POLYGAMY – A PRACTICE VIOLATING KEY FUNDAMENTAL RIGHTS ENSHRINED IN THE CONSTITUTION OF INDIA

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ABSTRACT

On 22nd August, 2017 the Supreme Court of India had deemed Triple Talaq to be averse to constitutional morality. Among the arguments that the Supreme Court relied on to invalidate talaq-e-biddat, or instant divorce, was that the practice was considered un-Islamic in even Muslim countries, many of which had abolished or reformed it. Henceforth, a petition challenging the practices of polygamy and nikah halala prevalent in Muslim community will be heard by Supreme Court in the near future. The Court has recently said it would examine the constitutional validity of polygamy, which Muslim Personal Law in India recognises.[1]

The concept of polygamy has staged heated debates in public, political and academic arena as it is evidenced by the number of articles, journals and books written on this institution of marriage. The current Indian law poses a constitutional paradox because subjecting Muslim women to polygamy under the Freedom of Religion provisions whilst prohibiting it among all other religions violates the equal protection provisions of the Indian Constitution. The author introspects this standpoint and argues that though the social and political reasoning for non-penalisation of polygamy during the time of its advent was justified under the Muslim Personal Law, the same practice has no relevance and is averse to the Constitutional ideology in context of the present society.

This paper examines the relevant constitutional provisions that are said to pose a constitutional paradox often by permitting polygamy only among Muslim men in India. And thereby highlight the practice as to being in violation of Articles 13, 14, 15 and 21 of the Constitution of India. The author then moves on to argue that polygamy is not immune under Article 25 and such practice does not hold a place in tune with progressive thinking modern democratic principles.

Keywords: *polygamy, constitution, fundamental rights, practice, constitutional scrutiny*

[1] Supreme Court declines urgent hearing of plea against polygamy, nikah halala, https://www.thehindu.com/news/national/supreme-court-declines-urgent-hearing-of-plea-against-polygamy-nikah-halala/article30136168.ece (last visited Dec. 2, 2019).

I. AN INTRODUCTION TO POLYGAMY

Polygamy the practice or custom of having more than one spouse at the same time. Cambridge Dictionary defines polygamy as *"the fact or custom of being married to more than one person at the same time."*[2] Polygamy is a more general term that encompasses the practice of having multiple spouses and should not be confused with the more specific terms of **polygyny**, having multiple female spouses, or **polyandry**, having multiple male spouses. Since this research emphasises on the law of polygamy under the Muslim Personal Law, polygamy under Islam is the main focus of the scrutiny.

Polygamy has existed since the dawn of human civilisation. Many holy personalities of the Bible had many wives or concubines at the same time. Abraham had two spouses, Sarah and Hajar. Abraham was first blessed with a son through Hajar whom he named Ishmael, and then he was blessed with another son through Sarah whom he named Isaac.[3] The historical backdrop of polygamy dates back to civilisations as the custom has been practiced for a long time by societies throughout the world.

Islam only permits polygynous form of polygamy. With the advent of Islam in the seventh century of the Common Era, it inherited the existing marriage system of polygamy. Polygamy permitted by Prophet Muhammad at the time was a type of social reform. In words of Karen Armstrong, "polygamy was not designed to improve the sex life of the boys — it was a piece of social legislation."[4] Prophet Muhammad modified and reformed the system in existence at the time. He put a limit to the numbers of wives that a person can have at one time – maximum of four wives at one time. He also imposed stringent conditions on a person who wanted to marry a second wife. According to the Holy Quran in Chapter 4 Verse 3 (Surah An-nisa), a person seeking multiple wives should be able to adequately maintain the family and do justice and fairness to all wives equally. However, Islam completely forbids polyandry in all its extent.

[2] Polygamy, https://dictionary.cambridge.org/dictionary/english/polygamy (last visited Jun. 5, 2020).

[3] Sayyid Muhammad Rizvi, Polygamy and the Marriages of the Prophet Muhammad (Jun. 5, 2020, 7:24 PM) https://www.al-islam.org/articles/concept-polygamy-and-prophets-marriages-sayyid-muhammad-rizvi.

[4] Karen Armstrong, Muhammad 190 (Harper One 2015).

II. LEGAL RECOGNITION OF POLYGAMY IN INDIA

Section 5(i) of the Hindu Marriage Act of 1955, which is applicable to Hindus, Buddhists, Jains, Sikhs and any other person who is not a Muslim, Christian, Parsi or Jew, 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. For Hindus in Goa and certain parts along the western coast, bigamy is legal. Sections 494 and 495 of the Indian Penal Code, 1860 prohibits polygamy for citizens following other religions except Islam. Polygamy is legal among Muslims in India and falls under the Muslim Personal Law. Muslims in India are subject to the terms of Muslim Personal Law Application Act (Shariat) of 1937, 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."[5] This has caused huge debate regarding the validity of Polygamy among Muslims in India with the All India Muslim Personal Law Board publicly showing their dis-agreement with the Supreme Court judgement**.**

[5] Polygamy not an integral part of Islam: SC, https://timesofindia.indiatimes.com/india/Polygamy-not-integral-part-of-Islam-SC/articleshow/46180105.cms (last visited Jul. 7, 2020).

III. KEY JUDGEMENTS ON POLYGAMY BY THE INDIAN JUDICIARY

State of Bombay v. Narasu Appa Mali, AIR 1952 Bombay 84.

The Bombay High Court in State of Bombay versus Narasu Appa Mali had held that personal law is not 'law' or 'laws in force' under Article 13. This 1951 judgment was never challenged in the Supreme Court but it was reaffirmed by the Supreme Court in several cases and set a precedent across the country legalizing polygamy among Muslims. The case dealt with the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The observations made by Chagla, CJ and Gajendragadkar, J. of the Bombay High Court set a precedent which provided a safeguard to practices such as polygamy for years to come.

Chagla, C.J. while giving his verdict made the following observations:

- Section 491, Penal Code, which makes bigamy an offence applies to Parsis, Christians and others, but not to Muslims because polygamy is recognised as a valid institution when a Muslim male marries more than one wife. It is an historic fact that both the Muslims and the Hindus in this country have their own personal laws which are based upon their respective religious tests and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds. One community might be prepared to accept and work social reform; another may not yet be prepared for it. Equally so if the law with regard to bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reason-able grounds.

- The history of polygamy as a social institution should not be overlooked. Polygamy is justified, if at all, on social, economic and religious grounds and hardly ever on grounds of sex. In the modern world polygamy may seem to be an anachronism and may seem to be based on outdated and outworn ideas. When, however, it is found recognised in any personal law, it is based on considerations which were very vital and compelling to those who believed and who still believe in the sanctity of their personal law. Therefore, it would be difficult to say that the institution of polygamy would-constitute a discrimination against members of one sex only on the ground of their sex.

Gajendragadkar, J. while giving his verdict made the following observations:

- The expression 'laws in force' is used in Article 13(1) not in that general sense. This expression refers to what may compendiously be described as statutory laws. There is

> no doubt that laws which are included in this expression must have been passed or made by a Legislature or other competent authority, and unless this test is satisfied it would not be legitimate to include in this expression the personal laws merely on the ground that they are administered by Courts in India. Article 372 which provides for the continuance in force of existing laws and their adaptation uses the expression "all the law in force" and defines it in terms substantially similar to those of Article 13(3)(b). The provision for the adaptation of the laws in force could not have been intended to apply to the personal laws in this country. If the personal laws are held to fall within Article 13(1), the material provisions of these laws permitting polygamy do not offend against Article 15(1)[6] and are therefore not void.

This observation is the basis on which Personal Laws have evaded constitutional scrutiny for decades. Supporters of polygamy have held to this observation in order to evade constitutional scrutiny of the age old practice.

Ahmedabad Women Action Group vs. Union of India, AIR 1997 SC 3614.

In this case, a writ petition was filed in the form of a Public Interest Litigation to declare Muslim Personal Law which allows polygamy as void as offending Articles 14 and 15 of the Constitution of India. The Hon'ble Supreme Court while dealing with the matter referred to the precedents set by *State of Bombay vs. Narasu Appa Mali*[7] wherein Chagla, C.J., while considering the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, observed that Legislature is responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue Therefore. It is for the Legislature to determine what legislation to put up on the statute bock in order to advance the welfare of the State. The Court also highlighted the view of Gajendragadkar, J. in Mali's case where it has observed that the personal laws do not fail within Article 13(1) of the Constitution of India.

Khurshid Ahmed Khan vs. State of U.P., (2015) 2 MLJ 237 (SC).

This judgement by the Supreme Court in 2015 is the first landmark judgement where the Supreme Court bench of A.K. Goel, J. and S. Thakur, J. have explicitly declared that polygamy is not an integral part of Islam and is subject to the regulatory power of the State. In this case, a Muslim man working for the Uttar Pradesh state government was dismissed from his job for

[6] The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
[7] State of Bombay vs. Narasu Appa Mali, AIR 1952 Bombay 84.

entering into a polygamous marriage. His action violated service rules requiring government employees to seek prior consent before engaging in polygamy. The Supreme Court made certain key observations while giving its judegement:

- Quoting its earlier judgement in *Javed v. State of Haryana*[8], the Court stated that Polygamy was not integral part of religion and monogamy was a reform within the power of the State under Article 25. A practice did not acquire sanction of religion simply because it was permitted. Such a practice could be regulated by law without violating Article 25.
- The Court also highlighted a Gujarat High Court judgment in *R.A. Pathan v. Director of Technical Education*[9] which observed that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (Surah 4 Verse 3 which permits polygamy) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

[8] Javed v. State of Haryana, AIR 2003 SC 3057.
[9] R.A. Pathan v. Director of Technical Education, (1981) 22 Guj LR 289.

IV. WHETHER THE PRACTICE OF POLYGAMY IS PROTECTED FROM CONSTITUTIONAL SCRUTINY BY THE SECULAR FABRIC OF INDIA?

'*Secularism*' means a State which does not recognise any religion as a State religion. It treats all religions equally. A Secular State in the context of the Constitution of India means a State which has no religion of its own. The State treats all religions equally and follows a policy of non-interference in matters of religion. The Preamble declares the resolve of the people of India to secure all its citizens **Liberty** of belief faith and worship. Articles 25 to 28 of the Constitution give concrete shape to the concept of Secularism. Article 25[10] of the Constitution gives a right of free conscience to every person to profess, practice and propagate religion. However, this freedom is not an absolute freedom, it is subjected to the regulatory power of the State. In the name of religion, nothing can be done which is against public order, health and morality of the public.

Aricle 25 specifically begins with the words- "***Subject to public order, morality and health and to the other provisions of this Part…"*** Therefore, albeit a Secular State does not promote or restrict religious affairs, it has a regulatory power to eradicate social evils and unjust practices which are carried out in the name of religion. The aim of the Secular fabric of our Constitution is to promote free conscience resulting in brotherhood and harmony in the Society. The right to profess a religion does not provide a free pass to any arbitrary practice which promotes social injustice. Therefore, practices such as polygamy are well within the regulatory power of the State.

[10] (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

V. WHETHER POLYGAMY CAN BE SUBJECTED TO CONSTITUTIONAL SCRUTINY UNDER ARTICLE 13 OF THE CONSTITUTION OF INDIA?

Over the years, the Supreme Court has taken traditional views while dealing with personal laws. In a number of cases it has held that personal laws of parties are not susceptible to Part III of the Constitution dealing with fundamental rights. Therefore they cannot be challenged as being in violation of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India.

Article 13(1) of the Constitution states that all laws which are in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void. A long standing debate has been taking place on whether Personal Laws are subject to judicial scrutiny under Article 13 of the Constitution of India as pointed out by the Bombay High Court in the case of *State of Bombay v. Narasu Appa Mali*[11] stated that Personal Laws do not fall under the ambit of Article 13(1). This observation is the basis on which Personal Laws have evaded constitutional scrutiny for decades. Supporters of polygamy have held to this observation in order to evade constitutional scrutiny of the age old practice. This viewpoint has been approved by the Supreme Court in cases such as *Maharshi Avdhesh v. Union of India*[12] where the Court has held that even codified personal law cannot be tested on the touchstone of fundamental rights.

The concept of polygamy is still practiced among the followers of Islamic faith in India. It is recognized by The Muslim Personal Law (Shariat) Application Act, 1937. It is an established principle that laws falling under the ambit of Article 13 of the Constitution of India stand to be challenged by the provisions of Part III of the Constitution, i.e. the Fundamental Rights Provisions. A plain reading of Article 13(1) indicates **'all laws in force'** in India when the Constitution comes in force shall be void if it is inconsistent with a Fundamental Right.[13] The term 'laws in force' is defined in Article 13(3)(b) as to include all laws that have been made or passed by a Legislature or any competent authority before the commencement of the Constitution and not previously repealed. The term 'law' as described in Article 13(3)(a) includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. These are inclusive definitions. For example, common

[11] State of Bombay v. Narasu Appa Mali, AIR 1952 Bombay 84.
[12] Maharshi Avdhesh v. Union of India, 1994 Sup. (1) SCC 713.
[13] Delhi Airtech Services Pvt. Ltd. V. State of U.P., AIR 2012 SC 573 (582).

law, though not explicitly mentioned in Articles 13(3)(a) and 13(3)(b), is subject to constitutional scrutiny. Therefore, the inclusive interpretation to these Articles shall also include Personal Laws.

In Sant Ram v. Labh Singh[14], a Constitutional Bench of the Supreme Court rejected the contention that the second definition, i.e., "laws in force" does not in any way restrict the ambit of word "law" in the first clause as extended by the definition of that word. The second definition merely seeks to amplify the first one by including something which but for it, would not be included in the first definition. The Court thus held that the word "laws" in the second definition has also the meaning of "law" as defined in the first definition. Thus, it is clear that Article 13(3)(b) does not exclude other forms of law besides the pre-constitutional legislative enactments and includes all existing laws. There lies no logical reasoning to conclude that scope of Article 13 is not extended to pre-Constitutional uncodified personal laws.

In this regard, the Kerala High Court judgement in the case of *Saumya Ann Thomas v. Union of India*[15] is highly important. The Court observed that all laws whether pre constitutional or post constitutional will have to pass the test of constitutional validity. There is no reason, in a secular republic, to cull out "personal law" alone and exempt the same from the sweep of Article 13 and Part III of the Constitution. This judgement had also been reiterated by the Hon'ble Kerala High Court in the case of *Kunhimohammed v. Ayishakutty*[16], where the Court held that personal law is also 'law'. It is 'existing law' and 'law in force' as contemplated by the constitutional provisions. Such stipulations in personal law cannot be out of bounds for Article 13 of the Constitution.

Coming to Article 372[17] of the Constitution, this Article mandates that subject to other provisions of the Constitution, all laws in force, in the territory of India immediately before the commencement of the Constitution, "shall" continue in force until altered or repealed or amended by a competent legislature or other competent authority. The Article leaves no doubt

[14] Sant Ram v. Labh Singh, 1964 SCR (7) 745.
[15] Saumya Ann Thomas v. Union of India, 2010 (1) KLJ 449.
[16] Kunhimohammed v. Ayishakutty, 2010 (2) KLT 71.
[17] (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

while clarifying that laws falling under the scope of Article 372 is also subject to Fundamental Rights provisions and falls under the regulating power of the State.

It is recognized that Muslims are governed by the Muslim 'personal law' – Shariat. Even before the commencement of the Constitution, the Muslim Personal Law (Shariat) Application Act, 1937 enforced the 'Muslim Personal Law', and as such, the Muslim 'personal law' should be considered as a "law in force", within the meaning of Article 13(3)(b) and can be altered under the mandate of Article 372.

There remains no doubt that the practise of polygamy, in particular, is justifiable to be scrutinized as it falls under the ambit of Article 13. The Kerala High Court in Abdurahiman v. Khairunnessa[18] has observed that polygamy is permitted, tolerated and accepted and enforced by the Indian courts only because the Muslim Personal Law (Shariat) Application Act, 1937 mandates that the Muslim Personal Law (Shariat) which permits polygamy has to be followed by the Indian courts. The stipulation regarding polygamy is therefore accepted and enforced as permitted and mandated under the Shariat Act, 1937. In that view of the matter, the law permitting polygamy will also have to pass the test of constitutionality under Article 13.

H.M. Seervai, in his much acclaimed work in Constitutional Law of India, Vol.1, has observed follows:

"…We have seen that there is no difference between the expression 'existing law' and 'law in force' and consequently, personal law would be 'existing law' or 'law in force'. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them; it was, therefore, necessary to treat the whole of personal law as existing law or law in force under Art. 372 and to continue it subject to the provisions of the Constitution and subject to the legislative power of the appropriate legislature..."[19]

Article 13 in no manner can be interpreted to support the violation of Fundamental Rights of the citizens and arbitrary and discriminatory personal laws cannot be shielded by its scope in a modern democracy.

While giving his verdict in the case of *Indian Young Lawyers Association v. State of Kerala*[20] (popularly known as the Sabarimala case) D.Y.Chandrachud, J. contradicted the Narasu

[18]Abdurahiman v. Khairunnessa, (2010) DMC 707.
[19] 1 H.M. Seervai, Constitutional Law of India 677 (Universal Law Publishing 2015).
[20] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

judgement and observed that custom, usages and personal law are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution. The individual, as the basic unit, is at the heart of the Constitution. Irrespective of the source from which a practice claims legitimacy, this principle enjoins the Court to deny protection to practices that detract from the constitutional vision of an equal citizenship.

The decision in Narasu, in restricting the definition of the term 'laws in force' detracts from the transformative vision of the Constitution. Carving out 'custom or usage' from constitutional scrutiny, denies the constitutional vision of ensuring the primacy of individual dignity. The decision in Narasu, is based on flawed premises. Custom or usage cannot be excluded from 'laws in force'. The decision in Narasu also opined that personal law is immune from constitutional scrutiny. This detracts from the notion that no body of practices can claim supremacy over the Constitution and its vision of ensuring the sanctity of dignity, liberty and equality. Hence, the decision in Narasu, in immunizing uncodified personal law and construing the same as distinct from custom, deserves detailed reconsideration in an appropriate case in the future.

VI. SCRUTINIZING POLYGAMY WITH RESPECT TO FUNDAMENTAL RIGHTS PROVISIONS ENSHRINED IN THE CONSTITUTION OF INDIA

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.

[i] Scrutinizing polygamy with respect to the Right to Equality provisions

Polygamy under Islam is a custom which gives an entitlement of multiple marriages only to the male spouse. A Muslim man is permitted to marry up to four wives at the same time. This arbitrary and vile practice has been existing in the present society even in the 21st century. The irony also lies in the fact that polyandry is banned in Islam. This means it is considered illegal and immoral for a Muslim woman to contract multiple marriages while a Muslim male can claim entitlement to such a practice. It is rather astonishing that such incidents of gender injustice and indignity have been kept unchecked by the judicial machinery of the country.

Equality and Liberty are integral facets of modern democratic principle. Equality is one of the magnificent corner-stones of our democracy. Article 14[21] states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Article 15(1)[22] states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(1) expresses a general application of the paramount principle of Equality embodied in Article 14. The doctrine of equality before law is a necessary corollary of Rule of Law which pervades the Indian Constitution.[23] The underlying object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity as enshrined in the Preamble.[24] Articles 14 and 15 read in light of the Preamble to the Constitution reflect the thinking of our Constitution makers and prevent any discrimination based on religion or origin in the matter of equal treatment and to apply the same in respect of a cooperative society.

[21] The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
[22] (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
[23] Ashutosh Gupta v. State of Rajasthan, (2002) 4 SCC 34: AIR 2002 SC 1533.
[24] Natural Resources Allocations, In Re Special Reference No. 1 of 2012, (2012) 10 SCC 1 (77).

The act of Polygamy is an arbitrary entitlement of a Muslim husband which is discriminatory towards Muslim wives. Such discriminatory practice stands against the Constitutional ideology. The Supreme Court in the case of *Manoj Narula v. Union of India*[25] has observed that the principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law. The concept of polygamy epitomizes the archaic beliefs of male supremacy and gender inequality. The question that is required to be answered is whether under a Secular Constitution, a Muslim woman be allowed to be discriminated against merely by virtue of her religious identity and can such women be downgraded to a status significantly more vulnerable to their male counterparts?

The practice of polygamy is permitted only for Muslims in India. Such practice has been abolished in all other religions. For instance, multiple marriages, permitted for Hindus was abolished by the Hindu Marriage Act, 1955. Section 494[26] of the Indian Penal Code, 1860 declares polygamy as an offence with a term of up to 7 years of imprisonment. Only Muslim males are exempted from this provision. Per contra, a Muslim wife is liable to be punished under the same provision of the Penal Code if she contracts a second marriage during the subsistence of her first marriage.

The Gujarat High Court, in the case of *Jafar Abbas Rasool Mohammad Merchant vs State Of Gujarat*[27] has observed that polygamy and the unilateral talaq without the wife's consent offends Article 14 ("Equality before law for all") and Article 15 (the State's non−discrimination on grounds of caste, religion, sex, etc.). If the State tolerates this law, it becomes an accomplice in the discrimination of the female, which is illegal under its own laws.

[25] Manoj Narula v. Union of India, (2014) 9 SCC 1.

[26] Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Exception—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

[27] Jafar Abbas Rasool Mohammad Merchant vs State Of Gujarat, Special Cr. Application no. 106 of 2010.

[ii] Scrutinizing polygamy with respect to Article 21

Article 21[28] assures to every person right to life and personal liberty. The scope this right is very expansive and has become a source of the basic human rights cherished by the Constitution. Any arbitrary practice is an enemy of individual Liberty. Our Constitution recognizes the indefeasible right of Life and Personal Libery in Article 21. In Maneka Gandhi's case[29], Krishna Iyer, J., held: "personal liberty makes for the worth of the human person."

It was observed in *Francis Coralie v. Delhi*[30] that right to life includes the right to live with human dignity. The same observation was made in *P. Rathinam v. Union of India*[31] alongside a plethora of landmark judgements. Dignity of women and gender justice are non-negotiable concepts. In today's liberal society, strive for equal status of women is paramount. Any practice, though be it customary, has to be done away with if it degrades the dignity of women.

The practice of polygamy is outright repugnant to dignity of the female spouse. When a Muslim woman contracts a marriage, she aspires a prosperous and peaceful marital life. Under the Muslim Law, marriage is a contract and contract cannot be rescinded unilaterally. So when the male spouse contracts a second marriage, the female spouse has two options:

i) dissolution of the marriage on the basis of any of the limited nine grounds highlighted in Section 2 of the Dissolution of Muslim Marriage Act, 1939, or

ii) silently accept the derogatory practice and share her conjugal rights with a third person.

Such a practice degrades the wife's dignity, self-esteem, privacy and conjugal rights, all of which fall under the ambit of Article 21. Every citizen has a right to safeguard the privacy of his own, his family, his marriage, procreation, motherhood, child bearing among others.[32]

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. If during the subsistence of a valid marriage the husband had remarried another, necessarily, that could amount to be mental cruelty towards the first

[28] No person shall be deprived of his life or personal liberty except according to procedure established by law.
[29] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[30] Francis Coralie v. Delhi, AIR 1981 SC 746.
[31] P. Rathinam v. Union of India (1994) 3 SCC 394.
[32] Gobind v. State of Madhya Pradesh & Anr. AIR 1975 SC 1378.

wife. Thus, polygamy is cruel towards woman and therefore affects her right to peaceful life guaranteed to her under Article 21.

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. The second marriage is not a single but a continuing wrong to the first wife.[33]

Gender justice is sine qua non of a progressive democratic society and is essential for preserving the integrity of the nation. Practices that deny equality of status and opportunity to women has no place in the modern liberal Society. 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.[34]. 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.

[iii] Scrutinizing polygamy with respect to Article 25

Article 25[35](1) guarantees to every person, and not only the citizens of India the freedom of conscience and the right freely to profess, practice and propagate religion. This right, however is not absolute and subject to public order, health, morality and other provisions related to Fundamental Rights.

A plain reading of the statute is sufficient to establish that the right to freely profess, propagate and practice religion cannot be inconsistent with other rights enshrined in Part III of the Constitution. It is a well-established principle of law that what is protected under Article 25 is the religious faith and not a practice which may run counter to public order, health or morality. In *Khursheed Ahmed Khan v. State of U.P*[36] the Supreme Court has upheld its observation in

[33] L.K. Swaraj & K.G. Prithvi, Polygamy in Muslim Law: An Overview, 2(2) International Journal of Law Management and Humanities, (2019).
[34] N. Adithayan v. The Travancore Devaswom Board, (2002) 8 S.C.C. 106.
[35] (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
[36] Khursheed Ahmed Khan v. State of U.P., (2015) 2 MLJ 237 (SC).

Court upheld its observation in *Javed v. State of Haryana*[37] that Polygamy was not integral part of religion and monogamy was a reform within the power of the State under Article 25.

Polygamy is not an essential practise in Islam. Prominent Islamic scholars have identified the same. Syed Khalid Rashid has opined that Islam has never developed polygamy. Instead it curtailed its extent and made it an instrument to be used in exceptional circumstances. He has further submitted that neither Islam favours polygamy nor the Muslims prefer polygamous unions. In Islam monogamy is the general rule while polygamy is only an exception.[38] Tahir Mahmood agrees to this submission. In his work, Muslim Law in India and Abroad, he has broadly explained the context of polygamy in Islam –

'The practice of unrestricted polygamy was rampant in the pre-Islamic society which Islam tried to discipline. The verse of the Quran [IV:3][39] believed to permit polygamy begins with the words ***"if you fear you cannot do justice to orphans"*** *. Clearly, it was revealed in the background of a pre-Islamic practice by which men used to marry orphaned girls with a view to grabbing their parental property. This verse took notice of the prevailing custom of polygamy and seemingly told men "why marry an orphaned girl for the sake of her property when you have several property otherwise." To this, the verse thoughtfully added a general rule that those who cannot be just to multiple wives must remain content with a single wife and thereby remain away from the sin of injustice. By warning men in a later verse of the same Chapter [IV: 129][40] that complete justice to several wives would be no easy job, the Quran tactfully established monogamy as the general norm. To this Quranic verse, the Prophet had added a highly deterrent warning that "a person having more than one wife but denying them equal justice will be torn apart when he appears before God on the Day of Judgement. Reading together the Quranic verses and the hadith cited above, it is clear that Islam established monogamy as the general norm.'*[41]

Thus, in order that a practice be treated as a part of a religion, it is necessary that it be regarded by the said religion as its essential and integral part. This caution is necessary otherwise purely

[37] Javed v. State of Haryana, AIR 2003 SC 3057.
[38] Syed Khalid Rashid, Muslim Law 80, 82 (EBC 2014).
[39] **Surah 4 verse 3:** And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice].
[40] **Surah 4 verse 129:** And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]. So do not incline completely [toward one] and leave another hanging. And if you amend [your affairs] and fear Allah - then indeed, Allah is ever Forgiving and Merciful.
[41] Tahir Mahmood, Muslim Law in India and Abroad 108, 109 (Universal Law Publishing 2016).

secular practices, not essential to religion, will be clothed with religious sanction and may claim to be treated as religious practices protected under Article 25. **Marriage, particularly in Islam, is a civil contract and has no religious connotations.** As highlighted by Sir Dinshaw Fardunji Mulla, *'Marriage according to the Mahomedan law is not a sacrament but a civil contract. All the rights and obligations it creates arises immediately……unlike a Hindu marriage, which is a sacrament, according to Islamic law, a marriage is a permanent and unconditional civil contract (which comes into immediate effect) made between two persons of opposite sexes with a view to mutual enjoyment and procreation and legalizing of children.'*[42]

Thus, it is to be noted that a Muslim marriage is purely a secular activity with no religious overtones. Such activities can be regulated under Article 25(2)(a) which states nothing in Article 25 shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. This is corroborated by Entry 5 of List III of the Seventh Schedule of the Constitution, which contains the Subject 'Marriage'. Therefore both the State and Union Governments have the power to regulate marital laws. Hence, it is proved beyond doubt that laws regarding marriage can be altered.

Thus it is clear that polygamy is not protected under Article 25. The very reason why Article 25(1) carries restrictions is that one cannot claim to freely profess, practice and propagate religion by violating basic human rights of others. Articles 14, 15 and 21 form part of the essential inalienable right which a citizen derives from the Constitution itself. The rights under Articles 14, 15 and 21 are absolute and are not subject to any restrictions. The restrictions put forth on Article 25(1) by the makers of the Constitution indicate that Article 25 should be harmoniously constructed with other Fundamental Rights. The freedom of religion is equally entitled to all persons viz. both men and women, and a Muslim husband does not have the right to degrade the dignity of a Muslim wife by virtue of his religious practice.

[42] Mulla, Principles of Mahomedan Law 338 (LexisNexis 2017).

VII. CONCLUSION

Patriarchal values and traditional notions about the role of women in society, are an impediment to the goal for achieving social democracy. Gender inequity impacts not only women, but has a ripple effect on the rest of the community, preventing it from shaking out of backwardness and partaking to the full, liberties guaranteed under the Constitution. Citizens from all communities, have the right to the enjoyment of all the constitutional guarantees, and if some sections of society are held back, it was likely to hold back the community at large, resulting in a lopsided development, with pockets of social backwardness. This kind of lopsided development is not in the larger interest of the integrity and development of the nation. Secularism, Equality and Fraternity being the overarching guiding principles of all communities, must be given effect to. This would move the entire citizenry forward, guaranteeing to women equal rights, and at the same time, preserve diversity and plurality.

Further, India is obligated to adhere to the principles enshrined in international covenants, to which it is a party. India being a founding member of the **United Nations**, is bound by its **Charter**, which embodies the first ever international agreement to proclaiming gender equality, as a human right in its preamble, and reaffirming faith in fundamental human rights, through the dignity of the human person, by guaranteeing equal rights to men and women. The preamble to the 1947 United Nations Charter indicates a determination to reaffirm faith in fundamental human rights in the equal rights of men and women. Article 55 of the Charter states that the U.N. will promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex.

Article 1 of the **International Convention on Economic, Social and Cultural Rights (ICESCR)** defines "discrimination", as discrimination against women on the basis of sex. Article 2 of the convention mandates, that all States would take all steps to eliminate discrimination against women – by any person, organisation or enterprise.

The Government of India ratified the **Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)** on 19-06-1993. Article 2(b) enjoins the State parties to pursue elimination of discrimination against women, by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women". Clause (c) of Article 2 enjoins the ratifying States, to ensure legal protection of the rights of women, and Article 3 of the CEDAW enjoins the States to take all 122 appropriate measures to ensure full development and advancement of women, for the

purpose of guaranteeing to them, the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 5(a) of CEDAW states that States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; CEDAW has stated that polygyny violates women's right to equality within marriage. In its General Recommendation no. 21 on Equality in Marriage and Family Relations, the Committee stated that:

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.

Even though polygamy was seen as a means of social welfare during the time of its advent, the same practice holds no ground in the modern world. The practice is arbitrary and discriminatory towards women. Neither is the practice an essential tenet of Islam and therefore is required to be outlawed.

Islamic scholar Ammi Ali has put it about years ago, in his Muhammadan Law:

"The conviction is gradually forcing itself on all sides in all Muslim communities that polygamy is as much opposed to Islamic laws as it is to the general progress of civilized society and true culture. In consequence of this conviction a large and growing section of Islamists regard the practice of polygamy as positively unlawful."[43]

Just because polygamy has been practiced since time immemorial among the Muslims and the same has not been amended, undue discrimination cannot be allowed to be prevalent in the modern 21st Century. As it is rightly said by Martin Luther King that **"Laws cannot change the heart of the people but it can restrain the heartless people."**

[43] K.K. Abdul Rahiman, History of the Evolution of Muslim Personal Law in India, 11(3), Journal of Dharma: Dharmaram Journal of Religions and Philosophies, 262 (1986).