

PROTECTION OF WOMEN IN THE MARRIAGE CONTRACT: AN EXPLORATION

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INTRODUCTION

Marriage under Muslim law is primarily a contract although it necessarily involves religious and social components. This article deals with safeguards for women, which may be inserted, in the contract of marriage. The inclusion of such safeguards operates to give the woman easier access to divorce as well as protect her other rights. Their absence, when the woman wishes to end the union, may involve her in prohibitive costs and lengthy procedures, or at worst condemn her to continue a distasteful relationship with no means of escape. She may also be deprived of her just demands for maintenance and dower.

The protective mechanisms, which may be inserted in the contract of marriage and the view of religious law regarding such insertions, are discussed in the following pages. Relevant legislative and judicial reforms are also briefly touched upon. The article is based on the argument that safeguards for women at the formative stage of the marriage are crucial. Unilateral exercise of the husband's right of divorce or the threat of such divorce by the husband on one hand and, on the other hand, the woman's inability to escape an unhappy marriage are the major causes of abuse and suffering for the Muslim wife. It is therefore necessary to try to discover ways and means to obviate such problems that a married Muslim woman may face. Since, as mentioned before, Muslim marriage is a civil contract: "the wife is entitled to protect herself at the hands of her husband in case of their future difference."¹

These precautionary measures, if included at the proper time, may go a

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¹ *Mohd. Zaman vs Irshad Begum* 1967 PLD 1104.

long way towards alleviating the sufferings of a Muslim wife.

DISSOLUTION OF MARRIAGE UNDER MUSLIM LAW

The husband's superior right of *talaq/talak*:

The death of either spouse terminates the marriage.² Apart from death, a Muslim husband has the unilateral right to dissolve the marriage by divorce at any time he wishes. This is the well-known right of the husband, called the right of *talaq*. Although divorce is considered by Islam to be distasteful, nevertheless it is recognised as a necessary evil—and the tools of this evil are placed primarily in the hands of the husband. Muslim jurists regard “the unjustified repudiation of an unoffending wife as a sin” but nevertheless to be legally effective.³

While Muslim law allows the husband wide powers to pronounce divorce and he may do so without sufficient cause and at his will or whim it seeks to protect the wife by requiring the divorcing husband to pay the deferred dower. He may: “after fulfilling all the conditions of the marriage contract, by his unilateral act dissolve it by means of *Talaq*.”⁴

In the case of *talaq*: no consent is required by the wife; and the pronouncement or declaration of *talak* is extra-judicial, in no way subject to any external check.⁵

THE WOMAN’S RIGHTS OF DIVORCE

The Muslim woman's rights regarding divorce are limited and depend to a large extent upon her husband. The wife may dissolve the marital tie if both she and her husband agree, i.e., by mutual consent or at her own behest.

a) *khula* and *mnubaraat*: Under Muslim law, the wife has the right to seek a *khula* or *mnubaraat* form of divorce. In the case of a *khula* divorce, the desire to separate or sever the marriage knot comes from the wife's side, and the husband agrees to release her in exchange for some consideration, usually the dower (either the entire amount or if prompt dower has already been paid the deferred dower).. On the other hand, when both husband

² Hodkinson, Keith, Muslim Family Law; London et al., 1984, at p. 219.

³ Anderson, J.N.D., Islamic Law in the Modern World, Connecticut, 1959, at p. 52.

⁴ *Sayeeda Khanum vs Samir* 4(1952) DLR 134.

⁵ Pearl, David, A Textbook on Muslim Personal Law, 2nd edition, London et al at, 1987, at p. 100.

and wife wish to end the marriage, dissolution takes the form of *mubaraat*. Therefore:

if the desire to separate emanates from the wife, it is called *kehul'*; but if the divorce is effected by mutual aversion (and consent), it is known as *mubara'at*.⁶

b) *Faskh* or dissolution through the Court:

Faskh is dissolution of marriage through the mechanisms of the Court, i.e. judicial divorce. *Faskh* means abrogation or termination and is the dissolution or rescission of the marriage contract by judicial decree.⁷ The *Dissolution of Muslim Marriages Act, 1939* lays down certain grounds under which a woman may obtain a dissolution of marriage.⁸ This Act marked the first step towards reform in such laws in the Indo-Pakistan subcontinent.⁹ Before its passing:

the notion of judicial annulment of marriage at the instance of a muslim wife was not recognised by the various schools of Law except for the Maliki school.¹⁰

Classical *Hanafi* law denied women the right to obtain dissolution of marriage by the decree of the court. According to Pearl¹¹ under *Hanafi* law the only ground upon which a woman may obtain a judicial termination of marriage occurs when she can prove to the court that her husband is incapable of consummating the marriage. This means that the courts, before 1939, following the *Hanafi* interpretation, denied women the rights of dissolution available to them under the *Shariah*.¹² After the passing of the Act of 1939, the right of judicially obtaining a divorce was granted to all

⁶ Fyzee, Asaf A.A., Outlines of Muhammadan Law; London, 1964, at p.162. See also, Pearl, David, "Within the Limits Prescribed by Allah" in 3:4 (1970) South Asian Review, pp. 313-322.

⁷ Halim, M.Abdul, Social Welfare Legislation in Bangladesh, Dhaka, 1993, at p. 31.

⁸ After the passing of the *Dissolution of the Muslim Marriages Act, 1939*, *Hanafi* women, as well as women belonging to other schools of Muslim law, are allowed to apply to the Court for a dissolution of their marriage based on any of the grounds mentioned in the Act. These include the husbands failure to maintain his wife, husband missing for a certain period or his imprisonment for a certain term as well as grounds such as his impotency or serious disease. Cruelty which may be mental as well as physical is also ground for dissolution under the Act.

⁹ Feroze, Mohammad Rashid, "The Reform in family laws in the Muslim World", 1:1 (1962) Islamic Studies, pp.102-130 at p.108.

¹⁰ *Ibid.*, at p. 109

¹¹ *Supra* note 5, at p. 130.

¹² *Supra* note 6, at p. 169.

Muslim women irrespective of which school she belonged to. The above Act is an example of how successful reforms, deemed contrary to Muslim law, became possible when undertaken by a colonial power.

THE RIGHT OF DELEGATED DIVORCE: *TALAQ TAWFEEZ*

As we have seen before, if both the husband and the wife wish to dissolve the union, the dissolution may take the form of *Khula* or *Mubaraat*. The right of the wife to obtain divorce in either of the two ways may be abused by the husband. Those who wish to divorce their wives may provoke them into asking for one of these forms of dissolution in order that they may use the dower or other sum to obtain another wife.¹³ On the other hand the husband may refuse to consent to a dissolution or if he does so consent to release the woman from the marital tie, she may lose the security of her dower by having to give it up as consideration of the husband's agreement. Thus the wife may be placed in a position of having to buy her way out of an unhappy union.¹⁴ As Pearl¹⁵ rightfully points out,

Only an extremely strong willed woman would be able to overcome the financial burden and the social denigration involved in seeking the husband's consent for a divorce.

Under the *Dissolution of Muslim Marriages Act, 1939*, the wife may go to court to obtain a judicial-divorce. As in the case of other legal rights, this involves the women in complicated and expensive legal processes, which few women have the financial or other capabilities to undertake. Moreover in a *purdah* society like Bangladesh, few women have the courage to appear in court and prove allegations against her husband in order that the court may pass a decree of divorce. According to Carroll¹⁶, a woman, in order to take advantage of the above Statute, not only has to be able to prove one of the recognized grounds but also has to be able to institute litigation which may go on for several years.

In view of the above, certain devices were developed by early jurists designed to give at least some protection to a Muslim wife in this matter of divorce, whether at her discretion or her husband's.¹⁷ A woman may have

¹³ Supra note 3, at p. 52.

¹⁴ Carroll, Lucy, "Talaq-I-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Wife", 16.2 (1982) *Modern Asian Studies*, pp.277-309 at p.277.

¹⁵ Pearl, David (1976). "The Legal Rights of Muslim Women in India Pakistan and Bangladesh" in *New Community* 6,68 (1976), pp68-74 at p.69.

¹⁶ Supra note 3, at p.278.

¹⁷ Supra note 3, at p. 56.

the right of divorce assigned to her: the husband's right of *talaq* may be delegated, if he wishes, to the wife at the time of the marriage or by way of pre-nuptial or post-nuptial agreement between the parties. This gives the wife the right of divorce by delegation or *tafweez al talaq* or *talaq-e tafwid*. The terminology used to refer to the right of delegated divorce differs from author to author. Fyzee¹⁸ has used the term *tafwid* while the *Hedaya* speaks of divorce or *talaq/talak* by *tafweez*¹⁹ The *Hedaya* defines the right of *tafweez al talaq* as:

where the husband delegates or commits the pronouncement of divorce to his wife, desiring her to give the effective sentence...²⁰

Fyzee²¹ calls it the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of the court.

The right of delegated divorce is thus an important safeguard for the woman and certain grounds may be specified upon which she may take advantage of the delegated authority. The delegation of authority may be either conditional or unconditional. The conditions however must not be opposed to public policy or the principles of Muslim law.

In the case of *Aklima Khat Un vs Mobibur Rahman And Others*²² the *kabin nama* gave the wife the right to pronounce divorce if prompt dower was not paid. The wife pronounced divorce after her demand was not met. It was held that such pronouncement was not against public policy and the principles of Muhammadan law. Therefore the wife can use her delegated power of divorce on the failure of her husband to pay prompt dower if it is so stipulated.²³

In the case of *Shamsun Nessa vs Yakub Mia* it was held that:

Where there is an express stipulation as to the wife's right to divorce the husband on the basis of delegated power given to her by her husband in the event of not living with her in her parents house, the wife is entitled by virtue of the delegated power to dissolve the marriage tie. ²⁴

The wife can also resort to *talaq-i-tafweez* to separate herself on her

¹⁸ Supra note 6.

¹⁹ Hamilton, Charles (translation), The Hedaya: A Commentary on the Mussalman Laws, 2nd edition, , London, 1876, at p.87.

²⁰ Ibid.

²¹ Supra note 6, at p. 159.

²² 1963 PLD Dacca 602.

²³ *Abdus Sukur vs Machuma Khatun* 7 (1955) DLR 1955 451.

²⁴ 8 (1956) DLR 19567 601.

husband's failure to pay maintenance in terms of the *kabin nama*.²⁵ The delegation to the wife of the right to divorce, or the insertion of conditions in the marriage contract, depends entirely on the wishes of her husband, and/or his family. Therefore, the right of *talaq* of husband and wife cannot be equal. In the case of *Mst. Resham Bibi vs Muhammad Shafi* the Court clearly stated:

Talak is the power given by Islam to the husband. The wife is not vested with such a power except in the case of *tawfeez*, i.e. delegation by the husband²⁶

Certain conditions may be specified as necessary before the woman can exercise the right of *talaq* delegated to her. Conditions may include the second marriage of the husband, non-payment of dower, non-payment of maintenance or ill-treatment of the wife. The problem arises when the wife exercises her right on the ground that the specified contingency has arisen, but the husband disputes her claim. The conditions attached to the delegation needs to be fulfilled stringently. In all cases where a power to grant *talaq* has been given conditionally:

... the condition ought to be fulfilled, literally and fully, before the power can be exercised. In other words, it has to be tested whether the condition exercised in the circumstance of the case is one which is reasonable and not opposed to the policy of the Muhammadan Law.²⁷

Moreover, if the woman's power of divorce is made contingent on several conditions, then the power can only be exercised upon the fulfillment of all the conditions or contingencies. This means that if the power of pronouncing *talaq* is made dependent on several conditions all of them must be fulfilled before the power can be used.

The pronouncement of *talaq* by the wife in the exercise of her *tawfeez* may therefore be challenged by the husband on the ground that the conditions required have not been fulfilled. In several cases for example, where the right of *talaq* by *tawfeez* was sought to be used by the wife on the ground that maintenance was not paid, the courts held that the right to get maintenance is dependant primarily on the wife's performing her marital duties or upon her conduct²⁸ Therefore in order to take advantage of the right of delegated divorce, all the conditions attached to the delegation must, as a pre-requisite, be completely fulfilled.

²⁵ *Safura Khatun vs Osman Gani Mulla* 9 (1957) DLR 1957 455.

²⁶ 19 (1967) DLR (WP)1967 104.

²⁷ *Ahmed Ali vs Sabha Khatun* 1952 PLD Dacca 385; 4 (1952) DLR 613.

²⁸ *Ibid.*

The right may legally be given unconditionally although in Bangladesh, following the pattern of the subcontinent, the conditional *talaq-i-tanfīez* is more common. Unconditional delegation of the right of divorce is valid according to Muhammadan law.²⁹ It is only when the right of delegated divorce is given unconditionally that the rights of the husband and wife become equal. Otherwise, in practical cases the exercise by the wife of her right may involve her in costly and time-consuming legal battles. Although the husband may not contest the divorce given by the wife, it often happens that he institutes a suit against the wife for restitution of conjugal rights.

It must be remembered that it is in the *khula* form of divorce that the women may be required to give up her dower demand as *imad* for the husband's consent. There exists some confusion as to the woman's right to dower when the dissolution is by way of her using her right of *talaq-i-tanfīez*. The woman is actually entitled to *mahr* or dower in the same manner as if the divorce had been pronounced by the husband. Therefore when the woman possesses the right of *talaq-i-tanfīez* and uses it, she is in a more secure position, at least in theory, than if her husband had consented to the dissolution in the *khula* form of divorce.

In 1961, section 8 of the *Muslim Family Laws Ordinance 1961* laid down that where the right of divorce has been duly delegated to the wife and she wishes to exercise it, or where the wife dissolves the marriage by any manner (including dissolution by a decree of the court), the wife is required to give notice in writing to the relevant authority and supply a copy to the husband in the same manner as the husband is required to do, if he is the one pronouncing divorce. The wife is deprived of her right of delegated divorce if the right has been given orally and not by way of a written and registered document.³⁰

The right of *talaq-i-tanfīez* may be an important safeguard for women although it can in no way be called equal to the right of the husband as regards *talaq*. Nevertheless a woman whose contract of marriage contains this right, will definitely find it easier to escape from an undesirable union.

²⁹ *Aklima Khatun vs Mahibur Rahman* 14 (1962) DLR 1962 476

³⁰ Huda, S, "Born to be Wed-- Bangladeshi Women and the Muslim Marriage Contract", unpublished Ph.D. Thesis, University of East London, 1996, particularly Chapter 8.

STIPULATIONS IN THE MARRIAGE CONTRACT

The insertion of conditions or stipulations in the marriage contract, whereby the wife lays a own certain conditions which have to be fulfilled, may be another protection for the married woman. The wife may reserve not only the right to seek divorce, but also a right to be maintained or to be paid compensation on the conditions or stipulations being breached.

On the face of it, the term 'stipulations in the marriage contract', which usually entitles the wife to divorce herself on the happening or omission of certain events, seems to be the same as the power of delegated divorce. However, the non-performance of a stipulation inserted in the marriage contract may grant "the wife rights other than divorce".³¹ In appropriate cases it may enable the wife to defeat the husband's suit for restitution of conjugal rights or to claim maintenance from her husband while refusing to live with him.³²

According to Tyabji, a stipulation in the marriage contract for divorce, is not a delegation of the husband's power because according to him:

At the time the agreement is made the man is not the husband of the woman — but about to become her husband. The stipulation consequently takes effect as part of an independent contract to which the persons who subsequently become husband and wife are both parties.³³

The various schools of Muslim law hold differing views as to the legality of inserting such conditions. Although the courts have reiterated time and again that marriage under Muslim law is a contract, whether like other contracts, stipulations or conditions can be attached to the contract is unclear. Engineer opines that:

Since marriage is contractual in Islam either side can validly lay down certain conditions. It is technically known as *Khayar al-shart* (choice to put conditions).³⁴

The *Hanafi* school does not recognise the validity of stipulations inserted in the marriage contract. Neither do the *Malikis* and the *Shafis*. According to the above schools, such stipulations are void unless they are supported by 'some express authority or merely reinforce the normal

³¹ Supra note 14.

³² Ibid.

³³ Tyabji, Faiz Badruddin, *Muslim Law*, 4th edition, Bombay, 1986, at p. 156.

³⁴ Engineer, Asgar Ali (1992). *The Rights Of Women in Islam*; IBS Buku Sdn Bhd, Selangor Darul Ehsan at p. 113.

effects of marriage'.³⁵ They hold that:

. . . the divine Lawgiver had prescribed the legal effects of a contract of marriage and that these were not subject to variation at the whim of the parties.³⁶

The *Hanbalis* on the other hand, though generally the more orthodox school of thought, support the inclusion of stipulations in the contract as valid and enforceable. The *Hanbali* school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city or will not take her along on a journey or that he will not take another wife, the conditions and the contract are both valid and must be fulfilled. In the event of the stipulations being violated the *Hanbali* wife can dissolve the marriage contract.³⁷

According to the Hanbalis all stipulations which are not themselves prohibited and not manifestly inconsistent with the nature of marriage are valid and enforceable.³⁸

The *Hanbalis* therefore recognise the validity of any stipulation in a marriage contract by which a husband undertakes not to do something which the *Shariah* normally permits but does not require as part of the essence of marriage.³⁹

Normally the conditions which are sought to be inserted are those which are likely to alleviate the position of women. It is necessary therefore to find out whether or not the insertion of these conditions is really disallowed by the *Hanafi* school; whether in spite of this such stipulations have been accepted or whether it is merely another way to stop the granting of rights to women which is perceived as diminishing the rights of men. As Fyzee⁴⁰ states, it is difficult to lay down with precision the rules regarding the insertion of stipulations since some ancient jurists particularly of the *Hanafi* school were not favourably inclined to allow freedom of contract in marriage. However as the state law of the subcontinent stands,

³⁵ Coulson, N.J. (1957). "Reforms of Family Law in Pakistan" in *Studies Islamica*, Vol. VII, 1957; pp. 135-155 at p. 140.

³⁶ Anderson, J.N.D. (1975). *Islamic Law in the Modern World*; (reprint); Greenwood Press, Connecticut at p.49.

³⁷ Mughniyyah, Allamah Muhammad Jawad, IV:I (1986) "Marriage according to five schools of Islamic Fiqh" (translated by Husayn, Mujahid) in *Al-Towhid* pp.49-72 at p.54.

³⁸ *Supra* note 35, at p.140.

³⁹ *Supra* note 36, at p. 115. See also Mughniyyah, *supra* note 37.

⁴⁰ *Supra* note 6, at p.126.

an agreement designed to regulate marital relations has been favoured by the courts since they are in consonance with the Prophet's injunctions.⁴¹

The *Hadith* clearly states that the Prophet was in favour of such conditions. The *Sahib Al-Bukhari* reports:

Umar said: The rights are decided by the conditions (stipulated during the wedding), And Al-Miswar bin Makhrama said: The Prophet mentioned his son-in-law and praised him highly as a son-in-law, He said "whenever he talked to me he told me the truth and whenever he promised me he kept his promise."⁴²

Again, according to the *Hedaya*⁴³, if a man marries a woman for a thousand *dirhams* on the condition that he is not to marry during his subsisting marriage and he fulfils this condition, the woman is allowed only the promised dower. On the other hand if the husband 'should infringe the condition' by marrying another wife she shall be entitled to her proper dower.⁴⁴ Therefore the principle is that she is entitled to *more* than the promised dower if the husband fails to fulfil the condition agreed 'because he has acceded to a condition on behalf of the woman which was advantageous to her'.⁴⁵ According to Abu Hanifa a man marrying a woman on the condition that he is to pay her monthly a certain sum as maintenance is valid.⁴⁶ Authors however agree that there are certain conditions, which would be void, although the contract of marriage itself would remain valid, and not be affected by the illegality (in their opinion) of the condition attached. For example according to Sircar,⁴⁷ conditions such as the husband shall not take another wife, that he shall not make her a participator of his inheritance or supply her with maintenance shall be held void. An illegal condition annexed to a

⁴¹ Ibid.

⁴² Bukhari, The Translation of Meanings of Sahih Al-Bukhari, Arabic to English; by Dr. Muhammad Muhsin Khan; Islamic University, Al-Medina Al-Munawara, 1986, at p.61.

⁴³ Supra note 19, at p. 49.

⁴⁴ Proper dower is the dower which is calculated according to the status of the bride's family, her qualifications and previous amounts of dower paid for other members of her family.

⁴⁵ Supra note 19, at p. 49.

⁴⁶ Mahomed Yusoof Khan, Mahomedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors, according to the Soonees; Tagore Law Lectures 1891-92, vols I and II by, reprint, Allahabad, 1984 at p. 27.

⁴⁷ Sircar, Shama Charan, The Muhammadan Law, Tagore Law Lectures 1874, Calcutta, 1875, at p. 363.

marriage does not cancel the marriage, but is itself void.⁴⁸ Thus, an agreement between the husband and wife that the survivor, in case of death of either, would not inherit from each other is invalid.⁴⁹

Tahir Mahmood comes to the defence of the legitimacy of stipulations in the marriage contract by saying that it is only at the formative stage that the contractual element is attached to the marriage contract. Once the marriage comes into existence it takes the form of a sacred covenant and the man and the woman may: "mutually settle their own terms for the entire duration of the partnership and in respect of all its aspects and phases."⁵⁰

Wilson⁵¹ has mentioned several stipulations 'which may not be embodied in a contract of marriage'. These include conditions such as those stipulating that the wife need not live with her husband; or those declaring the marriage to be temporary only. Again any condition that one party shall be at liberty to cancel the marriage on discovery of certain defects in the other party is also void.⁵²

Courts have generally settled for a liberal interpretation of what is permitted in a contract of marriage. The principles of the *Hanbali* school have been freely borrowed and assimilated so that the stipulating of conditions in the *kabin nama* have repeatedly been upheld by the Courts. The principle of incorporating the principles of one school into another is called *takhayyur*. Insertion of stipulations is an example of the use of this doctrine of *takhayyur*. Many countries have relied on this doctrine, for example Egypt and Sudan, to effect reforms. By the use of this doctrine, validity has been afforded to the insertion of stipulations in the marriage contract. Use has been made of the rules of the *Hanbali* school which allow such insertions. The right of the woman to go to the Court to obtain judicial termination of her marriage is also not recognised by the *Hanafi* school, and the doctrine of *takhayyur* allowed this right, recognised by the *Maliki* school, to be used for the benefit of women belonging to the *Hanafi* school.

The Courts have shown a tendency, within reasonable limits (since the

⁴⁸ Ali, Syed Ameer, Mahommedan Law, Calcutta, 1929, at p. 321.

⁴⁹ Ibid.

⁵⁰ Mahmood, Tahir (1986). "The Grandeur of Womanhood in Islam" in VI (1986) Islamic Comparative Law Quarterly, pp. 1-26 at p. 10.

⁵¹ Wilson, Roland Knyvet (1895). Digest of Anglo-Muhammadan Law; 5th edition, London, 1895, at p. 56.

⁵² Id.

husband 'has preponderant authority in matters matrimonial') to lean in favour of the wife and:

where some reason exists for supporting it, the courts would readily enforce an agreement which has been freely entered into by the parties.⁵³

In the case of *Jamait Ali Shab vs Mir Mubammad* it was held that:

When a marriage contract is entered into subject to an essential condition of a reasonable nature, not opposed to the policy of the Muhammadan Law, the Court may set aside the marriage on the breach of that condition, unless the condition has been waived or the breach thereof acquiesced in by or on behalf of the wife.⁵⁴

In the case of *Mubammad Amin vs Mt. Aimna Bibi and Others*, the plaintiff had entered into an agreement, the terms of which were as follows:

I shall not marry another woman in the presence of Aimna Bibi, and if I do so she is to be held to have been divorced by me, on account of the second marriage; simultaneously with that second marriage she will be qatai haram (absolutely forbidden) to my person and this very divorce by me in her favour would be valid and legal.⁵⁵

Addison J. opined that an agreement by the husband allowing the wife to divorce herself under certain specified contingencies amounts to a delegation of his powers by the husband and the pronouncing of the divorce by the wife amounts to the husband pronouncing it. Addison J. went on to add that he saw no difference between the husband agreeing that he shall be held to have divorced his wife, where a certain contingency arises, and a condition allowing a wife to divorce herself upon a certain contingency arising.

It was held that:

the agreement was valid and amounted to a divorce and was a complete answer to a suit for restitution of conjugal rights by the husband.⁵⁶

Polygamy and stipulations

Polygamy is an example of the misuse of power vested by the *Quran*, which allow men to have up to four wives, but only on condition that all the wives are treated equally. This requirement of equality between the wives is impossible to fulfil as the *Quran* in verse iv:128 agrees:

⁵³ Supra note 6, at p.121.

⁵⁴ 38 IC 1916 10.

⁵⁵ AIR 1931 Lah 134.

⁵⁶ Ibid.

Ye will not be able to deal equally (between) your wives however much ye may wish (to do so).⁵⁷

The necessity for obtaining the permission of the Arbitration Council and impliedly, the consent of the existing wife or wives to the proposed marriage under Sec.6 of the Muslim Family Laws Ordinance, 1961 has in reality no practical importance for most women in Bangladesh. Consent can usually be easily obtained from a wife financially and otherwise dependant on the husband and neither is the subsequent marriage invalidated. Various countries, including Tunisia, have construed the *Quranic* injunctions regarding polygamy to prohibit it absolutely.

The cases discussed below will show that by inserting stipulations in the contract of marriage, polygamy may be circumvented. In 1933 in the case of *Mt. Sadiqa Begum vs Ata Ullab*,⁵⁸ it was held that in an agreement between a husband and wife that the latter is entitled to divorce on the ground that her husband has married again is valid and such an agreement is not opposed to Mahomedan law or public policy. Without terminating the marriage, the wife may, if the husband breaches a condition not to marry again, be entitled to separate residence and maintenance. In the case of *Muhammad Zaman vs Irsbad Begum*,⁵⁹ the Court upheld the agreement that upon the husband's taking a second wife, the wife was entitled to receive alimony in the house of her parents or anywhere else she chose to reside. It was further held that the husband was not then entitled to a decree for restitution of conjugal rights.⁶⁰

What seems to be the essence of the laws relating to conditions in the marriage contract is that *Hanafi* law, (unlike, as mentioned before, the *Hanbali* law) does not permit conditional marriage contracts. Any condition upon which the marriage itself is contingent is unlawful. However, reasonable and lawful stipulations may be inserted in the contract of marriage.

Some of the conditions which may be validly imposed in a contract of marriage include: that the husband not contract a second marriage; that the husband not remove the wife from conjugal domicile without her consent; that he not absent himself from such domicile beyond a certain specified

⁵⁷ Pickthall, Mohammed Marmaduke (translation), The Meaning of the Glorious Qu'ran, London, 1930, at p.90.

⁵⁸ AIR 1933 Lah 885.

⁵⁹ PLD 1967 1104.

⁶⁰ Ibid.

time and that the couple shall live in a specified place⁶¹. Other conditions that may be valid include that a portion of dower be prompt and a portion deferred; that the wife be paid a fixed maintenance; that the husband maintain the children of the wife by a former husband and that he shall not prevent her from receiving visits from her relatives.⁶²

Consequences of breach of a valid condition may give the woman a variety of options, although not necessarily the right to dissolve the marriage. Restitution of conjugal rights may be denied to the husband, certain rights as to dower may arise, the wife may have the right to divorce herself and in an extreme case the marriage itself may be dissolved *ipso facto*.⁶³

In 1961, the *Muslim family Laws Ordinance* was promulgated based on the report of the Commission on Marriage and Family Laws appointed for this purpose in 1955. Although most of the changes recommended by the Commission,⁶⁴ (contained in the Ordinance of 1961) faced severe criticisms from the orthodox clergy, surprisingly the two famous persons who had disagreed with the view of the other members of the Commission both agreed that conditions could be inserted in the marriage contract. The question posed by the Commission was put in the following way:

Do you agree that any condition may be inserted in the marriage contract which is not repugnant to the basic principles of Islam and morality, and that all such conditions shall be enforceable in a law Court? ⁶⁵

In answer to the above, the Commission stated that:

There is consensus of opinion that marriage under Muslim law is a civil contract, and any conditions which are not repugnant to the basic principle of Islam and morality can be inserted in the Nikah-nama and that all such conditions can be made enforceable in a court of law.⁶⁶

Maulana Ehtishamul-Huq in his note of dissent on the report of the Family Commission admitted that the insertion of conditions in the marriage contract are not prohibited by the *Shariah* and if any person was anxious to have any condition inserted in the marriage contract they should

⁶¹ Supra note 48, at p. 321, and supra note 2, at p. 151.

⁶² Ibid.

⁶³ Supra note 6, at p.129.

⁶⁴ See Report of the Commission on Marriage and Family Laws; The Gazette of Pakistan; Extra Ordinary, June 20, 1956.

⁶⁵ Ibid at p.1210.

⁶⁶ Ibid.

be allowed to do so.⁶⁷ However he was of the opinion that the insertion of these conditions should not be encouraged because, firstly, the placing of 'more restrictions on such a delicate relationship' as marriage 'are not only inexpedient', they may prove harmful in the end.

Secondly,

such conditions should be avoided lest they (may) reduce the whole thing to a mere commercial transaction devoid of all the feelings of love and companionship, for if this practice becomes common, it is likely to give rise to many social and moral evils.⁶⁸

THE CONTRACT OF MARRIAGE IN BANGLADESH

The standard *nikah-nama* form is prescribed under the *Muslim Marriages and Divorces (Registration) Act, 1974*. Clause 17 contains the provision to insert special conditions in the marriage contract. Stipulations which protect women and which may be inserted in the marriage contract can afford women wide protection and have been accepted as valid. The field work⁶⁹ made it obvious that ignorance of this right on one hand, and on the other the weaker bargaining power of the bride's side, ensures that very rarely is such protection utilised.

In the villages a registered deed of marriage is often perceived as automatically giving women the right of divorce. One of the major reasons for avoiding registration is in fact the reluctance of the groom's side to grant such powers of divorce. 55.88% of the marriage documents examined, contained provisions delegating the right of divorce to the wife. The conditions upon which the power was delegated was the same in each deed of marriage:

God forbid if I go missing or am incurably ill, or go insane, or I wrongfully mistreat my wife, or fail to pay proper maintenance then my wife has the right, if she desires, of *talak-e tafweez*, for whatever cause, wherever and whenever she wishes.

As far as stipulations are concerned, the following was the norm and most of the marriages registered contained the same stipulations. These were as follows:

⁶⁷ English version of the note of dissent; The Gazette of Pakistan, Extra Ordinary, Aug. 30, 1956, at p. 1580.

⁶⁸ Ibid.

⁶⁹ Field work was conducted in three villages in Bangladesh for the purpose of the author's Ph.D. research upon which this article is based.

I shall always maintain my wife keeping her in proper *purdah*. If I fail to do so or there is, God forbid, any trouble between us, I shall keep her at her parents' house and maintain her monthly and visit her regularly.

The stipulations inserted in the marriage contract seem to be vague and ambiguous, especially since they were the same in every contract containing conditions. The Registrar usually writes the conditions down like a formula (or so it seemed in the rural areas) without the parties specifying their individual opinions. The conditions under which the right to divorce is delegated is also vague and would be difficult to prove if contested.

Clause 19 of the prescribed *nikah nama* is a curious one since it seems to have had no practical implications so far. It asks the question as to: 'whether the husband's right of divorce is in any way curtailed?'

None of the *nikah-namas* examined contained any such provision limiting the right of the husband and it was not possible to ascertain the origin of this clause. Lucy Carroll also remarks on the above, and says, that although there is no reported case law on the matter it would seem probable, by analogy with other contractual stipulations protecting the position of the Muslim wife that have been upheld by the courts:

that a Muslim husband could stipulate in the marriage contract, for instance that he would not *talaq* his wife without her consent and that any *talaq* pronounced without her consent would not be tenable before the Court.⁷⁰

The strangeness of this clause is remarkable since it apparently contradicts the Muslim husband's inalienable, inherent and absolute right of divorce under classical law. Kazi Syed Shariatullah, Chairman of the Bangladesh National Association of Marriage Registrars,⁷¹ was emphatic in his opinion that clause 19 is 'valueless' since the husband's right of divorce has been delegated by Allah and cannot be curtailed. According to him, there has never been a deed registered, to his knowledge, where clause 19 has been answered in the affirmative.

It is doubtful whether Carroll's suggestion as to obtaining the wife's consent to the husband's pronouncing divorce would be upheld by the court⁷² Nevertheless, other safeguards may check the husband's arbitrary use of his power of divorce as for instance, a stipulation that the husband can pronounce divorce only by making provisions for the maintenance of

⁷⁰ Supra note 14, at p. 308.

⁷¹ Personal interview with Kazi Syed Shariatullah, Chairman of the Bangladesh National Association of Marriage Registrars.

⁷² Supra note 14, at p. 308.

his wife and children for a particular period or until she remarries.

CONCLUSION

The fact that the Muslim contract of marriage is treated as a civil contract means that the prospective parties, or their guardians, may within reasonable limits define the terms of the contract and thus invest the wife with legal rights unavailable to her under general Muslim law in the absence of such contractual agreement⁷³ Greater use may be made of the protection which the insertion of conditions into the marriage contract provide, especially in relation to the delegation of the right to divorce.

The rights of women in Islam regarding the right to divorce are very limited. Whether the woman utilizes her right- of *talaq-e-tafwid*, dissolves the marriage tie through *khula*, or goes to court for a judicial dissolution based on the Act of 1939, there is no equality of rights regarding divorce, The man still has unrestricted right to repudiate his wife whereas the woman has, in the case of *talaq-e tafwid*, to depend on her husband's delegation of the right; in the case of *khul*, to generally obtain the consent of the husband and to give up her right to dower; and in the case of *faskh*, or judicial dissolution, to involve herself in costly legal procedures. In Bangladesh, the inequality is further intensified by the lack of bargaining power of the wife and her family. The fieldwork has shown that the girl's parents usually agree to the demands made by the groom's family for instance as regards dowry (*joutuk* or *daabi*) but there is no reciprocation with regard either to real dower or rights of divorce.

Lack of knowledge regarding the rights of women, which they may validly claim under Muslim law, is the primary cause for the failure in many cases to insert protective clauses in the contract of marriage. The woman and her family simply do not know what they can ask for. As in the case of specifying the amount and right to dower, the office of the Registrar of marriages may be utilised to educate the parties that come before him (especially the bride's side) as to the rights they have. He should be under a duty specifically to inform both the parties of the clauses which they can legally insert in the contract of marriage.

Enforcement of the laws regarding registration is therefore doubly essential, since the prescribed *nikah nama* form under the Act of 1974 contains the provisions for both the insertion of stipulations and the delegation of divorce.

⁷³ Supra note 14, at p.305.

A wife who has the right of *talaq* by *tafveez* is saved from costly legal battles. This right must however be mentioned either in the registered contract of marriage itself or in any pre-nuptial or post-nuptial contract which is registered. There have been cases where the groom's side has refused to include this right on the ground that it is inauspicious to think of the marriage coming to an end. If the husband's right of *talaq* is considered to be inherent, the woman should not be deprived from the protection that this right affords and therefore the husband should be asked to delegate this right at the time of the marriage. This could be achieved by amending the Registrars role when a marriage is registered.

Legislative reforms may include the requirement that the right of delegated divorce has to be always delegated to the wife. If that is not possible, then whenever granted it must be always granted unconditionally.

In response to arguments that this would mean that the wife could without sufficient cause seek divorce, it must be remembered that no woman, especially an average Bangladeshi woman, to whom marriage is so important and the prospect of returning to her parental home such an unwelcome one, would use this right capriciously.

The role of the judiciary in effecting reforms also becomes particularly important when a woman comes before the Court asking them to recognise the validity of rights agreed to at the time of marriage. It depends to a large extent on the discretion of the court to decide which stipulations are valid. The basic criterion for ascertaining the legal validity of contracts of the nature under discussion is 'reasonableness' and the courts of the subcontinent have demonstrated a marked reluctance to hold Muslim marriage contracts or contracts between Muslim husband and wife 'unreasonable.'⁷⁴

Judicial reforms can go a long way towards alleviating the position of the Muslim wife. It is only equitable that any particular condition that was agreed upon by both parties at the time of the marriage should be upheld, except for certain cases (when it is contrary to the concept of marriage itself). The courts will "no doubt pause before taking as a guide to high moral purposes, a husband who was willing to contract in derogation of those purposes."⁷⁵ The principle that has been accepted is that, upon marriage, such rights and duties arise between husband and wife as are

⁷⁴ Supra note 14, at p.283.

⁷⁵ Supra note 33, at p.62.

agreed to between the parties, or subsequently thereto, provided that the agreement is not inconsistent with any rule of law or of public policy.⁷⁶

Therefore, the potential of the permissive attitude of Muslim law to the insertion of rights in the marriage contract is highly significant for the protection of women throughout their married life. More may be made of this potential especially by extending the role of the Registrar and bringing test cases before the judges.

⁷⁶ Ibid at p.56.