

## Factors Influencing the Degree of Penalties for Matrimonial Offenders in The Selangor Shariah Court of Malaysia

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### Abstract

*The Islamic Family Law (Selangor) Enactment 2003 (IFLSE 2003) encompasses a range of matrimonial offences. The IFLSE 2003 empowers the Shariah Court judges with discretion to determine the degrees of penalties for these offences. In the absence of a clear guideline, there is a wide discretionary element in the decision-making process, leaving room for individual judicial interpretation and subjectivity in the application of penalties. Therefore, this research aims to analyze the factors influencing the degree of penalties imposed on matrimonial offenders within the Selangor Shariah Courts in Malaysia, in accordance with IFLSE 2003. This study employs a qualitative approach through semi-structured interviews with the judges of the Selangor Shariah Courts in Malaysia and conducting a thorough analysis of court files and documents related to cases of matrimonial offences. The research reveals several factors that significantly impact the court's decision in imposing lighter or heavier penalties on the offenders, which include financial status, absence of a criminal record, the severity of the offence, mitigating appeal, the discretion of the judge, compliance with the court order, social consideration, and public interest. The study concludes that the exercise of judicial discretion, manifested through judicial opinion (ijtihad), plays a crucial role in determining the appropriate degree of penalties for matrimonial offenders. As a result, individuals committing similar offences may face differing penalties based on the court's consideration of the presented mitigating factors. The research findings have important implications for the administration of justice within the broader Islamic legal system in Malaysia. The identification of influential factors underscores the need for a clear guideline for sentencing and highlights the dynamic nature of Islamic jurisprudence in contemporary legal proceedings. This study contributes original insights into the field of Islamic family law and criminal justice in Malaysia. This research uniquely focuses on the gap concerning explicit guidelines for determining penalties under IFLSE 2003. Additionally, the identification of specific mitigating factors that influence sentencing decisions represents a novel contribution, offering a comprehensive understanding of the complex decision-making process in cases of matrimonial offences in Shariah Courts of Selangor, Malaysia.*

**Keywords:** Matrimonial Offences, Islamic Family Law, Shariah Court, Socio-Legal.

### INTRODUCTION

The Islamic Family Law (Selangor) Enactment 2003 (IFLSE 2003) encompasses a range of matrimonial offences, such as engaging in polygamy without court permission (section 124), pronouncing divorce outside court and without court's permission (section 125), ill-treatment of spouse (section 128) and offences relating to solemnization and registration of marriages (sections 35-40). These offences are categorized as matrimonial non-seizable offences (section 2 of the Syariah Criminal Offences (Selangor) Enactment 1995), meaning that individuals cannot be arrested by a police officer without a warrant from the court. The initiation of legal proceedings occurs when the Shariah Public Prosecutor establishes a prima facie case against the accused, leading to a trial. If the accused is found guilty, the judge will issue penalties as stipulated in the Enactment (Sabarudin, 2022).

The primary objective of legislating matrimonial offences was not to inflict hardship upon society, but rather to instil a sense of piety and ethical conduct among the public. The penalties enacted under these provisions were intended to serve as deterrents, discouraging potential offenders from committing the offence and encouraging them to take accountability for their actions by facing the legal repercussions imposed by law (Zaidan, 2001). The establishment of matrimonial offences in IFLSE 2003 was not directly based on provisions from Islamic law. However, it represents a contemporary initiative by authorities to modernize the administration of the Shariah legal system, ensuring the effective implementation and enforcement of all

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matrimonial rights and responsibilities. This approach is adopted to uphold the higher objective of Islamic law i.e., preserving the well-being (maṣlahah) of the Muslim society (Anwarullah, 2004; Zawawi & Hussin, 2015).

In Islam, offences explicitly mentioned in the Quranic text and the saying of the Prophet Muhammad (As-Sunnah) fall under the category of ḥudūd and qiṣāṣ. Ḥudūd and qiṣāṣ encompass punishments that are specifically prescribed based on the nature of the committed crime. On the other hand, penalties not explicitly stipulated in the texts but later established by the authorities are known as ta'zir. In the case of ta'zir punishment, the judge is granted discretionary authority to impose penalties on offenders (Al-Qurtubi, 2003; Zawawi & Hussin, 2015). Matrimonial offences in IFLSE 2003 are considered ta'zir offences as they are established by the authorities and the stipulated penalties consist of fines and imprisonment. Therefore, the judges are entrusted with the responsibility of exercising their discretionary authority to determine the penalties (Sabarudin, 2022).

In light of the lack of a clear guideline regarding this matter, it raises concerns of potential inconsistencies in penalties imposition for similar offences, leading to possible issues of fairness and injustice within the legal system. Therefore, this research aims to analyze the factors influencing the court in determining the penalties imposed on matrimonial offenders under IFLSE 2003.

## **Literature Review**

### **Definition and Scope**

The laws for Shariah criminal offences in Malaysia have been categorized into five sections which are (1) Offences related to faith;

Offences related to the sanctity of Islam and its institution;

Offences related to morality;

Offences related to various offences such as unauthorised collection of zakat and misuse of halal certification

Matrimonial offences

Conceptually, these offences are not criminal offences, but they are subjected to penalties and criminal proceedings under Islamic law (Ismail, 2017; Samsudin, 2022).

The legal provisions on matrimonial offences are delineated in the Islamic Family Law Act/Enactment, while the Shariah Criminal Procedure Act/Enactments are applied to prosecute these offences. Matrimonial offences can be broadly categorized into two main categories which are:

Offences concerning the solemnization and registration of marriages. This encompasses actions such as failing to appear before the registrar within the prescribed timeframe, disrupting marriages, providing false declarations or statements to facilitate marriage, offences related to the solemnization of marriages, and solemnizing marriages without proper authority.

Family-related offences, which include acts like divorcing outside the court without the court's permission, neglecting to provide adequate maintenance to the wife, disobedience to court orders, wilfully neglecting to comply with maintenance orders, inciting husbands, or wives to divorce and engaging in polygamy without proper court permission.

In the context of the jurisdiction to impose penalties, the Syariah Courts are subjected to the maximum limits of punishment of a fine of RM5,000 or imprisonment not exceeding three years or whipping not exceeding six strokes (section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965). Nevertheless, there are no written guidelines on the process of determining penalties for matrimonial offences, and there have been no studies specifically focusing on the topic of penalties.

## **Impact of Matrimonial Offences**

Offences involving family matters exert profound and multifaceted impacts on individuals, families, and society at large. These offenders strike at the core of personal relationships and can disrupt the harmony and stability of families and communities (Tajul Urus & Azhar, 2020). This includes:

### **Strained Interpersonal Relationships**

Offences such as divorce without proper legal procedures, and maltreatment of family members can lead to strained interpersonal relationships within families. Trust is eroded, and emotional bonds may be severed, causing emotional distress to all parties involved.

### **Fragmentation of Family Units**

Certain offences, such as desertion or maltreatment of spouses, contribute to the fragmentation of marriages and families. This culminates in broken homes, affecting children's well-being and potentially leading to single-parent households.

### **Financial Vulnerability**

Failure to provide proper maintenance or neglecting financial responsibilities can engender financial vulnerability for the affected family members. This may result in challenges in meeting basic needs and exacerbate financial hardships.

### **Social Stigmatization**

Individuals embroiled in family-related offences confront social stigmatization and condemnation from their communities. This alienation can lead to social isolation and negatively impact their mental health and overall well-being.

### **Legal Ramifications**

Offences related to the solemnization of marriages or engaging in polygamy without proper authorization can entail legal repercussions, such as fines or imprisonment. These penalties may further exacerbate the predicaments faced by the offenders and their families.

### **Impacts on Children**

Offences like divorce without proper legal procedures or neglect of maintenance obligations can profoundly affect children. Children may experience emotional turmoil, academic setbacks, and social challenges due to the instability and upheaval caused by these offences.

### **Community Perception**

Offences involving family matters can influence the community's perception of the efficacy and integrity of Islamic family institutions. A prevalence of such offences may erode trust in the legal system and religious institutions.

### **Strain on the Judicial System**

A substantial caseload of family-related offences can strain the judicial system, leading to delays in case resolution and potentially impeding access to justice for other litigants.

### **Implications for Gender Equality**

Certain offences, such as domestic violence and forced marriage, disproportionately affect women, perpetuating gender inequality and contributing to a culture of violence against women.

Hence, addressing matrimonial offences necessitates a comprehensive and multi-dimensional approach. Legal interventions, complemented by social and educational measures, are imperative to foster healthy family dynamics, safeguard individual well-being, and uphold the sanctity of Islamic family institutions. This study,

nevertheless, seeks to contribute part of the legal approach, in analysing the factors influencing penalties for matrimonial offenders, with the anticipation of enhancing the Shariah legal system and fostering fairer sentencing practices in Malaysia.

## **METHODOLOGY**

The study employs a qualitative approach through in-depth semi-structured interviews with three (3) judges from three (3) distinct districts of the Lower Shariah Courts in Selangor, Malaysia. These districts include Klang, Kuala Selangor and Gombak Barat. These courts were chosen because they are among the busiest courts in Selangor and the judges selected have more than 10 years of experience sitting on the bench. 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 matrimonial offenders. The judge's experiences and perspectives hold particular significance in providing a nuanced understanding of their behaviours, actions and thoughts, aligning well with the thematic analysis process (Hatch 2002; Creswell 2003). Additionally, the study also analyses 15 files and documents to comprehensively comprehend and compare various sets of evidence pertaining to diverse situations within the same research. Therefore, the data collected are sufficient and constitute a valid representation of the general views of the Shariah Courts of Selangor.

## **RESULTS/FINDINGS**

Factors Determining the Degree of Penalties Imposed on Matrimonial Offences are:

### **Financial Status**

According to the Shariah Court Judges, before deciding the appropriate penalty for an offender, the court will normally examine various aspects of the offender such as income, current dependents, age, and physical and mental condition. This is to investigate the offenders' current capability to pay court-ordered fines, without economic hardship. In general, offenders with higher incomes may face higher monetary penalties (fines) due to the presumption of their ability to pay. Conversely, offenders with lower incomes are likely to receive reduced penalties. The number of dependents can also be a mitigating factor in determining the punishment. If the offenders have dependants, their monetary sentences are usually less severe than those without dependants (Rahim, 2023; Tohar, 2023; Habib, 2023).

This can be seen in the case of *Pendakwa Syarie v. Che Zahari bin Hamzah*, concerning the offence of abetting a woman to marry without the Registrar's permission. The accused, a teacher, earning RM8470 per month, received a penalty of an RM900 fine and one-month imprisonment. However, in the same case, the judge took a different approach by awarding the same penalty to his spouse, who was unemployed.

In the case of *Pendakwa Syarie v. Rozanna binti Abdul Latif*, engaging in a polygamous marriage without the court's permission, the accused was working as an administrative assistant, earning RM2000 per month, with two dependents - her mother and her disabled sister. Taking these factors into consideration, the court imposed a fine of either RM400 fine or two weeks imprisonment. The court in the same case, granted the husband, a farmer, earning a monthly income of RM5000 with dependents, double the penalty based on his financial status with a penalty of either an RM900 fine or three weeks imprisonment.

Nevertheless, there are instances where lower-income offenders received heavier fines than high-income offenders, albeit for the same offence. A case illustrating this is *Pendakwa Syarie v. Othman bin Mohd. Said*. In this case, the accused, a self-employed individual with a monthly income of RM8000, was penalized with a fine of RM500 or five days imprisonment. In contrast, in *Pendakwa Syarie v. Mohd. Rosni bin Ab. Rashid*, an employee of Proton DRB Hicom received a fine of RM900 or ten days imprisonment, despite earning a monthly salary of only RM1500 and having dependents.

### **Absence of Criminal Record**

The absence of a prior criminal record plays a significant factor in determining the severity of penalties imposed on the offender. In cases where the offence is frequent or repeated, the accused will be subject to heavier penalties, compared to first-time offenders (Rahim, 2023; Tohar, 2023; Habib, 2023).

This factor is not conclusive as it may vary based on the entirety of the case presented. In *Pendakwa Syarie lwn. Zunaidah binti Yusof & Che Zahari bin Hamzah*, both accused were charged and found guilty of their respective offences - marrying without the Registrar's permission and abetting the commission of the offence. During the mitigation process, both accused appealed for a reduction in the fine and to be spared from imprisonment, as first-time offenders. Despite their pleas, the court held both accused guilty and imposed a penalty of a fine of RM900 or one month of imprisonment.

Despite their first offences, the court considered that the nature of the offences was major due to the potential significant harm, therefore, the court decided to impose a higher punishment as a deterrent to prevent such offences from occurring in society.

### **Severity of the Offence**

Judge Nurulazhar Mohd Tohar (2023) classified an offence as minor or major depending on the potential harm caused by the act to the accused and society at large. If an offence has the potential to cause significant harm, it will be regarded as a major offence and subjected to severe punishment. On the other hand, if the offence poses a lesser threat of significant harm, it will be regarded as a minor offence, warranting more lenient punishment. The magnitude of fines imposed indicates whether the offence is major or minor, based on the extent of the potential harm it may inflict.

Pursuant to the above, the matrimonial penalties imposed in IFLSE 2003 exhibit a wide variation. The offence of disobedience of the wife is an offence punishable by a fine not exceeding RM100 for the first occurrence, or a fine not exceeding RM500 for the subsequent occurrence. This provision entails a relatively lenient punishment in comparison to other sections of IFLSE 2003. The reason is that the disobedience of a wife is perceived as an internal matrimonial issue that can be resolved by the couples themselves, without the need for court intervention.

Meanwhile, other provisions impose heavier penalties. Intentionally making false declarations or statements to procure marriage to take place constitutes an offence punishable by a fine not exceeding RM2000, imprisonment not exceeding one year or both. The penalties are heavier as the provision pertains to individuals seeking permission to marry, including circumstances like underage marriage, polygamy, and cases involving vulnerable groups of people that require the law to interfere like *wali raja* (Lembut, 2006). The goal is to prevent potential fraud that could negatively impact the future wife and the children from such a marriage. Therefore, imposing significant penalties is justifiable to avert injustice and safeguard the well-being of society.

### **The Mitigating Appeal**

Procedurally, before a judgment is made, the court may provide an opportunity for the accused to submit a mitigation appeal. This appeal aims to reduce the penalties through an exhibition of genuine remorse, regret, and a commitment to refrain from repeating the same offence from the offender (Rahim, 2023; Tohar, 2023; Habib, 2023). However, this is also within the judge's discretion to assess the reasonableness of the mitigating appeal before imposing the penalties.

In *Pendakwa Syarie lwn. Nurul Hudaini binti Ismail*, the case was concerning the offence of marriage without the Registrar's permission. The mitigation appeal highlighted the accused's unemployment status and the need to care for her young child at home. Despite this appeal, the court still imposed a substantial penalty, consisting of a fine of RM1000 or six months imprisonment. On the contrary, the court took a different approach in the case of *Pendakwa Syarie lwn. Nurfazian binti Sabarudin*. Despite committing the same offence, the accused received a lesser penalty of a RM400 fine or four days imprisonment due to her unemployment status.

In another case of *Pendakwa Syarie lwn. Edzam bin A.Rahman*, the accused was found guilty of polygamy without the court's permission. During the mitigation appeal, the accused, who works as a supervisor with a monthly income of RM5000, appealed for a lighter sentence. He stated that his first wife was unemployed, and they had four children together. Additionally, he also mentioned that his first wife had recently undergone a costly surgery. Furthermore, his second wife was pregnant and unemployed. Taking into account the mitigation

appeal and the accused's guilty plea, the court imposed a penalty of RM500 fine or 30 days imprisonment in the event of a payment default.

Based on the above, the mitigating appeal as an influencing factor for the degree of penalty is rather ambiguous and very much dependent on the judge's discretionary power. Therefore, a person committing the same offence can be subjected to various degrees of penalties.

### **Discretion of the Judge**

As mentioned above, ta'zir offences allow a wide discretionary authority to the judges in deciding a case. The judge will evaluate the case individually before exercising his opinion (ijtihad) and deciding on the reasonableness for penalties.

In the case of *Pendakwa Syarie lwn Syed Muhammad bin Syed Shahrom*, the accused pleaded guilty to his first offence of engaging in a polygamous marriage without the court's consent. Nonetheless, the court rejected his appeal and imposed a maximum penalty of RM1000 or seven days imprisonment. Similarly, in *Pendakwa Syarie lwn Ainun Humaira binti Basri* where the accused married without the Registrar's permission. Although it was her first offence, the learned judge ordered her to pay an RM1000 fine or seven days imprisonment. The judge also disregarded her financial plea of no income.

In a separate case of *Pendakwa Syarie lwn. Azaahar bin Husain* concerning the offence of divorce without the consent of the court, the accused, a public servant with a monthly income of RM2700, pleaded guilty and appealed for a reduction in fine and sought to avoid imprisonment. He presented his circumstances, including having four children, residing in teachers' quarters, and having a personal loan. Despite the prosecutor's argument for a higher punishment to serve as a lesson, the court considered that it was the accused's first offence and that the type of offence committed was less harmful. As a result, the court imposed a penalty of only RM300 or one month of imprisonment. This case demonstrates that a persuasive mitigating appeal can convince the court for lesser penalties, even when the aspect of setting examples and teaching the public a lesson is considered among the aggravating factors.

### **Compliance with Court Orders**

The effort of the offender to adhere to court directives and decisions significantly influences the imposition of penalties. When a person deliberately breaches the law, such act of disobedience reflects a lack of respect for the legal system and Islamic institution, particularly the Shariah court. This demonstrates wilful defiance of the law and a disregard for the consequences of one's actions. On the other hand, if an offender demonstrates a willingness to comply with court directives and shows remorse for their actions, the court may consider this as a mitigating factor and may impose a lighter punishment as a reflection of the individual's willingness to correct their behaviour and adhere to the law.

Judge Shukran Yusof, in his judgment against *Suhairi bin Supian* emphasized that the accused's intentional act of engaging in polygamy without approval from the Shariah Court constituted an act of disobedience, disrespect and challenge against the Shariah Court, the laws enacted by the State Legislative Assembly and the governing authorities. It further demonstrated that the accused displayed a lack of fear or respect for disregarding the court's orders, despite being fully aware of the potential harm and risks involved. This attitude of the accused has led to the perception that governmental Islamic institutions, particularly the Islamic Religious Office and Shariah Court, were viewed as insignificant and subject to frequent disputes. The accused's actions were perceived as exploiting the perceived weaknesses of these institutions for personal gain, undermining their integrity and credibility (*Suhairi bin Supian lwn. Pendakwa Syarie*).

The Judge further remarked that the accused's act of abandoning his wife and showing contempt for the laws reflects his lack of integrity and disrespect for various entities, including his wife, the marriage, family, society, governing authorities and the institutions responsible for legislating these laws to promote harmony and well-being in Muslim households and communities. The court also expressed the view that engaging in polygamy or marriage without the court's permission contributes significantly to the rise of social issues within Islamic family institutions, such as divorce, failure to provide maintenance to the wife and children, and the neglect of single

mothers left uncared for by their husbands. This, in turn, directly contributes to the overall increase in divorce rates in the country, particularly in Selangor (Suhairi bin Supian lwn. Pendakwa Syarie).

Additionally, the court viewed the accused's act of engaging in polygamy without the court's permission as a significant transgression that could not be easily forgiven, primarily because the accused was fully aware of the previous matrimonial offence but proceeded to commit it again. Despite the court's order explicitly prohibiting him from marrying his partner outside of Malaysia, specifically in Thailand, the accused deliberately defied the court's directive. His intentional challenge against the court's authority in this matter exacerbated the severity of the offence. Consequently, the court classified the accused's actions as a major offence, and if not met with severe punishment, it may potentially lead to a rise in similar cases within society (Suhairi bin Supian lwn. Pendakwa Syarie).

### **Social Consideration**

The social consideration includes the social status of the offender and the severity of the act caused on the family, dependants, and society. A person with higher social status is expected to abide by the law as an example of being a good citizen to the public.

In a case involving polygamy without the court's permission, the appellant appealed against the lower court's decision which warranted him a high penalty of a fine of RM900 and two days imprisonment. The lower Shariah Court judge in his ruling emphasized that despite his plea for the first-time offence, a high penalty was sufficient to serve him a lesson, particularly considering the appellant's societal status as a Village Chief. Hence, he was expected to set an example to the community by respecting the law. The Shariah Court of Appeal upheld the lower court's decision, affirming the necessity for a significant punishment (Abu Baker bin Ahmad lwn. Pendakwa Syarie).

The court took into consideration other factors apart from the first occurrence, in deciding the case, which was the societal status of the offender and the potential impact it causes on the community. The harm done by public figures disobeying the law extends beyond the individual and can affect society as a whole. Their actions can undermine the foundation of a just and law-abiding society, leading to mistrust, social instability, and negative consequences on various aspects of public life. Upholding the rule of law and holding public figures accountable for their actions are essential for maintaining a healthy and functioning society.

### **Public Interest**

Consideration of public interest and societal well-being is a cornerstone of every legislation. Laws are intended to create a just, safe, and prosperous society that protects the public, ensures fairness and equality, and promotes a sense of community. Therefore, public interest rises above all other reasons when determining penalties, to promote the common good.

In the case of Pendakwa Syarie lwn. Nurul Shahidah binti Mohammad & Ahmad Muzakkir bin Djusman both accused were found guilty of their respective offences. The first accused was convicted of marrying without the Registrar's consent while the second accused, was found guilty of abetting the first accused to marriage. During the mitigation appeal, the first accused expressed remorse for her offence, highlighting her unemployment status and responsibilities in raising a child. As a result, her penalties were mitigated, and the court imposed a fine of RM500 on her, with a potential six-month imprisonment punishment for failure to pay the fine. The second accused, a contractor with a monthly income of RM1200, sought a reduced fine due to his role as the sole breadwinner supporting his wife and children. Despite their pleas, the Prosecutor argued that marrying without permission was a widespread issue with the risk of invalid marriages. Both parties were also aware that their acts constituted matrimonial offences yet chose to commit them intentionally. Considering the public interest, the court fined the second accused RM800, with a potential six-month imprisonment penalty for non-payment.

In an appeal case of Pendakwa Syarie lwn. Abas bin K.K. Abu Bakar dan Norajura binti Mustapha, concerning the offence of polygamy without the court's permission, the first accused appealed for the reduction of fines, stating his responsibility for a child under his custody. Similarly, the second accused made the same plea, stating

her imminent delivery of a child within the next three months. The Sharie Public Prosecutor, in his arguments, had clarified that the marriage itself was not an offence but a violation of the legal process committed by both offenders. Given the public attention drawn to this case, the court should prioritize the public interest. The Prosecutor urged the court to dismiss the arguments of the accused. Subsequently, the court found both accused guilty and imposed a penalty of RM1000 fine or seven days imprisonment on each of them.

The court, in both cases, exercised its discretionary power to impose a heavier penalty based on public interest.

The above discussion reveals several factors that significantly impact the court’s decision in imposing lighter or heavier penalties on the offenders, which include financial status, absence of a criminal record, the severity of the offence, mitigating appeal, the discretion of the judge, compliance with the court order, social consideration, and public interest. The above findings can be summarized in Table 1.

**Table 1. Factors Determining the Degree of Penalties Imposed on Matrimonial Offences.**

Factors	Explanation
a) Financial Status	The financial assessment aims to gauge the offender's ability to pay fines without causing economic hardship. Generally, higher-income offenders may face higher fines, assuming their capacity to pay, while lower-income offenders could receive lower fines. Having dependents may also mitigate punishment, resulting in less severe monetary sentences than those without dependents.
b) Absence of Criminal Record	Repeated offences will be subjected to heavier penalties compared to first-time offenders.
c) Severity of the Offence	The magnitude of penalties is based on the extent of potential harm the offence may inflict. Major offences are subjected to severe punishment, whereas punishment for minor offences is more lenient.
d) Mitigating Appeal	The court allows the submission of mitigating appeals to seek lesser penalties by expressing genuine remorse, regret and a commitment to avoid repeating the same mistakes. However, the judge has the discretion to evaluate the reasonableness of the mitigating appeal before deciding on penalties.
e) Discretion of the Judges	<i>Ta'zir</i> offences allow a broad discretionary authority for the judge to exercise his opinion ( <i>ijtihad</i> ) to determine the appropriate penalties.
f) Compliance With Court Orders	The offender’s adherence to court orders reflects a commitment to rectify behaviours and respect the law.
g) Social Consideration	There are significant impacts of a person with higher social status on society. They are expected to abide by the law and be a good example to the public.
h) Public Interest	Laws are fundamentally intended to uphold a common good for the public. It aims to create a safe and prosperous society that ensures fairness and equality for the community. The interest of the public weighs higher than the interest of an individual, therefore, is given priority in determining penalties.

## DISCUSSION

The majority of provisions in IFLSE 2003 stipulate penalties for matrimonial offences not exceeding RM1000 or imprisonment not exceeding six months period. The legislators deliberately drafted these provisions to grant the court ample authority to exercise its opinion (*ijtihad*) and discretionary power in determining the appropriate penalty for *ta'zir* offences. As a result, it is apparent from the preceding cases that different offenders may receive varying penalties for the same offence committed. The court's discretion in evaluating the individual circumstances of each case, including the accused's background, the frequency and severity of offences committed, and the level of remorse expressed, allows for a nuanced and tailored approach to sentencing. Therefore, each penalty is customized to fit the unique aspects of each case, ensuring that justice is served while taking into account the specific factors that contributed to the commission of the offence. This approach acknowledges that not all offenders are the same and recognizes the importance of proportionality in delivering appropriate punishments for matrimonial offences.

However, a comparison of penalties imposed in different cases above highlights instances where lower-income offenders receive heavier fines than high-income offenders for the same offence. The observed inconsistencies may arise from several interconnected factors within the legal system. This includes the combination of societal, economic, and systemic influences contributing to this phenomenon.

**Income inequality:** Economic status can significantly impact an individual’s ability to pay fines. Higher-income offenders may be perceived as having a greater capacity to absorb financial penalties, leading to the imposition



of higher fines. In contrast, lower-income offenders may face challenges in meeting substantial financial obligations, resulting in potential economic disparities in penalties.

**Subjectivity in decision-making:** The discretionary power granted to judges allows for individual interpretation and judgement. Judges may consider various factors, but their personal perspectives, biases, or interpretations of an offender's financial capacity could lead to variations in penalties. This subjectivity might inadvertently contribute to disparities, emphasizing the need for clearer guidelines.

**Lack of standardized guidelines:** The absence of specific guidelines may contribute to variation in penalties. Clear and standardized guidelines would provide a framework for judges to follow, promoting consistency and fairness in sentencing.

**Social and cultural factors:** Societal perception of status and wealth may influence judgements. There might be an implicit assumption on certain status of offenders that can absorb higher penalties without significant hardship, potentially leading to increased penalties for this group.

**Legislative intent:** The legislative framework, such as IFLSE 2003, may not explicitly address the factors when determining penalties. It lacks clarity and leaves room for interpretation and potential disparities.

By addressing these factors, the legal system can work towards ensuring greater consistency, fairness and justice in the imposition of penalties for matrimonial offences. Therefore, the study emphasizes the need for further exploration and refinement of the sentencing process through a specific guideline to ensure transparency and justice for all parties involved.

Previous studies have suggested the severity of harm resulting from family-related offences that the penalties imposed by the justice system may not adequately address or redress the suffering and trauma experienced by the victims. The disparity between the harm caused and the penalties imposed can create a perception of injustice and dissatisfaction for the victims and their families. To address this issue, the justice system should take a more holistic and victim-centred approach to handling family offences. Restorative justice practices that focus on healing, accountability, and restitution could be integrated into the process. These approaches prioritize the needs of victims, encourage offenders to take responsibility for their actions, and aim to repair the harm done to individuals and relationships.

## **CONCLUSION**

The penalties imposed on matrimonial offenders in the context of IFLSE 2003 may vary based on several factors. In deciding a case, the court considers factors such as financial status, absence of a criminal record, the severity of the offence, mitigating appeal, the discretion of the judge, compliance with the court order, social consideration, and public interest. Subsequently, the court exercises its discretion to determine the appropriate penalties, taking into account both mitigating and aggravating factors.

The research highlights the importance of judges in exercising their judgment (*ijtihad*) in sentencing offenders and emphasizes the need for balance in imposing penalties that serve justice and the public interest. While the aim is to protect the well-being and harmony of society, the penalties should also consider individual circumstances and the potential for rehabilitation.

The study adds to the body of knowledge on the analysis of penalties for family-related offences in Malaysia. However, the research also acknowledges certain limitations, such as the absence of specific guidelines and the discretionary nature of sentencing. It suggests further exploration of the topic by researchers, academicians, legal practitioners, and related authorities to refine and enhance the understanding of the sentencing process for family offences in Islamic family law. Future studies can focus on exploring the societal impact of varying penalties and the effectiveness of different sentencing approaches in curbing matrimonial offences. Moreover, comparative analyses of sentencing practices in other jurisdictions can offer valuable insights for reforming and refining the Shariah legal system. It is essential to continue this line of inquiry to enhance the consistency, transparency, and fairness of judicial decisions in matrimonial cases. Overall, the research underscores the importance of striking a balance between public interest, justice, and individual circumstances when determining penalties for family-related offences.

## **Significance**

This research holds great significance as it sheds light on the crucial role played by judges in determining penalties for matrimonial offenders under the ILFSE 2003. By emphasizing the application of judges' discretion and opinion (ijtihad) in this process, the study underscores the dynamic and multifaceted nature of sentencing decisions in the context of ta'zir offences. The findings provide valuable insights into the complexities of the legal system and its impact on matrimonial offenders and society at large. Understanding these factors is essential for promoting a just and equitable administration of the Shariah legal system.

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### **Statute**

- Islamic Family Law (Selangor) Enactment 2003
- Shariah Criminal Procedure Act/Enactment
- Syariah Courts (Criminal Jurisdiction) Act 1965
- Syariah Criminal Offences (Selangor) Enactment 1995

### **Interviews**

- Mohd Hairuddin Ab Rahim. Shariah Judge. Interviewed on 16th March 2023 at the office of the Klang Lower Shariah Court, Selangor.
- Nurulazhar Mohd Tohar. Shariah Judge. Interviewed on 23rd March 2023 at the office of the Kuala Selangor Lower Shariah Court, Selangor.
- Mohd Faizal Habib. Shariah Judge. Interviewed on 31st March 2023 at the office of the Gombak Barat Lower Shariah Court, Selangor.

### **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)

**Appendices**

**Table 1: Matrimonial Offences in Malaysia**  
 Islamic Family Law Selangor Enactment 2003

Section 35	Omission to appear before Registrar within prescribed time
Section 36	Contravention of section 32 (unlawful register)
Section 37	Interference with marriage
Section 38	False declaration or statement for procuring marriage
Section 39	Unauthorized solemnization of marriage
Section 40	Offences relating to solemnization of marriage
Section 124	Polygamy without Court's permission
Section 125	Divorce outside Court and without Court's permission
Section 126	Failure to report
Section 127	Desertion of wife
Section 128	Ill-treatment of spouse
Section 129	Failure to give proper justice to wife
Section 130	Disobedience by wife
Section 131	Attempt to be murtad to annul marriage
Section 132	Illicit intercourse between divorced persons
Section 133	Wilful neglect to comply with order
Section 134	Attempts and abetment