

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 other wise invalid or valid, as the case maybe, 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 Nawawi. 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 untrammelled 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 duty, 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 Sahabdeen 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 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 LEO
authorised signatory
Faisz Musthapha... write e-
shahab*

[Signature]

Date : 21st December 2017

ANNEXURE

Assalamu Alaikum
Dear Sir

Pis. find below email received from Mr. Nadvi Bahudeen

----- Forwarded message -----
From: "Nadvi Bahudeen" <nadvilaw@gmail.com>
Date: Dec 20, 2017 8:57 PM
Subject: Re: MMDA Final Draf Report
To: "Ryzan" <ryzand@gmail.com>
Cc:

Dear Sir, (Mr. Faiz Musthpha PC)

This mail is sent to you informing that I have gone through the Final Report of the proposed amendments we prepared independent to the previous draft report of the Chairman , to which I did not fully agree

Since I am presently overseas and will be returning only in January 2018, Sir could you be kind enough to sign, the said Proposed Report prepared by us on my behalf.

This email can be part of the proposed Report, if same is necessary in order to validate the signature placed on my behalf .

Thank You.

Nadvi Bahudeen
Member
MMDA Reform Committee