

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 5

2022

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Constitutionality of Polygamy in India

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ABSTRACT

The British invasion into India and their intentions of keeping the Indians divided on the basis of their religion, has proved to be a successful move. This has been proved several times throughout history and even in the present time through all the inter-religious conflicts that the Indian citizens have always involved themselves in. This hatred that the British implanted in our minds has grown with such deep roots that it has spread its branches to the extent of expressing hatred and disgust again each other not only within India but even other countries following the same religion.

Hatred has reached a level where the public does not agree to certain practices despite the logic and sense simply because it is practiced by the opposing religion. Similarly, on the other hand, certain practices are encouraged merely because the other religion does not entertain it. This has led to multiple conflicts between the three main religious sections of India, namely: Hinduism, Islam and Christianity. One such highly debated practice is that of polygamy. Polygamy is a purely familial and personal decision which has unfortunately been connected to the religion of the individual. It has become an act that is permitted, even legally, only for persons of certain religiously oriented persons.

In addition to this discrimination, polygamy has also become an act permitted for the members of one sexual community. These boundaries too have been set by the religious heads or leaders of specific religions. All of these aspects have been highlighted in this paper on the Constitutionality of Polygamy in India.

I. INTRODUCTION

Polygamy is defined as the practice of marrying another person during the life of the first spouse. There are two main types of polygamy: **Polygyny**, when one man has more than one wife and **Polyandry**, when a single woman is married to two or more men simultaneously. Initially, while polygamy was permitted to both Hindus and Muslims in India, it was later made illegal for all except Muslims.² Despite being criminalised for Hindus, Christians, and Parsis under the *Indian Penal Code, 1860*, and their respective personal laws, we see widespread practice of polygamy in society even today.

Personal laws were introduced in the Constitution of India to preserve the secularist nature of

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² Law Commission Of India, One Hundred Fifty-Sixth Report on the Indian Penal Code, Volume I, August 1997.

the country. The makers of the Constitution aimed at maintaining public order by allowing all citizens the freedom to practice their respective religions without any conflicts. Unfortunately, with time, this has led to the misuse of these liberties in various ways.

This paper focuses on the ways in which polygamy breaches Fundamental Rights. A **Fundamental Right** is defined as a significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications.³ The different rights talked about in this paper are as follows:

Section – A Article 15 under Right to Equality

Section – B Article 21, i.e., Right to life and personal liberty

Section – C Article 25 and 26 under Right to Freedom of Religion

II. RIGHT TO EQUALITY

Right to Equality has two attributes to it:

1. **Equality before the law** is a slightly negative connotation in that it establishes that no individual is above the law of the land. “It is a concept implying the absence of any special privilege in favour of any individual.”⁴
2. **Equal protection of the law** a positive connotation as it states that equality will be given to persons in similar situations. It allows for discrimination between people, which would otherwise not be allowed under the concept of equality. The Doctrine of Reasonable Classification was brought about by the Supreme Court of India in the case of *Shri Ram Krishna vs Shri S. R. Tendolkar*,⁵ which stated the subsequent conditions that were necessary for a classification to be valid under this Article:
 - (a) The classification must be founded on an intelligible differentia, and
 - (b) The above-stated differentia has a rational nexus with the objective with which such classification is made.

Here, it is important to note that intelligible differentia is what helps to distinguish things which are grouped from others that are left out of such a group.

Polygamy has been illegal for Hindus, Jains, Buddhists, and Sikhs since 1956 under Sections 5 and 17 of the Hindu Marriage Act, 1955 and is considered a crime under Sections 494 and 495 of the Indian Penal Code, 1860. On the other hand, polygamy is considered partially legal for

³ *Black's Law Dictionary*.

⁴ MAMTA RAO, CONSTITUTIONAL LAW 103 (2nd edn, EBC Webstore 2013), p. 2.1.

⁵ AIR 1958 SC 538.

Muslim men under the Muslim Personal (Shariat) Application Act 1937. While Muslim Law permits men to have up to four wives, women are strictly prohibited from getting involved with anyone other than their husbands.⁶ The Committee under the CEDAW has also noted that polygamous marriages interfere with the equality between men and women.⁷

The former shows discrimination on the basis of religion, whereas the latter is on the basis of gender. The Muslim Personal (Shariat) Application Act of 1937 came into existence through the law-making procedure followed by the Legislature. This makes the Act subject to judicial reviews, like all other laws of the country. Polygamy, legalised amongst Muslims through this Act, can also be revoked by the same authority that gave effect to the Act itself.

III. RIGHT TO FREEDOM

The definition of the **Right to Life and Personal Liberty** includes the right to live with dignity.⁸ Polyandry is not practised as widely in India as polygamy.⁹ The practice of polygamy has a negative effect on the lives of not only the first wife but also the subsequent wives of the man. India is one of the members of the United Nations.¹⁰ The UN has a body called Human Rights Council, which promotes and protects human rights worldwide. The UNHRC has also stated that polygamy violates the dignity of women.¹¹ It further says that it is inadmissible discrimination against women and that it should hence be abolished wherever it continues to exist.¹²

The definition of Article 21 also includes the Right to Health in its scope.¹³ The term 'Health' includes the mental, physical and social well-being of an individual.¹⁴ Polygamy affects the mental and physical health of the women involved in such a relationship to the extent of an increase in female genital mutilation and possibility of the woman's death during childbirth.¹⁵ The rates of HIV infection are also higher in women than in men in a polygamous marriage, and the cases of domestic violence are also higher when compared to those in monogamous

⁶ Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937, s. 2 (India).

⁷ Committee on the Elimination of Discrimination against Women, General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW (2013).

⁸ Vincent v. Union of India, AIR 1987 SC 990 (India).

⁹ <<http://14.139.58.147:8080/jspui/bitstream/123456789/302/1/35LLM18.pdf>> accessed 3rd December, 2021.

¹⁰ <www.un.org/en/about-us/member-states> accessed 3rd December, 2021.

¹¹ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

¹² *Id.*

¹³ *supra* note 7.

¹⁴ Abhishek Naharia, *National Health Policy: A Step Towards Right to Health* 7 CNLU LJ 185 (2017-18).

¹⁵ Naomi Schaefer Riley, *The Problems with Polygamy*, INSTITUTE OF FAMILY STUDIES (July 8, 2015), <https://ifstudies.org/blog/the-problems-with-polygamy> accessed 3rd December, 2021.

marriages.¹⁶

These women are generally married away at a very young age (i.e., Before they reach the age of giving consent.)¹⁷ Polygamy affects not only the health of the wives involved in the relationship but also the children to be bored through such a relationship. These children are subject to higher chances of conflicted marriages and violence in the families than children resulting from monogamous marriages.¹⁸ This further makes the children more susceptible to behavioural and developmental problems.

The negative effects of polygamy are not restricted to only women and children; they affect men too. The men involved in polygamous marriages tend to get more caught up in preoccupations like alcoholism, and they also lack educational qualification.¹⁹ Based on the above-mentioned arguments, we can also conclude that polygamy is called a social evil for valid reasons.

IV. RIGHT TO FREEDOM OF RELIGION

The legality of polygamy in India differs on the basis of the religion of the man wishing to practice polygamy. The legislature supports the criminalisation of polygamy for Indians of all religions except Islam with the fact that Muslims have the right to practice polygamy as it is explicitly mentioned in their holy book, the Quran.

The Quran has a verse stating that a man can have up to 4 wives at the same time.²⁰ The public believes that this verse permits the men in Islam to practice polygamy; this is, however on the condition that the men treat all their wives fairly and with complete fairness. This is in accordance with the Constitution of India as well.

Articles 25(1) and 26(b) of the Constitution explicitly mention that all persons have the freedom to practice and profess their religions and manage their religious affairs provided the actions taken by them are not disrupting public order, morality, or the health of others.

Moreover, the Quran also has a verse which all readers comfortably skip reading. It states that it is never possible to be able to do justice to all the wives despite maximum efforts. The Quran thus normalises monopoly, though in a tactful manner. Polygamy has been proven to go against all the conditions laid down here and thus should be criminalised for all without exceptions.

The Indian Penal Code, 1860 is interpreted to allow bigamy for Muslims on the basis of

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Thom Brooks, *The Problem with Polygamy*, PHILOSOPHICAL TOPICS, 2009, at 109, 109-122.

¹⁹ *Id.*

²⁰ Surah 4: An-Nisa':2-3.

provisions of their personal law, but it is vital to observe that while the IPC does mention certain exceptions to the criminalisation of bigamy under Section 494 and 495, Muslims having the permission to practice polygamy is not mentioned explicitly or impliedly.²¹

While there have been judgements interpreting such exceptions with the personal laws as a reference, the validity of these judgements can be questioned now that the validity of the personal law itself has been questioned.

V. CONCLUSION

Polygamy was made illegal with the intention of avoiding situations such as inhuman treatment of the wives, the superiority of the males, etc. But the fact that it has remained legal for Islamic men alone defeats the purpose of its criminalisation for others. Criminalisation of polygamy for all religions except that of Islam has increased the number of conversions from these religions to Islam simply with the motive of legalising their marriages that would otherwise be declared void. Though this issue has theoretically been solved by the Hon'ble Supreme Court of India, marriages resulting from such conversions will be pronounced void and criminal under Sections 494 and 495 of the IPC.²² This still fails to stop the public from engaging in such activities. The practice continues to be carried out in secrecy, if not openly.

In my opinion, the leaders refuse to make any amendments to the laws such as this to ensure they secure the votes of the said minority in order to win the general elections. Another rather mainstream reason to allow such activities is to ensure harmony in society with the ideals of secularism and to avoid conflicts and protests in the country. This can be avoided only by ensuring that the judiciary is an independent body not only theoretically but also in practice. The judicial should be kept isolated from political influence in any way. To ensure such isolation, it becomes critical to restrict the participation of members of the judiciary from getting involved in the legislative process so that they can be kept out of the circle of vote bank politics and instead work solely service-driven. Polygamy breaches several fundamental rights and has no substantive claims to defend such breach and thus must be criminalised for all citizens irrespective of factors such as their religion or gender.

²¹ The Indian Penal Code, 1860, No.45, Acts of Parliament, 1860.

²² *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531 (India).