



The Debate Over Polygamy In the Context of Muslim Family Law Ordinance 1961

Naila Maqsood

Abstract: This paper concentrates on the continuous struggle between vigorous Modernists and highly institutionalized Traditionalists within the context of Pakistan's Muslim family law ordinance 1961. The later have resisted the efforts of the state to introduce any changes in family laws.

The discourse contends, in the first place, that the authentic historical evidence uncovers that the tension between vigorous Modernists (looking for substantive changes for Pakistani women) and highly institutionalized Traditionalists (upholding a conventional perusing of family law) over the extent of Ijtihad. Second, maybe all the more significantly, this guaranteed that the ordinance would be an 'offspring of compromise' which is considered the major cause of ineffectiveness of MFLO. This is confirmed in a nitty gritty analysis of the MFLO's features especially polygamy.

Key words: Marriage Commission Report, Modernists, Muslim family Laws (MFLO), Polygamy, Traditionalists

Muslim Family Law Ordinance 1961 is the most remarkable reform to Pakistan's family law, which has been promulgated in pursuit of recommendation of the Marriage Commission Report of 1956.

Origins of Ordinance: The Marriage Commission and Its Report of 1956

For over a decade, after independence family law did not experience any reform. Muslim Family Laws Ordinance was promulgated in 1961. The 1956 Constitution included "a provision known as the repugnancy clause affirming that no law repugnant to Islamic injunctions would be enacted and that all existing laws would be considered and amended in light of this provision. The repugnancy provision has been retained and strengthened in subsequent Constitutions and amendments".¹

The context of the Ordinance is quite interesting. The then Prime Minister, Muhammad Ali Bogra, remarried his secretary Aliya Begum in 1955 while still having his first wife begum Hamida. It is important to note that polygamy was uncommon among the elites of Pakistan in those days. Begum Hamida was a member/activist of an elitist women's organization, 'All Pakistan Women's Association' (APWA). Thereafter, APWA launched an organized demonstration against Prime Minister throughout the country. Along with APWA, United Front for Women's Rights (UFWR) put their energies to introduce a new ordinance/bill for the protection of rights of women including marriage, polygamy, divorce, maintenance, inheritance and children's custody.

On August 4, 1955, under pressure from UFWR and APWA, the government formed a Commission on "Marriage and Family Laws" to study Muslim Family Laws. The Commission comprised of six Modernists (three men and three women)

1) Dr Khalifa Shuja-ud-Din

- 2) Mr Enayet-ur-Rahman,
- 3) Dr Khalifa Abdul Hakim
- 4) Begum Anwar G. Ahmad,
- 5) Begum Shamsunnahar Mahmood
- 6) Begum Shahnawaz and
- 7) Maulana Ehtesham-ul-Haq Thanvi (Traditionalist)

On October 27, 1955, Mian Abdur Rasheed, former chief justice of Pakistan became president after the demise of the commission's first president, Dr Khalifa Shuja-ud-Din. On June 20, 1956, the commission issued its report. On August 30, 1956, Maulana Thanvi's separate vigorous dissenting note was submitted which depicted a traditional viewpoint on family affairs. While criticizing the selection of the commission's members, he wrote:

"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."² It seemed that Maulana himself "assumed the position of an expert authority on Shariah."³

By concluding the report he wrote:

"This report From every point of view, religious or intellectual, deserve complete rejection."⁴

Both the Report and the Dissent note illustrated the contradictory viewpoint existed in Pakistan on family affairs and laws, those of modernist and those of traditionalist. According to the Abbott, "On issues like divorce and polygamy there was a large gap between the Modernists and Traditionalists"⁵The report received severe criticism from orthodox traditionalists and remained shelved till military coup.

It is interesting to note that many of the recommendations of commission (i.e. maintenance of wives and custody of children) were not even fully integrated in 'Muslim Family Law Ordinance (MFLO)' due to strength of the traditionalist opposition. A long open deliberation between the traditionalist and those of modernist ensued.

The Muslim Family Law Ordinance of 1961

It was claimed that the first legal effort in Pakistan towards giving men and women "equal rights," was 1961 Muslim Family Law Ordinance (MFLO). "Its reforms were prescriptions for procedural safeguards rather than clear prohibitions of certain acts."⁶ In nutshell, "the MFLO reflected a compromise between Traditionalists and Modernists. This compromise weakened the effect of the reforms."⁷

There were four major provision of the ordinance: a) restriction on the practice of polygamy b) compulsory registration of marriage; c) regulation of divorce procedure and; d) succession although, it also restructured laws related to marriage registration, succession and maintenance.

I will focus on polygamy because, of all the provisions, this one has aroused the most vigorous protests on the part of the traditionalists on one hand and a cause of compromise made between Modernists and Traditionalists on the other hand (despite the fact that Modernist activists appeared to be most passionate about the annulment of the polygamy). Polygamy is treated in three parts.

First, explaining the concept of polygamy in Islam

Second, describing the interpretations of modernists' legislators and the traditionalists on the same issue.

Third, while discussing polygamy in the context of Muslim Family Law Ordinance, it is concluded that: “the MFLO offered at most procedural safeguards that might protect women or provide them with some rights, but it never actually prohibited any practices that might hurt them. In other words, the MFLO's writers yielded to Traditionalist pressures and struck a middle ground.”⁸

Polygamy

a. Polygamy in Islam

The following verses deal with the issue of polygamy in the Holy Quran.

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ
وَثَلَاثَ وَرُبْعًا فَإِنْ خِفْتُمْ أَلَّا تُعَدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَٰلِكَ أَدْنَىٰ
أَلَّا تَعُولُوا ﴿٣﴾

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“And if you have reason to fear that you might not act equitably towards orphans, then marry from among [other] women such as are lawful to you - [even] two, or three, or four: but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one - or [from among] those whom you rightfully possess. This will make it more likely that you will not deviate from the right course.”⁹ 4:3

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا
تَحِيلُوا عَلَى الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ وَإِنْ تُصْلِحُوا
وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ عَفُورًا رَحِيمًا ﴿١٣٩﴾

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“And it will not be within your power to treat your wives with equal fairness, however much you may desire it; and so, do not allow yourselves to incline towards one to the exclusion of the other, leaving her in a state, as it were, of having and not having a husband. But if you put things to rights and are conscious of Him - behold, God is indeed much-forgiving, a dispenser of grace.”¹⁰ 4:129

b. The debate over polygamy

Questionnaires and It Replies

The following questions about the above mention issue were modeled to the marriage Commission:

Q.1. “The Qur'anic verse dealing with polygamy occurs only in connection with the protection of the rights of orphans (verse 3, Surah An Nisa). Is polygamy prohibited except when the protection of the rights of the orphans is the main objective?”

Q.2. Should it be made obligatory on a person who intends to marry a second wife in the life-time of the first to obtain an order to that effect from a court of law?

Q.3. Should it be laid down that no court can grant such an order till it is satisfied that the applicant can support both wives and his children in the standard of living to which he and his family have been accustomed?

Q.4. Should it be laid down that the court shall make provision that at least one-half of the salary of such an individual is paid directly to the first wife and her children?

Q.5. In case of a person who do not enjoy a direct salary, should the court demand guarantee from the application for the payment of at least half his income to the first wife and her children?"¹¹

The Marriage Commission replies

The Marriage Commission replied in response to the Q.I:

According to commission, there is only one verse in the Holy Qur'an (4:3) deals with of polygamy. In the commission view, the objective of the verse to give solution in the case of widows and orphan girls whose number during the recent battles between Muslims and non-Muslims had increased. "The permission to marry more than one wife originated for the establishment of social justice. According to this verse there was a fear of orphan girls and Widows being exploited or unjustly dealt with. For that the Holy Quran, as a matter of emergency, permitted Muslims to marry more than one woman. But a proviso was attached to this permission that if this way of solving the problem leads to injustice for family relations then the Muslims are advised to practice monogamy only.it is incumbent on the state to prescribe a procedure which would prevent people from taking advantage of this permission without any restriction being placed on them. It is a universally accepted maxim that prevention is better than cure."¹²

Dealing with Q.2 commission wrote:

"It would be absolutely in the interest of justice and in conformity with the spirit of Hoy Quran that a man contemplating to have a second wife should present himself before a court to explain the circumstances which, according to him, justify his taking this step."¹³

Keeping in view the 'rational justification' provided by man, court will give conditional permission to take a second wife. The conditional permission incudes: maintenance and social justice in term of treatment between two wives and his children. In commission's point of view, this will help in curbing the polygamy which is being caused of discomfort in family life.

Dealing with the Q.3 the commission answer is in yes. Commission emphasizes on economic consideration as another condition for obtaining the permission and if a man cannot fulfill the condition he should not take a second wife. It also relies on Quranic concept of 'Adl between the wives'.

Giving the answer of the Q.4 commission is left the maintenance amount for first wife and her children on the discretion of the matrimonial court.

Dealing with the Q.5 the commission answer is in yes. Accord to the commission there should be some guarantee for maintenance of first wife and her children.

Tradionalist's replies to the questionnaires

- i. Maulana Maududi's replies

Maulana Maududi replied in response to the Q.I:

The verse 3 of Surah An Nisa had urged that a particular current practice , which was permissible, should be resorted to for the solution of a social problem. The new thing in the verse was putting restriction on the number of wives.

Maulana Maududi wrote in response to the second question:

“The Shariah has made no difference between the first, second, third and fourth marriages.... If the first marriage requires no order from a court of law, even the third and fourth, what to say of the second marriage, should not be conditioned with the procurement of any court order. Suggestions like these can be considered only on the presumption that polygamy is inherently an evil and that, if it cannot be abolished altogether, it must be checked by legal restrictions. This is the view of the Roman Law, not of the Islamic Law.”¹⁴

Dealing with Q.3 Maududi wrote:

“Moreover, how odd it looks that setting aside all considerations, like those of love, the bliss of matrimonial relationship and of the peace, poise and happiness of the family life, the only question that has been given any weight is that of satisfying the court in respect of one's financial ability to support the wives and their children.”¹⁵

It seems that by using the “love, peace, the bliss of matrimonial relationship, poise and happiness of the family life” as rationales for his stand, he justifies the practice of polygamy.

While discussing the consequences of applying this condition (one's financial ability to support two families) on society, he explains that polygamy will become prohibited for lower and middle class while its entryway will stay totally open for the upper class.

Dealing with the Q.4 & 5 Maududi interpret the provision of “one half salary paid to the first wife and her children ...” as a rudderless regulations based on monstrous injustice. He gives his own point of view that is:

“Shariah provides that the husband should himself be fair in treating his wives and if any wife complains of injustice, the court, keeping the circumstances of the family in view, should devise a course based on justice and equity.”¹⁶

ii. Maulana Islahi's Replies

Maulana Islahi described his opinion as:

“It is absurd to say that the permission to marry up to four wives was granted by this verse, or that it was granted merely to protect the rights of the orphans and the widows. What can be justifiably said is that through this verse Muslims were asked to avail of a permission that already existed, for the solution of a social problem.....Islamic permission for polygamy is not based merely on the plea that it is essential to protect the rights of the orphans- altogether it is important ground for permission.”¹⁷

Islahi highlights different needs i.e social, moral and psychological, which paved the way for practice of polygamy, such as:

- (1) Essential for the disseminating religious teaching and community development
- (2) To fulfill the social and national needs i.e. war and moral laxities;
- (3) Elevate the status of widows as a honourable member of society;
- (4) For maintaining person's own Moral and ethical health/ standards; and
- (5) To provide evade from the 'sinful Western culture'

Maulana Islahi, emphasizes on the remedy of a "social problem," not attaining "social justice" in society. While criticizing commission, He says:

It is unjustified to imposed some restrictions over and above those which Islam has already imposed...If the new conditions are being imposed because of the view that the Islamic injunctions cannot be abided without the imposition of these restrictions then, I am sorry to say, it is an extremely perverse view of Islam....the imposition of such restrict s is the way of the Jews. ...the commission on the one hand sheds tears over this attitude of the Jews and on the other is following exactly in their own foot-steps.

Islahi refers the consequence of the 'law' as it will:

- Increase in divorce rate,
- Psychological disturbance of man,
- Seek the immoral and licentious life which ultimately destroys the society.
- A very instrument in obtaining for a number of women certification of insanity or incurability.

Once again, the tension is observed even within the traditionalists. Maududi contends against Western impact while supporting Islamic lawful conventions over Roman traditions. On the other hand, Islahi, centers his opposition for the West on its sexual practices. None of them discusses the main issue of the commission, which is the requirement for pliable tenets that stay aware of current social needs.

Explanation and Discussion

1. The provision on the issue has been opposed by conservatives of all shades of opinion, who have said that it violates the Quranic injunction (verse 3 Surah AnNisa). it must be admitted, that the practice of all Muslims from the beginning of Islam has been to regard this verse as permission for a man to take up to four wives. The entire classical fiqh-law of the Muslims permits this and assumes this.

The modernists thinking of various shades on this question has been, since the second half of the nineteenth century that the Qur'an really meant to legislate monogamy but that polygamy was permitted under certain special circumstances. Among these modernists of various shades were non-ulama westernized intellectuals like Sir Syed Ahmad Khan and Syed Amir Ali, as well as Shaikh Muhammad Abduh of Egypt.

The modernists contend that if study whole Quranic verse of which part has been quoted above, their stand becomes clear. It is then argued that Holy Quran forbids polygamy because of the fact that it is impossible for man to do justice among wives.

2. The modernists find categorical support for their thesis in the first part of the verse 129 Surah An Nisa which says in no unclear terms that it is impossible for a man to do justice among more than one wife.

It seems that the conservative interpretation that the Quran's speaking about external justice is difficult to hold. The Qur'an states categorically that it is not possible to do justice among wives for a man. That is, Quran considers it impossible. Under common sense, meeting demands of external justice, equity, is not something impossible. It is internal equality which may lie in the realm of impossibility, not the external equality or justice. There are certain other weighty statements of the Qur'an also to be taken into consideration in this connection. While characterizing the relationship of husband and wife in family life, the Qur'an makes certain statements which reveal its deeper assumptions:

"And among the signs of God is that He has created for you from among yourselves spouses and He has created between you a relationship of love and mercy. Verily, in this there are signs for people to think" (30:21).

The Qur'an repeats the same thing while speaking of the relationship of the first couple, Adam and Eve. Again, "your wives are garments unto you and you are garments unto them" (2:187).

This clearly shows that the best possible relationship that the Qur'an visualizes between the husband and the wife is that of adoration/love and that the conjugal bond can't be characterized fundamentally as far as external treatment. It accepts that the external treatment will tail this inward relationship of adoration/love. When, therefore, the Qur'an says that it is impossible to do justice among women, it is clearly saying that it is impossible to love more than one woman in the same way. The conservative contention on this point is undoubtedly weak.

There is other evidence in the Qur'an to show that the concept of the normal family life according to it must be monogamous. The fundamental concept of the "pair" which occurs in the Qur'an in various contexts, more than a score of times, when studied closely, clearly leads to this conclusion. In 51:49, the Qur'an states as a general law of creation that "everything We have created in pairs." But there are numerous passages where this concept occurs about human relationship in family life: "We have made you pairs" (35:11); and, "We have created you in pairs" (88: 8). In 4:19, the Qur'an says, "if you intend to replace one spouse with another . . ." this verse clearly assumes that if one wants to have another wife the normal method is to bring her in the place of the first wife rather than add her to the latter.

The conservative, on the other hand, seeks support in the latter half of the same verse and says that since the Qur'an asks us not to "incline away completely" from one wife; it seems to presuppose the coexistence of several wives. The conservative then challenges the modernist interpretation of the term "justice" and says that "justice" stands for external treatment.

3. The formidable question arises, how does one explain the continuous unbroken practice of the Muslim tradition?

The conservatives have a point when they say, first, that there has been this continuous practice of polygamy and, second, that the Qur'an itself, in some of its statements noted above, tacitly assumes polygamy and even, in fact, explicitly permits four polygamous marriages.

The honest reply of modernists' scholarship would be to admit this fact and to say that despite the fact that the Islam is to deliver a monogamous society, however, it allowed polygamy since polygamy had gotten to be endemic to the social life of Arabia. The Qur'an, subsequently, while tolerating 'status quo' as usual and making upgrades upon it as well as can be expected on the legitimate plane, went to promote ethically with the expectation that society would gradually move toward a monogamous society.

It must be recognized that the legislative part of the Qur'an, which according to us Muslims is the revealed Word of God, nevertheless presupposes the flesh and blood of the society to which it was immediately applied. Instead of this direct approach, which not only does not threaten but even strengthens the evidence for the revealed character of the Qur'an, the modernists in general, and particularly in Pakistan, rely on artificial arguments based on forced interpretations of the verses of the Qur'an. They thus unnecessarily weaken their case against the conservatives and hinder the modernization of law.

4. Even as it is, the law has been subjected to very severe criticism. Among the arguments advanced by the conservatives there is one point which may appear to have some moral weight, and this should be considered. It has been alleged that restrictions on polygamy would tend to increase the incidence of extra-marital sexual relationships and attendant social problems. In this connection, the conservative has not been slow to point out that there is, relatively speaking, a high incidence of extra-marital relationships in western societies, which he attributes to the existence of monogamy. A little reflection, however, would show that this argument is quite mistaken. It is admitted that in certain sectors of present-day western society a loose sexual morality does exist, but this phenomenon has little to do with monogamy and is explained primarily by the impact of industrialization and its effects on the family structure. The developing societies of Asia must also prepare to deal with the rapid social changes that are taking place and will take place as a result of industrialization. But these facts cannot be construed as an argument for polygamy

c. MFLO: A Compromise Between Modernists and Traditionalists

Family Laws Ordinance particularly polygamy seeks to make a compromise between the modernists and the conservatives positions. Section six of MFLO deals with polygamy which is as follows:

(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 (3), 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 condition 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 the simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.”¹⁸

1. It should be noted first that the ordinance does not say that if a second marriage is contracted without the previous permission of the Arbitration Council, the marriage would be invalid/illegal. It lays down that if a marriage is contracted without such previous permission, the husband shall be liable to pay forthwith the entire dower due to the existing wife or wives and, secondly, he may be imprisoned for a maximum period of one year or fined a maximum of 5,000 rupees or both. Despite these penalties, the marriage itself remains valid.

2. If the line of reasoning and the reasoning of the modernists in general has been correct, the law logically falls short of it. For the law makes the second, polygamous marriage dependent on the permission of the Arbitration Council which, in turn, is dependent on the permission of the first wife. If they are right in concluding that the Qur'an categorically declares that one cannot do justice among several women, then to say that one may marry a second wife if the first wife permits this, is tantamount to saying that if the first wife permits injustice to be done to her then that injustice may be legally allowed. That is to say, if the modernist contention is correct, then the Qur'an seems to prohibit polygamy. However, if the Prophet himself, with his unique charismatic authority, could effect only a certain measure of social change at a given time, a Muslim government of the present day cannot go beyond certain limits. To ignore these limits would be socially disruptive and, in fact, would lead to the creation of two different societies within one country.

In view of the ultra-traditionalism of the conservatives of Pakistan, who, as modernists see, are in general much more conservative than the conservative ulama of the Middle East, this law is a reasonable compromise. It has already produced good results in several ways and has been appreciably effective in diminishing the incidence of polygamy since it came into operation.

CONCLUSION

This study illustrated the ideological struggle amongst Modernists and Traditionalists over the idea whether past judicial interpretations/ ijtihad by individuals, later recognized as immutable, was really so. That struggle created a series of compromises between thoughts, particularly by those interested in the process of modernization. Those compromises incorporated the Marriage Commission's Report of 1956, which cut out women's new rights through procedural safeguards however, did not go so far as to make polygamy unlawful/illegal. The Report's proposals were not completely consolidated into the MFLO, yet it was another compromise. Today, legal utilization of the Ordinance to individual litigants is a type of compromise, as strict use of the code frequently transforms into a more adaptable case-by-case choice of how closely to follow the code.

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