THE MUSLIM LAW OF MARRIAGE APPLICABLE IN SRI LANKA

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A - Introduction

Marriage is an institution set up for the well being of the individual and society. Indeed, according to the authoritative Shaffie text *Minhaj-et-Talibin,* "marriage is to be recommended for every man who feels the need of it, provided he is able to undertake the pecuniary obligations that result from it."[1] While Canekeratne J. in *Noorul Naleefa v Marikar Hadjiar* has pointed out that "marriage is, in Mahommedan law, simply a contract"[2] as opposed to a religious sacrament,[3] Qureshi has observed that "a Muslim marriage is a religious duty as well as a contract." [4] The marriage contract creates mutual rights and obligations binding on the spouses and confers upon the children born to them the status of legitimacy. The parties to the contract of marriage may therefore incorporate into their contract any terms that are not repugnant to the basic principles of Islam and morality.

The marriage law applicable to Muslims in Sri Lanka is contained in the Muslim Marriage and Divorce Act of 1951.[5] It is expressly provided in §16 of this Act that the validity of a Muslim marriage does not depend on "registration or non-registration" and should be determined according to "the Muslim law governing the sect to which the parties to such marriage…belong." Accordingly, in *Sideek v Shiyam*,[6] the Board of Quazis held that the registration of a marriage contrary to the principles of *sharia't* and the provisions of the Act is a nullity and of no force or avail in law. It is further provided in the Act that "in all matters relating to any Muslim marriage…, the status and the mutual rights and obligations of the parties shall be determined according to the Muslim law governing the sect to which the parties belong." Thus, the marriage is governed by *sharia't* law within the statutory framework of the Muslim Marriage and Divorce Act.

B - Sects and their importance

Before going into the details of the requisites of a valid marriage under Muslim law, it is necessary to say something about the great sects of Islam. These sects are extremely important in view of §§16 and 98(2) of the Muslim Marriage and Divorce Act, which provide that the validity of a Muslim marriage, and the status and mutual rights of parties

[1] *See*, Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*, Book. 33 Chapter I Section 1, 281

[2] (1948) 48 NLR 529 at p.532. In *Abdul Kadir v Salima* (1886) 8 AIR 149 at pp. 154-5, Mahamud J defined marriage as "a contract for the purpose of legalising sexual intercourse and the procreation of children."

[3] See, *Hyde v Hyde* L.R.P & D 130

[4] Qureshi M.A., *Muslim Law of Marriage, Divorce and Maintenance*, 1st ed., (1992), 55

[5] The Muslim Marriage and Divorce Act No. 13 of 1951 (CLE 1956 Official Ed. Cap. 115) as amended by Act No. 1 of 1965, Act No. 5 of 1965, Act No. 32 of 1969, Law No. 41 of 1975 and Act No. 40 of 2006

[6] [2006] 1 Board of Quazis' Law Reports 129

arising therefrom, should be determined in accordance with the Muslim law of the sect to which the parties belong.

The two great sects of Islam are the Sunni and Shiah sects. The divergence of legal doctrine in Sunnite Islam, which has the allegiance of the vast majority of the Muslims, is crystallised in the existence of four different schools of law, named after the jurists who founded them, namely, the Hanafi, Maliki, Shaffie and Hanbali schools. The Shiah sect, is in turn divided into three major schools, known as Ithna'Ashari, Ismaili (which includes the Dawoodi sub-school to which the Bohras belong) and Zeydi.[7] Our courts have held consistently that as Sri Lankan Muslims largely belong to the Shaffie sect "the Shaffie doctrine is generally applicable"[8] and a party should be presumed to be a Shaffie unless there is evidence to the contrary.[9] However, it should be remembered that a school of thought such as the Shaffie school, is merely a 'way' or *madhab* and should not be treated as a sect.[10]

One obvious result of equating a school of thought to a sect is that an adherent of a particular *madhab* such as the Shaffie school will be rigidly bound by the teachings of that school, and will not have the freedom to deviate from these precepts unless he declares himself to be a follower of a different school of thought. This is why it became necessary for the Shaffie girl in *A.L.M.Haniffa vs. A.A.Razack*[11] who wished to marry against the wish of her *wali* (marriage guardian) to become a Hanafi in order to avoid the rule of Shaffie law that a woman requires the approval of her *wali* for contracting marriage.[12]

It is questionable whether such an inflexible approach can be reconciled with the spirit of the *madhabs* themselves particularly in the context that Imam Shaffie himself was a student of Imam Malik, and had his only son instructed by none other than Imam Hanbal. It is said that Imam Shaffie was born on the very day Imam Abu Hanifa departed this world, and in a biographical sketch of Imam Shaffie it is narrated that:

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

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

[8] *Affefudeen v Periatamby* (1912) 14 NLR 295 at p.300 per Middleton J

[9] *See*, *Mangandi Umma v Lebbe Marikar* (1908) 10 NLR 1; *Marikkar v Marikkar* (1916) 18 NLR 446; *Mohamedu Cassim v Cassie Lebbe* (1929) 29 NLR 136; *In re Nona Sooja* (1931) 32 NLR 63; *Ummul Marzoona v Samad* (1979) 79 NLR 209

[10] Hamilton A.R.G., *Mohammedanism*, (1955), 82; Farouque H.M.Z., *Muslim Law in Ceylon: An Historical Outline*, 4 MMDLR 1, 26: footnote 67

[11] (1959) 60 NLR 287; *See* also, *Abdul Cader v Razik* (1953) 54 NLR 201 (PC)

[12] *See*, § 25(1) of the Muslim Marriage and Divorce Act, *Supra* note 5

> *Qunut* at *Subhu*, and explained that he acted so out of respect for the Imam Abu Hanifa in whose presence they were."[13]

It has also been suggested that the rigid classification of persons as the followers of the Hanafi, Maliki, Shaffie and Hanbali 'sects' is not consistent with certain Quranic injunctions.[14] Of particular interest, in this connection, is a verse from *Sura Al-An'am* in which Allah frowns upon the division of religion into sects so as to break up the unity of Islam.[15]

From a pragmatic point of view, the most important problem that arises from this state of the law is one of application. For purposes of illustration let us take a marriage between a Shaffie bride and a Hanafi groom, the validity of which marriage has to be determined "according to the Muslim law governing the sect to which the parties to such marriage belong",[16] and ponder upon some of the issues such a marriage can give rise to. Firstly, if the bride marries without the approval of the *wali* or Quazi, is the marriage valid? On the reasoning of *A.L.M.Haniffa vs. A.A.Razack*[17] the bride had no capacity, but should the groom according to whose school of law the marriage is obviously valid, be permitted to challenge it? Secondly, let us suppose that the bride's *wali* approved the marriage, but there were only one male and two female witnesses at the *nikah* ceremony. According to Hanafi law the marriage is valid.[18] But according to Shaffie law, the marriage is void.[19] Since the validity of the marriage has to be determined according to *the law of the sect to which the parties belong,* should the matter be decided by applying the Hanafi law or Shaffie law?[20]

It is quite obvious that the judicial equation of schools of law with sects would give rise to knotty problems in Sri Lanka, where there is a fair number of followers of Imam Abu Haniffa in the predominantly Shaffie Muslim community. Problems of this kind may be minimised by treating the great *madhabs* such as Shaffie, Hanafi, Maliki and Hanbali as schools of law, so that the Courts could select the best out of their teachings adopting an eclectic approach (*takhayur*) to produce a rich blend of Sunni law.

C - Essentials of a Muslim marriage

For a marriage to be regarded as valid (*sahi*) the following requirements should be satisfied:

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[13] Mapillai Alim, *Fat-hud-Dayyan fi Fiqhi Khairil Adyan*, (Translated by Saifuddin J. Aniff-Doray), (1963), 534
[14] Marsoof S., *Fallacies of Muslim Law* (1996-1997) Meezan, 63 at p66
[15] The Holy Quran (Edited by Abdullah Yusuf Ali) Sura Al-An'am VI:159
[16] §16 of the Muslim Marriage and Divorce Act, *Supra* note 5
[17] (1959) 60 NLR 287; *See* also, *Abdul Cader v Razik* (1953) 54 NLR 201 (PC)
[18] Mahmood T., *The Muslim Law of India*, (1982), 53
[19] Doi A.R.I, *Shariah: The Islamic Law* (1984), 138
[20] One cannot obviously utilise the rule contained in §2 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 for the resolution of this problem as the said provision will apply only where there is a valid marriage between the parties, the very question that arises for determination in the illustration. Furthermore, the said provision will not apply when the man and woman belong to the same race or nationality. *See*, *Manikka v Peter* (1901) 4 NLR 243 and *Bandaranayake v Bandaranayake* (1924) 24 NLR 245

(1) The parties should have either the *capacity to marry* or the capacity to be married;
(2) The parties should *agree* to the marriage;
(3) The *formalities* of marriage should have been followed;
(4) There should be *no legal impediments* to the marriage; and
(5) The dower *(mahr)* should have been provided.

Some jurists classify invalid marriages into two categories: (a) those which are vitiated by a permanent impediment which renders the marriage incurably void (*batil*); and (b) those which are subject to a transcendent impediment which makes the marriage temporarily void (*fasid*) for the duration of such impediment, but which has the potential of becoming valid (*sahi*) upon the subsequent removal or correction of such temporary impediment.[21] This classification is not followed by other jurists who claim that there can be only two types of marriages, those that are valid and those that are void, and there is nothing in between.[22]

(1) CAPACITY TO MARRY

Under Muslim law, every person is capable of being contracted in marriage, but only persons who are of sound mind and have attained majority have the capacity to contract marriage on their own. The first essential of a valid marriage under Muslim law is that the parties should have the capacity to contract marriage, or if they have not this capacity, they should be contracted in marriage by their marriage guardians (*wali*).

The term *wali* refers to the marriage guardianship which, is subjected to a two-fold classification in the Shaffie text *Minhaj-et-Talibin.* The first type of marriage guardians are those who "have a right to dispose of the hand of a woman as they please, i.e. her father or father's father."[23] The second type of marriage guardians are those who cannot dispose of the hand of a woman, but "who have the right to assist a woman as guardian at her marriage."[24] The latter type of guardianship devolves successively on (1) the father, (2) the father's father, (3) the father's father's father, (4) the whole brother or half brother of the father's side, (5) the son of such a brother or a half brother or other agnate descendent, (6) father's whole brother or half brother, (7) the other agnates in the order in which they are called to succession, it being understood that a whole brother always has priority over a half brother on the father's side[25]. According to *Minhaj,* "a son, though the nearest agnate, cannot give his own mother in marriage, since a right of guardianship does not pass into the descendant line; he can

[21] *See*, Mohanlal Dayalji Manek, *Handbook of Mohomedan Law*, 5th ed, 33. *See* also, Mahmood T., *The Muslim Law of India*, (1987), 46
[22] *See*, Al-Haj Muhammed Ullah, *The Muslim Law of Marriage*, (1990), 12
[23] Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*, Book 33, Chapter I Section 4, p.284 and Section 5, p.286
[24] *ibid*, Book 33 Chapter I Section 4 at p.285
[25] *ibid*

only do so if he is also the son of the son of his mother's father's brother, or by right as patron or as judge representing the Sovereign."[26]

A peculiar feature of Muslim law is that the first type of marriage guardian (*wali)* possesses the power known as *jabr* to give in marriage a child of tender years which is incapable of contracting a marriage on its own.[27] It is noteworthy that the Muslim Marriage and Divorce Act[28] does not lay down a minimum age for marriage.[29] Accordingly, child marriages have been held to be valid in Sri Lanka.[30] The power of *jabr* over a male child ends at puberty. According to traditional Shaffie law a female is subject to it as long as she remains a virgin. As Imam Shaffie observes "a father can dispose as he pleases the hand of his daughter, without asking her consent, whatever her age may be provided she is a virgin".[31] It is pertinent to consider whether the Shaffie law in regard has been modified by §25(1) of the Muslim Marriage and Divorce Act,[32] which is quoted below:

> "25(1) For the avoidance of doubt it is hereby declared that no contract of marriage of a woman belonging to the Shaffie sect is valid under the law applicable to that sect, unless:-
>
> (a) a person entitled to act as her *wali*:
>
> (i) is present at the time and place at which the contract is entered into;
> (ii) communicates her consent to the contract and his own approval thereof; or
>
> (b) the *quazi* has under §47 authorised the marriage and dispensed with the necessity for the approval of a *wali*."

This section displaces the view of Shaffie law expressed in *Minhaj-et-Talibin*[33] and followed in *Rhoda Ryde v Ibrahim,*[34] that the formal consent of the bride is necessary

[26] *ibid*, For summaries of the rules of the other schools relating to devolution of marriage guardianship, see, Mahmood T., *The Muslim Law of India*, (1982), 51; Charles Hamilton, *The Hedaya*, Vol. 1, Book II, Chap. 11, pp. 34-39

[27] According to Imam Shaffie only a father or paternal grandfather can exercise the power of jabr. Imam Abu Haniffa extends the power to "paternal kindred" but permits the child 'the option of puberty' (khyar- ul bulugh) to repudiate the marriage on attaining puberty where the marriage was contracted by a wali other than a father or paternal grandfather. *See*, Charles Hamilton, *The Hedaya*, Vol. 1, Book II, Chap. 11, pp.36- 37. In *Ibraheem Alim v. Mohamed Mustafa* 2 MMDLR 45 at p.46 the Board of Quazis took the view that where the wali is someone other than the father, the consent of the bride is always essential under Shaffie law

[28] *Supra*, note 5

[29] The minimum age of marriage for non-Muslims is 18 years in terms of §15 of the Marriage Registration Ordinance No. 19 of 1907 (CLE 1956 Official Ed. Cap 112) as amended by Act No. 11 of 1963, Act No. 3 of 1970, Act No. 18 of 1995, Act No. 12 of 1997, Act No. 11 of 2001, Act No. 36 of 2006 and Act No. 38 of 2006.

[30] *See*, for example, *Mukamadu Lebbe v Mohamado Tamby* 1 MMDLR 40 where the marriage of a girl only eight years old was held to be valid. For a discussion of the pros and cons of child marriages, *see*, Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, pp.19-25

[31] Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*, 284 Section 3. The position is different under Hanafi law where jabr ends when the girl attains puberty. *See*, *Mohiuddin v. Khatuabibi* 41 Bombay Law Report 1020

[32] *Supra*, note 5

[33] Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*, Book. 33 Chapter I Section 4, 284

only if she has lost her virginity due to sexual intercourse. It is submitted that the term 'woman' in the above provision refers to a female who has arrived at puberty (*bulugh*).[35] This is to be contrasted with the use of 'girl' in certain other sections of the Act[36] to refer to females who have not attained the age of twelve years which is "an age practically coincident with, or at least not far removed from, that of puberty."[37] The resulting position is that while a girl belonging to the "Shaffie sect" could be contracted in marriage by her *wali* with the authority of the Quazi,[38] a woman above the age of puberty cannot be given in marriage without her consent, irrespective of whether she is a virgin or not.[39] In *Yaseem v Noor Naeema*[40] a girl, who had been given in marriage by her father without her knowledge or consent, sought to have the marriage annulled. The Board of Quazis held that she was not entitled to any relief as the marriage was valid under Shaffie law.[41]

However, it is noteworthy that in *Akeerthamby Muheideenbawa v Seylathumma,*[42] the Board of Quazis permitted a girl who was presumably a follower of Imam Shaffie given in marriage by her father the option of puberty (*khyar-ul-bulugh*) to have the marriage rescinded upon attaining age. In the course of its order, the Board of Quazis expressed the view that "this social evil (institution of child marriages) should be eradicated by the creation of public opinion."[43] The decision has been criticised on the basis that the Shaffie girl was not entitled to the option of puberty, which is only a Hanafi law concept unknown to Shaffie law.[44] It is noteworthy that even under Hanafi law, the option is available only to a girl given in marriage without consultation by a *wali* who was not her father or grandfather,[45] whereas in the *Seylathumma* case it was the father who gave her in marriage. The decision may nonetheless be justified on the basis that it is not in the public interest to hold a girl to a marriage bond that she did not voluntarily enter into.

As pointed out by De Sampayo J. in *Narayanan v Saree Umma* "there are two kinds of 'majority' under Muhamadan Law, namely, one as regards capacity to marry without the intervention of a guardian, and the other as regards the general capacity to do other acts as a major".[46] While according to Muslim law a Muslim attains majority for purposes of marriage on reaching *bulugh* or puberty,[47] majority for all other purposes is

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[34] 3 MMDLR 131
[35] *See*, Farouque H.M.Z., *Muslim Law in Ceylon*, 4 MMDLR 1, 12
[36] For example, §§ 23 and 47
[37] Per Wood Renton C.J. in *Marikar v. Marikar* (1916) 18 N.L.R. 481, at p.483
[38] §.23 of the Muslim Marriage and Divorce Act, *Supra*, note 5
[39] *See*, also in this connection the recommendation of the Muslim Law Research Committee that "provision be made for the bride to place her signature in the Marriage Register by the amendment of tiem 16 of Form IV" in (1978) 4 Colombo Law Review, 57 at p.58
[40] 3 MMDLR 113
[41] *See* also, *Nabisa Umma etal. v. Ahamedo Mohammado Salih* 2 MMDLR 118
[42] 2 MMDLR 53.
[43] *ibid.*, at page 55
[44] *See*, Marsoof S., *Marriage Laws of the Muslims in Sri Lanka*, (1980) Meezan, footnote 39
[45] *See*, Hamilton C., *The Hedaya*, Vol. 1, Book II, Chap 11, 37
[46] (1920) 21 NLR. 439, at p.440
[47] *Abdul Cader v. Razik* (1950) 52 NLR 156: (1953) 54 NLR. 201; A female child would attain puberty at about 9 years and a male child at about 12 years of age. According to Babu Ram Verma. *Mohamedan Law*, 3rd ed., 249: a child of 15

dependent on *rushd*, that is, the arrival at the age of the discretion.[48] §2 of the Age of Majority Ordinance[49] provides that all persons are deemed to have attained the legal age of majority on reaching "the full age of eighteen years." Although there is doubt as to whether this provision has superseded the Muslim law relating to majority of the second kind,[50] the Privy Council has laid down in *Abdul Cader v Razik*[51] that a Muslim becomes a major for purposes of marriage at puberty (*bulugh*) notwithstanding the provisions of §2 of the Age of Majority Ordinance.

It would appear, however, that under Shaffie law only a Muslim male of sound mind is capable of contracting a marriage on his own upon attaining puberty. It must be remembered that according to §25(1) of the Muslim Marriage and Divorce Act[52] a "woman belonging to the Shaffie sect" by which phrase we mean a Shaffie woman above the age of puberty, would have to obtain the approval of her *wali* or the authority of the *quazi* for her marriage. On the other hand, a Hanafi woman of sound mind who has attained age would not require the approval of her *wali* or the approval of a *quazi* in contracting a marriage.[53]

(2) AGREEMENT TO MARRY

Agreement is essential for marriage and is manifested as an offer (*ijab*) and an acceptance (*quabul*). The parties to the agreement are the bride and the bridegroom, but it would be generally necessary for the marriage guardian (*wali*) of a Shaffie bride to represent the bride at the *nikah* ceremony and express his approval for the marriage. As Muslim women are expected to be in *purdah*, the bride does not participate directly in the *nikah* ceremony. It is customary to send the *wali* of the bride to her side accompanied by two witnesses. The *wali* asks the bride within the hearing of witnesses whether she authorises him to agree to the marriage on her behalf for the dower money (*mahr*) offered by the bridegroom. When the bride says "yes" or signifies her consent by some other method, the three persons come out. The bridegroom, the *wali* and the two witnesses then come before the *khatib* who asks the bridegroom whether

years would be presumed to have arrived at puberty. *See* also, *Marikar v. Marikar* (1916) 18 NLR 481, at p.485 per De Sampayo J

[48] *Assanar v. Hamid* (1949) 50 NLR 102, specially at p.104. According to Wood Renton C.J. In *Marikar v. Marikar* (1916) 18 NLR 481, at p.482 "If a minor should not be discreet at the age of puberty, he or she is presumed to be so at the completion of the eighteenth year, unless there is any direct evidence to the contrary". In *Haniffa v. Razak* (1959) 60 NLR. 287: 4 MMDLR. 144, a girl of sixteen who was "very mature for her age" was found to possess *rushd* or discretion

[49] No. 7 of 1865 (Cap. 66) as amended by Act No. 17 of 1989

[50] *See*, *Narayanen v. Saree Umma* (1920) 21 NLR 439: contra, *Assanar v. Hamid* (1949) 50 NLR. 102. Lord Cohen in *Abdul Cader v. Razik* (1953) 54 NLR 201, at pp. 202- 203 was careful to leave the matter open. See also, Weeramantry C.G., *The Law of Contracts* (1967) Vol. 1, pp.459- 460

[51] (1950) 52 NLR. 156.

[52] *Supra*, note 5

[53] *See*, *Abdul Cader v. Razik*, *Supra*, note 51; *Haniffa v.Razak* Supra note 49; Hamilton in his Hedaya Vol. 1, Book II, Chap. 11, 34 summarises the views of the various Imams as follows: "A woman who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians; and this, whether she be a virgin or a siyeeba. This is the opinion of Haneefa and Aboo Yoosaf, as appeared in the Zahir- Rawayet ….. On the other hand, Malik and Shaffie assert that a woman can by no means contract herself in marriage to a man in any circumstance……."

he offers to marry the girl on payment of the specified dower. He says "yes". Then the *wali* tells the *khatib* that he is the agent of the girl. The *khatib* asks him whether he agrees to the marriage on the specified dower. The *wali* says "yes". The witnesses are present there, so that if the *khatib* has any doubt he should question them as to whether the *wali* is the duly authorised agent of the bride. As soon as both sides have said "yes" the *khatib* reads the scriptures and the *nikah* ceremony is complete.

In *Noorul Naleefa v. Marikar Hadjira* the Supreme Court pointed out that as under Muslim law a marriage is a civil contract, the parties "may agree on the terms of the contract, and if the terms are of a reasonable nature and are not opposed to the policy of the law, they will be binding."[54] According to *Minhaj-et-Talibin,* a marriage contract cannot be made conditional upon the occurrence of an event such as the bride obtaining a divorce from, or being repudiated by, her present husband.[55] Nor can a marriage contract be entered into for a fixed term.[56] However, the parties may incorporate into the marriage contract any terms that are not repugnant to the basic principles of Islam and morality. For example, the condition that the husband will not remove the bride from her native town[57] or that the couple will make the bride's residence their matrimonial home,[58] are clearly in accord with the *sharia't.* So would be a condition that the husband shall not keep a concubine.[59] It has been held that a stipulation in a marriage contract to the effect that the husband shall not marry a second wife during the subsistence of the first marriage[60] or shall not take a second wife without the consent of the first,[61] is consistent with Islamic morality.

It must, however, be noted that a marriage contracted in violation of a mere *contractual* stipulation of monogamy would still be valid,[62] although in *Abeysundere v Abeysundere,*[63] the Supreme Court of Sri Lanka took a different view in regard to a *statutory* prescription of monogamy. It has been observed in the context of a *contractual* stipulation of monogamy that "enforcement may, in many situations, pose a problem if the contract does not itself provide for sanctions in the event of a breach of the agreed terms. If the marriage contract contained simply a stipulation, for instance, that the husband should not marry a second wife during the subsistence of the first union, the stipulation would be valid but practically unenforceable."[64] With a view of mitigating this situation, most jurists hold that it is lawful to provide in the marriage contract that

[54] Per Canekeratne J in *Noorul Naleefa v. Marikar Hadjirar* (1948) 48 NLR 529 at 532
[55] *See*, Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*, Book. 33 Chapter I Section 3, 283
[56] *ibid.*, The position is different in Shiah law under which temporary marriages are lawful. See, Sayyid Ali Reza Naqavi, *Family Laws of Iran*, (1971), pp.20 - 21
[57] *See*, Maulana Sayed Saeed Akhtar Rizvi, *Islamic Law Relating to Marriage*, (1967) Mombasa, 23
[58] *See*, *Muhammad Yasin v Mumtaz Begum* 1936 AIR (Lahore) 716. The Courts have, however, sometimes refused to uphold the exercise by the wife of the husband's delegated power of talaq on account of the violation of such a condition. *See*, *Imam Ali Patwari v Arafatun Nessa* 1914 AIR (Calcatta) 369; *Khatun Bibi v Rajjab* 1926 AIR (Allahabad) 615
[59] *See*, *Meer Ashruf Ali v Meer Ashhad Ali* (1871) 16 Weekly Reporter (Sutherlands) 260
[60] *See*, *Muhammad Amin v. Amina Bibi* 1931 AIR (Lahore) 134
[61] *See*, *Sainuddin v Latifannessa Bibi* (1919) Indian Law Report 46 Calcatta 141
[62] Carroll L., *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce*, (1996) Lahore, 55. *See*, also *Attorney-General v. Reid.* (1963) 65 NLR. 97; (1964) 67 NLR. 25
[63] [1998] 1 Sri LR 185
[64] Carroll L, *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce*, (1996) Lahore 1996 pp.55-56

in the event of the violation of such stipulation the husband's power to pronounce divorce would stand delegated to the wife. According to these jurists, a pronouncement of divorce made by a wife, under authority delegated to her by the husband is deemed to be an act of the husband himself, and has the effect of dissolving the marriage without the intervention of a court. It has been held that such delegation may be absolute and unconditional[65] or effective on the fulfilment of certain stipulated conditions.[66] This form of divorce is known as *talaq-i-tafwid*. However, there is no mention of *talaq-i-tafwid* in the authoritative Shaffie text *Minhaj-et-Talibin,*[67] and it has been observed that there may be some difficulties in accommodating the concept into the statutory framework existing in Sri Lanka even in regard to parties belonging to *mazhabs* such as the Hanafi school which recognises the concept of *talaq-i-tafwid*.[68]

(3) THE FORMALITIES OF MARRIAGE

The *nikah* ceremony constitutes the essence of a Muslim marriage. It is at the ceremony that the offer to marry (*ijab*) and the acceptance thereof (*qabul*) is made. The approval of the *wali* (where this is necessary) should also be indicated at this ceremony. If a woman has no *wali* or the *wali* is unreasonably withholding his consent, the *Quazi* could authorise the marriage.[69] The *nikah* should be performed in the presence of two male or one male and two female witnesses who should be adult Muslims of sound mind. Shaffie maintains that "the integrity of the witnesses is also an essential condition".[70]

As pointed out earlier, the validity of a Muslim marriage does not depend on registration,[71] but it must be noted that §17 of the Muslim Marriage and Divorce Act imposes the duty of causing the marriage to be registered upon the bridegroom, the *wali* and the *khatib* who officiated at the *nikah* ceremony. Before the marriage is registered the bridegroom is expected to make a declaration substantially in form II of the First Schedule of the Act and the *wali* of the bride has to make a declaration substantially in form III of the First Schedule of the Act. It is important to note that a bridegroom wishing to contract a second or subsequent marriage while an earlier marriage is subsisting is not required by the Act to obtain the consent of his wife or wives for such marriage, nor is it necessary to obtain the approval of the *quazi* or any other authority for this purpose. However, the bridegroom has to give thirty days notice of his intention to contract a subsequent marriage to the *quazi* for the area in which he resides, the *quazi* or *quazis* for the area in which his wife (or wives) resides and to the *quazi* for the area in which the person whom he intends marrying is resident. Every *quazi* who receives notice of such a marriage should cause a copy of such notice

[65] *See*, *Aklima Khatun v Mahibur Rahman* (1963) All Pakistan Legal Decisions (Dacca) 602
[66] *See*, *Mst. Bafatan v Abdul Salam* 1950 AIR (Calcatta) 308. *See* also, Ahmed K.N., *The Muslim Law of Divorce*, (1978) New Delhi, pp.201-204
[67] *See*, Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*
[68] *See*, Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, pp.43-47 for a detailed discussion of this issue
[69] *See*, §47 of the Muslim Marriage and Divorce Act, *Supra*, note 5
[70] Hamilton C., *Hedaya*, Vol. 1, Book 11, Chap 1, 27
[71] §3 of the Muslim Marriage and Divorce Act, *Supra*, note 5

to be exhibited at each of the Jumma Mosques within his area.[72] The objective of this procedure is merely to give notice to the affected parties of the intended marriage and to create a climate in which moral or social pressure is brought to bear on the bridegroom to carefully consider the consequences of his intended action. It is respectfully stated that some amount of control over the exercise of polygamy, consistently with the requirement of the *sharia't* for fair and just treatment of the wives, should be introduced into the Act by amending legislation.[73]

It must also be noted that while there is no prohibition in Muslim law against the marriage of a girl below the age of twelve years, the authority of the *quazi* for the area in which the girl resides has to be first obtained for the purpose of *registering* such a marriage.[74] Accordingly, although such a marriage is valid in law, it will not be capable of being registered in terms of the Act, which is a distinction without much difference. Because registration is not required to render a Muslim marriage valid in the eyes of the law[75], the only practical ramification of a child marriage being contracted without the approval of the Quazi is that the *nikah* ceremony will have specially proved by evidence without the assistance of a certificate of registration, which would otherwise be *prima facie* proof of that fact.

(4) LEGAL IMPEDIMENTS TO MARRIAGE

It is essential that there should be no legal impediments to the marriage. Under Muslim law (i) polyandry, (ii) consanguinity, (iii) affinity, (iv) fosterage, (v) marriage with infidel man, (vi) marriage with infidel woman, (vii) polygamy, (viii) unlawful conjunction, (ix) *iddat*, (x) *ihram* and (xi) *talaq* may affect the validity of a marriage.

These impediments are of two kinds:

> (a) permanent impediments which vitiate a marriage altogether and render it absolutely and incurably void (*batil*)[76]; and
>
> (b) temporary impediments which are transcendent in nature, which make the marriage temporarily void (*fasid*)[77]with the potentiality of becoming valid upon the removal or correction of the impediment in question.

[72] §24

[73] *See*, Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, pp.29-37 for a detailed discussion of this issue

[74] §23 of the Muslim Marriage and Divorce Act, *Supra*, note 5

[75] *ibid.*, §16

[76] Such a marriage does not create any civil rights and obligations between the parties and the offspring of such a union are illegitimate

[77] A marriage which is merely irregular has no effect before consummation, but after consummation some legal consequences ensue viz (a) The wife is entitled to mahr; (b) The wife is bound to observe the iddat of divorce, but not of the death; and (c) The offspring are legitimate

Impediments (i), (ii), (iii), (iv) and (v) above are regarded by all jurists as capable of rendering the marriage void *ab initio*. The position is different as regards impediments (vi), (vii), (viii), (ix), (x) and (xi). Whilst some Imams regard these impediments as capable of vitiating any marriage altogether, others regard a marriage affected by such an impediment as having the potential of becoming valid when the impediment ceases to exist *(fasid).*

(i) Polyandry: A married woman cannot lawfully contract a second marriage during the subsistence of the first marriage. This is an absolute bar imposed by law with a view to ensuring the legitimacy of the children born to the woman in lawful wedlock.

(ii) Consanguinity: A man is prohibited on account of consanguinity from marrying (a) his descendent; (b) his ascendant; (c) his sister, whether full, consanguine or uterine; (d) his niece or great-niece, how low so ever; and (e) his aunt or great-aunt, how high so ever, whether paternal or maternal[78]. Similarly, a woman cannot marry (a) her descendent; (b) her ascendant; (c) her brother, whether full, consanguine or uterine (d) her nephew or great-nephew, how low so ever; and (e) her uncle or great-uncle, how high so ever, whether paternal or maternal.[79] Any violation of these prohibited degrees of marriage would deprive the marriage of all legal force.

(iii) Affinity: A man is prohibited on the ground of affinity from marrying (a) his wife's mother or grandmother; (b) his own wife's daughter (by a former husband), or granddaughter, how low so ever; (c) his son's, grandson's, father's or grandfather's wife or widow or divorced wife; and (d) his wife's sister, his wife being then alive.[80] Similarly, a woman cannot marry (a) her husband's father or grandfather; (b) the son or grandson of her husband (by another woman); and (c) her daughter's, granddaughter's, her mother's or grandmother's husband or widower or divorced husband.[81] Any violation of these prohibited degrees of marriage would vitiate the marriage.

(iv) Fosterage: Fosterage is as much a prohibition to marriage as consanguinity, because the act of suckling is regarded as equal to the act of procreation. When a child under the age of two years has been suckled not less than five times from the breast of a living woman other than its mother,[82] the woman becomes the foster mother of the child. Similarly, the natural relations of the child and the foster mother become foster relations. In the Indian case of *Janab Ali Mia v Nazimudin Pradhania*[83], one Nawaz Ali had a son by the name of Janab Ali. A few years later Nawaz Ali's wife took charge of a female child Zohra Banu and suckled her. Zohra Banu was then an infant in arms and

[78] §80 (1) (a), (b), (e), (d) and (e) of the Muslim Marriage and Divorce Act, *Supra*, note 5
[79] §80(2) (a), (b), (c), (d) and (e) of the Muslim Marriage and Divorce Act, supra note 5.
[80] §80 (1) (f), (g), (h) and (i) of the Muslim marriage and Divorce Act, supra note 5.
[81] §80 (2) (f), (g) and (h) of the Muslim Marriage and Divorce Act, supra note 5.
[82] *Huraira Sawall v. Buhary Sawall* 4 MMDLR.174 at p.177: The Hanafi view would appear to be broader and it would suffice if milk from the breast of the woman reaches the stomach of the child: "…..the quantity of the milk makes no difference, nor whether it is taken direct from the breast or it is poured down its throat or administered medically nor whether the woman is living or dead at the time that milk is taken from the breast" *See*, Tyabji, *Muhammadan Law*, 3rd ed, Section 33
[83] (1914-1915) 19 Calcutta Weekly Notes. 897

less than two years in age. Subsequently Nawaz Ali gave Zohra Banu in marriage to his son Janab Ali. It was held that the marriage was *batil*. Similarly, in the Sri Lankan case of *Huraira Sawall v Buhari Sawall*[84] one Zowry Buhary Sawall complained to the *Quazi* under §47(2) of the Muslim Marriage and Divorce Act that her father Buhari Huraira Sawall was unreasonably withholding his consent to her intended marriage with one Jumar Samsudeen. It was in evidence that Zowry's mother Lailon had breast fed Jumar Samsudeen when he was only a few months old. The Board of Quazis were of opinion that the intended marriage was prohibited by law and that the father was justified in withholding his consent to the marriage. Although marriage between foster relations is generally void, it would appear from the authorities that a man is entitled to marry (a) a sister's foster mother, (b) a foster sister' mother, (c) a foster mother's sister and (d) a foster brother's sister[85].

(v) Marriage with an infidel man: A marriage contracted by a Muslim woman with a non-Muslim man, irrespective of what religion or faith he belongs to, is *batil* or void *ab initio*. Referring to Muslim women in so married, Allah says in *Sura Mumtahana*:

> "They are not lawful (wives)
> For the Unbelievers, nor are
> The (Unbelievers) lawful (husbands)
> For them." [86]

(vi) Marriage with an infidel woman: A Muslim male can contract a valid marriage not only with a Muslim woman, but also with a *kitabia* that is a woman following a revealed religion such as a Christian or Jewess. In *Sura Maida* Allah says:

> "Lawful unto you in marriage
> Are not only chaste women
> Who are believers, but
> Chaste women among
> The People of the Book…."[87]

The position is different where a Muslim male marries an idolatress (e.g. a Hindu) or a fire-worshiper. *Sura Baqara*[88] contains a strict injunction against marrying "Unbelieving women idolaters (*mushrikathi*) until they believe." There is a paucity of judicial decisions on this question. The only decided case involved the marriage of a Muslim man to a Buddhist woman, which was held to be void until she is converted to Islam.[89] The distinction between a *kitabia* and a woman who did not fall within the category of People of the Book (*Ahl-al-Kitab*), as well as the question of idolatry, would have been of crucial

[84] 4 MMDLR. 174
[85] Mohanlal Dayalji Manek, *Handbook of Mohomedan Law*, 5th ed, 34
[86] The Holy Quran (Edited by Abdullah Yusuf Ali) Sura Mumtahana LX:10
[87] The Holy Quran (Edited by Abdullah Yusuf Ali) Sura Maida V:6
[88] The Holy Quran (Edited by Abdullah Yusuf Ali) Sura Baqara II:221
[89] *Official Assignee v Ma Hta Htwe* 1929 AIR (Rangoon) 35

importance in cases such as *Attorney General v Reid*[90] and *Abeysundere v Abeysundere*[91] in which the parties to the first marriage were Roman Catholics, although there was no evidence in these cases on the question whether they practised idol worship. It is unfortunate that this aspect was not looked into by any of the courts that heard these cases.

(vii) Polygamy: Polygamy is to some extent permitted by Muslim law. Although the Holy Quran permits a Muslim male to "marry of the women, who seem good to you, two or three or four",[92] it is acknowledged that "the Quranic prescription was monogamy and not polygamy."[93] The *sharia't* has laid down stringent conditions for the exercise of polygamy, and demands that all wives be treated "fairly and justly".[94]

According to the Shaffie doctrine as enunciated in *Minhaj-et-Talibin*:

> "A marriage concluded by a free man with five wives at once is null as regards all of them; but if he married them one after the other, the fifth alone is void."[95]

However, according to Hanafi law, where a man who already has four wives marries a fifth, the marriage with the fifth wife will be *fasid*, and would become valid upon the death or divorce of one of the other wives[96]. In the *Reid*[97]and *Abeysundere*[98] cases the question arose as to the validity of the second marriage of a man who had contracted such marriage after embracing Islam with a woman professing Islam during the subsistence of the first non-Muslim monogamous marriage contracted under the general law. In the first of these cases, the Privy Council held that the second marriage was valid. In the second case, the Supreme Court of Sri Lanka took a contrary view and held that the second marriage was void due to the subsistence of the first marriage. While this decision has been criticised on the basis that it has overlooked applicable principles of the *sharia't*,[99] it is also inconsistent with §§16 and 98(2) of the Muslim

[90] (1964) 65 NLR 97 (SC): (1966) 67 NLR 25 (PC)

[91] [1998] 1 Sri LR 185

[92] Holy Quran, (Translated by Marmaduke Pickthall) Sura Nisaa IV: 3; *See*, also *Attorney-General v. Reid*. (1963) 65 NLR. 97; (1964) 67 NLR. 25. Cf. *Queen v. Obeysekera* (1889) 9 SCC. 11; *Katchi Mohamed v. Benedict* (1961) 63 NLR 505. For the legal effect of a subsequent polygamous marriage on the original monogomuus marriage, *See*, *Abdoulie Drammeh v. Joyce Drammeh* 4 MMDLR. 203 and *Abeysundere v Abeysundere* [1998] 1 Sri LR 185

[93] Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, 30

[94] The Holy Quran, (Edited by Abdullah Yusuf Ali Sura Nisaa IV:129. The Board of Quazis applied this principle in holding that a polygamous husband is bound to provide independent living quarters for each of his wives. *See*, *Nainam Sahib Seyed v Muttu Pathumma Monna Ahamadu* 2 MMDLR 27

[95] *See*, Mahiudin Abu Zakaria Yahya Ibn Sharif en Nawawi, *Minhaj-et-Talibin*, Book. 33 Chapter II Section 1, 292

[96] Bharatiya V.P., *Syed Khalid Rashid's Muslim Law*, (1996), 81

[97] *Attorney General v Reid* (1964) 65 NLR 97 (SC): (1966) 67 NLR 25 (PC)

[98] *Abeysundere v Abeysundere* [1998] 1 Sri LR 185

[99] *See*, Marsoof S., *The Abeysundere Decision: An Islamic Perspective*, (1998-1999) Meezan, 59. For other comments on this decision see, Marasinghe L., *Monogamy, Polygamy and Bigamy; Abeysundere v Abeysundere – A Conundrum*, (1998) Bar Association Law Journal Vol. VII Part II, 44; Kulatunga K.M.M.B, *Natalie Abeysundere v Christopher Abeysundere & Another*, (1999) Bar Association Law Journal Vol. VIII Part 1, 109; Siriwardhana C., *Bigamy Revamped – Abeysundere v. Abeysundere*, Moot Point, Vol 2, Issue 1 page 12 and Perera J., *A Sociological Note on the Bigamy Case Abeysundere v Abeysundere*, (2004) 3 Sri Lanka L.C.L.R 14, Marasinghe L., *The Abeysundere Decision - Polygamy v Bigamy: An area for reform*, (2005) Meezan, 89, Marsoof S., *The Abeysundere Decision – Legislative Intervention Imperative*, (2005) Meezan, 73

Marriage and Divorce Act discussed in Part – A of this article. The *Abeysundere* decision also gives rise to the question whether the second marriage should be treated as *batil* or *fasid* in the eventuality of the first marriage coming to an end by the death of the first wife or by divorce.

(viii) Unlawful conjunction: A Muslim is forbidden to have two wives at the same time so related to each other by consanguinity, affinity or fosterage that if either of them had been a male they would have been prohibited from marrying each other.[100] This impediment is known as "unlawful conjunction", the reason for the bar being to avoid confusion of kindred. Thus a Muslim cannot contract a valid marriage with his wife's sister or his wife's niece. A marriage involving unlawful conjunction is irregular or *fasid* but would become valid upon the death or divorce of the wife so related.

(ix) *Iddat*: It is not lawful for a Muslim to marry a woman undergoing *iddat* of her previous marriage.[101] *Iddat* means the period[102] during which the wife must wait after the dissolution of her marriage before she can marry again. *Iddat* has been ordained with a view to ascertain correctly the paternity of the child or children that may be born to the wife after the dissolution of the marriage. According to the teachings of Imam Shaffie a marriage contracted during *iddat* is void altogether (*batil*), but Hanafi jurists regard the marriage merely irregular (*fasid*) and capable of becoming valid at the expiry of the period of *iddat*.[103]

(x) *Ihram*: *Ihram* is the period during which the pilgrims remain at Mecca and are enjoined to refrain from all worldly pleasures. According to Imam Shaffie it is only irregular (*fasid*) for a man or a woman to marry during *Iharm*, but the other imams consider such a marriage valid.[104]

(xi) *Talaq*: If a man irrevocably divorces his wife "she is not lawful to him until she shall first have been regularly espoused by another man, who, having duly consummated the marriage, afterwards divorces her or dies, and her *iddat* from him be accomplished, because God has said "if he divorce her, she is not, after that, lawful to him until she marry another husband".[105] The above principle was applied in *Saleem v Inul Rifaya*,[106] where the Board of *quazi*s pointed out that the following conditions should be observed if a divorced wife wishes to re-marry the same husband: (a) the wife should observe *iddat* after the divorce; (b) after *iddat* the wife should be re-married to another husband; (c) such intervening marriage should actually be consummated; (d) the second husband must then pronounce *talaq* or should have died; (e) the wife

[100] Hamilton C., *Hedaya*, 2nd ed, Vol. 1, Book II, Chap. 1, 29
[101] *See*, *Thahir v. Mohomad Gani Noor* 4 MMDLR 48. *See* also, Verma B.R, *Mahamedan Law*, 3rd ed, (1959), 69
[102] The Period of iddat when it arises from divorce is the period covered by three course in the case of a woman subject to menstruation: if the woman is not subject to menstruation, the period is three months. On the death of the husband the period is four months and ten days, and if the woman is pregnant at the time of her husband's death, four months and ten days or up to the time of delivery, whichever is longer
[103] *See*, *Thahir v. Gani Noor* 4 MMDLR 51
[104] Hamilton C., *Hedaya*, 2nd ed, Vol-1, Book II Chap 1, 30
[105] *ibid*, Vol. 1 Book IV, Chap VII, 108
[106] 4 MMDLR 64

should then observe *iddat*; and (f) after the completion of the period of *iddat* a marriage should take place between the original husband and wife. It is obvious that the policy behind the imposition of obstacles such as the above for the re-marriage of divorced spouses is the discouragement of divorce which is regarded in Islam as most reprehensible.

(5) DOWER

Dower (*mahr*) is an essential incident of marriage under Muslim law, and is enjoined by law as a token of respect for the woman.[107] The Holy Quran commands:

> "And give the women
> (On marriage) their dower;
> As a free gift; but if they
> Of their own good pleasure,
> Remit any part of it to you,
> Take it and enjoy it
> With right good cheer."[108]

It follows that the parties could fix the quantum of the *mahr* by mutual agreement, and also that the bride might expressly agree to waive her right to the dower. However, where the obligation to provide *mahr* is not expressly excluded by agreement, and the parties have not agreed on the amount of the dower,[109] the woman would become entitled to a 'proper' dower to be computed considering her age, beauty, fortune, understanding, virtue and social position.[110] *Mahr* may be either prompt (*muaffal*) or deferred (*mauwaffal*). The prompt dower is payable immediately on the marriage taking place and it must be paid on demand. It has been said that where the *mahr* is prompt "a woman may refuse to submit to carnal consummation until she receives the dower".[111] Prompt dower could be recovered during the subsistence of the marriage.[112] A deferred dower is only payable on the dissolution of the marriage by death or divorce.[113] In the absence of agreement among the parties, the *mahr* would be presumed to be prompt.[114] It must be noted that the woman is entitled to the *mahr* in full only if the marriage is valid (*sahi*) and has been consummated.[115]

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[107] *See*, *Waffa v. Sithy Hafeela* 4 MMDLR 132; *See* also, Mohanial Dayalji Manek, *Handbook of Mahomedan* Law, 5th ed, 42; cf. Hamilton C., *Hedaya*, 2nd ed.,, Vol. 1, Book II, Chap III, 44

[108] The Holy Quran (Edited by Abdullah Yusuf Ali) Sura Nisaa IV:4

[109] For the evidentiary aspects *see*, *Al-Ayed v. Ayed* 3 MMDLR 25; *Kadua Beebee v. Abdul Rahimam* 2 MMDLR 40; *Rahamath Umma v. Abdul Hamid* 3 MMDLR 30; *Isila Marikar v. Mohamed Haniffa* 2 MMDLR 82; *Sheriffdeen v. Rahuma Beebi* 4. MMDLR 160; *Jiffry v. Ummu Ayesha* 4 MMDLR 151; *Khalid v. Ummu Hanima* 3 MMDLR 68; *Naina Mohamadu v. Siththi Nona* 3 MMDLR 95; *Ahamadu Levval v. Asanathumma* 3 MMDLR 8; *Meyadeen Kandu v. Meera Lebbe* 1 MMDLR 36

[110] *Waffa v. Sithy Hafeela* 4 MMDLR 132

[111] *Pathumuttu Nachiar v. Abdullah Marikar* 9 S.C.C. 21; 1 MMDLR 28

[112] *Pathuma Bebe Cassim Vaidiyer v. Mohamed Cassim Sahjaan* 2 MMDLR 35; *Ibroos Lebbe Marikar Mohamed Mohideen v. Ummu Nona* 2 MMDLR 82; *Pathumma v. Cassim* 1 MMDLR 76; *Abdul Raheem Bhal v. Ibrahim Lebbe Noor Umma* 2 MMDLR 89

[113] *Sarb Krishna v. Fatima* 1937 Lahore 829; Verma B.R., *Mohammedan Law*, 3rd ed, 121

[114] Mohanial Daylji Manek, *Handbook of Mahomedan Law*, 5th ed, 45

[115] *Natchia v. Pitche* (1912) 14 N.L.R. 276. Where the marriage is valid but has not been consummated, the wife is entitled to half the mahr (*Umma v. Marikar* 1 MMDLR 53) unless she was responsible for the seperation (*Hashim v. Sithi Fathima* 3 MMDLR 135). Where the marriage is fasid and has been consummated, the woman is entitled to the

Mahr has to be distinguished from *kaikuli* which has been defined as "any sum of money paid, or other movable property given, or any sum of money or any movable property promised to be paid or given, to a bridegroom for the use of the bride, before or at the time of the marriage by a relative of the bride or by any other person."[116] Unlike *mahr* which when given constitutes the absolute property of the bride, the *kaikuli* is held in trust by the bridegroom on behalf of the bride and should be returned to her on the dissolution of the marriage.[117] However, as was pointed out be the Board of Quazis in *Munafdeen v Noorul Faslina*,[118] "irrefutable documentary and oral evidence" will have to be led to refute the *prima facie* evidence contained in a Marriage Certificate to the effect that "no *kaikuli*" was paid. Although it has been often suggested by humans rights activists that *kaikuli* should be abolished, in fact the institution is beneficial to married women insofar as husbands are accountable for the money or movable property given as *kaikuli* like any other trustee. In fact, it is most desirable to extend such protection to a house or other immovable property given to a bridegroom for the use of the bride on the occasion of the marriage.

D - Consequences of a Muslim Marriage

The legal consequences of a Muslim marriage are multifarious. Where the spouses do not belong to the same race or nationality, the wife will be governed by the personal law of the husband during the subsistence of the marriage.[119] Accordingly, if for example, a Kandyan Sinhalese woman marries a Muslim man who is not a Sinhalese, she will be governed by Muslim law so long as the marriage lasts, even where she had not embraced Islam, and the marriage was under the General Marriages Ordinance.

Marriage legalises sexual intercourse.[120] In the context of child marriages, which are permitted under the Muslim law of Sri Lanka, the question arises whether §363 of the Penal Code is applicable to a child marriage. This Section, as it originally stood, made it an offence to have sexual intercourse with a female under twelve years of age[121] and in *Mukamadu Lebbe v. Mohamado Tamby* [122] Moncreiff A. C. J. expressed doubts as to whether the section would apply to a Muslim child marriage. The Muslim Law Research Committee,[123] however, has adopted the opinion of Prof. H.M.Z.Farouque

specified dower or the proper dower, which ever is less. If the marriage be fasid but has not been consumarated, or if the marriage is batil the woman is not entitled to any mahr

[116] §97 of the Muslim Marriage and Divorce Act, *Supra*, note 5. It has been held that immovable property given to the bride cannot be regarded as kaikuli and may be alienated by him without the wife's consent. *See*, *Zainabu Natchiya v. Usuf Mohamadu* (1936) 38 N.L.R. 37; 2 MMDLR 12. *See* also, *Sharifdeen v. Rahuman Beebi* (1958) 60 NLR. 138; *Jayah v. Shaheeda* (1957) 61 N.L.R. 36.

[117] *Sowdoona v. Abdul Munees* (1955) 57 NLR. 75

[118] [2006] 1 Board of Quazis' Law Reports 2

[119] *See*, §2 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876. *See* also *Supra*, note 21

[120] *See*, *Abdul Kadir v. Salima* (1886) 8 AIR 149 at pp.154-155

[121] The fifty limb of §363 of the Penal Code No. 2. of 1883, as subsequently amended, enacted that "a man is said to commit 'rape' who,…. has sexual intercourse with a woman…..with or without her consent, when she is under twelve years of age."

[122] 1 MMDLR 40 at 42

[123] In its report published in (1978) 4 Colombo Law Review 57 at p.60

that "a man commits the offence of rape if he has sexual intercourse with a girl below twelve years of age even if she is his wife and irrespective of her consent."[124] In his recent work entitled '*The Quazi Court System in Sri Lanka and its Impact on Muslim Women'* the author expressed the view that the penal section would apply with respect to a Muslim girl below the age of twelve,[125] a view which is certainly strengthened by the 1995 amendment to the Section which expressly provides that a man will be guilty of 'rape' if he has sexual intercourse with a woman "with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man."[126]

It has been held in Sri Lanka that anti-nuptial contracts are not necessarily invalid.[127] As noted earlier, on marriage taking place the wife becomes entitled to *mahr*, unless this right has been expressly waived or deferred. The husband is also liable to maintain his wife.[128] Furthermore, by reason of marriage, the spouses would become entitled to each other's company, and while the husband would have to provide the wife with a residence[129] she cannot refuse to live with the husband on the ground that his other legal wives are also living with him.[130] However, as observed by the Board of Quazis in *Nainam Sahib Seyed v Muttu Pathumma Monna Ahamadu,*[131] "it is unlawful for the husband to provide a dwelling to one of his wives and call the rest to it" and "to keep two co-wives together in one house except with the mutual consent of both of them".

In Sri Lanka, § 47(1) of the Muslim Marriage and Divorce Act which empowers the Quazi Court to inquire into and adjudicate upon any claim for maintenance by a wife, restricts this power in the case of a *divorced* wife to the award of maintenance "until the registration of the divorce or during her period of *iddat*, or, if such woman is pregnant at the time of the registration of the divorce, until she is delivered of the child"[132]and to *lying in expenses*. [133] It is important to note that there is no express statutory provision for the award of *matah* which may be described as a 'consolatory gift' which a husband is commended in several verses of the Holy Quran[134] to make to his wife on the occasion of the divorce, and it is necessary to implement the recommendation of the Dr. Sahabdeen Committee that the Act should be amended to provide for the same.[135] In this background, it is also interesting to note that in India great strides have been taken to improve the condition of a divorced wife following the decision of the Supreme Court of India in *Mohd. Ahmed Khan v. Shah Bano Begum*[136]and the enactment of the Muslim Women (Protection of Rights on Divorce) Act of 1986. §4(2) of this Act directs the

[124] Farouque H.M.Z, *Muslim law of Ceylon*, 4 MMDLR 1 at p.12
[125] *See*, Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, 22
[126] §12 of Act No. 22 of 1995 which seeks to replace the original §363 of the Penal Code with a new one.
[127] *Abdul Rahiman v. Ussan Umma* 1 MMDLR 65
[128] *Sithi Sanooba v. Mohamed Nazim* . Cf. *Thahir v. Gani Noor* 4 MMDLR 51
[129] *Sithi Zanooba v. Mohamed Nazim* 3 MMDLR 102, 105
[130] *Pathumma v. Seeni Mohammadu* 1 MMDLR 81; (1923) 23 NLR 277
[131] (1937) MMDR II, 27
[132] § 47 (1) (d) of the Muslim Marriage and Divorce Act, *supra* Note 5
[133] *ibid.,* § 47 (1)(g). See also, Nafeek v Sithi Janufa [2006] 1 Board of Quazis' Law Reports 43
[134] *See,* for instance, the Holy Quran, *Sura Baqara* II: 229; *Sura Ahzab* XXXIII: 49 and *Sura Talaq* LXV: 2
[135] *See*, Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, 49
[136] 1985 (2) SCC 556. See also, *Mst. Zohara Khatoon v. Mohd. Ibrahim* AIR 1981 SC 1243

State Wakf Board to make payment of maintenance to a divorced woman who was unable to maintain herself and whose relatives as defined in Sub-section (1) of that section are also not in a position to maintain her.[137] While this legislation has provoked controversy, the judicial and legislative endeavours highlight the need to bring the statutory law in line with the principle of *sharia't* law.

Marriage would also confer on the husband some right for the guardianship and the custody[138] of any legitimate child. It has been held that the mere fact that a custodial dispute between the parties is pending before the District Court does not prevent a Quazi Court from awarding maintenance with respect to a child who is the subject of such dispute.[139] A married man is liable under the *sharia't* law only to maintain his legitimate children. In regard to proof of legitimacy the Islamic law principles have been displaced by §112 of the Evidence Ordinance,[140] and by reason of an amendment made to the Muslim Marriage and Divorce Act in 1965 a Muslim man is liable to maintain even his illegitimate child where the mother of such child is also a Muslim.[141] In *Hashim v Hashim*, the Board of Quazis emphasised that the objective of the Act was to provide Muslims "solutions to their matrimonial problems without being hemmed in by a plethora of technicalities"[142] and that in this background there was not objection to a combined application being filed on behalf of a wife and a child for the recovery of maintenance.

It is noteworthy that "the doctrine of 'unity of person' has no place in Muhammadan matrimonial law"[143] and the wife possesses an independent legal personality even after the marriage. The marriage would also not affect the property rights of the wife.[144] A married woman can sue on her own, and there is no bar to her instituting legal proceedings even against her own husband.[145] The marriage does not in any way make her husband her legal representative.[146] It has also been held that marriage does not confer majority according to Muslim law.[147]

As noted earlier, marriage also has the effect of preventing the female spouse from entering into a subsequent marriage during the subsistence of the first marriage. Even where the marriage is terminated by the death of the husband or by divorce, the

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[137] The constitutional validity of this provision was upheld in *Syed Fazal Pookoya Thangal v. Union of India* AIR 1993 Ker. 308 and *Danial Latifi v. Union of India*, (2001) 7 SCC 740

[138] *See*, Marsoof S., *Muslim Law Relating to Custody of Children*, (2006) Bar Association Law Journal, Vol XII, 10

[139] *See*, *Fathuma Beebi v Mohamed Jiffry* [2006] 1 Board of Quazis' Law Reports 24

[140] *See*, *Mohamed Faleel v. Najeema Umma* 2 MMDLR 110; *Sheriff v. Sowdoon Umma* 4 MMDLR 111; Cf, *Dawood Lebbe v. Kalender Beebee* 2 MMDLR 104 ; *Sulaina Lebbe v. Mariamkandu* 2 MMDLR 64 and *Maharoof v Hamsa Umma* [2006] 1 Board of Quazis' Law Reports 56

[141] § 47 (1) (d) of the Muslim Marriage and Divorce Act, *supra* Note 5 as amended by § 6 of Amending Act No. 1 of 1965

[142] *Hashim v Hashim*, [2006] 1 Board of Quazis' Law Reports 17 at page 20

[143] Mohanlal Dayalji Manek, *Handbook of Mahomedan Law*, 5th ed., 39

[144] *Tillekeratne v. Samsedeen* (1901) 4 NLR. 65

[145] *Pathumma v. Cassim* 1 MMDLR 76; *Idroos Lebbe Marikar Mohamed Mohideen v. Ummu Nona* 2. MMDLR 83. *See* also, the case reported in 1851 Austins Report 169

[146] *Timothy David v. Ibrahim* (1911) 13 N.L.R. 318

[147] *See*, *Narayanen v. Saree Umma* (1921) 21 NLR 439

woman is prohibited from entering into another marriage during the period of *iddat.*[148] It should not be forgotten that there are certain restrictions placed even on a male as regards subsequent marriages. Marriage would also create certain relationships that would constitute legal impediments to further marriages. Marriage also creates mutual rights of inheritance between the spouses to the extent permitted by Islam. [149]

E - Conclusions

From the foregoing, it would be apparent that most of the problems in the Muslim Law of Marriage applicable in Sri Lanka arise from the deficiencies in the statutory framework within which the *sharia't* rules operate, and the failure of the Courts to appreciate and give effect to the wisdom of the *sharia't.* For example, §25(1) of the Muslim Marriage and Divorce Act, which provides that the validity of a Muslim marriage has to be determined according to *the law of the sect to which the parties belong,* is incapable of application when the parties to the marriage are adherents of two different sects. Furthermore, although the *sharia't* regards marriage as a contract as opposed to a religious sacrament, there is no provision in the Act for the bride to place her signature in the marriage register, and the consensual nature of marriage has been overlooked in most of the judicial decisions relating to the exercise of the option of puberty (*khyar-ul-bulugh)* by girls given in marriage by their marriage guardians. Obsessed by the self imposed need to apply Shaffie law to the followers of the Shaffie *mazhab,* our Courts have forced such girls to abide by marital bonds which they had not voluntarily entered into.

The best solution is to enact, after careful deliberation, a Code of Muslim Law which will universally apply to all Muslims irrespective of the sect or *mazhab* to which they belong. However, in view of the difficulties involved in enacting such a Code in the present circumstances, it is suggested that some of the shortcomings in the present Act may be overcome or minimised by deleting from §25(1) of the Muslim Marriage and Divorce Act words that tend to equate 'sect' with *mazhab* or 'school of thought'. It would be desirable to include in the Act a definition of the term 'sect' to mean the Sunni or Shiah sects, as opposed to mere schools of thought. Courts and tribunals administering Muslim law can then depart from the stringent application of the teachings of the various Imams to their adherents and adopt an eclectic approach which could produce a rich blend of Sunni and Shiah law. It is also necessary to clarify by legislation the law that will apply for the determination of the validity of a marriage that may be contracted between two persons belonging to two different sects.

Amendments to the Muslim Marriage and Divorce Act are also necessary to provide for the entering of the terms of the marriage contract in the Marriage Register. The Act may also be amended to provide for the placing of the signature of the bride (in addition to the signatures of the bridegroom and the marriage guardian of the bride) in the Marriage Register. It is also imperative to incorporate into the Act the conditions

[148] *See*, *Thahir v. Mohomad Gani Noor* 4 MMDLR 51

[149] *See*, Akbar M.T., *The Mohammedan Law of Intestate Succession In Ceylon*, (1919) 1 Ceylon Law Recorder 3-5, xix- xxii, iviii-ixii, ixix- ixxii

insisted upon by the *sharia't* for the exercise of polygamy and to subject the exercise of polygamy to some kind of judicial control as has already been done in several other jurisdictions.[150] The provisions contained in the Muslim Marriage and Divorce Act regarding divorce has also to be carefully considered in the context of the increasing incidence of *talaq* which has become a serious social problem in the absence of specific provision in the Act for the award of *matah*.[151] It is also necessary to add to the grounds of divorce available for a woman seeking a *fasah* divorce, and to include provision in the Act for the recognition of *talaq-i-tafwid*. Furthermore, some relief has to be given to married as well as divorced women by removing the difficulties presently experienced by them in recovering maintenance and other dues, and by conferring on the Quazi the power to decide on the custody of children when granting or registering a divorce. The uncertainties created in the law by the recent judgment of the Supreme Court in *Abeysundere v. Abeysundere*[152] also need to be resolved through legislative intervention.

[150] For an account of legislation restricting the exercise of polygamy in countries such as Syria, Tunisia, Morocco, Iraq, Pakistan and Bangladesh, *see*, Marsoof S., *Polygamy: Is Judicial Control Necessary?*, (1983) Meezan, 42

[151] *See,* text accompanying *Supra* note 134. See also generally on his subject, Marsoof S., *The Quazi Court System in Sri Lanka and its Impact on Muslim Women*, (2001) MWRAF, Chapter V

[152] [1998] 1 Sri LR 185