

Shari'ah Concerns in the proposed MM&D Act

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1) Substantive Law (Madhhob - Sects)

Proposed Amendments

1. Deletion of word "Sect" from sections 16, 18(1), 19(1), 25(1), 26(1), 28(1), 28(2)
2. Amending section 25(1) to substitute for the words "Sunni sect" in place of the words "Shaffie sect"
3. Definition of the term "sect" to refer to the Sunni and Shiah sects in section 97
4. Provision to be made for the parties who belong to two different "sects", to mutually agree in their declarations made in terms of section 18(1) to abide by the Muslim Law governing a sect of their choice. To all aspects of their marriage including its validity, nullification and termination.
5. Provision to be made if one or both parties to a marriage do not belong to any sect, or where the two parties belong to two different sects and they have not mutually agreed to abide by the Muslim law of any particular sect in the declaration made in terms of section 18(1), the validity of a Muslim marriage or divorce shall be governed by the Principles of Muslim law

Views & Suggestlons for the above amendments

1. When observing the history, during the time of Islamic Caliphate and especially at the time of Ottoman Caliphate where nearly two thirds of the world was conquered, the Madhabs were followed to regularize constitution of each region.
2. Even in today's world, almost all Muslim countries are following a Madhab. For example: India, Pakistan, Turkey and Bangladesh follow Hanafi Madhab, Morocco & Sudan follows Maliki Madhab. Kuwait, Jordan, Egypt, Indonesia and Malaysia follow the Shafie Madhab. And Saudi Arabia follows the Hanbali Madhab
3. Supreme court of SL has ruled that the Muslims of SL will be governed by the Shafi'e Madhab

4. Madhabs "Sect" are an important part of Fiqh or jurisprudence, and should not be removed from the ACT.
5. As per majority of the scholars, all the 'shia' divisions cannot be considered as a 'sect' in Islam
6. If a Madhab is not specified, it could lead to a lot of confusion and misuse, people could pick and choose from different Madhabs based on their whims and fancy, people would request for rulings based on narrations they see fit for them

2) Appointing Women as Registrars & Quazi's

Proposed Amendments

1. Deleting the word "Male" in sections 8(1), 9(1) and 10(1) dealing with the appointment of Registrars of Muslim Marriage, Temporary and Special Registrars ;
2. Deleting the word "Male" from sections 12(1) and 14(1) of the Act dealing with the appointment of Quazis and Special Quazis;
3. Amending section 15(1) of the Act by substituting for the words "Male Muslims" the word "Muslim" and expressly providing that in making appointments to the Quazi Appellate Tribunal (or the Board of Quazis), JSC should ensure that adequate representation is provided for men and women;

Views & Suggestions for the above amendments

1. The objective of a registrar is merely to record and register a particular marriage. Even though there is no hard and fast rule of a woman being entrusted with that duty, There are serious Shari'ah concerns since all the marriages are being conducted with the involvement of males (Wali, witnesses, groom) and at the same time marriages should be encouraged to held in Masjids, as it is recommended in Shari'ah, so by appointing a woman registrar, she would be compelled to compromise important Shari'ah aspects.
2. With regard to the appointment of female Quaazis, the majority of the Ulama hold the view that this has no basis in Shari'ah.
3. It is not permissible for a woman to be appointed as a judge, and if she is appointed, the one who appointed her is sinning, and her appointment is invalid, and her judgements carry no weight, no matter what ruling she passes. This is the view of the Maalikis, Shaafa'is and Hanbalis, and of some of the Hanafis.
4. Rational behind this view is based on Quran and Sunnah which states: Men are the protectors and maintainers of women (4:34), Men have a degree (of responsibility) over them (2:228), Hadeeth says "No people will ever prosper who appoint a woman in charge of their affairs."

5. Dar ul-Ulum at Deoband, India's largest and most influential madrasa and expertise in the field of Hanafi school of thought, recently issued a fatwa declaring that appointing a woman as a judge was 'near haram'.
6. The majority of the Community also will not accept the appointment of female Quazi's due to practical reasoning. One should not consider this as injustice to women but rather protection of the rights, honour and modesty of women. However, The appointment of females in the Advisory Board and also as members of the Juri is recommended that would support the Quazi court system in a valuable manner,

3) Registration of Marriages

Proposed Amendments

1. Amending section 16 of the Act by deleting the words "or divorce"
2. Amending section 16 of the Act to provide that "no marriage contracted between Muslims shall be valid unless it is duly solemnized and registered in accordance with the provisions of this Act

Views & Suggestions for the above amendments

1. The prevailing clause in the Section 16 (1) is completely compliant to the Shari'ah. We do not agree on any changes being made to this Section. Even the word 'divorce' should not be deleted.
2. Section 16 of the ACT in which each and every word has been drafted by our predecessors with great wisdom and long sightedness, for the betterment of the Community and safeguarding the fundamental principles of the Shari'ah
3. We strongly consider registration of marriages is very important step in safeguarding the contract, but we are not in favor of making unregistered marriages as null and void. Thus we state that Section 16(1) should remain as it is.
4. As per the existing MMDA Section 81 which imposes a fine for non-registration, indicates the legal validity of the marriage. And it also indicates that the persons mentioned in the Section 17(2) shall be guilty of offence due to non-registration of the marriage. This is not contrary to the Shari'ah principles. We suggest that the sum of the fine should be reconsidered to an acceptable amount.
5. To mitigate late registrations, need to implement stringent procedures to prove the occurrence of the Marriage, through which the public themselves would realise the importance of the timely registration.

6. Need to conduct awareness programs to educate the public and other related stakeholders on the consequences of non-registration and the stringent processes involved in the late registration of a marriage.

4) Importance of Wali

Proposed Amendments

1. The Amendment to section 17 (Duty of causing marriage to be registered), section 18 (declaration and form of registration), section 19 (entries of the marriage to be signed and attested) and removing the word "Sect" from section 25(1) have truly created an element of doubt to the fact that without the consent of Wali, a bride on her own free will, can proceed with her marriage

Views & Suggestions for the above amendments

1. The Prophet (peace be upon him) said "There is no marriage without a guardian"
2. The Prophet (peace be upon him) said: Any woman who gets married without the permission of her guardian, her marriage is invalid, her marriage is invalid, her marriage is invalid
3. There several reasons (Wisdoms) why Wali is considered important in the marriage of a woman.
4. As a result of this improper action, it will definitely endanger the family and community ties. Since the preservation and protection of the family setup is of paramount importance in Islam, the marriage which takes place with the blessings of the parents, who are the foremost guardians, will definitely shield and shelter the newly formed family.
5. These amendments shall not be accepted by the Scholars and the Muslim Community at large, as it violates the integral part of a valid marriage contract
6. There should be no amendments to the section 17, 18, 19 of the MM&D Act.

5) Minimum Age of Marriage

Proposed Amendments

1. Notwithstanding anything in Section 16 and 17 of this Act, a marriage contracted by any Muslim who has not attained the age of 18 years shall not be registered under this Act unless the Quazi Court for the area in which the such Muslim resides, pursuant to any application made in the prescribed form seeking permission to solemnize the marriage of such Muslim who has not attained the age of eighteen, shall after such inquiry as may be deemed necessary, has authorized the solemnization and registration of the said marriage being satisfied that such marriage shall be in the best interest of such Muslim (*Where ever Muslim girl appears have been deleted hence it will apply for both boy & girl*)

- a) Such Muslim has attained the age of sixteen years;
- b) there are special reasons that would justify permission being granted for such Muslim to be given in marriage prior to attaining the age of eighteen years; and
- c) Such marriage shall be in the best interests of such Muslim.

Views & Suggestions for the above amendments

1. There is no need to make any amendments to the section 23 of the existing act since there are no shari'ah violations in it.
2. No restrictions for age of marriage in Quran as per following verses 65:4, 4:3, 4:127, 24:32
3. Ibn Hazm says: "A father giving in marriage of his daughter before attaining puberty is possible and this is the evidence that Abu Bucker (RadhiAllahu Anhu) gave A'ishah (RadhiAilahu Anha) on marriage to Prophet (Peace be upon him) when she was 6 years.
4. With regard to implementing "top line and Bottom line" for minimum age, it is a grave shari'ah violation and there is no evidence in shari'ah for its restriction.
5. We also agree that Islam does not promote child marriages but at limited circumstances it is permissible. This has great wisdoms behind it.
6. If any amendment to be made to section 23, the only suggestion is to substitute the word "not attain the age of twelve years" by "not attain the age of fifteen years"
7. According to the District Registrar of Ampara in which a Majority of Muslims live, 14,737 marriages has taken place from 2011 to 2016 out of which ONLY 870 (5.9%) marriages have taken place between 13-18, the breakdown of which is given below.

Age	No of Marriages	Percentage
13	8	0.088
14	36	0.244
15	84	0.569
16	243	1.64
17	499	3.38
<i>Total</i>	870	5.9

The important point to be noted here is that no marriage has taken place below 12 years.
(Source: Divisional secretary of Ampara district)

6) Status of the Quazi Court and Quazis

Proposed Amendments

1. Elevate the institution of Quazi to the status of a court

2. Reduction of the Quazi divisions from the current 64 to around 20 - 25 zones.
3. Appoint permanent and full time Quazis
4. Persons to be appointed as Quazis, Temporary Quazis and Special Quazis, should preferably be Attorneys-at-law

Views & Suggestions for the above amendments

1. When Sharī'ah Law is being challenged and opposed by a few in our community, We do not see this as the appropriate time to propose enhancement of the Quazi Court to the Status of Court we might even lose the prevailing system
2. The current judicial administration system of Sri Lanka prefers Alternative Dispute resolution system rather than ordinary Court proceeding. Rigidity, expenses in civil court cases amount to denial of justice to an aggrieved party who comes before the court. Because of the strict procedures and rigidity in the rules, the judges cannot dispose of cases speedily
3. The current Quazi Court system function more like a mediation process therefore elevating it as a court would be a barrier to several bottom level people for the access of justice
4. we agree that it is necessary to have the support of the government in upgrading the administrative facilities provided to the Quazi courts by offering standard recognitions, remunerations and other necessary requirements
5. Since the numbers of cases are increasing day by day, there will be a rush at the Quazi division to handle matters smoothly and efficiently. This will result in delay in processing cases and addressing the matters on a corrective purpose.- 2011 and 2012 in 4 Quazi divisions situated in CMB have reported a total No of 657 & 406 talaq and faskh cases respectively
6. The distance will also be a problem to travel for each hearing and especially it will bring a burden for the women to travel long distance and spend on transportation.
7. The miserable abeyance in the proceeding would cause several ill impact in the society, also it will lead people disobey the orders of the court.
8. "Justice Delay Justice Denied" all the delay caused by this process will deprive the justice

7) Polygamous Marriages

Proposed Amendments

1. Where a male Muslim who has entered into one or more marriages which are subsisting, intends to contract another marriage, he shall apply in the prescribed form, to the Quazi Court for permission to contract another marriage, and upon receipt of such application, issue notice in the prescribed form to each of the persons to whom the applicant is married, and requiring

such persons to appear before him on a date and time to be specified in such notice, being at least one month after the date of the said notice.

2. On a date that may be fixed by the Quazi Court for this purpose, the Court may inquire
3. Whether the applicant is living with, and justly and adequately maintaining and caring for, his present wife or wives
4. Whether the applicant is looking after his children in a just and equitable manner; and
5. Whether the applicant has the financial capacity to maintain and provide suitable and independent residence in accordance with his and her social standing for his intended wife, and any children that might be born to such intended wife.
6. The Quazi Court shall, after inquiry, make order setting out the reasons for refusing or granting permission for the applicant to enter into a subsequent marriage, and setting out any conditions that have to be satisfied.
7. Any subsequent marriage contracted by him contrary to any order made under the provisions of this Act refusing permission to enter into a subsequent marriage or imposing conditions to be satisfied before entering into a subsequent marriage shall be invalid and shall not be registered by any Registrar of Muslim Marriages.

Views & Suggestions for the above amendments

1. The stringent restrictions above will No doubt bring more hardships and injustice to women
2. If stringent regulations are formulated, the husband might divorce the current wife, or might resort to torture his wife morally and ethically, and might even be pushed towards Zina etc. Therefore further restrictions on polygamy will have more negative impact on the existing marriage
3. if permission is Not granted for a person for his second marriage and further processing of the matter becomes impossible due to invalidation of such marriage, hence this will lead to non-other than considering his wife as a curse for his entire life and whatever the love and affection which he had towards her will vanish.
4. Measures should be taken to increase the Taqwa and knowledge of the community. As only those who live with the fear of Allah will fulfil the rights of others.
5. Men and women should be provided with a properly designed pre-marital education in which duties of each spouse should be properly elaborated.
6. Opportunities should be created for family counseling in case of any misunderstandings. This facility should be easily accessible around the island.

7. The Quazi courts should be strengthened:

- To monitor the oppressions done to women. Be it in single marriage or polygamy
- Strict action should be taken in case of any proved cases of oppression to women
- Instead of calling up women for multiple sessions, decision making process should be fast tracked.
- Bribes, favours, influences should not be entertained and those who attempt such methods should be severely dealt with.

8) Procedure for Divorce

Proposed Amendments for section 27 (Divorce By Husband)

1. Section 27 (Divorce by Husband)- section 27 of the Act be replaced the lines of Annexure 'I' appended to this Report with the objective of ensuring service to the wife of notice of initiation of proceedings under section 27 of the Act *and to strengthening the process of reconciliation* to be effected with the assistance of those with specialized skills in counselling.

Views & Suggestions for the above amendments

1. With regard to the proposed amendments section 27(1) we do appreciate for the steps taken in reconciling and bring about resolution for a husband who intended to pronounce *talaq*. But at the same time amendments to section 16 by removing the word 'divorce', and repealing the existing section 30, will definitely create a situation that violates the Shari'ah principals of *talaq*. But with existing section 30 stating as below, we do not see any contradiction to Shari'ah principals.

".....a Muslim husband states that he has at any time earlier divorced his wife.....statement of the husband at such proceedings shall be deemed to be the pronouncement of the talak under the Muslim law and shall be recorded accordingly..."

Since situations of such nature occurred even at the time of Prophet (peace be upon him) where Ibn Umar (*RaliAllahuAnhu*) pronounced *talaq* and informed Him and whereas Zaid ibn Haritha (*RaliAllahuAnhu*) pronounced *talaq* to his wife Zainab (*RaliAllahuAnhu*) while Prophet (peace be upon him) advised him not to pronounce *Talaq*. Allah describes this incident in the Quran in verse (33:37). Thus we should understand that Prophet (peace be upon him) being the Quazi didn't make their pronouncements as invalid.

Proposed Amendments for section 28(1) Faskh

1. 28(1)(Faskh) Reasons to divorce her husband
 - a) impotency at the time of marriage,
 - b) ill-treatment, non-maintenance
 - c) disappearance of the husband resulting in his whereabouts not being known to the applicant for more than 3 years,
 - d) imprisonment of the husband for a period exceeding 7 years,

- e) continuous refusal of the husband to discharge any of his marital obligation without justifiable cause,
- f) violation by the husband of any term of the contract of marriage or on account of any act or omission on his part which amounts to a "fault" under Muslim law

Views & Suggestions for the above amendments

1. (a), (c), can be accepted as we don't see any Shari'ah violations
2. (d) Instead of 3 years it should be 4 years as this is the minimum period that can be extracted from Shafi books of jurisprudence.
3. (e) Imprisonment of the husband for a period exceeding 7 years – Jurists (Fuqaha) has not mentioned this matter explicitly. However in a situation the imprisoned husband returns back through a presidential pardon within few years, and found that, wife has got married, what will be the ruling?
4. (f),(g),(h) has lot of ambiguity in the wordings and Jurists (Fuqaha) have not permitted Faskh for those reasons

Proposed Amendments for section 28(2) Khula

1. Section 28(2)(Khula) where the wife applies for a khula divorce (without the consent of the husband on the ground that the husband has become repulsive to her) the Quazi Court may after due inquiry in accordance with the procedure set out in the Third Schedule, permit the divorce if it is satisfied that the said ground has been established by evidence, subject to the payment of such compensation to the husband as may be agreed by the parties, and in the absence of agreement in this regard, as may be determined by the Court.

Views & Suggestions for the above amendments

1. ".....the wife applies for a khula divorce (without the consent of the husband" - This indicates that the wife can apply for Khula' without the consent of the husband, which cannot be agreeable according to the teachings of Shari'ah.
2. ".....and in the absence of agreement in this regard, as may be determined by the Court." – This quote gives an assumption that in the absence of mutual agreement, it can be enforced via court

9) Mata'a

Proposed Amendments

1. 34(1) where a marriage has been or is to be dissolved in terms of section 27 or 28(1) without any fault attributable to the wife, such wife shall be entitled to mata'a.

Views & Suggestions for the above amendments

1. According to Quran and Hadeeth, Mataa' is given only for Talaq (Section 27). There is difference of opinion among the jurists as there is nothing said in Quran and Hadeeth about giving Mataa' in Faskh (Section 28(1)) type of separation. However, in Shafie School of Thought, in one scenario Mataa' becomes compulsory in faskh. That is, if the reason for the faskh separation is only the husband and he himself request for a faskh from the Quazi for his faults, then Mataa is compulsory.
2. In determining the quantum of mataa' the prescription given by shari'ah is based only on two aspects.
 - a) Consideration of the economic condition of the husband
 - b) The status of the wife

10) Representation of Attorneys-at-law behalf of any party

Proposed Amendment

1. Amending section 74 of the MM&D Act to enable parties to be represented by Attorneys-at-law or other representative of their choice.

Views & Suggestions for the above amendments

1. Each proceeding will be delayed and the case might be dragged on for months and in some instances for years and will not come to a proper reconciliation.
2. It will not be practical for parties to bear the lawyer consultation fee and it will be an over burden with all their present calamities.
3. Lawyer representation would not make win-win outcome rather it gives an adverse impact on the harmony between the two parties.