Polygamy in Muslim Law: An Overview

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ABSTRACT:

The practice of having more than one female spouse at a time is known as Polygamy. This practice has an intense history and also created a great impact among the statutory laws in India. Polygamy is an offence in India. However, Muslims in India are allowed to practice polygamy, thus bringing in a conflict among other groups. The authors herein, will reflect upon the history of polygamy in Muslim law as well as in ancient India. Subsequently, we would be discussing the constitutional validity of Polygamy in Muslim Law with respect to the Indian Constitution. In the course of discussing the constitutional validity, the authors will be deliberating on the issues regarding the fundamental rights.

I. INTRODUCTION

One The Constitutional morality and the norms and values of some religion in a country or a state are mostly at their loggerheads. It is the duty of the judiciary to encompass and overview them and making them not to be so. Polygamy is one such practice of such kind. In this paper, the authors would be keen on dealing with the constitutionality and rationality of Polygamy.

Polygamy

Polygamy is a practice whereby a person has more than one spouse at a time. Polygamy is of two types;

• Polygyny (where a man has more than one spouse at a time)

• Polyandry (where a woman has more than one spouse at a time)

II. POLYGAMY IN ANCIENT INDIA:

In ancient India, polygamy and polyandry were somewhat prevalent, however the public opinions may differ. Polygamy in ancient India was a matter of personal choice, status symbol and at times social, moral and religious obligation. In the traditional sense, Marriage in Hinduism was mainly meant for progeny and carrying out duties which are obligatory in accordance to the dharma of a person, so that the four major aims of human life could be attained and realised. Even if polygamy served these ideas, the Hindu law books did not refrain any Hindus from its practice. However, certain rules and restrictions were laid down for its practice. The book 'Yagnavalkya Smriti' prescribes that a man should marry a woman who was not married before. However, the same rule was not prescribed for in case of men. This book also suggests that 'If a man's wife drinks alcohol, is sickly, cantankerous, barren, wastes money, quarrelsome, begets only female children or is hostile to men, then

he may take another wife.' In Islam, polyandry is completely prohibited, whereas limited polygyny is permitted.

III. POLYGAMY IN MODERN INDIA:

In modern times, the Hindu Marriage Act of 1955, which is applicable to a majority of Indians, prohibits the practice of polygamy and declares the marriage to be void if either of the partners has a living spouse at the time of marriage. However, in certain communities, polygamous marriages still exist even though its extent is not known. The findings of the 2005-06 National Family Health Survey (NFHS-3) state that 2% of women reported that their husbands had other wives besides themselves. It also stated that the Husbands of women without children are more likely to have multiple wives than women who have at least one child. Sections 494 and 495 of the Indian Penal Code, 1860 prohibited polygamy for Christians. The Hindu Marriage Act was drafted in 1955 which prohibited the marriage of a Hindu whose spouse was still alive. Hence polygamy became illegal in India from 1956, uniformly to all of the citizens except for that of Muslims since they are permitted to have a maximum of four wives; for Hindus in Goa and along the western coast, where bigamy is legal. A polygamous Hindu marriage is null and void, while the punishment specified in sections 494 and 495 is applicable.

IV. POLYGAMY IN MUSLIM LAW

Muslims in the country are subject to the terms of Muslim Personal Law Application Act (Shariat) of 1937, interpreted by the All India Muslim Personal Law Board. Still many Hindus, Buddhists and certain tribes practice it all over the country, declining the laws as such by not following them. Muslims are not rejected from practising their religion and Muslims in India are in favour of Muslim Personal law interpreted by the All India Muslim Personal Law board. However, a Supreme court judgment in February 2015 stated that "Polygamy was neither an integral nor the fundamental part of the Muslim religion, and monogamy is a reform within the power of the State under Article 25 of the Indian Constitution.

V. CONSTITUTIONALITY OF POLYGAMY IN MUSLIM LAW

Polygamy in Muslim Law is not prohibited till now since it is their religious practice and so they tend to practice it. However, it is to be noted that if a custom or practice that is prescribed under personal law violates the basic fundamental rights of the Constitution, it should be struck down. In this paper, the authors will reflect upon them in detail.

RIGHT TO EQUALITY:

Article 14 guarantees equality before the law within the territory of India. One facet is that there shall be no

privileged person or class and that none shall be above law. Another facet is the obligation upon the State to bring about an equal society as equality can be predicated meaningfully only in equal society.[1] It permits classification but prohibits class legislation. So, a reasonable classification is not only permitted but is necessary for a society to progress.[2] The classification must not however be arbitrary, artificial or evasive but must be based on substantial distinction bearing reasonable relation to the object which is sought to be achieved.

Test of reasonable classification:

Classification to be reasonable, there must be a substantial basis for making the classification and there should be a nexus between the basis of classification and the object of the statue under consideration.[3] It must be founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.[4]

Section 494 of IPC makes bigamy a criminal offence, but section 2 of Shariat Act allows the application of polygamy on Muslims. Also, Muslim women aren't allowed to practice polygamy which results in arbitrary and unreasonable classification solely based on the basis of religion and sex. Thus, equality guaranteed under Article 14 is disrupted.

Religious Discrimination

By section 2 of the Shariat Act, Muslim men can practice polygamy. Men belonging to other religions are prohibited from practicing polygamy by section 494 of IPC and their respective personal laws do not provide them with the power of unilateral and irrevocable 'talaq'.

Also, women belonging to other religions are protected from these evil practices but they are invoked against Muslim women. Direction issued for rehabilitation by state Government of community (Muslim Families) alone, found unacceptable.[5] Classification of establishments does not satisfy test of equality. Although, Indian Christians form a class by themselves but there is no justifiable reason to hold that the classification made is either based on intelligible differentia or the same has any nexus with the object sought to be achieved. The purport and object of that provision must be held to be non-existent. While interpreting a restrictive statute, one may consider not only the past history of the legislation but the manner in which the same has been dealt with by the legislature of its origin. Moreover, the Constitutionality of a provision, it is trite, will have to be judged

[1]Sri Srinivasa Theatre v. Govt. of Tamil Nadu, (1992) 2 S.C.C. 643.
[2]Jagit Singh v. State, A.I.R. 1954 Hyd. 28.
[3]Laxmi khandasari v. State of Uttar Pradesh, (1981) 2 S.C.C. 600.
[4]State of Maharashtra v. Indian Hotel &Restaurants assn., (2013) 8 S.C.C. 519.
[5]Mohd. Haroon v. Union of India, (2014) 5 S.C.C. 705.

keeping in view the interpretive changes of the statute affected by passage of time.[6]

Gender Discrimination

Polygamy should be considered as arbitrary and discriminatory, under Art. 14 and 15, in the same manner as it was held in the case of Charu Khurana v. Union of India.[7] It was held that discrimination based on sex was opposed to gender justice. Apart from violating the statutory command, they also violate the Constitutional mandate which postulates that there cannot be any discrimination on the ground of sex as sustenance of gender justice is the cultivated achievement of intrinsic human rights.

Also, India recognizes a plural legal system, wherein different religious communities are permitted to be governed by different personal laws. However, the laws of each religious community must meet the test of Constitutional validity and/or Constitutional morality.

Art.15 (1) prohibits the State from discriminating against citizens on grounds only of religion, race, sex, caste, and place of birth or any of them. The right guaranteed in Art. 15 (1) is conferred on a citizen as an individual and is available against him being subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen generally.[8] Hence, by allowing the practice of polygamy, the State has discriminated on the basis of gender and religion which is against the Constitution.

The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the act with its interpretive armory to articulate the felt necessities of time. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law.[9] In S.R. Bommai v. Union of India,[10] this Court held that the Preamble is a part of the basic structure of the Constitution. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women are anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Art. 13 if they violate fundamental rights. When a statue is in part void, it will be enforced as regards the rest, if that is severable from what is invalid.[11] It is humbly submitted that the application of Section 2 of the said act in respect of marriage and divorce are alone void. The application on the rest of the subject matters is valid. Therefore, the practice of polygamy is in violation of Art. 14 of the constitution and ought to be struck down.

[6]John Vallamattom v. Union of India, (2003) 6 S.C.C. 611.
[7]Charu Khurana v. Union of India, (2015) 13 S.C.C. 44.
[8]Nain Sukh Das and Ors. v. State of U.P. and Ors., A.I.R. 1953 S.C. 384.
[9]State of Karnataka v. AppuBaluIngale&Ors., A.I.R. 1993 S.C. 1126.
[10]S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1.
[11]R.M.D Chamarbaugwalla v. Union Of India, A.I.R. 1957 S.C. 628

RIGHT TO LIFE

It is submitted that the practice of polygamy is in violation of Article 21 of the Constitution as the right of a woman to human dignity, social esteem and self-worth are vital aspects of her right to life under Article 21.

The right to life includes the right to live with human dignity. It includes right to livelihood, better standard of living, hygienic conditions in the work place and leisure.[12] In a catena of cases, the Supreme Court observed that the right to live is not merely a physical right but includes within its ambit the right to live with human dignity.[13] In the case of Bandhu Mukti Morcha v. Union of India,[14] the State has obligatory duty to protect from the violation of fundamental rights especially to the weaker section of the society. Women were considered to be the weaker sex in the above mentioned case. Any custom or usage irrespective of even any proof of their existence in pre-Constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament.[15] It is submitted that a woman's right to a good and healthy life is being infringed by the practice of polygamy. The decent and civilized life is the fundamental right which also includes food, weather and decent environment. The practice of polygamy takes away this right of a Muslim woman. Polygamy is a practice that has been recognized as an evil plague and has been banned under section 494 of the IPC. Unfortunately, it still bothers Muslim women notwithstanding that it poses extremely serious health, social, economic, moral and emotional injury.

The "right to life" includes the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. The practice of polygamy disrupts the peace of the women and creates a toll on their mental health. It is also submitted that, if during the subsistence of a valid marriage the husband had remarried another, necessarily, that will be a mental cruelty towards the first wife. Thus, polygamy is cruel towards woman and therefore affects her right to peaceful life guaranteed to her under Article 21.

Under the Muslim Law, marriage is a contract and contract cannot be rescinded unilaterally. Personal law or Constitution of India does not entitle the husband to rescind contract, orally, by notice or by ex parte decisions, hence seems to be unsustainable, otherwise also it shall be bad in law.[16] The Holy Quran clearly states that one can marry the widowed and orphaned up to four, but only if they can treat them all equally.[17] The Holy Quran also states that it is impossible to treat all of the wives equally. Hence, it is very pertinent to note that the practice of polygamy is not mandated by the Holy Quran.

[12]Francis Coralie v. Union Territory of Delhi, (1981) 1 S.C.C. 608.
[13]Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241.
[14](1997) 10 S.C.C. 549
[15]N. Adithayan v. The Travancore Devaswom Board, (2002) 8 S.C.C. 106.
[16]Aaqil Jamil and Ors. v. State of U.P. and Anr, (2017) 2 A.C.R. 1870.
[17]Quran surah al nissaayat 3.

Matrimony today is not merely in arrangement of convenience for exhausting biological, physical and carnal urges without offending the norms of morality of the given age. Spouses today are not merely machines in the assembly line of production to perpetuate the human race on this planet.[18] The second marriage is not a single but a continuing wrong to the first wife.[19] "It is but a short step from this principle to ask the husband who has taken it into his head to have a second wife during the subsistence of the first marriage to explain the reasons for this conduct and in the absence of a convincing explanation, to conclude that there is little likelihood of the first wife receiving equitable treatment from him. A complete ban on polygamy has long been need of the hour as it renders Muslim wives extremely insecure, vulnerable and infringes their fundamental rights. A combined reading of Articles 14, 15 and 21 of the Constitution provides that no law can be made or can be applied which discriminates against women.

RIGHT TO RELIGION

Polygamy is not an essential practice of Islam religion. Article 25 protects those practices of a religion without which the fundamental character of the religion will change. What is meant by 'an essential part or practice of a religion' is now the matter for elucidation. In the present case, the Respondents claim that polygamy and 'talaq-e-biddat' are essential practices of Islam. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practices mean those practices that are fundamental to follow a religious belief.[20] Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice, if the nature changes then it can be treated as an essential part of the religion.

Earlier, Muslims believed that shifting of graves was not allowed. But in the case of Abdul Jalil v. State of Uttar Pradesh,[21] the Hon'ble Court Supreme Court observed that there is no text in the Holy Quran prohibiting removal or shifting of graves. Likewise, the Quran is being misinterpreted by Muslim men to have more than one wife and to give unilateral divorce.

In the case of Shahulameedu v. SubaidaBeevi,[22] it has been observed by the Kerala High Court that, "Yusuf Ali in his commentary on the Holy Quran pointed out that the Prophet first strictly limited the unrestricted number of wives of the 'Times of Ignorance' to a maximum of four, provided you could treat them with perfect equality in material things as well as in affection and immaterial things.' As this condition is most difficult to fulfil, the recommendation was understood to be towards the practice of monogamy."

[18]Aboobacker v. Rahiyanath, 2008 (3) K.L.T. 482.
[19]Abdurahiman 49 years v. Khairunnessa 43 years, (2010) D.M.C. 707 Ker.
[20]Commissioner of Police v. Acharya JagadishwaranandaAvadhuta and Ors., (2004) 12 S.C.C. 7.
[21]Abdul Jalil v. State of Uttar Pradesh, A.I.R. 1984 S.C. 882.
[22]Shahulameedu v. SubaidaBeevi, 1970 K.L.T. 4.

Though the personal law of Muslims permitted having as many as four wives it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favor of monogamy does not interfere with the right to profess, practice and propagate religion and does not involve any violation of Art. 25 of the Constitution.[23] It is humbly submitted that the other essential practices of the religion can survive in isolation of this practice.

It is to be understood that Muslim Law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances.[24] Muslim Personal Law does not permit a Muslim to treat one wife cruelly, drive her out of the Matrimonial home and then get married for the second time.[25]

It is submitted that Art. 26 (b) grants rights to a religious denomination to freely manage and exercise its own affairs in matters of religion except in cases where they run contrary to public order and morality. Although this right is given to the religious denomination, the Courts have the right to decide what amounts to an essential right or ceremony as regarding to the tenets of the particular religion.[26] Polygamy is not an essential part of the Islam religion, and hence would come under the clause 2 of Art. 25 of the Constitution. Polygamy is only an act permitted by the religion and not mandated so it will not amount to the distinct culture mentioned under Art 29 (1).

In the case of Zahid Mukhtar and Ors. v. The State of Maharashtra and Ors.,[27] Art. 29 is for preservation of the essential culture of the people and not with peripheral customs which have no relation to an existing culture. He rightly gave an example of the abolition of the practice of Sati or untouchability which can be said to be a part of traditional practice. However, the abolition of such traditional practice cannot amount to destroying culture. Cultural right cannot be confused with right to religion. Common thread in Art. 29(1) is language, script and culture and not religion. Therefore, the argument based on the violation of Art. 29 is without any merit. Hence polygamy, even it is an existing culture in Islam, it is not an essential part of the religion and hence it cannot claim protection under Art. 26 (2) and Art. 29.

VI. CONSTITUTIONALLY VALID

There is always a presumption in favour of the constitutionality of a statute, and the burden is upon him who

[23]Badruddin v. Aisha Begum, (1957) All L.J. 300.
[24]Smt. R.A. Pathan v. Director of Technical Education and Ors., A.I.R. 1960 All. 684.
[25]Jafar Abbas Rasool Mohammad Merchant v. State of Gujarat, (2012) S.C.C. Guj. 1358.
[26]Achariyajagdiswaranandavadhut v. commr of police, (1984) 4 S.C.C. 522.
[27]Zahid Mukhtar and Ors. v. The State of Maharashtra and Ors., (2017) 2 A.B.R. 140.

attacks it to show that there has been a clear transgression of constitutional principles.[28] The Legislature understands and correctly appreciates the need of its own people that its laws are directed to problems made manifest by experience.[29] The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any law attacked as discriminatory and violative of the equal protection of the laws.[30]

Polygamy is not violative of Article 14:

Art. 14 of the Constitution is a guarantee of equal treatment. An equal law should be applied with an equal hand to all persons who are the equal. Art. 14 of the Constitution is a synthesis of the two principles, 'equality before law' and 'equal protection of the laws'.[31] 'Equal protection of the laws' is a positive concept which obligates the State to give special treatment to persons in different in order to establish equality amongst all. It guarantees equality before the law and equal protection of the laws within the territory of India.[32] The rule is that the like should be treated alike and not that unlike should be treated alike.

The same or uniform treatment of unequals is as bad as unequal treatment of equals.[33] Separate treatment is often required for the varying needs of different classes of the society. From the very nature of the society, there should be different laws in different places and the Legislature controls the policy and enacts laws in the best interest of the safety and security of the State. In fact, identical treatment in unequal circumstances would amount to inequality.[34] So, a reasonable classification is not only permitted but is necessary if society is to progress.[35]

In the case of Ram Krishna Dalmia v. Mr. Justice S.R.Tendolkar,[36] it was observed that:- In order to pass the test for permissible classification two conditions must be fulfilled, namely—

• The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group. • The differentia must have a rational relation to the object sought to be achieved by the statute in question.[37]

It is observed by the author that the classification made between Muslim men and men of other religion is

[28]R.K.Garg v. Union of India, 1981 A.I.R 2138, The Amalgamated Tea estate v. State of Kerala 1974 A.I.R 849, Amrit Banaspati v. Union of India 1995 A.I.R 1340, State of Bihar v. Sachchidanand Kishore Prasad, A.I.R 1995 S.C 885.
[29]Chiranjit Lal Chauduri v. Union of India, A.I.R. 1951 S.C. 41.
[30]Saurabh Chaudri v. Union of India, A.I.R. 2004 S.C 361, Dr.Subramanian Swamy v. Director, C.B.I. (2005) 2 S.C.C. 317.
[31]Indian Const. Art. 14.
[32]State of Kerala v. N.M Thomas, A.I.R. 1976 S.C. 490; Anita Kushwaha v. Pushap Sudan, A.I.R. 2016 S.C 3506; Union of India v. B. Kishore, (2011) 13 S.C.C. 131.
[33]All India Sainik Schools Employees' Assn. v. Sainik Schools Society, 1989 Supp. (1) S.C.C. 205.
[34]State of Madhya Pradesh v. Mandawar, A.I.R. 1954 S.C. 493; Gauri Shankar v. Union of India, A.I.R. 1995 S.C. 55.
[35]Jagit Singh v. State, A.I.R. 1954 Hyd. 28.
[36]A.I.R 1958 S.C. 538.
[37]Thimmappa v. Chairman, Central Board of Directors, SBI, A.I.R 2001 S.C. 467.

completely reasonable and not arbitrary and natural classification. They have to be classified as different religions are governed by their own set of personal laws. In fact, it would be violative Art. 14 if the classification is not made, as it may deprive one religion of the right to religion, taking away their right to equality.

Also, there is an intelligible differentia between those who get married under the Special Marriages Act and those who get married under the Shariat Act. They have the choice to get married either under the Special Marriages Act or by the Shariat Act. By getting married under the Shariat Act, they agree to be governed by its provisions. And so, there is always an option to choose between and there is compulsion on a person to marry only as per the Act. A new dimension of Art. 14 transcends the classificatory principle. Art. 14 is no longer to be equated with the principle of classification. It is primarily a guarantee against arbitrariness in State action and 'the doctrine of classification' has been evolved only as a subsidiary rule for testing whether a particular state action is arbitrary or not. Thus, these contentions placed by the author clearly show that this practice of polygamy in Muslim Law does not violate Article 14 of the Part III of the Constitution.

Practice of polygamy is protected under Art.25:

As per the esteemed Constitution none of the rights guaranteed are absolute. They are subject to certain restrictions. Sometimes, the Constitution itself imposes the restriction. In others, the Parliament has the power to make the restriction. In the present case, Constitution has imposed the restriction. In order to exercise the fundamental right guaranteed under Art. 25, a restriction is placed on Art. 14 which is also a fundamental right.[38] Classification on the basis of religion has been permitted in several cases by the Hon'ble Courts and by the constitution itself. It was held that classification enshrined in religious practice which is saved by Arts. 25 and 26 of the Constitution is not violation of Art. 14.[39]

The principle of equality does not mean that every law must have Universal application, as the varying needs of different classes of persons often require different treatment. Therefore, the principle provides the State the power to make classifications with a legitimate purpose.[40] Different treatment does not per se constitute violation of Art. 14. It is in violation only when the classification is unreasonable.[41] Every classification in some degree is likely to produce inequality and mere production of inequality is not enough.[42] It is for the Legislation to determine, what categories; it would embrace within the scope of Legislation and merely because certain categories which would are left out would not render the Legislation which has been enacted in any

[38]H.H Swamiji of Shri Amar Mutt v. Commr. Hindu Religious and Charitable Endowments Dept., (1979) 4 S.C.C. 642
[39]Riju Prasad Sarma v. State of Assam, (2015) 9 S.C.C. 461.
[40]State of Bihar v. Balsara, (1951) S.C.R. 682 (708); Babu Lal v. Collector of Customs, A.I.R. 1957 S.C. 677; Gopichand v. Delhi Administration, A.I.R. 1959 S.C. 609.
[41]Ameeroonissa v. Mehboob, A.I.R. 1953 S.C. 91.
[42]State of Bombay v. F N Balsara, A.I.R. 1951 318.

manner discriminatory and in violation of Art. 14.[43] Therefore, the author herein placing reliance on these contentions and concludes that the practice of polygamy under the Muslim Law are not in violation of Art. 14.

The practice of polygamy is protected under Art. 25 of the Constitution. Religion has been defined by this Hon'ble Court as the matter of faith with individuals and communities and it is not necessarily theistic.[44] Further, it observed that religion is the belief which binds spiritual nature of men to supernatural beings. It includes worship, belief, faith, devotion, etc. Religious right is the right of the person believing in a particular faith to practice it, preach it and profess it.[45]

The author herein state that Art. 25(1) includes the freedom to practice rituals and ceremonies which are an integral part of one's religion.[46] The religious practices and performances of acts in pursuance of religious belief are a part of religion as faith or belief in particular doctrines.[47] Polygamy is understood as a common practice permitted by the Islamic religion and it is the right of the individual to follow the beliefs and faiths of his religion.

In the case of Gulam Abbas v. State of UP,[48] it was held that the Court cannot interfere with the religious communities, customary rights and beliefs. In Islam polygamy are widely accepted and approved. It has been understood by the apex court in the case of HH Srimad Perarulala Ethiraja Ramanuja jeeyar swami v. State of Tamil Nadu,[49] that what constitutes to a religious practice should be decided by Courts with reference to the doctrine of a particular religion and include the practices which are regarded by the community as a part of the religion. The learned scholar Yosufali in his commentary of the Quran has stated that the Prophet has allowed the Muslim man to marry four women at a time, and this has been recorded in the case of Shahulameedu v. SubaidaBeevi.[50]

In the case of Abdulla khan v. Chandini bi,[51] the Court as held that a Musilm wife cannot deny living with the husband for the mere reason that he has contracted another marriage, she can only move out if she and her children have not been maintained properly. In the case of State of Bombay v. Narasuappamali,[52] the Bombay High Court held that all the personal laws are beyond the grip of Art. 13(1) and that they cannot be challenged on the touch stone of Part III of the Constitution. It was observed in the above-mentioned case that even the section 494 of the IPC which criminalises bigamy does not apply to the Muslims as their personal allows permit

[43]Sakhawant v. State of Orissa, (1955) 1 S.C.R. 1004.
[44]The Commissioner, Hindu v. Sri LakshmindraThirthaSwamiar, A.I.R. 1954 S.C. 282.
[45]PMA Metropolitan v. Moran Marthhoma, A.I.R. 1995 S.C. 2001.
[46]E.R.J. Swami v. State of Tamilnadu, A.I.R. 1972 S.C. 1586.
[47]Ratilal Gandhi v. State of Bombay, A.I.R. 1954 S.C. 388.
[48]Gulam Abbas v. State of U.P, (1982) 1 S.C.R. 1077.
[49]HH SrimadPerarulalaEthiraja Ramanuja jeeyar swami v. State of Tamil Nadu, A.I.R. 1972 S.C. 1586.
[50]Shahulameedu v. SubaidaBeevi, 1970 K.L.T. 4.
[51]Abdulla khan v. Chandini bi, A.I.R. 1956 Bhopal 71.
[52]State of Bombay v. NarasuAppa Mali, A.I.R. 1952 Bom 84.

up to four marriages. It was also reinstated in the Nikhil Soni v. Union of India,[53] where the Court held that the Santara was a personal law of the Jains and that the Court cannot interfere with the personal law of the communities. Every religion has their own laws regarding their marriage, divorce and adoption and they are unique to their religion and interfering in their personal laws would mean disruption of their religion.

The practice of marriage, divorce and maintenance differs in each religion. Each religion views these practices in a different context and therefore the practices in each religion are unique and peculiar to that particular religion only. In such circumstances, one cannot look at the validity of the practices of one religion or judge them as being unequal with the rights in another religion. Hindus as well as Muslims in India have their own personal laws which are based upon their religious texts and embody their own distinctive evolution and background. Personal laws can be defined as "The law that governs a person's family matters, regardless of where the person goes".[54] This shows that matters regarding marriage and divorce are personal laws and are protected under Art. 25 of the Constitution and also that this is the matter of the Legislature as this falls under the third list item 5. The practice of polygamy is clearly well within the reasonable restrictions of Article 25 of the Constitution and does not violate public morality, peace and public health. Hence, the judiciary cannot step into the ambit of the legislature.

Not Violative of Article 21:

• Right to quality life

The right to life with human dignity encompasses within its fold some of the finer facets of human civilization. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned.[55] The need for a decent and civilized life includes the right to food, water and decent environment.[56] Quality life guaranteed by the husband to the wife is not violated by the practices of polygamy.

The Hon'ble Court has ruled that the right to life is guaranteed in any civilized society which would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. For an animal, it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual.[57]

• Right to choose

[53]Nikhil Soni v. Union of India, 2015 Cri. L.J. 4951.
[54]Black's law dictionary (10th Edition, 2014)
[55]CERC v. Union of India, A.I.R. 1995 S.C. 922.
[56]Chameli Singh v. State of Uttar Pradesh, (1996) 2 S.C.C. 549; Avas Evam Vikas Parishad v. Friends Cooperative Housing Society Ltd., A.I.R. 1996 S.C. 114.
[57]Shantisar Builders v. Narayan KhimlalTotame, A.I.R. 1990 S.C. 630; Francis Coralie Mullin v. Administrator, Union Territory of Delhi, A.I.R. 1981 S.C. 746; BijaylakshmiTripathy v. Managing Committee of Working Women Hostel, A.I.R. 1992 Ori. 242; Mohini Jain v. State of Karnataka, A.I.R. 1992 S.C. 1858; Shaibya Shukla v. State of Uttar Pradesh, A.I.R. 1993 All 171; Inderpuri General Store v. Union of India, A.I.R. 1992 J&K 11.

The Hon'ble court held that Art. 21 is the heart of the Constitution. It confers right to life as well as right to choose.[58] The right to choice was recognized as a part of Art. 21 of the Constitution.[59] The consent of either party to a marriage is not just to marry a particular person, but also to the particular law which will apply to the marriage that is whether it is personal law or enacted civil law. In such a situation, a person who consciously opts for the personal law cannot complain that the personal law is unfavourable or discriminatory. It is submitted that marriage among Mohammadans is not a sacrament, but purely a civil contract".[60] Every contract has terms and conditions to it. Deviation from the terms and conditions of the contract takes away the basic fundamentals of the Islamic law. Hence, if a woman marries according to the Islamic law with full consent, she cannot prosecute her husband for bigamy.

She had made a free choice to marry under Islamic law and thus she cannot go back from it. Any other interpretation of the law would be unjust and unfair to the husband since wife is subject to rights and obligations from the law freely chosen by her. She is not subject to unreasonableness by the practice of polygamy as she had a choice of marrying under the Special Marriages Act which does not permit polygamy.[61] The right to choose a life partner is a facet of individual liberty.[62] A person who has come of age and has the capability to think on his/her own has a right to choose his/her life partner.[63]

The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable.[64] The respect for an individual human being and in particular for his right to choose how he should live his own life is individual autonomy or the right of self-determination. Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death.[65]

• Right to Dignity

Our Constitution has often been described as transformative. One of the most important purposes of this transformation is to ensure that, by the realisation of fundamental socioeconomic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy.[66] Dignity is the quintessential quality of a personality and a human frame always desires to live in the mansion of dignity, for it is a highly

[58]I.R Coelho v. State of Tamil Nadu, (1999) 7 S.C.C. 580.
[59]State of Karnataka v. Associated management of English medium primary & secondary schools, (2014) 9 S.C.C. 485.
[60]Abdul Kadir v. Salima, (1886) I.L.R. 8 All 149.
[61]The Special Marriage Act, 1954, sec. 43 & sec. 44.
[62]Shakti Vahini v. Union of India, 2018 S.C 275.
[63]Shafin Jahan v. Asokan K.M., 2018 S.C.C 343.
[64]Navtej Singh Johar v. Union of India Law Ministry, (2018) 1 S.C.C 791.
[65]Reeves v. Commissioner of Police of the Metropolis, (2000) 1 AC 360.
[66]Road Accident Fund and another v. Mdeyide, 2008 (1) SA 535 (CC)

cherished value.[67] In the case of Navtej Singh Johar v. Union of India Law Ministry,[68] this is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself as he desires and allow him to express himself, with the consent of the other. That is the right to choose without fear.

• Right to privacy

In the infamous case of Navtej Singh Johar v. UOI Law Ministry,[69] the honourable court held that Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. The way of life one chooses to follow is an integral part of privacy. Each person is entitled to privacy of their self and their body.[70] Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.[71]

The right to privacy is an essential ingredient of the right to life.[72] " Article 12 of the Universal Declaration of Civil and Political Rights clearly states that no person shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Any such interference or attack on a person in his life will be a serious violation of privacy. Thus, the author asserts the dependence on these judgments and contentions thereby conclude that the practice of polygamy does not violate Right to privacy and Art.21 as a whole.

VII. CONCLUSION

Religion is often placed on the highest pedestal in our country and our Constitution also gives protection for all religion and religious practices. But the judiciary focusing on a transformative constitution and the concept of constitutional morality playing an integral role in the recent landmark judgments there has been a changing trend. The practice of polygamy in Muslim law and its constitutional validity have been clearly discussed by the authors and herein leave the open ended question on deciding whether this practice should be struck down or not.

[67]Joseph Shine v. Union of India, A.I.R. 2018 S.C. 4898.
[68](2018) 1 S.C.C. 791.
[69](2018) 1 S.C.C 791.
[70]Aruna Ramachandra Shanbaug v. Union of India, A.I.R. 2011 S.C. 1290.
[71]Sareetha v. VenkataSubbaiah, A.I.R. 1983 A.P. 356.
[72]People's Union of Civil Liberties v. Union of India. A.I.R. 2003 S.C. 2363, R.Rajagopal v. State of Tamil Nadu, A.I.R. 1995 S.C. 264, Shardha v. Dharmpal, A.I.R. 2003 S.C. 3450.