REPORT OF THE COMMITTEE APPOINTED TO CONSIDER AMENDMENTS TO THE MUSLIM MARRIAGE AND DIVORCE ACT

VOL. I

REPORT OF THE COMMITTEE WITH ALL ANNEXURES

FOREWORD

As the Chairman of the Committtee of Experts appointed by the then Minister of Justice and Law Reform, Hon Milinda Moragoda to suggest amendments to the Muslim Marriage and Divorce Act, No. 13 of 1951, it is my duty to thank the then Hon. Minister, as well as all those Hon. Ministres of Justice who succeded him, including the current Minister of Justice and Foreign Employment Hon.Thalatha Athukorale, for all the support provided to the Committee to complete its enormous and time-consuming task.

The work involved was not easy, particularly in view of the sensitive and complex issues that arose for deliberation and the diversity of opinion held by the Muslim community in Sri Lanka and the members of this Committee, in regard to some of these issues. However, in view of the fact that these issues affect the very life of all men and women, who may be driven by matrimonial strife, to seek redress from the Quazi Court and its appellate bodies in order to resolve their disputes which also affected their families, their children and society at large, these issues had to be considered in great depth from both the shariah and pragmatic perspectives. This Report is the product of the commitment, concern and hard work of the members of this Committee, who had fully co-operated with me despite acute differences of opinion that arose, most of which have fortunately been resolved. Hence, it is my duty to thank all members of the Committee for their dedicated work and tolerance.

Law reform is no easy task, and is undertaken to meet the challenges faced by society from time to time. The work of this Committee was no exception, and there is much more to be done for implementing the major reforms recommended in earnest by this Committee. I would therefore, on behalf of all members of the Committee, request the Hon. Minister to take all necessary action to have the recommendations of the Committee implemented as proposed in this Report.

Justice Saleem Marsoof, PC
Chairman of the Committee

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Annexure

REPORT OF THE COMMITTEE APPOINTED IN 2009 TO CONSIDER AMENDMENTS TO THE MUSLIM MARRIAGE AND DIVORCE ACT

In the Name of God, the Most Gracious and the Most Merciful.

1. Introduction

For the ease of reference, this Report is divided into six parts. Part 1 seeks to provide a general introduction and will deal with the appointment of this Committee, its membership and its secretariat. Part 2 will attempt to put the Report in context and outline the history of Muslim Matrimonial Law Reform in Sri Lanka. Part 3 will outline the terms of reference of the Committee, the procedures adopted for the deliberations of the Committee and the issues deliberated by it, and Part 4 will summarize the theoretical basis for law reform and the approach adopted by the Committee. Part 5 is a simplified summary of the recommendations of the Chairman and the members of the Committee and Part 6 consists of the detailed reasoning justifying the said recommendations.

1.1 The appointment of this Committee and its Secretariat

1.1.01 After the enactment of the Muslim Marriage and Divorce Act No 13 of 1951[1](hereinafter also referred to as MM&D Act), two government appointed bodies[2] and one civil society initiated committee[3] had deliberated on the reform of the matrimonial law applicable to the Muslims of Sri Lanka and had made recommendations. The Chairman of this Committee had also made certain recommendations for the reform of the law in the concluding chapter of his book entitled *The Quazi Court System in Sri Lanka and its Impact of Muslim Women*.[4] None of these recommendations have been implemented by the government, and the law is substantially in the same state as it stood at the time of its initial enactment in 1951.

1.1.02 This Committee was appointed by the former Minister of Justice and Law Reform Hon. Milinda Moragoda, with the approval of the Cabinet of Ministers, to consider and recommend amendments to the existing MM&D Act. The letters of appointment dated 30th July 2009 (a copy of which is annexed to this Report marked Annexure A) issued to each member of the Committee by

[1]Muslim Marriage and Divorce Act No. 13 of 1951 as amended by Act No. 31 of 1954, Act No. 22 of 1955, Act No. 1 of 1965, Act No. 5 of 1965, Act No. 32 of 1969, Law No. 41 of 1975 and Act No. 24 of 2013.

[2] The first of these was the Commission on Marriage and Divorce chaired by Mr. A.R.H. Canekeratne Q.C and the second was a Committee appointed in 1990 by the then Hon. Minister of State for Muslim Religious and Cultural Affairs under the Chairmanship of Dr. A.M.M. Sahabdeen.

[3] The civil society initiated Committee appointed in 1972 was chaired by Dr. H.M.Z Farouque, a former Registrar-General, who was also well known for his academic credentials.

[4] Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women* (2001 edition), published by the Muslim Women's Research and Action Forum (MWRAF), Chapter VIII (Conclusions) pages 71 to 74, accessible at: https://www.academia.edu/30277198/The_Quazi_Court_System_in_Sri_Lanka_and_its_Impact_on_Muslim_Women

the Hon Minister of Justice stated that since a review of the Muslim personal law and the system of Quazi Courts require urgent revision, this Committee comprising of eminent persons in the field should consider and present reforms to this area of law. The Committee appointed by the Minister consisted of the following members:-

1. Hon. Justice Saleem Marsoof PC, former Judge of the Supreme Court (Chairman),
2. Hon. Justice A.W.A. Salam, former Judge of the Court of Appeal,
3. Hon. Suhada Gamalath PC., Solicitor General, former Secretary to the Ministry of Justice and Law Reform,
4. Mr.Shibly Aziz, PC, former Attorney General and former President of the Bar Association of Sri Lanka,
5. Mr.Faisz Musthapha, PC, former Deputy Director of Public Prosecutions,
6. Professor Sharya Scharenguivel, Professor of Law, University of Colombo, former Executive Director of the Centre for Human Rights Studies,
7. Hon. Justice Mohammed Mackie, Judge of the Civil Appellate High Court and former Assistant Secretary to the Judicial Service Commission,
8. Mr.S.M.A. Jabbar, Chairman of the Board of Quazis, who passed away on 25th February 2012. Mr. Nadvi Bahaudeen, Attorney-at-law, who was appointed as the Chairman of the Board of Quazis, took his place in the Committee.
9. Dr M.A.M. Shukri, Director, Jamiah Naleemiah,
10. Ash-Shiekh Mohaummad Magdoom Ahamed Mubarak, former President and current Secretary of Jamiyyathul Ulama,
11 Ash-Shiekh Mohammad Ibrahim Mohummad Rizwe Mufti, President of Jamiyyathul Ulama,
12. Deshabandu Mrs. Jezima Ismail, former Member of the National Committee on Women and the Human Rights Commission of Sri Lanka,
13 Mrs. Faleela Be Jurangpathy, Commissioner, Mediation Boards Commission, and former Principal of Muslim Ladies College, Colombo 4,
14. Razmara Abdeen, Attorney-at-Law,
15. Mrs. Safana Gul Begum, Attorney-at-Law, former Member of the Muslim Women's Research and Action Forum (MWRAF),
16. Mrs. Fazlet Shahabdeen, Attorney-at-Law,
17. Mrs. Sharmeela Rassool, Attorney-at-Law and National Project Coordinator, Access to Justice Project, UNDP,
18 Mr. A.H.G. Ameen, Attorney-at-law (who passed away on 26th November 2015), and
19. Mrs. Dilhara Amarasinghe, Additional Secretary to the Ministry of Justice and Law Reform (Secretary).

1.1.03 The Ministry of Justice was represented in the Committee by Mr.Suhada Gamalath PC., Solicitor-General, who was the Secretary to the Ministry of Justice and Law Reform at the time this Committee was appointed and Mrs. Dilhara Amerasinghe, Additional Secretary to the Ministry of Justice and Law Reform, who also functioned as the Secretary to the Committee. Mr. A.K.D.D. Arandara, who was then an Assistant Secretary to the Ministry of Justice and Law Reform, was appointed as Joint Secretary to the Committee and did not attend the deliberations of the Committee but performed a coordinating role. When his services became unavailable, Mr. Razmara Abdeen, Attorney-at-law, assisted with the secretarial functions and performed a coordinating role as well. The Committee was also assisted by Mr. Hejaaz Hizbullah, Attorney-at-law and Ms. Sabrina Ahmed Ali, Attorney-at-law, who were both State Counsel at that time, Ms. Ziyana Ahmad, Attorney-at-law and Lecturer in Law at the University of Colombo, and Ms. Romali Thudawe, Barrister and Attorney-at-law, in some of the secretarial work and drafting functions, purely on a voluntary basis.

1.2 The Sad Demise of Two Members

1.2.01 It is recorded with sadness that during the period of eight years during which this Committee has been functioning, two prominent and active members of the Committee, namely, Mr. S.M.A Jabbar and Mr. A.H.G. Ameen, passed away.

1.2.02 Mr. S.M.A. Jabbar, former Quazi and former Chairman of the Board of Quazis, was an extremely valuable member, who had played a major role in bringing about a meaningful enhancement in the status of the Quazi Court and the Board of Review. He participated actively in the deliberations of the Committee and its sub-committees, and was extremely sympathetic towards the grievances of the litigating public, particularly women. Mr. A.H.G. Ameen, Attorney-at-law, who has been an erudite scholar, lecturer and writer, taught Muslim Law at the Sri Lanka Law College and has also contributed to legal literature by publishing the Al-Ameen Law Report (which reported judgments relating to Muslim matrimonial law as well as judgments on the subject of intestate succession and wakfs) on an annual basis and had also written valuable books on Muslim law, participated regularly in the deliberations of the Committee and worked tirelessly in several sub-committees of this Committee. No appointment was made to the Committee in his place. The untimely demise of these two members of the Committee was a great loss to the Committee and affected its equilibrium.

2.1 Historic Context of Muslim Matrimonial Law Reform

2.1.01 It is necessary to put the appointment of the present Committee into perspective. Muslims as well as their laws and customs have had a long and distinguished history in Sri Lanka. Muslims have been visiting the Island, then known as Taprobane, Serendib and Ceilan, from at least the eighth century AD, and some of them decided to settle down in the Island and even got married to Sinhalese

and Tamil inhabitants of the country. Tennent records that, "from Idrisi's account of the Sinhalese court of the 12th century, it would appear that the Muslims as well as the Christians and Jews were accorded complete freedom of worship and a matter of internal jurisdiction to be governed by their own laws and usages, apart from being actively associated in the royal consultative council."[5] Dr. H. G. Reissner, Ceylon Historical Journal 111 No. 2 page 141 has stated that "in line with their conception that all law was derived from revealed scripture", these communities must have been governed by their respective legal systems in the 'whole range of civilian commitments from marriage contracts to commercial obligations'. Rev. Fr. S. G. Perera, History of Ceylon for Schools, Volume 1, 1947, page 9 quoting Chief Justice Sir Alexander Johnston, says that when the Portuguese arrived in 1505, Colombo which was the chief port and the mart of the island's trade with a largely Muslim population, had a court of justice to settle disputes according to Islamic Law.[6]

2.1.02 This was not for the first time that the reform of the Muslim law relating to marriage has been considered in Sri Lanka. The religious laws and customs of the Muslims were applied by the Sinhalese kings in resolving disputes among Muslim subjects from ancient times, and a special court was established for this purpose in Colombo in the fifteenth century. In view of uncertainty arising in regard to the content of the applicable law, the Dutch Governor in 1770 introduced into Sri Lanka, certain parts of the New Statutes of Batavia of 1766 enacted by the Dutch Governor General in Batavia (now Jakarta) dealing with marriage and divorce and connected matters. It was this Dutch Code,[7] which to a great extent was consistent with the teachings of the Shaffie school of thought followed by the majority of the people in Indonesia, that was later translated into English on the directions of Governor Fredrick North, who in consultation with the Muslim community in the capital city of Colombo, enacted it into law as the Mohammedan Code of 1806.[8]

2.1.03 The Quazi Courts were only established in Sri Lanka in the third decade of the twentieth century. The events that led to the establishment of the Quazi Court system in Sri Lanka are of some

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[5] Sir James Emerson Tenant, *Ceylon - an Account of the Island, Physical, Historical and Topographical*, Vol I (5th Edition, 1860) page 597,

[6] For a detailed account of the historical sequence of the Muslim Law in Sri Lanka, see Dr. H. M. Z. Farouque "Islamic Law in Sri Lanka - An Historical Survey with Particular Reference to Matrimonial Laws" in *Muslims of Sri Lanka, Avenues to Antiquity*" edited by M. A. M. Shukri. See also, Dr. Lorna Dewaraja, *The Muslims of Sri Lanka - One Thousand Years of Ethnic Harmony*.

[7] Titled *Bysondere Wetten aangaande Mooren off Mohametanen en andere Inlandsche Natien* meaning the Special Laws Relating to Moors or Mohameddans and other native races.

[8] The Mohammedan Code was initially applicable only in the maritime parts of Ceylon which were under the control of the Dutch and British, but its provisions were extended to the whole of Sri Lanka by Ordinance No. 5 of 1852 after the fall of the Kandyan areas to the British. *See, Abdul Rahiman et al v Ussan Umma et al* 19 NLR 175 at 178 per Ennis J. See, also L.J.M Cooray, *An Introduction to the Legal System of Sri Lanka*, (2003 Standford Lake) page 133, M.A. Nuhman, *Understanding Sri Lankan Muslim Identity*, (2002 - International Center for Ethnic Studies) page 23 (accessible at: http://www.noolaham.net/project/62/6195/6195.pdf), and B. Skanthakumar, *The Duty to Protect Muslim Family Law in Sri Lanka*, The Yearbook of Islamic and Middle Eastern Law Vol 10 (2003 - 2010) page 130.

interest. In 1925 the decision of the Supreme Court in *King v Miskin Umma*[9] raised doubts regarding the legal validity of the practice of a married woman or her father appointing a 'Quazi' for the purpose of obtaining a divorce according to the special laws and customs of the Muslims. In that case, the Supreme Court had held that a Muslim marriage can only be terminated at the instance of the wife by the District Court, and that the aforesaid practice had no legal sanction.[10] Agitation by the Muslims for the general reform of the law and the introduction of a Quazi Court system prompted the British Government in 1926 to appoint a Select Committee of the Legislative Council to make suggestions with regard to the reform of the existing law. The Committee chaired by Mr. M.T. Akbar, the then Acting Attorney General, also included Mr. N.H.M. Abdul Cader, Mr. H.M. Macan Makar, Dr. T.B. Jayah and five others who were non-Muslims. The Justice Akbar Committee recommended the establishment of Quazi Courts with original jurisdiction and a Board of Quazis with appellate jurisdiction to deal with matrimonial disputes among the Muslims of Sri Lanka.[11] The Muslim Marriage and Divorce Registration Ordinance of 1929[12] was enacted to give effect to these recommendations. However, this Ordinance was promulgated only in 1937. Prior to its promulgation it had to be amended by an Ordinance enacted in 1934 in accordance with the recommendations of a Committee appointed in 1930 and chaired by Mr. P.E. Peiris with Dr.T.B.Jayah, and Messers M.C.Abdul Cader, S.M.Aboobucker, Mohomad Macan Markar, A.H.M.Ismail and M.I.M.Haniffa as its other members. The Final Report of this Committee has not been published.

2.1.04 Since the system established by the abovementioned legislation did not work smoothly, the Governor appointed a Committee in 1939 to consider further amendments to the law. This Committee consisted of the Registrar General, who was the *ex officio* Chairman, and leading Muslims such as Mr. M.T. Akbar, then a retired Puisne Judge, Dr. T.B. Jayah and Mr. M.I.M. Haniffa. This Committee made far reaching recommendations in its unpublished report in regard to the substantive and procedural law, and the resulting legislation was the Muslim Marriage and Divorce Act of 1951[13] which came into force in 1954. The present Quazi Court system is governed by this legislation. The Muslim Marriage and Divorce Act of 1951 provides for the appointment of Quazis to "hold office for such period as may be specified"[14] in the notification relating to their appointment. The Act also contains provisions for the appointment of temporary Quazis[15] and special Quazis "whenever there is a special necessity for the appointment" of such Quazis.[16] In *Ansar v Fathima Mirza*[17] the Supreme Court held that the power to

[9] *King v Miskin Umma* 26 NLR 330
[10] See, *King v Miskin Umma, op;.cit.* and *Ageska Umma v Abdul Careem* (1880) 4 SCC 13.
[11] The Report of the Justice Akbar Committee has been published as Sessional Paper No. XX of 1928.
[12] The Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, as amended by Ordinance No. 9 of 1934 and promulgated as law on 1st January, 1937.
[13] Muslim Marriage and Divorce Act, *supra* note 1.
[14] *ibid.,* Section 12.
[15] *ibid.,* Section 13.
[16] *ibid.,* Section 14.
[17] 75 NLR 279

appoint a special Quazi was very wide and it was not necessary to spell out the reasons for such appointment in the order made for this purpose. The Act also provides for the appointment of a Board of Quazis to hear appeals against decisions of Quazis.[18] An appeal is also available to the Court of Appeal from a decision of the Board of Quazis, but such an appeal can only be filed with the leave of the Court of Appeal.

2.1.05 Originally, the Muslim Marriage and Divorce Act No. 13 of 1951 provided for the appointment of Quazis and members of the Board of Quazis by the relevant Minister, who was at that time the Minister of Home Affairs. However, the decision in *Jailabdeen v Danina Ummah*[19] holding that these provisions were inconsistent with the Constitution, made it necessary to amend the law in 1965 vesting the power of appointment in the Judicial Service Commission.[20] The Commission also has the power, in its discretion, to cancel the appointment of any Quazi. It is, however, curious that Quazi Courts and the Board of Quazis continued to exist, for administrative purposes, under the Ministry of Home Affairs and not the Ministry of Justice, until 2005, when the situation was rectified by bringing them under the purview of the Ministry of Justice by an order made by the then President of Sri Lanka, Hon. Chandrika Bandranayake Kumaranatunge in terms of article 44 (1)(a) of the Constitution. For a short period in 2015, Quazi Courts and the Board of Quazis were brought under the Ministry of Muslim Affairs, but by another order made under article 44 (1)(a) of the Constitution by the President of Sri Lanka, Hon. Maithripala Sirisena, they are now back under the Ministry of Justice, which no doubt is the Ministry that should be responsible for these institutions as they discharge judicial functions. At present there are 64 judicial divisions in Sri Lanka for each of which there is a Quazi. The only requirement in the Act in regard to the qualifications of Quazis is that they have to be male Muslims "of good character and position and of suitable attainments",[21] but no minimum professional or academic qualifications are stipulated in the Act. At present, only four persons holding office as Quazis are Attorneys-at-Law.

2.1.06 During the last six decades or so, there has been some agitation for the reform of the matrimonial laws of the Muslims of Sri Lanka, and as already noted reform proposals have been made by certain commissions and committees. In 1956, the Governor-General appointed a Commission on Marriage and Divorce chaired by Mr. A.R.H.Canekeratne Q.C, with Rev. Father Peter Pillai, Ven. Mottunne Sri Indasara Nayaka Thero, Dr. J.H.F Jayasooriya, O.B.E, Dr. (Mrs.) Mary Hellen Rutnam, Mrs. E.I.A Deraniyagala, Mr. P.B Ranaraja, Mr. D.B Ellepola, C.B.E, Al Haj M.I.M Haniffa M.B.E, Mr. M. Vairamuttu J.P, Mr. Ivor Misso, Mr. S.A.D.M. Don James Senartne and Mr. M.M.P de Zoysa as members. Mr. T.E Gooneratne, Advocate and Registrar General was appointed as Secretary of the Commission with Mr. T.P Unamboowe, Advocate as Assistant Secretary.[22] The terms of reference of the Commission included the issues of the desirability or otherwise of raising the age below which

[18] Section 15 of the Muslim Marriage and Divorce Act, *supra* note 1.
[19] 64 NLR 419.
[20] Section 2 of the Muslim Marriage and Divorce (Amendment) Act, No. 1 of 1965.
[21] *ibid.,* Section 12(1).
[22] The Report of the Commission on Marriage and Divorce chaired by Mr. A.R.H.Canekeratne Q.C has been published as Sessional Paper XVI – 1959 in the Ceylon Sessional Papers Volume II.

marriage should be prohibited, altering prohibited degrees of marriage, grounds of divorce and nullity and circumstances in which judicial separation may be granted, measures to prevent, minimise and redress matrimonial disputes, and the making of recommendations to amend the existing law in regard to these issues. A reading of the Report of the Commission will reveal that the Commission examined the aforesaid matters very carefully not only with respect to the general law but also in the context of both Kandyan law and Muslim Law and made very many valuable recommendations. Some of the contents of the said Commission Report pertaining to issues relating to Muslim marriage and divorce, such as preparation for marriage, the registration of marriage, singing the marriage register by the bride, the minimum age of marriage and the procedure in matrimonial proceedings, will be adverted to later in this report.

2.1.07 In 1972, the Muslim Law Reform Committee chaired by Registrar-General, Dr. H.M.Z. Farouque, and consisting of Mr. M.A.M Hussain, retired District Judge, Mr. A.H.M. Ismail, Bar-at-law, Mr. A.H. Macan Marker, Bar-at-law, Messers. M.M. Markhani, A.H. Mohideen and M.U.M Saleem, Attorneys-at-law, Mr. A.L.M Lafir, former Quazi, took the initiative to study the issues and problems concerning Muslim personal law and the Quazi Court system, with Sir Razeek Fareed, Dr. M.C.M. Kaleel and Mr. A.M. Ameen, retired District Judge, also being consulted in preparing the report of the Committee, and Mr. M.M. Zuhair, then a State Counsel, functioning as the Secretary. The Faouque Committee recommended several important amendments amongst which were the following proposals:[23]

(a) Section 12(5) to be amended to relax the rule that a Quazi should be a resident of the area for which he is appointed;

(b) Provision to be made to require the bride to sign the Marriage Declarations and Register by amending section 18(1) and the relevant form;

(c) Child marriages to be curtailed by prohibiting the solemnization or registration of marriage of any Muslim male below 16 years or Muslim female below 14 years subject to the power of the Quazi under section 23 to authorise the solemnization and registration of the marriage of a Muslim girl aged between 12 and 14 years;

(d) The powers of the Board of Quazis under Sections 43 and 44 be extended to include proceedings under section 24 with respect to second or subsequent marriage and also to *talaq* proceedings section 27 and the 2nd Schedule;

(e) Express provision be made to prohibit the solemnization or registration of any marriage which is rendered punishable as incestuous under Sections 80(1) and (2);

[23] *See,* the Report of the Muslim Law Research Committee chaired by Dr. H.M.Z.Farouque*: Proposals for the Amendment of the Muslim Marriage and Divorce* Act, reproduced in (1978) 4 Colombo Law Review 47, at page 64.

(f) Since the grounds stipulated in section 28(1) for a *fasah* divorce are insufficient, more grounds to be added in the lines of the Dissolution of Muslim Marriages Act 1939 of India and Pakistan;

(g) The Third Schedule to be amended for the purpose of adding some new Rules;

(h) Provisions to be made for registering betrothal contracts and providing sanctions for the breach thereof;

(i) Enhancing the status, powers and duties of Quazis;

(j) Difficulties in the way of enforcement orders of Quazis to be removed by suitable amendments;

(k) Fines and punishments prescribed in the Act for violations thereof to enhanced to meet current needs; and

(l) Provisions to be included to deal with contempt of the Board of Quazis.

2.1.08 In 1990 the Minister of State for Muslim Religious and Cultural Affairs appointed a fifteen member Muslim Law Reform Committee under the chairmanship of Dr. A.M.M. Sahabdeen (hereinafter referred to as the "Dr. Sahabdeen Committee") to report on necessary amendments to legislation relating to Muslims including the Muslim Marriage and Divorce Act No. 13 of 1951. Mr. M.Z. Akbar was appointed Secretary to the committee and its other members were Mr. Faisz Musthapha, P.C., Mr. Shibly Aziz, P.C., Dr. M.A.M. Shukri, Dr. M.S. Jaldeen, Messers S.H.M.Mahroof, A.A.M.Marleen, M.T.M. Bafiq, M.M. Zuhair, Mohamado Markhani, Moulavi S.M.A.M. Muzammil, Al-Alim A.R.M. Zarook, Mrs. Roshana Aboosally Mohamed and Miss Yasmin Ghaffoor. This was the first time that women were appointed, at their firm request, as members of a commission or committee to suggest changes in the field of Muslim family law in Sri Lanka. Justice Saleem Marsoof (then Deputy Solicitor General) was co-opted into this committee at a later stage of the deliberations.

2.1.09 The Committee chaired by Dr. Sahabdeen held several public sittings and recorded evidence. Despite receiving representations from the public to the effect that the Quazi Court system was not functioning in a commendable manner and suggesting that fundamental and far reaching reforms were necessary, the said Committee came to the conclusion that the Muslim Marriage and Divorce Act as it stands now needs very few amendments and has stood the test of time. The Committee nevertheless recommended certain amendments to the existing legislation. Unfortunately, the Report of the Dr.

Sahabdeen Committee[24] has not been published. The very limited recommendations of the Committee, which were mainly administrative in nature, may be summarised as follows:-

(a) Establishing a Quazi Service Commission and introducing into the MM&D Act provisions prescribing minimum educational qualifications for Quazis and the Board of Quazis;

(b) Amending Section 18(2) of the Act and Form IV thereof, to enable the inclusion in the Register of Marriages the conditions MM&D of the marital contract or any pre-nuptial contract the parties may have entered into;

(c) Amending Sections 18(1)(a) and 19(1)(a) of the MM&D Act to enable the bride to sign the Marriage Register;

(d) Amending Section 47(1)(f) of the MM&D Act and Rule 4(1)(a) of the Second Schedule thereof to provide for the payment of *mata'a*;

(e) Amending Sections 64(1) and 64(3) of the MM&D Act with a view of removing hardships caused to litigants in relation to the enforcement of orders of Quazis and the Board of Quazis;

(f) Amending Section 74 of the MM&D Act to remove the prohibition of an Attorney-at-law appearing on behalf of any party or witness before a Quazi as an authorised representative; and

(g) Introducing into the Act provisions to prevent abuse by non-Muslims of the provisions of the MM&D.

2.1.10 It is pertinent that in the final chapter of a book authored by the Chairman of the Committee Justice Marsoof in 2001, entitled *The Quazi Court System in Sri Lanka and its Impact of Muslim Women,*[25] he has quoted the following passage from the Dr. Sahabdeen Committee Report only to emphasise that "Muslim law reform is a top priority concern for the Sri Lankan Muslim woman"[26]:

> "Our considered view is that the Act as it stands now needs very few amendments and has stood the test of time. Its provisions faithfully represent the letter and spirit of the Holy Quran, Hadiths, Ijma and Qiyas. As far as the Muslim marriage law is concerned, the urgent need of the Muslim

[24] *See,* Report of the Dr. Sahabdeen Committee appointed by the Hon. Minister of State for Muslim Religious and Cultural Affairs to Recommend Amendments to the Muslim Marriage and Divorce Act and the Wakfs Act (unpublished)
[25] Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women, supra* note 4 at page 71
[26] *ibid.,* page 72.

community is more in the nature of administrative reforms than amendments to the law as such."[27]

Justice Marsoof, who had the opportunity of observing the rapid deterioration of the Quazi Court system since the publication of the Dr. Sahabdeen Committee Report, commented in his book published in 2001 that it is "unfortunate that there is a tendency to assume that the principles of Muslim law applied in Sri Lanka are sound, and that such application produces results which are both Islamic and just, there being very little need to reform, clarify or codify the law."[28] In the final chapter of the book authored by him[29], he has proceeded to make a few progressive recommendations for the reform of the Quazi Court system and the amendment of the MM&D Act. He had recommended-

(a) the amendment of sections 16, 25(1), 98(2) and other relevant provisions of the MM&D Act to delete the reference to "sect" or to clarify the meaning of the term to enable the Quazis and other courts to adopt an eclectic approach towards *mazhabs* which will be more conducive to the development of the Muslim law to meet contemporary challenges;
(b) the amendment of the MM&D Act with respect to child marriage, the consent and signature of the bride, conditions relating to marriage and the registration of *talaq-i-tafwid*;
(c) the incorporation into the MM&D Act the conditions insisted upon by the *shariah* for the exercise of polygamy and to subject the exercise of polygamy to some kind of judicial control as has already been done in several jurisdictions including Pakistan and Bangladesh;
(d) the amendment of the MM&D Act to reform the Muslim law of divorce to remove the imbalance that currently exists in the law and to clarify the issue as to whether section 27 of the act read with the Second Schedule is the exclusive procedure in regard to *talaq*;
(e) the amendment of the MM&D Act to confer on the Quazi Court the jurisdiction to make orders for payment of *mata'a* and for the custody and care of children of estranged spouses;
(f) making meaningful amendments to the Act to enhance the status of the Quazi to that of a full time Magistrate, laying down minimum qualifications for appointment of Quazis and merging at least four or five Quazi divisions into a 'Quazi Circuit Court', so that the position of Quazi would attract more qualified, capable and balanced individuals to Quaziship and could also help overcome the problem of corruption;
(g) amending MM&D Act to remove the prohibition against women being appointed as Registrars of Marriages, Quazis and members of the Board of Quazis;
(h) amending section 74 and other provisions of the Act and the Rules that prevent the appearance of Attorneys-at- law in Quazi Courts in addition to parties who chose to appear by themselves or through an authorised representative;
(i) amending sections 64 to 66 of the MM&D Act to remedy the unnecessary complexities in the recovery procedure applicable to Quazi Courts;

[27] *See*, Report of the Dr. Sahabdeen Committee, supra note 24, page 31.
[28] Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women, supra* note 4 at page 72.
[29] *ibid.,* Chapter VIII from pages 71 to 74.

(j) amending relevant provisions of the Act to accommodate the need for devolution and convenience of the litigating public to enable the Board of Quazis to operate at a Provincial or Regional level instead of being based in Colombo; and
(k) bringing the Quazi Courts and the Board of Quasis under the purview of the Ministry of Justice;

2.1.11 As observed by the former Minister of Muslim Religious and Cultural Affairs and then Deputy Chairman of Committees, Hon. A.H.M. Azwer in the course of his speech in Parliament made on 9th March 2012 when introducing a resolution seeking the enhancement of the status of the Quazi Court System with better facilities, "the problems faced by those who were intended to benefit from the Quazi Courts System have become even more acute with the passage of time."[30] It is therefore unfortunate that none of the aforesaid recommendations made by the Dr. H.M.Z Farouque Committee, the Dr. A.M.M Sahabdeen Committee or the recommendation made by the Chairman of the current Committee in his publication entitled *The Quazi Court System in Sri Lanka and its Impact on Muslim Women* have been implemented by the government to date.

2.01.12 It was in this background that the present Committee was appointed with a mandate to study the functioning of the Quazi Court System in depth and recommend amendments to the Muslim Marriage and Divorce Act.

3 The Terms of Reference, the Procedures adopted and the Issues Deliberated by the Committee

3.1 Brief Introduction to the Quazi Court System

3.1.01 A brief introduction to the Quazi Court System as it functions in Sri Lanka may be useful in appreciating the need for setting up this Committee, the procedures adopted by it and the issues that had to be deliberated by this Committee.

3.1.02 By way of introduction, it may be stated that the provisions of the Muslim Marriage and Divorce Act (MM&D Act) may be divided into 5 main parts, viz- (1) The Administration of the Act including the appointment of Registrars of Muslim Marriages, the Muslim Marriage & Divorce Advisory Board, Quazis and the Board of Quazis (sections 3 to 15 of the MM&D Act); (2) The Registration of Marriages (sections 16 to 26 of the MM&D Act); (3) The Registration of Divorces and Declarations of Nullity (sections 27 to 33 & 47(1)(i) of MM&D Act) (4) Matrimonial Causes including claims for maintenance, *mahr* and *kaikuli* (sections 34 to 39, 47 and 64 to 66 of MM&D Act) (5) Appeals (sections 60 to 63 of the MM&D Act) and (6) General Provisions including Offences and Penalties, prohibition of lawyers appearing before the Quazi Court, Supplementary Provisions including the power to make and amend regulations and rules, Interpretation, Transitional Provisions and Savings (sections 67 to 99 of MM&D Act).

[30] Parliamentary Debates (Hansard) dated 9th May 2012 at page 976.

3.1.03 It is significant that the "jurisdiction exercisable by a Quazi under Section 47 shall be exclusive and any matter falling within that jurisdiction shall not be tried or inquired into by any other Court or Tribunal whatsoever".[31] It is important to note that under the MM&D Act, the Quazi Court has no jurisdiction to deal with the question of custody of, and access to, children of estranged spouses. Some of the main problems faced by litigants before the Quazi Court system have been outlined in paragraphs 2.1.05 to 2.1.11 of this Report.

3.1.04 The hierarchical structure of the Quazi Court system permit an aggrieved party to appeal or move in revision against a decision or order of the Quazi Court made in the exercise of the aforesaid jurisdiction, to the Board of Quasis, and from there to the Court of Appeal. A party aggrieved by a decision or order of the Court of Appeal, may with the leave of the Court of Appeal or special leave of the Supreme Court, appeal to the Supreme Court.

3.1.05 It is noteworthy that some major decisions of the Quazi Courts, the Board of Quazis and even the Court of Appeal and the Supreme Court relevant to Muslim matrimonial law have been published in several volumes of the Muslim Marriage and Divorce Law Reports and the Al-Ameen Law Reports, providing access to not only to Quazis, Judges, legal practitioners, academics and researchers but also to students of law and the general pubic of the rich jurisprudence that had emanated from the Quazi Court system.

3.2. The Terms of Reference, the Procedure Adopted and matters Deliberated by the Committee

3.2.01 Reference has already been made in paragraphs 2.1.06 to 2.1.11 of this Report to the increasingly intensified agitation for the reform of the Muslim Marriage and Divorce Act (MM&D Act) from the time of its enactment in 1951 for over 6 decades. It is with the objective of making a comprehensive study of the problems that arise from the workings of the Quazi Court system which have caused untold hardships to all litigants involved in matrimonial disputes, and formulating recommendations necessary to resolve the difficulties and injustices faced by an important segment of the people of this country, that this Committee was appointed. This Committee has considered a large number of issues that were brought to its notice through public representations, the varied experiences of its members, and several public and private consultations with the public as well as experts in this specialized field of law and practice and has arrived at its conclusions. Before going into details of the deliberations before the Committee, it may be useful to examine the Committee's Terms of Reference.

3.2.02 The Terms of Reference contained in the letter of appointment dated 30th July 2009 (Annexure A) issued to the members of the Committee did not set out any timeframe for suggesting

[31] See, Section 48 of the MM&D Act, *supra* note 1. *See, Ummul Marzoona v A.W.A.Samad* 79 NLR 209.

recommendations of reform to the Hon. Minister of Justice. The letter simply stated that since a review of the Muslim personal law and the system of Quazi Courts require urgent revision, this Committee comprising of eminent persons in the field, should consider and present reforms to this area of law.

3.2.03 The members of the Committee met for the first time on 6th August 2009 and met very regularly thereafter, in all on 33 occasions.[32] Meetings of the Committee were held at the Supreme Court Lounge, the Auditorium of the Ministry of Justice, the YMMA Conference at Dematagoda Road, Colombo 9, the MICH Auditorium at Lilly Avenue, Colombo 6, the Conference Room of the Muslim Lawyers' Association, 3rd floor, Orchard Building, Galle Road, Colombo 6, the Head Office of the World Association of Muslim Youth (WAMY), at Mahawaila Gardens off Baseline Road, Colombo 9, the residence of Justice Mohammed Mackie at No. 658/43A, Mahawila Garden, off Baseline Road, Colombo 9 and the Auditorium of the All Ceylon Jamiathul Ulema, No. 281, Jayantha Weerasekera Mawatha, Maligawatte. Colombo 10, Most of these meetings were held from 9.30 am to 4.30 pm.

3.3. Publication of Notices calling for Representations of the Public

3.3.01 Pursuant to a decision taken at the very first meeting of the Committee held on 6th August 2009, Notices dated 10th August 2009 were published by the then Secretary to the Ministry of Justice in the newspapers in all three languages calling for representations from members of the public. Furthermore, at the request of the Committee, reminders were also sent to about 55 Muslim institutions by the Muslim Lawyers' Association requesting them to forward their proposals and suggestions as required by the said Notices.

3.3.02 The Committee received numerous representations from the public, including the following:-

(1) All Ceylon Muslim Marriage Registrars' Association, Baiththuzeenath, No. 515, Aruuodaya Mawatha, Obeysekerpura, Rajagiriya;
(2) Muslim Marriage Registrars Forum, 257, Akkarapattu 5;
(3) Quazi Judges' Forum of Sri Lanka, 134/2, Sirimavo Bandaranayake Mawatha, Ratnapura;
(4) Mr. M.F. Miskin, Attorney-at-law, No. 7, Belmont Street, Colombo - 12;

[32] Meetings of the Committee were held on 6th August 2009, 8th October 2009, 28th October 2009, 9th December 2009, 3rd February 2010, 17th March 2010, 5th May 2010, 13th June, 2010 (with learned theologians of ACJU), 28th July 2010, 12th December 2010 (with the Director and senior academic staff of Jamiah Naleemiah) 22nd March 2011, 1st July 2011, 9th February 2012, 17th March 2012, 4th April 2012, 2nd June 2012, 28th October 2014, 5th April 2015, 5th May 2015, 14th February 2016, 27th March 2016, 19th July 2016, 6th November 2016, 13th December 2016, 29th January 2017, 19th March 2017, 29th April 2017 and 4th May 2017 (with ACJU Fathwa Committee), 21st May 2017, 27th August 2017, 17th September 2017, 26th November 2017 and 20th December 2017.

(5) Muslim Women's Research & Action Forum (MWRAF), 73/19E, Kirulapone Avenue, Colombo 5;
(6) The Muslim Lawyers' Association, 3rd Floor Orchard Building, Galle Road, Colombo 6;
(7) All Ceylon YMMA Conference, No. 63, Vayiragana Mawatha, Colombe 9;
(8) The Supreme Assembly of Theologians of Ahlus Sunnath-Wal–Jamaath, 25, Forbes Lane, Maradana, Colombo - 10;
(9) Council of Muslims of Sri Lanka, No.34 1/5, Sebastians Hill, Colombo 12;
(10) Muslim Welfare Association, 134/2, Colombo Road, Ratnapura;
(11) Muslim Marriage Registrars' Association, Kurunegala District, 79-37 Thakkiya Road, Mallawapitiya, Kurunegala;
(12) Kandy Forum,552/18, Elagolla Estate,Heerassagala, Kandy;
(13) A.H. Leila Umma, C/o S.M. Maksoof, Pahala Pannawa, Kobeigane;
(14) Madrasathul Haniffa Jummah Mosque, No. 642/1B, Colombo Road, New Town, Ratunapura;
(15) Hon. U.L.A Majeed, retired High Court Judge, Chairman of the Al Amaan Nusrath Organisation, No. 27, St Mary's Lane, Mattakkuliya, Colombo 15;
(16) Prof. Hussain Ismail, Islamic Science University Malaysia, President, All Ceylon Muslim Educational Conference;
(17) Mr. Muzammil Mansoor, FCA., No. 20/3, Kassapa Road, Colombo 5.
(18) Mr. M. Farook Thahir, Attorney-at-Law, 34 - 1/45, Lawyers Office Complex, Colombo 12;
(19) Mr. A.R. Abdul Fareel JP., Quazi Judge-Dumbara 31/7, Madige, Udatalawinna;
(20) Al-Haj S.M. Abdul Gaffoor JP, Registrar of Muslim Marriage, No. 257, Jummah New Mosque Road, Akkaraipattu – 5;
(21) Al-Haj M.B.M Zubair, JP, Chairman, Kandy Islamic and Cultural Centre, Kandy.
(22) Joint Submissions of Ms.Ermiza Tegal, Ms. Hasanah Cegu Isadeen, Attorneys-at-law and Ms. Hyshyama Hamin, Gender Consultant and Independent Researcher;
(23) Miss. Mohamed Razik Anar, Apprenticing Lawyer;
(24) Mr. A.L.M. Hussein, Nilupa Manzil, Bammanna, Narangoda;
(25) The Galle Muslim Cultural Association, P.O Box 59, No. 47 Rampart Street, Fort, Galle;
(26) Ikrah Women Development Organization, Navalar Road, Jaffna;
(27) S.M. Wijayaratna, 15/1, Kongahamula, Manikhinna;
(28) All Ceylon Jamiyyathul Ulama, Mutur Branch;
(29) All Ceylon Jamiyyathul Ulama, Pannawa Branch;
(30) Nahlathul Muslimath Muslim Ladies Scholars Forum, Weligama;
(31) Makkiyya Arabic College, Galle;
(32) Galle District Muslim Mosques Trustees & Committee Members;
(33) Federation of Kattankudi Mosques and Muslim Institutions, Kattankudi;

(34) Islamic Women's Association for Research and Empowerment (IWARE), 32/1,Quazi S.M.M.Musthaffa Hajiar Lane, Kattankudi;
(35) All Ceylon Jamiyyathul Ulama (ACJU), Maligawatte, Colombo 10;
(36) Nawinna Jumma Mosque, Galle;
(37) Colombo District Masjid Federation, 41 1/1, Sir Henry De Mel Mawatha, Colombo 2;
(38) Al Madrasathul Aliyya Arabic & Islamic Law College, Galle;
(39) Sri Lanka Tawheed Jamaath (SLTJ), Maligawattha, Colombo 10; and
(40) Muslim Women's Development Trust, Palavi, Puttalam.

3.3.03 Some of the members of the public as well as the representatives of the institutions that had made representations were also invited to meet with members of the Committee on 10th June 2010 at the Ministry of Justice Auditorium, and even thereafter, several such meetings were held for the purpose of understanding the grievances of the public in detail and discussing solutions. This Committee is grateful to all members of the public and the various institutions for submitting these representations and attending the consultations.

3.3.04 Several sub-committees were appointed by the Committee to study specific issues in greater depth and to assist in drafting the report of the Committee and the proposed amendments to MM&D Act. Firstly, a Drafting Committee, was assigned the work of drafting the recommendations of the Committee into a report format and the work of drafting the suggested amendments to the Muslim Marriage and Divorce Act and its forms and schedules.[33] The drafting work of this Committee was carried out simultaneously with the preparation of a draft bill for presentation in Parliament in the event the proposals contained in the report are accepted by the government. Such a dual approach was adopted in order to assist the government, in particular the Legal Draftsman, to introduce the consequential legislation without too much delay.

3.3.05 Eight subject based sub-committees were also appointed to examine in some depth the many sensitive and complex issues that could arise in the course of the deliberations, which required detailed study from both the shariah and pragmatic perspectives. These sub-committees considered issues such as (1) the Appointment of Women Quazis[34]; (2) the Minimum Age of Marriage[35]; (3) the

[33] The Drafting Committee consisted of Hon. Justice Saleem Marsoof (Chairman), Mr. Razmara Abdeen (Co-ordinator), Hon. Justice Mohammed Mackie, Mr. A.H.G. Ameen, Ms. Safana Gul Begum and Mr. Nadvi Bahudeen (who took the place of Mr. S.M.A Jabbar after he passed away).
[34]The Appointment of Women Quazis sub-committee consisted of the late Mr. S.M.A.Jabbar (Chairman), Ms. Safana Gul Begum (Coordinator), Mr. Razmara Abdeen, Ms. Sharmeela Rassool and Ms. Fazlet Shahabdeen.
[35] The Minimum Age of Marriage sub-committee comprised of Prof. Sharya Scharenguivel (Chairman), Hon. Justice Saleem Marsoof (Coordinator) and Mrs. Jezima Ismail (by co-option).

Divorced Women's Entitlement for *Mata'a*[36]; (4) *Talaq* and *Talaq* Procedure[37]; (5) Enforcement of Orders of Quazi Courts[38];(6) *Khula* Divorce[39]; (7) the Status of Quazis[40]; and (8) Polygamy[41]and submitted reports from time to time to the main Committee for its consideration. All meetings of these sub-committees took place at the residence of a member of the sub-committee on a voluntary basis.

3.3.06 It must be mentioned that several special meetings were held for the fuller understanding of the issues that required attention for completing the task assigned to the Committee. The first of these meetings was held on 13th June 2010 with the learned theologians of the All Ceylon Jamiyyathul Ulama at the Hotel Ranmutu, Colombo 03. More than twenty five theologians from various parts of the country representing the All Ceylon Jamiyyathul Ulama participated at the conference. Ash-Sheik M.I.M. Rizwe Mufti, President of All Ceylon Jamiyyathul Ulama (ACJU), and Ash-Sheik. Mohaummad Magdoom Ahamed Mubarak, Secretary of the ACJU led the ACJU delegation and Hon Justice Saleem Marsoof chaired the meeting.

3.3.07 The next special meeting took the form of a one-day session held on 12th December 2010 for members of the Committee to interact with the learned theologians (*ulama*) of Jamiah Naleemiah, Beruwala. This session was co-chaired by the Committee Chairman Hon. Justice Saleem Marsoof and Dr. M.A.M. Shukri, in his capacity as the Director of Jamiah Naleemia. Deputy Director of Jamiah Naleemia Ash-Sheik Agar Mohomad and other members of the staff of Jamiah Naleemia also participated in the discussions. The session was useful in bringing about greater understanding of the principles of shariah as well as the problems faced by those who invoke the jurisdiction of Quazi Courts and the Board of Review.

3.3.08 Taking advantage of the presence in Sri Lanka of Dr. H.M.Z.Farouque, who was a former Registrar General of Sri Lanka and a distinguished legal scholar who now lives in Australia, the Committee also held a meeting with him at the Supreme Court Complex, and had a very useful discussion. He was the Chairman of the Muslim Law Research Committee, which was a community initiative to the issues relating to the Quazi Court system, which Committee had from 1972 studied

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[36] The Divorced Women's Entitlement for *Mata'a* sub-committee consisted of Hon. Justice Mohammed Mackie (Chairman), Mr. S.M.A. Jabbar, Ms. Fazlet Shahabdeen and Ms Safana Gul Begum.

[37] The *Talaq* and *Talaq* Procedure sub-committee consisted of Hon. Justice Saleem Marsoof (Chairman), Mr. Razmara Abdeen (Coordinator), Justice Mohammed Mackie, As-Sheik M.M.A. Mubarak and Mr. A.H.G Ameen.

[38] The Enforcement of Orders of Quazi Courts sub-committee comprised Hon. Justice Mohammed Mackie (Chairman) Mr S.M.A. Jabbar (Coordinator) and Ms. Safana Gul Begum.

[39] The *Khula* Divorce sub-committee consisted of Mr. S.M.A Jabbar(Chairman), Ms. Safana Gul Begum and Prof. Sharya Scharanguivel.

[40] The Status of Quazis sub-commmittee consisted of the late Mr. A.H.G. Ameen (Chairman), Ms Safana Gul Begum (Coordinator), Hon. Justice Mohammed Mackie As-Sheik Rizvie Mufti, Deshabandu Ms Jezima Ismail, Ms Faleela Jurangpathy and Ms Sharmeela Rassool.

[41]The Polygamy sub-committee comprised Ms Fazlet Shahabdeen (Chairman), Mr. Razmara Abdeen (Corordinator), Prof. Sharya Scharanguivel, Ms Faleela Jurangpathi and Ms Safana Gul Begum.

the problems and published an excellent report containing many proposals for the reform of the law.[42] This too was an enriching experience for the members of the present Committee.

3.3.09 It must be mentioned that this Committee set about its task in earnest with a great sense of urgency. However, due to many reasons, including the sensitivity of the issues for consideration, the necessity to study some of the issues in depth both from *shariah* and pragmatic stand points, the many areas of disagreement amongst the members of the Committee, the need to obtain the views of the members of the public in regard to the way the current system of Quazi Courts was functioning, the lack of resources and facilities, the recommendations of the Committee could not be finalized till now. Although in the meantime there were changes in government, and several honourable members have occupied the office of Minister of Justice or Minister in charge of Quazi Courts, the members of the Committee went ahead with their work amidst difficulties. The driving force behind the Committee was its community obligation to find ways of bringing about changes in the system in order to make it fully *shariah* consistent and ensure that the Quazi Court System functions efficiently in a fair and just manner for the benefit of those who invoke its jurisdiction for the redress of matrimonial disputes.

3.3.10 The Ministry of Justice was always kept informed of the progress of the work of the Committee through its Secretary to the Committee Ms. Dilhara Amarasinghe, Senior Assistant Secretary to the Ministry of Justice, who attended almost every meeting of the Committee. Hon Rauf Hakeem, who succeeded Hon Milinda Moragoda as the Minister of Justice, gave a comprehensive account of the deliberations of the said Committee and the progress made by it, in the course of his address to Parliament on 9th March 2012.[43] It is also noteworthy that the Hon. Minister of Justice on that occasion was speaking in support of a resolution moved by the late Hon. A.H.M.Azwer, then the Deputy Chairman of Committees, seeking the enhancement of the status of the Quazi Court System with better facilities, which was duly adopted by Parliament. The address made by the late Hon. Azwer in presenting the resolution was also reported in the Hansard.[44] The relevant

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[42] The Muslim Law Research Committee*: Proposals for the Amendment of the Muslim Marriage and Divorce* Act, reproduced in (1978) 4 Colombo Law Review 47, at page 64.

[43] Parliamentary Debates (Hansard) dated 9th May 2012 from pages 985 to 987. At page 986, Hon Rauf Hakeem referred to the matters under deliberation before the Committee in the following words: "The status of Quazis, the appointment and disciplinary control of Quazis and the related transitional provisions that need to be included, the qualifications of Quazis, whether the Quazis should solely be lawyers learned in the *Shariah*, the registration of marriages, would registration be compulsory, the test for validity of marriages between persons professing Islam and the role of sect or *madhab*, the minimum age of marriage and role of *wali* ensuring consent of the bride to marriage, issues relating to polygamy and the provisions that need to be further reinforced, types of divorce and procedures for the same, including registration of divorce and several such matters are intended to be included, I am told, by the Committee, the details of which I would be able to submit to Parliament as soon as the Committee submits the report to me."

[44] *Ibid.,* pages 973 to 980. At page 977 the late Hon. A.H.M.Azwer stressed that "in dealing with Quazi Court matters, one factor that has got to be taken very seriously is the sufferings of the Muslim women.".

Parliamentary Debates (Hansard) are appended to this Report marked Annexure B. The resolution unanimously adopted by Parliament on 9th March 2012 was to the following effect:-

> "This Parliament is of the opinion that the Quazi Court System that was established in Sri Lanka under the Muslim Marriage and Divorce Ordinance of 1929 and subsequently amended under the Muslim Marriage and Divorce Act in 1951 must be upgraded with powers vested with the Quazi judges to adjudicate upon all matters concerned with disputes arising in Muslim families and also the status of the Quazi Court System must be upgraded in such a manner where sittings be held in premises congenial to the dignity of the system and as the Quazi judges are appointed by the Judicial Service Commission they should be placed on a respectable and an acceptable salary structure payable to other judicial officers."[45]

3.3.11 In January 2015, the subjects of the Quazi Courts and Board of Quazis were assigned to Hon. M.H. Abdul Haleem, the Minister of Posts, Postal Services and Muslim Affairs, but after these institutions were restored to the Ministry of Justice, successive Ministers of Justice, viz Hon. Wijedasa Rajapakshe and Hon. Thalata Athukorale, were also kept informed of the progress made by the Committee. Some of the meetings of the Committee were held in the Auditorium of the Ministry of Justice, and the assistance provided by the Ministry in this connection is gratefully acknowledged.

3.4 The Main Issues Deliberated by the Committee

3.4.01 The representations received from the public and the consultations held by the Committee with persons and organisations that had submitted representations helped to formulate the issues that needed to be addressed in considering the recommendations to be made by the Committee.

3.4.02 The principal issues deliberated by the Committee included the following:-

(a) The scope and applicability of the Muslim Marriage and Divorce Act (MM&D Act)[46], in particular whether an option should be granted for any Muslim to be governed by the Marriage Registration Ordinance (also known as the "Genearal Marriages Ordiance")[47] as opposed to the provisions of the MM&D Act, and the the question of overcoming certain problems arising from the interpretation given by the Registrar-General to the word "inhabitants" occurring in section 2 of the MM&D Act which prevented the registration of marriages between Muslims solemnised in Sri Lanka by reason of their current non-resident status;

[45] *Ibid.,* page 973.
[46] *Supra* note 1.
[47] Marriage Registration Ordinance No. 19 of 1907 (Cap 131 of the Legislative Enactments of Sri Lanka 1980 Revised Edition) as subsequently amended. This Ordiance is also popularly referred to as the General Marriages Ordinance [Cap 131].

(b) Enhancing the status of Quazis and the Quazi Courts by making suitable amendments to sections 12, 13 and 14 of the MM&D Act with the objective of strengthening the Quazi Court System and enhancing its levels of efficiency and credibility;

(c) Reforming the Muslim Marriage and Divorce Advisory Board by making suitable amendments to sections 4,5,6 and 7 of the MM&D Act with the objective of making it a useful and vibrant body as envisaged by the drafters of the MM&D Act;

(d) Restructuring the Board of Quazis and amending section 15 of the MM&D Act to make its Chairman a full-time officer and increasing the number of its members to make it more accessible to the Provinces;

(e) Considering amending sections 4, 8, 9, 10, 12, 14, 15 and the schedules of the MM&D Act to bring about changes in the prevailing perception of unfairness to women arising from the fact that Registrars of Muslim Marriages and Quazis are required to be male;

(f) Considering the amendment of sections 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2) and 98(2) of the MM&D Act by removing the reference to "sect" or by making alternative proposals to overcome religious and practical difficulties arising from the said reference;

(g) Bringing out the consensual nature of marriage and making detailed provisions for the compulsory registration of all marriages through suitable amendments to sections 16, 17, 18, 19, 20 and 21 of the MM&D Act;

(h) Considering the fixing of a minimum age of marriage and curtailing child marriages through amendments to sections 23 and 25 of the MM&D Act;

(i) Preventing the abuse of polygamy by suitably amending section 24 of the MM&D Act;

(j) Reformulating sections 27 and 28 of the MM&D Act for making provisions for pre-hearing couseling and mediation to help the parties to reconcile their differences without the direct involvement of the Quazi in the process of reconciliation prior to the application for divorce being taken up for hearing by the Quazi, and to make the system more just and equitable;

(k) Amending section 29 of the MM&D Act with a view to streamlining the procedure for the initiation of proceedings in terms of sections 27 and 28 of the Act or under any other provision of the Act where there is no express provision in this regard, to provide for the service of process and the registration of divorces;

(l) Repealing section 30 of the MM&D Act (which has gone into disuse) and replacing it with a provision for applications for nullity of marriage;

(m) Bringing about greater equity and justice by amending provisions of the MM&D Act to confer on the Quazi Court the jurisdiction to make orders for the payment of *mata'a* to divorced women and removing hardships caused by the prevalent un-Islamic dowry practices, the payment or return of *mahr* and *kaikuli* and the payment of maintenance and interim maintenance;

(n) Suitably amending section 47 of the MM&D Act dealing with the Jurisdiction and powers of the Quazi Court, and the Quazi Appellate Court and the right to legal representation

(o) Amending sections 58 to 61 of the MM&D Act to deal with the time limits and procedures for the lodging of appeals from decisions of Quazi Courts to the Quazi Appellate Court and from the decisions of the said Court to the Supreme Court instead of to the Court of Appeal;

(p) Reformulating sections 65 and 66 to provide for more efficient enforcement of orders of the Quazi Court;

(q) Establishment of a Maintenance Fund for the benefit of destitute married or divorced women;

(r) Providing for Transfer of Cases, Appearance of Attorneys-at-law, Enhancement of Punishments and other Miscellaneous Matters;

(s) Supplementary Provisions for making and amending Regulations, Rules, Schedules and Forms, and Interpretation; and

(t) Savings and Transitional Provisions.

4 The Theoretical Basis for Law Reform and the Approach Adopted by the Committee

4.1.01 In dealing with the above issues, this Committee was conscious of the sensitive nature of the matters it had to consider in making its recommendations for the amendment of the Muslim Marriage and Divorce Act of 1951 (MM&D Act),[48] and adopted a cautious approach with the required reformatory zeal. This Committee has examined the representations received in writing from various

[48] *Supra* note 1.

organizations and the general public in response to the notices published in the newspapers, and has deliberated on a large number of highly contentious issues that arise from the MM&D Act and its implementation, particularly in regard to the legal and social framework within which the Quazi Court system currently functions, and its efficacy.

4.1.02 While most of the grievances of litigants were brought to the notice of the Committee through public representations and public stings held at the Ministry of Justice Auditorium, one of the main criticism of the system was that it caused server hardships to litigants and did not fulfill the aspirations of those who were responsible for the establishment of the system. The Committee engaged itself fully in the exercise of finding ways of improving the system to enable it to function in a beneficial and efficient manner.

4.1.03 It is important to mention that the Committee was extremely careful to examine all issues deliberated by it within the framework of the *shariah*, in the broadest sense of the term. In this context, it may be useful to mention at the outset that this Committee has discerned a conflict of opinion in the representations received from organizations and individuals which is very much similar to the conflict of views that existed six decades ago and reflected in particular in paragraph 54 of the Report of the Commission on Marriage and Divorce[49], wherein it was noted that-

> "There was one extreme point of view advanced by witnesses that the Quran establishes an exhaustive religious code of conduct for all time which no Muslim or other person has the right to amend in even the slightest degree. There were others who maintained, with equal reverence to the Quran, that considerable reforms of the law were possible within the very framework of the *Shariat*"

4.1.04 This apparent conflict of opinion may be easily dispelled by a better and more pragmatic understanding of the dynamism of the principles of *fiqh* and a fuller appreciation of the difference in the nature and methodology of these two concepts. As we all know, the word "*shariah*", which literally means "the way to God", is generally used to refer to the body of Islamic canonical law based on the teachings of the Holy Quran and the traditions of the Holy Prophet (*Hadith* and *Sunna*), prescribing both religious and secular duties and sanctions to deal with lawbreaking. The term "*fiqh*" which in Arabic literally means "deep understanding" or "full comprehension", refers to the body of Islamic law extracted from detailed Islamic sources, and constitutes an important aspect of the *shariah*. It is this body of law that is referred to as "the Muslim law" in various provisions of our Muslim Marriage and Divorce Act (MM&D Act). It is necessary to stress that while this Committee views the Holy Quran and the principles of the *shariah* with great reverence, it is of the opinion that progressive reform of the law was possible within the very framework of the *shariah* owing to the dynamic nature of Islamic *fiqh*.

[49] *See,* the Report of the Commission on Marriage and Divorce (1959) *supra* note 22 paragraph 54 to 72.

4.1.05 Though often used interchangeably, the two terms, *shariah* and *fiqh* have different meanings. As has been stressed by a Sri Lankan writer, the *shariah* "is nothing but the best practice applicable in purifying the heart, soul and body of any given human community and diverse social contexts to build and sustain a just human society that uphold immutable values such as justice, freedom, protection, dignity, respect etc. that are Islamic and at the meantime universally shared."[50]Prof. Imran Ahsan Khan Nyazee has observed in his work entitled *Islamic Jurisprudence* that the term *shariah* includes both the tenets of faith and the law, whereas the *fiqh* is "the knowledge of the law." [51] *Shariah* is closely identified with the divine revelation (*wahi*), the knowledge of which can only be derived from the Quran and the Sunnah. *Fiqh*, on the other hand, has been developed mainly by the jurists, and consists of legal rules (*al ahkam al amaliyyah*) which are founded mainly on human reasoning and *ijtihad*[52]. As Nyazee goes on to point out, *usul al-fiqh* (juridical methodology) consists of the body of principles of interpretation which help to derive the law from the detailed evidence contained in its sources of law. [53]

4.1.06 As Prof. Mohammad Hashim Kamali has observes in his *Principles of Islamic Jurisprudence, usul al-fiqh*, described as the roots of Islamic Law, expound the indications and methods by which the rules of *fiqh* are deduced from their sources." [54] The essence of *fiqh* is to be found in the Holy Quran and *Sunna* of our Prophet (PBUH), which are in fact very closely interlinked in the sense that it is through the Sunnah that Prophet Muhammad fulfilled his divine mission by elaborating on the divine principles of the Holy Quran.[55] Additionally, *Ijma*, which means the consensus of opinion of jurists, and *Qiyas*, which refers to rules derived from analogical deduction from the first three sources, are also recognized as primary sources. The *shariah* also recognizes *istishab* (presumption of continuation), *istihsan* (juristic preference similar to equity in English law), *urf* (customs), *sadd al-dhara'i* (blocking the means to evil), and *maslahah nursalah* (public benefit or interest), as additional sources of law to the extent permitted by the rules of *usul al-fiqh*.[56]

4.1.07 It is significant to observer in this context that Professor Kamali notes a major difference in the approaches of the Shaffie and Hanafi schools of thought (*madhab*) in regard to the study of *usul al-fiqh*, which might be later useful to have in mind in the discussion to follow. Kamali states that-

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[50] Ummu Hana, Sharia Law: Myths And Reality - A Sri Lankan Perspective, https://www.academia.edu/9720912/Sharia_Law_Myths_And_Reality_A_Sri_Lankan_Perspective (accessed on 19.8.2017)
[51] Nyazee, *Islamic Jurisprudence*, Malaysian Edition 2003 (The Other Press) page 24.
[52] *Ijtihad* literally means "exertion", and technically the efforts a jurist makes in order to deduce the law, which is not self-evident, from its sources.
[53] Nyazee, *supra* note 51, page 37.
[54] Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society, Cambridge, UK (1997 reprint) page 1.
[55] *Ibid.,* pages 63 to 64.
[56] *Ibid.,* pages 363 to 367. See also, Saleem Marsoof, *Maslahah Mursalah as a Basis for Muslim Law Reform in Sri Lanka*, [2016 – 2017] 51 Meezan page 32

> "Following the establishment of the *madhahib*[57], the *ulema* of the various schools adopted two different approaches to the study of *usul al-fiqh*, one of which is theoretical and the other deductive. The main difference between these two approaches is one of orientation rather than of substance. Whereas the former is primarily concerned with the exposition of theoretical doctrines, the latter is pragmatic in the sense that theory is formulated in the light of its application to relevant issues. The difference between the two approaches resembles the work of a legal draftsman when it is compared to the work of a judge. The former is mainly concerned with the exposition of principles whereas the latter tends to develop a synthesis between the principle and the requirements of a particular case. The theoretical approach to the study of *usul al-fiqh* is adopted by the Shaffie school and the Mutakallimun, that is the ulema of *kalam* and the Mutazilah. The deductive approach is, on the other hand, mainly attributed to the Hanfis."[58]

4.1.08 A further distinction which may have to be drawn here to supplement what Kamali has said about the respective roles of the legal draftsman and the judge, is the one between the legal draftsman and the policy maker, or the one who formulates policy and instructs the legal draftsman to draw up draft legislation in order to give effect to a specific set of policies. The principal task of this Committee to recommend amendments to the Muslim Marriage and Divorce Act of 1951 (MM&D Act)[59] after investigating pragmatic issues concerning the efficacy of the Act and the Quazi Court system it established, with the objective of the problems that have arisen in the implementation of the provisions of the Act. In doing so, this Committee was conscious of the need to make its recommendations within the framework of the *Shariah*, and the body of law we call *Fiqh*. In the performance of this task, this Committee had to perceive the issues from the perspective of the Judge, as opposed to the legal draftsman, and suggest remedial measures.

4.1.09 It is necessary to point out at the outset that section 16, 98(2) and few other sections of the MM&D Act and schedules thereto have expressly referred to the "Muslim law of the sect to which the parties belong", and the word "sect" has been interpreted by our courts to refer to *mazhabs* or schools of thought. In this context, it is relevant to note that while some predominantly Shaffei nations such as Indonesia have codified *shariah* rules relating to marriage and divorce in order to avoid inter-sect

[57] *Madahib* is the plural of *madhab*, which means a school of thought.
[58] Kamali, *supra* note 54 at pages 7 to 8.
[59] *Supra* note 1.

conflicts[60], other Shaffei jurisdictions such as Singapore[61] and Malaysia[62] have attempted to provide flexibility and virility to the law through legislation by giving impetus to the Shaffei *mazhab* while providing for consulting the views of the Hanafi, Hanbali or Maliki schools of thought if the application of the Shaffei law will conflict with the public interest (*maslahah mursalah).*

4.1.10 It is noteworthy that, while the All Ceylon Jamiyyathul Ulama (ACJU) in its representations submitted to this Committee and included in volume II of this Report marked C1,[63] as well as in its subsequent opinions which shall be adverted to later in this Report, has strongly objected to the adoption of an eclectic approach towards the approaches of the various "sects" or *mazhabs* in the context of law reform as well as in the application of the law, the Sri Lanka Tawheed Jama'ath (SLTJ) in its representations submitted to this Committee and included in volume II of this Report marked C2,[64] has suggested a pluralistic approach and strongly objected to the references to "sects" (*mazhabs*) in section 16, 25 and 98(2) of the MM&D Act. The Kandy Forum has in its representations to this Committee marked C3, observed that the *shariah* "has continuously been a subject to various interpretations by different *madhabs* in the past and various Islamic scholars in the contemporary world as appropriate to their socio-historical context."[65] Having said that, in the concluding paragraphs of its representations, the Kandy Forum has observed as follows:-

> "The MM&D Act specifies that the Sri Lankan Muslims should be governed by the sect (*madhab*) traditionally they belong to. *Madhabs* are based on the interpretations of Quran and *Sunna* by individual Imaams and each *madhab* differs from the other in various important aspects of Islamic Personal Law. In this context, should the Muslims be governed by the sect (*madhab*) traditionally they belong to as specified by the MM&D Act? Or can they follow Quran

[60] See, Law of the Republic of Indonesia No 1 of the year 1974 on Marriage. See also, Nani Soewondo, "*The Indonesian Marriage Law and its Implementing Regulation*", Archipel, Année 1977 Vol 13 page 283.

[61] See, section 33(2) of the Administration of Muslim Law Act of 1966 (edited in 2009) provides that though the Majlis and the Legal Committee shall ordinarily follow the tenets of the Shafi'i school of law, "If the Majlis or the Legal Committee considers that the following of the tenets of the Shafi'i school of law will be opposed to the public interest [*maslahah mursalah*], the Majlis may follow the tenets of any of the other accepted schools of Muslim law as may be considered appropriate, but in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations."

[62] For similar provisions applicable in Malaysia, see section 39 of the Administration of Islamic Law (Federal Territories) Act of 1993.

[63] Representations of the ACJU included in volume II of this Report marked C1 and entitled "*Proposal for the Muslim Marriage and Divorce Act – Shari'ah Perspective*" (2016) particularly pages 10 to 12.

[64] Representations of the Sri Lanka Tawheed Jama'ath (SLTJ) dated 4th July 2017 included in volume II of this Report marked C2 entitled "1951 இலக்கம் 13 முஸ்லிம்திருமன மற்றும் விவாகரத்து சட்டத்தின் திருத்தங்களுக்காக தவ்ஹீத் ஜமாஅத் சார்பில் முன்வவக்கப்படும் பரிந்துவரகள்" at paragraph 01 at pages 1 to 5.

[65] Representations of the Kandy Forum included in volume II of this Report marked marked C3, page 1. The Signatories to the representations submitted by the Kandy Forum were: Prof M.A. Nuhman, Prof S.H. Hasbullah, Prof M.A.M Sitheeque, Mr. M.M. Niyas, Prof M.S.M. Anes, Mr. J.M Mubarak, Dr. M.Z.M. Nafeel, Dr. A.S.M. Nawthal, Dr. A.L.M. Mahroof, Dr. J.M. Niwas and Mr. U.M Fazil.

and Sunna of the Prophet with their own rational interpretation appropriate to the modern context?

The Kandy Forum wishes to propose to adopt a pluralistic approach in revising the MM&D Act, without restricting to a particular *madhab* and to incorporate all the appropriate and progressive aspects of Personal Laws of different *madhab* in order to give more importance to Quran and Sunna than individual *madhab*."[66]

4.1.11 It is important to appreciate that the myth of homogeneity of Muslim laws is one of the biggest stumbling blocks to *shariah* law reform. A close look at the Muslim legal systems around the world reveals a diverse and immense range of interpretations of Quranic injunctions. It is the opinion of this Committee that the reform of Muslim law to ensure justice for the entirety of the *ummah* in the contemporary setting is possible through *ijtihad,* which as already noted in this Report, literally means "exertion" and in the context of *fiqh*, the efforts a jurist makes in order to deduce the law, which is not self-evident, from its sources. Without doubt, Islam is a universal religion applicable to all people of all times, and its *fiqh* must necessarily be dynamic to meet the demands of society in every part of the world at all times, and this dynamism can be achieved by adopting the methodology of the principle of *takhayyur* or eclectic choice which involves the consideration of all shades of opinion of the Imams as reflected in the various schools of thought recognised by the provisions of the MM&D Act, and selecting the most appropriate one that helps to solve any particular legal problem in the same way as a court of law would select the applicable principle of English law through a review of a myriad of judicial precedent or conflicting opinions of Roman Dutch law jurists such as Voet, Grotious or Vanderlinden. In the opinion of this Committee, the approach suggested by the Kandy Forum is the most appropriate for law reform, particularly in view of the fact that the existing MM&D Act itself recognises within its fold the Muslim law of all *mazhabs,* and there are serious conflicts of opinions between the teachings of these *mazhabs*. It is also noteworthy that most Muslims in Sri Lanka are not very conscious of the basic doctrines of the particular *madhab* they belong to, and in fact, there are a large number of Muslims who claim that they do not adhere to any *mazhab*.

4.1.12 This Committee may, by its own composition and the quality of its expertise, be said to represent the conscience of the community, which is and ought to be the driving force for legal reform. As Kamali[67] has observed, it is the spirit of *maslahah* and of the theory of *ijma* which endows the community with the divine trust of having the capacity and competence to make the right decisions. Of course, the process of arriving at the right decisions would necessarily take time for conducting the necessary research, deliberations, weighing the harm against the benefits the implementation of a particular proposal may bring about, and reaching consensus, and indeed the work of the Committee had taken time for its accomplishment.

[66] *ibid.,* page 7.
[67] Kamali, *supra* note 54 at page 193.

4.2. The Struggle to Achieve Unanimity

4.2.01 Despite the diverse approaches that may be adopted in the process of law reform, in particular in regard to the interpretation of the Holy Quran and Sunna, this Committee was overwhelmingly conscious to present a unanimous or near unanimous Report, and strove hard to achieve this very illusive objective. It must be mentioned that while the Committee was in the verge of deciding on a unanimous report with some progressive and beneficial proposals for law reform, the deliberative process of the Committee was somewhat impeded by the decision taken by the Cabinet of Ministers on the recommendation of the then Minister of Justice and Buddha Sasana, Hon. Dr. Wijedasa Rajapahkshe to appoint a Parliamentary Committee consisting of certain Hon. Ministers to consider amendments to the Muslim Marriage and Divorce Act.[68] This development, resulted in large scale protests and the ventilation of the opinion that any reform of the Muslim Matrimonial law as applied in Sri Lanka should come from within the community.[69]

4.2.02 The consequent politicization of issues disrupted our work considerably, due mainly to pressure being put on the Committee through massive signature campaigns in December 2016 organized by ostensibly the Colombo District Masjid Federation (CDMF) and other such bodies spread throughout Sri Lanka but sponsored by hidden hands that were intended to carry the message that the Muslim Marriage and Divorce Act required absolutely no amendment at all. This is evidenced by the fact that a letter was personally addressed to the Chairman of this Committee by the President of CDMF dated 23rd January 2017 (Annexure B1), but which was released to the internet for public viewing even prior to its hard copy was received by the Chairman of this Committee that alleged that this Committee had not consulted relevant stakeholders and adverted to "a statement of the Government of Sri Lanka that Muslim Marriage and Divorce Act needs to be amended to obtain the GSP plus grant by the European Union". This letter was tabled at a meeting of the Committee held on 29th January 2017, and the Committee unanimously authorised the Chairman to respond to the said letter and to issue a Press Release to correct the wrong perception created in the minds of the public and concerned members of the Muslim Community in regard to the work of this Committee which had commenced in 2009. A copy of the letter dated 12th February

[68] According to news reports, this Committee consists of Minister of Public Enterprise Development, Hon. Kabir Hashim, Minister of Water Supply and Drainage, Hon. Rauff Hakeem, Minister of Industry and Commerce, Hon. Rishard Bathuideen, Minister of Provincial and Local Government, Hon. Faiszer Mustapha, Minister of Muslim Affairs and Postal Services, Hon. M.H.M. Haleem, Minister of Women and Child Affairs, Hon. Chandrani Bandara and Deputy Minister of Water Supply and Drainage, Hon (Dr.) Sudharshani Fernandopulle. See, http://dailynews.lk/2016/10/27/local/97245

[69] See, Skandha Gunasekara "*Marriage & Divorce Laws - Muslims protest against proposed changes*" accessible at: http://www.ceylontoday.lk/print20160701CT20161030.php?id=8622; Rathindra Kuruwita, "Addressing Women's Issues will Strengthen Muslim Community", Ceylon Today, accessible at its link: http://www.ceylontoday.lk/print20161101CT20161231.php?id=9241

2017 addressed by the Chairman of this Committee to the President of the Colombo District Masjid Federation (CDMF) is attached to this Report marked Annexure B2 and the press release issued on 6th February 2017 which received wide publicity[70] is attached to this Report marked Annexure B3. These responses of the Committee to the politicization of issues after the appointment by the Cabinet of Ministers of a Parliamentary Committee consisting of certain Hon. Ministers to consider amendments to the Muslim Marriage and Divorce Act did little to mitigate the widening divide within the Committee of those holding very conservative views and those wishing to bring about progressive and beneficial reform of the Muslim matrimonial law.

4.2.03 It was in this context that the Chairman of this Committee raised at a meeting of the Committee held on 19th March 2017 a question regarding the role the concept of *maslahah mursalah* (public benefit or public interest) can play in law reform within the framework of the *Shariah,* and since the question was considered to require careful and exhaustive examination, a meeting with the Fathwa Committee of the Jamiyathul Ulema (ACJU) was scheduled for 30th April 2017. At this meeting it was decided to examine the draft recommendations of the Committee in the light of the concept of *masalahah mursalah*, with the assistance of a Five Member sub-committee of the Fathwa Committee, which meeting eventually took place on 4th May 2017 at the ACJU Headquarters. This process became necessary mainly to meet the criticism levelled at this Committee that some of its recommendations were not consistent with the *shariah.* A smaller sub-committee of this Committee was also formed to have more in-depth discussions on the contents of the reform proposals on three Sundays[71] with a view to bridging further the differences of opinion that existed among the members of the Committee. A meeting was also held with the Fathwa Committee of the All Ceylon Jamiyyathul Ulama (ACJU) on 29th April 2017 to specifically discuss the role of the concept of *maslahah al mursalah* (public benefit or public interest) in the context of law reform initiatives, and a special session was also conducted with selected members of the Fathwa Committee on 4th May 2017 to discuss some of the more controversial proposals for reform that were being considered by the Committee. The said session helped to bring about greater understanding of the issues involved in the minds of the participants.

4.2.04 Towards the end of the deliberations, a sub-committee was set up to study deeply certain contentious issues with a view to finding solutions after in depth discussions. This sub-committee (also known as the "small committee") consisted of Justice Saleem Marsoof (Chairman), Hon. Justice A.W.A. Salam, As Sheikh Rizwe Mufti, As Sheikh M.M.A. Mubarak, Mr. Faisz Musthapha

[70]See, report entitled "*Marsoof Committee finalising recommendations for amending Muslim Marriage and Divorce Act*" published in the Island newspaper on 8th Feruary 2017 at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=159925 ; See also, article by Hamin and Kodikara entitled "*Gender-just laws versus "divine" law in Sri Lanka*" accessible at; https://www.opendemocracy.net/5050/hyshyama-hamin-and-chulani-kodikara/battling-sri-lankan-state-gender-just-laws-vs-divine-law

[71] Two of these meetings took place during the holy month of Ramadan on 28th May 2017 and 4th June 2017, with considerable success, and the next is scheduled to take place on 23rd July 2017.

PC, Mr. Shibly Aziz PC, Desabandu Ms. Jezima Ismail and Ms. Safana Gul Begum, Attorney at law. The small committee sat on three occasions, at the chamber of Mr. Faisz Musthapha PC (28th May 2017), at the residence of Ms Jezima Ismail (4th July 2017) and at the ACJU Headquarters (10th August 2017). All these endeavours, in particular, the modalities and processes outlined, did result in producing greater enlightenment and understanding amongst the members of the Committee, even though the sensitive nature of the issues that came up for consideration and the contrasting approaches adopted by the members, prevented the Committee from achieving unanimity with respect to a few issues, as would be seen from the opinions, conclusions and recommendations included in this Report.

4.2.05 In particular, it must be mentioned that the Committee faced serious difficulties and was compelled to postpone two scheduled meetings of the Committee due mainly to the late submission of the opinions of some members of the Committee on the very day of the scheduled meetings. The first such postponement occurred when an email was addressed to the Chairman of the Committee by Ash-Sheikh Mufti Rizwe on the morning of 17th September 2017 (Annexure B4) , which was the date fixed for the first of these meetings, to which was attached a report designated as "majority report", and most of the members who were said to be subscribing to the opinions contained in the said email attachment, did not attend the meeting to enable a full discussion of the contents of the said "majority report" at the meeting summoned. The same process was repeated on 26th November 2017, which was the date fixed for the second of these meetings, when hard copies of a document signed by seven members of the Committee (Annexure B5)[72] was presented at the said meeting after the meeting had commenced, with some of the main signatories, who could have participated in meaningful discussion keeping away from the meeting. Even Mr. Shibly Aziz PC, whose name appears as a signatory on Annexure B5 without his signature did not attend the said meeting. In the circumstances, at the insistence of the few signatories to B5 who attended the meeting held on 26th November 2017 and the other members of the Committee who were not agreeable to subscribe to the contents of B5, the meeting was adjourned to 20th December 2017 for the members to sign either a unanimous Report or two separate reports in the event no unanimity could be achieved. On 13th December 2017, the Chairman of this Committee addressed an email, a copy of which is attached to this Report as Annexure B6, to As-Shekh Mufhie Rizwe and Mr. Shibly Aziz PC seeking confirmation as to whether the contents of Annexure B5 may be incorporated into the Report of the Committee being compiled by the Cahirman, and also whether Mr. Shibly Aziz should be treated as a signatory to the same, but there has been no response todate from these two gentlemen to this email.

[72] The document attached to this Report as Annexure B5 dated 26th November 2017 was signed by the following members of this Committee: Hon Justice A.W.A Salam, Mr. Faisz Musthapha PC, Dr. A.M. Shukri, As-Sheikh M.I.M. Rizwe Mufti, As-Sheikh M.M.A. Mubarak, Ms. Fazlet Sahabdeen, and Mr. Nadvi Bahaudeen. The name of Mr. Shibly Aziz PC appears in the signature column of this document without his signature.

4.2.06 In the circumstances, it is a blessing that the differences of opinion that arose within the Committee as reflected in the document signed by seven members of the Committee and tenedered to the Committee on 26th November 2017 (Annexure B5), which is similar in content to the attachment designated as "majority report" submitted to the Committee by email on 17th September 2017 (Annexure B4), were confined only to a few issues deliberated by the Committee as evident from these documents. These areas of contention are set out below (in the order that these appear in paragraph 3.4.02 of this Report):

(1) Enhancing the Status of Quazi Courts and Quazis (paragraph 3.4.02(b);
(2) Reforming the Muslim Marriage and Divorce Advisory Board (MMDAB) (paragraph 3.4.02(c);
(3) Appointing Women as Quazis, Registrars, Assessors, Counsellors and to the MMDAB (paragraph 3.4.02(e);
(4) The Substantive Law (paragraph 3.4.02(f);
(5) Registration of Marriage and Wali (paragraph 3.4.02(g)
(6) Age of Marriage ((paragraph 3.4.02(h);
(7) Polygamy (paragraph 3.4.02(i);
(8) Divorce (paragraph 3.4.02(j);
(9) *Mata'a* (paragraph 3.4.02(m); and
(10) Appearance of Attorney at law – Section 74 (paragraph 3.4.02(r).

4.2.07 The opinions expressed in Annexure B5 had been considered fully in Part 5 and 6 of the draft Report which was finalized for signature at the scheduled meeting summoned for this purpose on 20th December 2017. The contents of the said document were also incorporated into Part 5 and 6 thereof for separate signature by the members who subscribe to the opinions expressed in the said document marked B5, but by an email addressed to the Chairman of the Committee by Ash-Sheik M.I.M. Rizwe Mufti received at 3.16 pm on 19th December 2017 (a copy of the said email is attached to this Report marked Annexure B7) it was notified that a signed detailed version of the opinion of some members of this Committee with which he was in agreement will be made available by 12 noon on 21st December 2017. It was also brought to the notice of the members of the Committee at the meeting held on 20th December 2017 by Mrs. Fazlet Sahabdeen, the only signatory to the document marked B5 that attended the said meeting, that the document under presentation to be signed and delivered to the Chairman of the Committee on 21st December 2017 would be a more skimmed down version which will endeavor to minimize the differences in the opinions held by the members of this Committee. In the circumstances, in view of the intention of certain members to provide another signed report, hopefully with some minor deviations, the draft Report was amended to be singed only by members of the Committee who have been firmly committed to the progressive recommendations contained in this Report, so that whatever contrary opinions, which were not expected to be too divergent, could be set out in the Report to be signed and submitted to the

Chairman of the Committee on 21st December 2017 to enable the views of the members of the Committee along with their recommendations to be presented to the Hon. Minister of Justice as one Report.

4.2.08 Differences of opinion are tolerated by the *shariah* as evidenced by the existence of different sects and *mazhabs* which come within the broad framework of Islam. It is also believed that non-negative differences of opinion assist the development of *fiqh,* and will certainly help the government to choose between the different opinions on a qualitative rather than a quantitative assessment to decide what course of action is desirable for the betterment of society. Fortunately, there was reason to hope that the areas of contention will be narrowed down to the greatest possible extent by the document to be presented on 21st December 2017.

4.2.09 It is in this backdrop of pluralism and these factual circumstances that the recommendations of the Committee are set out below:

5.1 – Summary of Recommendations

5.1.01 To make it easy to understand the detailed recommendations of this Committee, a brief summary of recommendations is provided in this Part of the Report by reference to the paragraphs of the next following Part (Part 6) which provides the detailed reasoning and justifications for the said recommendations.

5.1.02 This Committee, except when expressly stated otherwise, unanimously recommends the following amendments to the Muslim Marriage and Divorce Act:-

A – The Scope and Applicability of the Muslim Marriage and Divorce Act

1. Having considered certain demands made by women's groups for the option to marry under the Muslim Marriage and Divorce Act (MM&D Act) or the Marriage Registration Ordinance (also known as the "General Marriages Ordinance''), for the reasons set out in detail in paragraphs 6.1.01 to 6.1.03 of this Report, the undersigned members of this Committee unanimously recommend that the option of permitting a person professing Islam to register his or her marriage under, and be governed by, the Marriage Registration Ordinance (also known as the "General Marriages Ordinance''), should be considered as a measure of last resort, only if the endeavor to amend the Muslim Marriage and Divorce Act (MM&D Act) in a *shariah* compliant and progressive manner remedying the existing discriminatory provisions in the MM&D Act in a satisfactory manner, fails. In the event that it is decided to grant an option to marry under the Marriage Registration Ordinance, it will be necessary to amend not only the MM&D Act but also the Marriage Registration Ordinance (also known as the "General Marriages Ordinance") as well, to achieve the desired result.

2. It is also unanimously recommended by this Committee for the reasons set out in paragraphs 6.1.04 to 6.1.07 of this Report, that the Registrar General be required to withdraw the circular dated 2nd October 2013 and any other circular or directives issued by him in similar lines. This Committee unanimously recommends that the Muslim Marriage and Divorce Act (MM&D Act) be synchronized with the Marriage Registration Ordinance (also known as the "General Marriages Ordinance" by amending section 2 of the MM&D Act by substituting for the words "of those inhabitants of Sri Lanka who are Muslims" the words "of persons professing Islam (hereinafter referred to as "Muslims") at least one of whom is an inhabitant of Sri Lanka". It is also recommended that section 97 be amended by adding the following definition of "Inhabitant of Sri Lanka" immediately after the definition of "District Registrar":-

> "Inhabitant of Sri Lanka" shall mean any person who inhabits or had been inhabiting Sri Lanka and shall be presumed to include any descendant of any such person irrespective of whether such person or such descendant has acquired the citizenship or permanent residency of another country, unless it is established by unequivocal evidence that he or she has abandoned such inhabitancy."

B - Enhancing the Status of the Quazi Court and Quazis

3. As would appear from paragraph 6.2.01 of this Report, there is general consensus within the community that the Quazi Court and Quazis should be brought into the mainstream of the Sri Lankan judicial system and the status of the Quazi Court and Quazis should be enhanced. Accordingly, this Committee unanimously recommends that, for the reasons set out in paragraphs 6.2.01 to 6.2.06 of this Report, the Muslim Marriage and Divorce Act (MM&D Act) should be amended to strengthen the Quazi Court system and to elevate the institution of Quazi to the status of a court, to be designated as Quazi Court, and be recognized as an integral part of the Sri Lankan Judiciary. The amending legislation to provide for the reduction of the number of Quazis from the current 64 to a number that may be considered adequate by the Judicial Service Commission considering the volume of work, to make it financially viable to appoint permanent and full time Quazis, whose primary functions would be judicial, with the reconciliatory function of the Quazi Court being entrusted to trained Counsellors and Mediators, with the Quazi performing only administrative and supervisory functions without directly getting involved in the process of reconciling the parties.

4. The undersigned members of the Committee recommend amending sections 12, 13 and 14 of the MM&D Act to expressly provide that persons to be appointed as Quazis, Temporary Quazis and Special Quazis, should be Attorneys-at-law having a sound knowledge of Muslim law, and empower the Judicial Service Commission to prescribe by order published in the Gazette, the qualifications and attainments necessary for appointment as Quazi.

5. This Committee unanimously recommends that Quazis should be conferred a status befitting their office, well remunerated, and provided with all facilities that are necessary to maintain the efficiency and dignity of their judicial office, free from corruption and incompetence. It is also recommended that the Quazis be appointed into a closed service to be designated as the "Quazi Service", with adequate safeguards in regard to security of tenure subject to strict disciplinary control and the prospect of being considered for appointment into higher judicial office. It is also proposed that the power of appointment, transfer, promotion, disciplinary control and dismissal of Quazis be vested in the Judicial Service Commission, and that the provisions of Article 114 of the Constitution of the Democratic Socialist Republic of Sri Lanka shall *mutatis mutandis* apply to such Quazis.

6. It is also the recommendation of the undersigned members of this Committee that appropriate transitional provisions be made that would facilitate the transition from the current Quazi Court system to the elevated status as recommended in paragraphs (3), (4) and (5) above.

C - Reforming the Muslim Marriage and Divorce Advisory Board

7. In view of the position that the Muslim Marriage and Divorce Advisory Board (MMDAB) has become altogether defunct, for the reasons set out in paragraphs 6.3.01 and 6.3.02 of this Report, this Committee unanimously recommends that sections 4, 5, 6 and 7 of the Muslim Marriage and Divorce Act be amended with the objective of restructuring and strengthening the Muslim Marriage and Divorce Advisory Board (MM&DAB) by repealing the provisions relating to "nomination" of members, and empowering the Judicial Service Commission to appoint between 7 and 9 members to the said Board, who shall be eminent Muslims having expertise in the principles of Muslim Law, one of whom shall be designated as its Chairperson. It is also recommended that the Judicial Service Commission be empowered to prescribe the qualifications and attainments necessary to be appointed as the Chairman or as a member of the said Board by order published in the Gazettee.

8. It is also unanimously recommended that in making appointments to the MM&DAB, the Judicial Service Commission shall ensure that males and females are adequately represented in the membership of the said Board.

9. This Committee also unanimously recommends as follows:-

   (a) Amending section 5(1) of the Act so as to provide that a member of the Board shall, unless he earlier resigns from the office as a member or dies or is rendered otherwise incapable of discharging his functions, hold office for a term of three years or, where he is appointed to fill a vacancy in the Board, for such shorter period as may be specified at

the time of the appointment of that member. Section 5(2) and 5(3) should also be amended by the deletion of the word "nominated";

(b) Amending section 5(3) of the Act to empower the Judicial Service Commission to remove any member from office if it is satisfied that such member is unfit to continue to hold office as a member of the Board, or where such member has without leave of the Board, failed to attend three consecutive meetings of the Board. (The proviso in existing Act should be removed);

(c) Amending section 6 of the Act to enable the Registrar General at his discretion or a Quazi Court at its discretion to consult the Muslim Marriage and Divorce Advisory Board on any difficult question relating to the applicable substantive law;

(d) Amending section 7(3) to enable the Minister in charge of the subject of Justice to appoint an officer of his Ministry to be or to act as the Secretary of the Board, and it shall be the duty of the said Secretary to keep minutes of each meeting of the Board. Any additional allowance that may be payable to an officer appointed as the Secretary of the Board, may be prescribed by regulation made under Section 94(2) of this Act.

D - Restructuring the Board of Quazis and making it more accessible to the Provinces

10. It is the unanimous opinion of this Committee that for the reasons fully set out in paragraphs 6.4.01 and 6.4.02 of this Report, the provisions relating to the Board of Quazis in the Muslim Marriage and Divorce Act be amended by substituting for the words "the Board of Quazis" wherever it occurs in the Act, the words "Quazi Appellate Court" and section 15 (1) of the MM&D Act be amended increasing its membership from 5 to 9 members "possessed of such qualifications and attainments that may be prescribed by the Judicial Service Commission by order published in the Gazette".

11. It is also unanimously recommended that the Chairman of the Quazi Appellate Court shall be a Muslim Attorney-at-law having a sound knowledge of Muslim Law and possessed of such qualifications and attainments that may be prescribed by the Judicial Service Commission. It is proposed that section 15(7) of MM&D Act should be amended to expressly provide that the Chairman of the Quazi Appellate Court shall be a full-time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission with respect to whom the provisions of Article 114 of the Constitution of the Democratic Socialist Republic of Sri Lanka shall *mutatis mutandis* apply.

12. Express provisions to be made to vest in the Judicial Service Commission the power of disciplinary control of the Chairman and members of the Quazi Appellate Court, including the power to suspend or terminate the services of a member of the said Appellate Court.

13. It is further unanimously recommended that the MM&D Act should also specifically provide that in making appointments to the Quazi Appellate Court, the Judicial Service Commission shall ensure that adequate representation is provided therein for males and females, and that any person who has previously held office as a member of the Board of Quazis or the Quazi Appellate Court shall be eligible for re-appointment to the Quazi Appellate Court for a fresh term of office.

14. It is further recommended that section 15(6) of the Act be amended to provide for the Judicial Service Commission to appoint a scheduled public officer to be or to act as the Secretary to the Quazi Appellate Court, and to provide that the person so appointed shall perform all such duties and functions as may be assigned to the secretary by the provisions of this Act or the regulations made thereunder or by a decision of the Quazi Appellate Court not inconsistent with any such provision.

E - Changing the Public Perception of Unfairness to Women

15. A matter of great concern to the Committee was the prevailing perception of unfairness to women arising from the fact that Registrars of Muslim Marriages and Quazis are required to be male, and the entire Quazi Court system is weighted very much in favour of men quite contrary to the gender justice and equality sanctioned by the *shariah* itself and the right to equality enshrined in Art. 12 of the Constitution of Sri Lanka.

16. After giving considerable thought to the issues that arise in this context, for the reasons set out in paragraphs 6.5.01 to 6.5.11 of this Report, this Committee unanimously recommends the following measures be adopted to overcome the prevailing public perception of unfairness against women:-

    (a) Ensuring adequate representation for Muslim men and women in the Muslim Marriage and Divorce Advisory Board as proposed in this Report;

    (b) Removing the disqualification of females from holding office as Registrars of Muslim Marriage by deleting the word "male" in sections 8(1), 9(1) and 10(1) of the MM&D Act dealing with the appointment of Registrars of Muslim Marriage, Temporary Registrars and Special Registrars;

    (c) Amending section 15(1) of the Act by substituting for the words "male Muslims" the word "Muslim" and expressly providing that in making appointments to the Quazi Appellate Court (Board of Quazis), the Judicial Service Commission should ensure that adequate representation is provided for men and women;

(d) Amending section 57 of the Act to provide that one at least of three assessors constituting a panel of assessors hearing a case before the Quazi Court shall be a female and at least one of the panel members shall be a male.

(e) Amending section 94 of the Act to empower the Minister to make regulations to ensure that the required number of men and women are made available for the constitution of panels of assessors which are representative of both sexes.

(f) Making necessary amendments to the MM&D Act as well as the Sri Lanka Judges Institute Act to ensure that Quazis and members of the Quazi Appellate Court (Board of Quazis) are provided with competence enhancement programmes (inclusive of components involving gender related issues) on a structured basis; and

(g) Amending the relevant provisions and schedules of the Act to ensure that male and female marriage counsellors and mediators are available to assist the parties to resolve their disputes and differences and to ensure that the such counsellors and mediators are properly trained and compensated, and lists of trained counsellors and mediators are made available to the Quazi of each Quazi division with other particulars necessary to contract them whenever necessary.

17. It is unfortunate that unanimity could not be reached in the Committee in regard to the removal of the prohibition contained in sections 12(1) and 14(1) of the MM&D Act relating to the appointment of women as Quazis. However, for the reasons set out in paragraphs 6.5.02 to 6.5.11 and 6.5.13 of this Report dealing with the appointment of Quazis and Special Quazis, the undersigned members of the Committee recommend that the word "male" be deleted from the aforesaid sections 12(1) and 14(1) of the Act to remove the existing disqualification of women holding office as Quazis.

F - The Substantive Law:

18. A very contentious question deliberated by the Committee was the substantive law applicable to determine the validity of marriages and divorces as well of the status, mutual rights and obligations of the parties. The focus of attention in this connection was on sections 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2) and 98(2) of the Muslim Marriage and Divorce Act (MM&D Act). In view of the absence of unanimity in this regard, the undersigned members of the Committee fervently recommend the following amendments to the MM&D Act for reasons fully set out in paragraphs 6.6.01 to 6.6.13 of this Report:-

(a) Amending sections 16 and 98(2) of MM&D Act by the removal of the word "divorce" from those sections to avoid conflict with sections 27 and 28 of the Act and the schedules referred thereto; and

(b) Amending sections 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2) by the deletion of any reference to "sect" (or *mazhab)* so that all matters contemplated by those provisions will be governed by the principles of "Muslim law", and the opinions of all recognized schools of thought may be considered in making orders and decisions of the Quazi Court and the appellate courts.

19. Fortunately, for reasons fully set out in paragraphs 6.6.01 to 6.6.13 of this Report, there is consensus among members of the Committee in regard to the following alternative recommendations, which would arise for consideration only if the government decides not to implement the recommendation contained in paragraph 18(b) above :-

(a) Provision be made for the bride and bride groom who may belong to two different *mazhabs*, to mutually agree in their declarations made in terms of section 18(1) of the Act to abide by the Muslim Law governing a *mazhab* of their choice in regard to all aspects of their marriage including its validity, nullification and termination.

(b) In the event that both parties to a marriage do not belong to any *mazhab*, or where the two parties belong to two different *mazhabs* and they have not mutually agreed to abide by the Muslim law of any particular *mazhab* in the declaration made in terms of section 18(1), it is proposed that express provision be made in section 16 and other relevant provisions that the validity of a Muslim marriage shall be governed by the principles of Muslim law, without being confined to the law governing any particular *mazhab*.

(c) In the event the recommendation in paragraph 18(b) above is not acceptable, and the recommendations in paragraphs 19 (a) and (b) above are acceptable, three new provisions to be added to section 16 as sections 16A in the lines suggested in sub-paragraph (03) of paragraphs 6.6.15 of this Report.

G - Bringing out the Consensual Nature of Marriage and providing for its Proper Registration of Marriages

20. It is the unanimous opinion of this Committee that it is imperative to bring out the consensual nature of marriage well recognized by s*hariah* and *fiqh,* and to make better and more stringent provisions in the Act to ensure that all marriages are registered for the purpose of avoiding difficulties that can arise in proving the existence of the marriage, prosecuting those who abuse the provisions of the MM&D Act by providing false information to the Registrar of Marriages such as those relating to marital status and the age at the time of marriage or failing to register the marriage.

21. For the reasons set out in paragraphs 6.7.01 to 6.7.15 of this Report, the undersigned members of the Committee recommend that the ambiguities in the existing law as well as the

difficulties and abuses resulting from non-registration of marriages be removed by repealing section 16 of the Act and replacing it with a provision simply enacting that "no Muslim marriage shall be valid unless it is solemnized in accordance with Muslim law and is registered as provided in this Act."

22. This Committee unanimously recommends that section 17(1) and 17(2)(b) of the MM&D Act be amended in order to include among the categories of persons on whom the duty of registering a marriage is currently imposed, the bride, or where the bride has not attained the minimum age of marriage specified in section 25(1) or suffers from some other incapacity, the person who officiated as her marriage guardian (*wali*) at the time and place where the *nikah* ceremony was conducted.

23. This Committee also unanimously recommends that for the reasons set out in paragraphs 6.7.01 to 6.7. 15 of this Report, sections 18 and 19 of the MM&D Act be suitably amended with the objective of better regulating pre-marital procedures such as the making of declarations of intention to marry, providing for pre-marital counselling and ensuring the registration of marriages simultaneously with the solemnization thereof, providing for the bride as well to sign the Marriage Register in addition to the bridegroom to signify their consent to the marriage, and making it an offence for any person to conduct a *nikah* ceremony without receiving from the Registrar of Muslim Marriages a counter-signed copy of the declarations required to be made under Section 18(1).

24. The undersigned members of this Committee also recommend that section 19A of the Act be repealed and section 19 be amended by introducing the new provisions as sections 19(3), 19(4), 19(5), 19(6) and19(7) of the MM&D Act, in particular imposing a duty on the person who conducts any *nikah* and the Marriage Registrar who officiates at the *nikah* to ensure that the bridegroom and the bride have attained the minimum age of marriage or the marriage has been approved by the Quazi Court as required by section 23 of the is Act. It is also recommended by this Committee that where the bridegroom or bride has not attained the minimum age of marriage or suffers from some other incapacity, the person who officiates as the marriage guardian (wali) of the said bridegroom or bride, has duly made and signed the declarations required by Section 18(1).

25. It is also recommended that provision be made in Section 19(7) stating that "the entry made by the Registrar in his marriage register under this section shall constitute the registration of the marriage, and shall be the best evidence thereof before all courts and in all proceedings in which it may be necessary to give evidence of the marriage."

26. It is proposed by the undersigned members of this Committee that section 22 of the MM&D Act dealing with marriages contracted within *iddat* period, be amended by substituting for the worlds "shall not be registered" appearing therein the words "shall not be solemnised or

registered." It is also proposed that sections 40 and 41 of the Act be repealed and replaced with new provisions in the following lines:-

"40 (1) Every Registrar of Muslim marriages shall maintain, in the prescribed form, a current index of the contents of every book and register kept by him, except where it is otherwise provided by regulation; and every entry in such index shall be made, so far as practicable, immediately after he has made an entry in the book or register.

(2) Every Registrar of Muslim marriages shall keep all registers, books and indexes until they are filled up and shall then forward them for record to the District Registrar.

(3) Except as provided in this Act, no person other than a Registrar of Muslim Marriages shall keep any book or register which is or purports to be a register of Muslim marriages maintained under this Act.

(4) The Registrar General may inspect or cause to be inspected from time to time the books and the registers required to be kept under this Act by any Registrar of Muslim Marriages and may entertain and hear any complaints against any Registrar of Muslim Marriages about his conduct or in respect of any such books or registers or entries therein.

(5) Where a Registrar of Muslim Marriages leaves the area for which he is appointed, or resigns his office, or where his appointment is terminated, he or in the event of his death, his legal representative, shall forthwith deliver his records, books, registers, and indexes to the District Registrar and on failure of such delivery the District Registrar shall take possession of them after following the due process.";

41.The District Registrar shall cause to be bound together in a general register all copies of entries sent to him by any Quazi Court in pursuance of the provisions of this Act."

27. In view of the need to facilitate greater access to the public and other State Departments of all records maintained by the Department of Registrar General in electronic form, and to make it possible for the Registrar General himself to inter-link various registers such as birth, marriage, divorce and nullity registers with cross-references using national identity card numbers of the relevant persons, it is proposed that section 42 of the MM&D Act be repealed and and replaced with a new provision to the effect that the Registrar General "may also take such measures as may be appropriate to facilitate the maintenance of electronic records of the contents of all the registers required to be kept under this Act by any Registrar of Muslim Marriages and contents of copies of entries relating to nullity of marriage and divorce sent to him by any Quazi in pursuance of the provisions of this Act with appropriate cross references."

H - Fixing a Minimum Age of Marriage and Curtailing Child Marriages

28. This Committee has been conscious of the urgent need to reform the law to eradicate the menace of child marriages and had considered the question of fixing a minimum age of marriage for Muslims.

29. After careful consideration of the applicable principles of *fiqh*, the undersigned members of the Committee recommend for reasons fully set out in paragraphs 6.8.1 to 6.8.16 of this Report that section 23 and 25 be amended so as to impose a uniform minimum age of marriage fixed at 18 for males and females. It is also recommended that provision be made to empower the Quazi Court to authorise the solemnization and registration of the marriage of any person who has not attained the said minimum age of marriage or suffers from some other incapacity, provided that such person has attained the age of sixteen and the Court is satisfied that it is in the best interests of such person.

30. It is also recommended by the undersigned members of this Committee that section 25(1) and (2) of the MM&D Act be repealed and replaced with a new provision expressly providing that "no marriage of a Muslim shall be solemnized or registered under this Act, unless the declarations required by Section 18 are duly made, and the bridegroom and bride have attained the age of eighteen, and are present at the time and place at which the contract is entered into, and consent to the marriage." By a proviso to the proposed section, provision to be made for the bride, who does not wish to participate in the *nikah* ceremony, to be represented by her marriage guardian (*wali*) who may represent her at the time and place at which the contract is entered into and communicate the bride's consent to the marriage, provided that, she simultaneously places her signature on the appropriate column of the marriage register as set out in detail in section 18(3)(b) of the Act.

31. The undersigned members of this Committee further recommend that where the bride and / or groom has not attained the minimum age of marriage or suffer from some other incapacity, provision be made for a contract of marriage to be validly solemnized and registered if a person entitled to act as marriage guardian (*wali*) (a) is present at the time and place at which the contract is entered into; and (b) communicates his own approval thereof, provided that no such marriage may be solemnized or registered under this Act, unless the approval of the Quazi for such marriage has been obtained as provided in Section 23 of this Act.

32. It is also proposed by the undersigned members of this Committee that section 47(1)(j) of the MM&D Act be amended by substituting for the word "girl" occurring therein, the word "Muslim" and by substituting for the words "who has not passed the age of twelve years" the words "who has not attained the age of eighteen years or suffers from some other incapacity".

I - Preventing the abuse of Polygamy

33. The Holy Quran curtails the exercise of polygamy, which has been a widespread pre-Quranic practice, by not only limiting the number of wives a man could lawfully have at any given time but also imposing stringent conditions for the exercise of this privilege. The undersigned members of the Committee are of the opinion that in addition to following the essentials of *nikah* prescribed by the *shariah* and mandatory registration of every marriage as stipulated in section 17(1) of the Muslim Marriage and Divorce Act (MM&D Act), compliance with the conditions laid down in the Holy Quran for the exercise of polygamy should be incorporated into the MM&D Act to ensure that such conditions are adhered to in contracting plural marriages.

34. Accordingly, for the reasons set out in paragraphs 6.9.01 to 6.9.07 of this Report, the undersigned members of the Committee propose that section 24 of MM&D Act be amended to restrict a male Muslim from contracting a second or subsequent marriage without the prior approval of the Quazi. It is recommended that the Quazi should be vested with a discretion to authorize the solemnization and registration of such a marriage taking into consideration the conditions laid down in the Holy Quran and all relevant circumstances pertaining to the relevant application for permission to marry, which may be set out as follows:-

    (a) whether the applicant is living with, and justly and adequately maintaining and caring for, his present wife or wives;
    (b) whether the applicant is looking after his children born to his wife or wives in a just and equitable manner;
    (c) whether the applicant is capable of dealing justly and equitably with his intended wife and his other wife or wives; and
    (d) whether the applicant has the financial capacity to maintain and provide suitable and independent residence in accordance with his and her social standing for his intended wife, and any children that might be born to such intended wife.

35. It is recommended by the undersigned members of this Committee that express provision be made in the Act to the effect that the Quazi Court shall, after inquiry before the Court assisted by three assessors, make order in terms of Schedule 1A setting out the reasons for refusing or granting permission for the applicant to enter into a subsequent marriage, and may when it grants permission to enter into a subsequent marriage, set out conditions, if any, that the Court considers necessary to be satisfied by the applicant before entering into a subsequent marriage and registering the same. When the Court makes order granting permission to enter into a subsequent marriage, it shall also issue a certificate permitting the subsequent marriage and specifying the conditions, if any, subject to which such permission was granted, without which the subsequent marriage shall not be solemnized or registered.

36. The undersigned members of the Committee also propose that notwithstanding anything contained in Section 16 and 17 of this Act, an applicant who has been refused permission to enter into a subsequent marriage by the Quazi Court, the Quazi Appellate Court or the Supreme Court, shall not contract or register such subsequent marriage, nor shall he contract or register a subsequent marriage for which permission has been granted by the Quazi Court or Quazi Appellate Court until two months have expired after the order granting such permission, and in the event any appeal has been filed before the Quazi Appellate Court or the Supreme Court against any such order, unless the appellate proceedings have been concluded with an order affirming the grant of permission by the lower court. Nor shall an applicant who has been granted permission to enter into a subsequent marriage by the Quazi Court subject to any condition or conditions, enter into a fresh contract of marriage or register the same without fulfilling all conditions imposed by Court.

37. It recommended by the undersigned members of this Committee that it should be an offence for any person to knowingly solemnise or register a subsequent marriage contrary to any order made by any Court under the provisions of this Act refusing permission to enter into a subsequent marriage, or without complying with all conditions that may have been imposed by Court before entering into a subsequent marriage or registering the same, and any marriage solemnised or registered contrary to the provisions of this section shall be invalid.

J - Reforming the Law and Procedure for Divorce

38. This Committee was acutely conscious of the need to amend the law and procedure for divorce. In paragraphs 6.10.01 to 6.10.16, the Committee has examined in great detail the issues that arise in the area of divorce among the Muslims in the light of the relevant principles of *fiqh*. The Committee has examined very carefully the aspect of dispute resolution in the context that divorce is only a remedy of last resort according to the *shariha*, and the concern that marital strife affect adversely not only the parties but also their families, and in particular the children. For this reason, the Committee has strongly recommended incorporating into all the schedules relevant to sections 27 and 28, the feature of marital counselling and mediation through experts, which will strengthen the process of reconciliation of marital disputes through the most revered form recommended in the Holy Quran, *Sura Nisa* 4:35 of each party appointing an arbiter from his or her family to resolve any dispute.

39. While it is not proposed to amend section 27 of MM&D Act dealing with *talaq* except for incorporating the aforesaid reconciliatory mechanism into Schedule 2 along with the payment of *mata'a* as compensation to a wife who may be unjustly divorced by the husband, it is recommended that section 28(1) and the schedules applicable thereto relating to the grant of *fasah* divorce be amended to provide for the wife a right of divorce on certain additional

grounds sanctioned by the *shariah* which are not spelt out currently in that section, as well as on the ground of the violation of any term of the contract of marriage.

40. The undersigned members of the Committee also recommend that section 28(2) of the Act and Schedule 3 be amended to clarify that where the wife applies for a divorce without the consent of the husband on the ground that the wife has an incurable aversion to her husband (*khula* divorce), the Quazi Court may after due inquiry, permit the divorce if it is satisfied that the spouses could no longer live together in conformity with their conjugal obligations, subject to the payment of such compensation to the husband as may be agreeable to the parties, and in the absence of agreement in this regard, as may be determined by the Court.

41. It is also unanimously recommended that a new sub-section be added as 28(3) to the Act, to deal with applications for divorce by mutual consent (*mubaarat)* which will also have a new form and be governed by Schedule 3A.

K - Initiation of Proceedings, Service of Process and Registration of Divorce

42. In the light of the representations received from the public, this Committee felt it necessary to streamline certain procedural matters relevant in particular to applications to be made to the Quazi under the provisions of the MM&D Act. Accordingly, for the reasons set out in paragraphs 6.11.01 and 6.11.02 it is unanimously recommended that section 29 of the MM&D Act be amended by the repeal of section 29(1) and (2), the re-numbering of the existing sections 29(3), 29(4) and 29(5) of the Act as respectively, sections 29(4), 29(5) and 29(6) with certain slight amendments, and introducing three new sections as sections 29(1), 29(2) and 29(3) for clearly setting out the division of the Quazi Court in which applications for divorce, declarations of nullity and other matrimonial relief may be filed, the procedure for issuing summons or other processes by Quazi Court and the procedures for the registration of divorce as set out in paragraph 6.11.02 in elaborate detail.

43. It must be mentioned that in drafting the aforesaid amendments the Committee had endeavoured wherever possible to require the filing of proceeedings in the Quazi Court within the division in which the wife resides, and formulating service procedures which will ensure that the rules of natural justice will be strictly followed.

L - Applications for Declaration of Nullity of Marriage

44. This Committee has also taken into consideration the fact that there is no provision in the Act, except for the oblique reference to it in section 47(1)(i) of the Act, to deal with applications for declaration of nullity of marriage. In those circumstances, it is proposed by the undersigned members of the Committee for the reasons set out in paragraphs 6.12.01 and 6.12.02 of this Report, that this omission be rectified by introducing a new section to replace the existing section

30, which has become redundant by reason of the existence of section 32 in of the Act, to deal with nullity of marriage:-

> "30(1) Any person who is a party or a purported party to a marriage solemnized under this Act, may within a reasonable time make an application in the prescribed form for a declaration of nullity of marriage from the Quazi Court of the division in which the wife or purported wife is resident, and the procedure set out in Schedule 3A shall be followed.
>
> 30(2) A Quazi Court may grant a declaration of nullity of marriage on the basis of a circumstance that existed at the time of the marriage that made the marriage a nullity. All declarations of nullity granted by Court shall be entered in a Nullity Register to be maintained by Court in the format prescribed in Schedule 1 form 5B"

M - Providing for Greater Equity and Justice relating to Maintenance, Mata'a, Dowry, *Mahr and Kaikuly*

45. Having carefully examined sections 34 to 39 of the Muslim Marriage and Divorce Act (MM&D Act) this Committee has the consensus to propose certain amendments to those provisions. As explained in paragraphs 6.13.01 to 6.13.12 of this Report, these amendments are required to clarify the provisions and procedures applicable to payment of maintenance, *mata'a*, dowry, *mahr* and *kaikuli*. They also consider it necessary to make provisions therein to prohibit by law the demanding, giving and receiving any form of dowry, and the aiding and abetting thereof, other than those specifically recognized by the Act as lawful.

46. The undersigned members of the Committee propose that Sections 34 of the MM&D Act be re-numbered as section 35(1) and sections 35(1) and 35(2) of the Act be renumbered respectively as sections 35(2) and 35(3) and in all these sections be further amended by substituting therein for the word "maintenance", the words "maintenance or interim maintenance", and a new section relating to the award of *mata'a* be introduced as section 34 in the following lines:-

> "34(1) Where a marriage has been or is to be dissolved in terms of section 27 or in terms of section 28(1) on the ground of any matrimonial fault of the husband, the divorced wife shall be entitled to *mata'a* and may apply for the same in terms of section 47(1)(h) of this Act. In determining the quantum of *mata'a* to be awarded, the Quazi Court may take into consideration the following matters:-
>
> (a) the means of the husband including his monthly income;
> (b) the social and economic standing and educational attainments of the wife;
> (c) the age of the husband and that of the wife;

(d) the duration of the marriage;
(e) the availability of other means of support for the wife;
(f) the number of children falling within the custody and care of the husband and / or the wife;
(g) the conduct of the parties to the marriage during the pendency of the marriage; and
(h) any other circumstances that may be relevant in making a reasonable assessment of requirements of the wife after divorce."

34(2) Where there is any dispute as regards the means of monthly income of the husband, the burden of proving the same shall be on the husband.

34(3) The provision in sub-sections (1) and (2) shall apply retrospectively from the date of the principal Act, without prejudice to any decision of a Quazi, the Board of Quazis, the Court of Appeal or the Supreme Court, that may have been finally made.

47. It is also recommended by the undersigned members that a definition of the term "*mata'a*" be added to section 97 of the Act to mean "a consolatory payment determined by court in the absence of any express agreement between the parties payable to a wife who is divorced by the husband under section 27 of this Act or under section 28(1) of this Act upon proof of the matrimonial fault of the husband".

48. In regard to the issues relating to payment of maintenance, it is proposed that Section 36 of the MM&D Act be amended by substituting therein for the word "maintenance", the words "maintenance or interim maintenance", replacing the word "authority" with the word "Court", and by substituting for the words "and, in every such case, maintenance, in accordance with the order, shall be payable from the date on which such claim was made", the words "and, in every such case, maintenance, in accordance with the order, shall be payable from the date on which such claim was made, unless the date determined by the said Court as the date on which the spouses were actually separated falls within a period of three years prior to the date of the claim, in which event, the maintenance shall be payable from the actual date of separation so determined by Court. In any case where the income of the person who is liable to pay maintenance is in dispute, the burden shall be on such person to prove his income by evidence."

49. The undersigned members of the Committee recommend that section 37 of the MM&D Act be amended by renumbering the existing section 37 as Section 37(2) and replacing the words "*mahr* or *kaikuli*" contained therein of the words "*mata'a,* maintenance (including interim maintenance), dowry*, mahr* or return of any *kaikuli*" and introducing a new provision as section 37(1) which shall read as follows:

"37(1) It shall be unlawful to give or take or abet the giving or taking of any dowry as defined in section 97 of this Act"

50. It is further recommended by the undersigned members of this Committee that section 84 of MM&D Act be suitably amended to make the giving or the taking of a dowry as well as the abetment thereof, an offence punishable with a fine and / or a term of imprisonment. The only form of dowry sanctioned by Islam is *mahr*, which is provided by the groom to his bride, and the practice of *kaikuli,* though strictly inconsistent with the obligation of *mahr*, has been sanctioned by the Muslim Marriage and Divorce Act so long as it consists of movable property and given "for the use of the bride", which then is held in trust (*amanath*) by the husband. It is therefore necessary to amend Section 97 by adding a definition of "dowry" to mean "any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom in consideration of the marriage prior to, at the time of, or even after, entering into the contract of marriage, by a relative of the bride or by any other person, but does not include any *kaikuli* which is recorded in the Register of Marriage, or any presents of the type which are usually given at the time of marriage to the bridegroom without any demand having been made in that behalf".

51. This Committee unanimously recommends that Section 38(1) of the MM&D Act be amended by the replacement of that sub-section by a new sub-section in the following lines:

"Where in any proceedings under this Act for maintenance (including interim maintenance), *mata'a, mahr* or return of dowry and / or *kaikuli*, the woman claimant is represented by some other person under section 37, all moneys received by the Quazi Court to which that woman is entitled as the claimant shall notwithstanding anything in section 53, be forthwith deposited by the Quazi Court in a bank that may be determined by it in consultation with the parties or their representatives, in the name of the woman claimant and give notice to the said claimant that such money has been deposited in her name in the said bank. With respect to any movable or immovable property that may be claimed in any such proceedings, the Quazi Court may make an appropriate order that shall facilitate the expeditious satisfaction of the claim."

52. The definition of "*kaikuli*" in section 97 to be amended to mean "any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom *for the use of the bride*, prior to, at the time of, or even after entering into the contract of marriage, by a relative of the bride or by any other person.

53. It is also proposed that Section 38(2) be amended by substituting for the words "a Quazi in a kachcheri under sub-section (1)" of the words "a Quazi Court in terms of sub-section (1)" and section 39 be amended by substituting for the words "woman's *mahr*" of the words

"woman's *mahr* or return of dowry and / or *kaikuli*" and the substitution for the words "dissolution of the marriage" and "dissolution of marriage", the words "declaration of nullity or dissolution of the marriage".

N - Jurisdiction and Powers of Quazi Courts, the Quazi Appellate Court and the Right to Legal Representation.

54. The undersigned members of the Committee recommend that sections 43 to 53 of the Muslim Marriage and Divorce Act (MM&D Act) be amended to clarify the jurisdiction and powers of the Quazi Court, and in particular the supervisory powers of the Quazi Appellate Tribunal and the Judicial Service Commission, which powers shall extend with respect to financial accountability as well. For the reasons set out in paragraphs 6.14.01 to 6.14.09, this Committee recommends that the system of supervision of Quazi Courts be strengthened, particularly in the context of the levels of inefficiency and corruption prevailing in these courts.

55. The undersigned members of the Committee therefore recommend that with this end in view, the revisionary power of the Quazi Appellate Court be clarified by amending section 43 of the MM&D Act by re-numbering the said section as section 43(1) and substituting in place of "Quazi" that appears therein, the words "Quazi Court" and in place of "Board of Quazis" the words "Quazi Appellate Court", and by introducing a new provision as section 43(2) in the following lines:

> "The Quazi Appellate Court may in exceptional circumstances with a view of avoiding any miscarriage of justice, *ex mero motu* or on any application made in that behalf by any party to proceedings before any Quazi Court, call for, inspect and examine any record of the said Court and in the exercise of its revisionary powers, make any order thereon as the interests of justice may require."

56. One factor that is extremely material in this regard, and adds to the abuse that currently prevails in the Quazi Courts is the total absence of legal representation for parties who have to appear before the Quazi Court. This causes great inconvenience to parties and often results in gross injustice particularly those who feel extremely vulnerable when appearing in Court without legal advice or assistance. Although Attorneys-at-law are currently permitted to appear before the Board of Quazis, section 44(2) of the Act that deals with representation for the parties before Quazi Courts does not expressly provide for appearance through an Attorney-at-law, and section 74 of the Act prohibits the appearance of an Attorney at law "on behalf of any party or witness". It is therefore recommended that section 74 of the Act be repealed and section 44(2) be amended by substituting for the words "in person or by his representative" of the words "in person or through an authorised representative", which will then enable a party to retain the services of an Attorney-at-law if it is so desired.

57. It is also recommended that section 47 (1) of the Act be amended by providing that the powers of the Quazi Court under this Act shall include the power to inquire into and adjudicate upon-

(a) any claim by a wife for the recovery of *mahr* or for the refund of any dowry given to the bridegroom;

(b) any claim for maintenance, including interim maintenance, by or on behalf of a wife;

(c) any claim for maintenance, including interim maintenance, by or on behalf of a child;

(d) any claim for maintenance, including interim maintenance, by or on behalf of an illegitimate child, where the mother of such child and the person from whom maintenance is claimed are Muslims;

(e) any claim by a wife or divorced wife for maintenance until the registration of the divorce or during her period of *iddat*, or, if such woman is pregnant at the time of the registration of the divorce, until she is delivered of the child;

(f) any claim for the increase or reduction of the amount of any maintenance ordered by the Quazi Court;

(g) any claim by a wife or a divorced wife for her lying-in expenses;

(h) any claim for *mata'a*;

(i) any claim for the recovery of or the return of dowry or *kaikuli*;

(j) any application for the facilitation of mediation;

(k) any application for judicial separation;

(l) any application made in the course of any proceedings before the Quazi Court under this Act, for the custody of, and access to, any child born to the spouses; and

(m) any application for an order from a Quazi Court for interim relief that may be necessary to prevent any application made under this Act becoming nugatory or incapable of being enforced.

58. It is unanimously recommended by this Committee that power and jurisdiction with respect to the award of custody and access to children of parents whose marital disputes are before the Quazi Court be also conferred to the Quazi Court itself to avoid the parents having to go before another Court to resolve disputes involving custody of children. It is threfore

recommended that sections 47(5) and section 47(6) of the Act be repealed and replaced with new provisions in the lines formulated in paragraph 6.14.06 of this Repot.

59. It is curious that section 48 of the Act currently limits the exclusive jurisdiction of the Quazi Court only with respect to matters that fall within section 47 of the Act, while the Court has the jurisdiction to approve marriages in various circumstances, grant divorces and provide many other relief in other provisions of the Act. It is recommended that this anomaly be remedied by amending sections 48 in the following lines:-

> "48 Subject to any special provision in that behalf contained in this Act, the jurisdiction exercisable by a Quazi Court under this Act shall be exclusive and any matter falling within that jurisdiction shall not be tried or inquired into by any other court or tribunal whatsoever."

60. The undersigned members of the Committee unanimously recommended that sections 54 to 59 of the MM&D Act be amended as provided in great detail in paragraph 6.14.09 of this Report to improve on the system of assessors, in particular to ensure that there is at least one male and one female assessor in every panel of assessors who has no conflict of interest with either of the parties along with a proper system for the empaneling of assessors who shall maintain their independence and efficacy in their important role of being Judges of facts subject to the Quazi's duty to independently assess their findings, the efficient maintenance of records including electronic records relating to all proceedings in the Quazi Court and the Quazi Appellate Court pertaining to nullity, divorce, maintenance and other proceedings, and the maintenance of a Nullity Register and a Divorce Register with cross-references.

O - Procedure and Time Limits for Appeals

61. Sections 60 to 63 of the MM&D Act deal with appeals against orders of the Quazi Court and orders of the Board of Quazis. A party aggrieved by a decision of the Board of Quazis (to be renamed Quazi Appellate Court) has to appeal to the Court of Appeal, and there is also a possibility of an appeal being taken to the Supreme Court from an order or decision of the Court of Appeal.

62. As outlined in detail in paragraphs 6.15.01 and 6.15.02 of this Report, uncertainty caused by the lack of uniformity in the time limit for appeals laid down in the Schedules to the Current Act and too many opportunities for appeals currently available may frustrate the parties who may under the proposed amendments have been granted relief by the Quazi Court and the Quazi Appellate Court. In these circumstances, it is necessary to streamline the procedure by providing reasonable and uniform appealable periods for such appeals and reduce the number of appeals. It is recommended that a uniform period of 4 weeks be set as the appealable period for appeals against orders of the Quazi Court to the Quazi Appellate Court, and only one

more appeal be available thereafter direct to the Supreme Court with the leave of that court instead of an appeal to the Court of Appeal.

P - Enforcement of Orders of Quazi Courts

63. This Committee is unanimously of the view that the procedure for enforcement of the orders of Quazi Courts currently contained in sections 64 to 66 of the Muslim Marriage and Divorce Act (MM&D Act) should be improved to bring about greater efficiency. For the reasons set out in paragraphs 6.16.01 to 6.16.03, it is recommended that sections 64 to 66 of the Act be repealed, and new enforcement provisions be introduced as sections 62 to 64 of the Act to give the Quazi Court greater power and discretion to implement orders of Quazi Court in a beneficial manner without causing unnecessary delays and difficulties.

64. An important feature of the proposed amendments is that the Quazi Court may directly implement its orders to recover maintenance or any other payment due under the Act as if it were a fine imposed by the Court without referring the matter to the Magistrates Court, and in the event that the money could not be so recovered, for instance, due to the fact that the person liable to make the payment is overseas and it is not practicable to bring him or her down to Sri Lanka, the Quazi Court may issue a certificate to the District Court to recover the money as if the order of the Quazi is a decree issued by the District Court through the seizure and sale of any immovable property belonging to the person liable to pay such money. Such inter-changeability of remedies can avoid a great deal of anguish currently prevailing in regard to the enforcement of the orders of Quazi Courts.

Q - Establishment of a Maintenance Fund

65. For the reasons set out in paragraphs 6.17.01 to 6.17.03 of this Report, it is unanimously recommended by this Committee that sections 65 to 66 of the Act be replaced with new provisions to establish a Maintenance Fund for providing relief to married or divorced women who are in indigent circumstances and are unable to recover maintenance from any persons who may be liable in law to maintain them under the provisions of the Act. This measure, it is hoped, will prevent destitute women going astray.

66. The proposed Maintenance Fund shall consist of money that may be donated thereto including *sadaqa* received from charitable institutions and individuals in Sri Lanka or abroad, and money that may be collected as *zakat* in Sri Lanka or overseas, and any other contributions lawfully made to the said Fund. It is proposed that the management of the Maintenance Fund be vested in a Board of Management, which may be constituted as proposed in paragraph 6.17.03 of this Report.

67. It is the unanimous recommendation of this Committee that the proposed Maintenance Fund be administered and managed by a Board of Management which shall consist of the Chairman of the Quazi Appellate Court, the Secretary to the Ministry in charge of the subject of Justice and the Director of Muslim Religious and Cultural Affairs, who shall be *ex officio* members, and seven other members to be appointed by the Minister in charge of the subject of Justice in consultation with the Minister in charge of the subject of the Department of Muslim Religious and Cultural Affairs (hereinafter referred to as "nominated members"), who shall be eminent Muslims having expertise in management or Muslim law. In selecting such persons for nomination to the Board, care should be taken to give adequate representation for males and females.

R - Transfer of Cases, Representation through Attorneys-at-law, Enhancement of Punishments and other Miscellaneous Matters

68. For the reasons outlined in paragraphs 6.18.01, the undersigned members of the Committee recommend that the power exclusively vested in the Judicial Service Commission by Section 67 of the MM&D Act to appoint a Special Quazi to hear a case where there is reasonable fear that a fair and impartial inquiry cannot be had before the Quazi before whom it is instituted or is to be taken up, be discharged by the said Commission on the recommendation of the Quazi Appellate Court. The undersigned members of the Committee also recommend to confer additional power to transfer a case from one Quazi Court to another Quazi Court, in the lines of proposed section 67(1) and (2), which should replace the existing section 67.

69. Section 74 of the MM&D Act currently prevents the appearance of Attorneys-of-Law in the Quazi Court on behalf of any party or witness in any proceeding before a Quazi. Understandably, the MM&D Act barred lawyers from appearing for parties or witnesses before the Quazi on the basis that due to the informality of the system and its reconciliatory approach lawyers may not only add to the costs of litigation but also cause undue delay in proceedings. However, the experience of the last few decades, has been quite the contrary, particularly in hotly contested *fasah* proceedings and maintenance cases, and shows that the non-availability of proper legal advice and representation has amounted to a denial of a basic human right which has seriously prejudiced the parties by giving room for corruption and caused unnecessary hardships, creating a general perception of unfairness in the minds of all litigants.

70. In these circumstances, the undersigned members of the Committee unanimously recommend that section 74 be repealed and be substituted by a new provision to be numbered as section 74(1) in the following lines:-

> "(1) Unless there is express contrary provisions in this Act or any applicable schedule to this Act, every party shall be entitled to appear in person or through an authorised

representative in any proceedings before the Quazi Court or the Quazi Appellate Court."

71. There is also a grave need to make the Quazi Court self-sufficient in the enforcement of its orders, and while certain recommendations pertaining to this matter have already been made in paragraphs 6.16.02 to 6.16.04 of this Report, it is recommended that two new provisions be added as sections 74(2) and 74(3) imposing a duty on every police officer and grama niladhari to aid and assist the Quazi Court and the Quazi Appellate Court in compliance with any order that might be made in the exercise of their jurisdiction and powers, particularly in regard to the service of notices, summons or other process or for the execution of any warrant of arrest that may be issued by the Quazi Court or Quazi Appellate Court as the case may be under this Act, and for the Deputy Inspector General of Police and the Divisional Secretary who has jurisdiction over an area to ensure that every police officer and grama niladhari of the area respectively, aids and assists the Quazi Court and the Quazi Appellate Court in the exercise of their jurisdiction and powers under this Act."

72. This Committee is also of the view that it is necessary to introduce into the Act provisions that will enable the Quazi Court and the Quazi Appellate Court to seek the assistance of the other original courts as well as other institutions in Sri Lanka in arriving at decisions and implementing its decisions and orders, and a new provision be introduced as section 75(1) as set out in paragraph 6.18.05 of this Report.

73. One of the greatest obstacles to the implementation of the MM&D Act at present is the gross inadequacy of the penalties and other sanctions set out in sections 79 to 93 of the current Act, and the enhancement of these sanctions is essential to improve the credibility and efficacy of the Quazi Court system. Realistic mendments to all these provisions have been recommended in great detail in paragraph 6.18.06 of this Report.

S - Supplementary Provisions

74. The undersigned members of the Committee recommend that the regulation making powers currently found in Section 94 of the existing Act and are vested solely in the Minister in charge of the subject of Home Affairs be now split up into two to enable the Minister in Charge of the Department of Registrar General to make all regulations under proposed section 94(1) in consultation with the Muslim Marriage and Divorce Advisory Board with respect to matters involving registrations of marriages and the maintenance and preservation of marriage registers whether in paper or electronic form as explained in paragraph 6.19.02 of this Report. The regulation making powers pertaining to Quazi Courts and the Quazi Appellate Tribunal may be delegated to be exercised by the Minister in charge of the subject of Justice in terms of the proposed section 94(2) in consultation with the Judicial Service Commission as outlined in paragraph 6.19.03 of this Act.

75. Additionally, it is recommended that the current section 94(2) be renumbered section 94(3) to enable a new provision to be inserted as section 94(2) to read as follows:

> "Any form in the schedule 1 and any rule in the Schedules 1A, 2, 3, 3A, 4, 5 may be rescinded, amended, modified or replaced, and any Schedule may be added to or replaced, by regulation made under this section by the Minister in charge of the subject of Justice in consultation with the Judicial Service Commission."

76. In view of certain powers are proposed to be conferred on the Judicial Service Commission, it is also recommended by the undersigned members of the Committee that a new provision be included in the Act as section 94(5) to read as follows:-

> "94(5) All matters required by this Act to be prescribed by the Judicial Service Commission shall be prescribed by the Judicial Service Commission in consultation with the Secretary to the Minister of Justice, and shall come into force when the same is published in the Gazettte."

77. It is further recommended that the definition of "*kaikuli*" found in section 97 of the MM&D Act be amended and new definitions be added into section 97 for concepts such as "authroised representative", "dower", "*mahr*" and "*mata'a*" as suggested in the preceding paragraph 6.19. 07 of this Report.

(T) Savings and Transitional Provisions

78. This Committee also recommends that savings and transitional provisions be made as proposed by them in paragraphs 6.20.1 to 6.20.03 of this Report. In particular, in view of the need to create awareness among members of the Muslim community in regard to the changes to be brought about by the proposed recommendations and also taking into consideration the time that might be required to take certain measures of selecting suitable persons for appointment as Quazis and providing them with in depth training necessary personnel and setting up counselling and mediation centers with adequate expertise, it is recommended that the recommended provisions should not come into force when the same is enacted in Parliament and certified by the Speaker, but some time should be allowed at the discretion of the Minister in charge of the subject of Justice to make an order to bring the new provisions into force. Accordingly, the following transitional provision is recommended as proposed section 99(c):-

> "99(c) The amendments effected to the principal Act by this Act shall come into force upon an order to that effect being made by the Minister in charge of the subject of

Justice after two years have elapsed from the date of certification of this Act, or in the absence of any such order being made by such Minister, upon the expiry of three years from the date of certification of this Act. All Quazis, Temporary Quazis, Special Quazis and members of the Board of Quazis appointed under this Act and serving on the date of certification of this Act shall continue to hold office until the provisions of this Act come into force."

6.1 – Detailed Recommendations

The detailed recommendations of the Committee on the twenty matters listed in paragraph 3.1.04 of this Report are set out below with reasons and justifications.

A - The Scope and Applicability of the Muslim Marriage and Divorce Act

6.1.01 Section 2 of the Muslim Marriage and Divorce Act of 1951 (MM&D Act)[73] provides that "this Act shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Sri Lanka who are Muslims". It is noteworthy that the Marriage Registration Ordinance (also known as the "General Marriages Ordinance''),[74]which according to its preamble is an "Ordinance to consolidate and amend the law relating to marriages other than the marriages of Muslims and to provide for the better registration thereof", defined the term "marriage" in section 64 of the said Ordinance so as to exclude "marriages contracted between persons professing Islam."

6.1.02 It may be useful to state at the outset that in the joint representations submitted to this Committee by Ms. Ermiza Tegal, Attorney-at-law, Ms. Hasanah Cegu Isadeen, Attorney-at-law and Ms. Hyshyama Hamin, it has been submitted that since the MM&D Act together with the Registration of Marriage Ordinances effectively prohibit persons professing Islam from choosing to marry under the General Marriage Ordinance, every Muslim should be conferred the right to choose under which law his or her marriage should be governed. This Committee notes that a similar option is conferred on those governed by Kandyan law by section 3(1)(a) of the Kandyan Marriage and Divorce Act of 1952, and the Commission on Marriage and Divorce had considered the question whether a similar option should be granted to the Muslims in paragraphs 66 to 70 of its Report.[75] In paragraph 68, considering the proposal to have a uniform law of marriage and divorce applicable to all citizen and those domiciled in Sri Lanka (then Ceylon), the said Commission had opined as follows:-

[73]The Muslim Marriage and Divorce Act, supra note 1.
[74]Marriage Registration Ordinance No. 19 of 1907, *supra* note 47.
[75] *See,* the Report of the Commission on Marriage and Divorce (1959) *supra* note 22 paragraphs 66 to 70.

"We are convinced that the principle must be accepted that there should be a uniform marriage and divorce law, applicable throughout the country equally to everyone, irrespective of race and religion. We recommend (1) that this law should be available to a Muslim as well, whether *one or both* parties to a marriage are Muslims, and (2) that the special marriage and divorce laws applicable to the Muslims should continue to apply, where *both parties* to a marriage are Muslims, so that in each such case the parties will have the option of marrying under either law."

6.1.03 It is apparent that there was a demand for the grant of an option to marry under the Marriage Registration Ordinance[76] (also known as the "General Marriages Ordinance'') even in 1956, when the Commission on Marriage and Divorce called for public representations, as well as in the present day context only in the backdrop of the poor light in which the entire Quazi Court system was and is perceived by the general public including the Muslim community in Sri Lanka.[77] In the circumstance, the undersigned members of this Committee which is endeavoring to remedy the various deficiencies of the Quazi Court system that have been highlighted in representations received by the Committee, take the view that the demand for the option to marry under the Marriage Registration Ordinance will not be pursued by women's groups if the recommendations of this Committee to progressively and beneficially amend the MM&D Act are implemented by the Government. Furthermore, this Committee is unanimously of the opinion that unlike in the case of Kandyan Marriage and Divorce Act, which is not "faith based", the Muslim Marriage and Divorce Act was intended to apply to every person professing Islam who is an inhabitant of Sri Lanka. The undersigned members of this Committee are therefore of the view that the option of permitting a person professing Islam to register the marriage under, and be governed by, the Marriage Registration Ordinance (also known as the "General Marriages Ordinance'') should be considered as a measure of last resort only if the endeavor to amend the MM&D Act in a *shariah* compliant manner remedying all existing discriminatory provisions and inequities, fails. In the event that it is decided to grant an option to marry under the Marriage Registration Ordinance, the undersigned mebers of this Committee are of the opinion that it will be necessary to amend not only the MM&D Act but also the Marriage Registration Ordinance.

6.1.04 In recent times, some uncertainty has arisen in regard to the scope and ambit of the MM&D Act consequent upon the Registrar-General issuing a circular dated 2nd October 2013 directing Muslim Marriage Registrars not to register marriages of persons professing Islam who are not for the time being resident in Sri Lanka. The practical effect of this circular was that it prevented the registration under the MM&D Act of the marriages of citizen of Sri Lanka who are permanently or temporarily resident overseas for purposes such as employment, profession or business even after

[76] *Supra* note 47.
[77] *See*, Shreen Abdul Saroor, *Muslim Women – Second Class Right Holders in Sri Lanka's Quazi System,* Daily Mirror of 9.12. 2016 at: *https://www.pressreader.com/sri-lanka/daily-mirror-sri-lanka/20161209/283034054204454*

the *nikah* ceremony had taken place in Sri Lanka. The ostensible justification for the issue of the circular was the use in section 2 of the MM&D Act, of the phrase "*inhabitants* of Sri Lanka who are Muslims". The term "inhabitants" is not defined in the Act, but when viewed in the context of the application of Thesawalamai law to a "Malabar *Inhabitant* of the Province of Jaffna (Jaffnapatnam)",which concept was considered by the Supreme Court in decisions such as *Sivagnanalingam v Sutheralingam*,[78] the fallacy of the circular can be readily understood. In the course of his judgment in the said case, his Lordship Shavananda CJ observed that-

> "In view of the admitted fact that the deceased was a Jaffna Tamil who started life as an inhabitant of Jaffna, the burden lay on the Respondent to *rebut the presumption of continuance of the inhabitancy* by leading unequivocal evidence of abandonment of that inhabitancy. The presumption prevails until abandonment of than inhabitancy is established……. For such residence, to divest a person of such character, it should have been in pursuance of an intention of remaining there permanently. Such residence must have been voluntary, a matter of free choice and not of constraint as being obliged to reside in a place for the purposes of his employment, profession or business."[79]

6.1.05 The same presumption of inhabitancy will, no doubt, apply to a Sri Lankan who has acquired the citizenship or permanently residency in another country, having migrated to such country as a displaced person or for purposes such as employment, profession or business. The difficulty with the Registrar-General's circular is that it does not give recognition to the fact that any Sri Lankan who has migrated to another country in the above circumstances, will be presumed by law to be an inhabitant of Sri Lanka unless it is established by clear evidence that he has given up the intention of returning to Sri Lanka.

6.1.06 In this context, the Committee examined the provisions of the Marriage Registration Ordinance (also known as the "General Marriages Ordinance"), has not adopted a similar requirement of inhabitancy with respect to those who shall be governed by its provisions, and it is clear from section 23(4) of that Ordinance that even where neither party to a proposed marriage is a citizen or resident of Sri Lanka, the marriage may be solemnized and registered after giving four days' notice.

6.1.07 Section 22(5) of the Marriage Registration Ordinance (also known as the "General Marriages Ordinance'') shows that such notice may be given by one of the parties in anticipation of the arrival in Sri Lanka of the other party to the marriage. This Committee is unanimously of the view that it is necessary to amend section 2 of MM&D Act to clarify the scope and ambit of the Act and have it properly aligned with the Marriage Registration Ordinance to which it is an exception. It is also

[78] *Sivagnanalingam v Suntheralingam* (1988) 1 SLR 86.
[79] *Ibid.,* at page 95.

necessary to resolve problems resulting from the circular dated 2nd October 2013 issued by the Registrar General which is unnecessarily restrictive and discriminatory.

6.1.08 Having taken all relevant matters into consideration, this Committee is of the unanimous opinion that the Registrar General should be requested to withdraw the aforesaid circular dated 2nd October 2013 and any other circular or directives issued by him in similar lines. This Committee recommends that the Muslim Marriage and Divorce Act be synchronized with the Marriage Registration Ordinance (also known as the "General Marriages Ordinance'') by amending section 2 of the MM&D Act by substituting for the words "of those inhabitants of Sri Lanka who are Muslims" the words "of persons professing Islam (hereinafter referred to as "Muslims") at least one of whom is an inhabitant of Sri Lanka". It is also unaniously recommended that section 97 be amended by adding the following definition of "Inhabitant of Sri Lanka" immediately after the definition of "District Registrar":-

> "Inhabitant of Sri Lanka" shall mean any person who inhabits or had been inhabiting Sri Lanka and shall be presumed to include any descendant of any such person irrespective of whether such person or such descendant has acquired the citizenship or permanent residency of another country, unless it is established by unequivocal evidence that he or she has abandoned such inhabitancy."

B - Enhancing the Status of the Quazi Court and Quazis

6.2.01 There is general consensus that the Quazi Court and Quazis should be brought into the mainstream of the Sri Lankan judicial system and the status of the Quazi Court and Quazis should be enhanced. In 2012, Muslims in Sri Lanka accounted for 9.66 percent (1,967,523) of the total population of 20.3 million people[80]. There are currently 64 Quazi divisions in Sri Lanka to each of which a Quazi is appointed and 2 more Special Quazis appointed specifically to handle cases involving the Bohra and Memon communities. It is also well known that the Quazi Courts handle a large volume of work, although exact official figures are not available. The All Ceylon Jamiyyathul Ulama (ACJU), has observed in its official representations to this Committee that the number of *talaq* and *fasah* cases reported in the 4 Quazi divisions situated in Colombo district alone amounted to 657 in 2011 and 406 in 2012, and that although official figures for all the 64 Quazi divisions are not available, the

[80] Census of Population and Housing 2012 – Department of Census and Statistics: http://www.statistics.gov.lk/ (last accessed on 19.8. 2017 at 10.03 am). Unfortunately, the Department of Census and Statistics has not posted on its website any later figures, but there are some estimates for mid-2013. According to a more up to date website, at the time of writing, the population of Sri Lanka stood at 20,940,512 of which women were 10,608,807 amounting to 50.7 percent of the total and men were 10,331,705 amounting to 49.3 percent of the total population. Vide http://countrymeters.info/en/Sri_Lanka (last accessed on 19.8.2017 at 10.05 am).

volume of divorce, maintenance and other cases that have to be dealt with by the Quazi Courts in the whole Island should be quite "significant".[81]

6.2.02 However, none of the Quazis hold office on a permanent basis and are not necessarily lawyers, nor are they adequately competent or compensated. Section 12(1) of the MM&D Act simply provides that "the Judicial Service Commission may appoint any male Muslim of good character and position and of suitable attainments to be a Quazi", which provision required serious re-examination for several reasons, which include the inability of the Quazis to conduct their judicial and administrative functions with efficiency and dignity. Although some Quazis have been assigned buildings for the conduct of judicial work, the majority of Quazis conduct Court in their private residences as courthouse buildings are not always made available to them. This also gives rise to inconvenience and embarrassment, lowering not only the esteem of the office of Quazi but giving rise to a public perception that the government is not committed to spend in this sphere of public justice. The Quazis themselves are handicapped by the lack of facilities to maintain proper records, and are often threatened or pressurised by parties to disputes that come before the Quazi Court, and there have been some reported cases of assault of Quazis by litigants or their relatives, which have resulted in some of them being charged before the Magistrates' Court for assault and such offences. Due to the inadequacy of allowances paid to Quazis and facilities made available to them, it has become increasingly difficult to attract sufficiently suitable persons to hold office as Quazis. It was once reported to the Judicial Serivcce Commission that a Quazi whose main occupation was taking passangers on hire in a three-wheeler, had exhibited his designation as Quazi Judge on the back of his three-wheeler, bringing his office to disrepute. These factors have in turn led to inefficiency, indiscipline and corruption and the public perception that the Quazi Court system is unfair, particularly to women.

6.2.03 One factor that has contributed to this situation is the duality of the function of the Quazi as reconciliator and judge. Under the existing Act, the functions of a Quazi include that of attempting to reconcile estranged spouses, which makes the Quazi privy to confidential information concerning their affairs, but when all efforts at reconciliation fail, the Quazi is expected to hold a judicial inquiry and decide whether any relief such as a divorce or maintenance should be granted. It is felt that the duality of these functions is not conducive to the proposer administration of justice as a Quazi who attempts reconciliation may become aware of facts and positions of parties and might be unfairly prejudiced when he later holds a judicial inquiry in accordance with the rules of evidence contained in the Evidence Ordinance. In these circumstances it is the unanimous opinion of this Committee that the reconciliatory function be taken away from the Quazi to enable the Court to refer the parties to one or more person of their choice for attempting reconciliation as provided in Holy Quran 4:35, *Sura Nisa*, and when appropriate, refer the parties for counseling and / or mediation, by suitably trained Counsellors or

[81] Representations of the ACJU, supra note 63, page 15.

Mediators prior to taking up the case for hearing, so that he will be free to exercise his powers as a Judge independently and free from prejudice.

6.2.04 A major issue that affects the efficiency of the Quazi Court system is that the Quazi Court is not autonomous as its orders have to be enforced as provided in section 64 and 65 of MM&D Act through other courts, which causes hardships to the parties and delays in implementing the orders of the Quazi Court. Often, the parties are required to pursue enforcement orders in other courts, increasing thereby the number of courts they have to attend to resolve their grievances. Recommendations to redress these problems have been included in paragraphs 6.16.02 to 6.16.04 of this Report.

6.2.05 Representations received by Committee in connection with the enhancement of the status of the Quazi Courts and Quazis show that there was no general consensus in regard to the manner of how the above-mentioned objectives should be achieved, except that all were unanimous that reform of the Quazi Court system was urgently necessary. For instance, there was agreement that the Quazis should be competent persons and should be appropriately rewarded for their services. However, while the ACJU and the YMMA Conference[82] were of the view that appointment of Quazis should not be restricted to Attorneys-at-law, and even Moulavis and Retired School Principals should be considered eligible for appointment, the Muslim Women's Research and Action Forum (MWRAF)[83] has recommended that "the Judicial Service Commission may appoint any Muslim of good character and position and of suitable attainments to be a Quazi." However, the Muslim Lawyers' Association[84] and the Al Amaan Nusrath Organization[85] were of the opinion that only experienced Attorneys-at-law with a sound knowledge of Muslim Law should be appointed as Quazis. The latter organization has in its representations, expressed the opinion that "Quazis may be selected from among the members of the legal profession and be appointed at a permanent salary scale basis." The Muslim Lawyers' Association has in essence agreed with the proposals made by the Shahabdeen Committee[86] in this regard, and proposed that-

"(a)A Quazi should be a full-time judicial officer;

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[82] Representations of the ACJU, supra note 63 page 14 and the representations of the YMMA Conference entitled "*Proposals on Reforms to the Muslim Matrimonial Law and Upgrading of Quazi Courts*" included in volume II to this reprt marked C4, at pages 4 and 5.

[83] Representations of the Muslim Women's Research and Action Forum (MWRAF) entitled "*Recommendations for the amendments to the Muslim Marriage & Divorce Act No.13 of 1951*" included in volume II to this reprt marked C5, at page 16.

[84] Representations of the Muslim Lawyers' Association entitled "*Reforms and Suggestions to amend the Muslim Marriage and Divorce Act No. 13 of 1951*" included in volume II to this reprt marked C6, at page 6.

[85] Representations of the Al Amaan Nusrath Organization included in volume II to this reprt marked C7 entitled "*Suggestions for Reforming the Muslim Family Law and the Quazi Courts System in Sri Lanka*", at page 9.

[86] Dr. Shahabdeen Committee Report, Paragraph 2.9

(b) Appointees should be qualified lawyers with sound knowledge of Muslim Law and Islamic Jurisprudence, shall be married and shall not be less than 30 years of age. Female Muslims too should be considered eligible to be appointed as Quazis;

(c) Quazis should receive remuneration and enjoy service conditions and judicial powers on par with those of Magistrates;

(d) For the proposal in (a) above to be meaningful, the number of Quazis should be reduced and the areas of their jurisdiction be extended to cover the entire land; and

(e) They should function as itinerating judicial officers within their area of jurisdiction to ensure speedy disposal of cases." [87]

6.2.06 ACJU has in is representations to this Committee agreed that it is necessary to upgrade "the administrative facilities provided to the Quazi courts by offering standard recognitions, remunerations and other necessary requirements to ensure efficiency and smooth functioning"[88] but has objected to the proposal of the Muslim Lawyers' Association to reduce the number of Quazis as counter-productive in view of the large volume of work presently handled by the Quazis[89]. It appears the ACJU has misunderstood the representation of the Muslim Lawyers' Association, which was only to reduce the number of Quazis and not the number of Quazi zones, as the proposal of the Muslim Lawyers' Association envisages the appointment of permanent Quazis on par with Magistrates, who will function on a full time basis and will be able to better cope with the work load by covering approximately 3 Quazi divisions on circuit basis on three working days with two spare days to perform other administrative duties. In fact, it may be possible as a transitional measure for the Judicial Service Commission to consider releasing Muslim Magistrates to function in certain areas as Quazis, in the way it releases Magistrates in low load areas to function as Presidents of Labour Tribunals. The proposal of the Muslim Lawyers' Association, if implemented with enhance the status of the Quazi Court making it possible for it to function in a more productive manner.

6.2.07 Having taken into consideration all the representations made to the Committee in this regard, the Committee makes the following unanimous recommendations:-

(1) Amending the MM&D Act to strengthen the Quazi Court system and to elevate the institution of Quazi to the status of a court, to be designated as Quazi Court, and be recognized as an integral part of the Sri Lankan Judiciary. The amending legislation to provide for the reduction of the number of Quazis from the current 64 to a number that may be considered adequate by the Judicial Service Commission so that it would be financially viable to appoint permanent and full time Quazis, whose primary functions would be

[87] Representations of the Muslim Lawyers' Association, supra note 84 pages 6 to 7.
[88] Representations of the ACJU, supra note 63 page 14.
[89] *Ibid.,* page 15,

judicial, with the reconciliatory role of the Quazi Court to be vested on trained Consellors and Mediators, with the Quazi performing only administrative and supervisory functions without directly getting involved in the process of reconciling the parties;

(2) Amending sections 12, 13 and 14 of the MM&D Act to enhance the status of a Quazi to that of a permanent and full time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission. The amending legislation to provide that persons to be appointed as Quazis, Temporary Quazis and Special Quazis, should be Attorneys-at-law having a sound knowledge of Muslim law, and empower the Judicial Service Commission to prescribe by order published in the Gazette, the qualifications and attainments necessary for appointment as Quazi.

(3) Amending the MM&D Act to confer on Quazis a status befitting the office, who should be well remunerated, and provided with all facilities that are necessary to maintain the efficiency and dignity of judicial office.

(4) Making appropriate amendments to the MM&D Act for Quazis to be appointed into a closed service to be designated as the "Quazi Service", with adequate safeguards in regard to security of tenure subject to strict disciplinary control and the prospect of being considered for appointment into higher judicial office. It is the unanimous opinion of this Committee that express provision should be made in the Act requiring that the Quazi shall be a full-time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission, and that the power of appointment, transfer, promotion, disciplinary control and dismissal of a Quazi is vested in the Judicial Service Commission, and that the provisions of Article 114 of the Constitution of the Democratic Socialist Republic of Sri Lanka shall *mutatis mutandis* apply to such Quazi.

(5) Making appropriate transitional provisions that would facilitate the transition from the current Quazi Court system to the elevated status as recommended in paragraphs (1) to (4) above.

C - Reforming the Muslim Marriage and Divorce Advisory Board

6.3.01 In view of the position that the Muslim Marriage and Divorce Advisory Board (MMDAB) has become altogether defunct due to its non-appointment, this Committee considered how the said Board may be activated so as to fulfill the aspirations of the drafters of the original Act. It is also necessary to confer on the MMDAB with the power to provide opinions on questions of difficulty relating to the interpretation of the applicable substantive law.

6.3.02 Under the existing Act, the MMDAB had one *ex officio* member, namely the person holding office as the Registrar General who was expected to Chair meetings of the Board, which was to consist of a number of nominated members to be appointed by the Minister. The Board would have proved useful in the initial period after the MM&D Act came into force, but it is apparent that there was no purpose it could usefully serve in later years, and in these circumstances the Board went into disuse. However, it is the opinion of this Committee that the MMDAB should be retained to serve an altogether different purpose, namely to provide clarifications and guidance when difficult questions relating to the content of the rules of *fiqh* arise in the context of the implementation of the MM&D Act. The concepts of *shariah* and *fiqh* were examined in this Report in some detail in paragraphs 4.1.01 to 4.1.12 in relation to section 16, 98(2) and few other sections of the MM&D Act and schedules thereto which have expressly provided that the validity or otherwise of a Muslim marriage or divorce and the status and obligations that arise from a Muslim marriage or divorce shall be determined in accordance with the "Muslim law of the sect to which the parties belong". The word "sect" has been interpreted by our courts to refer to *mazhabs* or schools of thought. Registrars of Muslim Marriage, Quazis, the Board of Quazis and even other courts that are called upon to decide the validity of a Muslim marriage or divorce and the status and obligations that arise therefrom may have difficulty in ascertaining the content of the principles of *fiqh* that would apply in deciding such questions, and it is the opinion of this Committee that the Muslim Marriage and Divorce Advisory Board (MMDAB) may perform a useful purpose as a consultative body from which an authoritative opinion may be sought by the Registrar General, a Quazi Court, the Board of Quazis (to be renamed the Quazi Appellate Court), or other court in a complex case. The existence of such a body may be helpful in resolving issues of this nature following the principles of *usul al-fiqh* in the way the Majlis and the Legal Committee functions under section 33(2) of the Administration of Muslim Law Act of 1966 in Singapore.[90]

6.3.03 In these circumstances, this Committee unanimously recommens that sections 4, 5, 6 and 7 of the Act be amended with the objective of restructuring and strengthening the Muslim Marriage and Divorce Advisory Board in the following manner:

(1) Amending section 4(2) by removing the reference to the "Registrar General" therein and empowering the Judicial Service Commission to appoint not less than seven and not more than nine members, who shall be eminent Muslims having knowledge of the principles of Muslim Law to constitute the Muslim Marriage and Divorce Advisory Board, one of whom shall be designated as its Chairperson. The Judicial Service Commission shall by order published in the Gazette, prescribe the qualifications and attainments necessary to be appointed as the Chairman or as a member of the said Board, and in making such appointments shall ensure that males and females are adequately represented in the membership of the said Board;

[90] *See, supra* note 61.

(2) Amending section 5(1) so as to provide that a member of the Board shall, unless he earlier resigns from the office as a member or dies or is rendered otherwise incapable of discharging his functions, hold office for a term of three years or, where he is appointed to fill a vacancy in the Board, for such shorter period as may be specified at the time of the appointment of that member. Section 5(2) and 5(3) should also be amended by the deletion of the word "nominated";

(3) Amending section 5(3) to empower the Judicial Service Commission to remove any member from office if it is satisfied that such member is unfit to continue to hold office as a member of the Board, or where such member has without leave of the Board, failed to attend three consecutive meetings of the Board. (The proviso in existing Act should be removed);

(4) Amending section 6 enable the Registrar General, a Quazi Court or the Chairman of the Quazi Appellate Court (currently known as the "Board of Quazis") or any other Court or authority exercising any appellate or other function involving the application of the Muslim Marriage and Divorce Act to consult the Board on any matter including any difficult question relating to the applicable substantive law;

(5) Amending section 7(3) to enable the Minister in charge of the subject of Justice to appoint an officer of his Ministry to be or to act as the Secretary of the Board, and it shall be the duty of the said Secretary to keep minutes of each meeting of the Board. Any additional allowance that may be payable to an officer appointed as the Secretary of the Board, may be prescribed by regulation made under Section 94(1) of this Act.

D - Restructuring the Board of Quazis and making it more accessible to the Provinces

6.4.01 Currently, the Board of Quazis consists of five members none of whom, including its Chairman, hold office on a full-time basis. The Board holds its sittings mainly in Colombo to hear appeals and applications in revision from the Quazi Courts. However, for the last few years, the Board has also had occasional sittings in Kalmunai. It is considered necessary to provide greater access to the "Board of Quazis" by taking it into the Provinces, to overcome the problems of parties having to come to Colombo to pursue their appeals or applications in revision against decisions of Quazi Courts, or to respond to such appeals or revision applications. In particular, this will help prevent difficulties and problems currently faced by Muslim women in having to travel to Colombo in connection with their cases, which in some cases has been aggravated by the conduct of some Quazis against whom disciplinary action has already been taken.

6.4.02 For this purpose, after careful examination of the representations received from the public in this regard, this Committee unanimously recommends that the Board of Quazis be redesignated as the "Quazi Appellate Court", and that its Chairman be appointed on a full time basis. It is also recommended that the number of members of the Board (to be re-designated as the Quazi Appellate Court) be increased from the current 5 to 9 to facilitate more regular sittings in at least three outstation centers to be prescribed by regulation in terms of section 94 of the Act. Accordingly, it is unanimously recommended that-

(1) The Muslim Marriage and Divorce Act (MM&D Act) be amended substituting for the words "the Board of Quazis" wherever it occurs in the Act, the words "Quazi Appellate Court";

(2) Section 15(1) of the MM&D Act be amended to substitute for the words "five male Muslims resident in Sri Lanka," the words "nine Muslims resident in Sri Lanka, of whom one shall be nominated as its Chairman" and substitute for the words "position and of suitable attainments," the words "possessed of such qualifications and attainments that may be prescribed by the Judicial Service Commission by order published in the Gazette,";

(3) Section 15(1) of the Act should also specifically provide that in making appointments to the Quazi Appellate Court, the Judicial Service Commission shall ensure that adequate representation is provided therein for males and females, and that any person who has previously held office as a member of the Board of Quazis or the Quazi Appellate Court shall be eligible for re-appointment to the Quazi Appellate Court for a fresh term of office;

(4) Section 15(2) of the MM&D Act be amended by substituting for the words "the members" of the words "the Chairman and members", and adding immediately after the word "Gazette." at the end of that section a provision in the following lines:-

> "The Chairman and members of the Quazi Appellate Court shall take their oath of office before the President of the Court of Appeal or a Judge of the Court of Appeal prior to commencing their official functions."

(5) Section 15(3) of the Act be amended by adding a provision to the effect that "the Quazi Appellate Court shall hold its sittings in Colombo, or in any other provincial city as may be determined by the Judicial Service Commission by order published in the Gazette."

(6) Section 15(4) of the Act be amended to provide that "The Judicial Services Commission shall have the power of disciplinary control of members of the Quazi Appellate Court

including the power to suspend or terminate the services of a member of the said Appellate Court. In the discharge of its function under the said Article, the Judicial Service Commission or any Committee of Judges or the Secretary to the Commission, to whom the Commission might delegate its powers, may suspend a member of the Quazi Appellate Court pending a disciplinary inquiry, or at the conclusion of such an inquiry, terminate the services of such a member. Any order of the Commission by which the appointment of a member of the Quazi Appellate Court is suspended or terminated shall be published in the Gazette" ;

(7) Section 15(5) of MM&D Act be amended by substituting for the words "suitable person" the words "Muslim Attorney at law having a sound knowledge of Muslim Law and possessed of such qualifications and attainments that may be prescribed by the Judicial Service Commission in terms of sub-section (1) of this section";

(8) Section 15(6) of the Act be amended by substituting for the words "The Registrar General may appoint a person to be or to act as the Secretary to the Board of Quazis" the words "The Judicial Service Commission shall appoint a scheduled public officer to be or to act as the Secretary to the Quazi Appellate Court," and to provide that the person so appointed shall perform all such duties and functions as may be assigned to the Secretary by the provisions of this Act or the regulations made thereunder or by a decision of the Quazi Appellate Court not inconsistent with any such provision.

(9) The MM&D Act be further amended by adding a new provision as section 15(7) providing that the Chairman of the Quazi Appellate Court shall be a Muslim Attorney at law having a sound knowledge of Muslim Law and possessed of such qualifications and attainments that may be prescribed by the Judicial Service Commission. Section 15(7) to expressly provide that the Chairman of the Quazi Appellate Court shall be a full-time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission, and that the power of disciplinary control of the Chairman of the Quazi Appellate Court is vested in the Judicial Service Commission. The amendment should also provide that the provisions of Article 114 of the Constitution of the Democratic Socialist Republic of Sri Lanka shall *mutatis mutandis* apply to such officer.

E - Changing the Public Perception of Unfairness to Women

6.5.01 A matter of great concern to the Committee was the prevailing perception of unfairness to women arising from the fact that Registrars of Muslim Marriages and Quazis are required to be male, and the entire Quazi Court system is weighted very much in favour of men quite contrary to the gender justice and equality sanctioned by the *shariah* itself and is also enshrined in Art. 12 of the Constitution of Sri Lanka. This Committee has also given considerable thought to the question as to

what amendments should be made to sections 4, 8, 9, 10, 12, 14, 15 and the schedules of the Muslim Marriage and Divorce Act to bring about changes in the prevailing perception of unfairness to women arising from the fact that Registrars of Muslim Marriages and Quazis are required to be male, which is aggravated by the actual conduct of certain Quazis who are seen, according to reports, to exhibit bias against women. It is interesting to note that the MM&D Act expressly confines the appointment of Registrars of Muslim Marriages[91], Quazis[92]and members of the Board of Quazis (to be renamed the Quazi Appellate Court") to "male Muslims". The eligibility of women to hold office as Registrars of Muslim Marriages, Quazis and members of the Board of Quazis had been a contentious issue particularly in the context that of the total Sri Lankan population of 20,940,512 people, 10,608,807 amounting to 50.7 percent were women, and men accounted to only 10,331,705 amounting to 49.3 percent of the total population.[93]The equilibrium is certainly favours the women.

6.5.02 In this context, it must be mentioned that, while the All Ceylon Y.M.M.A Conference[94] has expressed the view that it will be contrary to the opinion of Imam Shaffie to appoint women as Registrars of Muslim Marriages and Quazis, the Muslim Lawyers' Association, the Muslim Women's Research and Action Forum (MWRAF)[95] and the Kandy Forum[96] have taken a contrary view and insisted in their representations to this Committee that the word "male" in sections 8(1), 9(1) and 10(1) in relation to the appointment of Registrars of Muslim Marriage (including temporary and special registrars), sections 12(1) and 14(1) in relation to the appointment of Quazis (including special Quazis), and section 15(1) in relation to the Board of Quazis (to be renamed the Quazi Appellate Court), should be deleted. In this context, the opinion of the Kandy Forum was extremely persuasive, and is quoted below:

> "According to MMDA all of these officers should be male Muslims and no Muslim woman can be appointed to these posts. *It is obviously discriminatory against women and also against the fundamental principle of equality in Islam.* While Muslim women play leading roles in various positions in political, social and judiciary sectors all over the world, it is ridiculous to think that they can't be appointed as Registrars of Marriage and Quazis in Sri Lank, while in Muslim countries like Malaysia, Indonesia, Egypt and Palestine, Muslim women occupy the post of Quazis and Judges. *According to several Islamic scholars it is not against the Sharia.* The Holy Quran and authentic *hadith* are *not discriminatory against women.*"[97](*Emphasis added*)

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[91]See section 8(1), 9(1) and 10(1) of the Muslim Marriage and Divorce Act, supra note 1.
[92]*Ibid* sections 12(1) and 14(1).
[93] *See*, note 80 *supra*.
[94] Representations of the YMMA Conference, *supra* note 82 pages 4 and 5.
[95] Representations of the Muslim Women's Research and Action Forum (MWRAF), *supra* note 84, page 15.
[96] Representations of the Kandy Forum, *supra* note 65, page 6.
[97] *Ibid.,*

6.5.03 This Committee has taken into consideration the fact that there is no specific and direct injunction in the Holy Quran or the *sunnah* of the Holy Prophet either permitting or prohibiting women from holding administrative or judicial office, and that there was a serious conflict of opinion among the Imams in this regard.[98] The Shaffie doctrine, as expressed in the *Minhaj-et-Talibin,* is that a person aspiring to hold public office as a Quazi must be a "Moslem, adult, sane, free, *male* of irreproachable character; sound of hearing, sight and speech; educated and enjoying a certain degree of authority in matters of law"[99]. It has to be mentioned that apart from Imam Shaffie, even Imam Malik and Imam Ibn Hanbal regarded women as being ineligible to hold judicial office based on an interpretation of the Holy Quran, 4:34 *Surah an-Nisa*, to the effect that "men are the protectors of women". The minority view of Imam Abu Hanifa is to the effect that the authority of a judge is not valid unless he or she possesses the qualifications necessary for a witness. Thus, Imam Abu Hanifa allows women to be judges in all cases except *hudud* and *qisas* cases.[100] This flows from Imam Abu Hanifa's interpretation of the Holy Quran 4:34 *Surah an-Nisa* and Holy Quran 2:282 *Surah al-Baqarah*. It is to be noted that although the latter verse requires two women witnesses in place of one male witness with respect to a commercial transaction, it being known that at the time of the revelation of the Holy Quran, women did not directly engage in commerce as seen from the fact that Madam Khadija (*Raliaylllahuanha*) appointing our Holy Prophet (PBUH) as agent to conduct all her commercial transactions on her behalf, in the generality of cases the testimony of a woman had the same status as that of a man. The fact that women may be as competent and compelling as men in their testimony is seen from Holy Quran 4:24 *Surah Nisaa,* which requires four witnesses (without restricting to male witnesses) for the proof of adultery and Holy Quran 65:2 *Surah At-Talaq ,* which insists on "two persons" to testify in proof of the fact and particulars of divorce.[101]

6.5.04 It is noteworthy that neither the Holy Quran nor Holy Prophet (PBUH) have in any sense stated or assumed that men are superior to women, and on the contrary, at the Battle of the Camel, Aishah (*Raliaylllahuanha*) was in command of the army which included many illustrious companions of the Prophet including Abu Bakr, and none of them objected to her being in command, nor did they desert her for that reason. There were also the individual views of other jurists such as al-Tabari and Ibn Hazm which stated that a woman can be a judge in all cases without exception as long as she fulfils the

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[98] *See*, Report of the Committee Appointed by the Hon. Minister of State for Muslim Religious and Cultural Affairs to Recommend Amendments to the Muslim Marriage and Divorce Act and the Wakfs Act, *supra* note 24, paragraphs 2.15 to 2.18 (pages 19-21).

[99]Mahiudin Abu Zakaria Yahva Ibn Sharif Nawawi, *Minhaj-et-Talibin*, (Navrang, 1992) Book 65, Chapter 1, Section 1, 500.

[100] This opinion has been well expressed by Sheikh Yusuf al-Qardawi, who argues that there is no clear evidence in Shariah to prohibit women to the post of judge. Further, Shiekh Muhammad al-Ghazzali, Abdul Careem Zaidan, Muhammad Baltahi and Tawfeeq al-Wai are some other significant scholars who approved the appointment of women judge. See, Dr. A.M.I Ramzy, *Appointing Women Quazi in a Minority Context: Sri Lankan Experience*, [2016-2017] 51 Meezan page 123 at page 127.

[101]*See,* Saleem Marsoof, *Witness Testimony – Some Perspectives from Sharia'at Law*, accessible at link: https://www.academia.edu/5466591/Witness_Testimony_Some_Perspectives_From_Shariaat_Law (last accessed on 19.8.2017 12.04 pm

requirements for the position. The opinions to the effect that women are not eligible to be judges based on the verse in the Holy Quran, 4:34 *Surah an-Nisa*, to the effect that men are the protectors of women also appears to be a misinterpretation of that verse in view of the statement in Holy Quan 9:71, *Surah al-Taubah*,[102] to the effect that believing men and women are each other's protecting friends and guardians. The hadith attributed to Abu Bakra to the effect that "no people who appoint a woman as their leader will ever prosper",[103] which is often used to justify the exclusion of women from leadership positions, is contradicted by the Qur'anic verses in *Suarah An Naml* relating to the Queen of Sheba.[104] A hadith cannot be accepted as authentic if it is contrary to the Holy Qur'an, and the contradiction between the two has to be resolved by giving precedence to the divine words of the Almighty. Moreover, this hadith, said to be related by Abu Bakra, is classified as *ahaad* or an isolated hadith.[105] In any event, it is obvious that although our beloved Prophet (PBUH) and Caliphs functioned both as head of State and Judge, with the development of society in all its complexity, the functions of leading a nation and sitting in judgment in a court of law could not be performed by one and the same individual, and Judges (who are in Arabic known as Quazis) were appointed to discharege judicial funcitons. As already noted, the decision in *Danina Ummas* case discussed in parargraph 2.1.05 of this Report has held that Quazis discharge judicial functions and should be appointed by the Judicial Service Commission and not the Minister, and emphasise that as far as Quazis in Sri Lanka are concerned, they being judicial officers, cannot be involved in politics, leave alone being deemed or equated to a head of state or leader of a nation to which the aforesaid hadith attributed to Abu Bakra is said to apply.

6.5.05 Representations received by the Committee on this question were diverse. While the All Ceylon Jamiyyathul Ulama (ACJU)[106] and the All Ceylon YMMA Conference[107] opposed the appointment of women as Quazis, the Muslim Lawyers' Association[108], the Muslim Women's Research and Action Forum (MWRAF)[109] and the Kandy Forum[110] favoured the appointment of women as Quazis. The fallacy in the reasoning of ACJU, is based on the distinction purported to be drawn between "equality" and "justice" at page 20 of its representiations to this Committee entitled "*Proposal for the Muslim Marriage and Divorce Act – Shari'ah Perspective*" (2016) in the following simple sentence:-

> "Not one single letter in the *Qur'an* enjoins equality, rather it enjoings justice"

It is unfortunate that ACJU has misunderstood a basic tenat of Islam that finds expression in the practice of congregational prayers where all worshippers, whether they be the ruler or the ruled, black or white,

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[102] *ibid.,*
[103] Reported by al-Bukhaari, 13:53.
[104] The Holy Quran 27: 20-44 *Surah An Naml* (Ed: Abdullah Yusuf Ali).
[105] See for a scholarly interpretation of the Quranic verses and the hadith of Abu Bakra, '*Female Leadership in Islam'* by Sarah Shehabuddin at: http://www.irfi.org/articles/articles_401_450/female_leadership_in_islam.htm
[106] Representations of the ACJU, *supra* note 63 pages 18 to 32.
[107] Representations of the YMMA Conference, *supra* note 82, pages 4 and 5.
[108] Representations of the Muslim Lawyers' Association, supra note 84 page 6.
[109] Representations of the Muslim Women's Research and Action Forum (MWRAF), *supra* note 83, pages 16 and 17..
[110] Representations of the Kandy Forum, *supra* note 65, page 6.

rich or poor, Arab or non-Arab stand shoulder to shoulder with equality and grace. It is also unfortunate that the supposedly most learned and pious organisation of Muslim theologians of Sri Lanka was unmindful of the following verses of the Holy Quran:-

> "Never will I suffer to be lost the work of any of you, be he male or female: Ye are members one another…"[*Surah Ali 'Imran 3:195*]
>
> "If any do deeds of righteousness - be they male or female- and have faith, they will enter Heaven, and not the least injustice will be done to them" [*Surah Nisaa*, 4:124]
>
> "And he that works a righteous deed-whether man or woman- and is a believer - such will enter the Garden (of Bliss): therein will they have abundance without measure." [*Surah Mu-min* 40:40]

The concept of "justice" (*adl*) very clearly envelopes the concept of "equality"(*musawa*), particularly gender equlity that is stressed in the aforesaid verses of the Holy Quran. There can therefore be no doubt that there is no prohibition in *fiqh* against women functioning as Judges and holding Judicial office. The Muslim Women's Research and Action Forum (MWRAF) has placed detailed submissions, both written and oral, before this Committee and provided a great deal of material including a judgement of Aftab Hussain C.J., Zahoorul Haq J. and Malik Ghulam Ali J. of the Federal Sharia't Court of Pakistan[111] which held that there was no prohibition in the *shariah* against women holding office as Judges, Magistrates and Quazis.

6.5.06 Even though the principles of Shaffie jurisprudence noted above require that a Quazi should be a male, the dangers of rigidly following the Shaffie doctrine and the importance of adopting an eclectic approach for the resolution of problems of this nature have been highlighted in paragraphs 4.1.02 to 4.1.12 and of this Report. The opinion of Imam Abu Hanifa supports the appointment of women Quazis, and in Indonesia, Pakistan, Egypt, Tunisia, Yemen, Sudan, Bangladesh, Malaysia[112], and Maldives women do hold office as Judges in Shariah Courts. For instance, in Indonesia, which like Sri Lanka, is a notable adherent of Shaffie jurisprudence and has been described as "the frontrunner" in welcoming women to occupy positions as judges at its Islamic court,[113] women have been hearing cases as Judges as early as in the 1960s. The position is the same in Malaysia, and in a recent publication entitled *Administration of Islamic Law of Malaysia*, the authors have examined the opinions of the Imams and other scholars, and adopted the view that any decision in regard to "the appointment of women as qadi

[111] Sharia't Petition No. K 4 of 1982.
[112] http://www.loonwatch.com/2016/06/shariah-high-court-appoints-first-women-judges-in-malaysia/
[113]Euis Nurlaelawati and Arskal Salim, "*Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia"* at:https://www.academia.edu/7788312/GENDERING_THE_ISLAMIC_JUDICIARY_Female_Judges_in_the_Religious_Courts_of_Indonesia

should also consider the need of today's Muslim community. The view of the Hanafis should be adopted to help us solve the problem we are facing nowadays."[114]

6.5.07 In Pakistan, Justice Majida Rizvi was the first woman to be appointed as a judge when in 1994, she was appointed as a Judge of the High Court in Pakistan, and in December 2013, Ashraf Jehan, who was serving as an additional judge at the High Court in Sindh, became the first female judge to be appointed to Pakistan's Federal Shariat Court.[115] In Egypt, Tahani al-Gibali was the first woman to be appointed to the High Constitutional Court in 2003, which paved the way to the appointment in 2007 of 31 women to serve as judges in family courts.[116] Judge Khouloud el-Faqeeh, who was appointed to the Sharia Court in the Palestinian territory of Ramallah in 2009 is considered the first female Sharia Judge of the Middle East.[117]

6.5.08 This Committee is aware that, as the Kandy Forum has pointed out in its representations, many Sri Lankan Muslim women have held administrative and judicial office in Sri Lanka with distinction and continue to do so, and when any decision of the Quazi Court or the Board of Quazis goes on appeal or revision to a higher court, it may be decided by one or more women appellate judges, who may not necessarily be Muslims. Dr. Ashiek Mohammad Ismath Ramzy, in an enlightening article in the 51st Editon of the *Meezan*, after examining principles of *fiqh* in the context of Sri Lanka in a pragmatic manner, and taking note of the importance of the privacy of women litigants before the Quazi Court, has concluded that:-

> "Due to the absence of clear evidences in the Quran and Sunnah as well as other sources of Islam on qualifications of Quazi, this article recommends appointment of qualified, old and pious women to the post of Quazi" [118]

Hyshyama Hamin and Hasanah Segu Isadeen have stated as follows in a recent publication:-

> "The fact that countries like Indonesia and Malaysia have reformed family law using options within Islam to justify female Quazis, is often cast aside as "not applicable to Sri Lankan Muslims". Certain Ulema have also cast off these countries' attempts to allow women to be Quazis as a 'western influence' or that these countries practice 'English law'. A grave irony considering that, while the MM&D Act accommodates provisions of different sects to apply

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[114] *See,* Shuaib, Bustaki and Kamal, *Administration of Islamic Law of Malaysia*, (2nd Edition, 2010 Lexis Nexis) pages 457 to 461, particularly at page 459.
[115] Dawn (Dec 30, 2013), "*Pakistan appoints first female Judge to Sharia Court*", http://www.dawn.com/news/1077328 (last accessed on 19.8.2017 at 11.33 am).
[116] Women living under Muslim Laws, "*Egypt: Open All Judicial Positions to Women*", http://www.wluml.org/node/6002 (last accessed on 19.8.2017 at 11.34 am)
[117] See, Ilene R. Prusher, *New Female Judge transforms Islamic Court*, The Christian Science Monitor (13.5.2009), https://www.csmonitor.com/World/Middle-East/2009/0513/p06s20-wome.html
[118] Dr. A.M.I Ramzy, *Appointing Women Quazi in a Minority Context: Sri Lankan Experience*, supra note 100, at page 133 to 134.

their practices, the option for women to be Quazis as allowed under Hanafi *madhab,* predating any modern family law reforms processes, has been completely disregarded."[119]

6.5.09 It is noteworthy that Indonesia and Malaysia adopted an eclectic approach in making those reforms, despite the fact that both nations are traditional followers of Imam Shaffie, and it is the view of this Committee that a similar approach has to be followed in Sri Lanka in resolving some of the contentious issues highlighted in this Report. It is also significant to note that the continued existence of the word "male" in the sections of MM&D Act dealing with appointment of Registrars and Quazis will be obnoxious to Art 12 of the Constitution which guarantees equality before the law and equal protection of the law to all irrespective of their sex. It is noteworthy that, reacting to representations already made by certain activist groups before the Constitutional Assembly sub-committee on Fundamental Rights that Art. 16(1) of the Constitution should be amended to enable review of all existing personal laws including the MM&D Act, a definite course of action has already been recommended by the said sub-committee.[120]

6.5.10 In this connection, it is significant that the existing provisions of the MM&D Act restrict the appointment of Quazis and Special Quazis to a "male Muslim", but section 13(1) dealing with the appointment of Temporary Quazis is not similarly restrictive, and enables "a suitable person" to be appointed as Temporary Quazi. It is also noteworthy that provision for the appointment of Special Quazis was made in the MM&D Act especially for the benefit of Muslims who are not governed by teachings of Imam Shaffie, such as Muslims of Indian origin who are adherents of the teachings of Imam Abu Hanifa and the Dawoodi Bohra community that belongs to the Isma'ili branch of Shiah sect. There may also be a need to appoint Special Quazis to deal with cases in which the services of a woman Quazi may be required in view of the sensitive nature of a particular case. Although the views of the members of this Committee were divided in regard to the question of women holding office as Quazis, most members were of the opinion that there should be no legal bar to the appointment of women as Registrars of Muslim Marriages and as members of the Quazi Appellate Court (Board of Quazis).

6.5.11 A fact that is often overlooked is that the objections that may exist for the appointment of women as Quazis may not apply with the same force for the appointment of women as marriage registrars, who perform the function of recording the fact and the particulars of a *nikah* ceremony which is customarily performed by an *imam* of the parties' choice. The function of a Marriage Registrar, is obviously much simpler that the task that was performed by Aishah (*Raliaylllahuanha*) as narrator and recorder of the highest number of authentic *hadiths*. Islam does not prohibit women from going out to work, nor does it prohibit a woman undergoing *idda't* from going out for work in case of necessity. One practical

[119] Hyshyama Hamin and Hasanah Segu Isadeen, "*Unequal Citizen: Muslim Women's Struggle for Justice and Equality in Sri Lanka*", page 25, accessible at: https://drive.google.com/file/d/0Bzyi8GJfqXRHSEpYeVR5Nnp3dkU/view

[120] "Sri Lanka Constitutional Panel recommends postponing Muslim Personal Law Amendment", Indian Express (21st November 2016), accessible at: http://www.newindianexpress.com/world/2016/nov/21/sri-lanka-constitutional-panel-recommends-postponing-muslim-personal-law-amendment-1541071.html

limitation was pointed by Al Amaan Nusrath Organisation in its representations before this Committee, namely that most of the *nikah* are now taking place in the mosques, and it might not be a salutary idea for women registrars to officiate at *nikah* ceremonies conducted in mosques. However, there is no hard and fast rule in this regard as the decision as to where the *nikah* ceremony should take place is a matter for the parties, and a fair percentage of *nikah* ceremonies do take place in homes and wedding halls, and even in star class hotels. In the opinion of a majority of members of this Committee, there can be no legitimate objection in regard to the removing of the word "male" from sections 8(1), 9(1) and 10(1) of the MM&D Act with respect to the appointment of Registrars of Muslim Marriages.

6.5.12 For the reasons outlined above, this Committee unanimously recommends that the following measures be taken to overcome the prevailing public perception of unfairness against women:-

(1) Ensuring adequate representation for Muslim men and women in the Muslim Marriage and Divorce Advisory Board as proposed in this Report;

(2) Deleting the word "male" in sections 8(1), 9(1) and 10(1) dealing with the appointment of Registrars of Muslim Marriage, Temporary Registrars and Special Registrars to remove the prohibition of appointing women as Registrars of Marraige;

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(3) Amending section 15(1) of the Act by substituting for the words "male Muslims" the word "Muslim" and expressly providing that in making appointments to the Quazi Appellate Court (Board of Quazis), the Judicial Service Commission should ensure that adequate representation is provided for men and women;

(4) Amending section 57 of the Act to expressly provide that one at least of the three assessors empanelled to hear a case shall be a male and a female, and amending section 94 of the Act to expressly provide for regulations to be made to ensure that required number of men and women are made available for the constitution of panels of assessors which are representative of both sexes;

(5) Making necessary amendments to the MM&D Act as well as the Sri Lanka Judges Institute Act[121] to ensure that Quazis and members of the Quazi Appellate Court (Board of Quazis) are provided with competence enhancement programmes (inclusive of components involving gender related issues and dispute resolution methodology) on a structured basis; and

(6) Amending the relevant provisions and schedules of the Act to ensure that male and female marriage counsellors and mediators are available in proximity to Quazi Courts to assist the

[121] Sri Lanka Judges Institute Act No. 46 of 1985.

parties to resolve their disputes and differences and to ensure that the such counsellors and mediators are properly trained and compensated, and lists of trained counsellors and mediators are made available to the Quazi of each Quazi division with other particulars necessary to contract them whenever necessary.

6.5.13 There was one impoarant matter in which there was no unanimity in the Committee, which unfortunately relates to the prohibition contained in the MM&D Act against the appointment of women as Quazi Judges. This aspect of the matter has been examined in great depth in paragraphs 6.5.02 to 6.5.10 of this Report, and for the reasons set out therein, the undersigned members of this Committee recommend that sections 12(1) and 14(1) be amended by the deletion of the word "male" to enable suitable women too be considered for appointment as Quazis.

F - The Substantive Law:

6.6.01 A very contentious question deliberated by the Committee was the substantive law applicable to determine the validity of marriages and divorces as well of the status, mutual rights and obligations of the parties. Section 16 of the Muslim Marriage and Divorce Act of 1951(MM&D Act) provides as follows:-

> "Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non registration, any Muslim marriage or divorce which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage or divorce belong."

This provision embodies both negative and positive elements. The negative aspect of this provision is contained in the words "*Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration*", which formulation in effect makes registration or absence of registration of a marriage or divorce altogether irrelevant to the question of the validity or otherwise of the marriage or divorce. It is convenient to consider this aspect of the matter in detail in Section G of this Report under the heading "*Bringing out the Consensual Nature of Marriage and providing for its Proper Registration of Marriages.*" What is considered in this part of the Report is the positive element of section 16, which consists of what may be described as the substantive law applicable to all marriages and divorces among Muslims in Sri Lanka. In this context, it is noteworthy that prior to the enactment of the MM&D Act in 1951, principles of *shariah* law were not sought to be applied in Sri Lanka based on a categorization of Muslims according to their sect, and as already noted in paragraph 2.1.02 of this Report, neither the Dutch Code that was later translated into English on the directions of Governor Fredrick North and enacted it into law as the Mohammedan Code of 1806, nor

the Muslim Marriage and Divorce Registration Ordinance of 1929,[122] which replaced the provisions of the said Code dealing with marriage and divorce, adverted to the sect of the parties. Both the Mohammedan Code and the Muslim Marriage and Divorce Registration Ordinance sought to apply the Mohammedan law or Muslim law to all Muslims uniformly irrespective of the sect to which they belonged.

6.6.02 When section 16 of the MM&D Act is viewed in the light of this background, its express provision that the validity or otherwise of a Muslim marriage or divorce shall be determined according to "the *Muslim law governing the sect to which the parties to such marriage or divorce belong*" will be seen to make a radical change in the substantive law applicable to Muslims with respect to their marriage, divorce and connected matters. Section 98(2) of the Act further elaborates the sectarian aspect of the substantive law in providing that "in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the *Muslim law governing the sect to which the parties belong*." There is also reference to "sect" in sections 18(1), 19(1), 25(1), 26(1), 28(1) and 28(2) of the Act. However, the MM&D Act does not seek to define the term 'sect' or enumerate the source or sources from which "the Muslim law governing the sect to which the parties belong" could be extracted. In its ordinary meaning, the term may be construed to mean the two great sects of Islam, namely, the Sunni and Shiah sects, but in section 25(1) there is a reference to "Shaffie sect". In this connection, it must be noted that the Sunni Sect consists of four schools of thought (*mazhab*), named after the jurists who founded them, namely, the Hanafi, Maliki, Shaffie and Hanbali schools. The Shiah sect, is in turn divided into three major schools, known as Ithna 'Ashari, Ismaili (which includes the Dawoodi sub-school to which the Bohras belong) and Zeydi.[123] Our courts have held that as Sri Lankan Muslims largely belong to the "Shaffie sect", "the Shaffie doctrine is generally applicable,"[124] and section 25(1) of the MM&D Act also makes express reference to the "Shaffie sect". Our courts have also held that a party should be presumed to be a Shaffie unless there is evidence to the contrary.[125] Sri Lankan courts have applied the law governing the sect of an individual, even in matters, such as donation[126], which are not governed by specific legislation.

6.6.03 One fundamental question that has been deliberated by this Committee at length is whether in these circumstances, the reference to "sect" should be removed from section 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2) and 98(2) of the MM&D Act and the Schedules thereto, as suggested in some of

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[122] Muslim Marriage and Divorce Registration Ordinance of 1929, *supra* note 12.

[123] For an extremely interesting exposition of the various sects and schools of Muslim law, *see* C.G.Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988 edition), Chapter 4 pages 46 to 58. For a brief description, *see* L.J.M.Cooray, *An Introduction to the Legal System of Sri Lanka* (1991 edition) page 132.

[124] *See, Affefudeen v Periatamby,* 14 NLR 295 at page 300 *per* Middleton J.

[125] *See, Mangandi Umma v Lebbe Marikar,* 10 NLR 1; *Marikkar v Marikkar* 18 NLR 446; *Mohamedu Cassim v Cassie Lebbe,* 29 NLR 136; *In re Nona Sooja* 32 NLR 63; *Ummul Marzoona v Samad* 79 NLR 209.

[126] *See, Affefudeen v Periatamby*, supra note 124.

the representation received by the Committee in response to its notice calling for views of the public. The representations received by this Committee in favour of removing the reference to "sect" in section 16 and other connected sections of the Act were premised on four grounds. The *first* reason advanced in favour of removing the reference to "sect" in section 16 and the other provisions of the Act is that it goes against the spirit of the *shariah* itself. One obvious result of equating a *mazhab* such as the Shaffie school to a "sect" would be that an adherent of a particular *mazhab* will be rigidly bound by the teachings of that school, and will not have the freedom to deviate from these precepts unless he declares himself to be a follower of a different school of thought.[127] It is questionable whether such an inflexible approach can be reconciled with the spirit of the *mazhabs* themselves, particularly in the context that Imam Shaffie himself was a student of Imam Malik, and had his only son instructed by none other than Imam Hanbal. It is said that Imam Shaffie was born on the very day Imam Abu Hanifa departed this world, and in a biographical sketch of Imam Shaffie it is narrated that-

> "Al-Shafii admired men of learning; he considered that there was none so perfect as Imam Malik in knowledge, but for whom and Sufyan b. Uyaina, he said, *hadith* would have disappeared in the Hijaz; though his teachings differed from Imam Abu Hanifa's. He once remarked, "in matters concerning *Fiqh* all of us are followers of Imam Abu Haniffa." When he spent a night in the shrine of Imam Abu Hanifa, he led *Isha* and *Subhu* prayers as a Hanafi, omitting to recite *Bismilla* aloud or *Qunut at Subhu*, and explained that he acted so in respect for Imam Abu Hanifa in whose presence they were."[128]

6.6.04 However, the essential flexibility of *mazhab* as illustrated by the life stories of the great Imams themselves, is defeated by section 16 and other provisions of MM&D Act, which simply crystalize "a way" (*mazhab*) in to a rigid classification of persons bound by a particular body of law. Thus, in *A.L.M.Haniffa v A.A.Razack*[129] the Shaffie girl who wished to marry against the wish of her marriage guardian (*wali*) had to convert herself to the Hanafi *mazhab* in order to avoid the rule of Shaffie law that a woman requires the approval of her *wali* for contracting marriage. It is mainly for this reason that the Kandy Forum[130] has proposed the adoption of a pluralistic approach without restricting to a particular school of thought in order to give more importance to Quran and Sunna than individual *mazhab*.

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[127] *See, Abdul Cader v Razik* (1953) 54 NLR 201 (PC) and *A.L.M.Haniffa v A.A.Razack* 60 NLR 287; See, also Section 25(1) of the MM&D Act, *supra* note 1.
[128] Mapillai Alim, *Fat-hud-Dayyan fi Fiqhi Khairil Adyan,* (Translated by Saifuddin J. Aniff-Doray) (1963 edition) page 534.
[129] *A.L.M.Haniffa v A.A.Razack, supra* note 127.
[130] See, the Representations of the Kandy Forum, *supra* note 65 at page 7. See also, Razmara Abdeen, *Sectarianism in Islam,* [2016-2017] 51 Meezan page 179, Dr. Nazima Kmardeen, *Human Rights in Islam*, [2016-2017] 51 Meezan page 172.

6.6.05 The *second* of these grounds is that the division of persons according to their sect or on the basis that they are followers of the Shaffie, Hanafi, Maliki, or Hanbali schools of thought (*mazhab*) and applying a different body of law to the followers of each sect or *mazhab*, is not consistent with certain Quranic injunctions,[131] and in particular attention is drawn to the following verse from the Holy Quran 6:159 *Surah Al-An'am* in which Allah says to our Prophet Muhammad (PBUH)-

> "As for those who divide
> Their religion and break up
> Into sects, thou hast
> No part in them in the least:
> Their affair is with God:
> He will in the end
> Tell them the truth
> Of all that they did."[132]

6.6.06 It is significant that Abdullah Yusuf Ali, in his commentary on this verse, observes that the Arabic term *'farraqu'*, which literally means "divide the religion", may lead to sectarian bias which will break up the unity of Islam.[133] It is noteworthy that the All Ceylon Jamiyyathul Ulama (ACJU) has expressed a contrary view to the effect that the above quoted verse was "revealed with regard to the Jews and Christians and does not refer to the different schools of thought or *madhabs*".[134] However, it is significant to note that in another verse of the Holy Quran[135] the Almighty Lord of the Universe explains that "they became divided only after knowledge reached them, through selfish envy as between themselves.….*But truly those who have inherited the Book after them are in suspicious doubt concerning it.*" The Almighty Allah, has likened those who divide the religion to those indulging in idol worship.[136] It is necessary to stress that it is not the opinion of this Committee that the *mazhabs*, which reflect the flexibility, virility and dynamism of the *shariah*, by themselves constitute *bidah*[137]. However, in the view of this Committee, the rigid application of the law of a

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[131] See, Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women, supra* note 4 at page 16.

[132] The Holy Quran 6:159 *Sura Al-An'am* (Ed: Abdullah Yusuf Ali).

[133] *ibid.,* footnote 985. According to Abdullah Yusuf Ali, the Arabic term '*farraqu*' might refer to endeavours by man to (1) make a distinction between one part of it and another, take the part which suits and reject the rest; or (2) have religion one day of the week and the world the rest of the six days; or (3) keep "religion in its right place," as if it did not claim to govern the whole life; make a sharp distinction between the secular and the religious; or (4) show a sectarian bias, seek differences in views, so as to break up the unity of Islam.

[134] Representations of the ACJU, *supra* note 63 page 6.

[135] The Holy Quran 42:14 *Sura Ash-Shura* (Ed: Abdullah Yusuf Ali).

[136] The Holy Quran 30:31 to 32 *Sura Ar Room* (Ed: Abdullah Yusuf Ali).

[137] The term *bidah* refers to innovation in religious matters, but it is noteworthy that scholars make a two-fold classification of *bidah* as *bidah sayyiah* and *bidah hasanah*. The former (*sayyiah*) consist of an innovation that goes against the Holy Quran and the Sunnah, while the latter (*hasanah*) is something new that is not inconsistent with the letter and spirit of the Holy Quran and Sunnah. See, Concept of Bidah in Islam, International Islamic Web accessible at: *http://www.alahazrat.net/islam/concept-of-bidah-in-islam.php*

particular *madhab* to those considered to be governed by that *mazhab* as provided expressly in section 16 and other provisions of the MM&D Act, would inflexibly tie down the adherents of that *mazhab* exclusively to the teachings of that *mazhab* and deprive them of the freedom of considering the norms accepted by other *mazhabs*. This would tantamount to a kind of sectarian division which will not be condoned by Allah as set out in the above quoted verses of the Holy Quran.

6.6.07 The *third* reason advanced by those agitating for the removal of the reference to "sect" in the MM&D Act is the difficulty, from a purely pragmatic point of view, of applying the provisions of sections16 for determining the validity of a marriage between parties belonging to two different "sects" such as a marriage between a Sunni and Shiah party or Shaffie and a Hanafi party, in which situation the question would arise as to whether the matter should be decided according to the law governing the "sect" to which the bride-groom belongs or the law governing the sect to which the bride belongs. For instance, if the bride marries without the approval of the *wali* or Quazi, is the marriage valid? On the reasoning of *A.L.M.Haniffa vs. A.A.Razack*[138] the bride had no capacity, but should the groom according to whose school of law the marriage is obviously valid, be permitted to challenge it? Secondly, let us suppose that the bride's *wali* approved the marriage, but there were only one male and two female witnesses at the *nikah* ceremony. According to Hanafi law the marriage is valid.[139] But according to Shaffie law, the marriage is void.[140] Since the validity of the marriage has to be determined according to *the law of the sect to which the parties belong,* should the matter be decided by applying the Hanafi law or Shaffie law?[141] A related question is that, if only the bride belongs to a particular sect and the bridge groom does not believe in any, again the question arises as to whether the bride groom who does not believe in any particular sect will be bound by the law of the sect to which the other party to the marriage belongs. The MM&D Act does not provide any answer to these questions.[142]

6.6.08 There is a fair amount of consensus in the Muslim community that the reference to "sect" in sections 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2) and 98(2) of the MM&D Act and the Schedules thereto should be removed to overcome the doctrinal, pragmatic and theoretical issues set out above and also in order to provide the Quazi with the freedom to consider the opinions of all the great

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[138] *A.L.M.Haniffa v A.A.Razack, supra* note 127.
[139] Tahir Mahmood, *The Muslim Law of India* (1982 edition) page 53.
[140] A.R.I.Doi, *Shariah: The Islamic Law* (1984 edition) page 138.
[141] One cannot obviously utilize the rule contained in Section 2 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 for the resolution of this problem as the said provision will apply only where there is a valid marriage between the parties, the very question that arises for determination in the illustration. Furthermore, the said provision will not apply when the man and woman belong to the same race or nationality. *See*, *Manikka v Peter* (1901) 4 NLR 243 and *Bandaranayake v Bandaranayake* (1924) 24 NLR 245.
[142]Some problems of application arising from the reference to "sect" in these sections are illustratively explained in Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women, supra* note 4 at pages 17 to 18. See also, Saleem Marsoof, *Maslahah Mursalah as a Basis for Muslim Law Reform in Sri Lanka*, *supra* note 56.

Imams in the resolution of a difficult case coming up for decision before the Quazi. The adoption of such an eclectic approach will no doubt produce a rich blend of Sunni law. It has been suggested that the process of *takhayyur,* by which is meant the jurisprudential methodology of selecting one among the available rulings or opinions of a single *mazhab* or of the different *mazhabs* on a broader scale for the purpose of legislation and enforcement is permitted in Islam, and the exercise of *takhayyur* can produce just results in decision making.

6.6.09 The Chairman of this Committee, in his book entitled *The Quazi Court System in Sri Lanka and its Impact on Muslim Women,*[143] has highlighted the serious adverse implications of the reference to "sect" in the MM&D Act, and in those circumstances, the Chairman of this Committee and several other members of the Committee were of the view that the references to "sect" in the MM&D Act must be removed. However, some other members of this Committee, particularly the signatories to the booklet attached to this Report marked B5[144], were of the view that the schools of law (*mazhab*) performed a useful function and that the references to "sect" should remain in the Act. A solution to this impasse that came out of discussions this Committee held with the Fathwa Committee of the Jamiyyathul Ulama is to reformulate section 16 and other provisions of the Act so that all matters coming within the purview of the MM&D Act shall be governed by the Shaffei school of thought subject to the overriding principle of *maslahah mursalah* (public interest) in the lines of section 33 of the Singaporean Administration of Muslim Law Act of 1966[145]. Accordingly, if this proposal is adopted, tenets of the Shaffei *mazhab* shall be applied with respect to all persons governed by the MM&D Act, but in the event that the following of the tenets of the said *mazhab* will be opposed to the public interest, the court may follow the tenets of the Hanfi, Maliki or Hanbali schools of thought as may be considered appropriate. This Committee is not inclined to adopt the Singaporean solution as it would not suit the situation in this country since there is a large number of Muslims in Sri Lanka who are not sufficiently familiar with the rules of even the *mazhab* they believe they belong to, and there is also a large number of Muslims who do not consider themselves as followers of any particular sect or *mazhab*. It will therefore be unfair to compel a person who belongs to a *mazhab* other than Shaffei or a person who does not adhere to any sect or *mazhab* to be regarded as being bound by the tenets of the Shaffei school of thought. Although some of our learned colleagues of this Committee take the view that section 16 itself sanctions the *right* to adhere to a particular *mazhab*, they fail to realize that it is also implicit in the said provision that a person may refrain from subscribing to the teachings of any particular school of thought.

6.6.10 In the considered opinion of this Committee, if the deletion of all reference to "sect" or *mazhab* in sections 16 and 98(2) and other connected sections to enable all Muslims to be governed uniformly

[143] *ibid.,* pages 13 to 18.
[144] The document attached to this Report as Annexure B5 dated 26th November 2017 was signed by the following members of this Committee: Hon Justice A.W.A Salam, Mr. Faisz Musthapha PC, Dr. A.M. Shukri, As-Sheikh M.I.M. Rizwe Mufti, As-Sheikh M.M.A. Mubarak, Ms. Fazlet Sahabdeen, and Mr. Nadvi Bahaudeen.
[145] *Supra* note 61.

by the principles of Muslim law without categorising them according to "sect" is found unacceptable, it would be desirable to provide a mechanism for clarifying the law applicable to determine the validity of a marriage between two persons belonging to two different sects, particularly where they have not agreed to abide by the law of one particular sect, or where they do not consider themselves as adherents of any "sect". It is recommended that in that event, any question of validity of the marriage, status of the parties or their marital obligations should be determinable by the general principles of Muslim law, without being confined to the tenets of any particular school of thought. This position is supported by a verse of the Holy Quran[146], that was referred to, albeit incompletely, by the All Ceylon Jamiyyathul Ulema at page 4 of its representations,[147]which is quoted below in full:

> "O you who have believe!
> Obey God, and obey the Apostle,
> and those charged
> With Authority among you.
> And if yee differ in anything
> Among your selves, refer it
> To God and his Apostle,
> If ye do believe in God
> And the Last Day:
> That is the best, and most suitable,
> for final determination."

In the view of the Committee, if any court has any difficulty in that regard, it could seek the opinion of the Muslim Marriage and Divorce Advisory Board (MM&DAB). This position has been supported even by the signatories to the document attached to this Report marked B5, who have suggested an alternative provision to be added to section 16 of the MM&D Act the amendment of which they oppose, in the following lines:

> 16(1) *In any case of difficulty, the Quazi Court or other court that has to make a decision on marriage & divorce to any sect to which the parties belong to may consult the Muslim Marriage and Divorce Advisory Board and the said board may follow the tenets of any of the other sect as may be considered appropriate, but in doing so, the judgment or order of the said Marriage and Divorce Advisory Board shall set out in clear detail the applicable principles with all necessary explanations.*

This draft formulation demonstrates a fundamental flaw in the opinion of the signatories to B5, which is that if the Muslim Marriage and Divorce Advisory Board is to be empowered the task of interpreting

[146] The Holy Quran 4:59 *Surah Nisaa* (Ed. Abdullah Yusuf Ali)
[147] Representations of the ACJU, *supra* note 63 page 4.

the applicable substantive law by the process of *takhayyur* or eclectic choice, after the enhancement of the status of the Quazi Court and that of individual Quazis as proposed in this Report, the Quazis themselves should be capable, by reason of their knowledge of Muslim law and principles of *shariah* and *fiqh*, to adopt the same process of juridical reasoning, and only cases of extreme difficulty may be referable to the Muslim Marriage and Divorce Advisory Board. Their argument that the Quazis are incompetent to apply the principle of *takhayyur* or eclectic choice is inconsistent with their opposition noted in paragraph 6.2.05 of this Report, to the recommendation of the undersigned members of this Committee that only Attorneys-at-law with in-depth knowledge of *shariah* and *fiqh*, should be appointed as Quazis.

6.6.11 Another fundamental question is whether the reference to "divorce" in section 16 and 98(2) should be deleted. The Muslim Women's Research and Action Forum (MWRAF) has in its representations[148], proposed that sections 16 and 98(2) should be confined to marriage, and the reference to "divorce" in the said section should be omitted. The ACJU has strongly objected to this proposal in its representations, stating that the same substantive law should apply to marriage and divorce,[149] and by the document attached to this Report marked Annexure B5, seven members of this Committee (including the two representatives of ACJU in the Committee) have expressed the same view. MWRAF has sought to justify the removal of the word "divorce" from these sections by highlighting the irreconcilable conflict that exists between provisions such as section 16 and 98(2) on the one hand and provisions such as sections 27 and 28 which specifically seek to regulate all matters arising in applications for divorce through the application of the carefully drafted schedules referred to expressly in those provisions. In the opinion of this Committee, conflicts of the kind that arose in decisions of our courts in *Nansoora v Sithi Jariya*[150] and *Mohomed Farook Khan v A.H. Moomin and Others*[151] and the difference of juristic thought adverted to in *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*,[152]may best be avoided by removing the reference to "divorce" from sections 16 and 98(2) of the MM&D Act.

6.6.12 Reference has already been made in paragraph 2.1.02 of this Report to the controversy created by the decision of the Supreme Court in *King v Miskin Umma*,[153] which had to be resolved by enacting the Muslim Marriage and Divorce Registration Ordinance of 1929 by which the Quazi Court and Board of Quazis were established to deal exclusively with the resolution of matrimonial disputes involving Muslim parties. Additionally, in the opinion of this Committee, the reference to "divorce" in sections 16 and 98(2) of the MM&D Act is clearly inconsistent with the express provisions of sections 27 and

[148]Representations of the Muslim Women's Research and Action Forum (MWRAF) included in volume II to this Report marked marked Annexure C5, *supra* note 83, page 22.
[149] See the Representations of the ACJU, *supra* note 63, page 78.
[150] *Nansoora v Sithi Jariya* (1945) MMDR vol III page 40.
[151] *Mohomed Farook Khan v A.H. Moomin and Others* (1994) BALJR vol V page 80.
[152] Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women, supra* note 4 at page 51.
[153] *Supra* note 9.

28 of MM&D Act read with the relevant schedules, and has already given rise to pragmatic difficulties as noted in paragraph 6.6.11 of this Report.[154] The retention of the word "divorce" in section 16 and 98(2) could also create controversy in Sri Lanka similar to that which culminating in the decision of the Indian Supreme Court in *Shayara Bano v Union of India* and other connected cases[155] involving the constitutionality and *shariah* consistency of the *triple talaq*, and resurrect the issue that was dealt with and disposed of for good by the decision of the Supreme Court in *King v Miskin Umma* in 1925 and the enactment of the Muslim Marriage and Divorce Registration Ordinance of 1929[156] which established the Quazi Court system.

6.6.13 The view expressed by the signatories to B5 that the word "divorce" should not be deleted from sections 16 and 98(2) on the basis that according to the *shariah* principles the Quazi has no role to play in *talaq*, which is a male prerogative, overlooks the fact that *talaq* is not the only mode of divorce and section 28 of MM&D Act itself recognizes the power of the Quazi Court to grant divorce based on matrimonial fault (*fasah*) and other factors such as repulsion or aversion (*khula*) when it is satisfied that that the spouses could no longer live together in conformity with their conjugal obligations, as recognized by the *shariah*. Furthermore, the extreme view adopted by ACJU and the signatories to B5 ignore the pragmatic considerations of natural justice that requires that all parties to any dispute should have notice of matters that affect their status, which rule is often violated when the *talaq* is pronounced without recourse to the Quazi Court, and is altogether inconsistent with the fundamental rule of the *shariah* that *talaq* should only be a last resort when all avenues of reconciliation have failed. It is noteworthy that section 27 read with the Second Schedule emphasize and implement the requirement of reconciliation. These safeguards provided by the existing provisions of the MM&D Act, will altogether be flouted if the word "divorce" is permitted to remain in the aforesaid provisions of the MM&D Act. All that this Committee seeks to do by deleting the word "divorce" from these provisions is to avoid the ambiguity and doubt that is created by the existence of self-contradictory provisions in the Act.

6.6.14 In view of the absence of unanimity in this regard, the undersigned members of the Committee propose the following amendments to the MM&D Act for the reasons fully set out in paragraphs 6.6.01 to 6.6.12 of this Report:-

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[154] See, *Nansoora v Sithi Jariya* (1945) MMDR vol III page 40 and *Mohomed Farook Khan v A.H. Moomin and Others* (1994) BALJR vol V page 80.

[155] *Shayara Bano v Union of India* Writ Petitions (C) No. 118 of 2016 and five other connected cases, bearing reference Writ Petitions (C) No. 2 of 2015, No 288 of 2016, No 327 of 2016, No 665 of 2016 and No. 43 of 2017 (decided on 22.8.2017) accessible at: https://www.outlookindia.com/website/story/full-text-of-the-court-order-supreme-court-declares-triple-talaq-unconstitutiona/300633

[156] The Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, *supra* note 12.

(a) Amending sections 16 and 98(2) of MM&D Act by the removal of the word "divorce" from those sections to avoid conflict with sections 27 and 28 of the Act and the schedules referred thereto; and

(b) Amending sections 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2) by the deletion of any reference to "sect" (or *mazhab)* so that all matters contemplated by those provisions will be governed by the principles of "Muslim law", and the opinions of all recognized schools of thought may be considered in making orders and decisions of the Quazi Court and the appellate courts.

6.6.15 There is some consensus among members of the Committee in regard to the following alternative recommendations, which would arise for consideration only if the government decides not to implement the recommendation contained in paragraph 6.6.14 (b) of this Report:-

(1)Provision be made in the MM&D Act for the bride and bride groom who may belong to two different *mazhabs*, to mutually agree in their declarations made in terms of section 18(1) of the Act to abide by the Muslim Law governing a *mazhab* of their choice in regard to all aspects of their marriage including its validity, nullification and termination.

(2)In the event that both parties to a marriage do not belong to any *mazhab*, or where the two parties belong to two different *mazhabs* and they have not mutually agreed to abide by the Muslim law of any particular *mazhab* in the declaration made in terms of section 18(1), express provision be made in section 16 and other relevant provisions that the validity of a Muslim marriage shall be governed by the principles of Muslim law, without being confined to the law governing any particular *mazhab*.

(3)In the even the recommendation contained in paragraph 6.6.14(b) of this Report is not acceptable to the government, and the recommendations in sub-paragraphs (1) and (2) above are acceptable, three new provisions to be added to section 16 as sections 16A in the following lines:

Section 16A: Notwithstanding the provisions of section 16 and 98(2) of this Act-

(i) where the parties to a Muslim marriage belong to two different sects, all matters relating to the said marriage including its validity or otherwise, and the status and the mutual rights and obligations of the parties shall be determined by the Muslim law governing the sect which the parties to the marriage have mutually agreed to subject themselves to in the declarations made by them in terms of section 18(1) of this Act;

(ii) where one or both parties to a Muslim marriage do not belong to any sect, or where the parties to the marriage belong to two different sects but they have not mutually agreed to abide by the Muslim law of any particular sect in the declaration made by them in terms of section 18(1), all the matters relating to the said marriage shall be governed by the principles of Muslim law, without being confined to the law governing any particular sect.

(iii) where in any situation falling within the provisions of the preceding sub-sections of this section, any question of difficulty arises in regard to the validity or otherwise of a marriage or the status, rights and obligations of the parties to the marriage in any proceedings in the Quazi Court or any other court that is required to make a decision or order, such court may consult the Muslim Marriage and Divorce Advisory Board by a reference addressed to the said Board. In making its determination, the said Board may consider the applicable principles of Muslim law and shall set out in its determination in clear detail the applicable principles with all necessary explanations.

(4)It is important to empahsise that the proposed section 16A need not be enacted if recommendation contained in paragraph 6.6.14(b) of this Report is accepted by the government for implementation.

G - Bringing out the Consensual Nature of Marriage and providing for its Proper Registration of Marriages

6.7.01 As Mahmood J. observed in *Abdul Kadir v Salima*,[157] marriage, according to Muslim law, "is not a sacrament but a civil contract". The consensual nature of marriage is emphasised in the Holy Quran 4:26 *Surah Nisaa* where it is described as a "solemn covenant"[158], and is brought out in the practice of making an offer (*ijab*) and acceptance (*qabul*) in the presence of witnesses at a *nikah* ceremony. Of course, it is stated in *Minhaj-et-Talibin,*the major treatise of the Shaffie school, that-

> "A father can dispose as he pleases of the hand of his daughter, *without asking her consent*, *whatever her age may be,* provided she is still a virgin. It is however always commendable to consult her as to her future husband; and her formal consent to the marriage is necessary if she has already lost her virginity. Where a father disposes of his daughter's hand during her minority,

[157]*Abdul Kadir v Salima* (1886) ILR 8 Allahabad, 144 at page 154.
[158]Holy Quran, 4:21 *Surah Nisaa* (Ed. Abdulla Yusuf Ali)

she cannot be delivered to her husband before she attains puberty. In default of the father, the father's father exercises all his powers.[159](*Emphasis added*)

6.7.02 According to Hanafi doctrine, a child becomes *sui juris* for purposes of marriage on attaining puberty, and may contract marriage without the concurrence of the marriage guardian (*wali*) or the approval of the Quazi,[160]Certain doubts that existed in the Shaffie law in regard to whether a marriage guardian (*wali*) could give in marriage a daughter or a female ward *without her consent*[161] had to be resolved by enacting section 25(1) of the Muslim Marriage and Divorce Act[162] to clarify that the marriage guardian should be present at the time and place where the marriage contract is entered into and must communicate "*her consent* to the contract and his own approval thereof."

6.7.03 It is noteworthy that section 17(1) of the MM&D Act explicitly provides that "save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act *shall be registered* as hereinafter provided, immediately upon the conclusion of the *nikah* ceremony connected therewith." In the year 2016, a total of 21,466 Muslim marriages were registered[163], but unfortunately, no statistical information is available regarding the number of unregistered Muslim marriages, which are believed to take place very often with dire consequences, despite the penal sanctions that exist in the Act. Section 16 of the MM&D Act does not make registration a pre-condition for any marriage coming within its purview to be considered as valid and binding. It simply enacts that the validity of a Muslim marriage shall be determined by the Muslim law governing the sect to which the parties to such marriage belong (this aspect of section 16 has been considered in Section F of this Report), and goes on to provide that "*nothing contained in this Act shall be construed to render…invalid, by reason only of…non-registration, any Muslim marriage or divorce which is otherwise…valid*".

6.7.04 Apart from the aspect of section 16 of MM&D Act involving the reference therein to the "sect to which the parties belong", which was considered in paragraphs 5.6.01 to 5.6.10 and paragraph 5.6.13 of this Report, the other significant issue that arises in relation to section 16 is *whether registration should be made a pre-condition for the validity of a Muslim marriage*. The general consensus in the Muslim community is that the time is now ripe for making registration of a marriage mandatory and while making stringent provisions to ensure that all marriages are registered, the sanctions already contained in the Act against the failure to register a marriage solemnized between persons professing Islam should be enhanced in a meaningful manner. However, there is no consensus in regard to the question whether registration of a marriage should be considered a pre-

[159]Nawawi *Minhaj-et-Talibin, supra* note 99, Book 33, Chapter 1, Section 4, 284.
[160]*See Haniffa vs Razak* 60 NLR 287. See also Hamilton, 'Hedaya' Volume 1, Book II Chaptr 34.
[161] *See, Yaseen v Noor Naeema* 3 MMDLR 113 and *Rhoda Ryde v Ibrahim* 3 MMDLR 130.
[162]Muslim Marriage and Divorce Act, *supra* note 1.
[163] See Table 7 of Bulletin of Vital Statistics, Registrar General's Department, Ministry of Home Affairs accessible at: http://www.statistics.gov.lk/PopHouSat/VitalStatistics/Bulletin/AnnualBulletin2016.pdf

requisite for the purpose of making the contract of marriage valid and binding on the parties. In regard to this question, reference has been made to the following commandment of the Almighty in the Holy Quran 2:282 *Surah al-Baqarah*-

> "….And get two witnesses,
> Out of your own men,
> And if there are not two men,
> Then a man and two women,
> Such as ye choose, for witnesses,
> So that if one of them errs,
> The other can remind her." [164]

6.7.05 Applying the principles of *usul al-fiqh,* and in particular, considering the rampant abuse of the objectives of the law and difficulties to the parties that arise from the failure to register a marriage, and the explicit provisions of Section 17 of the existing providing that "every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith", the undersigned members of this Committee are of the view that section 16 should be amended by the removal of the words "*nothing contained in this Act shall be construed to render…invalid, by reason only of…non-registration, any Muslim marriage or divorce which is otherwise…valid*", and clear provision should be made to make the validity of a marriage depend on the solemnisation of the marriage according to the principles of Muslim law *and the registration thereof*. It is the unanimous opinion of the undersigned members of this Committee that the above quoted words of section 16 give the "wrong signal" to the public and to those who intend entering into the bond of matrimony, when the objective of the Act as well as the already quoted verse of *Surah al-Baqarah* stress the need to reduce all important transactions involving future obligations *to writing in the presence of witnesses* in order to avoid any doubt or ambiguity, particularly in regard to the existence of a marriage relationship between two persons as well as establishing the legitimacy of children born to the marriage. In this context, it is clear from the following passage of *Minhaj-et-Talibin,* the major treatise of the Shaffie school, that the incompetence of the witnesses to a *nikah* affects its validity:-

> "Though our school *regards as null* a marriage effected before witnesses whose incompetence from notorious misconduct was known at the time, this circumstance alleged after the celebration is only admissible if legally proved or admitted by the parties."[165]

It is the opinion of the undersigned members of this Committee that such lingering doubts of the validity of a marriage may be ideally dispelled by the registration of the marriage, and there are very

[164] Holy Quran 2:282 *Surah al-Baqarah* (Abdullah Yusuf Ali)
[165] Nawawi, *Minhaj-et-Talibin*, *supra* note 99, Book 65, Chapter 1, Section 4, 284.

good reasons for recommending that marriages that are not registered should be regarded as invalid in the eyes of the law.

6.7.06 It is noteworthy that the Muslim Women's Research and Action Forum (MWRAF) has recommended that the registration of the marriage should be made a pre-condition to the validity of the marriage, and provision should be made for the registration of the marriage at the time the *nikah* takes place, and for the signature of the bride to be obtained signifying her consent to the marriage, along with the signature of the *wali* of the bride*,* where the same is required by law.[166] In the opinion of MWRAF, this would enable the bride to express her consent to the marriage in the clearest manner, and avoid all ambiguity in regard to the existence and validity of the marriage. The undersigned members of the Committee are of the view that a marriage that is not registered under the Act should be declared invalid for the purpose of preventing the widespread abuse of the provisions of the Act by unscrupulous persons and the difficulties of proving an unregistered marriage as time goes by, particularly for purposes of admitting a child to a school (where it is advantageous for the child's father to make the application under the Chief Occupier category) and for establishing heirship in cases of intestate succession.

6.7.07 A matter of concern was the fact that section 23 of the MM&D Act, which required the approval of the Quazi for the registration, though not the solemnization of the marriage of a girl below 12 years of age, may easily be side-stepped by unscrupulous persons for marrying girls below the age of 12 (or whatever higher age that may be suggested by this Committee under Section H paragraphs 6.8.13 to 6.8.15 of this Report) without the Quazi's prior permission. In this context, it is significant to note that the Muslim Law research Committee[167] which was chaired by Dr. H.M.Z Farouque, observed as follows in paragraph 5.2 of its report:

> "Section 22, 24(4), 25(2) and 26 prohibit the registration of certain classes of marriages. We would recommend that the *solemnization of such marriages too be prohibited*. (as regards section 23 see the recommendation in para 3:4 above."

A reading of paragraph 2:4 of the Farouque Committee Report will also show that a similar recommendation was also made with respect to section 23, which will be considered in greater detail in the next following Section H of the Report of this Committee.

6.7.08 Notwithstanding these pragmatic considerations, there was considerable reluctance on the part of some of the other members of the Committee to agree to any amendment of section 16 which

[166] Representations of the Muslim Women's Research and Action Forum (MWRAF) included in volume II to this Report marked C5, *supra* note 84, pages 27 and 28.
[167]the Report of the Muslim Law Research Committee chaired by Dr. H.M.Z.Farouque*: Proposals for the Amendment of the Muslim Marriage and Divorce Act*, supra note 23 at page 60.

would make registration a pre-condition to the validity of the marriage on the basis of two grounds, namely that-

(a) registration was traditionally not a pre-condition for the validity of a *nikah* under the *shariah*, which only required an offer to marry (*ijab*) for a specified *mahr* and an acceptance of the said offer (*qabul*) in the presence of the person who conducts the *nikah* and the required number of witnesses[168]; and

(b) the possibility that the insistence of registration as a pre-condition for validity could render the child or children born to the marriage illegitimate[169].

With respect to ground (a) it is relevant to note that in the days of our Holy Prophet there was no system for the registration of births, marriages, divorces or even deaths. If only there had been a system of registration of births, modern day scholars would be relieved of the task of speculating as to whether the age at which Hazrat Aisha (Ral) married the Prophet was 9 years or 19 years.[170] There is nothing in the Holy Quran or the Sunnah of the Prophet in regard to registration, but the Holy Quran 2:282 *Surah al-Baqarah* recommends that "when ye deal with each other in transactions involving future obligations in a fixed period of time" to reduce same into writing and signed in the presence of witnesses. It is possible to argue that that a contract of marriage will come within the objective of this verse since it involves future obligations for a significant period of time, and it is obvious that the policy behind the recommendation in the Holy Quran was to maintain some tangible evidence of such transactions so that there can be no doubts about its terms. It must be noted that a written agreement to marry is still a private document in the hands of the parties to the marriage, and does not necessarily get into the public domain. Islam encourages the *nikah* to take place in public although the essential requirement is that it should be before at least two witnesses, and secret marriages are contrary to the letter and spirit of the *shariah*. Had a system of registration existed at the time of the Prophet, the practice of registering marriage contracts would have naturally arisen because the *shariah* insists that marriage shall not be a secret arrangement but must be contracted in public, and it is in the public interest to give publicity to the marriage relationship and maintain clear records of births, deaths, marriages and divorces.

6.7.09 As already noted, Section 17(1) of the MM&D Act explicitly provides for compulsory registration of marriages and the failure to register a marriage is rendered a penal offence. Case studies conducted by women's activists show that extremely young and immature girls have been taken for a ride by unscrupulous men, and it is this aspect of widespread abuse that makes it essential to make stringent provisions in regard to the requirement of registration. In certain parts of Sri Lanka, where the position of young girls and women is more vulnerable than in Colombo, there is a marked

[168] See, ACJU Representations, *supra* note 63, page page 34.
[169] *Ibid.,* page 36.
[170] See, A Faizur Rahman, *Hazrat Aisha was 19 not 9*, the Hindustan Times of 9th May 2009 accessible at http://www.hindustantimes.com/india/hazrat-aisha-was-19-not-9/story-G4kaBHqM0VXoBhLR0eI2oO.

propensity of marriages, particularly of young girls, not being registered. In certain parts of Sri Lanka where certain extremist ideologies are dominant, there is an "anti-registration" movement which discourages the registration of births, marriages, divorces and even deaths. Although it is the position of ACJU that statistics available with the Registrar General do not show a general increase in the number of polygamous marriages or child marriages[171], it has to be stressed that the Registrar General has very clearly stated in paragraph 3 of his letter dated 14th July 2017 addressed to the Secretary to the Ministry of Justice (Annexure B9) in response to the letter sent by the latter to the Registrar General dated 31st May 2017 appended to this Report as Annexure B8, that the Registrar General's Department has no data relating to unregistered marriages. Statistics provided by the Registrar General (Table A) show that of the total of 19,217 marriages involving Muslims registered in Sri Lanka in 2007, only 6 involved men who were entering into a second marriage. Similarly, of all registered Marriages involving Muslims for the year 2007, 18,072 marriages involved females who were above 18 years, as against 2,925 involved girls who were between 12 and 18 years of age.

Table A – Muslim Marriages registered in Sri Lanka in 2007

Year		2007	Total figures for 2007
Sri Lanka	**Total number registered Muslim Marriages**		**19,217**
	No.of marriages where bride is below than 12 years of age	0	
	No.of marriages where bride is 12	0	
	No.of marriages where bride is 13	1	
	No.of marriages where bride is 14	19	
	No.of marriages where bride is 15	61	
	No.of marriages where bride is 16	284	
	No.of marriages where bride is 17	780	
	No.of marriages where bride is 18	1,780	
	No of marriages where bride is between 12 and 18 years		**2,925**
	No of marriages where bride is above 18 years		**16,292**
	No.of marriages where groom has a previous marriage	6	
	Total number registered Muslim Marriages		**19,217**

Source:Registrar- General's letter dated 14th July 2017 to the Secretary to the Ministry of Justice (Annexure B9) and annexures thereto.

6:7:10 Furthermore, statistics tabled by the Hon. Minister of Home Affairs in Parliament in response to Question No. 1500/16 raised by Hon. M.H.M Salman, Member of Parliament, the data sheet relating to which was annexed to the letter dated 4th October 2017 (Annexure B11) sent by the

[171] *See*, ACJU Representations, supra note 63, page 52.

Registrar-General to the Secretary to the Ministry of Justice in response to his letter dated 17th August 2017 (Annexure B10) reveals that the number of registered marriages involving Muslim girls aged between 12 and 18 years had decreased to 1,777 by 2016.[172] It is noteworthy that the number of registered marriages involving Muslim girls aged between 12 and 18 years had significantly decreased between 2007 and 2016. However, the number of girls involved is still high, and statistics show that as between the years 2014 to 2016 there appears to be an upward trend in the number of registered marriages involving Muslim brides. The detailed figures relating to marriages registered involving Muslim parties for the years 2014 to 2016 are summarised in Table B below:-

Table B – Muslim Marriages registered in Sri Lanka in 2014 - 2016 – Number of brides between 12 – 18 years

Districts	2014	2015	2016	Province
Colombo	287	251	250	Western
Gampaha	117	110	132	
Kalutara	83	84	100	
Kurunegala	79	64	92	North Western
Puttalam	117	125	114	
Anuradhapura	54	53	49	North Central
Polonnaruwa	29	30	48	
Jaffna	Nil	1	4	Northern
Kilinochchi	Nil	Nil	Nil	
Mullativu	1	4	3	
Vavuniyar	7	5	14	
Mannar	4	3	6	
Batticaloa	190	184	163	Eastern
Trincomalee	275	310	316	
Ampara	192	224	264	
Galle	33	56	54	Southern
Matara	20	14	20	
Hambantota	29	25	30	
Kandy	90	68	46	Central
Matale	30	20	17	
Nuwara Eliya	3	14	2	
Badulla	37	15	19	Uva
Monaragala	1	2	2	
Kegalle	18	40	21	Sabragamuwa
Ratnapura	22	15	11	
Sri Lanka	**1,618**	**1,717**	**1,777**	

[172] Question No. 1500/16 raised by Hon. M.H.M Salman, MP from the Hon. Minister for Home Affairs was as follows: "Will he inform this House, separately, in terms of each district, of the number of marriage registrations performed in connection with the Muslim girls of the age 12 to 18, in terms of the Muslim Marriages and Divorces Act?"

Judging by the reports of abuse of the provisions of the Muslim law, particularly the propensity of not registering marriages involving young girls or supplying wrong dates of birth to the Registrars at the time of registration, these figures of registered marriages may be described as the trip of the iceberg, and the problem of sexual abuse and exploitation of young women goes on unabated. It is therefore time to act.

6.7.11 It is evident from representations received by this Committee that most polygamous marriages and child marriages are not registered, and even if they are registered, false declarations are often made with respect to whether the man is a party to a subsisting marriage or marriages, and in the case of child marriages, the age of the girl being married or given in marriage. In fact, the affidavit tendered to this Committee by Cader Saheeb Saheela marked Annexure B12, its English Translation marked Annexure B13 and the attachments thereto demonstrate how the registration of the birth of a child born to a woman who had married the father of the child without registration was falsified by the father to show that the child was that of another woman whom he had married whose marriage was registered. The circumstances of this case clearly violate the public interest (*maslahah mursalah*) of preserving the progeny or lineage, which is one of the five principal interests that are sought to be protected by the *shariah*, the other such interests being life, religion, property and knowledge (*akl*)[173] *maslahah mursalah* can no doubt play a major role in reforming the law relating to marriage and divorce in Sri Lanka, and the decisions of the Court of Appeal in *Ghouse v Ghouse*[174] illustrates how Justice M. Jameel, in a dissenting judgment which was later affirmed by the Supreme Court[175] applied the *maslaha* relating to lineage in resolving the conflict between section 6(3) of the Adoption of Children Ordinance[176], which provided that upon an adoption order being made, "the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter", and section 2 of the Muslim Intestate Succession Ordinance,[177] which provided for any question of intestate succession to a deceased Muslim shall be determined by reference to the "Muslim law governing the sect to which such deceased Muslim belonged", and all sects of Muslim law were unanimous that an adopted child, not being an agnatic heir, does not acquire by reason of such adoption, any right to succeed to the estate of a deceased adoptive parent. In arriving at his decision in the case, Justice Jameel observed that-

[173] See, for a useful article, Kamali, *Maqasid al Shariah*: The Objectives of Islamic Law, Islam 101 accessible at: http://islam101.net/index.php/shariah/141-maqasidalshariah
[174]*Ghouse v Ghouse*, [1986] 1 Sri LR 48 [CA].
[175] *Ghouse v Ghouse*, [1988] 1 Sri LR 25 [SC].
[176] The Adoption of Children Ordinance No. 24 of 1941 (Cap. 76 of the Unofficial Legislative Enactments of Sri Lanka, (1980 Edition).
[177] Muslim Intestate Succession Ordinance, No. 10 of 1931 (Cap. 72 of the Unofficial Legislative Enactments of Sri Lanka -1980 Edition).

> "Lineage, which implies consanguinity is one of the prerequisites to heirship in Muslim law. Accordingly, I hold that a child adopted under our Adoption Ordinance……does not qualify to be an heir under Muslim law."[178]

It is extremely obvious that the case of Cader Saheeb Saheela discussed above put the concept of progeny or lineage to total disarray.

6.7.12 Objection (b) put forward by those who are opposing the making of registration a pre-condition to the validity of a marriage is that it may render prohibited (*haram)* something that is otherwise permitted (*halal*) according to the *shariah*, and that in effect render illegitimate the children that may be born to an unregistered but otherwise valid marriage. The ACJU in its representations[179] was vocal in its objections, and asked:-

> "For instance in a non-registered marriage to which a child is born or not, and the couple comes forward for registration after a period, what has the proposed amendment regulated about this couple? Similarly, what is legal state of their relationship? *And what is the legal status of a new born, other than considering the child as illegitimate?* We consider, the absence of a solution to the above situation in your final draft, as a grave omission and would result in a major controversy in the community. Thus, the invalidity of a non-registered (sic) would definitely create an enormous deviation between Islamic *Shari'ah* and Muslim Personal Law."

The fears of ACJU were shared by a few other members of this Committee as well, but it is necessary to observe that the ACJU contentions are in fact totally unfounded, as registration certainly furthers two public interest requirements of Islam namely, (a) giving publicity to the marriage, which is the objective of *nikah*[180] and *walima*[181], and (b) the need to avoid uncertainty and ambiguity as to what the parties have agreed to in their marriage contract. Both these requirements may be justified under the concept of *maslahah mursalah.*[182] In fact, it is the duty of all right-thinking people to consider the pros and cons of the issue, and weigh the concerns raised by the ACJU and some other members against the abuses that are taking place in the Muslim community as a result of the legal position that registration is not a pre-requisite for the validity of a marriage. It is necessary to consider the question of registration in a broader perspective, and consider the plight of a girl or woman who is persuaded to enter a matrimonial relationship which she is unable to prove due to the lack of registration and the absence of other evidence (due to the circumstance that the *nikah* was a private and / or secret affair or the late stage in which the validity of the marriage has to be established, for instance in the

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[178] *Ghouse v Ghouse*, [1986] 1 Sri LR 48 at page 86 *per* Jameel J.
[179] Representations of the ACJU, *supra* note 63 page 36.
[180] *Nikah* is the Islamic solemnization of the marriage with an offer (ijab) and acceptance (*qabul*) in the presence of at least the requisite number of witnesses, but customarily in a ceremony at a masjid or at home.
[181] *Walima* is a public function hosted by the groom to celebrate the marriage.
[182] See for elaboration of the concept in the context of Sri Lankan Matrimonial Law Reform, Saleem Marsoof, *Maslahah Mursalah as a Basis for Muslim Law Reform in Sri Lanka*, *supra* note 56.

course of a testamentary case, and the demise or inability to trace the officiating priest and witnesses to the *nikah* ceremony to testify in court). It is well known and documented that the most pathetic cases of ill-treatment, lack of maintenance, desertion and other serious matrimonial issues arise from unregistered marriages, with dire consequences for the wife and children. Indeed, the ACJU representations quoted above which stress the issue of legitimacy of the off-spring of a marriage that may be deemed invalid, have failed to address the question of how a child will prove its own legitimacy in the absence of a marriage certificate that would provide *prima facie* evidence of the fact that its parents were lawfully married, particularly where the witnesses have passed away or left the country for good.

6.7.13 In any event, it is important to bear in mind that the concerns raised by the ACJU may be met by the creation of public awareness of the consequences of failing to register marriages. All members were of the unanimously of the opinion that efforts should be taken to create greater awareness in the Muslim community regarding the necessity to make registration of marriages compulsory and the legal consequences that would ensure from the failure to register a marriage. The Committee is of the opinion that more stringent provisions should be introduced to the Act with respect to notice of marriage, declarations to be made prior to the marriage, obtaining the consent of the bride and the bridegroom to the marriage, recording of terms of the marriage contract and the enhancement of punishments for offences under the Act for making false entries or declarations or failing to register or to cause the registration of marriage. General ignorance or lack of familiarity of the law prevalent in the community may be remedied by giving sufficient publicity in regard to the proposed amendments, particularly the serious consequences that could ensue from the failure to register a marriage through Jumma sermons, radio and TV broadcasts, news reports, the social media as well as through WhatsApp and SMS messages, which have become very popular in our society and can transmit information to every nook and corner. This Committee is also of the opinion that transitional provisions should be made providing for the recommended amendments to come into operation after a period of two years from the date of certification.

6.7.14 It is noteworthy that the fears expressed by the ACJU in its representations[183]about "the danger of children of marriages which are not registered being rendered illegitimate" are unfounded as such marriages may be registered subsequently in terms of section 32 of the MM&D Act, and in any event, the amendments suggested to Section 18 (proposed Section 18(2)(a) and (b) in regard to the duty of the Registrar to forward to the person who is expected to conduct the *nikah* ceremony a duplicate of the declarations made by the bride and groom and the prohibition sought to be imposed by section 18(2)(b) against the conduct of the *nikah* ceremony without receiving the said duplicate of the declarations) and the proposed enhancement of punishments recommended by the Committee to be imposed on those who are bound in law to have the marriage registered and failed to do so and the transitional provisions that will give two years' time for creating public awareness about the

[183] Representations of the ACJU, *supra* note 63 page 36.

significance and implications of the recommended amendments, will certainly prevent any injustice taking place to the parties to the marriage or the off spring of such marriage. In this context, it is necessary to stress that Sri Lanka has been since 12th December 1962, a party to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and is bound to give effect to the provisions of the said Convention relating to the consent to marry[184] and the registration of marriage.[185]

6.7.15 It is in the view of this Committee necessary to amend sections 39 to 42 of the Act in order to streamline the procedures for maintaining the Registers of Marriages and in particular for empowering the Registrar General to take steps as may be appropriate to facilitate the maintenance of electronic records of the contents of all the registers required to be kept under this Act by any Registrar of Muslim Marriages and contents of copies of entries relating to nullity of marriage and divorce sent to him by any Quazi in pursuance of the provisions of this Act with appropriate cross references. Such electronic record keeping can be helpful to verify by reference to the national identity card number, the marital status of any person seeking to enter into a contact of marriage without disclosing the fact that he or she was previously married and whether or not any previous marriage is subsisting.

6.7.16 In these circumstances, it is recommend that the MM&D Act be amended as follows (subject to a transitional provision that the said amendments shall come into effect only after the expiry of 2 years from the date of certification of the amending Act):-

(1) Repealing section 16 of the Act and replacing it with a provision enacting that "no Muslim marriage shall be valid unless it is solemnized in accordance with Muslim law and is registered as provided in this Act.";

(2) Amending section 17(1) by deleting the words "Save as otherwise hereinafter expressly provided," appearing at the commencement of that section;

(3) Amending section 17(2)(b) of the Act by substituting there to the following:-

"(b) the bride, or where the bride has not attained the age specified in section 25(1) or suffers from some other incapacity, the person who officiated as her marriage guardian (*wali*) at the time and place where the *nikah* ceremony was conducted;"

[184] UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, (10th December 1962) Art 1 which provides as follows: "No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."

[185] *ibid*., Art 3 which provides as follows: "All marriages shall be registered in an appropriate official register by the competent authority."

(4) Amending section 17(4) of the Act by substituting the following in place of paragraphs (a), (b), (c) and (d) of that section;-

"(a) the name and address of the bridegroom;

(b) the name and address of the bride, and where she was represented by her marriage guardian, the name and address of the person who officiated as her marriage guardian;

(c) the name and address of the person who conducted the *nikah* ceremony; and

(d) the date on which and the time and place at which the *nikah* ceremony was conducted."

(5) Amending section 17(5) of the Act by deleting therein the words "which is required by this Act to be registered";

(5) Amending section 18(1) of the Act by the substitution thereto of the following new provision:-

"(1) At least seven days prior to the intended date of solemnization and registration of a marriage, the following declarations shall be made in duplicate and in the prescribed form and manner and tendered to the Registrar of Muslim Marriages-

(a) a declaration by the bridegroom and, where the bridegroom has not attained the age specified in section 25(1) of this Act or suffers from some other incapacity, the person who intends to officiate as the marriage guardian (*wali*) of the bridegroom at the *nikah*, substantially in form IIA set out in the Schedule 1;

(b) a declaration by the bride and, where the bride has not attained the age specified in section 25(1) of this Act or suffers from some other incapacity, the person who intends to officiate as the marriage guardian (*wali*) of the bride at the *nikah*, substantially in form IIB set out in the Schedule 1."

(6) Repealing section 18(2) of the Act and renumbering section 18(3) of the Act as section 18(4) to enable the following new provisions to be introduced as sections 18(2) and18(3):-

(2) (a) After taking any action that may be prescribed by regulation for ensuring that the bridegroom and the bride go through a programme of pre-marital counselling, the Registrar of Muslim Marriages shall forward to the person before whom the marriage is intended to be solemnised one copy of the declarations referred to in

sub-section (1) of this section, counter-signed by the Registrar to enable the *nikah* to be conducted.

(b) It shall be an offence for any person to conduct a *nikah* without receiving from the Registrar of Muslim Marriages a counter-signed copy of the declarations required to be made under Section 18(1).

(3) It shall be the duty of the of any person who conducts any *nikah* and the Marriage Registrar who officiates at the *nikah* to ensure that –

(a) the bridegroom and the bride have attained the age specified in section 25(1) of this Act, and in the event that the bridegroom or bride has not attained such age, the marriage has been approved by the Quazi Court as required by section 23 of this Act;

(b) where the bridegroom or bride has not attained the age specified in section 25(1) of this Act, or suffers from some other incapacity, the person who officiates as the marriage guardian (*wali*) of the said bridegroom or bride, has duly made and signed the declarations required by Section 18(1); and

(c)that the bridegroom and the bride have confirmed their agreement to the marriage and the terms of the contract of marriage by placing their respective signatures in the appropriate column in the Register of Muslim Marriage, provided that where the bridegroom or the bride has not attained the age specified in section 25(1) of this Act or suffer from some other incapacity, it would suffice if the Quazi Court has approved such marriage, and a person who officiates as the marriage guardian (*wali*) of the said bridegroom or bride has signed the respective column in the said Register to signify the consent of such bridegroom or bride to the marriage and the terims of the contract of marriage and his approval thereof.

(d) No marriage which is not contracted in accordance with the provisions of sub-sections (1) and (2) of this section and paragraphs (a), (b) and (c) of this section shall be valid or be registered under this Act.

(7)Amending section 19(1) of the by the substitution of the following for paragraphs (a) and (b) thereof:-

(a) the bridegroom, or where the bridegroom had not attained the age specified in section 25(1) of this Act or suffers from some other incapacity, the person who officiated as the marriage guardian (*wali*) of the bridegroom at the *nikah*;

(b) the bride, or where the bride had not attained the age specified in section 25(1) of this Act or suffers from some other incapacity, the person who officiated as the marriage guardian (*wali*) of the bride at the *nikah*;

(8) Repealing section 19A of the Act and introducing the following new provisions into the Act as sections 19(3), 19(4), 19(5), 19(6) and 19(7);-

(3) The Registrar who registers a marriage shall detach the duplicate from the marriage register, and send such duplicate and the declarations made under section 18(I), on or before the fifth day of the month following that in which the marriage was registered, to the District Registrar.

(4) Where a marriage is registered by a registrar authorised under the proviso to section 11, he shall send certified copies of the statement of particulars entered in the marriage register, the declarations, and the letter authorizing him to register the marriage, to the District Registrar having jurisdiction over the area in which the marriage is registered.

(5) All duplicates and declarations sent to the District Registrar in accordance with the provisions of sub-section (3) of this section, shall be forwarded by him to the Registrar-General who shall cause such duplicates and declarations to be filed and preserved in his office.

(6) The third copy referred to in the preceding sub-section of this section shall forthwith, free of charge, be delivered or transmitted by post to the female party to the marriage by the Registrar.

(7) The entry made by the Registrar in his marriage register under this section shall constitute the registration of the marriage, and shall be the best evidence thereof before all courts and in all proceedings in which it may be necessary to give evidence of the marriage;

(12) Amending section 22 of the Act dealing with marriages contracted within *iddat* period, by substituting for the worlds “shall not be registered” appearing therein the words “shall not be solemnised or registered.”

(13) Repealing section 40 of the Act and replacing same with a new section in the following lines:-

"40 (1) Every Registrar of Muslim marriages shall maintain, in the prescribed form, a current index of the contents of every book and register kept by him, except where it is otherwise provided by regulation; and every entry in such index shall be made, so far as practicable, immediately after he has made an entry in the book or register.

(2) Every Registrar of Muslim marriages shall keep all registers, books and indexes until they are filled up and shall then forward them for record to the District Registrar.

(3) Except as provided in this Act, no person other than a Registrar of Muslim Marriages shall keep any book or register which is or purports to be a register of Muslim marriages maintained under this Act.

(4) The Registrar General may inspect or cause to be inspected from time to time the books and the registers required to be kept under this Act by any Registrar of Muslim Marriages and may entertain and hear any complaints against any Registrar of Muslim Marriages about his conduct or in respect of any such books or registers or entries therein.

(5) Where a Registrar of Muslim Marriages leaves the area for which he is appointed, or resigns his office, or where his appointment is terminated, he or in the event of his death, his legal representative, shall forthwith deliver his records, books, registers, and indexes to the District Registrar and on failure of such delivery the District Registrar shall take possession of them after following the due process.";

(14) Section 41 of the Act be repealed and a new section be enacted in its place in the following lines:

"41.The District Registrar shall cause to be bound together in a general register all copies of entries sent to him by any Quazi Court in pursuance of the provisions of this Act.";

(15) For the purpose of fully complying with the provisions of the Electronic Transactions Act[186], it is recommended that section 42 of the MM&D Act be repealed and a new provision be enacted in the following lines to facilitate electronic record keeping which may be used by other departments of State to update or link records maintained by it and have cross-references:-

"42. The Registrar General may also take such measures as may be appropriate to facilitate the maintenance of electronic records of the contents of all the registers required to be kept under this Act by any Registrar of Muslim Marriages and contents of copies of entries relating to nullity of marriage and divorce sent to him

[186] The Electronic Transactions Act No. 19 of 2006 as amended by Act No. 25 of 2017.

by any Quazi in pursuance of the provisions of this Act with appropriate cross references."

H - Fixing a Minimum Age of Marriage and Curtailing Child Marriages

6.8.01 This Committee has given serious thought to the very contentious issue of fixing a minimum age of marriage and curtailing child marriages. The Muslim Marriage and Divorce Act of 1951 (MM&D Act)[187] does not lay down a minimum age for marriage, but it is noteworthy that Section 23 thereof prohibits the *registration* of any "marriage contracted by a Muslim girl who has not attained the age of twelve years" unless the Quazi for the area in which the girl resides has, "after such inquiry as he may deem necessary, authorised the *registration* of the marriage". This provision does not prohibit the *solemnization* of such a marriage without the Quazi's authority, and Section 16 expressly enacts that non-registration will not render void a marriage which is otherwise valid "according to the Muslim law governing the sect to which the parties to such marriage...belong". This "loophole" in the law has provided unscrupulous persons from violating the spirit, if not the letter, of the law by contracting child marriages without registering the same, or registering them by providing false information regarding the age of the bride to the Registrar of Marriages. As already note, Section 16 of the MM&D Act, as it currently stands, is violative of Sri Lanka's national obligation in terms of Art 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[188] which provides that-

> "All marriages shall be registered in an appropriate official register by the competent authority."

Existing provisions of MM&D Act facilitate parents of young children and those who have the custody of them, whether lawfully or not, from focing such children to enter into marriage without their "full and free consent" contrary to Art. 1 of the said Convention. The question of child marriage is particularly serious with respect to the Muslim community where the prevalence of registered and unregistered chid marriages is very high. Statistics provided by the Registrar General (Table B reproduced at paragraph 5.7.10 of this Report) show that the number of registered marriages involving Muslim girls aged between 12 and 18 years was 1,618 in the year 2014, 1,717 in the year 2015 and 1,777 in the year 2016, which is indicative of an upward trend. These figures may be misleading since according to reports of abuse of the provisions of the MM&D Act, there is a *widespread practice of not registering marriages when they involve child brides*, and even in cases where such marriages were registered, this was done by *falsifying the age of the bride*.

[187]Muslim Marriage and Divorce Act, *supra* note 1.
[188] *Supra* note 184.

6.8.02 Although complete and detailed statistics of the prevalence of child marriages amongst Muslim parties in all the districts of Sri Lanka for the more recent years grouped by age are not available with the Registrar General[189], it is noteworthy that Hyshyama Hamin and Hasanah Segu Isadeen, in their work entitled "*Unequal Citizen: Muslim Women's Struggle for Justice and Equality in Sri Lanka*"[190] observe that-

> "Records on Muslim marriage registration in Kattankudy indicate that in 2015 - 22% of all registered marriages were with a bride below 18 years of age. This is a considerable increase from 2014 when the figure was 14%. According to the Quazi for Colombo East, there are also many instances of early marriages happening in areas like Mattakkuliya and Maradana. The Quazi for the minority Muslim community in Colombo also mentioned that girls of the community mostly get married between 15 and 17 years of age because according to him "the value of the girl decreases after she is 17"

It may be useful to compare these figures with those contained in Table C below, containing statistics relating to registered child marriages in six districts extracted from the documents and data sheets attached to the Registrar-General's letter dated 4th October 2017 to the Secretary to the Ministry of Justice (Annexure B11) in response to the Secretary / Justice's letter to the Registrar General dated 17th August 2017 (Annexure B10):

Table C – Muslim Marriages registered in Sri Lanka in 2014 involving brides between 12 – 18 years for the districts of Ampara, Batticaloa, Kalutara, Kandy, Trincomalee and Puttalam

Age of Bride	Ampara	Batticaloa	Kalutrara	Kandy	Trinco-malee	Puttalam
Below 12 years	0	0	0	0	0	0
12 years	0	0	0	4	0	0
13 years	1	0	0	0	2	0
14 years	9	6	0	0	3	0
15 years	13	15	0	2	7	0
16 years	38	33	12	9	20	10
17 years	66	79	40	45	40	39
18 years	155	90	64	144	198	137
Total between 12-18	282	223	116	204	270	186
Total above 18	2,777	1,196	1,305	1,767	1,324	995
Total for District	3,059	1,419	1,421	1,971	1,594	1,181

[189] This is clear from the contents of the annexures to the letter addressed to the Secretary of the Ministry of Justice by the Registrar General dated 4th October 2017 attached to this Report marked Annexure B11, where complete statistics are available only up to the year 2014, and that too only with respect to few districts.

[190] Hyshyama Hamin and Hasanah Segu Isadeen, "*Unequal Citizen: Muslim Women's Struggle for Justice and Equality in Sri Lanka*", *supra* note 119, page 8

Source: Extracted from documents and data sheets attached to the Registrar- General's letter dated 4th October 2017 to the Secretary to the Ministry of Justice (Annexure B11) in response to the Secretary / Justice's letter to the Registrar General dated 17th August 2017 (Annexure B10) .

It will be noted from Table C that there have been a fair number of registered marriages involving Muslim brides between 14 to 18 years, and the majority of the cases involved women who had attained 18 years of age. It is also significant that in the 6 districts included in the Table C, there has not been a single marriage registered involving a bride below the age of 12, while in the Kandy district the marriage of 4 girls of 13 years have been registered in 2014. In Puttalam (an area from which many abuses arising from unregistered child marriages are reported) and Kalutara there was not a single child bride below the age of 16 for 2014.Judging by the reports of abuse of the provisions of the Muslim law relating to child marriages, particularly in areas such as Ampara, Batticaloa, Trincomalee and Puttalam, these figures suggest that most of the marriages involving children were either unregistered or registered with false entries as to the age of the bride at the time of the marriage, which is a prevalent practice in these areas as the famous case of Rizana Marfic would demonstrate, where a girl below 18 had obtained a passport and travelled to the middle east for employment with dire consequences.[191]

6.8.03 There is no consistency in the opinions of Islamic jurists on the question of child marriages. According to Imam Shaffie, the farther and paternal grandfather of a child possess the power (known as *jabr*) to give in marriage a child of tender years who is incapable of contracting marriage on its own.[192]In this context, it is important to note that the term "child marriage" could connote two different types of marriages:

(a) the marriage of a child who has not attained puberty (*bulugh*), which is contracted by the marriage guardian (*wali*) with or without the consent of the child;

(b) the marriage of a "child"[193] who has attained puberty (*bulugh*), contracted by the child (with or without the approval of the marriage guardian(*wali*) or by the *wali* (with or without the consent of the child).

[191] Rizana Nafeek was a Sri Lankan girl convicted and subsequently executed in Saudi Arabia for the murder of four-month-old infant Naif al-Quthaibi. Her parents alleged that in order to get work in Saudi Arabia the date of birth was altered on Nafeek's passport when in reality she was under 18 when the offence took place, and that her execution was contrary to the Convention on the Rights of the Child. See, https://en.wikipedia.org/wiki/Execution_of_Rizana_Nafeek

[192] According to Maliki and Hambali Law only the father can exercise *jabr.* Under Shaffie and Hanafi law the power of *jabr* extends to other "paternal kindred". *See,* Hamilton, *Hedaya* Volume, I, Book II. Chapter II, 36-37.

[193]The term "child" has been variously defined, for example, in the Child marriage Restraint Act of 1929 (Pakistan), as a male under 18 years of age and a female under 16 years, in the Child Marriage Restraint Act of 1929 (India), as a male below 18 years and a female below 15 years of age and in the Administration of Muslim Law Act 1968 (Singapore) as a male or female under 16 years of age.

Puberty (*bulugh*) signifies the period at which a child's sexual desires are aroused. This period differs for males and females, as well as from region to region and even person to person. For girls, puberty may be reached between 9 to 12 years, and for males it takes a little longer, and ranges from 12 to 15 years.[194] According to the *shariah*, a child, whether male or female, is capable of being *given in marriage* by its marriage guardian (*wali*) before it attains puberty, but a male child who has attained puberty is said to possess the *capacity to marry* on its own. In regard to a female child, there is a conflict of opinion among the great Imams, and a female child may marry on her own according to the opinion of Imam Abu Haniffa, but not so according to the opinion of Imam Shaffie.

6.8.04 Modern Islamic scholars predominantly hold the view that physical maturity by itself, is not enough for a person to handle the responsibilities of marriage, and hence, sound judgment (*rushd*) is equally important. It is noteworthy that Wood Renton CJ in *Marikar v Marikar et al*[195] and Gratiaen J in *Asanar v Hamid*[196] relied on Ameer Ali[197]to hold that if a minor child "should not be discreet at the age of puberty, he or she is presumed to be so on the completion of the eighteenth year, unless there is any direct evidence to the contrary."

6.8.05 The Shaffie doctrine, as already noted, is set out in *Minhaj-et-Talibin,* according to which, a father as marriage guardian (*wali*) possesses the power known as "*jabr*" to give in marriage as he pleases "his daughter, without asking her consent, whatever her age may be,"[198]However, the power of "*jabr*" is not without limitations, as according *Minhaj* itself, "a guardian can never give a woman in marriage to a man of inferior condition, except with her entire consent".[199] It is noteworthy that the law had to be clarified by section 25 of the MM&D Act when certain judicial decisions[200] questioned the correctness of the Shaffie doctrine as explained above, and the 'option of puberty' (*khyar-ul-bulugh*) available to a Hanaffi girl given in marriage by a *wali* who is not her father or paternal grandfather to repudiate the marriage on attaining puberty, was held to be unavailable to a Shaffie girl so given in marriage.[201]

6.8.06 Section 25(1) of the MM&D Act sought to declare that "no contract of marriage of a *woman* belonging to the Shaffie sect is valid under the law applicable to that sect", unless her marriage guardian (*wali*) is present at the time and place where the marriage contract is entered into and communicates "*her consent* to the contract and his *own approval* thereof." The use of the term "woman" in section 25(1) shows that this provision was not intended to change the law in regard to

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[194]*The Beginning of Sexual Life: Bulugh and Rushd*, Al-Islam.org, https://www.al-islam.org/religion-al-islam-and-marriage/beginning-sexual-life-bulugh-and-rushd
[195] *Marikar v Marikar et al*, 18 NLR 481 at 482.
[196] *Assanar v Hamid*., 50 NLR 102 at 104
[197] Muhammadan Law Vol II pages 467 to 468.
[198] Nawawi, *Minhaj-et-Talibin*, *supra* note 99, Book 33, Chapter 1, Section 4, 284.
[199] Nawawi, *op.cit.,* Book 33, Chapter 1, section 5, 288.
[200]*Rhoda Ryde vs Ibrahim* 3 M.M.D.L.R. 131
[201]*See for example, Nabisa Umma et al v Salih*, 2 M.M.D.L.R. 188.

child marriages, which have been recognised as lawful and valid in Sri Lanka,[202] although the Board of Quazis has been constrained to observe in *Muheideenbawa vs Seylathumma* that "in the best interest of the community *this social evil* should be eradicated by the creation of public opinion"[203]It is therefore necessary to revisit this very sensitive issue with objectivity and foresight.

6.8.07 It is important to understand the Islamic thinking in regard to the question of minimum age of marriage, which is not a concept unknown to the *shariah*. It is evident from the Holy Quran *Surah Nisaa* 4:5*,* that those in charge of orphans who are "weak of understanding" by reason of their tender age, are encouraged to feed and clothe them out of their own property, and to speak to them words of kindness. In the very next verse (Holy Quran 4:6) , those in charge of orphans are commanded to-

> "Make trial of orphans
> Until they *reach the age*
> *Of marriage*; if then ye find
> *Sound judgment* in them,
> Release their property to them."[204]
> (*Emphasis added*)

6.8.08 The above quoted verse clearly shows that *shariah* law recognizes the concept of "age of marriage", which is believed at least by Hanafi jurists to have reached, as already noted, when a child reaches puberty *(bulugh*). However, Imam Shaffie differs in this respect from Imam Abu Haniffa in holding that at least in the case of a girl, the attainment of puberty (bulugh) does not confer on her the capacity to marry on her own. This difference of opinion between these two great Imams on the interpretation of the above quoted verse in *Surah Nisaaa*, makes it just and appropriate to apply the concept of *maslahah mursalah* (public interest) to decide how the law should be interpreted or reformed. It is significant to note that in the above quoted verse, the guardian is commanded not to give over any property belonging to an orphan until the orphan is possessed of "sound judgment" (*rushd*). Since both capacity to marry (or to be given in marriage by the *wali*) and the gift of *mahr* are essential ingredients of a contract of marriage, the above quoted verse does raise the question as to whether the said verse was intended to prevent the handing over of *mahr* to a child being given in marriage until the child is possessed of sound judgment (*rushd*), which may be regarded as being attained between the ages of 16 and 18, and presumed to be attained by our courts as already noted in *Marikar v Marikar et al*[205] and *Asanar v Hamid*[206], at the age of eighteen.

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[202]*See, Mukamadu Lebbe vs Mohamado Tamby* 1 M.M.D.L.R. 40 and *Muheidenbawa vs Seylathumma* 2 M.M.D.L.R. 53.
[203]*See, Muheideenbawa vs Seylathumma* 2 M.M.D.L.R. 53 at page 55.
[204] Holy Quran *Surah Nisaa* 4:6 (Abdullah Yusuf Ali Translation).
[205] *Supra* note 195.
[206] *Supra* note 196.

6.8.09 The question whether it is unlawful for a man to contract a marriage according to the Muslim law of the "sect to which the parties belong" to a girl below 12 years of age without the approval of the Quazi and without registering the marriage (the validity of which marriage will be recognized by section 16 read with section 23 of the MM&D Act) was considered by the Supreme Court of Sri Lanka in *Mukamadu Lebbe v Mohamado Tamby,* where Moncreiff, A.C.J. doubted whether Section 363 of the Penal Code[207] which made it an offence to have intercourse with a female under 12 years of age, was intended to apply "to a case of this kind."[208] However, the Muslim Law research Committee[209] which was chaired by chaired by Dr. H.M.Z Farouque, has adopted the opinion expressed by Dr. Farouque himself in an article written by him that "a man commits the offence of rape if he has sexual intercourse with a girl below twelve years of age even if she is his wife and irrespective of her consent".[210]It is noteworthy that the legal position has been clarified by an amendment the Penal Code has undergone in 1995[211]by which section 363(e) has been amended to read as follows:-

> "A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the following descriptions-
>
> (a) to (d) ……
> (e) with or without her consent when she is *under sixteen years of age*, unless the woman is his wife who is *over twelve years of age* and is not judicially separated from the man." (*Empahsis added*)

6.8.10 In view of this amendment, there cannot be any doubt that even the lawful husband of a Muslim girl below the age of twelve shall be guilty of rape, if he has sexual intercourse with her. This will make it imperative to consider amending section 23 of MM&D Act which is in conflict with section 363 (e) of the Penal Code. Furthermore, on the medical side, Dr. Ahamed Ibrahim has outlined some of the ill effects of child marriages in the following words:-

> Early marriages mean that the girls are not quite ready for married life. They will be poorly educated and if there is any trouble between the parties, the girls will be at a disadvantage. If the marriage breaks up, she will not be able to go out and earn a living for herself. Eventually it is the children who suffer because the mother being poorly educated and improperly trained is unable to bring up the children properly and adequately according to modern standards".[212]

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[207] The Penal Code, Ordinance No. 2 of 1883.
[208] I.M.M.D.L.R. 40,42
[209] *See,* the Report of the Muslim Law Research Committee chaired by Dr. H.M.Z.Farouque*: Proposals for the Amendment of the Muslim Marriage and Divorce Act*, *supra* note 23, page 60.
[210] H.M.Z.Farouque, 'Muslim Law in Ceylon', 4 M.M.D.L.R. 1, 12.
[211]The Penal Code (Amendment) Act No. 22 of 1995.
[212] World Muslim League, Volume III No. 1 63-64.

6.8.11 Hyshyama Hamin and Hasanah Segu Isadeen, have commented, on some of the serious issues child marriages can give rise to. They say-

> According to women volunteers who assist affected women, one of the main reasons that husbands seek divorce from wives who are minors is because they are "unfit to have sex" and "unable to do housework". The plight of young girls who are divorced becomes precarious. Education of young women and girls who get married early is more often than not discontinued, thereby significantly limiting their higher educational and economic opportunities. This compels them to be highly susceptible to grave financial difficulties in the event that husbands are unable or unwilling to provide maintenance, in case of death of husbands, polygamy, divorce or abandonment.[213]

6.8.12 The representations received by this Committee have been extremely helpful and give some idea as to the thinking of the Muslim community and its intelligentsia on this sensitive question. For instance, the All Ceylon YMMA Conference has proposed that the age of a Muslim girl below which the authorization of the Quazi, after such inquiry as he may deem necessary, is required for purposes of registration of a marriage be increased from the present "twelve years" to "sixteen years"[214]. These representations have clarified that the said proposal is made taking into account the provisions of the Penal Code regarding statutory rape. The Muslim Lawyers' Association has proposed that clear provisions should be introduced into the MM&D Act fixing the age of marriage for males at 18 years and for females at 16 years, and as in Tunisia, marriage below these ages should require special permission from the Quazi, which may be granted only for pressing reasons and on the basis of a clear interest of both spouses. MWRAF has insisted that without infringement to Islamic equity principles a higher age should be fixed as the minimum age of marriage to prevent the abuse of child marriages. The Kandy Forum has recommended that for males and females, the unconditional minimum age of marriage should be 18 years, but the Quazi should be authorised by a suitable amendment to section 23 to grant special permission for any child below 18 years but over 15 years to be given in marriage in situations where there is justification for granting such permission, provided that this would not affect adversely the child's physical and psychological needs and education.

6.8.13 Professor Savitri Goonasekara has pointed out that "since Sri Lanka became a party to the U.N. Convention on Consent to Marriage and the Minimum Age of Marriage, 1962[215] under which Sri Lanka is bound to take steps to abolish such customs, ancient laws and practices that conflict with the said Convention, there is a "clear basis for introducing reforms even if they conflict with traditional concepts

[213] Hyshyama Hamin and Hasanah Segu Isadeen, supra note 119. page 8.
[214] Representations of the YMMA Conference, *supra* note 82, page 6.
[215] *Supra* note 184.

of the Muslim Law in Sri Lanka".[216] Art. 2 of the said Convention expressly provides that State Parties to the Convention[217]-

> "…..shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses."

It is also noteworthy that the failure to lay down a minimum age of marriage for Muslims while all others are not permitted to enter into matrimony prior to attaining the age of 18 will violate the equality provision of the Constitution of Sri Lanka.[218] What is probably of greater concern to Muslims of Sri Lanka is whether the proposal to specify a minimum age of marriage for Muslims can be accommodated within the *shariah*, and in this context it may be useful to note that the procedure of obtaining the approval of the Quazi for entering into matrimony found in section 23 of the MM&D Act could provide a means of reconciling the principles of the *shariah* with the needs of society with due regard to the best interests of the affected person. In this context is worth noting, as Abdulala Maududi stresses, that in regard to "such affairs, the function of the legislature is to understand the principles and fulfil the intention of the law-giver".[219] It has been noted that child marriages could be rationally justified in exceptional circumstances though they should not be encouraged generally.

6.8.14 In the light of the above considerations, the question may be posed as to whether the *fiqh* in regard to the minimum age of marriage may be developed in the light of the concept of *maslahah mursalah* in the public interest so as to regard the age of 18 as the age at which a male or female may ordinarily be capable of entering in to a contract of marriage. The justification for 18 years as the age at which a Muslim may be permitted to marry in normal circumstances is three-fold: (1) As already noted eighteen is the age at which a person may be safely presumed to have attained "sound judgment" (*rushd*). It is necessary to stress that although it has been suggested by ACJU and others that the minimum age of marriage may be fixed at 18 for males and 16 for females, this suggestion did not find favour with the undersigned members of the Committee in the absence of any empirical evidence to suggest that females acquired sound judgment (*rushd*) ahead of males; (2) Setting the minimum age at 18 will not interfere with the right to education at least in the sense that a child could by that age complete its education at least up to the General Certificate of Education (Ordinary Level) Examination before it is given in marriage; and (3) Eighteen is the minimum age of marriage applicable in Sri Lanka with respect to persons other than Muslims and will therefore be consistent with the concept of equality before the law embodied in Art. 12 of the Constitution.

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[216] Savitri Goonasekara, "*Sri lanka Law on Patent and Child*" (1987) at p. 318.
[217] *Supra* note 184.
[218] Art 12 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.
[219] Abdulla Maududi, "*Islamic Law and Constitution'*, (1960) 78.

6.8.15 If the law is reformed in this manner and the minimum age of marriage is fixed at 18 years for male and female Muslims, the question arises as to how section 23 should be amended, to enable a male or female below the said minimum age or suffering from some other incapacity to be given in marriage with the approval of the Quazi in appropriate and exceptional circumstances. This Committee notes that the Faouque Committee had also recommended in its Report[220] that considering section 363 of the Penal Code (as it stood prior to the 1995 amendment) and to local conditions as revealed by the statistics, (a) subject to (b) below, a marriage of Muslim male below 16 or a female below 14 years shall not be *solemnized or registered*; and (b) the Quazi shall have the power to authorize the *solemnization and registration* of the marriage of a Muslim girl aged between 12 and 14 years. However, for all the reasons stated in the preceding paragraphs of the Report of this Committee, there is consensus in this Committee to amend section 23 to empower the Quazi to authorize, the solemnization and registration of the marriage of a person below the minimum age of marriage or suffering from some other incapacity, in exceptional circumstances in the best interest of the person concerned after due inquiry, provided that such person is not below the age of 16.

6.8.16. These reforms will then be both consistent with the *shariah* and also give due weight to the protection of the intellect (*aql*), which is one of the which is one of the five principal interests that are sought to be protected by the *shariah*, the other such interests being life, religion, property and progeny or lineage[221]. Conferring the Quazi Court the power to authorize in exceptional circumstances the marriage of a person below the minimum age of marriage or a person suffering from some other incapacity, will also avoid any conflict with section 363(e) of the Penal Code. In the light of the above considerations, this Committee recommends amending sections 23 and 25 of the MM&D Act by fixing the minimum age of marriage at eighteen years for both males and females, and empowering the Quazi Court to authorize the solemnization and registration of a marriage of a person who has not attained the age of eighteen years in exceptional circumstances where such authorization is justified in the best interest of the said person, provided that he or she has attained the age of 16.

6.8.17 Accordingly, it is recommended that sections 23 and 25 of the MM&D Act be amended in the following manner:-

(1)Amending section 23 of the MM&D Act by substituting for the words "section 17" the words "sections 16, 17 and 25", substituting for the words "Muslim girl" the word "Muslim", substituting for the words "the girl resides" the words "such Muslim resides", substituting for the words "who has attained the age of twelve years" the words "who has not attained the age of eighteen years or suffers from some other incapacity", substituting

[220] *See,* the Muslim Law Research Committee*: Proposals for the Amendment of the Muslim Marriage and Divorce Act*, *supra* note 23, at page 64 paragraph 3:4.
[221] Kamali, *Maqasid al Shariah*: *supra* note 173.

for the words “not be registered” the words “not be solemnized or registered” and substituting for the words “authorised the registration of the marriage” the words “authorised the solemnization and registration of the marriage, being satisfied that-

(a) such Muslim has attained the age of sixteen years;

(b) there are special reasons that would justify permission being granted for such Muslim to be given in marriage prior to attaining the age of eighteen years; and

(c) such marriage shall be in the best interests of such Muslim.”

(2)Repealing section 25(1) and (2) of the MM&D Act and replacing the same with the following:-

25(1) Subject to section 16 and sub-section (2) of this section, no marriage of a Muslim shall be solemnized or registered under this Act, unless the declarations required by Section 18 are duly made, and the bridegroom and bride have attained the age of eighteen, and are present at the time and place at which the contract is entered into, and consent to the marriage.

Provided that the contract of marriage shall be valid under the Act even where the bride is not present at the time and place at which the contract is entered into, if the bride’s marriage guardian (*wali*) is present at the time and place at which the contract is entered into, and communicates the bride’s consent to the marriage and she places her signature on the appropriate column of the marriage register as provided in detail in section 18(3)(b) of this Act.

(2) A contract of marriage may be validly entered into and registered under this Act, even where the bridegroom or bride have not attained the age of eighteen or suffers from some other incapacity, if a person entitled to act as marriage guardian (*wali*) -

(a) is present at the time and place at which the contract is entered into; and
(b) communicates his own approval thereof,

provided that no such marriage may be solemnized or registered under this Act, unless the approval of the Quazi for such marriage has been obtained as provided in Section 23 of this Act.

(3)Amending section 47(1)(j) of the MM&D Act by substituting for the word "girl" occurring therein, the word "Muslim" and by substituting for the words "who has not passed the age of twelve years" the words "who has not attained the age of eighteen years or suffers from some other incapacity".

I - Preventing the abuse of Polygamy

6.9.01 The question of preventing the abuse of polygamy was another important matter that engaged the attention of this Committee. The Holy Quran curtails the exercise of polygamy, which has been a widespread pre-Quranic practice, by not only limiting the number of wives a man could lawfully have at any given time but also imposing stringent conditions for the exercise of this privilege. The undersigned members of the Committee are of the opinion that in addition to following the essentials of *nikah* prescribed by the *shariah* and mandatory registration of every marriage as stipulated in section 17(1) of the Muslim Marriage and Divorce Act (MM&D Act), compliance with the conditions laid down in the Holy Quran for the exercise of polygamy should be incorporated into the MM&D Act to ensure that such conditions are adhered to in contracting plural marriages. It is noteworthy that the permission to marry four wives is contained in the following verse of *Sura Nisaa* which was revealed immediately after the disastrous Battle of Uhad which left many widows and orphans -

"*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….
That will be more suitable,
To prevent you
From doing injustice."[222](*Emphasis added*)

6.9.02 It is significant to note that this verse emphasises that polygamy is permitted in *exceptional circumstances only to those men who have the confidence that they are able to "deal justly" with the several wives*. The onerous nature of the condition of being "fair and just" is emphasised by Allah elsewhere in the same verse -

"*Ye are never able*
To be fair and just

[222] The Holy Quran 4:3 *Surah Nisaa* (Ed. Abdullah Yusuf Ali)

As between women
Even if it is
Your ardent desire…"[223](*Emphasis added*)

6.9.03 It is clear from the above quoted passages and the commandment in *Sura Nur* to marry "those among you who are single"[224] that the Quranic prescription was monogamy and not polygamy.[225]The Muslim Marriage and Divorce Act accommodates within its framework polygamous marriages, but imposes the additional requirement of giving notice of the intended marriage to the existing wife or wives.[226] Even this procedure is generally observed in the breach. Furthermore, there does not appear to be any mechanism to bring to book the errant men who do not even observe the very minimal safeguards built into the law with a view of putting moral pressure on persons seeking to contract plural marriages. It is significant that the Act does not incorporate the conditions insisted upon by the *shariah* for the exercise of polygamy.

6.9.04 The question arises in this context as to whether the exercise of polygamy should be subjected to judicial control. Hyshyama Hamin and Hasanah Segu Isadeen, have observed[227] that "different countries with Muslim majorities have approached polygamy differently. Countries like Malaysia have stringent prerequisites for polygamous marriages, including thorough investigation by the judge of the area about the husband's financial standing, the permission of previous wives and the opportunity for previous wives to draw up a contract conditional on their permission." It is in this context, noteworthy that Turkey criminalized polygamy in 1926, and Tunisia banned it in1956 by declaring the practice archaic and no longer possible or relevant in a modern context.[228] Some other Muslim majority countries have curtailed the exercise of polygamy in the interests of justice. For instance, in Syria, the Judge is empowered to refuse permission to a married man to marry another woman "if it is established that he is not in a position to support two wives…"[229] While in In Iraq, it is illegal for a man to marry more than one woman without authorisation from the *Qadi*, who would permit the marriage only if there was no fear of any unequal treatment of the wives,[230]closer home in Pakistan[231]and Bangladesh[232]the prior approval of the Arbitration Council is required for entering

[223] The Holy Quran 4:19 *Surah Nisaa,* (Ed. Adullah Yusuf Ali)
[224] The Holy Quran 24:32 *Surah Nur* (Ed. Abdullah Yusuf Ali)
[225]Islam encourages matrimony as a means of discouraging illicit sexual relationships which are harmful to society. In doing so, Islam has imposed clear limits to plural marriages which are evident from the Holy Quran and hadith. Polygamy has its advantages and disadvantages, which are discussed in detail in Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, supra note 4, page 30.
[226]*See*, Section 24 of the Muslim Marriage and Divorce Act, *supra* note 1. See also, *Reid v Attorney General* 65 NLR 97 (SC); *Attorney General v Reid* 67 NLR 25 (PC).
[227] Hyshyama Hamin and Hasanah Segu Isadeen, *supra* note 119, page 19.
[228] See, Art. 18 of the Tunisian Code of Personal Status. 1957.
[229] Syrian Law on Personal Status, (Decree No. 59) of 1953.
[230] Art 3 of the Iraqi Code on personal status, 1959
[231] See, Section 6 of the Muslim Family Laws Ordinance, 1961 (Pakistan).
[232] See, Section 6 of the Muslim Family laws Ordinance, 1961 (Bangladesh).

into a second or subsequent marriage. In India, where there is no legislative mechanism in place seeking to restrain the exercise of polygamy, the Supreme Court has recently pronounced, in the context of a challenge to an administrative circular on the basis that it violated Art. 25 of the Indian Constitution which guaranteed the right to propagate or practice any religion, that-

> "What was protected under Article 25 (right to practice and propagate any religion) was the religious faith and not a practice which may run counter to public order, health or morality. Polygamy was not integral part of religion and monogamy was a reform within the power of the State under Article 25."[233]

6.9.05 Representations received in this connection from the public have brought to the notice of this Committee the need to reform the law in regard to the exercise of polygamy by Muslims in Sri Lanka. The Kandy Forum has observed[234] that the Holy Quran has very much discouraged polygamy by describing the difficulties of the exercise, but has permitted its exercise exceptionally. The provisions of section 24(1), (2) and (3) of the MM&D Act which impose a duty to give prior notice of an intended polygamous marriage is seen to be practiced very much on the breach, and the situation is aggravated by the fact that most polygamous marriages in Sri Lanka are unregistered thanks to the "loophole" provided by section 16 of MM&D Act. The All Ceylon Jamiyyathul Ulama (ACJU) initially opposed to any amendment being made to section 24 of the MM&D Act for providing the Quazi Court the power to approve polygamous marriages on the ground that statistics available with the Registrar General did not show a general increase in the number of polygamous marriages[235], but the Registrar General has stated very clearly in paragraph 3 of his letter dated 14th July 2017 addressed to the Secretary to the Ministry of Justice (Annexure B9 sent in response to the letter dated 31st May 2017 appended to this Report as Annexure B8) that the Registrar General's Department has no statistics relating to unregistered marriages. It is noteworthy that statistics provided by the Registrar General and included in Table A show that of the total of 19,217 marriages involving Muslims registered in Sri Lanka in 2007, only 6 involved men who were entering into a second marriage, but a completely different picture is painted by women's groups that have reported a sizeable number of unregistered plural marriages. It is the opinion of the undersigned that for these reasons, more stringent regulations should be formulated to restrict the abuse of the provisions of the Act in its totality. The Muslim Lawyers' Association has in its representations has suggested that a mechanism should be introduced to the MM&D Act to find out as to whether the exceptional circumstances in which the Holy Quran and *sunna* permit the exercise of the right of polygamy exist in every case, that is, to ascertain

[233] "Supreme Court Rules out the practice of Polygamy in any Religion", *Muslim Mirror* (11th February, 2015) accessible at: http://muslimmirror.com/eng/supreme-court-rules-out-the-practice-of-polygamy-in-any-religion/
[234] Representations of the Kandy Forum included in volume II of this Report marked C3, *supra* note 65, page 4.
[235] *See*, ACJU Representations included in volume II to this Report marked C1, *supra* note 63, page 52.

whether the man is in a position to be fair and just, so that this right of the man for polygamy is not abused[236].

6.9.06 The Muslim Women's Research and Action Forum (MWRAF)[237] has similarly recommended that any male seeking to exercise rights of polygamy should be required to apply to the Quazi who should following an inquiry be empowered to either accept or reject the application. The Quazi should be authorised to inquire into the details regarding to-

(a) the causes and reasons for the second or subsequent marriage;
(b) the ability of the husband to treat justly and fairly both or all existing wives;
(c) whether there is any fault on the part of existing wife or wives, and
(d) whether all parts concerned are aware of the existing marriage or marriages and about the proposed marriage.

6.9.07 The All Ceylon YMMA Conference, has in its representations proposed that upon receipt of a notice of subsequent marriage by a Quazi in terms of Section 24(1) and after he the Quazi has caused such notice to be exhibited as required by Section 24(3) of the MM&D Act, the Quazi should be empowered to inquire into the questions of (a) whether the husband in question is living with and adequately maintaining his present wife or wives; and (b)whether he has the capacity to maintain and provide adequate and independent lodging for his intended wife.[238] It is further proposed that the Quazi upon such inquiry convey his findings to the parties concerned, provided however that the Quazi should not be able to prevent the registration of a subsequent marriage that may be solemnized contrary to the Quazi's determination. It is also proposed that the power of the Quazi to conduct such inquiry be brought under Section 47 preferably after Subsection (4) thereof.

6.9.08 Having carefully examined the principles of *shariah* law as enshrined in the Holy Quran and Hadis, as well as the adequacy of the existing provisions of the MM&D Act in regard to the exercise of the right to polygamy, this Committee unanimously recommends the repeal of the existing provisions of section 24 of the MM&D Act and replacing same with the following new provisions as sub-sections 24(1) to (5) respectively:-

(1) Where a married male Muslim who has entered into one or more marriages which are subsisting, intends to contract another marriage, he shall apply for permission to contract another marriage in the prescribed form, to the Quazi Court holden in the Quazi division

[236] Representations of the Muslim Lawyers' Association, *supra* note 84 pages 15 to 16.
[237] Representations of the Muslim Women's Research and Action Forum (MWRAF) included in volume II of this Report marked Annexure C5, *supra* note 84, page 29.
[238] Representations of the YMMA Conference included in volume II to this reprt marked C4, *supra* note 82 page 6.

within which his wife, or where he has more than one wife, the first of his subsisting wives usually resides.

(2) Upon receipt of such application, the said Court shall take steps in accordance with Schedule 1A and inquire into all circumstances that may be relevant to the application for permission to marry, including the following:-

(e) whether the applicant is living with, and justly and adequately maintaining and caring for, his present wife or wives;
(f) whether the applicant is looking after his children born to his wife or wives in a just and equitable manner;
(g) whether the applicant is capable of dealing justly and equitably with his intended wife and his other wife or wives; and
(h) whether the applicant has the financial capacity to maintain and provide suitable and independent residence in accordance with his and her social standing for his intended wife, and any children that might be born to such intended wife.

(3) The Quazi Court shall, after inquiry before the Court assisted by three assessors, make order in terms of Schedule 1A setting out the reasons for refusing or granting permission for the applicant to enter into a subsequent marriage, and may when it grants permission to enter into a subsequent marriage, set out conditions, if any, that the Court considers necessary to be satisfied by the applicant before entering into a subsequent marriage and registering the same. When the Court makes order granting permission to enter into a subsequent marriage, it shall also issue a certificate permitting the subsequent marriage and specifying the conditions, if any, subject to which such permission was granted, without which the subsequent marriage shall not be solemnized or registered.

(4) The conditions that may be imposed by the Quazi Court in terms of the preceding sub-section of this Section shall include orders to ensure the proper maintenance of the wife or wives of the applicant, the maintenance of the children of the applicant's subsisting marriages including the expenses that may have to be incurred for their future education, and the maintenance of the wife the applicant proposes to marry.

(5) Notwithstanding anything contained in Section 16 and 17 of this Act, an applicant who has been refused permission to enter into a subsequent marriage by the Quazi Court, the Quazi Appellate Court or the Supreme Court, shall not contract or register such subsequent marriage, nor shall he contract or register a subsequent marriage for which permission has been granted by the Quazi Court or Quazi Appellate Court or until two months have expired after the order granting such permission, and in the even any appeal has been filed

before the Quazi Appellate Court or the Supreme Court against any such order unless the appellate proceedings have been concluded with an order affirming the grant of permission by the lower court.

(6) Notwithstanding anything contained in Section 16 and 17 of this Act, an applicant who has been granted permission to enter into a subsequent marriage by the Quazi Court subject to any condition or conditions, shall not enter into a fresh contract of marriage or register the same without fulfilling all conditions imposed by Court.

(7) It shall be an offence for any person to knowingly solemnise or register a subsequent marriage contrary to any order made by any Court under the provisions of this Act refusing permission to enter into a subsequent marriage or without complying with all conditions that may have been imposed by Court before entering into a subsequent marriage and registering the same.

(8) Any marriage solemnised or registered contrary to the provisions of this section shall be invalid.

J - Reforming the Law and Procedure for Divorce

6.10.01 The question of amending section 16, 98(2) and any other provisions of MM&D Act that require the application of "the Muslim law of the sect to which the parties belong" to determine the validity of a divorce has been considered in detail in paragraphs 6.6.12 to 6.6.13 of this Report. In the course of the discussion, reference was made to the judgment of the Supreme Court of India in *Shayara Bano v Union of India* in regard to the constitutionality and *shariah* consistency of the *triple talaq*.[239] It is noteworthy that the Indian Supreme Court held by a split decision of 3-2 that the *triple talaq* was unconstitutional. However, two judges, namely the Chief Justice of India Justice Jagdish Singh Khehar and the only Muslim to sit on the 5 Judge Bench, Justice Abdul Nazeer, dissented holding that the *triple talaq* was not contrary to the Indian Constitution. However, even these two learned Judges were firmly of the view that the *triple talaq* was contrary to the letter and spirit of the Holy Quran. In the judgments of the majority judges (Justices Kurian Joseph, U.U. Lalit and A.F. Nariman) as well as the minority judges (Khehar CJ with whom Nazeer J concurred) the first verse and more of *Surah Talaq* was quoted, and in the first verse itself (Holy Quran Surah Talaq LXV:1, Allah says:

"1. O Prophet! When ye
Do divorce women,
Divorce them at their

[239] See note 155 *supra*.

Prescribed periods, And count (accurately)
Their prescribed periods:
And fear God your Lord:
And turn them not out
Of their houses, nor shall
They (themselves) leave,
Except in case they are
Guilty of some open lewdness,
Those are limits
Set by God: and any
Who transgresses the limits
Of God, does verily
Wrong his (own) soul:
Thou knowest not if
Perchance God will
Bring about thereafter
Some new situation."

It is obvious from the citations from the Holy Quran as well as of the *sunnah* of the Prophet in a very lengthy and in depth judgment[240], that the *triple talaq* is contrary to the *shariah* and rules of *fiqh*, and the practice is altogether un-Islamic. The question cannot arise in Sri Lanka in view of section 27 of MM&D Act, which provides exclusively the procedure outlined in the Second Schedule to the Act, which does not contemplate or permit the *triple talaq*. In the considered opinion of this Committee, for the reasons set out in paragraphs 6.6.11 to 6.6.13 of this Report, the word "divorce" should be removed from sections 16, 98 and any other provisions of the Act that will resurrect a question that has been put to rest by the decisions of our Courts referred to in the said paragraphs. Besides this, another important question that engaged the attention of this Committee was the issue of reformulating sections 27 and 28 of the Muslim Marriage and Divorce Act[241] and the forms and schedules thereto setting out the law and procedure applicable to the various forms of divorce recognised by Muslim law. In this context, Hyshyama Hamin and Hasanah Segu Isadeen[242], have submitted that the MM&D Act differentiates between the types, conditionality and procedures for divorce for men and women. Under the MM&D Act, husbands have the provision to proclaim '*talaq*' divorces, while wives have the provision to obtain '*fasah'* divorces.

[240] The said judgment may be accessed at: http://www.thehindubusinessline.com/.../Supreme_Court
[241]Muslim Marriage and Divorce Act, supra note 1.
[242]Hyshyama Hamin and Hasanah Segu Isadeen, have observed in their work "*Unequal Citizen: Muslim Women's Struggle for Justice and Equality in Sri Lanka*", supra note 119, page 14.

6.10. 02 Adverting to the application of the procedure laid down in section 27 of MM&D Act for the pronouncement of *talaq*, the Chairman of this Committee has in his work, "*The Quazi Court System in Sri Lanka and its Impact on Muslim Women*", explained that-

> "Section 27 of the Muslim marriage and Divorce Act of 1951 provides that where a husband desires to divorce his wife, the procedure laid down in the Second Schedule to the Act should be followed. The objective of the legislation is to lay down a uniform statutory procedure for divorce……. It appears from Rules 2,6 and 7 of the Second Schedule that a great deal of emphasis is placed on the reconciliation of the estranged spouses."[243]

6.10.03 Hyshyama Hamin and Hasanah Segu Isadeen[244], observe that-

> "*Talaq* (which literally translates as a proclamation of "I divorce you") is a type of divorce that is initiated by the husband. *Talaq* does not require the husband to have anyspecific basis or reason to divorce. Furthermore, the MM&D Act disallows the Quazi from recording the alleged reason/grounds on which divorce may be sought, should there be any.
>
> …..The MM&D Act requires that the husband who seeks *talaq* to give notice to the Quazi of the area in which his wife resides. But because the pronouncement of *talaq* does not require the presence of the wife, women's groups have reported many instances when the wife is unaware of her husband's intention to divorce until the Quazi informs her of it. Quazis do not always pursue mandatory mediation and there are many cases where Quazis have been strong-armed or bribed into finalizing divorce as quickly as possible, sometimes within a day.
>
> *Talaq* is also sought in instances of polygamous marriages when maintaining multiple wives and families becomes burdensome. Women volunteers in Puttalam have come across cases where the Quazis themselves have recommended divorce as an option to men who are unable to maintain their wives and families. In *talaq* divorces - where husbands are required to provide maintenance during the *iddat* or confinement period, there are cases where Quazis have granted divorce prior to establishing payment of maintenance for children, return of dowry or *kaikuli* or settlement of *mahr*, leaving women (and girls) in difficult and vulnerable situations financially and socially."

6.10.04 The Muslim Lawyers' Association, has in its representations to this Committee, made the following recommendations with respect to the *talaq* procedure referred to in section 27:-

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[243]Saleem Marsoof, *The Quazi Court System in Sri Lanka and its Impact on Muslim Women, supra* note 4 at page 50.
[244]Hyshyama Hamin and Hasanah Segu Isadeen, "*Unequal Citizen: Muslim Women's Struggle for Justice and Equality in Sri Lanka*", *supra* note 119 pages 14 to 15.

"11.11 We suggest a procedure of a *Ahsan talak,* but the pronouncement of talak has to take place at the end of the third reconciliation period. From the time of conveying the intention for *talak* there shall be a reconciliation process for three *tuhr* period; thereafter at the end of third *tuhr* period if the parties are unable to arrive at a settlement one and only talak will be pronounced and thereafter the wife has to observe an *iddat* period. During the *iddat* period too there shall be an effort to reconcile. Until the end of the *iddat* period the *talak* is revocable.

11.12 Divorce is permitted as a matter of great evil which may result from the continuance of marriage. But even in such case an attempt is first to be made for reconciliation by referring the matter to arbitration.[245]Thus it is laid down in Quran-

"If ye fear a breach between the two, appoint (two) arbitrators, one from his family and the other from hers. If they wish for peace Allah will cause their reconciliation."[246]

11.13We have to mostly concentrate on reconciliation process. Husband shall not be given an opportunity to divorce his wife without going through this reconciliation process.

11.14Rules in the Second Schedule do not give sufficient opportunity for reconciliation. Just a few words such as "……..the duty of the Quazi to attempt to effect as reconciliation between such husband and wife with the help of the relations of the parties……." would really not help to bring about a settlement. An effective method should be introduced for mediation as Abdulla Ysuf Ali puts in "…….every facility has to be given for reconciliation till the last moment."[247]

11.15 *Talaq* procedure laid down in the Second Schedule has to be repealed and a new set of Rules has to be introduced-

(i) to do justice to weaker party
(ii) to protect the interest of unborn or new born lives
(iii) to protect the social decency, and
(iv) to keep the doors always open for reconciliation

11.16 The procedure suggested by us is given in Appendix."

6.10.05 This Committee is unanimously of the view that the problems outlined above in relation to section 27 may be resolved by amending the Second Schedule, and only recommends the replacement

[245]K.N.Ahmed, *Muslim Law of Divorce*, p.4
[246]Sura 4:35
[247]Abdullah Yusuf Ali. *AL QURAN-Text, Translation and Commentary* , p. 1241

of the existing Second Schedule in the lines of a fresh schedule which is appended to this Report as the Schedule 2, without making any amendment to section 27 itself. The main features of the new Schedule 2 are that it seeks to-

(a) ensure that proper notice of the application is served on the female spouse by the issue of process as provided in the new section 29(2) of this Act;

(b) spread out the stages of the process of divorce over three *tuhr* periods as commended by the *shariah* with greater opportunities for reconciliation of the estranged spouses;

(c) provide the Quazi Court with greater options for the reconciliation of spouses by utilizing the services of persons of their own choice in whom they have confidence including trained male and female Muslim marriage counsellors and trained mediators; and

(d) ensure that all maintenance payable to the female spouse and / or any children including *iddat* maintenance and arrears of maintenance, *kaikuli*, *mahr,* and any sum awarded by the Quazi Court are recovered from the applicant for divorce prior to the registration of the divorce.

6.10.06 Where a wife wishes to obtain a divorce from her husband, she is required to apply in terms of section 28(1) or 28(2) of the MM&D Act. Section 28(1) provides for what is known as a *fasah,* divorce, which is granted by a Court at the instance of the wife on the ground of ill-treatment oron account of any act or omission on the part of her husband which amounts to a "fault" under theMuslim law governing the sect to which the parties belong. An application for divorce under section 28(1) is required to be made in accordance with the Third Schedule to the Act.

6.10.07 An important distinction between the procedure contained in the Second Schedule and the procedure contained in the Third Schedule is that the former does not envisage an adjudication on disputed facts, while the Third Schedule provides a procedure specially geared to the proof by the wife of her husband's matrimonial fault on the basis of which her application for divorce is made. While the Second Schedule to the MM&D Act specifically provides that "the Quazi shall not record the alleged reasons for which, or the alleged grounds upon which, the husband seeks to pronounce the *talaq*", application for a *fasah* divorce depends for its success on the applicant proving ill-treatment by the husband or "any act or omission on his part which amounts to a 'fault' under the Muslim law governing the sect to which the parties belong." The inquiry into the application has to be held by the Quazi with the assistance of three Muslim assessors, and it has been held that the failure to empanel assessors in a case of *fasah* divorce is fatal to the validity of the proceedings.[248]

[248]*See Fareed v Jesima* (1967) MMDR V, 65; *Compare, Fareed v Jesima* (1967) MMDR V, 63.

6.10.08 It is expressly stated in Rule 11 of the Third Schedule that-

> "The Quazi shall maintain a record of the proceedings in the case and shall enter therein the statements made on oath or affirmation by the wife and her witnesses and by the husband (if he is present) and his witnesses. Of the wife's witnesses the number examined shall not be less than two in any case. The record of every such statement shall be read over by the Quazi to the person who has made it and, after any necessary corrections have been made therein, shall be signed by such person. Where such person refuses to sign such statement, the fact of such refusal shall be recorded by the Quazi"

6.10.9. Section 28(1) and the Third Schedule has come in for a great deal of criticism from women's groups. The Muslim Women's Research and Action Forum (MWRAF) has pointed out that the combination of the lack of proper representation and assistance for women to conduct their cases, the gender bias exhibited by some "unenlightened" Quazis, the failure of the system of assessors to function properly mainly due to administrative failures, the practice adopted by some Quazis of converting *fasah* cases into *talaq* cases due to their own inability to conduct proper inquiries under the Third Schedule and the general inefficiency of the system which is aggravated by rampant corruption, has resulted in a great deal of injustice to women.

6.10.10 Hyshyama Hamin and Hasanah Segu Isadeen have also commented about the problems faced by women. They have pointed out that-

> "Under the MM&D Act there is provision for the (unwritten) law of the sect to apply for *fasah* divorces. Therefore, if a particular sect or *madhab* does not recognize divorce by wife (fasah) then women of those sects or *madhabs* are unable to initiative divorce even on fault grounds and only *talaq* divorce by the husband is recognized. As a result women would require 'permission' from their husbands for divorce no matter the circumstance. Therefore the provision for divorce is also not equal to women across sects or *madhabs* in Sri Lanka. According to the Quazi for the Memon community, there is no provision for *fasah* divorce under Hanafi *madhab*, therefore any *fasah* cases received by him from the Memon community are referred to a Quazi who follows Shafie *madhab*."[249]

6.10.11 This Committee has taken into consideration all these issues, some of which have been fully dealt with elsewhere in this Report. However, an important difficulty that has been adverted to is the lack of clarity and deficiencies on the grounds for divorce set out in section 28(1). With the view to redressing this particular grievance, this Committee is unanimously of the view that the Third Schedule referred to in section 28(1) of the Act should be suitably amended in the lines of the proposed Schedule 3 appended to this Report, and that section 28(1) should also be amended as follows;-

[249] Hyshyama Hamin and Hasanah Segu Isadeen, "*Unequal Citizen: Muslim Women's Struggle for Justice and Equality in Sri Lanka*", *supra n*ote 119 at page 15.

"28(1) Where a wife desires to effect a divorce from her husband without his consent, on the ground of-
(a) impotency of the husband at the time of marriage,
(b) ill-treatment by the husband,
(c) non-maintenance,
(d) disappearance of the husband resulting in his whereabouts not being known to the applicant for period exceeding 3 years,
(e) imprisonment of the husband for a period exceeding 7 years,
(f) continuous refusal of the husband to discharge any of his marital obligation without justifiable cause,
(g) violation by the husband of any term of the contract of marriage, or
(h) any act or omission on the part of the husband which amounts to a fault under Muslim law, or any supervening circumstance that prevents the spouses living together in conformity with their conjugal obligations,
the procedure laid down in the Schedule 3 shall be followed."

6.10.12 It is relevant in this context that the Muslim Lawyers' Association has in its representations observed that no provision has been made in the existing MM&D Act to expressly recognise the form of delegated *talaq* practiced by Hanafi Muslims known as *talaq-i-thafwid*. However, it is apparent that ground (g) above can be utilised by an applicant for giving effect to a stipulation in the contract of marriage in the nature of *talaq-i-thafwid*.

6.10.13. Section 28(2) is a provision in the MM&D Act that seeks cover all kinds of divorce that is open to a Muslim woman other than *fasah* already dealt with. The section provides as follows:-

"28(2) Where a wife desires to effect a divorce from her husband on any ground not referred to in subsection (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure."

6.10.14 It is clear that this provision was intended to apply to *khula* and *mubarat* divorces as well. *Khula* is traditionally regarded as a termination of marriage by the husband on the request of the wife in consideration of the payment of some compensation by the wife in circumstances where she has an incurable aversion to her husband. In *Khurshid Bibi v Mohamed Amin*, where a *khula* divorce had been sought, the Supreme Court of Pakistan held after considering relevant *ahadith*, that a Muslim wife is entitled as of right to obtain such a divorce even against the wish of the husband if she can prove that "the spouses could not live together in conformity with their conjugal obligations."[250] The

[250]*Khurshid Bibi v Mohamed Amin* (1967) XIX P.L.D. 97 at page 118 (per Rahman J.)

Court preferred the views of Imam Malik on the subject and departed from the traditional Hanafi doctrine of Pakistan. On the other hand, in *Fathima Mirza v Ansar*[251] on similar facts, the Sri Lankan Supreme Court considered itself bound to follow the strict Shafie law and left the hapless wife to suffer in silence. Declining an invitation by learned Counsel to adopt an eclectic approach and follow the opinion of Imam Malik on the matter, Samarawickreme J. left a ray of hope in the horizon when he said at page 296 of his judgment that "Having regard to the rapid pace at which traditional notions are shed in these days, it may not be correct to regard the possibility of an expansion of the law as distant."

6.10.15 The optimism of that erudite judge has reached fruition in the work of this Committee. The undersigned members of the Committee recommend that the necessity to obtain of the husband's consent for a *khula* divorce should be done away with, subject to the payment of compensation to the husband. It is recommended that section 28(2) of the Act be amended by deleting the words "governing the sect to which the parties belong" and adding the following sentence at the end of the said section:-

> "For the avoidance of doubt it is hereby enacted that where the wife applies for divorce without the consent of the husband on the ground that the spouses could not by reason of the wife's incurable aversion to her husband live together in conformity with their conjugal obligations (*khula* divorce), the Quazi Court may after due inquiry, permit the divorce subject to the payment of such compensation to the husband as may be agreed by the parties, and in the absence of agreement in this regard, as may be determined by the Court. Subject to the provisions of Rules 9 and 10 of Schedule 3, the period of *iddat* shall not commence until the agreed compensation or the compensation ordered by court is fully paid to the husband."

6.10.16. It is now necessary to deal with the *mubarat* divorce, which is a divorce by mutual consent of the parties. This too was presumably covered by the existing section 28(2), but for clarity, it is recommended that a new form of application that can be used for a *mubarat* application and a new Schedule 3B in the lines of the draft attached to this Report be introduced into the MM&D Act along with a new section to be added as section 28(3) in the following lines:

> "28 (3) Where either the husband or the wife or both wish to obtain divorce by mutual consent (*mubarat*), the procedure laid down in the Schedule 3A shall be followed."

6.10.17 It may be useful to summarise the recommendations of the undersigned members of the Committee with respect to the provisions of the Muslim Marriage and Divorce Act (MM&D Act) that deal with divorce. In summary, the said members of the Committee unanimously recommends that:-

[251] *Fathima Mirza v Ansar* 75 NLR 295.

(1) The Second Schedule referred to in section 27 of the Act be replaced with a new Schedule 2 appended to this Report with the objective of ensuring service to the wife of notice of initiation of proceedings under section 27 of the Act and to strengthening the process of reconciliation to be effected with the assistance of those with specialized skills in counseling, mediation and other forms of dispute resolution including the most revered form recommended in the Holy Quran 4:35 *Sura Nisaa,* of each party appointing an arbiter from his or her choice to resolve any dispute.

(2) The Third Schedule referred to in section 28(1) of the Act be suitably amended in the lines of the Schedule 3 to this Report, and that section 28(1) be amended as suggested in this Report to provide for the wife a right of divorce from her spouse on the ground of his impotency at the time of marriage, ill-treatment, non-maintenance or disappearance of the husband resulting in his whereabouts not being known to the applicant for more than 3 years, imprisonment of the husband for a period exceeding 7 years, continuous refusal of the husband to discharge any of his marital obligation without justifiable cause, violation by the husband of any term of the contract of marriage or on account of any act or omission which amounts to a "fault" or other supervening circumstance under Muslim law.

(3) Section 28(2) of the Act be amended by deletion of the reference to the "sect to which the parties belong" and by adding a new sentence at the end of that section clarifying that where the wife applies for a *khula* divorce without the consent of the husband on the ground that the spouses could not by reason of the wife's incurable aversion to her husband live together in conformity with their conjugal obligations, the Quazi Court may after due inquiry in accordance with the procedure set out in the Schedule 3, permit the divorce subject to the payment of such compensation to the husband as may be agreed by the parties, and in the absence of agreement in this regard, as may be determined by the Court.

(4) Further amending section 28 by introducing a new sub-section as section 28(3) of the Act, to deal with applications for *mubarat* divorce (where either the husband or the wife or both wish to obtain divorce by mutual consent) with a new form and a Schedule 3A setting out the procedure to be followed.

K - Initiation of Proceedings, Service of Process and Registration of Divorce

6.11.01 In the light of the representations received from the public, it is felt necessary to streamline certain procedural matters relevant in particular to applications to be made to the Quazi under the provisions of the MM&D Act. In the opinion of the Committee, amendments are necessary to provide in clear term the Quazi Court in which particular proceedings may be instituted, and the procedure for issue of process. These procedures to apply generally to all proceedigns in the Quazi Court in regard to

the grant and registration of divorces, declaration of nullity and all other forms of matrimonial relief that may be granted by the Quazi Court

6.11.02 Accordingly, it is recommended that section 29 of the MM&D Act be amended by repealing sections 29(1) and (2) and the re-numbering existing sections 29(3), 29(4) and 29(5) of the Act as respectively, sections 29(4), 29(5) and 29(6). Existing section 29(3) to be renumbered as section 29(4) to be amended therein by substituting for the words "under subsection (1)" the words "under subsection (3)" and any reference to "Quazi" be amended as "Quazi Court". Section 29 to be amended further by introducing three new sections as sections 29(1), 29(2) and 29(3) in the following lines:-

29 (1) All applications for divorce in terms of sections 27 of this Act, shall be filed in the Quazi Court of the division in which the wife resides or where she is not for the time being resident in Sri Lanka or her whereabouts are unknown, in the Quazi Court of the division in which the wife was last resident, in the prescribed form. All applications for divorce in terms of section 28 or for a declaration of nullity in terms of section 30, and unless express provision to the contrary is made in any provision of this Act, all other applications in terms of this Act, shall be filed in the prescribed form in the Quazi Court for the division in which the wife resides.

(2) The following provisions shall apply for the service of process including summons and notices under this Act:

(a) Any notice, summons or other process required to be served by this Act may in the first instance be served by registered post or through the grama seva niladhari of the division and or the fiscal officer of the District Court or Magistrate Court of the area, as may in its discretion be determined by Court;

(b) Where the Court is satisfied by statement on oath or affirmation of the applicant that in the circumstances of the case it is not possible to serve the process as prescribed in paragraph (a), the Court may direct that it may be served through the employer or the nearest relative of the person to be served with process;

(c) Where the Court is satisfied by statement on oath or affirmation of the applicant that the person to be served with process is not in Sri Lanka, it may at its discretion direct the issue the process required by paragraph (a), to the overseas address of the person to be served with process where the same in known or verifiable-

(i) by registered airmail, courier or other expeditious method including email; or

(ii) through the overseas employer of the person to be served with process;
(iii) in terms of the provisions of the Mutual Assistance in Civil and Commercial Matters Act No. 39 of 2000 or any other applicable legislative provision; or
(iv) where the applicant in not aware of whereabouts of the person to be served with process, service may be made through nearest known relative.

(d) Where the Quazi Court is satisfied by any statement on oath or affirmation of the applicant that the whereabouts of the person to be served with process are unknown and that the said person is not employed or his or her place of employment is not known and that there is no relative of such person known to be in Sri Lanka, the Court may direct the service of the process referred to in paragraph (a) through publication in one or more newspapers as may be determined by it.

(3) The Quazi Court which is required in accordanc with Schedule 2 or Schedule 3 to register a divorce, shall enter in Sinhalese or in Tamil or in English, a statement of the particulars of the divorce in triplicate, that is to say, the original, the second copy (hereinafter referred to as the "duplicate") and a third copy, in a divorce register, which it is hereby required to be kept for that purpose substantially in form VA of Schedule 1, and be signed by the parties if present at the time the entries are made and the Quazi. The third copy shall bear an endorsement under the hand of the Quazi to the effect that it is issued under section 29 (6) of the Act.

L - Applications for Declaration of Nullity of Marriage

6.12.01 This Committee has also taken into consideration the fact that there is no provision in the Act, except for the oblique reference to in section 47(1)(i) of the Act, to deal with applications for declaration of nullity of marriage. It is recommended that this omission be rectified by introducing a new section to replace the existing section 30, which has become redundant by reason of the existence of section 32 of the Act, to deal with nullity of marriage.

6.12.02 In this connection, it is important to bear in mind that a factor that may nullify a marriage may have existed at the time the purported marriage was contracted or arise subsequent to the marriage. Where the nullifying factor is a supervening circumstance, such as a change of the gender or sexual status of a party to the marriage or on the ground of intervening change of religion, it may be more appropriate to resolve the matter through divorce.

"30(1) Any person who is a party or a purported party to a marriage solemnized under this Act, may within a reasonable time make an application in the prescribed form for a declaration of

nullity of marriage from the Quazi Court of the division in which the wife or purported wife is resident, and the procedure set out in Schedule 3A shall be followed.

30(2) A Quazi Court may grant a declaration of nullity of marriage on the basis of a circumstance that existed at the time of the solemnization of the marriage that made the marriage a nullity. All declarations of nullity granted by Court shall be entered in a Nullity Register to be maintained by Court in the format prescribed in Schedule 1 form 5B"

M - Providing for Greater Equity and Justice relating to Maintenance, Mata'a, Dowry, *Mahr and Kaikuly*

6.13.01 This Committee has carefully examined sections 34 to 39 of the MM&D Act in the light of the representations received in this regard and the experience of its members through practice and observation, and considers it necessary to make some recommendations with a view to clarify the provisions and procedures applicable to payment of maintenance, *mata'a*, dowry, *mahr* and *kaikuli*. In this connection, detailed representations made by the Muslim Womens Research and Action Forum (MWRAF) and research inputs from MWRAF and the All Ceylon Jamaiyyathul Ulama (ACJU) were particularly useful.

6.13.02 Questions relating to payment of maintenance and *mata'a* were examined in depth by the Commmittee. The Muslim Womens Research and Action Forum (MWRAF) has proposed that section 36 of the Act should be amended to clarify that a wife or child shall be entitled to past maintenance from the date that the husband deserted his wife or the father ceased to maintain a child, provided that the exact date or period of desertion or non-maintenance can be proved on a preponderance of evidence, and that express provision should be made in the MM&D Act providing for the award of *mata'a*. The MWRAF recommendations relating to the payment of maintenance were readily acceptable, but the issue of *mata'a* had to be more carefully examined.

6.13.03 In this context, it is important to mention that this Committee considered in some depth the concept of *mata'a,* which may be defined in section 97 of the MM&D Act to mean "a consolatory payment provided to the wife by the husband on the termination of marriage upon an order in terms of section 27 or 28(1) without any fault attributable to the wife". The award of *mata'a* finds support in several verses of the Holy Quran, the most notable being Holy Quran *Surah Al-Baqarah* 2:236 and 2:241. The first of these verses, Holy Quran, 2:236 is translated by Abdullah Yusuf Ali as follows:-

"There is no blame on you
If ye divorce women

Before consummation
Or the fixation of their dower (*mahr*);
But bestow on them
(A suitable gift)
The wealthy
According to his means,
And the poor according to his means:-
A gift of a reasonable amount
Is due from those
Who wish to do the right thing."

6.13.04 It is noteworthy that the other translations do not envisage the payment recommended by the said verse as a mere gift as does Yusuf Ali, and M.M. Pickthall interprets it as "a *fair provision"* which is a *"bounden duty* for those who do good", and Shakir uses similar language and describes *mata'a* as "a provision according to usage; (this is) a *duty on the doers of good* (to others)". This verse of course, relates to a divorce in a situation where the marriage had not been consummated. In *Surah Al-Baqarah* 2:241, the Holy Quran deals with a situation where the marriage has been consummated, and as translated by Yusuf Ali, recommends that-

"For divorced women
Maintenance (should be provided)
On a reasonable (scale).
This is a duty
On the righteous."

6.13.05 It is significant to note that some of the other translations, do not use the word "maintenance" at all, and M.M. Pickthall describes it as "a provision in kindness", and the term "provision" is used in most of the other translations, such as those of Wahiduddin Khan, Shakir, Ahmed Ali, T.B. Irving, Muhammad Sarvar, and Umm Muhammad (Sahih International). From these verses of the Holy Quran, it becomes clear that *mata'a* is a moral as opposed to a legal duty. However, in the social environment in Sri Lanka where the result of the exercise of *talaq* by the husband and the grant of a *fasah* divorce by the Quazi Court dissolves the contract of marriage without any fault attributable to the wife causing immeasurable mental agony and severe financial hardship to the wife, there is strong justification for converting this moral obligation into a legally enforceable duty. In fact, when moving a resolution for the upliftment of the Quazi Court system in 2012, former Minister of Muslim Religious and Cultural Affairs who was that time the Deputy Chairman of Committees, the late Hon. A.H.M Azwer made the following pertinent observation[252]:

[252] Parliamentary Debates (Hansard) dated 9th May 2012 at page 977

"In dealing with Quazi Court matters, one factor that has got to be taken very seriously is the sufferings of the Muslim women. When maintenance has to be paid according to Matha (*mata'a)* concept, they (presumably the husbands who were pronouncing *talaq* on their wives or driving them to a situation where they have to seek a *fasah* divorce) do not pay it as ordered."(*Explanatory words in parenthesis have been added*)

6.13.06 This Committee is aware that Quazis have been making orders for *mata'a* on the basis of principles of the *shariah* enshrined in the above quoted verses of the Holy Quran despite the absence of express provision in the MM&D Act empowering the Quazi to award *mata'a* and that the Judicial Service Commission had issued a circular to Quazis sanctioning this practice in view of section 98(2) of MM&D Act which provides that the "mutual rights and obligations of the parties shall be determined according to Muslim law", and there is currently an appeal before the Supreme Court on the legality of an award of *mata'a* in these circumstances. The Muslim Womens Research and Action Forum (WRAF) has recommended that *mata'a* should be paid to the wife upon the divorce either by wife or husband if there is no matrimonial fault on the part of the wife. Such a payment should also be made to the wife by a husband who was a Muslim at the time of the marriage but subsequently became an apostate thereby terminating the matrimonial relationship. The undersigned members of the Committee therefore recommend that express provision be made in the MM&D Act to impose a legal duty to pay *mata'a* where a man divorces his wife without fault on her part or a woman is compelled to apply for divorce on the ground of the husband's matrimonial fault, and to make this provision applicable retrospectively. In the opinion of the undersigned members of the Committee, a definition of the term *mata'a* may be included in section 97 of the Act to mean "a consolatory payment provided to the wife by the husband on the termination of marriage upon an order in terms of section 27 or 28(1) without any fault attributable to the wife."

6.13.07 It is manifest from the verses of the Holy Quran quoted above, that in quantifying the amount of money to be awarded as *mata'a*, the means of the husband would be an extremely relevant factor. It is the considered opinion of this Committee, the means of the husband should be taken into consideration along with other material circumstances such as the social and economic standing of the divorced woman, the duration of the marriage, the age of the divorced woman, her educational attainments, availability of other means of support, and the conduct of the parties. In fixing the amount of *mata'a,* the ultimate criterion is whether the amount is "reasonable" in all the circumstances of the case. The undersigned members of the Committee recommend that the said factors too be incorporated into a new section to be introduced as section 34 of the MM&D Act, after re-numbering the current section 34 as section 35(1) of the Act and renumbering the existing sections 35(1) and 35(2) as sections 35(2) and 35(3) respectively, to guide the Quazi Court in computing the amount to be awarded as *mata'a*. Legislative provision should also be made to place the burden of

proof of proving the actual income of the husband on him rather than on the wife, who in most cases may not be aware of his actual financial standing.

6.13.08 Having examined issues that arise in connection with the award of maintenance in considerable depth, this Committee is of the opinion that it is necessary to amend the existing sections 34, 35(1) and 35(2) of the MM&D Act, which may be renumbered as suggested above as sections 35(1), 35(2) and 35(3) respectively, by interpolating the words "or interim maintenance" wherever the word "maintenance" occurs in those sections, to empower the Quazi Court to award interim maintenance as well. It is also recommended that section 36 be amended to make it possible for maintenance or interim maintenance to be paid for any period prior to the date of application if the claimant is able to prove the exact date and / or period of desertion or non-maintenance is on a preponderance of evidence, provided that such date or period falls within a period of 3 years prior to the date of the claim. It is also recommended that section 37 be amended to provide that where a woman is unable to appear in court by reason of sickness, infirmity or other reasonable cause, she may be permitted by the Court to detail some other person to institute proceedings on her behalf for the recovery of *mata'a, mahr* or return of any *kaikuli* and appear in Court on her behalf.

6.13.09 This Committee has also examined the question of dowry that is in practice in some parts of the Island where it is impossible to give a girl in marriage without providing huge dowries which are shamelessly demanded by the intended bridegroom or his family from the bride or her family. It is the opinion of the undersigned members of the Committee that the practice of a man demanding a dowry from his would be wife is altogether irreconcilable with the obligation of the groom to provide his wife with a token of respect called *mahr*, and the practice of demanding or yielding to any form of monetary or other inducement for a man to enter into matrimony should be prohibited by law and made punishable.

6.13.10 In this context, the Committee has also examined the provisions in the MM&D Act dealing with *kaikuli,* in the light of representations received from the public to the effect that the practice of *kaikuli* too should be abolished. It is noteworthy that section 97 of the MM&D Act defines "*kaikuli*" to mean "any sum of money paid, or other movable property given, or any sum of money or *any movable property* promised to be paid or given, to a bridegroom *for the use of the bride*, before or at the time of the marriage by a relative of the bride or by any other person." It is noted that although the provision of any dowry other than *mahr* is not consistent with Islamic principles, it is a reality in modern day society the prevalence of which is diminishing due to the infusion of Islamic values, especially among the youth and the rise in the standards of education and employability of marriageable girls. However, it is also noteworthy that demanding a dowry consisting of property of high value or fairly large sums of more is in vogue in certain parts of Sri Lanka, and in view of its inconsistency with the *shariah*, there is consensus in the community that all forms of dowry other than *mahr* and *kaikuli* should be prohibited by law and punishable as an offence. *Mahr* is a religious

obligation enjoined by the Holy Quran[253] and though not defined in the MM&D Act, it is recommended that a definition of the term be included in section 97 of the Act to mean "a mandatory gift that may take the form of money, movable or immovable property or any other thing of value given or promised to be given by or on behalf of the bridegroom to the bride as a token of respect to her at the time of the marriage, that is deemed to be her property." Section 97 of the Act defines as "a sum of money or movable property given to a bridegroom "*for the use of the bride*" and constitutes a trust (*amanath*) in favour of the bride and should be considered lawful. In this connection, it is significant to note that the Muslim Women Research and Action Forum (MWRAF) has recommended that a specific mandatory provision should be made for entering the particulars of *kaikuli* in the marriage register and the non-inclusion of these particulars in the register should be made an offence punishable by law. MWRAF has also recommended that the definition of *kaikuli* should be expanded to include properties *movable and immovable* and even those provided after the marriage takes place.

6.13.11 In these circumstances, this Committee is of the unanimous opinion that while provisions should be introduced in the Act to prohibit the giving or taking of any dowry as defined in section 97 of the Act as well as the abetment thereof, *kaikuli* should be excluded from the definition of dowry. The concept of trust (*amana* or *amanath*), which is one of the greatest contribution of Islamic jurisprudence to society in general, should be applied even more widely so that whatever property, whether movable or immovable, given to a bridegroom prior to, simultaneously or even after entering into a contract of marriage solely for the benefit of the bride, may not be converted by the bridegroom for his exclusive use or enrichment. In the opinion of the Committee the definition of *kaikuli* as found in the MM&D Act should, as suggested by MWRAF, be widened to include land and other immovable property that may be given for the purposes of the bride at the time of the marriage or even after entering into the contract of marriage. This Committee unanimously recommends that the definition of "*kaikuli"* in section 97 be so widened to mean "any sum of money paid, or other m*ovable or immovable property* given or any sum of money or any property promised to be paid or given to a bridegroom for the use of the bride, prior to, at the time of, or even after, entering into the contract of marriage, by a relative of the bride or by any other person." Such widening of the scope and ambit of *kaikuli w*ill, in the opinion of the Committee, be beneficial to the bride.

6.13.12 It is also proposed to amend section 38 to provide that in such a case, all moneys payable to such woman shall, notwithstanding anything in section 53, be forthwith deposited by the Quazi Court in a bank that may be determined by it in consultation with the parties or their representatives, in the name of the woman claimant and give notice to the said claimant that such money has been deposited in her name in the said bank. It is also proposed to provide by amendment that in respect to any

[253] See for example, Holy Quran, 4:4 *Surah Nisaa* (Ed. Abdulla Yusuf Ali)

movable or immovable property that may be claimed in any such proceedings, the Quazi Court may make an appropriate order that shall facilitate the expeditious satisfaction of the claim.

6.13.13 In summary, the undersigned members of the Committee make the following recommendations under this head:-

(1) The title of Part V of the MM&D Act be amended to read: PROVISIONS RELATING TO MATA'A, MAINTENANCE, DOWRY, MAHR AND KAIKULI.

(2) Sections 34 of the said Act be re-numbered as section 35(1) and sections 35(1) and 35(2) of the Act be renumbered respectively as sections 35(2) and 35(3) and in all these sections be further amended by substituting therein for the word "maintenance", the words "maintenance or interim maintenance", and a new section be introduced as section 34 in the following lines:-

"34(1) Where a marriage has been or is to be dissolved in terms of section 27 or in terms of section 28(1) on the ground of any matrimonial fault of the husband, the divorced wife shall be entitled to *mata'a* and may apply for the same in terms of section 47(1)(h) of this Act. In determining the quantum of *mata'a* to be awarded, the Quazi Court may take into consideration the following matters:-

(a) the means of the husband including his monthly income;
(b) the social and economic standing and educational attainments of the wife;
(c) the age of the husband and that of the wife;
(d) the duration of the marriage;
(e) the availability of other means of support for the wife;
(f) the number of children falling within the custody and care of the husband and / or the wife;
(g) the conduct of the parties to the marriage during the pendency of the marriage; and
(h) any other circumstances that may be relevant in making a reasonable assessment of requirements of the wife after divorce."

34(2) Where there is any dispute as regards the means of monthly income of the husband, the burden of proving the same shall be on the husband.

34(3) The provision in sub-sections (1) and (2) shall apply retrospectively from the date of the principal Act, without prejudice to any decision of a Quazi, the Board of Quazis, the Court of Appeal or the Supreme Court, that may have been finally made."

(3) The definition of "*kaikuli*" in section 97 to be amended to mean "any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom for the use of the bride, prior to, at the time of, or even after entering into the contract of marriage, by a relative of the bride or by any other person" A definition of the term "*mata'a*" be added to section 97 of the Act to mean "a consolatory payment determined by court in the absence of any express agreement between the parties payable to a wife who is divorced by the husband under section 27 of this Act or under section 28(1) of this Act upon proof of the matrimonial fault of the husband" and;

(4) Section 36 of the said Act be amended by substituting therein for the word "maintenance", the words "maintenance or interim maintenance" and requiring that maintenance should be payable from "the date on which such claim was made, unless the date determined by the said Court as the date on which the spouses were actually separated falls within a period of three years prior to the date of the claim, in which event, the maintenance shall be payable from the actual date of separation so determined by Court. In any case where the income of the person who is liable to pay maintenance is in dispute, the burden shall be on such person to prove his income by evidence."

(5) Section 37 of the said Act be amended by renumbering the existing section 37 as Section 37(2) and replacing the words "*mahr* or *kaikuli*" contained therein of the words "*mata'a,* maintenance (including interim maintenance), dowry*, mahr* or return of any *kaikuli*" and introducing a new provision as section 37(1) which shall read as follows:-

"37(1) It shall be unlawful to give or take or abet the giving or taking of any dowry as defined in section 97 of this Act";

(6) Section 84 of MM&D Act be suitably amended to make the giving or the taking of a dowry as well as the abetment thereof, an offence punishable with a fine and / or a term of imprisonment, and Section 97 be amended by adding to that section a definition of "dowry" to mean "any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom in consideration of the marriage prior to, at the time of, or even after, entering into the contract of marriage, by a relative of the bride or by any other person, but does not include any *kaikuli* which is recorded in the Register of Marriage, or any presents of the type which are usually given at the time of marriage to the bridegroom without any demand having been made in that behalf"

(7) Section 38(1) be amended by the replacement of that sub-section by a new sub-section in the following lines:

> "Where in any proceedings under this Act for maintenance (including interim maintenance), *mata'a, mahr* or return of dowry and / or *kaikuli*, the woman claimant is represented by some other person under section 37, all moneys received by the Quazi Court to which that woman is entitled as the claimant shall notwithstanding anything in section 53, be forthwith deposited by the Quazi Court in a bank that may be determined by it in consultation with the parties or their representatives, in the name of the woman claimant and give notice to the said claimant that such money has been deposited in her name in the said bank. With respect to any movable or immovable property that may be claimed in any such proceedings, the Quazi Court may make an appropriate order that shall facilitate the expeditious satisfaction of the claim."

(8) Section 38(2) be amended by substituting for the words "a Quazi in a kachcheri under sub-section (1)" of the words "a Quazi Court in terms of sub-section (1)"

(9) Section 39 be amended by substituting for the words "woman's *mahr*" of the words "woman's *mahr* or return of dowry and / or *kaikuli*" and the substitution for the words "dissolution of the marriage" and "dissolution of marriage", the words "declaration of nullity or dissolution of the marriage".

N - Jurisdiction and Powers of Quazi Courts, the Quazi Appellate Court and the Right to Legal Representation.

6.14.01 This Committee has also examined sections 43 to 53 of the MM&D Act relating to the jurisdiction and powers of the Quazi Court and the Board of Quazis (to be renamed "the Quazi Appellate Court"). The Committee is of the opinion tha it is necessary to strengthen the system of supervision of the Quazi Courts, particularly in the context of the levels of inefficiency and corruption prevailing in these courts, and recommends unanimously that the revisionary power of the Quazi Appellate Court be clarified by amending section 43 of the MM&D by re-numbering the said section as section 43(1) and substituting in place of "Quazi" that appears therein, the words "Quazi Court" and in place of "Board of Quazis" the words "Quazi Appellate Court", and by introducing a new provision as section 43(2) in the following lines:

> "The Quazi Appellate Court may in exceptional circumstances with a view of avoiding any miscarriage of justice, *ex mero motu* or on any application made in that behalf by any party to proceedings before any Quazi Court, call for, inspect and examine any record of the said

Court and in the exercise of its revisionary powers, make any order thereon as the interests of justice may require."

6.14.02 Although Attorneys-at-law are currently permitted to appear before the Board of Quazis, section 44(2) of the Act that deals with representation for the parties does not expressly provide for appearance through and Attorney-at-law, and section 74 of the Act prohibits the appearance of an Attorney at law "on behalf of any party or witness". It is therefore recommended that section 74 of the Act be repealed and section 44(2) be amended by substituting for the words "in person or by his representative" of the words "in person or through an authorised representative", which will then enable a party to retain the services of an Attorney-at-law if it is so desired. It is therefore recommended that section 44(2) be amended by substituting for the words "in person or by his representative" of the words "in person or through an authorised representative." A definition of "authorised representative" should be included in section 97 to clarify that an authorised representative may or may not be an Attorney-at-law.

6.14.03 It is also necessary to provide for the Quazi Appellate Court to consult the Muslim Marriage and Divorce Advisory Board in appropriate circumstances. It is therefore unanimously recommended that section 45 of the MM&D Act be amended by renumbering it as section 45(1) and introduce the following provision as section 45(2):

"(2)The Quazi Appellate Court may, where it considers it expedient, consult the Muslim Marriage and Divorce Advisory Board in regard to any question relating to the content of Muslim Law."

6.14.04 With the same objective, it is also unanimously recommended that section 46 be amended by adding a new sub-section as section 46(4) to read as follows:

(4) If any question of law reserved for its consideration under sub-section (1) of this section involves any principle of Muslim Law, the Quazi Appellate Court may, where it considers it expedient, consult the Muslim Marriage and Divorce Advisory Board prior to formulating its opinion."

6.14.05 For the purpose of conferring on the Quazi Court the necessary jurisdiction to inquire into the matters that have been considered and recommendations made elsewhere in this report, it is unanimously recommended that section 47(1) of the MM&D Act be amended to read as follows:-

47 (1) The powers of the Quazi Court under this Act shall include the power to inquire into and adjudicate upon-

(a) any claim by a wife for the recovery of *mahr* or for the refund of any dowry given to the bridegroom;

(b) any claim for maintenance, including interim maintenance, by or on behalf of a wife;

(c) any claim for maintenance, including interim maintenance, by or on behalf of a child;

(d) notwithstanding anything to the contrary in any other provision of this Act, any claim for maintenance, including interim maintenance, by or on behalf of an illegitimate child, where the mother of such child and the person from whom maintenance is claimed are Muslims;

(e) any claim by a wife or divorced wife for maintenance until the registration of the divorce or during her period of *iddat*, or, if such woman is pregnant at the time of the registration of the divorce, until she is delivered of the child;

(f) any claim for the increase or reduction of the amount of any maintenance ordered by the Quazi Court;

(g) any claim by a wife or a divorced wife for her lying-in expenses;

(h) any claim for *mata'a*;

(i) any claim for the recovery of or the return of dowry or *kaikuli*;

(j) any application for the facilitation of mediation;

(k) any application for judicial separaction;

(l) any application made in the course of any proceedings before the Quazi Court under this Act, for the custody of, and access to, any child born to spouses whose marriage has been contracted under this Act; and

(m) any application for an order from a Quazi Court for I nterim relief that may be necessary to prevent any application made under this Act becoming nugatory or incapable of being enforced.

6.14.06 It is recommended that section 47(5) and section 47(6) of the Act be repealed and replaced with a provision in the following lines:-

"(5) The power of the Quazi Court to deal with and determine any application made in the course of any proceedings before the Quazi Court in terms of section 47(1)(l) of this Act for the custody of, and access to, any child born to spouses who are governed by the provisions of this Act shall

be exercised by the Quazi Court without prejudice to the jurisdiction vested in the Court of Appeal and the High Court of the Provinces to issues writs of *habeus corpus.*

(6) Unless there is express contrary provisions in this Act or any schedule to this Act, every inquiry under this section shall be held as nearly as possible in accordance with the rules in the Schedule 4."

6.14.07 It is further recommended that sections 48 and 49 of the Act be amended in the following lines:-

"48 Subject to any special provision in that behalf contained in this Act, the jurisdiction exercisable by a Quazi Court under this Act shall be exclusive and any matter falling within that jurisdiction shall not be tried or inquired into by any other court or tribunal whatsoever."

49 (1) Every Quazi shall take an oath of office in the prescribed form as soon as may be after his appointment and before he commences to exercise any powers or perform any duties or functions under this Act before a judicial officer in the area which he is appointed not below the rank of a Judge of the High Court.

(2) A Quazi Court shall in the exercise of its jurisdiction under this Act, conduct sittings at such places as may be prescribed by the Judicial Service Commission by order published in the Gazette."

6.14.08 The Committee also recommends the amendment of sections 51 to 53 of the Act in the following lines:-

"51(1) Every Registrar of a Quazi Court shall, before he commences to perform any of the functions of his office, enter into a bond in a sum of money that shall be prescribed by the Judicial Service Commission conditioned for the due and faithful discharge of his duties.

(3) The said bond shall be executed before the Quazi for the division to which the said Registrar has been appointed, or before the Chairman of the Quazi Appellate Court, and the value of the bond shall be secured to the State by the guarantee of two sureties in that behalf to the satisfaction of the Quazi or Chairman of the Quazi Appellate Court before whom the said bond is executed.

(3) The Registrar of the Quazi Appellate Court shall, before he commence to perform any of the functions of his office, enter into a bond in a sum of money that shall be prescribed by the Judicial Service Commission conditioned for the due and faithful discharge of his duties.

(4) The said bond shall be executed before the Chairman of the Quazi Appellate Court or before a Judge of the High Court, and the value of the bond shall be secured to the State by the

guarantee of two sureties in that behalf to the satisfaction of the said Chairman of the Quazi Appellate Court or High Court Judge before whom the said bond is executed.

(5) Every Bond executed under the preceding sub-sections of this section shall be expeditiously forwarded to the office of the Judicial Service Commission and filed in that office.

52 (1) A record of each sum of money received by a Quazi Court under any of the provisions of this Act or the regulations there under shall forthwith be made by the Registrar of the Quazi Court in the prescribed book and such money shall forthwith be paid by him to the person entitled thereto or to the nominee of the claimant.

Proviso 1 – Provided that where the person entitled to any money is a child who has not attained the age of eighteen, such payment may forthwith be made by the Quazi Court at its discretion to the person who from time to time has the custody of that child subject to any conditions that may be imposed by the Court in the interests of such minor child;

Proviso 2 - Provided further that

(i) All moneys paid to and received by any Quazi Court which is not forthwith paid over in the manner aforesaid shall be deposited in a current account in a designated bank situated within the Quazi division in which such court is situated, and such account shall be maintained by the Registrar of the Quazi Court in accordance with the provisions of this Act and regulations made there under.

(ii) Where the person entitled to any money cannot be found or does not claim the money which is deposited within the period of one year after the date on which the Quazi Court received such money, such money shall be transmitted with a report to the High Court of Sri Lanka having financial control and oversight over the relevant Quazi division, and shall be disposed of by the said High Court in such manner as may be prescribed.

(2) A record of each sum of money paid by a Quazi Court or deposited in any current account in pursuance of the provisions of subsection (1) shall forthwith be made by the Registrar of the Quazi Court under the supervision of the Quazi in the prescribed book and every such payment must be supported by a receipt in the prescribed form signed by the person receiving the money.

53. Every Registrar of the Quazi Court who deposits any money in or authorises the withdrawal of any money from the bank referred to in section 52 shall forthwith report to the Registrar of the High Court of Sri Lanka having financial control and oversight over the relevant Quazi division, the amount so deposited or withdrawn, the date on which the deposit or withdrawal was made and any other particulars which may be prescribed.

6.14.09 It is also unanimously recommended that sections 54 to 59 of the Act be amended as follows to ensure the efficient maintenance of records including electronic records relating to all proceedings

in the Quazi Court and the Quazi Appellate Court pertaining to nullity, divorce, maintenance and other proceedings, the maintenance of a Nullity Register and a Divorce Register, and to improve the system of assessors, in particular to ensure that there is at least one male and one female assessor in every panel of assessors who has no conflict of interest with either of the parties:-

54 Unless otherwise provided by regulation, every Registrar of the Quazi Court shall, at the close of each month, send to the Judicial Service Commission with copy to the Secretary to the Ministry of Justice, particulars of all applications received, disposed of and pending during the said month, verified by the Quazi in the prescribed form.

55 Every Registrar of the Quazi Court shall keep, in the prescribed form, a current index of the contents of every record, register, book or index maintained by him, except where it is otherwise provided by regulation; and every entry in such index shall be made, so far as practicable, immediately after he has made an entry in the book or register.

56 (1) The Registrar of the Quazi Court is the custodian of all records, books and indexes to be maintained by the Quazi Court under this Act.

(2) - Subject to the other provisions of this Act, and except in such cases or on such occasions as may be prescribed or except on the orders of a competent court, no person other than a Quazi or Registrar of the Quazi Court shall have in his possession or custody any records, books and indexes of the Quazi Court.

(3). Subject to the other provisions of this Act and except in such cases or on such occasions as may be prescribed or authroised by the Quazi Appellate Court or other competent court, no person other than the Quazi or Registrar of the Quazi Court or other official of court duly authorised in this regard by the Quazi or Registrar, shall keep any record, book or register which relates to any proceeding in the Quazi Court or purports to be a Marriage, Divorce or Nullity Register, and no Quazi, Registrar or other official shall permit any other person to take possession or to have the custody of any record, register, book, or other document required to be kept by the Quazi Court or Registrar under this Act..

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57 (1) The Quazi Court shall obtain from the Divisional Secretariat within which the court is situated and from the Jumma masjids and Muslim organizations in the area, lists of adult Muslims of both sexes who are eligible to be empaneled as assessors, and ensure their presence in Court at times when inquiries under the Act which are required to be taken up before assessors are due to take place.

(2) In empaneling assessors, the Quazi Court shall ensure that there is at least one male and one female assessor in the panel of assessors and that the assessors so empaneled do not have any conflict of interest with either of the parties to the dispute.

(3) Every Muslim assessor who is empaneled for the purposes of this Act shall take an oath in the prescribed form before he or she functions as an assessor.

58 (1) - The Registrar of the Quazi Court that registers a divorce or nullity of marriage shall detach the duplicate from the Divorce Register or Nullity Register as the case may be, and send such duplicate, on or before the fifth day of the month following that in which the marriage or divorce was registered, to the District Registrar.

(2) - All duplicates sent to the District Registrar in accordance with the provisions of subsection (1) shall be forwarded by him to the Registrar-General, who shall cause such duplicates to be filed and preserved in his office.

59 The Judicial Service Commission may take steps as may be appropriate to facilitate the maintenance of electronic records of the contents of all the registers required to be kept under this Act by the Quazi Court and the Board of Quazis relating to nullity of marriage and divorce, and to ensure in co-ordination with the Registrar General that appropriate cross-references are made in the records relating to marriage in pursuance of the provisions of this Act."

O - Procedure and Time Limits for Appeals

6.15.01 Sections 60 to 63 of the MM&D Act deal with appeals against orders of the Quazi Court and orders of the Board of Quazis. A party aggrieved by a decision of the Board of Quazis (to be renamed Quazi Appellate Court) has to appeal to the Court of Appeal, and there is also a possibility of an appeal being taken to the Supreme Court from an order or decision of the Court of Appeal. Uncertainty caused by the lack of uniformity in the time limit for appeals laid down in the Schedules to the Current Act and too many opportunities for appeals currently available may frustrate the parties who may under the proposed amendments have been granted relief by the Quazi Court and the Quazi Appellate Court. In these circumstances, it is necessary to streamline the procedure by providing reasonable and uniform appealable periods for such appeals and reduce the number of appeals. It is recommended that a uniform period of 4 weeks be set as the appealable period for appeals against orders of the Quazi Court to the Quazi Appellate Court, and only one more appeal to be available thereafter direct to the Supreme Court with the leave of that court instead of an appeal to the Court of Appeal.

6.15.02 With these objectives in mind, it is unanimously recommended that the provisions in section 60 to 63 of the MM&D Act be replaced with the following new provisions:-

60 (1) - Any party aggrieved by any final order or decision made by a Quazi Court under the powers vested in by this Act, may prefer an appeal to the Quazi Appellate Court within four weeks of the order of the Quazi, except where such order or decision-

(a) has been made in terms of Schedule 3 A granting a divorce on mutual consent; or
(b) is an order absolute made by a Quazi Court under Schedule 4 hereof.

(2) Notwithstanding anything in sub-section (1) of this section or any Schedule to this Act, it shall be competent for the Quazi Appellate Court-

(a) where any appeal has been lodged out of time, to entertain the appeal if the Court is satisfied that the appeal could not be filed in time owing to illness, accident, misfortune or other unavoidable cause; or

(b) where a petition of appeal is not stamped or is insufficiently stamped, to entertain the appeal if the petitioner pays in stamps an amount equal to twice the value of the stamps that should have been affixed or twice the deficiency, as the case may be.

(3) All appeals under this section shall be heard and disposed of in accordance with the rules in the Schedule 5 to this Act.

61 (1) Any party aggrieved by any order of the Quazi Appellate Court on any appeal under section 60 may with the leave of the Supreme Court first had and obtained appeal to that Court from such order. Any such application for leave to appeal shall be preferred within six weeks from the date of such order.

(2) The rules of the Supreme Court for the time being applicable to applications for leave to appeal from the High Court of the Provinces vested with jurisdiction to hear civil appeals, shall *mutatis mutandis* apply to applications for leave to appeal under sub- section (1) of this section.

P - Enforcement of Orders of Quazi Courts

6.16.01 The Committee proposes that the provisions for enforcement of orders of Quazi Courts currently contained in sections 64 to 66 of the current Act be reformulated and re-enacted as sections 62 to 64 to give the Quazi Court greater power and discretion in regard to the manner in which the money and other properties recoverable under the Act may be recovered.

5.16.02 A feature of the proposed amendments is that the Quazi Court may directly implement its orders to recover money as if it were a fine imposed by the Court without referring the matter to the Magistrates Court, and in the event that the money could not be so recovered, for instance, due to the fact that the person liable to make the payment is overseas and it is not practicable to bring him down to Sri Lanka, the Quazi Court is vested with the power to issue a certificate to the District

Court to recover the money as on a decree issued by that Court through the seizure and sale of any immovable property belonging to the person liable to pay such money. Such inter-changeability of remedies can avoid a great deal of anguish currently prevailing in regard to the enforcement of the orders of Quazi Courts.

5.16.03 This Committee unanimously recommends that Part VII of the Act entitled "ENFORCMENT OF ORDERS" be shifted to appear between sections 61 and 62, and sections 64 to 66 be replaced with the following new provisions:-

> *"*62 (1) In granting any relief to any party in proceedings commenced under this Act, the Quazi Court may order that any relief awarded by it for the recovery of any immovable property or movable property other than money, may be recovered in terms of a certificate for the recovery of the same issued by the Quazi Court to the District Court having jurisdiction within the area of residence of the person who is entitled to recover such property.
>
> (2) In granting any relief to any party in proceedings commenced under this Act for the recovery of any money, the Quazi Court may order any money payable in terms of the order of the said Court, may be paid to the person entitled to it on a date or within a period of time, with or without instalments that may be specified in the said order. If such order does not specify a date or a period of time for the payment of any money, it shall be deemed that the sum of money should be paid within thirty (30) days from the date of the order.
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> (3) Any order made under the preceding sub-section may also specify a bank account of the person entitled to the payment to which any amount payable may be credited.
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> (4) In the event of default, the Quazi may taking into consideration all the circumstances of the case, recover the same either –
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> (a) as if it were a fine imposed under this Act; or
>
> (b) on a certificate for the recovery of the same under a decree to pay money addressed to the District Court having jurisdiction within the area of residence of the person to whom the said sum is due.
>
> (5) Where it is ordered that any amount of money may be recovered as a fine imposed under this Act, the Quazi Court shall at the time of making the order specify the default sentence that may be imposed for the non-payment of the fine.
>
> (6) If after the commencement of any proceedings before a Quazi Court, any person from whom any relief is claimed under this Act, has alienated or otherwise disposed of any of his or her assets whether movable or immovable for the purpose of avoiding satisfaction of such

claim, such alienation or disposition shall be null and void and of no force of avail in law, without prejudice to the rights of any third party who had purchased such assets or any rights therein in good faith and without knowledge that such person alienated or disposed of the same with the objective of avoiding satisfaction of such claim.

(7) If pursuant to an order made by the Quazi Court, the amount payable could not be fully recovered, the Quazi Court, may make further orders for the recovery of the property or amount outstanding, as may be appropriate.

63 (1) Where a Quazi Court orders that any immovable property, or any movable property other than money, may be recovered on a certificate for the recovery of the same under a decree of the District Court issued under the provisions of section 64 of this Act, the District Court to which the certificate of the Quazi Court is directed shall register the same and give effect to the same as if it were a decree to recover property entered by such court on the date of such registration, and such decree shall be binding on all parties concerned and may be enforced in the same manner as a decree of that court. All further proceedings in the District Court in connection with such certificate shall be liable to stamp duty as if they were proceedings in an action for the recovery of the property specified in such certificate.

64(1) Where it is ordered that any sum of money is recoverable as if it were a fine under the preceding section, the Quazi Court shall issue a warrant for levying the amount due in the manner provided by law for levying fines imposed by Magistrates, and may sentence such person in respect of the whole or any part of the amount remaining unpaid by such person after execution of the warrant, to a sentence of imprisonment of either description for any term not exceeding the default sentence specified by the Quazi Court in proportion to the amount remaining unpaid, notwithstanding that the said fine and default sentence exceeds the maximum fine and sentence of imprisonment that may be imposed by a Magistrate.

(2). Where it is ordered that any sum of money may be recovered on a certificate for recovery under a decree, the District Court to which the certificate of the Quazi is presented shall register the same and the said certificate shall be deemed to be a decree to pay money entered by such court on the date of such registration, notwithstanding that the aggregate amount specified in such certificate may exceed the maximum amount which that court may award in the exercise of its ordinary jurisdiction, and shall be binding on all parties concerned and may be enforced in the same manner as a decree of that court. All further proceedings in the District Court in connection with such certificate shall be liable to stamp duty as if they were proceedings in an action for the amount specified in such certificate.

Provided that where such amount exceeds one thousand five hundred rupees, stamp duty shall be leviable as though such amount were one thousand five hundred rupees."

5.16.04 It is hoped that the wide discretion sought to be conferred on the Quazi Court under this provision and the power of the Quazi Court to directly levying money recoverable as fines without referring the matter to the Magistrate Court will redress one of the main grievance that women had faced in recovering maintenance and other dues in the past.

Q - Establishment of a Maintenance Fund

6.17.01 One of the most serious problems faced by society in general, and the Muslim community in particular, is that women who are divorced or had to seek relief by way of divorce due to the breakdown of the marriage or to escape from an unhappy marriage, find it difficult to get re-married and are also not in a position to find employment or any other legitimate means of livelihood. Apart from this, there are also women who are abandoned by their husbands or whose husbands' are not in a financial position to provide for their maintenance. There are also men who would not want to provide for their wives due to ill feelings or who cannot be compelled to pay for their upkeep because they are overseas or are destitute themselves. The sad plight of these women made it necessary for this Committee to consider establishing a Maintenance Fund to provide them adequate means of support in the lines of similar Indian legislation.

6.17.02 The recommendation of this Committee to establish a Maintenance Fund to provide relief to married or divorced women who are in indigent circumstances and are unable to recover maintenance from any persons who may be liable in law to maintain them under the provisions of the Act is intended to avoid the controversy that arose from a piece of Indian legislation that sought to remedy the same problem.[254] This fund shall consist of money that may be donated thereto including *sadaqa* received from charitable institutions and individuals in Sri Lanka or abroad, and money that may be collected as *zakat* in Sri Lanka or overseas, and any other contributions lawfully made to the said Fund. It is proposed that the management of the Maintenance Fund be vested in a Board of Management, which shall consist of the Chairman of the Quazi Appellate Court, the Secretary to the Minister in charge of Justice, the Director of Muslim Religious and Cultural Affairs and seven other

[254] India enacted the Muslim Women (Protection of Rights on Divorce) Act 1986, in the wake of the decision of the Indian Supreme Court in *Mohammad Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945 holding that a Muslim divorced woman who has no means to maintain herself is entitled to get maintenance from her former husband even after the period of *iddah*. The said Act in effect nullified the decision of the Supreme Court with respect to the liability of the husband to pay maintenance to his former wife beyond the period of *iddah*, but empowered the Magistrate to make order that a divorced woman in indigent circumstances who has not remarried to make order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit, and in the event that there is no such relative, direct the State Wakf Board to pay maintenance out of the Wakf Fund. A constitutional challenge against the Act raised on the basis that the objectives of the Wakf Fund did not include the maintenance of indigent women, was overcome mainly due to a technical problem, and the legislation survives to date.

members to be appointed by the Minister in charge of the subject of Justice in consultation with the Minister in charge of the Department of Muslim Religious and Cultural Affairs.

6.17.03 This Committee unanimously recommends that sections 65 to 66 of the MM&D Act be replaced with two new sections in the following lines:

65(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Quazi Court, after inquiring into the circumstances of indigence of any married or divorced woman professing Islam, is satisfied that she is not able to recover maintenance that may have been awarded to her by Court and is incapable of otherwise maintaining herself, may make order as may be appropriate directing

(a) any child or children of such married or divorced woman who is able to maintain her;

(b) any parent of the man who was married to such married or married or divorced woman and any parent of such woman; or

(c) any other relative as would be entitled to inherit her property on her death according to of the Muslim Law of the sect to which such woman belongs and who are able to maintain her;

to pay such reasonable and fair maintenance to her as the Quazi Court may determine fit and proper, having regard to the needs of the married or divorced woman, the standard of life enjoyed by her during her marriage and the means of such children, parents or other relatives.

(2) Where such maintenance is directed by the Court to be paid by more than one child, parent or relative, any such child, parent or other relative shall be liable to pay the maintenance in proportion to his or her right of inheritance to such married or divorced woman, and at such intervals as the Quazi Court may specify in its order.

(3) Where the Quazi Court is satisfied that even in terms of the preceding subsections of this section such divorced woman cannot be adequately maintained, the Court may direct that such reasonable and fair maintenance as it may determine may be recovered from the Maintenance Fund established by section 66 of this Act.

66(1) There shall be established a Maintenance Fund for providing relief to divorced women who are unable to recover maintenance from any persons who may be liable in law to maintain them under the provisions of this Act.

(2) The Maintenance Fund shall consist of–

(a) donations including sadaqa received from charitable institutions and individuals in Sri Lanka or abroad;

(b) zakat collected from those under the duty to pay zakat in Sri Lanka or abroad; and

(c) any other contributions lawfully made to the said Fund.

(3) Any contributor to the said Fund who is resident in Sri Lanka shall be exempt for the extent of the contribution from Income Tax under the provisions of law for the time being dealing with income tax.

(4). The said Fund shall be administered and managed by Board of Management which shall consist of the Chairman of the Quazi Appellate Court, the Secretary to the Ministry in charge of the subject of Justice and the Director of Muslim Religious and Cultural Affairs, who shall be ex officio members, and seven other members to be appointed by the Minister in charge of the subject of Justice in consultation with the Minister in charge of the subject of the Department of Muslim Affairs (hereinafter referred to as "nominated members"), who shall be eminent Muslims having expertise in management or Muslim law. In selecting such persons for nomination to the Board, care should be taken to give adequate representation for males and females.

(5). The members of the Board shall at the first meeting of their term of office, elect from amongst the nominated members, a suitable person to hold office as the Chairman of the Board, and he shall preside for the duration of his term of office, at every meeting of the Board at which he is present. In the absence of the Chairman from any meeting of the Board, the members present shall elect one among themselves to preside at the said meeting.

(6) Where any ex officio member of the Board is unable to personally attend a meeting of the Board, he may nominate his representative to attend the meeting on his own behalf.

(7) Every nominated member of the Board shall, unless he earlier resigns from the office as a member or dies or is rendered otherwise incapable of discharging his functions, hold office for a term of three years or, where he is appointed to fill a vacancy in the Board, for such shorter period as may be specified at the time of the appointment of that member.

(8) The Minister in charge of the subject of Justice may in consultation with the Minster in charge of the Department of Muslim Affairs, remove any nominated member from office if he is satisfied that such member is unfit to continue to hold office as a member of the Board, or where such member has without leave of the Board, failed to attend three consecutive meetings of the Board.

(9) Subject to the provisions of this Act and any written law, the Board shall have the power to do, perform and execute all such acts, matters and things whatsoever as are necessary, desirable or expedient for the promotion or furtherance of the objects of the Fund, or anyone of them including the power to open, operate and close bank accounts, to borrow or raise moneys, with or without security.

R - Transfer of Cases, Representation through Attorneys-at-law, Enhancement of Punishments and other Miscellaneous Matters

6.18.01 Section 67 of the MM&D Act currently vests exclusively in the Judicial Service Commission the power to appoint a Special Quazi to hear a case where there is reasonable fear that a fair and impartial inquiry cannot be had before the Quazi before whom it is instituted or is to be taken up. In the opinion of this Committee, the function of the Judicial Service Commission in this respect may best be discharged in co-ordination with the Quazi Appellate Court, and it may also be necessary to confer additional power to transfer a case from one Quazi Court to another Quazi Court, and hence, it is unanimously recommended that section 67 be replaced with new provisions in the following lines:-

67 (1) Where a party to, or any person interested in any proceedings instituted or to be instituted under this Act before a Quazi Court fears that a fair and impartial inquiry cannot be had before that Quazi Court, on the ground that the said Quazi officiating in that court is likely to be biased or for other adequate reasons, such party or person may, or such Quazi himself may, make application to the Quazi Appellate Court to inquire into and recommended to the Judicial Service Commission to have such proceedings instituted or continued before a Special Quazi appointed in that behalf, or be transferred to another Quazi Court as may in all the circumstances be just.

(2) If the Quazi Appellate Court after such inquiry as it may deem necessary is of the opinion that a fair and impartial inquiry cannot be had before such first mentioned Quazi Court, it shall recommend to the Judicial Service Commission to order that such proceedings be instituted or continued before and be heard by a special Quazi appointed in that behalf by the Commission under section 14 of this Act or be transferred to another Quazi Court, and the Judicial Service Commission may make such order as may in all the circumstances be just.

6.18.02 As already noted in paragraph 6.14.12 of this Report, Section 74 of the MM&D Act currently provides that-

> "No Attorney-at-Law shall be entitled or permitted to *appear on behalf of any party or witness* in any proceedings before a Quazi under this Act." (*Emphasis added*)

Understadably, the MM&D Act barred lawyers from appearing for parties or witnesses before the Quazi on the basis that due to the informality of the system and its reconciliatory approach lawyers may not only add to the costs of litigation but also cause undue delay in proceedings. However, as pointed by the Al Amaan Nusrath Organization in its representations[255], the experience of the last few decades, has been quite the contrary, particularly in hotly contested *fasah* proceedings and maintenance cases, and shows that the non-availability of proper legal advice and representation has violated the common law right of a party to be represented at any inquiry affecting his or her rights, and seriously prejudiced the parties by giving room for corruption and caused unnecessary hardships, creating a general perception of unfairness in the minds of all litigants. The Al Amaan Nusrath Organization has invited our attention to the decision of the Supreme Court in *Arunasalam Periyasamy v Commissioner for Registration of Indian and Pakistani Resdence*[256] and the decision of the Board of Quazis in *Thahir v Gani Noor*[257] in which the Board emphasized the need to provide for legal representations of parties at inquiries held under the Muslim Marriage and Divorce Act.

6.18.03 In these circumstances, this Committee unanimously recommends that the pharse "authorised representative" be defined in section 97 of the MM&D Act to mean "a relative or any other person, whether an Attorney-at-law or not, authorised by any party in writing to represent him or her in a Quazi Court or the Quazi Appellate Court" and section 74 be repealed and be replaced with a new provision to be numbered as section 74(1) in the following lines:-

> "(1) Unless there is express contrary provisions in this Act or any applicable schedule to this Act, every party shall be entitled to appear in person or through an authorised representative in any proceedings before the Quazi Court or the Quazi Appellate Court."

6.18.04 There is also a grave need to make the Quazi Court self-sufficient in the enforcement of its orders, and while certain recommendations pertaining to this matter have already been made paragraphs paragraphs 6.16.02 to 6.16.04 of this Report, it is recommended that a provision in the

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[255] Representations of the Al Amaan Nusrath Organization included in volume II to this reprt marked C7, supra note 85 at pages 11-12.
[256] *Arunasalam Periyasamy v Commissioner for Registration of Indian and Pakistani Resdence* 53 NLR 425 at 428 (Swan J).
[257] *Thahir v Gani Noor* 4 MMDLR 51.

following lines be introduced to the Act as sections 74(2) and 74(3) which will help enhance the status and efficacy of the Quazi Court and the Quazi Appellate Court:-

> "(2) It shall be the duty of every police officer and grama niladhari to aid and assist the Quazi Court and the Quazi Appellate Court in compliance with any order that might be made in the exercise of their jurisdiction and powers, particularly in regard to the service of notices, summons or other process or for the execution of any warrant of arrest that may be issued by the Quazi Court or Quazi Appellate Court as the case may be under this Act.
>
> (3) It shall be the duty of the Deputy Inspector General of Police and the Divisional Secretary who has jurisdiction over an area to ensure that every police officer and grama niladhari of the area respectively, aids and assists the Quazi Court and the Quazi Appellate Court in the exercise of their jurisdiction and powers under this Act."

6.18.05 This Committee is of the view that it is also necessary to introduce into the Act provisions that will enable the Quazi Court and the Quazi Appellate Court to seek the assistance of the other original courts as well as other institutions in Sri Lanka in arriving its decisions and implementing its decisions and orders. The Committee recommends substituting the existing section 75 with the following provisions:-

> "75(1) The Quazi Court or Quazi Appellate Court may, seek the assistance of the Registrar and /or the Fiscal Officer of a Magistrate's Court or a District Court for the service of notices, summons and other processes of the court on a party or witness in the suit who resides within the territorial jurisdiction of that Court.
>
> (2) Every Quazi Court or Quazi Appellate Court to which application is made in that behalf, shall make and issue appropriate orders and process of court directing the party against whom the application is made or any other person or institution to comply with such order or directions, which in the opinion of the Quazi Court or the Quazi Appellate Court may assist the Court for the effectual adjudication of the matter before such Court, and, in particular make necessary orders directing any person to appear in Court as a witness and /or produce any document or copy thereof including particulars of salary, income or of properties, movable or immovable, of any party or parties before the court, or to issue order imposing travel restrictions out of the country on any party in any case before such court."

6.18.06 One of the most serious problems affecting the status and credibility of the Quazi Court system is the absence of any provision that makes it an offence for any person required to furnish any statement or particulars by the MM&D Act to make a false or misleading statement or omit to disclose any particulars that are required to be furnished. Another factor that projects a wrong image

of the system is the extremely light punishments that have been prescribed for various offences under the MM&D Act. It is in the unanimous opinion of this Committee necessary to amend sections 79 to 93 of the Act in the following manner:-

(1) Amending section 79 of the Act by the substitution for all the words from "shall be liable" to the end of that section, of the following the words "shall be liable on conviction by a Magistrate for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees or imprisonment of either description for a term of not less than six months and not exceeding three years or with both such fine and imprisonment".

(2) Amending section 80(1) of the Act by the substitution for all the words from "shall be liable" to the words "not exceeding three years" of the words "shall be liable on conviction by a Magistrate for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees or imprisonment of either description for a term of not less than one year and not exceeding three years or with both the such fine and imprisonment"

(3) Amending section 80(2) of the Act by the substitution for all the words from "shall be liable" to the words "not exceeding three years" of the words "shall be liable on conviction by a Magistrate for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees or imprisonment of either description for a term of not less than one year and not exceeding three years or with both the such fine and imprisonment"

(4) Amending section 81 of the Act by the substitution in paragraph (c) thereof for the words "section 56 (1) or section 56 (4)" of the words "section 56 (3)" and by the substitution for all the words from "shall be guilty of an offence" to the end of that section, of the following words "shall be guilty of an offence, and shall be liable on first conviction by a Magistrate for a fine of not less than ten thousand and not exceeding twenty five thousand rupees and on a second or subsequent conviction to a fine of not less than ten thousand and not exceeding twenty five thousand rupees or imprisonment of either description for a term of not less than six months and not exceeding three years or to both such fine and imprisonment."

(5) Amending section 82 of the Act by the substitution for the words "section 24 (4)" of the words "section 24 (7)" and by the substitution for all the words from "shall be guilty of an offence" to the end of that section, of the following words "shall be guilty of an offence, and shall be liable on conviction by a Magistrate to a fine of not less than ten thousand rupees and not exceeding twenty five rupees or to imprisonment of either description for a term of not less than six months and not exceeding three years or to both such fine and such imprisonment."

(6) Amending section 83 of the Act by the substitution for all the words from "shall be guilty of an offence" to the end of that section, of the following words "shall be guilty of an offence, and shall be liable on conviction by a Magistrate to a fine of not less than ten thousand rupees and not exceeding twenty five rupees or to imprisonment of either description for a term of not less than six months and not exceeding three years or to both such fine and such imprisonment."

(7) Repealing section 84 of the Act and replacing it with the following new provisions:-

"84 Every person who-

(a) conducts a *nikah* without receiving from the Registrar of Muslim Marriages a counter-signed copy of the declarations required to be made under section 18(1) of this Act; and

(b) gives or takes or abets the giving or taking of any dowry as defined in section 97 of this Act;

shall be guilty of an offence and shall be liable on conviction by a Magistrate for a fine in a sum of not less than twenty-five thousand and not exceeding one hundred thousand rupees or imprisonment of either description for a term of not less than six months and not exceeding three years or with both such fine and imprisonment.";

(8) Repealing section 85 of the Act and replacing it with the following new provision:-

"85. Every person who willfully makes a statement that is false or misleading in any declaration, statement or entry required to be made or omits to disclose any particulars that are required to be included in any such declaration, statement or entry or otherwise furnished under the provision of this Act, shall be guilty of an offence and shall be liable on conviction by a Magistrate for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees or imprisonment of either description for a term of not less than six months and not exceeding three years or with both such fine and imprisonment.";

(9) Amending section 86 of the Act substituting therein for the words "Every registrar" the words "Every Registrar of Muslim Marriages" and substituting in paragraph (e) thereof for the words "by section 18, section 19, or section 58" the words "by section 18 or section 19" and substituting for the words "shall be liable" to the end of that section, the following words "shall be liable on conviction by a Quazi for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees or imprisonment of either

description for a term of not less than one year and not exceeding three years or with both the such fine and imprisonment";

(10) Amending section 87 of the Act by substituting therein for the words "shall be liable" to the end of that section, the following words "shall be liable on conviction by a Quazi for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees."

(11) Amending section 88 of the Act by substituting therein for the words "by section 56(3)" the words "by section 40(5)" and amending it further by substituting therein for the words "shall be liable" to the end of that section, the following words "shall be liable on conviction by a Quazi for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees."

(12) Amending section 89 of the Act by substituting therein for the words "the Board of Quazis or a Quazi" in sub-section (1) of that section to the end of that sub-section, the following words "the Quazi Appellate Court or a Quazi Court, with respect to his suit or business, shall be guilty of an offence and shall be liable on conviction by a Magistrate for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees."

(13) Amending section 90 of the Act by substituting therein for the words "Every police officer or grama seva niladhari" the words "Every grama seva niladhari or fiscal officer", for the words "section 75" the words "section 29(2)" and for the words "shall be liable" to the end of that section the following words "shall be liable on conviction by a Magistrate for a fine in a sum of not less than ten thousand and not exceeding twenty five thousand rupees."

(14) Amending section 91 of the Act by substituting in paragraphs (a) and (b) thereof for the words "under this Act" the words "under this Act or schedule thereto", and for the words "shall be liable" to the end of that section the following words "shall be liable on conviction by the Quazi Court for a fine in a sum of not less than five thousand and not exceeding twenty five thousand rupees."

(15) Amending section 92 of the Act by substituting therein for the words "of any provision of this Act" the words "of any provision of this Act or schedule thereto", and for the words "shall be liable" to the end of that section the following words "shall be liable on conviction by the Quazi Court for a fine in a sum of not less than five thousand and not exceeding twenty five thousand rupees."

(16) Amending section 93 of the Act by substituting in sub-section (1) thereof for the words "Board of Quazis" the words "Quazi Appellate Court", for the word "board" the word "Court", for the word "Quazi" the words "Quazi Court", and by substituting further for the words "not exceeding twenty rupees" the words "not less than five hundred and not exceeding one thousand five hundred rupees" wherever they occur in the said sub-section, by the repeal of sub-section (3) thereof and the re-enactment of sub-section (2) thereof as sub-section (3) substituting therein for the words "under sub-section (1), the penalty may be recovered from the defaulter, on application made to the Magistrate having jurisdiction in the area within which the defaulter is resident, as though it was a fine imposed on him by the Magistrate," the words "under sub-section (1) or (2), the penalty may be recovered from the defaulter as though it were a fine imposed on him by the Quazi Court," and by the enactment of the following provision as sub-section (2) of the said section:

"93(2) The Quazi Court and the Quazi Appellate Court shall for the purpose of maintaining its proper authority and efficiency, have a special jurisdiction to take cognizance of, and to try in a summary manner, any offence of contempt committed against or in disrespect of the authority of the Quazi Court or the Quazi Appellate Court, which may not fall within the purview of sub-section (1) of this section, and on conviction to commit the offender to jail for a term of imprisonment of either description not exceeding three years as such court shall direct, and the offender may in addition thereto or in lieu thereof in the discretion of such court, be sentenced to pay a fine not exceeding five thousand rupees."

S - Supplementary Provisions

6.19.01 Under this head, it is necessary to make provision for the making of regulations that may be necessary for giving effect to the provisions of the MM&D Act. It is necessary to split the regulation making power between the Minister in charge of the Department of the Registrar General and the Minister in charge of the subject of Justice, and hence it is recommended that the current section 94 to be replaced with the following provisions to be numbered sections 94(1) and 94(2) and the current sections 94(2) and 94(3) be renumbered as respectively as sections 94(3) and (4) and amended in the following manner;-

6.19.02 Section 94(1) - The Minister in charge of the Department of the Registrar General, may in consultation with the Muslim Marriage and Divorce Board, make regulation for or in respect of all or any of the following matters:-

(a) the allowance payable to the Secretary to the Muslim Marriage and Divorce Advisory Board;

(b) the qualifications and disqualifications applicable to persons holding office as Registrars of Muslim Marriages and the procedure for their selection, appointment, conduct and disciplinary control including inquiries into complaints against Registrars;

(c) the procedure to be followed by a Registrar of Muslim marriages upon receiving a declaration of marriage in terms of section 18 of the Act;

(d) the procedure for securing the services of pre-marriage counsellors for guiding parties intending to enter into marriage contracts and all matters connected thereto including payment of fees and allowances;

(e) the conditions to be satisfied for, and the places and times in which, the marriage of persons professing Islam may be registered;

(f) the conditions subject to which the marriage of a male Muslim not domiciled in Sri Lanka with a Muslim woman domiciled in Sri Lanka may be registered, being conditions relating to the prepayment of *mahr* and deposit of money for maintenance of the woman and any child that may be born of the marriage;

(g) the fees chargeable by Registrars of Muslim Marriages for the registration of marriages, declarations of nullity and divorces, including stamp fees, and allowances payable to such registrars and District Registrars (including allowances in reimbursement of the cost of travelling), and on any other account and the procedure for the issue of receipts for payments received by such registrars and District Registrars;

(h) the manner and form in which registers of marriages, declarations of nullity and divorces, and other records and indexes are to be maintained by Muslim Marriage Registrars and District Registrars, and the inspection and supervision by the Registrar-General or a District Registrar of the office premises of Registrars of Muslim Marriages;

(i) the correction of clerical errors in registers of marriages, declarations of nullity and divorces and the imposition of penalties on Registrars in respect of such errors where they are due to negligence or willful disregard of the provisions of this Act or any regulations made there under; and

(j) all other matters which are required or authorised by this Act to be prescribed or which may appear to the said Minister to be necessary or expedient for the purpose of carrying out the provisions of this Act relating to the registration of marriages, divorces and orders of nullity and all matters incidental thereto.

6.19.03 Section 94(2) - The Minister in charge of the subjects of Justice may, in consultation with the Judicial Services Commission, make regulations for or in respect of all or any of the following matters:-

(a) the utilization of court houses and connected offices of Quazis and the Quazi Appellate Court, the code of conduct of Quazis and members of the Quazi Appellate Court and the officers and other staff of the said courts;

(b) the procedure to be observed in cases before Quazis in regard to matters for which no express provision is made in the Act;

(c) supplementing the provisions of the principal Act regarding the service of processes to be issued by Quazi Courts and the Quazi Appellate Court including the manner in which and the conditions subject to which processes may be served by the Fiscal, or other officers or persons;

(d) the nature and form of the books, registers and indexes to be maintained by the Quazi Courts and the Quazi Appellate Court;

(e) the procedure for securing the services of marriage counsellors and mediators and / or arbitrators for resolving of matrimonial disputes and all matters connected thereto including payment of fees and allowances;

(f) the summoning, challenging, and empanelling of Muslim assessors, and other matters relating to such assessors including payment of fees and allowances;

(g) form and method of appeals to the Quazi Appellate Court and all matters incidental or appertaining to the hearing of such appeals and the recording of the verdict or decision of the board;

(i) the emoluments payable to the holder of the office of Chairman of the Quazi Appellate Court and the sums payable to the members and the secretary of the Quazi Appellate Court by way of fees and allowances (including allowances in reimbursement of the cost of travelling), and on any other account; and

(j) manner in which unclaimed moneys paid by Quazi Court under the second proviso to section 52 (1) or deposited by Quazis in banks under section 38 shall be disposed of; and

(k) all other matters which are required or authorised by this Act to be prescribed or which may appear to the said Minister to be necessary or expedient for the purpose of carrying out the provisions of this Act relating to the registration of marriages, declarations of nullity and divorces and all matters incidental thereto

6.19.04 It is also recommended that the existing Section 94(2) of the Act be renumbered as Section 94(3), which shall read as follows:-

> "Any form in the schedule 1 and any rule in the Schedules 1A, 2, 3, 3A, 3B, 5 may be rescinded, amended, modified or replaced, and any Schedule may be added to or replaced, by regulation made under this section by the Minister in charge of the subject of Justice in consultation with the Judicial Service Commission."

6.19.05 It is further recommended that Section 94(4) be reformulated as follows:-

> "94(4) Every regulation made by the relevant Minister under sub-section (1) of this section and every regulation made by the Minister in charge of the subject of Justice under sub-section (2) and (3) of this section shall be published in the Gazette. No such regulation shall come into operation unless it has been tabled in Parliament, and notification of such tabling has been published in the Gazette. If any provision of any regulation tabled in Parliament is disapproved by a majority of members of Parliament, such provision shall cease to have any legal force from the date of publication of notice of such disapproval is published in the Gazette, but without prejudice to any act or thing done or omitted in terms of the said provision."

6.19.06 In view of the fact that the Judicial Service Commission too is required to prescribe certain matters in the amended version of the Act, it is proposed to include a fresh section as section 94(5) in the following lines:-

> "94(5) All matters required by this Act to be prescribed by the Judicial Service Commission shall be prescribed by the Judicial Service Commission in consultation with the Secretary to the Minister of Justice, and shall come into force when the same is published in the Gazettte."

6.19. 07 Interpretation of certain terms as used in the Act may also require further elucidation. Hence the following amendments to section 97 are recommended:-

> 97 In this Act, unless the context otherwise requires-
>
> "*appointed date*" means the 1st day of August, 1954. However, this will not be the appointed date for the proposed amendments. For the proposed amendments, the "appointed date" will mean the date from which the amending provisions will commence to be in application. These amendments shall come into force upon an order to that effect being made by the Minister in charge of the subject of Justice after two years have elapsed from the date of certification of this Act, or in the absence of any such order being made by such Minister, upon the expiry of three years from the date of certification of this Act.

“authrorised representative” means a relative or any other person, whether an Attorney-at-law or not, authorised by any party in writing to represent him or her in a Quazi Court or the Quazi Appellate Court;

“district" means administrative district;

" District Registrar ", in relation to any district, means the person appointed to be or to act as the District Registrar of Marriages of that district for the purposes of the Marriage Registration Ordinance, and includes a person appointed to be or to act as an Additional District Registrar of that district;

“dowry” means any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom in consideration of the marriage prior to, at the time of, or even after, entering into the contract of marriage, by a relative of the bride or by any other person, but does not include any *kaikuli* which is recorded in the Register of Marriage, or any presents which are given at the time of marriage to the bridegroom without any demand having been made in that behalf;

“Inhabitant of Sri Lanka” shall mean any person who inhabits or had been inhabiting Sri Lanka and shall be presumed to include any descendant of any such person irrespective of whether such person or such descendant has acquired the citizenship or permanent residency of another country, unless it is established by unequivocal evidence that he or she has abandoned such inhabitancy.”

"Judicial Service Commission " means the Judicial Service Commission referred to in Article 112 of the Constitution ;

“*kaikuli*” means any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom for the use of the bride, prior to, at the time of, or even after, entering into the contract of marriage, by a relative of the bride or by any other person;

“*mahr*” means a mandatory gift that may take the form of money, movable or immovable property or any other thing of value given or promised to be given by or on behalf of the bridegroom to the bride as a token of respect to her at the time of the marriage, that is deemed to be her property;

“Marriage guardian” means the person who is entitled to be the *wali* of the person who is contracting the marriage or is being contracted in marriage, according to the Muslim law of the sect to which such person belongs;

"*mata'a*" means a consolatory payment determined by court in the absence of any express agreement between the parties payable to a wife who is divorced by the husband under section 27 of this Act or under 28(1) of this Act upon proof of the matrimonial fault of the husband;

"Minister" as used in the Act shall refer to the Minister in charge of the subject that is specified in any particular section.

"Muslim" means a person professing Islam, by which is meant a person who believes in the oneness of God and the prophethood of Muhammad (Peace be Upon Him);

" prescribed " means prescribed by regulations made under this Act ;

" Quazi " means a Quazi appointed under section 12 or section 13 or section 14 *;*

"registrar " means a male Muslim appointed under section 8 or section 9 or section 10 to register Muslim marriages under this Act ;

"scheduled public officer" shall have the same meaning as in the Constitution of the Democratic Socialist Republic of Sri Lanka

(T) Savings and Transitional Provisions

6.20.01 This Committee recommends that the saving contained in Section 98(1) be amended by substitution for the words "and the rights of the Muslims thereunder.", that appear at the very end of that provision the words: "and the rights of the Muslims thereunder, subject only to the amendments that may be enacted to the said Act from time to time."

6.20.02 In the opinion of this Committee Section 98(2) requires to be amended by the substitution for the words "according to the Muslim law governing the sect to which the parties belong" with the following words: "according to Muslim law subject to the provisions of this Act."

6.20.03 The transitional provisions contained in Section 99(a) and (b) may be retained unaltered, but it is recommended that Section 99(c) be repealed and replaced with a new provision which will provide a period of at least two years for all necessary steps to make preparations to bring the provisions of this Act into force. Such preparations shall include making the public as well as the officials aware of the significance and import of the changes brought about by this Act including its system of mandatory registration as a pre-condition to validity of any marriage, training marriage counsellors and mediators and establishing systems for efficient processes of pre-marital and post marital counselling and mediation of matrimonial disputes, providing for preparatory courses for Quazis and other officials as well as the Chairman and other members of the Quazi Appellate Court for a period of at least 2 months prior to the date of commencement of the Act at the Sri Lanka Judges Institute and putting in place programmes for enhancement of knowledge and skills of these personnel as well as the provision of the necessary infrastructure for the effective implementation of

the Act. Accordingly, it is recommended that section 99(c) be repealed and replaced by a new provision in the following lines:

> "99(c) The amendments effected to the principal Act by this Act shall come into force upon an order to that effect being made by the Minister in charge of the subject of Justice after two years have elapsed from the date of certification of this Act, or in the absence of any such order being made by such Minister, upon the expiry of three years from the date of certification of this Act. All Quazis, Temporary Quazis, Special Quazis and members of the Board of Quazis appointed under this Act and serving on the date of certification of this Act shall continue to hold office until the provisions of this Act come into force."

SCHEDULE 1

FORM I

Section 8 of the Muslim Marriage and Divorce Act

Certificate of appointment of Registrar of Muslim Marriages

(No amendment is recommended unless the Judicial Service Commission decides otherwise)

FORM II

Section 18 (1) (a) of the Muslim Marriage and Divorce Act

FORM OF DECLARATION BY BRIDEGROOM / MARRIAGE GUARDIAN

I /* We …….(holder of NIC or Passport bearing No:…….), of……(being the bridegroom)/* and……..(holder of NIC or Passport bearing No ……) of …… (being the marriage guardian) hereby give notice that a marriage is about to be solemnized between ……(name of bride) and myself /* a person under my guardianship, and I / we* further hereby solemnly declare that to the best of my / our* knowledge and belief the several particulars entered below are true and correct and that there is no lawful impediment to the said marriage:-

1. Bridegroom's name in full :
2. Bridegroom's date of birth and age on proposed date of nikah:
3. Bridegroom's sect, if any:
4. Bridegroom's NIC or Passport No:
5. Residential address of bridegroom:
6. Bride's name in full:
7. Bride's date of birth and age on proposed date of nikah:
8. Bride's sect, if any:
9. Bride's NIC or Passport No:
10. Bride's residential address:
11. If the bridegroom has not attained the age of 18, particulars of the order of the Quazi Court by which the proposed solemnization of marriage was authorised:
12. Whether the bridegroom was previously married or not :
13. If previously married, to whom:
14. Whether bridegroom's previous wife / wives* is dead or divorced:
15. If dead, particulars of death including Death Certificate No:
16. If divorced, date and number of divorce registration and Quazi Court case number:
17. If the bridegroom is a party to a subsisting marriage (that is, if the bridegroom's wife/ wives* is / are* still living and the marriage or marriages has / have not been declared a nullity or the said wife or wives have not been divorced), particulars of all existing and ex-wives, case No. and date of order of Quazi Court granting a declaration of nullity or divorce and / or authorizing the proposed marriage and all other relevant particulars (any relevant certificates of death and / or orders of the Quazi Court shall be attached):

18. Full name of the Bridegroom's Marriage Guardian (if required):
19. Relationship of the said Marriage Guardian to the bridegroom:
20. NIC No. or Passport No of Bridegroom's Marriage Guardian:
21. Residential Address of Bridegroom's Marriage Guardian:
22. If the bride and groom are already related, particulars of the relationship:
23. If the bride and groom have undergone pre-marital counselling, if so, particulars of same, and if not, particulars of counselling service intended to be utilized with dates:
24. If the bride and groom belong to two different sects (*mazhabs*), whether they have agreed to abide by the law of any particular sect as contemplated by section 16, and if so, which sect:

[Item 24 may be removed if the recommendation to remove all reference to sects (*mazhabs*) from the Act is being implemented]

Signature of Bridegroom

Signature of Bridegroom's Marriage Guardian (if required)

We ……..(holder of NIC or Passport bearing No:…….), of……/* and……..(holder of NIC or Passport bearing No ……) of …… do herby certify that the aforesaid Bridegroom…… /* and his Marriage Guardian……, who is /* are known to us, placed his /* their signature in our presence at …….(place of making declaration).

Signature of 1st witnesses

Signature of 2nd witnesses

Signed before me, on this…day of……..20…. at …….(place of making declaration).

Signature of Registrar of Muslim Marriages / Justice of the Peace / Commissioner for Oaths

* Delete what is inapplicable

FORM III

Section 18 (1) (b) of the Muslim Marriage and Divorce Act

FORM OF DECLARATION BY BRIDE / MARRIAGE GUARDIAN

I /* We …….(holder of NIC or Passport bearing No:…….), of……(being the bride)/* and……..(holder of NIC or Passport bearing No ……) of …… (being the marriage guardian) hereby give notice that a marriage is about to be solemnized between ……(name of bridegroom) and myself /* a person under my guardianship, and I / we* further hereby solemnly declare that to the best of my / our* knowledge and belief the several particulars entered below are true and correct and that there is no lawful impediment to the said marriage:-

1. Bride's name in full:
2. Bride's date of birth and age on proposed date of nikah:
3. Bride's sect, if any:
4. Bride's NIC or Passport No:
5. Bride's residential address:
6. Bridegroom's name in full :
7. Bridegroom's date of birth and age on proposed date of nikah:
8. Bridegroom's sect:
9. Bridegroom's NIC or Passport No:
10. Residential address of bridegroom:
11. If the bride has not attained the age of 18, particulars of the order of the Quazi Court by which the proposed solemnization of marriage was authorised:
12. Whether the bride was previously married or not :
13. If previously married, to whom:
14. Whether bride's previous husband is dead, divorced or there is a declaration of nullity:
15. If dead, particulars of death including Death Certificate No:
16. If divorced, date and number of divorce registration and Quazi Court case number:
17. Full name of the Marriage Guardian of the bride (if required):
18. Relationship of the said Marriage Guardian to the bride:
19. Marriage Guardian's NIC No. or Passport No:
20. Residential Address of Marriage Guardian:
21. If the bride and groom are already related, particulars of the relationship:
22. If the bride and groom have undergone pre-marital counselling, if so, particulars of same, and if not, particulars of counselling service intended to be utilized with dates:
23. If the bride and groom belong to two different sects, whether they have agreed to abide by the law of any particular sect as contemplated by section 16, and if so, which sect:

[Item 23 may be removed if the recommendation to remove all reference to sects (m*azhabs*) from the Act is being implemented]

Signature of Bride

Signature of her Marriage Guardian (if any)

We …….(holder of NIC or Passport bearing No:…….), of……/* and……..(holder of NIC or Passport bearing No ……) of …… do herby certify that the aforesaid Bride…… /* and her Marriage Guardian……, who is /* are known to us, placed his /* their signature in our presence at …….(place of making declaration).

Signature of 1st witnesses

Signature of 2nd witnesses

Signed before me, on this…day of……..20…. at …….(place of making declaration).

Signature of Registrar of Muslim Marriages / Justice of the Peace / Commissioner for Oaths

FORM IV

THE MUSLIM MARRIAGE AND DIVORCE ACT

MUSLIM MARRIAGE REGISTER

1. District :		
2. Full name of Marriage Registrar registering the marriage:		
3. Address of Marriage Registrar:		
4. Reference No. of the Declaration made by the Bridegroom and / or Marriage Guardian:		
5. Reference No. of the Declaration made by the Bride and / or Marriage Guardian:		
6. Full Name of the person conducting Nikah (if Nikah not conducted by the Registrar):		
7. Address of the person conducting Nikah:		
8. Name in Full:	Bridegroom:	Bride:
9. Residential address:		
10. NIC No / Passport No:		
11. Applicable Sect or *mazhab*: [This column may be removed if the recommendation to remove reference to sect in the Act is implemented]		
12. Name of father or other marriage guardian in full		
13. If marriage authorised by Quazi under Section 23 the particulars of the Quazi Court and the date and number of the Order:		

14. Civil status of parties to marriage at time of marriage:		
15. If marriage authorised under Section 24, Quazi Court case No. and date of order		
16. If any previous marriage has been declared a nullity particulars thereof and Quazi Court case No. and date of order		
17. If previously divorced, particulars thereof including the Quazi Court case No or Nos. and date or dates of registration of divorce		
18.Particulars of *Mahr*, whether handed over or not:		
19. Particulars of *Kaikuli*, whether handed over or not:		
20. Whether there are any other terms of marriage contract: Yes /* No. 21. If the answer to item 21 is "Yes", particulars of other terms of the marriage contract agreed upon: (If the contract terms are in writing the agreed and singed agreement may be attached):		
22. Place where Nikah took place:		
23. Date and hour of Nikah:		
24. Date and hour of registration :		
25. Full name and residential address of 1st witnesses:		

26.Full name and residential address of 2nd witnesses:
26.Signature of- a. Bridegroom: b. Bridegroom's marriage guardian (if required): c. Bride: d. Bride's marriage guardian (if required): e. First witness: f. Second witness: g. Person conducting Nikah ceremony: h. Marriage Registrar: [Signature of the Bride's marriage guardian may be omitted where no marriage guardian is required in law or where the Quazi Court has expressly authorised the marriage under Section 47 (2) of the Act]

FORM VA

SECTION 27 & 28 OF THE MUSLIM MARRIAGE AND DIVORCE ACT

MUSLIM DIVORCE REGISTER

1. District :		
2. Quazi Court of:		
3. Quazi Court case No:		
4. Quazi Appellate Court case No:*		
5. Supreme Court case No:*		
6. Name in Full:	Bridegroom:	Bride:
7. Address in Full (as on date of registration of Divorce)		
8. NIC No / Passport No:		
9. Applicable Sect or *mazhab*: [This column may be removed if the recommendation to remove reference to sect in the Act is implemented]		
10. Full name, area and district of person who conducted the nikah or registrar of marriage:		
11. Number and date of entry of marriage:		
12. Nature of Divorce (under which section of Act):		
13. Whether the Divorce was granted by the Quazi		

Court, the Quazi Appellate Court or the Supreme Court, and the date of the relevant order of court:	
14. In an application for divorce made in terms of section 28(2) on the ground that the applicant has an incurable aversion to her husband (*khula*), the agreed compensation payable to the respondent or the amount ordered by Court as compensation	
15. Names and ages of children from the marriage, if any:	
16.Particulars of orders relating to custody of, and access to, the children:	
17. Particulars of orders made with respect to payment of *iddat* maintenance:	
18. Particulars of orders made with respect to payment of arrears of past maintenance due to the divorced wife and / or children:	

19. Particulars of orders made with respect to payment of *mata'a,* where applicable:	
20. Particulars of orders made for the recovery of *mahr*.	
21. Particulars of orders made for the recovery of *kaikuli*:	
23. Particulars of orders made for the recovery of any dowry (other than *mahr* or *kaikuli*):	
24. Date of registration of Divorce:	
25.Signature of- a. Husband (if present): b. Wife (if present): c. Quazi:	

*To be included only where there had been an appeal or appeals

FORM VB

SECTION 30 OF THE MUSLIM MARRIAGE AND DIVORCE ACT

MUSLIM NULLITY REGISTER

1. District :		
2. Quazi Court of:		
3. Quazi Court case No:		
4. Quazi Appellate Court case No:*		
5. Supreme Court case No:*		
6. Name in Full:	Bridegroom:	Bride:
7. Address in Full (as on date of registration of Divorce)		
8. NIC No / Passport No:		
9. Applicable Sect or *mazhab*: [This column may be removed if the recommendation to remove reference to sect in the Act is implemented]		
10. Full name, area and district of person who conducted the nikah or registrar of marriage:		
11. Number and date of entry of marriage:		
12. Nature of Divorce (under which section of Act):		
13. Whether the Divorce was granted by the Quazi		

Court, the Quazi Appellate Court or the Supreme Court, and the date of the relevant order of court:	
14. Names and ages of children from the marriage, if any:	
15.Particulars of orders relating to custody of, and access to, the children:	
16. Particulars of orders made with respect to payment of arrears of past maintenance due to the divorced wife and / or children:	
17. Particulars of orders made for the recovery of *mahr*.	
18. Particulars of orders made for the recovery of *kaikuli*:	
19. Particulars of orders made for the recovery of any dowry (other than *mahr* or *kaikuli*):	
22. Date of registration of Declaration of Nullity:	

26.Signature of-

a. Husband (if present):

b. Wife (if present):

c. Quazi:

*To be included only where there had been an appeal or appeals

FORM VI

Application for entering into a second or subsequent marriage

Section 24 of the Muslim Marriage and Divorce Act read with the Schedule 1A

The Quazi Court for ……..,

.....(address)

APPLICATION FOR PERMISSION TO ENTER INTO A SUBSEQUENT MARRIAGE IN TERMS OF SECTION 24 READ WITH SCHEDULE 1A OF THE MUSLIM MARRIAGE & DIVORCE ACT

I, ...(name in full), of.....(address in full), (holder of NIC or Passport bearing No:…….), hereby declare that I married to.....(name in full), who holds NIC or Passport bearing No:…….), of.....(address in full) on.....(date) within the District of…..……,in Sri Lanka, and the marriage was registered under the provisions of the Marriage and Divorce (Muslim) Act No. 13 of 1951 / the marriage was unregistered*. A copy of the extract from the Muslim Marriage Register maintained under the said Act is annexed herewith.*

[In the event that there are more than one subsisting marriage, the names and other particulars of the other wives shall be included in the application in the same format]

I further declare that I desire to enter into another marriage and do hereby apply for the approval of the same.

I further declare that we have no children* / the below named children* whose ages are stated against their names:

1…….(name) ……(age)

2…….(name) ……(age)

3…….(name) ……(age)

[If there be more than 3 children, the names of the other children be added in the same format]

My wife / wives* and I have mutually agreed on the following terms with respect to the future affairs of the children*and / or ……(state any other matters on which settlement has been reached:…… ……. (If there is a detained agreement signed by the parties, the same may be attached)

Accordingly, I apply for approval of the Quazi Court to enter into a subsequent marriage in terms of section 24 read with the Schedule 1A to the Muslim Marriage and Divorce Act, and pray that an appropriate order be made in regard to my application.
*Strike off what is inapplicable

.....

(Signature of declarant)

The above was read and explained to)
the affirmant above named by me In)
…….(state language), who)
placed his right thumb impression/ *)
signed before me at ……..…….…)
on this day, the.....th of…….……)
20….) .....

(Signature of Justice of Peace)

FORM VIA

Application for divorce by husband

Section 27 of the Muslim Marriage and Divorce Act read with the Schedule 2

The Quazi Court for ……..,

.....(address)

APPLICATION FOR DIVORCE IN TERMS OF SECTION 27 READ WITH SCHEDULE 2 TO THE MUSLIM MARRIAGE & DIVORCE ACT

I, ...(name in full), of.....(address in full), (holder of NIC or Passport bearing No:…….), hereby declare that I married .....(name in full), who holds NIC or Passport bearing No:…….), of.....(address in full) on.....(date) within the District of…..……,in Sri Lanka, and the marriage was registered under the provisions of the Marriage and Divorce (Muslim) Act No. 13 of 1951 / the marriage was unregistered*. A copy of the extract from the Muslim Marriage Register maintained under the said Act is annexed herwith.*

I further declare that I desire to divorce my wife and do hereby apply for the same.

I further declare that we have no children* / the below named children* whose ages are stated against their names:

1…….(name) ……(age)

2…….(name) ……(age)

3…….(name) ……(age)

My wife and I have mutually agreed on the following terms with respect to the future affairs of the children*and / or ……(state any other matters on which settlement has been
reached:……
……. (If there is a detained agreement signed by the parties, the same may be attached)

Accordingly, I apply for divorce in terms of section 27 read with the Schedule 2 to the Muslim Marriage and Divorce Act, and pray that an appropriate order be made for divorce, and the same be registered as provided in the said Act.
*Strike off what is inapplicable

.....

(Signature of declarant)

The above was read and explained to)
the affirmant above named by me In)
…….(state language), who)
placed his right thumb impression/ *)
signed before me at ……..…….…)
on this day, the.....th of…….……)
20….) .....

(Signature of Justice of Peace)

FORM VI B

Application for divorce by wife

Section 28(1) or 28(2) of the Muslim Marriage and Divorce Act read with the Schedule

APPLICATION FOR DIVORCE IN TERMS OF SECTION 28(1) / 28(2)* READ WITH SCHEDULE 3 TO THE MUSLIM MARRIAGE & DIVORCE ACT

I, ...(name in full), of.....(address in full), (holder of NIC or Passport bearing No:…….), hereby declare that I married .....(name in full), who holds NIC or Passport bearing No:…….), of.....(address in full) on.....(date) within the District of…..……,in Sri Lanka, and the marriage was registered under the provisions of the Marriage and Divorce (Muslim) Act No. 13 of 1951 / the marriage was unregistered*. A copy of the extract from the Muslim Marriage Register maintained under the said Act is annexed herwith.*

I further declare that I desire to divorce my husband and do hereby apply for the same on the following ground or grounds:-

1…….[more grounds may be added if so advised]

I further declare that we have no children* / the below named children* whose ages are stated against their names:

1…….(name) ……(age)

2…….(name) ……(age)

3…….(name) ……(age)

[If there be any additional children, their names and ages may be added in the same format]

My husband and I have mutually agreed on the following terms with respect to the future affairs of the children*and / or ……(state any other matters on which settlement has been reached:…… ……. (If there is a detained agreement signed by the parties, the same may be attached)

Accordingly I apply for divorce in terms of section 28(1) / 28(2)* read with the Schedule 3 to the Muslim Marriage and Divorce Act, and pray that an appropriate order be made for divorce, and the same be registered as provided in the said Act.

*Strike off what is inapplicable

.....

(Signature of declarant)

before me at ……)
on this day, the.....th of)
.....20….)

.....

(Signature of Justice of the Peace

FORM VI C

Application for divorce on the basis of mutual consent

Section 28(3) of the Muslim Marriage and Divorce Act read with Schedule 3A

APPLICATION FOR DIVORCE IN TERMS OF SECTION 28(3) AND SCHEDULE 3A TO THE ACT

I, ...(name in full), of.....(address in full), (holder of NIC or Passport bearing No:…….), hereby declare that I married .....(name in full), who holds NIC or Passport bearing No:…….), of.....(address in full) on.....(date) within the District of…..……,in Sri Lanka, and the marriage was registered under the provisions of the Marriage and Divorce (Muslim) Act No. 13 of 1951 / the marriage was unregistered*. A copy of the extract from the Muslim Marriage Register maintained under the said Act is annexed herwith.*

I further declare that my wife / husband* and I myself wish to mutually terminate our marriage, for the reason that the marriage has broken down* /……(state any other reason, if applicable).

I further declare that we have no children* / the below named children* whose ages are stated against their names:

1…….(name) ……(age)

2…….(name) ……(age)

3…….(name) ……(age)

I understand that my wife / husband* will make a similar application for divorce. I also understand that my wife / husband* does not have any claim against me whatsoever.*

We have mutually agreed on the following terms with respect to the future affairs of the children*and / or ……(state any other matters on which settlement has been reached:…… ……. (If there is a detained agreement signed by the parties, the same may be attached)

Accordingly I / we apply for divorce in terms of section 28(3) of the Muslim Marriage and Divorce Act and the Schedule 3 to the Act, and pray that an appropriate order be made for divorce, and the same be registered as provided in the said Act.

*Strike off what is inapplicable

1……..

2 .....

(Signature/s of declarant /declarants)

Before me at ……)
on this day, the.....th of)
.....20….) .....

(Signature of Justice of Peace)

FORM VI D

Application for a Declaration of Nullity

Section 30 of the Muslim Marriage and Divorce Act read with the Schedule

APPLICATION FOR DIVORCE IN TERMS OF SECTION 30 READ WITH SCHEDULE 3A TO THE MUSLIM MARRIAGE & DIVORCE ACT

I, ...(name in full), of.....(address in full), (holder of NIC or Passport bearing No:…….), hereby declare that I married .....(name in full), who holds NIC or Passport bearing No:…….), of.....(address in full) on.....(date) within the District of…..……,in Sri Lanka, and the marriage was registered under the provisions of the Marriage and Divorce (Muslim) Act No. 13 of 1951 / the marriage was unregistered*. A copy of the extract from the Muslim Marriage Register maintained under the said Act is annexed herwith.*

I further declare that I desire to divorce my husband and do hereby apply for the same on the following ground or grounds:-

1…….[more grounds may be added if so advised]

I further declare that we have no children* / the below named children* whose ages are stated against their names:

1…….(name) ……(age)

2…….(name) ……(age)

3…….(name) ……(age)

My husband and I have mutually agreed on the following terms with respect to the future affairs of the children*and / or ……(state any other matters on which settlement has been reached:…… ……. (If there is a detained agreement signed by the parties, the same may be attached)

Accordingly I apply for divorce in terms of section 28(1) / 28(2)* read with Schedule 3A to the Muslim Marriage and Divorce Act, and pray that an appropriate order be made for divorce, and the same be registered as provided in the said Act.

*Strike off what is inapplicable

.....

(Signature of declarant)

before me at ……)
on this day, the.....th of)
.....20….)

.....

(Signature of Justice of the Peace

SCHEDULE 1A

Section 24 of the Muslim Marriage and Divorce Act
RULES TO BE FOLLOWED IN THE CASE OF AN APPLICATION BY A HUSBAND INTENDING TO CONTRACT A SUBSEQUENT MARRIAGE

(1) Where a married male Muslim who has entered into one or more marriages which are subsisting, intends to contract another marriage, he shall apply in the prescribed form, to the Quazi Court holden in the Quazi division within which his wife, or where he has more than one wife, the first of his subsisting wives usually resides

(2) Upon receipt of such application, the said Court shall take verify from the Applicant that he intends to pursue the said application, and in the event he is interested in pursuing such application issue summons in the prescribed form to each of the persons to whom the Applicant is married, informing them of his intent to contract another marriage, and requiring such persons to appear before Court on a date and time to be specified in such notice, being at least one month after the date of the said notice. The service of any summons referred to in Rule 2 or any other notice or process that may have to be served under this Schedule, may be served as provided in section 29(2) of the Act. The Quazi Court shall in addition –

(a) cause a copy of a notice in the prescribed form to be exhibited at each of the Jumma mosques within its Quazi division as well as in every judicial division in which his wife or wives reside, informing the public of the contents of such application; and

(b) where in all the circumstances of the case it considers appropriate, direct a public notice of the application to be made in the prescribed form and in such manner as it may direct, at the expense of the Applicant.

(3) The Quazi Court shall on such date and time specified in the summons referred to in Rule 2 or such other date and time as may be determined by the said Court, where appropriate to refer the spouses concerned at its discretion –

(a) to any relative or relatives mutually agreed by the parties or any other influential person or person of their choice who is willing to attempt to reconcile any dispute or difference that may have given rise to the application; and / or

(b) to a Muslim marriage counsellor from the Panel of Counsellors to be prescribed or any other competent Muslim marriage counsellor to provide necessary counseling to one or all the spouses with a view of reconciliation any dispute or difference that may have given rise to the application; and / or

(c) to a Muslim mediator from the Panel to be prescribed or any other competent Muslim Mediator to provide necessary appropriate mediation or other dispute resolution method, and facilitate the expeditious resolution of any cause of disharmony through such dispute resolution method which may have given rise to the application.

(4) The Court shall then adjourn the case for a date and time not less than one month from that date, and require the spouses to appear before it on such date and time. outlined in Rule 3.

(5) If on the date and time to which the case is adjourned as contemplated by Rule 4, it appears to the Quazi Court that the Applicant wishes to pursue his application, the Court shall continue with its efforts to resolve any dispute or difference that may have caused the Applicant to make the application for permission to enter into a subsequent marriage, and if necessary continue with one or more of the process set out in the Rule 4, and adjourn the case for a date and time not less than one month from that date, and require the spouses to appear before it on such date and time.

(6) If it appears to the Quazi Court that the Applicant does not wish to pursue his application, the Court shall record any terms of settlement the spouses may have agreed upon and terminate proceedings.

(7) In the event any party defaults in appearance before the Quazi Court, the Court shall deal with such default as provided in Rule 13 of Schedule 2.

(8) Any person who receives any summons or notice issued in terms of Rule 2, shall be entitled to make representations in writing to the Quazi Court in regard to the matters that have to be considered by the said Court in determining the said application. Where it is considered necessary, any person who makes an application in terms of Rule 1, or any person who receives any summons or notice issued in terms of Rule 2, may furnish to Court, within the period of time as it may direct, any relevant evidence by way of affidavit, or place before Court any other evidence that may be relevant.

(9) If the Applicant desires to pursue his application even after going through the processes laid down in Rule 4 and perusing any evidence in the form of affidavit that may be made available to Court by any person pursuant to notice or summons issued in terms of Rule 2, the Court shall proceed to fix a date and time not less than one month thereafter, for inquiry before the Quazi Court and 3 assessors as may be empaneled as provided in the Act and regulations formulated thereunder.

(10) On the date that is fixed for inquiry, or any other date to which the Court, for good and sufficient reasons, adjourns such inquiry, the Court shall in the presence of assesors inquire into all circumstances that may be relevant to the application for permission to marry, including the following:-

(a) whether the applicant is living with, and justly and adequately maintaining and caring for, his present wife or wives;
(b) whether the applicant is looking after his children born to his wife or wives in a just and equitable manner;
(c) whether the applicant is capable of dealing justly and equitably with his intended wife and his other wife or wives;
(d) whether the applicant has the financial capacity to maintain and provide suitable and independent residence in accordance with his and her social standing for his intended wife, and any children that might be born to such intended wife.

(11) At the conclusion of the inquiry, the Court shall consult the opinion of the assessors and record the same. The Court shall thereafter forthwith or as expeditiously as it could, pronounce its order granting or refusing the Applicant to contract a subsequent marriage, and laying down conditions, if any, that the Applicant shall fulfill prior to solemnizing and registering such marriage. In the event that the order of the Quazi Court is not consistent with the opinion of the majority of the assessors, the Quazi shall set out in his order the reasons for disagreeing with the majority opinion of the assessors.

(12) Conditions that may be imposed by the Quazi Court in terms of Rule 11 shall include orders to ensure the proper maintenance of the wife or wives of the applicant, the maintenance of the children of the applicant's subsisting marriages including the expenses that may have to be incurred for their future education, and the maintenance of the wife the applicant proposes to marry and any children that may be born to her.

(13) If the Court allows the application for the subsequent marriage, the Quazi shall issue a certificate permitting the subsequent marriage and specifying the conditions, if any, subject to which such permission was granted, without which the subsequent marriage shall not be solemnized or registered.

Provided however, the said certificate shall not be issued until the expiry of the appealable period or if an appeal is preferred until the conclusion of all appellate proceedings in the Quazi Appellate Court in relation to such order, and in the event of an application for leave to appeal to the Supreme Court against a decision of the Quazi Appellate Court, until the conclusion of the appellate proceedings before the Supreme Court.

(14) Any party aggrieved by any order made under the rules of this Schedule may, within thirty days form the date of the order of the Quazi, prefer an appeal to the Board of Quazis.

(15) Notwithstanding anything contained in Section 16 and 17 of this Act, an applicant who has been refused permission to enter into a subsequent marriage by the Quazi Court, the Quazi Appellate Court or the Supreme Court, shall not contract or register such subsequent marriage, nor shall he contract or register a subsequent marriage for which permission has been granted by the Quazi Court or Quazi Appellate Court or until two months have expired after the order granting such permission, and in the even any appeal has been filed before the Quazi Appellate Court or the Supreme Court against any such order unless the appellate proceedings have been concluded with an order affirming the grant of permission by the lower court.

(16) Notwithstanding anything contained in Section 16 and 17 of this Act, an applicant who has been granted permission to enter into a subsequent marriage by the Quazi Court subject to any condition or conditions, shall not enter into a fresh contract of marriage or register the same without fulfilling all conditions imposed by Court.

(17) All proceedings under this Rule shall be conducted in public, unless the Quazi Court decides by reason of the sensitivity of the issues, to hold any part of the proceedings in camera.

(18) From the time of receiving the application referred to in Rule 1, the Quazi Court shall commence a journal, in which shall be minuted, as they occur, all the events in the course of the proceedings, i.e., the original application, and every subsequent step, proceeding, and order; each minute shall be signed and dated by the Quazi, and the journal so kept shall be the principal record of the proceedings.

SCHEDULE 2

Section 27 of the Muslim Marriage and Divorce Act
RULES TO BE FOLLOWED IN THE CASE OF A DIVORCE BY A HUSBAND

1. An application for divorce under section 27 of the Muslim Marriage and Divorce Act shall be made in the Quazi Court of the division in which the wife resides, or where she is not for the time being resident in Sri Lanka or her whereabouts are unknown, in the Quazi Court of the division in which the wife was last resident, in the prescribed form.

2. Upon receipt of an application in terms of the preceding rule, the Quazi Court shall forthwith issue summons on the Respondent along with a copy of the application directing the Respondent to appear before the said Court on the date and time fixed by it, which shall not be less than one month from the date of the application.

3. The service of any summons referred to in Rule 2 or any other notice or process that may have to be served under this Schedule, may be served as provided in section 29(2) of the Act.

4. The Quazi Court shall on such date and time specified in the summons referred to in Rule 2 or such other date and time as may be determined by the said Court, endeavor to facilitate the reconciliation of the Applicant and the Respondent (hereinafter collectively referred to as the "spouses"), by referring them at its discretion –

   (d) to any relative or relatives mutually agreed by the parties or any other influential person or person of their choice who is willing to attempt to reconcile their dispute or difference, and facilitate the said process of reconciliation; and / or

   (e) to a Muslim marriage counselor from the Panel of Counsellors to be prescribed or any other competent Muslim marriage counsellor to provide necessary counseling to one or both spouses with a view of effecting reconciliation between them; and / or

   (f) to a Muslim mediator from the Panel to be prescribed or any other competent Muslim Mediator to provide necessary appropriate mediation or other dispute resolution method, and facilitate the expeditious resolution of such cause of disharmony through such dispute resolution method;

   The Court shall then adjourn the case for a date and time not less than one month from that date, and require the spouses to appear before it on such date and time.

5. If on the date and time to which the case is adjourned as contemplated by Rule 4, it appears to the Quazi Court that the spouses are reconciled, the Court shall record any terms of settlement the spouses may have agreed upon and terminate proceedings. However, if the spouses are not

so reconciled, the Court shall continue with its efforts to reconcile the parties in terms of Rule 4, and if necessary continue with one or more of the process set out in the said rule, and adjourn the case for a date and time not less than one month from that date, and require the spouses to appear before it on such date and time.

6. If on the date and time to which the case was so adjourned as specified in Rule 5, it appears to the Quazi Court that the spouses are reconciled, the Quazi shall record that fact and terminate proceedings. However, if the spouses are not so reconciled, the Court shall, if the Applicant appears before it and expresses his desires to proceed with the divorce, permit him to pronounce *talak* in the presence of the Quazi and the Respondent and two witnesses, and forthwith record such pronouncement. If on the said date and time the Respondent is not present in Court, the Court shall permit the Appellant to pronounce *talak* in the presence of the Quazi and two witnesses, and where she is not represented by any person authorised by her, the Court shall direct the Registrar to serve notice of pronouncement of *talak* on the Respondent in any of the modes prescribed in section 29(2) of the Act as the Court might consider appropriate. The Quazi Court shall not record the alleged reasons for which, or the alleged grounds upon which, the Applicant seeks to pronounce talak. The Court shall then fix a date and time not less than one month thereafter, for the spouses to appear before it, to enable the continuance of the process of reconciliation in terms of Rule 4 and / or 5, subject to the constraints of the *iddat* to be observed by the Respondent.

7. If the Applicant fails or without reasonable excuse neglects to appear before the Quazi Court, even after the pronouncement of *talak*, on any date specified by these Rules or ordered by the Quazi Court for him to appear, the Quazi shall dismiss the Application for divorce on the basis that the Applicant is not interested in pursuing the matter. In such an event the talak pronounced by the husband shall have no legal effect whatsoever and the status quo of the parties shall remain unchanged as if no talak has ever been pronounced.

8. The period of the wife's *iddat* shall commence upon the pronouncement of *talak* by the husband as provided in Rule 6.

9. Upon the pronouncement of talak, it shall be the duty of the Court-

(a) to order the recovery from the Applicant in the manner provided in this Act, any dowry, *kaikuli, mahr, mata'a, maintenance* or *iddat* maintenance payable to the wife or any child, whether or not a claim has been made by the Respondent for the same;

(b) to order the recovery from the Applicant any arrears of maintenance payable to the Respondent or any child, and expedite the payment of any maintenance ordered by the Quazi on any application previously made by the Respondent in this or other proceedings;

(c) to make all orders necessary to enable the delivery of all property and the payment of all money that is due in terms of this Act to the Respondent or any child. In the exercise of his powers under this Rule, the Quazi may in his discretion direct that any money due to the Respondent may be paid by the Applicant-

(i) by way of cash in open court to the Respondent or her representative;

(ii) by way of money order in the manner prescribed by regulation;

(iii) by way of deposit in any bank account that may be determined by the Quazi in consultation with the spouses, and to produce to Court proof of such deposit; or

(iv) by way of deposit into the bank account maintained under section 52(1) proviso (ii) in any case where the wife or her representative is not present in Court and has not notified any bank account to which payment may be made under the preceding sub-rule.

(v) Any money deposited in a bank account referred to in section 52(1) proviso (ii) in pursuance of Rule 8(c)(iv) shall only be withdrawn in pursuance of an order of the Quazi Court authorizing such has authorised withdrawal; and Court shall not authorize any withdrawal except in accordance with any regulation made under Section 94(2) prescribing the circumstances in which the Quazi Court may authorize moneys deposited under the said rule to be withdrawn.

(d) to make any order for the delivery of any property or money which is due to a child to the person entitled to custody of such child subject to the person who from time to time has the custody of that child subject to any conditions that may be imposed by the Court in the interests of such child;

(e) to make any order for the custody of, and access to, any child born in wedlock, and their future welfare.

10. When the case is taken up before the Quazi Court on the date and time to which it was adjourned in terms of Rule 6, if no reconciliation between husband and wife is effected, and where the Court is of opinion that there is a strong possibility of the spouses reconciling their differences if further time is allowed the persons nominated under Rules 4 or 5 or both to continue with their efforts to reconcile their dispute or difference and / or to comply with any order that may have been made by Court under Rule 9, the Court shall fix a date and time not less than one month thereafter, for the spouses to appear before it, to enable the said persons to endeavour to reconcile the spouses and to record any terms of settlement that may have been agreed upon.

11. The Quazi Court shall not proceed to register the *talak* pronounced by the husband until the *iddat* period is completed, and if the wife was pregnant, until childbirth. Since it is lawful for the spouses to reconcile even during the *iddat* period, the Quazi Court may as provided in Rules 4, 5, 6 and 10 continue with its endeavours to reconcile the parties during the said period

of *iddat*, taking into consideration the limitations placed on the wife in regard to her conduct and appearance in public.

12. If a husband or wife does not appear before the Quazi Court on any date specified in any summons or notice issued by Court, or having appeared before Court, does not appear on a subsequent date of which the wife or husband had notice, the Court may issue notice on the absent spouse requiring his or her attendance on another date to be specified in the said notice. If the Court is satisfied on the basis of any affidavit or other statement on oath or affirmation that the whereabouts of the husband or wife is not known, and that in the circumstances, it is not possible to serve upon him or her the summons or notice referred to any of the aforesaid rules, Court may order the notice to be served in the manner set out in section 29(2)(d) of the Act.

13. Where the Quazi Court is satisfied on the basis of any affidavit or other statement on oath or affirmation or from the entries in the journal, that the husband or wife, despite the steps contemplated by Rule 12 having been taken and having notice of the proceedings and date for attendance before Court, has failed and neglected to appear before Court, it may make any order as may be conducive to the efficient disposal of the matter in the absence of the spouse refraining so to appear before the Quazi. In the event that the spouse who so fails to appear before the Court is the wife, Court may make any other order as contemplated by these rules with a view to reconciling the spouses through counseling, mediation and / or arbitration and failing in those endeavours, permit the husband to pronounce *talak* as contemplated by Rule 6 and make any order for the recovery of any matrimonial gift and/or *mahr* and/or *matah* and/or maintenance and / or *iddat* maintenance in terms of Rule 9 and all consequential orders as may be appropriate in the circumstances.

14, All proceedings under this Rule shall be conducted in public, unless the Quazi Court decides by reason of the sensitivity of the issues, to hold any part of the proceedings in camera.

15. Save as otherwise provided in Rule 6, all proceedings taken under this Act and in terms of these rules, shall be duly recorded.

SCHEDULE 3

Section 28(1) / 28(2) of the Muslim Marriage and Divorce Act
RULES TO BE FOLLOWED IN THE CASE OF A DIVORCE BY A WIFE

1. An application for divorce under section 28(1) / 28(2) of the Muslim Marriage and Divorce Act shall be made in the Quazi Court of the division in which the applicant wife resides in the prescribed form.

2. Upon receipt of an application under the preceding Rule, the Quazi Court shall take all steps to issue summons on the respondent as provided in Rules 2 and 3 of the Second Schedule. In the event the respondent does not respond to the summons, or in response to the said notice satisfies the Court that he is unable for good reason to appear in court on the date specified in the said summons, the court may grant a further date and time for him or her to appear, and notify the applicant of such postponed date and time.

3. The Quazi Court shall on such date and time specified in the summons referred to in Rule 2 or such other date and time as may be determined in terms of section 29(1) of the Act or any further date as may be allowed for this purpose, endeavour to reconcile the spouses in the manner contemplated by Rules 4, 5 and 10 of the Second Schedule and where necessary adjourn the case as may be appropriate to enable reconciliation to take place.

4. If on the date and time to which the case was adjourned as provided in Rule 3, it appears to Court that the spouses are reconciled, the Court shall record any terms of settlement the spouses may have agreed upon and terminate proceedings. However, if the spouses are not so reconciled, the Court shall grant a date not less than one month from that date for the respondent to file his answer to the application of the applicant, and thereafter grant the applicant time to file any replication. The Court may, for sufficient cause, reasonably extend the period of time permitted by this rule for the filing of the answer and replication.

5. After the filing of the answer and replication, if any, the Court shall proceed to fix a date and time not less than one month thereafter, for inquiry before the Quazi and 3 assessors as may be empaneled as provided in the Act and regulations formulated thereunder. Subject to the aforesaid, the procedures to be followed at any inquiry shall be as provided in regulations.

6 In the event any party defaults in appearance before the Quazi Court, the Court shall deal with such default as provided in Rule 13 of the Second Schedule.

7. At the conclusion of the inquiry, the Court shall consult the opinion of the assessors and record the same. The Court shall thereafter forthwith or as expeditiously as it could, pronounce its order granting or refusing the divorce. Where the order of Court is not consistent with the opinion of the majority of the assessors, the Quazi shall include in his order the reasons for disregarding the opinion of the majority of the assessors.

8. In the event the Court decides to grant the divorce, the wife's *iddat* shall commence one month after the expiry of the appealable period of six weeks from the date of pronouncement of order of the Quazi Court.

9. In the event any appeal is filed within time against the decision of the Quazi Court, the wife's *iddat* shall note commence until the conclusion of proceedings before the Quazi Appellate Court and one month has elapsed after the expiry of the appealable period of six weeks for filing any application for leave to appeal to the Supreme Court.

10. In the event any application for leave to appeal against the decision of the Quazi Appellate Court is granted by the Supreme Court, the wife's period of *iddat* will commence upon pronouncement by the Supreme Court of its decision, if by the said decision the Supreme Courts grants the divorce.

11. Upon pronouncement of an order by the Quazi Court allowing an application for divorce, the Court shall, after expeditious inquiry in accordance with the rules contained in Schedule 4, make orders as may be appropriate relating to all matters set out in Rule 9 of the Second Schedule. In the event any appeal is duly filed against an order made in terms of this rule, no such order other than an order for interim maintenance, shall be enforceable until the conclusion of all appellate proceedings in the Quazi Appellate Court in relation to such order, and in the event of an application for leave to appeal is granted by the Supreme Court against a decision of the Quazi Appellate Court, until the conclusion of the appellate proceedings before the Supreme Court.

12. All proceedings under these rules shall be conducted in public, unless the Quazi Court decides by reason of the sensitivity of the issues, to hold any part of the proceedings in camera.

13. From the time of receiving the application referred to in Rule 1, the Quazi Court shall commence a journal, in which shall be minuted, as they occur, all the events in the course of the proceedings, i.e., the original application, and every subsequent step, proceeding, and order; each minute shall be signed and dated by the Quazi, and the journal so kept shall be the principal record of the proceedings.

SCHEDULE 3A

Section 28(3) of the Muslim Marriage and Divorce Act

RULES TO BE FOLLOWED IN THE CASE OF A DIVORCE BY MUTUAL CONSENT

1. An application for divorce under section 28(3) of the Muslim Marriage and Divorce Act shall be made by either or both spouses to the marriage in the Quazi Court of the division in which the wife resides.

2. Upon receipt of an application in terms of the preceding rule, the Quazi Court shall forthwith issue summons on the the husband and wife directing them to appear before the said Court on the date and time fixed by it, which shall not be less than one month from the date of the application.

3. The service of any summons referred to in Rule 2 or any other notice or process that may have to be served under this Schedule, may be served as provided in section 29(2) of the Act.

4. The Quazi Court shall on such date and time specified in the summons referred to in Rule 2 or such other date and time as may be determined by the said Court, endeavor to facilitate the reconciliation of the parties (hereinafter collectively referred to as the "spouses"), by referring them at its discretion as provided in Rule 4 of the Second Schedule and adjourn the case for such date as may be expedient which date shall be at least after the expiry of one month from that date.

5. If on the date and time to which the case is adjourned as contemplated by Rule 4, it appears to the Quazi Court that the spouses are reconciled, the Court shall record any terms of settlement the spouses may have agreed upon and terminate proceedings. However, if the spouses are not so reconciled, the Court shall continue with its efforts to reconcile the parties in terms of Rule 4, and if necessary continue with one or more of the process set out in the said Rule, and adjourn the case for a date and time not less than one month from that date, and require the spouses to appear before it on such date and time.

6. If on the date and time to which the case was so adjourned as specified in Rule 5, it appears to the Quazi Court that the spouses are reconciled, the Court shall record any terms of settlement the spouses may have agreed upon and terminate proceedings.

7. However, if the spouses are not so reconciled, the Court shall record that fact and inquire into the matters set out below in terms of the procedure set out in Schedule 4, and order-

   (a) the recovery from the husband in the manner provided in this Act, any dowry, *kaikuli*, *mahr,* maintenance payable to the wife or any child or *iddat* maintenance, whether or not a claim has been made by the Respondent for the same;

(b) the recovery from the husband any arrears of maintenance payable to the Respondent or any child, and expedite the payment of any maintenance ordered by the Quazi on any application previously made by the wife in this or other proceedings;

(c) the delivery of all property and the payment of all money that is due in terms of this Act to the wife or any child. In the exercise of his powers under this Rule, the Quazi may in his discretion direct that any money due to the wife may be paid by the husband-

(i) by way of cash in open court to the wife or her representative;

(ii) by way of money order in the manner prescribed by regulation;

(iii) by way of deposit in any bank account that may be determined by the Quazi in consultation with the spouses, and to produce to Court proof of such deposit; or

(iv) by way of deposit into the bank account maintained under section 52(1) proviso (ii) in any case where the wife or her representative is not present in Court and has not notified any bank account to which payment may be made under the preceding sub-rule.

(v) Any money deposited in a bank account referred to in section 52(1) proviso (ii) in pursuance of Rule 8(c)(iv) shall only be withdrawn in pursuance of an order of the Quazi Court authorizing such has authorised withdrawal; and Court shall not authorize any withdrawal except in accordance with any regulation made under Section 94(2) prescribing the circumstances in which the Quazi Court may authorize moneys deposited under the said rule to be withdrawn.

(d) the delivery of any property or money which is due to a child to the person entitled to interim custody of such child subject to the person who from time to time has the custody of that child subject to any conditions that may be imposed by the Court in the interests of such child;

(e) grant interim custody of, and access to, any child born in wedlock, and their future welfare.

8. Upon inquiring into the aforesaid matters and making all appropriate orders, the Court shall make order upon the consent of the parties granting the divorce on mutual consent. The period of the wife's *iddat* shall commence upon the granting the divorce, and the divorce shall not be registered until the expiry of the period of *iddat*.

9. No appeal shall lie against any order make in terms of Rule 8 granting a divorce on mutual consent, but any order made by Court in terms of Rule 7 shall be appealable as provided in Schedules 4 and 5.

10. All proceedings under this Rule shall be conducted in public, unless the Quazi Court decides by reason of the sensitivity of the issues, to hold any part of the proceedings in camera.

11. From the time of receiving the application referred to in Rule 1, the Quazi Court shall commence a journal, in which shall be minuted, as they occur, all the events in the course of the proceedings, i.e., the original application, and every subsequent step, proceeding, and order; each minute shall be signed and dated by the Quazi, and the journal so kept shall be the principal record of the proceedings.

SCHEDULE 4

Section 47 of the Muslim Marriage and Divorce Act

RULES TO BE FOLLOWED IN INQUIRIES UNDER SECTION 47

1. Subject to Rule 2 hereof, every claim, complaint or application referred in to Section 47 shall be made to the Quazi Court of the division in which the parties reside, or where they reside within more than one division, in the Quazi Court within which the wife resides, and shall specify the party or each of the parties (hereinafter referred to as the "respondent") from or against whom relief is sought.

2. Where a special Quazi has been appointed to exercise jurisdiction with respect to particular types of cases or a particular case, such claim, complaint or application, shall be made to such special Quazi, and shall specify the respondent from or against whom relief is sought.

3. Upon receipt of any claim, application or complaint, the Quazi shall immediately fix a date for the inquiry thereinto and shall cause a notice of the claim, application or complaint and of the date so fixed to be served upon the respondent:

   Provided that if it is made to appear to the Quazi Court, by way of affidavit or statement under oath or affirmation that any such respondent is not in Sri Lanka or has no fixed place of abode, the provisions of Rule 3 in Schedule 3 shall, mutatis mutandis, apply.

4. Where the respondent appears on the date fixed for the inquiry, the Quazi Court shall proceed with the inquiry, and after hearing both parties, shall make such order on the claim, complaint or application as to the Court may seem just.

5. Where the respondent does not appear on the day fixed for the inquiry, the Quazi Court, if it has dispensed with service of notice on the respondent or if the service of notice on the respondent or the posting up of the notice is proved by statement on oath or affirmation, shall proceed with the inquiry *ex parte* and shall, if he is satisfied that the applicant is entitled to the relief prayed for, make in his favour an order *nisi* conditioned to take effect in the event of the respondent not showing cause against it on a day specified for that purpose in the order and shall direct a copy of such order certified under his hand to be served on the respondent:

   Provided that if it is made to appear to the Quazi by statement on oath or affirmation that the respondent is not in Sri Lanka or has no fixed place of abode, the provisions of Rule 3 or of Rule 4 (as the case may require) in the Third Schedule shall, so far as applicable, apply.

6. Where the respondent fails to appear in any case in which the Quazi has dispensed with service of the copy of the order *nisi* on the respondent or in which the service of such copy on the respondent or the posting up of such copy is proved by statement on oath or affirmation, or where the respondent appears but fails to show cause against the order, the Quazi shall make the order absolute.

7. Where the respondent appears and shows cause to the satisfaction of the Quazi why the order *nisi* should not be made absolute, the Quazi shall set aside the order *nisi* and shall proceed with the inquiry as though no default had been made by the respondent in appearing in compliance with the notice issued under Rule 3.

8. The provisions of Rule 10 in the Third Schedule as to the record of proceedings shall apply so far as may be in the case of inquiries held under the rules in this Schedule.

9. Every order made by a Quazi in any inquiry held under the rules in this Schedule shall be entered in the record of the proceedings in the case and shall be signed by the Quazi and by the claimant, applicant or complainant and by the respondent, if he is present.

10. All proceedings under this Rule shall be conducted in public, unless the Quazi Court decides by reason of the sensitivity of the issues, to hold any part of the proceedings in camera.

11. The Quazi shall on payment of the prescribed fee furnish either party to the proceedings with a certified copy of the record of the proceedings in the case.

12. Every order made by the Quazi Court in terms of Rule 4 shall be appealable, but no appeal shall lie against any order absolute made by a Quazi in pursuance of the Rules in this Schedule, but if any person against whom an Order Absolute has been made appears within a reasonable time after such order and satisfies the Quazi that he was prevented from appearing to show cause against the making of the order absolute by reason of illness, accident, misfortune or other unavoidable cause or by not having received notice of the proceedings, the Quazi Court may upon such terms and conditions as he may think it just and right to impose set aside the Order Absolute and proceed with the inquiry as though there had been no default in appearance.

SCHEDULE 5

Section 60 of the Muslim Marriage and Divorce Act
RULES FOR CONDUCTING APPELLATE HEARINGS

1. Any party aggrieved by any final order or decision made by a Quazi, may appeal in writing in the prescribed form to the Qurazi Appellate Court within 4 weeks of the pronouncement of such order or decision, except where such order or decision-

    (a) has been made in terms of Schedule 3A granting or refusing a divorce on mutual consent; or

    (b) is an order absolute made by a Quazi Court under Schedule 4 hereof.

2. Notwithstanding anything to the contrary in Rule 1, it shall be competent for the Quazi Appellate Court-

    (a) where any appeal has been lodged out of time, to entertain the appeal if the Court is satisfied that the appeal could not be filed in time owing to illness, accident, misfortune or other unavoidable cause; or

    (b) where a petition of appeal is not stamped or is insufficiently stamped, to entertain the appeal if the appellant pays in stamps an amount equal to twice the value of the stamps that should have been affixed or twice the deficiency, as the case may be.

3. The hearing of the appeal before the Quazi Appellate Court shall ordinarily be conducted in public, unless the Court considers it necessary, in view of the sensitivity of any issue, to conduct any part of the proceedings in camera.

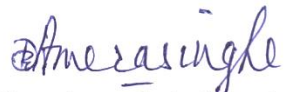
4. At the conclusion of the hearing, the Quazi Appellate Court may dismiss or grant the appeal, and may at its discretion, confirm, alter, amend, modify, affirm or reverse the order or decision made by the Quazi Court, and may also in in any appropriate case set aside the order or decision of the Quazi Court in whole or in part and remit the case to the Quazi Court for fresh inquiry. The Court may at its discretion make such order as to costs as it may deem just.

5. Every judgment pronounced by the Quazi Appellate Court and every order made by the said Court shall be reduced into writing and shall be signed by the members of the Court constituting the panel before which the hearing took place.

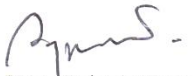
6. A copy of the judgment or order pronounced by the Quazi Appellate Court shall be served on any party or his or her Counsel who is present in Court, and a copy of the said judgment or order shall be forthwith sent by registered post to any party who was not present at the time the judgment or order was pronounced.

The above mentioned signatories place their respective signatures to signify their full and unanimous agreement with this Report:

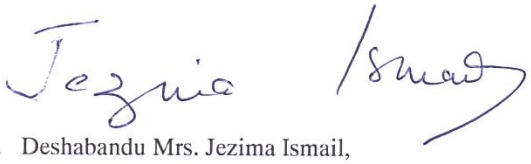
1. Hon. Justice Saleem Marsoof (Chairman)
   (President's Counsel, member of the Faculty Board of the Law Faculty of the University of Colombo, former Addl. Solicitor General, former President of the Court of Appeal and former Judge of the Supreme Court and former member of the Judicial Service Commission and the Board of Management of the Sri Lanka Judges Institute.)



2. Ms. Dilhara Amarasinghe (Secretary)
   (Officer Assisting the Cabinet Sub-Committee on Legislation, former Additional Secretary to the Ministry of Justice)



3. Hon. Suhada Gamalath,
   (President's Counsel, Solicitor General, former Secretary to the Ministry of Justice and Law Reform)



4. Deshabandu Mrs. Jezima Ismail,
   (Director and co-founder of the Muslim Women's Research and Action Forum, Chairperson of PAFFREL, former Member of the Human Rights Commission and the Public Service Commission and former Chancellor of South-Eastern University)

5. Prof. Sharya Scharenguvel
   (former fellow of Balliol College of Oxford St. Johns College, Cambridge, Professor of Law and former Dean of the Faculty of Law of the University of Colombo)

6. Mrs. Faleela Be Jurangpathy
(Commissioner of the Mediation Board Commission and former Principal of Muslim Ladies College, Colombo 4)

7. Mr. Razmara Abdeen
(Attorney-at-law)

8. Ms. Safana Gul Begum
(Attorney-at-law)

9. Mrs. Sharmeela Rassool
(Attorney-at-Law and National Project Coordinator, Access to Justice Project, UNDP)

Signed by the above signatories on this day, Wednesday, 20th December 2017 at the Ministry of Justice, Hulftsdorp, Colombo 12.

Substantive Law

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Based on the rationale explained below, we provide our recommendation with regard to the proposed changes to the substantive law for the consideration of the Committee,

Shari'ah Basis for Substantive Law

It is clear that sects (*Madhabs)* are an important part of *Fiqh* or jurisprudence, and should not be removed from the MMDA. From the time the Islamic Caliphate was established, and especially during the time of the Ottoman Caliphate, where nearly two thirds of the world was conquered, the *Madhabs* were followed to regularize the constitution of each region to such an extent that courts were based on a certain *Madhab*. eg- *Al-Majalla Al Ahkam Al Adliyyah* - the Ottoman courts manual (*Hanafi*). Currently too, many Muslim countries are following one specific *Madhab* with regard to their religious affairs. For example: India, Pakistan, Turkey and Bangladesh follow the *Hanafi* School of Thought, whereas Morocco & Sudan follow the *Maliki* School of Thought. Kuwait, Jordan, the Maldives, Egypt, Indonesia and Malaysia follow the *Shafie* School of Thought. And Saudi Arabia follows the *Hanbali* School of Thought.

Even the Supreme Court of Sri Lanka has ruled that the Muslims of Sri Lanka will be governed by the *Shafi'e* school of thought, unless an individual proves that he or she is from a different school of thought

If a *Madhab* is not specified, it could lead to a lot of confusion and misuse, and people could pick and choose from different *Madhabs* based on their whims and fancy. Moreover people would request for rulings based on narrations they see fit for them. The great scholar Imam Nawavi, explains the necessity of following a particular *Madhab* in the following words: "The reasoning for this is that, if following any school of thought was allowed, it would lead to people hand-picking the conveniences of the schools in order to follow their desires." If people abide only by Muslim Law without a 'sect', being specified, it would lead to a state of utter chaos.

If the word 'Sect' is removed from the MMDA and if it is replaced by the so called word 'Muslim Law', we will need to compose a comprehensive Manual for each and every topic such as integrals of the marriage agreement, Mahar, Wali, Talaq, Khula, Iddah, etc. under the MMDA for Quazies to refer when handling cases. A Quazi has to be provided with this comprehensive Manual, if not only a Mujthahid or a PhD holder in Islamic Studies has to be assigned as Quazi.

The Position of "*Shia*" in relation to Islam – is *Shia* a 'sect' or *Madhab* of Islam?

According to the majority of the scholars, all the '*shia'* divisions cannot be considered as a 'sect' in Islam since the belief of majority divisions of them violates the basic principles of the established religion. Therefore, in summary it could be said that a *Mazhab* (sect) is a methodology of a *Mujthahid* through which we approach the Quran and *Sunnah* in order to derive the law of *fiqh* out of it. Thus the sources, from which the *fiqh* of the particular sect have been derived, are from the Quran and *Sunnah*. For instance when Imaam Shafi's methodology is applied, the Shafi School of thought or the Shafi *Fiqh* will be derived. The sources of all four *Madhabs* (sects) are solely based on *Quran* and *Sunnah*. And the only difference is the methodology used by the *Mujthahid* in deriving the *Fiqh*, hence the final outcome of the ruling may differ.

The views held on the sources of *Ijthihad* of the scholars of *Ahl al-Sunnah wa'l-Jamaa'ah* and the Shia is vastly differed. This is due to their believe inauthenticity of Quran, disagreement with the six authentic Hadith compilations and there believe that their Imams are infallible and superior to the *Anbiyaa (Prophets)* and their words are considered as divine revelations.

Maslaha Mursala

It is very important to understand that when deriving Fatwa, it should basically be founded on what has been explicitly stated in the Qur'an and the Sunnah along with what has been supported by Ijma'a (unanimity) or proved by Qiyas (analogy) which are the fundamental sources of Islamic Law. After resorting to the fundamental sources, the judgment of the mufti with regards to the different viewpoints of the fuqaha (fiqh Scholars), i.e. istihsan (approbation) and Maslaha Mursala (public interest) may be considered as the basis of issuance of fatwa.

Fatwa should not be based on a personal view point that does not cater to the sources referred to above, or contradict with the general text of the Quran and Sunnah that have explicit indications. Moreover, fatwa should not also fall in disparity with well-established Ijma'a or the general rules derived from the Quran and Sunnah.

When adopting Maslaha, the erudite scholars insist that conditions for the use of Maslaha Mursala have to be followed strictly when deducing law on the basis of public interest. We have specified below the conditions stipulated by the *Shari'ah* in order to rely upon the principle of Maslahaa Mursala.

1. First and foremost it should not contradict the Islamic Shari'ah and its general principles and rulings.
2. It should be established after a thorough research that, the issue is in-fact a Maslahaa, as per the ruling and that it should bring a benefit or prevent harm.

3. Maslahaa brings benefit or prevents harm; it should harmonize with the objectives of the Shari'ah.
4. This Maslahaa which is definite should be a common Maslahaa and not an individual Maslahaa, meaning, as per the ruling, it should be beneficial to most of the people or prevent harm to many.
5. This task should be performed by a Mujtahid or through collective consultation.

Further, it is very important to note, when deducing a rule based on Maslahaa Mursala, the Ulama have emphasized to follow the legal maxims, which have been developed under the light of the Qur'an and the Sunnah.

We have listed below some of the legal maxims to be followed when applying the principle of Maslahaa Mursala.

1. Necessity permits that which may be objectionable / prohibited
2. Need sometimes falls in the category of necessity
3. Necessity is limited to its extent
4. Difficulty attracts ease.
5. Harm is repelled.
6. The common Maslahaa will be given preference than the uncommon/exclusive Maslahaa.

For an instance when adopting registration as a mandatory requirement in the MM&D Act based on the necessity, following principals of Maslaha should be applied

1. It is established after a thorough research that, the registration of marriage is in-fact a Maslahaa, thus it is absolute
2. It goes along with the objective of Shari'ah which comes under protecting of lineage
3. It is a common Maslahah
4. Thus, registration can be made mandatory, and violating it can be penalized, But, Only in the presence of a textual (Quran & Sunnah) indication validity and invalidity of the NIKAH shall be establish as legislation
5. Therefore, invalidating the Nikah in the absence of registration is against the Shari'ah

Permissibility for a Mufti providing fatwa based on his own school, as well as other than his own school

Mufti has the permissibility to provide fatwa (i.e. religious verdict) based on (the ruling of) his own school, as well as (what is) other than his own school, when he has accurate knowledge of (the ruling) based on which he gives fatwa and alludes to the Imam whose (ruling) it is. This is because (of the fact that) providing fatwa in the later centuries is only

(possible) by way of relaying and reporting, due to the discontinuance of ijtihad (i.e. scholarly deduction of rules directly from original sources) in all its levels since a (long) time, as clearly stated by more than one (scholar).

Thus when this happens to be the way for the Muftis today, there is no difference between (the Mufti) transmitting the ruling from his own Imam or from another (Imam). In fact, if it is assumed that a person has the competence of ijtihad in his own school as well as in another, it would be permissible for him to give fatwa based on what is dictated by the principles of each school, however, with (this it is necessary that he) clarifies this, and relates each opinion to the Imam who advocates it. This is what is observed in the practice of more than one of the leading scholars, who used to provide fatwa in two schools, e.g. the erudite scholar 'Abd al-Qadir al-Jili – may Allah bless him – who used to provide fatwa in the schools of al-Shafi'i and Ahmad – may Allah be pleased with them, and Ibn Daqiq al-'Id, (about whom) it is said that he used to give fatwa in the schools of al-Shafi'i and Malik. *Al Fatawa Al-Kubra Al-Fiqhiyyah*

The summary of what has been explained above is:

1. The Mufti in the present times is only a transmitter and a reporter and not a Mujtahid, (i.e. one practising ijtihad), due to the discontinuance of ijtihad, thus, (the Mufti) relays the ruling and reports it from his own Imam or from another (Imam); it is permissible for him to provide fatwa based on his school as well as (what is) other than it, when he relates the ruling to (the Imam) advocating it;
2. when he possesses the competence of ijtihad in his school as well as in another, e.g. in the Shafi'i school and the Hanbali school, it is permissible for him to give fatwa based on (what is) dictated by the principles of the school that he gives fatwa in, while relating the opinion to the one who had expressed it; (this is) as done by al-Shaykh al-Jilani, who was a Mujtahid (i.e. in the Shafi'i and Hanbali schools) and used to give fatwa in the school of al-Shafi'i and the school of Ahmad according to their principles. The leading scholar al-Haythami points out that (the Mufti) should not be dogmatic about a single school, and when there is a benefit in providing fatwa on the basis of a school other than his, there is no barrier or offence (in doing so, provided) he indicates the Imam whose (ruling) it is

As mentioned above, when such a complicated process needs to be followed in deriving a law using Maslaha Mursala or Mufti providing fatwa based on his own school, as well as other than his own school, it is very much questionable whether this mammoth task can be fulfilled by a Quazi or Court. Thereby to fulfil this task, definitely only a person in the caliber of a Mufti would be needed. Under no circumstances, should Quazies or the court be given the authority to perform this task since there is a high risk, that the ruling might go against the Qur'an and the Sunnah due to lack of knowledge in Islamic jurisprudence.

Assuming the above, when a Quazi encounters a complicated situation, while following the Shafie sect, and he is unable to provide a solution, we strongly suggest that he should refer the case to Muslim Marriage and Divorce Advisory Board.

Hence section 16 shall remain same and need to introduce a new sub-section as 16(1) of the Act.

Recommendations

Not to remove the word 'Divorce' in section 16 and 98(2) of the MM&D ACT. Since both marriage and divorce should be governed according to the Muslim law governing the sect to which the parties to such marriage or divorce belongs.

Not to removing any reference to word 'sect' from the MM&D Act. Furthermore, word 'Muslim Law' should not come in isolation without the word 'governing to sect' been associated with it, hence it should clearly indicate 'Muslim law governing the sect to which the parties belong'.

Section 16 – (Should remain as it is)

"Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage or divorce which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage or divorce belong"

Section 16 (1)

In any case of difficulty, the Quazi Court or other court that has to make a decision on marriage & divorce to any sect to which the parties belong to may consult the Muslim Marriage and Divorce Advisory Board and the said board may follow the tenets of any of the other sect as may be considered appropriate, but in doing so, the judgment or order of the said Marriage and Divorce Advisory Board shall set out in clear detail the applicable principles with all necessary explanations.

Reforming the Muslim Marriage and Divorce Advisory Board

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

It is a recommended opinion that the MMDAB should be retained to serve an altogether different purpose, namely to make determinations when difficult questions relating to rules of Fiqh arise in the context of the implementation of the MM&D Act and to be in line with new sub section introduced in 16(1). In this regard Muslim Marriage and Divorce Advisory Board (MMDAB) may perform a useful purpose as a consultative body from which an authoritative opinion may be sought by the Registrar General, a Quazi Court, and the Board of Quazis, or other court.

While it is recommended to appoint professionals to the MMDAB (Men & Women), it should be made mandatory to appoint not less than 2 Mufti's out of 7 members. A mufti is person who hold a degree in ifta (Islamic Jurisprudence) awarded by recognized Islamic institution (madarasa) in Sri Lanka and abroad, which will perform its core function that is to provide fiqh base solutions for the question and issues that will arise in the MM&D Act.

Recommendation

It should be made mandatory to appoint not less than 2 Mufti's out of 7 members.

Enhancing the Status of the Quazi Court and Quazi’s

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

We explain below our reasons and set our recommendations, with regard to the suggestion to elevate the institution of Quazi to that of the status of a Judge and reduction of the number of Quazi Court Divisions from 64 to 20 or 25 and appointing Attorneys-at-law as Quazis.

(a). Elevate the institution of Quazi to the status of a court

Please find below a few concerns, which need to be addressed before proposing to elevate the institution of Quazi to the status of a court, to be designated as Quazi Court to gain recognition as an integral part of the Sri Lankan Judiciary.

1. Currently, there is a certain amount of opposition to adopting the *Shari'ah* or Islamic Law among the Muslims in Sri Lanka. Hence, this may not be the appropriate time to propose enhancement of the Quazi Court to the Status of a Court.

2. The current judicial administration system of Sri Lanka prefers alternative dispute resolution to the ordinary court system. The court process may involve a substantial amount of time. Legal experts argue that rigidity and expenses in civil court cases amount to a denial of justice to an aggrieved party who comes before the court seeking justice. The stringent rules of procedures and inflexibility in the adherence to such rules have greatly contributed towards inordinate delay in the disposal of disputes in the speedy manner, thus creating a backlog of unresolved cases. Prosecuting or defending boat civil and criminal prosecution have become a luxury and gone beyond the affordability of the ordinary litigant who has no knowledge of the law or the procedure. He is compelled to seek advice from lawyers and spend exorbitant professional fees. Legal expenses involve court fees apart from lawyer's fees and other incidental expenses in litigation. People who cannot afford such high costs give up their democratic right to seek justice.

3. The current Quazi Court system function more like a mediation process. Therefore elevating it as a court would be a barrier to several bottom level people for the access of justice.

(b). <u>Reduction of the number of Quazi Court Divisions from 64 to 20 or 25</u>

Here we put forward important stats relating to *Talaq* & *Fasakh* for the period of 2011 & 2012 before deliberating on the subject matter.

Among the number of talaq & fasakh reported in 2011 and 2012 in all 64 quazi divisions, it should be noted that 4 quazi divisions situated in the Colombo district have reported a total number of *657* talaq and faskh cases in 2011 and *406* in 2012.(*Board of Quazi*)
These figures do not reveal the total number of talaq and fasakh cases recived to these quazi divisions. Hence, we should realize that there is a significant number of cases getting reported in all 64 quazi zones. As a matter of fact we think it is not a wise and advisable move to reduce the number of quazi divisions. Some of the issues that can be predicted by reducing the No. of Quazi Court Divisions are:.

1. Since the numbers of cases are increasing day by day, there will be a rush at the Quazi division to handle matters smoothly and efficiently.
2. Reducing the number of quazi divisions will result in delay in the processing of cases.
3. The distance will also be a problem to travel for each hearing, and especially it will be burdensome for women to travel long distance and spend on transportation.
4. Such delay and difficulties for the parties are likely to have an adverse impact on the Muslim community, and result in a lack of faith in the Quazi system.
5. The result may lead to a denial of justice.

(c). <u>Appointing Attorneys-at-law as Quazi's</u>

Based on the rationale explained below, we state our suggestions in regard to the proposed amendments on Appointing Attorneys-at-law as Quazis for the consideration of the Committee

Knowledge of judicial matters is one of the noblest and most sublime branches of knowledge, because it is a high position and prophetic role. Through it, blood may be protected or shed; it may determine which marriages are valid and invalid; it may confirm ownership or loss of wealth; and it may show which dealings are permissible or forbidden, disliked or recommended.

Taking up a position as a Quazi may be obligatory, or it may be permissible, or it may be *haraam*. It is *haraam* for the one who takes up such a position when he is ignorant of the rulings of *Shari'ah*. It is permissible for the one who can judge well but there are others who can also do it. And it is obligatory for the one who can judge well when there is no one else who can judge between people.

Some of the imams warned against being appointed as a judge and warned of the danger of this post. For example:

It was narrated that 'Ali ibn Abi Taalib (*RadhiAllahu Anhu)* said: *"If the people knew what is involved in judging they would not judge concerning the price of a piece of camel dung……" (*Akhbaar al-Qudaath)

Many of the imams sought to avoid being appointed as judges, and some of them even accepted beatings and imprisonment instead of being appointed, and some fled from their homelands in order to avoid being appointed as judges.

Many of the righteous predecessors *(Salaf)* avoided being appointed as judges and refused it emphatically, even if they were harmed as a result, because they feared its grave danger, as is indicated in many *Hadeeth*, in which a stern warning is issued to the one who is appointed as a judge and does not do the job properly, such as the *hadeeth*, "*Allah* is with the judge so long as he is not unjust, but once he becomes unjust He forsakes him and the *shaytaan* stays with him" *(Al-Tirmidhi 1330)*

And "Whoever is appointed as a judge or is made a judge has been slaughtered without a knife" *(Abu Dawood 3571, al-Tirmidhi 1325)*

The fact that some of the scholars refused to become involved in it, despite the fact that they were virtuous, pious and qualified for the post, may be understood as taking extreme precautions in order to protect themselves. Perhaps they thought that they were lacking in some way or they were afraid that it would distract them from other religious obligation.

Recommendations

(1) We recommend the elevation of the institution of Quazi to the status of a court nevertheless the court process should be held in camera restricting it only to parties and such relatives or agents as Quazi may decide.

(2) Amendments to be brought in to the Act to upgrade the administrative facilities provided to the Quazi courts by offering the necessary recognition, provide adequate remuneration to Quazis and make available the necessary support mechanism to ensure efficiency and smooth functioning of the Quazi system.

(3) Not to reduce the current number of Quazi courts existing in Sri Lanka.

(4) Not to amend section 12, 13 and 14 act, so that only Judicial Officer as Quazi are appointed. But we strongly recommend is that when recruiting a proper person for the post of Quazi, a stringent selection procedure should be in place to identify his attitude, temperament, skills etc. new amendments to introduce in this regard.

(5) An examination should be conducted by JSC specially to test his *Shari'ah* knowledge and legal knowledge related to MM&D Act.

(6) Comprehensive training program should be formulated and conducted for period of six months for selected individuals to familiarize the administrative and other activities related to MMDA.

Appointing Women as Quazi, Registrars, Assessors, Counsellors and to the MMDAB

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Shari'ah Basis on Appointment of Women as Quazi, Registrars, Assessors, and Counsellors and to the MMDAB

Appointing Women as Registrar

Based on the reasons explained below, we set out our recommendations with regards to the appointment of women as Quazi, Registrars, Assessors, and Counsellors and members to the MMDAB.

The objective of a registrar is merely to record and register a particular marriage. Even though there is no hard and fast rule against a woman being entrusted with that duty, we have serious *Shari'ah* concerns, since all the marriages are being conducted with the involvement of males (*Wali*, witnesses, groom), and at the same time solemnization of marriages should be encouraged to be held in Masjids, as recommended in the *Shari'ah*, By appointing a woman registrar, she would be compelled to compromise important *Shari'ah* aspects.

The majority of Islamic Scholars including the Imams of the four *Madhabs*, are of the view that it is recommended *(Mustahab)* to do the marriage contract in the Masjid, and they quoted as evidence for that the following Hadith:

"*Announce the marriage and do it in the masjid and beat daffs for that."* *(Tirmidhi –1089)*

And it is stated in *Nihaayat al-Muhtaaj* written by a Shafi'ee Scholar Imam Ramali:
It is Sunnah to get married in the month of Shawwaal, to consummate the marriage in (Shawwaal), to do the marriage contract in the masjid, to do it before a group of people and to do it at the beginning of the day.

It is stated in *Kashshaaf al-Qinaa'* written by a Hanbali Scholar, Imam Bahoothi that It is permissible to do the marriage contract in (the masjid), rather it is recommended (Mustahab) as was mentioned by some of our companions.

A Malikee Scholar Imam Al-Khorashi said in Sharh Khaleel: *It is permissible to do the marriage contract (in the masjid), i.e., the proposal and response, rather that it is recommended (Mustahab).*

It says in Majma' al-Anhur written by the Hanafi Scholar, Imam Shakhi Zaada: *It is* recommended *(Mustahab) to do the marriage contract in the masjid, and to do it on a Friday, but they differed as to whether it is Makrooh to hold the wedding party there. The best view is that it is not Makrooh if it does not involve anything that is detrimental to religious practice."*

It is also stated by the Sunnah of the Prophet (Peace & Blessings of Allah be upon Him). He said: "Do not prevent your women from going to the mosque, even though their houses are better for them." In this hadith, it clearly indicates that there is no doubt that a woman's prayer in her house is better for her than praying in the mosque, therefore it is very much recommended for women folk to avoid even the ceremonial activities in the mosque *(Abu Dawud al-Sunan)*

In keeping with the above guidance, the majority of the marriages are being held at the Masjids, but if a woman is appointed as registrar, it will be forbidden for her to enter to the Masjid in certain circumstances, as the Scholars' of the four *Madhabs* are of the view that it is not permissible for a menstruating women to stay in the masjid. They quoted as evidence for that the report narrated by al-Bukhaari (974) and Muslim (890)

In the event a marriage is conducted in a place other than a masjid, the travelling of women alone, the mingling of women with non-mahram men and processing the registration will no doubt have practical and Shari'ah concerns.

Appointing women as Quazi

The view of the Maalikis, Shaafa'is ,Hanbalis, and of some of the Hanafis in appointing women as judge (Quazi) is that it is not permissible for a woman to be appointed as a judge, and if she is appointed, the one who appointed her is sinning, and her appointment is invalid, and her judgements carry no weight, no matter what ruling she passes. For more clarity: *Bidaayat al-Mujtahid* (2/531); *al-Majmoo'* (20/127); *al-Mughni* (11/350).

Below is the evidence to support the above view;

1. Allah says in verse 4: 34 : ***"Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means"***

'Ali ibn Abi Talhah said, narrating from Ibn 'Abbaas *(RadhiAllahu Anhu)*: '*Men are the protectors and maintainers of women*' means that men are the leaders of women and they should obey them in areas where Allah has enjoined obedience. Obedience may mean treating his family kindly and protecting his wealth." (Tafseer Ibn Katheer, 1/490)

2. Allah says: **"*but men have a degree (of responsibility) over them*"** *(2:228)*

Allah has granted men a status higher in degree than women, and if a woman were to be appointed as judge that would contradict the degree that Allah has given men in this verse, because in order for a judge to judge between two disputants, he must have a degree over them.

3. It was narrated that Abu Bakrah *(RadhiAllahu Anhu)* said: *When the Messenger of Allah (peace be upon him) heard that the people of Persia had appointed the daughter of Chosroes as their ruler, he said: "No people will ever prosper who appoint a woman in charge of their affairs."* *Sahih* -al-Bukhaari (4425)

The Islamic Scholars quoted this verse as evidence that it is not permissible to appoint a woman as a judge, because lack of prospering is a kind of harm, the causes of which must be avoided. The *hadeeth* is general in meaning is applicable to all positions of public authority. So it is not permissible to appoint a woman, because the word "affairs" in general meaning, includes all the public affairs of the Muslims.

Imam Al-Shawkaani said: There is no stern warning greater than stating that they will never prosper, and the most important issue is to rule according to the rulings of Allah, may He be glorified and exalted, and therefore this warning applies more emphatically to women.*(Al-Sayl al-Jaraar (1/817)*

4. The judge is required to be present among men's gatherings, resulting unavoidably in intermingling between men and women, parties and witnesses, and need may arise sometime to be alone with them. Islam seeks to protect women and preserve their honour and dignity. So, Islam tells women to stay in their homes and not go out except in cases of necessity. And it forbids them from mixing with men and being alone with them, because that poses a threat to women and their honour.

5. The Prophet (peace be upon him) said: Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a **man** who knows what is right and gives judgment accordingly; but a **man** who knows what is right and acts tyrannically in his judgment will go to Hell; and a **man** who gives judgment for people when he is ignorant will go to Hell. *(Sunan Abi-Dawood)*

In this Hadith, it has been stated clearly that the Prophet (peace be upon him) has mentioned **male** in all of the above categories of Judges.

View of Hanafi School of Thought

In the *Madhab* of Hanafi, taking all the contradictory views related to a woman being a Quazi, Dar ul-Ulum at Deoband, India's largest and most influential madrasa with expertise in the Hanafi school of thought, recently issued a fatwa declaring that appointing a woman as a judge was 'near haram' (*Makrooh Tahreemi*), or, in other words, reprehensible. The below decree has been issued related to the question of appointing a Woman as a Quazi. (Fatwa: 1526/1189/B=1431)

"Yes, she can be appointed as a judge, but it is *Makrooh Tahreemi*, i.e. doing so is near haram. It is mentioned in hadith: It means that a nation that makes a woman their ruler will never succeed, hence, woman should not be appointed as a judge."*http://www.darulifta-deoband.com/home/en/Womens-Issues/24427*

The great scholars of Hanfi School, Abu Zuhura makes mention that even the Hanafi School is also in consensus, that it is incorrect to appoint women as Quazi. The only difference is that in a situation where a woman has been appointed as Quazi at any place or in any circumstances, whether her ruling can be executed or not. Thus this is the only reason that appointing women as Quazi didn't take place during the periods where Hanafi school of thought was widely practiced.

With regard to A'isha's *(RadhiAllahu Anha)* participation in the 'Battle of the Camel', it is important to note that it happened unexpectedly among the faction. Being the mother of the *ummah* (*ummahatul mu'mineen*), she was requested by Zubair and Talha *(RadhiAllahu Anhu)* to reconcile the matter within the parties. Definitely she was not in command of the army nor she attempted to be the person in charge. And at the same time many scholars have stated that she use to regret whenever she remembered the incident. This has been further supported by a well-known scholar Imam Zahabi in his book *Siyar-ul-A'laam*. And further more Ibnu Thaymiya in his book "Minhajus Sunna" have stated that whenever A'isha (ﷺ) remembered this incident she used to weep so much and due to this her veil would get soaked with tears.

The primary sources in deriving any rulings in Islam are the *Quran*, the *Sunnah*, *Ijama'* and *Qiyas*. As a general rule, it is not permitted to take incidents without any basis as an evidence for religious affairs. Incidents such as:

- the appointment of Shifa bint Abdullah as a market controller by Umar, which is an unauthentic source,
- the lady called Shajaratul Durr, after the murder of Izzuddeen Durr Kumani, having ruled Egypt for three months which is un-Islamic Historical event.

- Al-Hurrah as-Sulayhiya (al-Ismāʿīliyyah) – who belongs to the *Isma'ili* branch of *Shiaism* cannot be taken as evidence in appointing women as Quazi.

Further explanation in this topic is given our comprehensive report, which includes Views of Al-Tabari and Ibnu Hazm's

Recommendations

(1) Not to delete the word "male" in sections 8(1), 9(1) and 10(1) dealing with the appointment of Registrars of Muslim Marriage, Temporary Registrars and Special Registrars;

(2) Not to delete the word "male" from sections 12(1) and14(1) of the Act dealing with the appointment of Quazis and Special Quazis;

(3) It is recommend appointing women as assessors, counsellors, jurors and mediators and also to MMDAB as far as Shari'ah principles are adhered. In these circumstances, it is her duty not to indulge in situations where she will be compelled to compromise Shariah.

Registration & Wali

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Based on the reasons given below, we set out our recommendation in regard to the topic of Registration & Wali for the consideration of the Committee.

Shari'ah Basis for Registration & Wali

Registration

As far as Islam is concerned in order for a marriage to be valid, at least four people are required. The Wali of the bride (guardian), the bridegroom and two Muslim witnesses both of whom must be free men who had reached the level of puberty, ability to see and hear properly and be familiar with the language of the contracting parties. If these conditions are met, and the contract is done by means of the proposal (*Ijab*) and acceptance (*Qabool*) by the *Wali* and the groom, then the marriage is considered valid.

If a marriage is performed as mentioned above, in the sight of Allah it is valid and accepted; hence Islam has not made registration mandatory in order to render the marriage acceptable in Shari'ah.

Ruling of Writing Contracts in Islam

The verse 2:282 which explicitly spells out the manner in which lending of money transaction should preferably be performed. It makes a mention in Sura al-Baqarah, as to the desirability of a contract of debt for a fixed period having to be written down, and it has no reference whatsoever to the contract of marriage having to be reduced to the form of writing in Islam.

"O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuses to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable to dictate for himself, then let his guardian dictate in justice….." *[Al-Baqarah 2:282]*

Based on the verses 2:282, 283, majority of scholars are of the view that guaranteeing a debt in one of these three ways (writing, witnesses or pledge) is *Mustahab* (recommended), but it is not *Waajib* (obligatory) *[Tafseer al-Qurtubi in the verses : 2:282, 2:283]*

This is to protect people's rights so that they will not be exposed to loss because of forgetfulness or confusion, and it is also a precautionary guideline imposed upon those who fear Allah.

Failing to fulfil these three recommended acts in a debt agreement, does not invalidate nor is considered a sin. But still the parties are obliged to stand by the agreement and called upon fulfill the trust mutually reposed in them by each other.

The verse 2:283 itself clearly indicates that:

"If you are on a journey, and find no scribe, then (you may have resort to holding something as) mortgage, taken into possession. However, if one of you trusts the other, then the one who has been trusted should fulfil his trust, and should fear Allah, his Lord. Do not conceal testimony. Whoever conceals it, his heart is surely, sinful. Allah is All-Aware of what you do."

"Trust means not guaranteeing the loan by writing it down, having it witnessed or asking for a pledge. But in this case it is essential to fear Allah. Hence in this case Allah commands the one who is in debt to fear Allah and discharge his trust." *[Tafseer al-Sa'di 2:283]*

While the majority of the scholars have not made it compulsory, they state with certainty that there is no compulsion to reduce a debt contract into writing based on this verse. Hence, based on verse 2:282, registration cannot be considered a pre-requisite for the purpose of making the contract of marriage valid and binding. This line of interpretation would be totally erroneous and misleading. Quite importantly, there is no general consensus among the Muslim community that a marriage contract should be reduced to the form of writing.

Registration of a marriage is very important as there are many benefits flowing from it. In fact, registration will mainly benefit women, as the certificate of registration would be of evidential value in matrimonial and maintenance cases, and prevent unnecessary harassment that can otherwise be meted out to them. It will also be of evidential value in matters of the age of parties, the custody of children, and the rights of children born out of such marriages. But, unregistered marriages cannot be described as null and void since that would not comply with the Shari'ah

Wali

It is not permissible for a man to marry a woman without the permission of her guardian, whether she is a virgin or previously-married. This is the view of the majority of scholars, including Imam Shafi, Imam Malik and Imam Ahmad. According to the Shari'ah, the involvement of a Wali is an essential part of the marriage for its validity, without which the marriage contract will be null and void. The position relied upon within the Hanafi School is that the marriage of a free, sane and adult woman without the approval of her guardian (wali) is valid if the person she is marrying is a "legal" and suitable match (kuf') for her. Conversely, if the person she is marrying is not a legal match for her, then her marriage is considered invalid,

under which an incompatible marriage can be undone and nullified by the Quazi if the Wali's permission has not been obtained.

However, this does not mean according to Hanafi School, that such a marriage is encouraged or permitted without any blame. Disobeying one's parents is one of the gravest sins in Islam, and as such, no School would permit a child to go against the wish of one's parents. Many Hanafi jurists (fuqaha) have pointed out that it is generally blameworthy and going against the Sunnah to marry without the consent of the Wali regardless of whether the spouse is a legal match or otherwise based on many Hadiths of the Messenger of Allah (Allah bless him & give him peace) emphasizing the importance of having the approval of one's guardian.

While the Shariah has prescribed that no marriage is valid without the *Wali* acting on behalf of the bride, the Prophet (peace be upon him) has emphasized the importance of guardians obtaining the consent of the bride to marry her future partner. This in fact should be considered as a mandatory act, which if not complied, would be considered an offence. It has been narrated in a Hadith:

"*A previously-married woman should not be married until she has been consulted, and a virgin should not be married until her permission has been sought." They said: "O Messenger of Allah, what is her permission?" He said: "If she remains silent".*

A father is generally the *Wali* of the daughter, and he may marry her off without her consent, if she is a virgin, provided certain conditions are met. It is, however, *Mustahab* (recommended) to obtain the consent of the bride prior to the marriage. As for the non-virgin (i.e. a widow or a divorcee), the father may not marry her off without her consent. For such a marriage of a virgin without her consent to be valid there are certain provisions:

a) That there will be no clear animosity between father and daughter.
b) That she be married to someone who is her social equal (compatible and suitable).
c) That the *Mahr* shall not be less than the *Mahr ul Mithal*.
d) That the groom shall not be incapable of giving the *Mahr*.
e) That she should not be harmed or inconvenienced through marriage to a blind man or an old man or a cripple etc.

The guardian should only give her in marriage for her interests, not for his own benefit. In the event a *Wali* misuses his authority and gives his daughter in marriage in an inappropriate manner, and fails to adhere to the above mentioned conditions prescribed by the Shari'ah, she has the liberty and the right to come out of the wedlock. This principle has been recognized by Section 47 (2) of the present Act, which empowers the Quazi to overrule the stand of the *Wali.*

Section 47(2) of the Act states:

"A Quazi may inquire into and deal with any complaint by or on behalf of a woman against a Wali who unreasonably withholds his consent to the marriage of such woman, and may if necessary make order authorizing the marriage and dispensing with the necessity for the presence or the consent of Wali."

Recommendations

1. No Amendments shall be made to Section 16 of the Act, in which each and every word has been drafted by our predecessors with great wisdom and long sightedness. Based on Quran, Sunnah, Ijma the integral parts of Nikah for its validation are Bridegroom, Wali, two witnesses and its proclamation of the contract, thus Islam has not made registration as an integral part of the marriage for its validity. In no circumstance the amendments to the act should indicate that the unregistered marriages become null and void. Such an amendment would undoubtedly result in an "act" (marriage) which is halal being baselessly declared as haram.

   Section 16 (Should remain as it is)

   Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage or divorce which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage or divorce belong.

2. Since nonregistration of a marriage will definitely cause adverse consequences particularly to the wife and offspring, it is permissible to make the registration mandatory and non-performance of it an offence based on Maslaha (Public Interest). Section 81 Part X (Offences and Penalties) of the Act, which imposes a fine for non-registration, indicates the legal validity of the marriage. And it also indicates that the persons mentioned in Section 17(2) shall be guilty of an offence due to non-registration of the marriage. In this regard we recommend imposing a fine not less than Rs. 5000, if not paid should be able to recover from the moveable property of the offender.

3. In order to mitigate the unfortunate incidents in marriage, based on Maslaha obtaining the signature of the bride can be made as a mandatory requirement, and not obtaining the signature to be considered as an offense by the registrar, which if not complied, should constitute an offence under Part X (Offences and Penalties) of the Act.

4. Sections 17 (duty to cause the marriage to be registered), section 18 (declaration and form of registration) and Section 19 (*entries of the marriage to be signed and attested*) could be amended to include brides signature & Consent as prescribed below, but in no circumstance

it should indicate that without the consent of *Wali*, a bride on her own free will, can proceed with her marriage. Because occurrence of a Nikah without the consent of the wali is considered as invalid according to the majority of the scholars and blameworthy according to Hanafi School of thoughts.

Amending section 17 (2), which is "Duty of Causing the Marriage to be registered" with following lines:-

a) the bridegroom; and
b) in every case where the consent of the wali has not been dispensed with under section 47 and is required by the Muslim law governing the sect to which the bride belongs or such bride suffered from some other incapacity, the wali of the bride;
c) bride, and
d) the person who conducted the Nikah ceremony connected with the marriage.

Amending section 18(1) of the Act by the substitution thereto of the following new provision:-

18(1) before the registration of a marriage, there shall be made and signed in the presence of the Registrar

(a) a declaration by the bridegroom and, where the bridegroom has not attained the age of eighteen years or suffers from some other incapacity, the person who intends to officiate as the marriage guardian (wali) of the bridegroom at the nikah, substantially in form IIA set out in the First Schedule;
(b) a declaration by the wali of the bride substantially in form IIIB set out in first Schedule:
(c) a declaration by the bride, in every case where the consent of the wali has not been dispensed by the Muslim law governing the sect to which the bride belongs, substantially in form IIIB set out in that first Schedule

Amending section 19(1) of the Act by the substitution thereto of the following lines:-

19 (1) the statement of particulars entered in the register in respect of each marriage shall be signed in the original, the duplicate and the third copy, by

(a) The bridegroom
(b) The Wali of the bride; if any
(c) Bride
(d) The person who conducted the Nikah Ceremony connected with the marriage; and
(e) Two witnesses, being person present at the Nikah Ceremony
(f) The Registrar

5. To discourage late registrations, we propose to implement stringent procedures to prove the occurrence of the marriage, whereby the public would realize the importance of timely registration.

6. Under no circumstance bride and bridegrooms ‘sect’ has to be declared in the first schedule

Age of Marriage

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Based on the reasons assigned explained below, we set out our suggestions on the above matter for the consideration of the Committee.

Shari'ah Basis for Age of Marriage

Qura'nic Verses 65:4, 4:3, 4:127 and 24:32 explicitly indicate that a Nikah before puberty is valid and permissible. Even though this permissibility exists, child marriage is not promoted in Islam. The Quran does not prescribe a marriage for a young girl unless there is clear evidence that such a marriage will genuinely serve the interest of the girl. A person who adopts the practice of child marriage, without considering the interest and welfare of the child will be demonstrating his ignorance, immorality and his impiety.

The main source that indicates permissibility of a marriage before puberty is the Prophet's (peace be upon him) marriage with A`ishah (RadhiAllahu Anha) which has been reported in Ṣaḥīḥ al-Bukhārī and Sahih Muslim.

Denying the above Hadith amounts to rejecting entire deen. The mischievous attempt to nullify the effect of this hadeeth, with a view to create doubts in the hearts of the Muslims, attributing that the scholars have neither reported the Hadith nor have they compiled challenging its authenticity is not only palpable lie but baseless. Such an attempt degrades the very authentic hadith kitab Ṣaḥīḥ al-Bukhārī, which is considered next in status to the Holy Qur'an. This fact is accepted by almost all the prominent Islamic Scholars in the world. The Arabic word 'Sahih' is itself translated as authentic or correct

Ṣaḥīḥ al-Bukhārī and Sahih Muslim are two Kithabs of the Sihah as-Sittah (Six major Hadith Collections). These Prophetic Ahaadith were collected after being transmitted from Nabi Salallahu Alahi Wasallam to the Sahabah; then to Taabi'ee; then to the Taba Tabeen and thereafter to the Imaams of Ahaadith.

Consensus of Companions and Islamic Jurists (Al-Ijma') on age of marriage are given below

1. Imam Shafie says: Most of the companions of the Prophet (peace be upon him) gave their daughters in marriage in their small age.
2. Imam Abu Haneefa says: There is no difference of opinion as to the privilege of a father being permitted to give in marriage his small children before puberty without their consent.
3. Imam Ahmed Bin Hambal, when asked: Is it permissible for a small child's father to give her on marriage? He said: There is no any difference of opinion among the Ulama in this matter.

4. Further, this matter is concluded based on consensus (Ijma') , Imam Marwazi, Ibn Munzir, Al-Muhallab Al Maliki, Ibn Battal al- Maliki, Ibn Abdil Barr, Al Baghavi, Qadhi Iyaadh, Ibn Arabi, Ibn Hubaira, Ibn Rushdh, Ibnu Qudhama, Al Qurtubi, Ibn Thaimiyya, Imam Theebi, Imam Zarkashi, Al- Ubbee, Ibn Hajr Askalani, Al- Mirdhaawee, Ar-Ramlee, Mulla Ali Qari, Ash Shawkanee and all scholars have said that small children before attaining puberty could be given in marriage.

When applying the principle of Maslaha Mursala relating to the age of marriage the following matters should be considered instead of applying such principle in isolation.

1. First and foremost, it should not contradict the islamic Shari'ah and its common principles and rulings.
2. After thorough research, it should be established that the issue is in-fact a Maslahaa and, as per the ruling, it should bring a benefit or prevent harm.
3. Maslahaa brings benefits or prevents harm; it should harmonize with the objectives of the Shari'ah.
4. This Maslahaa which is definite should be a common Maslahaa and not an individual Maslahaa, meaning, as per the ruling, it should be beneficial to most of the people or should prevent harm to many.
5. This task should be performed by a Mujtahid or through collective consultation.

Based on the above, it is permissible to restrict child marriage on the principle of Maslaha. However, in no circumstances have we been given the authority by the Shari'ah to claim that a Nikah is invalid, if it happens without the approval of a Quazi. We should understand that Maslahaa based on the Qur'an and the Sunnah is to validate the Nikah.

The permissibility of child marriage in Islam has been granted for the best interest of that child. Even though they are given in marriage they should be handed over to their respective husbands, only when they are physically suitable for consummation. A period of time that was set forth between the marriage and consummation of A'ishah (RadhiAllahu Anha) was only due to this reason.

"Those young, sick and lean female children who have not attained the strength should not be made to commence the married life until the impediment ceases. It is undesirable (Makrooh) for the Wali to give (Tuhfatul Muhtaj, Chapter of Nikah)

An-Nawawi said, "It should be noted that Imam Shaafi'i and his companions said: It is recommended for the father or grandfather not to arrange a marriage for a virgin until she reaches the age of puberty and he seeks her consent, lest she find herself trapped in a marriage that she resents".

Recommendations

1. Minimum age of marriage for male and female would be 18 (Eighteen years), but approval can be obtained from Quazi for age between 16 (Sixteen) and 18 (Eighteen) and for marriage below 16 if occurred, in any circumstance MM&D Act should not indicate such marriage as invalid.

   Section 23 shall be amended as follows

   Notwithstanding anything in section 17, a marriage contracted by a Muslim who has not attained the age of eighteen years shall not be registered under this act unless the Quazi for the area in which the Muslim resides has, after such inquiry as he deems necessary, authorised the registration of the marriage, being satisfied that

   (a) such Muslim has attained the age of sixteen years;

   (b) such marriage shall be in the best interests of such Muslim."

2. No changes shall be made to section 25(1), which states declaration of Shaffie law as to marriage of a woman of that sect, hence 25(1) should remain same.

3. Amending section 47(1)(J) of the MM&D Act by substituting for the word "girl" occurring therein, the word "Muslim" and by substituting for the word "who has not passed the age of twelve years" the words "who has not attained the age of eighteen years"

4. In the event either party to the marriage is being less than 16 years and the marriage shall be registered upon the parties to such marriage attaining the age of 18 years.

Polygamy

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Shari'ah Basis of Polygamy

Categories to whom *Shari'ah* prescribes marriage

According to the *Shari'ah*, marriage is a contract between two partners of opposite sex, bringing about certain rights and responsibilities, whereby among other things, sexual relations is made permissible. Following are the categories to whom *Shari'ah* prescribes marriage.

Recommended (*Mustahab)*

According to the Shafi *Madhab* marriage is *Mustahab* if one is in need thereof and also possesses the necessary means for the *Mahr* and the maintenance of the wife. It is thus not *Mustahab* if one has no desire to be married or if the one is not in possession of the means.

Obligatory *(Waajib)*

If there is a distinct fear and possibility of falling into fornication *(Zina*), marriage becomes *Waajib*.

Offensive *(Makrooh)*

On the other hand even if one desires marriage and possesses the necessary means for it, but at the same time afflicted with extreme feebleness through old age or perpetual illness or impotency, disfigurement etc. it is *Makrooh* to marry.

In addition to above the following two conditions have been prescribed by *shari'ah*, to one who intends practicing polygamous marriage.

- Treat the wives in a just manner
- Capability of fulfilling the basic needs of wives

Elucidating the misconceptions of the Quranic verse 4:3 and 4:129

First of all it is important to explain that the interpretation of the Quranic Verse 4.3, stated in the final draft of the proposed amendments to the MMDA, is incorrect. It is mentioned that polygamy is only permitted in exceptional circumstances, due to the reason the above verse being revealed soon after the Battle of *Uhad*, in which many widows and orphans were left behind. Before discussing the amendments, the correct interpretation of the above Verse should be understood.

Allah says in *Al-Qur'an*:
"O men, fear your Lord who created you from a single soul, and from it created its match, and spread from the two, many men and women. And fear Allah in whose name you ask each other (for your rights), and surely, Allah is watchful over you." (4:1)

"And give the orphans their property, and do not substitute what is bad for what is good, and do not eat up their property Along with your own. It is, surely, a great sin."(4.2)

And if your fear that you will not do justice to the orphan, then, marry the women you like, in twos, in threes and in fours. But, if you fear that you will not maintain equity, then (keep to) one woman, or a bondwoman you own. It will be closer to your not doing injustice.(4:3)

<u>Is Polygamy limited for exceptional circumstances?</u>

In the Verse 4.1 & 4.2, guardians were warned against pilferage or misappropriation in the property of orphans. The Verse 4.3 is an extension of the basic command from another angle. Here they are warned against any attempt to marry orphaned girls under their guardianship hoping to get away, by fixing a dower of their choice and claiming their properties as additional benefit.

During *Jahiliyyah* (the period of ignorance) guardians holding orphaned girls under their charge, used to pick up the ones who had good looks or owned properties of value and marry them or arranged to have them married to their sons. They would fix the dower of their choice, usually the lowest, and maintained them in whatever manner they elected for they were the very guardians and caretakers for them.

There is a narration in Saheeh al-Bukhari from A'ishah *(RadhiAllahu Anha)*, which reports that an incident of this nature came to pass during the blessed time of the Holy Prophet (peace be upon him). There was someone who had an orphaned girl under his guardianship. He had a fruit-farm in which this girl held a share. This man married the orphaned girl and, rather than give her dower and things from his pocket, took her very share in the farm in his possession. **Thereupon, the following verse was revealed**:

*"And if you fear that you will not do justice to the orphans, then marry the women you like in twos, in threes, in fours"(*Verse 4.3)

It means that if you apprehend that after marrying a girl under your guardianship, you cannot do justice to her, then, instead of marrying her, you should marry **other women of your choice**.

So, the Holy Qur'an has very clearly declared that every excuse, device or stratagem set up to usurp the property of the orphan is impermissible. It is the duty of the guardians that they should protect the rights of the orphans honestly

Taking the sequence of the verses into consideration, first part of the Verse mentions ***"And if you fear that you will not do justice to the orphans".*** The term used here is "*Yatama*", which means orphan girls who have not attained the age of puberty and definitely NOT the widows. If the word "*An Nisa (Women)*" is referred to the widows and orphans as it is indicated in the report, then it should have been "*then marry from them" (Minhunna)* which is the pronoun of "*Yatama",* instead of "*marry the women you like*". Accordingly the interpretation in the report in this verse is totally against the eloquence of the Arabic Language and degrades the status the Quran. Thus it is explicitly evident that the word "*Nisa*" means "other women of your choice".

When the Verse is taken in whole, it is understood that polygamy is clearly being permitted without exceptions of circumstance. And the latter part of the Verse, ***"then marry the women you like",*** makes it clear that Qur'an does not restrict the choice to widows or orphans, instead it discourages marrying orphans due to the inability of man to do justice with the property of the orphans.

Correct explanation of dealing "Just and Fair"

Let us now see what the Qur'an says after allowing polygamy up to four wives. It says:

"But, if you fear that you will not maintain equity, then, (keep to) one woman, or a bondwoman you own" – 4:3

Through this part of the Verse, we find out that having more than one wife is permissible and appropriate only on condition that equality can be maintained among all wives as required under the *Shari'ah*, and that the rights of all can be duly fulfilled. As stated earlier, the injustice of multiple marriages during *Jahiliyyah* without any considerations for the rights of wives had made a mockery in wedlock relationship. So, the command was: If one does not have the capability to discharge his obligations in this manner, then restrict himself to no more than one.

Meantime we should keep in our mind, Allah emphasis that a person should have the capability to discharge his obligation even in his first marriage through the following verse.

"And those who cannot afford marriage should keep themselves chaste until Allah enriches them out of his grace"- 24:33

The importance of looking into the capability of the groom in discharging his obligation to his bride is not restricted only to polygamy but even it implies to monogamy as well. It is in this sense we should understand that as an individual decides for himself, without any external screening process to find out his capability of fulfilling the needs on his first marriage, the same non-screening process should be applied in subsequent marriages too.

So if we were to bring in restrictions due to few unfortunate situations that arise in polygamous marriages, the very same issues or severe than that have to be dealt even in monogamy. In

reality there are more divorces and *faskh* which happens in first marriages as compared to subsequent marriages. If we think that the only solution for problems that arise due to polygamous marriages, is to bring stringent restrictions, the same stringent screening mechanism needs to be implemented even in the first marriages which is not a practical approach. There for in both verses 24:33 and 4:3 Allah commands us to fear Him with regard to fulfilling the duties of a marriage, in spite of it being a polygamous or monogamous.

We feel that some have misinterpreted the verses 4:3 & 4:129, and they have fallen into a strange error. The correct understanding for these verses, is not "*the onerous nature of the condition of being fair and just emphasis by Allah*" as you have mentioned in the report, rather the word "equity" mentioned in verse 4:3 is about equality of treatment in things which are within the control of man.

For example, the coverage of personal expenses and parity in overnight stays etc. As for the word equity mentioned in the verse 4:129 it refers to the things out of man's control, such as the natural inclination of his heart which might tilt towards one of them, there is no accountability there for this is not a matter of choice. However, the binding condition is that, this tilt should not affect matters which are within man's control. Our noble Prophet, may Allah bless him for ever and ever, treated his venerated wives with full equality in everything within his control, yet he pleaded with his Lord:

*"*O Allah, this is my 'equalization' in what I control. So, do not hold me accountable in matters you control and I do not.*"* Sunan Al-Thirmidhi - 1140

Obviously, something even an infallible Messenger of Allah (peace be upon him) is not able to do, how can someone else claim to have the ability to do it? Therefore, the verse 4:129, *"And you shall be unable to maintain perfect equality between the women"* refers to the 'matters out of man's control.

Here, it has been made clear that love and the tilt of the heart are something out of man's control. It is beyond man's power to achieve perfect equality of treatment in what comes from the territory of the heart. But, even this involuntary conduct has not been left totally unchecked and unbalanced. In order to correct it, it was said: *"So, do not tilt, the full tilt".* It means: If you love one of your wives more than the other, there is nothing you can do about it. But, total indifference and heedlessness towards the other wife is not permissible even under this situation. The justice and equality mentioned in *(If you fear that you will not maintain equity, then keep to one woman 4:3)* refers to the same justice in matters of choice and volition, any discrepancy in which is a great sin.

When some people compare the verse under discussion, 4:3, and the verse quoted just a little earlier, 4:129, they are confused and they think: Here is this verse from *Surah al-Nisa'* which carries the command: 'If you fear that you will not maintain equity, then (keep to) one woman. Then, there is this second verse which says categorically that justice and equality (among wives) is just not possible. As a result, they doubt, having more than one **wife should not be**

permissible. But, such people should ask themselves: If, through these verses, Allah Almighty aimed at putting a cap over more than one marriage, what need was there to go into all these details? Why would the Qur'an say: *'marry women you like, in twos and threes and fours?'* and then, what would be the meaning of saying: *'if you fear that you will not do justice*' - for, in this situation, injustice is certain. How can we then explain the element of fear which would become meaningless? In addition to this, the words and deeds of the Holy Prophet & and the noble Companions and their consistent practice prove the fact that having more than one wife (up to four) was never prevented in Islam.

The truth of the matter is what has been stated earlier, that is, the first verse of *Surah al-Nisa'* talks about justice and equality in what man can do by choice while the second verse points out to man's inability to control lack of equal treatment when it comes to love and emotional inclination. Therefore, these two verses have no contradiction, nor does it prove that pluralities of marriages is absolutely forbidden or emphasis any need to enforce stern restrictions to it.

A very important fact that we need to understand in this injunction is NOT to discourage polygamy or make it a daunting act to perform. Islam being comprehensive has provided guidance to the Men who desires to opt polygamy without infringement of women's rights in doing so.

Indeed, the verse 4:3, by permitting, restricting and pronouncing equality in polygamy has safeguarded the women's right.

1. If Polygamy was not permitted, Adultery would become a norm. Women who involve in such dishonoured act will get greatly oppressed, furthermore the condition of the wives of the men who get involved in such act would be very pathetic
2. If Polygamy was permitted without any restrictions or warnings, men would take as many women as their wives (more than four) which will result in not treating them equally.
3. If warnings of equal treatment were not pronounced in this verse, man will treat his wives as per his wish, which will infringe their rights of them by spending less time, providing less rations, etc.

Going through the following amendments in section 24(1) (Second or Subsequent marriages) in your final draft which states as follows:

"……..issue notice in the prescribed form to each of the persons to whom the applicant is married, informing them of his intent to contract another marriage, and requiring such persons to appear before him on a date and time to be specified in such notice, being at least one month after the date of the said notice."

And in 24(4)

(4) On a date that may be fixed by the Quazi Court for this purpose, the Court may inquire into all circumstances that may be relevant to the application for permission to marry, including the following:-

(a) Whether the applicant is living with, and justly and adequately maintaining and caring for, his present wife or wives;

(b) Whether the applicant is looking after his children in a just and equitable manner; and

(c) Whether the applicant has the financial capacity to maintain and provide suitable and independent residence in accordance with his and her social standing for his intended wife, and any children that might be born to such intended wife.

Further explanation in this topic is given our comprehensive report

Recommendations

(1) When a married male Muslim living with or maintaining one or more wives intends to contract another marriage he shall apply in the prescribed form, at least thirty days before contracting such other marriage to the Quazi Court holden in the Quazi division within which he resides, for permission to contract another marriage, and upon receipt of such application

(2) Quazi will conduct an extensive study and will establish lawful (Sharia'h) cause and financial capability of the male Muslim who intends to contract another marriage. When doing so Quazi should conduct himself unbiased and by no means should he Act in a way that would infringe the rights of all parties concerned in this process. Quazi under no circumstances shall go beyond this mandate to perform his duties in this regard.

(3) After such an impartial inquiry, The Quazi Court shall, make order setting out the reasons for refusing or granting permission for the applicant to enter into a subsequent marriage.

(4) If the applicant enters into a subsequent marriage while Quazi has refused permission for such marriage, it shall be considered as an offence and a penalty shall be imposed. In this regard we recommend imposing a fine not less than Rs. 5000, if not paid should be able to recover by the sale of his movable or immovable property of the offender.

(5) There upon, it shall be the duty of the Quazi Court to inform the applicant's intent to contract another marriage to each of the persons to whom the applicant is married and intended to marry.

Divorce

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Shari'ah Basis for Divorce

Talaq is the word, used in Islamic Law for divorce. It is an Arabic word which means: '*to set free*'. It is only in unavoidable circumstances that *Talaq* is permitted in Islam as a lawful method to bring marriage contract to an end. The Shari'ah takes a very reasonable and realistic view of such a sad situation where marriage becomes impossible to continue and by all means fails to bring the couple together, by permitting divorce as a last resort. It is true that the sanctity of marriage is the essential basis of family life. But it is also true that the two incompatible individuals cannot be kept together in a life of hell, throughout the life. It is therefore necessary to give due allowance for human weaknesses and allow such people to part for good.

Islam Discourages Divorces

The Prophet (peace be upon him) is reported to have said:

"Of all the things permitted in Law, divorce is the most hateful thing in the sight of Allah." - Sunan Ibni Majah, 2018

"A woman seeking divorce unnecessarily will be deprived of the scent of Paradise."- Sunan Abi Dawood – 2226, Sunan Ibni Majah-1187, Sunan Al-Tirmidhi-2055

Types of Divorce

Talaq ar Raj'i (revocable divorce)

In this type of Divorce, the husband pronounces *Talaq* once or at the most twice. After the pronouncement of divorce the wife's period of *Iddah* starts. Before the period of *Iddah* expires, the husband may, if he desires, take his wife back. This is called "*Ra'ja*" or "*Ruju*" (return). But the right of "*Ra'ja*" will be lost as soon as the *Iddah* is complete and then the *Talaq* will cease to be revocable. However the husband and wife can still reconcile with a new marriage. After such a fresh marriage in future only one or two divorces (not three) will be counted as an absolute /irrevocable divorce.

Note: if there is no consummation, there is no *Iddah*. Therefore *Talaq* is always irrevocable where marriage has not been consummated.

Talaq Al Bain (Irrevocable Divorce)

Talaq Al Bain is divorce with three pronouncements of divorce by the husband in successive sittings or at the same sitting or divorce before the consummation of marriage.

If a husband divorces his wife three times, he cannot remarry her until after she has married another man and that husband has divorced her after consummation of marriage.

Should *Talaq* be pronounced only in presence of the Quazi?

Talaq, is a right granted for a husband, to be unbound legally from his marriage contract, in the event he is unhappy with his marriage life. If one cannot live happily, Al Quran guides to part with justice.

Furthermore, the Quran discusses the subject of *Talaq* in many places, but nowhere does it state to pronounce *Talaq* in presence of the Quazi.

*"**When you have divorced women**, and they have reached (the end of) their waiting period, do not prevent them from marrying their husbands when they mutually agree with fairness …. 2:232*

*"There is no liability (of dower) on you **if you divorce women** when you have not yet touched them, nor fixed for them an amount …." 2:236*

"*O prophet, **when you people divorce women**, divorce them at a time when the period of Iddah may start. And count the period of …"* 65:01

"*O you who believe, when you marry the believing women, and **then divorce them before you have touched them**, then they have no obligation of any Iddah (waiting period) for you that you may count. So give them (due) benefits, and release them in a pleasant manner …"* 33:49

"***If you divorce them before** you have touched them, while you have already fixed for them an amount (of dower), then there is one half of what you have fixed, unless they (the women) forgive …." 2:237*

Above verses states **'*if you pronounce Talaq*'** or **'you pronounce Talaq'**, and does not state to pronounce *Talaq* in presence of the Quazi.

And when Ibn Umar *(RaliAllahuAnhu*) said 'I have pronounced *Talaq* to my wife', the Prophet (peace be upon him), did not state that his *Talaq* is not valid as he has not pronounced *Talaq* in front of him (as he was the Quazi). But the Prophet (peace be upon him) accepted this as a valid *Talaaq*, and guided the necessary steps that should be followed thereafter. - *Saheehul Bukhari 4908*

Another form of separation of husband and wife is '*Dhihaar*'

(Definition of *Dhihar*: If a man states that his wife is as *haraam* to him as his mother is or another *mahram* woman who is permanently forbidden to him, then he has uttered a great evil and spoken

falsehood, and he comes under the rulings that result from *Dhihaar*. His wife remains *haraam* to him until he has fasted for two consecutive months; if he is not able to do that because of a legitimate *shar'i* reason, then he must feed sixty poor persons.).

Wife of Aws ibn Samit *(RaliAllahuAnhu*) came to the Prophet (peace be upon him) and stated that her husband has pronounced *Dhihaar*, the Prophet (peace be upon him) did not state that the pronouncement should be made in the presence of him (as he was the Quazi). - Musnad Ahmed 27319

Many similar incidents have occurred during the time of Prophet (peace be upon him). The Imams of the four *Madhabs*, (Islamic Jurisprudence) have stated the same ruling in the above situation. None of the scholars have stated that *Talaq* **should be only pronounced** in the presence of the Quazi and if pronounced in the absence of the Quazi, the *Talaq* is invalid. **But** there is no necessity for us to encourage the public in this regard.

Pronouncement of *Talaq*

1. **Explicit terms – (*Sareeh*)**

   In this way the word *talaq* itself is used, if so, *talaq* ensues with or without the intention of divorce, even if done in jest or in anger. Hence if a man says addressing his wife "*I talaq you*" "*I gave you talaq*"," *I divorced you*" marriage is terminated. Even in the event of his explaining that he had no intention of doing so his explanation shall not be accepted, and the period of *Iddah* is commenced immediately. For the effectiveness of *talaq* neither permission is required from Quazi nor is the presence of witness required.

2 **Ambiguous terms - *(Kinaayah)***

   In this way the word *Talaq* is not used but such terms are used which may indicate *talaq* as well as something else. Thus, if the intention was '*Talaq*' to terminate the marriage, it is considered *talaq,* otherwise not. For example saying the words '*you go home*' or '*you are free from me*' while intending *Talaq,* that *Talaq* is valid.

3 **Nonsensical utterance – *(Laghw)***

   There are some ways even the explicit terms of *talaq* are pronounced; the *talaq* will not be effective. For example if someone utters *'Talaq, Talaq, Talaq'* without addressing his wife (without using pronounce such as you, her, or hers name), *talaq* will not be effective even though the intention is to give *talaq*.

In the same time *fuqaha* explains under the chapter of *tala*q many subsections and essential conditions which ensues to effect and in effect of the *talak*, such as talaq given in writing, permitting the wife to *talaq* herself, intention to talaq, talaq by force, number of talaq, sunni talaq(talaq pronounced on her clean period during which no sexual intercourse took place) and bid'i talaq(Talaq during mensuration period ,post natal bleeding of woman whose marriage has already been consummated), conditional talaq (for example if you go out of this house you are divorced) and so on and so forth.

A comprehensive study is required for someone to understand the subject of *talaq* along with the subsections which we have mentioned above. Furthermore one should understand the gravity of the subject matter and it possesses a very thin line of differences in each types of *talaq* with regards to its effectiveness and ineffectiveness. It is vital for a Quazi to have an in-depth knowledge on the subject of *talaq*, when he is passing verdict against it, if not a grave shari'ah violation could happen.

The Definition of *Khula'*

Khula' is the termination of marriage (through the use of the word *Khula*' or *Talaq*) where by the husband accepts a compensation giving the wife her freedom from the marriage bond.

If a man says "I give you *talaq* on a condition that you hand over that which you had received as *Mah*r", and wife accepts, this will be *Khula*'. And if wife says "I perform *khula*' from you by giving you fifty thousand rupees", and man accepts the offer, this is also *khula*'. The compensation may be any amount much or little as long as it is of value and a fixed amount. It is necessary in *khula*' that both parties shall agree on all aspects of the contract.

The basic principle concerning this is the verse in which Allah says:

"*And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul' (divorce)" 2:229*

The evidence for that from the *Sunnah* is that the wife of Thaabit ibn Qays ibn Shammaas *(RaliAllahu Anhu*) came to the Prophet (peace be upon him) and said, "*O Messenger of Allah, I do not find any fault with Thaabit ibn Qays in his character or his religious commitment, but I do not want to commit any act of kufr after becoming a Muslim*." The Prophet (peace be upon him) said to her, "*Will you give back his garden*?" Because he had given her a garden as her

Mahr. She said, "*Yes*." The Prophet (peace upon him) said to Thaabit: "*Take back your garden, and divorce her.*" Saheehull-Bukhaari 5273

<u>Can Quazi give *Khula*' without the consent of husband?</u>

The consent of both spouses is a necessary condition for the validity of *Khula*', and if *Khula*' takes place under compulsion, the *Khula*' is not valid.

As Justice Mufti Taqi Uthmani writes:

"*To the extent we have researched, approximately all the great Jurists (Fuqahaa Mujtahidun) are agreed, and the evidences of the Qur'an and Sunna support this, that Khula is a mutually agreed transaction between the two sides.*" - P. 12 in Islam Me Khula Ki Haqiqat

The following are some of the verdicts of the classical Muslim jurists on *Khula*:

Shafi School - The great Imam and founder of the School that goes by his name, Imam Shafi writes in *Kitab al-Umm*:

"…the reason is that *Khula*` is in the ruling of *Talaq*. Thus no one has the right to divorce on behalf of someone else. This right is not gained by the father, the master, the guardian and not even the ruler."- Kithabul Umm, Chapter: Khula

Hanafi School - The great Hanafi jurist Imam Sarkhasi writes:

"*Khula*`is permitted by the ruler and other than the ruler because it is a transaction that is entirely based upon mutual agreement."- Al-Mabsooth, Chapter : Khula

Maliki School - The scholar Allaamah Abu al-Waleed al-Baaji in his commentary on the *Muwatta* of Imam Malik:

"The wife will have to return to him if the husband does not want her separation through *Khula*` or by some other way."- Al-Munthaqa for Al-Baji

Hanbali School - The great authority in the Hanbali school Imam Ibn Qudaama states:

"For *Khula*` is a transaction, thus the absence of the need of the ruler, just as in sale transactions (*Bay*`) and the marriage contract (*Nikah*) and because it stands for the ending of a (marriage) contract by mutual agreement. For this reason it resembles the mutually agreed cancellation of a sale contract (*Iqalaah*)."- Al-Mughni, Chapter ;Al-Khula'

This view is also the position of Imam Ibn Taymiyya and his famous student ibn al-Qayyim al-Jawziyya. The latter writes in his work *Zad al-Ma`aad*:

"That the Messenger of Allah ﷺ termed *Khula* to be *fidya* (an amount given in exchange for something) is proof that it has the meaning of a transaction and it is for this reason that the agreement of both the husband and wife has been made a condition in it." (Zad al-Ma`aad, Chapter: Khlua')

Faskh in Islam

In Islamic law the right of terminating the marriage through a *Talaq* has been given to the husband. There is great wisdom in this teaching of Islam. Notwithstanding the above, Islam has also taken into consideration the fact that a husband may sometimes abuse the power given to him and cause his wife undue distress by refusing to release her from marriage, despite the objectives of the marriage not being achieved. In these circumstances Islam has given the wife an opportunity to seek relief from such oppression. However, it is important to bear in mind the severe warnings directed to a wife who unduly seeks a divorce. The Prophet (peace be upon him) has mentioned that the fragrance of *Jannah* is Haram for a woman who seeks a divorce without a valid reason. - Musnad Ahmad

The difference between *talaq* and *faskh*, where as in *talaq* it is the ending of the marital relationship by the instigation of the husband, and it involves specific, well-known phrases. As for *faskh*, it is annulment of the marriage contract and dissolution of the marital bond completely, as if it never happened, and this can only be done by means of the verdict of a Quazi or a *shar'i* ruling.

Reason for Faskh

The Jurist *(Fuqaha)* has mentioned reasons for *Faskh* and some of them are listed below

1. Inability to pay the proposed *Mahr*.
2. Financial difficulty on the part of the husband, and inability to spend on his wife's maintenance,
3. Presence of a defect in either spouse that prevents intimacy or creates revulsion between them.
4. Disappearance of the husband resulting in his whereabouts not being known to the applicant for period exceeding 4 years,
5. If a woman has been given in marriage without her consent to someone who is not in her social equal (compatible and suitable) and she requests annulment of the marriage from the Quazi
6. In the event the above mentioned reasons are not applicable and the couple are not willing to continue with the marriage even after undergoing a thorough reconciliation process and the husband or wife does not consent for '*Talaq*' nor for '*Khula*', according to the second view of Shafi schools of thought the Quazi shall proceed with '*Faskh*'.

Recommendations

1. Not to remove the word 'Divorce' in section 16 and 98(2) of the MM&D ACT. Since both marriage and divorce should be governed according to the Muslim law governing the sect to which the parties to such marriage or divorce belong.

2. Section 30 of the MM&D Act should not be repealed. With regards to provisions for the nullity of marriage it is recommended to bring under the MM&D Act separately without deleting section 30.

3. Section 30 is not obsolete and it is a right given to husband base on Qur'an and the Sunnah along with what has been supported by Ijma'a (unanimity) and Qiyas (analogy).

4. In case if husband after pronouncement of Talaq appears before Quazi, the Quazi should inquire the details of the pronouncement, intention and status of utterance which are very vital to decide the effectiveness of the Talaq. After such inquiry,

    (a) If Talaq has not occurred or have uttered word Talaq one or two times, The Quazi Court shall implement the procedure set out in the Second Schedule.

    (b) After an inquiry to find out the details of the pronouncement, intention and status of utterance which are very vital to decide the effectiveness of the Talaq, proved that it has been uttered three times, the Quazi will register the divorce according to section 30 of the MM&D Act.

5. When declaring reasons for Faskh, it should be based on the Muslim law governing the sect to which the parties belong; any reasons other than what is prescribed in shari'ah cannot be taken as reasons for Faskh.

6. The consent of both spouses is a necessary condition for the validity of *Khula*', and if *Khula*' takes place under compulsion, the *Khula*' is not valid. Based on above under no circumstances Quazi should force either party to establish *'Khula'* type of separation.

Mataa

Contents

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Shari'ah Basis of *Mataa' or Mut'ah* in Islam

It is a financial compensation given by a husband to a wife who got separated. This has to be paid in *Talaq* and *Khula* type of separations, and only in one type of *faskh* separation.

Allah says the following in Quran regarding *Mataa'*:

"The divorced women deserve a benefit according to the fair practice, being an obligation on the God-fearing."- 2:241

"There is no liability (of dower) on you if you divorce women when you have not yet touched them, nor fixed for them an amount. So, give them Mataa' (a gift), a rich man according to his means and a poor one according to his means – a benefit in the recognized manner, an obligation on the virtuous." 2:236

Clarification on whether *Mataa'* is there in *Faskh*

1. *Talaq* is the right of a husband. Since it is used by the husband the compensation for the loss incurred by wife *Mataa'* is paid. Since *Khula* is also *Talaq* the law is the same.

2. According to Quran and *Hadeeth*, *Mataa'* is given only for *Talaq*. There is difference of opinion among the jurists as there is nothing said in Quran and *Hadeeth* about giving *Mataa'* in *Faskh* type of separation. However, in Shafie School of Thought, in one scenario *Mataa'* becomes compulsory in *faskh*. That is, if the reason for the *fasakh* separation is only the husband and **he himself request for a *faskh* from the Quazi for his faults**, then *Mataa* is compulsory. For example, due to apostasy or impotency etc. of the husband.

3. *Mataa'* is not compulsory if wife says she cannot live with him and asks *Faskh* to depart from husband, whether he has any drawback or not, *Mataa* is not compulsory, because the wife herself chooses the separation.

4. At the request of wife if the husband gives *Talaq* or *Khula'*, paying *Mataa'* to her becomes compulsory. This separation is not treated as a reason of wife, because *Talaq* and *Khula'* are husband's personal rights.

5. If a woman was told *Talaq* once or twice, only after the *Iddah* period *Mataa'* could be received. As he has the rights to revoke her before the end of *Iddah*

period. But, if the woman was told three *Talaqs*, before the end of *Iddah* she can ask for *Mataa'*.

Further explanation in this topic is given our comprehensive report

Recommendations

Where a marriage has been or is to be dissolved in terms of section 27 (Talaq) or 28(2) (Khula), under such two type of separation, the wife shall be entitled for mata'a.

1. In determining the quantum (Amount) of Mata'a to be awarded, the Quazi Court shall take into consideration only the following matters:

    (a) Consideration of the economic condition of the husband
    (b) The status of the wife

2. Section 97 be amended by adding to that section a definition of Mata'a to mean "a consolatory payment provided to the wife by the husband on the termination of marriage upon an order in terms of section 27*(Talaq)* or 28(2)*(Khula)*

Section 74

IN THE NAME OF ALLAH, THE ALL MERCIFUL, THE MOST MERCIFUL

Amending Section 74 of the MM&D Act to enable parties to be represented by Attorneys-at-law or other representative of their choice

i. The current judicial trend in Sri Lanka appears to be that the parties to matrimonial disputes prefer to have such disputes settled through mediation boards, rather than to obtain an adjudication in courts on the matter.
ii. If Attorneys at law are permitted to represent parties in such matrimonial related disputes, such proceeding will be further delayed, and the case might be dragged on for a further period of time and in some instances for years. In such an event the possibility of bringing about a reconciliation between them also will be too remote.
iii. It will be impractical for some parties to bear the lawyer fee and it will be an unnecessary burden on them particularly women who are already stricken with calamities.
iv. Legal representation would not render it beneficial to each of the two opposing parties and would leave in their mind continued rivalry than harmony.

Based on above, it not recommended to enable parties to represent by attorney at law, thus, we endorse not to make any changes to section 74 of the Act

In the name of Allah, the all merciful, the very merciful

REPORT OF THE COMMITTEE APPOINTED TO CONSIDER AMENDMENTS TO THE MUSLIM MARRIAGE AND DIVORCE ACT

In considering amendments to the Muslim Marriage and Divorce Act No 13 of 195 (hereinafter also referred to as MM&D Act), we are conscious of the observation made by the Sahabdeen Committee to the following effect:-

"Our considered view is that the Act as it stands now needs very few amendments and has stood test of time. Its provisions faithfully represent the letter and the spirit of the Holy Quran, Hadiths, Ijma and Qiyas. As far as Muslim marriage law is concerned, the urgent need of the Muslim community is more in the nature of administrative reforms than amendments to the law as such. We are of the view that a reform of the Quazi system, will, to very great extent, eliminate the hardships that are now caused to litigants in Quazi Courts. This however has to be done carefully and cautiously taking our social realities into consideration" (Page 31 of Sahabdeen Committee Report)

We are in agreement with this observation of that Committee, of which our distinguished Chairman Justice Saleem Marsoof was a member. We have approached our task from the same perspective as set out in the said observation.

We are in substantial agreement with the recommendations made by our colleagues in their separate report only in regard to administrative reforms and the upgrading of the Quazi court system. We however regret our inability to agree with their recommendations in regard to the subjects referred to below and as such we have set out our recommendations in regard to same in the succeeding paragraphs.

Substantive Law:

Section 16 of the present MM&D Act reads as follows

"Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage or divorce, which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage or divorce belong"

The issue arises is to whether the reference to "*Sect*" (Madhab) appearing in Section 16 should be deleted. In this context the great scholar Imam Nawavi contended for the need to follow a particular Madhab. He argued as follows

"The reasoning for this is that, if following any school of thought was allowed, it would lead to people hand-picking the conveniences of the schools in order to follow their desires."
(Al-Majmu: the commentary on Muhaddhab, by Nawavi, vol. 1)

We are in agreement with this view. We are of the opinion that in the generality of cases adherence to a particular Madhab is both desirable and necessary. In this context it would be noted that our Supreme Court has held that Sri Lankan Muslims are presumed to belong to the Shafi'e Sect. However we are conscious of the fact that in certain circumstances and particularly in the case of a party to a marriage or divorce wishing to adopt a madhab, of his or her choice, or where such parties belong to two different Madhabs, the question may arise as to the governing Madhab. Furthermore in the case of Abdul Cader vs Razzick reported in 52 NLR page 201 the Privy Council upheld the right of a Muslim to opt for or choose any Madhab in case of a marriage or divorce and other personal rights. Furthermore Section 16 implicitly recognizes the right of a Muslim to choose or change his or her Madhab.

Where the parties to a marriage do not at the time of marriage declare their Madhab or belong to different Madhabs the determination of the applicable law requires an in depth knowledge of Muslim Law. The generality of Quazis do not possess the required level of competence and knowledge to deal with this issue. We, therefore recommend that parties be encouraged to declare their Madhab at the time of their marriage. However in those instances where the parties have failed to do so or belongs to two different Sects the Quazi should be required by law to refer the issue for ascertainment of the applicable Madhab by the Muslim Marriage and Divorce Advisory Board (MMDAB) which should be empowered to express the opinion to the Quazi on the issue and reconstituted to include reputed Islamic scholars including at least two women. Their opinion would guide the Quazi in selecting the properly applicable Madhab.

The MM&D Act does not exclude the application of the principle of Maslaha Mursalha i.e. the interpretation of legal provisions in the light of public interest. However, great caution should be exercised in the application of Maslaha Murslah. According to Islamic texts and scholars, a decision based on Maslaha should conform to the following

1. First and foremost, it should not contradict the Islamic Shari'ah and its general principles and rulings.
2. It should be established after thorough research that, the issue is in fact a Maslaha, as per the ruling and that it should confer a benefit or prevent harm.
3. If the decision confers a benefit or prevents harm it should harmonize with the objectives of the Shari'ah.
4. The Maslaha should be a common Maslaha and not an individual Maslaha, meaning, as per the ruling. It should be beneficial to most people or prevent harm to many.
5. The task should be performed by a Mujtahid or through collective consultation.

As indicated above the MMDAB should be reconstituted in regard to its membership and its objectives reformulated. We are firmly of the opinion that regard should be had to the concerns of women and as such they should be represented on the Advisory Board. Hence as we have recommended above, not less than two members of the Board should be women. All members should be well versed in Islamic jurisprudence. They should possess a recognized academic qualification from an institution in Sri Lanka or abroad. The Board should be empowered to act as a consultative body from which authoritative opinions, including the question as to the applicable Madhab which should govern any marriage or divorce in the circumstances set out above, could be sought by the Registrar General, any Quazi Court or the Board of Quazis. The ordinary civil courts may also consult the Advisory Board regarding issues relating to a Muslim Marriage or Divorce.

Reform of the Quazi System:

Several women's organizations made strong representations favouring the appointment of women Quazis. In this context we note that the Sahabdeen Committee examined this issue and upon a consideration of the relevant Shafi'e text inclined to the retention of Section 12(1) of the Act as it presently stands. We too have examined the views of Islamic Scholars and texts and see no reason to depart from the view of the Sahabdeen Committee. Accordingly, we do not recommend any amendment of Section 12(1). However, we are acutely conscious of the criticism that the generality of Quazis discriminate against women and that women are in most cases adversely affected by decisions of the Quazi Courts pertaining to Marriage, Divorce and Maintenance.

We are strongly of the opinion that the quality and standards of Quazis should be greatly improved. Upon selection for appointment they should be given a training of not less than six months at the Judge's Institute. This training course should include Islamic Law, Islamic Jurisprudence, mediation and conciliation skills, and the status of women in Islam with particular reference to their rights in respect of marriage and divorce. Quazis should be made sensitive to the concerns of women, who should feel that they too have a stake in the system. A Quazi should be required to sit with assessors in hearing applications for Faskh divorce. The assessors should be drawn from a panel nominated by the MMDAB with the consultation of Quazi. There should be a minimum of three assessors of whom at least two should be women. They should be able to participate fully in the proceedings. The respective opinions of the three assessors should be separately recorded in writing and the Quazi should take their opinion in to account in making his decision. The opinions of the assessors should be part of the record and made available to the Board of Quazis in exercising its appellate or revisionary jurisdiction. Each Quazi should be assisted by a Panel of trained marriage Counselors and Mediators. Each of such Panels should consist of a majority of women.

We recommend the appointment of women as Registrars. In making such appointments regard should be had to cultural and social considerations and what the Sahabdeen Committee referred to as "social realities"

Polygamy:

The law of polygamy in Islam had been distorted and much maligned. Without being apologetic in any way, we must state that Islam neither introduced polygamy nor enjoined it. It simply disciplined untrammeled and unrestricted polygamy which was common in the pre-Quranic era. It is incredible how the detractors of Islam could attribute such unconditional permission for uncontrolled polygamy to a religion whose Holy Book clearly states that where a plural marriage is likely to cause any injustice, the believer should remain a monogamist.

"But if you fear that you will not be able to deal justly with them (Co Wives) then only one (wife). That will be more suitable to prevent you from injustice" (Quran 4:3)

This Islamic notion of the equal treatment of co-wives as a pre-condition to a polygamous marriage was reflected in the "Mohammedan Code". Article 100 of the Code read as follows

"a man according to the law of Mohamet is permitted to marry four wives, that is to say only such men as are uncommonly addicted to the fare sex and who have abilities enough to acquit themselves of their duly, and who possessed of wealth enough to maintain the same properly."

Representations that have been made to us, that the law of polygamy is frequently abused, in breach of the Quranic injunctions. Several cases have been brought to our notice of the first wife being left destitute or the second deserted and left without support. This demonstrates that it is not the Muslim law but Muslims who are in need of reform. Hence suggest that the Islamic notion of equal treatment of co-wives be made statutorily applicable. We recommend that no man should be permitted to contract a polygamous marriage without the permission of the Quazi. Upon an application being made seeking permission to contract a polygamous marriage, the Quazi should notice the current wife who would be entitled to a hearing in opposition to the said application. After inquiry the Quazi may grant permission, only if he is satisfied of the following

a) that a lawful (Shari'ah) cause exists to warrant the application
b) The applicant has sufficient financial capability to maintain the wives

We also recommend that if a person contracts a subsequent marriage without the permission of the Quazi, he should be rendered guilty of an offence and punished with a prescribed minimum term of imprisonment. We also recommend that religious leaders, social service organizations and the Department of Muslim Religious Affairs should take steps to create public awareness of

the pre-conditions prescribed in the Shari'ah for contracting a subsequent marriage and the operation of the proposed amendments when enacted.

We are acutely conscious of the abuse of the law relating to polygamy and the consequent suffering and hardships imposed on women who are victimized thereby. The ACJU has undertaken considerable research and assisted us in finding Shari'ah compliant methods to arrest such abuse. The ACJU has brought to our notice that the Muslim Womens' Research and Action Front had, in their representations to the Sahabden Committee had suggested that a Muslim woman should be empowered to enter into a pre-nuptial contract stating that she will be entitled to divorce her husband if he contracts another marriage without her consent whilst being married to her. This suggestion did not find favour with the Sahabdeen Committee. We have examined this suggestion afresh. We have been advised by the ACJU that there is an authority in the Hanbali school upholding such pre-nuptial contracts containing conditions which are not inconsistent with the Shari'ah including the right of a wife to seek a Faskh divorce in the event that the husband contracts a polygamous marriage without her consent. The ACJU has adopted an eclectic approach and we have been advised that in the given circumstances, an amendment to the MM&D Act recognizing such ante-nuptial contracts would not offend the Shari'ah. We accordingly recommend that provision be made for, and giving effect to such ante-nuptial contracts incorporating

a) A condition enabling the wife to seek a Faskh divorce in the event that the husband contracts a subsequent marriage without her consent and
b) Such other conditions as are not forbidden by the Shari'ah

It should be made clear that such contracts would be governed by Muslim law. We trust that this measure would prove useful in eradicating the social scourge of the abuse of the law of polygamy.

In this instance, also, we would urge state agencies and civil societies, particularly women's organizations, to engage in creating public awareness of the abuse of the law of polygamy and the availability under the law, once amended of pre-nuptial contracts of the nature referred to above.

Registration of Marriage and the requirement of a Wali:

Section 16 of the MMDA states that nothing in the Act would be rendered valid or invalid only by reason of registration or non-registration. Hence the validity of a marriage or divorce is determined by the law governing the sect to which the parties belong. Registration is only evidence of a marriage and does not constitute an essential requirement of a valid marriage.

It has been brought to our attention that there have been several instances where wives who have been deserted by their husbands have been unable to secure maintenance for themselves or secure a divorce as they have been unable to establish the fact of their marriage in the absence of registration. Moreover practical problems have been encountered in registering the birth of a child in the absence of the registration of the marriage of the parents. In case of succession to an inheritance registration provides easy proofs of parentage. In some cases children have been denied admission to schools in the absence of the birth certificates occasioned by the failure to register the marriage of the parents. We are therefore convinced that there is in an imperative need for the registration of the marriages. But we are unable to accept the proposition that a marriage should be rendered invalid only on account of non-registration of such a marriage where it complies with the requirements prescribed by the Shari'ah for a valid marriage.

We have therefore considered another methodology to induce parties to register their marriages. We suggest that registration be rendered mandatory and that in the event of non-registration the bridegroom should be rendered guilty of an offence. Upon conviction the offender should be noticed by the court to secure the registration of the marriage within a period of two months. If he defaults he may be sentenced to serve a mandatory jail sentence for a prescribed period. Quite apart from Shari'ah compliance, it would also be unfair by the children born of a marriage which is not registered, to declare such marriages void as such children would be rendered illegitimate although they are not culpable in any way and in terms of the Shari'ah they are born of a valid marriage.
We also recommend that it be rendered mandatory for a bride to sign the notice of marriage and /or the marriage register as evidence of her consent to the marriage.

It is not permissible for a man to marry a woman without the permission of her guardian, whether she is a virgin or previously-married. This is the view of the majority of scholars, including Imam Shafi, Imam Malik and Imam Ahmad. According to the Shari'ah, the involvement of a Wali is an essential part of the marriage and without such permission the marriage would be null and void. The position relied upon within the Hanafi School is that the marriage of a free, sane and adult woman without the approval of her guardian (wali) is valid. If the person she is marrying is not a compatible partner (kuf'), then her marriage is considered invalid and can be nullified by the Quazi if the Wali's permission has not been obtained. Hence we do not recommend any amendment to or deletion of Section 25 of the Act

Age of Marriage:

Section 23 of the present Act states that the marriage of any person under the age of twelve years shall not be registered. We are of the opinion that the minimum age prescribed in Section 23 should be amended so as to prohibit the registration of a marriage if the man is under 18 years of age or the woman is below 16 years of age. We also recommend that in the event the man is

below 18 years or the woman is below 16 years the permission of the Quazi should be made a necessary pre requisite for marriage. The Quazi would grant such permission only if he is satisfied that such a marriage is in the best interests of the parties. No question arises as to the competence of a person below the age of 12 years to marry, as in terms of the Penal Code any sexual relations with a minor under the age of 12 years would constitute statutory rape.

Mataa'

It is a consolatory payment made by a husband to a wife upon separation. Such a payment is envisaged only in the case of Talaq and Khula separations. However if the Quazi is of the opinion that a wife has been compelled by duress exerted upon her by the husband to seek a Faskh divorce in order to evade the payment of Mataa' which would ordinarily be due only in the case of Talaq or Khula separation, the Quazi could in his discretion order the payment of Mataa'. In regard to Mataa' Almighty Allah states in the Holy Quran'

"The divorced women deserve a benefit according to the fair practice, being an obligation on the God-fearing." (Quran- 2:241)

Appearance by lawyers before Quazi Courts:

Section 74 prohibits attorney at law from appearing before the Quazi courts for any party or witness. It has been submitted that it is desirable that this bar be removed. However we are of the opinion that the vast majority of cases that come before the Quazi courts do not involve any serious questions of law or fact. Moreover the appearance of lawyers may place women litigants at a disadvantage as they may not be able retain lawyers who are comparable to those retained by their husbands. In addition appearance by lawyers would add an adversarial element which is incompatible with the objectives of a Quazi court which is designed to act as a family court to facilitate the settlement of matrimonial and related disputes in an atmosphere free of bitterness. Hence we do not recommend any amendment to section 74 of the Act.

Upgrading the Status and Standard of Quazis:

As already indicated we are in substantial agreement with the recommendations made by our colleagues pertaining to the upgrading of the status and standard of Quazis. In addition we recommend the following

a) The Judicial Service Commission may appoint a Quazi with jurisdiction over more than one Quazi division or may bring such number of Quazi divisions under an existing Quazi for the purpose of the better administration of justice

b) The Judicial Service Commission may, having considered the needs and the circumstances, from time to time prescribe the number of Quazi divisions, the date, time and the place of sittings of the Quazi Courts functioning at a given period of time

Please see signatures overleaf

Signed by

1. Mufti M.I.M Rizwe - President of All Ceylon Jamiyyathul Ulama
2. Ash-Shiekh M.M.A Mubarak - General Secretary of All Ceylon Jamiyyathul Ulama
3. Hon. Justice A.W.A. Salam - Former President of the Court of Appeal
4. Hon. Justice Mohammed Mackie - Judge of the Civil Appellate High Court and former Assistant Secretary to the Judicial Service Commission
5. Mr. Shibly Aziz - President's Counsel, former Attorney General and former President of the Bar Association of Sri Lanka
6. Mr. Faisz Musthapha - President's Counsel
7. Dr. M.A.M. Shukri - Director Jamiah Naleemiah
8. Mr. Nadvi Bahaudeen - Attorney-at-Law and former Chairman of the Board of Quazis
9. Mrs. Fazlet Shahabdeen - Attorney-at-Law

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Nadvi Bahaudeen By his authorised signatory Faiz Musthapha PC vide e-attached

9. Mrs. Fazlet Shahabdeen
(Attorney-at-Law)

Date : 21st December 2017