

STATUS OF WOMEN AND SETTLEMENT OF FAMILY DISPUTES UNDER ISLAMIC LAW

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I. Nature of certain aspects of Islamic law explained

THE PURPOSE of this paper is, first, to explain the true nature of certain legal institutions in Islam affecting the status and rights of Muslim women and, secondly, to suggest the enactment of a law providing to Muslim women better facilities of redressing grievances against their husbands.

Polygamy

We will first take up polygamy which, it is alleged, is most prejudicial to women. Under Islamic law the principle that a person can have as many as four wives at a time is subject to the qualification that he cannot marry more than one wife if he cannot do justice between them. The *Qur'ān* says :

If ye fear that ye can do justice between women, then marry what seems to be good to you of woman, by twos, or threes, or fours; and if ye fear that you cannot be equitable, then only one.¹

The pre-Islamic absolute freedom of a man to take any number of wives with no restrictions whatsoever was, thus, curtailed by the *Qur'ān*.

During the recent past, this injunction of the *Qur'ān* has been interpreted by some persons as one practically restricting bigamy. This is not something novel. Even in the third century of Islam during the reign of Caliph al-Ma'mūn, the *Mu'tazila* believed that, under the aforesaid verse of the *Qur'ān*, monogamy was the rule and bigamy was absolutely prohibited.

In all the pre-Islamic civilizations polygamy was a recognized institution. Indians, Babylonians, Persians, Israelites and Athenians, all prac-

1. The *Qur'ān*, IV : 3.

tised polygamy with no restrictions whatsoever.² For the first time, the *Qur'an* restricted the number of wives to four with the condition of equal justice between co-wives.

Of course, polygamy is not the normal condition of Muslim society. The *Qur'an* allowed it under restrictions only to meet those contingencies of life wherein polygamy alone could check incontinence, which Islam would not allow in the slightest degree. An absolute denial of the permission of polygamy would in fact be a lacuna in the all-embracing legal system which Islam sought to provide to its followers. One who wants to see the results of an absolute denial of bigamy should turn to the contemporary western countries which professedly stick to monogamy but where, at the same time, there exist 'war baby-houses' and 'foundling-homes'. Islam had visualised these conditions fourteen hundred years ago and, therefore, it restricted polygamy providing ample safeguards to the co-wives.

Divorce

Among many nations of antiquity an unrestricted power of divorce was exclusively vested in the husband, and the wife was, under no circumstances, entitled to claim a divorce. Among the Athenians as well as the early Romans the husband's right to repudiate the wife was as unrestricted as among the ancient Israelites. At the time of the Prophet's appearance, divorce was very common among the Jewish tribes of Arabia and among the pagan Arabs. The Prophet restrained the power of divorce possessed by husbands. He gave women the right of obtaining divorce on reasonable grounds. At the same time he warned that divorce was "most detestable" among legally permitted things. The permission of divorce in Islam is to be interpreted in the light of this pronouncement of the Prophet. Thus, some Muslim jurists regard a unilateral divorce as really prohibited, except in extreme cases, like adultery of wife.

The *Mu'tazila* considered divorce to be not permissible without the sanction of a judge. Kamāluddīn ibn Humām, too, held that divorce was permissible only in rare cases. It is stated in an authentic legal text that the permissibility of divorce arises from the necessity of release from the marital tie in certain cases and, therefore, when there is no reason whatsoever, there is no room for release, and if divorce is given without any reason, that is stupidity and ingratitude to God. So, if there is no legal cause for divorce, it must be considered unlawful, for God says in the *Qur'an* that if your women are obedient to you, you must not seek separation from them.³ Ibrahim Halabi says that law gives man primarily the power of dissolving the marriage, if the wife by her indocility or bad character renders the married life unhappy; but in the absence of serious reasons no

2. Ameer Ali, *The Spirit of Islam* 222-26 (1904).

3. 2 *Radd al-Muhtār*, 682.

man can justify divorce either in the eyes of religion or under law. If he abandons his wife or puts her away due to caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously.⁴

Thus, divorce is permitted only when the wife by her conduct causes injury to the husband or happens to be impious. It may be obligatory on him when the husband cannot fulfil his duties, *e.g.*, when he is impotent. This nature of the Islamic law of divorce is explained by Sir Abur Rahim as follows :

It is a maxim of Muhammadan jurisprudence that the law cannot deprive any one of his rights except for hostility to the authority of law. But if the exercise of a particular right is likely to lead to abuses the law would guard against such a contingency by imposing conditions and limitations. There are certain limitations imposed by the law upon the right of the husband to dissolve the marriage. The object of these rules is to ensure that the husband was not acting in haste or anger and that separation became inevitable in the interests of the husband and the wife and their children.⁵

To the wife, the law of Islam gave the right of *khul'*, by exercising which the wife could easily repudiate an unwanted marriage. Further, in India the Dissolution of Muslim Marriages Act 1939 has given statutory form to the *Malikī* principles relating to wife's right to seek divorce through a court. Its provisions favourably compare with the Hindu Marriage Act under which the procedure for obtaining divorce is extremely cumbersome and requires an interval of at least three years from the date of marriage.⁶

Status of women

Under Islamic law women have a legal position superior than that of her counterparts under other religions.

As soon as a woman comes of age, the law of Islam vests in her all the rights of an independent human being. She is entitled to inherit her parents' and other relatives' property along with male heirs; the difference in the proportion of male and female shares being founded on their relative circumstances. On her marriage, she does not lose her individuality, nor she ceases to be an independent separate member of society; and her existence does not merge in that of her husband. The doctrine of coverture is not recognized in Islam. Her property remains hers in her individual right. She can sue and be sued. She can alienate or devise her property

4. As quoted by Ameer Ali, 2 *Mohammadan Law*, 531 (1908).

5. Abdur Rahim, *Mohammadan Jurisprudence*, 335 (1911).

6. S.14.

without asking the leave of her husband; she can act as an administratrix, executrix or trustee. She can appoint her own attorney and delegate to him all the powers she herself possesses. She can enter into valid contracts with her husband and others. If she is ill-treated, she has a right to have the marriage-tie dissolved. She is entitled to pledge the credit of her husband for the maintenance of herself and her children. The Prophet of Islam undoubtedly decreed to women rights which they had never possessed before; he allowed them privileges the value of which will be more appreciated as time advances. He placed them on a footing of perfect equality with men in the exercise of all legal powers.

II. Settlement of family disputes

Many of the sufferings of Muslim women in India are attributable not to non-availability of suitable provisions under the Muslim law but to the fact that the procedural laws in our country are very cumbersome, so much so that if a Muslim wants to have any relief under the substantive provisions of Muslim law, either it cannot be secured at all or becomes infructuous by the time it is granted. The *Qur'an* prescribes an ideal procedure for the settlement of family disputes:

If ye fear a breach between the twain (the man and wife) appoint one arbitrator from his family and one from hers. If they desire reconciliation, God will make them of one mind.⁷

On the basis of this Qur'anic verse, the *Mālikī* school of Islamic law laid down principles for the settlement of all matrimonial disputes by arbitrators representing the parties. According to these principles the award of the arbitrators is to be confirmed by a judicial decree.

III. Draft of the proposed "Muslim Family Disputes Settlement Act"

On the basis of the relevant verses of the *Qur'an* and the principles of the *Mālikī* school, the author suggests the enactment by Parliament of an Act prescribing an easy procedure for settlement of family disputes among the Muslims. It is expected that the proposed law will greatly help ameliorate the condition of married couples in the country. Its draft follows.

1. Without prejudice to the other remedies which may be available to her under any other law for the time being in force,⁸ a Muslim wife can make an application to the district judge for the formation of an arbitration council before which she can make a petition for the following purposes:

(i) realization of dower, prompt or deferred;

7. The *Qur'an*, IV: 35.

8. *E.g.*, under the Dissolution of Muslim Marriages Act, 1939.

- (ii) payment of maintenance by the husband in accordance with his obligation under Muslim law in that respect; and
- (iii) dissolution of marriage on one or more of the following grounds:
 - (a) the spouses are indifferent to each other;
 - (b) the man, having more than one wife, does not treat them equitably and justly;
 - (c) the husband does not provide maintenance to her and her children;
 - (d) the husband treats her with mental or physical cruelty;
 - (e) the husband does not perform his marital obligations;
 - (f) the wife has exercised option of puberty,
 - (g) the husband leads an immoral life, disposes of her property, prevents her from exercising legal rights over her property or obstructs her in performance of her religious profession or practice;
 - (h) the husband has embraced some other religion;
 - (i) the husband is impotent, has become insane, or is suffering from a virulent venereal disease or leprosy; or
 - (j) whereabouts of the husband are not known.

2. On receiving such an application, the district judge shall constitute an Arbitration Council within two weeks. The chairman of the council will be an advocate of not less than ten years' standing at the bar or any other person well conversant with the principles of Muslim law, preferably a Muslim of the sect to which the parties belong. Besides the chairman, the council will have two members—one nominated by the wife and the other by the husband or his legal representatives.

3. When a petition for dissolution of marriage is made, the Arbitration Council shall make efforts to effect reconciliation between the spouses. And if the ground on which dissolution of marriage is claimed is insanity, leprosy, impotency or a virulent venereal disease on the part of the husband, the council shall defer its decision for a reasonable period during which the alleged ailment may be expected to be cured.

4. If the council fails to effect a reconciliation, or the period referred to in section 3 lapses with no change in the conditions, the council may dissolve the marriage.

5. While making an order for the dissolution of marriage, the council shall also make suitable orders regarding the maintenance of the woman and her children. The amount of maintenance shall be fixed by the council in accordance with the status of the parties and in no case shall it exceed half of the total income of the husband.

6. Every direction, decree or order of the council shall have the force of a decree of a civil court and shall be executed as such.

7. The arbitration council shall have power to create a charge for the payment of maintenance or dower over the immoveable property of the husband; and such a charge would be enforceable under section 100 of the Transfer of Property Act, 1882.

8. An appeal shall lie from any direction or order of the council to the district judge having jurisdiction in the matter. A revision shall lie to the High Court against the judgment of a district judge.

9 The council shall complete the proceedings as expeditiously as possible; it will have authority to take evidence, summon witnesses, issue commissions and make inspections; and it shall follow the same procedure as the civil courts.

10. No decree of a court would be necessary to dissolve a marriage in a case of the exercise of option of puberty by a Muslim married girl given in marriage by her father or any other guardian before she attained the age of fifteen years, provided that she repudiates the marriage after attaining the age of eighteen years and before the marriage is consummated.

11. It shall be lawful for the parties to a marriage-contract to include in it a stipulation conferring the right of divorce on the wife exercisable in specified circumstances; and the wife shall be entitled to the exercise of the right in accordance with the terms of the agreement. Such a stipulation in the marriage-contract shall be binding on the parties notwithstanding anything to the contrary contained in the Contract Act 1872, the Evidence Act 1872 and the Registration Act, 1908 or any other law.

12. (a) It shall be lawful for the wife to refuse to perform marital obligations if any portion of the prompt dower is not paid, notwithstanding that the marriage has been consummated; and on the application of the wife, the arbitration council shall make an order for the immediate payment of such dower.

(b) When no details of the mode of payment of dower are specified in the marriage-contract the entire amount of the dower shall be deemed to be prompt and payable on demand.