



LAW REFORM IN THE MUSLIM WORLD: A COMPARATIVE STUDY OF THE PRACTICE AND LEGAL FRAMEWORK OF POLYGAMY IN SELECTED JURISDICTIONS

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ABSTRACT

This paper studies the framework of family law in general and of polygamy in particular in the various jurisdictions around the Muslim world. The chronicles in the application of Islamic law in relation to polygamy in those jurisdictions are comparatively analyzed based on historical developments of their legal systems on the application of Islamic law and reforms that were introduced therein to suit the needs and challenges of legal dynamism based on suitability with the people, place and time. Jurisdictions within the sphere of the study are categorized into three, namely: 1. Jurisdictions where polygamy is practiced without regulation; 2. Jurisdictions where polygamy is outlawed; and 3. Jurisdictions where polygamy is practiced under a regulated framework. For each category, a number of relevant jurisdictions are selected for study. The legal framework on polygamy in the selected jurisdictions is briefly elaborated with precision based on the applicable statutory and judicial authorities available. The social set up of the people involved in polygamy in some jurisdictions is illustrated where needed in order to unveil the legal challenges in them. For each jurisdiction, the study examines the law that applied before, subsequent reforms that were brought into them and the contemporary applicable law and its challenges if any.

Keywords: polygamy, law, reform, regulation, jurisdiction.

INTRODUCTION

Until the fall of the Caliphate of the Ottoman Empire in Turkey,¹⁶⁷ Muslim nations around the world were administered by the classical traditions of Islamic family law in its general ramifications with respect to family law matters including polygamy. The advent of reforms and regulations through legislative processes arose in several Muslim jurisdictions¹⁶⁸ as a result of changes in economic and socio-legal and political systems adapting the challenges of the contemporary world, especially the influence of the Western legal system and its civilization. The

¹⁶⁷ The Ottoman Empire reigned for about 700 years as a Caliphate for the Muslim world with its seat in Turkey. Consequent upon its defeat at the World War I, Mustafa Kemal Ataturk led the nationalist movement for the abolishment of the Caliphate and its substitution with a secular state. The Turkish National Assembly declared Turkey a republic on October 29, 1923, and proclaimed Ankara its new capital. See: Sowerwine, J. E., *Caliph and Caliphate: Oxford Biographies Online Research Guide*, (London: Oxford University Press, 2011) at 25.

¹⁶⁸ Jurisdiction herein refers to the territorial boundaries where judicial powers are exercised within a nation or group of nations having common legal system. See: Martin, E. A. and Law, J., (ed), *Oxford Dictionary of Law*, (6th Ed.), (Oxford: Oxford University Press, 2006), at 299.

first code of family law to be drafted and applied in the Arab and Muslim world was the Code of Family Rights of 1917, dealing only with matters relating to marriage and divorce.¹⁶⁹

Analysts identified two major reasons responsible for the emergence of these reforms namely, economic and social. The main economic rationale that gave rise to the quest for such reforms was the idea of the new world transition towards industrialization; that is, shifting from agricultural economy to industrial economy.¹⁷⁰ Agricultural economy was considered a major reason behind the wide practice of polygamy in many societies,¹⁷¹ as it assists in producing manpower required in the traditional agricultural system. Gradually, societies where polygamy was prevalently practiced, including the Arab world and Africa identified the significance of industrialization and its vital role in the Western economy and civilization. Hence, the historic transition began from hunting to herding, to agriculture and then to manufacturing. This final economic stage drew people away from family production and its requirement for more women to assist therein since industrialization has nothing to do with them.¹⁷² The second reason as identified above which gave rise to the quest for changes in the family system is the emerging trends of global social and legal challenges facing the Arab and the Muslim world before the Western legal system, influence of the theory of feminism and the impact of international conventions such as CEDAW, dealing with issues relating to marriage in particular and women's right in general.¹⁷³

However, the situation does not carry the same shape in all the Muslim countries. The Muslim world, according to Tahir Mahmood, may be categorized into three in this regard. The first category is of the jurisdictions where the classical family law system remains untouched. The second is where the classical system was abolished completely.¹⁷⁴ The third is where it was neither left untouched nor abolished, but rather reformed and regulated. To be more precise, countries that fall within the first category are those where polygamy is practiced without regulation, as was practiced in the early generations of Islamic history. This is due to the strict adherence of those jurisdictions to the classical provisions of the Shari'ah as is the case in Saudi Arabia¹⁷⁵ or due to the categorization of family law under a private and personal matter of the Muslims which requires no legislative intervention as is the case in Nigeria. In the second category on the opposite, the practice was found to be an outdated one contradicting the social justice of the society and non-accommodative in the contemporary conventional legal system

¹⁶⁹ Umar Sulayman al-Ashqar, *al-Wadih fi Sharh Qanun al-Ahwal al-Shakhsiyyah al-Urduni*, (Amman: Dar al-Nafa'is, 2012), at 17.

¹⁷⁰ M. Y., Kathryn and Rashad, H., "Historical Orientations to the Study of family Change: Ideational Forces Considered", in *Family in the Middle East: Ideational Change in Egypt, Iran and Tunisia*, Ed. By M. Y., Kathryn and Rashad, H., (New York: Routledge, Taylor and Francis Group, 2008), at 3.

¹⁷¹ In Nigerian history and Africa in general, agricultural production was identified as a major cause for the widespread of polygamous practice which is a means for getting multiple women and offspring used as manpower for farm cultivation. See: Phyllis Logie (2009), "Practice of polygamy in Nigeria", <<http://www.helium.com/items/65621-practice-of-polygamy-in-nigeria>>, accessed April 18, 2012.

¹⁷² Ibid.

¹⁷³ This may be illustrated by the impact of the struggle of some personalities such as Huda Sha'rawi, founder of the Egyptian Feminist Union (EFU) and Habib Bourguiba, leader of the nationalist movement in Tunisia who led the movement for the abolition of some classical Islamic family law matters including polygamy. See: Fay, Mary A., "International Feminism and the Women's Movement in Egypt, 1904-1923", in *Family in the Middle East: Ideational Change in Egypt, Iran and Tunisia*, Ed. By M. Y., Kathryn and Rashad, H., (New York: Routledge, Taylor and Francis Group, 2008), at 40; Charrad, M. M., "From Nationalism to Feminism: Family Law in Tunisia", in *Family in the Middle East: Ideational Change in Egypt, Iran and Tunisia*, Ed. By M. Y., Kathryn and Rashad, H., (New York: Routledge, Taylor and Francis Group, 2008), at 111.

¹⁷⁴ Mahmood, Tahir, *Family Law Reform in the Muslim World*, (New Delhi: The Indian Law Institute, 1972), at 2-3.

¹⁷⁵ Tahir Mahmood, at 3.

which advocates for gender equality in human rights. For this or other reasons, a new approach of interpretation emerged from scholars in support of the notion and was adopted and supported by legislations and sanctions in countries such as Turkey and Tunisia.¹⁷⁶ As for the third category, it was found that an amicable solution was more appropriate for the matter. With the support of juristic verdicts based on the doctrine of *maslahah* and other sources of Islamic law, countries like Egypt and Malaysia maintained the legality of polygamy under certain regulations.¹⁷⁷ The three systems explained above will be studied in detail.

JURISDICTIONS WHERE POLYGAMOUS PRACTICE IS UNREGULATED

Jurisdictions that fall within this category are those countries where polygamy and other matters related to family remain unregulated in some, and in some others uncodified, let alone being regulated. In those jurisdictions, family law is administered by courts according to the discretion of the *Qadi* (Shari'ah judge) as classically provided in the traditional literature of Shari'ah according to the provisions of the Qur'an, *Sunnah* and other sources of Islamic jurisprudence.¹⁷⁸ These countries include numerous Arab countries including Saudi Arabia, Yemen, Jordan, Bahrain, Kuwait and the United Arab Emirates. Others are countries with Muslim majority across West Africa. The *Hanbali* School of Islamic thought is prevalent in Arab countries like Saudi Arabia and the *Maliki* School is prevalent in the whole West Africa. There was an attempt for the codification of these laws in the Hejaz in 1927 but this attempt did not succeed and no such attempt was repeated hitherto.¹⁷⁹

Jurisdictions in West African countries like Niger, Senegal, Mali, Guinea, Chad, Mauritania and the Gambia, the classical law is still applicable and no legislation for its codification or regulation has taken place.¹⁸⁰ Polygamy is not a controversial matter in West Africa and is practiced by most ethnic groups, regardless of religion. A man's wealth is determined by the number of wives and children he has. Many West African Muslims see polygamy as part of being devout, as well as a status symbol for men. This is because it is considered part of religious rite fulfillment. For this reason, it is more practiced in Nigeria, the largest Shari'ah applying nation among all the colonies of Britain.¹⁸¹ For instance, among the large populated Hausa and Fulani tribes across the Northern region, when a man has more than one wife, the co-wives live peacefully in separate rooms within the same house, not in separate homes.¹⁸² In Senegal, approximately one-quarter of urban marriages and one-third of rural marriages are polygamous. Although the law requires first marriages to be declared polygamous or monogamous at the time of the wedding, in practice this is rarely done and there are no sanctions against men who change their minds.¹⁸³ In Mali, many men, particularly of the merchant class, perceive having more than one wife as part of being a serious person. Similarly for the Sosa of Guinea and Sierra Leone, a predominantly Muslim people of about a million, having multiple wives, sometimes more than four, conveys prestige.¹⁸⁴

¹⁷⁶ Ibid., at 5-6.

¹⁷⁷ Ibid., at 7-8.

¹⁷⁸ Ibid., at 3.

¹⁷⁹ Ibid., at 3.; However, since the 1980s and 1990s the situation has changed to some extent from the assertion of Mahmood as can be seen in subsequent analysis on Yemen and Bahrain.

¹⁸⁰ Ibid., at 4.

¹⁸¹ Anderson, J.N.D., *Islamic Law in Africa*, (London and New York: Routledge, Taylor & Francis Group, 2008), at 171.

¹⁸² Akande, J. O. D., *Laws and Customs Affecting Women's Status in Nigeria*, (Enugu: International Federation of Women Lawyers (Nigeria), 1979), at 11.

¹⁸³ Antoine, Phillipe and Jeanne Nanitelamio, "Can Polygamy be Avoided in Dakar" in *Courtyards, Markets, City Streets: Urban Women in Africa*, Kathleen Sheldon, ed. (Boulder, CO: Westview Press, 1996), at 139-169.

¹⁸⁴ Warms, Richard L. "Commerce and Continuity: Paths to Success for Malian Merchants", Retrieved from: <<http://www.law.emory.edu/ifl/region/westafrica.html>> accessed September 16, 2013.

An exception from the general practice in West Africa is Mauritania. There, the Maures, who are the elites of the country, are basically monogamous while the rest of the population is frequently polygamous. At the time of the wedding, a woman can stipulate that the marriage is dissolved if the husband takes a second wife. Maure women use this provision regularly.¹⁸⁵ In Niger, the first wife divides the goods and supplies from the husband among the other wives. Stress and strain between wives lead to frequent flights from urban matrimonial home. Some rural women, however, welcome other wives as additional workers. In Sierra Leone, Muslim Limba men sometimes have more than four wives.¹⁸⁶ Despite all this, the practice has not attracted notable legislative approach across the region in terms of regulation. For example, in Sierra Leone, like other West African states, application of Islamic law generally, where it was applicable, was left to the application of the *Qadis* of the Shari'ah Courts as traditionally written in the classical texts of the Maliki School of Thought. Thus, it is seen that those principles need not be codified as are clearly written and explained in those texts. This has been the custom and practice since the colonial era as enshrined in the Mohammedan Marriage Ordinance, 1905.¹⁸⁷

Unlike some Arab jurisdictions such as Saudi Arabia, many Arab countries that have written constitutions have so far codified the laws of Muslim personal status. In Yemen for instance, article 2 of the Constitution declares that Islam is the state religion; and in article 3 it states that Islamic Law is the major source of the its legal system. In the light of these provisions, the Yemeni Code of Personal status No. 20 of 1992 was promulgated.¹⁸⁸ The Code applicable in the Southern Yemen is the same in its wordings on its position on polygamy with that of Egypt which will be discussed later. But in Northern Yemen, it seems the system is the same with that of Saudi Arabia which is statutorily silent concerning polygamous regulation. The Yemeni Law of Personal Status recognizes polygamy and, until now the law remains the same in relation to polygamy. The only provision it contains concerning polygamy is in two sub-sections, one saying that among the rights of the wife over her husband is that he must be fair to them if he has more than one wife and the other saying that the husband must provide a separate house for each of his wives and is not allowed to lodge them in the same house except with their consent which the wife may revoke anytime thereafter.¹⁸⁹ These provisions are a replica of the classical law on polygamy *mutatis mutandis*. In Bahrain, article 11 (b) (1) of the Bahraini Code of personal Status allowed polygamy with a provision that the practice is limited to four wives even if one of the wives is in her *iddah* (post-divorce waiting period). It further provides in article 17 that the intending polygamist must declare before the Shari'ah Court, his marital status; if he was married already, the number of wives he has at the time of declaration and where they live; and if there was a 'no polygamy' stipulation by the first wife at the time of her marriage, he must produce a written consent from her to his subsequent marriage not exceeding a period of sixty days. Article 37 (d) of the Code mentions among the wife's right on the husband, justice and fair treatment among them in night-time share and maintenance if they are more than one under him. In article 60 (a), it is stated that the husband has no right to lodge his wife with her co-wife in the same abode, except with her consent, and she has the right to repudiate such consent as a result of *darar* on her in that regard.¹⁹⁰ Jordan maintains the same position, i.e. recognition of polygamy and its code of family law contains no regulation in relation to the practice of polygamy. Its

¹⁸⁵ Ibid.

¹⁸⁶ Dunbar, Roberta A., "Islamized Law and the Status of Women in Niger," paper prepared for the Southeastern Regional Seminar in African Studies, Oct. 15, 1983, Charlottesville, VA., Retrieved from: <<http://www.law.emory.edu/ifl/region/westafrica.html>> accessed September 16, 2013.

¹⁸⁷ Anderson, at 287.

¹⁸⁸ Anwar Qasim al-Khudri, *Awlamatu Qawanin al-Ahwal al-Shakhsiyyah fi al-Yaman*, (Riyadh: Markaz bi Abhath li Dirasat al-Mar'ah, 1432 A.H), at 54.

¹⁸⁹ The Yemeni Law of Personal Status No. 27 of 1998, articles 41 (3) and 42 (2).

¹⁹⁰ 'Adil Bin Hasan Bin Yusuf al-Hamad, *Awlamatu Qawanin al-Ahwal al-Shakhsiyyah fi al-Bahrayn*, (Riyadh: Markaz bi Abhath li Dirasat al-Mar'ah, 1432 A.H), at 99.

provision on polygamy is that which is mentioned in the classical law and no more. Under the section on temporary impediments to marriage it says a man cannot marry more than four wives at a time¹⁹¹ and in another section it declares such marriage as void.¹⁹² On maintenance, it says the husband must be fair to his plural wives if he has more than one.¹⁹³ Finally, it provides that the husband cannot join one wife with another in the same abode except with their consent.¹⁹⁴

In Saudi Arabia, the applicable law with respect to polygamy and family law in general is the classical law, mainly of the Hanbali school of thought.¹⁹⁵ The legal framework is generally based on the texts of Shari'ah sources which are applied perpetually by process of re-interpretations. New laws emerge through legislative, judicial and administrative processes in line with the rules of Islamic jurisprudence. For the purpose of enacting new laws, the jurisprudential principle of *maqasid al-Shari'ah* (Shari'ah objectives) are to be considered where there is a need for departing from current literalism and moving more towards the understanding of the broader text. Applicable laws in Saudi Arabia are classified into two namely, revealed laws (otherwise known as *qanun*) and man-made laws (otherwise known as *nizam*) which are also compatible with Shari'ah principles.¹⁹⁶ The judiciary is manned by *Ulama* (religious scholars) appointed as judges and are given the discretion to interpret and apply the law based on the principles of *ijtihad* which, in most cases is based on, but not restricted to the Hanbali School of Thought. No judge is bound by any statutory law or judicial precedence in matters of personal status or otherwise.¹⁹⁷ A unique feature of the legal framework in Saudi Arabia is that its legal system knows no codification, thus, defying the adoption of a written constitution. For this and other reasons, it is observed that Saudi Arabia was not influenced by the codification of the laws of personal status adopted by most Arab jurisdictions. Expressing its position on the application of classical Islamic law, the Saudi Basic Law declares the following rule:

Rule of the Kingdom of Saudi Arabia draws its authority from the Book of Allah Most High and the *Sunnah* of His Prophet. They are sovereign over this regulation and all regulations of the state.¹⁹⁸

The current social life of polygamous unions in Saudi Arabia in most cases is that it is practiced whereby the man has two separate families. In some cases the children of the co-wives may know one another and mix. In other cases, the children have nothing to do with one another and are close and loyal only to their mother whom they believe has been cheated and short-changed. The wives typically have their separate lives and do not want to mix. If there is a special occasion such as a birth, wedding, funeral or Eid celebrations, they may both be present. Here, because of the occasion which will generally have many other women present, the wives will be polite to one another, but this may neither be sincere nor realistic.¹⁹⁹ Moreover, besides the common polygamy, there is another popular but controversial act of polygamous practice in Saudi Arabia, the *misyar*. *Misyar* is a system of marriage where a man, practically already married, marries another woman without the awareness of his wife and/or children, relieving himself from certain marital responsibility towards the new wife in question. This type of

¹⁹¹ The Jordan Law of Personal Status No. 26 of 2010, article 28 (f).

¹⁹² The Jordan Law of Personal Status No. 26 of 2010, article 31 (c).

¹⁹³ The Jordan Law of Personal Status No. 26 of 2010, article 79.

¹⁹⁴ The Jordan Law of Personal Status No. 26 of 2010, article 75.

¹⁹⁵ Mahmood, at 2.

¹⁹⁶ Yamani, Maha A. Z., *Polygamy and Law in Contemporary Saudi Arabia*, (Reading: Ithaca Press, 2008), at 134-5.

¹⁹⁷ *Ibid.*

¹⁹⁸ The Saudi Arabian Basic Law of March, 1992, article 7.

¹⁹⁹ This is based on an article written by a female American observer based in Saudi Arabia, having personal experience of polygamous life in the Saudi Arabian society. See: American Bedu, (2010), "Saudi Arabia: The Cover Up of Polygamy", Retrieved from: <<http://americanbedu.com/2010/11/06/saudi-arabia-the-cover-up-of-polygamy/>> accessed September 19, 2013.

marriage is considered another approach to polygamy as is generally practiced by married men. Yusuf al-Qaradawy related this practice to polygamy since it is observed that those who are involved in it are doing so as a second, third or fourth marriage. Although the law in Saudi Arabia requires the husband to disclose any subsequent marriage to his wife, *misyar* is often practiced in secret.²⁰⁰

In Iran, a number of statutes were enacted dealing with matters of personal law. Its legal transition in relation to the practice of polygamy went through the era of non-regulation to an era of regulation and finally, to yet another era of non-regulation. The first statute regulating family law was the Iranian Civil Code of 1928. The Marriage Act was subsequently promulgated in 1937 to replace the Civil Code. In 1940, the Non-Litigious Jurisdiction Act of Iran was passed as a supplement to the Civil Code. The Family Protection Act was passed later in 1967 accommodating new changes for reform in the family law generally. All these statutes contain provisions in accordance with the Shi'a jurisprudence. Earlier in 1933, an Act was passed relating to matters of personal law of the Sunni Iranians.²⁰¹ The Family Protection Act remained in force till date undergoing amendments when and where required. Some of the changes incorporated in the Act which were not in the previous statutes include certain restrictions to polygamy. According to the code, the first wife may apply for a certificate from the Court that in case her husband marries another wife without her consent, she may object with no reconciliation.²⁰² For the husband, the Act allows him to marry another woman provided he obtains a permission to do so from the Court. The Act mandates the Court to issue such permission provided it is satisfied with the applicant's financial and physical ability to do justice to more than one wife. Here, the Act ignores the wife's consent and her right to challenge the permission given to her husband, hence, the right given to her by article 11 (3) to demand divorce in the case of her husband's subsequent marriage becomes ineffective.²⁰³ The latest amendment in the Act was the controversial Family Protection Bill (as amended 2011) which opened a wider gate for the practice of polygamy removing the restriction clauses and allowing men to take up to three additional wives without the consent or knowledge of their first spouse and without obtaining any permission from the Court. The amended section of the Act clearly reveals the statutory recognition of the Iranian law of the temporary marriage (*nikah al-mut'ah*) as is exclusively practiced by the Shi'as. Temporary marriage is another special approach to the practice of polygamy. According to Shi'a, Iranian men can readily take any number of temporary wives without informing their first wife. The length of a temporary marriage is defined in advance and can last anything from hours to decades. The number of temporary wives is not limited under the Shi'a law and hence the Iranian law. Thus, a man is at liberty to marry as many women as he desires simultaneously.²⁰⁴

JURISDICTIONS WHERE POLYGAMOUS PRACTICE IS OUTLAWED

In some countries across the Muslim world, there are some, whether the Muslim constitute the majority therein or not, where the application of Islamic law in its general ramifications, including the family law, has been abolished. This socio-legal revolution rendered the practice of polygamy in those countries a history. This is due to the total submission of these countries to secular legal systems applied uniformly on both Muslims and non-Muslims alike. Tahir Mahmood confirms that Turkey and Albania are, among those countries, where Muslims

²⁰⁰ Voorhoeve M., *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, (New York: I. B. Tauris & Co. Ltd., 2012), at 94.

²⁰¹ Naqavi, S. A. Reza, *Family Laws of Iran*, (Islamabad: Islamic Research Institute, 1971), at 4.

²⁰² The Iranian Family Protection Act No. 6516 of 1967, article 11 (3).

²⁰³ Naqavi, at 8.

²⁰⁴ Naqavi, at 8.

constitute the majority.²⁰⁵ According to him, the civil codes applied in these countries are a replica of the Western laws. Both the Turkish Civil Code, 1926 and the Albanian Civil Code, 1928 are in this form. Whereas the Turkish Civil Code reflects the Civil Code of Switzerland 1912, the Albanian Civil Code and of course the six Central Asian Republics of the defunct Soviet Union are among Muslim countries where Islamic law application was abandoned following the Bolshevik Revolution in 1917.²⁰⁶ Some African countries where Muslims do not enjoy the application of Islamic law even in family matters include Kenya and Tanzania. In the two countries, a uniform marriage law was enacted for the general populace.²⁰⁷

Tunisia went through critical chronicle in the history of its family legal system right from the promulgation of the Tunisian code of Personal Status (CPS), 1956 till date. The Code in its provisions made the family law more of secular than Islamic. The critical moment it went through was that despite the form of the CPS, feminists among the fundamental secularists canvassed that its provisions were not sufficient for the protection of women's rights. At the same time, conservative Muslims and clerics were agitating for a return to the traditional classical Islamic family law practice. Among the demands of the feminists was the abrogation of the legal requirement of the wife to obey her husband in marriage. On the other hand, conservative Muslims demanded for the restoration of the legality of polygamy, among others which the CPS of 1956 outlawed.²⁰⁸ After a moment of controversy and legal debates, the feminists finally succeeded and their demands were granted when in 1988, the then President declared his intention to retain the CPS and in addition, make further amendments that would be in the interest of the women's rights activists.²⁰⁹ The most important state action on the matter was the amendments of the CPS in 1993 which accommodated some of the feminists' controversial demands. The amended version of the CPS for instance, in addition to maintaining its strict position on polygamy, dropped the clause from earlier versions stating that the wife must obey her husband. It also expanded the mothers' prerogatives and reduced fathers' power after divorce with respect to child custody.²¹⁰ On the matter of polygamy, the wording of the Code provides thus:

Plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 240,000 francs, or for both, even if the second marriage is in violation of any provision of this law.²¹¹

Until now, the Tunisian Code of Personal Status, 1958 remains in force, and its position on polygamy remains unchanged.

In Turkey, the chronicle shows that the transition towards its current secular family legal system began from its ancient legal system, the classical Islamic law, to the Ottoman Law of Family Rights, 1917 and finally to the Turkish Civil Code of 1926. The Ottoman Code's recognition of polygamy may be understood from the following provisions:

A person who has four women married to him, or observing *'idda* for him; is not permitted to marry again.²¹²

Further restriction the Code provides in relation to polygamy is where it states:

²⁰⁵ Mahmood, at 4.

²⁰⁶ *Ibid.*, at 6. The CPS provides in article 18 that whoever marries again shall be liable to punishment with one year imprisonment or with fine or with both.

²⁰⁷ *Ibid.*

²⁰⁸ Charrad, M. M., at 126.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Tunisian Code of Personal Status 1958 (as amended, Law No. 63-65 of 1993), article 18.

²¹² The Ottoman Law of Family rights, 1917, article 14.

Where a woman stipulates with the husband that he would not marry another woman and that if he does so, she or the second wife would stand divorced; the contract of marriage shall be valid and the condition enforceable.²¹³

This provision became an influential legal tool in the transition towards abandoning polygamy and other similar controversial provisions of the Ottoman Islamic law. The Ottoman law remained in force until in 1924, when in the first draft of the Republican Civil Code special permission from a judge was required for any man intending polygamy. Furthermore, the applicant must prove to the Court that his need for polygamy was necessary and that he would be fair to both. The final stage of this legal chronicle was the total prohibition and sanctioning of polygamy in the Turkish Civil Code of 1926.²¹⁴ The Code provides thus:

No person shall marry again unless he proves that the earlier marriage has been dissolve by death of either party or by divorce or by decree of nullity.²¹⁵

A second marriage may be declared invalid by the Court on the ground that a person had a spouse living at the time of marriage.²¹⁶

JURISDICTIONS WHERE POLYGAMOUS PRACTICE IS REGULATED

This is the category of jurisdictions where polygamy was neither banned nor was its practice left in accordance with people's liberty as is prevalent in classical traditions and as applied in some Muslim countries discussed above. The origin of this development, as Tahir Mahmood observed, is as a result of the trends warranting law reforms in the classical practice and not in the classical law itself. The legal technique employed for such reforms is the utilization of the wide sphere of interpretation of texts based on the Islamic legal principle of public interest policy (*al-maslahah al-mursalah*).²¹⁷ Jurisdictions that applied such reforms adopted an amalgamated approach system whereby the text conforms to the principles of Shari'ah and the form of its Code conforms to the conventional legal system. These jurisdictions include: Malaysia, Algeria, Pakistan, Egypt, Morocco, Syria, Iraq and Sudan. Among the numerous jurisdictions that adopt this system which shall be studied here, focus will be laid on Egypt and Morocco among the Arab countries; Malaysia, Pakistan and Afghanistan among Asian countries.

Among all the jurisdictions where these reforms took place, some of the countries involved focus on matters relating marriage, divorce and matters incidental thereto, leaving other matters of personal law such as intestate and testamentary succession unchanged. These jurisdictions include Malaysia and Iran to mention a few. On the other hand, Egypt, Iraq and Morocco etc. extended reforms to matters relating to inheritance and wills. Also, due to the influence of the various Schools of Thought, enactments in these jurisdictions mostly reflect the particular School predominant therein. For instance, the Shafi'i School is generally considered in the Malaysian Code while the Maliki School dominated the Moroccan Code. This does not negate the applicability of amalgamation of jurisprudence from multiple Schools where necessary.²¹⁸

However, the legal reforms that took place in these jurisdictions, especially in those where the movement initiated were full of controversies. For instance, in Egypt, where the reform in matters

²¹³ The Ottoman Law of Family rights, 1917, article 54 (b).

²¹⁴ Duben, A. and Behar C., *Istanbul Households: Marriage, Family and Fertility 1880-1940*, (New York: Cambridge University Press, 1991), at 150.

²¹⁵ The Turkish Civil Code, 1926, article 93.

²¹⁶ The Turkish Civil Code, 1926, article 112 (1).

²¹⁷ Literally, *maslahah* means 'benefit' or 'interest'. When it is qualified as *maslahah mursalah*, however, it refers to unrestricted public interest in the sense of its not having been regulated by the Law giver insofar as no textual authority can be found on its validity or otherwise. It consists of considerations which secure a benefit or prevent harm but which are, simultaneously, harmonious with the objectives (*maqasid*) of the Shari'ah. See: Kamali, M. H., *Principles of Islamic Jurisprudence*, (Selangor: Ilmiah Publishers, 2000), at 233.

²¹⁸ Tahir Mahmood, at 7-8.

relating to polygamy was proposed by authorities after the 1952 revolution, many citizens from among fundamental Muslims and clerics opposed the idea. They canvassed that the idea was contrary to the Qur'anic provision that gave men the freedom to marry up to four wives. The argument was countered by other clerics who opined that it was not contrary to Shari'ah principles as polygamy falls within the ruling of permissibility and that the authority has the jurisdiction to restrict permissibility in the interest of public policy. They gave example of curfew. The act of leaving one's house and his movement is matter of permissibility which may be restricted by the authority on the ground of public peace and safety.²¹⁹

In Morocco, the Union of Feminine Action launched a national petition for reforming the *Mudawwana* Code in 1999, which was addressed to the Prime Minister to become the first gender issue filed in the history of Morocco.²²⁰ The struggle for the reforms were geared up and fuelled by women's rights activists between 2000 and 2003 until the code was finally repealed in 2004 and was passed into law by the King.²²¹ Apart from regulating polygamy making it almost impossible, the 2004 reforms gave women the right to divorce their husbands and to own assets and property obtained during marriage, and clamped down sharply on a man's ability to repudiate his wife.²²²

As stated earlier, the study of the Muslim Asian jurisdictions will focus on Afghanistan, Pakistan and Malaysia. These jurisdictions will give a picture of their family law in relation to polygamy and the chronicles of its reform representing other Asian jurisdictions. First of all, Afghanistan is known for its exodus Islamic background being the only Muslim Asian country not affected by the influence of colonialism. The first legislative action to consider reform in the legal system with respect to polygamy was the *Nizamnama of Nikah* in 1921. In its reformed provisions on polygamy, the law required the intending polygamist to testify before the Court, his undertaking to treat the plural wives fairly.

Contemporary researches indicate that polygamy in the Afghan society is widely practiced and that the functions of the judiciary and its intervention on the matter are minimal. According to research based facts, the reasons due to which men marry more than one wife in Afghanistan consist of tribal competitions, seeking for a male child, limited number of sons, sickness of wife, strong economy, power and status, travels, custom and traditional practices, as well as existence of marital disputes among couples. The types of polygamous marriages in Afghanistan are mostly through exchange for dispute settlement, exchange of daughters (*badal*), under age marriage, marriage of widows with relatives of their husband, forced marriage and contentment of both sides because of poverty. The reasons for women's silence towards their husbands' new marriages are fear of divorce, anxiety of their future, anxiety of the children's future, fear of

²¹⁹ Kharofa, Ala' Eddin, *Islamic Family Law: A Comparative Study with Other Religions* (Selangor: International Law Book Services, 2004), at 41.

²²⁰ Harrak, Fatima, (2009). "The History and Significance of the New Moroccan Family Code." Working Paper No. 09-002, March 2009, Institute for the Study of Islamic Thought in Africa (ISITA), Northwestern University.

²²¹ Among the prominent organizations that led the final edge struggle for such reforms was the Morocco's Democratic League for Women's Rights (LDDP) led by Fouzia Assouli, founded in 1993. Women's groups had feared that reforms, first promised when King Mohammed succeeded his father, Hassan II, in 1999, would never happen after protests from Islamic conservatives. In 2000, modernists seeking reforms led 100,000 marchers in the streets of Rabat in quest for reforms. See: Giles Tremlett (2003). "Family Law Change to End Polygamy in Morocco". Retrieved from: <<http://www.theage.com.au/articles/2003/10/13/1065917340424.html>> accessed September 30, 2013.

²²² See: The Moroccan Family Code (*Mudawwanah*) Law No. 5 of 2004. Articles 40-46. The original text of the Code is in Arabic. The corresponding English translation of the 2004 Moroccan Family Law was prepared by a team of English and Arabic speaking lawyers and a professional Arabic-English Moroccan translator at the Global Rights head office in Washington. Retrieved from: <<http://www.hrea.org/moudawana.html#13>> accessed October 1, 2013.

violence, considering the husbands' rights. These reasons are the leading factors rendering most women to be reluctant of seeking any judicial intervention on their husband's marriages. The research concludes that the main social factor affecting the practice of polygamy in Afghanistan is illiteracy among many polygamists whereas the main legal factor is the inadequacy of regulatory provisions on polygamy in the Civil Code and inadequacy of family courts to follow up such cases.²²³

In Pakistan, the Muslim Family Law Ordinance (MFLO), promulgated in 1961 was the first code to deal with matters relating family law.²²⁴ By this law, polygamy was regulated for the first time in the history of Pakistani law. Thus, the provision of the Ordinance on polygamy was thus:

No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.²²⁵

By this provision, a husband must submit an application and pay a prescribed fee to the local union council in order to obtain permission for contracting a polygamous marriage. Thereafter, the chairman of the union council forms an arbitration council with representatives of both husband and wife/wives in order to determine the necessity of the proposed marriage. The application must state whether the husband has obtained consent of the existing wife or wives. Contracting a polygamous marriage without prior consent is subject to penalties of fine and or imprisonment and the husband becomes bound to make immediate payment of dowry to the existing wife or wives.²²⁶ Nonetheless, if the husband has not obtained consent of the existing wife or wives the subsequent marriage still remains valid. The latest amendment on the MFLO was in 1981. However, although there were efforts for further reforms in the family law thereafter, the provision of the law on polygamy remains unchanged hitherto.²²⁷

In Malaysia, the multi-religious and multi-racial nature of the country rendered the chronicles of the nature and mode of the application of family law in the country a unique one, compared to the other Muslim jurisdictions around the world so far discussed. The country is dominated by the Muslim Malays followed by the Chinese and Indians professing Buddhism and Hinduism respectively. Christianity is also practiced among the Chinese and Indians. This diversity necessitated the existence of diversity in the legal system with respect to family law in the history of Malaysia. Thus, before the administration of statutory laws, each of the aforementioned cultures applied their respective personal laws.²²⁸ Notable problems in the administration of family law in the history of Malaysia were known in terms of its application on both Muslims and non-Muslims, though separated. For the non-Muslims, the desperate need for the reform and unification of their family laws in accordance with the Common Law principles became apparent in the celebrated case of *Re Ding Do Ca decd*²²⁹ which involved a case of polygamy practiced by Christian Chinese based on the Chinese customary law. Thompson LP observed that customary law brought a lot of problems in the administration of family law among non-Muslims. The conflict of laws involved in this case became a leading subject-matter triggering the promulgation

²²³ Research Report by the Women and Children Legal Research Foundation (2006), "Polygamy in Afghanistan". Retrieved from: <http://www.wclrf.org.af/?page_id=19> accessed October 2, 2013.

²²⁴ "Personal Status Law", (n.a). Retrieved from: <<http://islamopediaonline.org/country-profile/pakistan/islam-and-legal-system/personal-status-law>> accessed October 3, 2013.

²²⁵ The Pakistani Muslim Family Laws Ordinance, (Ordinance No. VIII of 1961). Section 6.

²²⁶ Farani, M., *Manual of Family Laws in Pakistan*, (Lahore: Lahore Law Times Publications, 1984), at 11.

²²⁷ "Polygamy in Pakistan: Polygamous Marriages under Muslim Family Laws in Pakistan", (n.a). Retrieved from: <<http://pakistanilaws.wordpress.com/tag/polygamy-in-pakistan/>> accessed October 3, 2013.

²²⁸ Majid, M. Kamariah, *Family Law in Malaysia*, (Kuala Lumpur: Malaysian Law Journal Sdn Bhd, 1999), at 2.

²²⁹ [1966] 2 MLJ 220 at 224, FC.

of the Law Reform (Marriage and Divorce) Act of 1976. The LRA was passed into law in 1982 and was made to apply generally to all persons in Malaysia except the Muslims.²³⁰ As regards the Muslims, the first legislation regulating Islamic marriage under the British rule in the Straits Settlements²³¹ was the Mohammedan Marriage Ordinance 1880, mainly procedural in content. The Ordinance was amended in 1908 to make registration of marriage and divorce compulsory, non-compliance being punishable by fine or imprisonment. In 1915, a law was enacted to integrate the 'Malay customary laws' in Serawak, which was a mixture of customs (*adat*) and Islamic law with enactment of Laws of the Malay Courts. In 1923 amendment was made in the Mohammedan Marriage Ordinance directing the application of Islamic law to intestate succession of Muslims insofar as local custom would permit, and without disinherit non-Muslim kin. The Ordinance continued to be applied in Penang and Malacca until State Acts were passed in 1959. Prior to this, with the enactment of the Civil Law Act of 1956, English law was applied throughout Malaysia including Sabah and Serawak. By virtue of s. 3.1 of the Act, Common law and the Rules of Equity were made to apply in peninsular Malaysia, Sabah and Serawak.²³² This, according to Ahmad Ibrahim, caused a problem on the Muslims whereby Islamic law was not applied on them even in cases where both parties were Muslims. This menace continued until after the independence in 1957 when the Federal Constitution granted the States power to enact laws on such matters under the Concurrent Legislative List. Hence, the Islamic Family Law Acts of the various states were promulgated.

By the provisions of these enactments, a person must obtain a written permission from the Court before he proceeds to marry a second wife. If however, such person goes ahead to contract such marriage without such permission, such person is liable to penalty, even if such marriage is validly contracted under the classical law. But this provision was later amended by providing a clause that such marriage shall be registered so long as it is in compliance with *Hukum Syarak*, which refers to the classical law. Notwithstanding, it is apparent that the statutes introduced reforms in the practice of polygamy in the context of Malaysian family law framework. An example of a reform introduced by the statutes can be seen in the IFLA (Federal Territories) which states that:

An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependents, including persons who would be his dependents as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained.²³³

This provision required the fulfillment of five conditions which were not applied in the Muslim family law framework before, for the permission of polygamy to be issued, viz:

1. The proposed marriage should be "just and necessary";
2. the applicant's financial capability to support both wives;

²³⁰ Pillai, Kamala M. G., *Family Law in Malaysia*, (Selangor Darul Ehsan: LexisNexis Malaysia Sdn Bhd, 2009), at 6.

²³¹ Straits Settlements refer to the former British crown [colony](#) on the Strait of Malacca, comprising four trade centers, [Penang](#), [Singapore](#), [Malacca](#), and [Labuan](#), established or taken over by the British [East India Company](#). With the exception of Singapore, Christmas Island, and the Cocos Islands, these territories now form part of [Malaysia](#). Retrieved from: Encyclopedia Britannica, <<http://global.britannica.com/EBchecked/topic/567981/Straits-Settlements>> accessed 19 October 2013.

²³² Kamali, M. H., *Islamic Law in Malaysia: Issues and Development*, (Kuala Lumpur: Ilmiah Publishers, 2000), at

²³³ Islamic Family Law (Federal Territories) Act No. 303 of 1984 (as at 2011). Article 23(4).

3. consent of the existing wife;
4. his ability to treat them fairly; and
5. that the proposed marriage does not cause *darar syar'i* to the existing wife or wives.²³⁴

Through gradual reforms in the Malaysian legal system, all the statutes applicable in the various states family laws now contain the same provisions unifying their position on polygamy as illustrated by the provision of the IFLA (Federal Territories).²³⁵ In the same vein, all the statutes uniformly impose sanctions on non-compliant polygamists whose act or omission may be liable to a specified penalty. On a man who practices polygamy without the legal permission, the IFLA says:

Any man who, during the subsistence of a marriage, contracts another marriage in a place without a prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both.²³⁶

Also, same punishment is provided on a man who neglects the requirement for justice and fair treatment to his wife or wives. The statute provides thus:

Any person who fails to give proper justice to his wife according to Hukum Syarak commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.²³⁷

To this end, despite all the reforms incorporated in the Malaysian family law on polygamy, it is still argued that there is need for further review in both the statutory and procedural laws. For instance, some writers canvassed that there is need for a return to the strict provision of the original provision of the IFLA 1984 which gave no room for the registration of a polygamous marriage contracted without prior permission of the Court.²³⁸ Similarly, it is further suggested by critics that the applicant for a polygamous marriage needs to prove in court that he can be just and fair and that the second marriage is necessary. This is the condition that was in the 1984 Islamic Family Law, which was, however, amended in 1994, the test now being "just or necessary" rather than "just and necessary". This amendment means that a man can now, when he wants to apply in court to be allowed to conduct a polygamous marriage, just prove in court, that it is necessary for him to take this woman as his second wife. Equally, in terms of application of the law, it is alleged that Courts are often very lenient. For example, the organization of Sisters in Islam and

²³⁴ Kamali, at 64.

²³⁵ See for example: Islamic Family Law (Selangor) Enactment No. 1 of 2003, article 23; Islamic Family Law (Malacca) Enactment No. 12 of 2002, article 23; Islamic Family Law (Kelantan) Enactment No. 6 of 2002, article 23; Islamic Family Law (Pahang) Enactment No. 3 of 2005, article 23; Islamic Family Law (Perlis) Enactment No. 7 of 2006, article 23; Islamic Family Law (Perak) Enactment No. 6 of 2004, article 23; Islamic Family Law (Penang) Enactment No. 5 of 2004, article 23. Islamic Family Law (Sarawak) Ordinance No. 43 of 2001, article 21. All these enactments contain same provisions and all are put in article 23 of each statute except the Sarawak Ordinance.

²³⁶ Islamic Family law (Federal Territories) Act No 303 of 1984 (as at 2011). Article 123.

²³⁷ Islamic Family law (Federal Territories) Act No 303 of 1984 (as at 2011), article 128. Other states of Malaysia followed suit with same provision and in same article except the Sarawak Ordinance which provides same in article 132. See: Islamic Family Law (Selangor) Enactment No. 1 of 2003, article 129; Islamic Family Law (Malacca) Enactment No. 12 of 2002, article 129; Islamic Family Law (Kelantan) Enactment No. 6 of 2002, article 129; Islamic Family Law (Pahang) Enactment No. 3 of 2005, article 129; Islamic Family Law (Perlis) Enactment No. 7 of 2006, article 129; Islamic Family Law (Perak) Enactment No. 6 of 2004, article 129; Islamic Family Law (Penang) Enactment No. 5 of 2004, article 129. Islamic Family Law (Sarawak) Ordinance No. 43 of 2001, article 132.

²³⁸ Mohammad, N., 'Reform of the Polygamy Law and Policy in Malaysia: An Empirical Study', [2012] 2 Web JCLI <<http://webjcli.ncl.ac.uk/2012/issue2/mohammad2.html>> accessed October 5, 2013.

the Association of Women Lawyers, presented a memorandum protesting against this fact in 1996, alleging that it was a common practice of the Syariah Courts to impose only 300 ringgit fines under section 123, even though a maximum fine of 1,000 ringgits was provided for. Furthermore, empirical study finds out that consent to polygamous marriages given by wives before the Courts is often obtained by means of duress, the wives being threatened with divorce by their husbands if they do not give their consent.²³⁹

CONCLUSION

Reforms in family law matters relating to polygamy were triggered around contemporary jurisdictions of the Muslim world by the influence of Western civilization and socio-economic trends among others. The reform process went through notable chronicles through the twentieth century, with a start from Turkey and Egypt and gradually eroding through the entire Muslim world. This study found out that the legal framework of polygamy around the Muslim world jurisdictions is divided into three broad categories. The first category is of jurisdictions where no reform was incorporated in their personal status laws, thereby leaving the practice of polygamy unregulated. The reasons behind the unchanged legal situation in this category are identified as either strict adherence to the classical laws of Shari'ah or due to loopholes in the application of dynamism in their legal systems. The second category listed jurisdictions where the practice has been totally abolished and prohibited, sanctioned by penal laws. The reason found there is the strong influence of secularism influenced by Western law and civilization, though the position is defended by its supporters, adopting a new approach of interpretations within the context of Shari'ah. The fourth category enumerated a large number of Muslim jurisdictions where the practice is allowed under a regulated system, though the regulation approach varies from one jurisdiction to another, ranging from simple to strict regulations. The reason identified there is approach towards legal pluralism, harmonizing Shari'ah principles with contemporary conventional legal principles based on the doctrine of *maslaha*. Today, polygamy still remains a controversial matter in almost all the Muslim jurisdictions, whereby its practice and its law reform process simultaneously overlap.

²³⁹ Ibid.