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POLYGAMY IN CLASSICAL AND MODERN HINDU LAW

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POLYGAMY IN CLASSICAL AND MODERN HINDU LAW

ABSTRACT:

The practice of Polygamy among the Hindu community is dated back to the ancient times, but it was restricted only to the ruling classes of the society. But this practice has been changing from time to time. Its practice during the Vedic period was neither completely prohibited nor explicitly encouraged by the Hindus. With the advent of the Mughals and the Britishers, serious changes have taken place in this concept. Even though the practice of Polygamy was widely recognised in the Muslim community, yet this practice was nowhere forced by the Mughal Emperors over the Hindu Community. Similarly, the Britishers enacted anti-bigamy laws in support to the wide practice of Monogamy among the Hindu Community. The Indian Legislation implemented the Hindu Marriage Act, 1955 according to which the practice of Polygamy was made punishable with a very few exceptions and marriages of bigamous nature are considered invalid and void. Further, the provisions of the Indian Penal Code provide for the punishment of such practices. In the modern times the social stigma attached with bigamous marriages are undoubtedly harsh and depressing to the woman involved in such ties. In this context, the present article documents and discusses the development in the practice of polygamy from the ancient Vedic times to the medieval periods to the post- implementation of the Hindu Marriage Act, 1955.

(1). INTRODUCTION-

The sweet relationship between a husband and wife is termed as marriage. It is believed that marriage, which is as old as the downfall of a civilisation and is considered a back bone for the betterment of the society. Marriage is considered as the last of the ten sacraments according to the ancient Hindu Law¹. The development of all the civilised societies is co-related to the institution of marriage. The concept of marriage revolves around the relationship between a male and female and is based on the fundamental principles of mutual cooperation and compromise. The nature and concept of marriage varies with the changes in the society and the social order.

The concept of marriage has been evolving with the changes in the social order. Marriage is a stable relationship between a male and female and it is not merely for sexual enjoyment, but rather is for an everlasting and long association of the couple to constitute a family, and hence be a part of contribution to the society. Ideally the well-recognised essentials of marriage of a

¹ Sundari Bai v. S. Hivanaryan, ILR (1908) 32 Bom. 81.

modern civilised society are that (i) Voluntary union; (ii) Must be for life; (iii) Must be monogamous.²

There are various sources of the Hindu Law; these are broadly divided as Ancient Sources and Modern Sources³. The former includes the age-old texts such as the Shrutis, Smritis, Digest and Commentaries, and Customs. Whereas the latter includes the Precedents and Legislations passed on by the state. For the better outcome of this research, the researcher draws a comparison between the ancient and the modern sources of Hindu Law pertaining to the practice of Polygamy. Through the examination of the sources of the Hindu Law, it is found that there are two forms of marriage, which are Monogamy and Polygamy.

Monogamy refers to the marital relationship of one man and one woman at a time. This is considered as the leading form in comparison to the other types of marital relationships such as polygamy and polyandry. Also, this type of a relationship between a man and a woman is proved to produce the highest type of affection and sincere devotion between the partners.⁴

Whereas, Polygamy is the generic term used to denote multiple marriages. Polygamy is classified as Polyandry and Polygyny⁵. The former refers to the relationship of one wife with many husbands. This is a form of marriage wherein a woman is married to more than one man at a time. This form is found in places where the conditions of social life are harsh, and thus requiring efforts of more than man to support a family. In the Hindu Mythology, the Pandavas (Five Brothers) shared the same wife Draupadi. Polyandry is popularly found in 2 forms namely, (i) Fraternal Polyandry - which refers to a situation where one wife is regarded as the wife of all the brothers who maintain a sexual relationship with her; (ii) Non- Fraternal Polyandry is a form where a woman has as many husbands with whom she can cohabit in turn. In case a child is born, then a special ritual is performed and one of her husbands is chosen as the child's social parent.⁶

The term Polygyny is widely referred to as Polygamy, even though the latter includes both Polyandry and Polygyny. Under this system, one man has more than one wife at the same time. In the olden days, polygamy was closely related to the institution of slavery, as usually the women captured in war were forcefully made the wife of the captor king.⁷ The concept of Polygamy is still prevalent in India, and is seen to be practised by the Muslim community at

² *Polygamy in Hindu Law*, 42 Allahabad L.J. 49 (1944).

³ Sara Raza, *The Hindu Marriage Act: A Review*, 4 LUMS L.J. 219 (2017).

⁴ Ross C. Houghton, *Women of the Orient: An Account of the Religious, Intellectual, and Social Condition of Women in Japan, China, India, Egypt, Syria and Turkey* (1877).

⁵ R. D. James, *Polygamy and Capacity to Marry*, 42 Mod. L. Rev. 533 (1979).

⁶ Frieda Hauswirth, *Purdah: The Status of Indian Women* (1932).

⁷ Walter Matthew Gallichan. *Women under Polygamy* (1915).

large and also by the Hindu community in the country. Both Polyandry and Polygyny had a greater harmful impact on the family life and hence, it is been declared illegal in most of the civilised societies. Considering the advantages that Monogamy offers over Polygamy, the Indian legislature has legally prohibited the practice of Polygamy. Even in the modern Hindu Law, through the Hindu Marriage Act, 1955 polygamy is considered as an offence. Also, as per section 494 of the Indian Penal Code, 1860 practice of Polygamy is declared a punishable offence.

The researcher for this research titled “**Polygamy in Classical and Modern Hindu Law**” has employed the Doctrinal Research method. The Doctrinal method of Research indicates “*A research which is more concerned on the documents, rather than the experiences of people, or the society*”. In comparison to other methods of research, a doctrinal research holds a wider scope as the researcher can easily access the information from various existing sources. Subsequently, descriptive and analytical means were used to reach the aforementioned objectives. The researcher has also critically scrutinized the existing legal procedures and policies through which possible suggestions were subsequently provided by the researcher.

The researcher has evolved the following research questions for the successful completion of this research work:

1. How as the concept of Hindu Marriage evolved over time and what are the various enactments made by the legislation?
2. Whether there was timely enactment of laws to curtail polygamy in modern India?
3. What is the position and role of the present day legislative and penal provisions relating to polygamy with regards to the Hindu Law?
4. What is the scope and applicability of the Hindu Marriage Act, 1955?
5. What are the various sources of ancient and modern Hindu Laws with reference to the practice of Polygamy?

The researcher has come up with the following research objectives for this research work titled “**Polygamy in Classical and Modern Hindu Law**”:

1. To examine the changing concept of Hindu Marriage and the timely enactments made by the legislation for better regulation.
2. To study the evolution of laws related to polygamy, with a special reference given to the Hindu Marriage Act, 1955.
3. To examine the role and position of the present day legislative and penal provisions relating to polygamy with respect to the Hindu Law.

4. To understand the scope and applicability of the Hindu Marriage Act, 1955.
5. To analyse in detail the various sources of ancient and modern Hindu Laws in reference to the practice of Polygamy.

The researcher through this work titled “**Polygamy in Classical and Modern Hindu Law**” gives out in detail the evolution of the practice of polygamy in the Indian Sub-Continent among the Hindu Community. The researcher has divided this article into 6 components, first being the introduction, which details about the research methodology used, research questions, research objectives and the literature reviewed by the researcher. Secondly, the researcher moves to discuss in detail the concept of Hindu marriage and the practice of polygamy by the Hindus. Thirdly, in this article the researcher talks about the Hindu polygamy in the ancient and early periods; fourthly, the changes made in the practice of polygamy after the advent of passing of the Hindu Marriage Act, 1955. Lastly, the researcher throws light on the current day scenario with respect to Polygamy, and finally concludes with the suggestions given by the researcher.

(2). THE CONCEPT OF HINDU MARRIAGE AND POLYGAMY-

With the advent of civilisation, the concept of Polygamy among Hindus has been evolving with the changes in the society and social order. The concept of Hindu Polygamy has received a lot of criticisms from legal philosophers stating the harsh psychological effects, which has led to the changes in the legislative enactments

According to the ancient Hindu Laws marriage is considered as one of the ten sacraments for both men and women.⁸ Dated back to the commencement of the Vedic periods, the concept of marriage was clearly a well-established institution. The sole purpose of marriage was considered to enable a male person to become a householder, to procreate children and to fulfil the sacraments as prescribed in practice. There is a reference made to *Rati*⁹, i.e., the Sexual and other pleasures derived from marriage in the Smritis.

It is evident that Polygamy and Polyandry existed in practice, but it was seen to be practised only by the rich category of people, like the kings, merchants, and the warrior class. Even though, the concept of polygamy existed, but at no stage during the course of the development of Hindu Laws, the practice of polygamy was evidently acclaimed, though a very few people practiced it, it was held to have low esteem. Thereon, the concept of monogamy prevailed over the concept of polygamy from ages.

In some instances, the Hindu Gods have also portrayed to be practicing the concept of Polygamy, though they are mere universal energies and do not appear in human forms. Though polygamy

⁸ Albert Swindlehurst, *Hindu Law and Its Influence*, 27 Yale L.J. 857 (1917-1918).

⁹ *High Court Judges Condemn Draft Hindu Code*, 43 Allahabad L.J. 13 (1945).

was seen to be in practice among the powerful and the rich classes of the society, the sages were seen to be strictly against the concept of polygamy.

During the Vedic period, the concept of Monogamy was favoured and practiced among the Hindus. Later, with the development of the Dharmashastras, it was believed that if a woman failed to give birth to a son, then such a person could proceed for remarriage. They recognised the need for a son for religious purposes and to continue the family lineage. In the ancient Hindu Law, the practice of Polygamy was considered the rule rather than an exception, there was no limit to the number of wives a man might have¹⁰. It is pertinent to note that, the practice of polygamy was widely permitted among the Hindu religious and customary beliefs, but it was not as prominent as it existed among the other religions. Further, during the post- Shastric period, the privilege of practicing polygamy was seen in all the castes of the Hindu Society.

The written works¹¹ about Hindu way of leading a life have also made references to the concept of polygamy and the Dharmashastras have permitted the practice of polygamy in certain special circumstances, which are not solely for the purpose of sexual pleasure and intercourse, but rather to continue to family lineage. Women in the ancient ages were under the watch of any close male member in that family. In instances where the husband of a woman dies, without any children, then such a woman was allowed to marry her husband's brother with the sole motive and purpose to beget children.

The tendency to abolish the practice of polygamy started in way back during the British regime under the colonial rule.¹² The authorities back then made efforts to organise and codify the various personal laws professed by the Indians. Considering the harmful impact that the practice of Polygamy caused, they decided to pass a legislation thereby prohibiting the practice of polygamy among the Hindus. Subsequently, the practice of Polygamy was prohibited by passing legislations, especially in the provisions of Madras and Bombay¹³. Later, during the post-independence period, a codified Hindu was passed in was passed by the Indian Legislature, which is referred to as the Hindu Marriage Act, 1955 which came into force on the 18th May, 1955.

(3). HINDU POLYGAMY IN THE EARLY PERIODS-

Ideally there are eight types of marriage recognised during the ancient times, these include

¹⁰ Menski, Werner F., '*Hindu Law Beyond Tradition and Modernity*', Oxford University Press, Fourth Edn., 2011, p.377.

¹¹ Supra Note. 2.

¹² Prakash A. Shah, *Attitudes to Polygamy in English Law*, 52 INT'L & COMP. L.Q. 369 (2003).

¹³ Supra Note. 12.

Brahma, Daiva, Arsha, Prajapati, Gandharva, Rakshasa, Paisacha and Ashur¹⁴. It is evident that the concept of marriage and the practice of polygamy and its notions have been changing constantly over the period of time. The researcher through this research work would discuss the evolution of the concept of marriage with reference to polygamy during the Vedic Period, during the Epics, the Mughal Period and the British Period.

In the Vedic periods, the objective of marriage was to fulfil the desire of giving birth to off springs, especially to a male child. This clearly brings out the patriarchal nature of the society back then. According to the ancient Hindu practices, the marriage between a man and a woman was considered to be in-dissolvable, yet the practice of polygamy was not completely restricted.¹⁵ Also, there is not even a statement in the Vedas, which supports the practice of polygamy. The terms Husband and Wife have been used only in singular forms in the Vedas, thereby explicitly complying that there was no propagation of polygamy in the Vedic texts. Following which a similar thought was expressed in the Commentaries and Digests, which are merely the interpretation of the Vedic texts.

In the epics such as Ramayana and Mahabharat, the practice of polygamy was clearly evident. King Dasharatha was seen practising polygamy, but in the same epic the protagonist Lord Rama is portrayed as an “Ideal Man”, and Lord Rama has reiterated the concept of Monogamy over polygamy. The Mahabharat, which revolves around the female character Draupadi has also picturised the practice of Polygamy. In this age, polygamy was in practice only among the elite royal group such as the rulers.¹⁶

During the Mughal Rule in India, the concept of polygamy was widely seen and practiced in the society, as Polygamy was an accepted norm in the Muslim community. This change in the society changed the perspective of the practice of Polygamy among the Hindus. In the words of Mirza Aziz Koka, the foster brother of Emperor Akbar,

“A man should marry four wives; a Persian one to talk to and make love, a khurasani to do housework, a Hindu to caress the husband and nurse the children and a strong woman of Mawar-ul-nahr to whip the other three and keep them in control.”

There are instances wherein the Indian Rajput kings have also practiced the act of polygamy, with a motive to beget warriors. With the advent of Colonial Rule in India, various personal laws were required to be codified for gaining better control over the people of India. But it was not practically possible to for the Colonial Government to interfere in the personal laws of the

¹⁴ Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. Colo. L. Rev. 963 (2012).

¹⁵ *Supra Note*. 2.

¹⁶ 43 Allahabad L.J. 16 (1945).

numerous communities in the society, as it might tend to create dissatisfactions among its members.¹⁷

Later, the system of polygamy did not prove to be an advantageous over the period of time, as it was creating problems of misunderstandings in the individual families, and thereby, the Hindus started to restrict the number of wives to only one, thereby, the ideology of having multiple spouses at the same time declined in the country.

Further, the Britishers implemented the Indian Penal Code, in the year 1860, under this, Sections 494 and 495 exclusively dealt with the prohibition of polygamy. It was held in the case of *Venugopal. K v. Union of India*¹⁸ that court observed that a Hindu person can be prosecuted under Section 494 of the Indian Penal Code, if that person marries again during the lifetime of his spouse. This was intensified during the Post- Independence period with the enactment of the Hindu Marriage Act, 1955. This act exclusively dealt with the codified provisions of the Hindu practices, thereby the practice of polygamy was made punishable and any such act was considered as a void act.

(4). THE HINDU MARRIAGE ACT, 1955-

India is widely recognised as a diverse country which has people belonging to various communities and preaching different religions. The time immemorial of them include the Hindus, who have their existence dated way back to the Vedic periods. The practices followed by this community have witnessed a lot of changes and has been influenced with the advent of constant invasion by outsiders (such as the Mughals, the French, and the Britishers to name a few) and the societal developments. The practice of Monogamy was made the rule in the advent of the enactment of the Hindu Marriage Act, 1955 by the Parliament post-independence.

*Section 5*¹⁹ of the Hindu Marriage Act, 1955 (herein after referred to as ‘the Act’) deals with the essential required conditions to solemnize a marriage between two Hindus, Section 5 (i) of this Act, explicitly provides that neither of the two parties has a spouse living at the time of the marriage. Thereby this implies that if a person has a living spouse at the time of the solemnization of marriage, then such a marriage is considered a void marriage.

Further, *Section 17*²⁰ of the Act states that any marriage that has been solemnized between two Hindus, and either one of them has a spouse living at the time of such marriage, then such marriage is considered unacceptable and void. The spouse so involved in such act is subject to

¹⁷ *High Court Judges Condemn Draft Hindu Code*, 43 Allahabad L.J. 13 (1945).

¹⁸ *Venugopal. K v. Union of India*, 2015 SCC Ker. 798.

¹⁹ The Hindu Marriage Act, No. 25 of 1955 § 5.

²⁰ The Hindu Marriage Act, No. 25 of 1955 § 17.

punishment under Section 494²¹ and Section 495²² of the Indian Penal Code. These provisions clearly show that the legislation favours the concept of Monogamy over the then prevailing concept of polygamy.

(5). CONCEPT OF POLYGAMY IN THE MODERN SOCIETY-

The concept of polygamy has been changing with the advent in the societal changes. The practice of polygamy in the present day is considered immoral and against the social norms.²³ Even though this practice is visible in a few areas in recent times, yet, the persons indulged in this practice are usually subject to pressures from family, penalised through legal procedures and are given relatively lesser esteem from the society.

In today's terms, the laws relating to marriage and dissolution of marriage have been codified to an extent, where uniformity can be maintained, and such codified laws are necessarily to be followed in its strictest sense. With the advent of the enactment of the Hindu Marriage Act, 1955, the practice of polygamy has been recognised as a punishable offence. The punishment for the practice of polygamy is granted under Section 494 of the Indian Penal Code²⁴.

As discussed already, the practice of polygamy in the present times is seen as undignified act and thereby, the persons involved in such acts pretend to maintain their second marriage in secrecy. It was rightly pointed out by Radha Krishna Rao, J.²⁵ opined that "*the courts are giving acquittals on the ground that the required ceremonies for the second marriage have not been proved beyond reasonable doubt*", and further he expressed his views that the second marriage done is generally kept as a secret, and thereby not all essential ceremonies of a marriage might have been taken place. So, it is necessary that the legislations should be amended with regards to the mode of proof of second marriage. Also, when the court insists on strict proofs only, then it amounts to encouraging perjury.

A similar problem was encountered in the *Bhaurao Shankar Lokhande*²⁶ case, where the court held that there was no solid evidence that a second marriage took place. But the Bombay High Court in the case of *Smt. Indu Bhagya Natekar v. Bhagya Pandurang Natekar and Another*²⁷, came out with a different perspective of dealing in the cases of Bigamy, and held that the accused can be convicted even if there are any other reliable evidences which prove the second marriage. Further, the Law Commission in its 227th Law Commission Report²⁸ laid down recommendations

²¹ PEN. CODE § 494.

²² PEN. CODE § 495.

²³ T. C. Hartley, *Polygamy and Social Policy*, 32 MOD. L. REV. 155 (1969).

²⁴ PEN. CODE § 494.

²⁵ B. Chandra Manikamma, v. B. Sudarsana Rao Alias Saleem, 1988 Cri LJ 1849.

²⁶ *Bhaurao Shankar Lokhande v. State of Maharashtra*, 1965 AIR 1564.

²⁷ *Smt. Indu Bhagya Natekar v. Bhagya Pandurang Natekar and Another*, 1992 Cri LJ 601 (Bom).

²⁸ Law Commission of India, Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings, Report No. 227 (August 2009), available at <http://lawcommissionofindia.nic.in/reports/report227.pdf> (Last visited on February 25, 2021).

that needs to be carried out as a means to abolish the practice of Polygamy in the country. The reforms with reference to the Hindu Community included-

- (i) That a new section needs to be inserted which would clearly state that, any married person whose marriage is governed by this Act, cannot marry again by merely changing his religion unless and until the first marriage is dissolved legally. Further that, such marriage so solemnized it is to be declared as invalid and void marriage.
- (ii) The Commission also opined that the provisions of the Indian Penal Code dealing with offences of Bigamy needs to be given the status of Cognizable offence.

(6). CONCLUSION AND SUGGESTIONS-

6.1. CONCLUSION-

It is conceivable to condense the present research work in this exact structure. Marriage is an institution of trust, love and understanding coupled with mutual respect, failing which, results in loss of trust and thereby leading to offences such as bigamy. During the Vedic period, women were shown given adequate recognition and due respect, women were witnessed as treated in the forms of goddesses. But at the same time, as the society was predominantly patriarchal in nature, giving birth to a female child was not seen in the same sense of giving birth to a male child. Also, the exceptional cases wherein polygamy was permitted included the capacity of a female to beget a male child, which evidently was not in her capacity to control.

Later during the Medieval era, especially in the Mughal period, even though women were given the right to education and property, yet they had to face more serious instances of the practise of polygamy. During the British Rule, the Indian Penal Code was enacted, according to which the practice of Bigamy is prohibited under Section 494 of the same. At present the offences of Bigamy / Polygamy are treated as both civil and criminal offences and are adequately given importance in the legislation. These acts have brought improvements in the status of women in India.

6.2. SUGGESTIONS-

The researcher after conducting the present research suggests the below mentioned measures which could be undertaken to ensure the better implementation of the abolishing the practice of polygamy and the probable changes that could be brought in the legislations. Such as-

- In order to restrain the practice of Polygamy in the country, it is necessary that the mindset of the people should be changed, that is, no law passed by a legislation can explicitly change the mindset of its citizens, unless they tend to change it all by themselves. Since, presently Polygamy is widely practiced in the rural areas, it is

necessary that the harsh impact of a Bigamous Marriage on the other spouse and the family members is made to known to the spouse so involved in such affairs. This is possible by creating awareness by educating the people.

- When the cases are in front of the court to decide upon the bigamous nature of a marriage under Section 494 of IPC, it becomes an excuse for the spouse involved in a bigamous relation, that during the course of the second marriage, all the rituals were not followed. As one of its essential requirements to prove the marriage. Thereby, section 494 has to be amended to keep a check on such existing loopholes in the legislation.
- Though the society is developing from time to time, yet the women in the rural areas of the country are economically dependent on their spouse. This dependency acts as a drawback to such women, and the men take advantage of the same, and indulge in activities like bigamous marriages.
- Also, the cases of false acquisitions that the other spouse is indulging in Bigamous relations should be prevented. In such cases, protection should be given to the spouse against whom such fake charges are imposed.
- Speedy trial is the need of the hour, as in many cases relating to matrimonial affairs, long time is taken by the courts, which does not serve the purpose of filing such cases. Delays in such cases puts in entire family at stake and ruins them mentally and psychologically.
- Lastly, it is necessary that the marriages are registered, as this would to an extent help in the reduction of repetitive marriages by the same person.