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Muslim Personal Law in the Present Context

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A Muslim woman at a demonstration organised by a women's organisation on the International Women's Day in Mumbai on March 8, 2005. File photo: Paul Noronha The Hindu

Demands for a common civil code by sections of the polity have brought into focus some features of the Muslim personal law in India. However, a better understanding of rulings by the Supreme Court of India, the conceptual foundations of Muslim laws relating to marriage and divorce, and Muslim laws in other countries will lead to a healthier discussion, create a better appreciation of the issues, and result in an improved legal system, says ***A. Faizur Rahman****, secretary general of the Islamic Forum for the Promotion of Moderate Thought.*

The debate on the Muslim personal law reached a crescendo in October 2016 after the Union government led by the Bharatiya Janata Party (BJP) filed an affidavit in the Supreme Court against certain Muslim practices. This prompted even the Prime Minister to join the fray in support of the constitutional rights of Muslim women. Indeed, it was the Supreme Court that had initiated this intense discussion when in October 2015 it ordered the registration of a Public Interest Litigation (PIL) to examine the discrimination suffered by Muslim women because of instant triple talaq and polygamy.

Although the government's affidavit, as some websites suggested [1] , does not ask the Supreme Court to "ban" or "abolish" instant talaq or polygamy, and concedes that "only some women are directly and actually affected by these practices [2] ", it nevertheless tells the highest court that "the issue of validity of triple talaq, *nikah halala* and polygamy needs to be considered in the light of principles of gender justice and the overriding principle of non-discrimination, dignity and equality [3] ."

Given this renewed interest in Muslim law, it would be worth testing the legality of the aforementioned three practices in the light of the Indian constitution and also principles of Islamic law.

Instant triple talaq

The Union government's affidavit seems to have ignored the fact that the Supreme Court invalidated instant triple talaq 14 years ago in *Shamim Ara v. State of U.P., 2002 (7) SCC 518* [4] .

The two-judge bench which decided this case, after expressing its "respectful agreement", reinforced a previous High Court judgment which had inter alia ruled that

> "…the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected."

The Supreme Court could not have been more accurate in its understanding of the Islamic law of divorce. [A detailed analysis of this law by the author was published in *The Hindu* [5]] Indeed, the endorsement of the Quranic procedure by the Supreme Court, in effect, delegitimised all forms of unilateral divorce initiated by Muslim men, particularly instant talaq or, *talaq al-bid'a*. Hence, it makes no sense to expect the highest court, as some Muslim groups are demanding, to "abolish" something which it has already invalidated.

Nevertheless, as the matter has been referred to it once again, the Supreme Court in the exercise of the powers conferred upon it by Articles 141 and 142 of the constitution, may, through a larger bench, further clarify, elaborate and enlarge the scope of the *Shamim Ara* judgment. For instance, it can make the procedure of talaq ratified in this ruling common to both men and women. This would also be in consonance with the Islamic idea of gender equality which is rooted in the fact that the Quran does not have gender specific tenets. All its guidelines are gender-neutral and universally applicable.

Halala

Halala is the un-Islamic temporary marriage a victim of instant talaq is forced to undergo with another man to remarry her first husband. It is actually a blatant distortion of a Quranic injunction [6] which, to emphasise the sanctity

of marriage and the enormity of ending it for frivolous reasons, introduced a prohibited degree by warning the parties who opt for separation through the third and final talaq that they cannot entertain hopes of remarrying each other unless the divorced wife voluntarily decides to marry another man and that marriage too ends in a divorce. It is understood here that divorce may result only if the couple has serious mutual disagreements. In the rare event of such differences cropping up, the wife and her new husband are required to follow the elaborate Quranic procedure of divorce mentioned in the *Shamim Ara* ruling, and elucidated in this author's article cited above.

Put differently, the post-talaq prohibited degree of marriage instituted by the Quran makes remarriage of irrevocably divorced couples extremely difficult. It goes without saying here that couples who go through the drawn-out Quranic procedure of divorce will not be keen on remarrying each other as their decision to separate would have been a well-thought-out one. However, the same cannot be said of victims of instant triple talaq which is invariably pronounced in a fit of rage, and generates a sense of helplessness in the minds of its victims for they are made to believe that their marriage has broken.

It is this totally unjustified legitimisation of instant talaq that has led to the abominable circumvention of the Quran, as a consequence of which a pliable person is set up to marry the instantly divorced wife, consummate the marriage overnight and divorce her the next day so as to legitimise her remarriage with the original husband in accordance with the law laid down in verse 2:230. This outrageousness which an innocent woman is subjected to in the name a wrong interpretation of *shariah* is known in sectarian jurisprudence as *nikah al-tahleel* or *halala*.

Thankfully, as the traumatic stitch of *halala* is necessitated by the cruel cut of instant triple talaq, the de-legitimisation of the latter in *Shamim Ara* has rendered the former redundant.

Polygamy

The word "polygamy" includes both "polygyny" (a man taking multiple wives) and "polyandry" (a woman taking multiple husbands). The Quran prohibits polyandry (4:24) and therefore, it is polygyny that the Supreme Court will be ruling on in the present case. It may be pointed out here that the proscription of polyandry as against the conditional permission of polygyny does not contradict the Quranic principles of gender equality. This is because conditional polygyny is not an Islamic right. It is an *ad hoc*social remedy which can be invoked only in certain critical situations.

Indeed, polygyny, which finds mention just once (4:3) in the Quran, is one of the most misunderstood concepts of Islamic law. It has been abused over the centuries by Muslim men without appreciating the spirit behind its exceptional sanction, which is clearly contextualised in the historical conditions of the time when a large number of women were widowed and children orphaned as Muslims suffered heavy casualties in defending the nascent Islamic community in Medina. Even a simple reading of verses 4: 2, 3 and 127 will show that it was under such circumstances that the Quran allowed conditional polygyny, mainly to protect orphans and their mothers from an exploitative society.

Verse 4:2 warns caretakers against devouring the assets of orphans either by merging them with their own, or substituting their "worthless properties for the good ones" of the orphans. And, if the caretakers "fear that they may not be able to do justice" to the interests of the orphans in isolation, the next verse allows them to marry their widowed mothers — on the condition that the new family would be dealt justly on a par with the existing one. For

those who are not up to it, the instruction of Quran is: “Then [marry] only one.” It may be noted here that barrenness or terminal illness of the first wife are not among the reasons that legitimise polygyny.

The sanctity of taking care of widows and their children was further emphasised in 4:127;

> “And remember what has been rehearsed unto you in the Book [4:2 and 3] concerning the orphans of women to whom you give not what is prescribed, and yet whom you desire to marry...”

It is clear from these arguments that verse 4:3 is not a hedonistic licence to marry several women.

In addition, there are several statements in the Quran which describe husband and wife as “spousal mates” created to find “quiet of mind” (7:189) and “to dwell in tranquillity” (30:21) in the companionship of each other. Indeed, verse 7:189, which emphasises the origin of man from a single cell (*nafsan waahida*), talks of the wife in the singular as *zaujaha*, thereby emphasising monogamy. Thus, marriage according to the Quran is the emotional bonding of two minds which cannot be achieved simultaneously with more than one woman.

If despite this, the Quran permitted conditional polygyny it was, as argued above, only as a social remedy to alleviate the sufferings of women and orphans in calamitous situations. This can be appreciated from the dreadful state of affairs in West Asia today. In November 2011, *The New York Times,* citing Iraqi government sources, reported the presence of a whopping one million war widows – and at least an equal number of orphaned children – in that country [7] .

The article highlights the poignant case of war widows housed in a “rusting trailer camp” to show how most of them wanted to remarry “however unlikely” but were unable to find husbands. A disturbing passage from the report concerning Noria Khalaf, a war widow, reads as follows:

> “Finding a good man in Baghdad these days is a challenge. Not only is nearly every trailer in this dusty government-run camp on the capital’s outskirts occupied by war widows like her [Noria Khalaf], with nary a man in sight, but across Iraq women now outnumber men.”

The report also underlines the difficulty of rehabilitating such a huge number of widows and orphans. It notes, “Confronted with so many widows, the Iraqi government is providing only minimal assistance, equivalent to about $80 a month to those widowed in the recent conflict.”

Thankfully, such conditions do not exist in India. Therefore, polygyny is not permissible for Muslim men here. This means that the Supreme Court would be justified in de-legitimising polygyny performed for reasons other than those mentioned in the Quran just as it invalidated instant triple talaq – in *Shamim Ara* – for not being in consonance with the Quranic procedure. Presently, Muslim men in India enjoy an unrestricted right to marry up to four wives which is a violation of Quranic injunctions. The court’s imposition of fetters on polygyny would serve as a *de facto* ban on the practice, thereby rendering unnecessary the need for a legislative ban which would be politically inexpedient in the prevailing circumstances.

Muslim polygyny vs. Hindu bigamy

From another point of view too, a total ban on polygyny may not be advisable. Latest census data and impact studies conducted by researchers such as Flavia Agnes show that bigamy continues to prevail among the Hindus

despite the Hindu Marriage Act, 1955 (HMA) outlawing it, and Sec. 494 of the IPC declaring it a punishable offense. Chart C-3 of the 2011 Census [8] containing details on marital status by religious community and sex provides the shocking information that among Hindus (not including Sikhs, Buddhists and Jains) married women outnumber married men by a whopping 43.56 lakhs. To be exact, out 471397900 married Hindus 233520803 are males and 237877097 females, thus exceeding the males by 4356294 (This number does not include widows).

The only inference that could be drawn from these figures is that 4356294 Hindu women are in bigamous relationships with Hindu men unless it can be proved they are married to non-Hindus. Put differently, in 60 years of its existence, the HMA has not prevented 4356294 Hindu men from having two wives simultaneously.

One reason for this could be the fact that Sec. 198 of the Cr.Pc does not allow any court to take cognisance of an offence punishable under Chapter XX of the IPC (which includes Sec. 494) except upon a complaint made by the "person aggrieved" by the offence. For a male bigamist the first wife is the aggrieved person, and if she chooses not to lodge a complaint her husband cannot be prosecuted.

However, the bigger issue here is that the "second wife" cannot claim rights on a par with the first wife under the Hindu law even if the first wife consents to her husband taking another wife, and the "second wife" is informed of the existence of the first before marriage. Surprisingly, there have been cases where even the Supreme Court has held that the second wife is not entitled to receive a share from her husband's property although her children born of the second marriage are allowed a share in their father's property [9] . This seriously compromises the equality guaranteed to her as a citizen of this country under Article 14, and the right to life with dignity assured under Article 21 of our Constitution. It also brings into question the constitutionality of laws that discourage women from making informed choices; and when they do, penalise them for exercising their human agency in the name of a state-defined societal morality. The presumption here is, women who enter into "oppressive" bigamous or polygamous relationships do so on the basis of a "false consciousness", (a Marxian concept) without really understanding what is good for them.

Anne Phillips of the London School of Economics, an authority on liberalism and multiculturalism, counters this dogmatic belief saying, "I don't think the general idea of the happy slave is very plausible…it's a figment of the philosopher's imagination…But if…somebody says, 'You may think this is oppressive but this is my choice', I think we have to listen to people [10] ."

Another fundamental question that needs to asked is: In a democracy, can a category called "second wives" be created under the definition of "reasonable classification" to downgrade the rights of women who voluntarily choose to enter into bigamous relationships, especially when the Protection of Women from Domestic Violence Act, 2005, recognises and protects even live-in liaisons?

Nonetheless, the consolation is that our courts are fully aware of the flaws in the Hindu law and have tried to overcome them through humanitarian interpretations. In *Rameshchandra Rampratapji Daga* (2004) the Supreme Court while justifying the granting of maintenance to a second wife and her daughter, observed:

> "Keeping into consideration the present state of the statutory Hindu Law, a bigamous marriage may be declared illegal being in contravention of the provisions of the [Hindu Marriage] Act but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependent [11]."

This view was fully endorsed in 2013 by another Supreme Court bench comprising Justices A. K. Sikri and Ranjana Desai in *Badshah Vs. Sou*. *Urmila Badshah Godse & Anr*. In what can be described as one the most sociologically compassionate judgments in recent history, the judges emphasised the "purposive interpretation" of legal provisions by pointing out that purpose of the Constitution is to achieve social justice.

> "Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society [12]."

From the point of view of making laws for changing times the judges' advice was: "Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law."

Unfortunately, ill-informed calls for the abolition of polygyny among Muslims are not based on an appreciation of the change in social reality which is manifesting itself in the form of a renewed emphasis on individual rights especially with regard to sexual orientation and preference. Karl Popper, one of the most influential thinkers of the 20th century, argues that the individual should not be forced to sub serve the interests of the whole. Attacking Plato for his totalitarian idea of "radical collectivism", Popper writes that it was the emancipation of the individual that had led to the breakdown of tribalism and the rise of democracy in the past [13] .

If, in the light of the foregoing arguments, a blanket ban on Muslim polygyny is being opposed it should not be construed as an expression of support for the practice. The point that is sought to be made here is this: if polygyny is abruptly declared illegal for Muslims on the lines of the Hindu law, without first identifying and addressing the causes of failure of HMA in preventing bigamy, it would end up creating the same confusions in the Muslim law, especially with regard to the rights of the "second wife" under Articles 14 and 21. And certainly it cannot be argued that if a woman marries someone despite knowing about the legal bar on second marriage she should suffer the consequences thereof.

The renowned Australian jurist Sir George Paton makes a significant legal point when he says,

"Even where there is a deliberate policy behind the enactment of a statute, sometimes the actual result is the reverse of that intended. This illustrates the importance of studying the actual effects of law, as well as its formulation in the books: some statutes miss their intended effect because a convenient means of evasion is found [14]."

Pending examination of the Hindu bigamy law through the prism of these facts, the most judicious option, insofar as Muslim polygyny is concerned, would be to regulate and fetter it with Quranic conditions. It makes no sense for any democratic state to enact and enforce laws in their teleological abstractness, when it can effectively curb unwarranted traditions by practical and practicable formulations without alienating a large section of the population.

Polygyny in Pakistan, Bangladesh and Morocco

The family laws of Pakistan, Bangladesh and Morocco provide an excellent case study of how polygyny has been regulated in most Muslim countries.

Section 6 of Pakistan's Muslim Family Laws Ordinance, 1961, rules that a Muslim man cannot contract another marriage without obtaining the previous permission in writing of the "Arbitration Council", a body consisting of the Chairman and a representative of each of the parties to a matter dealt with the Ordinance. He must also state the reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto. Anyone performing polygyny without the permission of the Arbitration Council is liable to be punished with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both. Such a marriage also cannot be legally registered under the Ordinance [15] . The same law has been adopted by Bangladesh [16] .

The Moroccan Family law, *Moudawana*, too makes it mandatory for a husband to petition the court if he wishes to marry again provided his first wife had not restrained him in the marriage contract from taking another wife. Even in the absence of such a restriction, Articles 40-46 of the *Moudawana* forbid the court from authorising polygyny if an exceptional and objective justification is not proven, and the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspects of life. The court is also required to summon the first wife and obtain her consent in person. However, the marriage with the second wife cannot be concluded until she has been informed of the first marriage of her husband-to-be, and she consents to it [17] .

It cannot be argued that the Pakistani, Bangladeshi and Moroccan laws have succeeded in totally eliminating polygyny in those countries. However, it must be conceded that, if properly enforced, they can make the practice extremely difficult. Indian lawmakers, in consultation with Islamic scholars and other important stakeholders, should explore the possibility of incorporating in the Muslim Personal Law relevant features from these enactments, especially the Moroccan code. It is imperative that this is done without compromising the multicultural values enshrined in India's constitution.

This should not be a difficult given the fact that eight out of the 10 countries (Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt, Sri Lanka and Iran) cited approvingly in the government's affidavit to the Supreme Court have regulated polygyny under Muslim Family Law by making it conditional. Interestingly, all the 10 have invalidated instant triple talaq. It would be unfair to hold up these countries as an example in the case of triple talaq while ignoring 80 per cent of them on polygyny.

[A shorter version of this essay was published in *The Hindu* on October 28, 2016, under the title *Situating law in the land*.]

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