

## **Modern Trends of Ijma in Islamic Countries**

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### **Abstract**

By the expression “Personal Law” are meant here the legal principles, applied on the basis of religious adherence, relating to matter which in the eastern countries are generally believed to have a religious aspect, viz, personal status, marriage, divorce, family relations domestics obligations, inheritance, wills, gifts and endowments, etc. And by Islamic countries I mean here those sovereign nations of the modern world which are ruled or otherwise dominated by the followers of Islam. The contemporary Islamic world includes, twenty two Arab and not less than eighteen non-Arab countries.

The winds of reform that began blowing across the globe since the middle of the 20<sup>th</sup> century did reach also the Muslim world. Everywhere in the Muslim world people were extremely sensitive-and, for that reason, the reformers abundantly cautious- in respect of personal law reform.

The source- materials for all the reforms have been located by the jurists and the legislators of Muslim world in depth, divergence, flexibility and richness of the legal principles within the framework of the Shariah. It is nobody’s case in the Muslim states that personal law has been codified and reformed merely to modernize or westernize the law. Nor has any wholly un- Islamic source ever been quoted for any of these reforms by their architects, advocates and exponents.

### **Methodology of Reform :**

To achieve the desired legal reforms recourse has been held in various Muslim countries to the Islamic jurisprudential doctrines of Musawat-i- madhahib-i-fiqh (equality of the schools of Islamic law) istihsan (juristic equity, masalih al-mussalah (public interest siyarsah shariyah (legislative policy of the state) istidlat (juristic reasoning) tawdi (Legislation) tadwin (condification) and the like.

The techniques and the methodology of reform adopted have included-besides the age-old process of Ijma (consensus of jurists) Qiyas (analogical deduction of rules) and individual or collective ijtehad (evolving new legal principles on the basis of the old ones) – some new principles like takhayur (eclectic choice out of divergent legal principles within the Islamic law) and talfiq (combination of two or more parallel legal rules to evolve a new one)

The task was indeed stupendous, but the achievements have been glorious.

### **Polygamy :**

As regards polygamy, a verse in the holy Quran (IV:3) says that though one could have four wives at a time, one who cannot treat co-wives with equality and justice should rest content with a single wife, adding that this (monogamy) would be better to keep men away from injustice (or to keep the family limited as per the interpretation of Imam Shafii). The permission for polygamy is thus conditional not absolute and therefore can be restricted by an agreement or by the law. Accordingly the Quranic conditions for polygamy have been enforced and in order to prevent misuse of the law on this subject further restrictions imposed, in a number of Muslim countries.

Anderson recommended legislation requiring registration of all marriages by means of statutory contract incorporating anti bigamy stipulation. The same solution to the problem of unrestricted bigamy has been suggested by some Indian scholars including Kamila Tyabji. In an article Kamila tells her coreligionists, "when a purely permissive right is given to you, as in the case of polygamy you cannot possibly be un-islamic if you give it up at the most it may be said you have been overgenerous".

Among the Ulama and their disciples, a spokesman of the Jamaat-e-Islami favours a judicial control of man's freedom to contract bigamous marriage. In the opinion of Maulana Sayeed Ahmad Akbarabadi, "Polygamy is a Mubah having its uses and abuses and if it is misused for "nefarious ends" it can be lawfully restricted.

In Jordan, Lebanon and Morocco legislation specifically recognize the right of every woman to stipulate at the time of marriage against her husband's possible second marriage while she remains his wife, violation of the stipulation entitling her to seek a divorce. In Algeria the law provides that an intended second marriage must be "justified", the husband must be able to treat co-wives with equality. In Egypt, the law requires every man getting married to provide to the marriage officials full facts of his existing marriage, if any, the first wife can seek a divorce if the second marriage has caused her an injury, the second wife can seek a divorce if she has been deceived into a bigamous marriage.

In Indonesia, Iraq, Malaysia, Somalia, South Yemen and Syria a married man wanting to marry again must obtain prior permission of the court, while in Bangladesh and Pakistan he must seek permission from quasi-judicial body.

In Turkey bigamy is altogether prohibited and a bigamous marriage is liable to annulment except if after its solemnization the first marriage has been dissolved, while in Tunisia bigamy is prohibited and if a bigamous marriage takes place it will be invalid and penal.

Thus while the decision whether a person does fulfill the Quranic conditions for bigamy which the ancient muslim jurists had left to his own subjective satisfaction has now been vested in the court or another agency in a number of other muslim countries in Tunisia and Turkey the State has now ruled that no body can fulfill those condition in modern social circumstances.

### **Triple Divorce**

Extra Judicial divorce by the action of the husband remains possible in several Muslim countries. A system of checks and balances of various kinds has however been devised for this form of divorce.

In Iraq, Jordan and Syria a husband wanting to effect a Talaq is advised but not compelled to approach the court where he does approach the court it shall exhaust all efforts to see that the divorce is avoided and can eventually permit only a single divorce. If a person does not go to court for Talaq he must register the talaq, after it is pronounced with the court or local registry which shall make sure that the talaq to registered is in fact effective in law and cannot be avoided.

In Afghanistan, Algeria, Indonesia, Malaysia, Somalia, South Yemen and Tunisia a Talaq can be effected by a husband only with the prior permission or intervention of the court which must first try to effect a reconciliation direct or through arbitrators failing which it can allow a talaq.

In Lebanon a talaq must be notified to the court by the husband who has pronounced it while in Bruni and Egypt it must be duly registered with Civil officials within 3 and 7 days respectively.

Under the laws of Bangladesh and Pakistan on Talaq, after it is pronounced, is to be notified to a local government official to enable him to set up the machinery for reconciliation and the talaq remains ineffective for 90 days during which period the said machinery will go into action and exhaust all possibilities of reconciliation.

### **Shares of Predeceased child's descendants**

One of the basic principles of the Islamic law of inheritance is "nearer excludes the remoter" and it applies to all classes and generations of heirs. In the presence of father the grandfather and in the presence of child a grandchild of deceased cannot be his heir, in the latter case it is irrelevant whether the grandchild is the child of a son or daughter of the deceased who has survived him or of one who has predeceased him. What is known as rule of "representation" is not recognized for such cases by the established Islamic Law. New legal rules on this point have now been introduced in ten Muslim Countries.

Fyzee has suggested enactment of the Pak-Bangla principle of representation in India under which the orphaned grand children would stand in the shoes of their link parents. Anderson has on

the other hand recommended adoption of the West Asian device of “obligatory bequest” under which rule a bequest (within the bequeathable limit)” will be presumed to have been left by a person survived by a predeceased child issues in favour of such issues.

In the area of succession to property, unconditional permissibility of bequest in favour of presumptive heirs is considered as a solution to many drawbacks. It will enable a husband to increase the share of his widow in his property. Similarly, a daughter’s share which now one-half of the son’s share can be increased by means of a will.

It may be noted that a bequest in favour of an heir is valid in ItthnaAshari law and the principle of that law has been adopted and made applicable to all Muslims in Egypt, Sudan & Iraq.

- (i) In Algeria, Jordan, Morocco and Syria a person whose son has died during his life time leaving behind his own children must make in favour of those children a will (called wasiyahwajibah) in order to give them the share which their deceased father would have inherited from him if he had survived him without, of course, going out of the limit of 1/3 of the estate.
- (ii) In Egypt, Iraq, Kuwait and Tunisia such a bequest must be made in favour of the children of a predeceased child of either sex.
- (iii) In Egypt, Jordan and Kuwait such a bequest shall be made also in favour of the children of a pre- deceased son’s how low soever.
- (iv) In all the abovementioned countries such a bequest if not made in fact is to be presumed by the law to have been made and shall be enforced in preference to other bequests made voluntarily, if any
- (v) In Bangladesh and Pakistan children of a predeceased child- son or daughter- of the predeceased shall directly inherit the share which that son or daughter would have received if alive at the opening of succession.

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