PREVENTION OF ILLEGAL MARRIAGES: A MAQASID AL-SHARI’AH PERSPECTIVE

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1. Introduction

Legal marriage is very important in Islam. Couples are obligated to be legally recognised by religion and the state through observing all the rules, procedures and formalities required. Unfortunately, some couples perceive the decreed rules, procedure and formalities are taxing, leading them to be married through syndicates or to elope.
1. Introduction

- Illegal marriages refer to:
  - syndicate marriages
  - runaway marriages (cross border marriages)/elopement
  (marriage against the Act/Enactments)
1. Introduction

- What is a runaway marriage and a syndicate marriage?
- Raihanah Abdullah (2001) highlighted that there is not much difference between a runaway marriage and a syndicate marriage. It is possible for a syndicate marriage to take place within the state, but a ‘runaway’ marriage or elopement could take place within the country’s borders, especially in the northern region.
- such marriages are considered legally incomplete because they do not conform to the state’s Islamic governance.
1. Introduction

* Syndicate marriages are those conducted by certain individuals who do not have the authority to solemnize the marriage. The marriages through syndicates is usually held discreetly in secluded areas. In this type of marriage normally, the *wali* (guardian) are not required and both the witnesses and *jurunikah* are provided by the syndicate.
According to Tuan Haji Mat Jusuh Sudin, ex-Chief Registrar of Family Unit, Negeri Sembilan Islamic Religious Department, Syndicates, have several *modus operandi*. **First**, the syndicate would perform the solemnisation ceremony in various parts of Malaysia. After the solemnisation of the marriage, the couple will be given a counterfeit Malaysian marriage certificate. **Second**, there are marriages solemnised in Malaysia but issued with a counterfeit foreign marriage certificates. **Third**, there are Malaysian syndicates operating internationally and they provide counterfeit foreign marriage certificates. **Fourth**, there are foreign syndicates which perform the solemnisation of a marriage within Malaysia which is usually for couples of Malaysian and foreign nationality.
2. METHODOLOGY

* A combination of library research and semi-structured interview are employed in this study as both methods are interrelated to highlight the importance of *maqasid al Shariah* in governing marriage and the loopholes in the current practices.
3. OBJECTIVES

- This research attempts first, to shed some light on the concept of *maqasid al-Shariah* in marriage, second, to examine the application of *maqasid al-Shariah* in preventing illegal marriages among Muslims in Malaysia.
4. Concept of *maqasid al Shariah* in marriage

* With regard to the *maqasid* of Islamic law, Muslim jurists have explained that Islamic law aims at preserving the public interest (*maslahah*) and preventing harm (*mafsadah*) in this world and the hereafter. The most important *maslahah* is the protection and advancement of the five essentials (*al-daruriyyat al-khamsah*), namely life, religion, property, intellect, and family (Al-Shatibi, nd: Ibn Qayyim, 1993)
4. Concept of *maqasid al Shariah* in marriage

* From among the five major purposes of *Shari’ah*, the preservation and promotion of posterity (*nasl*) or progeny (*nasab*) constitutes the primary goal for all the rules of Islam that technically come within the province Muslim Family Law in the Islamic viewpoint.

* As the principle of *maqasid al- Shari’ah*, is so important, the contemporary jurists have developed traditional *maqasid* terminology in today’s language to include preservation of family.
Ibn Ashur (2004) for example, has developed “preservation of offspring” into a family-oriented theory. He made “care for the family” to be the maqasid of the Islamic law, in its own right. Similarly, Jamal al-Din ʾAtiyyah (2001) has also extended the application of essential interests or maqasid into four realms, and one of them is the realm of the family.
4. Concept of maqasid al Shariah in marriage

* To achieve *maqasid al Shariah* in marriage, Islam provides comprehensive guidance in regulating marriage and family.

* For this, a number of legal rulings should also be strictly instituted, including those which prohibit illegal marriages and effective sanction on polygamy and divorce.
5. Prevention of illegal marriages in Malaysia

* It is a fact that a number of illegal marriages in Malaysia are alarming.
* Recent data from four states of Kelantan, Negeri Sembilan, Selangor and Federal Territories (refer to the Table 1) reveal an increasing number of applications for validations of marriages against the Act/Enactment especially for non-polygamous marriages. Kelantan recorded the highest number of applications for non-polygamous marriages and Selangor for polygamous marriages.
Table 1: The Number of Applications for Validations of Marriages Against the Act/Enactment

<table>
<thead>
<tr>
<th>State</th>
<th>Type of Marriage</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Non-polygamy</td>
<td>1166</td>
<td>1437</td>
<td>2751</td>
<td>3734</td>
<td>2960</td>
<td>2974</td>
<td>3085</td>
</tr>
<tr>
<td>Kelantan</td>
<td>Polygamy</td>
<td>2</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Negeri Sembilan</td>
<td>Non-polygamy</td>
<td>44</td>
<td>38</td>
<td>42</td>
<td>64</td>
<td>87</td>
<td>130</td>
<td>117</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>11</td>
<td>65</td>
<td>143</td>
<td>127</td>
</tr>
<tr>
<td>Selangor</td>
<td>Non-polygamy</td>
<td>50</td>
<td>79</td>
<td>77</td>
<td>105</td>
<td>133</td>
<td>164</td>
<td>637</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>74</td>
<td>95</td>
<td>62</td>
<td>76</td>
<td>102</td>
<td>124</td>
<td>409</td>
</tr>
<tr>
<td>Federal Territories</td>
<td>Non-polygamy</td>
<td>349</td>
<td>470</td>
<td>699</td>
<td>1079</td>
<td>902</td>
<td>976</td>
<td>1000</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>59</td>
</tr>
</tbody>
</table>
5. Prevention of illegal marriages in Malaysia


* For polygamous marriage for example, among the factors that contribute to the practice of such marriage conducted in neighbouring countries is difficulties to contract polygamous marriage in the country, either the couples have to wait longer for the process, or it is difficult to get approval from the court. The runaway marriage is also preferred because the application of polygamy was rejected by the Court either they are not qualified to practise polygamy or could not fulfil the required conditions.
5. Prevention of illegal marriages in Malaysia

Legal and administrative mechanism are designed to ensure the legality of marriage both under the Shari’ah and Malaysian laws, there are:

1) **Requirement for Registration of Marriage**
   - Section 25 of Islamic Family Law Act (Federal Territories 1984)
   - Reporting void or illegal marriages is regarded as a duty of every person – (Section 27)
2) Providing procedure of the Solemnisation of Marriage

- For the **solemnisation of marriage within Malaysia**, there are two ways of application, i.e., application of marriage through Registrar and application of marriage through Shari’ah Court

- **Section 16** (Procedure of application for permission to marry through Registrar)

- **Section 13** (Consent of guardian (wali) and both parties of marriage, consent of wali raja in the absent of wali nasab)

- **Section 18** (application of marriage through Shari’ah Court)
5. Prevention of illegal marriages in Malaysia

* For the solemnisation of marriage abroad, it is provided that a marriage may be solemnised in accordance with Hukum Syara’ by the Registrar appointed at the Malaysian Embassy High Commission or Consulate (Section 24).

* Section 108 – solemnisation of marriage abroad other than a marriage in the Malaysian Embassies etc.

* Section 20 (1) – registration of marriage abroad

3) Providing Penalties

- Various penalties are available under the Islamic Family Law Act/Enactments for offences relating to illegal marriages

- Section 39 - the offence of unauthorised solemnisation of marriage, penalties = a fine not exceeding one thousand Ringgit or with imprisonment not exceeding six months or with both fine and imprisonment.
5. Prevention of illegal marriages in Malaysia

* **Section 40**: offences relating to solemnisation of marriage such as is the solemnisation of marriage without the presence of witnesses etc. – same punishment -
* **Section 36/32**: offences relating to unlawful registers - - same punishment –
* **Section 123**: polygamous marriage without the court’s permission - same punishment –
* **Section 133**: abetting the husband in committing the offence - same punishment -
Thus, it is submitted that the available laws to prevent illegal marriages as stated in the Malaysian provisions are in line with the principle of *maqasid al-Shari’ah* as they guarantees the protection of the five interests of the Muslims i.e. Islamic religion, soul, mind, and descendants enshrined in Qur’ān and Sunnah.

However, there are some weaknesses that need to be improved.
This research propose several important recommendations from both legal and administrative mechanism. Among others:

1. Revise “loose” provisions in the Act/Enactments

Section 34 of the IFLA 1984, for example affirms that a marriage shall not be said as invalid merely by reason of not having been registered, whereas Section 12 (2) provides that a marriage which has been solemnised contrary to any provision of the Act but it is valid according to Hukum Syara’, may be registered under this Act with an order from the Court.
Due to these “loose” provisions, the couples ignore the importance of adhering to the procedure of marriage as the marriage is valid in accordance with *Hukum Syara*’ and could be registered later on.

In this regard, the practice of other countries could be referred for benchmarking. *Article 8 of the Algerian Personal Code* for example, strictly provides that if the husband has not obtained the judge’s authorisation, the new marriage is dissolved before consummation.

*Syrian Personal Codes* also provide that a marriage contracted out of court is not to be certified without such procedures with the exemption of cases where the wife is pregnant or a child has been born.
Similarly, Section 6 of the **Bangladesh Family Court Ordinance 1985** provides that any person who wants to marry during the subsistence of an existing marriage to contract another marriage; he shall have to obtain first permission from his existing wife and second permission from the arbitration council, without which the subsequent marriage will be illegal and liable to punishment.
6. RECOMMENDATIONS

* The other provision is Section 13 b of IFLA i.e., on the application of *wali hakim*. This Section authorises the *Shari’ah* judge to grant his consent to the *wali raja* (*wali hakim*) to solemnise the marriage when there is no *wali nasab* available or if the *wali* cannot be found or the *wali* refuses his consent without sufficient reasons.

* Research shows the failure in obtaining the *walis* consent is one of the reasons for runaway and syndicate marriages.

* to resolve this problem, the opinion of Imam Abu Ḥanifah in giving authority to women to contract her own marriage should be taken into consideration, especially when the *wali* refuses to give his consent without justified reasons.
6. RECOMMENDATIONS

2. Increase Penalties

* the penalties related to runaway and syndicate marriage are relatively low and would not deter the parties from contracting such marriages. The related penalties that are stated in IFLA such as Section 35, Section 36, Section 39, Section 40 (1) and (2), Section 123, Section 124, and Section 133 are generally low.

* The available punishment is a fine not exceeding RM 1000 or imprisonment not exceeding six months or both should be increased to RM 5000.00 which is the maximum fine under the Shariah Court jurisdiction
3. **Provide a common computerised data system**

This research identifies that a common computerised data system governing the marriage is not available. Every state has developed their own marriage data system and this will create problems in getting the particulars of marriage of a person who is living in different states.

Thus, it is suggested that a common computerised data system must be established as it is easier to produce a standard marriage certificate. This is important to avoid the marriage certificate from being falsified.
4. Provide a standard procedure in Registration of illegal marriages.

- Presently, the same rule applies for every state in Malaysia that is, the registration of marriage can be done after the legality of marriage has been confirmed by the court. However, **there is no standard procedure** on whether the registration of marriage can be made after or before prosecution.

- **In Selangor** and few other states, the registration could be made after the offender has been prosecuted and after the payment of the penalties has been paid.
However, in Federal Territories, the applicant could register his/her marriage before being prosecuted. In this case, the difficulty faced by the prosecutor is to trace the offender, especially if he/she has changed the address. Most couples manage to escape from being prosecuted.

The existence of different laws also enables couples from other states to take advantage of this convenient rule for their personal gain.
5. Ensure transparency and accountability in Prosecution

Presently, there is no mechanism to check whether the prosecutor take the initiative to prosecute all offenders. This is based on the feedback from the respondents who showed curiosity over the limited number of cases being prosecuted compared to the number of marriages that have been validated.
Another issue is there is no uniformity on the number of offences prosecuted. The available penalties are Section 123 (polygamy without the court’s permission) and Section 40(2) (offences relating to solemnisation of marriage), the new wife could also be charged under Section 133 for abetting the husband in committing the offence of a polygamous marriage.

However, in reality the prosecutor has absolute freedom to prosecute the offender on any offences.

Thus, it is suggested that there must be uniformity on the number of offences prosecuted.
6. Efficient efforts should be taken to combat illegal marriages

It is sad to say that the syndicates have freely placed an advertisement especially on the websites to lure people to enter into such marriages. Various special offers and attractions are offered and this will definitely attract the public.

Unfortunately, there is no action taken to curb the syndicate from making such advertisements. Thus, the state religious Department should work closely with police or other related authority to identify those culprits.
6. RECOMMENDATIONS

* **7. Provide Research and Development (R&D) Unit**

* This study found that the R&D unit which focuses on family issues does not exist in any of the Family Division of State Islamic Religious Departments. Similarly, in the Family Division and Legal Department of JAKIM, even though there are persons in charge of the research on family matters, the number is not adequate and there is insufficient facilities available.

* Thus, it is suggested that (R&D) Unit for family matters should be set up to focus on the research and development. This research unit should work in close collaboration with other agencies such as LPPKN or research centres of any universities to produce more useful reliable result.
It can be summed up that those interventions by the State in preventing illegal marriages are justified by the principle of *maqasid al-Shari’ah* as the objective and the intention of the State is to protect both the institution of family and the interest of the public. The State is obliged to materialise the *maqasid* of marriage as it is part of necessities (*daruriyyat*) in Islam. Therefore, the harmonious of family needs to be sustained through a good system of law, policy and governance.