

Islamic Law of Personal Status: Analysis of the Reforms of Islamic Family Law in Various Muslim Countries

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Abstract: In the world one of the major legal systems is governed by Islamic law. Though some countries have modified the system, most of the Arab countries follow the Islamic legal system. Some countries, particularly countries with majority Muslim population, recognize Islam as their state religion and that their legal system shall run in conformity with the religion of Islam. However, Islamic legal system is not followed by only Muslim countries rather it is also followed by some secular countries (like-India, Bangladesh) to determine the rights and obligation of their citizen respecting the Islamic family law matters. Islamic law of personal status is an exceptional form of law which is not only important for the Muslim countries but also important for no-Muslim or secular countries as it is the right of the Muslims to be regulated and adjudicated by the Islamic law of personal status. It is undoubtedly accepted that, Islamic family law has been gone through several significant reform and amendments. But the authority of such reforms and amendments cannot be doubted as the reform and amendments are done by following the rules and regulations of the major schools and sects of Islam as well as by following the juristic interpretation of Quran and Sunnah of Prophet Mohammad (PBUH).

Keywords –Islamic family law, marriage, divorce, polygamy, reforms in Islamic family law

Research Area: Law and Social Science

Paper Type: Research Paper

1. INTRODUCTION

In the world, one of the major legal systems is governed by Islamic law. Though some countries have modified the system, most of the Arab countries follow the Islamic legal system. Some countries, particularly countries with majority Muslim population, recognize Islam as their state religion and that their legal system shall run in conformity with the religion of Islam. However, Islamic legal system is not followed by only Muslim countries rather it is also followed by some secular countries (like-India, Bangladesh) to determine the rights and obligation of their citizen respecting the Islamic family law matters. Moreover, the legal system of Malaysia is governed by a mixed legal system of Islamic legal system and British legal system as it is an Islamic state and was a colony of Britain. There Islamic legal system is followed by Islamic courts (Shariah Court) mostly in respect of Islamic family law matter and only Muslims are subject to the jurisdiction of these courts. In addition to family law matters like-marriage, divorce, custody of children, succession, will during death sickness, Islamic law is followed to adjudicate in criminal law matters in Northern Nigeria. Intention of Northern Nigeria to follow Islamic law is to spread Shariah law in the society at large.

2. SOURCES OF ISLAMIC LAW

In respect of the source of Islamic law as a religious law, all school and sects of Islam accept that the Quran and Sunnah are the primary sources of Islamic law. In addition to these primary sources, there are some secondary sources of Islamic law like Qiyas (Analogy), and Ijma (Consensus). However, Ijma or consensus is not universally accepted as a source of Islamic law. Apart from the primary and secondary sources of Islamic law there are some further sources of Islamic law, like- Ijtihad (Individual reasoning), Istihsan (Juristic Preference), and Istisab (Doctrine of Continuance). Moreover, at present Islamic law can be divided into two parts, Sunni law and Shia law. There are four schools in Sunni law namely- Hanafi, Shafi, Mliki and Hanbali schools. In addition to that, Shia Muslims are divided into the sects of- Ithna Ashari (the Twelvers), Ismailis, and Zaydis.

3. MARRIAGE

Islamic law regarding family matters plays a significant role around the world as it a fundamental law to be followed in Islamic states and even by the secular states because the Muslim citizens of these states are governed by the Islamic family laws as their personal law. Regarding marriage, in Islamic law marriage is a social contract which is performed by a proposal from one party and being accepted by another party, though in Islamic law no particular word is required to conduct marriage as long as the intention of the parties are clear. Respecting marriage the offer and acceptance has to be taken place immediately and in the same meeting tough need not performed in the presence of the parties in front of each other. According to the law of Hanbali, Hanafi and Shafi schools two adult male persons have to present when the marriage contract is performed but the Maliki School and Ithna Asahri sect recognize that the presence of two male persons as witnesses is appreciated but not mandatory as sufficient publicity of marriage has to be done. However, legislation of many countries like-Pakistan, Bangladesh, Jordan, Egypt, Kuwait, Tunisia etc. requires the marriage certificate as an evidence or proof of marriage. Though non existence of marriage certificate does not render a marriage void rather might be punishable under national law.

3.1.CAPACITY OF MARRIAGE

Regarding the capacity of marriage, Hanafi school and Ithna Ashari sect recognize that any male or female person can consent to his or her own marriage if he or she has attained majority and is of sound mind. Majority or adulthood is meant by traditional Islamic jurisprudence as the physical puberty. Traditional Islamic law provides the presumption that, no male below the age of twelve and no female below the age of nine has attained puberty and at the age of fifteen both male and female have attained adulthood or physical puberty. However, women's right to conduct her own marriage is subject to some limitations provided by the Hanafi law. According to the Hanafi law guardian of the women may seek the marriage to be dissolved or to pay the demanded dower if the women consented to marriage for a lesser dower. Moreover, according to Hanafi law the guardian of the women may seek the marriage to be dissolved on the ground that the status of male and female are not equal to each other, though the right of the guardian will be dismissed as long as the women become pregnant. On the other hand, in Maliki, Shafi and Hanbali law consent of the women to her own marriage is not valid and the consent of the marriage guardian of the women is required to validate the marriage. According to these laws, if the woman is not previously been married, the consent of the marriage guardian to conduct her marriage is final even if it is

given against her express will. To stop child marriage, most of the countries including Arab countries have recognized a standard age of marriage through their national legislation, for example by India through Child Marriage Restraint Act 1929. However, contact of marriage performed below the specified age by the legislations does not render the marriage void rather it imposes a penal punishment to the law breaker.

3.2. IMPEDIMENTS TO MARRIAGE

In Islamic law there are some impediments to conduct marriage. They can be divided into- permanent impediments and temporary impediments. Permanent impediments include- blood relationship, relationship by affinity and fosterage. It is meant by the relationship by blood that, a man cannot marry his ascendants and decedents or the ascendants and decedents of his parents or the immediate child of any of his ascendants. It is meant by the relationship by affinity that, a man cannot marry the former wife of his ascendants and decedents or the ascendants and decedents of his former wife. Moreover, in respect of the relationship by fosterage, the rule of relationship by blood will apply if the relationship grows by suckling milk by the foster mother. Apart from this, temporary impediments to marriage provide that, a man cannot marry a married woman, woman who following the termination of her previous marriage is at her Iddah period (mandatory observation period after divorce or death of her husband), divorced (triplly repudiated) women who has not married to another and again divorced by him and observed her Iddah period, two women if one of them were male is not permitted to marry the other, and marrying a women as his fifth wife. In addition to that, a Muslim man is not permitted to marry a non-Muslim woman unless she is Kitabiyah (religion of Holly Book), which means that, a Muslim man is permitted to marry a Christian or a Jew woman. The presence of permanent impediments will make a marriage void where the presence of the temporary impediments will make a marriage irregular.

3.3. DOWER

Dower as a part of marriage is a unique feature of Islamic law. According to this law the husband is bound to pay the dower to his wife. The parties to the marriage may determine the amount to be paid to the wife as a dower. However, if the amount of dower is not determined at the time of marriage the wife will not be deprived of her right to get dower. The equivalence principle will apply to determine the dower of the women. In this regard the determined dower of her comparable family members, like her sisters or cousins, will be taken in to account in addition to her beauty, virginity, family lineage, and educational status. At the time of marriage the parties to the contract may determine whether the dower to be paid at once or to a later date. Moreover, the parties may determine to pay some portion of dower at the time of instituting marriage (prompt dower) and to defer the other portion until divorce or the death of the husband (deferred dower). If the first portion of the dower is not paid to the wife, she may refuse to consummate the marriage and once the marriage is consummated or her husband died before the consummation of marriage she is entitled to get the full dower. However, if the woman is divorced before the consummation of marriage she is entitled to get half of the dower and if the dower is not fixed she is entitled to get some gifts of consolation.

3.4. MAINTENANCE

Apart from dower, women are entitled to get maintenance from her husband even if her husband is poor and she is wealthy. Therefore, husband is bound to provide maintenance to his wife and maintenance includes-providing food, cloth, shariah dwelling, and providing servant according to her previous standard of living. Shariah dwelling house means providing such dwelling house which is structurally safe and out of general entrance from any other co-wives. Husband may require his wife to live with the infant children from his previous marriage though the Shia sect does not generally allow this practice. According to the Hanafi, Hanbali and Maliki law, the scale maintenance of the wife will be determined at the mean between the means of the husband and the previous life standard of the wife. Regarding the scale of maintenance, the view of Shia sect and the view of Ithna Asari are totally different to each other. Where Shia sect recognizes that the means of the husband will be the determining factor for the maintenance scale but the Ithna Ashari on the other hand recognizes that, the previous life standard of the wife shall be sole determining factor for the scale of maintenance. However, husband's obligation to provide maintenance to his wife only derives when the wife is under a duty to obey him and put her under the control of the husband. Maintenance and obedience is dependent on each other. Therefore, if the wife disobeys her husband she is not entitled to get her maintenance. Husband is not under an obligation to maintain her wife if she is not ready or able or willing to cohabit with her husband. Though the wife is ready to cohabit with the husband but the husband does not permit her to cohabit with him though she is living with her parents or guardians, he is not under an obligation to provide maintenance to his wife. Wife is entitled to get maintenance for whole life except she disobeys her husband. Therefore, women's right to maintenance is dependent upon her obedience to her husband. However, women will not be deprived of getting her maintenance if she disobeys her husband on some lawful grounds. Moreover, women's right to get maintenance terminates on the death of the husband as no provision respecting maintenance of the wife out of the estate of the husband has been specifically mentioned. However, regarding divorce the right to maintenance is totally dependent upon whether the divorce is revocable or irrevocable in nature. If the divorcee is revocable in nature the wife is entitled to get her maintenance during her Iddah period. However, in respect of irrevocable divorce, only the Hanafi school allows that the wife is entitled to get maintenance during her Iddah period and other schools and sects state that the wife is only entitled to get dwelling facility from her husband during the Iddah period.

4. DIVORCE

Regarding divorce or talaq several countries have modified the procedure thought their legislative procedure. In Tunisia, Article 30 of the Tunisian Law of Personal Status 1956 requires that divorce has to take place in the court of law. In Iran, previously the husband was vested with the absolute power to divorce his wife but this power was dissolved by Article 10 of the Family Protection Act 1967. Now granting the right to divorce is solely a judicial matter. In Bangladesh and Pakistan, according to section 7 of the Muslim Family Law Ordinance 1961 to divorce his wife husband has to send notice to the chairman of the Union Council and after 90 days of the service of the notice marriage shall be dissolved. If the husband disobeys this rule he shall be punished with up to one year imprisonment and/or with some pecuniary punishment. However, regarding post divorce maintenance, various legislative actions have been taken by various countries to provide the wife post divorce

maintenance if the divorce was done upon improper cause. According to Syrian law, husband is bound to pay post divorce maintenance for a period of three years. Moreover, Iraqi and Egyptian law allow post divorce maintenance of the wife for two years, while, the law of UAE, Kuwait and Yemen allow for one year post divorce maintenance. When a marriage is terminated, all the schools and sects of Islam allow that, the obligation for the custodial care of the children is primarily vested on the father of the child. In the absence of the father the custodial care shall lie on the male kinsman in the agnatic line. It is accepted by all schools and sects that, to be custodian of the children the guardian has to be an adult person and is of sound mind.

5. POLYGAMY

Though pre-Islamic tribal customary law permitted unlimited polygamy, Islam has put a restriction to it and permitted only to have four wives at the same time. It is accepted that, the authority of the permission for polygamy is found in the Quran at Sura Al- Nisa (Chapter-4, Verse-3). The interpretation of the verse requires the husband to treat his wives equally and to spend the same period of time for all of them. However, all the schools and sects recognize that, the husband need not take permission from his existing wife for any subsequent polygamous marriage and in this regard, it is the absolute right of the husband to marry polygamously. According to Sunni schools, a man is restricted to marry more than four wives consequently. However, the Ithna Ashari and the Shia sects permit to have four permanent wives and unlimited temporary wives at the same time. Regarding polygamous marriage, husband is obliged to provide same standard of maintenance to each of the wives. If any of the wives refuses to cohabit with the husband for providing less accommodation according to her previous standard of living, it will not be treated as disobedience of the husband.

Polygamous marriage has been restricted by many countries through their legislative effect. In some countries, permission of the court is necessary for the husband to take more than one wife. However, polygamous marriage is forbidden in Tunisia and regarded polygamous marriage as void. Tunisia is the first Muslim country which imposes a ban on polygamous marriage. In Tunisia polygamy is prohibited and a man shall be punished with one year imprisonment and fine if he takes more than one wife, the authority of this rule is Article 18 of the Tunisian Law of Personal Status, 1956. The reason for prohibiting polygamy in Tunisia is the same verse on polygamy in the Quran. According to the juristic interpretation of this verse, a man is permitted to do polygamous marriage if he can maintain equality between his wives. However, according to verse 129 of chapter 4 of the holly Quran it is impossible for anyone except the Prophet himself to maintain equality among his wives. Therefore, according to the Tunisian reformers, these two verses of the Quran actually prohibit polygamy. Moreover, Syria is the first country which has restricted polygamous marriage. According to Article 17 of the Law of Personal Status 1953, in Syria to take a second wife the permission of the court is required and the court will give permission being convinced that the husband has reasonable justification for polygamous marriage and he can maintain his wives equally. Syrian precedent has been followed by many countries, for example this view is reflected in Libyan Law 10 of 1984 and Yemeni decree 20 of 1992 (amended 1998), though in this regard husband's financial ability to equally maintain his wives is given primary importance by the judges for giving permission to marry polygamously. Article 8 of Algerian Family Law 1984 (amended in 2005) recognizes that, to

take more than one wife the husband need to proof his capacity that he can treat his wives equally and he has the financial capacity to maintain them equally. In addition to that, the husband has to seek permission from his existing wife for taking second wife and he has to express his legal status to his future wife. According to Algerian law, if the husband does otherwise the existing wife or wives shall have the authority to seek judicial divorce. According to Morocco's family law introduced in 2004, polygamous marriage is restricted and it is only permitted when the court is convinced that the husband has sound reason for polygamous marriage and he has the capacity to maintain his wives and children from each wife equally. However, according to the Iraqi law of Personal Status 1959, for polygamous marriage in addition to the financial ability husband has to show that there are some lawful benefits for taking a second wife. In 1985 Egyptian law for polygamy was amended and according to his law, on marrying a second wife husband has to declare that he has married previously and the public notary to whom the declaration was made shall inform the existing wife about her husband's second marriage. Being informed she has the right to seek judicial divorce on the ground of her physical or mental harm. According to Article 4 of the Muslim Family Law Ordinance 1961, in Bangladesh and Pakistan husband has to apply to the Chairman of the Union Council for obtaining permission. On application the chairman shall seek the reason for second marriage and also ask whether the permission of the existing wife is taken or not. If the permission of the Union Council is not taken wife may seek judicial divorce on this ground under Article 14 of the Muslim Family Law Ordinance. However, in India Muslim husband is permitted to marry polygamously without the consent of the existing wife. However, if the permission of the existing wife is not taken or the husband treats the co-wives unequally, wife can seek judicial divorce under the Dissolution of Muslim Marriages Act 1939.

6. SUCCESSION

The provision of succession is the modernized, sophisticated and complex issue in Islamic law. According to this provision, the surviving successors of the deceased Muslim have some right over the estate of the deceased. According to the Quranic law 9 heirs are allowed to get their right as a successor. They are: husband, wife, father, mother, daughter, full sister, consanguine sister, uterine brother, and uterine sister. These nine heirs are recognized by the Shia Muslims but the Sunni Muslims added another three heirs by the doctrine of Qiys. These three heirs are: son's daughter, parental grandfather, and parental grandmother. However, according to Sunni law the primary heirs are the inner family members including, husband-wife, father-mother, and son-daughter. And Sunni law recognizes that, the rights of primary heirs cannot be excluded by the presence of any other heirs. Many reforms regarding succession have been taken place in many countries. In line with this, Iraq introduces the Shia law as their rules for determining the right of inheritance though the court is permitted to distribute the property according to the Hanafi law if the deceased in a Hanafi Muslim. Moreover, Tunisia as a Maliki Muslim country restricts succession to the immediate nuclear family. However, reformers of Islamic law believe that the rule regarding succession that, the right of the nearer excludes the rights of the more remote person, is generally inequitable for the grandchildren of the deceased. Nevertheless, regarding this principle the first reform was taken place in Egypt. Moreover, Pakistani law also allows the inheritance right of the grandchildren as this provision is assured by Article 4 of the Muslim Family Law Ordinance 1961.

7. CONCLUSION

In conclusion it can be said that, Islamic law of personal status is an exceptional form of law which is not only important for the Muslim countries but also important for non-Muslim or secular countries as it is the right of the Muslims to be regulated and adjudicated by the Islamic law of personal status. It is undoubtedly accepted that, Islamic family law has been gone through several significant reform and amendments. But the authority of such reforms and amendments cannot be doubted as the reform and amendments are done by following the rules and regulations of the major schools and sects of Islam as well as by following the juristic interpretation of Quran and Sunnah of Prophet Mohammad (PBUH).

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