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MARRIAGE AND DIVORCE IN  
ISLAMIC AND MORMON POLYGAMY:  
A LEGAL COMPARISON

This paper compares how Islam and Mormonism crafted the legal framework of polygamy in an attempt to afford women important protections against its inherent inequality. Islam and Mormonism provided these safeguards by regulating how parties entered polygamy and by allowing women to initiate divorce.

## I. INTRODUCTION

In the fifth year of the *Hijrah*, Mohammad received a revelation that ushered in the age of *Shari'ah*, or Islamic holy law: "To thee We sent the Scripture in truth . . . so judge between them by what Allah hath revealed."<sup>1</sup> From this revelation onward, Islam would encompass legal disputes that were previously religion-neutral.<sup>2</sup> In 1831, another revelation promised a similar rule of divine law for the newly organized Church of Jesus Christ of Latter-day Saints: "Wherefore, hear my voice and follow me, and you shall be a free people, and ye shall

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1. *The Meaning of the Holy Qur'an*, 11th ed., trans. 'Abdullah Yusuf 'Ali (Beltsville: Amana Publications, 2004), 5:48. For a discussion of when this verse was written, see Samuel D. Goitein, *Studies in Islamic Histories and institutions* (Leiden: Brill Press, 1966), 126–34.

2. Goitein, *Studies in Islamic Histories and institutions*, 131.

have no laws but my laws when I come, for I am your lawgiver..."<sup>3</sup> Both Islam and Mormonism<sup>4</sup> became dynamic world religions that established theocratic societies and unique legal systems.<sup>5</sup>

Since the advent of Mormonism, commentators have noted the many similarities it shares with Islam.<sup>6</sup> For instance, both religions are a product of a series of new revelations and a prophet receiving a sacred book.<sup>7</sup> Both Muhammad and Joseph Smith viewed their revelations as the commencement of new dispensations, perfectly in line with older revelations and scriptures.<sup>8</sup> The *Umma* of Muhammad and the *Zion* of Joseph Smith were to be new social and political communities governed by heavenly law.<sup>9</sup> Finally, both Joseph Smith and Muhammad received revelations governing the practice of polygamy.

There is, however, a striking similarity that has received comparatively little attention: how the two religions designed similar legal structures around polygamy which afforded plural wives important social protections by regulating how a man acquired additional wives and by providing mechanisms for a wife to initiate divorce. Section II examines the rights of polygamous wives within classical and modern Islam. Section III analyzes the rights of Mormon wives within polygamy during the early Utah period. Section IV looks at the steps available to women to pursue divorce in both Islam and Mormonism. One difficulty with this comparison lies in the fact that within the history of Islamic polygamy, prac-

3. *The Doctrine and Covenants* (Salt Lake City, UT: The Church of Jesus Christ of Latter-day Saints, 1981), 38:22.

4. By "Mormonism," I refer to the Church of Jesus Christ of Latter-day Saints.

5. Eduard Meyer, *The Origin and History of the Mormons*, trans. Heinz F. Rahde and Eugene Seach (Salt Lake City: University of Utah Press, 1912), 1.

6. The comparison was frequently drawn by the critics of Mormonism. See, Thomas Ford, *A History of Illinois From Its Commencement As A State In 1818 to 1847* (Chicago: University of Illinois Press, reissue ed. 1995), 222 and Bruce Kinney, *Mormonism: The Islam of America* (New York: Fleming H. Revell Company, 1912). Others used the comparison to highlight the tenacity and conviction of the Mormons. See, Horace Greeley, *Nauvoo Neighbor*, 24 July 1844 and 14 August 1844.

7. Compare Meyer, *Origin and History of the Mormons*, 44–50 with *Joseph Smith History* (Salt Lake City, UT: The Church of Jesus Christ of Latter-day Saints, 1981), 1:14–20, 30–49.

8. *Doctrine and Covenants* 128:121 and *Holy Qur'an* 2:2–4.

9. Goitein, *Islamic Histories and Institutions*, 128 and Richard Bushman, *Rough Stone Rolling* (New York: Knopf, 2005), 520.

tices differ among time periods, sects, and schools. The sheer weight of Islamic history dwarfs Mormonism, a relatively recent arrival on the scene of world religion. Yet the practice of polygamy in Classical Islam and modern reforms throughout the Muslim world are similar enough to make a comparison with Mormon polygamy worthwhile.

## II. MARRIAGE AND POLYGAMY IN ISLAM

### a. Purpose of Islamic Marriage and Polygamy

The purpose of marriage in Islam is to create and sustain the Muslim family, and to populate the world with believers.<sup>10</sup> Marriage is required of every Muslim man and woman, unless they are physically, mentally, or financially unable to marry.<sup>11</sup> Yet strictly speaking, marriage is not a sacrament in Islam, nor can it be seen purely as a secular contract. Muslim marriage is a contract in the sense that it requires the mutual assent of both parties, allows for the parties to add conditions, limits marriages with non-Muslims, and is dissolvable if irreconcilable differences arise.<sup>12</sup> But it is a religious covenant in the sense that its purpose is to fill the earth with faithful Muslims; the primary means God employs to realize his will as revealed in the *Qur'an*.<sup>13</sup>

Islamic polygamy served the general purposes of marriage, but it had other functions as well. Many Muslim scholars argue using the *Qur'an* that God allows polygamy to ensure that the Muslim community cares for its widows and orphans. The Quranic treatment of polygamy came in the wake of the Battle of Uhud, a battle that left many Muslims without husbands or fathers. Allowance for the surviving men to take additional wives allowed them to receive the eco-

10. *Holy Qur'an* 30:21 and John L. Esposito, *Women in Muslim Family Law* (Syracuse, NY: Syracuse University Press, 2001), 15.

11. See *Holy Qur'an* 30:21 and Esposito, *Women in Muslim Family Law*, 14.

12. Hammudah 'Abd Al 'Ali, *The Family Structure in Islam* (Burr Ridge, IL: American Trust Publications, 1977), 59. Islamic law allows a Muslim man to marry a Jew or Christian, but forbids a woman to marry a non-believer. See, Chibli Mallat, *Introduction to Middle Eastern Law* (New York: Oxford University Press, 2007), 357, 389.

13. *Holy Qur'an* 7:189 and Esposito, *Women in Muslim Family Law*, 14–5.

conomic and social protections of marriage.<sup>14</sup> Polygamy further allowed the early Muslim Umma to form political ties with neighboring communities, and by entering polygamy, Mohammad managed to pacify and convert previously hostile tribes.<sup>15</sup> Polygamy also provided a subtle encouragement to manumit slaves.<sup>16</sup>

### **b. Regulations and Restrictions in Islamic Polygamy**

When the Quranic revelation on polygamy came, it extended greater protections to women. Polygamy in the pre-Islamic Middle East did not recognize a limit to the number of wives a man could take.<sup>17</sup> Husbands paid the *Mahr*, or dower, to the wife's family and not to the wife herself. As a result, she became totally dependent upon her husband's family for her maintenance.<sup>18</sup> A wife had no recourse to change her own status or seek divorce, yet she was subject to her husband's right to instant *talaq* (repudiation). The possibility of repudiation without a dower hung over a woman like the sword of Damocles, threatening to leave her destitute at any time and without warning.<sup>19</sup>

The *Qur'an* approved of polygamy, but limited its practice in important ways. The revelation stated: "If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, Two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one..."<sup>20</sup> The revelation allowed a man to take multiple wives, but on the condition that he treat them all fairly. Additionally, a Muslim man was forbidden to take more than four wives, even if he was capable of providing for them. If he repudi-

14. See, Khan Noor Ephroz, *Women and Law: Muslim Personal Law Perspective* (Jaipur, India: Rawat Publications, 2003), 112 and Esposito, *Women in Muslim Family Law*, 19.

15. Doi, *Women in Shari'ah*, 73–5.

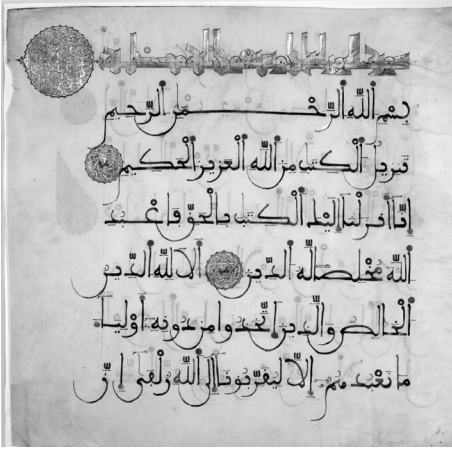
16. While the *Qur'an* limits the number of wives a man may take, there is no similar limit for taking slave concubines. The offspring of a slave woman, however, were free, and some commentators believe that Islam allowed unlimited concubinage to encourage emancipation, which Islam regarded as a laudable action. 'Abd al 'Ali, *The Family Structure in Islam*, 46–7.

17. See, Ephroz, *Women and Law*, 105.

18. Esposito, *Women in Muslim Family Law*, 13.

19. Javaid Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq," *International Journal of Law, Policy and the Family* 21 (2007): 108, 113.

20. *Holy Qur'an* 4:3.



Qur'an manuscript from Nasrid period, ca. 1230–1492).  
(Image copyright © The Metropolitan Museum of Art. Used by permission.)

ated his wife, the *Qur'an* obligated him to give her the unpaid portion of the dower for her maintenance.<sup>21</sup>

Modern reforms have expanded the scope of these initial protections by making polygamous marriage harder to enter and easier to escape. Modernist reformers, beginning with Mohammad Abduh, have interpreted the Quranic authorization of polygamy in 4:3 (stating that “if you fear you will not be able to deal justly [with multiple wives], then only one...”) with the later axiom

that “[y]e are never able to be fair and just as between women, even if it is your ardent desire...”<sup>22</sup> Abduh concluded that the authorization for polygamy must have been a concession to early Muslims, struggling as they were to adapt their customs and lifestyles to the rigors of the new faith. However, the Quranic ideal was monogamy.<sup>23</sup>

Abduh's interpretation has made its way into many legal codes, most notably into the 1986 Arab Family Law Project, the model code of family law. The project recommended a series of additional restrictions on Islamic polygamy. Several countries have adopted segments of the project's suggestions or have taken additional measures to curb the practice of polygamy. Syria included in Article 17 of its Law of Personal Status that a judge may prohibit a man from taking another wife if he does not have the ability to support the new family.<sup>24</sup> Morocco requires the husband to obtain permission from the first wife before he can enter into a polygamous relationship, and allows the first wife to insert

21. Esposito, *Women in Muslim Family Law*, 23.

22. *Holy Qur'an* 4:129.

23. Esposito, *Women in Muslim Family Law*, 48.

24. Law of Personal Status 1953 (Decree No. 59 of 1953), Art. 17. The amended version requires a man to state a “legal reason” for taking another wife. Mallat, *Introduction to Middle Eastern Law*, 378.

a condition into the marriage contract that the husband will not take another wife.<sup>25</sup> Yemen likewise follows the suggestions of the Arab Family Law Project.<sup>26</sup> However, Tunisia took these restrictions further and banned polygamy in 1956.<sup>27</sup>

In looking at both classical and modern Islam's treatment of polygamy, the trend has been toward restricting the husband's ability to take on additional wives and enhancing the protections owed to the wife. By limiting the number of wives in a family and requiring the wives be treated equally, early Islam restricted the unhampered marital practices of the pre-Islamic Middle East. Some contemporary Muslim nations have adopted the suggestions of the Arab Family Law Project or similar legislation, expanding the rights women enjoyed under classical Islam by giving them a greater voice in the husband's decision to take on multiple wives and ensuring his ability to maintain an expanded family.

### III. MARRIAGE AND POLYGAMY IN MORMONISM

#### a. Purposes of Marriage and Polygamy in Mormonism

Marriage in Mormonism is a sacrament if solemnized in the temple under the authority of the priesthood.<sup>28</sup> In 1843, Joseph Smith recorded a revelation explaining that a marriage not solemnized by the Mormon priesthood was "not of force when [the parties] are dead, and when they are out of the world."<sup>29</sup> Parties to such marriages could not aspire beyond being "angels" and "ministering

25. Mallat, *Introduction to Middle Eastern Law*, 401.

26. Before unification, South Yemen imposed greater restrictions on a man's ability to enter polygamy, requiring that he prove to the tribunal that his wife is sterile and the fact was unknown to him before the contracting the marriage, or that the wife has a permanent or contagious illness with no hope of cure. *Ibid.*, 378.

27. Personal Status Law Art. 18 states that "Polygamy is forbidden ... [and] is punishable by imprisonment of 1 year or a fine of 240,000 francs, or both." Iraq enacted similar limitations in the Law of Personal Status of 1959. Doi, *Women in Shari'ah*, 57. However, the strong backlash succeeded in repealing the ban in 1963. Jaime M. Gher, "Polygamy and Same-Sex Marriage: Allies or Adversaries Within the Same-Sex Marriage Movement," *William & Mary Journal of Women and the Law* 14 (2008): 559, 591n237.

28. Such marriages are also known as "temple sealings."

29. *Doctrine and Covenants* 132:15.





Joseph F. Smith, sixth president of the Church of Jesus Christ of Latter-day Saints, with his wives and children, ca. 1900. (Courtesy Widstoe Collection, Utah State Historical Society)

servants” in the life to come.<sup>30</sup> However, if a marriage is “sealed . . . by the Holy Spirit of Promise, by him who is anointed, unto whom [God has] appointed this power,”<sup>31</sup> then the marriage would endure beyond death, and the parties would be entitled to a “far more, and an exceeding, and an eternal weight of glory.”<sup>32</sup> In fact, to obtain the highest salvation, a person has to “enter into . . . the new and everlasting covenant of marriage.”<sup>33</sup> As one scholar put it, Mormon salvation is essentially a family affair.<sup>34</sup> The revelation warned of heavy consequences to those who refused to accept polygamy: “For behold, I reveal unto you a new and an everlasting covenant; and if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory.”<sup>35</sup>

30. Ibid., 16.

31. Ibid., 19.

32. Ibid., 16. This glory consisted of a person “going from a small capacity to a great capacity” until arriving at the station of godhood, as Joseph taught that Christ and his Father had done. Bushman, *Rough Stone Rolling*, 533–7.

33. *Doctrine and Covenants* 131:2. Joseph Smith referred to both monogamous and plural marriages solemnized in the temple as the “new and everlasting covenant of marriage.” Joseph Smith, *History of the Church* (Salt Lake City: *Deseret News*, 1912) 5:391–2.

34. Bushman, *Rough Stone Rolling*, 355–7.

35. *Doctrine and Covenants* 132:4.

The primary purpose of polygamy in Mormon theology was to prepare the earth for the Second Coming and glory in the next life,<sup>36</sup> though Mormons at times justified polygamy as a cure for social evils (such as adultery, prostitution, abortion, and infanticide).<sup>37</sup> However burdensome the practice was on earth, men and women who lived the “higher law” of polygamy would receive increased glory and honor in the life to come.

### **b. Regulations and Restrictions Within Mormon Polygamy**

Contrasted with the Quranic revelation authorizing polygamy, the Mormon revelation on plural marriage was theologically rich and administratively barren. The revelation was primarily concerned with the life to come and consequently, it did not provide any guidance as to how Mormons were to live in polygamy while on earth. Contrasted with the Quranic revelation, it neither imposed a limit on the number of wives, nor required all wives be treated equally. It did not necessitate a husband to prove his ability to provide for a polygamous family. It also did not treat polygamy as an exception to the rule. Joseph’s revelation did not simply tolerate polygamy—it commanded it.

In many ways, Mormon polygamy remains a mystery. Unlike Islam, Mormonism grew up in a puritanical society that viewed polygamy as barbaric, and Mormons initially practiced polygamy in secret. Under Joseph Smith, the practice of polygamy differed in significant ways from the later Utah period, when the church set up a theocratic government.<sup>38</sup> This comparison will only look to the Utah period, in which Mormons practiced polygamy under the jurisdiction of the “the laws of Israel”—presumably as it was intended to be practiced.<sup>39</sup>

36. Brigham Young, *Journal of Discourses* (Liverpool: Latter-day Saints Book Depot, 1867) 11:268–9.

37. Speech of Harriet Cook Young, 13 January 1870 (Salt Lake City), reprinted in Jeffrey Tullidge, *Women of Mormondom* (New York: Tullidge & Crandall, 1877) (advocating polygamy as a cure for various social problems).

38. For a description of how polygamy was carried out during the Nauvoo period, see James B. Allen, *Trials of Discipleship: The Story of William Clayton, A Mormon* (Urbana: University of Illinois Press, 1987), 188–202.

39. For an overview of “Mormon law,” see Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts* (Urbana: University of Illinois Press, 2001), 263–78.

While the Mormon revelation on polygamy did not impose the limits of the *Qur'an*, it did allow men free rein in marriage. Mormon polygamy was regulated in two significant ways. First, church leaders only allowed certain individuals to take multiple wives and second, the “Law of Sarah” required that the first wife give her consent before the husband enter into polygamy.

Only Mormons whom church leaders “called,” through an inspired process, could enter into polygamy. From the earliest occurrences of polygamy, Joseph Smith (and later his successors as president of the church) had to authorize the plural marriage. The revelation stated that the president of the church holds the keys or authority to seal marriages, “and there is never but one on the earth at a time on whom this power and the keys of this priesthood are conferred.”<sup>40</sup> A polygamous marriage entered into without the approval of the president was considered adultery.<sup>41</sup> The experiences of William Clayton and Hyrum Brown illustrate this point. At Nauvoo, Joseph approached Clayton in private and told him it was “lawful” for him to take additional wives.<sup>42</sup> When his plural wife became pregnant and some members began calling for church discipline against Clayton, Joseph told him, “[I]f they raise trouble about it and bring you before me I will give you an awful scourging and probably cut you off from the church and then I will rebaptise [sic] you and set you ahead as good as ever.”<sup>43</sup> Brown, on the other hand, began advocating polygamy in Michigan independent of Joseph’s authority, and was “cut off from the Church for his iniquity.”<sup>44</sup>

Not only was unsanctioned polygamy punishable, but a man who refused to take another wife after being called by Mormon leaders to do so was also subject to reprimand. Brigham Young warned reluctant Mormons that “[i]f any of you will deny the plurality of wives and continue to do so, I promise that you

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40. *Doctrine and Covenants* 132:7.

41. Firmage and Mangrum, *Zion in the Courts*, 358 (outlining church court decisions to excommunicate and disfellowship Mormons who entered into unauthorized polygamy).

42. William Clayton, *Nauvoo Journal*, 9 March 1843.

43. William Clayton, *Nauvoo Journal*, 19 October 1843 and Allen, *Trials of Discipleship*, 189, 194–5.

44. Joseph and Hyrum Smith, *Times & Seasons*, 1 February 1844.

will be damned.”<sup>45</sup> Mormon leaders taught that a man called to practice polygamy and who did not do so, risked losing his church office and membership in life; in the hereafter, he would fall short of the highest salvation and his wife would be given to a worthier man.<sup>46</sup>

Another important limitation on the practice of polygamy was the “law of Sarah.” This law, named for the wife of Abraham,<sup>47</sup> required the consent of the first wife before a man could take additional wives. The revelation outlined:

And again, verily, verily, I say unto you, if any man have a wife, who holds the keys of this power, and he teaches unto her the law of my priesthood, as pertaining to these things [polygamy], then shall she believe and administer unto him, or she shall be destroyed, saith the Lord your God; for I will destroy her; for I will magnify my name upon all those who receive and abide in my law. Therefore, it shall be lawful in me, if she receive all things whatsoever I, the Lord his God, will give unto him, because she did not believe and administer unto him according to my word; and she then becomes the transgressor; and he is exempt from the law of Sarah[.]<sup>48</sup>

While difficult to follow, the law of Sarah appears to require the wife’s consent before a man could take additional wives. The text seems to state that a man is exempt from the law of Sarah (the necessity of obtaining the wife’s consent) if she refuses to consent.<sup>49</sup> Yet early Mormon leaders interpreted the revelation as allowing the wife an opportunity to “state before the President the reasons

45. Provo Conference, *Deseret News*, 14 November 1855.

46. *Wilford Woodruff’s Journal Typescript*, ed. Scott G. Kennedy (Midvale, Utah: Signature Books, 1985), 7:152 (quoting Brigham Young as teaching that “a Man who did not have but one wife in the Resurrection that woman will not be his but [be] taken from him & given to another But he maybe saved in the kingdom of God but be single to all Eternity.”).

47. *Genesis* 16:1–2 (recounting the story of Sarah giving Abraham her handmaid, Hagar, as a plural wife).

48. *Doctrine and Covenants* 132:64–65

49. This incongruity was not lost on Congress during the Reed-Smoot hearings. *Proceedings before the Committee on Privileges and Elections of the United States Senate in the matter or the protests against the right of Hon. Reed Smoot, a Senator from the state of Utah, to hold his seat* (Washington DC: Government Printing Office, 1904) 1:201 (hereafter Reed Smoot Hearings).

why she withholds her consent.”<sup>50</sup> If her reasons were “sufficient and justifiable,” then the husband was forbidden to take another wife.<sup>51</sup> If her reasons for withholding consent were deemed insufficient, then the husband was permitted (though not required) to enter into polygamy without his wife’s consent.<sup>52</sup>

While the loophole in the law of Sarah curtailed a wife’s ability to keep her husband monogamous by requiring “sufficient and justifiable reasons,” Mormon women could effectively exercise their power to refuse in other ways. In one case, a wife in St. George told her husband that “if he ever took another wife, when he brought her in the front door, [she] would go out the back.”<sup>53</sup> In a similar instance, an elder told his wife that he had received a revelation to marry another woman, and that the wife must consent to the divine command. But the next morning, the wife announced that she had received a revelation of her own, instructing her to “shoot any woman who became his plural wife.”<sup>54</sup> In both instances, the husband remained monogamous.

It also seems that a Mormon wife who had given her consent could later withdraw it. In the case of Joseph Smith, his wife Emma initially gave consent for Joseph to marry two additional wives, Emily and Eliza Partridge, in 1843. Shortly after the wedding, however, she changed her mind and objected so vehemently to the polygamous marriage that she successfully persuaded Joseph to divorce them.<sup>55</sup> As Emily Partridge recorded, “[Emma] sent for us one day to come to her room. Joseph was present, looking like a martyr. Emma said some very hard things—Joseph should give us up or blood should flow . . . Joseph came to us and shook hands with us, and the understanding was that all

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50. Orson Pratt, *The Seer*, Washington DC, January 1853–August 1854, 41 (Salt Lake City: Seagull Book and Tape, 1993).

51. *Ibid.* It should be noted that early Mormons did not take it into their hands to “destroy” the refusing wife. They assumed that God would destroy her in his own time. Reed Smoot Hearings, 1:201.

52. Pratt, *The Seer*, 41.

53. Kimball Young, *Isn't One Wife Enough?* (New York: Henry Holt and Company, 1954), 123.

54. *Ibid.*

55. Emily Partridge Young, *Reminiscence*, 1899, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, Utah.

was ended between us.”<sup>56</sup> Although greatly dissatisfied with Emma’s decision, Joseph believed he could do nothing in the face of her refusal. As he explained to Eliza, “my hands are tied.”<sup>57</sup>

These regulations show that Islam and Mormonism wrestled with the inequality inherent in the practice of polygamy, and both attempted to provide some social protections to women. Within marriage, these protections were primarily restrictions on the husband. Islam initially allowed any man to practice polygamy, but restricted how the husband could treat his wives and how many he could take. Mormonism only allowed certain men to take additional wives, but neither limited the number nor required a husband to treat his wives equally. Yet Mormon revelation recognized from the beginning that a wife needed a voice in her husband’s decision to take more wives, while women in Islam have only recently acquired this right.

#### IV. WOMEN AND DIVORCE IN ISLAMIC AND MORMON POLYGAMY

Perhaps women’s most important protection in marriage is the right to pursue divorce. While Mormonism and Islam discourage divorce, both religions regarded it as being less evil than requiring the parties to remain in a dysfunctional marriage. Polygamous wives in both Islam and Mormonism had options available in the pursuit of divorce. This section will analyze and compare these recourses.

##### a. The Ability of a Woman in Islam to Pursue Divorce

Classical *Shari’ah* law reserved the right of *talaq*, or repudiation, exclusively to the husband.<sup>58</sup> Yet in certain limited circumstances, a wife could pur-

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56. Ibid.

57. Ibid.

58. Mallat, *Introduction to Middle Eastern Law*, 357. *Talaq* took two forms: revocable and irrevocable. Under a revocable *talaq*, the husband could take his wife back during the waiting period of three menstrual cycles (*idda*). However, a revocable *talaq* became irrevocable after three menstrual cycles or the final pronouncement of *talaq*. Ibid., 370.

sue a divorce, either by coming to an agreement with her husband to end the marriage or by petitioning a *Qadi* (Islamic judge) for a divorce. There were three basic types of divorce a woman could request: *khul'*, divorce in exchange for something of value; *'isma*, delegated divorce; and *faskh*, judicial annulment. These options remain open in contemporary Islam.<sup>59</sup>

*Khul'* was an extrajudicial divorce a wife could obtain by giving the husband something in return, the cost being decided by the mutual consent of the parties.<sup>60</sup> The *Qur'an* states, "if a wife fears cruelty or desertion on the husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed."<sup>61</sup> The traditional price was the *mahr* (dower), but historically, some husbands demanded exorbitant payment in exchange for *khul'* and effectively foreclosed a woman's ability to obtain a divorce. To correct these abuses, some countries, such as Algeria, have capped the amount a husband can demand in exchange for the wife's liberation.<sup>62</sup>

A Muslim wife could also terminate a marriage through *'isma*, or delegated divorce.<sup>63</sup> A husband could give his wife the power to divorce herself by pronouncing that "her business was in her own hands."<sup>64</sup> However, a husband could stipulate whether the divorce would be revocable or not, and determine how long she could retain the power to divorce.<sup>65</sup> The husband had to explain precisely what he meant, because the wife could not exceed the ambit of the delegation.<sup>66</sup>

59. Esposito, *Women in Muslim Family Law*, 93.

60. However, the price was not to exceed that of the dowry, or *mahr*. Ibid.

61. *Holy Qur'an* 4:128. While Mohammad is known to have granted divorces to women seeking *khul'*, Islam discourages the practice. Doi, *Women in Shari'ah*, 98. For a discussion of how jurists differ on the various procedures associated with *khul'*, see *ibid.*, 96--100.

62. Code de Famille, Titre II Art. 54 (1984).

63. See Ephoz, *Women and Law*, 224-7.

64. *Ibid.*, 225.

65. A husband could give his wife power to make three divorces, which would forever terminate the marriage, or he could simply give her the power to pronounce a revocable divorce. *Ibid.*, 225.

66. *Ibid.*, 226-7.



A third option was to seek *faskh*, a judicial annulment or abrogation of the marriage contract.<sup>67</sup> In classical Islam, a wife could petition for divorce under limited conditions. While these conditions vary among different schools and time periods, a wife could always seek *faskh* in the wake of apostasy, lack of equality, or mutual cursing (*li'an*).<sup>68</sup> Also, a wife could usually successfully petition for divorce successfully if the husband had contracted an incurable disease or infirmity, such as impotency or madness. Other grounds for *faskh* included abandonment through inexcusable absence for over a year, a lengthy prison sentence, or a refusal to share the wife's bed for over four months. Finally, a wife could exercise the "option of puberty," which allowed her to dissolve a marriage at puberty that her guardian had previously contracted for her.<sup>69</sup>

Following divorce, classical Islam afforded women some social protections. While the father invariably retained his position as guardian and his right to guide the child's education, the mother would receive custody of a young child until the child reached a certain age, and the father would have custody thereafter.<sup>70</sup> Following a revocable *talaq*, the husband had to support the wife for a period of three menstrual cycles, the time needed to determine if the wife was pregnant.<sup>71</sup> A husband was also under the Quranic obligation to return to his divorced wife the unpaid portion of her dower.<sup>72</sup>

While Muslim women retain the option of seeking divorce through the methods available under the classical paradigm, modern patterns of legal reform in the Middle East have given the wife additional rights by giving her greater autonomy in pursuing divorce and by limiting the husband's ability to unilaterally repudiate her. For example, many countries now consider sufficient grounds for

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67. Doi, *Women in Shari'ah*, 90.

68. Ephroz, *Women and Law*, 257.

69. See Abd Al 'Ali, *The Family Structure in Islam*, 244.

70. For a discussion of how this practice varied among the schools, see Mallat, *Introduction to Middle Eastern Law*, 357.

71. *Ibid.*, 370.

72. *Holy Qur'an* 2:228; 4:4; 4:19.



divorce if the husband fails to provide for his wife.<sup>73</sup> Iran recognizes a bride's right to insert additional conditions into the marriage contract, reserving her right to terminate the marriage under the conditions she specifies.<sup>74</sup> Iraq, Kuwait, Libya, Malaysia, Morocco, and Yemen have given the courts exclusive power to dissolve a marriage, and a husband attempting to dissolve a marriage outside of court (such as through *talaq*) may face prison sentences and fines.<sup>75</sup> Similarly, Jordan, Kuwait, Morocco, Somalia, Syria, and Yemen have prohibited triple *talaq*, the immediate and irrevocable repudiation of a wife.<sup>76</sup> Jordan, Kuwait, and Yemen now require husbands to pay maintenance to their wives for a year following divorce, and Syria has extended the time to three years.<sup>77</sup>

While classical Islam provided women with several mechanisms to pursue divorce, the majority of these methods required the husband's cooperation, and only in limited circumstances could a wife divorce an unwilling husband. Modern reforms reflect a growing concern in the Islamic world to protect women by giving them greater autonomy to divorce their husbands and by restricting the husband's power to repudiate the wife.<sup>78</sup>

### **b. The Ability of a Woman in Early Mormonism to Pursue Divorce**

Divorce<sup>79</sup> was not uncommon in polygamous Mormon families, and polygamous wives could obtain divorces relatively easily through the church court system. Because federal and territorial law did not recognize polygamous marriages, they refused to grant civil divorces to Mormon plural wives. A woman seeking to end a polygamous marriage had to petition the church's head office,

73. Esposito, *Women in Muslim Family Law*, 96. A court typically gives the husband a period of grace to pay his maintenance debt, and upon his failure to do so, the court will grant the divorce.

74. In this tradition, Iran requires certain stipulations to be in every contract, and each must be signed by both the bride and groom in order to make the marriage valid. *Ibid.*, 104.

75. *Ibid.*, 94.

76. *Ibid.*

77. *Ibid.*, 97.

78. Mallat, *Introduction to Middle Eastern Law*, 355.

79. "Divorce" as used in this section refers to a cancellation of a marital sealing by ecclesiastical authority.

known as the First Presidency, the only body that could cancel a temple sealing, as outlined in revelation.<sup>80</sup>

While church leaders discouraged divorce, they were surprisingly liberal in granting it, especially in polygamous marriages.<sup>81</sup> Brigham Young advised unhappy wives to “stay with [their] husband as long as [they] could bear with him, but if life became too burdensome, then leave and get a divorce.”<sup>82</sup> This willingness to grant divorce reflects Brigham Young’s earlier teaching that “when a woman becomes alienated in her feelings and affections from her husband, it is his duty to give her a bill and set her free,” because a man who continued to cohabit with a wife who had grown alienated from him was guilty of “fornication.”<sup>83</sup>

Divorce in Mormon polygamy cannot be understood without a brief overview of the ecclesiastical court system, the only forum in which polygamous wives could petition for divorce. The church court was a central aspect of the Mormon community. Local lay ecclesiastical leaders ran the courts, and they rarely had any legal training or background. They were simply expected to judge disputes according to the scriptures and the spirit of revelation.<sup>84</sup> If a party was unsatisfied with the court’s decision, they could appeal it to a higher court and ultimately to the church’s First Presidency.<sup>85</sup> Initially, Brigham Young heard every divorce petition, but the workload soon overwhelmed him. He authorized the church courts to hear marriage disputes, and he largely followed their recommendations in deciding whether to cancel polygamous sealings.<sup>86</sup>

Mormon leaders never established formal procedures for church courts, but procedure throughout the courts developed along similar lines. Precedent

80. *Doctrine and Covenants* 132:7.

81. Firmage and Mangrum, *Zion in the Courts*, 325–6. Brigham Young granted at least 1,645 divorces during his presidency. Van Wagoner, *Mormon Polygamy*, 92.

82. President’s Office Journal, 1858–1863 Book D, ed. Fred Collier (Hanna, Utah: Collier’s Publishing Co., 2006), 297.

83. James Beck Journal, 8 October 1861, LDS Archives, Salt Lake City, Utah (hereafter LDSA).

84. *Doctrine and Covenants* 107:71–2.

85. *Ibid.*, 285–6.

86. Firmage and Mangrum, *Zion in the Courts*, 322–3.

did not control decisions, but decisions tended to follow customs based on scriptural interpretation and instructions from Mormon leaders.<sup>87</sup> The courts had little respect for legal technicalities or lawyers, but occasionally allowed parties to be represented by counsel if the courts believed it would further the interests of the church.<sup>88</sup> Leaders accepted all relevant evidence and ignored the common law exclusion of hearsay.<sup>89</sup>

In the church courts, wives could petition for divorce on grounds such as adultery, “licentious conduct, habitual drunkenness, desertion for more than a year, or brutality.”<sup>90</sup> But a wife did not need to base her petition on her husband’s moral shortcomings to be successful. Some wives obtained divorces for little more than personal dislike of their husband.<sup>91</sup> One woman in Fillmore, Utah, sought a divorce solely because she had no affection for her husband.<sup>92</sup> While the church court stated her reasons for seeking divorce were “not just,” it recommended divorce all the same.<sup>93</sup>

However, women at times had difficulty in pursuing divorce, especially in posthumous proceedings. Since Mormons believed that a marriage solemnized by the priesthood lasts beyond death, some women petitioned for divorce after the death of their husbands. In these cases, women primarily sought to divorce their husband because of his moral shortcomings that made his salvation a remote possibility.<sup>94</sup> Church leaders were very reluctant to grant divorces in these cases, because the “parties are out of reach and are not able to defend themselves” and could be “wronged by the cancellation of the sealing.”<sup>95</sup> Accordingly, the church courts assembled witnesses in posthumous divorce proceedings

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87. *Ibid.*, 290.

88. *Ecclesiastical Court Cases* (hereafter *ECC*), 1873, fd. 10, LDSA.

89. Firmage and Mangrum, *Zion in the Courts*, 283; *ECC*, 1885, fd. 27, LDSA; *Disfellowship Files* (hereafter *DF*), 1885, fd. 2; 1897, fd. 14; 1891, fd. 3; 1893, fd. 5, LDSA. For an analysis of these decisions, see Firmage and Mangrum, *Zion in the Courts*, 280, 326–7.

90. Firmage and Mangrum, *Zion in the Courts*, 280, 326–7.

91. Firmage and Mangrum, *Zion in the Courts*, 327.

92. *ECC*, 1883, fd. 6 and 1886 fd. 8, LDSA.

93. *ECC*, 1883, fd. 6, LDSA.

94. Firmage and Mangrum, *Zion in the Courts*, 331–2.

95. *ECC*, 1884, fd. 10, LDSA.

to testify as to the character and standing of the deceased, and the council would base its decision largely on the testimony presented.<sup>96</sup>

While the language of some decisions seems to suggest a presumption that women were to blame for marital problems, church courts often treated women more favorably than men. While the courts at times chided women for their “abusive nature”<sup>97</sup> and admonished them to “humble [themselves] before God” and “honor and respect their husbands,”<sup>98</sup> they granted women divorces more frequently than men.<sup>99</sup> The courts also seemed to have treated a woman better than a man in the same situation. When a wife in 1883 sought a divorce without “just cause,” the records do not indicate any punitive action taken against her.<sup>100</sup> In a similar situation, a husband successfully petitioned for divorce even though he “had no just cause to put away his wife,” yet Brigham Young denounced him as a “fool” and “caution[ed] all the girls against him” for three years.<sup>101</sup>

Following divorce, Mormon women enjoyed greater rights than their Islamic counterparts. In most cases, the church courts awarded custody to the woman, regardless of the age or gender of the children. In an 1861 divorce case, Brigham Young stated “I do not believe in a man getting children,”<sup>102</sup> and church courts adopted this rule in handling divorce cases.<sup>103</sup> Additionally, a Mormon woman had claim upon her ex-husband for support, and “he [was] never completely dissolved” from this obligation.<sup>104</sup>

Mormon polygamy in practice often provided women with safeguards beyond those Islamic women enjoyed. Contrasted with a Muslim husband’s power of *talaq*, Mormonism strictly limited a husband’s ability to divorce his

96. Ibid.

97. ECC, 1866, fd. 11, LDSA.

98. Firmage and Mangrum, *Zion in the Courts*, 323.

99. Ibid., 324.

100. ECC, 1883, fd. 6, LDSA.

101. ECC, 1856, fd. 3, LDSA.

102. ECC, 1861, fd. 1, LDSA.

103. See, ECC, 1852, fd. 3, LDSA (noting that “it was general counsel from the Presidency that women are more competent to take care of little children than a man.”)

104. George Q. Cannon, *A Review of the Decision of the Supreme Court in the Case of George Reynolds v. the United States* (Salt Lake City: Deseret News Printing Establishment, 1879), 36.

wife by requiring him to petition the church courts. Mormon women also had greater autonomy in seeking divorce than Muslim wives, and got custody of the children when the marriage ended without regard to the age or gender of the children. Mormonism also recognized a divorced wife's continuous right to alimony, while Islam only required the husband to give his divorced wife the unpaid portion of the dower at the time of repudiation. However, in other aspects, Islam allowed women more autonomy than Mormonism. For example, a Mormon woman could not add conditions into the marriage contract and reserve the right to divorce under stipulated conditions.

## V. CONCLUSION

Mormonism and Islam both attempted to mitigate the natural unfairness in polygamy in unique ways. The Quranic revelation required husbands treat their wives equally and forbid a man from taking more than four wives. It also allowed a wife to seek divorce in some circumstances. Modern Islam increasingly restricts a husband's power to repudiate a wife, and is gradually recognizing a divorced wife's right to alimony. In contrast, the Mormon revelation only limits polygamy by requiring that it be authorized by the priesthood and recognizing the first wife's right to refuse her consent in some circumstances. Yet while the revelation provides fewer rights than the *Qur'an*, in practice Mormon women had greater latitude than their Islamic counterparts in alimony, custody, and the ability to pursue divorce for any reason.

It is interesting to note how, though separated by centuries and hemispheres, both Islam and Mormonism established safeguards and procedures designed to protect plural wives, demonstrating that both religions were troubled by the inequality inherent in polygamy. While Mormonism abandoned the practice over a century ago, the progress of gender equality in Islam demonstrates that Tocqueville was correct in noting that "the principal of equality is, therefore, a providential fact . . . [i]t is universal, it is lasting, and all events as well as men contribute to its progress."<sup>105</sup>

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105. Mallat, *Introduction to Middle Eastern Law*, 355-6.