

# Women's Rights in the Islamic Prenuptial Agreement

~ Use Them or Lose Them ~

by Rabia Mills

***And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect. [Qur'an 30:21 Yusuf Ali translation]***

A great deal of heartache can be avoided by a woman in her marriage if she, as the bride-to-be, agrees to and signs a carefully considered Prenuptial Agreement (also known as a Marriage Contract or Domestic Contract) that guards her rights before entering into wedlock. This is the crucial first step which will guarantee her rights throughout her marriage, because if problems should arise later on in the marriage, ignorance of the law will not be allowed as an excuse for the woman's failure to secure her rights. The Prenuptial Agreement can also guarantee a woman many of her Islamic rights, which can be enforceable by law(1) even if she lives in a western country. Arguably women's Islamic rights are more fair and equitable than the secular woman's rights in the west, so it makes sense to know just what her Islamic rights are and how they can be relinquished should she neglect to claim them before marriage.(2) A great deal of misinformation abounds concerning the Prenuptial Agreement and women's Islamic rights. Insha'Allah, this article will set the record straight, as much as possible, about what her Islamic rights are, and how to protect them with a carefully considered Prenuptial Agreement.

For the most part, we will address the western Muslim woman who is not only required to obey the Shar'iah, but who must also comply with the secular laws of her own country. However, we will touch briefly upon a few major issues which affect women living in Eastern countries where polygyny (3) and other such Muslim laws are extant. Because of the diversity of laws from country to country, we can only discuss the Muslim woman's rights in a general as opposed to specific fashion.

To be enforceable by law, a Prenuptial Agreement must also comply with the laws of the country (as distinct from the Islamic Law of the Shar'iah) in which it is drawn up and signed. This will guarantee that the agreement will be legally binding on both the husband and the wife, and should problems should later arise, the spouse will have protection under the law of his or her own country. It is therefore advisable for the couple to have at least a rudimentary understanding of the laws of their own respective countries in which they live.

Ideally it would be more advantageous for the couple to consult both a legal specialist in their own particular country and also a specialist in Islamic Law to help draw up their contract. We would suggest that the Prenuptial Agreement or Marriage Contract be drawn up by a religious leader in your community (i.e. the Imam of your local mosque might be able to help) and then checked over by each of the bride and groom's respective lawyers. Muslim lawyers -- if available -- would be preferable.

## **The Prenuptial Agreement - points to consider in your marriage contract**

It is impossible in an article of this nature to cover all of the possible inclusions which could conceivably go into the Prenuptial Agreement, so we will focus mainly on those points which have a bearing on protecting a Muslim woman's Islamic rights.

### **(a) Polygyny**

If a woman does not feel that she could allow her husband to marry more than one woman at the same time, then Islam allows her the right to refuse him permission to do this at the outset of their marriage, however, she must indicate this preference in the Prenuptial Agreement or she will forfeit this right under the Islamic Law. If she is uncertain as to whether or not she will be opposed to her husband marrying a second wife later on, then she could include that in the agreement and thus make it binding upon her husband that he must consult her at that time and that he must then abide by her wishes. To say nothing, however, could possibly invite more pain than gain as far as her desires are concerned.

In the West, polygamy (4) is illegal. Even so, the woman may still request that her husband not marry a second wife, and put this in the contract. This sort of request would be considered spurious in the Prenuptial Contract because men in the west are already forbidden polygyny. Nonetheless it might still prove to be a useful

addition to the contract at this time because later on the couple might possibly move to a country where polygyny is legal.

Although polygyny is illegal in Canada, if a person marries more than one wife anyway, then the second wife is cut off from access to her legal rights as a wife completely (i.e. inheritance, mahr, alimony, child custody, recognition as being a wife, etc.) because the second marriage is not legally recognized whatsoever by Canadian law authorities. Therefore she will not be treated equally under Canadian law to the first wife, who could easily go to a recognized legal authority to enforce her marital rights. The second wife will have no legal recourse whatsoever from Canadian law. So this is a strong argument against Muslims marrying a second wife in a country like Canada which will neither recognize nor enforce her Islamic legal rights when it comes to polygyny. Interestingly enough, it appears that the Canadian government is not entirely opposed to polygyny when it comes to immigrants. If the husband and his wives have already been married off of Canadian soil and should they immigrate to Canada, then the extra wives will be accorded equal protection under Canadian law as the first wife.

In any case, it would be a good idea to include a clause agreeing that the marriage will not be polygynous, if this is BOTH their preferences, for clarification between the two spouses and the Muslim community. It has already been mentioned that there is always the possibility that the couple could someday live in some other country that does recognize polygyny. So the couple may want to be clear on this point.

#### **(b) Mahr**

This is the dower, or gift from the groom to the bride, of either a fixed financial amount or even a property amount and it is usually given immediately at the time of the marriage. However, either some of it or all of it may be deferred until a later time where it would become payable to the wife either upon the death or divorce of her husband. This is her Islamic right. Therefore the details of its payment should be set out very clearly in the Prenuptial Agreement for this right to be accorded to the western Muslim woman. (i.e. that a certain portion of the dower will be paid at once or within a stated period, and the remainder upon the dissolution of the contract by either death or divorce.) For example, the bride could settle an appropriate amount of dower to cover the demands of life after either a divorce or the husband's death, or she could arrange for an annuity, or a fixed monthly

amount payable to her upon the occurrence of either of those two events, so long as the Canadian rule against perpetuities is not contravened. There doesn't appear to be anything in Islamic law that prohibits a wife from looking after her own interests in this way in Canada.

In the U.S.A., however, Prenuptial agreements which "facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy." This appears to mean that according U.S. law, a woman cannot claim her dower in the event of divorce, even though she had agreed to this in her Prenuptial Agreement. So ladies, be forewarned about this issue if you happen to live in the U.S.A.

#### **(c) Divorce**

In Islam, divorce is permitted when serious differences arise which cannot be resolved through reconciliation. However, it has to be the last resort, for the Prophet p.b.u.h. has described divorce as the most detestable of all lawful things in the sight of God. Now divorce is probably the last thing in the world that a couple would want to consider when negotiating their Prenuptial Agreement, but since Islamic divorce law is far more reasonable and equitable than Western divorce law, it would be wise to commit to the Shar'iah in your Prenuptial Agreement and in the early stages of marriage. Furthermore, this is the time when a woman may claim many of her Islamic rights.

There is a misguided notion both among western nations and even among Muslims themselves that under Muslim law a woman will get nothing from her husband towards her maintenance and living expenses beyond her probationary period of Iddat. This is a very simplistic notion and is clearly misleading.

In Islam the husband may unilaterally divorce his wife at any time, without specifying any reason, and a woman may do the same as long as she acquires this right when contracting her marriage. She can do this by negotiating and demanding that the prospective husband delegate to herself (or her nominated agent) the right to divorce herself at any time without assigning any reason.(5) It should be borne in mind that the procedure relating to the pronouncement of divorce can vary depending upon which school of law is followed by the husband and wife.(6) The prospective wife can also have the husband's right to divorce her curtailed in many other ways - all by demanding and having the required legal

conditions included in the marriage contract - and these conditions would be just as enforceable in a court of law as any conditions of a civil contract.

In fact, the modus operandi, even in a so-called bilateral marital breakdown situation (i.e., where both the husband and the wife mutually agree to divorce) is always for one of the two spouses to take the initiative to call the marriage off. So, in reality, marriage breakdown situations almost always entail unilateral decisions and motivations. Therefore, given that there is often an unavoidable, unilateral dimension in initiating divorce proceedings, one could argue that to let either of the two spouses have the unilateral right to divorce the other will save both of them from endless argumentation and bickering that could ultimately lead them to very expensive and emotionally charged court litigation.

Currently, if you live in Canada, the couple must first legally separate for a period of one year before divorce will be granted. It is a very complicated process and each spouse is advised to retain his or her own lawyer. At the moment, a Canadian Muslim couple cannot obtain a divorce in Canada according to Muslim Law. However, there are things which can be done to minimize the trauma and legal expense as long as BOTH the husband and wife are willing to compromise. Moreover, it would be very useful if they both had agreed to and signed a Prenuptial Agreement which had set out various prearranged issues such as child custody, maintenance, etc. and so if both the husband and the wife were willing to abide by this agreement, then the divorce could actually proceed quite smoothly.

#### **(d) Financial Independence**

According to Muslim Family Law, the responsibility for the wife's maintenance (nafqa) always remains with the husband. The wife has no corresponding obligation to support her husband. The Muslim law principle which has been jealously guarded and enforced by Muslim law courts is that a woman's property is hers alone. Period. Consequently, any property which a Muslim wife contributes towards the 'family's assets' (i.e. all the property accumulated during the marriage) remains hers alone and is not subject to division or sharing by the husband in the event of a marriage breakdown (unless otherwise agreed upon between the husband and wife). In other words, under the Muslim Law, her 'Net Family Property,' remains hers alone and with no corresponding obligation to share with her husband (unless both husband and wife have agreed to share). This is not the case in Ontario law. So to ensure that a woman's

Islamic rights are protected in Canada, particularly with respect to the matrimonial home provision of the Ontario Law, it is suggested that both the husband and wife consult a specialist (i.e. lawyer who specializes in Ontario Family Law if they happen to live in Ontario) so as to explore with this lawyer the legal possibilities of accommodating the couple's wishes, as much as possible, by finding ways and means to legally circumvent the (Ontario) law with regards to the obligatory special equal sharing of the matrimonial home provision.(7)

It appears that in the U.S.A., the Prenuptial Agreement can successfully redefine each spouse's property as either separate property or community property, so the wife can specify her financial independence and ownership of property at this time.

#### **(e) Education and Employment**

Muslim women may restate their God-given Islamic rights to education and independence to work (employment, business, professions, etc.) in the Prenuptial agreement at this time which could be used beneficially both in Muslim as well as non-Muslim countries. Women in the west have already been accorded these rights by law, although in practise the husband may or may not approve of a wife either working or getting a higher education. So it would be prudent for both the husband and the wife, either in the West or the East, to be clear on this issue so as to prevent discord and unhappiness in the marriage.

The Prenuptial Agreement may also provide for religious education and upbringing of the children in accordance with Islamic Law and traditions.

#### **A Woman's Right**

Hamza Yusuf, an Islamic Scholar, says:

"Today Islam is said to be less, not more, tolerant than the west, and we need to ask which, precisely, are the "western" values with which Islam is so incompatible? Some believe Islam's attitude towards women is the source of the Muslim "problem". Westerners need to look to their own attitudes here and recognise that only very recently have patriarchal structures begun to erode in the west.

"The Islamic tradition does show some areas of apparent incompatibility with the goals of women in the west, and Muslims have a long way to go in their attitudes towards women. But

blaming the religion is again to express an ignorance both of the religion and of the historical struggle for equality of women in Muslim societies.

"A careful reading of modern female theologians of Islam would cause western women to be impressed by legal injunctions more than 1,000 years old that, for instance, grant women legal rights to domestic help at the expense of their husbands. Three of the four Sunni schools consider domestic chores outside the scope of a woman's legal responsibilities toward her husband. Contrast that with US polls showing that working women still do 80% of domestic chores."

In order to ensure this right, the prenuptial contract could or should contain a clause of this nature so as to make the marriage more harmonious. On the plus side you would be following Islamic law.

### Conclusion

The Prenuptial Agreement can be likened to an 'insurance policy' for both Western and Eastern Muslim couples; and for the Muslim woman who wishes to adhere to the principles of Islam, she would be well advised to carefully consider her options. The couple may not necessarily consider themselves to be very religious in practice at the present time, but this could change many years down the road because one simply cannot know one's future. So it would be a good idea to cover all your bases as it were when considering your Prenuptial Agreement.

Whether you are a woman living in an Eastern Muslim country, or a woman living in a Western secular country, a carefully considered Prenuptial Agreement will prove to be an important asset to your marriage because (and most couples don't know this) the standard Marital Contracts that Mosques use, often do not claim those rights for women that are hers and these could be lost if not agreed upon in her Prenuptial Agreement. Particularly for women who live in Eastern Muslim countries, you cannot assume that because your country is governed for the most part by Muslim Law that your Islamic rights will be specified in this standard contract or that your rights will be protected if need be by your country's law. This may not be the case.

The reason why the importance and the practical need for a Prenuptial Contract seems to be ignored by such a large segment of the Muslim population is simply beyond comprehension. This lack of appreciation for the need for a Prenuptial

Agreement seems to become even more appalling if one, as a Muslim, would recognize the fact that the Muslim marriage (Nikah/aqd) is itself a civil contract. It contains the basic ingredients of a regular everyday civil contract! The whole matrimonial relationship is based upon mutual agreement and consent of both the husband and the wife. From this point of view then, whoever said "a marriage contract is like a blank cheque on a joint account containing almost unlimited funds" really knew what he was talking about. Just as either the husband or the wife may decide to increase or decrease the funds held in their joint account, so too can they add any number of mutual rights and obligations into their Marriage/Prenuptial Contract. Nothing is carved in stone - everything can be changed, altered and amended. All that is required is a certain amount of good will and a sincere desire to live happily ever after.

*Among His signs is [the fact] that He has created spouses for you from among yourselves so that you may console yourselves with them. He has planted affection and mercy between you; in that are signs for people who thi things over. [Qur'an 30:21 T.B. Irving Translation]*

- 
1. As long as they do not contravene the laws of the country in which the contract was drawn up.
  2. Even in a secular western sense, the Prenuptial Agreement is considered a useful tool because it imposes clear obligations and duties on the spouse, and this in turn can lead to less conflict and friction and can also cultivate peace and harmony within the marriage.
  3. Polygyny = polygamy in which a man has more than one wife at the same time.
  4. Polygamy = having more than one wife or husband at the same time.
  5. In other words, a wife may acquire from her husband the authorization to divorce herself from him at any time without assigning any reason. This is called delegation of authority/authorization by the husband to the wife, leaving it as her option to do what she likes, known as mashiat.
  6. For example and without going into great detail, Imam Abu Hanifah is of the opinion that a divorce cannot be declared without a good reason. This means that as long as the marriage

has no problems of compatibility, etc. divorce cannot be given. Imam Abu Hanifah is also of the opinion that the thrice repeated pronouncements of divorce cannot be made all at once. This means that there must be a gap of one menstrual period between each pronouncement of divorce despite his acknowledgement that even under these circumstances, the divorce will still be technically enforceable. This opinion of Imam Abu Hanifah is a minority opinion and as such does not enjoy the status of a generally accepted legal opinion (fatwa). If the husband and wife prefer to follow Abu Hanifah's minority opinion, then they are free to insert a clause to this effect in the Prenuptial Agreement.

7. This matrimonial home provision in Ontario seems to be so high handed in imposing its regime that one could probably successfully challenge its constitutionality on the grounds that it is against the Right to Freedom of Religion which is guaranteed by the Charter of Rights and Freedoms.