

Muslim Women's Research and Action Front (MWRAF)

MWRAF is a non political and non-profit making group of active, and progressive muslim women, who will take up multidisciplinary issues specific to Muslim women, while working together for raising of consciousness and total development challenging the forces that perpetuate underdevelopment and striving towards progress based on equality and justice;

Among the specific objectives are the following:-

1. Education through sharing of knowledge and experience for positive change and progress.
2. Undertake action-oriented participatory research with a view to identifying the forces that perpetuate oppression and plan out strategies for corrective action.
3. Aim at documentation of all available data and statistics pertaining to muslims in Sri-Lanka, and arrange a bibliography of all writings (both national and international).
4. Arrange for periodical workshops/studu groups on themes specific to Muslim Women:
 - Health and Muslim Women
 - Law and Muslim Women
 - Education and Muslim Women
 - Employment and Muslim Women
- (ii) At the international level e.g.
 - Law applied in other muslim countries and countries with muslim minorities
 - update our knowledge of muslim women and their struggle abroad.
5. Publish a newsletter/bulletin carrying news of current interest to muslim women with the object of education. Arrange for translations in Sinhala and Tamil.
6. Campaign for just and fair treatment of muslim women.
7. Form a common front for struggle and support with other progressive groups at national and international level.

***MWRAF** is presently in the process of building up its research and documentation centre on progressive writings on Islam and Muslim women, and would welcome contributions in the form of publications, books etc.*

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Memorandum submitted to the committee on proposed reforms to Muslim personal law

Muslim Women's Research and Action Front

The Muslim's Women's Research and Action Front considers the appointment of a committee to examine Muslim Personal Law in the light of reform as a positive step in the socio-legal and cultural upliftment of the community.

MWRAF as a group of committed and concerned Muslim women wishes to suggest a basis for reforms, though we would like to reiterate the fact that our framework is within the Quran & Sharia and the proposed changes would in effect be implementation of not only the letter of the law but also the spirit of the law- in other words the essence of the Quran in its totality.

Islam not only gave a high status to women, it gives them concrete and well defined rights in matters like divorce, marriage, maintenance, inheritance, etc. The Quran has also repeatedly exhorted men to be kind to women and treat her with Ihsan (benevolence) and in general women's rights should be respected.

A process of juristic development extending over more than two centuries separates the Quran from the classical formulation of Islamic law according to the different Sunni & Shia schools. The general Quranic norms & injunctions suffered considerable dilution during this period. The tendency was to interpret the Quranic provision in the light of the prevailing standards of the tribal law. In particular the general ethical injunctions of the Quran were rarely transformed into legally enforceable rules but were recognised as binding only on the individual conscience, for eg- a husband was never required to show that he had any reasonable or proper motive before exercising his power to repudiate his wife. And while the Quran insists upon the impartial treatment of cowives in polygamous unions, classical Islamic law did not elevate this requirement into any kind of legal restriction upon a husband's right to have four wives.

The Quran is thus not just a legislative document, but also the declaration of the fundamental Islamic ethic.

1. Marriage

Holy Quran (Sura iv - 3)
"If ye fear that ye shall not
Be able to deal justly
With the orphans
Many women of your choice,
Two, or three, or four ;
But if ye fear that ye shall not

Be able to deal justly (with them)
Then only one, or (a captive)
That your right hands possess.
That will be more suitable
To prevent you
From doing injustice."

This is the verse which is taken as granting permission to marry four times. First it permits polygamy only under certain conditions. It does not enjoin on every person to be polygamous. It categorically states that monogamy is the suitable choice. Malinterpretation of this verse to conclude that polygamy is permitted as a matter of routine is far from the truth. This malinterpretation has been intertwined as part of Muslim personal law and given judicial sanction.

It is regrettable that this false interpretation continues to be used judicially and polygamy permitted even in the envious situation of a convert to Islam specifically doing so to abrogate and dishonour his wife.

The present Ordinance which governs Muslim personal law in Sri Lanka - The Muslim Marriage and Divorce Act, we feel needs reform and certain specific safeguards have to be built into the present legal frame - not only to ensure justice but also to guarantee legal sanction to Quranic injunctions.

Enforcement of the principle of equality or fairness poses a difficulty, but the institution of polygamy depends on justice and therefore it is this aspect that has to be given legal sanction and not mere intention to marry (second or subsequent marriage) being publicly notified/exhibited at the mosque. (Part 11 sec. 24 - M M & D Act.).

In many Muslim countries today, a wife is permitted to insert stipulations into her marriage contract restricting her husband's right to marry additional wives.

In Iraq, Somalia, Singapore and two of the Malay states the husband who wishes to marry a second wife must first obtain the permission of the court. In Pakistan such permission must be obtained from an arbitration council with representatives of the husband and of the wife. In Iran and Pakistan the first wife can obtain a dissolution of her marriage and may even demand the full dower (as in Pakistan). Taking this further, in Iran, even if the court has granted permission to marry a second time, the first wife may still petition for divorce on grounds that she did not consent to the second marriage.

Considering the factors outlined we suggest that:

a) An independent body be appointed (comprising both male & female representatives of both husband and wife) to decide whether the man contracting the second or subsequent marriage could adhere to the principle of justice.

b) Justice and equality in its essence would mean not only providing for material living but also in the emotional plane. Love and affection, being subjective factors, in our opinion the first wife would be the best judge as regards fair treatment by the husband. The wife could give her consent in the presence of two witnesses in a Quazi Court.

Failure to get the first wife's consent should prevent the second marriage.

c) Any other form of guarantee that would ensure equality and justice as stated in Sura iv -3 (Holy Quran), considering what is legitimate in the context of the current social climate.

Consent to marriage

The consent of both spouses should be considered an essential condition for marriage and women should be given the option to conclude their own contracts. Consent to marriage should be obtained - Shafi law notwithstanding where "the father can dispose as he pleases the hand of his daughter without her consent....." (Minhj et Talibin p 284)

A Muslim attains "majority for purposes of marriage on reaching the age of puberty. In matters of marriage and divorce a Muslim is governed by the law of the sect to which he or she belongs. This is in contravention to the : Age of Majority Ordinance which is of general application and expressly states that "any law or custom notwithstanding the age of majority for all purposes is 21. In effect this Ordinance supersedes Muslim law.

The Holy Prophet frequently told that a woman should not be forced to live with a man she does not want or whom she hates, and explained on several occasions that, to start with a woman should be allowed to choose the man she is going to marry. (See page 6, para 5) Thus we feel the necessity to obtain the formal consent, by the signature of the woman on the marriage contract.

2. Divorce

Holy Quran : (iv - 128)

"If a wife fears
Cruelty or desertion on her husband's part.
There is no blame on them
If they arrange
An amicable settlement
Between themselves :
And such settlement is best;
Even though men's souls
Are swayed by greed."

Islam emphasizes the sanctity of marriage and family relationship and ensures the essential human dignity and fundamental equality of women.

The Holy Quran says - (Sura iv - 1)

O mankind reverence
Your Guardian Lord,
Who created you
From a single person,
Created, of like nature,
His mate, and women whom
Ye demand your mutual (rights),
And (reverence) the wombs
(that bore you) : For God
Ever watches over you".

Of all things permitted by law said the prophet, "divorce is the most hateful in the sight of God".

There is even punishment for a man who divorces in haste.

The Holy Quran dictates that all opportunities should be available for reconciliation. Therefore the necessary stipulation that "talaq" has to be pronounced separately with an interval between each pronouncement. (Holy Quran SLXV). Islam while not prohibiting divorce altogether imposed curbs on its unfettered use. Besides restricting the husband's power of divorce it raised the status of women conferring on them equal rights to obtain a divorce and went so far as to forbid its exercise without the intervention of arbiters. (Holy Quran - iv - 35) (ii - 229)

According to the present Muslim M & D Act, the man's right to divorce seems unconditional, and undisputed, whereas a woman's right is conditional, subject to proof of "fault" and evidence of two

witnesses. The law however puts severe restrictions on the wife even if there is proof. If "fault" cannot be established an application for fasah divorce can be refused. (Aseem Vs Noor Nanema)

Under Shafi law, unfettered by the procedure laid down in the Ordinance, the divorce becomes effective after a lapse of three lunar months from the pronouncement of the first talaq whether or not the subsequent talaqs are pronounced.

Thus Talaq pronounced by the husband in the absence of the wife takes effect though not communicated to her. (Seyadu Ahamed Va Ruwalda Umma). The legal implication of this would mean -that the wife who in reality, was no wife, sues for divorce only to be told that in law she and he were complete strangers to each other. (Mansoriya Vs Sithiy Jaria) A fasah divorce - can be applied for, only "on account of any act or omission" on the part of the husband which amounts to a "fault". What such fault is under the law, M M and D Act does not attempt to define. This seems to be a glaring omission in our Ordinance, when compared to the Family Codes in operation in other Muslim countries.

It is to be noted however that the central feature contained in the Quran is the intent to improve the social position of women. The Prophet has said, "Ye men, ye have rights over your wives, and your wives have rights over you." According to Islam a woman is allowed to tear up the marriage contract if she has been forced to conclude it, or was cheated when she entered into marriage agreement. The Prophet himself broke up the marriage of Khansa'a, the daughter of Khozam El Ansaria, because she was forced into it by her father (Sahih El Bukhari Vol. 7p. 18)

(The marriage of Zaid and Zainab was dissolved on account of incompatibility. (H.Q. 33-36, 37)

Considering the factors outlined we suggest that at the time of entering into marriage, certain provisions (not opposed to the purpose of marriage) be included into the marriage contract which gives the woman a delegated power to divorce her husband under certain conditions. (Family Protection Act - Iran. See Annexure I - Form of Nikahnana - Pakistan).

In Pakistan, the Supreme Court allows right of divorce to women for dissolution of marriage on grounds of incompatibility. The Syrian law of Personal Statute (1953) made the husband's motive for divorcing his wife a subject of judicial scrutiny. This law also provided that where a husband divorces his wife without good cause he should pay her financial compensation to the equivalent of one year's maintenance. In addition in Tunisia, Malaysia, Iraq, Iran and South Yemen, the law required that all pronouncements of divorce should be made in a court of law. Tunisia has even gone a step further and removed the power of unilateral talaq. In the light of the findings we suggest that :

- a) If a man marries another wife, his first wife should be entitled to seek fasah - a judicial dissolution of the marriage. This would in effect prevent undue delays and hardships to the affected wife.
- b) Unilateral utterance of talaq remains irrevocable under our Act. We strongly feel that this procedure does not give the wife equal protection under the law and utterance of talaq should be subject to the presence of witnesses, and with adequate reason for dissolution. The belief that the husband had the absolute power to divorce at the slightest provocation is pre-Islamic and was in fact forbidden by Islam.
- c) Incompatibility also made a legal ground for fasah divorce. Such conditions if incorporated into the marriage contract would make it valid and enforceable in law : as it would be binding on both parties (see Annexure I - Form of Nikahnama - Pakistan).

3. Maintenance

The Holy Quran is explicit on this subject when it states (LXV - 2)

"Thus when they fulfil
Their term appointed,
Further take them back
On equitable terms
Or part with them
On equitable terms
And take for witness
Two persons from among you,
Endued with justice,
And establish the evidence
(As) before God".

Parting on equitable terms cannot mean that one refused support to a divorced wife, if she has no other means of support. (511 - 241)

"For divorced women
Maintenance (should be provided)
On a reasonable (scale)
This is a duty
On the righteous".

The Holy Quran invokes that the divorced woman should be maintained each according to his means and in the same life style as the man. The Holy Quran also insists that there should be "mutual counsel" with "reasonableness" and is quite clear that "maintenance" is the right of the divorced woman.

Sura 11 - 229 of the Holy Quran allows divorce but recognises what is right and honourable.

Use of the instrument of law in obtaining an equitable distribution should be resorted to in matters when there exists a misunderstanding or when other considerations arise.

Under Islam, the Muslim women had been given this right in the form of contractual agreement where she and her future husband can stipulate and agree on all conditions before the marriage is contracted.

In Tunisia, the code of Personal Status, gives the woman the right to claim maintenance from her husband where she has spent on her own maintenance. i.o. the right to seek re-imburement. Also the right of maintenance is not lost to the wife by the passage of time.

The Islamic family law of Malaysia has even provided for payment of interim maintenance (where the court is satisfied that there are grounds for the payment of maintenance), to take effect at once and to be in force until an order of court is made on the application for maintenance.

In making an order for payment of maintenance much is left to the discretion of the Quazi under the present Act. Case records have revealed that maintenance is effective only from the date when it is made and not from the date of application, and reimbursement of any expenditure incurred previously is not included.

In the present context, where the Muslim women of this country have to bear the inevitable burden of the state of absolute poverty (which is in fact the reality faced by the community), payment of maintenance should be given first priority - whether interim, re-imburement, or general in order to help ease the economic sufferings.

Other considerations

1. Quazis:

In view of the incompetence of the present Quazis (even with unlimited powers under the present Act) to deal adequately in cases of divorce, maintenance, etc., we suggest that those qualified to be Quazis should be Attorneys -at-law with experience, and well learned in Islamic law & jurisprudence. They should enjoy the same compensation as the judges of the district Courts and should be allowed to serve in the office of Quazi only during good behaviour. In the appointment of Quazis it is preferred that there be referees (2) who could vouch for their integrity. Men & women should have equal rights to be appointed as Quazis.

2. Kaikuli (Bride price)

The definition of Kaikuli as stated in the Act is completely unislamic. In reality it is a practice that has been given legal format due to the force of customary law: and reducing marriage to a commercial transaction between buyer and seller. Every effort must be made to remove this, not only from the marriage contract form, but also from the social system because it places a heavy financial burden on the bride's family and reduces her status to that of an economic liability.

3. Second schedule to the Muslim Marriage and Divorce Act.

- Rules to be followed in the case of divorce by the husband.

"Sec. 3 - The Quazi shall not record the alleged reasons for which, or the alleged grounds upon which the husband seeks to pronounce the talak".

We strongly object to this clause as it is blatantly discriminatory to Muslim women.

Concluding comments

A legal system that is binding on all members of society seeks to preserve the status-quo. A legal system is thus time bound, unlike the social system that surround it which is dynamic. The result is that law tends to be divorced from social relations. Thus with time, contradictions between the legal and the social system get intensified and sharpened. This leads to a move to institute parallel reforms in the legal system in line with societal changes. But at the same time the justification for these changes will be determined by the limits of the existing legal system and the belief system on which it has been founded. In the case of women particularly it is the accepted customary belief system or ideology that pervades. Reforms instituted should in the first place be able to challenge the accepted customary/belief system if it is to serve any useful purpose; or it remains relegated to its former role of reinforcing the existing structures, codes of behaviour and belief system in a new legal terminology.

Whether the Muslim Personal Law Committee is genuinely aiming at reform only time will tell!

The Working Committee.

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MWRAF

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