

ISLAMICHERITAGE
LEADS THE TRANSFORMATION OF THE UMMAH

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Editors

Hasan Bahrom
S. Salahudin Suyurno
Abdul Qayyum Abdul Razak

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Tel: +606 558 2058

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Prakata

Sejarah warisan Islam telah memberikan dampak yang cukup besar kepada perkembangan dunia hari ini. Ia bukan sahaja memberi sumbangan kepada aspek kerohanian malah turut menyumbang kepada aspek ekonomi, politik, pendidikan, sosial, kesenian, kebudayaan, sains dan teknologi. Perkembangan ini memperlihatkan bahawa pentingnya ketamadunan ilmu kepada ketamadunan dunia. Perkara ini selaras dengan tuntutan al-Quran yang menyatakan dengan jelas bahawa Allah SWT memuji sesiapa yang berusaha menuntut ilmu dan juga bertaqwa kepadaNya. Namun sejak akhir-akhir ini, sumbangan hasil pensejarahan Islam sering dipandang sepi oleh generasi muda. Sejarah warisan Islam tidak lagi dijadikan panduan dan iktibar dalam melebarkan ketamadunan ilmu Islam. Mereka lebih tertumpu kepada ketamadunan Barat yang dikatakan ‘kaya’ dengan khazanah ilmu. Sedangkan kemajuan hari ini seharusnya berlandaskan kepada ketamadunan Islam.

Penelitian atau pengkajian mengenai warisan Islam perlu direncanakan sebagai ketamadunan dunia. Idea-idea baru mengenai sejarah warisan Islam perlu diketengahkan, Oleh yang demikian, menerusi *1st International Islamic Heritage Conference (IsHeC 2015)* dilihat akan dapat membantu kepada perkembangan produksi seterusnya menjana idea-idea baru khususnya untuk memperkayakan kajian dalam bidang sejarah warisan Islam kepada masyarakat. Dengan penganjuran seminar ini secara tidak langsung membantu untuk menjalinkan hubungan antara para sarjana dalam bidang sejarah warisan Islam. Ini adalah satu cabaran dan membuka peluang baru untuk membina satu perpaduan intelektual merentas sempadan dunia.

Buku ini merupakan kompilasi diskusi ilmu antara para ilmunan yang terlibat secara langsung dalam pembentangan kertas kerja mereka dalam *1st International Islamic Heritage Conference (IsHeC 2015)* daripada pelbagai platform ilmu Islam antaranya Kesenian, Ketamadunan, Komunikasi, Pendidikan, Kewangan, Sains dan Teknologi dan lain-lain lagi. Semoga curahan ilmu melalui penulisan ini mampu memberi sumbangan dalam menambah khazanah ilmu Islam kepada masyarakat.

Editor,

1st International Islamic Heritage Conference (IsHeC 2015),

Akademi Pengajian Islam Kontemporari,

UiTM Melaka.

Kata Aluan Rektor UiTM Melaka

Dengan Nama Allah Yang Maha Pemurah Lagi Maha Pengasih
Assalamu'alaikum warahmatullahi wabarakatuh

Segala puji bagi Allah, Tuhan seru sekalian alam, dengan limpah kurniaNya serta keizinanNya, kejayaan penganjuran *1st International Islamic Heritage Conference 2015* yang berlangsung di Hotel Mahkota Melaka pada 11-12 November 2015, telah menghasilkan banyak kertas kerja yang amat bermutu. Justeru, buku ini mengumpulkan puluhan penulisan para ilmuan dan cendekiawan dari dalam dan luar negara untuk bacaan semua.

Pelbagai isu telah dikupas termasuklah perihal seni Islam, budaya, politik, gendar, pendidikan, sejarah, kemasyarakatan, sains dan teknologi, ekonomi, kewangan, falsafah, bahasa dan komunikasi, kedermawanan dan pengurusan. Pembaca juga akan mendapati buku ini memuatkan kajian-kajian yang komited melaksanakan usaha mengintegrasikan antara ilmu duniawi dan ukhrawi. Ini membuktikan kesegaran keilmuan tamadun Islam itu sendiri.

Semoga perkongsian ilmu ini dapat meningkatkan komitmen umat dalam memartabatkan perintah Ilahi dalam kehidupan duniawi sebagai jambatan ukhrawi. Sekaligus ia bakal memberi manfaat pada alam sejagat.

Pihak UiTM Melaka merakamkan setinggi-tinggi tahniah dan ucapan terima kasih atas segala sokongan dalam bentuk material, tenaga dan sebagainya dalam merialisasikan seminar ini. Buat semua penaja yang telah memberikan sumbangan kepada wacana ini, sekalung penghargaan diucapkan. Semoga seminar dwi tahunan ini akan terus diperkasakan demi mengangkat martabat umat melalui kecemerlangan tamadun Islam yang diakui telah terbukti diseluruh jagat.

Sekian, terima kasih. Wassalam

PROF. MADYA DR MOHD ADNAN BIN HASHIM

Rektor ,
UiTM Melaka.

THE WISDOM OF POLYGAMY IN ISLAM: THE LAW AND CUSTOMARY PRACTICE IN AFGHANISTAN

Hekmatullah Muradi¹⁰⁴
Nasir Ahmad Yousefi¹⁰⁵

ABSTRACT

This paper aims to review the wisdom of polygamy in Islam, how the Prophet Muhammad (s.a.w) put it into practice by his divinely guided lifestyle and its practice in Afghanistan. Ninety nine percent of Afghanistan's population are Muslims and yet women in polygamous marriages are subjected to ill-treatment – a treatment which is often sanctioned by customs and/or the decisions of the so-called Jirga (elders council). This paper explains that the polygamy related customs and the Jirga's decisions in Afghanistan are contrary not only to Islamic Law but also Afghanistan domestic laws and international human rights law.

Keywords: polygamy, law, custom, rights, Jirga.

INTRODUCTION

Allah alone, the All-Merciful, deserve all praise and thanks, Lord of the universe, its creator and sustainer. Blessings and peace be upon the last of the prophets and messengers, Muhammad, his family and companions and all those who follow in his footsteps till the end of time

Prior to the emergence of Islam, the Arabian Peninsula was characterized by a wide range of marriage practices. As Leila Ahmed states in her work, *Women and Gender in Islam*¹⁰⁶, "evidence suggests that among the types of marriage practiced was matrilineal, uxorial marriage, found in Arabia, including Mecca, about the time of the birth of Prophet Muhammad (s.a.w) the woman remaining with her tribe, where the man could visit or reside with her, and the children belonging to the mother's tribe as well as polyandrous and polygamous marriages. Before the revelation of the Holy Qur'an, or almost 1400 years ago, Polygamy was a custom and unlimited. Also in Pre-Islamic Arabia a variety of different marriage practices existed. The most common and recognized types of marriage at this time consisted: agreement marriage, capture marriage, purchase marriage, inheritance and temporary marriage.

Polygamy in Islam is a favorite topic for the critics of Islam and its message. It is a complicated aspect of marriage in Islam in which the welfare of the community supersedes the desires of the individual (women). Nowadays, polygamy is usually viewed as a right that man has but should not take, or as a law that is outmoded and in need of being abolished.

The common and basic issues in the legal framework of Islamic countries, including Afghanistan, which are related to the family law these concerns are addressed in the Civil Code of Afghanistan. The people in Afghanistan are adherents to the Hanafiyy Madhab, and therefore, courts in Afghanistan adhere to Hanafiyy Madhab in their legal frameworks and judgements.

For this reason, the Hanafiyy Madhab was practiced until the Civil Code came into effect in 1977. The Afghan Civil Code intends to draw a clear demarcation polygamy to ensure that injustice is not perpetrated in the form of extramarital manners. This makes the review of polygamy imperative, as involve the most basic unit of a society, which is family.

¹⁰⁴ Master Graduated of Civil Law, Faculty of Syariah and Law, Universiti Sains Islam Malaysia. hekmat_muradi@yahoo.com

¹⁰⁵ Master Candidate L.L.M. International Law Centre, Islamic International University Malaysia (IIUM). 57512ZA@gmail.com

¹⁰⁶ Ahmed, Leila (1992). *Women and Gender in Islam*. New Haven: Yale University Press.

DEFINITION OF POLYGAMY

Polygamy means a system of marriage whereby one person has more than one spouse. Polygamy can be of two types. One is polygyny where a man marries more than one woman, and the other is polyandry, where a woman marries more than one man. In Islam, limited polygyny is permitted; whereas polyandry is completely prohibited.¹⁰⁷ Many books used polygamy therefore, this paper used polygamy as having two and or more wives at the same time.

THE RULES AND CONDITIONS OF POLYGAMY UNDER ISLAMIC LAW

Prior to the advent of Islam, polygamy was a common practice. Biologically speaking, when the population is scarce, polygamy is a great way to ensure the survival of a species. By the advent of Islam, the world is well populated, and the Qur'an set out in defining the practice of polygamy. Polygamy was originally intended to honour the wives and children of fallen warriors in the path of Islam. This is best demonstrated by the marriage of the Prophet (s.a.w), where all of his wives, with the exception of Aisha, were widows. The Qur'an permits the practice of polygamy, under strict conditions. Allah (s.w.t) says to the effect:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ ۖ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَٰلِكَ أَذْنَىٰ أَلَّا تَعْدِلُوا

"If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable to prevent you from doing injustice".¹⁰⁸

The Qur'an emphasises the message of *'adl* (justice), where it does not simply mean equal rights of treatment on lodging, clothing, and other domestic requirements, but also equal distribution of love, adoration, and care. Seeing as to how it is impossible to be perfectly fair, the Qur'anic injunction is in some ways a prohibition to the practice. The Qur'an is also clear on the fact that monogamy is perfectly attainable and preferred in a societal context. This is in accordance with the verse "...this is better to prevent you from doing injustice"¹⁰⁹ actually means that failure to adhere to the commandments in this verse will bring about severe punishment from Allah (s.w.t). It is a misconception that Islam allows its followers to marry four wives at the same time. Islam categorically prescribes certain conditions according to which, a man could marry more than one wife.¹¹⁰ Despite the fact that polygamy is permissible in Islam, it would be useful to examine the conditions that are attached to this practice.

A man can be married to multiple wives as long as he possesses perfection and wisdom enough for him to be impartial to all of his wives. The interpretation of the clause; "...marry women of your choice..."¹¹¹ signifies that the spousal life is not going to be delightful until they adhere to the following few simple conditions of polygamy:

1. The provision of the financial solvency, along with sufficient wealth, should be secured for decent living for the families. A wife is not permitted to have

¹⁰⁷ <http://dictionary.reference.com/browse/monogamy>

¹⁰⁸ Al-Qur'an. Al-Nisa. 4:3.

¹⁰⁹ Ibid.

¹¹⁰ Jamil Farooqui. 2007. "The Status of Women in Islam: A Sociological Perspective". *International Conference on the Status of Muslim Women in Contemporary Societies: Realities and Prospects*. Kuala Lumpur. International Institute for Muslim Unity and International Islamic University Malaysia. Vol.7. August. p. 249-250.

¹¹¹ Al-Qur'an. Al-Nisa. 4:3.

multiple husbands, and will therefore be vulnerable if her polygamous husband is not financially supporting her and her offspring.

2. The man must also be able to satisfy all of his wives equally, and not show favouritism to any of his wives. Prophet Muhammad (s.a.w), has mentioned “Whoever has two wives and leans unduly to one of them will come on the day of judgment with half of his body leaning.”¹¹²

It compels men who are in a polygamous marriage to divide their times equally with all their wives, and also share the same levels of affection with them.

3. The man must be wise and rational. He must also be fair in even trivial matters such as food, clothing, and treatment of all his wives. A man is required to keep this level of commitment even if he is ill. This is being clarified by the actions of Prophet Muhammad (s.a.w) as testified by his wife Aishah:

“Allah’s messenger would visit all of his wives when he was sick and would ask them where he shall be tomorrow”.¹¹³

When it became challenging for the Prophet (s.a.w) to relocate, he asked for their permission to be with Aisha. It was related that:

“when Allah’s Messenger was ill, he called all his wives together and said, “verily, I am no longer able to visit all of you, so, if you do not mind that I remain with Aisha, please allow me to do so.”¹¹⁴

This shows that if a husband wants to spend more time with one wife, the other wives need to give their consent.

Polygamy is often a complicated aspect of marriage issue in Islamic countries where communal welfare supersedes individual ones (women). Throughout Afghanistan, polygamy is normally viewed as being a right of a man, but its practice makes it highly undesirable, and the call to be abolished. Nowadays, women organisations often attempt to hide it for its existence. This approach is flawed and instead of hiding it, they should attempt to synchronise it with the current lifestyle and see how it can help Afghan society.¹¹⁵

The best example of those who practiced polygamy was the Prophet Muhammad (s.a.w), at the beginning he married only one wife Khadijah, and after her death, he married widows and took their children in as his own, and raised them under his care. These children were either war orphans or were in desperate need of parental attention. That is why the Prophet (s.a.w) married these widows because it proves that one of the reasons permitting polygamy is the need of parental care for orphans, as stipulated in the Qur’an. The Prophet (s.a.w) also said:

*“A woman maybe married for four reasons: for her property (wealth), her rank (lineage), her beauty and her religion. However, you should marry the one who is religious and you be satisfied”.*¹¹⁶

However, it is believed that the reasons for men taking second wives in Afghanistan have much to do with beauty and wealth; spirituality is seldom a deciding factor. The aforementioned conditions are actually almost impossible to fulfil in Afghanistan, as the women themselves do not seem aware of their own rights.

¹¹² Abu Dawud. *Sunan Abi Dawud*. n.d. Vol.2. No 2128. p.572.

¹¹³ Muhammad ibn Ismail. Sahīh Al-Bukhāri. (trans.) Muhammad Muhsin Khan. 1984. The translation of the meaning of Sahīh Al-Bukhāri, Arabic- English, vol. VII. NO, 144. p, 107.

¹¹⁴ Abu Dawud. *Sunan Abi Dawud*. Vol.2. No 2132. p.573.

¹¹⁵ Abu Ameenah Bilal Philips & Jameelah Jones. 2005. *Polygamy in Islam*. Saudi Arabia: International Islamic Publishing House. p. 85.

¹¹⁶ Abu Dawud. *Sunan Abi Dawud*. Vol.2. No 5445.

THE WISDOM AND PHILOSOPHY OF SEVERAL MARRIAGE OF PROPHET MUHAMMAD (S.A.W)

Study the life of Prophet Muhammad (s.a.w) and you will see that the Prophet was a man of highest character even long before he started preaching Islam. At the age of twenty-five, Prophet Muhammad (s.a.w) married a famous and a highly respected lady of Mecca, by the name of Khadija bint Khuwaylid, who was older than him in age.¹¹⁷The important thing is that he remained married to her for twenty-five years until she passed away in Mecca. Two years after her death, the Prophet migrated from Mecca to Medina where he founded the first Islamic society.

So for the first 50 years of his life, the Prophet had only one wife Khadija, whom he loved dearly and who was one of the strongest pillars of support in promoting his. During the last 13 years of his life, he married other wives. All the marriages of the Prophet, other than that with Khadija had a good political or religious rationales, like to providing protection and dignity of widows, for example, he married Sawdah bint Zam'ah whose husband had died in Abyssinia when she returned to Mecca, she was a widow; and her father and brother were not only infidels but also enemies of Islam. She could not seek shelter with them; they were so much opposed to Islam that they could even torture her to death. The Prophet, now a widower himself, married Sawdah in order to provide protection to her as well as to forge important link of kinship with his opponents¹¹⁸, to set the slave free, for example, Juwayriyyah bint al-Harith. جويرية بنت الحارث After the Battle of Banu Mustaliq in the 5th year AH, the Muslims took two hundred families of that tribe in slavery. Juwayriyyah, the daughter of the chief of that tribe, had become a widow. The Prophet set her free and married her. Why? The Muslims, who had made the two hundred families of Banu Mustaliq their slaves, realized that by Juwayriyyah's marriage to the Prophet, all these two hundred families were now related to the Prophet by marriage. Out of courtesy to the Prophet, the Muslims set them free. Impressed by this nobility, the whole tribe of Banu Mustaliq became Muslim. By this marriage, the Prophet was able to transform a hostile tribe into an ally. to forge friendly relationship for the sake of Islam. For example, He married with Safiyyah bint Huyaiy ibn Akhtab the daughter of the chief of Banu Nadhir, a Jewish tribe of Khaybar. She became a widow when her husband was killed in the Battle of Khaybar. She was taken as a captive by the Muslim forces. The Prophet married her to establish marriage ties with her Jewish tribe.

THE LAW AND CUSTOMARY PRACTICE OF POLYGAMY IN AFGHANISTAN

Polygamy and its particular condition are vividly described in holy Qur'an, Hadith, and Civil Code of Afghanistan in many situations. But in Afghanistan, women are risking their lives by simply entering into polygamous marriages. As mentioned over and over again, consent does not seem to be of concern in Afghanistan. It was also mentioned that marriage requires the consent of the woman in question, and in polygamy, a husband who is taking a second, third, or fourth wife will require the consent of the preceding wives. The next section analyses three factors; the first one is for men intending to practice polygamy, while the second involves woman consent in allowing husband to marry, and the third one woman being married to a married man.

Elements related to Man's Polygamous Practices in Afghanistan

In Afghanistan warlords are particularly fearful, and this fear had caused some families to give their daughters to these warlords. Ironically, most of these warlords are married more than four times despite the prohibition of that in Islam. In order to get away from this prohibition, a warlord would divorce one of his wives and wed another that catches his fancy.

¹¹⁷ Ibn Kathīr in al-Bidāyah wa an-Nihāyah, vol. 2 (Beirut: Dar Ihyā' Turathi 'l-'Arabi, 1408) p. 360.

¹¹⁸ Ibn Ishaq (Ketab Al Muqtada, 238).

This is exemplified in the case of a commander in Bamyan province, where upon spotting a local girl, ordered his soldiers to kill her husband, and forcibly married her. He covered all his current wives into giving him consent, and the family of the girl were also forced to consent to the marriage. Power along with duress plays a tremendous role in oppressing families to accept polygamous marriages.¹¹⁹ This occurs through the followings:

- Lack of rule of law. In places where rule of law is scarce, the most powerful local chieftain is the law, and they will usually act in a manner they prefer.
- Factor of tribal influence. There are many tribes within the Afghan societies, and each tribe has a lord. These lords use their positions to force families to hand over daughters to them or whomever they choose for marriage.
- Wealth and strong economy can make men marry several times. Most of the men that have married for the second occasion cited the reason of being financially established. For illustration, Abdullah Shafiq from Herat province explained, "I am thankful to God that I have wealth and can afford everything involving my wives and children daily expenses."¹²⁰

Determined by what is mentioned above, and according to Article 86 of the Civil Code of Afghanistan, it can be inferred that mere strong economic feature without other conditions being fulfilled is not sufficient to justify polygamy. A man should be compelled to provide a valid reason for taking a second wife. The unsuitable traditions are profoundly involved in a number of marriages. The custom itself can be directly considered as one of the elements of polygamy. As an example, if parents selected an illiterate bride for their educated son, the son still has to abide by the wishes of his parents simply because of obedience. It is considered that this may no longer be the case in the nearby future, where men would yearn for wives of the same education level. This is also prevalent in certain tribal customs, where Afghan men take second wives to fulfil tribal obligations. Reports are rife with cases where men compete along tribal lines, which have affected lives of individuals. These competitions involve men being compelled to take second wives simply because someone from another tribe has done so. Some might even attempt to go further, by taking third or fourth wives.

Single Afghan women are terrified by this competitive behaviour and they are hoping that they will be rescued from this fate before it befalls on them. Generally speaking, men who took second wives regretted their decision as they face numerous problems. This is due to the fact that such marriages are vulnerable and are wrought with traditions and customs.

It is ascertain that failure of a wife to reproduce can be a reason for a husband to take a second wife. In some extreme cases, a husband might also kill a wife for not being able to bear a son. For example, a woman in north-eastern Afghanistan was arrested for allegedly intending to strangle her 22 years old daughter-in-law for becoming pregnant with baby girl. The husband is suspected to be involved as well, but fled before he could be arrested. The son was a soldier in a local militia, and is currently enjoying an unlimited political support. Militia groups enjoy political patronage, and are perpetrators who commit abuses, robberies, and extortion. Local villagers claimed that he frequently abused his wife. This case occurred in Kunduz province. The new born girl was fortunately unharmed; Kunduz police chief, Sufi Habib, told the BBC that:

"The mother gave birth to a third girl two months ago. The husband and mother-in-law strangled her for giving birth to a third daughter."

The Director of Kunduz Women's affairs, Nadira Gya said "it has been a ferocious crime dedicated against an innocent woman". Local and tribal elders from the district

¹¹⁹ This case has been personally witnessed by the author when he was studying in a university in Afghanistan.

¹²⁰ Abdullah Shafiq. Shopkeeper of Herat province Afghanistan, (interviewed via Skype from Malaysia). 20 March 2013.

condemned this killing, saying it turned out a work of ignorance, and as a crime against Islam, humanity, and women's right. They also called for immediate punishment.¹²¹

Unfortunately, the birth of a boy is a cause of celebration in Afghanistan, while a girl is seen as a burden. Some wives in Afghanistan were abused due to their failure of bearing sons. In a traditional Afghan home, not having a son is an extreme burden. There is a saying: “*dar khanai k pesar na basha o khana tarik ast*” which connotes that a “family with no son is actually home without light”. This proverb outlines the worth of a son to a family and therefore in such a case, the family would usually opt for a second wife who may be capable of delivering them a son.

These are tragic signs of gender discrimination that is widened in Afghan society, regardless of urban or rural communities. This discrimination is ingrained into the society's mind set, and is present in almost all phases of life. Women in Afghan society are being abused from day one in their families' houses to the house of their in-laws. Due to the lack of medical understanding, men tend to put women's barren status on the wives and not the husbands. The reasons that determine as to whether a woman is to give birth to a baby girl or boy:

“Humans are made up of 23 pairs of chromosomes, these chromosomes are vital or even somatic, and with one of them being the sexual chromosome. The sexual chromosomes in men are termed XY, while for women, its XX. If a mother contributes an X chromosome and the father contributes an X chromosome as well, the child will be female, and if one of the parents contributes a Y chromosome, the child will be a male. This simple explanation goes to show that it is not completely the fault of the wives if they could not bear a son.”¹²²

All of the elements being discussed in this context are contradictory to both Islamic jurisprudence and Afghan Civil Code. The Civil Code permits childless men to take second wives, but even then, certain terms and conditions need to be fulfilled prior to doing so.

Predominantly, childlessness is another deciding element for men to be married for the second time. A man is permitted to take a second wife if the first is barren.¹²³ This is recognised in the Afghan Civil Code, where it authorises men who are with barren wives to take second ones, when the first wives are childless or when suffering from diseases which are hard to be treated.¹²⁴

The question that comes from this is how the barrenness is to be determined. Due to the shortage of medical facilities and the doubt of a patriarchal society, the benefit of the doubt frequently edging the husband; there are no prenuptial medical check-ups required in Afghanistan, and the marriage certificate does not require any sort of medical certificate to be provided. It is also not a requirement where medical doctors are scarce. Women afflicted with diseases that cause barrenness face particular challenges, as their husbands can exploit their illness to marry for the second times. There are some husbands in spite of getting financial help from the state to treat their wives; they will use these monies to get marry elsewhere.

This is nearly a common practice, with all Afghan men being interviewed admitted to doing this, despite the fact that their wives illnesses are perfectly curable. It should also be pointed out that 30 per cent of women lost their lives because of this. This serves to highlight

¹²¹ Bilal Sarwary. 30 Jan 2012 . “*Afghan woman is killed 'for giving birth to a girl'*”. Accessed 13, March 2013. <http://www.bbc.co.uk/news/world-asia-16787534>.

¹²² Jamila Shaighani. Experts Doctor of Obstetric of woman. Balkh Afghanistan.

¹²³ Donald Newton Wilber. 1962. *Afghanistan: Its People, Its Society, Its Culture*. New Jersey : HARF Press, Princeton,. Volume, 11. P 92.

¹²⁴ Art 86. Afghanistan Civil Code. 1977.

the lack of attention that women receive when they suffer from minor treatable diseases.¹²⁵ Another inhumane local practice seen nowadays throughout the Afghan society is referred to as a crook marriage. Statements from witnesses in Kabul said that a man after a few years of childless marriage would normally negotiate with his first wife to marry for the second time, and when the second wife delivered a baby, the man divorced her and kept the child with himself. It is a kind of persecute that women in Afghanistan are undergoing.

Elements related to Women getting married with a Married Man

The Afghan women play a specific role in arranging the marriage. The Civil Code of Afghanistan considers the contentment of couple to be one of the basic conditions for the arrangement of marriage. For the proper contract of marriage the observance of the following terms are required:

1. Offer and acceptance should be affected correctly by the parties to the contract or by their guardians;
2. Presence of two witnesses; and
3. Non-existence of permanent or temporary legal prohibition between the man and the woman.¹²⁶

If one of the couple shows unwillingness, the marriage is considered void. However, the reality is that despite these codes and laws are in place, however in practice, many forms of forbidden marriages are still being practiced in Afghanistan. Some of the situations compelling women to give consent to second wife are discussed below:

1. The consent of a woman was simply not asked for; in other words, forced marriage, such as *baad* (retribution of a woman for a murder, to restore peace), marriage in childhood, *baadal* (exchanging of daughters), and marriage of widows to her husband's family members, as already discussed in Chapter Two.
2. Where women consent to marrying a married man due to desperation. Studies have highlighted the fact that the most significant element behind polygamy in Afghanistan is the lack of centralisation of the family. Other elements, for instance economic difficulties, and conventional practices make women vulnerable instead of independent. Also, girls do not possess economic independence in many parts of Afghanistan.

Meanwhile, many girls are seen as burdens by their relatives, and also have to deal with massive limitations on the account of the lack of association with parents. Consequently, they are forced to marry a married man. This is due to the lack of presence of the parents. There are other sorts of situations that force women to marry in this situation. Lack of mother cause problems such as misbehaviour of having a step-mother, lack of attention from the father, as well as deprivation from the father's favour, cause girls to want to marry a married man, especially when only the mother is still alive, as this will help them both financially as well.

The absence of parents in a single parent household has negative impacts on child development in Afghanistan, especially, in education, custody, and health. The EVAW considers the following acts as violence against women: battery and laceration,¹²⁷ harassment or persecution,¹²⁸ prohibiting access to education,¹²⁹ and marrying more wives without the

¹²⁵ Women and Children Legal Research Foundation. 2006. *Research Report Polygamy in Afghanistan*. p. u.

¹²⁶ Art 77. Afghanistan Civil Code. 1977.

¹²⁷ Art 5 (7). EVAW law. 2009.

¹²⁸ Ibid. Article 14.

¹²⁹ Ibid. Article 19.

observance of article 86 of Civil Code.¹³⁰ This is substantiated by Article 35 of the EVAW which says:

“If a person who prohibits a woman from the right of education, work and exercising her other rights as provide by law, considering the circumstance the offender shall be convicted to short term imprisonment not more than 6 month.”¹³¹

Unawareness of a suitors’ marital status is certainly a point of contention. As it is required by law in Afghanistan that, a woman must be made aware of the suitors’ status as a married man prior to entering into a marriage contract with him, but in practice, it is not always the case. The Afghan Civil Code states that:

“During a marriage, when a person conceals his previous marital status from the newly wed-wife, and does not secure the clear consent and agreement of his wife, in the case where she contends to not continue living with the husband, she can demand divorce from the court in accordance with the provision of article 183 of this Civil Code.”¹³²

For the polygamous marriage, the Civil Code states that:

“A person who marries with more than one wife without the observation of the provision of Article 86¹³³ and 89¹³⁴ of the Civil Code, he shall be sentenced to short term imprisonment of not less than 3 months.”¹³⁵

Practically, the findings indicate that the percentage of men marrying without informing their second wives about their current marriage status is about 35 per cent.¹³⁶ This percentage is still increasing instead of decreasing because the economic problems play a powerful role in persuading women to marry a wealthy married man. Low financial stance forces poor people families to offer their very young daughters for marriage to a married man with the implicit promise of ensuring the daughter’s financial welfare. Also, women who consent to marry some of rich men, normally hope that by sacrificing their lives, they could alleviate the suffering of their immediate families.

Here are a few cases associated with women who consented to marry a married-man due to economic considerations. A lady from Parwan province was interviewed and she said:

“our father did not have money to solve our financial problems. We could only have meal one time a day and would stay hungry the rest of the day. Therefore, I married a rich married man, who promised to assist my father.”¹³⁷

Another woman from Ghazni province was interviewed and she quoted:

“My father was old and I was the only younger girl in my family. I was compelled to marry a rich married-man; since I wanted to help my father.”¹³⁸

A lady from Herat also said:

¹³⁰ Ibid. Article 20.

¹³¹ Ibid Article 35.

¹³² Art. 89. Afghanistan Civil Code. 1977.

¹³³ When the first wife is childless or when suffering from diseases which are hard to be treated.

¹³⁴ During a marriage, when a person conceals his previous marital status from the newly wed-wife, and does not secure the clear consent and agreement of his wife, in the case where she contends not to continue living with the husband, she can demand divorce from the court.

¹³⁵ Art. 38. EVAW law. 2009.

¹³⁶ Women and Children Legal Research Foundation. 2006. *Research Report Polygamy in Afghanistan*. Kabul Afghanistan. p. hh.

¹³⁷ Ibid.

¹³⁸ Ibid.

*"After the death of my husband, I had three children. All of them young and only one of them used to go to school. I could not send him to school because I did not have money. At the time, I never wanted him to remain uneducated. I was worried about their future and no one to assist me. I had to marry a married-man who pledged to pay for my children's expenses."*¹³⁹

The threat of divorce is additionally on the list of elements that will attract the particular consent of wives. Wives are compelled to permit their spouse to marry a second wife in order to avoid their husbands from divorcing them.

Elements related that Women's Silence on the Husband's Second Marriage

The research indicates that most women do not consent for their husbands to take second or several wives. In other words, the husband, without having the consent of their wives, decides to marry a second, third, and fourth girl. This issue is specifically being addressed under Article 87 Civil Code of Afghanistan, as it notes:

"A woman, whose husband has married contrary to the provisions of Article 86 of this Civil Code, can demand divorce from the court in accordance with the provisions of Article 183 of Civil Code on the grounds of separation caused by damage or loss."

The awareness of the wife regarding the husband's second marriage is one of the preconditions of polygamy. However, in practice, the wives remained quiet due to the following reasons:

1. Majority of women in Afghanistan are not aware of their simple rights with regards to the one mentioned under the Civil Code; as they are deprived of basic education.
2. A number of women are familiar with their protection under the law, but on the account of weak judicial system, and other bureaucratic obstacles within the courts, they chose not to pursue any matter.
3. Due to stresses endured from the ruling community, contacting the particular court is regarded as a shame and a disgrace, particularly for women, and due to this, women usually do not contact the courts in order to vindicate their rights.
4. Fear of their spouses and their in-laws, and fear of being dishonoured are also contributing factors as well.

Hekmatallah Muradi indicates some other significant reasons in his that add to the silence of women in terms of the second marriage of their husband to be as:¹⁴⁰

- i. Anxiety about divorce. Since divorce is generally deemed a cultural disgrace, the loved ones and family members on each side are likely to accept polygamy to be a last resort as an alternative to seeing the particular marriage dissolve.
- ii. Anxiety about the future of their children custody. They are afraid that they would not be given their children custody in case of divorce.
- iii. Financial instability. Because women mostly rely on their husbands to cover their expenses, but if they are being divorced, they risk losing all financial supports that are expected to be given by the husbands.

Meanwhile, the unprecedented needs and standards of living make impartiality amongst several wives and children very hard to keep. Conditions associated with life changes as a result of various stages of all time. While the basic principle of Islam is usually kept, they need to interpret it within the light of new socio-economic problems is noticeable. Islam helped polygamy for the protection of women and their substance. Yet polygamy within

¹³⁹ Ibid

¹⁴⁰ Hekmatallah Muradi. 2015. *Equal Protection before the Law: A study om the Matrimonial Rights of Women in Afghanistan*. Unpublished Master thesis. University Science Islam Malaysia library. P. 77.

this country is practiced, especially among the elites in such fashion of being detrimental to the rights and interests of women.

What the researcher finds about conditions related to polygamy revolves around justice, which is regarded as one of the major problems. It is impossible to find a man who has been able to behave accordingly in respecting the rights of his wives. For example, the Civil Code provides that if a person has more than one wife, he cannot force them against their consent to reside in a single residence.¹⁴¹ Yet, it is hard to find a man in Afghanistan who has more than one wife and provide them separate residence.

CONCLUSION

Polygamy is considered as part of the societal necessities. Islam applies specific conditions and places limits on those attempting to practice it. However, regretfully, in Afghanistan, the men circumvent the limits and abuse women vis-a-vis separation and divorce. Before Islam, polygamy existed with virtually no conditions. However, with the advent of Islam, it limited the number of wives a person can marry up to four.

In the domestic context, the Civil Code of Afghanistan has not properly addressed this problem. Family Courts are not in operation everywhere in the country to follow up with this kind of cases, and almost all of the family conditions are handled in ordinary courts.

Majority of Afghani people in recent time regard polygamy as incompatible with the current economic situation. Most of the polygamists are usually illiterate, but are financially secure, and with influential roles. It is clear that most men are involved in polygamy because of tribal competitive events, limited number of sons and women exploitation. Women remained silent when their husbands take new wives because they fear divorce, their futures, children's welfare, and violent life.

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¹⁴¹ Art, 116. Afghanistan Civil code, 1977.

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