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Angeladora Novi Chavarria

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# ISLAM AND POLYGAMY: THE MALAYSIAN CASE

## ABSTRACT

*For the last couple of decades, scholars and academics have been investigating issues concerning the role of women in Islamic family tradition. In many Muslim countries, the belief that the society and consequently the family structure are male centered is still a reality. Women are in fact not entitled to the same rights men are entitled to. The case of polygamy, an ancient practice, which allows having more than one wife or husband at the same time, represents a typical example of a gender-biased right. According to the Muslim tradition only males have the right to marry multiple women. Against this background, the aim of this thesis is to analyze in detail the Malaysian legislation on polygamy in order to explore the consequences, which a strict legislation, such as the Malaysian one, has on the life of the subjects involved, with particular regard to women and children. In order to do so, we will first of all provide an outline of the Malaysian legal framework. The second part will focus on the codification of the Islamic law and Islamic family law in Malaysia analyzing, more in general, the sources of Islamic law. The third part will deal with the question of polygamy, its regulation and interpretations with a broader perspective including the evolution of the practice in the entire Islamic world. The final part will offer to the reader an analysis of the consequences of the Malaysian rigid regulation on polygamy. An analytical reflection on the practice of polygamy and its repercussions on women and children will conclude the thesis.*

*Besonders in den letzten Jahrzehnten haben eine Vielzahl von WissenschaftlerInnen verschiedene Fragen zur Rolle der Frau in der islamischen Familientradition behandelt. In vielen muslimischen Ländern ist die Überzeugung, dass die Gesellschaft und damit auch die Familienstruktur männlich zentriert ist, immer noch vorherrschend. Tatsächlich haben Frauen nicht die gleichen Rechte, die Männern zugestanden werden. Der Fall der Polygamie, einer alten Praxis, die es erlaubt, mehr als eine Frau oder einen Mann zur gleichen Zeit zu haben, stellt ein typisches Beispiel für ein geschlechtsspezifisches Recht dar. Nach der muslimischen Tradition haben nur Männer das Recht, mehrere Frauen zu heiraten. Vor diesem Hintergrund ist es das Ziel der vorliegenden Arbeit, die malaysische Gesetzgebung zur Polygamie im Detail zu analysieren, um die Konsequenzen zu untersuchen, die eine strenge Gesetzgebung wie die malaysische auf das Leben der betroffenen Subjekte, unter besonderer Berücksichtigung von Frauen und Kindern, hat. Zu diesem Zweck wird zunächst ein Überblick über den malaysischen Rechtsrahmen gegeben. Im zweiten Teil wird die Kodifizierung des islamischen Rechts und des islamischen Familienrechts in Malaysia untersucht und die Quellen des islamischen Rechts im Allgemeinen dargestellt. Der dritte Teil wird sich mit der Frage der Polygamie, ihrer Regulierung und ihren Auslegungen in einer breiteren Perspektive befassen, die auch die Entwicklung der Praxis in der gesamten islamischen Welt einschließt. Der letzte Teil bietet dem Leser eine Analyse der Folgen der starren Regulierung der Polygamie in Malaysia. Eine analytische Reflexion über die Praxis der Polygamie und ihre Auswirkungen auf Frauen und Kinder wird die Arbeit abschließen.*

## 1. Introduction

Gender equality in Muslim societies is one of most heated subjects in the academic scholarship in the last couple of decades. The debate on the status of women in Islamic tradition can be rooted back in the 1980s when the revivalist movements throughout the Muslim world begun. Malaysia is one of the examples of Muslim countries where the Islamic resurgence had a great impact on a socio-political level. Up to the early twentieth century, the idea of a society based on males' predominance was generally accepted as a fact among the Malay population. With regards to the context of the family, while men had the role of rulers, women were mainly in charge of taking care of the household's affairs and of their children's growth and education. As a result, the marital relationship was based on males'

supremacy, while wives were considered useless and cause of troubles and discontent<sup>1</sup>. As of 1976, several legislations have been enacted by the government to mitigate the level of discrimination against women within the family context. For example women were recognized equal rights as men to enter into a marriage and to divorce and polygamy was abolished. However, the provisions were applicable only to non-Muslims women. The Malaysian law setting, indeed, differentiates the treatment between Muslim and non-Muslim people. Different laws and institutions regulate Muslims legal affairs. In 1984, the so-called Islamic Family Act 303 was issued improving significantly the position of Muslim women within the family. The Act, enacted by the Federal Parliament, was applicable to all the states in the countries, although the interpretations as well as the application of the regulations slightly differ from one state to another. Men's right to divorce without ensuring maintenance to the ex wife as well as the their right to marry an unlimited number of women were abolished<sup>2</sup>. The Islamic Family Act, which was reformed twice in 1994 and in 2003, admits polygamy only for men under certain strict conditions, polygamy for women, instead, is not allowed. Four is the maximum number of wives that a man can marry and five conditions provided by the law have to be fulfilled in order for the marriage to be in line with the law. Additionally, the provision establishes that a man who wants to marry another woman has to obtain first the Sharia Court's permission. Contracting another marriage without such permission is not illegal, yet the marriage can in some cases be officially registered under the payment of a fine for having violated the law<sup>3</sup>. Although the majority of marriages in Malaysia are monogamous, polygamy is popular and well practiced in the country. Since the Law Reform (Marriage and Divorce) Act in 1976 banned polygamy for non-Muslims, the practice has been increasingly associated with Islam and its sacred scriptures. Polygamy is one of the most disputable questions in the context of women's rights in Islam. Western societies, for example, consider the practice as a form of discrimination towards females and criticize it because of the consequent situation of women's subjugation. More in general, besides polygamy, other Islamic provisions concerning women's' rights to marry, divorce e and inherit are considered expression of a patriarchal idea of family, in which men have complete control over women<sup>4</sup>. Following this interpretation, some scholars claim that Malay Muslim women confront a double discrimination. First of all, the changes introduced by the 1976

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<sup>1</sup> Noor Z., *Gender Justice and Islamic Family Law in Malaysia*, *Kajian Malaysia*, XXV, No. 2, 2007

<sup>2</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session, Geneva, Switzerland, February 2018; Azeezi Y. A., Zakariyahii L., Azeez Y. A. and Shukor S. A., *Codification of Islamic Family Law In Malaysia: The Contending Legal Intricacies*, 2015

<sup>3</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>4</sup> H. A. Jawad, *The Rights of Women in Islam: An Authentic Approach*, Great Britain 1998

Law Reform, which abolished all the forms of discrimination against women are by law only applicable to non-Muslims. Thus, Islamic women receive a different and less favorable treatment compared to same gender individuals of different faiths. Secondly, the 1984 Islamic Family Act and its further revisions attribute to males more beneficial rights in matter of marriage, divorce and inheritance<sup>5</sup>. Among Muslims, dissenting are the opinions about polygamy. On the one hand, some Muslim feminists believe that polygamy is unfair and therefore advocate for further restrictions or complete abolishment. On the other hand, another interpretation claims that the practice is strictly linked to Islamic tradition and explicitly admitted in the Qur'an<sup>6</sup>. Although the Islamic Family Act provides a detailed regulation on the prerequisite that have to be fulfilled when contracting a polygamous marriage, the cases of infringement of the rules represent a quite common phenomenon in Malaysia since the past forty years. Due to the rules and limitations to polygamy established by the Islamic Family Act, many couples choose to marry outside Malaysia to avoid going through the Malaysian long legal procedures. Commonly known as cross-borders marriages, runaway marriages or marriages outside the jurisdiction, according to several studies, the most preferred area where the marriage takes place is Southern Thailand, where the rules are less stringent and the procedure much faster<sup>7</sup>. Even though this practice is convenient to meet the needs of couples that desire to shorten the Malay complicated process and overcoming the rigid laws of the country, cross-borders marriages trigger several problematic consequences<sup>8</sup>. First of all, it happens quite often that Thai non-official authorities release the marriage certificates or forge the document. In both cases the Malaysian Islamic Council rejects the recognition of the marriage, which has an inconvenient impact on the status of the marriage and its legal aspects such as the rights concerning the inheritance and legitimation and maintenance of the children<sup>9</sup>. Having said that, the purpose of this thesis is to explore the Islamic Malay regulation of polygamy and the consequences of such rigid regulation. While some states such as Tunisia and Turkey abolished polygamy, the 1984 Islamic Family Act in Malaysia admitted polygamy under strict conditions. In 1994 and 2000, two reforms, whose aim was to "further safeguard the rights of women" supposedly

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<sup>5</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>6</sup> Alamgir A., *Islam and Polygamy: A Case Study in Malaysia in Procedia - Social and Behavioral Sciences*, 2014

<sup>7</sup> Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015

<sup>8</sup> SaidM, Hashim N., Hak N., Che Soh R., *A Study of Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, *Journal Undang-undang dan Masyarakat*, 2019

<sup>9</sup> Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

introduced even more rigorous conditions as prerequisites to be respected to contract polygamous marriages<sup>10</sup>. Nevertheless, scholars are still skeptical about the positive effects of a rigid regulation. Malaysia, indeed, represents a typical example of a country where the tightness of its laws influenced negatively women's marital rights. First of all, as explained above, the severe Malay regulation leads many couples to contract their marriages abroad. As oftentimes cross borders marriages certificates are forged, this will put at risk the recognition of the union in Malaysia, which will affect negatively the validity of the marriage and all the connected rights in favor of children and the wife. It was estimated that in 2018 the 11.4% of 175 polygamy cases was unregistered<sup>11</sup>. In light of the above, the following chapters aim at providing an analysis of the consequences of the Malay rigid Islamic law on polygamy. In order to do so, we will first of all provide an outline of the Malay legal framework. The second part will focus on the codification of the Islamic law and Islamic family law in Malaysia analyzing, more in general, the sources of Islamic law. The third part will deal with the question of polygamy, its regulation and interpretations with a broader perspective including the evolution of the practice in the entire Islamic world. The final part will offer to the reader an analysis of the consequences of the Malay rigid regulation on polygamy and eventually focus on the issues related to cross-borders marriages. An analytical reflection on the practice of polygamy and its repercussions on women and children will conclude the entire paper.

## 2. The Malay legal framework

Nowadays, Islam has a crucial importance in the Malay society<sup>12</sup>. The majority of the population (61.3%) is indeed Muslim and as such a separate body of Islamic laws regulate their personal matters as well as all the questions concerning family law and inheritance whose regulation is covered by Islamic legislation. On the other hand, another body of civil laws applies to non-Muslim people as well as to Muslims for aspects not included in their separate legislative system. It is clear that the Malaysian legal structure is plural: common civil laws and Islamic regulations apply to different people and control different aspects of their lives. Malaysian Muslims belong to the Sunni branch of Islam. Of the four schools of

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<sup>10</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>11</sup> *Malaysian Muslim women agree on polygamy, but only a third say hubby can take new wife*, in *Malaymail*, on line <https://www.malaymail.com/news/malaysia/2019/10/15/malaysian-muslim-women-agree-on-polygamy-but-only-a-third-say-hubby-can-tak/1800385>, 2019

<sup>12</sup> Sufian Shuaib F., *Administration of Islamic Law and Human Rights: The Basis and Its Trajectory in Malaysia*, in *Al-Jāmi'ah: Journal of Islamic Studies*, Vol. 56, no. 2, pp.281-304, 2018

jurisprudence, which the Sunni sect comprises (*Hanafi, Shafii, Maliki and Hanbali*), Malaysians follow mostly the *Shafi'i* school<sup>13</sup>. As it will be explained more in details in the following paragraphs, the current dual legal conformation is a consequence of the innovations introduced due to the British colonization that imposed their system of common civil law. While the importance of Islam was undermined by the western domination, it rose again after the Malay independence in 1957.

## 2.1 The legal framework during the colonial period

Malaysia is a multi-religious country where the highest percentage of the population (61.3%) practices Islam. Buddhism, Christianity Hinduism and a small percentage of Chinese traditional religions are the other main confessions across the Malay communities. Likewise, its legal system is plural, English common law and Islamic law represent the two main legal scenarios, customary laws are also part of the general legal framework. The main legislative institution is the Federal legislature (Parliament), a system of Federal judiciary holds the executive power and is in charge of laws enforcement. On the other hand, Shari 'a Courts enforce Islamic laws, enacted by state legislative entities and whose application is limited to Muslims<sup>14</sup>. The described structure finds its origins in Malaysia's colonial past<sup>15</sup>. By the end of the nineteenth century, the British colonized Malaysia and established their authority in the country. The arrival of the British power interrupted the process of Islamization, which according to some scholars, started in the fourteenth century when Islamic laws started to be endorsed by the Sultanate. A collection of written Islamic laws, known as "Undang-undang Melaka" and customary laws in some specific areas represented the main legal tools to rule the country. However, the role of the "Undang-undang Melaka" was underestimated as more than a legal document it was considered a set of rules enacted by informal bodies rather than an official legal institution<sup>16</sup>. The British authority overturned the supremacy of Islamic laws introducing revolutionary changes to the previous legal order. The British power in the Malay territory was not exercised through one single colony, yet the sultanates were

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<sup>13</sup> Azeezi Y. A., Zakariyahii L., Azeez Y. A. and Shukor S. A., *Codification of Islamic Family Law In Malaysia: The Contending Legal Intricacies*, 2015

<sup>14</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>15</sup> Shuaib S. F., *The Islamic legal system in Malaysia*, *Washington International Law Journal*, Vol. 21, No. 1, *Special Issue: Islamic Law and Islamic Legal Professionals in Southeast Asia*, 2012; Sufian Shuaib F., *Administration of Islamic Law and Human Rights: The Basis and Its Trajectory in Malaysia*, in *Al-Jāmi'ah: Journal of Islamic Studies*, Vol. 56, no. 2, pp.281-304, 2018

<sup>16</sup> Abdullah R. and Khairuddin S., *The Malaysian Shari'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009



controlled in two different forms: direct and indirect control. Accordingly, part of the land was under direct English administration and was governed by English common law. Few matters, including family issues, were still administrated through Islamic laws. The judicial system was unique so that judges in charge of solving civil cases were also able to deal with questions concerning Islamic law. The executive power was composed of English judges or local judges instructed by the conqueror. On the other hand, in other areas of the Malay territory, the British authority was exercised through indirect control. While the sultans maintained their role as heads of the state, governing the few matters related to customary and Islamic laws, the British had control over areas of their interest and sphere of competence. Civil courts were responsible of solving questions concerning civil law, while few local courts were admitted to apply Islamic law to deal with questions related to this filed with particular regard to personal and family matters. The interpretation of Islamic law differed from states to states. In other words, in the process of colonization of the Malay states, the British adopt two forms of control, direct and indirect, applying plural legal methods. The English system of common laws was the most common to solve disputes, whereas Islamic laws were applied only in matters concerning personal law questions and family disputes. As a result, the system of Islamic laws lost the primacy and popularity gained in the pre-colonial era<sup>17</sup>.

## 2.2 The legal framework post independence

In 1957, the British colonies were granted independence and the federal nation of Malaysia was established. The states, which formed the new federal unit, were allowed to keep their sovereign powers and autonomy. The Federal Constitution, signed on the occasion of the independence, established a plural legal system similar to the previous colonial model. The Federal law regulated most of the areas, which were before administrated by English common law. However, the Rulers of each state were recognized as the Head of the Religion of Islam while the Federation had no legislative power to intervene in the matters concerning Muslim. Consequently, each state was attributed the power to legislate in the field of Islamic law and to establish their own system of courts to solve disputes related to Islamic laws<sup>18</sup>.

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<sup>17</sup> Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009

<sup>18</sup> Shuaib S. F., *The Islamic legal system in Malaysia*, *Washington International Law Journal*, Vol. 21, No. 1, *Special Issue: Islamic Law and Islamic Legal Professionals in Southeast Asia*, 2012; Sufian Shuaib F.,

Islamic laws were administrated through different bodies, which still exist. The main institution is the Muslim Religious Council, so called *Majlis Agama Islam*, which is in charge of advising the Rulers of each state on questions of Islam, excluding matters concerning Islamic and justice control<sup>19</sup>. The *Mutfi*, the second most important institution, instead, is responsible for providing the rulers with legal opinions on Islamic law and administration of justice. The *Fatwa* Committee assists the *Mutfi* in the issuing of legal advises, so called *Fatwas*, conducting research and studies on each specific case. The consultation of the *Fatwa* Committee is the *condicio sine qua non* for the *Fatawa* to have legal force and be binding for the entire Muslim population in the Federal territory. Thus, the described law-making process is exempt from any form of public participation as the Parliament's legislative powers are kept away, undermining fundamental principles of Islamic law as well as the principles of democracy protected by the Federal Constitution of 1957<sup>20</sup>. The jurisdictional power for disputes among Muslim parties concerning Islamic laws is exercised by the Sharia Courts whose judges are elected by the Rulers of each state. The Islamic system of disputes resolution is carried out by three levels Sharia Courts: the Sharia Subordinate Court, the Sharia High Court and the Sharia Appeal Court<sup>21</sup>. Sharia Courts have the right to exercise their competence in matters related to Islamic law, personal and family law, such as marriage, divorce and inheritance. During the first years of Malaysia's independence, the decisions of Sharia Courts could be appealed to the civil courts, whose interpretation of Islamic law was applicable to all the states of the Federation. In 1988, a Constitutional reform deprived the federal courts of the power to revise on appeal the interpretation of Islamic law made by Sharia judges. The amendment had a positive impact on Islamic law, which started gaining again the importance and identity, which it used to have before the British colonization. Consequently, more importance was given to the Islamic bodies contributing to the growth of Islamic laws in order to homogenize nationwide their interpretation. Federal civil judges did not anymore establish such harmonized interpretation, yet Sharia courts and *Mutfis* through the enactment of *Fatwas* became responsible of this harmonization. While the Sharia judges and the *Mutfis* contributed to the evolution of Islamic law. The civil federal courts had the authority to solve disputes arising from the breaches of federal law, offering a

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*Administration of Islamic Law and Human Rights: The Basis and Its Trajectory in Malaysia*, in *Al-Jāmi'ah: Journal of Islamic Studies*, Vol. 56, no. 2, pp.281-304, 2018

<sup>19</sup> Sufian Shuaib F., *Administration of Islamic Law and Human Rights: The Basis and Its Trajectory in Malaysia*, in *Al-Jāmi'ah: Journal of Islamic Studies*, Vol. 56, no. 2, pp.281-304, 2018

<sup>20</sup> Moustafa T., *Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia*, in *Law & Social Inquiry, Journal of the American Bar Foundation*, Vol. 38, No. 1, 168–188, 2013

<sup>21</sup> Sufian Shuaib F., *Administration of Islamic Law and Human Rights: The Basis and Its Trajectory in Malaysia*, in *Al-Jāmi'ah: Journal of Islamic Studies*, Vol. 56, no. 2, pp.281-304, 2018; Moustafa T., *Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia*, in *Law & Social Inquiry, Journal of the American Bar Foundation*, Vol. 38, No. 1, 168–188, 2013

uniform interpretation of the latter for all the states part of the Malay region. Civil law and its courts are generally referred as secular even though an Islamized interpretation of the federal legislation is constitutionally allowed. Nonetheless, since Malaysian independence, civil authorities have always preferred to keep the body of civil rules and its interpretation away from Islamic principles<sup>22</sup>. To sum, Malaysia current plural legal system based on the separation of the administration and interpretation of civil and Islamic laws finds its roots in the colonial era. However, while during the colonial period Islam lost partially its authority as the British common law system had the most influential role, after the independence in 1959, Islam started again gaining popularity and importance. Its judicial system of Sharia Courts was upgraded and the interpretation of Islamic law harmonized throughout the entire territory through the work of the *Mutfis* and the Sharia judges<sup>23</sup>.

### 3. The codification of the Islamic Family law

As stressed in the previous paragraphs, Malaysian legal system allows the application of a different set of laws to Muslims for the regulation of specific matters especially concerning personal matters and in particular family. At the same time, also the judicial mechanism competent in judging questions regulated by Islamic laws is separated and represented by the so called Sharia courts. As a consequence, family disputes among Muslims fall within the competence of Islamic courts. While the Law Reform Marriage and Divorce Act issued in 1976 applies to non-Muslims, the first written codification of Islamic family law in Malaysia was enacted in 1984. The Islamic Family Act 303 was adopted by all 14 the states of the peninsula on the basis of the agreement to endorse a uniform codification for the entire Malaysian Federation. Despite the uniformity of the code, there are some slight differences in the interpretation and application of the laws in each of the states. The 1984 codification regulates marriage, divorce, maintenance, custody of children and other various questions related to family matters<sup>24</sup>. While the Law Reform Act applicable to people of other faiths has been reformed several times in order to eliminate all the types of discrimination against women, the Islamic Family Act is criticized for treating males and females unequally. For example, while the minimum marriage age for men is 18, women can marry when reach the

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<sup>22</sup> Shuaib S. F., *The Islamic legal system in Malaysia*, *Washington International Law Journal*, Vol. 21, No. 1, *Special Issue: Islamic Law and Islamic Legal Professionals in Southeast Asia*, 2012

<sup>23</sup> Shuaib S. F., *The Islamic legal system in Malaysia*, *Washington International Law Journal*, Vol. 21, No. 1, *Special Issue: Islamic Law and Islamic Legal Professionals in Southeast Asia*, 2012

<sup>24</sup> Azeezi Y. A., Zakariyah L., Azeez Y. A. and Shukor S. A., *Codification of Islamic Family Law In Malaysia: The Contending Legal Intricacies*, 2015

age of 16. Furthermore, females, unlike males, can marry only once get the consensus of their guardian and only Muslim men, while males are allowed to have a non-Muslim wife. For what concerns divorce, men can dissolve a marriage without the intervention of the judicial powers, whereas women can divorce only if they prove to the judge reasonable and compelling evidence. Last but not least, men are allowed to marry up to four women, although polygamy is not admitted for women. Being the subject of main interest of the thesis, we will study the practice of polygamy in Malaysia, analyzing its regulation and implications in the following paragraphs. In the meanwhile, it is necessary to focus on the overall approach of the Islamic Family Act, which is deemed to be gender-biased in regulating family rights placing women in a weaker position compared to men<sup>25</sup>. As some scholars claim, the discrimination which Muslim women face in family matters is double. On the one hand, against the treatment which receive women of other faiths whose regulation of family matters, the 1976 Law Reform Act, treats both genders equally; on the other hand against Muslim man who, due to the Islamic Family Act 303, are on a privileged position in comparison to women. This scenario is confirmed by the legislative and the reform processes, through which the two regulatory acts were issued and amended. In fact, the Law Reform Act was adopted through a democratic procedure through the work of a consultative parliamentary body. Moreover, several amendments have gradually introduced reforms aiming at reducing inequalities among the genders. Polygamy was abolished and equal rights were recognized to female and males in matters of guardianship of the child and inheritance rights. In contrast, a Sharia working group ratified the Islamic regulatory statute after consultation with a committee composed of mostly male legal experts and religious leaders from the public braches. In 1994 and 2003, two subsequent reforms have brought changes that, even though were meant to introduce amendments “to further safeguard the rights of women”, ended up further worsening their position. In conclusion, the Malay Islamic legal framework in matters of family is based on a system of “reciprocal” rights. This is to say that in the Islamic family setting, man and female do not have equal rights, yet while men maintain and protect women, the latters have to obey them faithfully.<sup>26</sup>

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<sup>25</sup> Azezi Y. A., Zakariyahii L., Azeez Y. A. and Shukor S. A., *Codification of Islamic Family Law In Malaysia: The Contending Legal Intricacies*, 2015; Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session, Geneva, Switzerland, February 2018

<sup>26</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session, Geneva, Switzerland, February 2018

## 4. The sources of Islamic law

The application of Islamic family law and, more in general, of Islamic law requires a preliminary understanding of its foundation and main principles<sup>27</sup>. First of all, it is important to highlight the evolving and flexible nature of Islamic law or also commonly known as Sharia law. Its interpretation adapts to the development of social, political and historical circumstances in order to respond adequately to the needs of a community, which is in a continuing change<sup>28</sup>. Sharia means path of God to be followed in order to fulfill God's will, which is fundamental for the "well-being" of the entire Muslim community<sup>29</sup>. That said about the importance of Sharia as a means to improve one's own life, the following part wants to focus on the analysis of the different sources of Islamic law. The two main primary sources of Sharia law are the Quran and the Sunna. According to a vast majority of scholars, the primary and indisputable source is the Quran, the keeper of the word of God as revealed to Prophet Muhammad<sup>30</sup>. According to the Muslims' believe, the Quran, which was revealed during the Prophet's life, was concluded and officially produced after his death during the third Caliphate of Harzat Uthman (between 632 and 634)<sup>31</sup>. The Quran and its *surahs* (chapters) have a divine nature and therefore they are not questionable by human beings and have to be followed entirely. However, the Quran is not a legal text and thus its verses do not have any legal value. Yet the "Holy Book" contains a set of ethical principles and it is considered to be guidance rather than a binding legal document. The second primary source is the Sunna, which means "tradition" and which refers to the practices and oral lessons of the Prophet Muhammad during his life. Handed down by his disciples and other Muslim religious leaders, the Sunna, also called *hadith* was deemed to be the most venerated source of divine teachings

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<sup>27</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007

<sup>28</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; SonnT., *Islam: a brief history*, 2010; Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>29</sup> Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>30</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>31</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007

after the *Quran*<sup>32</sup>. Despite its important role, several concerns have been arising with regards to the authenticity of some of the Sunna<sup>33</sup>. While the *Quran* was noted down immediately after the Prophet's death, the Sunna was transmitted to the next generation in the form of *hadith*, which literally means "report" of the Prophet's Sunna, and its recording took place after a much longer period of time<sup>34</sup>. As a result, the authenticity of some of the Sunna is often subject of disputes among Islamic schools, which have attributed to some of the practices different interpretations. Despite the questionable authenticity of some of the Sunna and the different approaches, the *hadith* still represent an ideal example of behavior for Muslims<sup>35</sup>. On top of that, the *hadith* were of paramount importance for the evolution of Islamic law, having played a key role in the interpretation of unclear verses of the *Quran* and in filling the gap left by the divine God's word<sup>36</sup>. As stressed in the initial part of the paragraph, Islamic law can never be fully understood if not seen as an evolving set of rules, which develops in parallel with the development of the socioeconomic context. Against this background, the static nature of the Quran and the Sunna have been complemented by the dynamicity of other additional sources: the *Ijmaa*, the *Qiyas*, and the *Ijtihad*<sup>37</sup>. In other words, Islamic scholars and jurists throughout the time have filled the gaps left by the divine codes through the use of various techniques, which were used in all the circumstances where a legal provision was missing or was not adequate to regulate a particular case. In particular, *Ijmaa* means consensus, which practically indicates a means to create laws through agreements of jurists' decisions on Islamic questions or agreements on interpretation of verses of the Quran or the Sunna<sup>38</sup>. The *Ijmaa* derive from the traditional practice of consensus among the Prophet's companions based on the Prophet's hadith, which claims, "My community will never agree in

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<sup>32</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007

<sup>33</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>34</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007

<sup>35</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007

<sup>36</sup> Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>37</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>38</sup> Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

error”<sup>39</sup>. The *Qiyas* refers to analogy, a legal technique, which consists in deduction of a law through reasoning by analogy. In practical terms, the *Qiyas* is used to decide a case through the application of the reasoning of another case when there is similarity among the two<sup>40</sup>. Another form of law deduction is the so-called *Ijtihad*, the exercise of human reasoning to interpret Sharia law texts and apply it in concrete cases<sup>41</sup>. The *Qiyas* and the *Ijtihad* are two forms of legal reasoning, which intervene in all the circumstances where the two divine codes do not provide any provision applicable for the resolution of a concrete case<sup>42</sup>. To sum up, the sources of Islamic law can be divided in two main categories: divine sources and human sources. The human intervention is what gives the Sharia law its flexible character, despite the fact that the majority of Muslim scholars believe in the pure divine and immutable nature of the Islamic law<sup>43</sup>. Sharia law as well as all the other all the types of law (such as national, European and international law) cannot be thought as body of rules valid beyond time, yet the majority of their rulings are in constant evolution. The jurisprudence of the Sharia courts and the legal opinions (*fatwas*) of the *Mutfis* under the guidance of the principles of justice, equity and public welfare represent the essential human reasoning, which responds to the evolving social needs<sup>44</sup>. Through the *Ijmaa*, the *Qiyas*, and the *Ijtihad*, the human resources fill the gaps of the Quran and the Sunna, which due to the timing and context of their enactment are unable to cover all the situations and circumstances, which the current reality is called to cope with.

#### 4.1 Sharia, Islamic family law and their contextualization

The Quran and the Sunna sign a turning point for the history of Islam, introducing progressive changes with special concern to the role and rights recognized to women and consequently their image in the Muslim societies. During the pre-Islamic phase, which ended with the emergence of Islam in the 7<sup>th</sup> century CE, women were treated as slaves and, as such, did not have legal personality. In the every day life, women could be sold and purchased as

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<sup>39</sup> Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>40</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005

<sup>41</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>42</sup> Tucker J. E., *Women, Family and Gender in Islamic Law*, 2008

<sup>43</sup> An-Na'um A. A., *Toward an Islamic reformation: civil liberties, human rights, and international law*, 1990

<sup>44</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Sonn T., *Islam: a brief history*, 2010

objects. Also, with regards to the marriage practice, men were entitled to buy their wife and to acquire, as a consequence, the right of property. Furthermore, the practice of females' infanticide was allowed and polygamy was admitted for men without any kind of restrictions on the number of wives. As said above, the status of women was significantly improved by the advent of the divine laws. Women were finally provided with legal personality and were recognized the individual right to contract marriage on a voluntary base. Despite the positive achievements, many debates and criticisms have been arising on the question of gender biases in the Sharia law. Equality among genders is indeed questioned among scholars of Islam. To cite some examples, men are allowed to marry starting from the age of 18 against the 16 of women, also women can enter into marriage with Muslim men, while no restrictions on the partners' religion are imposed for men. One of the most debated questions is the issue of polygamy as although the Quran have introduced a limit of four wives for men, the reasons why this practice is not allowed for women are still unclear. Nowadays, many Islamic states allow polygamy, others admit it under certain condition, and others instead did not forbid the practice. The permissibility of polygamy in the Islamic world raises many questions. Since many years scholars have been investigating whether polygamy is compatible with the right to equality among genders and, if not, which are the consequences for women and children. These are just some of the multiple questions, which have been studied and analyzed by many scholars. The following paragraph will start to provide an insight of the practice of polygamy in general retracing its origins and evolution in Islam. Following, we will focus with more details on the Malaysian case study. In conclusion, the path of God and the Prophet's teachings represents a fundamental step in the history of Islam as for the first time attributed to women fundamental values and recognized them as human beings. However, many doubts still remain on issues of equality and treatment that women are recognized according to the Sharia law. Polygamy, which many countries still allow as an individual right for men, continues to be an open question in Islam as the ban of the practice for women seems to be in contrast with a general principle of equality and non discrimination<sup>45</sup>.

## 5. Polygamy: its origins and evolution

Polygamy represents a very controversial question worldwide. While western Christian societies banned the practice, polygamy is still legally allowed in many Muslim countries.

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<sup>45</sup>Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007



Despite being widely followed, many dissenting opinions have been arising on the use of this practice<sup>46</sup>. That said, this paragraph will analyze from a general perspective polygamy, providing first of all its definition, secondly retracing its history and evolution and, finally examining the multiple questions that have been popping up among contemporary societies. The term polygamy has double meaning as it could be considered to be the umbrella of two different connotations of it: polyandry and polygyny. Polyandry refers to the situation of a woman marrying two or more men, polygyny instead indicates the opposite, a man contracting multiple marriages with different wives. While polyandry is extremely rare and almost not practiced, polygyny is commonly widespread among several Muslim communities worldwide. For practical reasons, I will limit myself to using the term polygamy to refer to its “subspecies” of polyandry and polygyny, which is the focus of this thesis<sup>47</sup>.

## 5.1 Polygamy and its interpretation in Islam

Polygamy is an ancient tradition, which has been practiced since many centuries throughout the entire world and in particular among Muslim communities<sup>48</sup>. Generally speaking, the Sharia law, in Islamic countries, regulates marriage and divorce and its primary source, the Quran, explicitly admits polygamy under established conditions. Apart from being legally recognized, polygamy is a more complex phenomenon, which is strictly interlaced also with traditions, religion and sociocultural aspects<sup>49</sup>. The one verse (4:3) that talks about polygamy in the Holy Qur’an in the verse states:

*And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice<sup>50</sup>.*

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<sup>46</sup>Alam M. S., *A general understanding of polygamy among Upsi communities: problems and prospects*, in *Ozean Journal of Social Sciences*, Vol. 3, 2010

<sup>47</sup>Bailey M. and Kaufman A. J., *Polygamy in the Monogamous World Multicultural Challenges for Western Law and Policy*, 2010

<sup>48</sup> Alam M. S., *A general understanding of polygamy among Upsi communities: problems and prospects*, in *Ozean Journal of Social Sciences*, Vol. 3, 2010

<sup>49</sup> Bailey M. and Kaufman A. J., *Polygamy in the Monogamous World Multicultural Challenges for Western Law and Policy*, 2010

<sup>50</sup>Abdullah Yusuf Ali, *The Holy Qur’an: Text, Translation and Commentary* (Al-Riyadh, Saudi Arabia: Dar El-Liwa Publishing and Distributing, 1938), Sura 4, verse 3

The cited verse has been studied and interpreted against the circumstances in which the verse was revealed<sup>51</sup>. Many academics have contributed to elaborate various categorizations of the schools of thought of Muslim scholars on the question of polygamy in the Islamic world. A first analysis classifies the scholars interpreting the verse (4:3) in three groups: the *Textualist*, *Semi-Textualist*, *Contextualist*<sup>52</sup>. While, another study distinguishes between the *Fundamentalists* and the *Modernists*<sup>53</sup>.

### 5.1.1 Polygamy according to the *Textualists*, *Semi-Textualists*, *Contextualists*

According to the first classification of the Muslim scholar Abdullah Saeed, there are three main interpretations of the sacred scripture on the question of polygamy, which can be categorized in three groups: the *Textualist*, *Semi-Textualist*, *Contextualist*<sup>54</sup>. The *Textualists* base their explanation on the literal interpretation of the verse (4:3), arguing that the practice is accepted in Islam - *marry women of your choice, two, or three, or four*. Following their standpoint, considering that Muslims are encouraged to observe Prophet Muhammad's teachings and habits, polygamy is justifiable referring to the Prophet's example. He had, indeed, multiple wives. The *Semi-Textualist* believe that polygamy is acceptable only when the husbands are able to treat their women equally according to what the Quran says - *but if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice*. The *Contextualist's* analysis is based on the combined interpretation of the verse (4:3) together with the verses (4:2) and (4:129). The Quran, they claim, cannot be read in separate verses, yet its verses are all interlaced and must be read in a combined way. Furthermore, its interpretation has to be strictly connected with the socio-historical context at the time of its revelation. As highlighted above, the verse (4:3) is strictly linked to the verse (4:129) and a combined reading is necessary in order to fully understand the message of the Quran. The verse (4:129) claims:

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<sup>51</sup>Syed M. A., *The Position of Women in Islam A Progressive View*, State University of New York Press, 2004

<sup>52</sup>Nurmila N., *Women, Islam and Everyday Life Renegotiating polygamy in Indonesia*, Routledge, 2009

<sup>53</sup>Rohman A., *Reinterpret Polygamy in Islam: A case study in Indonesia*, in *International Journal of Humanities and Social Science Invention*, Vol. 2, pp 68-74, 2013

<sup>54</sup>Nurmila N., *Women, Islam and Everyday Life Renegotiating polygamy in Indonesia*, Routledge, 2009; Saeed A., *Interpreting the Qur'an: Towards a Contemporary Approach*, New York: Routledge, 2006

*You are never able to be fair and just as between women, even if  
it is your ardent desire: but turn not away (from a woman) altogether,  
so as to leave her (as it were) hanging (in the air). If you  
come to friendly understanding, and practice self-restraint, God is  
oft forgiving, Most Merciful<sup>55</sup>.*

The just quoted verse would clearly state that an equal treatment between women is not possible even if when someone wishes do to so. Consequently, men's' moral restriction of equal and just treatment among the wives required by the verse (4:3) cannot be fulfilled. It follows that, staying at this interpretation, polygamy must be banned as not morally acceptable according to the traditional Islamic values<sup>56</sup>. Thus, *Contextualists* argue that the Quranic reference to the practice of polygamy is explicable just in the light of the socio-historical context at the time of the revelation. The external circumstances were, in fact, determinant in shaping the messages and the content of the holy word of God<sup>57</sup>. In that sense, there are at least two ways of understanding the socio-historical context in which the verses of the Quran referring to polygamy were revealed. According to the first one, the most common, some scholars explain that the Quranic verses on polygamy were declared after the tragic battle of Uhud (625 A.D.), during which many male warriors died leaving scores of young widows and orphans. As a form of protection in favor of the women and children of the victims, the survivors of the martyr were encouraged to marry more than one woman so that they could have provided spiritual as well as economical support to the young widows and their children.<sup>58</sup> Another interpretation explains that the survived men were interested in marrying the orphans paying a smaller price to marry them. As their protectors died during the battle, the survivors felt as they had the right to treat them at their convenience<sup>59</sup>. Thus, the *Contextualists* believe that polygamy is understandable and justifiable only in light of the special circumstances of the post battle context, where the number of men

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<sup>55</sup> Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* (Al-Riyadh, Saudi Arabia: Dar El-Liwaa Publishing and Distributing, 1938), Sura 4, verse 3

<sup>56</sup> Syed M. A., *The Position of Women in Islam A Progressive View*, State University of New York Press, 2004

<sup>58</sup> Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Nurmila N., *Women, Islam and Everyday Life Renegotiating polygamy in Indonesia*, Routledge, 2009; Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; Rohman A., *Reinterpret Polygamy in Islam: A case study in Indonesia*, in *International Journal of Humanities and Social Science Invention*, Vol. 2, pp 68-74, 2013; Syed M. A., *The Position of Women in Islam A Progressive View*, State University of New York Press, 2004

<sup>59</sup> Abul A'la M. S., *Towards Understanding the Qur'an Vol. II Surah 4–6*, United Kingdom: The Islamic Foundation, 1989

outnumbered the quantity women. At that time having up to four wives was tolerable to meet unusual social, political and economic needs, which are no longer applicable in contemporary Muslim societies. According to the *Contextualists*, polygamy today must be forbidden<sup>60</sup>. In conclusion, on the one hand, *Textualists* and *Semi-Textualists* stick to a literal interpretation of the Quran, arguing that polygamy is allowed respecting the restrictions dictated by the sacred text. On the other hand, the *Contextualists* firmly reject their theory, claiming that polygamy was introduced as an exceptional practice due to the post-conflict extraordinary circumstances. Such explanation excludes the admissibility of polygamy in the contemporary Muslim countries, considering that the condition shortage of men as a consequence of the martyr of battle of Uhud is not applicable anymore.

### 5.1.2 Fundamentalists versus Modernists

The distinction among *Fundamentalists* and *Modernists* recalls the divergence between the *Textualists* and *Semi-Textualists* on one side and the *Contextualists* on the other side. The *Fundamentalists* claim that polygamy is authorized in name of Islam and its sacred sources, the Quran and the Sunna. The *Modernists*, instead, as the *Contextualists*, claim that the circumstances of the revelation are not negligible and that nowadays we should consider Islam as monogamous. The practice of multiple marriages for men, according to them, marginalizes women and, as such, it is not tolerable in our times. The *Fundamentalist's* approach is similar to the *Textualists'* argument. As the Quran talks about polygamy in one of its verses - *marry women of your choice, two, or three, or four*<sup>61</sup> - the practice must be considered as acceptable in the Islamic world. Furthermore, the *Fundamentalists* support their analysis with other arguments. First of all, they also recall a verse from the *Sunnah*, which says: *Be marry! The most bless in Islam are to those who have many wives*. Staying at their interpretation, the Prophet Mohammed would teach that the more women a man has the most blessings he receives from God. Having multiple wives, requires remarkable efforts due to the responsibilities of care that husbands have towards their women<sup>62</sup>. Other scholars also argue that polygamy is also a sort of preventive measure to limit adultery and prostitution. The main reasoning here is that men tend to have an higher sexual desire compared to women, which multiple wives would be able to fulfill. As a consequence, cases of

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<sup>60</sup> Nurmila N., *Women, Islam and Everyday Life Renegotiating polygamy in Indonesia*, Routledge, 2009

<sup>61</sup> Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* (Al-Riyadh, Saudi Arabia: Dar El-Liwaa Publishing and Distributing, 1938), Sura 4, verse 3

<sup>62</sup> Kodir F. A., *Nabi pun Setia monogami (Muhammad also loyal in Monogamy)*, in Jaringan Islam Liberal, <http://islamlib.com/id/?page=article&id=336>, 2012

adultery would decrease as well as prostitution would be diminishing, as men would not have the need to look for extra marital sexual relationships. Also, some believe that as of the today the number of men in Muslim societies is higher than the percentage of women. Thus, allowing males to have up to four wives can help the latter to be relieved from the economic problems and the limitations related to their gender status<sup>63</sup>. Their polygamous unions can also alleviate other inconveniences that men could face in the households. For example, when one of the wives because of a serious illness, is unable to take care of the housekeeping or to bearer the children, getting a new wife can help tackling the inconvenient situation. She would be in charged of the housework as well as of other matters making the man happy again<sup>64</sup>. *Fundamentalists* think that polygamy is a fundamental part of the Sharia and, as such, it has to be supported and encouraged in Muslim societies. *Fundamentalist* scholars blame the *Modernists* of having been influenced by Western ideology, which sees Islam as archaic and oppressive for women and which is responsible of the rise of Muslim feminist movements<sup>65</sup>. On their side, the *Modernists* following the same criteria of the *Semi-Textualists* of the systematic joint interpretation of the verses (4:3) and (4:129) argue that monogamy should be the rule in marital relationships among Muslims. Read together ...*But if ye fear that ye shall not be able to deal justly (with them), then only one and You are never able to be fair and just as between women, even if it is your ardent desire...*, it becomes clear that the Quran itself excludes the possibility of an equal treatment between the brides<sup>66</sup>. Besides repeating the *Semi-Textualists'* claims, the *Modernists* also recall the *Contextualists'* argument. They, indeed, recognize that the Prophet had many wives but also remind that Muhammad conducted polygamy as a consequence to the increased number of widows and orphans after the battle of Uhud<sup>67</sup>. The *Modernists* rejects the *Fundamentalists'* argument according to which men's sexual desires and needs are more intense than women's. This is nothing more than an assumption result of a patriarchal tradition based on the stereotype of superiority of men and women's subordination. It is claimed that polygamy is not a practice admissible in name of Islam yet the creation of a men-made culture, men which disempowers women<sup>68</sup>. Scholars

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<sup>63</sup> Rahman I. Doi A., *Woman in Sharia*, London, 1989

<sup>64</sup> Rahman I. Doi A., *Woman in Sharia*, London, 1989; Haifaa A. J., *The Rights of Women in Islam: An Authentic Approach*, Basingstoke: Macmillan and New York: St. Martin's Press, 1998

<sup>65</sup> Moghissi H., *Feminism and Islamic Fundamentalism*, New York, 1999; Beverly McCloud A., *Misrepresentations and the future of Islamic law in the United States*, Mich. St. L. Rev, 2006

<sup>66</sup> Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* (Al-Riyadh, Saudi Arabia: Dar El-Liwaa Publishing and Distributing, 1938), Sura 4, verse 3; Badawi L., *Islam*, in *Women in Religion*, eds. Jean Holm and John Bowker, London, 1994

<sup>67</sup> Rohman A., *Reinterpret Polygamy in Islam: A case study in Indonesia*, in *International Journal of Humanities and Social Science Invention*, Vol. 2, pp 68-74, 2013

<sup>68</sup> Ahmed L., *Women and Gender in Islam*, New Heaven, 1992

adhering to the *Modernist's* approach also dismiss the *Fundamentalists'* thesis of polygamy as a solution for all the cases of wives getting ill and unable to fulfill their duties as typical Muslim brides. While men would have the chance to marry again when their previous marriage does not meet anymore their desires of ideal marital life, women do not have the same privilege. On the contrary, such behavior would be judged as disrespectful towards their partner<sup>69</sup>. On top of that, *Modernists* also argue that polygamous households often cause unpleasant situations at the expense of women and children. An unconventional family structure can affect negatively their psychological conditions, which can then interfere with a healthy development of the children especially<sup>70</sup>. Finally, to the *Fundamentalists'* accusation of having been influenced by Western ideology, the *Modernists* respond saying that Western scholars have been of paramount importance for the development of the critical thinking of some Islamic academics. The latter have the merit of having moved beyond the literal interpretation of the sacred scriptures and learned how to contextualize their reading making of the Islam a living and evolving religion, culture and tradition. To sum up, *Fundamentalists* and *Modernists* repeating for some aspect the arguments of *Textualists*, *Semi-Textualists* and *Contextualists* have opposite opinions and thoughts about the role of polygamy in Islam. While *Fudamentalists* believe that Islam and Sharia support polygamy as the ideal form of marriage, *Modernists* argue against them claiming that contemporary Islam encourages monogamy. Their approach rejects the idea of inequality between the genders, which fosters a marginalization of the women in Islamic societies<sup>71</sup>.

## 6. Polygamy in Malaysia

As clarified in the paragraphs above, the 1984 Malaysian Islamic Family Act allows Muslims men to marry up to for women. Polygamy is a complicated matter in Malaysian history, whose evolution is highly influenced by the socio-historical context of the country, which shaped its legal scenario. In order to fully understand all the aspects concerning polygamy, it is of fundamental importance retracing the historical path, which the development of the practice followed. Thus, the next paragraphs will provide an overview of the different phases through which the evolution of polygamy went across. Overall, it is possible to identify three

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<sup>69</sup> Afshar H., *Islam and Feminisms*, London, 1998

<sup>70</sup> H. A. Jawad, *The Rights of Women in Islam: An Authentic Approach*, Great Britain 1998

<sup>71</sup> Rohman A., *Reinterpret Polygamy in Islam: A case study in Indonesia*, in *International Journal of Humanities and Social Science Invention*, Vol. 2, pp 68-74, 2013

different historical stages during which polygamy has received a different treatment and regulation: the pre-colonial period, the colonial period and the post-colonial phase<sup>72</sup>.

## 6.1 Polygamy during the pre-colonial period

Malaysian history of polygamy has very ancient roots, going back to approximately 800 years to the early Malay society. Even though polygamy is generally thought by Malaysian Muslim scholars as a practice strictly linked to Islam, in the Malay region, the habit of marrying multiple wives started long before the advent of Islam. Polygamous marriages are indeed incorporated into Malaysian culture and tradition and it seems that this practice was already widely used by the Indian and Chinese communities. In the early Malay society, the practice of polygamy was kept alive by customary rules. Evidence of the existence of polygamy in the pre-colonial phase is provided by Malay literature, Malay Annals and the Hukum Kanun Melaka (HKM), a legal code of Malay customary law. According to these sources, polygamy during that period was widely practiced by the upper classes of the society. Before the advent of Islam, the most practiced religion was Hinduism and its traditions and culture deeply affected the administration of the country. Hindu scriptures recognized polygamy as a traditional form of marriage, which confirms historical data that talk about polygamy as a societal practice of that period in the Malay Peninsula<sup>73</sup>. The *Hikayat Terung Pipit*, a text of the Malay literature, tells the story of a young woman who wanted to jump into a river once she was informed that her husband married another wife. In the 15<sup>th</sup> century, Islam was introduced in Malaysia and replaced for importance Hinduism. Many scholars argue that Islam became the “law of the land”, influencing each and every aspect of the life of the society, such as politics, culture, traditions and faith.<sup>74</sup> Two were the main legal groups of law: Hukum Kanun Melaka (HKM), collection of customary law and Malay Classic law. However, both of them did not regulate matters pertaining to polygamy. The shift towards Islam, indeed, did not bring a significant change with respect to polygamy. In lack of any legal regulation on the procedures concerning polygamy, the practice was admitted as a form of Islamic marriage, conform to the principles of Islamic law. Thus, just as during the Hindu

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<sup>72</sup> Abdullah R., Silmi Abdullah, and Nahid Ferdousi, The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015

<sup>73</sup> R. O. Winstedt, *Malaya and its History*, London, UK: Hutchinson University Library, 1962

<sup>74</sup> Raihanah Abdullah, Silmi Abdullah, and Nahid Ferdousi, The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015

phase, polygamy continued to be permitted, four was the number of maximum wives allowed under the condition of equal treatment among all of them. Just like before, polygamy mainly interested the richer and higher classes. According to Malay literature, women were not in favor of polygamy as also demonstrated by the story of the daughter of one of the Sultan, named Bendahara Raja Pahang, who refused to marry another Sultan who already had a wife at that time. To conclude, polygamy was practiced during the time of the early Malay society, during the Hindu phase as well as after the merger of Islam. Although generally popular among the upper classes, the majority of women were not promptly accepting to be co-wives.

## 6.2 Polygamy during the British domination

The arrival of the British as conquerors of the Malay Peninsula brought significant changes in the administration of the colonial territories. As a result of the numerous treaties that the British signed with the Malay rulers, the government of the region was put under British rules, while all the matters pertaining customary and Islamic law such as family, personal life and inheritance remained under Islamic rules. Not a single law addressed specifically polygamy, yet the state of Kelantan issued two regulations on polygamy. The first provision, notice 14/1914, established that men who wanted to contract a polygamous union have to prove to the *Mutfi* that they were financially capable to afford the support of multiple households. The infringement of that condition was punished with a fine of RM50 and it was considered as a form of adultery. When the same Sultan who ordered the notice did not respect it, concerns started to spread and a second notice was adopted. The second notice 15/1914, so called *Clause on Muslims with Intent to Marry Two, Three, or Four Wives*, had a similar content to the previous provision. Unlike the former rule, it was instructed that husbands that desired to marry another wife had to provide the judges with an official declaratory letter and swear in the court that they owned enough resources to financially support 2 or more spouses. In case of infringement, the transgressor had to pay a fine of maximum 100RM or go to jail for two months. A more severe punishment -300RM fine or three months jail- was charged to a religious leader (*Imam*) if celebrating a polygamous marriage without sending the declaratory letter to the court. Furthermore, the crime of adultery was abolished. In light of the previous episode, it was stated that the provision was not applicable to males belonging to the royal families. During the colonial phase, huge waves of immigrants from China and India landed in the Malay territories, which gradually became multicultural centers. Immigrants' culture, beliefs and traditions with particular regard to family affairs -mostly marriage and divorce- were given the same relevance as Malay



customs. Courts, indeed, used to apply for immigrants their native laws especially when dealing with questions concerning marriage and divorce. Chinese settlers, for example, were also allowed to practice polygamy as this practice was in compliance with their local laws and customs. According to Chinese laws, marrying another woman as concubine was allowed as long as the second wife was recognized a lower importance compared to the first one.<sup>75</sup> Instead, Malay judges insisted in recognizing to the second spouses the same rights and importance of the first one. Such scenario lasted until 1976 when the Law Reform Act (Marriage and Divorce) abolished polygamy for non-Muslims.<sup>76</sup> To conclude, Kelantan was the first state in Malaysia that tried to introduce some restrictions to the practice of polygamy. The failure of the first notice, the 14/1914, was partially tackled with the notice 15/1914. According to the two notices, before the 1976 ban, polygamy was practicable without distinction of religion and tradition. Despite the early attempt to constrain the custom of taking multiple wives, the two acts were not comparable to the more severe restrictions introduced by the 1984 Islamic Family Act.<sup>77</sup>

### 6.3 Polygamy during the post-colonial period

In the aftermath of the independence in 1957, every single state was given the possibility to adopt its own system of rules for the administration of the Islamic law. The example of Selangor, the first state issuing a statute of Islamic law in 1952, *Administration of Islamic law Enactment* was progressively followed by the other states. However, few of them adopted a specific legislation to regulate the procedure of polygamous marriages. For example the states of Sarawak, Sabah, and Johor had a specific body of laws administrating polygamous marriages in order to control the abuse of the practice in their territories. Additionally, the states of Johor and Malacca established that all the individuals that aspired to marry another woman had to produce to the court information concerning the existing wife, the future one and himself. Such informative documents had to be completed by the consent of the woman married beforehand and by a declaration of commitment to treat the co-wives equally. The regulation provided by the state Sarawak authorized men to conduct polygamous unions

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<sup>75</sup>Buckley Ebrey P., *Women and the Family in Chinese History*, New York: Taylor & Francis Group, 2003

<sup>76</sup> Raihanah Abdullah, Silmi Abdullah, and Nahid Ferdousi, The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015; Musawah For Equality in the Family and Sisters in Islam, Joint report on Muslim Family Law and Muslim Women's rights in Malaysia, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>77</sup> Raihanah Abdullah, Silmi Abdullah, and Nahid Ferdousi, The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015

after proving to be financially able to support more than one household. As highlighted above, the majority of the states did not have a set of regulatory measures dedicated to polygamy. Therefore, its execution was governed by the application of the precepts regulating monogamous marriages, which differ from state to state. According to the legislation of two states, Selangor and Negeri Sembilan, one additional condition had to be fulfilled for the valid celebration of a Muslim marriage. A Muslim man who desired to take someone as spouse had to present to the court an official written statement to declare his marital status, specifying if married or single. Before proceeding to the formalization of the marital union, the judge had to verify the financial capabilities, the health conditions, and more in general his accountability. Thus, while in some states the judges were bound by the regulations restricting polygamous marriages, in the territories where the issue was not specifically administrated the courts could use their discretionary powers for decisions concerning the permission to marry a second, third or fourth wife<sup>78</sup>. The described situation of diverse systems of Islamic family law governance in the different states reached a decisive turning point when the Islamic Family Law Act was promulgated in 1984. Such legislation was indeed applied with small differences in its application and interpretation in all the territories of the Federal state of Malaysia. At the time of its enactment, the codification seemed to be one of the most innovative and advanced in the entire Muslim world. The rights of women in the familiar context were significantly improved.<sup>79</sup> For example women were allowed to divorce, to annul the marriage and to receive financial support after an eventual separation. Likewise, the legislation concerning polygamous marriages was also significantly improved in favor of women.<sup>80</sup> However, in contrast to what other states like Egypt, Indonesia, Jordan and Pakistan, the new Islamic Family enactment did not abolish polygamy, yet simply introduced some restrictions aiming at preventing the abuse of the practice<sup>81</sup>. It is argued that regulating polygamy through the introduction of legal constraints is fundamental

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<sup>78</sup> Raihanah Abdullah, Silmi Abdullah, and Nahid Ferdousi, *The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia*, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015

<sup>79</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>80</sup> Raihanah Abdullah, Silmi Abdullah, and Nahid Ferdousi, *The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia*, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015; Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009; Zakariyahii L., Azeez Y. A. and Shukor S. A., *Codification of Islamic Family Law In Malaysia: The Contending Legal Intricacies*, 2015; Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>81</sup> Raihanah Abdullah, *Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective*, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East*, 2008; Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

in order to safeguard the holiness of the marriage. Being the latter a religious institution, a restrictive regulation of polygamy aims at preserving the sanctity of its purposes<sup>82</sup>. Likewise, as reiterated by the Sharia jurisprudence in the *of Mohd Izuddin Mohd Ilias v. Rozeta Hasan*, the aim of the new restrictive measures on polygamy was not to abolish the practice, yet to regulate it in order to make it conform to the principle of justice, which religious practices have to respect<sup>83</sup>. In 1994 and 2003 two reforms amended some of the provisions of the Islamic Family Act in order “to further safeguard the rights of women.” Despite the good intension of their purpose, the reforms produced the opposite effect of reducing the level of guarantee ensured to women’s rights by the Malay Islamic family laws<sup>84</sup>. With regards to the provisions on polygamy, the amendments did not bring revolutionary changes, yet only few minor changes<sup>85</sup>. Although the 1984 Act was meant to bring a uniform codification on issues concerning family in the Muslim communities in Malaysia, it is believed that the hoped result was not achieved. The enforcement of the law, in fact, differed from state to state. In this regard, a typical example of provisions whose application was not uniform is the regulation on polygamy. The lack of homogeneous laws regulating the procedures and processes of polygamous marriages led many applicants to use the non-uniformity to their own advantage. This is to say that many people abused of the law by going to the states where marrying another wife was easier as a consequence of a more relaxed regulatory system<sup>86</sup>. Even more problematic are those cases when husbands who wish to marry another wife cross the Malaysian border with the intention to solemnize their marriage. Due to the difficulties that some of the applicants often have to face because of the restrictions imposed by the Islamic Family Act, contracting the marriage outside the country seems to be the most popular path followed by Malaysian men. As many studies have demonstrated the most popular spot is Thailand whose regulation on the solemnization of polygamous unions far less restrictive<sup>87</sup>. That said, before going into details and analyzing the consequences, which

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<sup>82</sup> Rafeah, S. \*, Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>83</sup> Rafeah, S. \*, Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>84</sup> Musawah For Equality in the Family and Sisters in Islam, Joint report on Muslim Family Law and Muslim Women’s rights in Malaysia, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>85</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East*, 2008

<sup>86</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East*, 2008

<sup>87</sup> Abdullah R., Polygamy without the Sharia Court’s permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East*, 2008; Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating*

the Malay regulatory system on polygamy has been triggering, the next paragraph will provide more detailed information on the Islamic Family Act provisions on polygamy and its subsequent amendments.

### 6.2.1 The Islamic Family Law Act provisions on polygamy

The 1984 Islamic Family Law Act in its section 23, Part II, allows polygamy for Muslim men. The discipline is divided in 8 parts, which mainly regulate the administration of polygamy applications, the registration of the marriage and the conditions that the applicants have to fulfill in order to receive the approval of the Sharia court<sup>88</sup>. By the time of its enactment, the Islamic Family Law Act was adopted in all the 14 states of the Malay Federation. However, as highlighted above, the enactment was not enforced uniformly in all the states. For example, different are the sanctions applicable for marrying another wife without following the legal procedure or for not treating the different wives equally. Despite the small differences, all the Federal states provided that the each single applicants' request to contract a polygamous marriage had to be approved by the Sharia court<sup>89</sup>. As stated in the section 23 (1) of the Islamic Family Law Act:

*No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this act. . . .*<sup>90</sup>

Once received the application, the court is in charge of granting the permission for the marriage after having verified that the request as well as the husband fulfill he conditions

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*Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>88</sup> Firdaus binti Fatah Yasin R. and Shah Jani M., *The Efficiency of Legal Provision on Polygamy in Malaysia, A Critical Analysis from the Qur'anic Perspective*, in *International Conference on Multidisciplinary Innovation for Sustainability and Growth*, Kuala Lumpur, 2014

<sup>89</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008; Abdullah R. and Khairuddin S., *The Malaysian Shari'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009

<sup>90</sup> Islamic Family Law (Federal Territory) Act 1984, Part II – Marriage, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/ab535f57be74f80e482569810025f113?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/ab535f57be74f80e482569810025f113?OpenDocument)

stated by the 1894 code<sup>91</sup>. As stipulated by the Family Law Act, the application has to fulfill at least four conditions:

- 1) the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives
- 2) the applicant is financially capable to support the existing as well as the future wives including persons who would be his dependants as a result of the proposed marriage;
- 3) the ability of the applicant to grant equal treatment to all his wives as stated in the (4:3) verse of the Quran
- 4) the proposed marriage would not cause harm - *darar syarie* in Sharia law - to the existing wife or wives<sup>92</sup>.

The conditions imposed by the law are essential to ensure that the polygamous marriage is contracted fairly and adequately in order to avoid any possible harm or injustice to the detriment of the wives<sup>93</sup>. The applicants have the duty to show evidence of their capacity to fulfill the legal conditions by submitting a written demand to the court<sup>94</sup>. The demand should include the allegation of the reasons why the marriage is just and necessary, a detailed

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<sup>91</sup> Abdullah R., Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007; Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009; Abdullah R., Abdullah S., and Ferdousi N., The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015; Bailey M. and Kaufman A. J., *Polygamy in the Monogamous World Multicultural Challenges for Western Law and Policy*, 2010; Firdaus binti Fatah Yasin R. and Shah Jani M., *The Efficiency of Legal Provision on Polygamy in Malaysia, A Critical Analysis from the Qur'anic Perspective*, in *International Conference on Multidisciplinary Innovation for Sustainability and Growth*, Kuala Lumpur, 2014; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008; Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>92</sup> Islamic Family Law (Federal Territory) Act 1984, Part II – Marriage, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/ab535f57be74f80e482569810025f113?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/ab535f57be74f80e482569810025f113?OpenDocument)

<sup>93</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>94</sup> Abdullah R., Silmi Abdullah, and Nahid Ferdousi, The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015;

Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008; Abdullah R., Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007

information of the applicant's income, the number of people who will be dependent on him after the marriage and if already obtained, the declaration of consent of the existing wife<sup>95</sup>. As provided by the section 23 of the Islamic Family Act, upon receiving the application, the Sharia judge will first of all summon the applicant and his current wife or wives<sup>96</sup>. Their consultation aims to protect them from any unfairness, making the procedure the most transparent possible<sup>97</sup>. Secondly, he will carry out the necessary investigations to verify whether the applicant is truly eligible to marry another wife. If the applicant's request is conform to the legal conditions, the court issues a written declaration of approval. Therefore, some scholars claim that the right to polygamy is no longer a unilateral right of men, yet the result of a judicial approval<sup>98</sup>. Consequently, the procedure for polygamous union is no more an easy one<sup>99</sup>. The Sharia court plays a crucial role in determining whether the husband has the legal capacity to marry another women and a decision of non-approval or rejection of the demand is issued if the conditions are not fulfilled<sup>100</sup>. A polygamous marriage stipulated without the court's permission cannot be registered. The non-registration of a polygamous marriage has a negative impact on the marital rights of the new wife and the children. Non-registration, in fact, means that the unregistered wife and their children will not have any of the legal privileges, which normally are attributed to married couple, such as inheritance, maintenance after potential divorce or death of the husband and custody. Thus, in order to mitigate the negative consequences to women, Kelantan was the first state in 1992 amending the 1984 Family Act with a provision stating that polygamous marriages concluded without the court permission could be registered. Contravening the law, however, also means that the transgressor will be subjected to penalties<sup>101</sup>. Undoubtedly, the amendment is beneficial for women, as the legal recognition of their union would give her the right to fully claim her marital rights. Nonetheless, some scholars have been more critical, arguing that such

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<sup>95</sup> Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>96</sup> Islamic Family Law (Federal Territory) Act 1984, Part II – Marriage - *On receipt of the application, the Court shall summon the applicant and his existing wife or wives to be present at the hearing of the application, which shall be in camera...*

[http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/ab535f57be74f80e482569810025f113?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/ab535f57be74f80e482569810025f113?OpenDocument)

<sup>97</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>98</sup> Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009

<sup>99</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>100</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>101</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

provision would incentivize and make easier the celebration of unauthorized marriages<sup>102</sup>. While the state of Kelantan made such amendment in order to safeguard women's rights, other states did not, threatening the rights of women in all the hypothesis of unregistered marriages. Overall, the state of Kelantan seems to be one of the most progressive in terms of women well-being protection. This is also confirmed by the provision, which refers to the summons of the existing wife or wives by the judge. While Kelantan enforced such rule, other states, as for example Perlis did not. Its regulatory measures only provide that the husband, whose presence in the hearing is necessary, has to bring two witnesses to in support of his application. Summoning the previous wife is not compulsory and consequently they have no right to oppose to the husband's will. As highlighted in the previous paragraph, the discrepancy of regulation among the states allows men to travel within the Malaysian borders or abroad to escape from the most stringent rules and longer procedures<sup>103</sup>. In order to reduce the "law shopping" at least within the country, feminists group advocating for women's right in Malaysia strived for the adoption of a more homogeneous as well as more women oriented legislation<sup>104</sup>. As a result of their efforts, in the early 2000s, the 1984 Islamic Family Law Act was amended with the purpose to standardize its enforcement throughout the entire Malay territory<sup>105</sup>. Having in mind also the aim to further safeguard the role of the women in the family setting, some of the enactments concerned also polygamy provisions<sup>106</sup>. The first change involves the first of condition listed in the section 23 on the requirements of the marriage as just and necessary. The new formulation requires the proof of the marriage as just or necessary. Thus, while before the applicant had to prove the double conditions (just and necessary) nowadays, the evidence of one of the two is enough (just or necessary). Another enactment is related to the right of the wife to choose between the right of maintenance and the right of keeping a share of the matrimonial assets<sup>107</sup>. As argued by

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<sup>102</sup> Rizal bin Abidin M., *Polygamy: A Concession to Necessary Social Conditions?*, in Zaleha Kamaruddin, *Islamic Family Law Issues 2000*, International Islamic University, 2001; Kamali H., *Islamic Law in Malaysia: Issues and Developments*, Ilmiah Publishers, 2001

<sup>103</sup> Jones G. W., *Marriage and Divorce in Islamic South East Asia*, Oxford University Press, Kuala Lumpur, 1994

<sup>104</sup> Bailey M. and Kaufman A. J., *Polygamy in the Monogamous World Multicultural Challenges for Western Law and Policy*, 2010; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008; Owoyemi M. Y., *Sisters In Islam's Quest for The Reinterpretation of The Qur'an and Hadith: An Analysis of Their View on Equality, Women Judges and Polygamy*, in *Kajian Malaysia*, Vol. 32, No.1, 2014, pp. 55–80

<sup>105</sup> Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>106</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>107</sup> Section 23 (10) of the Selangor Islamic family Act 2003 provides that: *Every Court that grants the permission or orders the marriage to be registered under this section shall have the power on the application by any party to the marriage— (a) to require a man to pay maintenance to his existing wife or wives; or*

some literature, the new provisions are nothing else than an illusory enhancement of women's rights in polygamous marriages. Although the provisions were enacted to improve the welfare of women in polygamous relationship, the two just mentioned amendments produced the opposite effect of further discrimination against females. The burden of proof born by the male applicant is less demanding than before. Now, it's enough to prove either the justice or the necessity, while in the original version both had to be proved at the same time, which is more complicated than showing evidence of just one of the two requisites. Furthermore, the second amendment seems to be in contrast with the spirit of the Islamic law. According to the Sharia, husbands are obliged by the law to maintain their wife, while the division of the matrimonial assets and properties is an additional right, whose aim is to safeguard the financial stability of the existing wife and children upon the decision of the husband to marry another wife. In other words, granting the right to choose between maintenance and division of assets limits women's entitlement to dispose of both the rights<sup>108</sup>. Besides the two just mentioned revisions, another amendment was introduced with regards to the existing wife's summons in the court, adopting an equal approach within all the states<sup>109</sup>. As of today, it is compulsory for the judges to summon not only the existing wife or wives but also the forthcoming wife and her guardian (*wali*)<sup>110</sup>. It happens often that the polygamy demands do not go to trial when the existing wife provides the judge with an oral declaration of agreement with the husband's will. The oral declaration is most of the time considered enough for the judge to approve the demand of polygamy. However, if on the one hand this provision accelerates the procedure, on the other hand a mere oral declaration can be in some cases misleading. Further investigation should be carried out by the judge to assess the unconditional will of the woman as her consensus could be nothing more than the result of a threatened or a concrete use of violence<sup>111</sup>. In any case, with the exception of the hypothesis of forced consensus, the acceptance of the existing wife is of crucial importance for the well

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(b) to order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division of the proceeds of the sale. Enactment no. 2 of 2003 Islamic Family Law (State of Selangor) Enactment, 2003,

[http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_enactment\\_Upd.nsf/100ae747c72508e748256faa00188094/1c6c28deedc64ddd48256f3a002a2d02?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Upd.nsf/100ae747c72508e748256faa00188094/1c6c28deedc64ddd48256f3a002a2d02?OpenDocument)

<sup>108</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>109</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>110</sup> Section 23 (5) of the Selangor Islamic family Act 2003 provides that: *On receipt of the application, the Court shall summon the applicant, his existing wife or wives, the woman to be wedded, the wali of the woman to be wedded, if any, and other persons who in the opinion of the Court may provide information relating to the proposed marriage to be present at the hearing of the application...* Enactment no. 2 of 2003 Islamic Family Law (State of Selangor) Enactment, 2003,

[http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_enactment\\_Upd.nsf/100ae747c72508e748256faa00188094/1c6c28deedc64ddd48256f3a002a2d02?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Upd.nsf/100ae747c72508e748256faa00188094/1c6c28deedc64ddd48256f3a002a2d02?OpenDocument)

<sup>111</sup> Abdullah R. and Khairuddin S., *The Malaysian Shar'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009



being of existing as well as of the future marriages. As some research shows, the most successful polygamous relationships are those where the families maintain an open and transparent communication. A marriage celebrated without the knowledge of the other wife or wives could, first of all, have negative consequence on the life of the latter as well as of the children and furthermore its chances of success are very low. It is very likely, in fact, that when all the parties become aware of the situation they will be seriously psychologically affected<sup>112</sup>. To sum it up, a Malay Muslim man who wishes to marry another wife has to present a written demand to the Sharia court. If the application fulfills the requirements provided by the law, the judges will approve the request. To recap, the husband has to be financially capable to afford having multiple wives, the proposed marriage has to be proven to be just or necessary, the husband has to treat all the wives equally and prove that the proposed marriage will not cause any harm to the existing wives, last but not least the approval is subjected to the consent of the latter. As confirmed by the jurisprudence in several law cases, all the requirements have the same importance and therefore they all have to be proved separately. This is what the judge of the Appeal court of Selangor claimed in the case of *Aishah v. Wan Mohd Yusof*. The same point of law was ruled in the case of *Rajamah v. Abd Waha*, as the applicant's demand was rejected for not fulfilling all the legal requirements. Likewise in the case of *Ruzaini v. Nurhafizah*, the court rejected the demand as although the husband demonstrated the consensus of the existing wife, his capacity to treat the existing and prospective wives equally was, according to the judge, not compelling<sup>113</sup>. Fulfilling all the five conditions required by the law and proving them to the Sharia courts is not as easy as we would expect. Very often men who wish to contract polygamous marriages do not have the legal capacity to do so. This is to say that in many cases, applicants whenever are not eligible for polygamous unions for not meeting the legal requirements, can contract the marriage without the court's permission. Polygamy without the court's approval is legally admitted upon the payment of a small fine, upon serving a short imprisonment or a combination of both. The Section 123 of the Islamic Family Law ACT 1984, part IX provides:

*Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished*

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<sup>112</sup> Firdaus binti Fatah Yasin R. and Shah Jani M., *The Efficiency of Legal Provision on Polygamy in Malaysia, A Critical Analysis from the Qur'anic Perspective*, in *International Conference on Multidisciplinary Innovation for Sustainability and Growth*, Kuala Lumpur, 2014

<sup>113</sup> Abdullah R., Silmi Abdullah, and Nahid Ferdousi, *The Fragile Status of a Muslim Wife: The Legal History of Polygamy in Malaysia*, in *Journal of Family History*, Vol. 40(2), pp. 135-152, 2015

with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment<sup>114</sup>.

Thus, according to what set by the law, contracting a marriage during the existence of another marital union even though is allowed, it is an offence, which has to be duly punished. Malaysian Federal states have enforced the provision differently, by providing punitive measures differing in their amount and severity. For example, in the state of Kelantan, the offender can get a fine not higher than RM300 or can be imprisoned for not more than a month or can be fined and imprisoned. While Kelantan has the lowest penalties, the states of Sarawak and Sabah have the most severe penalties across the country. The fine can be up to RM 3000 and the imprisonment can cast maximum two years, in some cases the transgressor can receive both the punishments<sup>115</sup>. As some research demonstrates, very rare are the hypothesis where men have been condemned to jail for violating the law, which makes of the court permission and indispensable condition<sup>116</sup>. Moreover, also the fine provided by the law are significantly low, which makes quite easy for men to contract the marriage illegally and then notify it to the court paying a small fine. Consequently, many scholars believe that the penalties did not have any deterrent effect and did not help to reduce the cases of polygamy in the country, as contravening the law seems to be easier than respecting it<sup>117</sup>. In conclusion, the 1984 Islamic Family Law Act as amended in the 2000s and enforced with slight differences by the Federal Malay states regulates polygamy procedures in the Malay Peninsula. A man who, during the subsistence of another marriage, wishes to marry another woman has to present a written request to the Sharia court. Upon some investigation, the court will release the permission if the applicant fulfills the legal conditions. As we have just seen, the lack of the court permission does not refrain men to contact polygamy as the penalties are not severe and most of the times consist in not more than a payment of a very

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<sup>114</sup> Islamic Family Law (Federal Territory) Act 1984, Part IX – Penalties, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/48c79a6979e5351b482569810025f177?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/b3ac9c218c8efdc4482568310022d8b3/48c79a6979e5351b482569810025f177?OpenDocument)

<sup>115</sup> Abdullah R., Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007

<sup>116</sup> Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

<sup>117</sup> Abdullah R., Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007; Firdaus binti Fatah Yasin R. and Shah Jani M., *The Efficiency of Legal Provision on Polygamy in Malaysia, A Critical Analysis from the Qur'anic Perspective*, in *International Conference on Multidisciplinary Innovation for Sustainability and Growth*, Kuala Lumpur, 2014; Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017; Musawah For Equality in the Family and Sisters in Islam, *Joint report on Muslim Family Law and Muslim Women's rights in Malaysia*, 69th CEDAW Session Geneva, Switzerland, February 2018

small fine. Against this background, many criticisms have arisen against the Malay legal provisions on polygamy. The strict conditions imposed by the law to curb the abuse of polygamy in the country are easy to contravene. Oftentimes, indeed, men are willing to pay the fine when that means being able to marry another wife. On top of that, a vast majority of men escape the Malay severe rules solemnizing their marriages outside the country, mostly in Thailand. The phenomenon of cross border marriages, which will be analyzed in the following chapters, is not a recent one in Malaysia, being instead a 40 years old practice.

## 7. Escaping the Islamic Family Law Act: cross border marriages

As we have highlighted in the previous paragraph, Malay Muslim men who desire to contract a polygamous marriage have to abide to the strict procedures prescribed by the Islamic Family Act as amended in the 2000s. Receiving the permission of the Sharia courts is by no means easy, many and not simple to meet are the legal conditions prescribed by the law. As a consequence, the marriage procedures can be very long as the investigations that the judges have to carry out to gather more information about the applicants' legal capacity to marry more than a woman often require long time. Therefore, in order escape from the rigidity of the Malay restrictions on polygamy and to avoid the long procedures, Malaysian Muslim men prefer to marry their second, third or fourth wife abroad. This practice is an old practice in the region and it is commonly known as cross border or runaway marriage and it is deemed to be the most convenient solution to contract a polygamous marriage for Malay husbands<sup>118</sup>. Cross border marriage is a form of marriage not allowed by the law as well as by the customary law and not favorably seen by the religion<sup>119</sup>. Marriage in Islam is indeed a sacred act, which has to be conducted following the prescribed regulations and, therefore, any act contrasting them is in conflict with the holy principles of this religious ritual<sup>120</sup>. The most popular places preferred by Malay men for their proximity to the Malaysian territories are Southern Thailand, especially the regions of Narathiwat, Patani, Satun, Songkhla and Yala<sup>121</sup>.

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<sup>118</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008; Zubir A., Marzuki N.A., Abu Bakar M. Z., *Factors and Implications of Cross-Border Marriage among Malaysian Citizens*, in *International Journal of Humanities and Social Science Invention*, 2016

<sup>119</sup> Che Soh R., Hak N. A., Helmi Md Said M., *Children of Cross-Border Marriage: Rights and Future*, in *International Journal of Academic Research Business and Social Sciences*, Vol. 9, No.5, pp. 470–480, 2019; Bt Md Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015

<sup>120</sup> SaidM, Hashim N., Hak N., Che Soh R., *A Study of Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, *Journal Undang-undang dan Masyarakat*, 2019

<sup>121</sup> Bt Md Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015; Helmi Md Said M., Md Hashim N., Abd. Hak N., Che Soh R., *A Study of*

Commonly known in the Malay local language as *kahwin lari*, this form of marriage, considered by some as a form of violation of the *Sunnah* of the Prophet, is concluded without the permission of the Sharia judges, generating many concerns about its registration and legal consequences<sup>122</sup>. The reasons that can lead a couple to conclude their marriage across the borders of Malaysia can be different, for example some people claim that the foreign service is faster and less expensive, or some others prefer to marry in the husband's or wife's country of origin, in some other cases the *wali*<sup>123</sup> refused to give the consent or the wife is pregnant before the marriage. Even though the motivations can be multiple, the most common is the hypothesis in which a husband who wishes to contract a polygamous marriage, marries abroad to avoid the Malay long and rigid procedure through which a man has to go<sup>124</sup>. Furthermore, most of the time, husbands that practice polygamy through runaway marriages, do it without the knowledge of the previous wife or wives<sup>125</sup>. According to some approximate figures, between the two thirds and the three quarters of the total polygamous couples in Malaysia, have celebrated their marriage without the court permission<sup>126</sup>. The consequences of cross borders marriages are problematic when the celebration of marriage in Thailand had been conducted illegally. Very often, in fact, many foreign authorities act in contrast to the Sharia law issuing false marriage certificates. Also known as runaway marriages, these unusual forms of marital union celebrations, even though considered a matrimonial offence, can be registered in Malaysia<sup>127</sup>. As stated by the Family Law Act of 1984, the registration is allowed if, the interested persons ask for it in the Malay Registrar of Muslim Marriages within six months from the celebration<sup>128</sup>. Although the registration of the

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*Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, in *Journal Undang-undang dan Masyarakat*, 2018; Md. Hashim N., Abdul Hak N., Helmi Md Said M., *Legal Developments in Cross-border Marriages*, in *International Islamic University Malaysia*, Vol. 23, No. 2, 2015; Zubir A., Marzuki N.A., Abu Bakar M. Z., *Factors and Implications of Cross-Border Marriage among Malaysian Citizens*, in *International Journal of Humanities and Social Science Invention*, 2016

<sup>122</sup> SaidM, Hashim N., Hak N., Che Soh R., *A Study of Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, *Journal Undang-undang dan Masyarakat*, 2019

<sup>123</sup> A *wali* is a guardian who ensures women's rights in a marriage and whose consent is indispensable for her to get married.

<sup>124</sup> Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015; SaidM, Hashim N., Hak N., Che Soh R., *A Study of Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, *Journal Undang-undang dan Masyarakat*, 2019

<sup>125</sup> Che Soh R., Hak N. A., Helmi Md Said M., *Children of Cross-Border Marriage: Rights and Future*, in *International Journal of Academic Research Business and Social Sciences*, Vol. 9, No.5, pp. 470–480, 2019; Md Hashim N., *Non-Registration of Muslim Marriages in Malaysia: Socio-Legal Implications*, *International Conference on Law and Social Obligations: "Law and Social Obligations: The Way Forward"*, Faculty of Law, University of Kashmir, Srinagar, India, 2009

<sup>126</sup> Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009

<sup>127</sup> Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009

<sup>128</sup> Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015; SaidM, Hashim N., Hak N., Che Soh R., *A Study of Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, *Journal Undang-undang dan Masyarakat*, 2019

marriage is admitted, it is subjected to very mild sanction. The punishment for having performed the marriage without the Sharia court permission consists in a fine of not more than a thousands Ringgit or imprisonment for not more than six months or both<sup>129</sup>. As some have highlighted, the penalties are too low to be an efficient deterrent for couples that violating the law ask the registration of a marriage not legally authorized<sup>130</sup>. It is worth stressing that cases of imprisonment are extremely rare. However, some states have very severe policies towards the acceptance of registration of requests of cross borders marriages. For examples, the states of Narathiwat, Songkhla, Satul and Patani only accept certificates from officially qualified authorities. Other states, instead, such as the Perak and the Federal Territory of Kuala Lumpur, do not recognize at all certificated released by the Islamic Council of Thailand<sup>131</sup>. Against this background, serious problems arise when marriages cannot be registered because celebrated by non-authorized authorities or because of a state decision to not attribute recognition to certificates issued by Thai authorities. To recap, the 1984 Islamic Family Act makes the registration of the marriage compulsory, and considers non-registration as an offence to the Islamic Law<sup>132</sup>. The registration of the marriage is conditioned to its validity. Cross borders marriages certificates are often issued by not authorized authorities, which makes the marriages invalid and as such non registrable in Malaysia. As we also stressed above, some states even consider certificated released by Thai authorities not valid as such, as common are the cases of falsification. The consequences of non-registered marriages mostly affect wives and children. The next paragraph will illustrate the legal repercussions that unregistered runaway marriages can have on the life of the wife and of the children.

## 7.1 The consequences of non registered cross border marriages

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<sup>129</sup> Abdullah R., Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007; Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008; Hashim N., *Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia*, 2015; SaidM, Hashim N., Hak N., Che Soh R., *A Study of Elopement among Muslims in Malaysia and Island of Lombok, Indonesia*, *Journal Undang-undang dan Masyarakat*, 2019

<sup>130</sup> Abdullah R. and Khairuddin S., *The Malaysian Sharī'ah Courts: Polygamy, Divorce and the Administration of Justice*, in *Asian Women*, Vol.25 No.1, 2009; Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>131</sup> Kamaruddin Z. and Abdullah R., *Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective*, in *Journal of Women of the Middle East and the Islamic World*, Vol. 6, pp. 176–201, 2008

<sup>132</sup> Section 25 and Section 35 of the Islamic Family Act, 1984

The effects of non-registered cross border marriages especially affect the wife and the children whose capacity to claim marital rights will be undermined as a consequence of the non-legal recognition of the union. As said above, indeed, registration of wedding certificates is an indispensable condition for the legal recognition of the marriage, which is essential for claiming marital legal privileges, such as inheritance or maintenance. First of all, it is easily understandable that the first person directly affected by the non-registration is the wife. In case of death of the husband, the non-recognized wife will not be able to claim any inheritance rights<sup>133</sup>. On top of that, it will not be easy for her to ask for divorce. Divorce requests have to be accompanied by the marriage certificate, which is normally released upon registration. The lack of the latter does not allow obtaining the divorce. As a consequence, the wife will not be entitled to claim her right to maintenance or division of matrimonial property, to which she is legally entitled in normal situations<sup>134</sup>. It is clear that the same situation will occur also in the hypothesis in which is the husband to ask for divorce. At the same time, the negative impact of unregistered polygamous marriages will also affect the children. The non-registration implies that the birth cannot be registered and also, in the rare cases where the registration is admitted, it will not be possible to certify the identity of the biological father. Birth registration and its consequential birth certificate are of paramount importance in Malaysia, as the consequences of non-registration seriously undermine the rights of the children. For example, the lack of the birth certificate entails that the child will not have access to basic healthcare services, education as well as other essential social services. Furthermore, non-registration also means that the child will not receive the status of legitimate<sup>135</sup>. As illegitimate, a child will not be recognized the right to inheritance as well as any other basic rights, which is connected to a legitimate status. In sum, women and children are the victims of these unconventional forms of polygamous marriages<sup>136</sup>. Unfortunately, the majority of runaway marriages go unregistered, which makes clear that the Malay regulation on polygamous marriages is not producing the expected results, that of

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<sup>133</sup> Abdullah R., Polygamy without the Sharia Court's permission in Malaysia: A Socio-Legal Perspective, in *The Malaysian Journal of Social Administration*, Vol. 4, 2007

<sup>134</sup> Md Hashim N., *Non-Registration of Muslim Marriages in Malaysia: Socio-Legal Implications*, International Conference on Law and Social Obligations: "Law and Social Obligations: The Way Forward", Faculty of Law, Univeristy of Kashmir, Srinigar, India, 2009

<sup>135</sup> Che Soh R., Hak N. A., Helmi Md Said M., *Children of Cross-Border Marriage: Rights and Future*, in *International Journal of Academic Research Business and Social Sciences*, Vol. 9, No.5, pp. 470–480, 2019; Bt Md Hashim N., Cross border marriage (CMB): a comparative study on the profiles and factors of CBM among Malays in Malaysia, 2015; Md Hashim N., *Non-Registration of Muslim Marriages in Malaysia: Socio-Legal Implications*, International Conference on Law and Social Obligations: "Law and Social Obligations: The Way Forward", Faculty of Law, Univeristy of Kashmir, Srinigar, India, 2009

<sup>136</sup> Md Hashim N., *Non-Registration of Muslim Marriages in Malaysia: Socio-Legal Implications*, International Conference on Law and Social Obligations: "Law and Social Obligations: The Way Forward", Faculty of Law, Univeristy of Kashmir, Srinigar, India, 2009

reducing the abuse of polygamous marriages in the country<sup>137</sup>. The case study of Malaysia, shows, in fact, that restrictive regulations on polygamy to reduce its rate are not effective. Instead, they trigger the opposite result, the majority of the marriages are celebrated abroad and non-registered in the country. The effects of non-registration are seriously impacting the well being of wives and children whose rights that normally the marital unions attribute cannot be claimed for the lack of the legal prerequisites.

## 8. Polygamy in the human rights context: the impact of polygyny on women and children

Having analyzed in the previous paragraphs the issues concerning the practice of polygamy, its regulation and the consequences in the specific case of Malaysia, it is now important to shed a light on the implications, which such practice has with regards to women and children rights in the context of international human rights law. Several research have been questioning whether polygamy is compatible with the values, which protect fundamental human rights. In fact, as pointed out by many scholars, men's right to marry multiple wives is often a harmful practice at the expense of women and children<sup>138</sup>. Furthermore, with regards to the international human rights standards, polygamy also seems to be contrasting with the right to gender equality and therefore, violating the international law parameters. In light of the above, the following paragraphs aim to explore and highlight first of all the harms, which polygamy triggers against women and against children and, secondly, the inconsistency of polygamy with respect to the international human rights law.

### 8.1 Polygamy as harmful practice for women

As many scholars have claimed, the practice of polygamy has been interpreted as a form of protection of widows and orphans after the disastrous events of the Battle of Uhud due to the

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<sup>137</sup> Rafeah, S., Hanifah, M. F. H., Zakiah, S., Fadhilah Adibah, I. and Nur Zahidah, H. J., *Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia*, in *Pertanika Journals Social Sciences and Humanities*, 2017

<sup>138</sup> Elbedour S., Onwuegbuzie A. J., Caridine C., and Abu-Saad H., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, in *Clinical Child and Family Psychology Review*, Vol. 5, No. 4, 2002; Shepard L. D., *The Impact of Polygamy on Women's Mental Health: A Systematic Review*, in *Epidemiology and psychiatric sciences*, 2013; Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

high percentage of males warriors dead during the war<sup>139</sup>. However, in the contemporary context, the right of men to marry multiple wives has been associated with a patriarchal structure of the family in which males are superior to women. Following this interpretation, polygamy is seen as a means to fulfill men's self interest allowing them to contract multiple marriages where the previous ones do not satisfy their expectations and perhaps sexual and reproductive desires. In this sense, men's unilateral right jeopardizes the role of women in the family context where patriarchy rules and women are humiliated by the male figure. Besides being victims of a male dominated family, women who are part of a polygamous union are also affected by lack of the privilege to be the exclusive wife. The principle of exclusivity, indeed, is what characterizes monogamous relations and it is considered as one of the most fundamental values in a marital relationship as it strengthens the level of intimacy in the couple. The non-exclusive nature of the union is aggravated by the competitiveness, which can arise among the wives of the same men especially when they share the same household. Jealousy, rivalry, hostility and tension are the most common feelings, which characterize the relation between the co-wives<sup>140</sup>. The impossibility to treat the multiple wives in the same way is what exacerbates the emotional status of the female partners. It is generally common, in fact, that the senior wife – term used to refer to the first wife – suffers from the change in her husband's behavior towards her. It is very likely, indeed, that the second or also called junior wife will receive a more favorable treatment compared to the first or, in general, the previous wives. Consequently, the psychological status of the senior wife/s will be negatively affected by the reduction of attentions received by their partner<sup>141</sup>. Thus, it is easy to understand that the change experienced by the first wife can be traumatic and destabilizing, provoking at the same time negative consequences on her mental health.

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<sup>139</sup>Mashhour A., *Islamic Law and Gender Equality: Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, Vol. 27, No. 2, , pp. 562-596, 2005; Nurmila N., *Women, Islam and Everyday Life Renegotiating polygamy in Indonesia*, Routledge, 2009; Rehman J., *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, in *International Journal of Law, Policy and the Family*, Vol. 21 (1)1, pp. 108–127, 2007; Rohman A., *Reinterpret Polygamy in Islam: A case study in Indonesia*, in *International Journal of Humanities and Social Science Invention*, Vol. 2, pp 68-74, 2013; Syed M. A., *The Position of Women in Islam A Progressive View*, State University of New York Press, 2004

<sup>140</sup> Abbo C., Ekblad S., Waako P., Okello E., *Psychological distress and associated factors among the attendees of traditional healing practices in Jinja and Iganga districts, Eastern Uganda: A crosssectional study*, in *International Journal of Mental Health Systems*, 2009; Altindag A. and Ozkan M., *Mental health aspects of Turkish women from polygamous versus monogamous families*, in *International Journal of Social Psychiatry*, 2006; Catherine Abbo, Solvig Ekblad, Paul Waako, Elly Okello, *Psychological distress and associated factors among the attendees of traditional healing practices in Jinja and Iganga districts, Eastern Uganda: A crosssectional study*, in *International Journal of Mental Health Systems*, 2009; Shepard L. D., *The Impact of Polygamy on Women's Mental Health: A Systematic Review*, in *Epidemiology and psychiatric sciences*, 2013; Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>141</sup> Shepard L. D., *The Impact of Polygamy on Women's Mental Health: A Systematic Review*, in *Epidemiology and psychiatric sciences*, 2013; Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>



Low self-esteem, depression, psychological distress, anxiety and psychiatric disorders have been found to be much more prevalent in women in polygamous unions rather than in the monogamous ones<sup>142</sup>. Besides the mental implications, also health issues mostly related to the reproductive system are likely to affect women in polygamous unions. As pointed out by the CEDAW General Recommendation No. 24 on Women and Health, the practice of polygamy increases for women the risk of contracting HIV/AIDS as well as other diseases sexually transmitted<sup>143</sup>. A more intense sexual activity of the husband with his multiple wives exposes all of them to an increased risk of developing any sexual transmissible diseases<sup>144</sup>. Last but not least, polygamous relations can also trigger economic complications particularly when the relationships' structures attribute to the male the role of head of the household. When man is the only member of the household allowed to work and therefore earn financial resources, while women are only entitled to take care of the home affairs, the income of the head of the family has to be shared among the multiple wives and children. In other words, a single income might not be sufficient enough to support a large family unit<sup>145</sup>. In conclusion, several are the negative consequences, which polygamous families can cause to the detriment of women. Beyond the more obvious psychological problems, such as low self-esteem, depression and competition among the multiple spouses, scholars also stressed the possible unpleasant economic consequences as well as the increased risk of contracting health harms with specific regard to all the possible sexual transmissible diseases

## 8.2 Polygamy as harmful practice for children

As pointed out by several research studies, not only women are the victims of polygamous marriages but also the well being of their children is affected by the irregularities of this unconventional form of family<sup>146</sup>. It has been indeed argued that the typical monogamous

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<sup>142</sup> Shepard L. D., *The Impact of Polygamy on Women's Mental Health: A Systematic Review*, in *Epidemiology and psychiatric sciences*, 2013; Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>143</sup> CEDAW General Recommendation No. 24: *Article 12 of the Convention (Women and Health)*, 1999, in *Global Health and Human Rights Database*, in <https://www.globalhealthrights.org/instrument/cedaw-general-recommendation-no-24-article-12-of-the-convention-women-and-health/#gsc.tab=0>

<sup>144</sup> Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>145</sup> Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>146</sup> Al-Sharfi M. A., Miller K. and Pfeffer K., *The effects of polygamy on children and adolescents: a systematic review*, in *Journal of Family Studies*, 2015; Elbedour S., Onwuegbuzie A. J., Caridine C., and Abu-Saad H., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, in *Clinical Child and Family Psychology Review*, Vol. 5, No. 4, 2002;

family structure represents for children the ideal environment for a healthy development of their personalities. On the other hand, children of polygamous relationships seem to suffer more than monogamous children from psychological disorders, depression, anxiety, low self-esteem and low school performances. These disorders have been associated to different factors, such as family conflicts, family distress, lack of attention from the parents and economic problems. First of all, the levels of marital violence and distress are proved to be higher in polygamous families. Violence and family's conflicts generated by the competitive and tense relationships between the co wives and between the wives and the husband have a direct effect on children's minds. The early stages of their lives are crucial for the development of a strong and secure personality and the tense atmosphere, which surrounds them, negatively impacts their growth. Furthermore, the rival relationship between the wives, which causes distress for the latter, also affects their children as the mothers' psychological status impede them to take full and adequate care of the youngest components of the family. At the same time, also the paternal figure is less likely to be present as it is normally in monogamous unions. Multiple wives mean most of the time multiple children, which makes difficult for one single father to dedicate them enough attention. This is to say that the number of children in polygamous marriages is commonly much higher than in monogamous couples. The very often significant number of children makes difficult for the father to provide all of them with the care that a child needs in the initial stage of his life. Moreover, the increased number of family members in polygamous households also means less financial resources to properly support the entire family and in particular children. Insufficient economic means force the parents to invest less in their children and consequently less money can be spent in their education or health. Hence, this explains the lower level of education or the poor health of children of polygamous parents. To sum up, multiple risks are associated to polygamy, as such atypical family unit makes more difficult to create an enjoyable and safe environment. The tense atmosphere, which features the relationships in polygamous units provokes harms not only to women but also to their children being the latter's victims of psychological disorders and distress<sup>147</sup>.

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Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>147</sup> Al-Sharfi M. A., Miller K. and Pfeffer K., *The effects of polygamy on children and adolescents: a systematic review*, in *Journal of Family Studies*, 2015; Elbedour S., Onwuegbuzie A. J., Caridine C., and Abu-Saad H., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, in *Clinical Child and Family Psychology Review*, Vol. 5, No. 4, 2002; Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

### 8.3 Polygamy as a breach of the international human rights principles

In light of what argued in the previous two paragraphs, it is clear that polygamy, even though legal in some countries, is a harmful practice at the expense of women and children. Thus, the various forms of harms towards the latter have been interpreted as violation of their rights as protected under international human rights law<sup>148</sup>. Different are the fundamental principles, which are likely to be infringed in the hypothesis of polygamous marriages. Firstly, recognizing an exclusive right to men to conduct polygamous marriages is an implicit violation of the right to gender equality in family and marriage matters. The principle of gender equality before the law is one of the most fundamental and basic rights protected by international human rights law. For example the preamble to the United Nations Charter (1947) as well as the article 55 of the same charter attributes the same rights to both genders without any kind of distinctions<sup>149</sup>. Furthermore, the Committee on the Elimination of Discrimination Against Women in its General Recommendation no 21 states that:

*Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.*<sup>150</sup>

On top of that, the International Covenant on Civil and Political Rights in its article 17 establishes that: *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*<sup>151</sup>. Thus, it has been argued that polygamy can lead to a breach of the right to private and family life as, especially in the hypothesis where the wives share the same household, their privacy is dramatically reduced and, therefore, their right to enjoy their privacy at home violated. Moreover, the article 5 of Convention on the Elimination of All Forms of Discrimination against Women New York (1979) defines as against the law any form of prejudice or stereotypes, which is *based on the idea of the inferiority or the superiority*

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<sup>148</sup> Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>149</sup> Charter of the United Nations, in <https://www.un.org/en/charter-united-nations/>

<sup>150</sup> General Recommendation 21, Equality in Marriage and Family Relations, UN CEDAWOR, 13th Sess., 1994, in [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/A\\_49\\_38\(SUPP\)\\_4733\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38(SUPP)_4733_E.pdf)

<sup>151</sup> *International Covenant on Civil and Political Rights*, in *United Nations Office of the High Commissioner*, in <https://www.ohchr.org/en/professionalinterest/pages/ccpr.as9px>, 1976

of either of the sexes or on stereotyped roles for men and women<sup>152</sup>. In this regard, polygamy is very often associated to a family structure in which the woman is mainly valorized because of her reproductive capacity. It is worth stressing that polygamy has also been interpreted as a form of psychological violence against females, which is prohibited according to the General Recommendation no. 19<sup>153</sup>. It is, in fact, established that violent is any act, which risks to cause harm or suffering to women. More in general, article 7 of the International Covenant on Civil and Political Rights forbids any type of inhuman or degrading treatment, which has been more and more also associated with human sexuality<sup>154</sup>. Hence, the abuse of the mental and reproductive health, which are under risk in the hypothesis of polygamy, have been addressed as a form of inhuman treatment because of the interference in women's private lives<sup>155</sup>. The importance of ensuring to all the human beings the highest possible standards of health, as protected by the World Health Organization's (WHO) 1946 Constitution<sup>156</sup>, also confirms that the practice of polygamy is in contrast with the international fundamental principles of law. As highlighted above, indeed, polygamy undermines women's health, increasing for the latter the chances of contracting sexual transmissible diseases. To conclude, marrying multiple wives, although still admitted in some countries, is in contrast with some of the paramount principles of international human rights law as women's fundamental rights can be seriously jeopardized by such unconventional practice.

## 9. Conclusion

Polygamy is an old and complex habit, whose practice nowadays is still admitted in several countries, which allow under different conditions and limitations men to marry multiple wives. Women, instead, are only allowed to monogamous marriages. Malaysia represents one of the territories where polygamy is tolerated and legally recognized under strict rules. First of all, Islamic law is the only branch of Malaysian regulations, which accept polygamy as legal. The Islamic Family act, in fact, grants to Muslim men the right to contract up to four

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<sup>152</sup> Convention on the Elimination of All Forms of Discrimination against Women New York, 1979, in in *United Nations Office of the High Commissioner*, in <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx#:~:text=States%20parties%20are%20therefor%20obliged,stereotyped%20roles%20for%20men%20and>

<sup>153</sup> General Recommendation 19, Equality in Marriage and Family Relations, UN CEDAWOR, 13th Sess., 1994, in [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_3731\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf)

<sup>154</sup> *International Covenant on Civil and Political Rights*, in *United Nations Office of the High Commissioner*, in <https://www.ohchr.org/en/professionalinterest/pages/ccpr.as9px>, 1976

<sup>155</sup> Research Report, *Polygyny and Canada's Obligations under International Human Rights Law*, 2006, in <https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap1.html>

<sup>156</sup> Constitution of the World Health Organization, 1948, in [https://www.who.int/governance/eb/who\\_constitution\\_en.pdf](https://www.who.int/governance/eb/who_constitution_en.pdf)

marriages with different women, while the Malaysian secular legislation officially banned polygamy. Therefore, it has been argued that this practice is strictly linked to Islam and its ancient traditions. Although legal, polygamy in Malaysia is object of multiple disputes among groups of Islamic feminists that consider the practice as a form of humiliation of the role of Muslims women. The latters, indeed, receive a different treatment not only compared to women of other faiths, but also compared to Muslim men. On top of that, the already troubling situation related to polygamy in Malaysia is even more complicated due to so called phenomenon of cross border marriages, which we have analyzed in the above paragraphs. Malay polygamy regulations are very restrictive, as this anomalous form of marital engagement cannot be carried out without the permission of the Sharia judges upon a rigorous control of the polygamy request, which has to fulfill the strict legal prerequisites. The tightness of the conditions to which the approval of the request is subjected has not been helpful to reduce the rate of polygamous marriages in the country. Yet, the restrictive nature of such regulation facilitated the unleashing of the so-called phenomenon of cross borders or run away marriages. Since the past forty years, a considerable majority of Malay Muslim men driven by the willingness to marry another wife travel to southern Thailand to celebrate there their marriage taking advantage of the less restrictive conditions in the neighboring country. Cross borders marriages are not per se problematic, yet issues arise when the certificate released in Thailand has to be registered in Malaysia. Very often the certificated are forged or released by non-official authorities and therefore, it happens quite often that the marriage cannot be register in Malaysia. Additionally, some Malay states do not even admit the registration of such certificates to avoid the risk of registering a marriage celebrated against the law. Hence, marital unions, which go unregistered in Malaysia are very likely to undermine women and children rights. In fact, non-registration means non-recognition of typical marital rights to women, as well as failure of recognition of the status of legitimate for children of polygamous couples. In light of the above, I argue that the restrictive Malay regulation on polygamy is cause of troubles and uncertainties and risks to significantly undermine the rights of the weakest parties of polygamous unions especially when the latters are celebrated abroad and non-registered in Malaysia. As highlighted, invalid and thus non-registered marriage do not attribute any rights to the wife during the marital life as well as in case of death of the husband. On top of that, also their child cannot receive any recognition and consequentially the rights, which he would deserve as born from a married couple. Thus, Malaysia and its regulation on polygamy represent a peculiar and interesting case, from whose analysis is possible to assume that restrictive laws on polygamy are not always an efficient means to reduce its rate in a certain country. More in general, non-

monogamous unions seem to be an unconventional and questionable practice as, even in the hypothesis where the marriage is regularly celebrated and registered, women and children are still the ones who suffer the consequences of such practice. Polygamy, indeed, has been proved to be the trigger of psychological disorders and distress in women and children. Against this background, it is possible to claim that, generally speaking, polygamy is a harmful and unfair practice and, as such, in contrast with the internationally protected fundamental rights.

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"On my honour as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it."

Angeladora Novi Chavarria