

Star

LAW report

Judicial interpretation of polygamy

Revisiting Jesmin Sultana v Mohammad Elias

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POLYGAMY refers to a system of 'marriage with more than one person at once'. The opposite of polygamy is monogamy where each person has a maximum of one spouse at any one time. In Bangladesh, Muslim men can practice polygamy. It has been reported that in Bangladesh the number of polygamous Muslim men with more than one wife has been increasing. Such increase is due to the fact that the laws of Bangladesh (specifically, the Muslim Family Laws Ordinance 1961) allow Muslim married men to keep multiple wives.



The Muslim Family Laws Ordinance 1961 was said to be enacted as a result of active lobbying by All Pakistan Women's Association in 1950s to restrict polygamy in Pakistan (including East Pakistan, now known as Bangladesh). However, the effect of the said Ordinance turned out to be quite different. The Muslim Family Laws Ordinance 1961 has rather legitimized male polygamy in Bangladeshi Muslim society.

The relevant portions of the Section 6 of the Muslim Family Laws Ordinance 1961 reads as follows:

1. No man, during the subsistence of an existing mar-

riage, shall, except with the previous permission in writing of the arbitration council, contract another marriage...

2. ... (such) application form ... shall be submitted to the chairman (of the arbitration council)... and shall state the reasons for the proposed marriage and whether the consent of the existing wife or wives has been obtained thereto.

3. On receipt of the application ... the Chairman (of the arbitration council) 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, grant, subject to such conditions, if any, as may be deemed fit, the permission applied for.

Therefore, it is clear from the above legal provisions 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 Muslim Family Laws Ordinance 1961 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. Therefore, it is stated that the Arbitration Councils are left with a wide discretionary power to deal with the issue of polygamy in Bangladesh.

In the history of Bangladesh, there has so far been only a single case in the court of law where the judiciary dealt with the issue of polygamy in Bangladesh. In

Jesmin Sultana v Mohammad Elias (17 BLD 1997), there was a direction to the legislature from the High Court Division of the Supreme Court of Bangladesh to repeal the relevant law of Bangladesh to abolish polygamy from the society. The court essentially 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 specified 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 Law Ordinance 1961 is against the principle of Islamic Law. We recommend that this section be deleted and be substituted with a section prohibiting polygamy.'

However, on an appeal, the High Court Division was vehemently admonished by the Appellate Division for giving such direction:

'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 at all 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.' (Per Mohammad Gholam Rabbani J)

Further, the discussion on polygamy in Islam and the relevant recommendation made therein, as accorded in the High Court Division judgment, was 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.



It is stated that the reasons of the Appellate Division for deleting the relevant portion of the High Court Division decision in Jesmin Sultana Case are not at all convincing for the reasons stated below:

First, the doctrine of judicial precedent followed in any common law country (including Bangladesh) empowers the judges to make laws by deciding cases before the court. Judicial decisions of any common law court consist of both 'ratio decidendi' (rational behind the decision) and 'obiter dicta' (an incidental remark or observation; a passing comment). Though ratios are binding, the obiter dicta only have got persuasive authority. Therefore, the High Court Division's incidental observations

regarding polygamy in Jesmin Sultana Case cannot be said to be totally of no importance.

Second, it is a well-known belief that in a common law country, the judiciary follows 'adversarial system of justice' where it plays the role of a 'mere umpire'. However, in today's world, judicial activism has been welcome in many developing countries including those of South Asia. In Bangladesh also, the High Court Division of the Supreme Court of Bangladesh under its 'inherent power of jurisdiction' made a series of remarkable 'suo moto' decisions to meet the end of justice, without there been any petition or conflicting parties at all. [For example, State vs. Deputy

Commissioner of Satkhira (1993) 45 DLR 643.] Those decisions illustrating the activist role of the judiciary against violation of human rights were always welcome by the Appellate Division. However, it is not understood why the Appellate Division every time becomes unnecessary critical when similar activist role is played by the High Court Division concerning the issue of women in Bangladesh.

In this regard a reference can be made to Hefzur Rahman v. Shamsun Nahar Begum. In this case the High Court Division of the Supreme Court of Bangladesh decided that- '... a person after divorcing his wife is bound to maintain her on a reasonable scale

beyond the period of iddat (three months) for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person'. The Appellate Division of the Supreme Court of Bangladesh reversed the above High Court decision rejecting the liberal interpretation of Muslim women's rights forwarded by the High Court Division.

Third, the Appellate Division feared that the High Court decision on legal polygamy would create confusion in the mind of the subordinate courts. However, it did not explain why and how it might create such confusion. The role played by the higher judiciary in interpreting legal provisions is of crucial importance to the lower judiciary. However, if the flow of liberal interpretation of religious laws is obstructed, it is doubtful how these laws can be developed to meet the need of the time.

Finally, the issue of polygamy should not be limited only to a matter of religious interpretation. There can be other aspects of interpretation to the issue of polygamy, which the Appellate Division failed to adequately address and/or appreciate. The notion of polygamy gives rise to many aspects of national life 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 way or other related to the questions of polygamy. As Muslim men in Bangladesh are allowed more options to wife, the value of women becomes insignificant to them, for they know even if one wife is dead, there will still be others.

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HUMAN RIGHTS

advocacy

Proposed national human rights commission

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THE Council of Advisers on March 19, 2007 has approved a foreign ministry proposal in principle to constitute a National Human Rights Commission (NHRC) to check violation of human rights incidents in the country. A high profile committee has also been formed headed by the cabinet secretary that includes secretaries of law, home and foreign ministries as members to look into the details of the proposed NHRC. The committee will look at the human rights commissions in South Asia, i.e. India, Sri Lanka, Maldives and Nepal to sketch a possible structure and guidelines, and place detailed proposals for the proposed NHRC in consultation with concerned ministries and members of the civil society. Formation of such commission will enhance the image of the country abroad and help reduce violation of human rights incidents.

Human rights are few conditions without which people cannot live as human beings, i.e. right to live, freedom of expression, freedom of movement, freedom of religion etc. Those are not enforceable by law though those rights are universal and inalienable. So those rights warrant obligation of the state to promote and protect. Human rights are referred by International Bill of Rights that includes Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, International Covenant on

Economic, Social and Cultural Rights (ICESCR) 1966, and Optional Protocol to ICCPR 1966.

In 1992, the UN Commission on Human Rights endorsed a set of internationally recognised principles concerning the status, powers and functioning of national human rights institutions. The UN Principles relating to the Status of National Institutions, known as the Paris Principles, were subsequently endorsed by the UN General Assembly in 1993, which set out the basic guidelines recommended by the UN in the establishment of a national human rights institution. The UN defines a national human rights institution as a government body established under the constitution or by law, whose functions are specifically designed to promote and protect human rights. The UN also broadly groups national human rights institutions into three categories, i.e. human rights commissions, ombudsmen, and specialized national institutions designed to protect the rights of a particular vulnerable group (such as ethnic minorities, indigenous populations, refugees, women or children).

India has constituted the NHRC by Human Right Act 1993, which was amended in 2006. Besides NHRC, 14 States have already set up State Human Rights Commission. The NHRC is headed by a chairperson, four members, and three ex-officio members, i.e. Chairperson of National Commission for Minorities, Chairperson of National Commission for Scheduled Castes and Scheduled Tribes and Chairperson of

National Commission for Women. In Nepal the NHRC is an independent and autonomous statutory body established in 2000 under the Human Rights Commission Act 1997 with a separate sphere of responsibilities in the constitutional legal system of the country, which is headed by a chairman and four other members. Maldives has constituted an NHRC, but it lacks institutional independence.

In Sri Lanka the NHRC was constituted in 1997 to independently investigate human rights abuses with wide powers. It has recently been involved in documenting allegations of torture and extra-judicial killings by the police, and has also taken a very strong stand against the LTTE's recruitment of child soldiers.

Bangladesh is an active member of the UN Human Rights Commission since 1993. Though it is late but a wise decision has

been taken by the government to form such commission at the national level. The same proposal had been approved in principle by successive governments and setting up the NHRC was also an electoral pledge of the previous elected government, but none of them materialize their commitment to the nation.

The NHRC should be constituted on the basis of the Paris Principles and as a possible solution to the human rights problems existing in the country. It is expected to be watchdog, monitor, advocate and promoter of the rights. For achieving this objective, the proposed NHRC is expected to have powers and resources and the government should provide adequate support through necessary legal mandate and resources.

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RIGHTS

investigation

UN: Rights Council in Darfur

The UN Human Rights Council closed its fourth regular session today having failed to take action to address many of the world's most urgent human rights situations, said Human Rights Watch. The council adoption of a compromise text regarding the crisis in Darfur, however, was a welcome if small step forward.

"The council again chose talk over action on worsening human rights situations in countries such as Burma, Iran, Sri Lanka, and Uzbekistan," said Peggy Hicks, global advocacy director at Human Rights Watch. "The council's resolution on Darfur is a relatively bright light in an otherwise disappointing session."

The council adopted the Darfur text put forward by Germany, as amended, by consensus, after extended negotiations involving a competing Algerian draft. The resolution establishes a group composed of six currently-serving independent experts on a range of abuses including violence against women, extrajudicial executions and torture and led by the council-appointed expert on Sudan. The expert group is charged with working to ensure follow-up and implementation of existing recommendations by the council and its experts, by the council's predecessor, the UN Commission on Human Rights, and by other UN human rights institutions. The group is also charged with reporting back to the council in June. The text does not, however, criticize the Sudanese government directly for its role in orchestrating and perpetrating massive violations of human rights and humanitarian law in Darfur.

Several African states played a critical role in breaking the council's silence on Darfur. Six states Cameroon, Ghana, Mauritius, Nigeria, Senegal and Zambia called for council action in response to a report on Darfur from a high-level mission established by the council in December. These and other states, including Uganda and Mauritania, engaged constructively in discussions over the German text. A key test for the council will be whether these and other swing states such as India, Indonesia, the Philippines, and South Africa will engage similarly to address abuses in other locations in the future.

The council continued its practice of hearing detailed reporting from its independent experts on human rights violations who focus both on "thematic" issues, such as torture or violence against women, and on particular country situations. This segment of the council's agenda shines a spotlight on violations in many countries, an act which could itself help to protect human rights in some cases. However, the council again failed to take specific action to follow up on the experts' recommenda-



tions, often made in the face of massive violations, or to address the endemic failure of many states to cooperate fully with the experts.

In a particularly disturbing development, the council decided to end its scrutiny of Iran and Uzbekistan. Both countries had been subject to council monitoring under a confidential procedure known as 1503 (after the resolution that created it). The human rights situations in both countries have significantly deteriorated in the past year. "The council's decision actually rewarded Iran and Uzbekistan for their crackdowns on human rights, and it risks fueling further abuses in both countries," Hicks said. "Rather than worrying how repressive governments will respond to scrutiny, council members should think of the thousands of victims in Uzbekistan and Iran who are hoping the council will make a difference."

The council also adopted a resolution on defamation of religions that could itself endanger human rights, Human Rights Watch said. The resolution, put forward by Pakistan on behalf of the Organization of the Islamic Conference, focuses on protection of religions themselves, particularly Islam, rather than the rights of individuals, including members of religious minorities. This approach, and a provision which notes that free expression can be limited based on "respect for religions and beliefs," could be used to justify encroachments upon freedom of thought, conscience and religion. More

positively, the council adopted by consensus a European Union resolution which addresses elimination of all forms of intolerance and of discrimination based on religion or belief, and calls for the council to address this issue at its sixth session this June.

On a more positive note, 57 states led by Argentina joined together to urge the council to address violations of the human rights of women and girls in a more effective and integrated manner than its predecessor, the UN Commission on Human Rights. More than 30 states also supported the new "Yogyakarta Principles" on sexual orientation, gender identity, and human rights and urged the council to take action on these issues.

The common refrain of this session was the need to complete "institution-building," and the concern that too much activity on pressing human rights issues would undermine that focus. A review of the council's system of experts and of the Resolution 1503 procedure is scheduled to be completed by June 18. In addition, the council was given a year to establish a "universal periodic review" under which the human rights situation in all states will be examined. "A substantial backlog of work has piled up as the council focused on building the new institution this year," Hicks said. "Let's hope the council has the energy and political will to get down to business once the institution-building phase ends in June."

Source: Human Rights Watch.