ON THE MAGIC OF MONOGAMY AND SIMILAR ILLUSIONS

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I. Introduction

About two decades ago, Justice Gajendragadkar made a striking, if not startling, observation. He said :

> Although the point urged before us is not by any means free from difficulty on the whole, after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in article 13(1).[1]

Countering this dictum H.M. Seervai points out:

> (T)here is no difference between the expressions "existing law" and "law in force" and consequently personal law would be "existing law" and "law in force". This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them; it was therefore necessary to treat the whole of personal law as existing law or law in force under article 372 and to continue it subject to the provisions of the Constitution and subject to the legislative power of the appropriate legislature.[2]

The learned writer's argument may be reinforced by the fact that in British colonial legislation as well as in the opinion of the Judicial Committee the

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1. *State of Bombay* v. *Narasu Appa*, A.I.R. 1952 Bom. 84 at 89. In dealing with the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, the Madras High Court found it unnecessary to consider whether "laws in force" in art. 13(1) included personal law. See *Srinivasa Aiyar* v. *Saraswathi Ammal*, A.I.R. 1952 Mad. 193 at 195-196.
2. H. M. Seervai, *Constitutional Law of India*, 254-55 (1967).

expression 'native law and custom' is used to denote not two things but one thing, that is, customary law.

It is submitted, with respect, that the 'doctrine of the jurist' is to be preferred to the observation of a court. It is on the assumption that the doctrine lays down the correct law that in the following pages certain provisions of Islamic law are looked at in the light of constitutional provisions.

II. Monogamy

If personal law forms part of the "laws in force" contemplated in article 13(1) under the equality provisions of the Constitution, the Muslim personal law requires to be amended either to introduce polyandry or to abolish polygyny (union of one husband and two or more wives). The present writer is not unaware of Justice Gajendragadkar's view that the provisions of personal laws permitting "polygamy"[3] do not amount to any discrimination against women only on the ground of sex.[4] If the learned judge required any support for his view it was amply supplied by Chief Justice Chagla who said :

> It is urged that polygamy discriminates against women only on the ground of sex. This argument, in our opinion, overlooks the history of polygamy as a social institution. Polygamy is justified if at all, on social, economic and religious grounds and hardly ever on grounds of sex. In the modern world polygamy may seem to be an anachronism and may seem to be based on outdated and outworn ideas. When, however, it is found recognized in any personal law, it is based on considerations which were very vital and compelling to those who believed and who still believe in the sanctity of their personal law. Therefore it would be difficult to say that the institution of polygamy would constitute a discrimination against members of one sex only on the ground of their sex.[5]

What we are at present concerned with, if one may say so with respect, is the law regarding 'polygamy' rather than its history as a social institution. As law, it is obvious, it discriminates against women. It may be that there are economic reasons for this discrimination. All the same the discrimination is there, and whatever be the reasons for it, the discrimination is against women. If men and women of the same community who are similarly placed are not treated alike by law, the only conclusion that can be arrived at appears to be that the law is unequal. And it is this unequal treatment by law which is prohibited by the constitutional provision. As

3. Polygamy means multiple mates. The word can be applied to both polygyny and polyandry, but popularly it is sometimes used to connote polygyny.
4. *Supra* note 1 at 93.
5. *Id.* at 89.

Justice Hegde observed : "There is no constitutional guarantee to respect the personal law of any community."[6]

If Muslim men are regarded as a class by themselves not on the ground of religion alone but on the ground of adhering to a different culture from those of other communities in the country, and are, therefore, considered to be exempt from the application of laws prohibiting bigamy, Muslim women may also be regarded as a class by themselves and may be regarded as being entitled to the privilege of obtaining the love and favour of four husbands. The difference between Muslim men and Muslim women is one of sex, a difference which, according to the Constitution, may be invoked only in favour of women. Article 15(3) of the Constitution provides :

> Nothing in this article shall prevent the state from making any special provision for women and children.

Though dictionaries may be quoted to show that the preposition 'for' may occasionally do duty for 'as regards', it is clear from the context that the clause envisaged making provision 'in favour of' or 'for the benefit of'[7] women and children.[8] It is generally assumed that women and children are in need of special protection and it is this assumption which is behind the genesis of the clause.

Article 25(2) of our Constitution empowers the state to make laws providing for social welfare and reform. It is under this provision that the Hindu Marriage Act 1955 was passed in spite of strong opposition from the Hindu community. It provided for monogamy and divorce, both undreamt of in the sacred laws of the Hindus. It was deemed, and still passes for, a measure of social reform. In a purely etymological or literal sense, there was reform (re-form, renew) in the Hindu personal law, but it is doubtful whether there was any reform in the sense of "change for the better".[9] It is also doubtful whether it was a measure of social welfare. Could one honestly say that there has been an appreciable degree of increase in the welfare of the Hindu society from 1955 onwards? Sixteen

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6. *Syed Ahmed* v. *N. P. Taj Begum*, A.I.R. 1958 Mys. 128 at 131.
7. The Oxford English Dictionary gives the following meanings, among others : in favour of, with the purpose or result of, benefiting or gratifying.
8. See *Anjali* v. *State of West Bengal*, A.I.R. 1952 Cal. 825; *Cracknell* v. *State of U.P.*, A.I.R. 1962 All. 746; see also *Yusuf* v. *State of Bombay* (1954) S.C.R. 930. Though in the *Yusuf* case Justice Bose expressed the view that the special provisions referred to in art. 15(3) need not be restricted to measures which are beneficial, the decision was concerned with a provision which was clearly for the benefit of women. See D.D. Basu, I *Commentary on the Constitution of India*, 520 (5th ed. 1965).
9. It is intriguing that Chief Justice Chagla and Justice Gajendragadkar in the *Narasu Appa* decision (*supra* note 1) speak of bringing about social reform by stages but are silent about a graduated scale of increase in social welfare. The Madras High Court, however, refers to social welfare and reform in the *Saraswati Ammal* case, (*supra* note 1), following the text of the Constitution.

years are not a negligible period of time in the life of a generation. Have young men and women of marriageable age in 1955 lived a happier married life than their counterparts say in the early 40s?

Reform is not only a relative term, but also one laden with a wealth of subjective overtones. Social welfare and reform are spheres of life where one person's or community's meat is another's poison. There is no magic about monogamy; nor is there anything evil about polygyny or polyandry. Let us look at a few sociological facts. Malinowski wrote a few years ago:

> Monogamy as the unique and exclusive form of marriage, in the sense that bigamy is regarded as a grave criminal offence and a sin as well as sacrilege, is very rare indeed. Such an exclusive ideal and such a rigid legal view of marriage is perhaps not to be found outside the modern, relatively recent development of western culture. It is not implied in Christian doctrine even.[10]

Malinowski further stated:

> Many peoples have been said to be monogamous but it is difficult to infer from the data at our disposal whether monogamy is the prevalent practice, the moral ideal or an institution safeguarded by sanctions.[11]

Referring to the development of the dogma of monogamy and the sacramental nature of marriage in the Christian churches, a high authority on marriage laws has said that the institution of monogamy has long been "accompanied by indulgence towards marital unfaithfulness of the male and by toleration of prostitution and of the mistress system."[12]

If one prefers concubinage and prostitution to plurality of wives, one can at least look for support among our social and legal reformers. They will decry prostitution and concubinage as deadly evils or mortal sins, according to their several tastes and religious persuasions, but will not mind paving a smooth way to them by insisting on a facade of monogamy. For it is no secret among sociologists that (to quote two American sociologists) "where polygany lacked legal sanction, it frequently existed in the more or less illegal form of concubinage."[13]

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10. B. Malinowski, 'Marriage', in *Encylopaedia Britannica* (1962). Malinowski, however, states that monogamy is, has been and will remain the only *true* type of marriage. To place polygyny and polyandry as "forms of marriage" coordinate with monogamy is *erroneous* (*ibid*, emphasis added). Clearly this is an expression of opinion, not a finding of fact.
11. *Ibid.*
12. Max Rheinstein, 'Marriage', in *Encyclopaedia Britannica* (1968).
13. J. H. Locke and J. A. Peterson, 'History of Marriage' in *Encyclopaedia Americana* (1969).

From the data that Malinowski was able to collect he came to the conclusion that "as an institution polygyny exists in all parts of the world."[14] We, in India, were familiar with the institution from time immemorial. What our reformers find wrong in the institution is that it is not fashionable in the West. Our classical literature bears testimony to the fact that in spite of legally warranted polygyny, concubinage and prostitution were prevalent among us in ancient days.[15] If that were so, are we likely to relinquish our favourite practices when there is greater compulsion for them owing to legally enforced monogamy?

As for polyandry, it is an institution we are not unfamiliar with in India and our neighbouring countries. We have a classical instance of it in the *Mahabharata*. In Tibet, fraternal polyandry is prevalent. Among the Todas in the Nilgiri Hills and the Veddas in Ceylon polyandry is the only known matrimonial institution.

Would it be right to brush aside polyandry and polygyny as institutions found only among the less developed peoples and in developing or underdeveloped countries? We assume that monogamy is considered fashionable in the West because statutes prescribe it, and religious leaders preach it. But it is doubtful whether it is regarded as "trendy" these days. In the United States, for instance, the principle of monogamy is often violated through successive polygyny and polyandry. It is not uncommon for an American to have three or more spouses in his or her life time. This is made possible and legal by the device of divorce. All the same, the principle is clearly violated.[16] It may be more advisable to adhere to polygamy than to subject oneself to the heartbreak which divorce generally entails.

The incidence of polygamy will be restricted by a few social factors. As polygamy presupposes a considerable accumulation of wealth it will, in general, be confined to the wealthy. In conditions prevailing in certain developing countries, it may also be found among the very poor who find it necessary to have more than one pair of working hands in the field or who consider that a few men have to put their funds together to be able to maintain a wife. Polygamy will also be restricted by the fact that the number of males and females in a given population is relatively equal. This will result in the majority of marriages being monogamous.

In the history of mankind, polygamy has existed and will continue to exist. If polygamy is legislated out of existence, it will 'reform' itself into concubinage or prostitution, according to individual tastes, and assume a garb of respectability. If it is permitted by law, a few men may marry

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14. *Supra*, note 10. The American sociologists, Locke and Peterson, also point out that the practice of polygyny has been 'widespread among practically all people, though the numbers involved have been small. ['History of Marriage', in *Encyclopaedia Americana*, (1969)].
15. For instance Pingala in *Sivapurana*, and Vasavadatta in Buddhist legends.
16. J.H. Locke and J.A. Peterson, *op. cit. supra* note 13.

more than one wife, not necessarily out of concupiscence,[17] and a few women, very few of them it would seem, may take more than one husband.

Live and let live. Legislatures are not likely to usher in an era of social welfare by abolishing polygamy or introducing monogamy. We cannot bring about social welfare by ignoring individual welfare and the latter is not subject to the whimsical prescriptions of priests or legislators.

It may be that Islamic law, being sacred, is immutable. But a provision of law which runs counter to the provisions of the Constitution should not be enforced by an institution created by the Constitution. If, for instance, polygyny is part of a sacred immutable law, it would be clearly wrong to deprive a man of his divinely-ordained right to marry four wives. But the law relating to restitution of conjugal rights is not a divine law, and the courts can easily refuse to lend their aid to a man who complains that on his taking a second wife, the first one has said good-bye to him. If the first wife, regardless of its validity under Islamic law, contracts a marriage with another man when the first husband is alive and has not favoured her with a divorce, should she be prosecuted under laws prohibiting bigamy? Her prosecution under the circumstances would be an act of flagrant discrimination against her on the sole ground of sex, a discriminatory ground prohibited by our Constitution. To uphold the Constitution and, incidentally be fair to the fair sex, the courts may have to close their eyes to the wife's polyandrous propensities. Further, if the first husband is given a judgment in his favour, the second husband's identical rights also are to be respected. All this will naturally create confusion and complications.

Under the Constitution, there appear to be only two alternatives :

(*i*) prescribe monogamy for all citizens, or
(*ii*) give legal sanction to polygyny as well as polyandry.

The first alternative will bring, in its train, infidelity, concubinage, prostitution and hundred other social activities which are not considered prone to promote social welfare. In the Indian context, infidelity may be avenged by assault and even murder. The second alternative appears to be more in consonance with the traditions of the Indian society. What was prevalent in India among most communities was polygyny; but as the Constitution prescribes, as a rule of law, equality of the sexes, polyandry also has to be permitted. No religious group will have any cause for complaint under the proposed permissive legislation. If Christians are inclined to follow the recently evolved dogma of monogamy, they are free to do so; they are not compelled to take more than one spouse. If the legislature forbids what is permitted by religion, it may be interpreted as interference with religion;

17. "Polygyny is scarcely anywhere due to masculine concupiscence. On this point evidence from several areas is mutually corroborative" (Robert H. Lowie, 'Marriage', X *Encyclopaedia of Social Sciences*, 146 at 149).

but if the legislature permits what is forbidden by religion, there is no interference. The religiously inclined person can follow the dictates of his conscience and observe the prohibition while the less religious minded or those who follow a different religious persuasion may take advantage of the permissive legislation and benefit by it. There is no reason why a West-oriented hypocrisy should be inscribed into our statute book on the plea of uniformity of law or social welfare, when we are ourselves more than self-sufficient in that quality.

Thailand's image in the 'Comity of Nations' is not in the least tarnished because Thai men marry more than one wife.[18] The same is true of many African countries. After all isn't it time that we stopped playing to the galleries of the West?

III. Divorce and inheritance

A young American student speaking about the young "groovy" Indians is reported to have said:

> It is amazing how far behind western songs and dances these kids are. The songs they sing, the ideas of protest they have went out in the West months ago.[19]

What is true of juvenile tastes in India is also true of Indian legislation. In 1955 we passed an Act practically adopting all salient provisions of the British Matrimonial Causes Act, 1950. We even adopted, in our desire to play the sedulous ape to the United Kingdom Parliament, certain provisions which the British had taken over from Christian ecclesiastical law. Time does not stand still. As the waters flowed down the Thames, the matrimonial law in the United Kingdom was amended a few times over the last two decades. "Irretrievable break-down of marriage" has been made the sole ground for divorce there.[20] But we prefer to keep burnished and aloft our unscrupulous borrowings from western ecclesiastical law. It may be that our Parliamentarians are very busy amending the Constitution so that there is no time left for them to take up the main task assigned to them, or it could be that they consider that the ecclesiastical law of the West is more suited to Indian people and Indian conditions than the laws laid down in the sacred texts of the east. If we choose to ape the West, let us ape the West of the present day and not of a quarter of a century ago.

Unilateral divorce

Let us now consider the question of unilateral divorce in Islamic law. What is perhaps inadvisable and appears unpleasant to women in Islamic

18. When the Asia Magazine conducted a gallup poll in Thailand in 1965, a vast majority of Thai women (including educated ones) expressed themselves in favour of polygyny.
19. *The Statesman*, January 6, 1972, p. 3.
20. See Divorce Reform Act, 1969, s. 1.

law is the ease with which a Muslim wife may be repudiated by a *talāq*. If the provision for *talāq* as forming part of Qur'anic law is considered immutable, its cutting edge could be easily blunted by permitting the same right of repudiation to the wife. No legislation may be necessary; the purpose will be served if no proceedings for restitution of conjugal rights are entertained by courts against a wife who has pronounced *talāq* against the husband—the same way as a wife who has been repudiated by *talāq* is not regarded as capable of enforcing such restitution against her erstwhile husband. The judiciary, which is one of the organs of the state, refrain from passing an order (which is law) that violates the constitutional provision regarding equality between the sexes. If equality between the sexes is considered an inalienable human right, it is doubtful whether a Muslim woman can contract away her inherent right to repudiate her husband as long as he retains his right to pronounce *talāq*. *Khul'* is a poor substitute for *talāq*. In case equality of rights in regard to repudiation of the spouse is recognized, the unconscienable practice of *talāq* which one observes at present might disappear, and along with it the importance attached to dower may also vanish.

Registration of divorce

It may be desirable to pass legislation requiring registration of divorce by mutual consent[21] or a judicial pronouncement of divorce. If after a declaration of *talāq* or any other relevant form of divorce recognized by Islamic law, the spouses live separaterly, say, for a period of two years,[22] the fact of such a separation may be regarded as evidence of irretrievable breakdown of marriage and a judicial decree of divorce may be granted. Only the decree will be considered legally valid. Those who adhere strictly to Islamic law are not prohibited from considering themselves divorced if the husband has pronounced *talāq*, but legal consequences will follow only on the grant of a judicial decree or registration at a civil registry. The parties may not be seriously prejudiced, as, under a regime of polygamy which is contemplated, both of them will be in a position to marry their preferred partners before a decree is obtained. Non-recognition of a religious divorce by the

21. In Singapore, under s. 12(3) of the Muslims Ordinance 1957, registration of divorce except those effected by a decree or order of the *Shari'a* court or Appeal Board is compulsory and the *kāthi* (*qādī*) is required, after inquiry, to satisfy himself, before he registers a divorce, that both the husband and the wife have consented to the divorce.

An arbitral award given, say, by a family council consisting of members of the families of both the spouses, when registered with the appropriate civil authorities may also be considered to indicate mutual consent. Legislative provisions may also be made for such award giving it the force of a judicial decree, when registered with the civil authorities.

22. Desertion for a period of two years is considered one of the proofs of breakdown of marriage under the (United Kingdom) Divorce Reform Act 1969, s. 2.

state will not be regarded as interference with religion. In a number of West European countries, which are considered Christian, a religious marriage is not recognized as of any legal consequence. Legislative provisions in these states insist on a marriage at a civil registry or at the mayor's office. The parties are, however, free to go through a religious ceremony after the marriage has been performed and registered by the civil authorities. As there is a civil marriage, even a person whose religion prohibits the practice of divorce is enabled to seek a divorce at a court of law, and when he obtains a decree of divorce he will be regarded as divorced under the state law, and still remaining married according to ecclesiastical law. As the sanctions of ecclesiastical law are contemplated for a life after death, those who desire to live a comfortable life on earth, with the consortium of a preferred partner are not over-burdened with thoughts of penalties elsewhere, and are generally concerned with the legal consequences of their secular, legal marriage or divorce.

Inheritance

There are other provisions in Islamic law which are repugnant to constitutional provisions as, for instance, the unequal shares for men and women under the law of succession. The courts which are entrusted with the duty of upholding the Constitution and doing justice between the parties before them, are precluded from enforcing these unequal laws.

IV. Conclusion

As we have seen, there are a few provisions of Islamic law which are not in consonance with the provisions of the Constitution. We have referred to a few instances such as polygyny, unilateral repudiation of the wife by the husband and a daughter's share of inheritance. These are the provisions which impinge upon the concept of equality between the sexes contemplated by the Constitution. They also tend to affect adversely the development of personality of Muslim women. Though our Constitution, unlike the Basic Law of the Federal Republic of Germany,[23] does not spell out in express terms an individual's right to development of his personality, the preamble which sets out democratic values indicates that development of personality is envisaged as an essential principle of the new constitutional order which seeks to secure to all citizens equality of status and of opportunity and to promote dignity of the individual.

23. The Basic Law of the Federal Republic provides :

Article 1:—The dignity of man is inviolable. To respect and protect it shall be the duty of all State authority.

Article 2(1) :—Everyone shall have the right to the free development of his personality in so far as he does not violate the right of others or offend against the Constitutional order or the moral code.

Islamic law, being sacred, is understandably immutable. But immutability is not tantamount to enforceability. State courts can and should refuse to enforce a provision of law which is repugnant to the Constitution, as judges are bound to "bear true faith and allegiance to the Constitution." It seems erroneous to argue that certain personal laws are not part of "laws in force" mentioned in article 13(1), when certain others are regarded as forming part of them.[24] That Parliament can embark upon legislation for social welfare and reform by stages may be a valid argument for imposing monogamy against their will, on certain sections of the people who are considered ripe for these reforms.[25] But it has not yet been proved that the reform is one which actually promotes social welfare. The Bombay Prevention of Hindu Bigamous Marriages Act was passed in 1946. A quarter of a century does not appear to have been found an adequate passage of time to bring the assumed benefits of this legislation to certain other sections of India's citizenry. It has been said that the wheels of the Church grind slowly. The wheels of the legislatures grind slower still when grinding down eternal, sacred laws. The choicest alternative is to give up the attempt. Let every community or religious group in the country adhere to its personal laws if it so chooses; but the courts should give recognition only to those laws which are consistent with the Constitution. When a number of provisions of personal laws remain unrecognized and unenforced by courts, they might fall into desuetude. Then it will be time to consider a uniform civil code which should respect, and incorporate in it, as far as practicable, provisions from personal laws of various communities or religious groups, which are not divergent from one another and are not inconsistent with constitutional provisions.

24. See *Sheekaran Singh* v. *Daulatram*, A.I.R. 1955 Raj. 201; also *Bhau Ram* v. *Baij Nath*, A.I.R. 1962 S.C. 1476 and *Sant Ram* v. *Labh Singh*, A.I.R. 1965 S.C. 314.
25. *Supra* note 1.