Polygyny and the Constitution of Pakistan – A Critical Analysis of Muslim Family Law Ordinance: Section 6

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Introduction

In August 1955, Government of Pakistan assigned the task to a committee comprising seven members of reviewing existing constitution of family laws to present appropriate suggestions for modifications. To accomplish the task, a questionnaire was disseminated among the Muslim scholars by the committee, report was prepared and submitted to the Government of Pakistan and published in 1956 in Gazette of Pakistan. Through an ordinance in March 1961, the president of Pakistan gave effect to some of the recommendations which is called as “Muslim Family Law Ordinance 1961” of which Section 6 deals specifically with polygyny.

Feminist Influences and Historical Context of MFLO Section 6

Before partition, polygamy was common practice among Muslims of united India but declined afterwards because of poor economic conditions, increasing trends of women’s education and empowerment and also because men realized difficulties of handling family contentions. Moreover, Muslim men were less...
likely to conduct equity between multiple wives as deterioration in their daily Islamic conduct which drove even traditionalist like Justice Tanzil ur Rahman to say that state should play its role to restrict polygyny. 

In independent Pakistan, the considerable reformations in family laws initiated in 1955, when Premier of Pakistan, Muhammad Ali Bogra attempted a second marriage with his secretary Alia Beigum. Because polygyny remained uncommon among elites of Pakistan since its inception, so the marriage became cause of widespread unrest and protests led by women activist organizations. Wives of the elites, fearing that their husbands would follow the example set by Mr Bogra, started to boycott all state functions i.e. welcome parties of foreign diplomats, inaugurations of national universities, new wings of Pakistan Secretariats etc. at which Aliya Begum was invited. Her presence would mean the absence of all hostesses of elite gatherings. This boycott was the first step towards social unacceptability of polygyny in Pakistan.

Beigum Hamidah, first lady and first wife of Prime Minister was an activist of “All Pakistan Women Association”, so APWA and United Front for Women's Rights (UFWR) joined hands, protested and demanded a bill or ordinance for protection of women’s rights. Under the feminist pressure, Government of Pakistan constituted six members’ “Commission on Marriage and Family Law” on August 4, 1955 to suggest suitable reforms in constitution.

The specific clauses of polygamy in constitution of Pakistan conserved a history of politics, power-struggles, and intellectual conflicts leaving almost no room for demonstration of the Quranic spirit. On August 30, 1955 one of the members, Maulana Ahtsham al-Haq Thavvi submitted his dissenting note; expressing his concerns on selection of the other member he stated: “Most disappointing and surprising…. [they had] neither the detailed knowledge of Islamic teaching and injunctions nor [were] they versed in the interpretation and application of those laws”. Remarks testified Abbott’s thesis that on issues like polygamy there remained a large gap between the Traditionalists and Modernists in Pakistan.

The commission was inclined towards restricting polygyny but didn’t dare to forbid it. It was argued that state is liable to restrict polygamy so people would not take unlawful advantages and it is
absolutely in conformity with the spirit of Hoy Quran that man presents himself in front of court and justify his necessity of second marriage and prove him as capable of bearing financial responsibilities of extended family. He would be permitted to do so once the court satisfy and allow a conditioned permission that he would remain just in matters of maintenance and treatment. Although the commission recommended permissibility of polygamy with sole condition of obtaining an approval certificate from the court assuring that he would remain just with his wives, the recommendation wasn’t accommodated in the related section 6 of MFLO 1961 and permission of first wife was made mandatory.

The procession of women headed by Nasīm Aūrangzaīb, daughter of President General Ayūb Khān and stalwart supporter of Mrs Hamīdah Bogra, presented proposed ordinance to her father who signed it into law. The specific clauses promulgated under Gen. Ayūb Khān martial law administration are as follow:

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.

[(2A) The Nikah Registrar or the person who solemnizes a Nikah shall accurately fill all the columns of the nikahnama form with specific answers of the bride or the bridegroom.]

(3) On receipt of the application under sub-section (2), the 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) If a person contravenes the provision of:
(i) subsection (2A), he shall be punished to simple imprisonment for a term which may extend to one month and fine of twenty five thousand rupees; and
(ii) subsection (3), he shall be punished to simple imprisonment for a term which may extend to three months and fine of one hundred thousand rupees.\]
(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 the simple imprisonment which may extend to one year and with fine of five hundred thousand rupees.\]

Implicative Level of the Section 6 in View of Different Schools of Thought

According to the existing law-section 6 MFLO 1961, Muslim men of Pakistan are required to obtain written permission to marry subsequent second wife by explaining the cause to Arbitrary council, comprising representatives of petitioner, the existing wife, and a neutral chairman of union council. The permission is granted if the council finds the cause as ‘just and necessary’ according to rule 14 of MFLO 1961 which includes grounds like sterility, physical infirmity, physical unfitness for the conjugal relation, willful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife. 8

Modernists’ Demands: Modernists who seek total restriction on the practice claimed that Quran is inclined towards prohibition of polygamy; it was in affect for only a certain measure of social change for specific time thus government cannot go beyond these certain limits. On one side it is clearly mentioned in the holy Qurān that man is unable to do justice between his multiple wives whereas for allowing second marriage arbitrary council requires permission of first wife. If the first wife permits this, it is tantamount to saying that first wife permits injustice to be done her and that injustice may be legally allowed. Moreover, criminal penalties stipulated in sub section 4 and 5 remain ineffective until
someone complains about it. They indicated the ineffectiveness of the constitution stating that the ordinance does not mention that if a man marries a second wife without permission of the Arbitration Council, the marriage would be invalid/illegal; this weakens the influence of law on society. Traditionalists’ Reservations: Traditionalists who contented on unrestricted legality of polygyny rejected the Sharī‘ate status of the constitution arguing that imposing non-Islamic conditions to restrict religiously-permitted practice is the way of Jews. Such restrictions to polygyny would increase divorce rate, psychological disorders among men, and licentious life within the society. Associating the permission with certificate of the court is based on presumption that polygyny is inherently an evil. The Shrīʿah neither laid any condition like obtaining a certificate from court of law to marry nor made any difference between first, second, third, and fourth marriage thus attempting polygyny should not be conditioned with the procurement of court order. Obtaining permission from first wife is neither fardh nor wājib but consultation is necessary on moral and social grounds as its association with justice between wives. On the commission’s note that compulsion of obtaining the permission, “relies on Quranic concept of ‘adl between wives’, which includes: maintenance and social justice in term of treatment between two wives and his children, Maūdūdī reacted that this ‘conditional permission’ would close entryway of polygyny for lower and middle class but open solely for upper class. The two constitutional forums of Pakistan established to present declarations by interpreting laws according to spirit of Islamic injunctions, Council of Islamic Ideology (CII) and Federal Shariah Court (FSC) held different opinions regarding Shariate status of obtaining permission from existing wife. In its 194th meeting held on March 10-11, 2014 presided by chairman Maūlānā Muḥammad Khān Shīrānī, CII recommended that man who wish to contract second marriage may seek permission only from union council and does not require permission of existing wife however, he is liable to do equity between wives according to Shariah. On the other hand, FSC concluded that as section 6 does not forbid attempting polygyny so status of arbitrary councils cannot be declared against Quranic injunction. The provisions are only a procedure to ensure
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The implementation of Quranic verse in its totality with reference to the condition of 'adl. “If the husband marries another woman without telling the existing wife can his dealing with the first wife be categorized just or is he maintaining the footing of kindness and equity?”

**Legal Experts’ Perception:** Legal experts point out the technical flaws made the implementation and smooth functioning of constitution practically difficult; for example the arbitration Council possessed neither the experience nor authority and sanctions equal to courts of law. Secondly, part of Arbitration Councils, the Union Councils were authorized to summon appeals against decision of arbitration Council and enforce penal action against the violation of the ordinance had been abolished after dissolution of basic democratic systems leaving the vacuum behind as no chairman appointed to perform assigned duties of union council. Data revealed that Pakistani men usually not bother to obtain the approval from arbitrary councils moreover; there are rare instances when men applied for approval and couldn’t obtain it. If a husband writes, for instance, mentions ‘No’ in column 21 pertinent to permission from first wife while filling marital contract/ nikāh nām form prescribed by rule 8 of MFLO 1961 for contracting second marriage and second wife finds later that he belied or finds that she has not been treated equitably or equally to first wife, she is not entitled to file a case against husband on this ground because according to constitution of Pakistan only first wife is ‘aggrieved’ or in other words victim of unjust of being not cognizance of husband’s second marriage. So all junior wives would be in need of first wife to file a petition against husband if he violates sub-sections 1, 2, and 3. Furthermore, if the husband does not obtain permission from existing wife and she files petition to magistrate against him and he is sent to jail, it would be very easy for him to obtain bail and get released on the next day as contracting second marriage without first wife’s consent is a bailable offence. She becomes entitled to immediate payment of dower which provides a ground for dissolution of marriage. Practically, it is not as simple as seems. There is still a laborious court procedure which she has to go through to get dowry or dissolution if she wants it.
Suggested Legal Recommendations to MFLO Section 6

Rather taking measures to ensure functioning of equity between wives the further legislation made in such regard focused on restricting the practice by making it difficult to attempt for those who seek legal permission. Pakistan Women’s Rights Committee’ recommended in 1976 that along with wife’s consent form, recording of her statement, payment of due dowry, and delegation of divorce right to existing wife should be made part of constitution. Zari Sarfarāz Commission suggested fathers to get the condition accepted at time of nikāḥ that bride groom would not practice polygyny in ‘1985 Report of the Status of Women Commission’. ‘Report of the Commission of Inquiry for Women 1997’ proposed submission of assets and income details by petitioner so that his existing wife can be provided by adequate provisions for maintenance. Increase in duration of imprisonment from one year to five years and fine to 20,000 PKR was recommended moreover, it was suggested that aggrieved wife should be allowed with same rights like existing wife i.e. payment of due dowry, delegation of divorce right, and adequate provisions in case her husband misstated preexisting marital status. At forum of ‘Legislative Watch Program’ organized by Aurat Foundation, eminent judges and law experts recommended further strictness in polygamy regime by demanding only insanity, unavailability for conjugal relationship, and barren maternal status of first wife as grounds for permission of contracting second marriage. Muslim Family Laws (Amendment) Bill 2010 recommended submission of medical certificate of recognized medical officer if incurable disease of wife is grounded for permission whereas allotment inheritance right to wife was also recommended.

Conclusion

Allowing and restricting polygyny at same time seems to made compromise between traditionalists, modernists and feminist, neither a single school of thought is satisfied with the constitution nor it succeed in discouraging polygyny rather reports like Pakistan Women’s Right Committee came after fifteen years of MFLO, Pakistan Commission on the Status of Women 1985 and the National Report for the Beijing World Conference on Women
1995 acknowledged prevalence of polygyny and the inadequacy of the laws in Pakistan\textsuperscript{28}. About Islamization of polygyny in Pakistan, Coulson commented: “In sum, it appears that modern jurisprudence has not yet evolved any systematic approach to the problem of adapting the traditional law to the circumstances of contemporary society”\textsuperscript{29}. The outdated constitution MFLO is incompatible to the ground realities which exist today, almost after sixty years of many social transformations resulting section 6 as merely a formality rather than an effective deterrent and source of implementation of the basic condition—the Quranic stipulation of equity between wives.

**REFERENCES & NOTES**


2 Tanzīl ur Raḥmān, Polygamy in Pakistan and Other Muslim Countries, Vol. 19 (Pakistan Legal Decisions, 1967), 38-39


5 Rubya Mehdi, The Islamization of the Law in Pakistan, (Surry: Curzon Press, 1994) 163

6 Rafia Zakaria, The Upstairs Wife: An Intimate History of Pakistan , 46

* A body comprising Chairman and representative of each party


8 Law and Procedure of Second Marriage in Pakistan, Retrieved from https://pakistanilaws.wordpress.com/author/pakistanilawfirm/, on February 5, 2018


11 Mehdi, supra note 23

12 Amin Ahsan Islahi in Khurshid Ahmad, Marriage Commission Report X-Rayed, 203

13 Maudoodi, Syed Abdul A”la. in Khurshid Ahmad, Marriage Commission Report X-Rayed, 18

14 International News, “Those unable to do justice should limit to one wife: Ulema,” March 22, 2014

15 Abdur Rashid, Mian. in Khurshid Ahmad, Marriage Commission Report X-Rayed, pp. 66-67

16 Maudoodi, Syed Abdul A”la. in Khurshid Ahmad, Marriage Commission Report X-Rayed, 19


18 Allah Rakha v Federation of Pakistan (PLD 2000 Federal Shariat Court 1) 56-57


22 The phenomenon is similar to British law which doesn’t recognize polygamy so rights of wives other than first one remain suspended being of having no legal status to claim for maintenance and other rights if event like divorce occurs. Although Supreme court of Pakistan disagreed the husband urged that the second wife had no locus standi to
file a complaint under section 6 MFLO 1961 (Faheemuddin v Sabeeha Begum PLD 1991. Supreme Court 1074) wife except the first one are still not entitled to file the petition.


24 Shirkat Gah, Women's Rights in Muslim Family Law in Pakistan, 27

25 Ibid, 28


27 Khalid Rahman, Nadeem Farhat (eds), Legislation on Women and Family in Pakistan: Trends and Approaches, (Islamabad: Institute of Policy Studies, 2014), 16

28 Shirkat Gah, Women's Rights in Muslim Family Law in Pakistan, 24