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**LAW
COMMISSION
OF
INDIA**

**Preventing Bigamy via Conversion to Islam – A
Proposal for giving Statutory Effect to Supreme
Court Rulings**

Report No. 227

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2



**THE LAW COMMISSION OF INDIA
(REPORT NO. 227)**

**Preventing Bigamy via Conversion to Islam – A
Proposal for giving Statutory Effect to Supreme
Court Rulings**

**Forwarded to the Union Minister of Law and Justice,
Ministry of Law and Justice, Government of India by Dr.
Justice AR. Lakshmanan, Chairman, Law Commission of
India, on 5th day of August, 2009.**

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**The Law Commission is located in ILI Building,
2nd Floor, Bhagwan Das Road,
New Delhi-110 001**

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Any enquiries relating to this Report should be addressed to the Member-Secretary and sent either by post to the Law Commission of India, 2nd Floor, ILI Building, Bhagwan Das Road, New Delhi-110001, India or by email to lci-dla@nic.in

Dr. Justice AR. Lakshmanan
(Former Judge, Supreme Court of India),
Chairman, Law Commission of India



ILI Building (IInd Floor)
Bhagwandas Road,
New Delhi – 110 001
Tel. 91-11-23384475
Fax. 91-11 – 23383564

D.O. No. 6(3)/159/2009-LC (LS)

5 August, 2009

Dear Dr Veerappa Moily ji,

Subject: Preventing Bigamy via Conversion to Islam – A Proposal
for giving Statutory Effect to Supreme Court Rulings

I am forwarding herewith the 227th Report of the Law Commission of India on the above subject.

2. For a long time past, married men whose personal law does not allow bigamy have been resorting to the unhealthy and immoral practice of converting to Islam for the sake of contracting a second bigamous marriage under a belief that such conversion enables them to marry again without getting their first marriage dissolved.
3. The Supreme Court of India outlawed this practice by its decision in the case of *Sarla Mudgal v Union of India*, AIR 1995 SC 1531. The ruling was re-affirmed five years later in *Lily Thomas v Union of India* (2000) 6 SCC 224.
4. In view of the above, the Law Commission *suo motu* took up the subject to examine the existing legal position on Bigamy in India along with judicial rulings on the subject and to suggest changes in various family law statutes.
5. We have recommended in this Report as under:
 - i) In the Hindu Marriage Act 1955, after Section 17 a new Section 17-A be inserted to the effect that a married person whose marriage is governed by this Act cannot marry again even after changing religion unless the first

- marriage is dissolved or declared null and void in accordance with law, and if such a marriage is contracted it will be null and void and shall attract application of Sections 494-495 of the Indian Penal Code 1860.
- ii) A similar provision be inserted at suitable places into the Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936 and the Dissolution of Muslim Marriages Act 1939.
 - iii) The Proviso to Section 4 of the Dissolution of Muslim Marriages Act 1939 – saying that this Section would not apply to a married woman who was originally a non-Muslim if she reverts to her original faith – be deleted.
 - iv) In the Special Marriage Act 1954 a provision be inserted to the effect that if an existing marriage, by whatever law it is governed, becomes inter-religious due to change of religion by either party it will thenceforth be governed by the provisions of the Special Marriage Act including its anti-bigamy provisions.
 - v) The offences relating to bigamy under Sections 494-495 of the Indian Penal Code 1860 be made cognizable by necessary amendment in the Code of Criminal Procedure 1973.

With warm regards,

Yours sincerely,

(Dr AR. Lakshmanan)

Dr M. Veerappa Moily,
Union Minister of Law and Justice,
Government of India,
Shastri Bhawan,
New Delhi – 110 001.

Preventing Bigamy via Conversion to Islam - A Proposal for giving
Statutory Effect to Supreme Court Rulings

Contents

	Page Nos.
<i>Chapter I</i>	
Introduction	9-11
<i>Chapter II</i>	
Penal Law on Bigamy	12-15
<i>Chapter III</i>	
Bigamy under Civil Marriage Laws	16-19
<i>Chapter IV</i>	
Bigamy under Community-Specific Legislation	20-27
<i>Chapter V</i>	
Bigamy under Muslim Personal Law	28-32
<i>Chapter VI</i>	
Bigamy by Non-Muslims on Embracing Islam	33-34
<i>Chapter VII</i>	
Judicial Rulings on Bigamy by Conversion	35-39
<i>Chapter VIII</i>	
Recommendations	40-42

Chapter I

Introduction

Marriage laws other than that of the Muslims now in force in the country prohibit bigamy and treat a bigamous marriage as void. For this reason a marriage to which any of these laws apply attracts the anti-bigamy provisions of the Indian Penal Code which are applicable to a bigamous marriage if it is void under the governing law for the reason of being bigamous [Sections 494-495].

For a long time past, married men whose personal law does not allow bigamy have been resorting to the unhealthy and immoral practice of converting to Islam for the sake of contracting a second bigamous marriage under a belief that such conversion enables them to marry again without getting their first marriage dissolved.

The Supreme Court of India outlawed this practice by its decision in the case of *Sarla Mudgal v Union of India*, AIR 1995 SC 1531. The ruling was re-affirmed five years later in *Lily Thomas v Union of India* (2000) 6 SCC 224.

Though these cases related to marriages governed by the Hindu Marriage Act 1955, their *ratio decidendi* would obviously apply to all marriages whose governing laws do not permit bigamy.

The Supreme Court decision on this subject is now the law of the land, and yet it is being widely violated across the country. Two conspicuous cases of unlawful bigamy through the route of conversion to Islam have made headlines in recent days.

In one of these cases a prominent politician, already a husband and a father, mysteriously disappeared and surfaced a month later with a new bride claiming that they had become husband and wife under the law of Islam to which both of them had since converted. The fact that the new bride in this case, who is a lawyer and has been a law officer with the government of her State, keeps on publicly claiming that her marriage to the convert-bigamist is fully legal due to his conversion to Islam clearly shows the ignorance about the law settled in this respect by the Supreme Court prevails also in the community of lawyers.

In the second case another married man, an army physician of India serving in Afghanistan, converted to Islam in order to marry an Afghan Muslim girl serving him as an interpreter. The poor girl was kept in the dark about his marital antecedents and discovered the same only when years later he returned to India leaving her behind in Afghanistan.

These are, of course, not the only prominent instances where married non-Muslim men claiming to have converted to Islam have duped their first wives; many such cases go unnoticed. There is, thus, a need to make the legal position as settled by the Supreme Court clear enough by introducing necessary provisions to that effect in all the existing legislative enactments governing marriages among various communities.

This Report examines the existing legal position of bigamy in India and suggests ways to check the social malaise of bigamy through the route of sham conversion.

Depending on the number of plural marriage in a particular case and the gender of the person indulging in them, etymologists use different expressions for various situations of plural marriages – bigamy (double marriages by a man or woman), polygamy (triple or more marriages by a man or woman), polygyny (bigamy by men) and polyandry (bigamy by women). Avoiding these subtle differences and for the sake of brevity and convenience, we are using in this Report the common terms ‘bigamy’ or ‘polygamy’ which are opposite of monogamy and may be applied to all cases of plural marriages irrespective of gender and number of spouses.

Chapter II
Penal Law on Bigamy

Bigamy in General

The Chapter on Offences relating to Marriage under the Indian Penal Code of 1860 contains two provisions relating to bigamy – the first of these applicable to married persons marrying again without concealing from the second spouse the fact of the first marriage, and the second to those who do so by keeping the second spouse in the dark about the first marriage. Section 494 of the Code reads as:-

“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.”

Coming to the cases of bigamy where a person indulges in it by deceiving the second spouse, Section 495 of the Indian Penal Code says:-

“Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”.

It will be seen that application of these provisions of the Indian Penal Code would be attracted only if the second marriage is void, for the reason of being bigamous, under the law otherwise applicable to the parties to a particular case; but not so otherwise.

As such the anti-bigamy provisions of the Indian Penal Code apply to all those whose marriages are governed by any of the following legislative enactments all of which regard a second bigamous marriage, by a man or woman, as void :

- (i) Special Marriage Act 1954
- (ii) Foreign Marriage Act 1969
- (iii) Christian Marriage Act 1872

- (iv) Parsi Marriage and Divorce Act 1936
- (v) Hindu Marriage Act 1955

As regards the Muslims, the IPC provisions relating to bigamy apply to women – since Muslim law treats a second bigamous marriage by a married woman as void – but not to men as under a general reading of the traditional Muslim law men are supposed to be free to contract plural marriages. The veracity of this belief, of course, needs a careful scrutiny.

The anti-bigamy provisions of the Indian Penal Code would not apply also to tribal men and women if their customary law and practice does not treat their plural marriages as void. It has been judicially affirmed that Section 494 of the Indian Penal Code will not apply to members of Scheduled Tribes unless the tribal law applicable to a case treats a bigamous marriage as void. See, for instance, *Surajmani Stella Kujur (Dr.) v Durga Charan Hansdah* AIR 2001 SC 938.

Nature of Offence

The offence under Section 494 of the Indian Penal Code is non-cognizable, bailable and compoundable by the aggrieved spouse with the permission of the court. That the offence is compoundable by mutual consent of the parties was affirmed in *Narotam Singh v State of Punjab* AIR 1978 SC 1542.

In the State of Andhra Pradesh, however, by a local amendment of 1992 the offence under Section 494 was made cognizable, non-bailable and non-compoundable

The offence under Section 495 of the Penal Code is non-cognizable, bailable and – unlike that under Section 494 -- non compoundable. Notably, in Andhra Pradesh this offence too has been made cognizable and non-bailable.

IPC Provisions in Action

Bigamy by women is very exceptional in the society, but bigamy by men is indeed rampant. However, since the anti-bigamy provisions of the Indian Penal Code are (except in Andhra Pradesh) non-cognizable most cases of the offence of bigamy remain unpunished. The aggrieved first wives of all communities silently suffer the miseries caused by the practice of bigamy.

There is also a trend in the society to use devices, supposed to be ‘legal’, to escape application of the IPC provisions. Among these are holding incomplete and defective marriage ceremonies, non-marital cohabitation and fake change of religion.

With the sole exception of Andhra Pradesh, nowhere have any changes in the IPC provisions or the related procedural law been yet considered in order to improve upon the working of the said provisions.

Chapter III

Bigamy under Civil Marriage Laws

Special Marriage Act 1954

Monogamy is the rule under the Special Marriage Act 1954. Among the conditions for solemnization of a civil marriage spelt out in the Act the foremost is that “neither party has a spouse living” – Section 4 (a).

In respect of bigamy there are two different penal provisions under the Act. If a person already married, under whatever law, fraudulently contracts a civil marriage the provision of Section 43 of the Act reproduced below will apply:

“Save as otherwise provided in Chapter III, every person who, being at the time married, procures a marriage of himself or herself to be solemnized under this Act shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be, and the marriage so solemnized shall be void.”

The other provision contained in Section 44, reproduced below, is meant for a person married under the Special Marriage Act who contracts a second marriage under any other law:

“Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in Section 494 and Section 495 of the Indian Penal Code, for the offence of

marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.”

Chapter III of the Act, referred to in Section 43 reproduced above, provides the facility of turning a pre-existing marriage solemnized as per religious or customary rites into a civil marriage by registering it under this Act. This facility is also available subject to the condition that “neither party has at the time of registration more than one spouse living” – Section 15 (b). If a person having more than one spouse living fraudulently registers either of his marriages under this Act he will be guilty of the offence of knowingly making a false statement punishable under Section 45 of the Act.

The anti-bigamy provisions of the Special Marriage Act apply to every marriage contracted under its provisions irrespective of the religion of the parties. A court has specifically held that if a Muslim contracts a civil marriage under the Special Marriage Act instead of his personal law the anti-bigamy provisions of the Act will apply to him. See *S. Radhika Sameena v. S.H.O., Habeeb Nagar Police Station, Hyderabad* 1997 CriLJ 1655 (AP).

However, if a person who has registered his pre-existing marriage under the Special Marriage Act in terms of Section 15 contracts a second bigamous marriage, it is not clear from the language of the Act if the provision of Section 44 reproduced above will apply to the case. The words “Save as otherwise provided in Chapter III” in Section 43 are not clear in their meaning. In the fitness of things, since *ex post facto* registration of a religious or customary marriage turns it into a

civil marriage for all purposes, the anti-bigamy provisions of the Act should also apply to such a case.

Foreign Marriage Act 1969

This Act facilitates solemnization of civil marriages in foreign countries between two Indians or an Indian and a foreigner. Monogamy is the rule under this Act as well, the first condition for the solemnization of marriage under its provisions being that “neither party has a spouse living” – Section 4 (a).

If the condition of monogamy and the other conditions mentioned in Section 4 of the Act are met, a pre-existing marriage between two Indians or an Indian and a foreigner solemnized in a foreign country under a local law can be registered under the Foreign Marriage Act, upon which it shall be deemed to have been solemnized under the said Act – Section 17.

The anti-bigamy penal provision of Section 19 of the Foreign Marriage Act, reproduced below, applies to both marriages originally solemnized under its provisions and those solemnized as per a foreign law but later registered under the Foreign Marriage Act:

“(1) Any person whose marriage is solemnized or deemed to have been solemnized under this Act and who, during the subsistence of his marriage, contracts any other marriage in India shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code, and the marriage so contracted shall be void.

(2) the provisions of sub-section (1) apply also to any such offence committed by any citizen of India without and beyond India.”

The anti-bigamy provisions of the Foreign Marriage Act, like those of the Special Marriage Act 1954, are applicable to all cases governed by it, irrespective of the religion of the parties.

Effect of change of religion

Post-marriage conversion by either party to a civil marriages has no legal consequences – the convert remains subject to the provisions of the Special Marriage Act 1954 or the Foreign Marriage Act 1969, as the case may, and neither the converting spouse can contract another marriage nor the other spouse can seek divorce on the ground of change of religion.

If either party in such a situation marries again after changing religion, but without obtaining divorce or a decree of nullity, his or her conduct will still attract anti-bigamy provisions of the Indian Penal Code.

Chapter IV

Bigamy under Community-Specific Legislation

Christian Marriage Act 1872

As is well known, the Christian religion prohibits bigamy. In India Christian marriages are governed by an old Act of the British period – the Christian Marriage Act 1872. It applies to all sorts of marriages among the Christians of India and requires them to be solemnized under its provisions not only when both parties are Christian but also when one of them is a Christian and the other a non-Christian (see Section 4 of the Act).

Marriages can, under this Act, be either solemnized by a ‘Minister of Religion’ of a Church, or by or in the presence of a Marriage Registrar.

In the first case, the notice to be given for marriage by either party is to be accompanied by a declaration of the parties’ marital status at the time of marriage, and the prescribed form for this purpose mentions only two possibilities – the person giving a notice may be either a bachelor/spinster or widower/widow. A certificate of compliance with the notice requirement is to be issued upon the applicant filing a declaration affirming that “he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance, to the said marriage;” and the marriage shall be solemnized only after such a certificate has been issued (Sections 12, 18, 25 & Schedule I).

For obtaining a certificate in the case of a marriage solemnized by or in the presence of a Marriage Registrar, instead of filing a written declaration the person giving the notice has to take an oath to the same effect

– that “he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance, to the said marriage” (Sections 41-42).

The marriage of a native Christian can be certified without the preliminary notice mentioned above subject to the condition, *inter alia*, that “neither of the persons intending to be married shall have a wife or husband still living”(Section 60).

The Act provides that a person making a false oath or declaration or signing a false notice, intentionally and for the purpose of procuring a marriage, shall be guilty of the offence punishable under Section 193 of the Indian Penal Code – Section 66.

There is no specific reference in this Act to the anti-bigamy provisions contained in Sections 494-495 of the Indian Penal Code. Since bigamy is strictly prohibited by the Christian religious law and the Act also impliedly prohibits it, applicability of the said IPC provisions to married Christians may be seen as a foregone conclusion. Yet, there is a case for making the Act specific on this point.

A post-marriage change of religion by either spouse may have no effect on prohibition of bigamy under the Christian law since both the Christian Marriage Act 1872 and its divorce supplement, the Indian Divorce Act 1869, apply also to cases where only one spouse is a Christian.

Parsi Marriage and Divorce Act 1936

Unlike the Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936 specifically prohibits bigamy and says that Sections 494-495 of the

Indian Penal Code will be attracted by every case of bigamy in any marriage governed by that Act. Sections 4 and 5 of the Act read as follows:

Section 4

“(1) No Parsi (whether such Parsi has changed his or her religion or domicile or not) shall contract any marriage under this Act or any other law in the life time of his or her wife or husband, whether a Parsi or not, except after his or her lawful divorce from such wife or husband or after his or her marriage with such wife or husband has lawfully been declared null and void or dissolved; and, if the marriage was contracted with such wife or husband under the Parsi Marriage and Divorce Act, 1865, or under this Act, except after a divorce, declaration or dissolution as aforesaid under either of the said Acts.

(2) Every marriage contracted contrary to the provisions of subsection (1) shall be void.”

Section 5

“Every Parsi who during the lifetime of his or her wife or husband, whether a Parsi or not, contracts a marriage without having been lawfully divorced from such wife or husband, or without his or her marriage with such wife or husband having legally been declared null and void or dissolved, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code (45 of 1860) for the offence of marrying again during the lifetime of a husband or wife”.

The reference to bigamy after change of religion and its prohibition constitute a unique feature of the Parsi Marriage and Divorce Act 1936 which has no parallel under any other family-law enactment for the time being in force.

Hindu Marriage Act 1955

Since times immemorial it was believed – rightly or wrongly – that Hindu religious law allowed an unrestricted polygamy and imposed no specific conditions on the polygamist-husband. The Muslim rulers of India had left the Hindu law on polygamy – whatever it was – untouched and did not impose on any non-Muslim the rules of Islamic law tolerating limited polygamy in a well-defined discipline of equal justice to co-wives. The British rulers, who did reform many other aspects of Hindu law, also did not abolish the rules on polygamy under the traditional Hindu law and custom. Only the Brahmosamajis had managed to legally adopt monogamy under a special law enacted for them in the erstwhile Bengal province in 1872.

After the advent of independence anti-bigamy laws were enacted for the Hindus by provincial legislatures in Bombay, Madras, Saurashtra and Central Provinces. Finally, in 1955 Parliament enacted the Hindu Marriage Act putting a blanket ban on bigamy for the Hindus. Buddhists, Jains and Sikhs, declaring bigamous marriages on their part in future to be void and penal (see Sections 5, 11 & 17).

One of the conditions for a valid marriage under the Hindu Marriage Act is that “neither party has a spouse living at the time of the marriage” [Section 5 (i)]. Violation of this condition shall make the marriage null and

void and liable to be so declared by a decree of nullity on a petition filed by either party against the other party (Section 11).

Section 17 of the Hindu Marriage Act once again declares every bigamous marriage among persons governed by the Act to be void and makes it punishable under the anti-bigamy provisions of the Indian Penal Code 1860. It reads as follows:

“Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code shall apply accordingly.”

Though Section 7 (2) says that if a marriage is solemnized through the *sapt padi* ceremony the marriage will be complete and binding on taking the seventh step, some High Courts took the view that this is not a special rule of evidence requiring in a case of bigamy proof of the seventh step having been duly taken. – *Padullapath Mutyala v Subbalakshmi* AIR 1962 AP 311, *Trailokya Mohan v State* AIR 1968 Ass 22.

In 1988 a learned judge of the Andhra Pradesh High Court, Radha Krishna Rao, had issued an important note of caution:

"During the subsistence of the first marriage the second marriage will generally be done in secrecy. It is too idle to expect direct testimony. In some cases the *purohit* also who performed the marriage will be treated as abettor. The courts are giving acquittals

on the ground that the required ceremonies for the second marriage have not been proved beyond reasonable doubt. Suitable legislation has to be made with regard to the mode of proof of the second marriage. If the marriage was done publicly and openly to the knowledge of one and all, the court can expect direct evidence. When second marriage is being performed in secrecy, knowing fully well that it is an offence, if the courts insist on strict proof, it amounts to encouraging perjury. The motto of the court is not to encourage perjury, but to find out the real truth and convict the accused if there is a second marriage. Unfortunately, none of the social organizations which' claim about the protection of the rights of women, have taken any steps to see that suitable legislation be made with regard to the mode of proof for performance of the second marriage." – [1988 CriLJ 1848].

However, linking the anti-bigamy provisions of the Act with the requirement of a ceremonial solemnization of marriages under Section 7 (2) of the Act, the Supreme Court later held that if a customary ceremony is incompletely or defectively performed (to get married again), the resulting second marriage will be non-existent in eyes of law and hence will not attract the anti-bigamy provisions of the Act, or of the IPC. See *Bhaurao v State of Maharashtra* AIR 1965 SC 1564.

Going by this interpretation, if the *saptpadi* ceremony has been incompletely employed in view of the rule of Section 7 (2) there is all the more reason to treat the second allegedly bigamous marriage as non-existent.

If the anti-bigamy provisions of the Hindu Marriage Act are to be strictly enforced, there is a case for de-linking them from the provision of Section 7 of the Act under which some ceremony has to be necessarily employed for solemnizing a marriage.

Effect of Change of Religion

Post-marriage change of religion by either party is under the Hindu Marriage Act a ground for divorce in the hands of the other non-converting spouse [Section 13 (1) (ii)]. Without obtaining this relief the non-converting spouse cannot marry again.

As regards the converting spouse, the Act says nothing as to whether its anti-bigamy provision, or any other provision for that matter, would cease to apply to him or her. In the absence of a clear statutory provision on this point, it has always been a contentious issue if a married man governed by this Act can upon his conversion to Islam contract a second bigamous marriage which, it is generally believed, is permissible under Muslim law.

Unexceptional abolition of bigamy for the Hindus, Buddhists, Jains and Sikhs has created a serious problem for those married men among these communities who for some reason or the other, justifiable or unjustified, want to marry again. The new law wants them to first have the existing marriage legally dissolved. This is not easy. The Hindu Marriage Act makes room for dissolution of marriages, but the cumbersome judicial process in the ordinary civil courts given the jurisdiction under the Act has turned divorce-proceedings into vexatious and long-drawn out struggles. There are

genuine cases of broken marriages, as also those in which people dishonestly want to kick out their first wives and take new partners – the former cases, of course, outnumber the latter. Those married men who want to marry again have no religious inhibition, since they believe that their religion allows them to have their wish; and they do not mind violating the newly imposed legal ban on bigamy without any religious sanction for it. To avoid the penalties threatened by the new law to be inflicted on bigamists they, however, need a 'device'. And, different 'devices' are suggested by those who are always ready to help lawbreakers – a fake conversion to Islam being foremost among these devices.

The law of monogamy under the Hindu Marriage Act is, indeed, full of serious shortcomings and loopholes. Combined with the Act's provisions relating to marriage-rites, it provides in-built devices for an easy avoidance of all the consequences of its violation.

Chapter V

Bigamy under Muslim Personal Law

Traditional Law

It is generally believed that under Muslim law a husband has an unfettered right to marry again even where his earlier marriage is subsisting. On a closer examination of the relevant provisions of the Qur'an and the other sources of Islamic law, this does not seem to be the truth. The rule of Muslim law conditionally permitting bigamy in fact visualized two or more women happily living with a common husband – taking a second wife after forsaking or deserting the first was not Islam's concept of bigamy.

Bigamy with no restrictions or discipline whatsoever was rampant in the society where Islam made its first appearance and also in many other societies across the globe. The Holy Qur'an put restrictions on it, allowing it within limits, and even within those limits subjecting it to a strict discipline. The Qur'an permitted polygamy subject to a strict condition that the man must be capable of ensuring equal treatment of two wives in every respect. Asserting that this may not be possible even with the best of intentions, the Holy Book at the same time advised men to keep to monogamy as “this would keep you away from injustice” (Qur'an, IV: 3 & 129). To this Qur'anic reform the Prophet added a highly deterrent warning: "A bigamist unable to treat his wives equally will be torn apart on the Day of Judgment." This was the reform that the Islamic religious law could, and did, introduce in the 7th century AD.

If bigamy means forsaking of the first wife without divorcing her and bringing in a new wife, the Qur'an certainly does not permit it. In Muslim law bigamy envisages two women happily married to the same man actually living with him and getting from him equally all that a wife can expect from her husband. Where this is not possible, the Qur'an enjoins the husband to remain a monogamist. Bigamy of the type now prevalent in India in which the first wife is wholly forsaken and thereby tortured and a second wife is allowed to usurp her place in the husband's home is not approved anywhere in Islamic legal texts.

The Muslim law -- as now traditionally understood, interpreted and applied in India -- is however believed to permit four marriages during the subsistence of one another. Though the capacity to do justice between co-wives is in law a condition precedent for bigamy, whether a man has such capacity or not is, for inexplicable reasons, not justiciable before he actually contracts a bigamous marriage. The Dissolution of Muslim Marriages Act 1939 treats unequal treatment between co-wives as a ground for divorce available to the aggrieved wife; but there is no law under which a man's right and capacity to contract a second marriage can be examined by anybody before he enters upon such a course of action.

Rules of Muslim law empower women to restrict the freedom of their would-be husbands to indulge in bigamy by entering a condition to that effect in their marriage contract. And since Muslim law allows out-of-court divorce at the instance of both men and women, it further provides that a woman who after availing the legally provided facility to get rid of her husband marries again, will not face the charge of bigamy. These pro-

women provisions of Muslim law have been judicially recognized in India in several cases.

Social & Judicial Trends

Bigamy has been fully abolished or severely controlled by law in most Muslim countries of the world. Turkey and Tunisia have completely outlawed it while in Egypt, Syria, Jordan, Iraq, Yemen, Morocco, Pakistan and Bangladesh, it has been subjected to administrative or judicial control. (Details of these reforms can be seen in Tahir Mahmood's book *Statutes of Personal Law in Islamic Countries*, 2nd edition, 1995).

In India bigamy is not very common among the Muslims and cases of men having more than one wife at a time are few and far between. The Muslim society of India in general in fact looks at polygamy with great disfavour and a bigamist is generally looked down upon in and outside his family. Despite this, unfortunately, the religious leaders are not prepared for any legislative reform in this respect and the religious sensitivities have never allowed the State to introduce any reform in this regard.

The courts in India also greatly look down upon bigamy and provide all sorts of relief to the first wives of bigamist husbands. Several High Courts have held that bigamy amounts to cruelty which can be pleaded as an answer to the man's suit for restitution of conjugal rights against the first wife – see *Itwari v Asghari* AIR 1960 All 684, *Raz Mohammad v Saeeda Amina Begum* AIR 1976 Kant 200, *Shahina parveen v Mohd Shakeel* AIR 1987 Del 210.

The Supreme Court of India has held that the provision of Section 125 of the Code of Criminal Procedure 1973 allowing separate maintenance to a wife on the ground of her husband's cruelty applies to Muslim women whose husbands contract a second bigamous marriage. See *Khatoon v Yaamin* AIR 1982 SC 853.

In another case the Supreme Court has severely criticized the practice of bigamy and observed that there is no difference between a second wife and a concubine. See *Begum Subhanu v Abdul Ghafoor* AIR 1987 SC 1103.

Administrative Service Rules

The Central Civil Services (Conduct) Rules 1964 provide that a person who has contracted a bigamous marriage or has married a person having a spouse living shall not be eligible for appointment to such services – Rule 21. The All India Services (Conduct) Rules 1968 place the same restrictions on those who are already member of any such service – Rule 19. Both the Rules, however, empower the government to exempt a person from the application of these restrictions if the personal law applicable permits the desired marriage and “there are other grounds for so doing.”

These provisions of Service Rules apply to the Muslims and their constitutional validity has been upheld by the Central Administrative Tribunal and the courts. See, e.g., *Khaizar Basha v Indian Airlines Corporation, New Delhi* AIR 1984 Mad 379 [relating to a similar provision found in the Regulations framed under the Air Corporation Act 1953].

Effect of Change of Religion

Under the traditional Muslim law if a married Muslim woman converts to another religion her marriage would be automatically dissolved. This rule is, however, not applicable in India. The Dissolution of Muslim Marriages Act 1939 provides that apostasy of a Muslim wife shall not dissolve her marriage (Section 4). So, although the 1939 Act does not specifically say so, if a married Muslim woman renounces Islam and, believing that her first marriage has been *ipso facto* dissolved marries again, her second marriage will attract application of Section 494-495 of the Indian Penal Code.

There is an exception to this rule under the Dissolution of Muslim Marriages Act 1939 – if a married convert Muslim woman by renouncing Islam reverts to her original religion the provision of Section 4 will not apply. In other words, in this case her re-conversion will automatically dissolve her marriage with her Muslim husband. In such a case, therefore, anti-bigamy provisions of the Indian Penal Code will not apply. The exceptional provision clearly seems to be discriminatory.

Chapter VI

Bigamy by non-Muslims on Embracing Islam

Bigamy by conversion – viz. a second marriage by a married non-Muslim man after conversion to Islam – is a common practice in India. The man having resort to it is given to believe by the lawyers ignorant of the true Islamic law that on becoming a Muslim he will be legally entitled to freely marry again irrespective of his previous marital status. This mistaken belief militates against the letter and spirit of the Islamic law on bigamy. If the conversion in any such case is sham – as in most such cases it indeed is – the second marriage will be a fraud on Islamic law and can have no recognition in it. If the conversion is genuine the second marriage can be allowed subject to the bar of equal treatment of the co-wives, which obviously would be impossible in such a case. In either case therefore the second marriage will be repugnant to the Islamic religion and law.

As regards converts to Islam opting for bigamy, their conversion must be judged by the Prophet's general verdict saying that "Effect of an action is governed by the underlying intention" and so conversion by a married non-Muslim man motivated by a desire to have another wife is of doubtful religious validity. But even where conversion seems to be genuine, it cannot be a license for indulging in bigamy by deserting the first wife in violation of Islam's insistence on treating co-wives with unexceptional equality and equal justice.

The fact, of course, is that conversion in such cases is invariably a humbug and is generally followed by formal or informal re-conversion of

the newly-wed to their original faith – in fact they never convert to Islam from the heart. This shuttle-cock playing with various religions is not checked by our existing law, though it is neither allowed by the religion which is dishonestly adopted nor sanctioned by the one that is forsaken for selfish ends. What married Hindu men do and are helped with by ill-educated religious functionaries and misinformed lawyers is a fraud on Hinduism, a disgrace to Islam, a cruel joke on the freedom-of-conscience clause in the Constitution of the country and a criminal scheming against the law of the land.

Chapter VII

Judicial Rulings on Bigamy by Conversion

There has always been a simmering discontent in the judiciary regarding the tendency of converting to Islam for the sake of contracting a second bigamous marriage and the courts have tried to control it.

In *Vilayat Raj v Sunila* AIR 1983 Delhi 351 Justice Leela Seth of the Delhi High Court had decided that the Act would continue to apply to a person who was a Hindu at the time of marriage despite his subsequent conversion to Islam and that he could still seek divorce under the Act (except on the ground of his own conversion).

In *In re P Nagesashayya* (1988) Mat LR 123 Justice Bhaskar Rao of Andhra Pradesh High Court severely criticized the unhealthy practice of bigamy by conversion and observed that the old rule that the motive behind conversion could never be questioned had to be rejected at least in the cases of conversion coupled with bigamy. Similar observations were made in the case of *B Chandra Manikyamma v B. Sudarsana Rao alias Saleem Mohammed*, 1988 CriLJ 1849.

Finally, in the leading case of *Smt. Sarla Mudgal v Union of India* (1995) 3 SCC 635 the Supreme Court decided that every bigamous marriage of a Hindu convert to Islam would be void and therefore punishable under the Indian Penal Code. The court observed:

"Since it is not the object of Islam nor is the intention of the enlightened Muslim community that the Hindu husbands should be encouraged to become Muslim merely for the purpose of evading their own personal law by marrying again, the courts can be persuaded to adopt a construction of the laws resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law".

As regards the logic by which a married non-Muslim's second bigamous marriage contracted after conversion to Islam could be treated as void under the Hindu Marriage Act, the court argued as follows:

"It is no doubt correct that the marriage solemnized by a Hindu husband after embracing Islam may not strictly be a void marriage under the Act because he is no longer a Hindu, but the fact remains that the said marriage would be in violation of the Act which strictly professes monogamy. The expression 'void' for the purpose of the Act has been defined under Section 11 of the Act. It has a limited meaning within the scope of the definition under the section. On the other hand the same expression has a different purpose under Section 494 IPC and has to be given meaningful interpretation. The expression 'void' under Section 494 IPC has been used in the wider sense. A marriage which is in violation of any provisions of law would be void in terms of the expression used under Section 494 IPC. A Hindu marriage solemnized under the Act can only be dissolved on any of the grounds specified under the Act. Till the time a Hindu marriage is dissolved under the Act none of the spouses can contract second marriage. Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. The second marriage by a convert would therefore be in violation of the Act and as such void in terms of Section 494 IPC.

Any act which is in violation of mandatory provisions of law is *per se* void. The real reason for the voidness of the second marriage is the subsisting of the first marriage which is not dissolved even by the conversion of the husband. It would be giving a go-by to the substance of the matter and acting against the spirit of the statute if the second marriage of the convert is held to be legal.”

The court further observed that the second marriage of an apostate-husband married under the Hindu Marriage Act would be in violation of the rules of equity, justice and good conscience, as also those of natural justice. The court concluded that:

“The interpretation we have given to Section 494 IPC would advance the interest of justice. It is necessary that there should be harmony between the two systems of law just as there should be harmony between the two communities. The result of the interpretation, we have given to Section 494 IPC, would be that the Hindu law on the one hand and the Muslim law on the other hand would operate within their respective ambits without trespassing on the personal laws of each other.”

In a separate judgment given in the *Sarla Mudgal* case Justice R.M. Sahai indeed spoke the truth when he said that “much misapprehension prevails about bigamy in Islam”. Grossly caricatured now, the Qur’anic concept of bigamy envisaged two women happily married to the same man and getting from him equally all that a lawfully wedded wife could rightfully expect from the husband. Where this was not possible, the Qur’an enjoined monogamy. While the Qur’anic norms must be strictly observed also by born Muslims, the popular belief that the Qur’an enables a non-Muslim husband who has kicked out his wife without a legal divorce to marry again

by announcing a sham conversion to Islam is absolutely false. Derecognizing bigamous marriages of non-Muslim husbands contracted in such a fraudulent manner indeed enforces Qur'anic justice. On this point the *Sarla Mudgal* ruling of the Supreme Court is unassailable.

The *Sarla Mudgal* ruling was looked with disfavour in certain circles on the ground that it infringed a person's fundamental right to freedom of conscience and profession of religion guaranteed by Article 25 of the Constitution. The matter was brought before the Supreme Court which dismissed the idea. In *Lily Thomas v Union of India* (2000) 6 SCC 227 the court observed:

“The grievance that the judgment of the Court amounts to violation of the freedom of conscience and free profession, practice and propagation of religion is also far-fetched and apparently artificially carved out by such persons who are alleged to have violated the law by attempting to cloak themselves under the protective fundamental right guaranteed under Article 25 of the Constitution. No person, by the judgment impugned, has been denied the freedom of conscience and propagation of religion.... Freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit this belief and idea in a manner which does not infringe the religious right and personal freedom of others. It was contended in *Sarla Mudgal* case that making a covert Hindu liable for prosecution under the Penal Code would be against Islam, the religion adopted by such person upon conversion. Such a plea raised demonstrates the ignorance of the petitioners about the tenets of Islam and its teachings.”

As regards the true position of the permission for bigamy under the traditional Muslim law, the court said:

“Even under the Muslim law plurality of marriages is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted a second marriage cannot be permitted to urge that such marriage should not be made the subject-matter of prosecution under the general penal law prevalent in the country. The progressive outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody’s case that any such converttee has been deprived of practicing any other religious right for the attainment of spiritual goals. Islam which is a pious, progressive and respected religion with a rational outlook cannot be given a narrow concept as has been tried to be done by the alleged violators of law.”

Chapter VIII
Recommendations

All said and done, the Supreme Court of India settled the law once for all in its *Sarla Mudgal* ruling of 1995 affirmed in *Lily Thomas* case of 2000.

We are in complete agreement with the thinking of the Supreme Court. The verdict that a married non-Muslim even on embracing Islam cannot contract another marriage without first getting his first marriage dissolved is undoubtedly in conformity with the letter and spirit of Islamic law on bigamy.

In any case, this is now the inviolable law of India -- whatever one may erroneously presume the Islamic law to be. Unfortunately this law as settled by the Supreme Court is now widely known to the public at large and is being constantly violated in numerous cases. The need of the hour, therefore, is to turn the apex court's ruling into a clear legislative provision inserted into all matrimonial-law statutes of the country.

Though these rulings were handed down in the context of the Hindu Marriage Act 1955 they will apply to all marriages governed by the other family-law statutes that are *pari materia*.

On a careful consideration of all aspects of the trend prevailing among married non-Muslims to try to defy the law by marrying again on embracing to Islam, we recommend insertion of the following additional provisions into various family-law statutes:

1. In the Hindu Marriage Act 1955, after Section 17 a new Section 17-A be inserted to the effect that a married person whose marriage is governed by this Act cannot marry again even after changing religion unless the first marriage is dissolved or declared null and void in accordance with law, and if such a marriage is contracted it will be null and void and shall attract application of Sections 494-495 of the Indian Penal Code 1860.
2. A similar provision be inserted at suitable places into the Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936 and the Dissolution of Muslim Marriages Act 1939.
3. The Proviso to Section 4 of the Dissolution of Muslim Marriages Act 1939 – saying that this Section would not apply to a married woman who was originally a non-Muslim if she reverts to her original faith – be deleted.
4. In the Special Marriage Act 1954 a provision be inserted to the effect that if an existing marriage, by whatever law it is governed, becomes inter-religious due to change of religion by either party it will thenceforth be governed by the provisions of the Special Marriage Act including its anti-bigamy provisions.
5. The offences relating to bigamy under Sections 494-495 of the Indian Penal Code 1860 be made cognizable by necessary amendment in the Code of Criminal Procedure 1973.

Although we fully agree with the fact that traditional understanding of the Muslim law on bigamy is gravely faulty and conflicts with the true Islamic law in letter and spirit, to keep our recommendations away from any unhealthy controversy we are not recommending any change in this regard in Muslim law.

(Dr Justice AR. Lakshmanan)

Chairman

(Professor Dr Tahir Mahmood)
Agrawal)

Member

(Dr Brahm A.

Member-Secretary