

Through this Shariat Petition, the petitioner has challenged the vires of subsection (5) of section 6 of the Muslim Family Laws, Ordinance, 1961 and has prayed that the said subsection may be declared repugnant to the Injunctions of Islam.

Before going into the merits of the petition, it will be appropriate to reproduce section 6 of the Muslim Family Laws, Ordinance, 1961 as under :-

"6. Polygamy:- (1) 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 this Ordinance.

(2) 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 reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under sub-section(2), 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, grant, subject to such conditions if any, as may be deemed fit, the permission applied for.

(4) 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 fee, prefer an application for revision, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall-

(a) pay immediately the entire amount of the 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 with fine which may extend to five thousand rupees, or with both."

✓ The petitioner has contended that Islam has allowed every male Muslim to marry with four women at a time if he can maintain justice with all of them. He has relied on the following verse of the Holy Qur'an:-

"فَاكْحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَى وَثُلَاثَ وَرُبْعَ  
فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً "

"Marry women of your choice, two, or three, or four; but if you fear that you will not be able to deal justly (with them), then only one." (4:3)

The above verse allows a male Muslim to marry with two, three or four women at a time if he can do justice with them. It is thus obvious that it is not an absolute right of every male Muslim to marry with two, three or four women as and when he wants, but it is conditioned with maintaining justice with them. The petitioner argues that when Allah has permitted marriage with four women at a time, the government cannot make regulations to place any restrictions on that and punish any person on the violation of such regulations.

It is pertinent to point out that the Holy Quran in the end of the above verse has preferred monogamy. The Holy Qur'an says,

" ذَالِكِ ادْسَى الْاِتْعَوْلُوا "

" This (monogamy) will make it more likely that you will not deviate from the right course." (4:3)

The Holy Qur'an further says,

"وَلَيْسَ تَسْتَطِيعُوا اَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَاِذَا تَمَلَّوْا  
كُلَّ الْمِثْلِ فَتَذَرُوهَا كَالْمَعْلُوقَةِ "

" You will not be able to deal equally between your wives, even if it is your ardent desire. So do not turn away (from a wife) altogether - so as to leave her as she were hanging (in the air). (4:129)

while

Abdullah Yusuf Ali, / explaining the above verse writes,

"Legally more than one wife (up to four) are permissible on the condition that the man can be perfectly fair and just to all. But this is a condition almost impossible to fulfil. If, in the hope that he might be able to fulfil it, a man puts himself in that impossible position, it is only right to insist that he should not discard one but at least fulfil all the outward duties that are incumbent on him in respect of her." (English commentary on Holy Qur'an by Abuallah Yusuf Ali, page 221)

Maulana Abul Ala Maudoodi while explaining the above verse, writes,

"قرآن کریم نے تصریح کر دی ہے کہ دلی محبت کا جہاں تک تعلق ہے اس میں مساوات برتنے پر نہ اسان قادر ہے اور نہ اس کے لئے مکلف (ولس تستطعوا ان تعدلوا بس النساء ولو حرمتن) - النہ اس کو تکلیف حسبات کی دی گئی ہے وہ یہ ہے کہ بے اور معاشرت اور تعلقات زن و شوہر میں ان کے ساتھ یکساں برتاؤ کریں - مرد کے ظلم کی یہ تین صورتیں ایسی ہیں جن میں قانون مداخلت کر سکتا

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"In this verse the Holy Qur'an has declared that so far love is concerned, no human being can be able to maintain equality in it (among the wives). A man is, however, required to keep equality in maintenance, social dealings and conjugal rights (of the wives). These are the three kinds of cruelty of a man wherein the state can interfere." (Huquq al-zaujain, page 41).

He further writes,

"قرآن مجید کی مذکورہ بالا آیت سے ثابت ہوتا ہے کہ جو شخص دو یا زائد بیویوں کے درمیان عدل نہیں کرتا ، اور ایک کی طرف جھک کر دوسری کے حقوق ادا کرنے میں کوتاہی کرتا ہے وہ ظالم ہے - تعدد ازواج کی اجازت سے فائدہ اٹھانے کا اس کو کوئی حق نہیں ہے - قانون کو ایسی حالت میں اسے صرف ایک بیوی رکھنے پر مجبور کرنا چاہیئے اور دوسری بیوی یا بیویوں کو اس کے خلاف قانون سے داد رسی پاسے کا حق ہونا چاہیئے -

" The above verse (4:129) ordains that any man who does not maintain justice between his two or more wives and by inclining to one of them, ignores the rights of others, is a cruel. He is not entitled to utilize the permission of polygamy. The state (law) may oblige him in such situation to have only one wife, and to give his other wives the right to sue against him for getting their rights." (Ibid, page 40)

It is relevant to mention here that section 6 of the Muslim Family Laws Ordinance, 1961 does not invalidate the second, third or fourth marriage if it is contracted without the permission of the Arbitration Council. The provisions of section 6 are thus not repugnant to the injunctions of Islam in so far as they do not invalidate the second, third or fourth marriage even without the permission of the Arbitration Council. However, question arises whether or not the government can make any regulations for the determination of justice before contracting second, third or fourth marriage and make their violation punishable with ta'zir as provided in subsection (5) of section 6 of the impugned Ordinance.

The system of polygamy in its various forms was in vogue in many countries, and particularly in Arabia, when Islam came. Before the advent of Islam, people generally lived in an era when fighting was the order of the day, with the result that the number of men was much less than that of women many of whom were to live a miserable life. This state of affairs largely contributed to the rise of the institution of polygamy. Such emergency may arise at any time when the number of men becomes less than that of women due to war or any other reason. Emergency could also be individualistic as, for instance, physical inability on the part of wife to fulfil the duties of marriage or her inability to give birth to a child. It was in order to meet such emergencies that Islam permitted men to have wives more than one. However, the Holy Qur'an made monogamy the general rule and polygamy only an exception for emergencies.

Legislation in Islam is based on public welfare (Maslahah). There are a number of legal maxims laying down rules for the application of the principle of maslahah (public welfare). This principle defines the limit within which the rulers can exercise their administrative and political authority and take measures for the protection of the rights and freedoms of the masses so as to establish justice. The criterion of

justice changes in the changing circumstances. A law is just in a time and in a context while it is unjust in another time and another context. Every harm and corruption, in whatever form and whatever degree and proportion it may be, should be removed and exterminated as far as possible. The jurists have laid down a legal maxim as under:-

"تصرف الامام على الرعية مسوط بالمصلحة"  
(The ruling of a ruler over his subject is based on the welfare (of the subject). " (Majallah, Article 558).

The Holy Qur'an says,

"يا ايها الذين آمنوا اطيعوا الله  
واطيعوا الرسول و اولى الامر منكم"

"Oh you who believe! Obey Allah, obey the Prophet and those who are in power among you" (4:58)

Explaining the above verse, Abdullah Yousuf Ali writes:-

"As Islam makes no sharp division between sacred and secular affairs, it expects ordinary government to be imputed with righteousness, and stand in the place of the righteous Imam, and we must respect and obey such authority, otherwise there will be no order or discipline."  
(Commentary on Holy Qur'an by Abdullah Yousuf Ali, page 198)

It is a basic principle in Shari'ah that if a permissible act becomes injurious and harmful to the public, it will be prohibited for the sake of removal of the injury and harm caused to the public. In this connection a famous contemporary scholar Ali Hasabullah writes:-

"فاذا تبين في بعض الحزئيات ان العمل بالنص او القياس  
لايحقق المصلحة المقصودة بل يترجح افسأوه الى مفسدة وح  
اسياء هذه الحزئيات في اضيق الحدود تحققاللمصلحة  
المشروعسة"

(When it appears in some matters that to act therein according to the text (نص) of Holy Qur'an or Sunnah,



"ان للامام ان يمنع او يحد من زراعة العنب في قرية  
اعتاد اهلها ان يزرعوا العنب يتخذ منه عميرا للخمر"

"The ruler is empowered to prohibit or restrict the cultivation of grape in the area where the people cultivate grape for making wine therefrom." (Muhammad Farooq al-Nabhan, Nizamul Hukm fi al-Islam, Page 323).

A contemporary Egyptian scholar, Abdul Qadir Audah writes,

"وتركت لولي الامر في الامة ان يحرموا ما يرون  
بحسب الظروف لانه ضار بمالح الجماعة او نظامها  
وان يضعوا قواعد لتنظيم الجماعة و توجيهها  
و يعاقبوا على مخالفتها "

"And it has been left to the discretion of the ruler to declare any act unlawful which he deems prejudicial to peace and tranquility under prevailing circumstances. Moreover, a ruler has the power to frame rules and regulations for the maintenance of peace and tranquility and punish those who oppose or violate them." (Abdul Qadir Abudah, Al-Tashri'a al-jinai al-Islami, Volume I, Page 78).

Abdul Aziz Amir, while discussing the powers of a ruler, writes,

" ان رأى المصلحة في التعزير في الحالات التي قيل فيها  
بعدم العقاب فانه له ذلك و سلطته تسع جميع الظروف  
والاحوال "

"If (the ruler) deems any public welfare in awarding punishments on the acts which are permissible (and not liable to punishment), he is authorised to do so in all such cases." (Al-Ta'zir fi al-Shariah al-Islamiyyah, Page 497).

Allamah Rashid Razza, while discussing polygamy, writes,

"امامع تعدد الزوجات اذا فشا ضرورة و كثرت مفسدة  
و ثبت عند اولى الامر ان الجمهور لا يعدلون فيه بعض السداد  
لعدم الحاجة اليه بل الضرورة فقد يمكن ان يوحد له وجه  
في الشريعة الاسلامية السمحة اذا كان هناك حكومة اسلامية  
فان للام ان يمنع المصاح الذي يترقب عليه مفسدة مادامت  
المفسدة قائمة به والمصلحة بخلافه بل منع عمر (رض) في  
عام الرمادة ان يحد سارق "

"And when the harms of polygamy become obvious and scattered and the ruler is informed that the majority of the people in certain areas do not maintain justice in this matter, there is reason for him in such situation to prohibit polygamy. The ruler can prohibit a permissible act when it becomes harmful and injurious obviously.

Hazrat Umar had suspended the hadd punishment of theft during the famine period," (Tafsir al-Manar, Volume 11, Page 297)

The above author further writes,

"إن التهذيب الذي يعرفه الإنسان قيمة الحياة الزوجية  
منع صاحبه التعدد لغير ضرورة .....  
وأي لا يعرف احدا من اصحابي في مصر و سورية لـ  
اكتر من زوج واحدة "

"The civilization with which a man wants to know the value of his conjugal life prevents him from polygamy without any dire need. Only a few of the civilized people have married with more than one women. And none of my friends in Egypt and Syria has more than one wives" (Ibid).

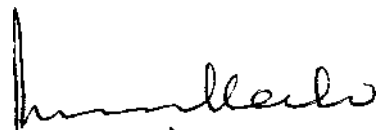
In any case polygamy comes under permissible (mubahat) and, as such, like other permissibles, has its uses and abuses. If there comes a time when a certain permissible thing begins to be abused and misused for nefarious ends shattering the moral and social structure of the society, an Islamic state would have every right to interfere in the matter by stopping it temporarily or by putting some restrictions on its operation. Polygamy is decidedly legal and permissible in Islam but the nature of its legality, the conditions imposed, the circumstances that demanded its recognition and other social and economic repercussions of its practice on our society, all indicate that an Islamic state is entitled to restrict the operation of the practice to save it from abuse and exploitation.



It is relevant to point out that the impugned provisions of section 6 impose the prescribed punishment on a man not only that he has contracted second, third or fourth marriage during the subsistence of any existing marriage without the permission of the Arbitration Council, but after a complaint filed against him regarding any injustice caused therein and for which he is convicted by the Court.

Under the above discussion it is crystal clear that an Islamic government can make regulations to impose restrictions on a permissible act like polygamy if it deems necessary and declare the violation of such regulations punishable with ta'zir and as such the provisions of subsection(5) of section 6 of the Family Laws Ordinance, 1961 are not repugnant to the injunctions of Islam as laid down in Holy Qur'an and Sunnah of the Holy Prophet.

The petition is without force and is liable to be dismissed accordingly.



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