

Marriage and the Family in Classical Islamic Jurisprudence

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The Muslim presence in Europe and across the Atlantic is today a common feature. The phenomenon of migration to these regions by Muslims, especially from the African continent and from the Middle East, has reached a scale unprecedented in human history. The vast majority of these migrants have settled in other countries for economic reasons, others are refugees fleeing from oppressive regimes as well as from war zones. Migration also brings about not only settlement in host countries, but also the founding of family units. It is therefore relevant that one should take a look at the concept of marriage and the family in classical Islamic jurisprudence which lies at the basis of all legislation in Muslim-majority countries. In doing so, one may also understand some of the religious and cultural tensions that arise in European and so-called 'Western' countries as a result of a Muslim presence.

Arabic terms for 'marriage' and 'family'

The Arabic language applies two terms for marriage; the first is *zawāğ*, which carries a rather socio-anthropological connotation given that it is derivative of the root *z-w-ğ* and implies 'pairing'. The second is *nikah*, which stresses the unitive aspect of marriage through sexual intercourse.¹ Concerning the family there exist also two terms, namely *'usra*, which is the most common term, and *'ā'ila*. The latter is a singularly juridical term derived from the verb *'ālā*, meaning 'to feed, nourish, or sustain a household'. Taken in this sense, therefore, the term *'ā'ila* refers to the persons of the household who depend upon the one who feeds, nourishes, and sustains them, that is to say, the husband/father.

Impediments to marriage

The Qur'ân stipulates two kinds of impediment as regards marriage: those that are

permanent and those that are temporary. Permanent impediments are those pertaining to consanguinity, affinity, fosterage, and the so-called 'anathema'. Those pertaining to consanguinity and affinity are found in Q. 4:22-24 and in most cases they follow the impediments stipulated in the Torah, especially in the Books of Exodus, Leviticus and Deuteronomy. The list below refers to types of permanent impediments found in the above-mentioned verses of the Qur'ân together with parallel references in the Bible:

Wives of the fathers (see Lv. 18:18; Dt. 23:1; 27:20; 1Co. 5:1)

Mothers (see Lv. 18:7)

Daughters

Paternal aunts (see Lv. 18:12)

Maternal aunts (see Lv. 18:13)

Daughters of brothers and sisters

Foster-mothers

Foster sisters

Wives' mothers (see Dt. 27:23)

Step-daughters (except in the case of non-consummation of marriage with her mother, see Lv. 18:17 where it is always forbidden)

Daughters-in-law (see Lv. 18:15)

Two sisters at one and the same time (see Lv. 18:18; Ex. 29:27).

Although these prohibitions are addressed to males (just as in the case of the Old Testament), it is of course reciprocal and equally applies to women. The foster relationship also creates a bar in Islamic jurisprudence. Dawoud Sudqi El Alami and Doreen Hinchcliffe have described in detail the complications arising with reference to impediments on the grounds of fosterage:

The Qur'ân itself merely prohibits the marriage of a man with his foster mother and her daughters. The jurists, however, extended the bar of fosterage and virtually equated it with that of blood relationship. Thus not only may a man not marry the

woman who suckled him, or her daughter, he may not marry the mother or grandmother of his wet-nurse, his daughter by fosterage, i.e. his wife's foster child and her descendants, or his foster sisters and her descendants, the paternal and maternal aunts of his foster-mother. The jurists also extended the bar of fosterage and virtually equated it with that of affinity. Thus a man is forbidden to marry the wives of his son by fosterage, i.e. the wives of those his wife has suckled and the wives of his foster-father, i.e. the husband of his wet-nurse, and their ascendants and descendants. He may not marry his wife's foster mother or her ascendants and descendants. A marriage is even prohibited between two persons who had different wet-nurses, if each of these women was the wife of the same man.²

On the other hand, the impediment known as 'anathema' forbids the man to take back as his wife a woman whose child he has denied paternity, presumably due to suspicion of adultery, a case that will be considered later in this article.

As for temporary impediments, Islam also distinguishes four types namely, marriage with idolaters, marriage with free women who are still married, marriage with more than four wives concurrently, marriage with a woman who is still in her waiting period (*'idda*) prior to becoming free to re-marry.

The prohibition of marrying idolaters (*mušrikūn/mušrikāt*) applies to both men and women.³ There is, however, an explicit prohibition to women marrying men from among the "unbelievers", i.e. those who do not believe in the message preached by Muḥammad.⁴ Here one would include both Jews and Christians.

The impediment regarding women who are still married is to be found in the Qur'ān.⁵ The same applies in the case of a man who marries a woman knowing that she is still observing the *'idda* following the termination of her previous marriage, whether by death or by repudiation (*ṭalāq*).⁶ The primary purpose of the *'idda* is to determine whether a woman is

pregnant or not with her husband's child. As for the *'idda* following repudiation, it serves the added purpose of giving the husband time to reconsider his action.

The duration of the *'idda* following repudiation is that of three menstrual cycles,⁷ unless the woman is pregnant, in which case this expires when the child is delivered.⁸ The *'idda* following death⁹ is that of four months and ten days unless, according to the classical jurisprudence, the widow is pregnant, in which case the *'idda* terminates when the child is delivered, even if delivery occurs before the expiry of four months and ten days.

Finally, a man may not remarry a woman upon whom he has pronounced a definitive repudiation unless she has in the meantime contracted a marriage with another man which has been consummated and terminated, and the *'idda* following it observed. This provision is diametrically opposed to what is stated in the Book of Deuteronomy where such a practice is explicitly forbidden.¹⁰

The Qur'ān does, however, permit a man to have sexual relations with his woman-slave even if she is married (see Q. 4:24) given that she is considered as his legitimate property.

Marriage contract

The marriage contract is modelled upon what is stated in Q. 2:282 concerning the procedure to be followed when contracting a debt for a fixed period of time:

You who believe, when you contract a debt for a stated term, put it down in writing: have a scribe write it down justly between you. No scribe should refuse to write: let him write as God has taught him, let the debtor dictate, and let him fear God, his Lord and not diminish [the debt] at all. If the debtor is feeble-minded, weak, or unable to dictate, then let his guardian dictate justly. Call in two men as witnesses. If two men are not there, then call one man and two women out of those you approve as witnesses, so that if one of the two women

should forget the other can remind her. Let the witnesses not refuse when they are summoned...¹¹

The consent of an adult woman, virgin or otherwise, is required to the marriage. El Alami and Hinchcliffe describe the process in the following manner:

If the woman is not a virgin she must give her express consent to the marriage, but in the case of virgins, acceptance may be implied from conduct. If a woman remains silent on hearing the offer of marriage, this will be construed as acceptance, as also if she laughs or even if she cries a little, for a few tears will be seen as a sign that she regrets leaving her parents, and not as a refusal of the offer of marriage. If both parties consent in jest, the marriage is nonetheless concluded.¹²

The dowry or bride-gift (*ṣadāq* or *mahr*) is a technical term denoting the compensation given to a woman in the marriage contract for the right the husband enjoys over her body. The Qur'ān itself imposes such a payment on the future husband. It is thus an essential condition for the legality of the marriage since, without it, the marriage is null and void.¹³

If the parties do not specifically state when the dowry shall be paid, some schools of jurisprudence stipulate that it should be divided in two parts; the first would be due on the conclusion of the contract (*mu'aḡḡal*), whereas the second (*mu'aḡḡal*) would be deferred until the marriage is consummated or terminated either through repudiation or through the death of the husband. If, following the conclusion of the contract the wife refuses to consummate the marriage, she will be considered as being disobedient (*naṣīza*) and will lose her right to maintenance (*nafaqa*). If the husband refuses to pay the wife the first portion of the dowry on demand she may refuse to consummate the marriage and this refusal will not be deemed disobedience so as to deprive her of the right to maintenance.

Polygamy

Polygamy is one of the elements inherent to a patriarchal society and is mentioned

frequently in the Old Testament. In Islam this has always been considered a fundamental right of a Muslim husband and meets with the approval of the Qur'ān. Before the advent of Islam, unlimited polygamy was widely practiced by the Arabs during the *Ġāhiliyya*. The Qur'ān reformed the existing tribal customary law by restricting the number of wives a man might have concurrently to four (together with any number of slave girls and concubines). Here one must also keep in mind that, in the case of Islam, marriage was also an effective way of offering security to widows and their children. The only condition placed upon this practice is that the intending polygamist must treat his wives equitably:

If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you, two, three, or four. If you fear that you cannot be equitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias.
(Q. 4:3)

The question of treating one's wives equitably has been a matter for discussion among Muslim jurists who, in the light of another verse in the same chapter, maintain that such a condition is impossible:

You will never be able to treat your wives with equal fairness, however much you may desire to do so, but do not ignore one wife altogether, leaving her suspended [between marriage and divorce].
(Q. 4:129)

This view was endorsed by Article 18 of the Tunisian Personal Status *Maḡalla* of 1956 which prohibited polygamy outright and set a heavy penalty upon eventual transgressors.¹⁴

Family life

A husband is duty bound to maintain his wife so long as she submits herself to his authority. Maintenance includes the provision of food, clothing and lodging for the wife. As stated above such maintenance is withdrawn if the wife refuses submission. In this case the husband has various options in order to secure his wife's return to his authority:

Husbands should take good care of their wives with [the bounties] God has given to some more than others and with what they spend out of their own money. Righteous wives are devout and guard what God would have them guard in their husbands' absence. If you fear high-handedness from your wives, remind them [of the teachings of God], then ignore them when you go to bed, then hit them.¹⁵ If they obey you, you have no right to act against them: God is most high and great.

(Q.4:34)

The wife has a duty to suckle the children for two years, or for the amount of time desired by the husband.¹⁶ The husband's authority over his wife extends to that of his children. The offspring do not belong to the couple, but to the husband/father. It is therefore of paramount importance that the legitimacy (*nasab*) of the offspring be traced to the husband of the woman who gave them birth. He is the only one who could give them legal status. The husband/father is the guardian of the children; he is therefore responsible for their maintenance, as well as their physical, moral and intellectual upbringing and good conduct. Furthermore, the children receive their religion from their father, which is why Muslim women are not permitted to marry outside their religion.¹⁷ That having been stated, the children are enjoined to honour both their father and their mother.¹⁸

Repudiation

The most common method by which marriages are dissolved in the Muslim world is by the husband exercising his right of *ṭalāq*. Throughout this essay I have opted to translate this term in English by using the word 'repudiation' rather than the modern secular term 'divorce', since the latter is somewhat misleading. It is in essence the right granted to the husband by the Qur'ān and by Islamic jurisprudence to unilaterally terminate the marriage at will without his being obliged to give reasons for such an action. With regard to the way repudiation of the wife takes place, the Qur'ān instructs husbands that this "can happen twice, and [each time] either be kept

on in an acceptable manner or released in a good way" (Q. 2:229).

Even in those Muslim countries where *Šarī'a* is not the supreme law of the state this right is still upheld and civil law courts are obliged to grant the dissolution of a marriage by the *will* of the husband (*irādat al-zawğ*), by mutual consent (*tarādī*) of the two spouses, or at the *request* of the wife (*ṭalab al-zawğā*).¹⁹ All that the law requires is that the husband should be adult and sane when he pronounces the formula of repudiation, whether orally or in writing. In some Muslim countries today such an act can also be expressed via text message from one's mobile phone. Immediately upon the pronouncement of *ṭalāq* the wife will enter the period of *'idda*, which, as stated above, will last for three menstrual cycles, or if she is pregnant, until the delivery of the child.

Besides the above-mentioned traditional method of repudiation the Qur'ān provides other ways through which the termination of a marriage could be brought about. First among this is *īlā*, wherein a husband would state under oath not to have intercourse with his wife for a period of four months or more. If he keeps his oath the marriage is dissolved upon termination of the stipulated period.²⁰

Another way is that of *zihar*. This is a procedure whereby the husband compares his wife to any of his female relatives who are within the above-mentioned prohibited degrees of relationship to him. The formula applied is "you are for me (as untouchable) as the back of my mother". Here the term *zahr* implies the application of a part of the human anatomy to the whole. Such a statement does not dissolve the marriage and is, indeed, considered as an impious declaration for which the Qur'ān imposes a heavy penalty upon the husband who pronounces it.²¹

Yet another form of repudiation is *hul'*. In this case the wife requests the husband to declare repudiation. Here the wife may offer to pay him a certain sum, which is usually the amount of the dowry that she had initially re-

ceived from him when the marriage contract had been concluded.²² Through this form of repudiation the wife appears to seek a way of ransoming herself.

According to the Qur'ân and classical Islamic jurisprudence, a husband who has good reason to believe that his wife had been unfaithful to him, but who is unable to prove his case by way of the strict standards of *Šarī'a* could exercise *li'ân*. He may accuse her solemnly four times of adultery and deny the paternity of a child with which she was pregnant or to which she had just given birth. The wife may escape punishment (stoning where *Šarī'a* is strictly enforced) if she equally denies solemnly four times such an accusation.²³

The Qur'ân further stipulates that, should serious discord (*šiqāq*) arise between spouses, then two arbitrators, preferably one from the family of each, are to be appointed.²⁴ Their remit is to attempt to resolve the discord and reconcile the parties. Should they fail to bring about reconciliation they may advise the husband to exercise *talāq*. According to certain schools of Islamic jurisprudence measures should be taken if either of the spouses is to blame for such irreconcilable differences.

Since the children belong to the father, he remains their sole guardian in case of repudiation and they ultimately return to their father. In case of death the children fall under the authority of the deceased father's male next-of-kin or some other male to whom the deceased has delegated authority prior to his death. If the former wife/widow decides to remarry, they will neither fall under her authority still less under that of her new husband.

Conclusion

From what has been written above it is obvious that marriage according to classical Islamic jurisprudence (in the light of the Qur'ân) differs greatly from family laws enacted in modern secular societies. This has sometimes brought about tensions between Muslim communities living in Europe and their host countries. It is most unfortunate that

multiculturalism, as frequently interpreted in some European countries such as Britain and the Netherlands, has brought about not only an aversion to integration by immigrant communities but, even more so, the absence of a sense of belonging. It is a situation that needs to be urgently addressed by both secular state legislators and Muslim religious scholars. What lies at stake is the future harmony and well-being of our societies.

NOTES

¹ See Q. 24:32; 28:27; see also Q. 2:235.236; 4:6.

² DawoudSudqi El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws in the Arab World* (London: CIMEL/Kluwer Law International, 1996), p. 13.

³ See Q. 2:221; cf. Ex. 34:16; Dt. 7:14; see also Esd. 9-10.

⁴ See Q. 60:10.

⁵ See Q. 2:230.

⁶ See Q. 2:228; 65:1.

⁷ See Q. 2:228.

⁸ See Q. 65:4.

⁹ This practice is also to be found in the Bible. See, for example, 2 Sam. 11:26-27.

¹⁰ See Dt. 24:1-4.

¹¹ Unless stated otherwise, all quotations from the Qur'ân are taken from *The Qur'an: A new translation*, by M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2004).

¹² See DawoudSudqi El Alami and Doreen Hinchcliffe, *op. cit.*, p. 6.

¹³ See Q. 4:24.

¹⁴ See DawoudSudqi El Alami and Doreen Hinchcliffe, *op. cit.*, p. 242.

¹⁵ In a note concerning this verse, Abdel Haleem states that "this signifies a single slap, as is clear from the circumstances of the revelation of this verse." See, *op. cit.*, p. 85, note c.

¹⁶ See Q. 2:233; 31:14.

¹⁷ See Q. 60:10.

¹⁸ Q. 17:23-24. This text is reminiscent of Sir. 3:1-6.

¹⁹ See, for instance, the Code of Personal Status, Law no. 84-11 of 9 June 1984 comprising Family Law, art. 48.

²⁰ See Q. 2:226-227.

²¹ See Q. 58:4-5.

²² See Q. 2:229.

²³ See Q. 24:6-9.

²⁴ See Q. 4:35.