

LAW OPINION

Polygamy: Enabling Law and its analysis in Bangladesh Perspective

JUSTICE MD. MOZIBUR RAHMAN MIAH

Polygamy implies the practice of getting married to more than one spouse at the same time. As per paragraph 255 of Mulla's Principles of Mahomedan Law, a Mahomedan may have as many as four wives at the same time but not more (Baillie, 30, 154 (fourth class)). It is admitted that the above interpretation originated from the Holy Quran (An-Nisa" 3rd verse of the fourth surah) where it has been proclaimed "If you fear that, you will not deal fairly with orphan girls you may marry whichever other woman seems good to you, two, three or four. If you fear that you cannot be equitable to them, then marry only one. (Quoted from the book "The Quran, translated in English by M.A.S. Abdel Haleem)

As a matter of fact, we have inherited the statutory laws on Polygamy from Pakistan (Muslim Family Laws Ordinance, 1961 and that of rules, 1961 (briefly, MFLO)). Subsequently, MFLO went through several amendments in

exercising his right bestowed upon him by the Quran on account of section 6 in MFLO.

There has been a general perception among the commoners that a husband should only take permission from his existing wife/wives while taking another wife. It is partially true in the sense that while seeking permission to the Arbitration Council (shortly, AC) husband has to affirm that he obtained consent from his existing wife/wives. Obviously, a husband has to furnish two basic information to AC, one entailing the reason for the proposed marriage and another, asserting the obtention of consent of the existing wife/wives. Here the question of partiality of the AC may surface. Though the AC consists of three members, the Chairman plays a pivotal role in granting permission. However, the Chairman while granting or refusing permission, has to record his/her reasons. Still, the decision to be pronounced by the AC is not a conclusive one and the same is amenable to revision by an Assistant Judge inasmuch as any party aggrieved with the decision of the AC can

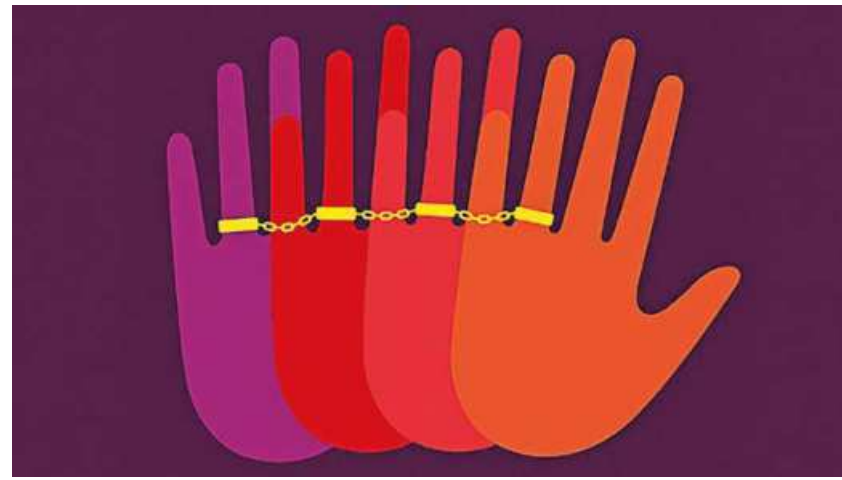


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might have thought of the social setup of the village people, their socio-economic condition vis-a-vis mobility of the majority of people in the country. On top of that, a Chairman being an elected public representative in the lowest tier of local government is more accessible to the people of his/her locality and privy to their wellbeing enabling him to reach the decision.

That being said, the legislature has also very consciously conferred revisional jurisdiction upon an Assistant Judge to examine the legality and veracity of the decision passed by a Chairman and then implicitly to the High Court division. Given the above scenario, it appears that there has been no shortcomings as such in the formation of AC. Now, let me focus on the consequence a husband may face for the contravention of the law. A husband will have to face two different sorts of eventualities, firstly, he has to pay back the entire amount of dower whether prompt or deferred to the existing wife/wives, failing which the amount shall be recoverable through certificate proceedings, and secondly, the existing wife/wives can lodge Complaint Register (CR) case before the competent court of Metropolitan Magistrate or Judicial Magistrate under section 190(1) of the Code of Criminal Procedure (CrPC). In the event of contravention, the husband can be penalised with a one-year simple imprisonment or with a fine that may extend to taka ten thousand or with both. An existing wife/wives can choose both the recourses even while keeping her/his marriage existing.

In our prevailing social setup with some exceptions, a married woman particularly a village woman tends to

be reluctant to go for any legal action against her existing husband foreseeing her financial vulnerability, fear of getting a divorce, social stigma.

Another legal point that may come up in this respect and which did not find a place in section 6 of MFLO is the question as to whether a wife has to initiate criminal proceedings on her own. The obvious answer is "no", as section 190(1) (c) of CrPC empowers a competent magistrate to take cognisance of the offense upon gathering information from "any person" having knowledge of the commission of the offense. All in all, with the cumulative discussion, it has been deduced that there have been no loopholes in section 6 of MFLO in terms of getting proper remedy by an existing wife/wives. More often than not, in our society, women are not well-aware about exercising their rights. In such a panorama, non-government organisations, different civil society platforms, and rights organisations can sensitise women regarding their legal rights. Even though in our country polygamy is legal, our society does not look at polygamy in a positive manner. Earlier, our literacy rate was not that satisfactory and people were not aware of the law and did not bother about birth control, the reproductive health vis-a-vis polygamy was prevalent mostly in the rural areas; however, over time, with the advent of modern technology and tremendous enhancement of literacy rate, people have become more conscious in terms of their family planning, financial stability, upbringing of their offspring as worthy citizens which have eventually dwindled the polygamous marriages.

Clearly, a Muslim husband can exercise his right of polygamy if there

are legitimate reasons. However, there is no scope to assume that legal provisions of polygamy have given unfettered authority to a Muslim husband to contract marriages at his own sweet will. Rather, section 6 of MFLO has set out some stringent conditions and if properly implemented, it may be regarded as one of the best pieces of legislation. Literally, certain checks and balances have been imposed in case of polygamy so that the husband could not exercise authoritative disposition over his existing wife/wives. It is widely viewed that, for certain compelling humanitarian reasons polygamy had been permitted in Islam and since such necessity is not prevalent in our modern society, it should be abrogated. But such a view may not be well-founded when our holy Quran bestowed it upon Muslims and section 6 of MFLO is still in vogue.

In this context reference may be given in the case of *Mohammad Illius v. Jesmin Sultana* reported in 19 BLD (AD) 122. In that verdict, our apex court flatly dismissed the observation made by the High Court Division recommending the deletion of section 6 from MFLO while adjudicating a civil revision. It will not be out of place to note that it was found to be extraneous in making such recommendation as the matter stemmed from a family suit for dower and maintenance filed by the wife against her husband (17BLD 4). Invariably, we are now constitutionally bound to follow section 6 of MFLO strictly as the same has been solidified by the decision of the Appellate Division.

It is a common perception, in patriarchal values, that polygamy is a weapon that handed a husband towering authority to subdue a woman allowing him to marry as many times as he desires to deny equal honour, dignity, fair treatment among the wives leaving them to lead substandard life. But the above notion is relative, as a human disposition cannot be guided by enacting law. With the foregoing discussion it is now abundantly clear that section 6 of MFLO has been incorporated in MFLO only to bring polygamy into the legal framework and to make polygamous marriages congenial, productive, and effective. If the provisions set forth above are adhered to, particularly by the husbands, polygamy will not remain as a debated issue for the society.

THE WRITER IS A JUSTICE AT THE HIGH COURT DIVISION, SUPREME COURT OF BANGLADESH.

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apply for revision within 30 days and the decision of the Assistant Judge shall be final. Now, a question may arise as to how the decision of an Assistant Judge can be made final rendering the aggrieved party virtually without any remedy. The simple answer to that question is that upon exhausting such statutory remedy, the constitutional remedy will then open to the aggrieved party who can then resort to the writ jurisdiction of the High Court Division under article 102(2) of our Constitution. Even then, some may vent their displeasure saying that why the legislature at the first instance bestowed authority upon a Chairman over a judicial officer. In my view, the legislature

1974, 1982, 1985, 1987, and lastly in 1989. In section 6, the statutory rules regarding Polygamy has been provided for which laid down certain obligations and punishments that are to ensue from the contravention of such obligations.

In this piece, I would like to take the opportunity to shed light on the application of our relevant laws to dispel inquisitiveness in that regard. By the same token, I shall also discuss on whether the law safeguards the right of the existing wife/wives from being exploited by their husband in the name of polygamy and paradoxically, whether a Muslim husband is debarred from

LAW VISION

Right to informed consent in childbirth

SURIYA TARANNUM SUSAN

A 2019 research paper titled "Assessing informed consent practices during normal vaginal delivery and immediate postpartum care in tertiary-level hospitals of Bangladesh," (hereinafter, the research paper) divulged the absence of informed consent in normal vaginal delivery (hereafter referred to as NVD) and post-partum care in the tertiary level hospitals of Bangladesh. New data provided by Save the Children reveals that Bangladesh has seen a surge in medically unnecessary C-Sections by 51 % between 2016 and 2018. Bangladesh witnessed an estimated 860,000 uncalled-for operations in 2018, whereas 300,000 women desperately in need of it are unable to afford or access it. Subsequently, a writ petition was filed in the High Court Division seeking a countrywide ban on medically unnecessary C-sections at the hospitals. The research paper affirms that lack of information about the adverse aftereffects of C-Section and inaccuracies surrounding NVD, makes many pregnant women opt for unnecessary C-Sections. The situation is diabolical in low-income health settings. The vacuum of informed consent in the existing maternity care of Bangladesh impedes women to make the educated choice.

Respectful Maternity Care Charter (hereafter referred to as RMC), a Charter of universal human rights due to every childbearing woman in every health system around the world, recognises informed consent as one of the basic rights of pregnant women. Informed consent encompasses the voluntary agreement of the patient to undergo an intervention upon disclosure of the patient's information regarding the proposed intervention, its repercussions, and alternatives. Any examination, intervention, or treatment, especially in the case of pregnant women unaccompanied by informed consent is considered assault. Pregnant women have the right to base their maternity care decisions based on accurate, contemporary, and comprehensive information. In 2014, World Health Organization issued a statement affirming, "Every woman has a right to the highest attainable standard of health, which includes the right to respectful, dignified healthcare throughout pregnancy and childbirth."

The Code of Professional Conduct of the Bangladesh Medical and Dental Council infers



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informed consent in case of invasive procedures for new medications or surgeries, artificial insemination, prenatal diagnostic procedure for fetal disease detection, and clinical trial participation. The code unfortunately remains silent on informed consent practices in childbirth. The admission form signed by childbearing women prior to delivery does not pround any of the repercussions of the procedure. It merely provides the information of the patient and a written consent to proceed with the procedure. This points out the infringement of the universal right of childbearing women. Appraisal on healthcare facilities worldwide unearths experiences of women facing disrespect or abuse, in the form of non-consensual services during delivery, post-partum care, surgery, and other invasive procedures. Regrettably, there is no data concerning the same in the context of Bangladesh.

The universal rights of childbearing women endorsed by RMC Charter ratified by Bangladesh, need to be incorporated in the existing Code of Professional Conduct of Bangladesh Medical and Dental Council. The inclusion of informed consent practices is the first step to make childbearing women feel heard, respected, and empowered in order to make their own choices. There needs to be transparency and accountability in maternity care. Physicians should lay out the reverberations of NVD and C-Section. The right to informed consent in childbirth enables a woman to weigh the full spectrum of perils and benefits associated with the respective procedure and make a decision free from biases pursuant to her values and perspectives. Failure of a physician to obtain informed consent from a patient should be considered tantamount to medical negligence.

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LAW EVENT

Experts suggest Company Law reforms in Bangladesh

The Academy of Law and Policy (ALAP), in collaboration with The Daily Star, in its 7th webinar, on 7th May 2021, discussed the adequacy and effectiveness of the company law reforms of 2020 and the need for further reform of the Companies Act, 1994 and rules framed thereunder.

The Hon'ble Minister of Commerce, Mr. Tipu Munshi, MP and Mr. Justice Khurshid Alam Sarkar, Hon'ble Judge (currently presiding over the Company Bench), High Court Division, Supreme Court of Bangladesh graced the webinar as Chief Guest and Special Guest respectively. Barrister Nihad Kabir, Senior Partner, Syed Ishtiaq Ahmed & Associates, President, MCCI and Mr. Md. Mokbul Hossain, Registrar (Additional Secretary) of the Office of the Registrar of Joint Stock Companies and Firm (RJSC) attended as distinguished panellists.

The opening remarks for the session was delivered by Mohammed Golam Sarwar, Assistant Professor of Law, University of Dhaka and In-Charge of Law & Our Rights, The Daily Star. This was followed by a Keynote presentation by Barrister Reshad Imam, Partner, Akhtar Imam & Associates, Founder Trustee and Director of Finance, ALAP presenting an in-depth analysis of the 2020 amendments and the Companies Act, identifying gaps and proposing reform. Barrister Mafruha Murphy, Advisor, Bangladesh Competition Commission delivered her address on the draft mergers regulations of Bangladesh. Barrister Rashna Imam Managing Partner, Akhtar Imam & Associates, Founder Trustee & Executive Director, ALAP delivered the closing remarks. The webinar was moderated by Barrister Anita Ghazi Rahman, Founder and Managing Partner, the Legal Circle, Founder Trustee & Director of Communications, ALAP.

Mr. Justice Khurshid Alam Sarkar suggested various reforms to the Companies Act, 1994. He recommended



inclusion of definitions of 'Financial Report' (keeping in mind the Financial Reports Act, 2015), 'Inspector' and 'Official Liquidator' in the definitions section. He suggested reform of the sections on reconstruction and amalgamation of companies, ensuring consistency of such reforms with the Competition Act, 2012. He recommended increasing the number of Company Courts and giving the Company Court jurisdiction to deal with all company-related matters. He suggested enabling the Bangladesh Securities and Exchange Commission to lodge a case upon receiving complaints from small investors in the capital market. He also highlighted the need for judges to play a more proactive role in managing cases, suggesting a legislation like the Indian Legal Services Authority Act to promote this.

Barrister Nihad Kabir emphasised the need for a business-friendly company law regime. She recommended targeted reforms over an overhaul of the Act. She criticised the prohibitively high paid-up capital requirement (BDT 25 Lakhs) of the one-person-company (OPC), which defeats the very reason behind its introduction,

namely, to enable sole entrepreneurs to take advantage of the company structure. She urged for the need for more ICT resources for the RJSC and suggested the following to improve its efficiency and transparency: use of electronic signatures, electronic record-keeping, end-to-end use of digital submissions for filing, and online payment of requisite charges.

Mr. Md. Mokbul Hossain, the Registrar called for decrease of the paid-up capital requirement of OPC. He informed that the infrastructure for the use of electronic signatures to approve share transfers at the RJSC has already been acquired and installed and shall be operational soon. He discouraged the practice of lifting from the Indian legislation when reforming our law as that would create more complications than solve in the local context.

The Hon'ble Minister appreciated the reform proposals made and assured that these will be considered by the Ministry of Commerce. He further requested ALAP to submit the reform proposal in writing to the Ministry.

EVENT REPORT BY ALAP.