

AN ANALYSIS OF THE PENALTIES IMPOSED ON MATRIMONIAL OFFENDERS IN THE SELANGOR SHARIAH COURT OF MALAYSIA

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ABSTRACT

This research aims to analyze the penalties imposed by Malaysia's Selangor Shariah Courts on matrimonial offenders. Sections 35-40 and 124-134 of the Islamic Family Law (Selangor) Enactment 2003 (IFLSE 2003) enunciates several non-seizable matrimonial offences that fall within the criminal matrimonial offences. If a person commits any offences of the provisions, he or she may be charged for that offence and if convicted, may be penalized with either a fine or imprisonment or both, as specified under the provision. The crux of this research is to address the lacuna in the Enactment regarding the guidelines in determining the degree of penalties that should be imposed on the offenders. The study employs a qualitative approach through semi-structured interviews with the judges of the Shariah Courts and analysing files dan documents from cases in courts. The findings of this research show several mitigating factors that influence the decision of the courts to impose lighter penalties including the background of the offender, the number of offences committed, the type of offence, and the appeal made by the learned counsel of the accused, in addition to the facts of the case and the arguments presented by the Sharie Public Prosecutor. This paper concludes that a judge needs to exercise his opinion (ijtihad) in determining the appropriate penalties to be imposed on the offender. Therefore, irrespective of whether a person commits the same offence as another, he or she may be subjected to different penalties depending on the consideration of the courts after hearing the mitigating reasons presented in court.

Keywords: Penalty, Offender, Matrimonial Offences, Selangor Shariah Court of Malaysia, socio-legal.

INTRODUCTION

There are numerous matrimonial offences provided under the Islamic Family Law (Selangor) Enactment 2003 (IFLSE 2003) including polygamy without Court's permission (Section 124), divorce outside Court, and without Court's permission (Section 125), ill-treatment of spouse (Section 128) and offences relating to the solemnization and registration of marriages (Section 35-40). These offences are considered matrimonial non-seizable offences, where a police officer is not allowed to arrest a person without a warrant from the court. Only if the Sharie Public Prosecutor can establish a *prima facie* case against the accused, will the matter proceed to trial and if convicted, the judge will penalize the accused in accordance with the punishments stated in the Enactment, i.e., imprisonment or fine, or both.

The main objective of the legislation was not to cause hardship in society but rather to educate the public to be God-fearing and ethical citizens. The penalties enacted under these provisions were intended to deter the offenders from committing the offence and taking

accountability for their actions by facing the legal consequences imposed by law. The establishment of the matrimonial offences in IFLSE 2003 are not offences stated under Islamic law. However, it is an effort initiated by the contemporary authorities that modernizes the administration of the Shariah legal system to ensure that all matrimonial rights and responsibilities are adequately implemented and enforced. This approach is taken to attain the higher objective of the Islamic law i.e., preserving the well-being (*maslahah*) of the Muslim society (Zaidan, 2001).

In Islam, any offences explicitly mentioned in the Quranic text and the saying of the Prophet Muhammad (As-Sunnah) are known as *hudud* and *qisas*. Under *hudud* and *qisas*, the forms of punishment have been prescribed according to the type of crime committed. Whereas penalties which are silent in the texts and later initiated by the authorities are known as *ta'zir*. In *ta'zir* punishment, it requires the judge to exercise his discretionary power to penalize the offenders.

Matrimonial offences under the IFLSE 2003 are considered as *ta'zir* offences as they are initiated by the authorities and the penalties consist of fines and imprisonment. The judges will have to exercise their discretionary power to determine the types and degrees of penalties depending on the evidence presented before them. In the absence of a specific guideline, this study aims to analyse the approach taken by the court in determining the penalties imposed on the offender.

METHODOLOGY

The study employs a qualitative approach through in-depth semi-structured interviews with the judges of the Shariah Courts in Selangor, Malaysia. The data from the interview were analyzed using inductive and thematic analysis aiming to identify and extract information regarding factors in determining the penalties imposed on the offender. The judge's experiences and views are significant in giving the most appropriate interpretation for their behaviours, actions and thoughts which fits in well with the features that are involved in the process of thematic analysis (Hatch, 2002; Creswell, 2003). The study also analyses files and documents from cases in courts to understand and compare different sets of evidence pertaining to different situations in the same study.

The Factors Determining the Penalties Imposed on the Offender

Background of the Offender

Before deciding the appropriate penalty for an offender, the court will normally examine the background of the offender, including his income, current dependents, age and ability or disability in health, physical and mental stability (Rahim, 2023; Tohar, 2023; Habib, 2023). In general, the higher the income, the greater the monetary penalty (fine), based on the presumption of his ability to pay. On the other hand, if the offender's income is low, the penalty will usually be reduced. In circumstances when the offenders have dependents, their monetary sentences will be lower than those without dependents. The number of dependents may also mitigate one's punishment.

In the case of *Pendakwa Syarie v. Che Zahari bin Hamzah* (Case number 10010-147-0002-2021), the accused was charged under section 134 of the IFLSE 2003 for abetting a woman, Zunaidah, to marry him without the Registrar's permission, which is considered an offence in section 40(2) of the IFLSE 2003. The accused, a widower who was a teacher,

earning RM8470 per month, was punished with an RM900 fine and a month's imprisonment, while Zunaidah who was unemployed was given the same penalty.

In the case of *Pendakwa Syarie v. Rozanna binti Abdul Latif* (Case no 10010-147-0088-2019), the accused was found guilty under section 134 of the IFLSE 2003 for abetting a man, Mohamad Maqbool, to engage in a polygamous marriage with her without the court's permission in section 124 of the IFLSE 2003. The accused worked as an administrative assistant with a salary of RM2000 per month. She had two dependents which are her mother and her disabled sister. Considering this, the court imposed a fine of RM400 or two weeks imprisonment on her. The husband, Mohamad Maqbool, on the other hand, a farmer with a monthly income of RM5000 with dependents, was penalized with RM900 or three weeks imprisonment.

Nevertheless, there can be instances where lower-income offenders are penalized with heavier fines than high-income offenders, albeit for the same offence. An example is a case named *Pendakwa Syarie v. Othman bin Mohd. Said* (Case number 10002-167-0096-2013). The accused, a self-employed, with a monthly income of RM8000, was penalized with a fine of RM500 or five days imprisonment. Whereas in *Pendakwa Syarie v. Mohd. Rosni bin Ab. Rashid* (Case number 10002-167-0001-2013), the accused was a private employee of Proton DRB Hicom was penalized with a fine of RM900 or ten days imprisonment even though his monthly salary was only RM1500 and he had dependents.

Number of offences

The 'number of offences' refers to the occurrence or repetition of the same offence by the offender. This factor influences the weightage of penalties that will be imposed. If the offence was committed more than once, the accused will be given heavier penalties (Rahim, 2023; Tohar, 2023; Habib, 2023).

In the case *Pendakwa Syarie lwn Syed Muhammad bin Syed Shahrom* (Case number 10023-166-0027-2022), the accused, was an engineer with a monthly income of RM18000 had pleaded guilty for his first offence of engaging in a polygamous marriage without the consent of the court under section 124 IFLSE 2003. Despite his first offence, the court fined him a maximum of RM1000 or seven days imprisonment. Similarly, in *Pendakwa Syarie lwn Ainun Humaira binti Basri* (Case number 10023-165-0029-2022), the accused had married without the permission of the Registrar, hence, committed an offence under section 40(2) of the IFLSE 2003. Although the accused was a housewife with no income and it was her first offence, the learned judge ordered her to pay an RM1000 fine or seven days imprisonment.

In another case of polygamy without the court's permission under section 124, the appellant, Abu Baker bin Ahmad (Case number 10008-166-4-2002), a Village Chief with a monthly salary of RM2000, had appealed the lower court's judgment which imposed him a fine of RM900 and two days imprisonment. The judge of the Shariah Court had highlighted in his judgment that a high penalty was sufficient to teach him a lesson, especially after considering his position and status in society. As a chief of a village, he should lead by example and not violate the law. Thus, the appeal court upheld the decision of the lower court and stated that high punishment was necessary.

Types of offence

The types of offence, whether it is considered a minor or major offence, are determined by the impact of an act on the accused and the greater society (Tohar, 2023). If the offence has the potential to cause significant harm, it will be regarded as a major offence

and will be punished severely. On the other hand, if the offence has less potential to cause significant harm, it will be regarded as a minor offence, and the offender will be punished minimally. The quantum of fines imposed reflects whether the offence is major or minor, as determined by the extent of harm it may do.

In light of the above, the penalties imposed in IFLSE 2003 vary. Section 130 IFLSE 2003 stipulates the disobedience of the wife is an offence punishable by a fine not exceeding RM100 for the first time, or a fine not exceeding RM500 for the second time or later. This provision imposes a relatively minimal punishment in comparison to other sections of the IFLSE 2003 since disobedience by a wife is considered an internal matrimonial problem that can be managed by the couples without the interference of the courts.

Meanwhile, another provision imposes heavier penalties, which include a fine of up to RM1000 or six months of imprisonment. Section 38 of the IFLSE 2003 provides that if a person intentionally made a false declaration or statement to procure marriage to take place, that person has committed an offence and shall be punished with a fine not exceeding RM2000 or imprisonment not exceeding one year or both. The penalties are heavier since it pertains to a person seeking permission to marry, which includes conditions such as underage marriage, polygamy, and vulnerable groups of people that require the law to interfere like *wali raja* (Lembut, 2006). The goal is to prevent potential fraud that will afflict the future wife and the children from that marriage. Therefore, it is reasonable to impose such a heavy penalty to avoid injustice and ensure the well-being of society.

In the case of *Pendakwa Syarie lwn. Abas bin K.K. Abu Bakar dan Norajura binti Mustapha* (Case number 10008-166-0012-2012, 10008-147-0013-2012) concerning the offence of polygamy without the court's permission under section 124 of the IFLSE 2003, the first accused (Abas bin K.K. Abu Bakar) had pleaded that the fines to be reduced given the fact that he has a child under his responsibility. The second accused (Norajura binti Mustapha) also pleaded the same since she will deliver a child in the next three months. The Sharie Public Prosecutor in his arguments had explicated that the marriage is not an offence, but a breach of the legal process committed by both offenders. This case has attracted the public attention and the court must prioritize the public interest. The Prosecutor pleaded that the arguments of the accused be dismissed. The court then subsequently held both accused guilty and they were both penalized with a fine of RM1000 or seven days imprisonment.

In an appeal case of polygamy without the court's permission, Judge Shukran Yusof in his judgment against Suhairi bin Supian (Case number 10010-166-0026-2012) had expounded that the accused's act of intentionally committing polygamy without approval from the Shariah Court not only was an act of disobedience, humiliation and challenge against the Shariah Court, but against the law that was passed by the State Legislative Assembly as well as the government that currently ruled the country. It also shows that the accused had neither fear nor respect for breaching any of the court's orders while being aware of its harm and risks. This attitude of the accused has caused governmental Islamic institutions, especially the Islamic Religious Office and Shariah Court, to be perceived as trivial and often disputed, as the act of the accused is nothing more than taking for granted the weaknesses of that institution for the sake of his personal interest.

The Judge added that the accused's act of turning his back on his wife and mocking the laws indicates that the accused is a dishonest person and lacks respect for his wife, the marriage, family, society, ruler, and authorities that legislated these laws for ensuring harmony and well-being of Muslim households and communities. The court was also of the opinion that polygamy or marriage without the court's permission is one of the reasons that contribute to the increase of social problems in Islamic family institutions like divorce,

neglect of maintenance to the wife and the children, single mothers who were not cared by their husband which directly led to the increase of divorce rate in this country in general, especially in Selangor.

Additionally, the court viewed the accused's act of polygamy without the court's permission as a grave offence that could not be easily forgiven because the accused was aware of the matrimonial offence yet preceded for the second time. The accused disobeyed the court's order prohibiting him from marrying his partner outside of Malaysia, i.e., in Thailand. The accused had intentionally challenged the court's order that was obtained against him. Due to his behaviour, the offence committed by the accused is considered major and if not punished severely, will perhaps increase the number of similar cases in this society.

The appeal of the offender

Procedurally, before a judgment is made, the court may give a chance for the accused to submit a mitigation appeal. The appeal is made to reduce the gravity of punishments by proving his financial constraints through his monthly pay slip and the number of dependents. Aside from that, the appeal must show genuine regret and promise not to repeat the offence. (Rahim, 2023; Tohar, 2023; Habib, 2023). Nonetheless, the judgement to allow the mitigation appeal is subjected to the judge's discretion in ascertaining the reasonableness of the penalties imposed.

In the case of *Pendakwa Syarie lwn. Nurul Hudaini binti Ismail* (Case number 10021-165-0054-2020), regarding the offence of marriage without the Registrar's permission under section 40 of the IFLSE 2003, had demonstrated that during the mitigation appeal, the accused had pleaded that the fine be reduced because she was unemployed and needed to take care for her young child at home. Regardless, the court still imposed a heavy penalty which includes a fine of RM1000 or six months imprisonment. On the contrary, in the case of *Pendakwa Syarie lwn. Nurfazian binti Sabarudin* (Case number 10021-165-0238-2017), even though the accused committed the same offence, the penalty given was a fine of RM400 or four days imprisonment because she was unemployed.

In the case of *Pendakwa Syarie lwn. Edzam bin A.Rahman* (Case number 100027-166-0010-2019), the accused was found guilty of polygamy without the court's permission under section 124 of the IFLSE 2003. During the mitigation appeal, the accused, a supervisor with an income of RM5000 per month had appealed for a lighter sentence by stating that his first wife is not working, and they had four children together, in addition to the fact that his wife had recently undergone a surgery that required a significant amount of money. Furthermore, his second wife is pregnant and also unemployed. The court also considered the mitigation appeal as well as the guilty plea made by the accused and imposed a fine of RM500 or 30 days imprisonment in the event of default of payment.

The factors determining the penalties imposed on the offender as discussed above can be summarised in the table 1 below.

Table 1 FACTORS DETERMINING THE PENALTIES IMPOSED ON THE OFFENDER IN MATRIMONIAL OFFENCES BEFORE THE SHARIAH COURTS OF SELANGOR, MALAYSIA	
Factors	Explanation
Background of the offender	The offender's income, dependents, ability in health, physical and mental stability, and age based on the presumption of his ability to pay.
Number of offences	The occurrence or repetition of the same offence by the offender influences the weightage of penalties that will be imposed.
Types of offences	The quantum of punishment imposed reflects whether the offence is major or

	minor, as determined by the extent of harm it may do.
The appeal of the offender	The appeal indicates genuine regret and promises not to repeat the offence. Nonetheless, it is subject to the judge's discretion in ascertaining the reasonableness of the penalties imposed.

ANALYSIS AND DISCUSSION

The penalty given by the court will depend on several general factors as explained in the previous cases. Nevertheless, the factors are not exhaustive, and the court will consider all facts presented as well as the prosecutor's arguments. All these aspects will then determine the severity of the penalties imposed on the accused. While the accused may put forth his reasons for mitigation such as his financial struggles, the first minor offence committed that causes insignificant harm or his plea of regrets and promise not to repeat the same mistakes, the prosecutor, on the other hand, will convince the court for a maximum level of penalty to teach the accused and society a lesson. The ultimate decision will depend on the discretion of the judge in examining the case to ensure justice is done on both sides.

In the case of *Pendakwa Syarie lwn. Nurul Shahidah binti Mohammad & Ahmad Muzakkir bin Djusman* (Case number 10026-165-0054-2020, 10026-147-0054-2020), the first accused Nurul Shahidah was found guilty of committing the offence of marrying without the Registrar's consent under section 40(2) of the IFLSE 2003. The second accused, Ahmad Muzakkir was also found guilty of abetting the marriage of Nurul Shahidah under section 134 of the IFLSE 2003. Both of them pleaded guilty and in the mitigation appeal, the first accused apologized for her offence, thus mitigating her penalties given the fact that she was unemployed and was raising a child. The second accused, who was a contractor with an income of RM1200 monthly, also pleaded for his fine to be reduced since he was the sole breadwinner who provides for the wife and children in his family. The prosecutor argues that the offence of marrying without permission is so rampant and is exposed to the risk of having an invalid marriage. In addition to that, both parties were aware that such acts are matrimonial offences yet intentionally chose to commit them. Therefore, the court had considered the public interest and decided to fine the first accused RM500 and the failure to pay it will result in six months imprisonment punishment. The second accused was fined RM800 or six months of imprisonment if he failed to pay the fine.

The case above demonstrated the broad elements considered by the courts to determine the amount of penalties for the offenders. The initial penalty is a fine not exceeding RM1000 or six months imprisonment. However, the punishment will be made lighter if the court is satisfied with the mitigation plea presented before him by the accused. Therefore, in this case, the first accused was penalized with a fine of RM500 because she was unemployed, while the second accused was given a heavier sentence which was a fine of RM800 because he had an income to pay. These punishments were still considered low than the initial punishment in IFLSE 2003.

In the case of *Pendakwa Syarie lwn. Zunaidah binti Yusof & Che Zahari bin Hamzah* (Case number 10010-165-0001-2021 & 10010-147-0002-2021), the accused, Zunaidah, was charged for the first time and found guilty of the offence of marrying without the Registrar's permission under section 40(2) of the IFLSE 2003 while the accused Che Zahari pleaded guilty for abetting such commission under section 134 of the IFLSE 2003. During the mitigation, the accused Che Zahari, a teacher earning a monthly income of RM8470 appealed for the fine to be reduced and he is spared from imprisoned. The other accused, Zunaidah who was unemployed, also pleaded the same. The court held both accused guilty with a fine of RM900 or a month of imprisonment.

In the above situation, although the court eventually reduced the penalties as pleas of guilt were made by both of the accused and these were their first offences. However, it was established that the type of offences was major and would result in significant harm. Therefore, the court decided to impose a higher punishment so that it becomes a lesson for all to prevent this offence from occurring in society.

Although the aspect of 'teaching the public a lesson' was included as one of the aggravating considerations, nonetheless, if the appeal made was able to persuade the court, the accused may receive lighter penalties. Based on the case of *Pendakwa Syarie lwn. Azaahar bin Husain* (Case number 10010-167-0006-2021) pertaining to the offence of divorce without the consent of the court, the accused, working as a public servant with an income of RM2700 monthly, had pleaded guilty and appealed that the fine imposed on him to be reduced and that he not be imprisoned because he had 4 children, lived in the teachers' quarters, and had a personal loan. Despite the prosecutor's argument for a higher punishment to teach him a lesson, nevertheless, since it was his first offence and the type of offence he committed was considered less harmful, he was only fined RM300 or imprisoned for one month.

Based on the case analysis above, there are two main factors that will play a significant role in the context of mitigation or aggravating penalties which are first, the factor of giving a lesson to the accused and society and second, the factor of appeal. Certainly, the factor of giving lessons to the accused and society is the aggravating factor to impose the maximum penalties as provided in the Enactment. Nonetheless, a determined plea from the accused during the mitigation appeal does have an impact on the court's decision to impose a lighter punishment.

CONCLUSION

The majority of provisions in the Islamic Family Law (Selangor) Enactment 2003 provide penalties for matrimonial offences not exceeding RM1000 or imprisonment not exceeding six months period. The way the provisions were drafted by the legislators allows the court to exercise its opinion (*ijtihad*) and use its discretionary power to impose however many fines or imprisonment as they believe suitable for *ta'zir* offences. As a result, different offenders face varying penalties. Before imposing any of the said penalties, the learned judge shall assess and ascertain in detail several general factors including the accused's background, number of offences committed, types of offence, and the entire case including facts of the case and the prosecutor's arguments, all of which, will either be a mitigating or aggravating factor, depending on the circumstances. The primary factor that will influence the court's decision to impose a lighter punishment is how persuasive the accused can present his mitigation appeal in court.

Contribution

This study indicates the importance of judges in exercising their opinion (*ijtihad*) in determining the appropriate penalties to be imposed on the offender. Therefore, this research contributes to the body of knowledge on the analysis of penalties imposed towards the offenders of matrimonial offences before the Selangor Shariah Court of Malaysia. In the absence of specific guidelines regarding the above matter, this area is anticipated to be further explored for future research among researchers, academicians, legal practitioners, and related authorities.

List of Cases

- Pendakwa Syarie lwn. Che Zahari bin Hamzah (Case number 10010-147-0002-2021)
- Pendakwa Syarie lwn. Rozanna binti Abdul Latif (Case number 10010-147-0088-2019)
- Pendakwa Syarie lwn. Othman bin Mohd. Said (Case number 10002-167-0096-2013)
- Pendakwa Syarie lwn. Mohd. Rosni bin Ab. Rashid (Case number 10002-167-0001-2013)
- Pendakwa Syarie lwn Syed Muhammad bin Syed Shahrom (Case number 10023-166-0027-2022)
- Pendakwa Syarie lwn. Ainun Humaira binti Basri (Case number 10023-165-0029-2022)
- Pendakwa Syarie lwn. Abas bin K.K. Abu Bakar dan Norajura binti Mustapha (Case number 10008-166-0012-2012, 10008-147-0013-2012)
- Pendakwa Syarie lwn. Nurul Hudaini binti Ismail (Case number 10021-165-0054-2020)
- Pendakwa Syarie lwn. Nurfazian binti Sabarudin (Case number 10021-165-0238-2017)
- Pendakwa Syarie lwn. Edzam bin A.Rahman (Case number 100027-166-0010-2019),
- Pendakwa Syarie lwn. Nurul Shahidah binti Mohammad & Ahmad Muzakkir bin Djusman (Case number 10026-165-0054-2020, 10026-147-0054-2020)
- Pendakwa Syarie lwn. Zunaidah binti Yusof & Che Zahari bin Hamzah (Case number 10010-165-0001-2021 & 10010-147-0002-2021)
- Pendakwa Syarie lwn. Azaahar bin Husain (Case number 10010-167-0006-2021)
- Abu Baker bin Ahmad lwn. Pendakwa Syarie (Case number 10008-166-4-2002)
- Suhairi bin Supian lwn. Pendakwa Syarie (Case number 10010-166-0026-2012)

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REFERENCES

- Creswell, J.W. (2003). Research: Qualitative, quantitative, and mixed methods approaches. *California. EUA: Sage*.
- Hatch, J.A. (2002). Doing qualitative research in education settings. *SUNY Press*.
- Lembut, I. (2006). Kesalahan-kesalahan dalam Akta/Enakmen Undang-undang Keluarga Islam Negeri-negeri di Malaysia. Dalam Abdul Monir Yaacob & Siti Shamsiah Md. Supi (pnyt). *Manual Undang-Undang Keluarga Islam*.
- Zaidan, A.K. (2001). Al-wajiz fi usul al-fiqh. *Beirut: Muassasah al Risalah*.

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