Substantive Law

Based on the rationale explained below, we provide our final suggestions with regard to the proposed changes to the substantive law for the consideration of the Committee,

It is clear that sects (*Madhabs)* are an important part of *Fiqh* or jurisprudence, and should not be removed from the MMDA. From the time the Islamic Caliphate was established, and especially during the time of the Ottoman Caliphate, where nearly two thirds of the world was conquered, the *Madhabs* were followed to regularize the constitution of each region to such an extent that courts were based on a certain *Madhab*. eg- *Al-Majalla Al Ahkam Al Adliyyah* - the Ottoman courts manual (*Hanafi*). Currently too, many Muslim countries are following one specific *Madhab* with regard to their religious affairs. For example: India, Pakistan, Turkey and Bangladesh follow the *Hanafi* School of Thought, whereas Morocco & Sudan follow the *Maliki* School of Thought. Kuwait, Jordan, the Maldives, Egypt, Indonesia and Malaysia follow the *Shafie* School of Thought. And Saudi Arabia follows the *Hanbali* School of Thought.

Even the Supreme Court of Sri Lanka has ruled that the Muslims of Sri Lanka will be governed by the *Shafi'e* school of thought, unless an individual proves that he or she is from a different school of thought

If a *Madhab* is not specified, it could lead to a lot of confusion and misuse, and people could pick and choose from different *Madhabs* based on their whims and fancy. Moreover people would request for rulings based on narrations they see fit for them. The great scholar Imam Nawavi, explains the necessity of following a particular *Madhab* in the following words: "The reasoning for this is that, if following any school of thought was allowed, it would lead to people hand-picking the conveniences of the schools in order to follow their desires." If people abide only by Muslim Law without a 'sect', being specified, it would lead to a state of utter chaos.

If the word 'Sect' is removed from the MMDA and if it is replaced by the so called word 'Muslim Law', we will need to compose a comprehensive Manual for each and every topic such as integrals of the marriage agreement, Mahar, Wali, Talaq, Khula, Iddah, etc. under the MMDA for Quazies to refer when handling cases. A Quazi has to be provided with this comprehensive Manual, if not only a Mujthahid or a PhD holder in Islamic Studies has to be assigned as Quazi.

The Position of "*Shia*" in relation to Islam – is *Shia* a 'sect' or *Madhab* of Islam?

According to the majority of the scholars, all the '*shia'* divisions cannot be considered as a 'sect' in Islam since the belief of majority divisions of them violates the basic principles of the established religion. Therefore, in summary it could be said that a *Mazhab* (sect) is a methodology of a *Mujthahid* through which we approach the Quran and *Sunnah* in order to derive the law of *fiqh* out of it. Thus the sources, from which the *fiqh* of the particular sect have been derived, are from the Quran and *Sunnah*. For instance when Imaam Shafi's methodology is applied, the Shafi School of thought or the Shafi *Fiqh* will be derived. The sources of all four *Madhabs* (sects) are solely based on *Quran* and *Sunnah*. And the only difference is the methodology used by the *Mujthahid* in deriving the *Fiqh*, hence the final outcome of the ruling may differ.

The views held on the sources of *Ijthihad* of the scholars of *Ahl al-Sunnah wa'l-Jamaa'ah* and the Shia is vastly differed. This is due to their believe inauthenticity of Quran, disagreement with the six authentic Hadith compilations and there believe that their Imams are infallible and superior to the *Anbiyaa (Prophets)* and their words are considered as divine revelations.

It is very important to understand that when deriving Fatwa, it should basically be founded on what has been explicitly stated in the Qur'an and the Sunnah along with what has been supported by Ijma'a (unanimity) or proved by Qiyas (analogy) which are the fundamental sources of Islamic Law. After resorting to the fundamental sources, the judgment of the mufti with regards to the different viewpoints of the fuqaha (fiqh Scholars), i.e. istihsan (approbation) and Maslahaa Mursala (public interest) may be considered as the basis of issuance of fatwa.

Fatwa should not be based on a personal view point that does not cater to the sources referred to above, or contradict with the general text of the Quran and Sunnah that have explicit indications. Moreover, fatwa should not also fall in disparity with well-established Ijma'a or the general rules derived from the Quran and Sunnah.

When adopting Maslaha, the erudite scholars insist that conditions for the use of Maslaha Mursala have to be followed strictly when deducing law on the basis of public interest. We have specified below the conditions stipulated by the *Shariah* in order to rely upon the principle of Maslahaa Mursala.

1. First and foremost it should not contradict the Islamic Shari'ah and its general principles and rulings.
2. It should be established after a thorough research that, the issue is in-fact a Maslahaa, as per the ruling and that it should bring a benefit or prevent harm.

3. Maslahaa brings benefit or prevents harm; it should harmonize with the objectives of the Shari'ah.

4. This Maslahaa which is definite should be a common Maslahaa and not an individual Maslahaa, meaning, as per the ruling, it should be beneficial to most of the people or prevent harm to many.

5. This task should be performed by a Mujtahid or through collective consultation.

Further, it is very important to note, when deducing a rule based on Maslahaa Mursala, the Ulama have emphasized to follow the legal maxims, which have been developed under the light of the Qur'an and the Sunnah.

We have listed below some of the legal maxims to be followed when applying the principle of Maslahaa Mursala.

1. Necessity permits that which may be objectionable / prohibited
2. Need sometimes falls in the category of necessity
3. Necessity is limited to its extent
4. Difficulty attracts ease.
5. Harm is repelled.
6. The common Maslahaa will be given preference than the uncommon/exclusive Maslahaa.

For an instance when adopting registration as a mandatory requirement in the MM&D Act based on the necessity, following principals of Maslaha should be applied

1. It is established after a thorough research that, the registration of marriage is in-fact a Maslahaa, thus it is absolute

2. It goes along with the objective of Shari'ah which comes under protecting of lineage

3. It is a common Maslahah

4. Thus, registration can be made mandatory, and violating it can be penalized, But, Only in the presence of a textual (Quran & Sunnah) indication validity and invalidity of the NIKAH shall be establish as legislation

5. Therefore, invalidating the Nikah in the absence of registration is against the Shari'ah

<u>Permissibility for a Mufti providing fatwa based on his own school, as well as other than his own school</u>

Mufti has the permissibility to provide fatwa (i.e. religious verdict) based on (the ruling of) his own school, as well as (what is) other than his own school, when he has accurate knowledge of (the ruling) based on which he gives fatwa and alludes to the Imam whose (ruling) it is. This is because (of the fact that) providing fatwa in the later centuries is only (possible) by way of relaying and reporting, due to the discontinuance of ijtihad (i.e. scholarly deduction of rules directly from original sources) in all its levels since a (long) time, as clearly stated by more than one (scholar).

Thus when this happens to be the way for the Muftis today, there is no difference between (the Mufti) transmitting the ruling from his own Imam or from another (Imam). In fact, if it is assumed that a person has the competence of ijtihad in his own school as well as in another, it would be permissible for him to give fatwa based on what is dictated by the principles of each school, however, with (this it is necessary that he) clarifies this, and relates each opinion to the Imam who advocates it. This is what is observed in the practice of more than one of the leading scholars, who used to provide fatwa in two schools, e.g. the erudite scholar ‘Abd al-Qadir al-Jili – may Allah bless him – who used to provide fatwa in the schools of al-Shafi‘i and Ahmad – may Allah be pleased with them, and Ibn Daqiq al-‘Id, (about whom) it is said that he used to give fatwa in the schools of al-Shafi‘i and Malik.[1]

The summary of what has been explained above is:

1. The Mufti in the present times is only a transmitter and a reporter and not a Mujtahid, (i.e. one practising ijtihad), due to the discontinuance of ijtihad, thus, (the Mufti) relays the ruling and reports it from his own Imam or from another (Imam); it is permissible for him to provide fatwa based on his school as well as (what is) other than it, when he relates the ruling to (the Imam) advocating it;

2. when he possesses the competence of ijtihad in his school as well as in another, e.g. in the Shafi‘i school and the Hanbali school, it is permissible for him to give fatwa based on (what is) dictated by the principles of the school that he gives fatwa in, while relating the opinion to the one who had expressed it; (this is) as done by al-Shaykh al-Jilani, who was a Mujtahid (i.e. in the Shafi‘i and Hanbali schools) and used to give fatwa in the school of al-Shafi‘i and the school of Ahmad according to their principles. The leading scholar al-Haythami points out that (the Mufti) should not be dogmatic about a single school, and

[1] Al-Fatawa al-Kubra al-Fiqhiyyah

when there is a benefit in providing fatwa on the basis of a school other than his, there is no barrier or offence (in doing so, provided) he indicates the Imam whose (ruling) it is

As mentioned above, when such a complicated process needs to be followed in deriving a law using Maslaha Mursala or Mufti providing fatwa based on his own school, as well as other than his own school, it is very much questionable whether this mammoth task can be fulfilled by a Quazi or Court. Thereby to fulfil this task, definitely only a person in the caliber of a Mufti would be needed. Under no circumstances, should Quazies or the court be given the authority to perform this task since there is a high risk, that the ruling might go against the Qur'an and the Sunnah due to lack of knowledge in Islamic jurisprudence.

Assuming the above, when a Quazi encounters a complicated situation, while following the Shafie sect, and he is unable to provide a solution, we strongly suggest that he should refer the case to Muslim Marriage and Divorce Advisory Board.

Hence section 16 shall remain same and need to introduce a new sub-section as 16(1) of the Act.

In this regard the Majority Committee Members Recommendation are listed as follows

1. Not to remove the word 'Divorce' in section 16 and 98(2) of the MM&D ACT. Since both marriage and divorce should be governed according to the Muslim law governing the sect to which the parties to such marriage or divorce belongs.

2. Not to removing any reference to word 'sect' from the MM&D Act. Furthermore, word 'Muslim Law' should not come in isolation without the word 'governing to sect' been associated with it, hence it should clearly indicate 'Muslim law governing the sect to which the parties belong'.

Section 16 – (Should remain as it is)

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

.

Section 16 (1)

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

Reforming the Muslim Marriage and Divorce Advisory Board

It is a recommended opinion that the MMDAB should be retained to serve an altogether different purpose, namely to make determinations when difficult questions relating to the content of the rules of Fiqh arise in the context of the implementation of the MM&D Act and to be in line with new sub section introduced in 16(1). In this regard Muslim Marriage and Divorce Advisory Board (MMDAB) may perform a useful purpose as a consultative body from which an authoritative opinion may be sought by the Registrar General, a Quazi Court, the Board of Quazis, or other court in a complex case.

While it is recommended to appoint professional to the MMDAB (Men & Women), it should be made mandatory appoint at least 3 Alim as members, which will perform its core function that is to provide fiqh base solutions for the question and issues that will arise in the MM&D Act. An Alim appointed should in the calibre of person described below

(a) He should have knowledge of the texts of the *Quran* and *Sunnah*
(b) He should also know what is *saheeh* (sound) and what is *da'eef* (weak) in the texts of the *Sunnah*.
(c) He should have knowledge of the issues of consensus (*Ijmaa'*)
(d) He should be well versed in the Arabic language
(e) He should have knowledge of *usool al-fiqh* (basic principles of Islamic jurisprudence), including analogy (*qiyaas*), because *usool al-fiqh* is the foundation for deriving rulings.

Hence we strongly recommend including the following when reformatting MMDAB in the MM&D Act.

Appointing 3 scholars with following characteristics as members to the MMDAB

(a) He should have knowledge of the texts of the *Quran* and *Sunnah*
(b) He should also know what is *saheeh* (sound) and what is *da'eef* (weak) in the texts of the *Sunnah*.
(c) He should have knowledge of the issues of consensus (*Ijmaa'*)
(d) He should be well versed in the Arabic language
(e) He should have knowledge of *usool al-fiqh* (basic principles of Islamic jurisprudence), including analogy (*qiyaas*), because *usool al-fiqh* is the foundation for deriving rulings.

Enhancing the Status of the Quazi Court and Quazi's

We have explain below our rational and the recommendations, with regard to elevating the institution of Quazi to the status of a court, reduction of the number of Quazi Court Divisions from 64 to 20 or 25 and appointing Attorneys-at-law as Quazis.

(a). Elevate the institution of Quazi to the status of a court

Please find below a few concerns, which needs to be addressed before proposing to elevate the institution of Quazi to the status of a court, to be designated as Quazi Court, and be recognized as an integral part of the Sri Lankan Judiciary

1. Currently, there is a certain amount of opposition to adopting the *Shari'ah* or Islamic Law among the Muslims in Sri Lanka. Hence, this may not be the appropriate time to propose enhancement of the Quazi Court to the Status of a Court.

2. The current judicial administration system of Sri Lanka prefers alternative dispute resolution to the ordinary court system. The court process may involve a substantial amount of time. Legal experts argue that rigidity and expenses in civil court cases amount to a denial of justice to an aggrieved party who comes before the court seeking justice. Because of the strict procedures and rigidity in the rules, the judges cannot dispose of cases speedily, thus creating a

backlog of unresolved cases. Prosecuting or defending in civil matters is beyond the affordability of the ordinary litigant who has no knowledge of the law or the procedure. He is compelled to seek advice from lawyers and spend exorbitant professional fees. Legal expenses involve court fees apart from lawyer's fees and other incidental expenses in litigation. People who cannot afford such high costs give up their democratic right to seek justice.

3. The current Quazi Court system function more like a mediation process. Therefore elevating it as a court would be a barrier to several bottom level people for the access of justice.

(b). <u>Reduction of the number of Quazi Court Divisions from 64 to 20 or 25</u>

Here we put forward important stats related to *Talaq* & *Fasakh* for the period of 2011 & 2012 before deliberating on the subject matter.

Among the number of talaq & fasakh reported in 2011 and 2012 in all 64 quazi divisions, it should be noted that 4 quazi divisions situated in the Colombo district have reported a total number of *657* talaq and faskh cases in 2011 and *406* in 2012. (*Board of Quazi*)

These figures do not reveal the total number of talaq and fasakh cases recived to these quazi divisions. Hence, we should realize that there is a significant number of cases getting reported in all 64 quazi zones. As a matter of fact we think it is not a wise and advisable move to reduce the number of quazi divisions. Some of the issues that can be predicted by reducing the No. of Quazi Court Divisions are:.

1. Since the numbers of cases are increasing day by day, there will be a rush at the Quazi division to handle matters smoothly and efficiently.
2. Reducing the number of quazi divisions will result in delay in the processing of cases.
3. The distance will also be a problem to travel for each hearing, and especially it will be burdensome for women to travel long distance and spend on transportation.
4. Such delay and difficulties for the parties are likely to have an adverse impact on the Muslim community, and result in a lack of faith in the Quazi system.
5. The result may lead to a denial of justice.

(c). <u>Appointing Attorneys-at-law as Quazi's</u>

Based on the rationale explained below, we state our suggestions in regard to the proposed amendments on Appointing Attorneys-at-law as Quazis for the consideration of the Committee

Knowledge of judicial matters is one of the noblest and most sublime branches of knowledge, because it is a high position and prophetic role. Through it, blood may be protected or shed; it may determine which marriages are valid and invalid; it may confirm ownership or loss of wealth; and it may show which dealings are permissible or forbidden, disliked or recommended.

Taking up a position as a Quazi may be obligatory, or it may be permissible, or it may be *haraam*. It is *haraam* for the one who takes up such a position when he is ignorant of the rulings of *Shari'ah*. It is permissible for the one who can judge well but there are others who can also do it. And it is obligatory for the one who can judge well when there is no one else who can judge between people.

Some of the imams warned against being appointed as a judge and warned of the danger of this post. For example:

It was narrated that 'Ali ibn Abi Taalib (*RadhiAllahu Anhu)* said: *"If the people knew what is involved in judging they would not judge concerning the price of a piece of camel dung……" (*Akhbaar al-Qudaath)

Many of the imams sought to avoid being appointed as judges, and some of them even accepted beatings and imprisonment instead of being appointed, and some fled from their homelands in order to avoid being appointed as judges.

Many of the righteous predecessors *(Salaf)* avoided being appointed as judges and refused it emphatically, even if they were harmed as a result, because they feared its grave danger, as is indicated in many *Hadeeth*, in which a stern warning is issued to the one who is appointed as a judge and does not do the job properly, such as the *hadeeth*, "*Allah* is with the judge so long as he is not unjust, but once he becomes unjust He forsakes him and the *shaytaan* stays with him" *(Al-Tirmidhi 1330)*

And "Whoever is appointed as a judge or is made a judge has been slaughtered without a knife" *(Abu Dawood 3571, al-Tirmidhi 1325)*

The fact that some of the scholars refused to become involved in it, despite the fact that they were virtuous, qualified for the post and pious, may be understood as taking extreme precautions in order to protect themselves and erring on the side of caution. Perhaps they thought that they were lacking in some way or they were afraid that it would distract them from other religious obligation.

In this regard the Majority Committee Members Recommendation are listed as follows

(1) Not to make any amendments in elevating the Quazi court to the status of the Court.

(2) Amendments to be brought in to the Act in upgrading the administrative facilities provided to the Quazi courts by offering the necessary recognition, provide adequate remuneration to Quazis and make available the necessary support mechanism to ensure efficiency and smooth functioning of the Quazi system.

(3) Not to reduce the current number of Quazi courts existing in Sri Lanka.

(4) Not to amend section 12, 13 and 14 act, so that only Judicial Officer as Quazi are appointed. But we strongly recommend is that when recruiting a proper person for the post of Quazi, a stringent selection procedure should be in place to identify his attitude, temperament, skills etc. new amendments to introduce in this regard.

(5) An examination should be conducted by JSC specially to test his *Shari'ah* knowledge and legal knowledge related to MM&D Act.

(6) Comprehensive training program should be formulated and conducted for period of six months for selected individuals to familiarize the administrative and other activities related to MMDA.

Appointing Women as Quazi, Registrars, Assessors, Counsellors and to the MMDAB

Appointing Women as Registrar

Based on the rationale explained below, we state our recommendations with regards to appointment of women as Quazi, Registrars, Assessors, and Counsellors and to the MMDAB.

The objective of a registrar is merely to record and register a particular marriage. Even though there is no hard and fast rule of a woman being entrusted with that duty, we have serious *Shari'ah* concerns since all the marriages are being conducted with the involvement of males (*Wali*, witnesses, groom), and at the same time marriages should be encouraged to be held in Masjids, as recommended in the *Shari'ah*., By

appointing a woman registrar, she would be compelled to compromise important *Shari'ah* aspects.

The majority of Islamic Scholars including the four *Madhabs*, are of the view that it is recommended *(Mustahab)* to do the marriage contract in the Masjid, and they quoted as evidence for that the Hadith: **"***Announce the marriage and do it in the masjid and beat daffs for that."* *(Tirmidhi – 1089)*

And it is stated in *Nihaayat al-Muhtaaj* written by a Shafi'ee Scholar Imam Ramali:
It is Sunnah to get married in the month of Shawwaal, to consummate the marriage in (Shawwaal), to do the marriage contract in the masjid, to do it before a group of people and to do it at the beginning of the day.

It is stated in *Kashshaaf al-Qinaa'* written by a Hanbali Scholar, Imam Bahoothi:*It is permissible to do the marriage contract in (the masjid), rather it is* recommended *(Mustahab) as was mentioned by some of our companions.*

A Malikee Scholar Imam Al-Khorashi said in Sharh Khaleel: *It is permissible to do the marriage contract (in the masjid), i.e., the proposal and response, rather that it is recommended (Mustahab).*

It says in Majma' al-Anhur written by the Hanafi Scholar, Imam Shakhi Zaada: *It is* recommended *(Mustahab) to do the marriage contract in the masjid, and to do it on a Friday, but they differed as to whether it is Makrooh to hold the wedding party there. The best view is that it is not Makrooh if it does not involve anything that is detrimental to religious practice."*

It is also stated by the Sunnah of the Prophet (Peace & Blessings of Allah be upon Him). He said: "Do not prevent your women from going to the mosque, even though their houses are better for them." In this hadith, it clearly indicates that there is no doubt that a woman's prayer in her house is better for her than praying in the mosque, therefore it is very much recommended for women folk to avoid even the ceremonial activities in the mosque *(Abu Dawud al-Sunan)*

In keeping the above references, the majority of the marriages are encouraged to be held at the Masjid, but if a woman is appointed as registrar, it will be forbidden for her to enter to the Masjid as the Scholars' of the four *Madhabs* are of the view that it is not permissible for a menstruating women to stay in the masjid. They quoted as evidence for that the report narrated by al-Bukhaari (974) and Muslim (890)

In the event a marriage is conducted in a place other than a masjid, the travelling of women alone, the mingling of women with non-mahram men and processing the registration will no doubt have practical and Shari'ah concerns.

Appointing women as Quazi

The view of the Maalikis, Shaafa'is ,Hanbalis, and of some of the Hanafis in appointing women as judge (Quazi) is that it is not permissible for a woman to be appointed as a judge, and if she is appointed, the one who appointed her is sinning, and her appointment is invalid, and her judgements carry no weight, no matter what ruling she passes. For more clarity: *Bidaayat al-Mujtahid* (2/531); *al-Majmoo'* (20/127); *al-Mughni* (11/350).

Below are the evidence for the above;

1. Allah says in verse 4: 34 : ***"Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means"***

'Ali ibn Abi Talhah said, narrating from Ibn 'Abbaas *(RadhiAllahu Anhu)*: '*Men are the protectors and maintainers of women*' means that men are the leaders of women and they should obey them in areas where Allah has enjoined obedience. Obedience may mean treating his family kindly and protecting his wealth." (Tafseer Ibn Katheer, 1/490)

2. Allah says: **"*but men have a degree (of responsibility) over them*"** *(2:228)*

Allah has granted men a degree over women ,and if a woman were to be appointed as judge that would contradict the degree that Allah has given men in this verse, because in order for a judge to judge between two disputants, he must have a degree over them.

3. It was narrated that Abu Bakrah *(RadhiAllahu Anhu)* said: *When the Messenger of Allah (peace be upon him) heard that the people of Persia had appointed the daughter of Chosroes as their ruler, he said: "No people will ever prosper who appoint a woman in charge of their affairs."* *Sahih* -al-Bukhaari (4425)

The Islamic Scholars quoted this verse as evidence that it is not permissible to appoint a woman as a judge, because lack of prospering is a kind of harm, the causes of which must be avoided. The *hadeeth* is general in meaning and applies to all positions of public authority. So it is not permissible to appoint a woman, because the word "affairs" is general in meaning and includes all the public affairs of the Muslims.

Imam Al-Shawkaani said: There is no stern warning greater than stating that they will never prosper, and the most important issue is to rule according to the rulings of Allah, may He be glorified and exalted, and therefore this warning applies more emphatically to women.*(Al-Sayl al-Jaraar (817/1)*

4. The judge is required to be present among men's gatherings and to mix with disputants and witnesses, and may need to be alone with them. Islam seeks to protect women and preserve their honour and dignity, and protect them from those who would toy with them. So, Islam tells women to stay in their homes and not go out except in cases of necessity. And it forbids them from mixing with men and being alone with them, because that poses a threat to women and their honour.

5. The Prophet (peace be upon him) said: Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a **man** who knows what is right and gives judgment accordingly; but a **man** who knows what is right and acts tyrannically in his judgment will go to Hell; and a **man** who gives judgment for people when he is ignorant will go to Hell. *(Sunan Abi-Dawood)*

In this Hadith, it has been stated clearly that the Prophet (peace be upon him) has mentioned **male** in all of the above categories of Judges.

View of Hanfi school of thought

In the *Madhab* of Hanafi, taking all the contradictory views related to a woman being a Quazi, Dar ul-Ulum at Deoband, India's largest and most influential madrasa with expertise in the Hanafi school of thought, recently issued a fatwa declaring that appointing a woman as a judge was 'near haram' (*Makrooh Tahreemi*), or, in other words, reprehensible. The below decree has been issued related to the question of appointing a Woman as a Quazi. (Fatwa: 1526/1189/B=1431)

"Yes, she can be appointed as a judge, but it is *Makrooh Tahreemi*, i.e. doing so is near haram. It is mentioned in hadith: It means that a nation that makes a woman their ruler will never succeed, hence, woman should not be appointed as a judge."*http://www.darulifta-deoband.com/home/en/Womens-Issues/24427*

The great scholars of Hanfi School, Abu Zuhura make mention that even the Hanafi School is also with the consensus, that it is incorrect to appoint women as Quazi. The only difference is that in a situation where a woman has been appointed as Quazi at any place or in any circumstances, whether her ruling can be executed or not. Thus

this is the only reason that appointing women as Quazi didn't take place during the periods where Hanafi school of thought was widely practiced.

With regard to A'isha's *(RadhiAllahu Anha)* participation in the 'Battle of the Camel', it is important to note that it happened unexpectedly among the faction. Being the mother of the *ummah* (*ummahatul mu'mineen*), she was requested by Zubair and Talha *(RadhiAllahu Anhu)* to reconcile the matter within the parties. Definitely she was not in command of the army nor she attempt to be the person in charge. And at the same time many scholars have stated that she use to regret whenever she remembers the incident. This has been further supported by a well-known scholar Imam Zahabi in his book *Siyar-ul-A'laam*. And further more Ibnu Thaymiya in his book "Minhajus Sunna" have stated that whenever A'isha (ﷺ) remembers this incident she will weep so much and due to this her veil will get soaked with tears.

The primary sources in deriving any rulings in Islam are the *Quran*, the *Sunnah*, *Ijama'* and *Qiyas*. As a general rule, it is not permitted to take incidents without any basis as an evidence for religious affairs. Incidents such as:

- the appointment of Shifa bint Abdullah as a market controller by Umar, which is an unauthentic source,
- the lady called Shajaratul Durr, after the murder of Izzuddeen Durr Kumani, having ruled Egypt for three months which is un-Islamic Historical event and the Ruler of Yemen,
- Al-Hurrah as-Sulayhiya (al-Ismāʿīliyyah) – who belongs to the *Isma'ili* branch of *Shiaism* cannot be taken as evidence in appointing women as Quazi.

Further explanation in this topic is given our comprehensive report, which includes Views of Al-Tabari and Ibnu Hazm's

In this regard the Majority Committee Members Recommendation are listed as follows

(1) Not Deleting the word "male" in sections 8(1), 9(1) and 10(1) dealing with the appointment of Registrars of Muslim Marriage, Temporary Registrars and Special Registrars;

(2) Not Deleting the word "male" from sections 12(1) and14(1) of the Act dealing with the appointment of Quazis and Special Quazis;

(3) It is recommend appointing women as assessors, counsellors, juries and mediators and also to MMDAB as far as Shari'ah principles are adhered. In these circumstances, it is her duty not to indulge in situations where she will be compelled to compromise Shariah.

Registration & Wali

Registration

Based on the rationale explained below, we state our recommendation in regard to the topic of of registration & Wali for the consideration of the Committee.

As far as Islam is concerned in order for a marriage to be valid, at least four people are required. The Wali of the bride (guardian), the bridegroom and two Muslim witnesses both of whom must be free men, males over the age of puberty, ability to see and hear properly and be familiar with the language of the contracting parties. If these conditions are met, and the contract is done by means of the proposal (*Ijab*) and acceptance (*Qabool*) by the *Wali* and the groom, then the marriage is considered valid.

If a marriage is performed as mentioned above, in the sight of Allah it is valid and accepted; hence Islam has not made registration as an integral part of the marriage for its validity.

Ruling of Writing Contracts in Islam

The verse 2:282 which explicitly talks about the correct way of lending money which Allah mentioned in *Sura al-Baqarah*, is about debt, and has no reference what so ever to the writing of a marriage contract in Islam.

"O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuses to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable to dictate for himself, then let his guardian dictate in justice….." [Al-Baqarah 2:282]

Based on the verses 2:282, 283, majority of scholars are of the view that guaranteeing a debt in one of these three ways (writing, witnesses or pledge) is *Mustahab* (recommended), but it is not *Waajib* (obligatory) *[Tafseer al-Qurtubi in the verses : 2:282, 2:283]*

This is to protect people's rights so that they will not be exposed to loss because of forgetfulness or confusion, and it is also a precaution against those who do not fear Allah.

Failing to fulfil these three recommended acts in a debt agreement, it does not invalidate nor it is considered as a sin. But still the agreed parties are entrusted to discharge their trust.

The verse 2:283 itself clearly indicates that:

"If you are on a journey, and find no scribe, then (you may have resort to holding something as) mortgage, taken into possession. However, if one of you trusts the other, then the one who has been trusted should fulfil his trust, and should fear Allah, his Lord. Do not conceal testimony. Whoever conceals it, his heart is surely, sinful. Allah is All-Aware of what you do."

"Trust means not guaranteeing the loan by writing it down, having it witnessed or asking for a pledge. But in this case it is essential to fear Allah. Hence in this case Allah commanded the one who is in debt to fear Allah and discharge his trust." *[Tafseer al-Sa'di 2:283]*

While the majority of the scholars have not stated the compulsion of documenting a debt contract based on this verse revealed solely addressing this subject, hence concluding matters base on verse 2:282 that making registration a pre-requisite for the purpose of making the contract of marriage valid and binding is an incorrect interpretation and neither it's a general consensus of the Muslim community do so.

Registration of marriages is very important because there are many benefits in it. In fact, registration will mainly benefit women, as the registration certificate would be of evidential value in matrimonial and maintenance cases, and prevent unnecessary harassment meted out to them. It will also be of evidential value in matters of the age of parties, the custody of children and the rights of children born out of such marriages. But, unregistered marriages cannot be described as null and void since that would not comply with the Shari'ah

Wali

It is not permissible for a man to marry a woman without the permission of her guardian, whether she is a virgin or previously-married. This is the view of the majority of scholars, including Imam Shafi, Imam Malik and Imam Ahmad. According to the Shari'ah, the involvement of a Wali is an integral part of the marriage for its validity, without which the marriage contract will be null and void. The relied upon position within the Hanafi School is that the marriage of a free, sane and adult woman without the approval of her guardian (wali) is valid if the person she is marrying is a "legal" and suitable match (kuf') for her. Conversely, if the person she is marrying is not a legal match for her, then her marriage is considered invalid, under which an

incompatible marriage can be undone and nullified by the Quazi if the Wali's permission has not been obtained.

However, this does not mean according to Hanafi School, that such a marriage is encouraged or permitted without any blame. Disobeying one's parents is one of the most serious of sins in Islam, and as such, no School would, and can, allow going against the wishes of one's parents outright. Many Hanafi jurists (fuqaha) have pointed out that it is generally blameworthy and going against the Sunnah to marry without the consent of the Wali regardless of whether the spouse is a legal match or otherwise due to the many Hadiths of the Messenger of Allah (Allah bless him & give him peace) emphasizing the importance of having the approval of one's guardian.

While the Shariah has prescribed that no marriage is valid without the *Wali* acting on behalf of the bride, the Prophet (peace be upon him) has emphasized the importance of guardians obtaining the consent of the bride to marry her future partner. This in fact should be considered as a mandatory act, which if not complied, would be considered an offence. It has been narrated in a Hadith:

"*A previously-married woman should not be married until she has been consulted, and a virgin should not be married until her permission has been sought." They said: "O Messenger of Allah, what is her permission?" He said: "If she remains silent*.

A father is generally the *Wali* of the bride, and he may marry her off without her consent, if she is a virgin, provided certain conditions are met. It is, however, *Mustahab* (recommended) to acquire the consent of the bride prior to marriage. As for the non-virgin (i.e. a widow or a divorcee), the father may not marry her off without her consent. For such a marriage of a virgin without her consent to be valid there are certain provisions:

a) That there will be no clear animosity between father and daughter.

b) That she be married to someone who is her social equal (compatible and suitable).

c) That the *Mahr* shall not be less than the *Mahr ul Mithal*.

d) That the groom shall not be incapable of giving the *Mahr*.

e) That she should not be harmed or inconvenienced through marriage to a blind man or an old man or a cripple etc.

The guardian should only give her in marriage for her interests, not for his own benefit. In the event a *Wali* misuses his authority and gives his daughter in marriage in an inappropriate manner, and fails to adhere to the above mentioned conditions

prescribed by the Shari'ah, she has the liberty and the right to come out of the wedlock. This principle has been recognized by Section 47 (2) of the present Act , which empowers the Quazi to overrule the stand of the *Wali*.

Section 47(2) of the Act states:

"A Quazi may inquire into and deal with any complaint by or on behalf of a woman against a Wali who unreasonably withholds his consent to the marriage of such woman, and may if necessary make order authorizing the marriage and dispensing with the necessity for the presence or the consent of Wali."

In this regard the Majority Committee Members Recommendation are listed as follows

1. No Amendments shall be made to Section 16 of the Act, in which each and every word has been drafted by our predecessors with great wisdom and long sightedness. Based on Quran, Sunnah, Ijma the integral parts of Nikah for its validation are Bridegroom, Wali, two witnesses and its proclamation of the contract, thus Islam has not made registration as an integral part of the marriage for its validity. In no circumstance the amendments to the act should indicate that the unregistered marriages become null and void.

   Section 16 (Should remain as it is)

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

2. Since non registration of a marriage will definitely cause severe consequences, it is permissible to make the registration mandatory and non-performance of it as an offence based on Maslaha (Public Interest). Section 81 Part X (Offences and Penalties) of the Act, which imposes a fine for non-registration, indicates the legal validity of the marriage. And it also indicates that the persons mentioned in Section 17(2) shall be guilty of an offence due to non-registration of the marriage. In this regard a fine for committing an offence under Section 81 shall be suitably amended.

3. In order to mitigate the unfortunate incidents in marriage, based on Maslaha obtaining the signature of the bride can be made as a mandatory requirement, and not obtaining the signature to be considered as an offense by the registrar, which if not complied, should constitute an offence under Part X (Offences and Penalties) of the Act.

4. Sections 17 (duty to cause the marriage to be registered), section 18 (declaration and form of registration) and Section 19 (*entries of the marriage to be signed and attested*) could be amend to include brides signature & Consent as prescribed below, but in no circumstance it should indicate that without the consent of *Wali*, a bride on her own free will, can proceed with her marriage. Because occurrence of a Nikah without the consent of the wali is considered as invalid according to the majority of the scholars and blame worthy according to Hanafi School of thoughts.

   Amending section 17 (2), which is "Duty of Causing the Marriage to be registered" with following lines:-

   a) the bridegroom; and

   b) in every case where the consent of the wali has not been dispensed with under section 47 and is required by the Muslim law governing the sect to which the bride belongs or such bride suffered from some other incapacity, the wali of the bride;

   c) bride, and

   d) the person who conducted the Nikah ceremony connected with the marriage.

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

   18(1) before the registration of a marriage, there shall be made and signed in the presence of the Registrar

   (a) a declaration by the bridegroom and, where the bridegroom has not attained the age of eighteen years or suffers from some other incapacity, the person who intends to officiate as the marriage

guardian (wali) of the bridegroom at the nikah, substantially in form IIA set out in the First Schedule;

(b) a declaration by the wali of the bride substantially in form IIIB set out in first Schedule:

(c) a declaration by the bride, in every case where the consent of the wali has not been dispensed by the Muslim law governing the sect to which the bride belongs, substantially in form IIIB set out in that first Schedule

Amending section 19(1) of the Act by the substitution thereto of the following lines:-

19 (1) the statement of particulars entered in the register in respect of each marriage shall be signed in the original, the duplicate and the third copy, by

(a) The bridegroom

(b) The Wali of the bride; if any

(c) Bride

(d) The person who conducted the Nikah Ceremony connected with the marriage; and

(e) Two witnesses, being person present at the Nikah Ceremony

(f) The Registrar

5. To discourage late registrations, we propose to implement stringent procedures to prove the occurrence of the marriage, whereby the public would realize the importance of timely registration.

6. Under no circumstance bride and bridegrooms 'sect' has to be declared in the first schedule

Age of Marriage

Based on the rationale explained below, we state our suggestions on the above matter for the consideration of the Committee

Qura'nic Verses 65:4, 4:3, 4:127 and 24:32 explicitly indicate that a Nikah before puberty is valid and permissible. Even though this permissibility exists, child marriage is not promoted in Islam. The Quran does not prescribe a marriage for a young girl unless there is clear evidence that such a marriage will genuinely serve the interest of the girl. A person who adopts the practice of child marriage, without considering the interest and welfare of the child will be demonstrating his ignorance, immorality and his impiety.

The main source that indicates permissibility of a marriage before puberty is the Prophet's (peace be upon him) marriage with A`ishah (RadhiAllahu Anha) which has been reported in Ṣaḥīḥ al-Bukhārī and Sahih Muslim.

Rejecting the Hadith above amounts to rejecting entire deen. The mischievous interpretation that not a single scholar who either reported the Hadith or compiled the Hadith had ever met the Prophet Muhammad or his companions or his wives and other attempts to create doubts in the hearts of the Muslims on the authenticity of this Hadith is baseless. Such an attempt degrades the very authentic hadith kitab Ṣaḥīḥ al-Bukhārī, which is considered next in status to the Holy Qur'an. This fact is accepted by almost all the prominent Islamic Scholars in the world. The Arabic word 'Sahih' is itself translated as authentic or correct

Ṣaḥīḥ al-Bukhārī and Sahih Muslim are two Kithabs of the Sihah as-Sittah (Six major Hadith Collections). These Prophetic Ahaadith were collected after being transmitted from Nabi Salallahu Alahi Wasallam to the Sahabah; then to Taabi'ee; then to the Taba Tabeen and thereafter to the Imaams of Ahaadith.

Consensus of Companions and Islamic Jurists (Al-Ijma') on age of marriage are given below

1. Imam Shafie says: Most of the companions of the Prophet (peace be upon him) gave their daughters in marriage in their small age.
2. Imam Abu Haneefa says: There is no difference of opinion in a father being permitted to give in marriage his small children before puberty without their consent.
3. Imam Ahmed Bin Hambal, when asked: Is it permissible for a small child's father to give her on marriage? He said: There is no any difference of opinion among the Ulama in this matter.

4. Further, this matter is concluded based on consensus (Ijma') , Imam Marwazi, Ibn Munzir, Al- Muhallab Al Maliki, Ibn Battal al- Maliki, Ibn Abdil Barr, Al Baghavi, Qadhi Iyaadh, Ibn Arabi, Ibn Hubaira, Ibn Rushdh, Ibnu Qudhama, Al Qurtubi, Ibn Thaimiyya, Imam Theebi, Imam Zarkashi, Al- Ubbee, Ibn Hajr Askalani, Al- Mirdhaawee, Ar-Ramlee, Mulla Ali Qari, Ash Shawkanee and all scholars have said that small children before attaining puberty could be given in marriage.

When applying the principle of Maslaha Mursala relating to the age of marriage the following matters should be considered instead of applying such principle in isolation.

1. First and foremost it should not contradict the islamic Shari'ah and its common principals and rulings.
2. After thorough research, it should be established that the issue is in-fact a Maslahaa and, as per the ruling, it should bring a benefit or prevent harm.
3. Maslahaa brings benefits or prevents harm; it should harmonize with the objectives of the Shari'ah.
4. This Maslahaa which is definite should be a common Maslahaa and not an individual Maslahaa, meaning, as per the ruling, it should be beneficial to most of the people or should prevent harm to many.
5. This task should be performed by a Mujtahid or through collective consultation.

Based on the above, it is permissible to restrict child marriage on the principle of Maslaha. However, in no circumstances have we been given the authority by the Shari'ah to claim that a Nikah is invalid, if it happens without the approval of a Quazi. We should understand that Maslahaa based on the Qur'an and the Sunnah is to validate the Nikah.

The permissibility of child marriage in Islam has been granted for the best interest of that child. Even though they are given in marriage they should be handed over to their respective husbands, only when they are physically suitable for consummation. A period of time that was set forth between the marriage and consummation of A'ishah (RadhiAllahu Anha) was only due to this reason.

"Those young, sick and lean female children who have not attained the strength should not be given until the impediment ceases to commence the married life. It is undesirable (Makrooh) for the Wali to give" (Tuhfatul Muhtaj, Chapter of Nikah)

An-Nawawi said, “It should be noted that Imam Shaafi’i and his companions said: It is recommended for the father or grandfather not to arrange a marriage for a virgin until she reaches the age of puberty and he seeks her consent, lest she find herself trapped in a marriage that she resents”.

In this regard the Majority Committee Members Recommendation are listed as follows

1. Minimum age of marriage for male and female would be 18 (Eighteen years), but approval can be obtained from Quazi for age between 16 (Sixteen) and 18 (Eighteen) and for marriage below 16 if occurred, in any circumstance MM&D Act should not indicate such marriage as invalid.

   Section 23 shall be amended as follows

   Notwithstanding anything in section 17, a marriage contracted by a Muslim who has not attained the age of eighteen years shall not be registered under this act unless the Quazi for the area in which the Muslim resides has, after such inquiry as he deems necessary, authorized the registration of the marriage, being satisfied that

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

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

2. No changes shall be made to section 25(1), which states declaration of Shaffie law as to marriage of a woman of that sect, hence 25(1) should remain same.

3. Amending section 47(1)(J) of the MM&D Act by substituting for the word “girl” occurring therein, the word “Muslim” and by substituting for the word “who has not passed the age of twelve years” the words “who has not attained the age of eighteen years”

Polygamy

Categories to whom *Shari’ah* prescribes marriage

According to the *Shari’ah*, marriage is a contract between two partners of opposite sexes, bringing about certain rights and responsibilities, whereby among other things, sexual relations is made permissible. Following are the categories to whom *Shari’ah* prescribes marriage.

Recommended (*Mustahab)*

According to the Shafi *Madhab* marriage is *Mustahab* if one is in need thereof and also possesses the necessary means for the *Mahr* and the maintenance of the wife. It is thus not *Mustahab* if one has no desire to be married or if the one is not in possession of the means.

Obligatory *(Waajib)*

If there is a distinct fear and possibility of falling into fornication *(Zina*), marriage becomes *Waajib*.

Offensive *(Makrooh)*

On the other hand even if one desires marriage and possesses the necessary means for it, but at the same time afflicted with extreme feebleness through old age or perpetual illness or impotency, disfigurement etc. it is *Makrooh* to marry.

In addition to above the following two conditions have been prescribed by *shari'ah*, to one who intends practicing polygamous marriage.

- Treat the wives in a just manner
- Capability of fulfilling the basic needs of wives

<u>Elucidating the misconceptions of the Quranic verse 4:3 and 4:129</u>

First of all it is important to explain that the interpretation of the Quranic Verse 4.3, stated in the final draft of the proposed amendments to the MMDA, is incorrect. It is mentioned that polygamy is only permitted in exceptional circumstances, due to the reason the above verse being revealed soon after the Battle of *Uhad*, in which many widows and orphans were left behind. Before discussing the amendments, the correct interpretation of the above Verse should be understood.

Allah says in *Al-Qur'an*:
"O men, fear your Lord who created you from a single soul, and from it created its match, and spread from the two, many men and women. And fear Allah in whose name you ask each other (for your rights), and surely, Allah is watchful over you." (4:1)

"And give the orphans their property, and do not substitute what is bad for what is good, and do not eat up their property Along with your own. It is, surely, a great sin."(4.2)

And if your fear that you will not do justice to the orphan, then, marry the women you like, in twos, in threes and in fours. But, if you fear that you will not maintain equity, then (keep to) one woman, or a bondwoman you own. It will be closer to your not doing injustice.(4:3)

Is Polygamy limited for exceptional circumstances?

In the Verse 4.1 & 4.2, guardians were warned against pilferage or misappropriation in the property of orphans. The Verse 4.3 is an extension of the basic command from another angle. Here they are warned against any attempt to marry orphaned girls under their guardianship hoping to get away, by fixing a dower of their choice and claiming their properties as additional benefit.

During *Jahiliyyah* (the period of ignorance) guardians holding orphaned girls under their charge, used to pick up the ones who had good looks or owned properties of value and marry them or arranged to have them married to their sons. They would fix the dower of their choice, usually the lowest, and maintained them in whatever manner they elected for they were the very guardians and caretakers for them.

There is a narration in Saheeh al-Bukhari from A'ishah *(RadhiAllahu Anha),* which reports that an incident of this nature came to pass during the blessed time of the Holy Prophet (peace be upon him). There was someone who had an orphaned girl under his guardianship. He had a fruit-farm in which this girl held a share. This man married the orphaned girl and, rather than give her dower and things from his pocket, took her very share in the farm in his possession. **Thereupon, the following verse was revealed**:

*"And if you fear that you will not do justice to the orphans, then marry the women you like in twos, in threes, in fours"(*Verse 4.3)

It means that if you apprehend that after marrying a girl under your guardianship, you cannot do justice to her, then, instead of marrying her, you should marry **other women of your choice**.

So, the Holy Qur'an has very clearly declared that every excuse, device or stratagem set up to usurp the property of the orphan is impermissible. It is the duty of the guardians that they should protect the rights of the orphans honestly

Taking the sequence of the verses into consideration, first part of the Verse mentions ***"And if you fear that you will not do justice to the orphans"***. The term used here is "*Yatama*", which means orphan girls who have not attained the age of puberty and definitely NOT the widows. If the word "*An Nisa (Women)*" is referred to the widows and orphans as it is indicated in the report, then it should have been "*then marry from them" (Minhunna)* which is the pronoun of "*Yatama",* instead of "*marry the*

women you like". Accordingly the interpretation in the report in this verse is totally against the eloquence of the Arabic Language and degrades the status the Quran. Thus it is explicitly evident that the word "*Nisa*" means "other women of your choice".

When the Verse is taken in whole, it is understood that polygamy is clearly being permitted without exceptions of circumstance. And the latter part of the Verse, ***"then marry the women you like",*** makes it clear that Qur'an does not restrict the choice to widows or orphans, instead it discourages marrying orphans due to the inability of man to do justice with the property of the orphans.

Correct explanation of dealing "Just and Fair"

Let us now see what the Qur'an says after allowing polygamy up to four wives. It says:

"But, if you fear that you will not maintain equity, then, (keep to) one woman, or a bondwoman you own"[2]

Through this part of the Verse, we find out that having more than one wife is permissible and appropriate only on condition that equality can be maintained among all wives as required under the *Shari'ah*, and that the rights of all can be duly fulfilled. As stated earlier, the injustice of multiple marriages during *Jahiliyyah* without any considerations for the rights of wives had made a mockery in wedlock relationship. So, the command was: If one does not have the capability to discharge his obligations in this manner, then restrict himself to no more than one.

Meantime we should keep in our mind, Allah emphasis that a person should have the capability to discharge his obligation even in his first marriage through the following verse.

"And those who cannot afford marriage should keep themselves chaste until Allah enriches them out of his grace"[3]

The importance of looking into the capability of the groom in discharging his obligation to his bride is not restricted only to polygamy but even it implies to monogamy as well. It is in this sense we should understand that as an individual decides for himself, without any external screening process to find out his capability of fulfilling the needs on his first marriage, the same non-screening process should be applied in subsequent marriages too.

So if we were to bring in restrictions due to few unfortunate situations that arise in polygamous marriages, the very same issues or severe than that have to be dealt even in monogamy. In reality there are more divorces and *faskh* which happens in first

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[2] 4:3

[3] 24.33

marriages as compared to subsequent marriages. If we think that the only solution for problems that arise due to polygamous marriages, is to bring stringent restrictions, the same stringent screening mechanism needs to be implemented even in the first marriages which is not a practical approach. There for in both verses 24:33 and 4:3 Allah commands us to fear Him with regard to fulfilling the duties of a marriage, in spite of it being a polygamous or monogamous.

We feel that some have misinterpreted the verses 4:3 & 4:129, and they have fallen into a strange error. The correct understanding for these verses, is not "*the onerous nature of the condition of being fair and just emphasis by Allah*" as you have mentioned in the report, rather the word "equity" mentioned in verse 4:3 is about equality of treatment in things which are within the control of man.

For example, the coverage of personal expenses and parity in overnight stays etc. As for the word equity mentioned in the verse 4:129 it refers to the things out of man's control, such as the natural inclination of his heart which might tilt towards one of them, there is no accountability there for this is not a matter of choice. However, the binding condition is that, this tilt should not affect matters which are within man's control. Our noble Prophet, may Allah bless him for ever and ever, treated his venerated wives with full equality in everything within his control, yet he pleaded with his Lord:

*"*O Allah, this is my 'equalization' in what I control. So, do not hold me accountable in matters you control and I do not.*"*[4]

Obviously, something even an infallible Messenger of Allah (peace be upon him) is not able to do, how can someone else claim to have the ability to do it? Therefore, the verse 4:129, *"And you shall be unable to maintain perfect equality between the women"* refers to the 'matters out of man's control.

Here, it has been made clear that love and the tilt of the heart are something out of man's control. It is beyond man's power to achieve perfect equality of treatment in what comes from the territory of the heart. But, even this involuntary conduct has not been left totally unchecked and unbalanced. In order to correct it, it was said: *"So, do not tilt, the full tilt"*. It means: If you love one of your wives more than the other, there is nothing you can do about it. But, total indifference and heedlessness towards the other wife is not permissible even under this situation. The justice and equality mentioned in *(If you fear that you will not maintain equity, then keep to one woman 4:3)* refers to the same justice in matters of choice and volition, any discrepancy in which is a great sin.

When some people compare the verse under discussion, 4:3, and the verse quoted just a little earlier, 4:129, they are confused and they think: Here is this verse from *Surah al-Nisa'* which carries the command: 'If you fear that you will not maintain

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[4]Sunan Al-Thirmidhi - 1140

equity, then (keep to) one woman. Then, there is this second verse which says categorically that justice and equality (among wives) is just not possible. As a result, they doubt, having more than one **wife should not be permissible**. But, such people should ask themselves: If, through these verses, Allah Almighty aimed at putting a cap over more than one marriage, what need was there to go into all these details? Why would the Qur'an say: *'marry women you like, in twos and threes and fours?'* and then, what would be the meaning of saying: *'if you fear that you will not do justice*' - for, in this situation, injustice is certain. How can we then explain the element of fear which would become meaningless? In addition to this, the words and deeds of the Holy Prophet & and the noble Companions and their consistent practice prove the fact that having more than one wife (up to four) was never prevented in Islam.

The truth of the matter is what has been stated earlier, that is, the first verse of *Surah al-Nisa'* talks about justice and equality in what man can do by choice while the second verse points out to man's inability to control lack of equal treatment when it comes to love and emotional inclination. Therefore, these two verses have no contradiction, nor does it prove that pluralities of marriages is absolutely forbidden or emphasis any need to enforce stern restrictions to it.

A very important fact that we need to understand in this injunction is NOT to discourage polygamy or make it a daunting act to perform. Islam being comprehensive has provided guidance to the Men who desires to opt polygamy without infringement of women's rights in doing so.

Indeed, the verse 4:3, by permitting, restricting and pronouncing equality in polygamy has safeguarded the women's right.

1. If Polygamy was not permitted, Adultery would become a norm. Women who involve in such dishonoured act will get greatly oppressed, furthermore the condition of the wives of the men who get involved in such act would be very pathetic
2. If Polygamy was permitted without any restrictions or warnings, men would take as many women as their wives (more than four) which will result in not treating them equally.
3. If warnings of equal treatment were not pronounced in this verse, man will treat his wives as per his wish, which will infringe their rights of them by spending less time, providing less rations, etc.

Going through the following amendments in section 24(1) (Second or Subsequent marriages) in your final draft which states as follows:

"…….issue notice in the prescribed form to each of the persons to whom the applicant is married, informing them of his intent to contract another marriage, and requiring such persons to appear before him on a date and time to be specified in such notice, being at least one month after the date of the said notice."

And in 24(4)

(4) On a date that may be fixed by the Quazi Court for this purpose, the Court may inquire into all circumstances that may be relevant to the application for permission to marry, including the following:-

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

Further explanation in this topic is given our comprehensive report

In this regard the Majority Committee Members Recommendation are listed as follows

(1) When married male Muslims living with or maintaining one or more wives intends to contract another marriage he shall apply in the prescribed form, at least thirty days before contracting such other marriage to the Quazi Court holden in the Quazi division within which he resides, for permission to contract another marriage, and upon receipt of such application

(2) Quazi will conduct an extensive study and will establish lawful (Sharia'h) cause and financial capability of the male Muslim who intends to contract another marriage. When doing so Quazi should conduct himself unbiased and by no means should he Act in a way that would infringe the rights of all parties concerned in this process. Quazi under no circumstances shall go beyond this mandate to perform his duties in this regard.

(3) After such an impartial inquiry, The Quazi Court shall, make order setting out the reasons for refusing or granting permission for the applicant to enter into a subsequent marriage.

(4) There upon, it shall be the duty of the Quazi Court to inform the applicant's intent to contract another marriage to each of the persons to whom the applicant is married and intended to marry.

Divorce

Divorce in Islam

Talaq is the word, used in Islamic Law for divorce. It is an Arabic word which means: '*to set free*'. It is only in unavoidable circumstances that *Talaq* is permitted in Islam as a lawful method to bring marriage contract to an end. The Shari'ah takes a very reasonable and realistic view of such a sad situation where marriage becomes impossible to continue and by all means fails to bring the couple together, by permitting divorce as a last resort. It is true that the sanctity of marriage is the essential basis of family life. But it is also true that the two incompatible individuals cannot be kept together in a life of hell, throughout the life. It is therefore necessary to give due allowance for human weaknesses and allow such people to part for good.

Islam Discourages Divorces

The Prophet (peace be upon him) is reported to have said:

"Of all the things permitted in Law, divorce is the most hateful thing in the sight of Allah."[5]

"A woman seeking divorce unnecessarily will be deprived of the scent of Paradise."[6]

Types of Divorce

Talaq ar Raj'i (revocable divorce)

In this type of Divorce, the husband pronounces *Talaq* once or at the most twice. After the pronouncement of divorce the wife's period of *Iddah* starts. Before the period of *Iddah* expires, the husband may, if he desires, take his wife back. This is called "*Ra'ja*" or "*Ruju*" (return). But the right of "*Ra'ja*" will be lost as soon as the *Iddah* is complete and then the *Talaq* will cease to be revocable. However the husband and wife can still reconcile with a new marriage. After such a fresh marriage in future only one or two divorces (not three) will be counted as an absolute /irrevocable divorce.

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[5] Sunan Ibni Majah, 2018

[6] Sunan Abi Dawood – 2226, Sunan Ibni Majah-1187, Sunan Al-Tirmidhi-2055

Note: if there is no consummation, there is no *Iddah*. Therefore *Talaq* is always irrevocable where marriage has not been consummated.

***Talaq Al Bain* (Irrevocable Divorce)**

Talaq Al Bain is divorce with three pronouncements of divorce by the husband in successive sittings or at the same sitting or divorce before the consummation of marriage.

If a husband divorces his wife three times, he cannot remarry her until after she has married another man and that husband has divorced her after consummation of marriage.

Should *Talaq* be pronounced only in presence of the Quazi?

Talaq, is a right granted for a husband, to be unbound legally from his marriage contract, in the event he is unhappy with his marriage life. If one cannot live happily, Al Quran guides to part with justice.

Furthermore, the Quran discusses the subject of *Talaq* in many places, but nowhere does it state to pronounce *Talaq* in presence of the Quazi.

*"**When you have divorced women**, and they have reached (the end of) their waiting period, do not prevent them from marrying their husbands when they mutually agree with fairness …."*[7]

*"There is no liability (of dower) on you **if you divorce women** when you have not yet touched them, nor fixed for them an amount …."*[8]

"*O prophet, **when you people divorce women**, divorce them at a time when the period of Iddah may start. And count the period of …"*[9]

"*O you who believe, when you marry the believing women, and **then divorce them before you have touched them**, then they have no obligation of any Iddah (waiting period) for you that you may count. So give them (due) benefits, and release them in a pleasant manner …"*[10]

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[7] 2:232

[8] 2:236

[9] 65:01

[10] 33:49

"***If you divorce them before*** *you have touched them, while you have already fixed for them an amount (of dower), then there is one half of what you have fixed, unless they (the women) forgive …."*[11]

Above verses states '***if you pronounce Talaq***' or '**you pronounce Talaq**', and does not state to pronounce *Talaq* in presence of the Quazi.

And when Ibn Umar *(RaliAllahuAnhu*) said 'I have pronounced *Talaq* to my wife', the Prophet (peace be upon him), did not state that his *Talaq* is not valid as he has not pronounced *Talaq* in front of him (as he was the Quazi). But the Prophet (peace be upon him) accepted this as a valid *Talaaq*, and guided the necessary steps that should be followed thereafter.[12]

Another form of separation of husband and wife is '*Dhihaar*[13]'. Wife of Aws ibn Samit *(RaliAllahuAnhu*) came to the Prophet (peace be upon him) and stated that her husband has pronounced *Dhihaar*, the Prophet (peace be upon him) did not state that the pronouncement should be made in the presence of him (as he was the Quazi).[14]

Many similar incidents have occurred during the time of Prophet (peace be upon him). The Imams of the four *Madhabs*, (Islamic Jurisprudence) have stated the same ruling in the above situation. None of the scholars have stated that *Talaq* **should be only pronounced** in the presence of the Quazi and if pronounced in the absence of the Quazi, the *Talaq* is invalid. **But** there is no necessity for us to encourage the public in this regard.

Pronouncement of *Talaq*

1. **Explicit terms – (*Sareeh*)**

   In this way the word *talaq* itself is used, if so, *talaq* ensues with or without the intention of divorce, even if done in jest or in anger. Hence if a man says addressing his wife "*I talaq you*" "*I gave you talaq*"," *I divorced you*" marriage

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[11] 2:237

[12] *Saheehul Bukhari 4908*

[13] Definition of *Dhihar*: If a man states that his wife is as *haraam* to him as his mother is or another *mahram* woman who is permanently forbidden to him, then he has uttered a great evil and spoken falsehood, and he comes under the rulings that result from *Dhihaar*. His wife remains *haraam* to him until he has fasted for two consecutive months; if he is not able to do that because of a legitimate *shar'i* reason, then he must feed sixty poor persons.

[14] Musnad Ahmed 27319

is terminated. Even in the event of his explaining that he had no intention of doing so his explanation shall not be accepted, and the period of *Iddah* is commenced immediately. For the effectiveness of *talaq* neither permission is required from Quazi nor is the presence of witness required.

2. **Ambiguous terms - *(Kinaayah)***

In this way the word *Talaq* is not used but such terms are used which may indicate *talaq* as well as something else. Thus, if the intention was '*Talaq*' to terminate the marriage, it is considered *talaq,* otherwise not. For example saying the words '*you go home*' or '*you are free from me*' while intending *Talaq,* that *Talaq* is valid.

3. **Nonsensical utterance – *(Laghw)***

There are some ways even the explicit terms of *talaq* are pronounced; the *talaq* will not be effective. For example if someone utters '*Talaq, Talaq, Talaq'* without addressing his wife (without using pronounce such as you, her, or hers name), *talaq* will not be effective even though the intention is to give *talaq*.

In the same time *fuqaha* explains under the chapter of *tala*q many subsections and essential conditions which ensues to effect and in effect of the *talak*, such as talaq given in writing, permitting the wife to *talaq* herself, intention to talaq, talaq by force, number of talaq, sunni talaq(talaq pronounced on her clean period during which no sexual intercourse took place) and bid'i talaq(Talaq during mensuration period ,post natal bleeding of woman whose marriage has already been consummated), conditional talaq (for example if you go out of this house you are divorced) and so on and so forth.

A comprehensive study is required for someone to understand the subject of *talaq* along with the subsections which we have mentioned above. Furthermore one should understand the gravity of the subject matter and it possesses a very thin line of differences in each types of *talaq* with regards to its effectiveness and ineffectiveness. It is vital for a Quazi to have an in-depth knowledge on the subject of *talaq*, when he is passing verdict against it, if not a grave shari'ah violation could happen.

The Definition of *Khula'*

Khula' is the termination of marriage (through the use of the word *Khula*' or *Talaq*) where by the husband accepts a compensation giving the wife her freedom from the marriage bond.

If a man says "I give you *talaq* on a condition that you hand over that which you had received as *Mahr*", and wife accepts, this will be *Khula*'. And if wife says "I perform *khula*' from you by giving you fifty thousand rupees", and man accepts the offer, this is also *khula*'. The compensation may be any amount much or little as long as it is of value and a fixed amount. It is necessary in *khula*' that both parties shall agree on all aspects of the contract.

The basic principle concerning this is the verse in which Allah says:

"*And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul' (divorce)"*[15]

The evidence for that from the *Sunnah* is that the wife of Thaabit ibn Qays ibn Shammaas *(RaliAllahu Anhu*) came to the Prophet (peace be upon him) and said, "*O Messenger of Allah, I do not find any fault with Thaabit ibn Qays in his character or his religious commitment, but I do not want to commit any act of kufr after becoming a Muslim*." The Prophet (peace be upon him) said to her, "*Will you give back his garden*?" Because he had given her a garden as her Mahr. She said, "*Yes*." The Prophet (peace upon him) said to Thaabit: "*Take back your garden, and divorce her.*"[16]

Can Quazi give *Khula*' without the consent of husband?

The consent of both spouses is a necessary condition for the validity of *Khula*', and if *Khula*' takes place under compulsion, the *Khula*' is not valid.

As Justice Mufti Taqi Uthmani writes:

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[15] 2:229

[16] Saheehull-Bukhaari 5273

"*To the extent we have researched, approximately all the great Jurists (Fuqahaa Mujtahidun) are agreed, and the evidences of the Qur'an and Sunna support this, that Khula is a mutually agreed transaction between the two sides.*"[17]

The following are some of the verdicts of the classical Muslim jurists on *Khula*:

Shafi School - The great Imam and founder of the School that goes by his name, Imam Shafi writes in *Kitab al-Umm*:

"…the reason is that *Khula`* is in the ruling of *Talaq*. Thus no one has the right to divorce on behalf of someone else. This right is not gained by the father, the master, the guardian and not even the ruler."[18]

Hanafi School - The great Hanafi jurist Imam Sarkhasi writes:

"*Khula`* is permitted by the ruler and other than the ruler because it is a transaction that is entirely based upon mutual agreement."[19]

Maliki School - The scholar Allaamah Abu al-Waleed al-Baaji in his commentary on the *Muwatta* of Imam Malik:

"The wife will have to return to him if the husband does not want her separation through *Khula`* or by some other way."[20]

Hanbali School - The great authority in the Hanbali school Imam Ibn Qudaama states:

"For *Khula`* is a transaction, thus the absence of the need of the ruler, just as in sale transactions (*Bay`*) and the marriage contract (*Nikah*) and because it stands for the ending of a (marriage) contract by mutual agreement. For this reason it resembles the mutually agreed cancellation of a sale contract (*Iqalaah*)."[21]

This view is also the position of Imam Ibn Taymiyya and his famous student ibn al-Qayyim al-Jawziyya. The latter writes in his work *Zad al-Ma`aad*:

"That the Messenger of Allah ﷺ termed *Khula* to be *fidya* (an amount given in exchange for something) is proof that it has the meaning of a transaction and it is for

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[17] p.12 in Islam Me Khula Ki Haqiqat

[18] Kithabul Umm, Chapter: Khula

[19] Al-Mabsooth, Chapter : Khula

[20] Al-Munthaqa for Al-Baji

[21] Al-Mughni, Chapter ;AL-Khula'

this reason that the agreement of both the husband and wife has been made a condition in it."[22]

Faskh in Islam

In Islamic law the right of terminating the marriage through a *Talaq* has been given to the husband. There is great wisdom in this teaching of Islam. Notwithstanding the above, Islam has also taken into consideration the fact that a husband may sometimes abuse the power given to him and cause his wife undue distress by refusing to release her from marriage, despite the objectives of the marriage not being achieved. In these circumstances Islam has given the wife an opportunity to seek relief from such oppression. However, it is important to bear in mind the severe warnings directed to a wife who unduly seeks a divorce. The Prophet (peace be upon him) has mentioned that the fragrance of *Jannah* is Haram for a woman who seeks a divorce without a valid reason.[23]

The difference between *talaq* and *faskh*, where as in *talaq* it is the ending of the marital relationship by the instigation of the husband, and it involves specific, well-known phrases. As for *faskh*, it is annulment of the marriage contract and dissolution of the marital bond completely, as if it never happened, and this can only be done by means of the verdict of a Quazi or a *shar'i* ruling.

Reason for Faskh

The Jurist *(Fuqaha)* has mentioned reasons for *Faskh* and some of them are listed below

1. Inability to pay the proposed *Mahr*.
2. Financial difficulty on the part of the husband, and inability to spend on his wife's maintenance,
3. Presence of a defect in either spouse that prevents intimacy or creates revulsion between them.
4. Disappearance of the husband resulting in his whereabouts not being known to the applicant for period exceeding 4 years,
5. If one of the spouses apostatizes from Islam and does not come back to it.

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[22] (Zad al-Ma`aad, Chapter : Khlua')

[23] Musnad Ahmad

6. If a woman has been given in marriage without her consent to someone who is not in her social equal (compatible and suitable) and she requests annulment of the marriage from the Quazi

7. In the event the above mentioned reasons are not applicable and the couple are not willing to continue with the marriage even after undergoing a thorough reconciliation process and the husband or wife does not consent for '*Talaq*' nor for '*Khula*', according to the second view of Shafi schools of thought the Quazi shall proceed with '*Faskh*'.

In this regard the Majority Committee Members Recommendation are listed as follows

1. Not to remove the word 'Divorce' in section 16 and 98(2) of the MM&D ACT. Since both marriage and divorce should be governed according to the Muslim law governing the sect to which the parties to such marriage or divorce belongs.

2. Section 30 of the MM&D Act should not be repealed. With regards to provisions for the nullity of marriage it is recommended to bring under the MM&D Act separately without deleting section 30.

3. Section 30 is not obsolete and it is a right given to husband base on Qur'an and the Sunnah along with what has been supported by Ijma'a (unanimity) and Qiyas (analogy).

4. In case if husband after pronouncement of Talaq appears before Quazi, the Quazi should inquire the details of the pronouncement, intention and status of utterance which are very vital to decide the effectiveness of the Talaq. After such inquiry,

   (a) If Talaq has not occurred or have uttered word Talaq one or two times, The Quazi Court shall implement the procedure set out in the Second Schedule.

   (b) After an inquiry to find out the details of the pronouncement, intention and status of utterance which are very vital to decide the effectiveness of the Talaq, proved that it has been uttered three times, the Quazi will register the divorce according to section 30 of the MM&D Act.

5. When declaring reasons for Faskh, according to Shari'ah only following has been prescribed, in no circumstances any reason other what is mentioned below should be included in the MM&D Act.

    1. Inability to pay the proposed *Mahr*.
    2. Financial difficulty on the part of the husband, and inability to spend on his wife's maintenance,
    3. Presence of a defect in either spouse that prevents intimacy or creates revulsion between them.
    4. Disappearance of the husband resulting in his whereabouts not being known to the applicant for period exceeding 4 years,
    5. If one of the spouses apostatizes from Islam and does not come back to it.
    6. If a woman has been given in marriage without her consent to someone who is not in her social equal (compatible and suitable) and she requests annulment of the marriage from the Quazi

8. In the event the above mentioned reasons are not applicable and the couple are not willing to continue with the marriage even after undergoing a thorough reconciliation process and the husband or wife does not consent for '*Talaq*' nor for '*Khula*', according to the second view of Shafi schools of thought the Quazi shall proceed with '*Faskh*'.

9. The consent of both spouses is a necessary condition for the validity of *Khula*', and if *Khula*' takes place under compulsion, the *Khula*' is not valid. Based on above under no circumstances Quazi should force either party to establish *'Khula'* type of separation.

***Mataa' or Mut'ah* in Islam**

It is a financial compensation given by a husband to a wife who got separated. This has to be paid in *Talaq* and *Khula* type of separations, and only in one type of *faskh* separation.

Allah says the following in Quran regarding *Mataa'*:

"The divorced women deserve a benefit according to the fair practice, being an obligation on the God-fearing."[24]

"There is no liability (of dower) on you if you divorce women when you have not yet touched them, nor fixed for them an amount. So, give them Mataa' (a gift), a rich

[24] [2:241]

man according to his means and a poor one according to his means - a benefit in the recognized manner, an obligation on the virtuous."[25]

Clarification on whether *Mataa'* is there in *Faskh*

1. *Talaq* is the right of a husband. Since it is used by the husband the compensation for the loss incurred by wife *Mataa'* is paid. Since *Khula* is also *Talaq* the law is the same.

2. According to Quran and *Hadeeth*, *Mataa'* is given only for *Talaq*. There is difference of opinion among the jurists as there is nothing said in Quran and *Hadeeth* about giving *Mataa'* in *Faskh* type of separation. However, in Shafie School of Thought, in one scenario *Mataa'* becomes compulsory in *faskh*. That is, if the reason for the *fasakh* separation is only the husband and **he himself request for a *faskh* from the Quazi for his faults**, then *Mataa* is compulsory. For example, due to apostasy or impotency etc. of the husband.

3. *Mataa'* is not compulsory if wife says she cannot live with him and asks *Faskh* to depart from husband, whether he has any drawback or not, *Mataa* is not compulsory, because the wife herself chooses the separation.

4. At the request of wife if the husband gives *Talaq* or *Khula'*, paying *Mataa'* to her becomes compulsory. This separation is not treated as a reason of wife, because *Talaq* and *Khula'* are husband's personal rights.

5. If a woman was told *Talaq* once or twice, only after the *Iddah* period *Mataa'* could be received. As he has the rights to revoke her before the end of *Iddah* period. But, if the woman was told three *Talaqs*, before the end of *Iddah* she can ask for *Mataa'*.

Further explanation in this topic is given our comprehensive report

In this regard the Majority Committee Members Recommendation are listed as follows

[25] [2:236]

1. Where a marriage has been or is to be dissolved in terms of section 27 (Talaq) or 28(2) (Khula), under such two type of separation, the wife shall be entitled for mata'a.

2. In determining the quantum (Amount) of Mata'a to be awarded, the Quazi Court shall take into consideration only the following matters:

   (a) Consideration of the economic condition of the husband

   (b) The status of the wife

3. Section 97 be amended by adding to that section a definition of Mata'a to mean "a consolatory payment provided to the wife by the husband on the termination of marriage upon an order in terms of section 27*(Talaq)* or 28(2)*(Khula)*

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

i. The current judicial administration system of Sri Lanka prefers to divert matrimonial cases to mediation boards, rather than settling in courts, to give an opportunity to settle the case.

ii. If Attorney at law is represented 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.

iii. It will not be practical for some personnel's to bear the lawyer consultation fee and it will be an over burden with all their present calamities, specially the women.

iv. Lawyer representation would not make win-win outcome rather it gives an adverse impact on the harmony between the two parties.

Base on above it not recommended to enable parties to represent by attorney at law, thus,we endorse not to make any changes to section 74 of the Act