

AN ANALYSIS OF THE LEGAL IMPLICATIONS OF *MALAKI V. PEOPLE OF THE PHILIPPINES* ON POLYGyny UNDER THE CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES

Norhabib Bin Suod S. Barodi*

ABSTRACT

This article, using case analysis, examines the legal implications of polygyny under the Code of Muslim Personal Laws of the Philippines of the case of *Francis D. Malaki and Jacqueline Mae Salanatin-Malaki v. People of the Philippines*, G.R. No. 221075, November 15, 2021, which not only affirmed the settled doctrine - that the non-Muslim male party to a subsisting civil marriage who converts to Islam and subsequently marries another woman in accordance with the Code of Muslim Personal Laws of the Philippines commits the crime of bigamy - but also suggests a novel proposition that a Muslim husband who contracts a subsequent marriage without the consent of the wife or permission of the Shari'ah court in case of wife's refusal to consent is also bigamous; therefore, the subsequent marriage is void from the beginning under the Family Code of the Philippines and penalised as a crime under the Revised Penal Code of the Philippines. After analysing the case, this article concludes that the subsequent marriage of a Muslim husband who has subsisting Muslim marriage should not constitute the crime of bigamy, as there is no legal framework in the Qur'an or Sunnah which requires the consent of the wife for the Muslim husband to contract a subsequent marriage. It further concludes that this novel doctrine should be treated as an *obiter dictum* to avoid its practical effect of criminalising what the Qur'an and Sunnah have made legal and permissible. Nonetheless, existing legal provisions against abuse of the privilege to contract subsequent marriage may be enhanced.

Keywords: Polygyny, Bigamy in Philippine Penal Law, Wife's Consent to the Proposed Subsequent Marriage, Marriage After Conversion to Islam, Code of Muslim Personal Laws of The Philippines.

* Dean and Associate Professor of Law, College of Law Mindanao State University. Email: nbs.barodi@gmail.com/norhabibbinsuod.barodi@msu-main.edu.ph.

ANALISIS IMPLIKASI UNDANG-UNDANG MALAKI LWN ORANG FILIPINA MENGENAI POLIGAMI DI BAWAH KOD UNDANG-UNDANG PERIBADI MUSLIM FILIPINA

ABSTRAK

Artikel ini, melalui analisis kes, mengkaji implikasi undang-undang terhadap poligami di bawah Kanun Undang-Undang Peribadi Muslim Filipina dengan menganalisa kes *Francis D. Malaki dan Jacqueline Mae Salanatin-Malaki v. Orang Filipina*, G. R. No. 221075, 15 November 2021. Kes ini bukan sahaja menegaskan satu doktrin tetap, bahawa pihak lelaki bukan Islam yang masih berada dalam perkahwinan sivilnya dan kemudiannya memeluk Islam lalu mengahwini wanita lain selari dengan Kanun Undang-Undang Peribadi Muslim Filipina telah melakukan satu jenayah bigami, bahkan juga telah mencadangkan satu cadangan baru iaitu seorang suami Muslim yang melangsungkan perkahwinan yang berikutnya tanpa persetujuan isteri atau kebenaran mahkamah Syariah, sekiranya si isteri menolak untuk memberi persetujuan, juga telah melakukan satu jenayah bigami; oleh itu, perkahwinan berikutnya tidak sah sejak awal lagi di bawah Kanun Keluarga Filipina dan dihukum sebagai satu jenayah di bawah Kanun Kesusksaan Filipina (Disemak). Setelah menganalisa kes tersebut, artikel ini menyimpulkan bahawa perkahwinan berikutnya oleh seorang suami Muslim yang masih berada dalam perkahwinan sedia ada, tidak sepatutnya menjadi satu jenayah bigami, kerana tidak terdapat kerangka hukum dalam Al-Quran atau Sunnah yang memerlukan persetujuan isteri bagi membolehkan suami Muslim itu melangsungkan perkahwinan berikutnya. Ia juga menyimpulkan bahawa doktrin baru ini harus dijadikan sebagai obiter dictum untuk mengelakkan impak praktikalnya yang boleh menyalahi apa yang disahkan dan dibenarkan oleh Al-Quran dan Sunnah. Walau bagaimanapun, peruntukan undang-undang sedia ada terhadap penyalahgunaan keistimewaan bagi kontrak perkahwinan berikutnya boleh dipertingkatkan.

Kata kunci: Poligami, Bigami dalam Undang-Undang Jenayah Filipina, Persetujuan Isteri Terhadap Cadangan Perkahwinan Berikutnya, Perkahwinan Selepas Memeluk Islam, Kanun Undang-Undang Peribadi Muslim Filipina.

INTRODUCTION

The potential for jurisprudence in a legal system to evolve is an inevitable reality. As a society in which law is made to govern constantly transitions from one era to another, courts also have the tendency to interpret the law differently from precedents. The Philippine jurisprudence on subsequent marriages of Muslims is not an exception. In the recent case of *Malaki v. People*,¹ the Supreme Court of the Philippines did not only reiterate settled doctrines, but also affirmed novel interpretations of relevant provisions of Presidential Decree No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines ('*Muslim Code*')² regulating subsequent Muslim marriages.

According to this jurisprudential development, when a non-Muslim who is a party to a subsisting civil marriage converts to Islam, his conversion does not authorise him to contract a subsequent marriage under the Muslim Code. If he does so, the subsequent marriage is bigamous; therefore, it is void from the beginning under the Family Code³ and is a criminal offense under the Revised Penal Code⁴. This is a settled doctrine in the Philippine jurisprudence on subsequent marriages purportedly contracted under the Muslim Code.

However, *Malaki v. People* did not stop there. It asserts that a Muslim husband in a subsisting Muslim marriage who contracts – without the consent of the wife or permission of the Shari'ah court in case of the wife's refusal to consent – a subsequent marriage is likewise guilty of bigamy. This is the novel doctrine that has motivated the writing of this article in view of its far-reaching legal implications on

¹ *Francis D. Malaki and Jacqueline Mae Salanatin-Malaki v. People of the Philippines*, G.R. No. 221075, November 15, 2021.

² *Muslim Code 1977* (Philippines).

³ Art. 35. The following marriages shall be void from the beginning: (4) Those bigamous or polygamous marriages [Article 35, Executive Order No. 209 (The Family Code of the Philippines)]

⁴ Art. 349. *Bigamy*. – The penalty of *prisión mayor* shall be imposed upon any person who shall contract a second or subsequent marriage before the former marriage has been legally dissolved, or before the absent spouse has been declared presumptively dead by means of a judgment rendered in the proper proceedings. [Article 349, Act No. 3815 as Amended (The Revised Penal Code)]

polygyny under the Muslim Code, which behooves analysis and, yes, debate.

THE CASE OF *FRANCIS D. MALAKI AND JACQUELINE MAE SALANATIN-MALAKI v. PEOPLE OF THE PHILIPPINES*

The factual background of *Malaki v. People* is not complicated.

Francis D. Malaki is a Muslim convert. Before his conversion to Islam, he and Nerrian Maningo-Malaki ('Nerrian'), her non-Muslim first wife, were married in 1988 in accordance with the religious rites of Iglesia ni Cristo, a Christian sect in the Philippines. In 2005, Nerrian discovered that Francis was cohabiting with another woman named Jacqueline, and that they contracted marriage on June 18, 2005, solemnised by a Municipal Trial Court judge. Francis and Jacqueline admitted that they got married while Francis's marriage to Nerrian was subsisting. However, they contended that they could not be penalised for the crime of bigamy as they converted to Islam prior to their marriage.

For contracting a subsequent marriage while Francis's civil marriage to Nerrian was still subsisting, Francis and Jacqueline were charged with bigamy. The Regional Trial Court found them guilty beyond reasonable doubt. On appeal, the Court of Appeals affirmed in *toto* the decision of the Regional Trial Court holding that 'all the elements of bigamy were present'⁵ and held further that 'unless the first marriage was dissolved and finalised under the Civil Code, any party's subsequent marriage shall make them liable for bigamy.'⁶

Francis and Jacqueline eventually elevated their case to the Supreme Court of the Philippines where they claimed that they were Muslims who were married under Muslim law. As such, they argue that it is the Muslim Code that applies to them. Hence, they could not be tried for the crime of bigamy.

The issue of the petition for resolution of the Supreme Court of the Philippines is whether the petitioners are guilty of bigamy, which requires a determination of whether or not a party to a civil marriage

⁵ *Malaki v. People*, 3

⁶ *Malaki v. People*, 3

who converts to Islam and subsequently marries under the Muslim Code is exempted from criminal liability.⁷

The Supreme Court denied the petition with the following pronouncement:

A party to a civil marriage who converts to Islam and contracts another marriage, despite the first marriage's subsistence, is guilty of bigamy. Likewise guilty is the spouse in the subsequent marriage. Conversion to Islam does not operate to exculpate them from criminal liability.⁸

At this specific juncture in the Court's disposition, the author actually interposes no disagreement. The *ponencia* has correctly decided Francis's and Jacqueline's case in accordance with the applicability provisions of the Muslim Code. These are Article 3⁹, Article 13¹⁰, Article 178-180¹¹ and

⁷ Malaki v. People, 5

⁸ Malaki v. People, 5

⁹ Article 3. *Conflict of provisions.* - (1) In case of conflict between any provision of this Code and laws of general application, the former shall prevail. (2) Should the conflict be between any provision of this Code and special laws or laws of local application, the latter shall be liberally construed in order to carry out the former. (3) The provisions of this Code shall be applicable only to Muslims and nothing herein shall be construed to operate to the prejudice of a non-Muslim.

¹⁰ Article 13. *Application.* - (1) The provisions of this Title shall apply to marriage and divorce wherein both parties are Muslims, or wherein only the male party is a Muslim and the marriage is solemnized in accordance with Muslim law or this Code in any part of the Philippines. (2) In case of marriage between a Muslim and a non-Muslim, solemnized not in accordance with Muslim law or this Code, the Civil Code of the Philippines shall apply.

¹¹ Article 178. *Effect of conversion to Islam on marriage.* - The conversion of non-Muslim spouses to Islam shall have the legal effect of ratifying their marriage as if the same had been performed in accordance with the provisions of this Code or Muslim law, provided that there is no legal impediment to the marriage under Muslim law. Article 179. *Effect of change of religion.* - The change of religion by a Muslim shall not have the effect of extinguishing any obligation or liability whatsoever incurred prior to said change. Article 180. *Law applicable.* - The provisions of the Revised Penal Code relative to the crime of bigamy shall not apply to a

Articles 186-187¹², which the Supreme Court cited in length. These provisions are consistent with the settled doctrine that when a non-Muslim who is a party to a subsisting civil marriage converts to Islam, his conversion does not authorise him to contract a subsequent marriage under the Muslim Code.

Francis and Nerrian's marriage is governed by the Civil Code (superseded by the Family Code)

In this case, Francis and Nerrian (the non-Muslim first wife) were married not in accordance with the Muslim Code or Muslim law. Prior to Francis' conversion to Islam, both of them were non-Muslims. Therefore, their civil marriage is governed not by the Muslim Code but by the Civil Code. As the Supreme Court pointed out, "The general law, the Civil Code (superseded by the Family Code), governs marriages not solemnized under Muslim rites, including those between a Muslim and a non-Muslim."¹³ This is in accordance with Article 13(2) of the Muslim Code which provides that in case of marriage between a Muslim and a non-Muslim, solemnized not in accordance with Muslim law or the Muslim Code, the Civil Code of the Philippines shall apply.

Francis cannot contract a subsequent marriage

Next, considering that Francis was married to his non-Muslim first wife in accordance with the Civil Code, he – notwithstanding his conversion to Islam – cannot contract a subsequent marriage even if it is

person married in accordance with the provisions of this Code or, before its effectivity, under Muslim law.

¹² Article 186. *Effect of code on past acts.* -(1) Acts executed prior to the effectivity of this Code shall be governed by the laws in force at the time of their execution, and nothing herein except as otherwise specifically provided, shall affect their validity or legality or operate to extinguish any right acquired or liability incurred thereby. (2) A marriage contracted by a Muslim male prior to the effectivity of this Code in accordance with non-Muslim law shall be considered as one contracted under Muslim law provided the spouses register their mutual desire to this effect. Article 187. *Applicability Clause.* - The Civil Code of the Philippines, the Rules of Court and other existing laws, insofar as they are not inconsistent with the provisions of this Code, shall be applied suppletorily

¹³ *Malaki v. People*, 9.

purportedly in accordance with Muslim law. This is because his civil marriage with his non-Muslim wife is still subsisting and the Civil Code (superseded by the Family Code) does not grant him that privilege because it is bigamous and penalised under the Revised Penal Code. Hence, Francis cannot derive convenience from the provision of Article 180 of the Muslim Code –

The provisions of the Revised Penal Code relative to the crime of bigamy shall not apply to a person married in accordance with the provisions of the Muslim Code or, before its effectivity, under Muslim law.

Further, to construe that Francis has been granted the privilege to marry subsequently despite the subsistence of his civil marriage is violative of Article 3(3) of the Muslim Code. This provision states that the provisions of the Muslim Code shall be applicable only to Muslims and nothing therein shall be construed to operate to the prejudice of a non-Muslim. And this was sufficiently emphasised by the Supreme Court, thus:

Article 3 of the Muslim Code declares that its provisions shall not be construed to the prejudice of a non-Muslim. Certainly, granting the Muslim convert, like petitioner Francis, the recourse provided in Article 180 would be prejudicial to the abandoned wife, and the state, the aggrieved party in criminal prosecutions.¹⁴

Not even Article 178 of the Muslim Code on the effects of conversion to Islam on marriage would be able to alter the outcome of the case. This provision is reproduced below for emphasis.

The conversion of non-Muslim spouses to Islam shall have the legal effect of ratifying their marriage as if the same had been performed in accordance with the provisions of this Code or Muslim law, provided that there is no legal impediment to the marriage under Muslim law.

Explaining the import of Article 178 of the Muslim Code, this author has previously argued that this provision deals with the ‘conversion of non-Muslim spouses’.¹⁵ Thus, both spouses must

¹⁴ Malaki v. People, 9

¹⁵ Barodi, Norhabib Bin Suod Sumndad. 2019. “The Code of Muslim Personal Laws of The Philippines: Beyond The Lenses Of Bondagiy V.

convert to Islam, for the provision to have complete application on the effect of conversion to Islam on a marriage.¹⁶ The provision does not apply if only one of the non-Muslim spouses converts to Islam.¹⁷ Consequently, the marriage will not be ratified as if the same had been performed in accordance with the provisions of the Muslim Code or Muslim law.¹⁸ In many existing non-Muslim marriages, that only one of the spouses converts to Islam seems to be prevalent.¹⁹ In these cases, the non-Muslim law with which the marriage was originally solemnised continues to govern.²⁰

It is worth noting that these observations made in 2019 are consistent with the pronouncement of the Supreme Court in *Malaki v. People* decided in 2021.

Moreover, Article 13(2) of the Muslim Code provides that in case of marriage between a Muslim and a non-Muslim solemnised not in accordance with Muslim law or this Code, the Civil Code of the Philippines shall apply. As correctly pointed out by the Supreme Court:

There is no conflict with general law here. The nature, consequences, and incidents of petitioner Francis' prior and admittedly subsisting marriage to Nerrian remain well-within the ambit of the Civil Code, and its counterpart penal provisions in the Revised Penal Code.²¹

Thus, the Supreme Court concluded that:

Whether petitioner Francis converted to Islam before or after his marriage with petitioner Jacqueline, the subsequent marriage consummated the crime of bigamy. He cannot successfully invoke the exculpatory clause in Article 180, considering that the Muslim Code finds no application in his then-subsisting marriage with Nerrian, the marriage recognized by law that bars and penalizes a subsequent marriage.²²

Bondagjy". *IIUM Law Journal* 27 (2):367-96.
<https://doi.org/10.31436/iiumlj.v27i2.447>

¹⁶ Barodi, Code of Muslim Personal Laws: Bondagjy v. Bondagjy, 375.

¹⁷ Barodi, Code of Muslim Personal Laws: Bondagjy v. Bondagjy, 375.

¹⁸ Barodi, Code of Muslim Personal Laws: Bondagjy v. Bondagjy, 375.

¹⁹ Barodi, Code of Muslim Personal Laws: Bondagjy v. Bondagjy, 375.

²⁰ Barodi, Code of Muslim Personal Laws: Bondagjy v. Bondagjy, 375.

²¹ *Malaki v. People*, 10.

²² *Malaki v. People*, 10.

THE LEGAL IMPLICATIONS OF THE SUPREME COURT'S PRONOUNCEMENT ON ARTICLE 162 OF THE MUSLIM CODE

The foregoing pronouncements of the Court, even without going on any further, are already sufficient for the complete resolution of the pivotal issue of *Malaki v. People*. To reiterate, it is not disputed that under the factual milieu of the case, Francis and Jacqueline are guilty of bigamy in spite of their assertion that they converted to Islam before they were married. It is consistent with existing jurisprudence and relevant provisions of the Muslim Code which are explained above.

However, *Malaki v. People* went on further by embarking the application of Articles 27 and 162 of the Muslim Code, which must be correlated. Articles 27 and 162 read:

Article 27. Notwithstanding the rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time, no Muslim male can have more than one wife unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases.

Article 162. Any Muslim husband desiring to contract a subsequent marriage shall, before so doing, file a written notice thereof with the Clerk of Court of the *Shari 'a* Circuit Court of the place where his family resides. Upon receipt of said notice, the Clerk shall serve a copy thereof to the wife or wives. Should any of them object, an *Agama* Arbitration Council shall be constituted in accordance with the provisions of paragraph (2) of the preceding article. If the *Agama* Arbitration Council fails to obtain the wife's consent to the proposed marriage, the Court shall, subject to Article 27, decide whether or not to sustain her objection.

We can readily agree with the pronouncement of the Supreme Court that Article 27 and Article 162 of the Muslim Code respectively constitute the substantive and formal requisites of a Muslim husband's subsequent marriage under the Muslim Code. And this author has previously alluded to these requisites as stringent requirements for and fundamental limitations on the practice of polygamy.²³

²³ Barodi, Norhabib Bin Suod Sumndad. 2021. "Muslim Converts and Bigamy In Philippine Penal Law: Exploring The Free Exercise Of Religion As A

The present author's reservations are aimed at the legal implications of what *Malaki v. People* seems to suggest concerning Article 162 of the Muslim Code. The Supreme Court made the following pronouncements quoted here in length:²⁴

The Muslim husband must first notify the Shari'a Circuit Court, where his family resides, of his intent to contract a subsequent marriage. The clerk of court shall then serve a copy to the wife or wives. If any of them objects, the Muslim Code mandates the constitution of the Agama Arbitration Council, which shall hear the wife. Ultimately, the Shari'a Circuit Court decides whether to sustain the wife's objection.

"In other words, the consent of the wife, or the permission of the *Shari 'a* Circuit Court if the wife refuses to give consent, is a *condition sine qua non* with respect to the subsequent marriage." Absent the wife's consent or the court's permission, the exculpatory provision of Article 180 shall not apply, since it only exempts from the charge of bigamy a Muslim husband who subsequently marries "*in accordance with the provisions of [the Muslim Code]*."

The wife's knowledge of the impending subsequent marriage is essential and may not be waived:

The lack of knowledge of the wife from the prior subsisting marriage does not only deprive her of the opportunity to consent or object, but also prevents the *Shari'a* Circuit Court from ruling on any objection. The subsequent marriage therefore fails to satisfy the requirement of prior consent or permission under Article 162.

...

The subsequent marriage in the contemporary practice is not contracted in accordance with the Muslim Code or Muslim Law. Article 349 of the Revised Penal Code may validly regulate such subsequent marriage. (Citation omitted)

Moreover, failure to comply with the statutory requirements under the Muslim Code shall be punished by *arresto mayor* or a fine.

Defense". *Journal of Malaysian and Comparative Law* 48 (1):1-26.
<https://ejournal.um.edu.my/index.php/JMCL/issue/view/2070/755>.

²⁴ *Malaki v. People*, 11-12.

The Muslim Code classifies marriages with infirmities into *batil* (void) and *fasid* (irregular). However, there is no provision on the status of a male Muslim's subsequent marriage which failed to comply with the formal requisites laid down in Article 162. Renowned shari'ah jurists Justice Jainal Rasul and Judge Bensaudi I. Arabani, Sr. opine that it is bigamous. As a bigamous marriage, it is declared as void from the beginning by the Family Code, and penalized under the Revised Penal Code.

In sum, the Supreme Court seems to establish the doctrine that the validity of the Muslim husband's subsequent marriage hinges on the consent of the wife, or the permission of the Shari'ah Circuit Court if the wife refuses to give consent. Stated differently, any subsequent Muslim marriage performed without compliance with Article 162 is bigamous; hence, it is void from the beginning under the Family Code and penalised as a crime under the Revised Penal Code.

The Court's pronouncements of Article 162 of the Muslim Code are not necessary to resolve the core issue

With all due respect to the Supreme Court, the inclusion of discussions on Article 162 in resolving *Malaki v. People* lays down the foundation for complications that may infiltrate settled doctrines of Islamic law on marriage and its consequences in the context of the Muslim Code.

Francis and Jacqueline are guilty of bigamy because their marriage – having been contracted while Francis had a subsisting civil marriage with his first wife (Nerrian) – was bigamous under the Civil Code (superseded by the Family Code). The Muslim Code was not applicable. And this conclusion did not need the pronouncements on Article 162 because their situation was covered by other clear and applicable provisions of the Muslim Code indicating that they cannot rely on their conversion to Islam to exculpate themselves from criminal liability for bigamy.

Moreover, Article 162 governs the subsequent marriage of a Muslim husband whose subsisting marriage is solemnised in accordance with the Muslim Code or Muslim law. Francis's subsisting civil marriage with his non-Muslim wife was solemnised in accordance with the religious rites of *Iglesia ni Cristo*, a Christian sect in the Philippines. Therefore, at the expense of being repetitive, Article 162 was entirely unnecessary in resolving *Malaki v. People*.

Being unnecessary for the complete resolution of the core issue, the pronouncements on Article 162 take the form of an *obiter dictum*. An opinion of the Court that is in the nature of an *obiter dictum* does not establish judicial precedent. However, if it was the intent of the Court to make them judicial precedents, then such pronouncements have to be probed as to their conformity with settled doctrines of Islamic law on marriage.

Subsequent marriage and the consent of the first wife or permission of the Shari'ah court

To contextualise, the Supreme Court cited with approval the following observation –

"In other words, the consent of the wife, or the permission of the *Shari 'a* Circuit Court if the wife refuses to give consent, is a *condition sine qua non* with respect to the subsequent marriage."²⁵

This brings us to the fundamental question of whether under the Qur'an or Sunnah the consent of the first wife is indispensable before the Muslim husband can marry a second wife. Overlooking for a while the 'significance' of the formal requisites in Article 162, an answer, under the general supervision of *Shaykh* Muhammad Saalih al-Munajjid has been proffered that there appears no evidence either in the Qur'an or Sunnah which requires consent of the wife if her husband desires to contract a subsequent marriage.²⁶ Thus, it has been conceded that obtaining the consent of the existing wife to the subsequent marriage of her husband is not embraced in the real framework of polygamy as it is not stated anywhere in the Qur'an or Sunnah.²⁷ Another perspective asserts that based on surah al-Nisā' 4:3, the wife's consent is also not mandatory on the condition that the husband has

²⁵ Malaki v. People, 11.

²⁶ "Second marriage in Islam: Do you need permission from your first wife? [Islam Question and Answer (General Supervisor: Shaykh Muhammad Saalih al-Munajjid), Publication : 14-06-1997, <https://islamqa.info/en/answers/61/second-marriage-in-islam-without-permission-of-first-wife-and-for-love>, accessed: June 7, 2023]

²⁷ Fatah Yasin, R. F. B. (2012). Analysis Of Polygamy Provision Under The Islamic Family Law (Federal Territories) Act 1984 With Reference To The Qur'ān And Sunnah. *IIUM Law Journal*, 18(2). <https://doi.org/10.31436/iiumlj.v18i2.25>

sufficient religious, education, moral and financial qualification, and wisdom to evaluate his eligibility in leading a polygamous family.²⁸

Nonetheless, the author does not ignore that Article 162 rhymes with good reason in the formulation of the procedural or formal requisites by the framers thereof. Retired *Justice* Saaduddīn A. Alauya of the Philippines,²⁹ on the question of how to determine that the husband can deal with his wives with equal companionship and just treatment, has the following insights to share:

It can only be wisely determined by properly scrutinizing the financial status of the husband and of his peculiarities in life and I recommend that the state where the husband and his wife are residing should do the determination considering that it is left to the discretion of the husband, he will declare on top of his voice over and above any circumstance under which he is situated that he can do perfect justice to all of his wives should he be given the chance to contract subsequent marriage. It is equally true that if it is left to the decision of a wife or the wives, she or they will certainly disqualify the husband even if he is the most fair and just one in the world because no wife should bear to see her plate divided.³⁰

In other words, when the wife objects to the proposed marriage and the *Agama* Arbitration Council fails to obtain her consent, the Shari'ah court, under Article 162, is in a better if not the best position to determine that the Muslim husband can deal with his wives with equal companionship and just treatment as enjoined by Islamic law. In this context, Article 162 is a good provision.

²⁸ Fatah Yasin, Raudlotul Firdaus and Jani, Mohd. Shah (2014) *The efficiency of legal provision on polygamy in Malaysia, a critical analysis from Qur'anic perspective*. In: International Conference on Multidisciplinary Innovation for Sustainability and Growth (MISG 2014), 27-28 August 2014, Kuala Lumpur. <http://irep.iium.edu.my/id/eprint/37991>, accessed: November 21, 2023.

²⁹ Former Jurisconsult in Islamic Law in the Philippines with the rank of Court of Appeals Justice. He was a member of the Presidential Commission that drafted the Code of Muslim Personal Laws of the Philippines (Presidential Decree No.1083)

³⁰ Saaduddīn A. Alauya, *The Quizzer in Muslim Personal Law* (KFCIAAS, 1984) 31.

Moreover, on the significance of letting the wife knows about the proposed marriage, *Raudlotul Firdaus Binti Fatah Yasin* offers the following reasoning:

There are many social and psychological reasons for letting the existing wife know about the proposal. The average Malaysian woman contributes substantially to the family institution, economically and financially in addition to be responsible for all the chores at home. Both parties should discuss the matter rationally with regards to their individual personal interests for the betterment of their family institution. Failure to inform the existing wife of the proposed marriage according to Dr Zaharuddin is also an early signal of the husband's failure to deal wisely in his future polygamous life. A real wise man can persuade his wife to accept his decision to marrying another woman without any need of cheating her. Furthermore, it has been concluded that 'the successful polygamous marriages are those where there is extensive communication between the husband and his existing wife.' Logically, 'the existing wife's experience of married life and cohabitation with her husband would provide information and assist the court in ascertaining the character of the husband and his ability or lack of it to contract another marriage.'³¹

There is no difficulty in appreciating the rationale of the process in Article 162. It is a mechanism to probe the qualifications of the Muslim husband to add one or more wives. It gives the wife the opportunity to consent or object to the proposed subsequent marriage. However, ultimately in cases of wife's refusal to give consent, it is the Shari'ah court that will decide. In other words, the correct and complete conclusion is not reached when one proffers that the wife's consent is essential to the validity of the subsequent marriage. In fact, this has no basis in the Qur'an and Sunnah.

³¹ Yasin, Analysis of Polygamy Provision under the Islamic Family Law, 276.

Subsequent marriage that did not comply with Article 162 of the Muslim Code: Its validity and consequences

Following the implication of *Malaki v. People* concerning Article 162, any subsequent Muslim marriage contracted without observing the formal requisites in Article 162 is bigamous. However, the Muslim Code classifies this marriage neither as *batil* (void) nor as *fasid* (irregular). The *ponencia* admits this in this wise—

The Muslim Code classifies marriages with infirmities into *batil* (void) and *fasid* (irregular). However, there is no provision on the status of a male Muslim's subsequent marriage which failed to comply with the formal requisites laid down in Article 162.³²

This author believes that the silence of the Muslim Code as to this issue is not without profound legal implications. If the Muslim Code – of course, expectedly from the legal framework of polygyny under the Qur'an and Sunnah – did not expressly categorise the Muslim's subsequent marriage (which failed to comply with Article 162) as *batil* (void) nor *fasid* (irregular), then asserting the subsequent marriage as one without validity under Islamic law may not have sufficient basis. Inevitably, the *ponencia* is left with no other choice but to look towards a general law, *i.e.*, the Family Code, to assign the subsequent Muslim marriage with a badge of nullity from the very beginning. This is evident from the Court's ratiocination—

Renowned shari'ah jurists Justice Jainal Rasul and Judge Bensaudi I. Arabani, Sr. opine that it is bigamous. As a bigamous marriage, it is declared as void from the beginning by the Family Code, and penalized under the Revised Penal Code.³³

Apparently, the Court cited with approval the opinion of *Justice* Jainal Rasul and *Judge* Bensaudi I. Arabani, Sr. that the marriage is bigamous. With all due respect to the two learned jurists, it is discernible that their basis in declaring so is not the Muslim Code or Islamic law, but the Family Code and the Revised Penal Code. This factor is decisively consequential. The two sets of laws are total opposites of one another on the issue of the legality of polygyny. Whereas the Muslim Code or Islamic law on one hand recognises polygyny as legal and permissible on the basis of the primary sources

³² Malaki v. People, 12.

³³ Malaki v. People, 12.

of Islamic law, *i.e.*, Qur'an and Sunnah, the Family Code and the Revised Penal Code on the other hand respectively declare it to be void from the beginning and punishes it as a crime. Therefore, it is reasonable to conclude that what *Justice* Rasul and *Judge* Arabani had in mind is a bigamous marriage in the context of the Family Code and the Revised Penal Code, not the Muslim Code. This is because it would be an absurdity to assert the idea that Islamic law criminalises bigamous or polygamous marriages and treats them as void from the very beginning. In fact, in Malaysia the polygamous marriage may still be registered even though it is contracted without the court's permission.³⁴

To reiterate, if the *Malaki v. People* pronouncement on Article 162 is left to stand as judicial precedent, any subsequent Muslim marriage contracted in violation thereof is bigamous. As a bigamous marriage, the subsequent marriage is void *ab initio*. The parties thereto are guilty of bigamy. Hence, they are criminals committing the *malum in se* crime of bigamy under the Revised Penal Code. The parties thereto are deemed engaged in sexual relations outside lawful wedlock. In other words, they are in the state of *zina* or illegal sexual relations. Children born from their bigamous marriage are illegitimate.

These implications should not be taken lightly. They go deep into the very concept of validity of marriage in Islam. Hence, to tinker with it by declaring as bigamous the subsequent Muslim marriages contracted without observing the process in Article 162 is essentially risky for its amendatory and restrictive effect on what the Qur'an and Sunnah permit under well-defined conditions.

These serious implications on Muslim's subsequent marriage can be avoided by granting it the badge of validity in accordance with the Qur'an and Sunnah, setting aside – through the Muslim Code – the general and relative assumptions of the Family Code and the Revised Penal Code on the issue of polygyny. In other words, even if the subsequent marriage does not comply with Article 162, it should remain valid but the Muslim husband shall be penalised under Article 183 of the Muslim Code as explained below.

³⁴ Abdul Hak, Nora. 2008. "Just and Equal Treatment in Polygamous Marriage: The Practice In The Shariah Courts In Malaysia". *IIUM Law Journal* 16(1):153.

ADDRESSING CIRCUMVENTIONS AND ABUSES OF THE LAW

Lest the author is misunderstood, it is necessary at this juncture to distinguish between (1) non-Muslims who have subsisting civil marriages and attempt to circumvent the Philippine penal law against bigamy by converting to Islam, and (2) Muslim husbands who have subsisting Muslim marriages and contract subsequent marriage without complying with Article 162. As to the first, the Supreme Court has consistently affirmed in several cases the conviction of the offenders for bigamy. *Malaki v. People* is but one of these cases.³⁵ Said the Court:

These cases involved similar facts with the case at hand. The male party to a subsisting civil marriage converted to Islam and subsequently married another woman. On charges of bigamy, appellants invoked Article 180 of the Muslim Code, countering that Muslims may not be indicted of the crime.

This Court rules in the same manner and maintains its stance.³⁶

Indeed, non-Muslims who have subsisting civil marriages and purportedly convert to Islam to circumvent the Philippine penal law against bigamy are not only committing an illegal practice but they are also making a mockery of the Code of Muslim Personal Laws of the Philippines. Nay, they are making a mockery of Islam. Indeed, they are guilty of bigamy as in *Malaki v. People* and similarly decided cases.

However, their category is different from the category of Muslim husbands in a Muslim marriage who marry subsequently, albeit without compliance with Article 162. Theirs (Muslim husbands) is a violation of a different provision of the Muslim Code. They do not become criminals via the crime of bigamy by the mere fact of contracting a subsequent marriage, which in the first place is permitted by the Qur'an and Sunnah.

The mechanism of the Muslim Code against any Muslim husband who contracts subsequent marriage without undergoing the process in Article 162 is Article 183 which penalises the offending

³⁵ *Nollora v. People*, 672 Phil. 771 (2011) [Per J. Carpio, Second Division]; *People v. Ong*, G.R. No. 202130, April 7, 2014 (Resolution) [First Division]; *Sayson v. People*, G.R. No.214018, April 20, 2015 (Resolution) [First Division].

³⁶ *Malaki v. People*, 14.

husband with *arresto mayor* (imprisonment of 1 month and 1 day to 6 months) or a fine or both:

ARTICLE 183. *Offenses relative to subsequent marriage, divorce, and revocation of divorce.* - A person who fails to comply with the requirements of Articles 85, 161, and 162 of this Code shall be penalized by *arresto mayor* or a fine of not less than two hundred pesos but not more than two thousand pesos, or both, in the discretion of the court.

The Muslim husbands who commit an offense under Article 183, by all means, should be penalised for that offense; but not for bigamy. In Pakistan, any Muslim husband who contracts another marriage without the permission of the Arbitration Council is penalised with simple imprisonment of up to one year or with a fine of up to five thousand rupees or with both; but not for bigamy.³⁷ In Malaysia, the failure of the Muslim husband to obtain written permission from the court to contract polygamy is penalised with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment; but not for bigamy.³⁸

The legal complications of convicting Muslim husbands of bigamy under the Revised Penal Code – because their respective wives did not consent or the Shari’ah court did not permit in case of wife’s objection – are so serious that they may possibly infiltrate settled doctrines of Islamic law on marriage. The validity of marriage, first or subsequent, is carefully anchored by the Shari’ah on the essential requisites established by the Qur’an and Sunnah. When these essential requisites are complied with, the marriage is valid for all intent. Declaring a subsequent Muslim marriage as bigamous in the context of the Family Code and Revised Penal Code for failure to comply with Article 162 invalidates what the Qur’an and Sunnah sanction as valid. This complication is provocative, at the very least.

³⁷ *Muslim Family Laws Ordinance, VIII of 1961* (Pakistan).

³⁸ *Section 123, Islamic Family Law (Federal Territories) Act 1984* (Malaysia).

Deterrence against abuses of the permissibility of polygyny under the Muslim Code

That there are abuses committed against the permissibility of polygyny of Muslim husbands cannot simply be ignored as unreal. Admittedly, there are Muslim husbands who cannot comply with the substantive requisites of subsequent marriage but still manage to contract one by not undergoing the process in Article 162. Thus, the first wife or wives are not given the opportunity to consent or object or the Shari'ah court is deprived of the opportunity to rule on the objection of the wife and decide whether the husband is qualified. This is precisely one of the primary reasons why Article 183 punishes non-compliance of Article 162.

Concededly, Article 183 notwithstanding, it is a reality in the Philippines that subsequent Muslim marriages are contracted without complying with Article 162. This author sees two reasons: (1) the first wife is not interested to file against her husband a criminal complaint based on Article 183, and (2) Article 183 is not so much of a deterrent considering that the penalty provided is relatively minimal, *i.e.*, *arresto mayor* (imprisonment of 1 month and 1 day to 6 months) or a fine of two hundred pesos but not more than two thousand pesos, or both, in the discretion of the court.

This insufficiency in the deterrent effect of imposable penalties for violations of restrictions on polygyny is also noticeable in other foreign jurisdictions. In Malaysia, the statutory penalties to deter husbands who contract polygamous marriages without permission from the court are also seen as insufficient.³⁹

However, the task of making laws more deterrent against the evils they seek to punish and prevent is not a function of the courts. It is a legislative function. Therefore, the need to make Article 183 more deterrent against those who abuse the permissibility of polygyny under the Muslim Code should be addressed to the Congress of the Philippines.

³⁹ Abdul Hak, *Just and Equal Treatment in Polygamous Marriage*, 153.

CONCLUSION

Settled is the doctrine that when a non-Muslim who is a party to a subsisting civil marriage converts to Islam and thereafter contracts a subsequent marriage, the said marriage is bigamous under the Family Code of the Philippines and is a criminal offense under the Revised Penal Code of the Philippines. His conversion does not authorise him to contract a subsequent marriage under the Muslim Code.

However, the case of a Muslim husband in a subsisting Muslim marriage who contracts a subsequent marriage without the consent of the wife or permission of the Shari'ah court in case of the wife's refusal to consent should be treated differently. His (Muslim husband) subsequent marriage does not constitute the crime of bigamy but only a violation of Article 183 of the Muslim Code, as there is no legal framework in the Qur'an or Sunnah which requires the consent of the wife for the Muslim husband to contract a subsequent marriage. To rule otherwise will disturb settled doctrines on the validity of Muslim marriage and its consequences under Islamic law.

The novel doctrine in *Malaki v. People* should be treated as an *obiter dictum* to avoid its practical effect of criminalising what the Qur'an and Sunnah have made legal and permissible, *i.e.*, subsequent marriage sans consent of the wife. Nonetheless, Article 183 may be enhanced by increasing the penalty against Muslim husbands who do not comply with the formal requisites of or do not undergo the process in Article 162 for subsequent marriages.