

The Rights and Obligations of Spouses in Islamic Classic Law

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Abstract

Islamic Law, the third largest global legal system, next to *Civil Law* and *Common Law*, has been far -back subject of an increased interest to the academics. Its main peculiarity is the absorption of theology in the law. There is no clear borderline between juridical and religious regulation. For this reason it is important to understand how certain legal institutes were regulated in the past. In fact, Islamic classic law despite its later evolution is considered the most authoritative legal source, because closest to the Divine Revelation.

With regard to the rights and obligations of spouses, they're conceived in terms of complementary, while their equality is interpreted in terms of moral and spiritual rights and obligations. In order to better comprehend their rights and obligations, it is necessary to analyze the different roles of gender inside the Islamic family.

Given the premises, this paper will focus on specific rights and obligations between spouses and with regard to the child-parent relationship. In particular, it will treat the meaning of the *supremacy* or *authority* of the man to the woman; the rights and obligations that they have towards the children born in and out of wedlock; the questions on the practice of the polygyny.

Key words: authority, obedience, *mahr*, *hadana*, *wilaya*, *kafalah*.

1. Introduction

Before Islam, marital relations in Arabia were governed by the determination of individuals and Islam established a significant evolution in this regulation. In reference to personal rights and obligations of spouses, the most important innovations concerned the fact that : the marriage was intended as the only legitimate form of union between man and woman; the practice of polygamy was restricted; women were in some cases legitimated to ask for divorce. With regards to Islamic society, there is a prejudice about women in a twofold direction:

- a) first, that in Islam she is considered inferior to the man;
- b) second, that her inferiority is sanctioned by the main source of the Islamic law, the Qur'an.

Indeed, despite the efforts to mitigate the condition of women compared to that of the pre-Islamic Arabia, the unbridgeable asymmetry between the position of women and men represents a firm principle and characteristics of the Islamic society. During her entire life, the woman is constantly subjected to the more or less intense authority of the man¹. From birth to marriage, it is exercised by her father or, with the marriage, by her husband. In the event of widowhood or divorce, she returns to the original family, and if that is not possible, she will withstand the authority of her major sun for life or till a new marriage.

2. The different concepts on gender in Islam

This position of man's supremacy to the woman originates from a naturalistic vision, to what God has founded, from the creation, in the very nature of things. Submission to God is the attitude of any believing (the word "Islam" means *submission*) which is expressed directly for men and indirectly for women, by obedience to her husband. "Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend from their means; [...]" (Qur'an IV, 34). The other verse concerning man's superiority to the woman - "[...] but men have a degree over them [...]" (Qur'an II, 228) - was interpreted to mean that *it does not concern the ontological inferiority of women to men but rather refers to a well-defined circumstance: that in which a woman who has obtained the divorce realizes after that to be expecting a baby. In this circumstance, if her husband intends to reconcile, his wife*

¹ For a comprehensive discussion on the position of women in Islam, see AHMED L., *Oltre il velo. La donna nell'Islam da Maometto agli ayatollah*, La nuova Italia, Firenze, 1995.

can't object this decision². In fact, Islam imposes obligations to men and women that reduce their freedom in the best interests of the family.

Within Islam, we find two different concepts of gender:

- a) the first concerns rules to be observed by the members of the society (both men and women) in their relationships (for example between husband and wife);
- b) the second is related to an ethic concept of gender, such as the spiritual relation between any human being and God.

That is the reason why we find hierarchy between men and women in Islamic institute of marriage³ (or in other social relations), but not at a spiritual level, where they're completely equal. The equality between men and women is therefore interpreted in terms of moral and spiritual rights and obligations. An example is the verse stating that "[...] Never will I allow to be lost the work of any of you, be he male or female. You are (members) one of another [...]" (Qur'an III, 195). It can also be deduced by another important verse: "Verily, the Muslims men and women, the believers men and women, [...] who are obedient, [...] truthful, [...] patient, [...] who give Sadaqat, [...] who observe Saum, [...] who guard their chastity, [...] who remember Allah much with their hearts and tongues or praying extra additional, Allah has prepared for them forgiveness and a great reward" (Qur'an XXXIII, 35).

3. The rights and obligations between spouses

The rights and obligations between spouses are considered mostly in terms of reciprocity rather than equality. They reflect the sphere of action of each spouse related to their functions, separate and complementary⁴. Thus, the key word to understand the role of husband and wife in the classic Islamic family is *leadership*, which doesn't mean domination or oppression. At the basis of a married life, there is mutual tenderness and mercy, because man and woman are absolutely indispensable to each other. "And among His Signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy [...]" (Qur'an XXX, 21). In a figurative expression they are compared to "clothing (or dressing) each other" (Qur'an II, 187).

² GIOLFO M., *Attraverso il velo. La donna nel Corano e nella società islamica*, Ananke, Torino, 2002, pp.55-56.

³ Marriage in Islam is not a sacrament but a legal contract between a man and a woman.

⁴ LAPIDUS IRA M., *Storia delle società islamiche. I popoli mussulmani*, vol. III, Einaudi, Torino, 1995, pp. 374-375.

The legal and moral obligations between spouses, despite their differences have a reciprocal nature: not complying with these obligations causes the dissolution of the marriage. Reciprocal obligations are considered: cohabitation, respect, affection, protection of the moral and material interests of the family. If is not stated otherwise in the marriage contract, the husband may pretend her wife to live in his house. The main obligations for the husband, once paid the *mahr* or *sadaq*⁵, consist in financially supporting the family and providing for its needs: he must ensure to his wife/wives, maintenance (food, clothing and shelter) convenient to her social status (*nafaqah*). The *nafaqah* is not owed to repudiated women or to widows, unless they were infirm at the time of marriage. It is controversial whether this is owed to the woman who returns to her father's house without having consummated the marriage.

The husband should treat his wife with kindness, and must refrain from any unfair behavior towards his wife (wives: “[...] you should not treat them with harshness [...]. And live with them honorably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good” (Qur'an IV, 19). Husband and wife must treat each other “conveniently”, meaning that their relationship should be founded in generosity, sincerity and in harmony living. The same behavior should also be observed in case of marriage dissolution. “And when you have divorced women and they have fulfilled the term of their prescribed period, either take them back on reasonable basis or set them free on reasonable basis. But do not take them back to hurt them, and whoever does that, then he has wronged himself [...]” (Qur'an II, 231).

By marrying the woman, the man obtains the authority over her (*ismah*) and, by consequence the wife should obey to her husband. In case of disobedience the husband can legitimately use correction means prescribed by Qur'an: he can initially admonish her, and if disobedience persists, deprive her of marital affection; and finally, as a last remedy, he can use physical means of coercion. “[...] As to those women on whose part you see ill-conduct, admonish them, refuse to share their beds, beat them , but if they return to obedience, seek not against them means (of annoyance) [...] ” (Quran IV, 34). This power, however, must be used in moderation and not digress into acts of torture or mistreatment: in that case the woman is entitled to ask for a divorce. In any case, it is important to stress out that this obedience is conditioned and limited only to “lawful” actions. In fact, according to the opinion of the author Sayyid Qutb, “The referred obedience is the one that comes from will, compassion and love, not what is dictated by the duress and constraint. It is for this reason that the in Qur'an we find the word obedient (*qanitat*) and not subdued (*taiat*) ,

⁵ Patrimonial attribution in favor of the bride which the groom is obliged because of marriage.

because this is the more appropriate term to express the tranquility, tenderness, protection and love that unite the two halves of a single soul"⁶. The woman may be, in fact, entitled to refuse the performing of any prohibited act, which is considered disobedience to God. It is woman's responsibility to raise and educate the children and to run the family *ménage* in the best way possible.

While the woman is relieved from the duty of maintaining the family, it doesn't mean that she's prevented from supporting the family: if she wants to, she can withhold her earnings or contribute to the family budget to her liking.

4. The debate on polygyny

The Islamic marriage can be polygynous, meaning that a man can have up to four wives at the same time, provided that his is just to them and treats them equally. In this case the man is obliged to be equal with his wives: the Prophet said: "the best among you are the best to their wives"⁷. This equal treatment refers not only to the material but also to the affective sphere: if the first condition doesn't entails insurmountable problems of practical implementation, the second one is in fact impossible. The debate on polygyny today divides modernists and traditionalists: the former argue its inadequacy in our times, while the latter refuses any new interpretation. Polygamy was a common practice in pre-Islamic society to which they tried to put a limit restraining the maximum number of wives to four. It had a special meaning in Arabia pre-Islamic Arabia, where many marriages alliances meant many possibilities of trade, but since the end of the nineteenth century, it has been subject to a profound criticism from the Muslim world. The modernists argue that equality in religious rights and obligations is just the beginning of a long way in recognizing additional ones⁸.

There is only one verse in the Qur'an which allows polygyny, (to be precise, *tolerates* it) and it prescribes the following: "And if you fear that you shall not be able to deal justly with the orphan-girls, then marry women of your choice, two or three, or four but if you fear that you shall not be able to deal justly, then only one or that your right hands possess. That is nearer to prevent you from doing injustice". (Qur'an IV, 3). According to tradition, the Prophet had encouraged his companions to take charge of the orphans by integrating them

⁶ NESSEF F., *La donna alla luce dell'Islam: diritti e doveri nel Corano e nella Sunna*, Al Hikma, Imperia, 2005, p. 162.

⁷ RAMADAN H., *La donna nell'Islam; al di là dei pregiudizi*, L.S. Gruppo Editoriale, Bologna, 2005, p. 13.

⁸ MASHHOUR A., *Islamic law and gender equality-could there be a common ground? A study of divorce and polygamy in Shari'a law and contemporary legislation in Tunisia and Egypt*, in *Human Rights Quarterly*, 2005, vol. 27/2, p. 569.

into their families. At these conditions, the only way for the woman to overcome the difficulties of taking care of the new extended family, could be overcome by marrying the man other women, to a maximum of four wives.

The sub mentioned verse clarifies the usefulness of polygamy as an extreme remedy in situations of emergency and necessity. Anyway, it refers to slave women and slavery has been abolished. Consequently, it can be argued that – because of a purpose-built interpretation of the Qur'an, which takes account of the historical evolution of the society - even polygyny should be considered illegitimate.

The regulation on polygamy has been interpreted by the experts in close relation to another verse of Qur'an, which prescribes: "You will never be able to do perfect justice between wives even if it is your ardent desire [...]" (Qur'an IV, 129). According to the majority of jurists, this verse clearly proves that it is impossible for a husband to be fair and impartial with their wives⁹. For this reason polygamy should be accepted only in very rare cases, remaining virtually prohibited in normal situations. This institution is, in fact, not only a strong element of destabilization of the family, but it is also a clear demonstration of the difference between legal spouses. The Qur'anic foundation of the institution has prevented from explicitly excluding the polygyny in the later codes of personal status. Nonetheless, lawmakers have tried to limit it through many different restrictions: for example, by recognizing the women's right to include in the marriage contracts a clause that excludes polygyny. If this clause is not satisfied, the woman would be entitled to ask for divorce.

In consideration of the system of polygamy - the spouses are like two strangers and retain full ownership and disposition of assets they owned at the time of marriage. There is a regime of strict separation of property and donation between spouses is permitted. The husband must provide for the maintenance of his wife, regardless of the fact that the woman needs it: even the rich woman can claim to be maintained¹⁰. In case of polygyny he must provide to each wife a different shelter. A married woman has full management of her patrimony and can freely dispose of it, not depending on permission of her husband.

⁹ Only the Hanbali School admits the inclusion in the marriage contract of the clause that prohibits the husband to contract a second marriage.

¹⁰ It is controversial if the woman's right to be maintained starts from the moment of conclusion of the marriage contract, or from the time of consummation: the hanifiti school adopts the first solution, while the malikiti school adopts second one.

5. Parent-child relationship

With regard to the parent-child relationship (*nasab*), the Muslim law prescribes rigid rules. This relationship is legitimate only within a valid marriage and only in paternal descent, while the adoption of children is expressly prohibited. "Allah has not put for any man two hearts inside his body [...] nor has He made your adopted sons your real sons [...]" (Qur'an XXXIII, 4).

According to Islamic classic law, the children that are considered part of the family are:

- a) those born in the wedlock;
- b) those recognized by a formal declaration of paternity
- c) those born from relationships with his servant (the latter case being no longer considered, being slavery abolished throughout the world).

The attribution of the child to his father is closely related to the fact that he was conceived and born in wedlock, with some exceptions. The doctrine of the four main law schools interprets differently the minimum period of gestation: for the *malakiti*, the son is attributed to the husband only if he is born within one hundred eighty days after real or assumed consummation of marriage, while for the *shafi'iti* such period will run from the contract day¹¹. The presumption of paternity is absolute for the *hanafiti*, meaning that the child is attributed to the father even in cases of lack of real consummation of marriage.

On the contrary, for the *malakiti*, the presumption is *iuris tantum*, so once the proof of non-consummation is reached, the attribution of fatherhood is excluded by the declaration of disavowal of the husband, which can be performed by the procedure of *li'an* (imprecatory oath). As to the birth of children after the dissolution of marriage, the doctrine's interpretation admits a very long gestation period, which can be up to four years for *malakiti* and *shafi'iti*¹². A necessary condition for the attribution of the child to her husband was that the woman didn't contract a second marriage. The reason of this flexible interpretation was to avoid the severe consequences that the law prescribed in case of adultery.

A very common practice in pre Islamic Arabia for the attribution of the fatherhood was the adoption (*tabanni*). With Islam, it becomes admission of paternity. The recognition is permissible only if the person is of unknown

¹¹ Cfr. SANTILLANA D., Istituzioni di diritto mussulmano malichita con riguardo anche al sistema sciafiita, vol. I-II, IPO, Roma, 1938, p. 187.

¹² Il feto, secondo tale interpretazione, vivrebbe latente nell'alveo materno. Per ulteriori approfondimenti, si veda SANTILLANA D., Istituzioni di diritto mussulmano malichita con riguardo anche al sistema sciafiita, cit., p. 187.

fatherhood and if by the difference in age it can reasonably be assumed a parent-child relationship. A basic prerequisite for this practice was for the child to be born in wedlock. With regard to abandoned children, their protection is guaranteed by the institute of *kafalah*: they should be treated as biological children, but are not entitled to the same rights of the later such as the name and inheritance¹³. This is prescribed in the following verse: "Call them by (the names of) their fathers, that is more just with Allah. But if you know not their father's (names, call them) your brothers in faith and Mawalikum [...] ", (Qur'an XXXIII, 5).

In mother-child relationship, the main right/obligation is to take care of the infants. The Qur'an prescribes breastfeeding for a maximum of two years as part of *hadana*, which refers to mother's care and custody of the children. For boys it lasts until puberty while for girls until marriage. Even though she is wealthy, she is not required to contribute to the maintenance of the children: the only exception was provided for minors or infirm categories, when the husband was absent, insolvent, or deceased, leaving no sufficient resources for the family. In that case the wife had the right to ask for reimbursement of the incurred expenses to her husband or to her son. The father is also obligated to protect his children (*wilaya*). The *wilaya* consists in making decisions regarding his children on education, work, marriage and administration of their property: it means also that the father is the child's legal representative. Another prerogative of the *wilaya* is the power of compulsion on males until they are pubescent, and on females until they marry. The children must be educated in the Muslim religion, and in mixed marriages, any agreement between the spouses in conflict with this rule is to be considered null and void. The respect and obedience of the children to their parents is always owed as an expression of a more general attitude of reverence towards them. That is established as one of the most important precepts of Islam. The son guilty of having committed an act of rebellion to his parents becomes incapable to testify. The only exception of justified disobedience concerns orders against the prescriptions of Islam.

Children must maintain their parents if they're poor or if they're unable to work.

6. Conclusion

The rights and the obligations of spouses in the Islamic classic law reflect their different role inside the family. A hierarchic relationship exists between men and women in Islamic marriage or in other social relations, but not at a

¹³ BARGACH Jamila, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Rowman & Littlefield Pub Inc, Mars 2002, p. 104.

spiritual level, where they're completely equal. The equality between men and women is interpreted in terms of moral and spiritual rights and obligations. The key word to understand the role of husband and wife in the classic Islamic family is *leadership*, which doesn't mean domination or oppression. Husband and wife must treat each other "conveniently", meaning that their relationship should be founded in generosity, sincerity and in harmony living. The same behavior should also be observed in case of marriage dissolution. For this reason that we find in the Qur'an the word obedient (*qanitat*) and not subdued (*taiiat*), because this is the more appropriate term to express the tranquility, tenderness, protection and love that unite the two halves of a single soul.

With reference to polygyny, it is considered an extreme remedy in situations of emergency and necessity, thus it is tolerated rather than allowed. It refers to slave women and slavery has been abolished, thus part of the doctrine deduces that polygyny should be considered illegitimate. Moreover, according to the majority of jurists, this verse clearly proves that it is impossible for a husband to be fair and impartial with their wives.

At last, with regard to children born in and out of wedlock, they are treated differently: attribution of the child to his father is closely related to the fact that he was conceived and born in wedlock. This doesn't mean that abandoned children remain without protection: it is guaranteed by the institute of *kafalah*.

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