The Quazi Court System in Sri Lanka and its Impact on Muslim Women

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by

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A Message

Mr. Saleem Marsoof, P.C. must be commended for his pioneering and scholarly study of Sri Lanka's Quazi Court system from the perspective of the Muslim woman. Quazi Courts and the Board of Review form an integral part of the judicial hierarchy of Sri Lanka. These institutions have exclusive jurisdiction in regard to matrimonial disputes involving persons professing Islam.

The Quazi Courts as well as the members of the Board of Review are bound to resolve disputes by applying Muslim law as found in the Holy Qur'an and the other sources of Islamic law. In this connection it is worth recalling the following direction issued by a Caliph to a Judge as quoted by M.C.Bassiouni in *The Islamic Criminal Justice System* (New York, Oceana Publications, 1982) at pages 31 - 32:

> "If a case is presented to you and you cannot find an applicable rule clearly stated in the Holy Qur'an or the Sunna, you can reason the solution, contemplate (deliberate judiciously), try to find an analogy (to a rule in the Qur'an or Sunna), and study the work of the wise and then render your judgement accordingly. Beware of anger, anxiety, monotony, disgust, and do not be biased against or for anyone even if he be your ally (friend)."

A Quazi should not only have a thorough knowledge of *shariat* law, but he should also be impartial and just. In *Surah An-nisa* IV: 135, the Holy Qur'an stresses the need for impartiality in the administration of Justice:

> "O ye who believe, stand out firmly for justice, as witnesses to God, even as against yourselves or your parents, or your kin

> and whether it be against rich or poor; for God can best protect both".

The appointment of Quazis and members of the Board of Quazis by the Judicial Service Commission ensures the independence of these institutions. The Quazi is not only a Judge but is also a mediator. He is expected to make every endeavour to reconcile estranged spouses coming before him. He should always bear in mind what the Prophet of Islam said in the course of his Farewell Sermon:

> "Ye people! ye have rights over your wives and your wives have rights over you. Treat your wives with kindness and love; verily we have taken them on the security of Allah."

I am deeply conscious of the necessity to improve the knowledge of Quazis and members of the Board of Review in regard to applicable principles of Muslim law, and I have no doubt that this book will provide them with a wealth of information. I am also aware of the need to impart to these judicial officers training in mediation techniques and other skills necessary for the efficient discharge of their functions. I am happy that the Ministry of Justice has taken the initiative in organising training programmes for Quazis in collaboration with the Judicial Service Commission with this objective in mind, and I appreciate the contribution made by Mr. Marsoof in this connection.

I am also aware that there are certain shortcomings in the existing legislation governing the Quazi Court system, and there are serious difficulties faced by Muslim women. I am confident that Mr. Marsoof's research will be of great assistance in considering necessary reform to the existing law with a view of overcoming these difficulties.

Sarath Nanda Silva,
Chief Justice.

Chief Justice's Chambers,
Superior Courts Complex,
Colombo 12.
28 November 2000

Foreword

Assalamu Alaikum,

The author has kindly invited me to contribute a foreword to his valuable work entitled 'THE QUAZI COURT SYSTEM IN SRI LANKA AND ITS IMPACT ON MUSLIM WOMEN'. The main objective of this work is "to examine from a woman's point of view, the statutory and administrative framework of the Quazi Court system existing in Sri Lanka". I believe that this is the first attempt made in Sri Lanka to assess the impact of a judicial institution from the perspective of the woman.

Blending the wealth of experience gained through a long and distinguished career in the Attorney General's Department with the immense knowledge of Muslim law acquired in the process of teaching the subject for more than two decades, the author has highlighted the multifarious issues concerning the Quazi Court system in a lucid and practical way and ventured to suggest meaningful solutions. His critical analysis of the shortcomings in the Muslim Marriage and Divorce Act could well form the basis for suitable amendments to existing legislation, specially in respect of the reconstitution of the Quazi Court system and the procedure adopted in these Courts.

It is heartening to note that the author has taken up the cause of women. Long have they suffered in silence. As one party to a Muslim marriage is necessarily a female, the need to examine the laws applicable to the marriage from the point of view of the woman cannot be denied or underscored. Women are entitled to give expression to their views on the local laws that apply to them. It is well known that they had done so right from the beginning of the Islamic era. When Omar Ibn al Khattab (Ral), the second Caliph of Islam, attempted to impose a ceiling on the quantum of *mahr* payable to women for marriage, it was a lady who prevented this by drawing his attention to verses of the Holy Quran indicating that the parties to the marriage were free to agree on the *mahr*.

The focus in the prologue to this work on the plight of Fathirna, as a helpless person much in need of assistance, is not without justification. Nevertheless, one should not loose sight of the fact that while it needs two persons to make a marriage, it also takes two persons to make a quarrel. It should also be borne in mind that out of all those actions which have been made permissible in Islam, divorce is the most hated by Almighty Allah, and that it has been granted as an act of mercy to Mankind, and only to be used as a last resort. Therefore, every person - whether male or female - who gives consideration to the option of divorce should remember that "To Him Is The Return"

Wassalam,

M. Jameel
Former Judge of the
Supreme Court of Sri Lanka

No.13/10, Daya Road,
Colombo 6.
28 November 2000.

Preface

I thank the Muslim Women's Research and Action Forum for entrusting me the task of writing this book which is intended to deal with the Quazi Court system in Sri Lanka and its impact on Muslim women. The Quazi Court system existing in Sri Lanka was intended to redress matrimonial problems of Muslim women without them having to go through the procedures of the ordinary courts.

The objective of this book is to make an in-depth assessment of the Quazi Court system and its impact on Muslim women. For this purpose, information was gathered by administering questionnaires on Quazis as well as on parties to disputes before Quazis. Valuable insights were also gained through the observation of proceedings before Quazis. A meeting was also organised by the Muslim Women's Research and Action Forum at which the main participants were Quazis and members of the Board of Quazis. I functioned as the Special Rapporteur at this meeting.

I need to explain how I got involved in Muslim law research, and in particular, in the endeavors of the Muslim Women's Research and Action Forum. Having not had the opportunity of following any formal course in Muslim Law during my student days, I had to study the Muslim Law as applied in Sri Lanka on my own. I was shown the way by two Quazis. The first was my maternal grandfather Marhoom M.M.M.Noohu Lebbe who was the Imam of the Dehiwala Muhiyyaddeen Grand Jumma Mosque and also the Marriage Registrar and Quazi for the Muslims of a great part of Colombo. As a small boy I remember reading *kadutham* records, which were then in his custody, which reflect the contractual nature of the Muslim Marriage. He was virtually my tutor in Islam and Muslim law.

The other Quazi who has been a great source of inspiration to me is Alhaj M.H.M. Yehiya, the Quazi for Ratnapura and presently the Secretary of the Sri Lanka Quazi Welfare Association, who somewhere

in 1969 gave me a spare copy of the first Volume of the Muslim Marriage and Divorce Law Report, when I was only a law student, and continued to share with me his experiences as Quazi. In 1977, the late Mr. V. Ratnasabapathi, who was at the time the Principal of the Sri Lanka Law College, asked me whether I could teach the subject at the Law College. I accepted the assignment, and this marked the beginning of a great learning experience for me.

It was while I was teaching Muslim Law at the Faculty of Law of the University of Colombo in 1984 that I began to realise that there were serious problems in the law that was administered in Sri Lanka. My association with the Muslim Women's Research and Action Forum began almost at the same time when I met two very agitated members of the Forum who were determined to fight for the reform of the Muslim Law of Sri Lanka. I was able to convince them that it would be useful to study the system in greater depth, and I accepted their invitation to join them in their research. We have since then engaged in an exhaustive study of the subject with a view to agitating for the necessary reform. Once again, I thank the members and the office-bearers of the Forum for giving me this opportunity to associate myself with their extremely important and useful work.

It is our view that while the Quazi Court system prevailing in Sri Lanka has been of some benefit for the Muslims of Sri Lanka, the substantive as well as the procedural laws applied by the Courts and other institutions administering Justice suffer from numerous shortcomings which are in need of urgent correction. It is hoped that some of these shortcomings are sufficiently highlighted in this work, and the suggested solutions would pave the way for the creation of a more efficient and just system.

I thank his Lordship the Chief Justice of Sri Lanka for his inspiring message. I also wish to thank Justice M. Jameel, former Judge of the Supreme Court of Sri Lanka and the Former Ambassador of Sri Lanka to the United Arab Emirates, not only for writing the very encouraging

foreword but also for going through the manuscript and suggesting many improvements. I am grateful to Ms. Faizun Zackariya, Ms. Ann Jabbar and Ms. Chulani Kodikara for the assistance and encouragement given by them. I also thankfully acknowledge the secretarial assistance I received from Ms. Sriyani de Silva and Ms. Suneetha Jayatillaka of the Attorney General's Department in preparing the manuscript. I am deeply indebted to my former apprentices Mr Sumedha Mahawanniarachchi, State Counsel, Messers. Sabry Haleemdeen and Malin Rajapakse, Miss. Roshana Rashid, Mrs. Marini de Livera and Ms. Kaushali Dilani, all Attorneys-at-Law of the Supreme Court of Sri Lanka, for reading the manuscript and suggesting corrections and improvements. Last but not least, I thank my wife Muneera and son Althaf for being patient and tolerant during the time of my research and writing.

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Sri Lanka.
3rd January 2001.

Prologue

She could not believe that just one word, when repeated three times, could shatter her life into shambles. The word "*talaq*"[1] haunted her like a never-ending echo. Fathima remembered how her parents had put in everything they had to arrange her marriage to Ikram just two years ago. To her, the *nikah*[2] was the foundation for a new life. She had dreamt of a wonderful married life with a loving and caring husband, blossoming into a family of two or three kids. Being born and bred in Islamic morals and values, she had done her best to hold the marriage bond together dutifully and patiently. She never imagined that her dreams would become a nightmare within such short a time. Now she has to turn to the Quazi[3], whose notice had just reached her, in the fervent hope that he could do something to save her marriage, and indeed her life.

This is an attempt to examine, from a woman's point of view, the statutory and administrative framework of the Quazi Court system[4] existing in Sri Lanka. The Quazi Court system was intended to give relief to Muslim women in distress like Fathima without they having to go through the procedures of the ordinary courts. As the objective of this study was to make an in-depth assessment of the system and its impact on Muslim women, information was gathered by administering questionnaires[5] on Quazis as well as on parties to disputes before

1 The term literally means 'divorce', and connotes the termination of the marriage tie through a pronouncement made unilaterally by the husband.

2 This Arabic word is used to refer to the marriage ceremony.

3 A Quazi is a judicial officer having matrimonial jurisdiction over Muslims of Sri Lanka and is appointed in terms of Section 12 of 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 and Law No. 41 of 1975.

4 The Quazi Court system consists of Quazis appointed with respect to distinct judicial zones, Special Quazis appointed on an all-Island basis and a Board of Quazis with appellate jurisdiction

5 A copy of the Questionnaire used by the Muslim Women's Research and Action Forum is included in Appendix A.

Quazis. Valuable insights were also gained through the observation of proceedings before Quazis. A meeting was also organised by the Muslim Women's Research and Action Forum with Quazis and members of the Board of Quazis. The author functioned as the Special Rapporteur at this meeting[6].

6 A report of this meeting with Quazis has been published under the title Dialogue with Quazis (Colombo, 2000) by the Muslim Womens' Research and Action Forum.

Chapter I

The Quazi Court System

There is evidence that from ancient times, the religious laws and customs of the Muslims were applied by the Sinhalese kings in resolving disputes among Muslim subjects, and a special court was established for this purpose in Colombo in the fifteenth century. Although the special laws and customs had somehow managed to survive nearly four centuries of foreign dominion, the special judicial apparatus set up by the Sinhalese kings had perished.

A Quazi Court system covering the entirety of Sri Lanka was established only 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 interest. In 1925 the Supreme Court held that a Muslim marriage can only be terminated at the instance of the wife by the District Court, and that 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 had no legal sanction.[7]

Agitations for Reform

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 Committee recommended the establishment of Quazi Courts with

7 See, *King v Miskin Umma* 26 NLR 330; See also, *Ageska Umma v Abdul Careem* (1880) 4 SCC 13.

original jurisdiction and a Board of Quazis with appellate jurisdiction to deal with matrimonial disputes among the Muslims of Sri Lanka[8]. The Muslim Marriage and Divorce Registration Ordinance of 1929[9] 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.

Since the system established by the above mentioned 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[10] 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"[11]in the notification relating to their appointment. The Act also contains provisions for the appointment of temporary Quazis[12]

8 The report of the Committee has been published as Sessional Paper No. XX of 1928.

9 The Muslim Marriage and Divorce Registration Ordinance No.27 of 1929, amended by Ordinance No. 9 of 1934 and promulgated as law on 1st January, 1937.

10 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 and Law No.41 of 1975.

12 *ibid.*, Section 13.

and special Quazis "whenever there is a special necessity for the appointment" of such Quazis.[13] In *Ansar v Fathima Mirza*[14] the Supreme Court held that the power to 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.[15] 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.[16]

Originally, the Muslim Marriage and Divorce Act 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*[17] 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.[18] 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 still fall, for administrative purposes, under the purview of the Ministry of Home Affairs and not the Ministry of Justice. At present there are 52 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",[19] but no minimum professional or academic qualifications are stipulated in the Act. At the time of doing research for this study in 1994, only four persons holding office as Quazis were Attorneys-at-Law.

13 *ibid.*, Section 14.

14 75NLR 279

15 Section 15 of the Muslim Marriage and Divorce Act, supra note 10.

16 See, *infra* Chapter VI.

17 64NLR 419.

18 Section 2 of the Muslim Marriage and Divorce (Amendment) Act No. 1 of 1965.

19 Section 12(1) of the Muslim Marriage and Divorce Act, supra note 10.

Dr. Sahabdeen Committee

During the last three decades, there has been agitation for the reform of the matrimonial laws of the Muslims of Sri Lanka. 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 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. Faiz Mustapha, 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 as members of a Commission or Committee to suggest changes in the field of Muslim family law in Sri Lanka. Justice M. Jameel and the present author were later co-opted into this Committee.

The Committee held several public sittings and recorded evidence. The Muslim Women's Research and Action Forum also made representations to the Committee suggesting fundamental and far reaching reforms. The Committee, however, 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".[20] The Committee nevertheless recommended certain amendments to the existing legislation. The recommendations of the Committee may be summarised as follows:

(a) Amending Section 18(2) of the Muslim Marriage and Divorce Act and Form IV thereof, to enable the inclusion in the Register of Marriages the conditions of the marital contract or any pre-nuptial contract the parties may have entered into.

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20 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. page 31.

(b) Amending Sections 18(1)(a) and 19(1)(a) of the Act to enable the bride to sign the Marriage Register.

(c) Amending Section 47(1)(f) of the Act and Rule 4(1)(a) of the Second Schedule thereof to provide for the payment of *matah*.

(d) Amending Sections 64(1) and 64(3) of the Act with a view of removing hardships caused to litigants in relation to the enforcement of orders of Quazis and the Board of Quazis.

(e) Amending Section 74 of the Act with a view of permitting Attorneys- at-Law to appear before Quazis.

(t) Introducing into the Act certain provisions for the establishment of a Quazi Service and prescribing minimum educational qualifications for appointment as Quazis and as members of the Board of Quazis.

(g) Introducing into the Act provisions to prevent abuse by non-Muslims of the provisions of the Muslim Marriage and Divorce Act.

Even these limited recommendations of the Dr. Sahabdeen Committee, however have not so far been officially adopted or implemented by the Government. It is difficult to predict how long Fathima and her lot will have to wait for these recommendations to be transformed into law, or for more elaborate or fundamental reforms to be effected in the law.

Chapter II

Jurisdiction of the Quazi

The jurisdiction of the Quazi may be divided into (a) jurisdiction relating to the grant of approval for certain types of marriages, (b) the divorce and nullity jurisdiction and (c) the matrimonial jurisdiction. These may be considered briefly.

Approval for marriages

Although under Muslim law a marriage guardian (*wali*) may give in marriage even a child under his care, the Muslim Marriage and Divorce Act requires the permission of the Quazi for registering the marriage of a girl who is below 12 years of age.[21] The approval of the marriage guardian is also required, as enunciated in Section 25(1)(a)(ii) of the Act, for the marriage of a woman of the Shaffie sect. However, the Quazi has the power to dispense with the consent of the marriage guardian in appropriate cases, for instance where the woman in question has no marriage guardian or the person entitled to act as the guardian has unreasonably withheld his approval for her marriage.[22]

Divorce and Nullity jurisdiction

Under part III and IV of the Muslim Marriage and Divorce Act the Quazi has wide powers in dealing with applications for, and the registration of, divorces.[23] This includes the function of registering *talaq* divorces at the instance of Muslim husbands, as well as the grant of divorces

21 Section 47(1)(j) of the Muslim Marriage and Divorce Act, No. 13 of 195 I 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 and Law No.41 of 1975.

22 *ibid*., Sections 25(1). 42(2) and 42(3). *Cf, Huraira Sawall v Buhary Sawall*, 4 MMDR 174.

23 *ibid.*, Sections 27 to 32.

sought by wives in accordance with Muslim law. As would appear from Chapter V of this work, in the context of a pronouncement of *talaq* by the husband, the role of the Quazi is conciliatory and administrative but not judicial. The Quazi has no power, for instance, to refuse to register a *talaq* which is valid in law, however inequitable it might be. In fact, Section 16 of the Muslim Marriage and Divorce Act expressly lays down that where a divorce is valid according to the Muslim law governing the sect to which the parties belong, its non- registration does not affect its validity. Furthermore, Rule 3 of the Second Schedule to the Act prohibits the Quazi from recording the alleged reasons for which, or the alleged grounds upon which the husband seeks to pronounce *talaq*, emphasising the position that divorce is available to a man as a matter of course.

There is, however, no express provision in the Muslim Marriage and Divorce Act for the registration of a *talaq-i-tafwid* at the instance of a married woman who exercised the power delegated to her by her husband to pronounce *talaq*. This question is considered in detail in Chapters IV and V.

Where the married woman applies for divorce under Section 28 of the Act from a husband who is not consenting to divorce, the woman has to prove ill-treatment or other act or omission on the part of the husband amounting to a 'fault' or some other ground of divorce recognised by the Muslim law governing the sect to which the parties belong. Here the Quazi is called upon to adjudicate upon disputed facts and issues of law, and his role is clearly a judicial one. The dual role thus played by the Quazi in divorce proceedings really highlight the imbalance in the Muslim law of divorce as applied in Sri Lanka.

A Quazi also has the power to deal with any application for the declaration of nullity of marriage by a husband or by a wife.[24]

24 *ibid.*, Section 47(l)(i).

Matrimonial jurisdiction

Part VI of the Muslim Marriage and Divorce Act confers on the Quazi an extremely broad matrimonial jurisdiction.[25] The Quazi Court has jurisdiction to inquire into and adjudicate upon

(a) any claim by a wife for the recovery of *mahr*[26];

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

(c) any claim for maintenance by or on behalf of a legitimate child or an illegitimate child whose mother and the person from whom maintenance is claimed are Muslims;[27]

(d) any claim by a divorced wife for maintenance until the registration of the divorce or during her period of *iddat*[28] or, if such woman is pregnant at the time of the registration of the divorce, until the birth of the child;

(e) any claim for the increase or reduction of the amount of any maintenance already ordered;

(f) any claim for *kaikuli*;[29]

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25 See generally Section 47(1).

26 Mahr is the dower enjoined by Islam to be offered by the bridegroom to a bride on the occasion of the marriage as a token of respect for the bride

27 The original provision in the Muslim Marriage and Divorce Act, *supra* note 21, only provided for the maintenance of a *legitimate* child. However, this provision was amended by Section 6 of Act No. 1 of 1965 extending the right of maintenance to illegitimate children in certain circumstances. See, *Nizam v Beebi* (l998) 1 SriLR 47

28 The period of *iddat* when it arises from divorce is the period covered by three menstrual courses in the case of a woman subject to menstruation. If the woman is not subject to menstruation, the period is three months. This is distinguishable from the period of *iddat* that has to be observed on the death of the husband which is four months and ten days.

29 This term is defined in Section 97 of the Muslim Marriage and Divorce Act, *supra* note 21, as "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 marriage by a relative of the bride or by any other person". *Kaikuli* is held in trust by the bridegroom on behalf of the bride and should he returned on the dissolution of the marriage. See, *Sawdoona v Abdul Munees 57 NLR 75.*

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

(h) any application for mediation by the Quazi between a husband and wife;[30]

There is no express provision in the Muslim Marriage and Divorce Act regarding the custody of children, although the issue of custody would loom large in matrimonial disputes. It is desirable to amend the Act to vest the custody jurisdiction exclusively on the Quazi, subject only to the *habeas corpus* jurisdiction of the Court of Appeal and the Provincial High Court.

Exclusive jurisdiction

It is relevant to note 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] In view of this provision, the *dictum* of H.N.G. Fernando J in *Abdul Gaffoor v Joan Cuttilan* that "the Kathi Court and the Magistrate's Court have concurrent jurisdiction to hear and determine applications for maintenance"[32] appears to be ill-founded and may be misleading.[33]

30 See Section 47(l)of the Muslim Marriage and Divorce Act, *supra* note 21.

31 *ibid*., Section 48. *See*. *Ummul Marzoona v A. W. A. Samad* 79 NLR 209.

32 61 NLR 88 at p.89.

33 *See M. T. M. Jiffry v Nona Binthan* 62 NLR 255.

Chapter III

The Applicable Law

It is now necessary to consider the law applicable in proceedings before Quazis and the Board of Quazis. In this connection, it is relevant to note that in Sri Lanka the marriage relationship is governed by statute. The Marriage Registration Ordinance, which is also known as the General Marriages Ordinance, was enacted in 1907 "to consolidate and amend the law relating to marriages other the marriages of Muslims"[34]. The provisions of this Ordinance now apply to all marriages "save and except marriages contracted under and by virtue of. . . . the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam."[35] The provisions of the Muslim Marriage and Divorce Act of 1951 are applicable to "the marriages and divorces, and other matters connected therewith, of those inhabitants of Sri Lanka who are Muslims."[36]

In this context, it is worth noting that the Holy Quran upholds the validity of a marriage between a Muslim man and a non-Muslim woman belonging to a revealed religion such as Christianity (*Ahl-al-Kitab*). In *Sura Maida* Allah says-

> "Lawful unto you in marriage
> Are not only chaste women
> Who are believers, but
> Chaste women among
> The People of the Book".... [37]

34 Marriage Registration Ordinance No. 19 of 1907 as subsequently amended. The quotation is from the preamble to the Ordinance.

35 *ibid*. Section 64.

36 The Muslim Marriage and Divorce Act, No. 13 of 1951 as amended by Act No. 31 of I 954. Act No. 22 of 1955.Act No.1 of 1965, Act No. 5 of 1965, Act No. 32 of 1969 and Law No. 41 of 1975. Section 2.

37 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Maida* V: 6.

However, such a marriage would not be a "marriage between persons professing Islam", and would not be governed by the provisions of the Muslim Marriage and Divorce Act. Such a marriage would be governed by the provisions of the General Marriages Ordinance.

It is expressly provided in the Muslim Marriage and Divorce Act of 1951 that the validity or otherwise of a Muslim marriage or divorce has to be determined according to "the Muslim law governing the sect to which the parties to such marriage or divorce belong."[38] It is further provided 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."[39] Accordingly, any question arising in any case regarding which the Act is silent must necessarily be decided according to Muslim law.

The Act has been described as the "first statute which suggests that Muslim marriage law outside the Code or the Ordinances affecting marriage and divorce registration obtains in Ceylon"[40] . However, it does not indicate what is 'Muslim law' or 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.

Interpretation of 'sect' by Sri Lankan Courts

The two great sects of Islam are the Sunni and Shiah sects, and the vast majority of Muslims belong to the former. The divergence of legal doctrine in Sunnite Islam is crystallised in the existence of four different

38 Section 16 of the Muslim Marriage and Divorce Act. *supra* note 36.

39 *ibid.*, Section 98(2).

40 T.E.Gooneratne. *An Historical Outline of the Development of the Marriage and Divorce laws Applicable to the Muslims in Ceylon*, Appendix B to the Report of the Commission on Marriage and Divorce, Sessional paper No. XVI of 1959, at p.188

schools of law, 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.[41]

Our courts have held consistently that as Sri Lankan Muslims largely belong to the Shaffie sect, "the Shaffie doctrine is generally applicable".[42] They have also held that a party should be presumed to be a Shaffie unless there is evidence to the contrary.[43] Sri Lankan courts have applied the law of the sect of the parties even in matters, such as donation,[44] which are not governed by specific legislation. In the *Ramupillai* case Jameel J. observed that-

> "It is in the matter of their Personal Laws that the Muslims (That is to say followers of Islam, be they Ceylon Moors, Ceylon Malays, Sinhalese, Tamils, or any other race or Nationality) in Sri Lanka are governed by the Muslim Law, and that too by the Law of the SECT to which they belong."[45]

However, a school of thought such as the Shaffie school, is merely a 'way' or *madhab* and should not be treated as a sect.[46] The confusion

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41 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.

42 *Affefudeen v Periatambv*, 14NLR 295 at page 300 per Middleton J.

43 See. *Mangandi Umma v Lebbe Marikar;* 10 NLR 1; *Marikkar v Marikkar* 18 NLR 346: Mohamedu Cassim v Cassie Lebbe, 29 NLR 136; *In re Nona Sooja* 32 NLR 63; *Ummul Marzoona v Samad 79 NLR 209.*

44 *See, Affefudeen v Periatamby, supra* note 41. specially at 300 where Middleton J. referred to that "the Shafi doctrine on the subject."

45 *Ramupillai v Minisrer of Public Administration. Provincial Councils & Home Affairs.* (1991)1 Sri LR II at page 47 *per* Jameel J.

46 Hamilton A.R.Gibb. *Mohammedanism* (1955 edition), page 82; H.M.Z.Farouque. *Muslim Law in Ceylon: An Historical Outline*. 4 MMDLR 1 page 26, footnote 67.

that can be caused by using the terms 'sect' and 'school' as if they were synonymous terms is apparent in the following passage from the judgment in *Ummul Marzoona v Samad* –

> "Although there are Muslims in Ceylon who belong to the Hanafi sect - see *Abdul Cader vs. Razick*, 54 NLR 201, and *A.L.M.Haniffa vs. A.A.Razack*, 60 NLR 287, yet "It appears that the Moors in Ceylon belong to the Shaffie sect of Sunnis" per Wood Renton, J. in *Wappu Marikkar vs. Ummaniumma*, 14 NLR 225 at 226. In the absence of any evidence to the contrary, in the instant case it may be presumed that the parties belong to the Shaffie sect and accordingly the principles applicable under that school of law would apply."[47]

The consequence of equating a school of thought to a sect is that an adherent of a particular school of thought will be rigidly bound by the teachings of that school. Accordingly, he will not have the freedom to deviate from these precepts unless he declares himself to be a follower of a different school of thought. Thus, in *A.L.M.Haniiffa vs. A.A.Razack*[48] the Shaffie girl who wished to marry against the wish of her *wali* (marriage guardian) had to become a Hanafi in order to avoid the rule of Shaffie law that a woman requires the approval of her *wali* for contracting marriage[49].

The spirit of madhabs

It is questionable whether such an inflexible approach can be reconciled with the spirit of the *madhabs* themselves, particularly in the context that Imam Shaffle himself was a student of Imarn Malik, and had his only son instructed by none other than Imam Hanbal. It is said that

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47 *Ummul Marzoona v Samad, 79* NLR 209 at page 211 per Vythilingam J.

48 60 NLR 287. *See also, Abdul Cader v Razik* 54 NLR 201 (PC)

49 *See*, Section 25(1)of the Muslim Marriage and Divorce Act, *supra* note 36.

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-Shaffi 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 *lsha* and *Subhu* prayers as a Hanafi, omitting to recite Bismilla aloud or *Qunut at Subhu*, and explained that he acted so out of respect for the Imam Abu Hanifa in whose presence they were."[50]

It has also been suggested that the rigid classification of persons as the followers of the Hanafi, Maliki, Shaffie and Hanbali 'sects' is not consistent with certain Quranic injunctions.[51] Of particular interest, in this connection, is the following verse from *Sura Al-An 'am* in which Allah frowns upon the division of religion into sects so as to break up the unity of Islam. Addressing Prophet Muhammad (PBUH) Allah says-

> "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".[52]

50 Mapillai Alim, *Fat-hud-Dayyan fi Fiqhi Khairil Adyan,* (Translated by Saifuddin J. Aniff-Doray) (1963 edition) page 534.

51 Saleem Marsoof, *Fallacies of Muslim Law* (1996-1997) *Meezan* page 63 at p. 66.

52 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Al-An 'am* VI: 159.

Abdullah Yusuf Ali, in his commentary on this verse, observes that the Arabic term '*farraqu*', which literally means "divide the religion", may connote one or more of four types of religious division, such as 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 breakup the unity of Islam."[53]

Problems of Application

From a pragmatic point of view, the most important problem that arises from this state of the law is one of application. For purposes of illustration, let us take a marriage between a Shaffie bride and a Hanafi groom. The validity of such a marriage has to be determined "according to the Muslim law governing the sect to which the parties to such marriage belong"[54]. Let us ponder upon some of the issues such a marriage can give rise to. Firstly, 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* [55] 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.[56] But according to Shaffie law, the marriage is void.[57] Since the validity of the marriage has to be determined according

53 *ibid.*, footnote 985.

54 Section 16 of the Muslim Marriage and Divorce Act, *supra* note 36.

55 60 NLR 287. *See also*, *Abdul Coder v Razik* 54 NLR 201 (PC)

56 Tahir Mahmood, *The Muslim Law of India* (1982 edition) page 53.

57 A.R.I.Doi, *Shariah: The Islamic Law* (1984 edition) page 138

to *the law of the sect to which the parties belong*, should the matter be decided by applying the Hanafi law or Shaffie law?[58]

It is quite obvious that the judicial equation of schools of law with sects give rise to some of the most knotty problems in the field of Sri Lankan Muslim law. Such equation also has the undesirable effect of depriving the courts and tribunals administering Muslim law in Sri Lanka of an extremely effective instrument of legal development. For example, in *Khurshid Bibi v MoharnedAmin*,[59] the Supreme Court of Pakistan held that a Muslim wife is entitled as of right to obtain a *khula* divorce against the wish of the husband if she can prove that the marriage has in fact broken down. The 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*[60] on similar facts, the Sri Lankan Supreme Court considered itself bound to follow the strict Shaffie law and left the hapless wife to suffer in silence.

A great deal could be achieved by regarding the term 'sect' in Section 16 of the Muslim Marriage and Divorce Act as a reference to the Sunni and Shiah sects.[61] Thus, in a case involving Sunni parties, the Quazi would be free to consider the opinions of the great Imams comprising the Shaffie, Hanafi, Maliki and Hanbali schools and arrive at a just decision. The adoption of an eclectic approach will no doubt produce a rich blend of Sunni law.

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58 One cannot obviously utilise the rule 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* 4 NLR 243: *Bandaranayake v Bandaranayake* 24 NLR 245.

59 (1967)XIX P.L.D. 97.

60 75 NLR 295. Samarawickreme J. left a ray of hope in the horizon when he said at page 296 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"

61 This will, of course, require the amendment of Section 25(l) of the Muslim Marriage and Divorce Act, *supra* note 36.

Chapter IV

The Substantive Law: Some Fundamental Problems

Apart from the question of the applicable law, there are several fundamental problems in the Muslim law of marriage and divorce, which merit careful and urgent attention. The more important of these issues concern child marriage, the consent and signature of the bride, polygamy, change of religion, conditions relating to marriage and the imbalance in the law of divorce.

Child marriage

The term "child marriage" connotes two different types of marriages:

> (a) the marriage of a child who has not attained puberty, which is contracted by the marriage guardian (*wali*) with or without the consent of the child;
>
> (b) the marriage of a "child"[62] who has attained puberty, contracted by the child (with or without the approval of the *wali*) or by the *wali* (with or without the consent of the child).

In Sri Lanka, the Muslim Marriage and Divorce Act[63] does not lay down a minimum age for marriage[64], but it is noteworthy that Section

62 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 of 1968 (Singapore) as a male or female under 16 years of age.

63 The 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 and Law No.41 of 1975.

64 The minimum age of marriage of 18 years specified in Section 15 of the Marriage Registration Ordinance No 19 of 1907 as amended by Act. No. 18 of 1995, has no application to "a marriage between persons professing Islam" (vide Section 64 of that Ordinance).

23 of the Act 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 solemnisation 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... belong". Child marriages have been recognised as lawful and valid in Sri Lanka,[65] although the Board of Quazis has been constrained to observe that "in the best interest of the community this social evil should be eradicated by the creation of public opinion"[66]

It is worth noting that in India and Pakistan child marriages are indirectly prohibited by the imposition of penal sanctions without in any way invalidating the marriage[67]. In Singapore, the position is more or less the same, except that the Quazi is empowered in "special circumstances" to solemnise the marriage of a girl who is under the age of sixteen years but has attained the age of puberty.[68]

According to Imam Shaffie the father and paternal grandfather possess the power (known as *jabr*) to give in marriage a child of tender years who is incapable of contracting marriage on its own.[69] It is stated in Minhaj-et-talibin that –

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65 See, *Mukamadu Lebbe vs Mohamado Tamby* 1 M.M.D.L.R. 40 and *Muheideenbawa vs Seylathumma* 2 M.M.D.L.R. 53.

66 See. *Muheideenbawa vs Seylathumma* 2 M.M.D.L.R. 53 at page 55.

67 See, the Child Marriage Restraint Act, 1929 (India) and the Child Marriage Restraint Act, 1929 (Pakistan).

68 See, the proviso to Section 90(4) of the Administration of Muslim Law Act, 1968 (Singapore)

69 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 l, Book II. Chapter II, 36-37.

> "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, she cannot be delivered to her husband before she attains puberty. In default of the father, the father's father exercises all his powers.[70]

According to *Minhaj* "a guardian can never give a woman in marriage to a man of inferior condition, except with her entire consent".[71]

Imam Bukhari[72] illustrates the exercise of the power of *jabr* by reference to the marriage of the six year old girl Aisha to Prophet Muhammed, which marriage was consummated when she was only nine. The *Sahih Al Bukhari* also places reliance on the Quranic prescription of the *idda't* period of three months to "those who have not yet menstruated"[73] for the proposition that such a marriage is lawful and valid. Imam Muslim points out that the permission granted by Islam to give in marriage a girl who is not fully grown up "is not a rule but an exception".[74] The Imam adds –

> "In life one finds oneself at times in the grip of such untoward circumstances when early marriage became almost a necessity; for example, a man is suffering from a fatal disease, he feels that his end is drawing near. He is at the same time a widower

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70 *Nawawi Minhaj - et - talibin* Book 33, Chapter 1, Section 4, 284.

71 *Nawawi Minhaj - et - talibin,* op.cit., Book 33, Chapter 1, Section 5, 288.

72 *Sahih Al - Bukhari* Volume III, chapter 39.

73 'The Holy Quran *Sura Talaq* LXV: 4(Tr. Mohammed Y. Zayid). Compare the use of the words "those who have no courses" by Abdulla Yusuf Ali and similar words by Marmaduke Picktall.

74 *Sahih Muslim,* Volume II, chapter DXLVIII, paragraph 3309 f.n. 1859.

> and thus there is no one to look after his young daughters. In such circumstances if he marries those daughters in a house where he is sure that they will be treated well, there is nothing objectionable in it".

Is it an offence in Sri Lanka to have sexual intercourse with a female child who is given in marriage in accordance with the Muslim law applicable in Sri Lanka? In *Mukamadu Lebbe v Mohamado Tainby* Moncreiff, A.C.J. doubted whether Section 363 of the Penal Code (Ordinance No. 2 of 1883, as subsequently amended), 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."[75] However, the Muslim Law Research Committee[76] has adopted the opinion of Professor H.M.Z. Farouque 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".[77] 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".[78]

The Hanafi law gives the child the "option of puberty"(*khyarul -bulugh*) to repudiate the marriage on attaining puberty where the marriage was contracted by a *wali* other than the father or paternal grandfather.

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75 1 M.M.D.L.R. 40, 42.

76 In its report published in (1978)4 Colombo Law Review 57, 60.

77 H.M.Z. Farouque, 'Muslim Law in Ceylon', 4 M.M.D.L.R. 1, 12.

78 World Muslim League, Volume III No. 1 63- 64.

It should be borne in mind that the "option of puberty" is strictly a Hanafi law concept[79] and there is no reference to it in Shaffie texts such as Minhaj-et-talibin. However, the option was successfully (but questionably) invoked in *Muheideenbawa vs Seylahumma* [80] which involved Shaffie parties, but it has been held in later cases that a child marriage of Shaffie parties will continue even after the girl so given in marriage attains puberty, as under Shaffie law she has no option of repudiating it.[81]

In regard to the second type of child marriage (that is, the marriage of a boy or girl who has attained puberty but who is still regarded as a child)[82] it should be noted at the outset that Islam does not distinguish between puberty and majority for purposes of marriage. As pointed out by De Sampayo J. in *Narayanan vs Saree Umma* "there are two kinds of 'majority' under Muhammadan Law, namely, one as regards capacity to marry without the intervention of a guardian, and the other as regards to general capacity to do other acts as a major".[83] While a Muslim attains majority for purposes of marriage on reaching *bulugh* or puberty,[84] majority for all other purposes is dependant on *rushd*, that is the arrival at the age of discretion.[85] Accordingly, a Muslim boy of whatever sect is free to marry the girl of his choice upon attaining

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79 See, Saleern Marsoof, 'Marriage Laws of the Muslims in Sri Lanka' (1980) *Meezan* f.n. 39: See also K.N. Ahmed, Muslim Law and Divorce (1978)142.

80 2 M.M.D.L.R. 53.

81 See for example, *Nabisa Umma et al v Salih* 2 M.M.D.L.R. 118.

82 *Minhaj-et-talibin* Book 33, Chapter 1, Section 4, p.284.

83 21NLR439.440.

84 *Abdul Cader vs Razik* 52 NLR 156, See also 'The Holy Quran' Sura Nisaa IV : 6 (Tr. Yusuf Ali) which refers to the 'age of marriage'.

85 See 'The Holy Quran', *Sura Nisaa* IV : 6 (Tr. Yusuf Ali) sanctioning the criterion of age of marriage coupled with 'sound judgment'. There is a great deal of doubt as to whether Section 2 of the Age of Majority Ordinance which confers majority at the age of twenty one years, has superseded the Muslim Law relating to majority of the second kind. See *Abdul Cader vs Razik* 54 NLR 201, 202- 203, and C. G. Weeramantry *'The Law of Contracts'* (1967) Volume 1, Section 450, p. 459 - 460. It is time that this doubt is eliminated by clear legislation, but there is no justification for deviating from the Quranic norm.

puberty, although a grown up female of the Shaffie sect would require the approval of her *wali* or the authority of a Quazi irrespective of her age.[86] The position is the same in Maliki law which precludes a woman from contracting herself in marriage, but according to Imam Hanifa and Imam Aboo Yoosuf a girl who has attained age may be married by virtue of her own consent.[87] The Hanafi law would thus prove attractive to Muslim women belonging to other sects who wish to marry against the wish of their parents.

A question of fundamental importance that would arise in this context is whether the general power granted by the Muslim Law for a child above the age of puberty to marry without the approval of the *wali* (except in the case of a Shaffie girl) is conducive to personal and social welfare in the light of the observations of Dr. Ahmed Ibrahim quoted earlier. Professor Savitri Goonasekera 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 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 of the Muslim Law in Sri Lanka".[88] What is probably of greater concern to Muslims of Sri Lanka is whether such reform could be accommodated within the *sharia't*.

In connection with the exercise of the power of *jabr* the *sharia't* has prescribed broad principles without laying down any specific injunctions. Abulala Maududi has observed that in regard to "such affairs, the function of the legislature is to understand the principles of the *Sharia't* and the intention of the law-giver and formulate such

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86 See Section 25(1) of the Muslim Marriage and Divorce Act *supra* note 63, which would appear to displace the decision in *Rhoda Ryde vs Ibrahim* 3 M.M.D.L.R. 131 that a non-virgin bride may validly enter into a marriage without the intervention.

87 See *Haniffa vs Razak* 60 NLR 287. See also Hamilton, 'Hedaya' Volume 1, Book II Chapter II, 34.

88 Savithri Goonesekera. *Sri Lanka Law on Parent and Child* (1987) at p. 318.

laws as are based on these principles and fulfil the intention of the law-giver".[89] It has been noted that child marriages could be rationally justified in exceptional circumstances though they should not be encouraged generally.

The Muslim Law Research Committee has recommended the amendment of Sections 33 and 47 of the Muslim Marriage and Divorce Act by generally prohibiting, by the imposition of penal sanctions, the solemnization or registration of the marriage of a Muslim male below sixteen or a female below fourteen years while conferring the power to the Quazi to authorise the solemnisation and registration of the marriage of a Muslim girl aged between twelve and fourteen.[90] The lower age limit of twelve years with respect to the proposed authorisation by the Quazi of the marriage of girls appears to have been suggested to bring the law into harmony with Section 363 of the Penal Code, but the recommendation seems to overlook the fact that a similar power to authorise the marriage of a boy below sixteen may be desirable in "special circumstances".

Consent and Signature of the bride

It is stated in the Shaffie text *Minhaj-et-talibin* that "a father can dispose of as he pleases the hand of his daughter, without asking her consent, whatever her age may be, provided she is still a virgin".[91] In relation to a woman who has attained puberty (and who is a major for purposes of marriage),[92] this statement is obnoxious and contrary to the teachings of the Holy Quran.

89 Abdulla Maududi, "Islamic Law and Constitution", (1960) 78.

90 'Proposals for the Amendment of the Muslim Marriage and Divorce Act - A Report to Government Prepared in March 1973 by the Muslim Law Research Committee', (1978) 4 Colombo Law Review, 57, 62.

91 *Minhaj-et-talibin,* Book 33, Chapter 1 Section 4, 284, See also *Yaseem vs Noor Naeema 3* M.M.D.L.R. 113. *Rhoda Ryde vs Ibrahim*, 3 M.M.D.L.R. 130. The position is the same in Maliki Law.

92 'The Holy Quran' *Sura Araf* VII: 189 (Tr. Yusuf Ali), See also *Sura Rum* XXX:21.

In *Sura Nisaa* marriage is described as a "solemn covenant".[93] *Sura Araf* speaks of the creation of man and woman "in order that he might dwell with her (in love).[94] Sura Baqara refers to the mutual support, mutual comfort and mutual protection envisaged by marriage when it says that men and women are each other's garments.[95] If marriage is seen as a "sacrosanct contract"[96] which creates reciprocal rights and obligations, it becomes extremely difficult to understand how such a contract could come into being without the consent of the bride. Did not Islam abolish the pre-Islamic custom of a step-son or brother taking possession of a dead man's widow along with his other property?

> "O! ye who believe!
> Ye are forbidden to inherit
> Women against their will".[97]

Sahih Muslim quotes Aisha as follows:

> "I asked Allah's Messenger (may peace be upon him) about a virgin whose marriage is solemnised by her guardian, whether it was necessary or not to consult her. Allah's messenger (may peace be upon him) said: "Yes, she must be consulted". I told him that she feels shy, whereupon Allah's messenger (may peace be upon him) said: "Her silence implies her consent".[98]

There was no doubt in the minds of Imam Abu Hanifa and Imam Aboo Yoosuf that "it is not lawful for a guardian to force into marriage an

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93 'The Holy Quran' , *Sura Nisaa* IV :21 (Tr. Yusuf Ali).

94 'TheHolyQuran' *Sura Araf* VII: 189(Tr. YusufAli), See also *Sura Rum* XXX : 21.

95 'The Holy Quran' *Sura Baqara* 11: 187.

96 See. *Siraj Mohammed Khan vs Jan Mohammed* (1981) A.1.R. (SC) 1972 *per* Murtaza Fazal Ali.

97 'The Holy Quran' *Sura Nisaa* IV: 19.

98 *Sahih Muslim*, Chapter DXLVII paragraph 3305. The same rule applies in regard to a *thayyiba* (a non virgin), except that in her case express consent is necessary. See *Sahih Muslim*,Chapter DXLVII paragraph 3303. See also *Sahih al Bukhari*, Volume VII Book LXII, paragraph 39, 49.

adult virgin against her consent"[99]. The Shaffie law was legislatively clarified in 1951 by Section 25(1) of the Muslim Marriage and Divorce Act which enacted that -

> 'For the avoidance of doubt it is hereby declared that no contract of marriage of a woman belonging to the Shaffie Sect is valid under the law applicable to that Sect, unless-
>
> (a) a person entitled to act as her *wali* -
>
> (i) is present at the time and place at which the contract is entered into; and
>
> (ii) *communicates her consent to the contract* and his own approval thereof; or
>
> (b) that Quazi has under Section 47 authorised the marriage and dispensed with the necessity for the presence and approval of the *wali*"[100]

The Muslim Marriage and Divorce Act provides that before the registration of a marriage the Registrar should obtain declarations from the bridegroom and the bride's *wali* respectively in Forms II and III of the First Schedule of the Act. Where the wall is neither the father nor the paternal grandfather, the bride too has to sign the *wali'*s declarations in confirmation. According to the proviso to Section 18(1) the *wali*'s declaration (Form III) is not required in the following circumstances:

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99 Hamilton, Hedaya, Volume I, Book II, chapter II. 34. See also *Abdul Cader vs Razik* 54 NLR 201. *Haniffa vs Razik* 60 NLR 287.

100 The term *'wali'* refers to the marriage guardianship which devolves on the father and paternal grandfather according to Shaffie Law. Under Hanafi Law the gaurdianship could devolve on brothers and other paternal relations and even the mother and maternal relations in the absence of the father and the paternal grandfather.

(i) where the *wali*'s approval has been dispensed with by the Quazi under Section 47; or

(ii) where no *wali* is necessary according to the Muslim law governing the sect to which the parties belong.

In the circumstances mentioned above, only the bridegroom signs the declaration (Form II) and the Marriage Register (Form IV) and there is nothing to show on the face of the Marriage Register, or any declaration made before the Registrar, that the bride or her representative has consented to the marriage. The bride's signature is the most effective mode of signifying her consent to the marriage, and the spread of female education has to a great extent removed the social condition that led to the exclusion of the signature of the bride in the Marriage Register. It is to be noted that the Divorce Register maintained by the Quazi (Form V of the First Schedule) requires the wife's signature. It is therefore necessary to amend the relevant provisions of the Muslim Marriage and Divorce Act to provide for -

(a) a declaration by the bride herself in the lines of Form III where the *wali*'s consent has been dispensed with or where the bride belongs to a sect which does not require a *wali*;

(b) the confirmation of the *wail*'s declaration in Form III by the bride in all circumstances and the deletion of the words "who is neither my father nor my paternal grandfather" from the foot of Form III; and

(c) the signing of the Marriage Register by the bride in all cases, and the consequential amendment of Item 16 of Form IV.

Polygamy

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."[101]

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
As between women
Even if it is
Your ardent desire…"[102]

It is clear from the above quoted passages and the commandment in *Sura Nur* to marry "those among you who are single"[103]that the Quranic prescription was monogamy and not polygamy.

In Sri Lanka only the Muslims enjoy the privilege of polygamy, and the desire to retain the privilege in all its fullness is quite understandable.

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101 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Nisaa* IV: 3.

102 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Nisaa* IV:129.

103 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Nur* XXIV:32.

Polygamy has its advantages.[104] Nature does not permit a woman to have sexual relations with her husband throughout the year. The institution of polygamy may provide an over-indulgent husband with the means of satisfying his sexual desires at times when his wife is unable to have sexual intercourse with him.

Polygamy may also provide a solution where a man wishes to have legal issues, but his wife is incapable of bearing children. In a society where there is an unequal distribution of the sexes and women outnumber men, polygamy may be used to overcome the problem of the women who could never hope to marry. Polygamy also helps population growth, where there is a genuine need to increase the population.

There are, however, some disadvantages. One is over-population, which is a contemporary social problem in Sri Lanka. Even more serious is the problem of destitute married women and children who are deserted by their husbands and fathers because they were not "possessed of wealth enough to maintain the same properly".[105] Sometimes life may be unpleasant and bitter for a woman or women who have to live with the other wives of their husband in the same house[106] Not only over-indulgence but also the physical and mental strain of having to live with and satisfy many wives may affect the health of the husband. Experience teaches us that excess in what ever form is at all times bad, and sometimes dangerous. While the many advantages of polygamy mentioned above clearly justify the continuance of polygamy, the aforesaid disadvantages make judicial control of the exercise of polygamy most desirable.

In Sri Lanka, the Muslim Marriage and Divorce Act accommodates within its framework polygamous marriages, but imposes the additional

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104 *See generally* Abu Ammenah Bilal Philips and Jameelah Jones, *Polygamy in Islam* (Riyadh 1985) and Arafaque Malik, *Polygamy* (London 1993).

105 Section 100 of the Muhammadan Code, 1806.

106 See, *Pathumma v Seeni Muhammadu* 23 NLR 277.

requirement of giving notice of the intended marriage to the existing wife or wives through the relevant Quazis.[107] The objective of this procedure is to bring about social pressure on a husband intending to enter into plural marriages. In Sri Lanka 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. The Act does not incorporate the conditions insisted upon by the *sharia't* for the exercise of polygamy.[108]

The question arises in this context as to whether the exercise of polygamy should be subjected to judicial control. The law has recently undergone change in several jurisdictions. 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…"[109] While in Tunisia polygamy is altogether forbidden,[110] in countries such as Morocco polygamy is prohibited where "it is likely to involve injustice towards the wives."[111] In Iraq it is not permissible 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.[112] Closer home in Pakistan[113] and Bangladesh [114] the prior approval of the Quazi or the Arbitration Council is required for entering into a second or subsequent marriage. The permission

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107 *See,* Section 24 of the Muslim Marriage and Divorce Act. *supra* note 63.

108 Saleem Marsoof, *Polygamy: Is Judicial Control Desirable?* (1983) Meezan.

109 Syrian Law on Personal Status, (Decree No. 59) of 1953.

110 *See*, Art. 18 of the Tunisian Code of Personal Status. 1957.

111 *See*, Art 30 of the Moroccon Code of Personal Status, 1958.

112 *See*, Art. 3 of the Iraqi Code on Personal Status, 1959.

113 *See*, Section 6 of the Muslim Family Laws Ordinance, 1961 (Pakistan).

114 *See*, Section 6 of the Muslim Family Laws Ordinance, 1961 (Bangladesh).

would only be granted if the Council was satisfied that the subsequent marriage was necessary and just. Should Sri Lanka follow this trend?

In the Questionnaire administered on Quazis, their opinion was sought in regard to the question as to whether the present Act ought to be amended to require a married man desirous of contracting a second or subsequent marriage to obtain the approval of the Quazi for this purpose. 83.3% of the Quazis answered the question in the affirmative, although the Dr. Sahabdeen Committee rejected the proposal to this effect which was strongly put forward by the Muslim Women's Research and Action Forum.[115] An amendment to the law in the lines suggested above would mitigate the hardships caused to Muslim women as a result of irresponsible plural marriages while discouraging colourable conversions to Islam, which are very much in vogue in our country.

Legal constraint of the exercise of polygamy is not new in Sri Lanka. The requirement of giving notice to the respective Quazis of the intention to contract a second marriage,[116] was a legislative innovation introduced with a view of discouraging plural marriages in circumstances not justified by Islam. There is also nothing new in the idea of the Quazi being able to control the exercise of absolute powers or privileges. For example, the Muslim Marriage and Divorce Act[117] restricts the unfettered power of the marriage guardian to give a minor girl in marriage without consulting, or even against, her wishes. Although in Sri Lanka less than half percent of Muslim marriages are polygamous, the increasing number of destitute women and children deserted by their polygamous husbands and fathers justify the introduction of legislation in the lines of the modern laws enacted in other countries.

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115 *See*, The Report of the Committee appointed by the Minister of State for Muslim Religious and Cultural Affairs to recommend Amendments to the Muslim Marriage and Divorce Act, paragraphs 2.2 to 2.6 (pages 8-11).

116 See, Section 24 of the Muslim Marriage and Divorce Act supra note 63. See also, *Reid v Attorney General* 65 NLR 97 (SC); *Attorney General v Reid* 67 NLR 25 (PC).

117 *ibid.*, Section 23.

The question whether a male who had entered into a monogamous marriage prior to embracing Islam may exercise polygamy after embracing Islam, has given rise to considerable controversy in Sri Lanka. In *Queen v Obeysekera,* [118] such a man who contracted a second marriage was convicted of bigamy,[119] as the Court did not regard him as a Muslim there being no "evidence of the defendant having pronounced himself as professing the Mohamedan religion".[120]

In *Attorney General v. Reid* [121] the Supreme Court noted that the man in question contracted the second marriage within three days of declaring himself a Muslim. However, the Supreme Court came to the conclusion that the second marriage was valid according to Muslim law, even though "the proximity of the date of the second marriage to the date of conversion gives room for the suspicion that the change of faith was with a view to overcoming the provisions of Section 18 of the Marriage Registration Ordinance".[122] The case went up on appeal to the Privy Council, which was at that time the highest court in the judicial hierarchy of Sri Lanka. The case was argued before the Privy Council on the express admission of Counsel that the conversion of the man to the Muslim faith "was sincere and genuine notwithstanding doubts expressed in the Courts below on this point."[123] The Privy Council affirmed the decision of the Supreme Court and set aside the conviction. The Court held that a man who first married according to Christian rites under the Marriage Registration Ordinance, and thereafter embraced Islam and entered into another contract of marriage with a Muslim woman during the lifetime of the first wife, did not commit the offence of bigamy. The Court was influenced by the

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118 *See, Queen v Obeysekera* (1889)9 S.C.C. 11.

119 Under Section 362B of the Penal Code, Ordinance No. 2 of 1883, as subsequently amended.

120 *Queen v Obeysekera* (1889)9 S.C.C. 11 at page 12 *per* Clarence J.

121 65 NLR 97(SC):67 NLR 25 (PC).

122 *Reid v Attorney General*, 65 NLR 97 at page 99 *per* Basnayake CJ.

123 *Attorney General v Reid*, 67 NLR 25 at page 28 *per* Lord Upjohn.

exclusion of "marriages contracted between persons professing Islam" from the ambit of the term 'marriage' as used in Sections 18 and 35 of the Marriage Registration Ordinance,[124] and appeared to be reluctant to make any pronouncement about the genuineness of the conversion to Islam. In the course of his judgment, Lord Upjohn emphasised that Ceylon was a country that was home to more than one religion, and went on to observe that-

> "In their Lordships' view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none."[125]

The decision of the Privy Council, opened the flood gates to a large number of colourable conversions to Islam. The right afforded by the law to a Muslim male to contract plural marriages has in recent times been openly abused by non-Muslim males wishing to avoid the rigours of their own personal laws, which did not permit divorce even where the marriage has irretrievably broken down. The recent decision of the Supreme Court of Sri Lanka in *Abeysundere v Abeysundere*[126] appears to be a reaction to this situation. The facts of the case were very similar to those of the *Reid* case, except that there were no admissions either way regarding the genuineness of the conversion of the accused. The accused married one Natalie in 1958 at All Saints Church, Borella under Section 35 of the Marriage Registration Ordinance. The marriage ran into troubled waters, and the accused instituted divorce proceedings against his wife alleging constructive malicious desertion.

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124 Marriage Registration Ordinance No. 19 of 1907 as subsequently amended. See, in particular Section 64 for the definition of 'marriage'.

125 *Attorney General v Reid*, 67 NLR 25 at page 32 *per* Lord Upjohn.

126 (1998)1 Sri LR 185.

The divorce action was dismissed in September 1985. According to the dock statement of the accused, he and one Kanthika embraced Islam sometime in March 1985. The accused married Kanthika according to Muslim law in October, 1985, just one month and two days after the dismissal of the divorce action. This circumstance created some doubt as to the genuineness of the alleged conversion of the accused to Islam, but the Court did not consider it necessary to determine this issue in view of its finding that *even if the conversion is genuine*, a convert to Islam cannot cast off the statutory obligations that directly arose from his previous marriage in terms of the Marriage Registration Ordinance. The conviction of the accused for bigamy by the lower court was upheld by a Divisional Bench of the Supreme Court of Sri Lanka in 1997.

It is important to note that in the *Abeysundere* case, the Supreme Court did not attempt to question the genuineness of the conversion. Instead, the court emphasised the monogamous nature of the first marriage and the status acquired by the parties by reason of entering into such a marriage, particularly in the light of Section 35(2) of the Marriage Registration Ordinance. After considering the *Reid* case, His Lordship G.P.S de Silva C.J., made the following observation-

> "There is no question that Reid was free to change his faith, but the true question which arose for decision was whether Reid could cast off the statutory obligations which *directly arose* from his previous marriage in terms of the Marriage Registration Ordinance by the simple expedient of a *unilateral conversion to Islam*. Could *he by his own act* overcome the incidents of the marriage he chose to contract in terms of the Marriage Registration Ordinance? In my view, the answer is emphatically in the negative. The statute expressly provides for the mode of dissolution of the marriage, and that is the only mode provided for by law.

> The Privy Council in Reid's case did not focus on the crucial question whether by a unilateral conversion to Islam subsequent to a lawful marriage in terms of the Marriage Registration Ordinance, Reid could absolve himself of the statutory liabilities incurred and the statutory obligations undertaken by him. The Privy Council overlooked the fact that the 'rights' of Reid were qualified and restricted by the legal rights of his wife whom he married in terms of the Marriage Registration Ordinance."[127]

It is submitted with respect, that the decision of the Supreme Court in the *Abeysundere* case is perfectly in consonance with the *sharia't* insofar as it held that a man is bound by his prior obligations including those incurred before he embraced Islam. It is pertinent to point out that the *sharia't* too places a great deal of emphasis on the importance of honouring one's pledges and obligations. As Abd-al-Rahman Azzam notes, "Islam forbids the betrayal of a pledge, secretly or openly, as it forbids the betrayal of any trust, materially or spiritually."[128] It is, however, respectfully submitted with respect that the decision of the Supreme Court in the *Abeysundere* case has overlooked other equally fundamental principles of *sharia't* law, while also misinterpreting applicable statutory provisions and disregarding Constitutional guarantees. It is unfortunate that the attention of Court was not invited to some of the applicable principles of the *sharia't*.[129] It is also unfortunate that a case of such grave concern to Muslims was not referred to a Full Court of the Supreme Court, particularly in the context of the need to review an earlier decision of the Privy Council which ultimately the Supreme Court purported to overrule.

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127 *ibid*., page 194.

128 Abd-al-Rahman Azzam. *Eternal Message of Muhammad* (1964 edition) 128.

129 *See*, Saleem Marsoof 'The Abeysundere Decision: An Islamic Perspective, (1998-1999) *Meezan* page 59. For other comments on this decision see, Dr. Lakshrnan Marasinghe 'Monogamy, Polygamy and Bigamy; Abeysundere v Abeysundere - A Conundrum, (1998) *Bar Association Law Journal* Vol. VII Part II page 44 and Justice K.M.M.B.Kulatunga, 'Natalie Abeysundere v Christoper Abeysundere & another (1999) *Bar Association Law Journal* Vol. VIII Part I page 109.

The judgement of the Supreme Court in *Abeysundere v Abeysundere*[130] has resulted in a great deal of uncertainty as to the applicable law. It is noteworthy that the *Reid* case was decided by the Privy Council as the highest court of the land. The *Abeysundere* case was decided by a Divisional bench of the Supreme Court, which is at present the apex court in Sri Lanka. Although in the course of its judgement in the *Abeysundere* case the Supreme Court purported to overrule the decision of the Privy Council in the *Reid* case, there is considerable doubt as to whether a divisional bench of the Supreme Court, which is not a collective or full court, is competent to overrule a decision of the Privy Council made while it was the highest court of the country.[131] As noted earlier, the Reid case was decided by the Privy Council which had authoritatively interpreted the relevant statutory provisions, and its interpretation of the relevant statutory provisions is binding on future courts in accordance with the doctrine of *stare decisis*. As Kerr L.J. observed-

> "The interpretation of the intention of Parliament as expressed in our statutes is a matter for the courts. Once the meaning of an Act of Parliament has been authoritatively interpreted, at any rate by the House of Lords at a judicial sitting as our highest tribunal, that interpretation is the law, unless and until it is thereafter changed by Parliament….. This does not involve any substitution of the views of the judges on questions of policy or discretion for those of the authority concerned, but merely the interpretation of the will of Parliament as expressed in its enactments. Therefore any change in the law from its definition by the courts again devolves to Parliament alone."[132]

130 (1998)1 Sri LR 185.

131 *See. Kanagaratna v Banda* 25 NLR 129, at page 136 and *Bandahamy V Senanayake* 62 NLR 313 at page 369. Cf; *Ratnayake v Bandara* (1990)1 Sri LR 156.

132 *R v London Transport Executive, ex p. Greater London Council* (1983) QB 484 at 490 *per* Kerr U.

In *Perera v Amarasooriya* [133] it has been held that where there is a conflict between the decisions of two courts which are equal in authority, a future court has the discretion to follow either of the two conflicting decisions. The question that arose in the *Reid* and *Abeysundere* cases is one of great importance to Muslims and non-Muslims alike. It is therefore desirable to clarify the law by legislation, as courts and other institutions administering justice will be in a dilemma in regard to the law that ought to be applied in view of the conflict of authority arising from the decisions of the highest courts of Sri Lanka in the above mentioned cases.

Change of religion

The Constitution of Sri Lanka recognises that every person is entitled to the freedom of thought, conscience and religion including the freedom to have or to adopt a religion or belief of his choice.[134] A change of religion gives rise, among other things, to certain legal consequences. It is trite law that the moment a person governed by Kandyan law or Thesawalamai law as his or her personal law embraces Islam, he or she *ipso jure* becomes subjected to Muslim law. The onus is on the person claiming to be a Muslim in any case to establish that fact by evidence.[135] Since the profession of Islam depends on belief, proof of a *formal* declaration of faith is *prima facie* evidence of conversion. [136] However, courts have in appropriate cases permitted the challenge of the genuineness of the conversions[137] and inquiry into colourable

133 l2 NLR87at page 88.

134 The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), Article 10.

135 *See, Queen v Obeysekera,* (1889)9 S.C.C. 11.

136 L.J.M.Cooray, An *Introduction to the Legal System of Sri Lanka* (Colombo, 1972) 137.

137 *See, Skinner v Orde*, (1871) 14 M.L.A 309. Cf, *Attorney General v Reid*, 65 NLR 97 (SC): 67 NLR 25 (PC) which case was finally decided by the Privy Council on the basis of the express admission of Counsel that the conversion of the man to the Muslim faith "was sincere and genuine notwithstanding doubts expressed in the Courts below on this point"(*per* Lord Upjohn at page 28). In *Abeysundere v Abeysundere* (1998) I Sri LR 185, the Supreme Court adopted an approach which obviated the need to go into the issue of genuineness of the conversion.

conversions is sanctioned by the Holy Quran despite the fact that "God knows best as to Their Faith".[138] In view of the reluctance on the part of our secular courts to embark on such an inquiry which might involve sensitive ecclesiastical issues as seen from the decision of our Supreme Court in *Katchi Mohamed v Benedict*,[139] the judgement of the Privy Council in *Attorney General v Reid*[140] and the reasoning of the Divisional Bench of the Supreme Court in *Abeysundere v Abeysundere,*[141] it would be necessary to consider establishing a religious body vested with legal authority to look into genuineness of conversions.

If, after accepting the religion of Islam a person marries another person professing Islam, "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."[142] As noted in the previous Chapter, the Holy Quran upholds the validity of a marriage between a Muslim man and a woman belonging to a revealed religion such as Christianity. In Sura Maida Allah says-

> "Lawful unto you in marriage
> Are not only chaste women
> Who are believers, but
> Chaste women among
> The People of the Book..." [143]

It will follow that where both parties to a marriage are followers of a revealed religion (*Ahl-al- Kitab*), such marriage will continue to be valid in the eyes of the *sharia't* even after the unilateral conversion to Islam of the male spouse. According to the *Minhaj*, "Where the

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138 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Mumtahana* LX: 10

139 63 NLR 505.

140 *Supra*, note 121.

141 (1998) I Sri LR 185.

142 Section 98(2) of the Muslim Marriage and Divorce Act *supra* note 63.

143 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Maida* V:6.

marriage remains valid, it is of no consequence whether it was originally contacted in contravention of our law, provided that the cause of illegality has ceased to exist at the time of conversion, and that the wife is then a woman who can be lawfully be given to her husband." [144]

The legal position is somewhat different where the parties to the first marriage were idol worshippers. If the male spouse embraces Islam, the marriage will stand dissolved. This is because of the strict injunction contained in *Sura Baqara* [145] against marrying "Unbelieving women idolaters (*mushrikathi*) until they believe". Similarly, where the parties to the first marriage were Hindus, Buddhists, athiests or polytheists, the consequence of the male partner accepting Islam would be the termination of the marriage.[146]

The *Minhaj* summarises the legal position as follows:

> "An infidel of whatever religion who is converted to Islam while married to a woman whose religion is founded upon some holy scripture keeps her as his wife; but if she is an idolatress or a fire worshipper, and is not converted with him, separation takes place immediately ipso facto, where the marriage has not yet been followed by cohabitation. Otherwise, the continuation of the marriage depends upon whether the woman embraces the faith before the end of the period of her legal retirement. If, before the expiry of this period the wife's conversion has not yet taken place, the marriage is considered to have been dissolved from the husband's conversion; and the same rule is observed if it is the wife who is converted, while the husband

144 Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-talibin*, Book. 33 Chapter III Section 1 page 296.

145 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Baqara* 11:221.

146 *See generally*, Abdur Rahman I. Doi, Shari'ah,: *The Islamic Law* (London, 1984) pages 133 to 138.

remains in a state of religious blindness. Where, on the other hand, both parties embrace the faith at the same time, the marriage remains valid."[147]

The distinction between People of the Book (*Ahl-al-Kitab*) and others as well as the question of idolatry would have been of crucial importance in cases such as *Attorney General v Reid*[148] and *Abeysundere v Abeysundere* [149] in which the parties to the first marriage were Roman Catholics, although there was no evidence as to whether they practised idol worship. It is unfortunate that this aspect was not looked into by any of the courts that heard these cases.

The marriage will also stand terminated where the female spouse embraces Islam, irrespective of whether the parties to the first marriage were *Ahl-al- Kitab* or not. In *Sura Mumtahana* Allah says-

"o ye who believe!
When there come to you
Believing women refugees,
Examine (and test) them:
God knows best as to
Their Faith: if ye ascertain
That they are Believers
Then send them not back
To the Unbelievers.
They are not lawful (wives)
For the Unbelievers, nor are
The (Unbelievers) lawful (husbands)
For them. But pay
The Unbelievers what they

147 *Minhaj-et-talibin,* op cit., Book. 33 Chapter III Section 1 page 295.

148 65 NLR 97 (SC): 67 NLR 25 (PC).

149 (1998)I Sri LR 185.

Have spent (on their dower).
And there will be no blame
On you if ye marry them
On payment of their dower
To them."[150]

Abdullah Yusuf Ali observes that it is clear from this passage that "the marriage of believing women with non-Muslims was held to be dissolved if the husbands did not accept Islam"[151].

Just as conversion to Islam brings a person within the authority of Muslim law, the renouncement of Islam will take him or her out of the reach of Muslim law. In *Katchi Mohamed v Benedict*, [152] the Supreme Court was invited by the Attorney General to consider whether under Muslim law a marriage was automatically dissolved by apostasy. In this case, a man who was a Muslim at birth and was married to a Muslim woman under Muslim law was charged for bigamy upon his marrying a Roman Catholic lady after himself going through a ceremony of conversion to Catholicism at St. John's Church at Mutwal. The Supreme court declined the invitation to go into the issue of apostasy as the accused had taken up the position at the trial and the appellate proceedings that he had never abandoned the Islamic faith although he had gone through the conversion ceremony with a view of changing his name and marrying the Roman Catholic lady.

Conditions relating to marriage

Under Muslim Law marriage is a civil contract as opposed to a religious sacrament. The parties to the contract may therefore incorporate into the marriage contract any conditions which are not repugnant to the basic principles of Islam and morality. For example, the condition that

150 The Holy Quran (Edited by Abdullah Yusuf Ali) Sum *Mumtahana* LX: 10

151 *ibid* footnotes 5422 and 5424.

152 63NLR505.

the husband will not remove the bride from her native town[153] or that the couple will make the bride's residence their matrimonial home,[154] are clearly in accord with the *shari'at.* So would be a condition that the husband shall not keep a concubine.[155]

There can also be no doubt that a stipulation in a marriage contract to the effect that the husband shall not marry a second wife during the subsistence of the first marriage[156] or shall not take a second wife without the consent of the first,[157] is also consistent with Islamic morality. It is relevant to note in this context that one of the conditions stipulated at the time of the marriage of Hazrat Ali [the Prophet's cousin and the first of the Shia Imams] with Hazrat Fatima [daughter of the Prophet] was that he would not contract another marriage in her lifetime[158]. In fact, as long as Fatima lived, Ali remained monogamous; after her death he had twelve other wives.

It must, however, be noted that a marriage contracted in violation of a mere *contractual* stipulation of monogamy would still be valid. Dr. Lucy Carroll, who has done extensive research on the subject observes-

> "Although stipulations in a marriage contract may be perfectly valid and legal under the Anglo-Muhammadan legal traditions of the subcontinent, enforcement may, in many situations, pose a problem if the contract does not itself provide for sanctions

153 *See*, Maulana Sayed Saeed Akhtar Rizvi, *Islamic Law Relating to Marriage*, (Mombasa 1967), page 23.

154 *See, Muhammad Yasin v Mumtaz Begem* 1936 AIR (Lahore) 716. The Courts have, however, sometimes refused to uphold the exercise by the wife of the husband's delegated power of talaq on account of the violation of such a condition. See, *Imam Ali Patwari v Arafatun Nessa* 1914 AIR (Calcatta) 369: *Khatun Bibi v Rajjab* 1926 AIR (Allahabad) 615.

155 *See, Meer Ashruf Ali v Meer Ashad Ali* (1871) 16 Weekly Reporter (Sutherlands) 260.

156 *See, Muhammad Amin v Amina Bibi* 1931 AIR (Lahore) 134.

157 *See, Sainuddin v Latifannessa Bibi,* (1919) Indian Law Report 46 Calcatta 141.

158 Aftab Hussain. *Status of Women in Islam* (Lahore, 1987) page 500.

> in the event of a breach of the agreed terms. If the marriage contract contained simply a stipulation, for instance, that the husband should not marry a second wife during the subsistence of the first union, the stipulation would be valid but practically unenforceable. *The husband could not be prevented from marrying a second wife if the fancy took him and his second marriage would he valid*. The relief available to the first wife would be extremely limited. The fact of breach of stipulation in a marriage contract may, in appropriate cases, enable the wife to defeat her husband's suit for restitution of conjugal rights, and it may, in appropriate cases, enable her to claim maintenance from her husband while refusing to live with him. . . A stipulation in a Muslim marriage contract may, however, be enforced by further provisions in the same contract delegating to the wife the right to dissolve the marriage by *talaq-i-tafwid* should the husband contravene the stipulation."[159]

In the opinion of most jurists, it is lawful to provide in the marriage contract that the husband's power to pronounce divorce would stand delegated to the wife. It has been held that such delegation may be absolute and unconditional[160] or effective on the fulfilment of certain stipulated conditions[161] . This form of divorce is known as *talaq-i-tafwid*. A pronouncement of divorce made by a wife, under authority delegated to her by the husband, is deemed to be an act of the husband himself and has the effect of dissolving the marriage without the intervention of a court.[162] The institution of *talaq-i-tafwid* is based on a Quranic verse wherein the Holy Prophet was commanded by Allah to say to his consorts-

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159 Dr. Lucy Carroll, *Talaq-i-tafwid:* The *Muslim Woman's Contractual Access to Divorce,* (Lahore 1996) pages 55 to 56 (italics added).

160 *See, Aklima Khatun v Mahibur Rahman,* (1963) All Pakistan Legal Decisions (Dacca) 602.

161 *See, Mst. Bafatan v Abdul Salam 1950,* 1950 AIR (Calcatta) 308. See also, K.N.Ahmed, *The Muslim Law of Divorce.* (New Delhi, 1978) pages 201-204.

162 *See, Suroj Mia v Abdul Majid* 1953 AIR (Tripura) 6.

"If it be that ye desire
The life of this world,
And its glitter, - then come!
I will provide for you
Enjoyment and set you free
In a handsome manner."[163]

Commenting on the above verse, Ahmad[164] observes-

"It is explained by the Muslim jurists that the Prophet had in obedience to the above injunction of the Quran, empowered his wives to choose either him or a separation, that is, they might either get their marriages dissolved or prefer to choose their continuation. Aishah has explained that we (the wives) chose the Prophet (peace be upon him), that is, we preferred the continuation of the marriages, and so we were not divorced and the marriages were not dissolved. It is inferred from this tradition that a husband can lawfully delegate to his wife the power to dissolve the marriage if she so wants."

It must, however, be noted that there is no mention of talaq-i-tafwid in *Minhaj-et-talibin*, the authoritative Shaffie text compiled by Imam Nawawi. The Imam observes-

> "Divorce may be effected by means of an agent, both on the one side and on the other; . . . A husband may lawfully appoint a woman to be his agent for divorce or repudiation. But husband and wife may not appoint the same individual to represent them in a divorce; though some jurists allow this."[165]

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163 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Ahzab*, XXXIII:28.

164 K.N.Ahmed, *The Muslim Law of Divorce*, (New Delhi, 1978) page 185.

165 Mahiudin Abu Zakaria Yahva Ibn Sharif en Nawawi, *Minhaj-et-talibin*, Book. 36 Section 1 page 321.

The above quoted passage might suggest that Shaffie law does not approve *talaq-i-tafwid* insofar as the husband cannot appoint his wife to pronounce *talaq* on herself. However, on closer analysis, this passage does not present any unsurmountable problem. If according to Shaffie law the wife cannot exercise the authority delegated to her by her husband while acting on her own behalf, she could appoint another person to represent her interests. In any event, agency for pronouncing *talaq* should be distinguished from the power to pronounce *talaq*. As Verma points out, "If the husband decides to effect a *talaq* but the actual formality of pronouncement is left to be done by some other person, it would be said to be a case of agency for *talaq*. But a power may also be conferred on some other person to pronounce a *talaq* by his own choice."[166] This is what happens in *talaq-i-tafwid.*

In this context, the question arises whether it is possible in Sri Lanka for a husband to lawfully delegate to his wife the power to pronounce *talaq* in the event of his contracting a further marriage. In the light of the authorities discussed in this section it is clear that the *shariaʻt* permits such a course of action. A case in point is the Indian decision in *Sainuddin v Latifannessa Bibi*.[167] In this case the husband agreed in the marriage document *inter alia* not to marry a second wife without the consent of the first wife. The husband did marry a second wife, the first wife left him, and the husband filed a suit for restitution of conjugal rights against her. The wife thereupon gave herself three divorces in accordance with Muslim law under authority delegated to her by the husband, and pleaded in defence to her husband's suit that she was no longer his wife. The Court accepted the validity of the dissolution of marriage and dismissed the husband's suit.

There are, however, some difficulties in accommodating the concept of *talaq-i-tafwid* into the statutory framework existing in Sri Lanka. In the first place, Sections 27, 28 and the relevant Schedules of the Muslim

166 B.R.Verma, *Mohommadan, Law*, (Delhi. 1980) page 192.

167 (1919) ILR 46 Calcutta 141.

Marriage and Divorce Act, do not contemplate this form of divorce and Section 29 does not provide for the registration of such divorces. Thus, although *talaq-i-tafwid* would be valid by reason of Section 16 of the Act, it would not possess the convenience of registration. Secondly, although there existed in Sri Lanka in the past a custom of recording the terms of the marriage contract into a document popularly known as the *kaduttham* , this practice has fallen into disuse, and there is no provision in the Muslim Marriage and Divorce Act for entering such conditions in the marriage register. Having carefully considered this question, the Dr. Sahabdeen Committee has recommended the amendment of Section 18(2) and Form IV of the First Schedule to the Muslim Marriage and Divorce Act by the inclusion of a cage under the heading "Any other conditions" so as to enable the registration of all terms and conditions of the contract of marriage.

The imbalance in the law of divorce

Another issue of importance relates to the imbalance now existing in the Muslim law of divorce. As the law stands today, it is extremely easy for a Muslim man to obtain a divorce by prouncing *talaq*. When one looks around one would find that it is equally easy for a man who has divorced his wife to remarry. However, what causes concern is that there are so many divorced women who find it extremely difficult, thanks to social values prevalent in our society, to find a suitable partner for re-marriage. This is not the way of life preached or practised by our Holy Prophet (PBUH), who at the prime of youth, married the widow Khadija fifteen years his senior, and went on to marry the divorcees Zaynab and Umm Habiba during the last decade of his noble and illustrious life.[168]

Under the Muslim law existing in Sri Lanka, whilst it is not easy for a woman to obtain a divorce on her own, a divorced woman is not entitled to any maintenance beyond the *iddat* period, and she is not entitled to

168 *See,* Ahmad Thomson, *The Wives of the Prophet Muhammad* (1993 edition).

any alimony. To a woman unjustly divorced by her husband this only adds insult to injury. In this respect, she is worse off than her non-Muslim counterpart. This certainly is a poor reflection on the *sharia't* law which regards divorce as most reprehensible, and commends the spouses to "separate with kindness"[169] if the marriage cannot be salvaged. In fact, in *Sura Ahzab*, Allah commands a man who wishes to divorce his wife before the consummation of the marriage, to do so in a "handsome manner".[170] It is obvious that there is a greater obligation cast on the husband who divorces his wife after consummation of marriage, and the prescription of *Sura Talaq* is to "part..on equitable terms.[171] It is therefore surprising that the Muslim Marriage and Divorce Act of Sri Lanka'[172] does not provide for the payment of *mattah* which is a 'consolatory gift'.[173] The law can be brought into conformity in this respect with the Quranic prescriptions only by giving effect to the recommendations of the Dr. Sahabdeen Committee that the Act should be amended by providing for the payment of *mattah*. These are just a few matters that deserve urgent attention, and possibly, reform.

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169 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Baqara* II: 229.

170 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Ahzab* XXXIII: 49.

171 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Talaq* LXV: 2.

172 *Supra* note 63.

173 *See*, for example, Section 52(2) of the Singapore Administration of Muslim Law Act No. 27 of 1966.

Chapter V

Procedural Law: Some More Problems

A right is of no use without a remedy, and for the same reason, procedural law is as important as the principles of substantive law. There is much to be desired in the procedures followed by Quazis, and law reform is essential.

Talaq procedure

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, without in any way rendering invalid or ineffective the traditional modes of divorce such as *talaq hasan*,[174] *talaq ahsan*[175] and *talaq-ul-bidaat*[176] 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.

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174 This form of divorce consists of three pronouncement of divorce made during three successive periods of purity *(tuhr).* The spouses may reconcile at any time before the third pronouncement, but the divorce becomes irrevocable upon the third pronouncement being made.

175 *Talaq ahsan* consists of a single pronouncement of divorce made during a period of purity. The divorce is revocable during *iddat* but becomes irrevocable on completion of the period of *iddat.*

176 This mode consists of three pronouncements of *talaq* made on one and the same occasion during a period of purity clearly indicating an intention to dissolve the marriage irrevocably. The pronouncement becomes instantaneously irrevocable. This is also known as the triple divorce' and is not looked upon with favour by the Jurists.

The procedure contained in the Second Schedule is somewhat different from the procedure that existed under the Muslim Marriage and Divorce Registration Ordinance of 1929. In *Nansoora v Sithi Jaria*[177] the Board of Quazis observed that the Ordinance only provided a procedure for the *hasan* type of *talaq*. Dr. M.S. Jaldeen has expressed the view that the Second Schedule of the Act of 1951 has also adopted *talaq hasan* as the effective mode applicable to Sri Lankan Muslim males.[178] However, this view was not followed by Justice Ameer Ismail in *Mohamed Farook Khan* v A.H. *Moomin and Others*[179] in which his Lordship held that "The Rules in the Second Schedule prescribe a procedure for the *ahsan* form of *talaq* as it has reference only to the pronouncement of a single *talaq*".[180]

At first glance it might appear that the rules contained in the Second Schedule supersede the procedures traditionally associated with various forms of *talaq* , but one should not lose sight of Section 16 of the Act which proclaims that "Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non- registration, any Muslim..... divorce which is invalid or valid, as the case may be, according to the Muslim Law governing the sect to which the parties .... belong". In *Nansoora v Sithi Jaria* the Board of Quazis made the following pertinent observation in the context of the former Muslim Marriage and Divorce Registration Ordinance which is equally applicable to the interpretation of the present Act:-

> "The Muslim Marriage and Divorce Registration Ordinance does not in the least abrogate the Muslim Law of Marriage and Divorce but it only provides a procedure…. A person who fails to register a divorce which has been authorised by a permit

177 (1945) MMDR III,40.

178 See, M.S. Jaldeen, *The Muslim Law of Marriage, Divorce and Maintenance in Sri Lanka.* page 39.

179 (1994) Bar Association Law Journal Reports, Volume V page 80.

180 *ibid* page 8l.

issued under the Ordinance is guilty of an offence, so is every Muslim who aids or abets another Muslim to obtain or effect a divorce otherwise than in accordance with the provisions of the Ordinance. A divorce effected otherwise than in accordance with the provisions of the Ordinance will therefore be valid and good under the Muslim Law, subject however to the penalty imposed under the Ordinance. Moreover the validity or invalidity of a divorce does not depend upon its registration or non-registration. Where a divorce is valid under Muslim Law its non-registration under the provisions of the Ordinance does not make it invalid".[181]

We are therefore left with the puzzle: Is there any contradiction between Section 16 of the Act, which seeks to preserve the *sharia't* law, and Section 27 read with the Second Schedule to the Act which seeks to lay down a procedure for divorce? Is the procedure laid down in the Second Schedule the exclusive procedure for divorce, as Section 27 seems to suggest? If so, is such procedure an adaptation of *talaq hasan, talaq ahsan or talaq-ul-bidaat*? If the procedure set out in the Second Schedule is not the exclusive procedure for divorce, and it stands side by side with the traditional forms of *talaq* mentioned above, is a divorce effected in terms of the Second Schedule valid if it does not conform to any of the traditional forms of *talaq*? These matters require urgent clarification.

Procedure for divorce by the wife

Where a wife wishes to obtain a *fasah*[182] divorce from her husband, Section 28(1) of the Act refers her to the procedure laid down in the Third Schedule. This Schedule is also made applicable by Section 28(2) to applications for divorce of any description permitted to a wife by the

181 (1945) MMDR III,40 at pages 44-45.

182 This is a divorce granted by a Court at the instance of the wife on the proof of some fault of the husband which is recognised by Muslim law as sufficient to terminate the marriage.

Muslim Law governing the sect to which the parties belong," which would presumably include *khula*[183] and *mubarat*[184] divorces as well.

As noted in the previous Chapter, although Section 16 of the Muslim Marriage and Divorce Act recognises the validity of *talaq-i-tafwid*, there is no express provision in the Act for the registration of such divorces. It is a matter of some doubt as to whether such a divorce can be registered under section 28(2) of the Act. It is submitted that this position should be clarified by legislative amendment which should specifically recognise *talaq-i-tafwid*.

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, apparently because the law confers on the husband the absolute right to *talaq* with no questions asked.

Indeed, Rule 3 of the Second Schedule to the 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*". On the other hand, an applicant for a *fasah* divorce is required to prove 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".[185]

The inquiry into this matter has to be held by the Quazi with the assistance of three Muslim assessors. It has been held that the failure

183 This is 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 the marriage has actually broken down.

184 This is termination of marriage by the mutual consent of the spouses.

185 See Section 28 and the Third Schedule of the 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 and Law No. 41 of 1975.

to empanel assessors in a case of fasah divorce is fatal to the validity of the proceedings.[186] It is expressly stated in Rule II 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."

In *Sameen v Noor Saffiya*[187] the Board of Quazis held that although a wife should have two witnesses to support her application for divorce, these witnesses need not necessarily be Muslims.

Procedure for Section 47 inquiries

Claims relating to *mahr*, maintenance, lying-in-expenses and *kaikuli* form the subject matter of inquiries held by Quazis under section 47 of the Act. The procedure to be followed in the inquiries under section 47 are laid down in the Fourth Schedule to the Act. The prescribed procedure is very much similar to summary procedure under the Civil Procedure Code. It is expressly provided that "the provisions of Rule 11 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".[188] There is no provision for assessors in the Fourth Schedule,

186 See *Fareed v Jesima* (1967) MMDR V, 65. Compare, *Fareed v Jesima* (1967) MMDR V.63.

187 (1960) MMDR V,6.

188 Rule 7 of the Fourth Schedule to the Muslim Marriage and Divorce Act, *supra* note 185.

and the Board of Quazis has summarily dismissed an argument based on the failure to empanel assessors in a maintenance case.[189]

The majority of applications made to the Quazi Courts in Sri Lanka relate to maintenance for children. While Muslim Law recognises that the father is liable for the maintenance of his children during the subsistence of the marriage as well as after separation or divorce and the Act provides a procedure to enforce this right, in reality women undergo much hardship trying to claim maintenance on behalf of children after separation or divorce. On the one hand, once they file a maintenance application in Quazi Court, the Quazi requires proof of income before he can order an appropriate amount. Women find it extremely difficult to prove the income of the husband or ex-husband. If the man is employed in a Government Department, public corporation or even in the private sector, the Quazi can call for particulars of salary direct from the employer. However most Muslim men are self employed and therefore the court has to rely on the evidence given by the man as regards his income to determine how much he should pay for his children. This means that in practice maintenance awards are extremely small and often the man appeals on the quantum to the Board of Quazis.[190]

Furthermore, once a maintenance order is made by the Quazi Court, fathers repeatedly default on the payments (however small these payments are). Women then have to spend a lot of time and money going back to courts to enforce the awards made by the Quazis, sometimes spending more than what they get as maintenance. Problems relating to enforcement of orders of Quazis for maintenance are discussed in detail in Chapter VI of this book.

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189 See, *Fareed v Jesima* (1967) MMDR V. 63 at 64.

190 This information is based on the experience of the Legal Counselling Unit of the Muslim Women's Research and Action Forum.

Streamlining the procedure

It is extremely important to streamline the procedure to be adopted by the Quazis in dealing with the matrimonial disputes brought before them. This could be achieved by making appropriate amendments to the Muslim Marriage and Divorce Act to overcome some of the shortcomings noted above, and also by educating Quazis and litigants about the applicable procedure. It is also important to ensure that persons of integrity having the necessary ability and knowledge are appointed as Quazis by introducing into the Act minimum educational and other qualifications required for appointment as Quazis.

A few Quazis who answered the Questionnaire prepared by the Muslim Women's Research and Action Forum have clearly displayed a lack of awareness of the vital distinction between the Second Schedule (*talaq* procedure) and the Third Schedule (*fasah* procedure). Some Quazis also appear to have difficulty in complying with the requirements of Rule 11 as they do not have clerical or stenographic assistance for the recording of evidence, or sufficient funds to procure such assistance.

Analysis of statistics relating to the disposal of applications for divorce provided by the Quazis themselves show that a greater percentage of applications filed by wives seeking *fasah* divorces have been delayed before the Quazis. Case studies reveal that Quazis have, out of their ignorance of the applicable procedure or as a result of their state of helplessness, attempted to obtain the consent of the husband for granting the *fasah* divorce without proceeding to inquire into the merits of the case in terms of the Third Schedule. As the Board of Quazis noted in *Zain v Subaitha*, "in the absence of pleaders in a Quazi Court, it would be incumbent on the Quazi to maintain the records very faithfully."[191] This is not always the case, and very often cases are sent back to the Quazi for trial *de novo*. In one case it was observed by the Board of Quazis that the records of certain cases have been kept

191 *Zain v Subaitha* 5 MMDR 51 at page 52.

using used file covers belonging to the Quazi which bore the numbers and other particulars of cases handled by the Quazi, who was also an Attorney-at-Law.[192] Sometimes parties are not allowed to call material witnesses,[193]and cross-examination is either not permitted[194] or allowed to be conducted in the most scandalous manner. This has not only aggravated the dispute but has also caused unnecessary bitterness among the spouses and their families. Such prolongation of the agony can be minimised by enhancing the status of Quazis and improving the resources and facilities available to Quazis for them to efficiently deal with the cases.

192 See *Jamaldeen v Sithi Nasiha* 5 MMDR 40.

193 See. *Zain v Subaitha* 5 MMDR 51.

194 *Abdul Salam v Sohara Umma* 5 MMDR 56.

Chapter VI

Enforcement and Appellate Proceedings

Part VIII of the Muslim Marriage and Divorce Act of 1951[195] contains provisions relating to the enforcement of orders of Quazis. The provisions contained in Part VIII of the Act basically draw a distinction between the execution of orders for the recovery of *mahr or kaikuli* on the one hand, and the enforcement of orders for the recovery of maintenance and lying-in expenses, on the other.

Recovery of mahr and kaikuli

In regard to the recovery of *mahr and kaikuli*, the Act originally provided for a certificate to be filed in the relevant Court of Requests, to be enforced as if it is a decree entered by that Court.[196]The abolition of Courts of Requests by the Judicature Act[197] has given rise to some amount of confusion in regard to the court in which the certificate has to be filed.

Although it may have been thought that the appropriate court for filing the certificate is the Primary Court, which replaced the Court of Requests, it is significant to note that "Any action by a Muslim for recovery of Mahr" has expressly been excluded from the jurisdiction of the Primary Court by the Fourth Schedule to the Judicature Act.[198] This might prompt one to file a certificate for the recovery of *mahr* in

195 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 and Law No. 41 of 1975.

196 *ibid.* Section 65(2).

197 Act No.2of 1978.

198 See, the Judicature Act No.2 of 1978 Fourth Schedule, item 25.

the District Court, and Ameen argues that a certificate for the recovery of *kaikuli* has to be filed, without doubt, in the District Court.[199] Dr. Jaldeen expresses the view that "the exclusion set out in the Fourth Schedule refers to the original jurisdiction of a Primary Court as a civil court".[200] According to him, the Fourth Schedule only means that in view of the exclusive jurisdiction of Quazi Courts, no person can directly institute proceedings for recovery of *mahr* before the Primary Court, but the forum for filing a certificate for enforcement is still the Primary Court He claims that this position is confirmed by the unofficial version of the 1980 edition of the Legislative Enactments of Sri Lanka.[201] It is submitted that the legal position should be clarified by amending legislation, as there is a great deal of uncertainty in the minds of litigants as well as legal practitioners and judges with regard to the court in which the certificates should be filed.

Recovery of maintenance and lying-in-expenses

The procedure applicable for the recovery of maintenance is very much different. The Act provides for the recovery of maintenance and lying in expenses through the Magistrate's Court as though it was a fine imposed by that Court.[202] It has been held that before making an enforcement order, a Quazi should issue notice on the Respondent and should satisfy himself after inquiry that the Respondent is in arrears.[203] It must, however, be remembered that the Magistrates Court has no role to play in the recovery of *mahr* or *kaikuli*, although sometimes Quazis reportedly file certificates for this purpose in the Magistrates Court instead of the Primary Court through sheer ignorance.[204]

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199 See, A.H.G.Ameen. *The Quazi Court Procedure and Practice* (Colombo, 1999) page 73.

200 M.S.Jaldeen. *The Muslim Law of Marriage. Divorce and Maintenance in Sri Lanka* (Colombo 1990) page 79

201 See, Section 65(2)of the Muslim Marriage and Divorce Act *supra* note 195.

202 *ibid.*, Section 66.

203 See. *Thahir v Shafie* 72 NLR 19.

204 See, the judgment of Palakidnar J. in *A.C.M. Uvais v Lafir Sithy Zuhira* CA Application No. 8056/87 decided on 25.3.1988 (unreported).

The combined effect of sections 64(1) and 66 of the Act is that a woman seeking to recover maintenance has to travel to the place where her husband is resident to obtain payment. Furthermore, even when an order is ultimately made under section 64(3) for the recovery of the maintenance "as a fine" imposed by the Magistrate's Court, the money has to be remitted to the Quazi for payment to the woman in question, further adding to her inconvenience and expense. This difficulty could be eliminated by amending the relevant provisions to enable the filing of the enforcement certificate in the Magistrate's Court within the local limits of which the person seeking maintenance is resident and for the said Court to make payment forthwith directly to the woman in question without the further intervention of the Quazi.

A further problem faced by women and children is that where the man against whom the Quazi has made an award of maintenance is living abroad or is absconding, it is not practical to recover the maintenance as a fine imposed by the Magistrates Court, and there is no alternative procedure for recovery. A weakness in the existing law is that there is no provision to execute an order for the recovery of maintenance against any assets or funds of the man available in Sri Lanka or abroad. Thus, in certain cases one comes across deserted women and children suffering in silence even though there are properties or bank accounts which could be siezed in execution. It is desirable to amend the present Act to provide greater flexibility in regard to the choice of the methods of enforcement.

Appeals

Any party aggrieved by a final order made by a Quazi under the rules in the Third Schedule of the Act or in any inquiry under section 47 is entitled to appeal as of right to the Board of Quazis.[205] The use of the phrase 'party aggrieved' in this Section means that only a party

205 Section 60(l) of the Muslim Marriage and Divorce Act, *supra* note 195.

so aggrieved has a right of appeal to the Board of Quazis. It has been held that the son of a party aggrieved has no standing to appeal. [206] The Board of Quazis consists of five male Muslims appointed by the Judicial Services Conmiission.[207] In terms of section 28 and the Third Schedule to the Act an aggrieved husband could appeal from an order granting a *fasah* divorce.

However, the same cannot be said in regard to an appeal by an aggrieved wife against any order of a Quazi where the husband has pronounced *talaq.* As Dr. Jaldeen points out –

> "Upon a reading of Sections 27 and 30 with the rules in the Second Schedule, it would seem that a wife has no right of appeal where her husband has pronounced three *talaqs* as per Rules 2,6 and 7 of the said Schedule. The Fifth Schedule which refers to the rules relating to appeal, confers a right of appeal only "where by any provision of this Act a right of appeal" is available. The appealable period of time is set out in Rule 1(a) and (b) of the last-named Schedule. The former specifying a period of ten days in the case of an order made by the Quazi with regard to a *wali* who unreasonably withholds his consent to the marriage of a woman under Section 47(2), and under Section 47(3) where the Quazi has made order authorising the marriage of a woman who has no *wali*. In the case of the latter, Rule 1(b), the reference is to any other order of a Quazi in which case the appealable period is thirty days. In the Third Schedule (which refers to rules in case of a divorce by a wife) there is specific reference to the appealable time (Rule 15). However, there is no such specific mention of an appealable period of time in the Second Schedule which refers

206 *Sara Mohomad Ibrahim v Ummu Rahima.* (1941) 2 MMDLR page 124.

207 *Supra* note 195, Section 15(1).

to divorces by a husband. In fact, upon the pronouncement of the third *talaq*, the divorce is to be registered. Therefore, it would imply that a wife, if aggrieved, has no right of appeal as such, if the husband has pronounced *talaqs* on her. The rationale of this would be that a husband cannot be prevented from pronouncing *talaq* on his wife. More so when in law he need not even adduce a reason or ground upon which he seeks to divorce his wife (See Rule 2 Second Schedule)."[208]

There is a further right of appeal from the decision of the Board of Quazis to the Court of Appeal, but it is necessary to obtain the leave of the Court of Appeal for such appeal.[209] There is also provision in the Act for the Supreme Court to make rules regulating such appeals.[210]

Revision

It is however possible for an aggrieved wife to have the order of the Quazi revised even where there is no right of appeal or the right of appeal has for some reason not been exercised.[211] However, to succeed in an application for revision she has to establish that thereare exceptional circumstances justifying the exercise of this extraordinary power.[212] In *Rauff v Raheem*, an application was made to the Board of Quazis to revise an order absolute entered under Section 60(1) of the Muslim Marriage and Divorce Act against which there was no right of appeal. The Board of Quazis refused to exercise their revisionary

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208 M.S. Jaldeen - *The Muslim Law of Marriage, Divorce and Maintenance in Sri Lanka* (1990) at page 129-130.

209 Section 62(l) of the Muslim Marriage and Divorce Act, *supra* note 195.

210 *ibid.,* Section 62(2).

211 See. Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. 1988 as subsequently amended.

212 *Mariam Beebee v Seyed Mohamed et al* 69 Ceylon Law Weekly 34; *Abdul Cader v Sittinisa et al* 52 NLR 536.

jurisdiction in the absence of "some grave illegality".[213]In *Ameena Suby v Suby*,[214]the Board of Quazis held that the revisionary powers of the Board conferred by Section 44(1) of the Act are not curbed by Section 34(2) of the Act. The Board of Quazis adopted with approval the following observation of Sansoni C.J. in *Bee Bee v Mohamed* –

> "The power of revision is an extraordinary power which is quite independent of, and distinct from, the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice."[215]

213 *Rauff v Raheem* 5 MMDR 69 at page 70.

214 *Ameena Suby v Suby* 5 MMDR 73.

215 *Bee Bee v Mohamed* 68 NLR 36 at page 38 per Sansoni C.J.

Chapter VII

The Quazi Court System and Women

Women in distress

More often than not it is a woman in distress who ventures to seek redress from the Quazi Court. Young Fathima, whom we encountered in the Prelude is just an example. One of the basic difficulties such a woman is faced with is the non-availability of any literature to guide her. As the Muslim Marriage and Divorce Act does not permit Attorneys-at-Law to appear before Quazi Courts, she is generally compelled to seek guidance from the clerk of the Quazi. Some Quazis have positively attempted to mitigate this difficulty by making available basic model application forms that can be used by a party seeking to have recourse to the Quazi Court. However, this is not always the case, and sometimes women get into difficulties by presenting technically defective applications. This could be remedied by incorporating as schedules to the Muslim Marriage and Divorce Act, model forms that can be used to make various kinds of applications in the Quazi Court.

It is also important to reconsider the decision not to permit Attorneys-at-Law to appear in Quazi Courts. The Muslim Marriage and Divorce Registration Ordinance of 1929[216] was silent on the question of the legal representation of parties before the Quazis, but in practice lawyers did sometimes appear with their permission. However, the Committee appointed in 1939 chaired by the then Registrar General observed in its unpublished report that "the retention of lawyers is expensive, delays the disposal of cases and frequently prevents reconciliation between the husband and wife, and if only one party is represented by a lawyer that party's case tends to be overweighed." It was this thinking that

216 The Muslim Marriage and Divorce Registration Ordinance No. 27 of 1929, amended by Ordinance No. 9 of 1934 and promulgated as law on 1st January. 1937.

led to the shutting out of lawyers from Quazi Courts by Section 74 of the Muslim Marriage and Divorce Act of 1951.[217] It is relevant to note that in their response to the Questionnaire administered by the Muslim Women's Research and Action Forum 83.3% of the Quazis felt that an Attorney-at-Law should not be permitted to appear on behalf of the woman in Court.

Though it is true that the legal fraternity has a reputation of impairing settlement of disputes, it must not be forgotten that an Attorney-at-Law could be of assistance to a woman particularly when a wealthy or influential husband chooses to resist the woman's attempt to seek redress in the Quazi Court. Indeed, in *Thahir v Gani Noor*[218] the Board of Quazis has pointed out that, in their experience, the result of non-representation was that "the case was not properly adjudicated, the issues in the case were not properly framed, inadmissible and irrelevant evidence was admitted, the procedure was not strictly followed, and even the law was misapplied." Section 4 1(2) of the Judicature Act[219] generally recognises the right of every party "to any proceeding before any person or tribunal exercising quasi-judicial powers" to be represented by an Attorney- at-law. It is therefore heartening to note that the Dr. Sahabdeen Committee has recommended that the prohibition on lawyers appearing in Quazi Courts should be removed.[220]If, in view of the reputation of lawyers to hinder reconciliation of parties, the Government is not inclined to give effect to this proposal in full, provision could be made to permit Attorneys-at-Law to appear in *talaq* proceedings governed by the Second Schedule to the Act after

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217 The 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 and Law No.41 of 1975.

218 (1954)4 MMDR 5 1 at page 53(A.R.A.M.Aboobucker Esq., dissenting.)

219 Act No. 2 of 1978 amended by Act No. 37 of 1979.

220 See Report of the Committee appointed by the Minister of State for Muslim Religious and Cultural Affairs to recommend Amendments to the Muslim Marriage and Divorce Act, paragraph 2.31 (page 28).

the lapse of a specific period of time from the date of commencement of proceedings. However, in proceedings governed by the Third and Fourth Schedules to the Act, where a Quazi is required to adjudicate on the basis of the evidence presented before him, there is absolutely no reason to shut out lawyers at any stage.

Help from Quazis

It is noteworthy that the majority of Quazis conduct Court in their private residences as courthouse buildings are not always made available for the use of Quazis. This very often gives rise to inconvenience and embarrassment. The Quazis themselves are handicapped by the lack of facilities to maintain proper records. Sometimes, Quazis are threatened or pressurised by a party to a dispute and his or her relatives. The personality of the Quazi himself becomes extremely important in this situation.

Quazis endeavour to do their best to give relief to the parties coming before them. In fact, it transpired at the meeting organised by the Muslim Women's Research and Action Forum that at least some Quazis have been very liberal in the interpretation of the substantive law as well as the procedural law applicable in the cases.

The ease with which *talaq* can be performed and registered in Sri Lanka and the absence of any provision for the payment of *matah*[221] to the wife has been manifested in the staggering number of *talaq* applications as opposed to *fasah* applications particularly in the Eastern and North Central Provinces. This phenomenon could have been more widespread if not for the enlightened approach of many Quazis who discouraged *talaq* by refusing to register the same until some reasonable compensation was paid to the wife. In fact, at the meeting with Quazis

221 The term connote a compensatory payment to a woman who is divorced without a valid reason to enable her to provide herself with the basic necessities of life according to her status and the means of the husband.

organised by the Muslim Women's Research and Action Forum, the Quazi for Negombo admitted that the enlightened procedure adopted by him was contrary to the provisions of the Muslim Marriage and Divorce Act. But as he pointed out, this procedure was not contrary to his conscience and certainly not contrary to the *sharia't* which commended a husband to part with his estranged wife "on equitable terms".[222] It is heartening to note that the Dr. Sahabdeen Committee has recommended the amendment of the law to provide for *matah* which could certainly discourage *talaq*.[223]

Women as Quazis

It is interesting to note that the Muslim Marriage and Divorce Act No. 13 of 1951 expressly confines the appointment of Quazis and Special Quazis to "male Muslims".[224] Similarly, the Act provides for the appointment of a Board of Quazis "consisting of five male Muslims resident in Sri Lanka, who are of good character and position and of suitable attainments, to hear appeals from the decisions of the Quazis under this Act."[225]

The Muslim Law Research Committee chaired by H.M.Z. Farouque, which proposed far reaching reforms to the existing law,[226]surprisingly did not recommend the lifting of the prohibition on women holding office as Quazis, special Quazis or in the Board of Quazis. The Dr.

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222 The Holy Quran (Edited by Abdullah Yusuf Ali) *Sura Talaq* LX : 2.

223 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, paragraphs 2.29 and 2.30 (pages 26-28).

224 Sections 12(1) and 14(l) of the Muslim Marriage and Divorce Act, *supra* note 217.

225 *ibid.,* Section 15(l) of Act No. l3 of 1951 as subsequently amended.

226 Report of the Muslim Law Research Committee on amendments to the Muslim Marriage and Divorce Act (1978)4 Colombo Law Review. page 57.

Sahabdeen Committee refrained from making any recommendation in this regard in the absence of a *fathwa* to the effect that women are not prohibited by the *sharia't* from holding judicial office.[227]

It has to be mentioned that the Muslim Women's Research and Action Forum 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[228] which held that there was no prohibition in the *sharia't* against women holding office as Judges, Magistrates and Quazis. The Conmittee studied these submissions and material very carefully, but considered itself bound by the Shaffie rule (which was considered applicable to the majority of the Muslims in Sri Lanka) that the Judge or 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"[229]. The Committee noted that there was no specific and direct injunction in the Quran or the *sunnah* of the Holy Prophet concerning this matter and that there was a serious conflict of opinion among the Jurists.[230] Even though the principles of Shaffie jurisprudence noted above require that an ordinary 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 emphasised in Chapter III of this work. It is submitted that there should be no legal bar to the appointment of women as Quazis and as members of the Board of Quazis.

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227 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, paragraphs 2.15 to 2.18(pages 19-2l.)

228 Sharia't Petition No. K 4 of 1982.

229 *Minhaj - et - talibin* (1992) 500.

230 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, paragraphs 2.15 to 2.18 (pages 19-21).

In the Questionnaire administered on Quazis (who at present are all males) their opinion was solicited in regard to the question whether women should be considered for appointment as Quazis. 50% of the Quazis who answered the Questionnaire were of the view that women should not be appointed as Quazis as this was prohibited by the *sharia't*. A further 8.4% objected to the appointment of women as Quazis "until it (Quazi Court) is raised to the level of a Magistrate's Court." While 16.6% of the Quazis who responded to the Questionnaire preferred not to express an opinion, 25% of the Quazis categorically stated that they had no objection whatsoever to women being considered for appointment as Quazis. One Quazi in fact emphasised that "today women are functioning as Magistrates, District Judges and even High Court Judges. Furthermore, women will be able to give hearings sympathetically." Indeed, today there are women judges even in the Court of Appeal and Supreme Court, and it may be observed with the greatest of respect, that they are in no way inferior to their male counterparts.

In this context, it is relevant to note that the Muslim Marriage and Divorce Act does not preclude the possibility of a woman being appointed as a temporary Quazi,[231]although at present the position is different in regard to permanent Quazis.[232]There is absolutely no justification for retaining the word "male" in section 14(1) in regard to the appointment of special Quazis in view of the latitude shown by Hanafi and Maliki Jurists in regard to this question[233] and the possibility that it might become necessary to appoint a special Quazi to hear a special case involving Hanafi or Maliki parties which can be heard by a woman Quazi according to the *sharia't*, or to deal with disputes relating to the followers of these sects in general.

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231 Section 13(1) of the Muslim Marriage and Divorce Act, *supra* note 217.

232 *ibid.,* Section 12(1).

233 See Sharia't Petition No. K 4 of 1982.

The Muslim Marriage and Divorce Act also provides for the appointment of a Muslim Marriage and Divorce Advisory Board consisting of the Registrar General (*ex officio Chairman*) and four to nine Muslims.[234]There is nothing to prevent the appointment of women to this Board. This provision reflects a policy of permitting female representation at an advisory level, and the same policy consideration can justify the amendment of Section 15(1) of the Act to enable the appointment of at least one female Muslim "of good character and position and of suitable attainments" to the Board of Quazis. An amendment in these lines would pave the way for the expression and appreciation of the feminine viewpoint, which is so vital for family life and the suppression of which is regarded as a major cause of matrimonial strife. Such a measure will greatly enhance the acceptability and credibility of the Quazi Court system.

234 Section 4(2) of the Muslim Marriage and Divorce Act, *supra* note 217.

Chapter VIII

Conclusions

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. This trend is also reflected in the Report of the Dr. Sahabdeen Committee on the Muslim Marriage and Divorce Act, which concludes as follows:

> "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 community is more in the nature of administrative reforms than amendments to the law as such."[235]

However, as noted in Part III of this work, the substantive law applicable in Sri Lanka is "the Muslim law governing the sect to which the parties belong". Apart from the knotty problems the judicial equation of schools of thought (*mazhabs*) with sects has given rise to, such equation also has the undesirable effect of depriving the courts and tribunals administering Muslim law in Sri Lanka of an extremely effective instrument of legal development. In view of certain judicial pronouncements by which our courts may be bound, it would be desirable for the legislature to step in and define the term 'sect' to mean the Sunni or Shiah sects and not mere schools of thought such as the Shaffie and Hanafi schools. It would also be necessary to suitably amend Section 25(1) of the Muslim Marriage and Divorce Act by removing words that may tend to equate 'sect' with 'school of thought'.

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235 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, page 31.

Muslim law reform is a top priority concern for the Sri Lankan Muslim woman. As noted in Chapter IV of this work, it is necessary to consider amending the law with respect to child marriage, the consent and signature of the bride, conditions relating to marriage and the registration of *talaq-i-tafwid*. It is also imperative to incorporate into the Act the conditions insisted upon by the *sharia't* 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. It is necessary to correct the imbalance in the general law relating to divorce as colourable conversions to Islam are only symptomatic of this state of imbalance. In this context it must be emphasised that it is necessary to reform the Muslim law of divorce and to clarify the issue as to whether the Second Schedule is the exclusive procedure in regard to *talaq*. The Quazi Court should also be conferred the jurisdiction to make orders for the custody and care of children of estranged spouses.

Enhancement of the status of the Quazi to that of a Magistrate, laying down minimum qualifications for appointment of Quazis, removing the prohibition against women being appointed as Quazis and members of the Board of Quazis, permitting the appearance of Attorneys-at- law in Quazi Courts and remedying the unnecessary complexities in the recovery procedure applicable to Quazi Courts are also high in the agenda.

It is generally accepted that it would be more conducive for the administration of justice if Quazi Courts are brought under the purview of the Ministry of Justice. 91.6% of the Quazis who attended the Meeting organised by the Muslim Women's Research and Action Forum and responded to the Questionnaire were of this view. Similarly 83.3% of the Quazis were of the opinion that they should be equated to other judicial officers such as Magistrates. For the majority of them, this was not a mere question of status, but a mechanism by which the practical problems and delay connected with the enforcement of their

orders as Quazis, could be eliminated. The upgrading of Quazis to the level of Magistrates would attract more qualified, capable and balanced individuals to Quaziship and could also help overcome the problem of corruption. It is however, important to bear in mind the multifarious issues the proposed upgrading of Quazis could involve. As one Quazi pointed out in his response to the Questionnaire-

"With an undefined specific academic qualification as it exists today, it is unfair to expect that Quazis be equated to the status of Magistrates. The basic academic qualification to become a Quazi must be raised first. The work in a Quazi's division cannot sustain a full time Quazi, like a Magistrate. To have a full time Quazi, at least five of the present divisions will have to be merged into a 'Quazi Circuit Court'. But this creates other problems like the parties being unable to meet the Quazi to explain woes. After all, the Quazi system was designed for the human approach."

Some thought must also be given to the reorganisation of the Quazi Court system in the context of devolution of power under the proposed Constitution. It would be convenient if the Board of Quazis operates at a Provincial or Regional level so that any appeals from orders of Quazis and applications for the revision of such orders could be determined at that level without the aggrieved party having to come to Colombo from where the Board of Quazis is functioning at present.

One of the fundamental issues meriting consideration is whether it is necessary or desirable to codify the Muslim law of Sri Lanka in the process of its reformation. Codification has the advantage of eclectic choice and clarity, but it will require a great deal of work by competent and dedicated draftsmen. Such a Code will of course run the risk of being struck down as a violation of the equality and possibly other provisions of the Constitution, and should not be attempted unless it can be justified on the basis of classification, or the requisite majority for enacting legislation inconsistent with the provisions of the Constitution can be marshalled.

All in all the Quazi Court system has had a beneficial impact on women in Sri Lanka. This can be illustrated by contrasting the way in which the question of the right to maintenance of a co-wife of a husband who has contracted plural marriages was dealt with by the traditional courts and the Quazi Court. When this question arose in *Pathumma v Seeni Mohammadu*[236] the Supreme Court of Ceylon (Justice Shaw) held that a wife who left the matrimonial home when the husband brought a co-wife was not entitled to maintenance as she has unlawfully deserted her husband. However, when the same issue arose before the Board of Quazis in *Nainam Sahib Seyed v Muttu Pathumma Monna Ahamadu*,[237]the Board quoted Mahalli Volume III, 300 to the effect that "it is unlawful for the husband to provide a dwelling to one of his wives and call the rest to it" and "to keep two co-wives together in one house except with the mutual consent of both of them", and granted the woman relief.

It may therefore be safely concluded that while the Quazi Court system has proved its worth in Sri Lanka, there are many areas of substantive as well as procedural law where it is possible, and indeed necessary, to improve the existing system.

236 23 NLR 277.

237 (1937) MMDR II, 27.

Epilogue: Fathima's Destiny

What happened to Fathima, the young wife we encountered in the Prologue?

Well, her story is indeed interesting. She commenced *idda't* of divorce but soon realised that she was carrying Ikram's child. Her father, who represented her before the Quazi, informed Ikram of this fact and begged him to come back to the matrimonial home. The Quazi also did all he could to reconcile the parties, but failed in his effort. In time, Fathima gave birth to a baby boy. The Quazi ultimately registered the divorce, and in addition to the amount he awarded Fathima as *idda't* maintenance, also directed Ikram to pay a small amount monthly for the maintenance of the child, Rilwan. Ikram did not pay one cent and went back to the Middle East, where he had been working. There was nothing Fathima could do to recover this money, and she became totally dependent on her parents for her day to day needs.

She soon learnt that in contemporary Sri Lankan society, particularly among the Muslims, a divorced woman is like a counterfeit coin with absolutely no value. There were divorcees or widowers who may have considered marrying a divorced woman, but the problem Fathima's parents faced was that Fathima now had a child, and giving a young mother in marriage was not easy. They were on the look out for a suitable man who would care for a unfortunate woman like Fathirna. It so happened that none of the proposals that came their way turned out to be suitable, and Fathirna became sad and depressed day by day.

At this juncture, Fathima's former classmate Sara proved herself a wonderful friend by proposing to Fathima the hand of her brother Ibrahim, who was a computer technician. Although Ibrahim who knew and liked Fathima at first showed interest in this proposal, most of his friends discouraged him from marrying a divorcee who also had a child by the former marriage. "You must have your head examined", some of

his friends said. Ultimately, Ibrahim indicated that he was not willing to go through with this proposal, which only saddened and depressed Fathima even more.

Fathima needed money to meet her own expenses and to take care of her young son, Rilwan. She was a Montessori teacher who had given up her job due to the insistence of Ikram. She could go back to her former school or even to another one and earn her living, but her parents would not let her do so as they thought that this would ruin her chances of getting married again.

Almost three years later Sara asked Fathima why she didn't go back to work. She encouraged Fathima to start teaching at the Montessori where she taught before she got married. Fathima was at first reluctant because of her baby. But he would soon begin Montessori himself so she discussed it with her parents and they decided she should go back to work once Rilwan began Montessori. Her parents were there to support her but they were old and for how long could they support her and her son? Once she started teaching again, she worried less about her future and devoted her life to Rilwan and to her work. She was concerned that Ikram might claim custody over Rilwan, as this was one matter which the Quazi had no power to resolve. But Ikram had failed to maintain his son for over three years despite the Quazi's order and Fathima was confident that she will not be forced to give her son back to a father who had not even inquired about him since the divorce.

Fate had taken Fathima a full circle before she could find happiness again. Greater appreciation of Islamic values and a more sensitive and effective Quazi Court system, could give women in distress like Fathima greater solace when it is most needed.

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Appendix 1

Questionnaire on the Operation of the Quazi Court System in Sri Lanka

(A) PERSONAL INFORMATION

1. Name of Quazi:

2. Judicial Division:

3. Date of first appointment as Quazi:

4. Qualifications
   a) Educational (general):
   b) Educational (religious):
   c) Educational (Arabic)
   d) Educational (Professional):

5. Fees and Allowance received as Quazi
   i) From non-governmental sources
      a) Fees charged under section 59:
      b) Other Revenue:
   ii) From government sources
      c) Personal Allowance (per year):
      d) Other Allowances (per year):

6. Expenditure incurred by Quazi for the discharge of his functions annually
   a) For travel:
   b) Clerical:
   c) Stationary, books registers and indexes:
   d) Other(specify):

7. a) Are the fees, other revenue and allowances provided adequate to meet these expenses? Yes/No

   b) If not what is the amount of the shortfall on an annual basis?

8. a) Amount of Quazi's annual income from other private sources?

   b) Do you spend any part of your private income for performing your duties? Yes/No

   c) if so the amount on an annual basis?

9. Place where sittings are usually conducted
   a) Court house
   b) Residence of Quazi
   c) Other (specify)

10. a) Do you have any difficulty in obtaining from the District Registrar all blank registers, books and records free of charge? Yes/No

    b) If so please list below the problems you face in this regard

11. State your recommendations, if any for improving the existing facilities given to Quazis:

(B) STATISTTCS

Please supply the following statistics for years 1990, 1991, 1992, 1993 and 1994 from your records. If exact figures are not available, you may give approximate figures. Where approximate figure are given please indicate that fact the abbreviation 'Approx'.

1 (a) No of applications for authority to register marriage of girls below 12 years of age

(b) No of such applications allowed

2 (a) No of complaints against *wali* regarding unreasonable withholding of consent to marry

(b) No of case in which authority was granted by Quazi

3 (a) No of applications for appointment of *wali* by female without *wali*

(b) No of such appointments made Quazi

4. No of applications for divorce
   (a) Talaq
   (b) Fasah
   (c) Khul
   (d) Mubarat

5. No of divorces registered
   (a) Talaq
   (b) Fasah
   (c) Khul
   (d) Mubarat

6. No of divorce applications settled
   (a) Talaq
   (b) Fasah
   (c) Khul
   (d) Mubarat

7. No of divorce applications not yet concluded
   (a) Talaq
   (b) Fasah
   (c) Khul
   (d) Mubarat

8. (a) No of claims by wives for maintenance
   (b) No of cases in which maintenance was awarded

9. (a) No. of claims by wives for recovery of mahr
   (b) No. of cases in which mahr was awarded

10. (a) No. of claims by husbands for kaikuli
    (b) No. of cases in which kaikuli was awarded

11. (a) No. of claims by wives for return of kaikuli
    (b) No. of cases in which order for return was made

12. (a) No. of claims by or on behalf of children for maintenance
    (b) No. of cases in which maintenance was awarded

13. (a) No. of claims by divorced wives for iddat maintenance
    (b) No. of cases in which maintenance was awarded

14. (a) No. of claims by wives or divorced wives for lying-in-expenses
    (b) No. of cases in which such expenses were awarded

15. (a) No. of applications for declaration of nullity of marriage
    (b) No. of cases where nullity was granted

16. (a) No. of applications for mediation by Quazi of Matrimonial dispute

(C) CAUSES OF MATRIMONIAL DISPUTES

1. Based on your experience as a Quazi, what do you consider as being the main causes for matrimonial disputes in order of importance:

2. Based on your experience as a Quazi, what are the factors that hinder settlement of matrimonial disputes, in order of importance?

3. (a) In your opinion should the Muslim Marriage and Divorce Act be amended to require a married man desirous of contracting a second or subsequent marriage to obtain the approval of the Quazi for this purpose? Yes/No

(b) Please give the main reasons for forming that opinion

(c) If your answer to 3(a) above is in the affirmative, please list the factors you would consider relevant for the grant or refusal of the approval of the Quazi

4. In your opinion should the law be amended to give a wife who unjustly divorced by the husband the right to alimony or Mutah? Yes/No

(D) PROCEDURE

1. In your court can a party to a divorce obtain the following additional reliefs by including a prayer for same in the application for divorce without making any separate application?

(a) *Iddat* Maintenance
(b) Maintenance for child/children
(c) *Kaikuli*
(d) *Mahr*

2. What is the procedure followed in your court in application for divorce where the applicable mode is:
(a) Talaq
(b) Fasah
(c) Khula
(d) Mubarat

3. State your recommendations if any of changes to be made in the procedure followed in the Quazi Court to improve the quality of justice?

4. What difficulties if any have face in enforcing order made by you as a Quazi?

5. Are you of the opinion that Quazis should be equated to judicial officers such as magistrates?

6. Please give the main reasons for forming that opinion.

7. (a) Are you of the opinion that women should not be considered for appointment as Quazis?

   (b) Please give the main reason for forming that opinion?