

Memorandum on Matrimonial Laws

[Extract From The Covering Note](#)

The following memorandum was written by Maulana Sayyid Sa'eed Akhtar Rizvi for submission before the Commission on the laws of Marriage, Divorce and succession, set up by the Kenya government under the Chairmanship of Mr. Justice Spry, of Kenya High Court.

The terms of reference for the Commission are:

"To consider the existing laws relating to marriage, divorce and matters relating thereto;

"To make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage, and divorce applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, Islamic law, Hindu law and the relevant acts of Parliament and to prepare a draft of the new law;

"To pay particular attention to the status of women in relation to marriage and divorce in a free democratic society".

The Commission had earlier sent questionnaires to all interested parties, and the Supreme Council sent their answers (also written by Maulana Sayyid Sa'eed Akhtar Rizvi) to the Commission beforehand.

The Commission sat for hearing in Mombasa from 21st August, 1967. Our delegation appeared before the Commission on 22nd August. Along with the memorandum, a comprehensive set of "Islamic laws" and a collection of lectures on Usul-e-Deen "Islam", both written and compiled by Maulana Sayyid Sa'eed Akhtar Rizvi, were presented before the Commission.

Needless to say that Maulana's effort in this respect has been most commendable; and I have no hesitation to admit that the following submission would not have been successful without his guidance and assistance.

The members of the delegation were Mulla Ashgherali M. M. Jaffer (Hon. Gen. Secretary), Mr. Hassan A. M. Jaffer (Hon. Treasurer), Maulana Sayyid Sa'eed Akhtar Rizvi, Maulana Sheikh Maqbool Hussain (Mombasa), Mr. Bashir H. Pira and I.

The Hon. General Secretary of the Khoja Shi'a Ithna-'Ashari Supreme Council, Mulla Asgherali M. M. Jaffer, acted as the spokesman of the Shi'a Ithna-'Asharis; and read out the submission before the Commission. He also replied to the questions put forward by the Commission, and clarified several points relevant to the laws of marriage, divorce etc. according to Shi'a school.

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President, Shi'a Ithna-'Ashari Supreme Council,
P.O. Box 1085, Mombasa.*

1. On behalf of the Shi'a Ithna-'Ashari Community of Kenya, we take the liberty of making this submission for the consideration of the Commission.
2. In this submission, we are confining our remarks to religious laws pertaining to Marriage, Divorce, Will and Inheritance of the Shi'a Ithna-'Ashari Sect of Islam.
3. It is appreciated that multiple social problems arising out of the abuse or misinterpretation of customary, traditional or religious laws, in general practice, give cause for serious concern to the Government; and the Government in its desire to secure the welfare of its people in that respect, is confronted with a difficult task of eradicating social evils.

Any effort in this direction is worthy of support and deserves all the co-operation. But, we feel that the idea of enacting a Common Law to replace the existing Islamic Laws is not the right one. Even traditional customs (not having any religious authority behind them) are hard to change. This becomes even more dangerous in cases like Islamic Law which are an integral part of our religion, which are not confined to rituals only. These Laws cannot be violated without incurring a sense of guilt and sin.

Therefore, we feel that the best way would be to "Let hundred flowers bloom." National unity does not demand that all citizens should have the same dialect or the same religious belief. So why is it considered essential that there be a Uniform Law of Marriage and Divorce applicable to all persons in Kenya.

4. Our Shi'a Ithna-ashen Sha'riah is not based upon "Ra'i" (Opinion) or "Qiyas" (analogy). It is based wholly on the Qur'an and the traditions of the Holy Prophet and our Twelve Imams.
5. As this Commission is concerned with matters of matrimony and succession, we must point out that the fundamental rules and many details of succession are given in the Qur'an. In fact, this subject is dealt with more fully in the Holy Book. Likewise, the fundamental rules of marriage and divorce are

based upon the Qur'an.

The details which are not explicit in the Qur'an are explained in the traditions as mentioned above.

Our religious scholars who are called Mujtahid do not give any ruling by their opinion, analogy or Consensus. There is no such authority given to anybody in our School of Law. They may differ in interpreting certain traditions concerning some minor details, but even then that difference is a difference in interpretation, not of opinion.

The Shi'a Ithna-'Ashari Sect follows in all religious matters the rulings of the greatest Mujtahid of the time. He is considered the representative of our Twelfth Imam and he is the final authority on all religious matters. In him vest in certain cases the powers of guardianship of children, guardianship in marriage and divorce, executorships of the Will and estate of a deceased and such matters.

Ithna-'Ashari school of Islamic Law is a well-knit entity. We cannot change or amend one or two aspects of it without destroying the whole fabric.

For example:

(1) Marriage and divorce rules have direct bearing on legitimacy or otherwise of a child; on virtue or sin of togetherness of the man and the woman; on their mutual right of inheritance and that of the child; apart from the social and legal embarrassments.

(2) In Islamic Law a man cannot use anything obtained illegally (in religious sense) either for secular or for religious purposes. Therefore, if a change is made in the Laws of succession and someone is given more than his due share according to Qur'an, his whole life would become miserable. His daily life would be a long list of transgressions; his prayers, pilgrimages, food and clothing would, in the religious sense, become unlawful.

Thus it is clear that the pattern of laws of marriage, divorce and inheritance cannot be changed; otherwise this would constitute a direct interference in our religion.

6. With regards to the Commission's desire "to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society" we wish to submit as under:-

(a) In our School of Law a women have such rights, privileges and safeguards since Fourteen Centuries, most of which were unimaginable in non-Islamic Societies up to the last century and some of which are ahead of the so-called modern time.

(b) Islam according to Shi'a school has given a woman right to contract herself in marriage if she is adult and discreet.

(c) Islam has given the woman an independent identity. A Muslim woman owns her property even after marriage and husband cannot interfere with it.

(d) She can sue her husband, can give evidence against him. She inherits from him by right and he from her. This mutual right of inheritance was given when no society ever thought about it.

7. A woman's share is, normally, half of that of a man. But this is quite logical. Islam has made man responsible for the maintenance of his family. No such burden is laid upon women. Even a rich wife is entitled to get her maintenance from her husband though he may be poor. As the maintenance of the family is the responsibility of man, he has been given double share in almost all inheritances.

Also, the woman gets the dowry which goes from husband to wife. The ratio of shares as laid down in the Qur'an is, therefore, most reasonable.

8. Islamic Laws relating to Will do not allow a person to will away more than one third of his net estate. Thus the financial position of the would-be heirs is always secure and beyond any encroachment by anyone. This security is still lacking in many societies which allow a man to give all his estate to a perfect stranger.

(a) Now we come to some of the matrimonial affairs:

Polygamy: African Society was, and to a certain extent is, a polygamous society. Islam also permits polygamy. It has allowed four wives at a time and has enjoined equality in treatment of all wives.

(b) It should be remembered that polygamy is not a compulsory thing nor is it advocated. It is just permission with certain limitation and conditions. And in some of the circumstances this permission proves extremely useful.

For example: If the wife is chronically ill, or is barren, or for some other reasons it is not desirable for the couple to live as husband and wife. The remedy offered by certain societies is to divorce the wife and remarry. But is this justice? Is it kind or noble to turn out a woman in her old or middle age from her home, just because she remains sick or she happens to be barren? Islam discourages such cruelty by permitting polygamy.

10. (a) **Divorce:** There is no need to emphasize that in certain conditions divorce is the only remedy left for a couple. The usefulness of the divorce system can be seen from the fact that even Hindus and many Christians have been compelled by sheer force of necessity to enact divorce laws.

(b) We must point out at the outset that the Shi'a Ithna-'Ashari school of Islamic Law has laid down strict rules based upon the Qur'an and traditions, concerning divorce.

(c) Divorce has been declared by the Holy Prophet to be the "most despised of all legal things."

(d) Qur'an has established the machinery for reconciliation whenever there is any discord between husband and wife.

(e) **Conditions of Divorce:** The divorce is allowed provided it is pronounced in the presence of two "Adils" (men of approved probity) witnesses who hear the words and understand the nature of divorce. The divorce must, be pronounced in approved, formula.

Further, it is also necessary that the husband must be adult, sane, and of sound understanding, acting on his own free will and not under the fit of rage or duress, and that he should have the distinct intention to dissolve the marriage.

So far as wife is concerned, she at the time of divorce must be in a state of purity, and that divorce cannot be pronounced even in a period of purity in which the husband has had sexual intercourse with her.

If any of the above mentioned conditions is violated, the divorce is null and void. ● '

(f) Three divorces cannot be given at one time. If somebody says that he gives three divorces, even one will not be valid.

(g) In most cases, the divorce is revocable and the husband is bound to maintain the divorced wife during the period of "Iddat" (normally three months) in his house unless she opts to leave.

(h) During the said period of "Iddat", the husband has right to revoke the divorce by words or action and there will be no need for any formality.

These strict rules have always been observed by our sect. Thanks to our Sha'riah, divorces in Shi'a Ithna-'Ashari Sect are very rare.

11. Right of Woman Regarding Dissolution of Marriage: Woman has not been given a right to divorce her husband. The reason is not very difficult to understand. Family is the basic society of humanity and as every society needs a final authority to keep it well-organized, the family also must have a supreme head. Islamic Law has given that place to the husband, and the husband has been given the right to give divorce.

But the wife is entitled to ask for divorce in many cases: e.g.

(1) She can ask for a Khula which can be agreed upon by the husband;

(2) She can request the Mujtahid to grant her divorce in cases where the husband has disappeared, or neglects to maintain her.

(3) In case of insanity of the husband, whether it occurred before or after the marriage, she has the right to cancel the marriage without any need to refer the case to Mujtahid.

(4) And she can nullify the marriage after referring the case to the Mujtahid, if the husband is impotent.

12. In our submission, we have pointed out earlier that a uniform law in a cosmopolitan society such as

that of Kenya is not essential for national unity. We now beg to submit that peaceful co-existence and goodwill among the people attached to diverse religious beliefs and laws can only be brought about if freedom is granted to them to practice such laws, and act accordingly.

It won't be out of place to mention here that Islam has a comprehensive set of Theology embracing all walks of life, and that its behests and directions are not confined to rituals and liturgy only. It is a code of life that gives a detailed treatment to the social, matrimonial, moral, as well as commercial conduct in human life.

It will, perhaps, be of interest to know that Tanzania has recently published the Statements of Islamic Law. This is the Subsidiary Legislation under the Restatement of Islamic Law Act (No. 56 of 1964). Gazette Supplement No. 34 of 27th June 1967 refers. This timely move in Tanzania established that any country advocating freedom of worship and religious practice can safely accommodate diverse laws in respect of marriage, divorce, inheritance or any such matters. It also shows that such a move is practicable. May we add that it also implies that such a codification is conducive to better understanding and relationship in country where amiable environment is to be created, and we commend the Commission to recommend a similar move in Kenya.

13. To try to draw a fine line between the Qur'an and Islamic Law is never imaginable. Any attempt to disrupt or in the wordings of the term of reference of the Commission to "replace Islamic Law" will be unacceptable. As explained above, the Muslim Law is based on the Holy Quran and replacing the Muslim Law is tantamount to replacing the Holy Quran.

14. We have submitted the questionnaire sent by the Commission duly completed along with the Codified Islamic Law (in English) according to Shi'a School of Law relating to Marriage, Dissolution of Marriage, Will, Inheritance, Acknowledgment and Wakf, and we shall be glad to answer any questions arising there from and submit clarifications required.

Dated, Mombasa, 22nd August, 1967

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