

Memorandum on Tanzania White Paper on Uniform Marriage Law

Note: This Memorandum unavoidably incorporates some paragraphs from the Memorandum submitted to the Kenya Govt.'s Commission.

On behalf of the Shi'a Ithna-'Ashari Community of Tanzania, we take the liberty of submitting the following views on the Government proposals on Uniform Law of Marriage (Government's Paper No. 1 of 1969).

The claimed aim of the proposals is to remove the present condition in which "the existing laws do not recognize all the marriages contracted under different laws as equal."

But, is it necessary, for this purpose, to enact a uniform law of marriage? Can this object not be easily achieved by bringing all the marriages under the jurisdiction of one court and under one register of marriages?

In 1964, the 'Restatement of Islamic Laws Act' was passed to the effect that the rules of Islamic Laws of marriage be codified. A Subsidiary Legislation¹ under that Act was published as the Supplement No. 34 in the Gazette of 27th June, 1967. This was supposed to be the first installment.

We wonder why that policy could not be continued, or even extended to cover the different customary as well as the Hindu and Christian marriage laws. These laws could be codified and brought under the jurisdiction of one court.

Then, and only then, could a comprehensive chapter be added dealing with the conflict of law, some examples of which have been given in the White Paper.

We appreciate that multiple social problems arising out of the abuse or misinterpretation of customary or religious laws, in general give cause for serious concern to the Government. The Government, in the efforts to secure the welfare of its people, in that respect, is confronted with the task of eradicating social

evils.

Any effort in this direction is worthy of support and deserves all co-operation. But we feel that the idea of enacting a common law, repealing the Restatement of Islamic Laws Act, is not the right one.

Even traditions (not having any divine authority behind them) are hard to change. This becomes even more dangerous in cases like the Islamic Law which is an integral part of our religion. These laws cannot be violated without incurring a sense of guilt and sin.

Therefore, we feel that the best way would be to "let a hundred flowers bloom." National unity does not demand that all citizens should have the same dialect or the same religious belief. Why is it considered essential to have a uniform law of marriage and divorce applicable to all people in Tanzania?

Our Shi'a Ithna-'Ashari Sha'riah is not based upon "Ra'i" (Opinion) or "Qiyas" (Analogy). It is based wholly on the Qur'an and the traditions of the Holy Prophet and our Twelve Imams.

As the White Paper is concerned with matters of matrimony, we must point out that our fundamental rules of marriage and divorce are based upon the Qur'an. Details which are not explicit in the Qur'an are explained in the traditions.

Our religious scholars who are called Mujtahid do not give any ruling by their opinion, analogy or consensus. There is no such authority given to any body in our school of law. They may differ in interpreting certain traditions concerning some minor details, but even then that difference is a difference in interpretation, not of opinion.

The Shi'a Ithna-'Asharis follow in all religious matters the rulings of the greatest Mujtahid of the time. He is considered the representative of our 12th Imam and he is the final authority on all religious matters.

In him rests in certain cases the powers of guardianship of children, marriage and divorce, executorship of the will and state of a deceased and such matters.

Ithna-'Ashari school of Islamic Laws is a well-knit entity. We cannot change or amend one or two aspects of it without destroying the whole fabric:¹

For example marriage and divorce rules have direct bearing on legitimacy of a child; on virtue or sin of togetherness of the man and the woman; on their mutual right of inheritance and that of the child; apart from other social and legal implications.

In Islamic Law a man cannot use anything obtained illegally (in religious sense) either for secular or-for religious purposes. Therefore, if a change is made in the laws of succession, for instance, and someone is given more than his due share according to Quran, his whole life would become miserable. His daily life would be a long list of transgressions; his prayers, pilgrimages, food and clothing would, in the religious sense, become unlawful.

Thus it is clear that the pattern of laws of marriage, divorce and inheritance cannot be changed. Otherwise, this would constitute a direct interference in our religion.

Regarding the rights of a woman in Muslim Law we wish to submit that:

In our school of Law, a woman has such rights, privileges and safeguards for the past fourteen centuries, most of which were unimaginable in non-Islamic societies up to the last century and some of which are ahead of the so called modern time.

Islam, according to Shi'a school, has given a woman right to contract herself in marriage if she is adult and discreet.

Islam has given the woman an independent identity. A Muslim woman owns her property even after marriage and a husband cannot interfere with it.

She can sue her husband, can give evidence against him. She inherits from him by right and he inherits from her. This mutual right of inheritance was given when no society ever thought about it.

A woman's share is, normally, half of that of man. But this is quite logical. Islam has made man responsible for the maintenance of his family. No such burden is laid upon a woman.

Even a rich wife is entitled to get her maintenance from her husband though he may be poor. As the maintenance of the family is the responsibility of man, he has been given double share in almost all inheritances.

The woman gets the 'Mahr' (it is not the 'bridge-price which is foreign to Islamic thinking) which goes from husband to wife. The ratio of the shares as laid down in the Qur'an is, therefore, most reasonable.

Islamic laws relating to will do not allow a person to will away more than one third of his net estate. Thus the financial position of the would-be heirs (including the wife) is always secure and beyond any encroachment by any one. This security is still lacking in many societies which allow a man to give all his estate even to a stranger.

Now coming to the White Paper itself, there is one proposal which in its present form, cuts deep at the root of all religions. It is the suggestion that "If a man cohabits with a woman for a period of more than two years then he would be presumed to have married that Woman, and if they have children such children would be deemed to be legitimate children of such spouse."

If the intention is to provide safety to a genuine wife whose marriage was not registered or whose marriage certificate was lost, the word 'co-habit' does not convey the idea.

It should be changed to "living together as man and wife in a family atmosphere, provided it is possible for them to marry and one of the spouses claims marriage which is not refuted by the other spouse; or in

case of death of either spouse, it is commonly known that they were married and it is not proved that there was no marriage at all.

Also, as we have mentioned earlier, in Islam a wife has no responsibility to maintain her husband. Thus the proposal of the White paper to make the wife liable to maintain her husband goes completely against Qur'anic injunctions.

As a debate is going on the question of polygamy, it is necessary to reaffirm that we are fully convinced of the desirability, nay, and essentiality of polygamy in many cases. African society, as the White Paper rightly affirms, is a polygamous society. Islam agrees with it. But Islam has put the limit to four wives at a time and has enjoined, by specific regulations, equality in treatment and rights of all wives, as the White Paper desires.

It should be remembered that polygamy is not a compulsory thing nor is it advocated. It is just permission with certain limitation and conditions. And in some of the circumstances this permission proves extremely useful.

For example: If the wife is chronically ill, or is barren, or for some other reasons it is not desirable for the couple to live as husband and wife. The remedy offered by certain societies is to divorce the wife and re-marry. But is this justice? Is it kind or noble to turn out a woman in her old or middle age from her home, just because she remains sick or happens to be barren?

Islam discourages such cruelty by permitting polygamy.

This is quite apart from the statistical findings that women out-number men in Tanzania, 100 women to 95 men; or that in certain calamities, like war, men have to face death more than the women. If polygamy is not allowed by the society it will compel five per cent women in the country to resort to prostitution.

We think this much will suffice to show the wisdom of the White Paper in recognizing polygamy as a lawful and "useful" institution. But, in its present form, the White Paper will not serve the required purpose.

What will happen if in spite of the conditions necessitating a second marriage, the first wife refused to 'Voluntarily and freely agree to convert the monogamous marriage" into a polygamous one? Will it not force the man "into a position whereby he has either to divorce his first wife or co-habit (illegally) with the other woman", with all its inevitable undesirable effects?

A better course is to require the man to go to the proposed marriage tribunal or board of his community and convince them of his needs. If they agree, the refusal of the first wife should not be entertained at all.

We assume that, as there is no question of changing the nature of marriage in a Muslim marriage, a

Muslim will not need the consent of his first wife (or wives) before marrying another one.

Divorce

There is no need to emphasize that in certain conditions divorce is the only remedy left to a couple. The usefulness of the divorce system can be seen from the fact that even Hindus and many Christians have been compelled by sheer force of necessity to enact divorce laws.

The White Paper recognizes this necessity. Also it must be remembered that Islam, while admitting of its necessity in some cases, has declared it to be the "most abominable of all legal provisions" to be resorted to in case of extreme hardship only.

The Qur'an has established the machinery for reconciliation, and many Muslim communities have such committees. Unfortunately some quarters have disregarded this important system completely. This abuse of the legality of divorce must be stopped and the attempt of White Paper to curb this tendency is very welcome.

Conditions of Divorce

We must point out at the outset that the Shi'a Ithna-'Ashari school of Islamic Laws has laid down strict rules based upon the Qur'an and traditions concerning divorce. The divorce is allowed provided it is pronounced in the presence of two "Adil" (men of approved probity) witnesses who hear the words and understand the nature of divorce. The divorce must be pronounced in approved formula.

Further, it is also necessary that the husband must be adult, sane, and of sound understanding, acting on his own free will and not under the fit of rage or duress, and that he should have the distinct intention to dissolve the marriage.

So far as a wife is concerned, she at the time of divorce must be in a state of purity, and that divorce cannot be pronounced even in a period of purity in which the husband has had sexual intercourse with her.

If any of the above mentioned conditions is violated, the divorce is null and void.

The Muslim law does not give the right of divorce to the woman. And any suggestion that the woman should be given right to divorce her husband is going to be an 'interference with religious precepts' which; the White Paper repeatedly says, is not the intention of the Government.

A family is the basic society, and like every society, it needs a final authority to maintain discipline and well-being of the members. Islam has given that place to the husband who has been given right to give divorce.

But a Muslim Woman is entitled to ask for dissolution of marriage or even nullify it herself, in the following cases:–

- She can ask for 'Khula' which may be agreed upon by the husband;
- She can request the Mujtahid (who is the 'Qadh' in Shi'a Ithna-'Ashari shariat) to grant her divorce if the husband has disappeared, or neglects to maintain her;
- She can cancel the marriage if the husband is insane, or becomes insane after marriage.
- And she can nullify the marriage (after referring the case to the Mujtahid) if the husband is impotent.

It will be necessary, while drafting the bill, to recognize the divorce granted by the Mujtahid and the nullification of marriage so far as the Shi'a Ithna-'Ashari marriages are concerned.

The above mentioned rules have a bearing on the provision of the White Paper concerning the husband who has disappeared. The granting of divorce by the Mujtahid (or in case of non-Ithna-'Asharis or non-Muslims by the judge) is a far better solution than to presume the husband dead (for the purpose of his marriage) and alive (for other purposes, including the other marriages, if any) at one, and the same time!

As the White Paper rightly recognizes the divorce given by a Muslim husband as final, and requires the court to register such divorce without any further investigation, we want to emphasize that such divorce should be effective from the date of pronouncement of the formula of divorce by the husband, and not from the date of registration.

The White Paper requires a Muslim intending to marry to give notice of his intention, 21 days before, to "a Sheikh authorized by the Minister to solemnize marriages."

It has overlooked the fact that a Muslim boy and girl can solemnize the marriage themselves without any need to "call a Sheikh and ask him to perform the marriage". We are sure it is not the intention of the Government to create a new version of Islam which would have institutionalized clergy like Christianity. So why this reference to a Sheikh authorized by the Minister? It is needless to say that this idea goes extremely against Islam.

Also we fail to see any need for this proposal of 21 days notice. Suppose a girl from Kigoma and a boy from Pangani (both presently residing at Dar-es-Salaam) inform the priest of their community at Dar-es-Salaam that they want to be married. That priest is not expected to publish or announce the proposed marriage in newspapers or on radio. So, how can he know if there is any legal hitch against that marriage?

And, after all, there will not be even one case of such illegal intention in one thousand marriages. We think, it is better to omit this provision and substitute it with another one to the effect that if it becomes known even after marriage that they could not be married lawfully, the marriage would be null and void

from the beginning.

So far as the registration of marriage and divorce is concerned, in our community marriage registers have been in existence for over 125 years, and we issue the couples with the marriage certificates.

But we must emphasize most forcefully that the validity of the marriage or divorce should not be made subject to registration. Non-registration may be made an offence; but it should not affect the validity of the marriage or divorce.

Likewise, in other respects also, if a marriage is correct, according to religion, it should not be considered void if it contravenes any conditions imposed by the White Paper. Otherwise, it would be a direct interference in religion.

The purpose of this memorandum is to bring home to the Government that enactment of laws should strive to preserve the religious laws of different communities living under one flag, especially when such laws have far reaching effect on such fundamentals as the marriage and family life.

As we have pointed out earlier, in Islam the law and the religion are inseparable, since our laws emanate from the Qur'an; needless to say that if any law is enacted which contravenes either the Qur'anic injunctions or the Hadith, it will naturally cause a considerable unrest in the minds of the Muslim public and therefore the whole Muslim community will be perturbed.

In the end, we would like to sum up our views as follows:—

We demand that instead of enacting a uniform law for all, the "re-statement of Islamic Laws Act" should remain in force for the Muslims and the Subsidiary Legislations under that Act be drafted, published and given effect to as soon as possible.

So far as the proposals of this White Paper are concerned we completely agree that "marriage must be a voluntary union" (para 6 of the English version of White Paper); that the couple should not be within prohibited degree of affinity or consanguinity (para 9); that "either espouse may own his or her own separate property" (para 19); that the wife should be able to give evidence against her husband (para 21); that there should be provision of divorce "if the marriage has completely broken down" and that the "divorces should not be treated lightly" (para 24); and that there should be marriage conciliation boards and that due recognition should be given to such boards which exist in venous communities prior to the proposed new legislation," (para 25).

We agree to the following proposals with certain conditions and qualifications:—

Minimum age of 15 and 18 years for the girls and boys respectively (para 7) and registration of marriage (para 17), and of divorce (para 27) are good things and we agree with them provided, their violation does not make a marriage or divorce null and void.

A Muslim's pronouncement of divorce formula is recognized in the White Paper as the evidence of complete break-down of marriage and the court is supposed to "issue a certificate dissolving the marriage.

We accept this proposal, provided the said certificate is retrospective with effect from the date of pronouncement of the formula of divorce by the husband.

We are in complete accord with the proposal to allow a monogamous marriage to be converted into polygamous. But we do not think it practical to insist on the consent of the first wife (para 12). The husband should have a right to approach the proposed marriage board and their decision should be final.

Also, we assume that a Muslim marriage being a potentially polygamous one, a Muslim husband will not be governed by this provision.

We think that the proposal to presume a husband (who has disappeared for 5 years) as dead is not the sound one. The right way is to allow the judge (or Mujtahid) to grant divorce if the circumstances demand it.

The right of the woman to demand divorce or dissolve or nullify the marriage must be limited to the circumstances mentioned earlier in this memorandum. Any legislation going beyond that limit will be a direct interference in our religion.

We vehemently denounce the proposal that co-habiting with a woman for any period (the limit of 2 years is quite arbitrary) makes the couple legally husband and wife. Unless the wording is changed as proposed in para 11 of this memorandum, this proposal cannot be acceptable.

We totally disagree with the proposal of making wife responsible to maintain her husband (para 19).

We think that the proposal requiring 21 days notice is absolutely useless, and coupled, in case of the Muslims, with the phrase "notice would be sent to the Sheikh, who is authorized by the Minister to solemnize marriage" acquires a very alarming note, as it appears to establish an institutionalized clergy which is absolutely against Islamic fundamentals. Therefore, we cannot agree with it.

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