

Conceptualization of Polygamy in the Context of Islamic Law: A Study of Modern Human Rights Law and Pakistani Law

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Abstract

Polygamy refers to a marriage involving more than two partners. Polygamy is a social practice that is not widely accepted in most nations and is prohibited by law. Usually, this phrase would refer to a sort of marriage in which there have been more than one spouse, but at the same time, this will apply to more than one wife. For a long time, many communities, tribes, and civilizations around the world viewed polygamy as a regular practice, and there were no issues with a man having more than one wife, and sometimes even a woman having more than one husband. This research investigates the framework of polygamy in Islam and international human rights law, focusing on Pakistan. The application of Islamic law in relation to polygamy is compared with the needs and challenges of legal dynamism in terms of suitability with people, place, and time in the light of international human law and domestic legal framework. The study is divided into three sections: 1. polygamy in Islam; 2. Modern Human Rights Law where polygamy is prohibited; and 3. Pakistani legislation where polygamy is permitted within a regulated framework.

Key Words: Polygamy; Islamic Law; Human Rights Law; Pakistan

Introduction:

Polygamy is a terminology derived from the Greek Words "Poly" for many and "Gamy" for woman or wife. It all usually amounts to "often married".¹



The term polygamy is frequently misunderstood, and it is sometimes confused with the definition of the term bigamy, which allows you to have two separate and distinct marriages at the same time, as opposed to what polygamy actually means: having several spouses living in the same household.² Polygamy has existed for a very long period, and practically every continent has had its own version of the practice. Although polygamy is illegal under civil law in many countries, it is nevertheless legal under customary law. The customary rule on polygamy permits a man to have many wives in many nations with different legal systems, and it precludes a current wife from objecting to her husband's marriage to a new woman. This practice regards women as second-class members of their families and as second-class citizens in comparison to men. Polygamy is particularly harmful to children because when a man has multiple wives, he frequently has a huge number of children in a short period of time. Because numerous rivalrous spouses and children are competing for resources, family conflicts are common. Although polygamy is not a prohibited practice under international human rights legislation, permitting it to exist legally allows it to breach essential rights such as dignity, equality, health, and legal equality. It also promotes women's lower social and economic standing by requiring them to share already scant resources with their co-wives and children.³ Polygamy has a negative influence on a woman's health, including mental health, sexual and reproductive health, and mortality from AIDS, due to its complicated role in divorce and inheritance law.

I. Polygamy in Islam:

Polygamy is permitted in Islam, with the exception that a man can only have four wives at a time. During His lifetime, Holy Prophet Muhammad (PBUH) was married to eleven different women. The Qur'an makes it plain that men who take this path must treat their spouses fairly.⁴ If the husband is afraid of not being able to treat fairly with his wives, he should only marry one. The Qur'an does not recommend marrying more than one wife, although it does allow it to make things easier for a woman who is alone. According to Islamic scholars, if a husband wishes to marry another woman, he must inform his first wife. It is not necessary for a husband to obtain consent from his first wife. Women, on the other hand, are only permitted to marry one husband, however they may remarry after a divorce.⁵ Although traditional Islamic law supports polygamy in many Muslim nations, secular elements

within some Muslim society question its legitimacy. In Muslim-majority nations that have not accepted Islamic law for marital rules, such as Azerbaijan, Bosnia and Herzegovina, Tunisia, and Turkey, polygamy is illegal.

Polygamy and polygamy legislation vary considerably across the Islamic world, creating a complex and varied background from country to country. While it may be fairly common in some Muslim countries, it is rare or non-existent in the vast majority. A man may have up to four wives, each of whom must have her own property, assets, and dowry, according to traditional Islamic law.⁶ The wives usually have little to no contact with one another and live separate lives in their own homes, sometimes in different cities, despite the fact that they all have the same spouse. Polygamy is the exception rather than the rule, and it is historically limited to men who are capable of managing their affairs. In certain nations, it is unlawful for a man to marry numerous women if he cannot afford to adequately care for each of them.

Polygamy is mostly prevalent in the modern Muslim community in Saudi Arabia, West and East Africa, and Sudan, where the president encourages it due of the huge female population. Tunisia is the only Arab League member state that specifically forbids polygamy. Libya, Pakistan, and Morocco are among the few countries that demand the first wife's written approval if her husband desires to marry a second, third, or fourth wife.⁷

No explicit prohibition

ALLAH would have specifically forbidden Muslims from practising polygamy if it was prohibited. ALLAH has expressly forbidden immorality, interest, wine, and unjustly devouring others' property. Verses for the said mentioned offences are:

1. الربا حرّم و البيع الله حلّ أ.
2. سبيلاً ساء و فاحشة كان إنّه الرّنا تقربوا ولا
3. بالباطل بينكم أموالكم تأكلوا لا آمنوا يهالذين يا

The term "adal" appears in the Quran in several different contexts. It's also referred to as "absolute adal" and "technical adal." Absolute adal refers to equality when it comes to a single inclination and love. However, human beings have little control over their feelings, and things that are beyond their control cannot be subjected to Shariah. In polygamy verses, the word "adal" refers to technical adal. That is to say, a polygamous male should offer all of

his wives with the same kind of lifestyle, maintenance, and night companionship, as well as the same accessories and everyday necessities.⁸ It is not about love and affection; it would be ideal if a guy loved all of his women equally, but it is human nature to love a person (wife) more than others for many reasons, such as her piety or good behaviour.

Two separate words are employed in these verses, one is "Qist" and the other is "Adal." These words' meanings should not be confused with one another. The term "Qist" relates to "technical Adal," which alludes to justice in terms of upkeep, conjugal rights, and lifestyle. While "Adal" is short for "Absolute Adal," which implies "righteousness in love and inclination." The condition for polygamy is Qist, not Adal.⁹

The best example for us is our Holy Prophet Muhammad (PBUH), who was just to all of His wives, but was more inclined to Hazrat Ayesha R.A. since justice among spouses only relates to material justice. Holy Prophet Muhammad (PBUH) and His companions serve as role models for all of us. Polygamous marriages have been wedded by Holy Prophet (PBUH)'s companions, tabe,een, taba tabe,een, and afterwards other notable Islamic thinkers. They would never have married more than one if polygamy had been outlawed. If you are scared about not being able to have equality among your women, Islam is the only religion that has set a ban on polygamy and instructs you to practice monogamy.

Stipulations against Polygamy in the Marriage Contract

In general, Islam allows a wife to include any terms she wants in her marriage contract. In determining the legitimacy of such circumstances, Muslim jurists divided. Any condition can be made a stipulation for marriage under the Hanbali school of law.¹⁰ If the husband however or rather breached the requirements agreed upon in the marital contract, the wife was entitled to divorce by way of talaq tafwid or talaq ta'liq.¹¹ They maintained that every Muslim should be required to follow all of the terms and conditions that had been agreed upon. In this case, the wife could put a clause in her marriage contract prohibiting her husband from entering into another marriage.¹²

On the other hand, the majority of jurists disagree with this viewpoint, calling such a prohibition unconstitutional. They contended that because the Qur'an clearly permits polygamy, a clause prohibiting it in any marriage contract would be in violation of the Qur'an.¹³ In the Hanbali schools of law, including a clause prohibiting polygamy in a marriage contract did not

prevent the husband from marrying again. If the husband broke the agreed-upon stipulation, the existing wife was entitled to petition for divorce. It's worth noting that the wives in the Hanbali schools of law have a slight advantage. They had the advantage of knowing that their spouses did not engage in polygamy, a right that is not granted by other schools of law.

However, not all of the conditions were followed. Stipulations that could not be carried out because they were proven to be damaging to the wives could not be carried out. For example, if a prospective woman demanded that her husband divorce an existing wife as a condition of marriage, all jurists agreed that such a request was void.

2. Modern Human Rights Law and Polygamy:

While polygamy is not expressly banned by any international treaty, it violates fundamental human rights such as the right to the preservation of women's dignity, the right to equality within the family, and the right to equal treatment under the law.¹⁴ Polygamy is usually considered to be incompatible with both article 16(1) of the Universal Declaration of Human Rights (UDHR), which states that men and women have equal rights in marriage, and article 16(1)(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which ensures the right to freely choose a spouse and enter into a marriage with free and full consent. Polygamy also violates article 23(4) of the International Covenant on Civil and Political Rights (ICCPR), which requires states to take reasonable steps to guarantee that spouses have equal rights and duties in marriage. Those provisions allude to marriage as an institution founded on the equality of husband and wife. Polygamy goes against the equality principle since it gives one spouse the unilateral authority to take many partners without spousal permission and then asks the first spouse to share the marriage's resources as a result of that decision.¹⁵

The United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) focused on women's rights in the context of the family in 1994, and examined CEDAW provisions relating to polygamy.¹⁶ Though the Committee acknowledged that "the family's shape and concept may vary from state to state," it was adamant that polygamous marriages are unacceptable since they violate women's right to equality with men. "Polygamous marriage contravenes a woman's right to equality with men, and can have such substantial emotional and financial effects for her and her

dependents that such marriages ought to be discouraged and forbidden," the Committee said this about practices in several nations. The Committee ruled that the continued practise of polygamy in these states breaches women's fundamental rights as well as Article 5(a) of the Convention, which requires state parties to work toward the elimination of practises based on sex-based discrimination or stereotypes.¹⁷

Article 16 of UDHR

Article 16 declares that "men and women" have the right to marry, with the UDHR's female drafters succeeding in their resolve that it should clearly state that women and men have equal rights in marriage, considering the pervasive discrimination in marriage at the time. "Marriage shall be entered into only with the free and full consent of the intending spouses," says paragraph 2 of Article 16. Because children may not be in a position to offer free and full consent, this, together with the wording "of full age" in paragraph 1, leads to a ban on child and/or forced marriage. The family is society's natural and fundamental group unit, and it is entitled to social and state protection.¹⁸

Article 23 of ICCPR

The family is the natural and essential group unit of society, according to Article 23 of the International Covenant on Civil and Political Rights, and it is entitled to protection from society and the state. Other articles of the Covenant also provide protection to the family and its members, either directly or indirectly. The family is society's natural and fundamental group unit, and it is entitled to society's and the state's protection. It is recognized that men and women of marriageable age have the right to marry and start a family. No marriage will be engaged into without the free and unrestricted consent of both parties. States Parties to the current Covenant must take reasonable steps to ensure that spouses' rights and obligations are equal before, during, and after marriage. In the situation of dissolution, provisions for the required protection of any children must be made.¹⁹

Article 16 of CEDAW

State Parties are required by Article 16 to take all reasonable steps to eliminate discrimination against women in all aspects of marriage and family life. This includes the following:

- The right to marry is the same for everyone.

- The same right to freely choose a spouse and to marry only with their free and informed consent.
- During and after a marriage, everyone have the same rights and duties.
- Regardless of their marital status, they have the same rights and responsibilities as parents.
- The same rights to choose the number and spacing of their children freely and responsibly, as well as to have access to the information, education, and resources necessary to exercise these rights.
- Children's guardianship, wardship, trusteeship, and adoption all have the same rights and obligations.
- Personal rights equal to those of a husband and wife, including the freedom to choose a family name, profession, and occupation.

Men and women have equal rights, thus if a woman can only marry one person at a time, a male should be limited to one marriage as well. The UDHR's clause is intended to fairness and equality between adult men and women. The secular West finds it difficult to reconcile these provisions of equal rights for spouses with Islamic law, which allows for up to four marriages for males and monogamy for women. However, laws have been created to limit the husband's right to do so.

3. Polygamy in Pakistani Law:

Article 6 of the Muslim Family Laws Ordinance (MFLO), 1961²⁰ prevents males from marrying another woman when already married, unless the existing wife consents, or then the Arbitration Council if she refuses. First, an application for permission to marry is made to the Chairman of the Union Council, in which the reasons for the proposed marriage are stated, as well as whether or not the already existing wife or wives agree. If the Chairman deems the reasons to be just and the already existing wife agrees, an Arbitration Council is formed, in which both the husband and wife nominate a representative each, and if they deem that a marriage is necessary, permission is granted.

The Arbitration Council may consider infertility, physical infirmity and physical unfitness for conjugal relations, purposeful evasion of a ruling for restitution of conjugal rights, or insanity on the part of the current wife in determining whether the proposed marriage is necessary and just. If a party is dissatisfied with the arbitration council's judgement, he or she may request a revision from the collector, whose decision is final

and cannot be challenged in a court of law. The petition for revision must be written. It must describe the grounds for challenging the decision and bear the applicant's signature.²¹

The provision regulating polygamy in the Muslim Family Laws Ordinance is mainly a compromise between conservative and modernizing viewpoints. The Ordinance does not outright prohibit polygamous marriages; rather, it places some procedural constraints on their unfettered practice. Polygamy will be less common as a result of these limits, as it will be limited to unique conditions and requirements alone.²²

The vagueness of the Ordinance's clauses prompted a number of concerns. What are the legal consequences of a marriage contracted in violation of Section 6 of the Ordinance, for example? "The Ordinance of course only penalises the person in respect of marriage celebrated in contravention of the provisions of the Ordinance by making him liable to imprisonment or fine or both, but does not invalidate the marriage itself," the Supreme Court said in *Ali Nawaz Gardazi v. Muhammad Yousaf*, PLD 1963 SC 51.

One question in *Abdul Bashir v. Nurun Nabi*, 39 DLR (1987) 333, was whether the approval of the existing wife was required for contracting a second marriage. The Court determined that Section 6's legislative objective was to limit polygamy and allow it only in circumstances where the Arbitration Council thought it was fair. Section 6 stipulated that the husband would be punished if he married without first obtaining the Arbitration Council's written authorization, but it did not mention any punishment for marrying without the consent of the existing wife. It should be noted that, while failing to obtain the approval of the current wife does not render the second marriage invalid or subject the husband to a fine or imprisonment, her consent is still significant in two ways. First off, it will make it easier for the husband to convince the Arbitration Council that the proposed second marriage is both necessary and just. Second, if the wife has refused to consent and the husband has taken another wife in violation of Section 6 of the Ordinance, she has the right to seek divorce.²³

Polygamy is Not Prohibited

Only with the consent of the Arbitration Council, a man may contract another marriage during the duration of an existing marriage. The marriage is not void if he does so without the consent of the Arbitration Council. The

Ordinance merely makes a person subject to jail, fines, or both for a marriage celebrated in violation of the Ordinance's provisions, but it does not invalidate the marriage itself (PLD FSC 518, PLJ FSC 236).

Grounds for Permission of Second Marriage

Section 6 of the MFLO, 1961 requires the Arbitration Council to rule on a husband's request for authorization to contact another marriage while his current marriage is still ongoing and to record the grounds for its decision. According to the rules, the council should consider the following factors in particular when examining the question. Sterility, physical infirmity, physical fitness, unfitness for marital relations, purposeful evasion of a decree for restitution of conjugal rights, or insanity on the side of an existing wife are all grounds for restitution of conjugal rights. The Arbitration Council, however, is not bound by these or any other reasons. They must make a decision based on their own reasoning and wisdom.²⁴

Marriage Without Permission of the Arbitration Council

Section 6 does not declare subsequent marriages illegal; rather, it prescribes a procedure to be followed for subsequent marriages, as well as penalties for non-compliance. As a result, the section's spirit is reformatory only, as it prescribes corrective measures to prevent injustice to existing wives/wives. Thus, a marriage contracted without the consent of the Arbitration Council or the woman is not void, but the male will face the penalties set forth in the clause, which are as follows: (KLR 1991 86) (b).

1. Pay the entire sum of dower immediately, whether deferred or prompt, and if not, recoverable as land revenue arrears.
2. If a complaint is filed against him, he may be sentenced to one year in prison and a fine of five hundred thousand rupees.

Failure to get such consent under section 6 results in just a penalty and has no bearing on the legitimacy of the second marriage (PLD 1995 Lah. 475). (b)

Necessary Ingredients for Polygamy

Section 6 of the ordinance requires the following factors to constitute an offence:

- i. A previous marriage and existing wife/wives.
- ii. Failure to obtain the necessary consent from the Arbitration Council for the addition of a wife.
- iii. Marriage celebrations in violation of section 6 of the ordinance MLD 93, 1992 (b)

Abetment of Offence

The question was addressed as to whether the second wife may be found guilty of aiding and abetting an offence under section 6(5)(b) of the Ordinance. *Makbul Ali v. Manwara Begum*, 39 DLR (1987) 181, dealt with the issue. The first woman said that her husband sent her to her father's house and that while she was gone, he married the second wife. A magistrate started proceedings against both of them after she filed a complaint under Section 6(5)(b). The second wife made an application to the High Court to have the proceedings against her halted. The Court ruled as follows:

Criminal liability will consequently be assumed by the husband, who is the "man" referred to in that sub-section, rather than the lady whom he marries, under sub-section (5) of section 6 of the Ordinance. The restriction is placed on the man who wishes to contract another marriage with a woman during the continuation of the existing marriage, and nowhere is the said already married woman required to apply for permission to marry or to suffer any imprisonment for her husband's taking her as a wife during the continuation of his existing marriage of marriages without permission, nor is she required to suffer the punishment as an abettor.

Special provisions are provided in all particular acts with regard to abetment of offences under such legislation. The Muslim Family Laws Ordinance 1961 lacks such a provision, and as a result, abetment of an offence is punishable under it. The goal of section 6(5) of the ordinance appears to be to ensure that only the individual who violates the ordinance's requirements is prosecuted, and no one else. *Dhaka LR 379, 1981*

Bar to Jurisdiction of Civil Courts

If a party is dissatisfied with the arbitration council's judgement, he or she may request a revision from the collector, whose decision is final and cannot be challenged in a court of law. However, if such agencies exercise jurisdiction outside of the legal area, the civil court has the right to intervene. (PLJ Rwp 638, 1981) (DB)

Permission by Wife on Condition Against Consideration

Wife consents to husband entering into a second marriage on the condition that he continues to pay Rs. 500/- per month in maintenance and transfers one residential room and a shop portion of the house. The husband took advantage of the opportunity and entered into a second marriage. However, instead of following through on his pledge, he divorced his first wife. The

wife's lawsuit was rejected because the agreement was made without consideration and in violation of section 27 of the Contract Act of 1872. However, the higher court ruled that, under section 3 of the MFLO, the ordinance will take precedence over any other law. Prior to a second marriage, Section 6 of the MFLO asks approval from the wife or the Arbitration Council, and the receipt of such consent is a valid consideration for the agreement to transfer the specific property. As a result, the lawsuit was not dismissed (PLD 2003 SC 128).

Conclusion

ALLAH has placed benefits for the entire humanity in everything, but we are sometimes unable to explore it and sometimes we pretend not to see the everlasting benefits. We must submit all of our actions to Islam and enact our national laws in accordance with true Islamic injunctions, or we will face the same problems that Europe is facing today. Europe today has a problem with an excess of women, and it should consider whether it can solve that problem other than by legalizing limited polygamy. Perhaps the only other option is prostitution, which is prevalent in all European countries and is recognized in practice even where the law does not recognize it. Nature will take its course, and the only other option to a limited polygamy is to allow illicit intercourse. Prohibiting legal polygamous marriage while permitting prostitution, bisexual and heterosexual intercourses makes no sense and is completely absurd. Polygamy definitely harms women because it fosters jealousy on their part. Women, on the other hand, should be grateful to Pakistan's economic factors, which have at least favoured them by limiting unbridled polygamous marriages. In a state where more than half of the population is fighting for survival and where a single marriage is regarded as a great achievement, polygamous marriage is nothing more than an adorable fantasy. It is very unfortunate that, on the one hand, we have made every illicit act easily accessible, while on the other hand, legal and permitted marriages are made extremely difficult. Someone correctly stated, "in a society where marriage is made quite difficult, adultery and fornication flourish out there."

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