

Legality and Conditions of Polygyny in Afghanistan Legal System

Abdul Wahab Ayoubi¹ and Fazal Rahman Ayoubi²

¹Department of Attorney and Judiciary, Faculty of Law and Political Science, Shaikh Zayed University, Khost AFGHANISTAN.

²Department of Administration and Diplomacy, Faculty of Law and Political Science, Shaikh Zayed University, Khost AFGHANISTAN.

¹Corresponding Author: wahab.ayoubii@gmail.com



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ABSTRACT

Marriage, a cornerstone of social institution, is conventionally practiced through monogamy. However, Afghanistan presents an exception, permitting men to marriage in polygyny under specific conditions. The Afghan Civil Code delineates the framework for polygyny, emphasizing justifiable treatment of wives, financial capacity to support them (alimony), and the fulfillment of legitimate expediency. This research engages a descriptive research design and utilizes qualitative methods to gather data from primary and secondary library sources. The main objective of this study is to illuminate the legal framework and conditions governing polygyny in Afghanistan. The findings indicate that polygyny is not an illegitimate practice but is subject to stringent regulations. Incorporating spousal consent into these considerations could potentially mitigate future family conflicts.

Keywords- Alimony, Justice, Marriage, Polygyny.

I. INTRODUCTION

Polygyny, the practice of a man having multiple wives, has been a prevalent form of marriage in various societies and religions throughout history. While it was once practiced without restrictions, Islam introduced regulations to govern the number of wives a man could have (Nael, 2015). In accordance with Article 1 of the Afghan Civil Code, the Afghan legal system encompasses Islamic, statutory, and customary norms. Consequently, polygyny is permissible under Islamic law, including the Afghan legal framework. As stipulated in the aforementioned article of the Civil Code: "In the absence of a statutory provision, courts shall render their decisions based on the general principles of Hanafi Jurisprudence of Islamic Sharia in order to achieve the best possible justice." In other words, polygyny is legally recognized in Afghanistan. However, it is crucial to acknowledge the specific conditions and limitations associated with polygyny, which will be elaborated on in this article.

The question arises regarding the definition and scope of marriage practices worldwide.

Across the globe, there exist various forms of marriage, with monogamy and polygamy being the most prevalent. Monogamy, characterized by a union with one partner at a time, stands in contrast to polygamy, which entails the marriage of two or more spouses simultaneously. (Lodhi & Sidduqui, 2016)

Polygamy manifests in two distinct forms: polygyny, where one man can have multiple wives (Britannica, 2014), and polyandry, where one woman is married to several men. In other words, polyandry refers to the arrangement where a woman has two or more husbands concurrently. (Adalatkhah, 2017). The third type of marriage, group marriage involving multiple men and women, is exceptionally rare. (Abdullah, 2010)

II. METHODOLOGY

To examine into the intricate dynamics of polygyny, this research engaged a descriptive-qualitative research design. Primary and secondary sources were methodically examined, surrounding books, essays, peer-reviewed journals, and authoritative websites. This

comprehensive approach yielded a robust foundation for understanding the phenomenon of polygyny.

III. FINDING AND DISCUSSION

3.1 The Legal Framework of Polygyny in Afghanistan

Polygyny, the practice of one man having multiple wives, is legally recognized in Afghanistan under specific conditions, aligning with the practices of numerous Sunni and Shiite jurisdictions (Rastin-Tehrani & Yassari, 2012). Polygyny has a long historical lineage, serving as a prevalent framework for marriage across diverse cultures and faiths for centuries. While its initial practice was unfettered, Islam introduced regulations to control and manage the number of wives [Nael, 2015]. Historical records attest to the practice of polygyny among numerous prophets preceding our esteemed Prophet Muhammad (peace be upon him) [Ishiaku, 2014]. Today, polygyny holds legal standing in fifty-eight nations worldwide, with the majority being predominantly Muslim countries. In most Islamic jurisdictions, polygyny with up to four wives is permitted under specific situations.

Article 86 of the Afghan Civil Code (ACC) grants permission for a man to marry more than one wife simultaneously. The law does not explicitly define the maximum number of wives a man may marry. However, all jurisprudence of Islamic law strictly prohibits a man from permanently marrying more than four wives. Polygyny is only permissible under specific conditions outlined in Article 86 ACC. As elucidated in Article 1 of Afghanistan's Civil Code, the Afghan legal system combined Islamic, statutory, and customary norms. Thus, in the absence of explicit statutory provisions, courts must base their rulings on the general principles of Hanafi Jurisprudence of Islamic Sharia to uphold the highest standards of justice. Furthermore, in accordance with Article 2 of the Afghan Civil Code, in cases where no legal provisions exist and no rulings can be found within the principles of Hanafi Jurisprudence of Islamic Sharia, courts must rely on common customs, provided that these customs do not encounter with provision of law or principles of justice.

3.2 Conditions of Polygyny in Afghanistan

Regulating Polygyny in Afghanistan: Adherence to Statutory Provisions. While polygyny is not prohibited in Afghanistan, its practice is meticulously regulated under the 1977 Civil Code. To do second marriage, a husband must convincingly establish that there is no apprehension of unjust treatment towards any of his spouses, that he possesses the financial wherewithal to cater to the essential needs of all wives, including nutrition, clothing, housing, and healthcare, and that there exists a justifiable cause for the second marriage, such as the first wife's inability to bear children or her enduring ailment that demands extensive medical attention. A court may decline to register a marriage that contravenes any of these conditions, and an aggrieved wife can initiate

divorce proceedings (Nazir, 2015). Furthermore, the 1977 Civil Code empowers women to incorporate a divorce clause in their marriage contracts, allowing them to dissolve their unions if their husbands take additional wives, regardless of whether or not the aforementioned three conditions are fulfilled.

In essence, marrying multiple women does not equate to an unfettered right in Afghanistan. Polygyny is permissible only in adherence to explicit prerequisites outlined in the Civil Code, such as ensuring equity and equality among spouses, possessing the financial capacity to support multiple households, and providing separate living arrangements for each wife. Article 86 of the Civil Code delineates these conditions with precision:

- 1- When the wives are free from fear of injustice.
- 2- When the man has sufficient financial means of supporting the wives' alimony, consisting of meals, clothing, housing, and appropriate medical treatment.
- 3- When there may be a legitimate interest, which includes the first wife's infertility or her having incurable diseases. Furthermore, there are different provisions for the guarantee of polygyny in the Afghanistan civil code, which will be discussed more below.

3.2.1 Ensuring Justice in Polygynous Marriages

The fulfillment of justice among wives is a cornerstone of polygynous marriages, as enshrined in Article 86 of the civil code. This article states that a man may marry more than one wife if there's no fear of injustice to the wives. It indicates that the man needs to make sure equality is maintained among the wives from all aspects, including welfare, sexual relationships, etc.

In the context of polygyny, justice primarily refers to material or substantive justice, which entails providing adequate compulsory maintenance, ensuring access to essential goods such as food, clothing, and housing, arranging for medical insurance, and allocating sufficient time for each wife. It is crucial to acknowledge that spiritual or emotional equality is not a precondition for polygynous unions. Love and desire are subjective emotions that cannot be perfectly distributed among multiple partners. As Allah Almighty declares in the Holy Qur'an (Abdullah, 2010), no one is obligated to undertake actions that exceed their capabilities.

Consequently, individuals who cannot provide equitable material support to their wives are prohibited from engaging in polygyny. In essence, they should confine themselves to a single marriage (Nael, 2015). This stipulation stems from Islamic jurisprudence, which emphasizes the paramountcy of fairness in all facets of life.

3.2.2 Alimony in Polygyny as a Responsibility and as a Right

The man should be financially able to support his wife (meals, clothing, housing, and appropriate medical care (Rastin-Tehrani & Yassari, 2012). Because alimony is the wife's lawful right from her husband. In a legitimate

and powerful marriage, the woman is entitled to alimony. according to Article 117(1) of the Afghanistan Civil Code, [21] the husband is obligated to pay alimony after a legal and effective marriage. Alimony of wife consists of meals, clothing, lodging, and appropriate medical treatment as in accordance with husband's financial capability, in line with Article 118 of the civil code. [22] As a result, the husband is obligated to pay alimony. If a man takes more than one wife, he should pay alimony to each of them. Thus, if a man is unable to pay the alimony of his second or more wives, he's no longer married to more than one wife. because polygyny is a specific situation in the Afghanistan civil code. according to article 86 of the civil code, while, someone has an adequate financial approach to support alimony of the wives, such as food, clothing, home, and proper healthcare. it is acceptable for a woman to live apart from the other wife. Every woman has the lawful right to her housing, according to the civil code. It is not acceptable for a husband to keep his wife live in the same house as him. According to Article 116 of the civil code, if a person is married to more than one woman, he may not force them to live in a single residence against their own will. In addition, by article 119 of the civil code, [24] if the husband stops paying alimony or his negligence is proven, the competent court shall compel him to provide it.

After reading the aforementioned, it's far possible to conclude that a man can marry more than one woman if he can pay their alimony, there may be fairness among wives, legitimate interest, and the first wife suffers from an incurable disease. The civil code has defined two resolutions to comply with and ensure these conditions, which might be as follows:

1. The Civil Code gives the woman the right, through the marriage contract, to stipulate that if her husband marries another woman in violation of the provisions of Article 86 of the Civil Code, the ability to divorce be transferred to her (Abdullah, 2010). In accordance with Article 88 of the Civil Code, a woman may additionally be explicit in her marriage contract that if her husband marries another woman in violation of the provisions of Article (86) of this law, the power to divorce shall be transferred to her. This condition is only applicable if it is covered in the marriage contract. As a result, if the first wife does this and her husband remarries, she is entitled to divorce without having to establish any loss. It should be stated that this agreement is only effective if it is covered in the marriage contract. (maximum plank) In this case, the first wife has the option of going to court and filing for divorce. according to Article 87 of the Civil Code, a woman whose husband has remarried in violation of the provisions of Article (86) of this law may, underneath the provisions of Article (183) of this law, demand divorce from the court based on separation due to harm.
2. If a man marries a second, third, or fourth wife according to Article 86 of the Civil Code, however,

hides his marriage or marital status from the second wife and does not get his consent in this regard, the second wife can also demand a divorce on the bases of separation due to harm. Article 89 of the Civil Code is cleared in this regard: a person who conceals his married status during his marriage with more than one woman, according to the provisions of Article (86) of this law, and has not acquired the explicit consent and agreement of the woman to whom he's newly married regarding the situation; in this case, if the new wife does not consent to continue living with the husband, she may admit.

3.2.3 Justification for Polygyny

In certain cases, compelling circumstances may necessitate a second marriage, such as a wife's extended illness or inability to conceive. Under these circumstances, a second marriage not only protects the family's integrity but also dissuades a man from engaging in extramarital affairs (Lodhi & Siddiqui, 2016). Furthermore, a compelling basis for another union, including infertility or an incurable ailment in the prior wife, must be established. As stipulated by Article 86 of the Civil Code, a second marriage is only permissible when there is a legitimate interest, such as the first wife's infertility or her being afflicted with challenging medical conditions. In addition to the aforementioned conditions outlined in the civil code, there exists a third criterion that must be met for polygyny to be legally recognized under the Afghan Civil Code."

IV. CONCLUSION

Polygyny, the practice of a man having multiple wives, is a complex and multifaceted issue with a long history. This research has explored the legal framework of polygyny in Afghanistan. Our study revealed that polygyny has deep roots in Afghan society, with its origins extending to ancient times. It is also recognized under Islamic law, which serves as the foundation of Afghan legal system. However, the Afghan Civil Code imposes limitations on polygyny, restricting a man to marrying up to four wives and mandating that he ensure equitable treatment among his spouses, ability of alimony and legitimate reason. Furthermore, if a person does not meet the conditions for polygyny, there is a guarantee that the most essential is in some cases is to transfer the right of divorce to the wife.

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