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## “Your Wives Are a Tilth For You...”

Sex, Marriage and Divorce  
under Islamic Law

by T. W. Lapin

*This is the last in a series of three articles in which the author has endeavored to introduce to his colleagues some aspects of a legal and philosophical system very different in form, but similar in spirit and background to our own. It is hoped that these articles in some way, however*

*minor, acted to encourage American lawyers and prospective lawyers to look past the boundaries of religion, nationality and geography in an effort to understand and appreciate the culture of a vast number of people who share this planet with us.*

To us in the West, marital processes in the Muslim World conjure up images of harems and quickie divorces. While it is true that polygamy (the practice of allowing a man more than one wife), and comparatively facile divorces have been common in Islamic countries for centuries, it is well to remind ourselves that for millenia polygamy was the norm, rather than the exception, in most parts

of the earth, and that divorce in the Soviet Union today is much faster and less cumbersome than in any Muslim land.

An Englishwoman, travelling in Egypt during the early years of the last century, remarked that, if there was a hell on earth, it was where polygamy was practiced. Hardly an objective view, it nevertheless deserves some examination.

Before becoming dewey-eyed over the thought of innocent young girls being delivered into a living death in the harem of a sex-crazed sheikh, a cursory glance at the intricate and eugenically sound Islamic prohibitions on consanguinity, forced and arranged marriages, etc., is in order.

Muslim marriages are, in contrast to the sacramental ritual to which we are accustomed, essentially civil contracts, grounded upon the mutual consent of both bride and groom and endowing each party with obligations and benefits, as well as remedies for what — for want of a better term — might be called “breach of contract.” The Muslim husband acquires no further rights to his wife of her property than those stated in the marriage agreement, the wife in turn reserves an absolute right in properties acquired by her both before and after the marriage; and, in addition, receives the right to a distinct lien upon her husband’s property for her prenuptial “meeting of the minds.” (N.B.: Islamic law gave equal rights of inheritance to women long before that concept was dreamed of in Europe).

Arranged marriages are still common in many parts of the Islamic World but this system is not without its checks and balances. As marriage is regarded as a contract, it can be entered into only by those capable of entering into any other type of binding agreement. Adult men and women can contract marriages on their own, as long as the marriage is properly witnessed. Where minors are concerned, marriages may be performed by the minors’ guardians on behalf of the minors, with the minors retaining an option, on attaining maturity, to ratify the contract or repudiate it. This practice is called “khair ul-Bulugh.”

In regard to marriageability, women are classified into four categories: 1.) Adult women who have previously been married, in whose case a marriage without their consent is void.

2.) Adult virgins, who — according to most Islamic sects — must consent to the marriage before it becomes lawful.

3.) Minor girls previously married. Most Islamic sects hold that their guardians may arrange marriages without the consent of the girls.

4.) Minor virgin girls, whom all major Islamic sects hold are under the authority of their guardians, who may marry them off almost at will. "In the case of [an adult] virgin, silence before the witnesses is a sufficient indication of consent; while in the case of a widow or divorced woman, express consent is necessary."

As previously stated, a minor girl given in marriage has the option of repudiating that marriage upon attaining legal maturity, i.e. puberty. There is one exception to this rule: a girl given in marriage by her father or grandfather may not revoke the marriage. But if it is recognized that the father or grandfather of the girl arranged the marriage with evil or foolish intent, the contract may be declared void by the minor herself. If the girl is a virgin, her repudiation of the marriage contract may be either express or implied, and must be made immediately upon attaining legal age and before consummation of the marriage. In the last instance, a decree of divorce is required.

A Muslim is forbidden by law to marry certain women: idolatresses, his mother, his grandmother, his sisters; his paternal aunts, his maternal aunts, the daughters of his brothers or sisters, his foster sisters, his daughters-in-law, and all married women. The grounds for this prohibition may be divided into the categories of consanguinity, fosterage, and affinity. It is further forbidden that a man marry two sisters at once; moral considerations aside, that could prove exhausting.

As a way of life, as well as a judicial corpus, Islamic law has a number of guidelines for sex, birth control, and other matters which we of the West are inclined to regard as moral prerogatives. Premarital sex is forbidden, as is male homosexuality; female homosexual ac-

tivities are looked upon as rather harmless, women being regarded as simple creatures who should be allowed more leeway in their emotional conduct than is allowed a man. Besides, sexual contacts between women were considered a viable safeguard against the "contaminating" results attendant upon illicit sexual relations with men.

The Biblical story of Sodom and Gomorrah made a deep impression on the early Islamic jurists. Among the sayings attributed to the Prophet Muhammad are: "Whomsoever you find doing the deed of the people of Lot, kill the doer and one on whom it was done;" "Verily, the most fearful of what I fear over my people is the action of the people of Lot." Prohibitions notwithstanding, homosexual activity by both genders was, and is, widespread throughout the East.

Bestiality is likewise stringently forbidden, as another saying of the Prophet evidences: "Whoso comes to an animal [with lust], kill him." (But cf. the rural Turkish notion that it is only animals that one eats which are under the ban). Anal coition with women is also forbidden, and it is recommended that a man thus caught in the act be killed. Vaginal coition, on the other hand, is encouraged, with any and all positions being deemed legal. Before commencing intercourse it is required of the man and woman that they recite, "In the name of God, the Almighty and Great. God is most great, God is most great!". As a precaution against the malicious "jinn" ("genies") who love to loiter about thresholds, toilets, baths, and marital beds, it is recommended that the couple recite, "O, God! Protect us from the Devil, and keep the Devil away from what Thou hast provided us!".

During intercourse the couple should not face towards the west. When the man ejaculates, he is to think of the following verse or its meaning: "All praise is for God, who created man from water. Then He made for him blood and the relationship of marriage." Before and after intercourse the genitals of both man and woman are to be washed. Sexual relations between man and wife are considered highly commendable, but there

are certain prohibitions placed upon these relations. Coition is forbidden during the time the wife is menstruating; after childbirth until the stoppage of blood, nearly up to the fortieth day; during the hours of fasting during religious holidays; and after a man whips his wife (which he should not do unless she deserves it).

The introduction of Western ideas of birth control into the Islamic World produced no end of disputes. Generally, birth control was forbidden under Islamic law, the idea of marriage being to produce children. There were exceptions to this flexible rule, based principally based on ill-health of the wife after too many or too frequent pregnancies. The accepted method of birth control under the appropriate conditions was "azal" (coitus interruptus). The relative merits of birth control have triumphed in the Muslim nations to the extent of being a national policy, as in Egypt and Pakistan. The controversy which arose in the Arab World after the introduction of population planning *en masse* seem almost humorous when one remembers that the Arabs invented the IUD almost two thousand years ago. Of course, it was used only on camels and assorted other beasts...

Until comparatively recent times, only the husband could initiate divorce proceedings under Islamic law. Times have changed to the point that today, in many Muslim countries, a woman may divorce her husband on virtually the same grounds previously open only to him. The finer points of the law vary from country to country: in Egypt, for example, a woman may divorce her husband only on the grounds of "excessive" beating, impotence, or for having a disfiguring or disgusting disease.

In the classical style, a Muslim husband had only to say to his wife, "I divorce thee, I divorce thee, I divorce thee," in the presence of witnesses, and the divorce was complete to the greater extent. Such a divorce was not valid if the husband was intoxicated or insane. Modernizations of this ancient rite have been made: to return to Egypt for example, we note that the husband's proclamation must be made on three

separate occasions, and before a magistrate. The Ottoman Family Law of 1917 gave considerable rights to women in divorce actions, but the extent of that law is beyond the scope of this article.

The principle behind divorce in Islam is that two people who do not get along with each other should not have to remain together: the matter is not taken lightly. Divorce among orthodox (Sunni) Muslims formerly took several forms: 'ila, zihar, and tahlil.

"'Ila" means "swearing." By this method the husband would swear not to



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have any sexual relations with his wife. The husband was entitled to invoke this privilege as many times as he wished, and would keep his wife in suspense throughout her life waiting for him to finalize the procedure. The Qur'an forbids this type of action, and states that if the husband does not return to the marital bed within four months of the swearing, his wife is divorced.

"Zihar," another early form of divorce, was the practice of the husband

saying to his wife, "Thou art to me as the back of my mother." The wife was then kept away from the husband for a time. The Qur'an abolished this behavior, too, saying that the man who exercised this option would have to atone for his action by fasting two consecutive months, or freeing one slave, or feeding sixty people.

"Tahlil," or "legalizing," is the only one of the three classical means of divorce still found in some Muslim countries. It finds no support in the Qur'an or in the Saying of the Prophet, and is actually a way of getting around the prohibition of marrying one's previously divorced wife. It operates thusly: when a wife has been divorced with the so-called "threefold divorce" (mentioned earlier: the husband says "I divorce thee" three times, and the divorce is irrevocable), and her husband decides to take her back, he enters into a contract with a third party under which that party will marry the wife and divorce her immediately after sexual intercourse with her. Muhammad was opposed to such practices, and cursed those who engaged in them.

There is a form of mutual divorce called "divorce by mubarat" in which both man and wife declare themselves divorced. As with other divorce proceedings, this must take place before two witnesses of legal age and of good character. Where the two parties are forced to obtain a divorce, that divorce is held void as it was against the mutual will of the husband and wife.

A rather novel form of divorce is that known as "divorce by Li'an." This is, literally, divorce by mutual cursing. The husband accuses his wife of adultery, she denies it, and they go before a magistrate. After four successive charges of adultery made by the husband, and four successive denials by the wife (accompanied by a great deal of cursing and swearing on the part of both man and wife — hence the name for the divorce —), the husband says words to the effect that if he is falsely accusing his wife of infidelity, he should be cursed by Allah. His wife replies with a similar statement that if she has been unfaithful may she drop dead, and the magistrate pro-

nounces them divorced.

After any divorce there is a time of waiting, called "iddat." If the marriage has not been consummated, there is no iddat. If the wife is pregnant, the iddat lasts until the time of delivery. If the marriage has been consummated, but the wife is not pregnant, the iddat is three months, that is, three periods of menstruation by the wife to determine that she is not pregnant.

The purpose of the waiting time is to reinforce the intention of the parties that the divorce be final. Within the iddat the wife may return to her husband for sexual relations; after the end of the iddat, the divorce is final, absolute, and binding on all concerned.

