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In Defence of Islamic Laws

Four Memoranda on Various Personal Laws of Islam

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This book contains the text of three memoranda submitted by the author to the Kenyan government in response to a request by the government seeking clarification on issues of the laws of matrimony,succession, and hijab in the Shi'a faith.

Author(s):

- Allamah Sayyid Sa'eed Akhtar Rizvi [3]

Publisher(s):

- Bilal Muslim Mission of Tanzania [4]

Category:

- Death and Dying [5]
- General [6]
- Hijab (Islamic Modest Dress) [7]
- Marriage [8]

Topic Tags:

- Islamic Laws [9]
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Preface

In 1964, Tanganyika parliament passed the "Islamic Law (Restatement) Act", which empowered the minister responsible for legal affairs to prepare and publish a statement of Islamic Law after consultation with learned persons in the Islamic schools of law According to the Standard Tanzania (13.7.67), "It is understood that Tanganyika is the first country to have undertaken the exercise of codifying the Islamic Law in a statutory form. These statements will greatly assist the courts who have to rely on text books"

The Khoja Shi’a Ithna-’Ashari Territorial Council of Tanzania took keen interest in this matter. Mr. Mohamed G. Dhirani then President of the said Council took me to the Attorney Generals Chambers, where I met the lawyer in charge of that project He was a Zanzibarian Muslim. He advised me to write in English the detailed Shi'a law on related matters, for use by his office. Thus I wrote "Islamic Laws, concerning marriage, dissolution of marriage, acknowledgement, will, inheritance and waqf', Mr. Fidahussein Abdallah Hameer, then Secretary of the said Council, arranged for secretarial help.

The papers finally reached Mr. Bashir Rahim, then Senior Parliamentary Draftsman, who finalized four chapters of marriage as accepted by three principal schools of Islamic Law — Shafi’i, Hanafi and Shi'a). It was published, under authority of Mr. Rashidi Kawawa, then Second Vice-President of Tanzania, who was also responsible for Legal Depts. It appeared as the Subsidiary Legislation under the Restatement of Islamic Law Act (No. 56 of 1964), the Gazette Supplement No. 34 of 27 June, 1967. It was understood that remaining chapters relating to custody of children and divorce etc. would be published by end of the year, and then the laws would come into force.

Turning to Kenya

Now the scene shifts to Kenya. The Kenyan Govt. had meanwhile set up a Commission on the laws of marriage, divorce and succession, under the Chairmanship of Mr. Justice Spry of Kenya High Court. The Commission was to make recommendations for a new law providing a comprehensive and, so far as might be practicable uniform law of marriage, and divorce applicable to all persons in Kenya, *which would replace the existing law on the subject comprising customary law, Islamic law,* (emphasis ours) Hindu law, and the relevant acts of Parliament and to prepare a draft of the new law; paying particular attention to the status of women in relation to marriage and divorce in a free democratic society.

I had gone to Mombasa in July 1967 in some other connection; and the office-bearers of the Supreme Council took me to meet an advocate who was an expert in the Muslim Personal Law. On being informed of the Tanzania developments, he asked me to send a copy of the Islamic Laws which I had written for Tanzania. I promised.

Prior to this, I had written answers to the Commission's questionnaires which were sent to the Commission beforehand.

Returning to Dar as Salaam, I got the said Islamic Laws (about a hundred foolscap size, closely typed pages) cyclostyled, and dispatched it to the Supreme Council.

In the 3rd week of August, 1967, I was hurriedly called to Mombasa where the Commission was to sit for hearing from 21st August. I wrote a memorandum for submission before the

Commission, which was finalized after discussions with the office bearers.

That Memorandum was submitted to the Commission and then published in the Light of July-August, 1967. (Late) Haji Mohamedali Meghji, the President of the K.S.I. Supreme Council, wrote a covering note an extract of which is reprinted before the first memorandum.

Mr. Justice Spry was heard saying to his colleagues afterwards that “these people knew what they were talking about.”

Another Memorandum on the law of Succession, written by me, was sent to the Commission and published in the Light of January-April, 1968. It is the second Memorandum in this collection.

Back to Tanzania

When the above developments were taking place in Kenya, the Tanzania Govt. had abruptly stopped the codification exercise.

The Kenya Commission submitted its reports and recommendations sometimes in 1969. On 10.9.69 the Tanzania Govt. published a White Paper. (No 1 of 1969) to the effect that it wanted to enact a Uniform Law of Marriage, and gave the details of the provisions it wanted to be included in the proposed Act.

With the publication of the White Paper, the govt. invited comments and suggestions from communities and individuals. The Christians, the Hindus and the Ismailis published their views in the newspapers. I approached Bakwata for this purpose; they flatly refused to interfere in the Govt.'s plan. I had no alternative but to write on behalf of the Shi'a Ithna-’Asharis only.

The comments were frank and probably the last paragraph was a bit harsh. I sent the draft to Mr. Anverali *M.* Rajpar, then President of the Khoja Shi’a Ithna-’Ashari Territorial Council of Tanzania. He told me to go ahead and get it published in the Standard on behalf of the Tanzania Council. It appeared in the Standard (Dar-es-Salaam) on 8th December, 1969 (Monday) and later its extracts were printed in the Light of December, 1969. This appears as the third Memorandum in this booklet.

When months later, the Supreme Council sent to me the two reports of the Kenya Commission, I was amused to see that most of the proposals of the Tanzanian White Paper were lifted from the Kenya Commission's recommendations.

While drafting the Law of Marriage Act, 1971, in the light of the White Paper and the comments received, Mr. Bashir Rahim, then the Chief Parliamentary Draftsman, tried his best to accommodate the provisions of the Islamic Laws. Before finalizing the draft, it was shown to the scholars of every religion and sect, and some changes were made based on their suggestions.

Present Situation

The Tanzania government now wishes to enact Law of Succession, which would give to women shares equal to that of men. When the Muslim scholars (not Bakwata) raised their voices against it, the then President His Excellency Al-Haj Ali Hassan Mwinyi, assured them

that the idea was not to change the Muslims' law, but to bestow right of inheritance on those women who have no such rights at all—rather they themselves are treated as items of inheritance.

Meanwhile in 1990, various Muslim associations (other than Bakwata) began a campaign for the Muslim girls to be allowed to use *hij'ab* in schools. Their representatives met several times, and based on their discussions, I wrote a Memorandum on *Hij*'*ab* and succession, which was ultimately presented to the President Al-Haj Ali Hassan Mwinyi. It is included in this booklet as the 4th Memorandum. It is gratifying to note that the President announced in a public speech on 10/8/1995 that Muslim girls were now allowed to wear *hij'ab* in schools; and the Acting Commissioner of Education issued a directive to this effect to educational institutions, the original of which may be seen on the next page, and its English translation is given at the end of the book.

The Bilal Muslim Mission of Tanzania feels that these Memoranda contain clear arguments to prove that the Islamic Laws, emanating from the Divine Wisdom, cannot be changed; and that the Islamic jurisprudence is the only system which can promulgate justice and fair play in a society.

It is for this reason that the Mission has decided to publish the four Memoranda together in this booklet. I am thankful to them for this initiative, and pray to Allah Subhanahu wa Ta'ala to give them more *tawfiq* and make this booklet a means of guidance for the Muslims and non-Muslims alike. Amen

Sayyid Sa'eed Akhtar Rizvi,
Dar-es-Salaam
31st October, 1998

Ministry of Education and Culture's Circular No. EDC/10/62/voI.1I417 dated 28 August, 1995

Cable: ELIMU. DAR ES SALAAM
Telephone: 27211.
Telex: 41742. Elimu Tz
In reply please quote:

Ref. No. EBC/10/62/Vol. I/417

MINISTRY OF EDUCATION
AND CULTURE
P. O. Box 9121
DAR ES SALAAM

Date 28 Agosti, 1995

Wakuu wa Shule,
Shule za Sekondari,
TANZANIA BARA.

YAH: UTEKELEZAJI WA AGIZO LA RAIS KUHUSU HVAAJI WA HIJAB SHULENI

Katika Baraza la Maulid lililofanyika tarehe 10/8/ 1995 hapa Dar es Salaam Mtukufu Rais Ali Hassan Mwinyi alidgiza Wanafunzi waruhusiwe kuvaa "Hijab" wanapokuwa Shuleni.

Madhumuni ya barua hii ni kuelekeza Shule sote za Sekondari na Vyuo vya Walimu kuansa kutekeleza mara moja agizo hilo la Rais.

Wanafunzi wa Kiislam waruhusiwe kuvaa "Hijab" mavazi hayo yawe ya aina na rangi yoyote itakayoamuliwa na Shule au Chuo.

S.P. Mkoba
KAIMU KAMISHNA WA ELIMU.

QUOTATION OF REF. NO. ESSENTIAL

(Translation on page 48)

English Translation

The Principals,

Secondary Schoois,

Tanzania Mainiand

Re: Implementation of the directive of the President regarding wearing of Hiiab in Schools

His Excellency the President, Ali Hassan Mwinyi, (speaking) in a Maulid (Birthday ofthe Prophet) celebration held on 10/8/1995 here at Dar-es-Salaanl, has ordered that the students should be allowed to wear "Hijab" within the schools' premises.

Through this letter all Secondary Schools and Teachers Training Schools are hert':by directed that they should immediately start implementing this Presidential directive.

The Muslim Students should be allowed to wear "Hijab"; these dresses should conform with the material and colour of the uniforms used in the school or Institute concerned.

(Signed)

S.P. Mkoba

Acting Commissioner of Education

Image:

Cable: ELIMU. DAR ES SALAAM
Telephone: 27211.
Telex: 41742. Elimu Tz
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Wanafunzi wa Kiislam waruhusiwe kuvaa "Hijab" mavazi hayo yawe ya aina na rangi yoyote itakayoamuliwa na Shule au Chuo.

S.P. Mkoba
KAIMU KAMISHNA WA ELIMU.

QUOTATION OF REF. NO. ESSENTIAL

(Translation on page 48)

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 questionaires 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.

Mohamedau Meghjl,
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

Memorandum on the Laws of Succession

NOTE: We take pleasure in enclosing herewith the Memorandum submitted to the Commission on the Law of Succession recently appointed by the Government of Kenya, The terms of reference being to consider the existing laws relating to marriage, divorce and matters relating there to and recommend a uniform law applicable to all persons in Kenya paying particular attention to the status of women in relation to marriage and divorce in a free democratic society.

The Secretariat is indebted to Maulana Syed Sa'eed Akhtar Rizvi, the resident priest of Dar es Salaam and Chief Missionary of Bilal Muslim Mission for his great efforts in preparing this memorandum. We are also indebted to Mulla Hussein A. Rahim, M. B.E., of Zanzibar, for his valued guidance.

We pray that God may reward them in plenty in this world and the world hereafter.

ASGHARAL1 M. M. JAFFAR,
Hon. Gen. Secretary,
K.S.1THNA-ASHER1 SUPREME COUNCIL
P.O. Box No., 1085, Mombasa.
*****

1. On behalf of the Shi'a Ithna-'Ashari Community of Kenya, we beg permission to make this submission for the consideration of the Commission.

2. Our remarks are confined to the religious laws appertaining to Will and Inheritance of the Shi'a Ithna-'Ashari Sect of Islam, except where it was essential to give other Sects' views to make our point clearer.

3. We have already submitted the questionnaire sent by the Commission duly completed together with the codified Islamic Laws (in English) according to Shi'a School of Law relating to Inheritance and Wills among other subjects. In this submission we will endeavor to explain the basic principles behind those rules.

4. We understand that this Commission is to 'pay particular attention to the status of women.' We venture to hope that the Islamic Law, enunciated according to the Shi'a school, would be of considerable help to the Commission in its work in this respect.

It will not be out of place to mention that the ancient Arab custom had one principal object in view, viz., and the permanent retention of the assets in the family. With this object in view, the succession was confined exclusively to the male relatives, and even among them only to those who were capable of bearing arms.

We do not propose to dwell further on this point; suffice it to say that similar attitude, more or less, existed in all societies at that time and has survived in many societies up to now. Islam gave, by express provision of Law, right of inheritance to those who were excluded by the ancient institutions. One of the beneficial results of the new divine law was to raise the status of women in the scale of civilization, by elevating their economic and social position, and giving the widow, the mother, the daughters and sisters and other female relatives a right to inheritance.

5. This spirit has been preserved in the Shi'a school of Law, which, to quote the words of the great jurist, Sayyid Amir Ali, "is of the greatest simplicity and does not involve any discussion regarding the relative rights of agnates and cognates - 'Asabah and the Zav-i--Arham'. Then he goes on to say that the greatest distinction, in fact, between the Shi'a and the Sunni Law of Inheritance consists in the question of agnacy. The Shi'ahs repudiate in total the doctrine of Taasib or agnacy; consequently the paternal relations of the male sex or what are called 'Asbah proper' in Sunni Jurisprudence, have no special privilege, nor are they preferred to the relations connected with the deceased through females. For example, Shi'ahs consider it as contrary to justice to exclude the daughter's children in favor of the remote descendants of a brother, on the fictitious ground of their being connected with the deceased through male relations". (Mohammedan Law, by Ameer Ali Vol, 2; p. 128).

For example:

(a) If a Sunni Muslim dies, leaving behind him a daughter's daughter with a brother's son, the brother's son, would, as an Asabah (agnate), take the entire inheritance in exclusion of the deceased's own grandchild. Under the Shi'a Ithna-'Ashari Law, the grand-daughter of

the deceased, as a lineal descendant takes the whole property to the exclusion of the brother's son.

(b) If a Sunni Muslim dies, leaving behind him a daughter and a brother, the daughter takes her specified share, viz., a moiety and the rest goes to the brother as an Asabah (agnate). Under the Shi’a Ithna-’Ashari Law, she takes the whole estate, half as... her specified share, and the other half by the doctrine of Return**.**

6. The guiding rules may be stated shortly in the following words:-

(a) The heir most nearly related to the deceased inherits in preference to one more remotely connected;

(b) Whoever is related to the deceased through any person does not inherit while that person lives;

(c) Full brothers and sisters are preferred to consanguine brothers and sisters; but uterine brothers and sisters will inherit with all of them.

(d) When the relationship is equal, a male gets usually double of a female's share; except in case of the heirs related through the mother who generally divide the inheritance among them equally without distinction of sex.

It may be asked why a woman's share is, normally, half of that of a man. In fact, it is quite logical. Islam has made male responsible for the maintenance of the family. No such burden is laid upon woman. Even a rich wife is entitled to get her maintenance from her husband though he may be poor. As the man has to bear all the expenses he has been given double share" in almost all inheritances. Also the woman gets the dowry which goes from man to the woman. Thus the ratio of the shares as laid down in the Qur'an is the most reasonable.

7. Groups and Classes of Heirs: In the Shi’a Ithna-’Ashari sheriat, heirs are divided into two groups, viz., those who inherit by right of Nasab (consanguinity); and those who inherit by right of 'Sabab', main of which is Matrimony. Both groups inherit side by side.

The First Group, i.e the relations who are entitled to inherit by virtue of consanguinity are divided into three Classes:

(a) First Class:
(i) Parents and
(ii) Children (or in their absence grand-children, how low-so-ever).

(b) Second Class: If there is no heir at all in the First Class, then the Ascendants and Descendants of the parents of the deceased will inherit. It means:
(i) the deceased's grand-parents (how high-so-ever) and
(ii) brothers and sisters (or in their absence the descendants of the brothers and sisters).

(c) Third Class: If there is no heir existing either in the First or the Second Class, then the descendants of grand-parents (how-high-so-ever) will inherit. It means the deceased's paternal and maternal uncles and aunts (or in their absence, their children how-low--o-ever).

As explained above, the husband or wife or wives of the deceased will inherit with all these classes.

8. Dhul-Fardh & Dhul-Qai abat**:** It is necessary to mention that, under the Shi'a Law, heirs, to which ever Group or Class they may belong, are divided into three categories, in respect of the right which entitles them to participate in the inheritance:

(1) Dhul-Fardh**:** Those who have right to a specified share in the inheritance. They are:

(a) The Mother
(b) The Husband
(c) The widow or widows
(d) The person or persons related through the same mother only.

(2) Dhul-Qarabat: Those who take the inheritance by virtue of their relationship with the deceased, but whose share fluctuates according to the number of heirs and circumstances. They are:

(a) The son or sons
(b) Full brothers, or in their absence half brothers on father's side
(c) Grand-parents
(d) Paternal uncle and aunts
(e) Maternal uncles or aunts.

(3) Dhul-Fardh Wal-Qarabat: These are the heirs who inherit some times by virtue of their relationship and at other times according to their fixed shares. They are:

(a) The father, who inherits a fixed share when there is a child of the deceased; and takes by relationship when there is no child of the deceased.

(b) The daughter or daughters who get their fixed share when without the deceased's father or her or their own brothers; and take by relationship when with anyone of them.

(c) Full sister or sisters or in their absence, a consanguine sister or sisters, who get their fixed share when without a grandfather or brother or brothers of the same degree as themselves, and take by relationship when with anyone of them.

Note: When there is only one heir, whether a Dhul-Fardh or a Dhul-Qarabat, or one entitled by virtue of the special relationship of sabab (matrimony), such heir takes the entire inheritance. For example, an only daughter takes her appointed share, viz. one-half, and the remainder goes to her by Return. An only son takes the entire estate by right of Qarbat, there being no specified share assigned to him by the law. When the deceased is a female and leaves behind her no relation excepting a husband, who is entitled to succeed by virtue of the matrimony, he takes the entire inheritance, first his specific share, and the remainder by Return.

9. Shares: As far a shares are concerned they are six in number, viz.:

(1) One-half,
(2) One-Fourth,
(3) One-eighth,
(4) One-third
(5) Two-thirds
(6) One-sixth.

(1) **One-half:** The following are entitled to one-half of the inheritance:

(a) The husband, when wife leaves no descendant;
(b) A daughter, when there is no son;
(c) A full sister in default of other heirs who have been mentioned earlier;
(d) A consanguine sister when there is no brother and no full sister.

(2) **One-fourth:** The following are entitled to one-fourth:

(a) The husband, when there is a lineal descendant of the wife;
(b) The wife, when there is no Lineal descendant of the husband.

(3) **One-eighth:** This is taken by the widow or widows when there is a lineal descendant of the husband.

(4) **One-third:** The following are entitled to One-third:

(a) Mother, when there is no lineal descendant of the deceased, nor has he left two brothers, or four sisters or one brother and two sisters.
(b) Uterine brothers and sisters, when two or more in number.

(5) **Two-Thirds:** The following are entitled to Two-thirds:

(a) Two or more daughters when there is no son;
(b) Two or more full sisters when there is no full brother or when there are no half-brothers (on father's side)

(6) **One-sixth:** One-sixth is taken by the following

(a) Both father and mother when the deceased has left lineal descendant
(b) The mother, when there exists with her two or more brothers of the full blood, or one brother and two sisters or four sisters of full blood (or by the same father only the father being in existence).
(c) A single uterine brother or sister.

10. Division of Estate: When there is only one of the above-mentioned heirs he or she gets the full estate If he is a Dhul-Qarabat, he gets it by virtue of the relationship; if he is a Dhul-Fardh, he first gets his appointed share, and then the residue is given to him as 'return' (Radd).

If there are two or more heirs, it will be divided in the following sequence: First the husband, or the wife or wives will take their share; then the Dhul-Fardh relatives will get their shares; then the residue will be divided among the Dhul-Qarbat heirs.

An Example: To give an example of our method, let me suppose that a man dies leaving his father, mother, wife, four sons, five daughters, three grandchildren, a grandfather, three brothers and two aunts.

As he has left parents and sons and daughters, who belong to the First Class of the heirs, the grandfather and the brothers (who belong to the second class) and the aunts (who belong to the third class) will be excluded from the inheritance.

Likewise, the grandchildren will be excluded because of the presence of the children, on the basis of the nearer excluding the more remote.
This system of eliminating leaves us with the following heirs: Wife, Father, Mother, the four

sons and five daughters

The wife will get 1/8 of the estate, because the deceased has left children; Father and Mother both will get one-sixth each.

The common divisor of 8 and 6 will be 24. Thus the estate will be divided in 24 shares - out of which the wife will get 3 (i.e. 1/8), the father 4 (i.e. 1/6) and the mother also 4 (i.e. 1/6). It will be seen that the father is treated here as a Dhul-Fardh, not as a Dhul-Qarabat, because of the children of the deceased, and the mother gets her reduced share (i.e. 1/6 instead of 1/3) because of the same reason.

Anyhow, after deducting 3+4-1-4 (i.e. 11/24), we are left with 13 shares. This will be divided among the children, a son getting double of a daughter's share. It means that each of the four sons will take two shares (making it 8) and each of the daughters will get one share (making it 5). Thus all the shares are exhausted.

11. Dhul-Fardh Must Get Their Appointed Share:

In the example above, the shares have fitted with the required portions of the inheritance. But there may be cases when the appointed shares may exceed the common divisor of the shares. For example, if a woman leaves behind her a husband, two daughters and a mother, their respective shares would be one-fourth, two-thirds and one-sixth. The common divisor of 3, 4, and 6 is 12, which represents the shares into which the estate would have to be divided … 3 being the husband's share, 8 of the daughters and 2 of the mother But 3+8+2 make 13, not 12. The Sunnis accordingly divide the state into 13 shares, bringing the shortage to all. But among the Shi’as, the mother and husband, being Dhul-Fardh, must get their full shares, i.e. 3+2. And the residue, i.e. 7/12 would be divided equally among the daughters, because the children are also among the Dhul-Qarabat.

Thus whenever there is any shortage in the appointed shares, it falls on the Dhul-Qarabat, whose shares are liable to fluctuation, not on the Dhul-Fardh.

12. Imam: Heir of Heirless Deceased: If there is no heir in any of the classes and groups mentioned above, the Imam will be his heir. As our 12th Imam is in seclusion for the time being, the Mujtahid will receive the estate on Imam's behalf and will utilize it on the propagation of the faith and the religious uplifting of the Shi’a community, preferably in the same area where the deceased lived.

A person having no heir except the Imam, has been allowed in the Shi’a Law, to dispose of by will his entire estate provided such disposition is for the interests of the Ithna-’Ashari poor, or Ithna-’Ashari ophans or Ithna-’Ashari destitute travelers only.

13. Exclusion from Inheritance: No testator has any right to debar any of his heirs from his due share of inheritance. Even if he makes a will to this effect, it will be null and void in law. But an heir would be debarred from inheritance if he happens to be a non-Muslim or if he has intentionally and unjustifiably killed the deceased in whose estate he would have inherited,

14. Testamentary Wills: The making of will is recognized and encouraged by Islamic law. A will may be oral or in writing. A testator is allowed to bequeath up to one-third of his net estate. Any bequest in excess of the one-third is void, unless assented to by the heirs. The detailed rules on this subject are given in the accompanying book "Islamic Law" and it is

unnecessary to go into details here,

15. Payment of Debts and Expenses from the Estate: It may be noted here that in all cases debts lawfully due by the deceased together with certain expenses must take precedence on the payment of bequests and shares of the heirs.

The term "debt" means ordinary debts incurred by or on behalf of the deceased and includes also religious dues such as **Zakat** (poor-tax), **Khums** (prescribed one-fifth), **kaffara** (atonement or expiation), Nazar (vows) etc.; and the term "expense includes the obligation to end a proxy at the expense of the deceased's estate to perform pilgrimage to Mecca if it had been obligatory on the deceased and had not been performed by him during his lifetime. Funeral expenses have also to be paid in priority.

After paying the aforesaid dues and expenses and any bequest directed by the will of the deceased to the extent of one-third of the net estate, the residue would be divided amongst the heirs.

16. In conclusion, we would like to repeat what we said earlier before the Commission on the Law of Matrimonial Affairs. We feel that the idea of enacting a common law to replace the existing Islamic law is not only wrong but sacrilegious from our religious point of view. It would be tantamount to imposing a common religion on all which would be a preposterous idea. Islamic law is an integral part of our religion. These laws cannot be altered or violated without incurring a sense of guilt and sin.

17. The rules concerning succession are laid down with utmost precision by the Holy Qur'an and are fully enunciated in the traditions of the Holy Prophet and the Twelve Imams and there is not the least doubt that these rules are in accordance with the broad principle of the brotherhood of man which Islam seeks to establish.

18. The 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 entire fabric. For example, in Islamic law a man cannot use anything obtained unlawfully (in religious sense) either for secular or religious purpose.

If therefore a change is made in Law of Succession, someone will naturally thereby get more than his or her due share allotted to him by the Quran and this unlawful gain would render his whole life miserable. His daily life would become a long list of transgressions; his prayers, his pilgrimage, even his food and clothing would become, in religious sense, unlawful. Thus he can never expect peace in the life hereafter.

Memorandum on Tanzania White Paper on Uniform Marriage Law

Note: This Memorandum unavoidably incorporates some paragraphs from the Memorandum submitted to the Kenya Govt.’s Commission.

On behalf of the Shi’a Ithna-’Ashari Community of Tanzania, we take the liberty of submitting the following views on the Government proposals on Uniform Law of Marriage

(Government's Paper No. 1 of 1969).

The claimed aim of the proposals is to remove the present condition in which "the existing laws do not recognize all the marriages contracted under different laws as equal.”

But, is it necessary, for this purpose, to enact a uniform law of marriage? Can this object not be easily achieved by bringing all the marriages under the jurisdiction of one court and under one register of marriages?

In 1964, the 'Restatement of Islamic Laws Act' was passed to the effect that the rules of Islamic Laws of marriage be codified. A Subsidiary Legislation' under that Act was published as the Supplement No. 34 in the Gazette of 27th June, 1967. This was supposed to be the first installment.

We wonder why that policy could not be continued, or even extended to cover the different customary as well as the Hindu and Christian marriage laws. These laws could be codified and brought under the jurisdiction of one court.

Then, and only then, could a comprehensive chapter be added dealing with the conflict of law, some examples of which have been given in the White Paper.

We appreciate that multiple social problems arising out of the abuse or misinterpretation of customary or religious laws, in general give cause for serious concern to the Government. The Government, in the efforts to secure the welfare of its people, in that respect, is confronted with the task of eradicating social evils.

Any effort in this direction is worthy of support and deserves all co-operation. But we feel that the idea of enacting a common law, repealing the Restatement of Islamic Laws Act, is not the right one.

Even traditions (not having any divine authority behind them) are hard to change. This becomes even more dangerous in cases like the Islamic Law which is an integral part of our religion. These laws cannot be violated without incurring a sense of guilt and sin.

Therefore, we feel that the best way would be to "let a hundred flowers bloom." National unity does not demand that all citizens should have the same dialect or the same religious belief. Why is it considered essential to have a uniform law of marriage and divorce applicable to all people in Tanzania?

Our Shi’a Ithna-’Ashari 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.

As the White Paper is concerned with matters of matrimony, we must point out that our fundamental rules of marriage and divorce are based upon the Qur'an. Details which are not explicit in the Qur'an are explained in the traditions.

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 any body 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-’Asharis follow in all religious matters the rulings of the greatest Mujtahid of the time. He is considered the representative of our 12th Imam and he is the final authority

on all religious matters.

In him rests in certain cases the powers of guardianship of children, marriage and divorce, executorship of the will and state of a deceased and such matters.

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

For example marriage and divorce rules have direct bearing on legitimacy 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 other social and legal implications.

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, for instance, and someone is given more than his due share according to Quran, 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.

Regarding the rights of a woman in Muslim Law we wish to submit that:

In our school of Law, a woman has such rights, privileges and safeguards for the past 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.

Islam, according to Shi’a school, has given a woman right to contract herself in marriage if she is adult and discreet.

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

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

A woman's share is, normally, half of that of man. But this is quite logical. Islam has made man responsible for the maintenance of his family. No such burden is laid upon a woman.

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.

The woman gets the 'Mahr' (it is not the 'bridge-price which is foreign to Islamic thinking) which goes from husband to wife. The ratio of the shares as laid down in the Qur'an is, therefore, most reasonable.

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 (including the wife) is always secure and beyond any encroachment by any one. This security is still lacking in many societies which allow a man to give all his estate even to a stranger.

Now coming to the White Paper itself, there is one proposal which in its present form, cuts deep at the root of all religions. It is the suggestion that "If a man cohabits with a woman for a period of more than two years then he would be presumed to have married that Woman, and if they have children such children would be deemed to be legitimate children of such spouse."

If the intention is to provide safety to a genuine wife whose marriage was not registered or whose marriage certificate was lost, the word 'co-habit' does not convey the idea.

It should be changed to "living together as man and wife in a family atmosphere, provided it is possible for them to marry and one of the spouses claims marriage which is not refuted by the other spouse; or in case of death of either spouse, it is commonly known that they were married and it is not proved that there was no marriage at all.

Also, as we have mentioned earlier, in Islam a wife has no responsibility to maintain her husband. Thus the proposal of the White paper to make the wife liable to maintain her husband goes completely against Qur'anic injunctions.

As a debate is going on the question of polygamy, it is necessary to reaffirm that we are fully convinced of the desirability, nay, and essentiality of polygamy in many cases. African society, as the White Paper rightly affirms, is a polygamous society. Islam agrees with it. But Islam has put the limit to four wives at a time and has enjoined, by specific regulations, equality in treatment and rights of all wives, as the White Paper desires.

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 re-marry. 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 happens to be barren?

Islam discourages such cruelty by permitting polygamy.

This is quite apart from the statistical findings that women out-number men in Tanzania, 100 women to 95 men; or that in certain calamities, like war, men have to face death more than the women. If polygamy is not allowed by the society it will compel five per cent women in the country to resort to prostitution.

We think this much will suffice to show the wisdom of the White Paper in recognizing polygamy as a lawful and "useful" institution. But, in its present form, the White Paper will not serve the required purpose.

What will happen if in spite of the conditions necessitating a second marriage, the first wife refused to 'Voluntarily and freely agree to convert the monogamous marriage” into a polygamous one? Will it not force the man "into a position whereby he has either to divorce his first wife or co-habit (illegally) with the other woman", with all its inevitable undesirable effects?

A better course is to require the man to go to the proposed marriage tribunal or board of his community and convince them of his needs. If they agree, the refusal of the first wife

should not be entertained at all.

We assume that, as there is no question of changing the nature of marriage in a Muslim marriage, a Muslim will not need the consent of his first wife (or wives) before marrying another one.

Divorce

There is no need to emphasize that in certain conditions divorce is the only remedy left to 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.

The White Paper recognizes this necessity. Also it must be remembered that Islam, while admitting of its necessity in some cases, has declared it to be the "most abominable of all legal provisions" to be resorted to in case of extreme hardship only.

The Qur'an has established the machinery for reconciliation, and many Muslim communities have such committees. Unfortunately some quarters have disregarded this important system completely. This abuse of the legality of divorce must be stopped and the attempt of White Paper to curb this tendency is very welcome.

Conditions of Divorce

We must point out at the outset that the Shi’a Ithna-’Ashari school of Islamic Laws has laid down strict rules based upon the Qur'an and traditions concerning divorce. The divorce is allowed provided it is pronounced in the presence of two "Adil" (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 a 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.

The Muslim law does not give the right of divorce to the woman. And any suggestion that the woman should be given right to divorce her husband is going to be an 'interference with religious precepts' which; the White Paper repeatedly says, is not the intention of the Government.

A family is the basic society, and like every society, it needs a final authority to maintain discipline and well-being of the members. Islam has given that place to the husband who has been given right to give divorce.

But a Muslim Woman is entitled to ask for dissolution of marriage or even nullify it herself, in the following cases:-

• She can ask for 'Khula' which may be agreed upon by the husband;

• She can request the Mujtahid (who is the ‘Qadh’ in Shi’a Ithna-’Ashari sheriat) to grant her divorce if the husband has disappeared, or neglects to maintain her;

• She can cancel the marriage if the husband is insane, or becomes insane after marriage.

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

It will be necessary, while drafting the bill, to recognize the divorce granted by the Mujtahid and the nullification of marriage so far as the Shi’a Ithna-’Ashari marriages are concerned.

The above mentioned rules have a bearing on the provision of the White Paper concerning the husband who has disappeared. The granting of divorce by the Mujtahid (or in case of non-Ithna-’Asharis or non-Muslims by the judge) is a far better solution than to presume the husband dead (for the purpose of his marriage) and alive (for other purposes, including the other marriages, if any) at one, and the same time!

As the White Paper rightly recognizes the divorce given by a Muslim husband as final, and requires the court to register such divorce without any further investigation, we want to emphasize that such divorce should be effective from the date of pronouncement of the formula of divorce by the husband, and not from the date of registration.

The White Paper requires a Muslim intending to marry to give notice of his intention, 21 days before, to "a Sheikh authorized by the Minister to solemnize marriages."

It has overlooked the fact that a Muslim boy and girl can solemnize the marriage themselves without any need to "call a Sheikh and ask him to perform the marriage”. We are sure it is not the intention of the Government to create a new version of Islam which would have institutionalized clergy like Christianity. So why this reference to a Sheikh authorized by the Minister? It is needless to say that this idea goes extremely against Islam.

Also we fail to see any need for this proposal of 21 days notice. Suppose a girl from Kigoma and a boy from Pangani (both presently residing at Dar-es-Salaam) inform the priest of their community at Dar-es-Salaam that they want to be married. That priest is not expected to publish or announce the proposed marriage in newspapers or on radio. So, how can he know if there is any legal hitch against that marriage?

And, after all, there will not be even one case of such illegal intention in one thousand marriages. We think, it is better to omit this provision and substitute it with another one to the effect that if it becomes known even after marriage that they could not be married lawfully, the marriage would be null and void from the beginning.

So far as the registration of marriage and divorce is concerned, in our community marriage registers have been in existence for over 125 years, and we issue the couples with the marriage certificates.

But we must emphasize most forcefully that the validity of the marriage or divorce should not be made subject to registration. Non-registration may be made an offence; but it should not affect the validity of the marriage or divorce.

Likewise, in other respects also, if a marriage is correct, according to religion, it should not

be considered void if it contravenes any conditions imposed by the White Paper. Otherwise, it would be a direct interference in religion.

The purpose of this memorandum is to bring home to the Government that enactment of laws should strive to preserve the religious laws of different communities living under one flag, especially when such laws have far reaching effect on such fundamentals as the marriage and family life.

As we have pointed out earlier, in Islam the law and the religion are inseparable, since our laws emanate from the Qur'an; needless to say that if any law is enacted which contravenes either the Qur'anic injunctions or the Hadith, it will naturally cause a considerable unrest in the minds of the Muslim public and therefore the whole Muslim community will be perturbed.

In the end, we would like to sum up our views as follows:-

We demand that instead of enacting a uniform law for all, the "re-statement of Islamic Laws Act" should remain in force for the Muslims and the Subsidiary Legislations under that Act be drafted, published and given effect to as soon as possible.

So far as the proposals of this White Paper are concerned we completely agree that "marriage must be a voluntary union" (para 6 of the English version of White Paper); that the couple should not be within prohibited degree of affinity or consanguinity (para 9); that "either espouse may own his or her own separate property" (para 19); that the wife should be able to give evidence against her husband (para 21); that there should be provision of divorce "if the marriage has completely broken down" and that the "divorces should not be treated lightly" (para 24); and that there should be marriage conciliation boards and that due recognition should be given to such boards which exist in venous communities prior to the proposed new legislation," (para 25).

We agree to the following proposals with certain conditions and qualifications:-

Minimum age of 15 and 18 years for the girls and boys respectively (para 7) and registration of marriage (para 17), and of divorce (para 27) are good things and we agree with them provided, their violation does not make a marriage or divorce null and void.

A Muslim's pronunciation of divorce formula is recognized in the White Paper as the evidence of complete break-down of marriage and the court is supposed to "issue a certificate dissolving the marriage.

We accept this proposal, provided the said certificate is retrospective with effect from the date of pronouncement of the formula of divorce by the husband.

We are in complete accord with the proposal to allow a monogamous marriage to be converted into polygamous. But we do not think it practical to insist on the consent of the first wife (para 12). The husband should have a right to approach the proposed marriage board and their decision should be final.

Also, we assume that a Muslim marriage being a potentially polygamous one, a Muslim husband will not be governed by this provision.

We think that the proposal to presume a husband (who has disappeared for 5 years) as dead is not the sound one. The right way is to allow the judge (or Mujtahid) to grant divorce

if the circumstances demand it.

The right of the woman to demand divorce or dissolve or nullify the marriage must be limited to the circumstances mentioned earlier in this memorandum. Any legislation going beyond that limit will be a direct interference in our religion.

We vehemently denounce the proposal that co-habiting with a woman for any period (the limit of 2 years is quite arbitrary) makes the couple legally husband and wife. Unless the wording is changed as proposed in para 11 of this memorandum, this proposal cannot be acceptable.

We totally disagree with the proposal of making wife responsible to maintain her husband (para 19).

We think that the proposal requiring 21 days notice is absolutely useless, and coupled, in case of the Muslims, with the phrase "notice would be sent to the Sheikh, who is authorized by the Minister to solemnize marriage" acquires a very alarming note, as it appears to establish an institutionalized clergy which is absolutely against Islamic fundamentals. Therefore, we cannot agree with it.

Memorandum on Hijab and Succession

May it please Your Excellency,

1. On behalf of our various Muslim communities and organizations, we take the liberty of making this submission for Your Excellency's kind consideration.

2. In this submission we are confining ourselves to two matters which have been agitating our minds since long. They are: *Hijab* for Muslim girls in educational institutions and Islamic laws pertaining to Will and Inheritance?

3. Your Excellency! We all are citizens of a free country, and we have given ourselves a Constitution which, *inter alia,* guarantees freedoms of worship, religion, association and expression. We particularly refer to the Articles 18(1), 19(1) (2) and 20(1) of the Constitution which are as follows:

18(1) Without prejudice to expression the laws of the land, every person has the right to freedom of opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers and also has the right of freedom from interference with his communication.

19(1) every person has the right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the freedom to change his religion or faith.

(2) Without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation of religion shall be free and a private affair of an individual; and the affairs and management of religious bodies shall not be part of the activities of the state authority.

20(1) Every person is entitled to freedom, subject to the laws of the land, to freely and

peaceably assemble, associate and cooperate with other persons, express views publicly, and more specially to form or join associations or organizations formed for the purpose of preserving or furthering his beliefs or interests or any other interests.

4. Allah has said in the Qur'an, His last word:

"And I have not created jinn and men except that they should serve Me." (Surah 51, verse 56)

All Muslims right from the beginning agree that the word "*li ya* '*budun* " which is derived from '*ibadah,* and is translated here as "serve", means total obedience.

Your Excellency! No body can be more aware than your good self that "*ibadah* " in Islam is not merely a set of some rituals to be performed at certain times or days. It encompasses a Muslim's whole life. Islam means surrender to the will of Allah and when we pledge to do so we are called Muslims. To guide us in our worldly life, and help us to reach near Him in the hereafter Allah has sent to us, through His Last Prophet (s.a.w.), a comprehensive set of Laws embracing all walks of life — domestic, social, financial, moral and spiritual.

5. Your Excellency knows very well that the Qur'an has treated no subject of law so elaborately and in such detailed manner as the laws of matrimony, will, inheritance and other related matters, including manner of dresses for women.

6. Hijab: It should be made clear at the outset that rules directing women to dress in such a manner as it covers their whole body and preserves their dignity is enunciated in the Qur'an. It is a common heritage of all Muslims and not confined to a certain sect or community. Also, it is not a cultural tradition; it is a compulsory divine law, and cannot be discarded without incurring a sense of sin and guilt.

7. There are not less than nine verses in various chapters of the Qur'an elaborating the rules of *hijab.* With Your Excellency's permission, we quote only two of them here:

"And say (O Prophet!) unto the believing women that they cast down their look and guard their private parts, and they display not their adornment except what becomes apparent of it; and they draw their head-covers over their bosoms; and they display not their adornment except to their husbands, or their fathers, or the fathers of their husbands, or their sons, or the sons of their husbands, or their brothers, or their brother 's sons, or their sister 's sons, or their women, or those whom their right hands possess, or the male servants void of sexual desire, or the children who have not yet attained the knowledge of women 's secrets; and they should not strike their feet so that what they hide of their adornments becomes known; and turn you all unto Allah, O you believers, .so that you may be successful (in the hereafter). (Surah 24, verse 31)

O Prophet! say unto your wives, and your daughters and the women of the believers that they let down upon them their "jilbab", so that they may be distinguished ..... (Surah 33, verse 59)

(Jilbab = A robe bigger than veil and shorter than shawl, which covers woman's head and breast.)

8. Basing on these and other Qur'anic verses and authentic traditions of the Holy Prophet (s.a.w.), the Muslim jurisprudents, without any sectarian difference, have decreed that:

(a) Muslim women should keep their whole body covered when going out of house. Only face (but not head or hair) and hands up to wrist may remain open.

(b) There are special and stricter rules of dress for prayer and *hajj.*

(c) The dress should not be tight to show the contour of body, nor flimsy to defeat the purpose of dress.

(d) Women should not wear a dress generally used by men, nor men the dress of women.

9. Your Excellency! The Ministry of Education in our country has selected a uniform for girls of primary schools, which is a copy of the western dress. We wonder why such a decision was taken. Blouse and skirt are not African, nor are they Christian or Islamic, Why that style of dress is so sacrosanct as it can't be changed? It would have been more in keeping with our national aspirations to prescribe long frocks and bui-bui instead, as it is a dress millions of African women wear. Is it not high time that we rid ourselves of the attitude that all that comes from the West is good for us, while our own values are "barbaric."?

10. In view of the above facts, we humbly request Your Excellency to direct the Ministry of Education to prescribe such a uniform for school girls as covers their heads and whole body, leaving open their faces and hands. It may be simplified to consist of:
scarf, frock, trousers and socks.

We believe that it will be a more dignified uniform, and will even allow the girls to participate in athletics and sports freely without fear of any embarrassing exposure.

11. Your Excellency!

If for any reason it is difficult to introduce such a uniform for all girls, then the Muslim girls should be allowed throughout the country to wear such uniform without any let or hindrance, as it is a law of their religion and not just a tribal or cultural tradition.

12. Before going to the other subjects, we would like to bring to Your Excellency's kind notice that Muslim girls in U.K. and France have gained the right to wear *hi jab* in schools although it took court actions (and in case of France, intervention by the European Human Rights Commission) to achieve that right. Nearer at home, in Kenya, this year an African Muslim girl won court case against school authorities when they refused to let her enter school with *hijab.* The official KANU newspaper, The Kenya Times (Nairobi) wrote an editorial on 2/2/1990 in which it, *inter alia,* wrote:

"For a democratic country like ours, where freedom of worship for all religions is enshrined in the constitution, it is difficult to believe that some people would find it fit to deny others this freedom.

"Religion, as we know, is a subject very close to the hearts of some people and to deny them the freedom to express their feelings whenever they want to is being against all efforts in creating a peaceful and harmonious society.

"Take Islam for instance. It is a complete way of life. To ask any staunch follower of this religion to discard some aspects of this life is actually asking him to defy- what is written in the Holy Quran. And who are we, in whatever capacity that we operate, to interfere with other people's private lives and their religion? The issue of this Muslim girl being asked to uncover her head while in the school compound should not arise. Similarly denying children

their right to education because they are wearing turbans is intolerable."

13. Islamic Law of Succession:

We have been given to understand that the Government intends to make changes in the Islamic Law of Succession. We are extremely perturbed by this news. As we have submitted earlier, the Qur'an has laid down with utmost precision the rules concerning succession, very elaborately allotting to various heirs their shares in a deceased Muslim's estate.

The Islamic Law is a well-knit entity. We cannot change or amend one or two aspect of it without destroying the entire fabric. For example, in Islamic law a person cannot use anything which is obtained unlawfully (in religious sense), either for worldly or religious purpose.

If therefore a change is made in Law of Succession, someone will naturally get thereby more than his or her due share (that was allotted to him or her by the Qur'an). That unlawful gain would render his or her whole life miserable. His/Her daily life would become a long list of sins and transgressions. His/Her prayer will be invalid; his/her pilgrimage, null and void; even his food and clothing would become, in religious sense, unlawful. Such a person can never expect peace in the life hereafter.

14. We do not know what the main idea behind this exercise is. Therefore, we cannot say any more at present. But we reiterate that these laws are based on the Qur'an, and it is not possible to draw a fine line between these laws and the Qur'an. Any attempt to change the Qur’anic allocations would be tantamount to change the Qur'an.

15. However, in this connection, we would like to draw Your Excellency's attention to the Tanzania Govt.'s Restatement of Islamic Law Act (No. 56 of 1964), under which work was started to codify the Islamic laws, giving due recognition to various schools of thoughts.

Four chapters related to Marriage, Guardianship of children etc. were even published as a Subsidiary Legislation under that Law in The Gazette Supplement No. 34 of 27th June, 1967. It was a move which had pleased the whole Muslim population of the country. Unfortunately that scheme was abandoned.

Yet, if that plan is revived by which rules of every school of thought are recognized as the law applicable to that community, and those laws codified in one volume for easy reference by the courts of law, it will be a highly commendable step for which the entire Muslim population of Tanzania will ever remain grateful to Your Excellency.

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