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Law of Polygamy in Bangladesh: An Analysis in the Context of Islamic Law and Human Rights

Dr Halima Khatun^{*}

Mst Hamida Khatun^a

ABSTRACT *The laws concerning polygamy differ greatly throughout the Islamic world and form a very complex and diverse background from nation to nation. In some Muslim countries it may be fairly common, whereas in most others it is often rare or non-existent. According to traditional Islamic law, a man may take up to four wives, if he is able to afford and take care of each of them properly and justly. It is to be noted that Islam permits polygamy only in some special contexts. However, some of the people of Bangladesh do not have knowledge enough about Islamic law as well as traditional law as regards polygamy. Due to lack of adequate knowledge or misconception of Islamic law some people of our country think that when they desire, they can enter into multiple marriage. In such a situation, the laws relating to polygamy need to be revised. Though, to restrict polygamy, there is Muslim Family Laws Ordinance, 1961 in Bangladesh, the Ordinance is unable to meet the aspiration of the people of our country. In this article an amendment of this Ordinance has been proposed to achieve this goal.*

KEYWORDS: *Human rights, Marriage, Muslim Family Laws Ordinance and polygamy*

1. Introduction

Polygamy is a system of marriage in which a spouse can marry more than one spouse at a time. The opposite of polygamy is monogamy where each person has maximum one spouse at a time. In Bangladesh, Muslim male can practice polygamy. The notion of polygamy gives rise to many aspects of national life

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of a state, such as social, economical, psychological and the overall personal security issues of women in the society. Even the widespread incidences of torture, both physical and mental, against women for dowry and the series of continuous domestic violence inflicted upon women are some trends related to the question of polygamy. As Muslim men in Bangladesh are allowed to take more than one wife at a time, the value of women becomes insignificant to them, because they know that even if one wife expired, there will still remain others. As a result, in a polygamous family the women suffer much. Article 27 and 28 of the Constitution of Bangladesh declare equality before law and equal rights of men and women. These rights are also recognised by international human rights instruments. In this paper, an attempt has been made to analyse the laws regarding polygamy in Islamic and Bangladesh perspective with the norms of human right laws and, at the same time, an attempt has been taken to make a proposal for amending the relevant provisions of the Muslim Family Laws Ordinance, 1961.

2. Definition of Polygamy

The word 'polygamy' comes from Greek '*polys gamos*' which means often married. Polygamy is a heterosexual marriage which includes more than two partners (Zeitzen 2008). In other words, the term 'polygamy' can refer to the simultaneous union of either a husband or wife to multiple spouses. The term 'polygamy' includes 'bigamy' which occurs when a person who is already married marries again, marries more than one person simultaneously, marries someone that he or she already knows to be married.¹

The Law Reform Commission of Canada (1983: 13) states that, polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage. It is to be noted that Islam does not permit any wife to marry more than one husband at a time. In this view, polygamy is the form of marriage in which only a man can marry more than one woman. That is to say, while a marriage subsists between a man and a woman, the man may contract another marriage with another woman, this kind of relation is known as polygamy.

3. Forms of Polygamy

There are three specific forms of polygamy which are as follows:

- a) **Polygyny:** It is a form of marriage where a man has multiple simultaneous wives.²
- b) **Polyandry:** Polyandry is a practice where a woman has more than one husband at the same time. This type of marriage was practiced among nomadic Tibetans in Nepal, Parts of China and part of northern India in which two or more brothers were married to the same wife, with her having equal sexual access to them.³
- c) **Group Marriage:** Group marriage is a marriage in which the family unit consists of more than one man and more than one woman, any of whom share parental responsibility for any children arising from the marriage.⁴

Historically all three practices have been found, but Polygyny is by far the most common. In Bangladesh, the broad term of polygamy is used. This word means polygynous marriage where a Muslim can marry more than one (maximum four) woman.

4. Reasons for Polygamy

There are some reasons for polygamy and those are as follows:

- a) **Inability to produce children:** It is one of the common reasons for polygamy. Sometimes it is found that when a couple failed to produce children, the liability goes to the wife. In this situation the wife is bound to give consent to her husband for second or multiple marriages. But a few of them go to doctor to check up the defect.
- b) **Inability to produce son:** A superstition goes among the people that the continuing family heritage will be extinguished without having a son. So, if a couple failed to produce son, the liability also goes to the wife. In this circumstance, the husband enters into second or multiple marriages. But it is proved by the medical science that woman has no role in gender selection. The holy Quran states,

² Webster's Third New International Dictionary, Unabridged, s.v. 'polygamy'.

³ Wikipedia, *Polygamy*. Available at <http://en.wikipedia.org/wiki/Polygamy>. Accessed 31 June 2014.

⁴ *Ibid.*

To Allah belongs the dominion of the skies and the earth. He creates what he wills. He bestows (children) male or female according to His will.⁵ Or he bestows both males and females, and He leaves barren whom He wills for He is full of knowledge and power⁶.

- c) **Wife's illness or health problems:** If due to illness or health problem the wife fails to intercourse with her husband or to do other family related works, the husband enter into second marriage.
- d) **Weak financial status of woman:** Most of the women of our country are unemployed or don't earn money. So weak financial status forces women to give consent to their husband marrying a second wife.
- e) **Orphanhood and homelessness:** Most of the orphan women who do not have proper guardian or family to protect them often marry with the men who already have one or more wives.
- f) **Physical strength of man:** Some of the people argue that there are some men who are sexually much capable and one wife is not considered enough for them. If the door of polygamy is closed to such a man, that will cause a great hardship for him and he will follow the forbidden ways to meet his desire.
- g) **Men's frequent travel:** In many cases men are to travel in other countries or cities for the sake of their profession. Such men argue that as they are not residing in one particular place, in each place they stay, they should marry one wife.
- h) **Wealth or having a lot of money:** Wealth or having a lot of money is another reason for polygamy. The men who are financially solvent think that they have enough money to provide maintenance and dower for their wives and they show it as a reason for enter into multiple marriage.
- i) **Power and social status:** Some people think that to have multiple wives is the symbol of power and social status. So to uphold their status they marry more than one wife.
- j) **Ignorance about the first marriage:** Most of the men who are polygamous do not disclose as to his second marriage to the first wife. In

⁵ Suratul Ash-shura: verse 49.

⁶ *Ibid*: verse 50.

these cases, at the very beginning, the women are not aware about their husband's first marriage. When they come to know, they have nothing to do. After knowing their husband's first marriage, the women hardly come to the court for their husband's deception.

- k) **Unawareness:** Many women in our country are illiterate. They have a little opportunity to get in touch with the literate people freely. They believe their husbands blindly. When their husbands express to marry another woman for the sake of religion, they give permission for the fear of Allah.

Besides the reasons mentioned above, Alean Al-Krenawi (2001: 193) has noted four common reasons for Bedouin-Arab's remarriage which are as follows:

- a) an exchange marriage (where two men marry each other's sisters);
- b) the number of daughters the first wife had;
- c) the age of the first wife (that she was seen as old); and
- d) other factors including situations where husbands were persuaded to marry a woman by his extended family.

5. Polygamy in Islam

Polygamy is allowed in Islam in which a man is entitled to have up to four wives at a time for only exceptional and limited cases. After 'the Battle of *Ohud*' most of the Muslim adult men were martyred and as a result too many women were left as widows and lots of children were left as orphans in a male dominated society. Then the women had to look after their farms; cattle and houses which became impossible after some time for them. So the women and the orphans went to the Prophet (Peace upon him) and asked who was going to look after their business? In this situation the holy Quran clearly stated:

If you fear that you shall be able to deal justly with the orphans, you may marry two or three or four women you choose. But if you apprehend that you might not be able to do justice to them, then marry only one wife, or marry those who have fallen in your possession.⁷

⁷ Sura An-Nisa: verse 3.

According to this verse fairness is a condition for polygamy. If a man gets more than one wife simultaneously, he must be fair in treatment to his wives in food, drink, clothing, housing, and sustenance. If he is not sure of his ability to fulfill such duties equitably and fairly, he is forbidden to marry more than one wife. The Almighty says:

You will never be able to do perfect justice between wives even if it is your ardent desire, so don't incline too much to one of them (by giving her more of your time and provision) so as to leave the other hanging.⁸

In this verse Allah, who knows best the nature of man, cautions in a manner- 'you are never able to be fair and just as between woman, even if it is your ardent desire'. Hence the men do not possess the ability to practice just in dealing with a perfect nature among the wives.

The Prophet (P) said, 'The man, who has two wives and is more inclined towards one of them, will come on the Day of Judgment dragging one of his sides while it is drooping'.⁹ The spirit of this *Hadith* warns in overlooking the rights of one wife of the twos. The Prophet (P) used to treat equitably among his wives and says, 'Allah that is my division as it is my power to do so. Do not blame me for what have and I have not'.¹⁰

In a nutshell, it is to be said that, in Islamic law the first condition to enter into polygamy would be an orphan or a widow who has no means of protection from her family and from the state. Secondly, the person who is to be affected is the party who will stand up and decide whether there is justice or not. The third factor is the economy, whether the husband will be able to provide equally in terms of food, clothing, house, love and affection etc.

6. Polygamy in the Context of Bangladesh

Polygamy is allowed in Bangladesh. One man may have four wives at a time. But it is restricted by the Muslim Family Laws Ordinance 1961. This Ordinance was enacted as a result of active lobbying by All Pakistan Women's Association in 1950 to restrict polygamy in Pakistan (including East Pakistan,

⁸ Surah Annisa: verse 129.

⁹ Transmitted by Abu Dawed (3133), Al Termithy (1141), Ibn Majah (1969). All on the authority of Abu Huraira.

¹⁰ Transmitted by Abu Dawed (2134), Al Termithy (1140), Ibn Majah (1971). All on the authority of Isha.

now known as Bangladesh). However, this Ordinance has rather legitimised male polygamy in Bangladeshi Muslim society. The relevant provision - section 6 of the Ordinance reads as follows:

- i. No man, during the subsistence of an existing marriage shall except with the previous permission in writing of the Arbitration Council contract another marriage nor shall any such marriage contracted without such permission be registered under the Muslim Marriages and Divorces (Registration) Act 1974.
- ii. An application for permission under sub-section (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee and shall state the reasons for the proposed marriage and whether the consent of the existing wife or wives has been obtained thereto.
- iii. On receipt of the application under sub section (2) the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative and the Arbitration Council so constituted may if satisfied that the proposed marriage is necessary and just subject to such conditions if any, as may be deemed fit, the permission applied for.
- iv. In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may in the prescribed manner within the prescribed period and on payment of the prescribed fees, prefer an application for revision to the Assistant Judge concerned and his decision shall be final and shall not be called in question in any court.
- v. Any man who contracts another marriage without the permission of the Arbitration Council shall: (a) Pay immediately the entire amount of dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid shall be recoverable as arrears of land revenue; and (b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year or fine up to ten thousand taka or with both.

It is clear from this section that in Bangladesh if a man wants to remarry, he has to go to the Arbitration Council by filing a written application. The Arbitration Council consists of a chairman and the representatives of both the wife and the husband. In this council, there has to be an acceptance on the part of the existing wife or wives for the second or third or fourth marriage of her husband. Before this council, the husband shows sufficient strong reasons and the wife or wives have to bind to give consent whether the reasons are right or wrong. However, the reality is very different. There are very few husbands who go to the Arbitration Council. In this respect a social pressure acts upon

the wife; because she is to retain her children and her position in the society as she understands that a divorced woman has very little social respect. If the existing wife does not give consent to her husband's second marriage, the general practice is that the wife has no alternative without demanding only her *Mahr* and maintenance. If the wife takes shelter of the Court and seeks remedy in proving the case, the husband will then be liable to give fine or may be imprisoned for one year or with both.

Therefore, from the above legal provision it is found that a Muslim man in Bangladesh can legally have multiple wives, if he can satisfy the Arbitration Council with 'necessary and just grounds' for such marriage. Further, section 6 of the Ordinance neither makes it necessary nor a sufficient condition for the husband to have consent from his existing wife. The existing wife only has a right of representation before the Arbitration Council. It is stated that her decision to give consent to her husband's plural marriage is only a factor before the Arbitration Council to find out whether the husband can remarry on 'necessary and just grounds'. Law has never tried to define what could possibly be 'necessary and just grounds' in this regard. The Arbitration Council is left with a wide discretionary power to deal with the issue of polygamy in Bangladesh. However the following grounds may be considered as 'necessary and just':

- i. Sterility;
- ii. Physical infirmity;
- iii. Physical unfitness for conjugal relation; and
- iv. Insanity on the part of the existing wife.

In the case of *Jesmin Sultana v Mohammad Elias*¹¹, the High Court Division of the Supreme Court of Bangladesh dealt with the issue of polygamy. The Court held that:

Muslim Jurists and scholars are almost unanimous in taking the view that in the context of modern society it is virtually impossible to be able to deal with the wives justly and as such the Quranic sanction for taking a second wife under specific conditions virtually amounts to a prohibition in taking a second wife during the subsistence of an existing marriage... So we find that Section 6 of the Muslim Family Laws Ordinance 1961 is against the

¹¹ 17 BLD 4.

principle of Islamic Law. We recommend that this section be deleted and be substituted with a section prohibiting polygamy.

However, this issue reached the Appellate Division of the Supreme Court by way of appeal and in the case of *Mohammad Ilias v Jesmin Sultana*¹² the Appellate Division observed that:

In the present case ... the learned judge quite unnecessarily expressed an opinion on a subject of Muslim Law without anybody asking for it and without hearing anybody whatsoever ... which is not required to be decided for the disposal of the matter before him ... We are sorry to say that this is a kind of aberration which seems to be pathological with the learned judge which is not at all desirable in a system of law and norms under which our courts have been functioning in this country since long.

Further, the discussion on polygamy in Islam and the relevant recommendations made therein, as accorded in the judgment of the High Court Division, ordered to be deleted as the Appellate Division feared that it might create confusion in the minds of the subordinate Courts and the people at large.

7. Polygamy and Violation of International Human Rights

The Islamic law provides equal rights of men and women. The holy Qur'an thus states: 'And they (women) have rights similar to those (of men) over them, and men are a degree above them'.¹³ In polygamous marriage these rights are violated. As a result it violates fundamental human rights of women and the best interest of children. Some of those rights are stated below:

7.1 Family life

Polygamy undermines the principle of exclusivity that serves to strengthen marital and familial bonds. Particularly, polygamy denies couple's exclusive sexual intimacy and the opportunity to build an exclusive life together. Moreover, it hinders the equal sharing of both material and emotional attention. It precludes the opportunity of creating something unique with another partner because of the expectation or at least the prospect of another party being introduced into the marital unification and interrupting the relationship. This type of marital interruption is striking in all polygamous

¹² 19 BLD (AD) 122.

¹³ Surah Al-Bakara: verse 228.

contexts, but perhaps most striking in those where subsequent wives reside with their husband and his present wife. As the Allahabad High Court of India noted in the case of *Itwari v Asghari* (1960)¹⁴ that, 'the taking of a second wife into the first wife's original shared domicile often constitutes a stinging insult to the first wife and is likely to pray upon her mind and health if she is compelled to live with her husband under the altered circumstances.

The prospects of having to share their husbands sexual, material and emotional attention with other wives within the one household thus deprives women of an exclusive connection to their husbands. Moreover, a review of anthropological literature suggests that jealousy, tension, strain and competitiveness are common among plural wives. While there are many examples of cooperative co-wife relationships, the majority of accounts emphasise negative feelings between wives in polygamous families. Conflict can arise in other aspects of day-to-day life including access to their husband and resource distribution (Altman & Ginat 1995: 341-343).

However, the Constitution of Bangladesh declares equal rights of men and women in every spheres of life. Similarly, article 16 (1) of the UDHR stipulates:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family ... and ... are entitled to equal rights as marriage, during marriage and its dissolution.¹⁵

As polygamy violates rights to equality of men and women within family life, the Committee against Discrimination formed under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. 21 states that:

Polygamous marriage contravenes a woman's rights to equality with men, and can have such serious emotion and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose Constitutions guarantee equal rights, permits polygamous marriage in according with personal or customary law. This violates the constitutional rights of women breaches the provisions of this convention.

¹⁴ (1960) A.I.R. 684 (Allahabad).

¹⁵ See also, article 23(4) of the ICCPR and article 3 of the ICESCR.

Though Bangladesh is a signatory of CEDAW, it is not possible to prohibit polygamy completely. Because most of the people of our country are Muslim and it depends on their religious believe and emotion. But it is a good sign in Bangladesh that most of the people know that in the subsistence of one wife marrying the second wife or more is not at all a right decision.

7.2 Economic rights

Economic instability and vulnerability clearly impact women in both monogamous and polygamous families. But economic harms to women are especially aggravated by polygamy. In Bangladesh, women's domestic work is typically uncompensated and that women on average have less education and so a lower wage-earning capacity are particularly aggravated by polygamy. The economic under-valuing of women's work will often cause inevitable financial strain in polygamous families where one husband's earning may have to support multiple wives and many children. It is very difficult for him to provide households and other related materials of more than one wife and a large number of children. These economic harms of polygamy are cited by many commentators as one of the main factors along with a growing trend toward recognising women's equality in the restriction of the practice internationally.

So the economic harms of polygamy indicate the practice of diminishing individual's ability to attain an adequate standard of living. Where polygamy precludes families from attaining an adequate standard of living, and places unequal economic and child-bearing strains on multiple wives, it undermines their and their children's ability to attain proper medical care, food, clothing and even housing which is clearly violation of the UDHR 1948. Article 25 of the UDHR states that:

[E]veryone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services...

Article 17 of the ICESCR has bestowed a positive duty upon the States parties stipulating that:

States parties to the present Covenant recognize the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions.

In addition, article 13 of the CEDAW further requires States parties to:

[T]ake all appropriate measures to eliminate discrimination against women in... economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular; the right to family benefits...

The equal right to 'family benefit' includes any benefits a family receives through employment, social security, or health care as a matter of public policy. In polygamous families, wives would not receive the same benefits as their husband if such benefits were intended to be proportionate to two spouses. Thus if a husband availed himself of half these benefits, with the rest to be shared between his wives, each wife would receive only a fraction in comparison to her husband.

7.3 Best interest of children

Polygamy is not only harm to women but also to children. In a study by Varghese I Cherian (1989: 117) academic achievement of children was measured in relation to their parents' marital status (monogamous or polygamous). According to the study, achievement score of children from polygamous families was significantly lower than those from monogamous families. The researchers explained this difference by noting that polygamous families are more prone to jealousy, conflict, tension, emotional stress, opposing motives, insecurity and anxiety. This type of emotional stress, anxiety and insecurity can seriously undermine educational progress of the children. In particular, competition and jealousy between co-wives can cause significant emotional problems for children. Moreover, fathers in households are often unable to give sufficient attention to all their children's educational and emotional security. This emotional deprivation and learning problems clearly violate the best interest of the child as required by article 3 of the Convention on the Rights of the Child 1990.

8. Conclusion

According to the Islamic law marriage is a sharing between the two halves of the society and its objectives are emotional wellbeing and spiritual harmony. Its bases are love and mercy. The Almighty says:

And among His signs is this: That he created mates for you from yourselves that you may find rest, peace of mind in them, and He ordained between you love and mercy. Lo, herein indeed are signs for people who reflect.¹⁶

The Quran also states that men who choose this route must deal with his wives justly. If the husband fears that he cannot deal with his wives justly, then he should marry only one.

In the socio-economic context of Bangladesh, equal treatment among the wives is impossible. In this view, the Muslim Family Laws Ordinance 1961 contains provision of polygamy along with specific requirements. This Ordinance requires that the man who wants to get multiple marriages must apply showing reasons to the Chairman of the concerned Union Council/ Municipal Corporation etc. But this provision is hardly followed. As a result, the women and children are deprived from their rights that are recognised by fundamental human right instruments. To overcome such problems, the following steps should be taken -

- a) to ensure justification of the application for polygamy, section 6 of the Muslim Family Laws Ordinance 1961 should be amended revoking the jurisdiction of the Arbitration Council and at the same time, inserting the exclusive jurisdiction of the Family Courts on polygamy;
- b) the man who wants to take another wife during the subsistence of any wife shall apply to the concerned Family Court assigning reasons that he has no alternative without getting another wife and he is a man of having good income to support his wives and dependants;
- c) after receiving application, the Court shall issue summons upon the existing and proposed wife and husband directing them to appear before the Court in a fixed date;
- d) on the date so fixed Court shall hear both wives (existing and proposed) and the husband as well as hear the learned pleaders (if any) engaged by the parties;
- e) thereupon the Court will verify the reasons assigned by the husband, consider the consent of the wives, financial capacity of the husband, mental capacity of equal treatment of the husband to his wives and other relevant issues;

¹⁶ Surah Ar-Rum: verse 21.

- f) upon a meticulous consideration of the facts and circumstances, if the Court is satisfied and convinced that the proposed marriage is necessary and not harmful for the existing wife/wives, the Court will allow the application of the husband and issue a certificate to that effect;
- g) if the Court is dissatisfied and considers the proposed marriage unnecessary, the application will be dismissed;
- h) any man who will contract another marriage without the permission of the concerned Family Court-
 - i. shall Pay immediately the entire amount of dower (prompt or deferred), if not so paid the amount shall be recoverable as arrears of land revenue; and moreover;
 - ii. upon complaint filed by the wife/wives in case of contravening these provisions, the husband will suffer exemplary physical and financial punishment. And in this connection section 6 of the Muslim Family Laws Ordinance, 1961 as well as section 5 of the Family Courts Ordinance, 1985 need to be amended.

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