

When the Right to Family Life Clashes with the Right to a United Family

By Sawsan Zaher¹

Many political philosophers view polygamy as a cultural right and assert that the courts should respect and protect it. The primary claim of these scholars is that no culture is superior to another and, thus, the courts should be prevented from imposing Western liberal values on a cultural group that does not share these values. Most of the feminist literature repudiates this approach and claims that it perpetuates power relations within a patriarchal society. In addressing this complex issue, I will argue that, as a rule, prohibitions on discrimination between men and women as well as infringements of basic human rights should be applied as overriding principles. Further, I will argue that the underlying motives of legislation or court decisions should be examined in certain cases as courts, on occasion, actually perpetuate discrimination between different cultural groups, on the pretext that "women's rights should be protected." Decisions of Israel's Supreme Court on the issue of family unification, in which there is discrimination between Jewish and Arab citizens, provide good examples of this complex matter.

"A married male who marries another woman and a married female who marries another man shall be sentenced to five years' imprisonment." Thus stipulates Section 176 of Israel's Penal Law (1977), thereby categorizing an act of polygamy as a criminal offense, the punishment for which is imprisonment in custody.² There can be no doubt that designating "polygamy" as a criminal offense was intended, first and foremost, as a deterrent against the undermining of the institution of monogamous marriage, one of the foundations of the state's social system. This was the lawmakers' intent when it was legislated and this remains the stance of the courts in applying it against offenders.³ The phenomenon of polygamy exists in the country among Palestinian Arab citizens, as well as Jews, particularly among immigrants from Yemen.⁴ This having been noted, there can be no doubt that the phenomenon is more common among the Arab Bedouin in the Naqab (Negev). According to estimates published by the Ministry of Health in 2001, 36% of Arab Bedouin women in the Naqab are married to a man who is married to more than one woman.⁵

The courts have related to the deterrent value of the sentence of imprisonment imposed on those found guilty of this crime and have declared on several occasions that "this matter does relate solely to the accused currently before the court, as there is a need primarily to deter others from doing something similar, lest chaos result in all matters related to the

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² The phenomenon of multiple marriages is called both polygamy and bigamy. There is a slight distinction between the two terms. Bigamy is a situation in which a man marries another woman at the same time that his first marriage is still valid. Polygamy is a situation in which a man lives a married life with another woman while his previous marriage was un-dissolved and without there being a need for a formal marriage ceremony. Other sources distinguish between the two terms on the basis of the number of a man's wives. According to this approach, bigamy describes a situation in which a man is married to two women, while polygamy is one in which a man is married to more than two women.

³ See Criminal Case (CC) 4433/04, *State of Israel v. Debes Khalil*, (Nazareth Magistrate Court) decision issued on 20 March 2005; Criminal Appeal (CA) 185/82, *Ahmed ibn Atiyah Gudah v. State of Israel*, (Supreme Court) PD 37 (1) 85.

⁴ See CA 392/80, *State of Israel v. Abraham Halevi*, (Supreme Court) PD 35(2) 698. In addition, it is worth noting that the phenomenon of polygamy also exists in Western countries. For example, the Mormons, most of whom reside in the state of Utah in the United States, practice polygamy despite a legal prohibition on the practice. See Slark, S. (2004). Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults? *Journal of Law & Family Studies*, 6.

⁵ Wartzberger, R. *Marriage Among Relatives and Polygamy*. Jerusalem: The Knesset Research and Information Center, 19 March 2001. (Hebrew)

institution of marriage in the state.”⁶ In applying the legislation that defined the crime, the court has imposed light sentences and has been lenient towards those found guilty. In the *Gudah* case,⁷ the court reviewed the policy of imposing lenient sentences that have been delivered following the passage of the law, and determined that more severe sentences should be imposed since there was at the time a steady increase in the number of polygamous marriages in the state. The court declared that “every criminal should see that the state does not take lightly anyone who does not uphold the law.”⁸

The courts have discussed the sentencing policy appropriate to the commission of this crime on several occasions, and have repeatedly determined that the principal intent of the legislation is to deter polygamous marriages. Here the court added that “it is not possible to achieve this goal through sentencing that is not imprisonment. Serving a sentence of public service is not a viable option for such crimes and misses the goal sought by punishment.”⁹ In another case,¹⁰ the court determined that suspended sentences do not meet the purpose of punishment for the crime. The court added that “a suspended sentence has no value whatsoever in the case of the crime of polygamy.”¹¹

However, the courts have not been consistent in their application of the criminal law, primarily in regard to adopting a sentencing policy in a uniform manner regarding this crime. On the one hand, the courts have repeatedly emphasized the importance of curtailing the phenomenon of polygamy for the purpose of protecting the institution of monogamous marriage. On the other hand, in determining the punishment (five years' imprisonment¹²) – especially in order to deter the commission of the crime – they have been content with the minimal application of the law and have applied very lenient sentences upon those who have been found guilty of committing this crime. There does seem to be any connection whatsoever between the lenient sentences imposed by the courts and the achievement of the goal of deterrence. For example, in the case of *Debes*,¹³ the President of the Magistrate Court in Nazareth imposed a 24-month sentence on the accused convicted of the crime of polygamy, only 18 months of which were to be served in custody. Incidentally, this is one of the highest sentences – if not the highest – of the sentences imposed on an accused found guilty of the crime of polygamy under Section 176 of the Penal Law. In other cases, the courts were even more lenient in sentencing. For example, in the case of *Gudah*,¹⁴ the Supreme Court refused the defendant's appeal regarding the severity of the punishment and imposed a sentence of 12 months' imprisonment. In another case,¹⁵ the Magistrate Court imposed five months' imprisonment and a 12-month suspended sentence. In yet another case,¹⁶ the Magistrate Court imposed an 18-month suspended sentence and only 6 months of imprisonment.

Beyond the desire to protect the institution of monogamous marriage, there can be no doubt that polygamy is gravely harmful to and abuses the rights of the women involved in such an

⁶ CA 185/82, *Ahmed ibn Atiya Gudah v. State of Israel*, (Supreme Court) PD 37(1) 85; CA 392/80, *State of Israel v. Abraham Halevi*, (Supreme Court) PD 35(2) 698; CC 1701/04, *State of Israel v. Salama Salah*, (Kfar Saba Magistrate Court) decision issued on 18 January 2005.

⁷ CA 185/82, *Ahmed ibn Atiya Gudah v. the State of Israel*, (Supreme Court) PD 37(1) 85.

⁸ *Ibid.*

⁹ CA 4085/91, *Ibrahim Shibli v. State of Israel*, (Supreme Court) decision issued on 17 October 1991.

¹⁰ CA 392/80, *State of Israel v. Halevi* (Supreme Court) PD 35(2) 698.

¹¹ See also CC 2626/02, *State of Israel v. ibn Zakken Hanniya*, (Beer el-Sabe' Magistrate Court) decision issued on 29 September 2005.

¹² Section 176 of the Israeli Penal Law, 1977.

¹³ CC 4433/04, *State of Israel v. Khalil Debes*, (Nazareth Magistrate Court) decision issued on 20 March 2005.

¹⁴ CA 185/82, *Ahmed ibn Atiya Gudah v. State of Israel*, (Supreme Court) PD 37(1) 85.

¹⁵ CC 558/04, *State of Israel v. Kahmuz*, (Kiryat Shmona Magistrate Court) unpublished decision issued on 2 June 2005.

¹⁶ CC 1346/03, *State of Israel v. Odeh ben Rabahi*, (Kfar Saba Magistrate Court) decision issued on 21 March 2004.

arrangement. The courts have not ignored abuses of the principle of equality between a man and a woman involved in polygamous marriages,¹⁷ which is itself anchored in the Women's Equal Rights Law (1951). Not long ago, the courts declared that the prohibition on bigamy includes assuming an obligation for an important social goal – the defense of the first wife.¹⁸ Insodoing, the court recognized that it must protect the first wife from discrimination, inequality, and inferior status.¹⁹ Such verdicts have been based upon studies conducted among Arab Bedouin women, which found that: "The women have difficult feelings about life in a polygamous family. The causes of the frustration and hostility between the husband's wives are due to his discriminatory actions and each woman's jealousy about her standing."²⁰

In addition to the psychological and social consequences of polygamous marriages, that in and of themselves dishonor the women, the phenomenon is an abuse of the basic human rights of all women involved in the polygamous family unit. Marriages to a husband with another wife lead to the partial – if not complete – breakdown of the original family, including abuse of the right to a family life of the women involved. Further, polygamous marriages cause an infringement of the rights to privacy, intimacy, and autonomy of the family unit, matters that have been recognized as a basic right by the Supreme Court.²¹ In addition, a polygamous arrangement harms the social and economic rights of the women involved. Polygamous marriages lead to a division of the husband's income between the women and the children in the polygamous family unit, and violate the rights of the women regarding the husband's legacy.²² Polygamous marriages also infringe the rights of women to a minimal existence and honorable life. In this regard, the courts have dismissed a number of suits for "income support" submitted by women who live within the framework of a polygamous family unit, whether they are married or have common-law status. The policy of the courts is to dismiss claims for recognition of a woman as a "partner" for the purpose of receiving "income support" from the National Insurance Institute, and insodoing prevent her from receiving a pension that was actually intended, initially, to assist the petitioner to attain at least a minimal level of existence.²³

As an additional means of curtailing the phenomenon of multiple marriages, the court has applied Section 7 of the Nationality Law (1952), which allows for family unification following the awarding of Israeli citizenship to one of the marriage partners when only one of them previously had this status. In hearings regarding petitions for family unification in accordance with this law, the court automatically accepted a policy of the Ministry of Interior to reject applications in cases of polygamous marriages. Furthermore, denial of requests for family unification increased following the legislation of the Nationality and Entry into Israel Law (Temporary Order) (2003), which prevents Israeli citizens from submitting new requests for family unification that would acquire status in Israel for a wife or husband who resides in the West Bank or the Gaza Strip. The amendment also prevents awarding status in Israel to any person who did not submit a request for family unification by 12 May 2002. According to the state's argument, this law was legislated for security purposes: to prevent residents of the West Bank and Gaza Strip receiving status in Israel to assist in carrying out actions which endanger the security of the state. The law has been applied to "suspicious" groups within

¹⁷ See note 15, above.

¹⁸ See note 11, above.

¹⁹ National Insurance Institute (NII) 1447/00, *Abu Ashibah Odah v. NII*, (Beer el-Sabe' Regional Labor Court) decision issued on 10 February 2002.

²⁰ *Ibid.* The court based its decision on research by Majid Alathonah, *The Connection Between the Status of the Bedouin Woman and her Psychological State*; presented at the Conference on Bedouin in Memory of Itzhak Netzer, February 1993, issue no. 24.

²¹ CA 2266/93, *Anonymous v. Anonymous*, (Supreme Court) PD 49(1) 221.

²² Women Living Under Muslim Laws (2003). *Women, Family, Laws and Customs in the Muslim World*. London: Women Living Under Muslim Laws.

²³ See NII 1041/02, *Afawei Nof v. NII*, (Tel Aviv Regional Labor Court) decision issued on 16 November 2003.

the population, in many cases retroactively, and denies legal rights to citizens directly and explicitly on the basis of ethnicity. A petition submitted to the Supreme Court against this law argued, *inter alia*, that the law breaches the legal rights of a person to dignity, equality, and liberty, to conduct family life in accordance with personal choice, to privacy, and the right to due process.²⁴

The question I will focus on is: To what extent is this amendment used legitimately by the courts in order to curtail the phenomenon of polygamous marriages? This question is not theoretical, as the Supreme Court has recently begun to deny, vigorously, requests for family unification by reasoning that their acceptance would lead to the recognition of polygamous marriages. For example, in a decision issued on 26 October 2005, the Supreme Court rejected a petition for family unification submitted by an Arab citizen of Israel from Led (Lod) who is married to five different women, from whom he has 39 children, upon learning that these are polygamous marriages.²⁵ In other cases, the Supreme Court reaffirmed decisions of the Ministry of Interior to deny requests for family unification.²⁶ In rejecting petitions submitted against the Ministry of Interior, the Supreme Court stated on a number of occasions that acceding to a request for family unification involving an Israeli husband guilty of polygamy would provide indirect support – *de facto* – for the commission of the crime, as well as encourage it.

Indeed, the denial of requests for family unification on the basis of not sanctioning the husband's polygamous marriages does contribute to limiting the phenomenon and may well act as a deterrent to the commission of a crime. Yet, such a denial also infringes the basic rights of the woman on whose behalf the request for family unification was submitted. A woman who becomes the second or an additional wife of her husband does not usually enter into such an arrangement of her own free will. In some cases, she does not even know in advance about the type of family life that she is entering. In the case that a woman – who is not an Israeli citizen and on whose behalf such a petition for family unification has been submitted – has given birth to children by her husband, she is forced to return to her original family's home following the denial of her request. Her rights to a full, united and proper family life and autonomy of the family unit are infringed. In some cases, such a woman is forced to return to her parents' home alone and leave her children with their father in Israel. In any event, the harm done to the woman and her children can have enormous social and economic consequences, some of which may be impossible to deal with.

Hence, the aforementioned nationality laws – The Nationality Law (1952) and The Nationality and Entry into Israel Law (Temporary Order) (2003) – have become the most effective tools in the battle against the phenomenon of polygamy. They are even more effective than the principal tool originally intended to fight it – Section 176 of the Penal Law (1977). However, it should be remembered that the two tools have different purposes. In an attempt to curtail the phenomenon, the intent of Section 176 of the Penal Law is to prevent a crime of polygamy. The two nationality laws, which were enacted for “demographic” and “security” reasons, lead to the nullification of legal rights for those seeking to unify their families and realize the basic right to a family life. The use of one law for the purpose of realizing the intent of another law may advance the stability and certainty of the rule of law. However, the implementation of the nationality laws in order to realize the intent of the Penal Law is incongruous, and an act that suggests that extraneous interests may be involved in the implementation of the laws. My intention is not to criticize the attempt to curtail the

²⁴ See H.C. 7052/03, *Adalah et. al. v. Minister of the Interior* (case pending). For further information, see http://www.adalah.org/features/famuni/2003july_fam_uni_pet-heb.pdf.

²⁵ H.C. 5291/05, *Abed Alkarim Azbaragah v. Minister of the Interior*, unpublished decision issued on 26 October 2005.

²⁶ See also H.C. 5185/02, *Abu Aiyish v. Minister of the Interior*, unpublished decision issued on 11 May 2003; H.C. 5303/05, *Badarneh v. Minister of the Interior*, decision issued on 21 July 2005; H.C. 9015/02, *Abu Alkimah v. Minister of the Interior*, unpublished decision issued on 25 June 2003; H.C. 1126/02, *Abu Assah v. Minister of the Interior*, unpublished decision issued on 23 October 2002.

phenomenon of polygamy, but rather to state a reservation about granting approval to and authorizing racist and discriminatory laws by claiming that they are intended to deter commission of a crime associated with another law. Consistent and systematic implementation of different laws with different objectives for the purpose of limiting a negative phenomenon the nationality laws so as not to endorse the crime of polygamy, so they are obliged to fully apply the directives of the Penal Law, which was legislated explicitly for the purpose of preventing and deterring commission of the crime of polygamy.

In summary, as noted above, the phenomenon of polygamy violates the basic rights of women, and for this reason legal tools should be employed in order to eliminate it. Thus, in my view, it is invalid to claim in such cases that there should be no intervention by the state in a matter regarding the cultural rights of a minority group. Such a lack of intervention will serve to retain a violation of the rights of women living in a polygamous family unit. Control over the definition of group rights rests upon control exercised by one dominant group from within the cultural group. Thus, the definition and its use in language require the negation and neutralization of these power relations. Such a neutralization will lead to a moral determination according to which an infringement of women's rights is also an infringement of the rights of all members of a group – men as well as women.

This having been said, on the basis of this egalitarian principle, the approach of the courts that seeks to maintain inequality between Arab and Jewish citizens on the basis of nationality by means of racist laws should not be condoned, even if it applies terminology that appears to protect the rights of women. The prohibition on family unification harms Arab men and children, but particularly Arab women. The approach taken by the court in cases of family unification has two anchors: one consists of the two nationality laws discussed above, and the other is the approach that views polygamy as a protected cultural right. In practice, both rest upon the continuation of domination and perpetuation of discrimination. The first seeks to discriminate between Jews and Arabs, while the second seeks to discriminate between men and women. Neither is legitimate in my opinion. In contrast, the legitimacy of the Penal Law derives from its being a means of deterrence that seeks to advance a legitimate purpose – the protection of women from harm on the basis of the principle of gender equality, and from an infringement of their basic human rights. Needless to say, the Penal Law should be applied universally. That is, it should be applied to every person who commits the crime of polygamy without distinction on the basis of religion or nationality.