

Preventing Illegal Marriages in the Light of Maqasid Al-Shariah

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ABSTRACT

One of the areas of primary concern to maqasid al-Shariah (objectives of Islamic law) is protection and advancement of the five essentials (al-dharuriyyah al-khamsah), namely protection of religion, life, progeny or family, intellect and property. In marriage, Shariah guides Muslims in achieving these maqasid. Additionally, there are obligatory procedures and formalities in Malaysia on couples planning to get married. Such procedures and formalities include attending a premarital course, undergoing HIV screening, registration of marriage and others. Unfortunately, some perceive the decreed rules, procedure and formalities as burdensome leading to illegal solemnisation of marriage through syndicates or by eloping. This research attempts to shed some light on the concept of maqasid al-Shariah in marriage and to examine the application of maqasid al-Shariah in preventing illegal marriages among Muslims in Malaysia. A combination of library research and semi structured interview is used to highlight the importance of maqasid al-Shariah and loopholes in the current practice. Findings of this research show that the theory of maqasid al-Shariah is extremely relevant in addressing the current challenges of Muslim marriage. The study proposes some recommendations to control illegal marriages in the light of maqasid al-Shariah.

Keywords: Illegal marriages, Malaysia, maqasid al-Shariah, muslims

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INTRODUCTION

Legal marriage is the most important criterion in good family governance as decreed in Islam. Islam has outlined some rules prior to getting married, such as obtaining consent from the guardian,

entering the event of betrothal first before marriage and others. Additionally, there are specific Sharia compliant procedures and formalities imposed by the state that must be undertaken by all couples planning to get married. However, this has not prevented couples entering into illegal marriage contracts.

Illegal marriages in this study refer to marriage syndicate and runaway marriages (familiarily known as cross border marriages or elopement). It is also known as marriage in contravention of the Act/Enactment as stated in Section 12 of the Islamic Family Law (Federal Territories) Act 1984, (hereinafter called IFLA1984) and also in Islamic Family Law Enactment of other states in Malaysia.

Abdullah (2001) and Saidon et al. (2016) 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. Md Hashim (2009) opines that the term "runaway marriage" denotes marriages solemnised either abroad or any part of Malaysia without the permission of the state religious office or Shariah court. Kamaruddin and Abdullah (2002) on the other hand, consider syndicate marriages as those conducted by certain individuals who do not have the authority to solemnize a marriage.

The solemnisation of marriages through syndicates takes place discreetly in secluded

areas. However, feedback from interviewees indicate such marriages also take place openly in public. Another criterion of this type of marriage is normally, neither *wali nasab* (bride's guardian), nor *wali hakim* (guardian authorised by the Yang di Pertuan Agong or Sultan), are required to approve the marriage, as the witnesses and *jurunikah* (the person in-charge of solemnising the marriage) is provided by the syndicate. According to Saleema (2002) and Suffian (1993), the marriage is also considered illegal even if it is conducted in accordance with Islamic teaching by fulfilling all the 'pillars' or requirements of marriage such as having an appropriate *wali* (guardian) and qualified witnesses but contravenes laws and procedures prescribed by the states.

It is a fact that a number of illegal marriages in Malaysia is alarming. Recent data reveals 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 (JAKIM, 2011). Realising the seriousness of the practice of illegal marriages, this study would highlight the importance of maqasid al-Shariah and its application in preventing illegal marriages among Muslims in Malaysia.

METHODS

This is a qualitative research on illegal marriage. A library research method is used to examine the concept of maqasid al-Shariah in marriage. Literature in the

form of books, journal articles, procedures/guidelines and relevant websites are used to provide insights and information relating to the research area. The related provisions as stated in IFLA 1984 are analysed to highlight the current legal mechanism in combatting illegal marriages. Since Federal Territories are the capital of Malaysia and directly administered by the federal government, IFLA 1984 is selected to present other states. This research also employs a semi-structured interview of respondents from selected institutions. The selected respondents consist of Registrars from the Islamic Religious Department (hereinafter called SIRD) of Selangor, Negeri Sembilan and Federal Territories, two judges from the Shariah Lower Court of Selangor and Kelantan, and one Shariah High Court judge. The interview method aims to examine the current legal and administrative mechanism in preventing illegal marriage and to identify the loopholes in the system particularly on the application of maqasid al-Shariah.

RESULTS AND DISCUSSION

The discussion on the analysis of the study is divided as per below.

Maqasid Al-Shariah Concept in Marriage

Islamic law aims at preserving the people's interest and preventing them from harm in this world and hereafter. It also aims at regulating the conduct of human beings and preventing them from destroying one another (Ibn Qayyim, 1993; Al-Qardhawi,

1997; Laldin, 2006). A clear definition of maqasid al-Shariah as provided in Ibn Ashur (2004, 2006) describes maqasid as the purpose and wisdom behind the enactment of all or most of the Shariah rulings. As far as maqasid al-Shariah is concerned, one of the primary relevant areas of Islamic law is protection and advancement of the five essentials (al-dharuriyyah al-khamsah) namely religion, life, intellect, family and property (al Shatibi, (n.d); Al Ghazali, 1938). The realisation of these essentials is very important for the community both collectively and individually. From the five major objectives of Shariah, preservation and promotion of posterity (*nasl*) or progeny (*nasab*) constitutes the primary goal of Muslims.

Shariah guides Muslims in achieving the maqasid of marriage. For example, Shariah has strictly encouraged Muslims to choose religious spouses (Qur'an, (24): 2). In addition, men are chosen as the protector (*qawwam*) and responsible for the maintenance of their family (Qur'an, (4): 24). Marriage and procreation are strongly encouraged and various laws of spousal marital obligations are prescribed (Qur'an, (24): 32, (30): 21), etc. At the same time, to achieve maqasid of marriage, Shariah, through its Quranic ruling and the Prophet's (SAW) guidance have prevented anything that could lead to harm or mafsadah. Illustrations include the prohibition of any illegal relationships such as adultery, homosexuality, and cohabitation. These acts are not only shameful, but lead to evil, and can destroy the family institution (Qur'an, (17): 32, (24): 30-31, (6): 151).

As the principle of maqasid al-Shariah, is vital, Atiyyah (2001) has proposed a contemporary context of maqasid al-Shariah relating to family which consist of regulating the relationship between the opposite sex, preservation of human race (*nasl*) realisation of harmony and mutual affection between spouses, preservation of lineage (*nasab*), preservation of religious well-being of the family, taking care of interpersonal relationships in the family and lastly, providing for the financial needs of the family.

In regulating marriage and the family, the application of maqasid should be given emphasis. In order to achieve this objective a number of legal rulings should be strictly instituted, including those which encourage marriage, effective sanction on polygamy and divorce, prohibition of illegal marriages, etc. It is interesting to note that changes in the present Islamic Family Law took place after re-examination of the Shariah laws contemporaneously, for the purpose of maqasid. Thus, the question is how to attain those maqasid in couples that caught in an illegal marriage?

Prevention of Illegal Marriages

To ensure the principle of maqasid al-Shariah the Islamic Family Law Act/Enactments has been designed to ensure the legality of marriage both under the Shariah and Malaysian laws. Thus, it is disheartening to find couples opting to work with syndicates or elope. For the purpose of discussion, relevant provisions and procedures from the IFLA 1984 are

reviewed with the aim of preventing illegal marriages.

Requirement for registration of marriage.

To achieve maqasid in marriage, it is essential to register the marriage.

Amongst the reasons for registration are to eradicate any unforeseen intricacies when proving one's marriage and in the request of *mahr* (Tanzil-ur-Rahman, 1984), to ensure that the rights and responsibilities of both parties are secured and for the benefit and protection of the society as a whole. According to Yaacob (2001), such requirement ensures the proper administration of a marriage and establishes the paternity of a child. Registration of marriage is also important to enable the husband or wife applying for a divorce as the marriage certificate is essential for all legal procedures (Yaacob, 2001). Another reason mentioned by him is to circumvent illegal and secret marriages and to prevent any form of abuse within a marriage from both parties (Yaacob, 2001).

The requirement of registration is clearly mentioned in Section 25 of the IFLA 1984. Reporting void or illegal marriages is regarded as a duty of every Muslim (Section 27, IFLA 1984). The provision is created to reduce the number of illegal marriages. However, the requirement of registration does not determine the validity of a marriage, but only as a proof of the existence of the marriage contract. A marriage solemnised contrary to any provision of the Act is valid according to the *Hukum Syara'*, and can be registered under the Act with an order

from the court (Section 12 (2), IFLA 1984). Nevertheless, if the person is found to have committed an offence, he or she will be tried and if convicted the punishment is a fine not exceeding one thousand ringgit or imprisonment not exceeding six months or in some instances both. In addition, none of the provisions of the Act renders invalid a marriage that has not been registered (Section 34, IFLA 1984).

Solemnisation of marriage procedure.

Islamic Family Law in Malaysia have specific procedure for solemnisation of marriages. For the solemnisation of marriage within Malaysia, there are two ways of application. First, application of marriage through Registrar, and secondly, through Shariah Court (Section 8, 13, 14, 16 and 23, IFLA 1984). For solemnisation of marriage abroad, the solemnisation needs to take place in accordance with *Hukum Syara'* and through Registrar appointed at the Malaysian Embassy High Commission or Consulate (Section 24 (1), IFLA 1984).

The procedures for the solemnisation and registration of a marriage abroad are similar to that pertaining to a marriage in a state in Malaysia (Section 24 (3), IFLA 1984). For example, before solemnising the marriage, the Registrar must be satisfied that each party has the capacity to marry according to *Hukum Syara'* and the Act (Section 24 (2), IFLA 1984). If the marriage is not solemnised in the Malaysian Embassies etc., the marriage is still valid if it is fulfilled the conditions as stated in Section 108, IFLA 1984. It should also

be noted here that a marriage may also be solemnised elsewhere provided that the permission was given either by the Registrar or Shariah judge (Sections 20 (1) and 20 (3), IFLA 1984).

Penalties for illegal marriages. Various penalties are available under IFLA 1984 for offences relating to syndicate marriage such as a fine not exceeding one thousands Ringgit or with imprisonment not exceeding six months or both under Section 39. Similar punishment applies to offences relating to solemnisation of marriage under Section 40 and Section 40, IFLA 1984.

Section 36 could be applied for prosecuting syndicate marriage. The offences relating to unlawful registers (under Section 32) which, among others includes unlawful issuing of certificate of marriage registered by the Registrar. However punishments are insufficiently severe, amounting to a fine not exceeding one thousands Ringgit or imprisonment not exceeding six months or with both. The same penalty is faced on a person who contracted a polygamous marriage without the court's permission (Section 123, IFLA 1984). Interestingly, in runaway and syndicate marriages, the newly married wife could also be charged under Section 133 for abetting the husband in committing the offence, which carries the same punishment. Unfortunately, this provision is rarely being applied. Meanwhile, a person who has contracted a valid marriage according to *Hukum Syara'* abroad is also required to appear before the Registrar within

prescribed time in order to register the marriage. Failure to do so can result in punishment as per Section 35, IFLA 1984.

Recommendations

Despite the actions taken by the authorities to combat illegal marriages their number continues to rise, thus showing that there are weaknesses in the system which needs to be addressed. The followings are the proposed recommendations to strengthen the regulations of runaway and syndicate marriages which are in line with the principle of maqasid al-Shariah.

Revise related laws and penalties. The existing laws and penalties relating to syndicate and runaway marriages should be revised. Sections 12(2) and 34 of the IFLA 1984 which recognise the validity of marriages that contracted according to *Hukum Shara'*, even though it contradicts laws and procedures. These provisions should be revised as they contribute to the increase of illegal marriage practices.

With regard to current penalties, it is worth mentioning that the penalties related to runaway and syndicate marriages are relatively low and would not deter the offender (Section 32, 35, 36, 39, 40 (1), 40 (2), 123, 124 and Section 133 of IFLA 1984). The available penalty that is fine not exceeding RM1000.00/RM500.00 or imprisonment not exceeding six months or both, which include penalties for all offenders the bride, bridegroom and the syndicate should be increased to maximum

penalty that can be imposed by the Shariah Court i.e. fine of RM5000.00 and three years of imprisonment. This penalty should be increased as research revealed that most couples purposely contracted their marriage in neighbouring countries to escape from the procedures and rules prescribed by authorities in Malaysia (Md Hashim, 2009; Abdullah, 2009). The increment is also needed to deter the offenders as statistics shows that the number of illegal marriages continues to increase. Moreover, severe penalties are necessary as syndicates profit from illegal activities.

Revise on *wali hakim* procedure. This research proposes the provision of wali hakim in the absence of *wali nasab*'s consent as stated in Section 13 (b) of IFLA 1984 should be revised arising from the phenomenon of runaway and syndicate marriages (Md Hashim, 2009; Hussin, & Siti Safwani, 2006). It is suggested that the opinion of Imam Abu Hanifah in giving women the authority to contract her own marriage should be taken into consideration, especially when the *wali* withholds his consent without justified reasons. Abu Hanifah's view will practically reduce the problem of runaway marriages.

Another suggestion is to have specific guidelines on the concept of 'adhl i.e., the guardian's refusal to consent. (Najibah, 2008). The suggested guidelines should provide criteria in which the guardian or *wali* is allowed to refuse to be a *wali*, thus protecting women's interests and ensuring against abuse of authority by the guardian.

This research also recommends that the National and State Fatwa Council should have rules based on *ijtihad* relating to *wali hakim*. It is suggested rule to make the marriage illegal for those who “runaway” from their *wali nasab* and apply *wali hakim*, because the act of denying or rejecting *wali nasab* without good reason is unacceptable.

Standard and an efficient procedure for registration and prosecution. It is suggested that there must be uniformity in the registration of runaway and syndicate marriages in Malaysia. This research reveals that there is no uniformity in the procedure. For example, in Selangor and Negeri Sembilan, the registration could be made after the offender has been prosecuted and payment of penalties (Yusof, Z. A. M., personal communication, April 17, 2012). However, in Federal Territories, the registration can be done before prosecution (Jusoh, M. Q., personal communication, July 6, 2012). The different procedure enables an individual to choose the lenient procedure for his/her own personal interest.

It is also suggested that the applicant should be prosecuted for offences that he/she has committed regardless of whether the marriage is valid or not. Currently, only if the marriage is valid the couple will be prosecuted. This means that the prosecution is based on the legality of marriage. As such, couples in a marriage not recognised by the Malaysian authorities are legally free to commit the repeated offence as they are not punished for it.

The other important issue is the absence of a mechanism to ensure the submission of the court order to the State Islamic Religious Department for prosecution purposes. Presently the spouse has the option whether to submit or not to the decision of the court. Submission risks prosecution hence the desire to evade registration. (Mutalib, A. A., personal communication, May 3, 2012; Selamat, S., personal communication, June 12, 2012). Thus, a proper mechanism to ensure that the court order is submitted to the State Islamic Religious Department for prosecution purposes needs to be formulated.

Another important issue is, there is no uniformity on the number of offences prosecuted. For example, a person who has committed a polygamous marriage without the court’s permission, should be charged under 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 polygamous marriage. However, in reality this is not the practice. The prosecutor has jurisdiction to prosecute the offender on any offence (Selamat, S., personal communication, June 12, 2012);

Husin, M. A., personal communication, June 15, 2012). Thus it is suggested for the sake of justice and fairness, greater transparency is needed. Failing which the law will lose its function in regulating behaviour and as a result, the society will not be able to function effectively.

Creation of effective plan of action. A proper plan of action is needed to combat the problem of runaway and syndicate marriages. Authorities such as Islamic Development Malaysia Department (JAKIM) and State Islamic Religious Department (SIRD) should appoint people specifically tasked with this duty. Other actions that should be taken immediately are to provide more programmes such as seminars, discourses or talks to inform the public about the importance of registration and observing all the procedures of marriage as prescribed. It is also suggested that a good way to combat runaway and syndicate marriage is to provide information on the proper procedure of marriage.

Stern action should also be taken to stop syndicates from advertising on the website, brochures, and flyers pertaining to such types of marriage. In this regard, close collaboration between religious officers and the police is needed.

Reform the practice of giving *hantaran* (marriage gift). SIRD and JAKIM should tackle the issue of *hantaran*, thus the practice of dual payment by the prospective husbands i.e., *mahr* (the obligatory marriage payment) and *wang hantaran* (marriage gift) should be abolished. *Wang hantaran* (marriage gift) should be considered as *mahr*, it belongs solely to the wife and the wife has the right to decide the amount. The practice of the states of Selangor, Kelantan and Terengganu in converting the *hantaran* or gift into a *mahr* is a good example. The effort of Selangor in increasing the rate

of *mahr* from RM80.00 to RM300.00 is commendable to protect the right of the woman.

Malaysia should provide more welfare funds to promote marriages like in Saudi Arabia, Bahrain, Qatar, and United Arab Emirate (UAE) in providing welfare funds to promote marriage.

CONCLUSION

It can be concluded that realisation of maqasid in marriage is very important not only for the individual and family but also for the whole community. In this regard, illegal marriages such as syndicate and cross border marriages should be prevented as they would not fulfil the maqasid of marriage in Islam. For that reason, multi-dimensional approaches encompassing legal sanction, religious and social measures are necessary. Legal measure is one of the effective methods to govern family. The finding of this research shows there are significant weaknesses in the existing legal and administrative mechanism relating to syndicate and runaway marriages. This shows that the concept of maqasid al-Shariah is given less emphasis particularly in governing such illegal marriages.

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