

POLYGAMY, UNILATERAL DIVORCE AND MAHR IN MUSLIM LAW AS INTERPRETED IN INDIA

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I. Introduction

The question of reform in the Muslim law as applicable in India has been increasingly debated over the last few years. Nowhere is reform so urgently needed as in the field of polygamy and divorce—and nowhere, consequently, has the debate been more furious. Muslims are, rightly, jealous of their privileges and concerned about the survival of their laws and customs. This sense of self-preservation rages all the more because, even twenty four years after partition, Muslims in India find themselves without a leader and have a sense of insecurity and fear. Whether justified or not, these feelings, which the majority of Muslims in this country share, cannot be lightly brushed aside—not only because no reform can be put through unless the community is carried with it, but because no reform is worthwhile unless the community wants to accept and act upon it. The purpose of reform, after all, is to benefit and raise the status of the Muslim community as a whole.

What makes the Muslims particularly sensitive to alterations in their personal law is the fact that the original source of Islamic law is the *Qur'ān*. Of course, this law greatly developed during the first four centuries after the birth of Islam; and of course no law on earth can remain completely static over the centuries; nevertheless, the basic reason why Muslims are so devoted to their law is none else but that it is founded on the *Qur'ān* and, next, on the *Sunna*. This paper invites the readers to examine the laws of polygamy, divorce and *mahr*, as presently applied in India, against the touchstone of the *Qur'ān* and *Sunna* themselves, with a view to showing that the *Qur'ān* and the *Sunna* in no way stand against what we speak of as reform in the Muslim personal law in India. On the contrary, such reforms

are obligatory on anyone who reads the *Qur'an* and the *Sunna* in the light of reason and sincerity.¹

II. Polygamy

As regards polygamy, the *Qur'an* says :

Of women who seem good in your eyes, marry one, two, three, or four; and if ye fear that ye shall not act equitably, then one only; . . . this will make justice on your part easier.²

In the same context, the *Qur'an* adds :

And ye will not have it at all in your power to treat your wives alike, even though you would fain do so.³

To most people, these two verses together are in themselves a pointer towards monogamy. However for those who feel that there is room for doubt, let us look at the kinds of polygamy that exist in India today and see if they conform to the Qur'anic demand for equity and equality.

First, and, according to most observers, the largest number of bigamous marriages found among Indian Muslims today are not cases where the husband lives with and supports two wives, which few can afford to do. In most cases of bigamy, the husband abandons his first wife (and frequently children as well) and goes off to marry another woman. Most of these people cannot be bothered with a divorce, and think nothing of leaving their wife legally bound to them. Frequently, also, the second wife knows nothing about the earlier marriage, nor of the children even though these may, at a later date, vitally affect her own rights of inheritance as well as the rights of her children. Can this behaviour, by any stretch of imagination, be justified by the two verses of the *Qur'an* quoted above? This is nothing but simple desertion, followed by bigamy. And yet, the present law of polygamy upholds it.

The second group of cases is of a different kind. Here the wife, finding the marriage unbearable, has left her husband and returned to her parents' home. The husband, in order to avoid paying the deferred *mahr*, or perhaps just out of spite, refuses to divorce her, but at the same time contracts another marriage. It does not seem to matter to such a husband that he is violating the following specific injunction of the *Qur'an* :

1. A detailed discussion of the means of achieving such re-interpretation of the texts as we have suggested is not intended in this paper. These are open to discussion. The author's personal view is that such a re-interpretation of law may be secured by two different means: first, by prescribing a standard form of marriage-deed and, secondly, through the tribunals established in different *jama'ats* of Muslims, who would be in a position, to enforce discipline within their group.

2. The *Qur'an*, IV : 3.

3. *Id.* at verse 129.

It is not allowed to you to be heirs of your wives against their will; nor to hinder them from marrying, in order to take from them part of the dowry you had given them. . . .but associate kindly with them. . .⁴

Under the present interpretation of the law, of course, there is nothing whatever to prevent a husband who has no means to maintain two wives equitably from contracting a second bigamous marriage.

The third group consists of wives who do put up with a husband acquiring a second wife and continue to stay with him. The reason for this is nothing but economic subservience. They do so because they can visualise no possible source of livelihood, for themselves and for their children, should they leave their unfortunate home. It would indeed be unreasonable to assert that the husband can be equitable and just in such a case.

A fourth group, not large but deserving mention (because it is particularly unjust against third parties and also because it leads to unnecessary ill-feelings between different communities) is where a person of another religious persuasion deliberately adopts Islam so as to contract a marriage which would not be permitted under his own system of law. It is hardly necessary to comment on such a fraudulent conversion. Obviously this is a loophole in the law which must be remedied.

We are left then with a small, a very small and diminishing, number of cases in which a woman may not object to her husband's contracting a second marriage because she is ill or too old or, for some other reason, would like another woman in the house.⁵ Those who defend the continuance of the right to polygamy do so keeping in view cases of this nature. We believe that such apologists are living in a bygone age. There was a time, perhaps, when it was less of a stigma to have a second wife in the house rather than some poor unmarried relative or a servant. Today, certainly, society would take the opposite view and it is inconceivable that any wife would consider it a hardship that her husband could not marry a second woman.

So much for the women's point of view. What about men? Would they lose some sacred and inalienable right under the *Qur'an* if they gave up the right to have more than one wife? We have before us the laws of those Islamic countries where the right to second marriages has been severely restricted, in the firm conviction that this is more in consonance with the spirit of Islam. Besides, and this seems to be the most important point, when a purely permissive right is given to you, as in the case of polygamy (and also unilateral divorce), you cannot possibly be considered un-Islamic if you give it up. At the most it may be said that you have been over-

4. *Id.* at verse 23.

5. The author herself has never met such a woman.

generous. And nowhere is it suggested that a man must marry more than one wife.

III. Unilateral divorce

We come next to the question of unilateral divorce. Marriage in Islam is a civil contract—so it follows that divorce is a comparatively simple matter. The ideas of arbitration and mutual agreement between spouses so far ahead of the times are put forward more than once in the *Qur'an* :

If ye fear a breach between man and wife, then send a judge chosen from his family, and a judge chosen from her family; if they are desirous of agreement, God will effect a reconciliation between them. . .⁶

And again :

And if a wife fears ill usage or aversion on the part of her husband, then shall it be no fault if they can agree with mutual agreement, for agreement is best.⁷

Unfortunately, however, it is not this kind of divorce that became current in Arabia, nor is it this which prevails in India today. What prevails, and has become almost synonymous with the word divorce in Muslim law, is unilateral divorce, *i.e.*, a *talaq* pronounced arbitrarily by a husband against the wife.

Let us see what the Prophet had to say about this kind of divorce. He warned his people saying :

The thing which is lawful but most disliked by God is divorce.

Look at this in conjunction with another *Hadith* :

That which is lawful is clear, and that which is unlawful likewise: but there are certain doubtful things between the two from which it is well to abstain.

Even though the *Qur'an* recognizes the right to divorce, it recognizes it only with numerous injunctions to observe justice and fair play, generosity and kindness.

There seems to be no real justification for the view, strongly held in India before the enactment of the Dissolution of Muslim Marriages Act, 1939 and held even today in certain circles, that women had no right to divorce in early Islam. The classical texts of Islamic law did recognize the validity of stipulations incorporated in marriage-contracts, the violation

6. The *Qur'an*, IV : 39.

7. *Id.* at verse 127.

of which would entitle the wife to get a divorce. Further, there is an *Hadīth* saying :

A woman who asks to be divorced from her husband without cause, the fragrance of the Garden is forbidden to her.

Obviously, then Muslim women were always entitled to ask for a divorce.

In India, the Act of 1939 has given Muslim women a statutory right to seek a divorce in several specific instances, *e.g.*, where the husband has not been heard of for more than four years or neglects or fails to provide maintenance for a period of two years. It also gives the right to divorce on any other ground (not specified in the Act) if recognized as valid by the Muslim law. These rights are however difficult and expensive to enforce, and howsoever aggrieved the wife may be it is not at all as easy for her to get a divorce as for the husband, who merely has to pronounce a few words.

Different sections of Muslims in India have found their own solutions to this unsatisfactory state of the law. The Khojas, under the enlightened leadership of their spiritual head, have their own marriage tribunals; and neither a second marriage nor a divorce is possible without recourse to these tribunals.⁸ In some Muslim families, the wife's right to divorce in specified circumstances is invariably incorporated in the marriage-deed.⁹ Also an increasing number of enlightened Muslims take recourse to registering their marriages under the Special Marriage Act 1954, thus showing that even such a step is in no way against the conscience of devout Muslims.

Once it is accepted that under Islamic law the wife does have a right to divorce, in certain circumstances, and also that the marriage-contract can be framed in any way the spouses wish, is there any obstacle to accepting the view that justice lies in men and women having equal rights in this matter? What is un-Islamic about it? If, as we have said, polygamy is a permissive right which anyone may renounce if he so chooses, unilateral divorce is even less than that. Not only has no Muslim been asked to indulge in unilateral divorce; it has, on the contrary, been specifically disapproved.

III. Dower

However much we may alter the laws of divorce, and even if we bring in equal rights between men and women, the dice will always remain heavily

8. This system, established under a decree of H.H. the Agha Khan, is very similar to reconciliatory proceedings interpolated into cases of divorce and polygamy by legislation in Pakistan and Iran *etc.* See Tahir Mahmood, *Family Law Reform in the Muslim World*, 154-57, 250-51 (1972).

9. Since 1929 this is being done in the author's own family, which is a follower of the Sulaymani Bohra creed.

laden against women so long as the Muslim law makes no adequate provision for maintenance after divorce. It is well known that a divorced wife's right to maintenance is limited to a short period called 'idda. This greatly increases the importance of dower (*mahr*).

Mahr is a pivotal concept in the Muslim law of marriage. As is well known, it may be either prompt (*mu'ajjal*) i.e., paid at the consummation of marriage, or deferred (*muwajjal*) i.e., payable at the termination of marriage either by husband's death or earlier by divorce. Unfortunately the idea of *mahr* in India is confused, perhaps because it has been translated as dower; though dowry means something very different from *mahr*. Some people, regarding it as shameful the way in which the bride is 'bought', agree only to a token *mahr*. This is wrong. It should not be forgotten that *mahr* is meant to provide a livelihood to the wife and her children in the event of divorce, if any, or to supplement the widow's share in her husband's estate after his death.

There is, however, one difficulty. In the early days of Islam, wealth consisted of lands, goats, camels, and some other tangible commodities. It was, therefore, possible to decide on a fair portion of these to be given to the bride. Today, the main asset of young men is not the capital they possess, but their earning power. Few, indeed, would be able to settle a capital sum, on their brides, which would be large enough to provide sufficient income in the case of a divorce. In such cases, it seems rational that *mahr* should not be a capital amount, but a part of the husband's income at the time of divorce. There is no dearth of quotations from the *Qur'ān* which would justify an interpretation that the amount of *mahr* need not be fixed at the time of marriage, but may depend on the husband's financial position at the time of divorce. For instance, the *Qur'ān* says :

Let him who hath abundance give of his abundance; let him, too, whose store is scanty, give of what God has vouchsafed to him. God imposes burdens only according to the means which He has given.¹⁰

Again :

And for the divorcee let there be a fair provision: this is a duty on those who fear God.¹¹

Unfortunately, in a vast majority of cases in India, a provision for the payment of *mahr* out of one's income will be unenforceable. Very often, there will be no income to speak of from which it could be paid. But the law, in any case, ought to be just.

10. The *Qur'ān*, LXV : 7.

11. The *Qur'ān*, II: 242.