

sexual intercourse, inspite of the consummation, while the two disciples hold that unless it was during the minority of the wife or insanity or against her free will, she cannot legally refuse him after consummation.<sup>1</sup>

### Increase & Decrease

As it is an alteration of the terms of the contract, within the power of the parties, and like an addition to the price in the sale, it may become incorporated with the original dower; hence the husband can, at any time, after the contract of marriage, increase the dower payable to the wife.

A wife after attaining the age of majority may validly agree for the reduction or remission of it, as the Quran says: 44 As such a remission is a gift by the wife, if it is made in death-illness, its validity is suspected, and heirs of wife may claim it. But if she seeks a divorce upon any breach of the duties of the husband through court, her dower debt is not affected.

### Widow's Lien For Dower

Under the Sharia, there is no hypothecation without seizing and, therefore a widow has no absolute lien over any specific property of her deceased husband, so as to enable her to follow' it, but her claim for dower is only a debt against her husband's estate and has a priority over legacies and the rights of heirs, and her rights may be waived by her.<sup>2</sup>

However, according to Indian judicial precedents, if she has obtained actual and lawful possession of the estate of her husband, under a claim to hold it for the dower debt, she will be entitled to retain possession until the debt is satisfied, with the usual liability for an account to the heirs.

عالم اسلام کو نیا اسلامی سال مبارک ہو

1. Ham. Hedaya, 54; Baillie I. 125
2. Ameer Ali, II, 450; See also Ham. Hedaya. 347. Ameer Ali, II, 451, Citing Mst. Beebee Bachun V. Sheikh Hamid Hussain (1871) 10 B.L.R. 45

☆ لا ینکر تغیر الاحکام بتغیر الزمان ☆ زمانہ کی تبدیلی کے سبب احکام کی تبدیلی کا انکار نہیں کیا جائے

The unspecified dower is to be regulated, in its amount or value, by that of the woman's paternal relations. However, the Sharia lays down the rules for the determination of the amount of dower. It is said that, 'in regulating the property dower of a woman, attention must be paid to her quality, with the woman from whose dowers the rule is to be taken, in point of age' beauty, fortune, understanding, and virtue because it varies according to any difference in all these circumstances; and in the like manner, it differs according to the place of residence, or time, and the learned in the law have observed that equality is also to be regarded in points of virginity, because the dower is different accordingly as the woman may be virgin or otherwise.<sup>3</sup>

The Ithna Ashrai Shia School holds that when the dower is unspecified, it should not exceed, at the time of fixation, more than 500 dirhems on the basis of the dower of Hazrat Fatima, the prophet's daughter.<sup>4</sup>

The specified or stipulated dower has been said to be either Muajjal or prompt, and Muwajjal or deferred. The prompt dower is payable immediately on demand by the wife after the marriage, while the deferred dower becomes payable after death or divorce.<sup>5</sup> If the specified dower has not been defined as prompt or deferred, a difference of opinion arose in the jurists.

Shara Viqaya in the Hedaya, holds that in such a case the whole must be treated as prompt, while the Fatwa-i-Alamgiri say that each case has to be decided according to its own merit and the judge has to take into consideration the position of the wife, her relations, the custom of the locality, and the amount of the specified dower will fix one portion of the dower as prompt.<sup>2</sup>

Until the payment of the prompt dower, the wife is entitled to refuse the husband to her company.<sup>3</sup> There is a conflict of opinion among the jurists when the marriage is consummated with the free consent of the wife, and still she refuses herself for non-payment of the dower. According to Imam Hanifa, she can refuse him to

3. Ham. Hedaya, 53-54; Ameer Ail, II. 437

4. Tayabji, S. 97

5. Ameer Ali II., 441-2; Wilson, 118

2. Baillie I. 127.

3. Baillie I. 125; Mohd. Yusuf, II. 165

given by the man to woman for entering into the contract of marriage, for such a contract in its original meaning is a conjunction and requires only the union of the parties to it, and is held valid even if no dower is mentioned, but as a dower is opposed to the usufruct of the woman's persons, the right to either is not complete without the other.

It is a safeguard against a man's arbitrary power of divorce, as it becomes binding on the husband by consummation, or on valid retirement, or by death.<sup>1</sup> The legal minimum of dower is ten Dirhams, which according to one account, makes about 10 Shillings and eight pence sterling. It may be stipulated at the contract of marriage for any some, however, large, and the wife is entitled for the whole amount upon the consummation of marriage or the death of the husband, otherwise, if no consummation had taken place, to a half dower.<sup>1</sup> If no amount is specified she is entitled to proper dower or Mahr-ul-Muajjal, which is a customary dower fixed for the females of her family.

### Classifications

The dower fixed, at the time of contract of Marriage, is called specified dower, but when it is not so fixed it is unspecified or proper dower,<sup>1A</sup> A specified dower may be prompt or (Muajjal) and deferred or (Muawajjal). In the specified dower the sum is fixed to which the husband has agreed to pay to the wife. The amount may be excessive or even beyond the capacity of the husband to, pay.

In India specifically, the muslims of middle class families, stipulate a fantastic excessive amount in dower, which remains perfectly beyond the capacity of the husband, and even in some cases, there is a lack of an intention of payment.

If a father of a minor, contracts to marry his son, the law binds the minor; and the dower becomes due upon him. If the specified dower is too small, the wife can claim to increase it in order to bring it upto the legal minimum allowed by the law.<sup>2</sup>

1. Ibid, Inayah II. 55 5. Ham. Hedaya, 44

1A. Ibid

2. Wilson, 117; Baillie I., 93; Ham. Hedaya. 44

- (3) The children are legitimate and inherit the parents
- (4) The father is liable to maintain the issues.
- (5) The dower becomes payable, or, in absence of consummation a half is to be paid.
- (6) The husband can terminate the contract, at will, by making gift of the unexpired period of the time in favour of the wife.
- (7) The wife cannot release herself before the fixed period and there is no right of maintenance.<sup>6</sup>

As this form of marriage is for enjoyment, there is no limit and a man may enter into such contracts with any number of women. On the expiry of the period of the contract and after consummation, a short period of 'Iddat' or waiting of two course is prescribed.

### The Law of Dower or Bride-Price

#### Theory & Definition

Dower (Or Mhr) is an obligation imposed by the Sharia on the husband as a mark of respect for the wife.<sup>1</sup> The basis of the doctrine is the Quran. A property of value must be assigned in dower, for, says Qadir Khan, that, 'Nothing can be (assigned) as dower, but what is (Mal) property which possesses value (according to law).

Therefore, if property on which the species is unknown is fixed (as dower), as when a man marries a woman, for an animal or 'cloth', then the woman is entitled to the proper dower, because (in such a case the dower fixed is not valid ( and the dower fixed will be taken to mean as if it had not at all been fixed. And in the same way (the proper dower will be due) if he marries her for 'a house (or enclosure)', without stating the position of the house (or enclosures).

A dower is defined, as the property, which is incumbent on the husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person. It is not the exchange or consideration

6. Baillie II. 97, 244. (8) Sircar, Mohd. Law, II, 375

1. Hidayah II. 58. (2) Mohd. Yusuf, II. 140 (3) Baillie I, 91, Kifayah II. 59

by the Muslim rules of law, and there is not emergence of her status as in the law of domicile.<sup>1</sup>

A Muslim's Christian wife or a Sunni's wife has the unfettered right to follow her own faith and practices, and if the husband raises any objection, he must be prepared to part with her.<sup>2</sup>

### Temporary Marriages or Mutaa:

One of the distinguishing features of the Ithana Ashari Shia School is the recognition of temporary marriage.<sup>3</sup> It is not recognized by the Sunni Schools, though Imam Malik considered it to be lawful, but others hold that the permission was only temporary and was abrogated.

The basis of the rule is attributed to the Quranic verse (IV. 24). It is said that the verse has been repealed by the Quran later, and as it was prohibited Caliph Umar, but the Ithana Ashari Shias recognized it.

The contract of Mutaa is for a definite period of time otherwise it becomes a permanent marriage. In the contract the period of cohabitation is fixed and some dower is specified. The period of the contract may be a day, a week, a month or so, and the dower must be in kind or cash, otherwise in the absence of a specified dower the contract is considered as void.

Such a marriage may be contracted with a woman, even of the Scriptural and a Parsi religion, though a Shia Muslim woman cannot enter into such a contract, except with one of her own sect.<sup>4</sup> There is no requirement of repudiation as the parties become separated on the expiration of the contracted period. The legal incidents of a Mutaa marriage are:-

- (1) that the wife cannot claim maintenance in the absence of a contract to the contrary.
- (2) So in the case of inheritance.

1. Ibid; Ameer Ali, II, 23, 459

2. Qadri, 63-64

3. Schacht, Origins 266; Encyl. of Islam III, 774976 (2) Q: IV: 24. (3) Ham. Hedaya, 33. (4) Schacht, Origins, 267.

4. Ameer Ali, II, 398. (6) Wilson 431: Baillie II. 42.

The wife has duties to reside in her husband's house, to allow him to sexual intercourse at reasonable times and places, with due regard to decency and health, and to obey him reasonably.

The wife has remedies against the husband:

- (1) She can demand maintenance and use in court for it, and
- (2) Demand the company of him.

The husband can divorce her and refuse to pay maintenance if she is rebellious.. The Quran favours reconciliation of differences between the parties in the following words:

“And if ye fear a breach between the husband and wife, he can send a judge out his family and a judge out her family; if they shall desire a reconciliation. God will cause them to agree for God is knowing and wise.”

It is a fundamental principle of Islamic Jurisprudence that it prohibits any interference in the rights of women, to their properties. The same provisions are also recognized in the Anglo-American Common Law, the evil and the Soviet systems, and a husband cannot interfere with the legal capacity of the wife within, the limits prescribed by the law.<sup>1</sup>

Under the Sharia the husband does not acquire any right to or control over his wife's property by the fact of marriage. Whatever property she has at the time of marriage remains absolutely her own and at her disposal and she is under no disability to acquire by reason of coverture.

That is to say a woman's legal capacity is in no way affected by her marriage, except as regards contracting conjugal relations with others, and if the husband tries to interfere with her legal rights over her property, he may be held liable to have his marriage dissolved.

After the marriage, each spouse retains his or her own status and a complete freedom of conscience is guaranteed to the wife

1. Abdur Rahim, 333, Qadri, 60 etsq.

**In the Sharia Muslim men and women cannot marry a pagan or a non-muslim.**

**The Quran says:**

“Wed not idolateress till they believe; for lo; a believing bondwoman is better than an idolatress though she please you; and give not your daughters in marriage to idolaters till they believe, for lo a believing slave is better than an idolater though he please you.....<sup>1</sup>

The Quran allows marriages with women of the scriptures in the following verse:

“And ye are also allowed to marry free women that are believers, and also free women of those who have received the scriptures before you, when ye shall have assigned them their dower, living chastely with them, neither committing fornication nor taking them for concubines.<sup>2</sup>

The Shia Schools prohibit even a marriage with a woman belonging to the scriptural religion, though they allow temporary marriages with them.<sup>3</sup>

### **The Reciprocal, Rights, and Duties of the parties:**

The Sharia favours harmony in the family life. It sanctions ways and modes of behaviours for the husband and wife. The duties of the husband are:

- (a) to maintain his wife according to his status,
- (b) to do justice between his wives if he has more than one wife,
- (c) to allow her to use her apartment and to exclude everyone except the husband,
- (d) to allow her to visit and be visited by her Parents, blood relations within prohibited degree of relationship.<sup>4</sup>

1. Q II: 221. (2) Sipara. (3) Baillie II. 29; Sharaya; 274  
 2. Wilson, 129; Baillie I, 44-46; Ham. Hedaya. 140  
 3. Wilson, 122; Baillie 1453; compare Bromley, Ch. VIII Consortion.  
 4. See Wis. Stat. Ss. 246-01, 246-06, 256-07, (1957) USA

## Rules Restrictive of Inter-Marriage

The primary basis of the authority of prohibition of marriage by degrees of relatives is the Quran.<sup>1</sup> The three kinds of prohibited relationships of marriage are consanguinity, affinity and fosterage and they are more or less common in every civilized legal system.

They arise from illegitimate or legitimate relationships of blood and are called consanguinity which are same in the Sunni and the Shia Schools. No marriage can be contracted :-

- (1) With the ascendants.
- (2) With the descendants
- (3) With the relations of the second rank, as brothers, sisters or their descendants.
- (4) With paternal or maternal aunts and uncles.

So, is the case of prohibition in regard to a natural off-spring or descendants, or father's wife or an ancendant's wife, or son's or any descendant's wife. Affinity and fosterage prohibit marriages between a man and his wife's mother or daughter for a man with his foster-sister, or for the foster-mother with her foster child's brother.

It is agreed between all the schools that contemporaneous marriages with two women, if they are so related to each other that if either of them were to be a male, a marriage between them would be illegal and unlawful.

It is totally prohibited for a woman to contract another marriage in the life-time of her husband, and so far a husband with a 5th wife. A divorced wife cannot marry her same husband unless after expiry of 'Iddat', when she marries another man who divorces her.

Under the Shia law, there is a perpetual prohibition to remarry, when a marriage is dissolved due to Lian or imprecation while in the Sunni law, according to Abu Yusuf, it is a total prohibition, while Imam Hanifa and Muhammad put a condition, that if the husband acknowledges false view of the accusation, he can remarry her.<sup>2</sup>

1A. Q:IV, 25. (2) Baillie I. 13; II, 193,203; Ham Hedaya 28, 29, Mohd. Yusuf I, 18-19

2. Baillie II, 29; Ham, Hedaya 125



the necessity of a proper and suitable match, but when the minors are contracted in marriage by a person other than father or grandfather, the minors have an option either to ratify or to cancel the marriage, for the law acts for the best interest of them.<sup>1</sup>

In order to repudiate the marriage, the decree of the judge must be obtained. In case, where the father has acted wickedly or heedlessly the marriage remains voidable at the instance of the minor attaining majority, according to the consensus of all schools. 2 The Shafi school holds that marriage of a minor by the father to an unequal man is unlawful and the girl can exercise her option<sup>3</sup>.

Though the Humbali school holds a different view, yet it is accepted that if the father was not a man of proper judgement and was of reckless character, and married his daughter to an immoral man, it can be set aside, and similar are the views of Abu Yusuf and Muhammad.<sup>4</sup> There are recognized modes of repudiation in the option of puberty. For example:

When a women perceives that her courses have come on, it would be proper to exercise her option immediately on noticing blood, as the option would stand cancelled by her mere silence in case of her being a virgin, or by her familiar conduct to the husband or by asking for maintenance.<sup>5</sup> The option can be exercised even after the consummation of the marriage, provided it was without her consent.

For the proper settlement of the dispute about the exercise of the option alongwith its effects, the decree of the judge has been made essential, as it has been said that, 'if a boy or girl should choose to be separated after arriving at puberty, but the judge has not yet made the separation when one of them dies, they have reciprocal rights of inheritance, and upto the actual separation between them by the judge, the husband may lawfully have intercourse with his wife' for such an intercourse is not zina and remains unpunished as such.<sup>6</sup>

1. Baillie II. 50; Ham. Hedaya, 37, 38, Sharah-Viqyah II 21.
2. Ameer Ali I. 235 on the basis of Fatwa-i-Alamgiri, Kitab-ul-Angar and the Jamaaush shittat; Wilson, 95
3. Al-Wajiz, II. 8
4. Abdul Rahim, 332 Prof. Abu Zahra in Law in the Middle east, 137 etsq.
5. Baillie I. 52 (6) Baillie I. 53; Ham. Hedaya 37; Mohd. Yusuf II, 239
6. Baillie I 50; Wilson 96

☆ جب حقوق باہم متعارض ہوں تو ان میں جس کا وقت ننگ ہو اسے ترجیح حاصل ہوگی ☆

is my Wife and the woman were to say, "this man is my husband," that would amount to a marriage, by the acknowledgement the two constituting a valid relationship according to Qadi Khan. A contemporaneous acknowledgement of a child, as a legitimate child by a man and a woman has the effect of an acknowledgement of marriage.

### Guardianship & Option' of Puberty:

This basis of guardianship in marriage is Quran and upon it the tradition says that, "There is no Nikah except by (means of) a guardian and it arises from different causes, those causes being four in number: viz., Milkool Yameen, Karabut, Wila, and Imamat".<sup>1</sup>

All the schools are agreed that the father has the power to enter into marriages of his children without their consent until they reach the age of majority.<sup>2</sup> Chronologically the power of the Wilayat-ul-Ijbar or "patria potestus" belongs to the father, and failing him to the father's father and upon their failing, it belongs subject to the option of puberty, to the brothers and remoter male paternal relatives. After these it devolves upon the mother, the maternal kindred within the prohibited degrees, and upon the failure of all, it devolves upon the government.<sup>3</sup>

Under the Shia law, the father and the grandfather are the only persons recognized to give a minor in marriage, and the Shafi and Maliki with the Fatimi Shia schools, recognize the right of jubr (imposition of these status of marriage) for females upto their marriage and emancipation from the "partia potestus".<sup>4</sup>

In Sharia the age of puberty and majority are one and the same as they originated in the Quran. The compiler of the Hedaya, maintains that upon either a boy or a girl completing the 15th year they are to be declared adult and there is also the concurrence of the Shafi school.<sup>5</sup>

The law of guardianship for purposes of marriage is due to

1. Mohd. Yusuf, II, 87
2. Amcer Ali II, 234
3. Wilson, 170; Ham
4. Minhaj, 321; Schacht origins 182
5. Ham. Hedaya, 529

ایک عابد پر عالم کی فضیلت ایسی ہے جیسے کہ چاند کی فضیلت دوسرے تمام ستاروں پر (سنن ابو داؤد و ترمذی)

The age of majority for a man is 12 years and for a woman it is 9 years, for it is said that the parties remain "non compos mentis" or unable to understand the nature of the contract before that age.

However, the law requires that such marriage must be Performed by lawful guardians, otherwise it is capable of being repudiated at the attainment of majority by the minor through the doctrine of option, of puberty or Khyar-ul-bulugh.<sup>1</sup>

The age of majority, according to the Hanafi and Shia schools, is presumed on the completion of the 15th year and to the Maliki school it is attained on the completion of the 18th year.<sup>2</sup>

A marriage may be proved on the basis of presumptions derived by the statement of the Parties or their conduct towards each other. In America the cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a strong presumption of marriage.<sup>3</sup>

Similarly the Soviet Code of 1927 provided that, the fact of marital relationship may be proved by the fact that the spouses lived together, by the existence of a common household resulting from it and by the open avowal of the marital relationship in front of a third person, in personal correspondence and other documents, depending on the circumstances, by the common up-bringing and education of children.<sup>4</sup>

The English law considers the general reputation as a presumption to establish the fact of the Parties being married.<sup>5</sup> In the Islamic law, it may be proved presumptively by the statement of the Parties or their general conduct towards each other.<sup>6</sup>

When a Person has seen a man and a woman living in the some house and behaving familiarly towards each other, as husband and wife, it is lawful for him to give evidence that the woman was the man's wife,<sup>7</sup> and so also if a man were to say this woman

1. Ham. Hedaya, 36
2. Ameer Ali, II. 535
3. See Gall V. Gall 114 Noy. 109; 21 NOE.106
4. Schlesinger, 457. (4) See Taylor, Evidences; S. 578.
5. Amir Ali. II. 326. (6) Ibid. on the basis of Fatwa-i-Alamgiri
6. Ibid. Fatwa-i-Alamgiri, I, 727
7. Baillie I. 423, but see Ghazanfar v Kaniz Fatjma 37 I. A. 105 (1910)

ایک عابد پر عالم کی فضیلت ایسی ہے جیسے کہ چاند کی فضیلت دوسرے تمام ستاروں پر (سنن ابو داؤد و ترمذی)

is essential according to the Hanafi school, while the Maliki and the Shia schools do not require their presence.<sup>2</sup>

To distinguish it from a mere promise, the proposal and acceptance must show an intention to establish conjugal relations from the moment of acceptance, instead of from some future time, and both the proposal and acceptance must be made at one meeting, and the husband must accept the offer unequivocally.<sup>3</sup>

It cannot be contracted by the use of the term Ijara or hire (as if a woman were to say "I have hired myself to you for so much") nor by Ibahit, or permission nor by Illah or rendering lawful, nor by ariyat or loan, as one of these operate as a principle of a right to a carnal conjunction; so also it cannot be contracted by the use of the term Waseeyat or bequest because a bequest does not convey any right of possession until after the testator's death.<sup>4</sup>

It can be constituted by the use of words denoting creation of immediate ownership in the substance of a thing according to the Hanafi school, for Imam Hanifa has said that whether word has the effect of creating ownership of Person (Rukba) if applied to the case of a female slave creates ownership of Nikah, when applied to a free woman (Hoorra).<sup>5</sup>

A marriage can be contracted through agents, for the powers of the agents to bind their principals are the same as recognized in the general law of contract. The practice is called in the language of the law as Wikalit-ba-Nikah.<sup>6</sup> But if the agent contracts a marriage of women with an unequal Person, with a Person belonging to a different town or family, the marriage is invalid.<sup>7</sup>

The marriage in the Islamic law depends upon the practices of the parties to marry each other, and every Muslim of the majority age, who is of sound mind can enter into a contract of marriage.<sup>8</sup>

1. Mohd. Yusuf II. Fitzgerald Mohd. Law, 38
2. Baillie I. 5, II. 4
3. Wilson, 100; Ham. Hedaya, 26; Baillie I. 10
4. Ham. Hedaya, 26 on basis of Rawayet-Saheeh.
5. Mohd. Yusuf II. 2, on authority of Qadi Khan
6. Ham. Hedaya, 42; Wilson. 101
7. Ibid., Baillie I, 77; Fatwa-i-Alamgiri III. 714
8. Baillie I, 4

☆ الاصل بقاء ماکان علی ماکان۔ بنیادی طور پر جو چیز جس حالت پر ہو اسی پر باقی رہتی ہے ☆

with each of his wives, successively or more.<sup>2A</sup>

For such amongst other reasons, in many Muslim countries the practice of polygamy has been restricted. The Islamic law as applied in Syria, since 1953, has provided that it is a condition precedent for the husband desirous of marrying a second wife during the life of his first wife, to show his position and income, coupled with his capacity to maintain, to the court for the grant of permission for such a second marriage.<sup>3A</sup>

The Moroccan law since 1958, has provided that if the husband is unjust, between his wives, he cannot enter into a second marriage and his first wife, can sue him in the court.<sup>1</sup> The Tunisian law has completely prohibited the practice since 1957, and in the Jordan and Egypt reforms have been made.<sup>2</sup>

In India the law empowers the wife to sue for dissolution of her marriage upon unjust treatment by the husband, and in Pakistan, the Family Law Ordinance of 1961 has copied the Middle East countries in adapting the law according to social changes, and in Aden, the law has been criticized and commented upon with a strong suggestion for improvements in the light of the Indian law<sup>3</sup>

### Form & Capacity to Marry.

Marriage like all other civil contracts always requires declaration and acceptance for its constitution, and both must be expressed in a manner demonstrating an intention without ambiguity.<sup>4</sup>

It is effected by the use of words 'Nikah' or marrying and Tuzweej or giving in marriage, and it can be contracted without any ceremony or formality, though either may be important for the evidence of the transaction.<sup>1</sup> The requirements of two witnesses

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- 2A. See Qad.i, Commentaries on the Dissolution of Muslim Marriages Act, 1939, 67 esq. (1961)
- 3A. Andersons, The Syrian Law of Personal Status, the Interl. & Comp. Q Vii (1955)
1. Anderson, Reforms in Family Law in Morocco, J L of African Law II, 3 (1958)
2. Anderson, Islamic Law in the Modern World (1959)
3. See Knox-Mawer "Islamic Domestic Law in the colony of Aden."
4. Baillie II. I; under the western laws, a marriage is complete when both the parties having capacity to enter into the contract observe.

his consorts had to work and assist as Mothers of the Ummat.

The Quran is explicit on the point and clarifies<sup>1</sup> the whole situation plainly. The wives of the Prophet had special positions and responsibilities, in the matter of guiding and instructing women who came into the fold of Islam, for Islam is a way of life, and the Muslims are a family and so the women community has an important place, for men and their intimate instruction must be through women.<sup>2</sup>

The reasons of polygamy, for the general muslims, was due to the facts of the necessities of times and, 'if we leave out of account that class of the people, who owing to abnormal conditions of society, are not generally speaking, influenced by the ideals of law and religion or by healthy public opinion, monogamy, is certainly the general rule and the exception among the Muhammaddans, while polygamy is regarded by them as a safeguard, however, undesirable in itself, against greater social evils,<sup>1A</sup> and even the modern Indian muslims consider it as a social drawback.

The institution is, no doubt, to be amended with the growing notion of changes of society, but as law and religion is mixed in Islam, which cannot be easily separated, it is submitted that it is a task for a well-equipped body of scholars to put the proposals for a change by keeping the spirit of time in mind for the sovereign legislatures, for it is not an easy task to tamper with the laws and institution of Islam, without serious repercussions. One way of doing it may be through the codification of the Quranic and other Sharia provisions itself, so as to avoid greater community reactions.

Some recent authorities accepting the incongruous situation of the English Private International Law to disregard a polygamous marriage, observe that, 'if the principle of Hyde v. Hyde is that English courts must rigidly deny recognition in any form to polygamous marriages, the logical answer to the above questions will appear a little odd, if not ironical when it is remembered that polygamy is a lawful feature not only of many foreign countries, such as Persia, Siam, Iraq, Egypt, and Morocco, but also of many parts

1. A. Yusuf Ali, The Holy Quran, Text, Transl. & Commentary, II. 1113.
2. Q: Ch. XXX III; 28-29 (3) Ibid 1115
- 1A. Abdur Rahim 340-41; Ameer Ali, The Spirit of Islam, Ch. V

of the British Commonwealth.

Moreover, the Privy Council, in hearing appeals from these places, has consistently recognized the validity of polygamous marriages and the legitimacy of the children of second wife.<sup>1</sup> In England, which has older and stronger ties with the Muslim jurisdictions, and where no statute impedes the immigration of polygamists,<sup>2</sup> it is said that, "to boycott polygamy would be to ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards, and all property left by an interest among them as escheating or becoming ownerless."<sup>3</sup>

Though, in the strict sense, the English courts exclude judicial remedies for polygamous marriages, but the English Law recognized such marriages, especially as to legitimacies of issues and successions to properties.<sup>4</sup>

Whatever be the theory and reasons of polygamy, it is agreed by all Muslim jurists, that, it is the duty of a husband to make every possible attempt to do justice between his wives, for the Hedaya says that, "If a man has two or more wives, it is incumbent among them, whether he may have married them as virgins or as Siyeeba or whether some of them be of the former description, and others of the latter; because the Prophet has said:-

"The man who hath two wives, and who, in partition, inclines particularly to one of them, shall on the day of judgement incline to one side," (that is to say shall be paralytic).

The husband is bound to divide his time equally among his wives, provide equal maintenance to them, make no difference in giving gifts and distribute all his attention equally in respect of conjugal amours.

But the mode of partition for the wives is left to the husband, for, it is said that, "If he chooses, he may fix one day of cohabitation

1. Cheshire, Private International Law, 294-5 ( 5th Ed.)
2. For Such States in America, see 8 USA Sec. 1182 (a) (ii)
3. Cheshire 294-95, Citing Sir Demnies in Society of Comparative Legislature J.II(NS)379
4. Ibid, 67

☆ عام کی تخصیص نیت کے ساتھ دیا جاتا ہے مگر کہ قضاء

his consorts had to work and assist as Mothers of the Ummat.

The Quran is explicit on the point and clarifies<sup>1</sup> the whole situation plainly. The wives of the Prophet had special positions and responsibilities, in the matter of guiding and instructing women who came into the fold of Islam, for Islam is a way of life, and the Muslims are a family and so the women community has an important place, for men and their intimate instruction must be through women.<sup>2</sup>

The reasons of polygamy, for the general muslims, was due to the facts of the necessities of times and, 'if we leave out of account that class of the people, who owing to abnormal conditions of society, are not generally speaking, influenced by the ideals of law and religion or by healthy public opinion, monogamy, is certainly the general rule and the exception among the Muhammaddans, while polygamy is regarded by them as a safeguard, however, undesirable in itself, against greater social evils,<sup>3</sup> and even the modern Indian muslims consider it as a social drawback.

The institution is, no doubt, to be amended with the growing notion of changes of society, but as law and religion is mixed in Islam, which cannot be easily separated, it is submitted that it is a task for a well-equipped body of scholars to put the proposals for a change by keeping the spirit of time in mind for the sovereign legislatures, for it is not an easy task to tamper with the laws and institution of Islam, without serious repercussions. One way of doing it may be through the codification of the Quranic and other Sharia provisions itself, so as to avoid greater community reactions.

Some recent authorities accepting the incongruous situation of the English Private International Law to disregard a polygamous marriage, observe that, 'if the principle of Hyde v. Hyde is that English courts must rigidly deny recognition in any form to polygamous marriages, the logical answer to the above questions will appear a little odd, if not ironical when it is remembered that polygamy is a lawful feature not only of many foreign countries, such as Persia, Siam, Iraq, Egypt, and Morocco, but also of many parts

1. A. Yusuf Ali, The Holy Quran, Text, Transl. & Commentary, II. 1113.  
 2. Q: Ch. XXX III; 28-29 (3) Ibid 1115  
 3. Abdur Rahim 340-41; Ameer Ali, The Spirit of Islam, Ch. V



economic and social conditions prevailing in the society at a particular time.

The Quran, as interpreted by the orthodox views, contemplates and fears about the out-break of wars and due to it, the men population may exhaust or decrease, on the other side the question of orphans and widows may become serious.

A recent example may be found in Germany after the world War II. It is for their care and welfare that the Quran sanctions polygamy as a necessity for the preservation and well-being of the human society.

But still the Quran sanctions the people having more than one wife to be equitable and just for otherwise it says that... if we agree and fear to abuse your wives, God is gracious and merciful. But if they separate, God will satisfy them both of his abundance for God is extensive and wife."

The modern secular view of the law, thinks that the institution is to be tolerated and even we find many muslim countries as Turkey, Tunis, Egypt, Pakistan and other have put ceilings upon the number of wives and provided various conditions for it.

In India it is a rare occurrence to have more than one wife, and the government services are restricted against such people. Considering the conditions of women in pre-Islamic Arabia, it was the Islamic Reformation which imposed a ceiling to the unrestricted conjugal greeds of the males. It reduced the number of wives to four only by putting necessary condition on the general muslim community.

The positions of the Prophet's a wives was not like that of ordinary women or wives. His only youthful marriage was with Hadhrat Khadija who was many years elder than him and is considered as the best of women and wives due to her virtues. His later marriages were governed upon two considerations. The first was compassion and clemency, as when he desired to provide for suffering widows, who could not be provided in any other way, in that stage of society, and the second, was help in his duties of leadership with women who had to be instructed and kept together in the large Muslim family, where women and men had similar social rights, and all

A batil or void contract of marriage is prohibited by the law, and creates no relationship of husband and wife as the marriage with a sister, and the issues are considered as illegitimate,

A fasid or irregular marriage is not inherently bad or unlawful but is one that is wanting in some of the conditions of validity, as for example the presence of witnesses.<sup>1</sup> Such a marriage must be avoided, though the issues are held legitimate but if the defect is removed, it may become a valid marriage.

In the Shia schools, there is no fasid or irregular marriage but only valid or void marriage. The issues of a void marriage are illegitimate unless there was a semblance of right to make the issue legitimate, for instance, if a man erroneously cohabits with a strange woman, supposing her to be his wife, and she should produce a child, its parentage is established in him.

### The Institution of Polygamy

It is lawful in the Sharia that a muslim man may have as many wives as four at a time, provided he deals with all of them with full equality and justice.<sup>2</sup> It is in accordance with the scheme of Islamic legislation which sets up certain moral ideals to be gradually realized by the community positively forbidding as such acts which, are clearly injurious to the social and individual life at all times.<sup>3</sup>

The basis of the rule is the Quranic text. But it should be noted that the permission is subject to certain limitations placed upon the economic, social and other conditions of the time, for otherwise the Quran sanctions that:-

If we fear that we cannot be equitable, then only one. It is not a religious duty that every muslim must have four wives, but it is only a safeguard against the daily abuses of family life and greater safeguard against the immoral whim by nature of men to be polygamous against women who are by nature monogamous.

There are many reasons, and the most important reasons for it are the physical and sexual weaknesses of females, and the

1. Ibid., 150, citing Dorrool-Mookhtar 207, (2) Ibid., 156 (3) Baillie II 93
2. Tafsiri-madarik, 162-2
3. Abdur Rahim 328

## CHAPTER XI

# The Law of Muslim Marriages in different Countries

### Nature of Classification

As sanctioned by the Sharia, the institution of marriage legalizes the sexual relations between a man and a woman to preserve the human species, the fixation of descent, restraining men from immorality, the encouragement of morality and the promotion of love and union between the parties and mutual self-help to earn livelihood.<sup>1</sup>

It is a form of civil contract in the eyes of law, to which the consent of the parties, capable in law of contracting is essential, and being formed by declaration and acceptance, expressed in a manner demonstrating an intention without any sort of ambiguity. It also creates a legal status of the married persons.<sup>2</sup>

The contracts of a marriage as classified by the Sunni schools, are:

- (a) Either Sahih or valid,
- (b) Batil or void,
- (c) Fasid or irregular.

A valid marriage is one which is in accordance with the law absolutely and its legal incidents are:

- (1) that the wife is entitled to be maintained,
- (2) she is entitled to dower,
- (3) the parties are entitled to have sexual intercourse among themselves
- (4) a certain degree of prohibited relationships between the parties and their relations is created.
- (5) the issues of the parties are legitimate, and
- (6) the husband has a reasonable power of control over the movements and activities of the wife within the prescribed limits of the law.<sup>3</sup>

1. Dashfu I Chumma, vol. ii. p. 56.

2. Tafsir-i-Ahmadi, p.226.

3. Kashfu-I-Ghumma vol. ii, p.52.