

27/01/1997

Polygamy: On-line register vital

Muharyani Othman

A COMMON computerised register of Muslim marriages and divorce should be established at national level and linked to a similar system at State level to enable the syariah court or the State Religious Department to establish immediately if an applicant is already married.

At present there is no mechanism by which the court or the department can check on the marital status of a Muslim male, in which case an applicant for a marriage could very well give false information to the wife-to-be and the court.

In cases where applicants have lied about their marital status, the court should dismiss outright any subsequent application on his part to contract a polygamous marriage and charge him with false declaration under section 38 of the Islamic Family Law.

This is among the recommendations contained in the memorandum on reform of the Islamic Family Law on polygamy which has been submitted to Prime Minister Datuk Seri Dr Mahathir Mohamad.

The memorandum was recently tabled by Zainah Anwar of Sisters In Islam (SIS) and Noor Farida Ariffin of the Association of Women Lawyers (AWL) and discussed with participants for any further recommendations at a workshop on reform of the Islamic Family Law and administration of justice in the syariah system.

The memorandum was prepared by SIS and AWL after consultations with other women's groups, in the light of the ongoing debate on polygamy in Malaysia and given the Government's current initiative to strengthen and promote the family institution and family values.

Women's groups feel that if the family is indeed seen as a basic unit of society, then the rights and prerogatives of Muslim males as traditionally understood, and which in practice have often subverted the very sanctity of marriage and family, must be re-evaluated.

This is to ensure that the pursuit of what is regarded by patriarchal societies as men's rights will no longer cause grave harm to women and children.

The current debate on polygamy is a reflection of how popular misconceptions and fallacious arguments about men's rights are actually rooted in tradition and values that regard women as inferior and subordinate to men.

This is further reinforced by the use of religion to sanctify these prejudices.

Those who promote polygamy in this country have used several arguments that the women's groups feel are untenable.

The memorandum has proposed that all Muslim males applying to marry sign a statutory declaration that they are unmarried and this is to be submitted together with their application form.

In Singapore, all Muslim males have to sign a statutory declaration that they are unmarried at the time of their marriage.

A false declaration results in criminal charges under the Statutory Declaration Act.

In Malaysia, the criminal prosecutions office of the Pendakwa Raya Syarii, which frames the charges for false declaration, is said to be weak.

It is recommended that the parties involved in the application for polygamy, including the intended wife, attend counselling sessions to

consider deeply the consequences of a polygamous marriage and its impact on the children.

The counsellor's report should be taken into consideration by the court in deciding whether permission should be granted.

All court judgments on applications for polygamy must be written, giving grounds as to why permission was granted or not to assist in the process of appeal.

It is proposed that the increased penalty for contracting a polygamous marriage without the court's permission be a minimum fine of RM1,000 (at present the maximum is RM1,000) and a mandatory custodial sentence of not less than four weeks. The maximum sentence should also be extended from the present six months to one year.

This must be strictly enforced to deter errant husbands, as it has been found in other jurisdictions that a mandatory jail sentence in cases of domestic violence has lowered the incidence of continued violence.

Paragraph (e) of section 23(4) of the Act must be reinstated as it provides that the proposed polygamous marriage should not directly or indirectly lower the standard of living enjoyed by the existing wife and dependents.

It is also proposed that an amendment be introduced to allow the court to make an order in respect of the wife's and children's maintenance, as well as the wife's share of harta sepencarian (property jointly acquired by her and her husband) prior to his new marriage.

This order should be made automatically by the court without the need for the aggrieved wife to make a specific application.

Women's groups strongly feel that it is unjust for a wife who has struggled together with her husband to be subsequently deprived of enjoying the just fruits of her labour and sacrifice when her husband marries another.

This order should also be made before a polygamous marriage contracted in contravention of the Act can be registered.

Another proposal is to insert a clause similar to section 127(2) of the Johor Islamic Family Act Enactment 1990 which provides as follows: "Any person who has more than one wife who has failed to give justice to the wives on maintenance, clothing, place of abode and their entitlement according to Hukum Syarak commits an offence and shall be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment."

To tighten and streamline the implementation of section 23(3) which pertains to application for polygamy and declaration stating grounds, the requirements should include the wife's signature to indicate whether she has been consulted or not, and the applicant to make a declaration to the truth of his statements and that any false declaration would render him liable to be charged under section 38 of the Act. The signatures of two witnesses should also be required to attest to the declaration.

The declaration form must also be supported by a medical report to prove that the proposed marriage is just and necessary because of the wife's sterility, physical infirmity, wilful avoidance of an order to reconstitute conjugal rights, or insanity.

There must be supporting documents from his employer or company too, his banks as well as income tax statements to prove his net income after deductions for debts and other liabilities.

It is often reported that syariah judges tend to give emphasis to a man's financial capacity in practising polygamy. Scant regard is given to the other three conditions - just and necessary, equal treatment and no harm caused to the existing wife - which the applicant has to fulfil under section 23(4).

The 1990 judgment of the Selangor Syariah Appeals Committee in the case of Aishah Abdul Rauf vs Wan Mohd Yusof Wan Othman should be used to establish guidelines for a more just implementation of section 23(4).

With regards to taqliq (terms agreed upon marriage), the current standard taqliq agreement provides for divorce in cases of desertion, non-maintenance or cruelty. There is no provision for redress in cases where the husband contracts a polygamous marriage without the agreement of the existing wife.

Thus it is proposed that an additional term be included in the standard taqliq agreement, at the option of individual couples, to provide for the right of the wife to obtain a taqliq divorce if the husband takes another wife.

This is not an automatic divorce, but an option to divorce given to the aggrieved wife who is unable to live in a polygamous situation. This is also not a recent modernist view. It is a Hambali ruling that has been adopted by many Muslim countries like Syria, Jordan, Morocco and Iran.

(END)