Abolition of Polygamy in India

- *Sejalsri Mukkavilli and Vishnupriya Prabhakar**

Abstract

Islamic laws around the world have now acquired a characteristic that has rendered them heterogeneous. The major confrontation in Islamic law is the divide between Islamic fundamentalists who wish to retain puristic traditions of the Quran and Sunna; and those who wish to entertain modern progressive thought. The question of polygamy as a harmful practice, and at the same time the perception of people as a steadfast tradition of Islam, this dispute has made the courts and the legislature inhibitive to introduce reforms under Muslim Law in India. But Islamic majority countries like Tunisia and Egypt have restricted the practice of polygamy. This paper thus, aims at devising a sound justification for the abolition of polygamy as a practice under Indian Muslim Law without disturbing the essence of Islam. The paper will explore the constitutionality of the practice of polygamy, as well as compare the legal provisions regarding polygamy in other Islamic countries.

Keywords: polygamy, Muslim law, Quran, constitution, Islamic counties.

I Introduction

Sharia has been described as the path ordained by God through which men may achieve salvation. The subject matter of the Sharia is thus, a block of preaching concerning two aspects of human life i.e., *marufat* (virtues) and *munkarat* (vices). The civil law aspects of Muslim law that we see today; rights and duties of children and parents, husband and wife, trustee and beneficiary are the emanations of the Sharia. If the Sharia were to be interpreted as the law of the sovereign, the force with the effect of the sovereign would not be any man, instead it is the command of Allah as presented as the revelations and practices of Prophet in the Holy Quran. Thus, Sharia is the source of all laws and to a traditionalist any view that deviates from this is perceived as opposition. The public law developed outside the realm of the Sharia by importing values of foreign countries (codification, secularization, etc.), however, the realm of family law has remained devoted to the Sharia. However, modernization and reforms of the Sharia have taken place in several countries such as Turkey, Egypt, Indonesia, Pakistan, Morocco, Syria,

Tunisia, Iraq and other Arab countries. This paper seeks to understand the process or the basis upon which these reforms have taken place so as to inject the same in India and most of all, to make justifications fro the abolition of polygamy.

The constitutional validity of the practice of polygamy has come up for consideration before the courts many times before, and the courts have urged that one of the reforms under family law should be the abolition of polygamy among the Muslims. It is at this juncture, that the legislature must enact a legislation that promptly abolishes polygamy under Muslim law. However, the legislature has steadfastly avoided this responsibility fearing impending protests from Muslims across India and the ramification it would have on the ruling party's electorate. In order to strengthen the State's position in abolishing polygamy under Muslim law, the following crucial questions have been answered: (a) Whether the abolition of polygamy under Muslim personal law is a violation of the right to freedom of religion guaranteed under Article 25 of the Indian Constitution?; (b) What is the basis upon which Islamic countries have abolished polygamy amidst the rigidness of the Sharia? This paper aims at furnishing arguments that prove that abolishing polygamy, on grounds of violations of Article 14, 15 and 21 under the Muslim personal law doesn't transgress the freedom of religion and conscience guaranteed under Article 25 of the Indian Constitution; and examining laws of Islamic Countries that have restricted or raised a blanket ban on the practice of Polygamy. The study of our paper is limited to the two-fold justification favoring the abolition of polygamy in India, constitutionally sound justification and a justification affirmed by Islamic jurisprudence.

II Constitutionality of Polygamy

Violates Article 21: Polygamy Results in Harmful Effects to 'Life'

Article 21 of the Indian Constitution contemplates 'life' as something beyond mere animal existences, this essentially transpires to mean that life is not just the continuing act of physical survival of the human body till death befalls, but also extends this right to live with human dignity and all that goes along with it, namely, the bare necessities of life and all the limbs and faculties by which life is enjoyed.[1]

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[1] *Munn v Illinois,* 94 US 113 (1877); *Fracis Coralie v Delhi,* AIR 1981 SC 746; *P Rathinam v UOI,* AIR 1994 SC 1844; *Shantisar Builders v Narayanan Khimalal Totane,* AIR 1990 SC 630.

Although polygamy as a concept entails both polygyny (one husband and several wives) and polyandry (one wife and several husbands), the truth of reality is that polygamy exists exclusively in the form of polygyny. This being the case, it puts women and children in polygamous relationships at greater risks of harm than men. No individual can be expected to live with human dignity, as is protected under Article 21, when the risks to women and children of polygamous relationships demonstrate in the form of multifarious health problems which are comprehensively psychological.[2] Therefore, the practice of polygamy is inherently harmful to those who participate in it and runs contrary to Article 21.

Violates Article 14: Polygamy is Structurally Inegalitarian

Article 14 provides for equality. The equality examined under Article 14 is that equals cannot be treated unequally. In a polygamous marriage all parties are placed equally in terms of their status as spouses. However, the roles that polygamous partners play are unequal in terms of consent and the opportunity to divorce.

Even if polygamous marriages, either, took form of polygyny or polyandry, the concept of polygamy is structurally inegalitarian because it represents an asymmetrical power relationship between its participants in terms of obtaining consent from polygamous partners to either join or divorce other polygamous partners, as well as an asymmetrical ability to leave a marriage.

(i) While a polygamous husband can divorce any one of them or all of them, a wife of polygamy can only divorce her husband and not divorce with other polygamous spouses. The polygamous husband is only one who exercises a choice or free will in essence, in deciding who will enter or leave a relationship through either marriage or divorce.
(ii) A feature that is indispensable to the concept of polygamy is that polygamous partners consent to such a marriage, and this is a feature that distinguishes it from extra-marital affairs, where the wife doesn't perceive the mistress as a fellow wife. In polygamous marriages, the

[2] Thom Brooks, 'The Problem with Polygamy' (2009) 37(2), Global Gender Justice <https//www.jstor.org/stable/43154559> accessed on 13 February 13, 2020: Women of polygamous relationships are at a greater risk of depression and low self-esteem than women in monogamous relationships; they enjoy less marital satisfaction and problematic women-child relationships; husband holds them primarily responsible for child-bearing; no control over their husband so they feel powerlessness and emotionally abused; they're at greater risks of contacting sexual diseases such as AIDS; children from polygamous marriages are at greater risks of behavioral and development problems. In *State v Green* decided by the State of Utah Supreme Court, it noted that "polygamy often coincides with crimes targeting women and children including incest, sexual assault, statutory rape, and failure to pay child support."

extent of the wife's consent is limited insofar as she may only agree to either all fellow polygamous partners or divorce her husband and leave the marriage. The polygamous husband, however, has absolute consent in agreeing to marry or divorce each wife.

(iii) Polygamy presupposes a married relationship of one man or woman with several other persons of the opposite sex and thus, excludes non-heterosexuals. Therefore, polygamy is presumably unequal insofar as it excludes within its ambit non-heterosexuals from participating in a polygamous relationship and a classification (heterosexuals and non-heterosexuals) on the basis of something inherent and inalienable to human beings such as sexual orientation, is unfounded in our constitution and is thus, violative of Article 14.[3] Additionally, polygamy also violates Article 15 as it discriminates on the basis of sex since, the practice only has in its consideration several partners of the *opposite sex* only. Article 15 prohibits discrimination on the basis of sex.

Abolition of Polygamy under Muslim Law Doesn't Violate Article 25

Article 25 (1) provides freedom of conscience and right to freely profess, practice and propagate any religion to all persons equally without any favor or discrimination in the matters of morality, health, public order and other provisions mentioned in Part III.

The scope of protection under article 25 only extends to religious practices that are 'essential' and 'integral' part of any religion. Not all secular acts are treated as religious practices under this article. Purely secular practices which are not essential and integral to a religion may be revoked by the legislation with respect to other Fundamental Rights. Hence, the Supreme Court has divided religious practices into two types i.e. essential and non-essential and in the case of *John Vallamattom And Anr vs Union Of India*[4] has held that "*Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion.*"

Religious practices under article 25 should not be based upon superstitious beliefs and unessential to the religion. Such practices can be abrogated. In *Durgah Committee, Ajmer and others v. Syed Hussain Ali and others*[5], the Court, said that few religious practices are merely superstitious beliefs and are unessential additions to religion and the claim of it being as an essential practice may have to be scrutinized before allowing such practice to have a continued existence. The

[3] *Navtej Singh Johar vs Union Of India Ministry Of Law and Ors.* (2018) SC WP (Criminal) 76 of 2016.
[4] WP (civil) 242 of 1997.
[5] (1961) AIR 1402.

court in *N Adithyan v. Travancore Devaswom Board*[6] case also stated that the court decides whether a particular act is an essential and integral part of a religion or not by referring to the doctrine of the said religion.

The doctrine of essentiality was introduced in the Shirur Mutt case[7] in 1954 by the seven- judge bench of the Supreme court. The court stated that 'religion' would be inclusive of all practices and rituals that are 'essential' and 'integral' part of a religion. Only the court has the authority to determine what practices would constitute as essential and integral part of a religion. This doctrine gives the judiciary the power to resolve purely religious questions. Article 25(1) and Article 26(b) extends its protection to religious practices and only those practices that are an integral part of the religion itself. To examine whether a given practice is an integral part of the religion or not, the practice in question should be regarded as such by the community following the religion. This approach, however, can be sure to pose difficulties, in that, a part of the community could believe a certain practice to be integral while another part of the same community could regard the same practice as unessential. And thus, this is a question that must be decided by the court. In doing so, the court must first enquire whether the practice in question is religious in nature and if it is, whether it can be regarded as an integral or essential part of the religion. And this is a finding that shall entirely depend on the evidence adduced before the court. This evidence is to be in consideration with the conscience of the community and the tenets of the religion.

In determining whether polygamy under Muslim Personal Law is an essential practice, the courts have made the following observations:

i) *State of Bombay v. Narasu Appa Mali*[8]

In this case the Bombay high court dealt with the question of the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The contention raised was that the Act was discriminatory in nature because it only prohibited and made an offence Hindu polygamous marriages, but not Muslims who were more likely to participate in polygamy.

6 *N Adithyan v. Travancore Devaswom Board*, (2002) 8 SCC 106.
7 *Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 AIR 282.
8 (1951) 53 BOMLR 779.

Though the judgement does not directly deal with the question of polygamy in Muslim personal law, the court gave an insight into the importance of monogamy as a means of social reform.

The court held that the freedom of conscience and the right practice or profess any religion under Article 25 is not an absolute right and is subject to the constraints of public order, morality, health and it must not be in direct contravention of any other fundamental rights envisaged under Part III of the Constitution. Article 25 (2) allows for the state to make laws with respect to religion

> "*regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice*;" and "*providing for social welfare and reform*…"

Thus, propagating monogamy through legislation is considered a matter of social reform and is well within the meaning of Article 25(2)(b). It was held that the duty of the state extends only to the protection of religious faith and belief and not practices. If any religious practice runs counter to public order, morality and health the state retains the right to interfere in such matters and provide for social reform through law. It was expressed that

> "*that the will expressed by the legislature, constituted by the chosen representatives of the people in a democracy, who are supposed to be responsible for the welfare of the State, is the will of the people and if they lay down the policy which a State should pursue such as when the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the courts of law to sit in judgment upon that decision. Such legislation does not contravene Article 25(1) of the Constitution.*"

ii) ***Khursheed Ahmed Khan*** **case**[9]

In this case the Supreme Court relied on the explanation given by the Bombay high court in the case of In *State of Bombay v. Narasu Appa Mali*[10] in declaring that polygamy in the Hindu religion was not an essential religious practice. The court used the same reasoning and applied it to Muslim personal law.

The court stated that just because a religion permits or prohibits a certain practice it does not immediately acquire an essential character i.e. it does not mean that it is an integral aspect of the

[9] CIVIL APPEAL NO.1662 OF 2015.
[10] *Ibid*, (n 8).

religion. A practice permitting a person to have one or more wives cannot be regarded as an essential practice as the same can be regulated by law to preserve public order, health and morality and to bring about social reform.

iii) In ***Badruddin v. Aisha Begum***[11] the Allahabad High Court noted that though the Muslim personal law permits polygamy, it is not an obligation imposed upon Muslims to engage in polygamy and as such does not interfere with the rights of a Muslim person under Article 25 to freely practice and profess their religion if they are in a monogamous marriage. Thus, it was concluded that a legislation favoring monogamy does not violate Article 25 of the Constitution.

iv) In ***R.A. Pathan v. Director of Technical Education***[12]

The Gujarat High Court provided for an interpretation of a Quranic verse to determine whether polygamy was an essential religious practice of the Muslims or not.

The court interpreted Chapter 4 verse 3 of the Quran which reads as -

> "*And if you fear that you will not be fair in dealing with the orphans, then marry of women as may be agreeable to you, two, or three, or four; and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice.*"

The court was of the opinion that the above mentioned verse did not provide for polygamy as an essential religious practice, instead what was envisaged was that if a Muslim man were to come across a female orphan, then he may contract a second or a third marriage. The intention behind such a clause, according to the court, was to show compassion to female orphans. The court also noted that there was a proviso provided in the verse that states that a second or a third marriage can happen only if he is able to 'deal' with all his wives justly.

The court came to a conclusion that based on this verse, polygamy was not a religious mandate to be followed and thus, could not acquire the character of an essential practice. Therefore polygamy cannot be protected under Article 25 and 26.

[11] (1957) All LJ 300.
[12] (1981) 22 Guj LR 289.

v) In ***Shahulameedu v. Subaida Beevi***[13], while discussing the validity of polygamy under Muslim personal law, the court held that it was surprising that

> "*dubious religious interpretations with values valid in a bygone age are being enforced in our current times by civil courts in our professedly secular state…*"

The court looked into the meaning of Chapter 4 verse 3 and verse 129 of the Quran.

Verse 129 reads as follows:

> "*Ye are never able to be fair and just, as between women, even if it is your ardent desire*"

The interpretation of the verses clearly states that man cannot treat two or more wives and thus, must restrict themselves to having only one wife. Thus, it was concluded by the court that what the Quran professes is monogamy but as an exception under certain circumstances allows for polygamy.

Thus, it can be concluded that polygamy is not an essential religious practice under Muslim personal law.

III Islamic Jurisprudence for Abolition of Polygamy

> *"If you fear that you will not be fair in dealing with the orphans, then marry of women as may be agreeable to you, two, or three, or four; and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice.*"

> *"Ye are never able to be fair and just, as between women, even if it is your ardent desire*"

The first verse refers to the wars of Islam which had rendered many girls orphaned and women had become widows. The increasing incidences of men dying as a result of the wars, increasing the number of widows and orphans and it was for their protection that this clause exists. Thus, it was permitted for a Muslim man to marry more than one wife for physical and financial protection of the widows and the orphans. Prophet introduced this as a reform because no one would be willing to bear the burden of maintaining a widowed wife and her children. So, polygamy was granted restrictively, to provide a home for the widow and her children. In fact,

[13] (1970) KLT 4.

Prophet himself had only one wife for more than twenty years- Khadijah. Thus, polygamy was conditional and never absolute.

If there is fear of injustice in marrying more than one, then a man must marry only one wife. Injustice was interpreted to mean cohabitation, in that, equality in maintenance and treatment but not in the matters of heart, for the Quran notes-

"you are never able to be fair and just between women even if it was your ardent desire."

Reading the conditional polygamy verse with the above verse, Azizah Al-Hibri illustrated that:

(a) If you can be just and fair among women, you can marry up to four wives.
(b) If you cannot be just and fair among women, then you may marry only one.
(c) You cannot be just and fair among women.[14]

Thus, it logically flows that you can marry only one wife.

Imam Shafi has interpreted the last verse to mean that "you may not cause them to suffer in their livelihood." Thus, the Muslim man must provide adequate maintenance to all his wives and dependants.

Muslim jurists hold that the 'Ruler' is empowered to restrict or prohibit something devised by divine law in public interest i.e., where a legal right has been abused, the Ruler must devise legal remedies to counter such misuses. This has been used to control the practice of polygamy. If polygamy is to cause injustice, it can be forbidden subject to preconditions by the Ruler.

There are two basic conditions laid down in the Quran: "if a would-be polygamist feared that he might be unjust in distributing his favours, he must content himself with a single wife; and secondly, that he must be in a position to support plurality of wives in addition to fulfilling his existing family responsibilities."[15] Thus, the decision to entertain more than one wife was not a question of the individual's conscience, rather is something that the Court must compute after the satisfaction that such a man is capable of fulfilling those two conditions.

[14] Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be A Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislations in Tunisia and Egypt' (2005) 27(2) Human Rights Quarterly <https://www.jstor.org/stable/20069797> accessed on 13 February, 2020.

[15] *Ibid.*

How would the Courts weigh the capabilities of a would be polygamist? Since, the real intention was to protect destitute women and orphaned children, the courts must see if the State provides for adequate machinery to safeguard destitute women and orphaned children, if a robust state mechanism is in place then polygamy may be forbidden. Thus, most hold that it is not a rule rather an exception under certain compelling circumstances.

IV Polygamy and Other Islamic Countries

Turkey replaced Muslim Law with the Swiss Civil Code, 1926. It declared polygamy illegal and introduced civil form of marriage instead of religious marriages.

In Syria, the Qadi may withhold permission to allow a man to marry polygamously, where he is not in a position to support all his wives.

The Moroccan Code of Personal Status 1957 provides for a woman the right to stipulate in her marriage contract that her husband shall not take another wife, if the husband breaches such a clause, the wife has the right to dissolve the marriage. If nothing has been stipulated in the contract by the wife, the wife can contest the polygamous marriage in a Muslim religious Court. The contract with the second wife cannot take effect until she is informed of the fact that her suitor is already married to another woman.

In Tunisia, there is an outright prohibition on polygamy. After gaining independence, Habib Bourguiba, a nationalist leader took over and brought about a series of reforms in Tunisian law. He was a firm believer of the fact that the backwardness of Islamic countries was due to it's inability to evolve with society. One of the biggest reforms he brought about was the banning of polygamy. The Law of Personal Status, 1957, prohibits polygamy, penalizes its practice and a polygamous marriage is void. Under Article 18 of the Tunisian Code of Personal Statutes, polygamy is punishable by 1 year imprisonment or by a fine of 240,000 francs or both. The reason for such an outright ban on polygamy is based on the interpretation of the Quranic verse, in which it is believed that a man cannot treat 2 or more wives equally. Since the practice of polygamy is permitted and not mandatory, the Tunisian Minister of Justice Al Snousi remarked that the state has the right to completely ban a practice that was not mandatory.

In Iraq, the permission of the Qadi is required who shall, only after his subjective satisfaction that the

(i) Husband is financially capable to support more than one wife;
(ii) And that there is some lawful benefit; permit a man to marry another wife while being married to one wife already. Failure to treat wives equally is a ground to disallow polygamy to a man. Failure to comply with the Code procedure is punishable with imprisonment or fine, or both.

Pakistan has enacted the Muslim Law Family Laws Ordinance, 1961 according to which permission in writing by the Arbitration Council is required to marry polygamously. Such a council is constituted of a Chairman and representatives of each of the parties. One cannot contract a polygamous marriage without the permission registered under the Ordinance. The application for permission must contain reasons for marriage and the proof of the consent of the existing wife or wives each. The council will state the reasons for its satisfaction in granting or refusing permission. If polygamous marriage is contracted without permission from the Arbitration Council, the man is liable to pay full amount of dower due to all his wives and be convicted or liable to fine.

The Indian Dissolution of Marriages Act, 1939 provides a married Muslim woman the right to avail for a decree of a dissolution of marriage if the husband has contracted another marriage and fails to, as per the Quranic verses, treat her fairly and equally.

The Hindu Marriage Act, 1955 on the other hand, completely does away with polygamy among Hindus. Thus, currently Muslims are not restricted from practicing polygamy.The judgement in the landmark case of *Itwari v. Asghari* clearly stated that polygamy as a practice under Muslim Personal law is not encouraged, rather it is a practice that is tolerated. The practice of polygamy in no way confers upon the husband the right to force his first wife to share consortium with the second wife. Thus, when the husband files a suit for restitution of conjugal rights it becomes the duty of the court to examine the circumstances under which the second marriage took place and whether as such the marriage amounts to cruelty upon the first wife. The test of cruelty to be applied here is whether the husband's conduct in contracting the second marriage will cause such mental or physical pain to the wise that it would affect her safety and health. While deciding what amounts to cruelty one must refer to the prevailing social conditions, with the change in nature of society today contracting a second Muslim marriage is viewed as an insult to the first wife. Thus, a husband who willingly contracts a second marriage must be aware of of

the effects of his actions on his first wife. And the onus is upon the husband to prove that the contracting of the second marriage created no insult or cruelty upon the first wife. In the absence of such proof and explanation the courts will automatically presume that an element of cruelty was involved.

V Conclusion

It is evident that polygamy was never the scheme of Islam, it was a practice that was in prevalence much before the advent of Islam and for centuries now has been misinterpreted and manipulated to match the patriarchal system of society. Through the comparative study above we are able to conclude that while many Islamic states themselves have restricted the practice of polygamy and have propagated for monogamy, India is one of the very few countries that have yet to take a stance on the issue. It appears that these countries have manoeuvred their way around the Sharia through intelligible interpretation. One of the means by which this has been achieved is that the Courts in these countries have been given limited jurisdiction in interpreting the laws of the sovereign. The right of the sovereign in administrating justice and its powers to prescribe the manner in which certain disputes are to be disposed off, have resulted in the Courts' limited powers in interpreting them variantly . In India, the Courts have often observed that personal laws didn't fall under the ambit of judicial scrutiny and have iterated that the Parliament should decide on its own terms. The Law commission of India in it's Consultation paper on 'Reform of Family Law' (2018) has suggested that in order to curtail the practice of polygamy in India, the marriage contract or the Nikah-Nama must specify that polygamy is an offense as per s. 494 of the Indian Penal Code. The Supreme Court has also through it's various decisions stated that that polygamy is not an essential practice of Muslims and thus, creating a law to propagate monogamy in the community for social reform and welfare is well within the ambit of article 25 of the Indian Constitution. Thus, now the onus lies on the government to reform the current position of Muslim women by bringing about changes in the current nature of marriage under Muslim Personal law.

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