

# RESTRAINTS ON POLYGAMY AND MUSLIM PERSONAL LAW

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## I. Control of polygamy

### **Family and marriage : Islamic norms**

A look at the institutions of marriage and family is necessary before we consider the issue of polygamy. Why is it that a man and woman enter into the marriage relationship? What are the individual and social ends desired to be secured in this manner; and are any alternative means to the same ends available? The answers offered here are different from those given by the sociologists or the psychologists who analyse only what they observe. Their answers reflect the weaknesses and failing of human behaviour and man's history. Islam is a system of norms, standing above man, revealed in harmony with and full response to man's needs. In Islam, the practice is to conform to these norms, and not *vice versa*

Islam envisages marriage and family as answering three basic needs of man as an individual and as a member of society, *viz.*, satisfaction of sex, procreation of children in order to continue the lineage, and continuation of and a balanced emotional growth of the spouses and children. For each of these three ends, marriage and family constitute the only means: there is no alternative so far as the Islamic way of life is concerned.

The crucial importance of this aspect of the Islamic philosophy of life can hardly be over-emphasized. Cultures which do not subscribe to this philosophy, specially those who would allow sex-relation outside wedlock or rely on *ad hoc* companionship for an emotional growth of the adult, take a view entirely different from that of Islam. Many confusions in the debate on the Islamic personal law arise because the debator subscribes to certain cultural ethos unknown to Islam and its culture.

### **Permission of polygamy**

A man normally takes only one wife and it is sufficient to secure the ends of marriage and family. That Islam envisaged a monogamous family

as the normal pattern of life is borne out by the context and construction of the Qur'anic verses on the subject. These verses were revealed in the context of some special circumstances arising in the then small Muslim community due to the loss of a number of men in war. The interest of orphans had to be properly protected. A solution to the problem recommended by the *Qur'an* was the already existing practice of taking more than one wife in some cases. Simultaneously, however, the number of co-wives was restricted to four and ability to do justice between the co-wives was made a pre-requisite of taking more than one wife. Failing this ability, it was stressed, one should take only one wife. The practice of the Muslim people throughout their history testifies that monogamy has always been the normal practice.

There are, however, circumstances which necessitate taking more than one wife. In such circumstances polygamy is permissible provided, of course, that the above-mentioned ends of married life are not jeopardised. In fact one or more of these ends may themselves necessitate polygamy. In such circumstances polygamy may be beneficial to the husband or the wife, or it may be necessary in view of some social conditions. In some societies, sometimes women outnumber men. There are, sometimes, widows and divorced women in search of a home. A wife may be incurably ill, suffering from a mental or physical disability. The husband may find his spouse no longer fit as his conjugal partner. The marriage might have become emotionally untenable, yet economic and social considerations might not permit a permanent separation. Besides, there is sometimes a widow in the family whose financial support devolves on a man who would give her greater protection by marrying her. It is not the purpose of this paper to go into the merits of these and other possible circumstances necessitating plurality of wives. These have been mentioned only to underline the seriousness of the purpose behind the Islamic permission for polygamy. Many of these circumstances cannot be handled in a framework of strict monogamy. Some of these could possibly be taken care of by allowing extra-marital sex relation, but Islam refuses to permit it in view of the tremendous harm to society and individual personality it would do. It refused permission for extra-marital relation because of its cherished ethos. However, Islam could not altogether ignore the special cases involving unsatisfied sex needs, unprotected orphans and widows, unbalanced personalities and the resulting anguish and suffering. Fitting the strait-jacket of monogamy to a human situation which included these special circumstances would have inevitably resulted into a revolt of the instincts in favour of the alternatives which Islam had decided to eschew. Islam, therefore, adopted the only sane course of permitting polygamy and, at the same time, ensuring that the evils that could possibly attend to this practice were minimized.

**Restraints on a bigamous husband**

The *Qur'an* restricts the number of co-wives to a maximum of four and subjects the permission of polygamy to the ability to do justice to them.<sup>1</sup> There has been a consensus on this interpretation throughout Islamic history.<sup>2</sup>

Before we discuss the Qur'anic conditions for polygamy, let us note that this qualified permission has been a distinctive feature of Islam throughout its history. Though this permissive law, like any other permissive law, might sometimes have been abused, yet it has helped preserve the peculiar ethos of the Islamic culture. Sex-relations outside the wedlock and promiscuity have never been looked upon with equanimity. Even young widows and spinsters have been regarded as aberrations, a deviation from the Islamic norm. Islam has discouraged divorce and helped in avoiding much of the frustrations of married life which result into broken homes. The stability of the institution of family among the Islamic people and the comparatively greater serenity of sex life in Islamic society owe much to the limited practice of polygamy by the Muslims.

Regarding the conditions attached with the permission of polygamy, namely, one's ability to do justice to the co-wives, it should first be noted that economic support of a wife is the legal responsibility of a husband, in Islam.<sup>3</sup> This is irrespective of the financial condition of the wife herself. A person who is incapable of doing so may be separated from the wife by a court of law. It should also be noted that the unmarried who lack the financial means of supporting a wife are advised to abstain from marriage till such time as they come to possess the means.<sup>4</sup> This clearly implies that financial capacity to support a number of wives is the prior-most connotation of the 'ability to do justice' mentioned in the verse of polygamy.<sup>5</sup> The con-

1. The *Qur'an*, IV: 3, 129.

2. Those who, in recent times, have construed the meaning of verse 129 as abrogating permission of polygamy are mistaken. The *Qur'an* could not contradict itself, and the two verses must be given a harmonious interpretation. A refutation of this recent interpretation is, moreover, contained in verse 129 itself. The admonition to "turn not altogether away (from one) leaving her as in suspense" becomes pointless if the earlier part of the verse, that is: "You will not be able to deal equally between (your) wives however much you wish (to do so)" was intended to withdraw the permission of polygamy altogether. The only interpretation of the earlier part of the verse quoted above which is consistent with this latter part is that which consensus has handed down. The equal treatment which is impossible refers to emotional attachment and sexual inclinations. The ability to do justice to co-wives which verse 3 makes a pre-condition of taking more wives than one has a different connotation. It relates to economic support of and equal treatment between the wives without discrimination.

3. The *Qur'an*, II : 293.

4. The *Qur'an*, XXIV : 33. The society is called upon to assist such persons through charity as well as state subsidy.

5. *Supra* note 1.

fidence that one would be able to treat the co-wives equally comes next. It has, however, no meaning in the absence of the first mentioned capacity. Moreover, it is only the first condition whose fulfilment can be objectively ascertained prior to the solemnization of a bigamous marriage. Whether despite this capacity one actually does treat the co-wives equally can be known only after he has married again. This is also true of the other ways in which the husband must treat the co-wives equally. The court can intervene only when there is a complaint from one of the wives. Both these connotations of the condition attached with the permission of polygamy, namely, financial capacity to support, and equal treatment of, the wives, are seriously meant and, in fact, necessary to minimize the evils which could possibly result from polygamy. It would be un-Islamic to slight these requirements. A society that allows its members to flout these conditions in practice would be deviating from the Islamic norms.

#### **Scope for action by the state**

This brings us to the most crucial part of our discussion. Should it be left to the individual's conscience that in availing of this permission one meets these requirements, or should the state ensure, through law, that these requirements are in fact met? So far as the second of the above mentioned requirements is concerned, namely, that of equal treatment, there is no difficulty in answering this question. We have seen that it is not possible to make sure of it prior to the solemnization of marriage, and the law as it stands does contain suitable provisions for disposal of complaints in this respect made after the marriage.<sup>5a</sup> There remains the financial capacity which it is possible to assess beforehand. Shall it be written into the law that a person who lacks the financial resources to support more wives than one will not be permitted to marry them?

A number of points deserve consideration in this respect. First, starting from the days of the Prophet till the recent days, the practice has been to leave this matter to the individual judgment. One who does not have the financial resources to support a second wife along with the first was not allowed to contract the second marriage, but he was not obliged to satisfy the state that he in fact possessed such resources. In other words, it was construed as an obligation not to be enforced through law but to be met voluntarily under the religious sanction.

Secondly, the Islamic jurisprudence comprises obligations which are enforceable by the state as well as those which are not. But the border-line is not always rigidly and permanently drawn. There are circumstances justifying the legal enforcement of certain obligations which are normally left to the conscience and voluntary action. We have argued that the category of socially obligatory duties (*faraid kifaya*) may be lawfully

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5a. Dissolution of Muslim Marriages Act 1939, s. 2(viii) (f).

made enforceable by the state.<sup>6</sup> That the earlier jurists and the practice over the centuries of Islamic history kept these duties in the non-enforceable category is no bar against transferring them to the category of legally enforceable duties, should the circumstances justify doing so.

There is certainly a virtue in broadening the area of human freedom by relying on individual conscience for compliance with certain commands. Islam has done so on a wide scale. But this virtue has sometimes to be weighed against the ill-effects of possible non-compliance, specially when large scale evidence of non-compliance is available. One of the agreed principles of Islamic jurisprudence is that eliminating ill-effects and corruption has a priority over securing advantages, so far as the 'permissible' acts are concerned. Muslim jurists also agree that it is within the powers of the state to curtail certain freedoms when they are widely abused.<sup>7</sup>

It is also noteworthy in this regard that the moral decadence which has set in human society in general, including the Muslim society, has loosened the grip of conscience on human behaviour. Further, public opinion is no longer a reflector of the Islamic values, especially the Islamic notions of justice. Of special significance is the degeneration of the religious view of life relegating one's obligations towards fellow human beings (*huqūq al-'ibād*) to a secondary position, while they had a priority in Islam. Women in our society are weak and suffer from certain disabilities. It is very difficult for most of them to secure justice through a court of law. Even though the incidence of polygamy among Muslims is rare, it has certainly been abused in some cases. People lacking in the necessary financial means have taken two wives, eventually denying financial support to the first wife, causing much suffering. This, at least, can be avoided by prior assessment by the state of one's financial capacity. As said above, the previous practice in Islamic history is no bar to doing so: Islamic jurisprudence admits of such a change.

#### **Suggestion for control by courts**

In the light of these considerations we would suggest that the court should have power to restrain a man who is already married from taking a second wife where it is established that he is not in a position to support both. A married man intending to take a second wife may be put under legal obligation to notify the court his intention to do so, stating that he is in a position to support two wives, supporting his statement by proper evidence. A suitable period may be prescribed for which this man must wait, after giving notice, before he actually contracts the second marriage. Meanwhile the court should conduct suitable enquiries to ascertain the veracity of his statement about his financial position. Should it be satis-

6. M. Nejatullah Siddiqi, *Some Aspects of the Islamic Economy*, 82-89 (1970).

7. Ibn Nujaym, *Al-Ashbāh wa'l-Nadhāir*, 125 (Calcutta, 1260 A.H.).

fied about his financial capacity to support both wives in accordance with his own standard of living, it could allow the notice period to lapse, which would leave the man free to marry a second wife. Should the court's finding be otherwise, it may, after giving him a chance to meet its objections, issue an injunction restraining him from taking a second wife; and violation of this injunction or the rule relating to notification may be suitably penalized.

This proposal is similar to the rule under the Syrian Law of Personal Status, 1953,<sup>8</sup> except in so far as our proposal dispenses with the need of a formal permission from the court in each and every case. In effect it seeks to enforce legally that part of the Qur'anic requirement which is amenable to objective assessment prior to the contracting of a bigamous marriage. It would be noted that this proposal does not oblige a man to give any reasons as to why he wants to take a second wife. This *ipso facto* does away with any need of listing the circumstances which could justify such a step. This matter may be left to individual discretion, as has been the practice till now. The reasons for doing so are many.

In the first instance, the *Qur'an* does not tie the permission, for polygamy to particular needs or circumstances. This is important despite our view that the permission is in fact meant for some particular needs and circumstances. The needs and circumstances we have listed above are empirically inferred. Grafting them into the divine law would be an act entirely different in nature from making a divine law, hitherto left to the conscience of the individual for compliance, enforceable through the courts.

Secondly, needs and circumstances justifying plurality of wives are delicate and sometimes subjective in nature. Emotional urges, the nature of disability from which the first wife is suffering, or the social considerations prompting a second marriage, all belong to the private spheres of one's life. It is advisable to avoid exposing them to scrutiny by courts of law as far as possible. Such an exposure destroys the peace and tranquility of the homes concerned and sometimes does serious damage to the personality of those directly involved. The fear of such an exposure may also drive some people unwillingly to divorcing the first wife, which may irreparably damage her interests, and that of the children, besides injuring the husband, at least in some cases.<sup>9</sup>

Thirdly, it is also feared that obliging the man to justify his intention by giving convincing reasons would give the courts in this country far more powers of restraining this practice than seems desirable. The courts are not presently manned by people subscribing to the ethos of the Islamic culture.

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8. Art. 17.

9. Trying to plug this loophole by modifying the law of divorce raises many issues which it is not possible to discuss in this paper.

They are bound to take a strict view as regards the justifying circumstances, which would narrow down to very few if they are made explicit in the law.

Likewise, our proposal does not make the consent of the first wife a pre-requisite of permission to taking a second wife. Let it be frankly admitted that, generally speaking, it does hurt the first wife when a man takes a second one. It hurts her emotionally. It could also hurt her economically. Our suggestion would partly protect her against the latter possibility. The emotional injury, and to some extent her possible economic loss too, must be weighed against the interests of the husband, the second wife, and the society in general, that may be secured through the second marriage. A matter involving the interests of several parties should not be decided with reference to what happens to one party only. It is admittedly at the cost of the first wife, to some extent, that Islam permits polygamy. But it does so in view of the higher interests of the society and the pressing needs of its members. While doing so, it has taken every care that the injury caused to the first wife is kept at the minimum.

A possible objection to the reform suggested by us is that it would fail to make an impact on the rich. It may, however, be pointed out that the purpose of the proposed reform is not to abolish the practice of polygamy but to ensure that it does not result in the first wife, or all the co-wives, being deprived of necessary economic support. In so far as such a support is denied by a well-to-do husband despite his ability to do so, there is a greater chance of the aggrieved wife protecting her interests through the courts. The incidence of polygamy is probably higher in the lower middle class and it is there that economic injustice generally attends upon this institution. An aggrieved wife in such a family can only rarely protect her interests by recourse to a court of law. The proposed reform is, therefore, expected to go a long way in reducing the overall incidence of polygamy; and it would do so in the cases where such a result is most needed. It may further be pointed out that modernization of society and all that it implies works against plurality of wives; and it is among the well-to-do that the process of modernization is the fastest. This can be safely relied on for reducing the incidence of polygamy in that class to the inevitable minimum.

The very requirement of giving notice to, and the possibility of some enquiry by, the court which may sometimes lead to a restraining order, would lessen the practice to some extent.<sup>10</sup>

#### **Polygamy in Muslim countries**

The reform suggested by us may now briefly be compared with the measures adopted in some of the Muslim countries. With the exception of Turkey and Tunisia, which have prohibited polygamy, most of these reform measures either seek to ensure the man's financial ability to do justice

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10. It would be worthwhile to study the impact of the Syrian reform of 1953 in this context.

to a number of co-wives, or along with this, ascertain that certain compelling reasons exist justifying a second marriage, before permitting it. The laws enforced in Syria, Morocco and some other West Asian countries fall into the former category,<sup>11</sup> while the latter is exemplified by the Pakistan law of 1961, which also takes into consideration the consent or otherwise of the first wife.<sup>12</sup> No other Muslim country has gone as far as Tunisia. In fact the overwhelming majority of them, including Egypt, have introduced no reforms in this respect.

The reason why even countries like Egypt have not interfered with the practice of polygamy partly lies in the very low incidence of polygamy in these countries. According to the 1960 census in Egypt, only one per cent of the married Egyptian men had two wives, only four out of one thousand had three, and the number of men with four wives defied any ratio.<sup>13</sup> That is true also of other Muslim countries.

### **Polygamy in India**

For our own country no exact figures are available, but according to a reliable study based on an all-India survey, less than one per cent of Muslims in urban areas have more than one wife.<sup>14</sup> The low incidence of polygamy amongst Muslims in India, coupled with the fact that there are powerful economic, social and psychological forces operating against this institution causing a continuous decline, renders unnecessary the heat generated by the hue and cry raised on this issue by a section of the elite in this country. In view of the fact that there are always some genuine cases deserving redress through polygamy, and they are bound to include economically viable instances, the number of cases which are not genuine is reduced to a very small fraction. The case for any drastic measure, especially such as would fail to accommodate the genuine and viable cases, therefore, does not exist. There is no reason for being unduly excited over this issue.

Muslim public opinion in this country regards any reforms in this respect as superfluous and views all such proposals with suspicion. Its fears relate not as much to any reform in this particular matter as to the apprehension that it would open the gates for further amendments in its personal laws which are, broadly speaking, based on the *Shari'a*. Before analysing this apprehension a few words on the reform suggested by us may be addressed to the Muslim community.

It has already been pointed out that the proposed measure is acceptable within the framework of the *Shari'a*. It may be recalled in this context that

11. See for details Tahir Mahmood, *Family Law Reform in the Muslim World*, 276 (1972).

12. The Muslim Family Laws Ordinance 1961, s. 6. See *supra* note 11 at 277-78.

13. M. Abu Zahra, *Tanzim al-Nasl wa Tanzim al-Asra*, 276 (1965).

14. The study made by Dr. Kanti Prakrasi of the Indian Statistical Institute, Calcutta, says: "nearly nine out of every 1000 married Muslims in urban areas in the country are polygamous." See the *Hindustan Times*, December 12, 1969.



the similar Syrian measure was endorsed, among others, by the late Mustafa al-Sabā'ī, chief of the Muslim Brotherhood in that country.<sup>15</sup> The Muslim community should rest assured that this reform would only do good to the Muslim families by avoiding deprivation and suffering and lessening the litigations that arise thereby. It would certainly not deprive any Muslim of a recourse to polygamy where this does not involve inability to support a number of wives. This is a good case in favour of accepting this reform, howsoever marginal its impact may be. By doing so we would considerably weaken the extremists who would rather abrogate the laws based on *Shari'a*, and impose a body of laws reflecting the ethos of the western culture. These extremists get strength from the fact that the Muslim community itself has not been fully alive to the need of reform.

## II. How to effect control of polygamy and other reforms

The major source of Muslim resistance to reforms in their personal laws is the main thesis of the chief protagonists of these reforms: that personal laws belong to the secular sphere of life which should not be governed by religion. This they cannot possibly accept while adhering to Islam, as Islam does govern these affairs through certain laws. The other arguments fail to carry conviction in the presence of this major premise. This seems to be the presumption behind article 44 of the Indian Constitution also. As these laws have sustained themselves throughout the vicissitudes of Islamic history, the fear of being deprived of them has become the fear of a total loss of identity. Should these apprehensions be removed, the community might be in a better position to consider objectively the need of reform, for which there is ample room within the framework of *Shari'a* itself.

All the provisions of the present Muslim personal law are not based on the texts of *Qur'an* and *Summa*. The particular laws based on particular juristic interpretations are amenable to modification in the light of the changed conditions of life, within the framework of the textual laws and agreed principles of Islamic jurisprudence.

Expedience as well as justice demand that reforms in Muslim personal laws are effected after securing acceptance of the Muslim community. That would also ensure the fullest implementation of these reforms. Past experience has shown that reforms in family law largely remain on paper unless the ground is first prepared by creating a favourable climate of opinion.

There is a growing awareness among the Muslims themselves that some of the presently enforced laws need modification in the light of the *Qur'an* and *Summa*, taking into consideration the changed conditions of life. The

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15. Mustafa al-Sabā'ī, *Al-Mar'a Baina'l-Fiqh wa'l-Qānūn*, 115-16 (2nd ed. 1962). Al-Sabā'ī has also written a commentary on the Syrian Law of Personal Status, 1953.

'*ulamā*' have been active in this regard.<sup>16</sup> Also some modernist Muslim scholars have published their proposals in this regard.<sup>17</sup> The proper method of effecting reform is first to encourage these activities and create the proper atmosphere enabling the community to arrive at some widely shared views on the subject.

There is a need for hastening the above process leading to the acceptance by the Muslim community of reforms in personal laws suggested by its own representatives and later translated into suitable pieces of legislation by Parliament. But the proper method of doing so lies in, first, assuring the Muslim community that they are living among friends who are far from being bent upon destroying their culture, depriving them of their identity, and forcibly drowning them in the so-called mainstream. The greatest stumbling block in the way of a positive response from the Muslims to any suggestion of reforms in their personal laws is their loss of confidence, the fear of loss of identity and a sense of being amidst culturally hostile surroundings. The oft-lamented withdrawal, isolationism, and tenacious sticking to the *status quo* in social affairs is but a product of this psychosis. Properly assured in this respect, they are sure to adopt a more positive attitude and proceed with confidence in the task of readjusting the dynamics of social life.

This process has been slow and hesitant, at least partly due to the peculiar stand taken by some of the politicians and protagonists of secularisation. They construe reform as wholesale cultural transformation, set up the western mores as standards, and show scant regard for the cultural traditions of the people themselves. Muslims are an easier target of their onslaught, being in a minority. This, however, is not the way to build a better, more just and saner society in India, of which the Muslims are a distinct and yet an integral part. The proper course lies in allowing the diverse cultures to flourish in an atmosphere of mutual understanding and respect, and, through unconstrained mutual adjustments, forge a joint thrust towards rapid economic development, political solidarity and social dynamism. Reforms in the Muslim personal law should come about as a part of this larger endeavour. *Ad hoc* measures and a policy of raising superstructures where no secure foundation exists will hardly pay any dividends.

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16. The matter was on the agenda of the *Majlis Tahqiqāt Shar'īyya*, based at *Naāwat al-'Ulamā*', Lucknow. The *Jamā'at Islami Hind* has also appointed a committee comprising of '*ulamā*' as well as modern lawyers to recommend such modifications.

17. See for instance Tahir Mahmood, 'Control of Polygamy; Islamic Doctrines', *Radiance Viewsweekly*, Aug. 15, 1971.