

CHILD MAINTENANCE

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Summary

Child maintenance, a critical component of post-divorce arrangements, profoundly impacts the well-being and development of children in Muslim families in Sri Lanka. This paper examines the deficiencies in the current Muslim Marriage and Divorce Act (MMDA) regarding child maintenance and analyzes how proposed amendments aim to rectify these issues and their potential effects on Muslim families. Based on a review of fiqh literature, Islamic Law categorizes maintenance as Nafaqa, Hadhana, and Rida'a. Nafaqa refers to providing the essential needs of the wife and child, including food, drink, clothing, and shelter. The amount of maintenance is determined by factors such as the father's income, the child's age and needs, and customary practices. Sections 35 to 36 of the Muslim Marriage and Divorce Act outline the procedures for providing child maintenance. However, reforming these provisions is essential to address current deficiencies and establish fair, consistent, and effective mechanisms that prioritize the welfare of children in Muslim families. These reforms should be implemented in accordance with Islamic principles, promoting a more just and equitable legal framework for child maintenance in the Sri Lankan context.

1. Introduction

Child maintenance, a crucial aspect of post-divorce arrangements, holds profound implications for the well-being and development of children within Muslim families in Sri Lanka. The importance of providing the children maintenance is not merely to cater to the children's needs, but it also functions as a medium to create a close relationship between the father and the children. The current Muslim Marriage and Divorce Act (MMDA) has faced criticism for inadequacies in child maintenance provisions. This paper explores the shortcomings of the existing MMDA in ensuring adequate child maintenance, analyzing how the proposed amendments address these concerns and their potential impact on Muslim families.

2. Research Question

The current lack of effective child maintenance provisions within the Sri Lankan Muslim Marriage and Divorce Act (MMDA) has led to concerns about:

1. Inadequate financial support: The current MMDA lacks a standardized approach to calculating maintenance, potentially leaving children financially vulnerable after their parents' divorce.
2. Unequal outcomes: The current system might disadvantage mothers, who often bear the primary responsibility for raising children, placing an undue financial burden on them.
3. Inconsistent enforcement: The absence of robust enforcement mechanisms might hinder the implementation of maintenance orders, jeopardizing children's well-being.
4. Limited compliance: The lack of clear legal guidelines and consequences for non-compliance might discourage fathers from fulfilling their financial responsibilities towards their children.

These issues raise a critical research question:

How will the proposed reforms to child maintenance within the new Muslim Marriage and Divorce Act address the shortcomings of the existing MMDA and promote the well-being of children from Muslim families in Sri Lanka?

3. Definition of Child in International and Sri Lankan and Islamic Law

Internationally:

United Nations Convention on the Rights of the Child (UNCRC): Defines a child as "every human being below the age of eighteen years.

Sri Lankan Law:

Children and Young Persons (Amendment) Act, No. 39 of 2022: Defines a child as "a person below the age of eighteen years.

Islamic Law:

Even though the word child is defined as someone who has not reached his or her puberty (al-Suyuti). Several Arabic terms are used in Islamic sources to refer to different ages and stages of childhood:

The Arabic word "Al-walad". The word "Al- Walad is used to refer to a son or daughter. In ordinary usage however, it is employed in a wider sense to refer to an infant, a kid or young ones. The word "walad" is used in Q17:111 to mean a child. There are other words used in the Qur'an to mean child and children they include" Banun, Tiflu and Saby" are mostly used when referring to a child who is yet to attain age of understanding or maturity.

1. "Tifl" (تفل): A general term referring to a young child, often used for infants and toddlers.

2. "Sabi" (سبى): A young boy who has not yet reached puberty.
3. "Sagheer" (سغىر): A broader term meaning "minor," usually indicating someone below the age of maturity.

3.1. Age of Majority

1. Puberty: In Islamic jurisprudence, the attainment of puberty is widely considered the primary marker of the end of childhood and the transition to adulthood. The signs of puberty differ for boys and girls, with specific guidelines and rulings under Islamic law.
2. Age Thresholds: If clear signs of puberty are not apparent, there are additional age thresholds for determining legal maturity that vary slightly in different schools of thought. These ages often fall in the range of 15-18 years old.

3.2. Significance of Age Distinction

1. Religious Obligations: While children are encouraged to engage in acts of worship, full religious obligations typically become mandatory upon reaching the age of majority.
2. Legal Rights and Responsibilities: Islamic law grants numerous rights to children, but it also establishes a transition where individuals gain greater legal accountability and responsibility for their actions upon reaching adulthood.

3.3. Lineage and Rights

1. Importance of Lineage (Nasab): Islam places great importance on determining the lineage of a child. Every child has the right to have their biological parents formally recognized.
2. Illegitimate Children: Islam does not recognize the concept of a child being born "illegitimate." All children have rights, even if they are born outside of wedlock.
3. Rights of a Child: Islamic teachings outline various rights of a child, including:
 - The right to life and protection from harm.
 - The right to be treated with kindness and compassion.
 - The right to sustenance, shelter, and education.
 - The right to religious guidance and instruction.

Contemporary Interpretations: Some contemporary scholars advocate for also factoring in psychological and social maturity to determine a child's capacity for legal responsibilities and rights. Legal Frameworks: Many Muslim-majority countries have specific laws codifying the age of majority and a child's rights which may sometimes differ slightly from traditional interpretations.

4. Definition of maintenance

3 Types of Maintenance:

- Nafaqa: This is the general term for maintenance or support, encompassing all the basic needs of the child.
- Hadhana: This refers specifically to the mother's right to be provided with accommodation and basic necessities during the waiting period (iddah) after a divorce, if she was pregnant or revocably divorced.
- Rida'a: This refers to the compensation a breastfeeding mother can claim from the father for the cost of nourishing the child. The amount is determined based on local customs and the mother's standard of living.

In Common definition of children maintenance can be understood from the Arabic word nafaqa, al-Nafaqah which is a noun from the word al-infaq which means to spend something like money (al-Sharbini, n.d). Meanwhile, the term can be defined as to provide the needs of the wife and child such as food, drink, dress and shelter, (al-Sharbini, N.d.), and other relevant needs (al-Husayni, n.d). Osborne, J. W. defines maintenance as “Supply of the necessities of life for a person” (Osborne, J. W. 1993). In the other words, maintenance can be understood as to spend on someone who is obliged for a person to support him or her economically. Therefore, the maintenance includes the education, dress, food, drink, shelter, health and other needs.

4.1. Core Principles

1. **Father's Responsibility:** In Islamic law, the father has the primary financial responsibility to provide for his children. This is considered a fundamental obligation regardless of whether a couple is married, divorced or the mother's financial status.
2. **Mother's Right to Compensation:** If the mother has custody of the children, she is entitled to compensation from the father for the expenses of raising them.
3. **Child's Basic Needs:** Maintenance covers the necessary requirements for a child, including:
 - Food
 - Clothing

- Shelter
- Education
- Healthcare

Aabdeen Vs Jahufer (1955)-

4.2. Factors Affecting Maintenance:

1. **Father's Income:** The amount of maintenance is based on the father's financial means. A wealthy father is expected to provide more generous maintenance than a father with limited income. *Beebi Vs Pichchei (1957)* –
2. **Child's Age and Needs:** Maintenance may increase based on the child's age and any special needs (e.g., medical expenses).
3. **Local Customs:** In some cases, the prevailing customs and standards of living in a particular region might influence the determination of maintenance.

4.3. Duration of Maintenance:

Sons: A father is obliged to maintain his sons until they attain puberty, or if they are unable to financially support themselves due to disability or pursuit of education. *Ummul Marsoona vs Samad (1977)* Case. **Daughters:** A father must maintain his daughters until they are married. If a daughter's marriage ends, the father's financial responsibility resumes, particularly if she does not have a source of income.

4.4. Specifics of Needs Covered by Maintenance:

Beyond basic necessities like food, clothing, and shelter, the concept of maintenance extends to covering other essential expenses:

- **Education:** Costs of schooling, books, and educational materials are considered part of the father's responsibility.
- **Healthcare:** The father is expected to cover medical expenses, including medication and healthcare services.
- **Other necessities:** Reasonable expenses related to the child's age and development, such as transportation, extracurricular activities, or personal upkeep, might also be considered under maintenance, depending on the father's financial means and local customs.

4.5. Methods of Determining Maintenance:

There's no single prescribed method for calculating maintenance. Traditionally, it often involved mutual agreement between the parents, considering the factors

mentioned above. In situations of disagreement, Sharia courts may employ various approaches:

- Ijtihad: Judges may use their legal expertise and reasoning based on Islamic principles to determine a fair amount.
- Customary practices: Local customs and standards of living might be taken into account alongside Islamic legal principles.
- Expert opinion: Qualified scholars with expertise in Islamic law and finance might be consulted for guidance.

5. MMDA on Maintenance

Sec 35 to 36

5.1.Maintenance of Legitimate Child

Maintenance of Legitimate Child in Islamic Law:

In Islamic law, the financial responsibility for the maintenance of legitimate children falls primarily on the father. The obligation is derived from various Quranic verses and Hadiths that emphasize the duty of the father to provide for the needs of his children.

Maintenance of children is a duty of the father, according to scholarly consensus, whether he remains married to his wife or divorces her, and whether the wife is poor or rich. She is not obliged to spend on the children when their father is still alive.

The woman who has been given a revocable divorce (first or second talaaq) must be given maintenance and accommodation during the ‘iddah, but when her ‘iddah ends, if she is not pregnant, she is not entitled to that.

In the event that custody of the children is given to a divorced woman, then the children’s maintenance must be paid by their father, and a mother who is breast-feeding may request payment for breastfeeding the child.

Maintenance of children includes providing accommodation, food, drink, clothing and education, and everything that they need, on a reasonable basis, depending on the husband’s circumstances, because Allah says (interpretation of the meaning):

“Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no

burden on any person beyond what He has given him. Allah will grant after hardship, ease”

[al-Talaaq 65:7]

This varies from one country to another and from one person to another.

If the husband is rich, then his spending should be in accordance with his wealth, and if he is poor or of moderate means, then he should also spend in accordance with his situation. If both parents agree on a certain amount of money, whether it is a little or a lot, that is up to them, and in the case of dispute the one who should decide concerning that is the qaadi (judge in a sharee’ah court).

Secondly:

It is permissible for a divorced woman to ask her husband for payment for breastfeeding the child, according to scholarly consensus.

Ibn Qudaamah (may Allah have mercy on him) said: Breastfeeding of the child is to be arranged for by the father only, and he should not force the mother to breastfeed him if she is divorced. We do not know of any difference of opinion concerning that. End quote from al-Mughni (11/430).

He also said: If the mother wants to breastfeed in return for payment , she has more right to do it, whether the father can find someone to breastfeed for free or not. Al-Mughni (11/431).

Shaykh al-Islam Ibn Taymiyah (may Allah have mercy on him) said: As for payment for breastfeeding, she is entitled to that according to scholarly consensus, as Allah says (interpretation of the meaning):

“Then if they give suck to the children for you, give them their due payment” [al-Talaaq 65:6].”(Al-Fatawa al-Kubra 3/347).

Key points include:

Basic Necessities: The father is obliged to provide for the basic needs of the child, including food, clothing, shelter, education, and medical care.

Financial Capacity: The amount of maintenance is determined based on the financial capacity of the father. If the father is wealthy, the expectation is that he provides a comfortable standard of living for his children.

Custody and Maintenance: In cases of divorce, if the mother has custody of the child, the father is still responsible for maintenance. However, if the child is in the custody of the father, the mother may be entitled to maintenance if she is not financially independent.

Right to Seek Increase: The mother has the right to seek an increase in maintenance if the father's financial situation improves.

Mother's Role: The mother is primarily responsible for the child's day-to-day care and custody. If she is unable to provide financially, the father's obligation for child maintenance prevails.

Duration: The father's obligation continues until the child reaches the age of maturity or becomes financially independent, with some variations based on gender and specific circumstances.

5.2.Maintenance of Legitimate Child in Sri Lankan Law:

In Sri Lanka, family law, including matters of child maintenance, is governed by various statutes. The primary legislation for Muslims in Sri Lanka is the Muslim Marriage and Divorce Act. Key points include:

Child Maintenance Obligation: The Act places an obligation on the father to maintain his legitimate children. The amount is determined based on the father's financial capacity and the needs of the child.

Custody and Maintenance: The Act also addresses custody and maintenance in cases of divorce. If the mother has custody, the father is usually required to provide maintenance for the child.

Application for Maintenance: The Act provides a legal avenue for the mother to apply for child maintenance. The court may issue an order specifying the amount of maintenance to be paid.

Review and Modification: Similar to Islamic law principles, Sri Lankan law may allow for the review and modification of maintenance orders if there is a change in the financial circumstances of either parent.

Muslim Marriage and Divorce Act (MMDA) of Sri Lanka

- **Provisions:** The MMDA contains provisions for the maintenance of legitimate children during marriage and after divorce.

- Quazi Courts: Disputes over child maintenance within the Muslim community are typically adjudicated by Quazi Courts in Sri Lanka, applying principles of Islamic law.
- Potential Challenges: Some critics argue that the MMDA's maintenance provisions lack precision, leading to inconsistent rulings, and that the enforcement mechanisms may need strengthening

5.3. Child Maintenance in Sri Lankan Common Law:

Legislation: The primary legislation governing child maintenance in Sri Lankan common law is the Maintenance Ordinance.. no 37 of 1999 maintenance Act

Financial Capacity: The court, under common law, considers the financial capacity of both parents when determining the amount of maintenance. The primary consideration is the best interests of the child.

Custody and Maintenance: The common law recognizes that the parent with custody of the child may require financial support from the non-custodial parent. Custody and maintenance are often addressed together in common law applications.

Application for Maintenance: A parent seeking maintenance can file an application with the relevant court under the Maintenance Ordinance. The court will then determine the amount based on the needs of the child and the financial capacity of the parents.

Review and Modification: Similar to the Muslim Marriage and Divorce Act, common law allows for the review and modification of maintenance orders if there is a significant change in circumstances.

5.4. Illegitimate children's maintenance

Islamic Law

Traditional View: Traditionally, Islamic jurisprudence doesn't recognize a legal relationship between a child born out of wedlock and their biological father. The scholars are unanimously agreed that the bed is the basic principle in establishing lineage. What is meant by the bed is marriage between the man and the woman. This means the father has no automatic legal obligation to provide maintenance.

However the scholars differed with regard to the zaani if he wants to acknowledge his illegitimate child and call him after himself: does that prove the child's lineage in shar'ī terms, or not? There are two well-known views:

1. That the illegitimate child is not to be attributed to the zaani even if he acknowledges him and names him after himself.

This is the view of most of the scholars of the four madhhabs, and of the Zaahiris (literalists) and others.

Based on this view, the illegitimate child – whether male or female – is not to be attributed to the zaani and is not to be described as his child; rather he is to be attributed to his mother, and he is a mahram to her and inherits from her like her other children.

Fatwas were issued on the basis of this view by Shaykh Ibn Ibraaheem, as in his Fataawa (11/146); Shaykh Ibn Baaz, as in Majmoo' al-Fataawa (18/124); and by the Standing Committee (al-Lajnah ad-Daa'imah, 20/387).

That is because the Prophet (blessings and peace of Allah be upon him) said: "The child is to be attributed to the bed (i.e., to the husband) and the adulterer deserves nothing." Agreed upon. The relevant point here is that the Prophet (blessings and peace of Allah be upon him) did not describe the child as belonging to anyone other than the bed (i.e., the husband), and he said that the adulterer did not deserve anything at all. Attributing the child to the adulterer is attributing the child to someone other than the husband.

The words: "The child is to be attributed to the husband" imply that attribution of the child is to be to the marriage only.

2. That if the zaani acknowledges his illegitimate child, then he is to be attributed to him.

This is the view of 'Urwah ibn az-Zubayr, Sulaymaan ibn Yasaar, al-Hasan al-Basri, Ibn Sireen, Ibraaheem an-Nakha'i, and Ishaq ibn Raahawayh, as was narrated from them by Ibn Qudaamah in al-Mughni (9/123)

This view was favoured by Shaykh al-Islam Ibn Taymiyah (may Allah have mercy on him) and his student Ibn al-Qayyim.

Among contemporary scholars it was also favoured by Shaykh Muhammad Rasheed Rida in *Tafseer al-Manaar* (4/382), and by Shaykh Ibn ‘Uthaymeen (may Allah have mercy on him), as in *ash-Sharh al-Mumti‘* (12/127).

That is because this child was born from his sperm, so he is his son in reality, and there is no clear, sound, shar‘i evidence to indicate that he should not be attributed to him.

With regard to the hadith “The child is to be attributed to the bed (i.e., to the husband) and the adulterer deserves nothing”, it refers to the case where there is a marriage, and the issue under discussion here has to do with a case where there is no marriage.

This is supported by what is mentioned in the story of the devoted worshipper Jurayj, when he spoke to the child whose mother had committed zina with the shepherd: “He said: ‘Who is your father, O child?’ The child said: ‘The shepherd.’” Agreed upon.

The speech of this infant was by way of a miracle and extraordinary event bestowed by Allah, and he stated that the shepherd was his father, even though the relationship was one of zina. This proves that paternity may be attributed to the zaani.

Moreover, the Lawgiver seeks to protect lineages and take care of children, and to give them the best upbringing and protect them from being lost.

The view that it is forbidden or permissible (to attribute an illegitimate child to his father) are two scholarly views that carry weight. This issue is one of the matters that are open to ijtihaad, so every case should be examined on its own merits. If the child will miss out on some religious or worldly interests (by not being attributed to his father), then we should adopt the view that it is permissible to attribute him to his father, in the interest of protecting him and ensuring that he will be taken care of, which is a legitimate shar‘i interest.

There is another opinion suggesting that if the adulterer acknowledged the paternity of the illegitimate child, the relevant Sharee‘ah provisions of filiation like inheritance are established. The child would be attributed to him and the mutual right to inheritance would be established. This scholarly view is strong and considerable (carries authoritative weight).

Nonetheless, some scholars are of the view that if the father claims the lineage of the child, and the woman was not married at the time, then the child bears his name. Ibn Qudaamah said: "The child born out of Zina does not bear the name of the fornicator according to the view of the majority of the scholars, but Al-Hasan and Ibn Seereen said: "He bears the name of the fornicator if the Hadd (i.e. punishment determined by the Islamic Law) is applied on him (the fornicator), and he inherits from him."

The customs of their society as a marriage; then, in this case, that child is the son of that man; he must spend on him and take care of him, and they both inherit from each other.

Shaykh Ibn Taymiyyah (Rah) said:

"The Muslims have agreed that if a Muslim consummates a marriage (has sexual intercourse) with his wife in a marriage which he believes to be valid, then his child from that marriage bears his name and they inherit from each other, according to the consensus of the Muslims, even though this marriage is invalid also according to the consensus of the Muslims ... the confirmation of family lineage does not require the validity of marriage; rather, the child belongs to the owner of the bed, as the Prophet (Pbuh) said, 'The child belongs to the owner of the bed, and the stone is for the adulterer.' [Al-Bukhaari and Muslim]."

Moral and Ethical Duty: While not a strictly legal obligation, scholars emphasize the moral and ethical responsibility of the father to care for his biological child, even if born outside of marriage. This is rooted in Islamic principles of compassion and protecting the vulnerable.

Mother's Responsibility: The mother bears the primary responsibility for the illegitimate child's maintenance. However, scholars may encourage the father to contribute financially as an act of charity if the mother is unable to provide.

Muslim Marriage and Divorce Act (MMDA) of Sri Lanka

Limited Provisions: The MMDA generally aligns with traditional Islamic perspectives, lacking explicit legal provisions for obligating the father to maintain illegitimate children.

But in 13 of 1951 MMDA Sec – 47 – Geneneral Powers of Quazis C, CC-illegitimate Child

Mohideen Vs Assiya Maryam (1958) - The Islamic legal framework does not explicitly prescribe a duty to care for illegitimate children – but this argument rejected

Informal Arrangements: Mediation and informal agreements within the community might sometimes be used to encourage the father to provide support, emphasizing a moral rather than a legal duty.

6. Common Law in Sri Lanka

Legal Provisions: Sri Lankan common law contains provisions that recognize the right of illegitimate children to seek maintenance from their biological fathers. The court can issue maintenance orders after suitable proof of paternity.

Practical Consideration: Muslims may choose to utilize the provisions under common law to secure maintenance for illegitimate children due to the limitations within traditional Islamic interpretations enforced under MMDA.

Key Points

- There's a notable discrepancy between traditional Islamic law (as reflected in the MMDA) and Sri Lanka's common law provisions regarding the maintenance of illegitimate children.
- While Islam emphasizes a moral duty, Sri Lanka's common law provides greater legal security for illegitimate children to obtain maintenance from their biological fathers.
- This reflects the evolving approaches to addressing the rights and well-being of illegitimate children, balancing cultural and religious sensitivities with the realities of contemporary society.

7. Adopted children

Islamic Law

No Formal Adoption: Traditional Islamic law does not recognize the concept of adoption in the same way as modern secular legal systems. This is based on the importance placed on preserving lineage (nasab) and preventing confusion regarding inheritance rights.

Our Prophet Muhammad (Peace be Upon Him) once said that a person who cares for an orphaned child will be in Paradise with him, and motioned to show that they would be as close as two fingers of a single hand. An orphan himself, Muhammad paid special attention to the care of children. He himself adopted a former slave, Zayd son of Harithah, and raised him with the same care as if he were his own son, and called him Zayd Ibn (son of) Muhammad. Zayd was one of the first to accept Islam, and his bond to our Prophet (Sal) was further strengthened through his marriage to the Prophet's cousin, Zaynab bint Jash. Not only did Zayd take the name of his adoptive father Muhammad, but he was also for all purposes treated as the Prophet's biological son, and by reason of his marriage even his wife Zainab fell within prohibited degrees to the Holy Prophet. All this changed with the revelation of Surah Al-Ahzab, in which Allah (in His Wisdom) proclaimed that—“God has not made For any man two hearts In his (one) body:.....nor has He made your adopted sons Your (real) sons. Such is (only) Your (manner of) speech..... Call them by (the names) Of their fathers: that is Juster in the sight of God...” (Holy Qur'an XXXIII:4-5) The above verses of the Holy Qur'an made a clear departure from the pre-Islamic position on adoption which was very similar to the concept known to our own general law, and adopted a more realistic and meaningful approach to this very sensitive subject. The sharia't categorically rejects the pre-Islamic notion that a mere declaration of adoption can, through a legal fiction, distort facts in such a way as to make a stranger a relative or an adopted individual a son. They demonstrate that a mere verbal expression or figure of speech cannot make the blood of a man run in the veins of his adopted son or daughter, produce feelings of fatherly affection in the man's heart or filial emotions in the heart of the adopted child, or transfer either the genetic characteristics or physical, mental, or psychological traits of the adopting parents to the child. 2 This is not to say that Islam prohibits or even discourages adoption. On the contrary, in Surah Baqara Allah stresses that it is not righteousness that you “turn your faces towards East or West” but it is righteousness to believe in God, the Judgment Day, the Angels, the Book and the Messengers and “to spend of your substance, out of love for Him, for your kin, for orphans, for the needy and for the wayfarer...” (Holy Qur'an II:177). The Holy Qur'an is studded with verses which emphasise the virtues of looking after orphans and the needy, and the Islamic concept of kafala which is the term used to mean ‘adoption’ makes such care of orphans and the needy through a foster-parent relationship a bounden duty of every pious man or woman. However, the Holy Qur'an seeks to regulate the relationship between a child and his or her adoptive family, which rules must be understood and complied with by every adopting parent who, in the eyes of the sharia't, are mere trustees and caretakers of someone else's child.

It needs to be emphasized that the rules laid down in the Holy Qur' anand the sunnah in regard to adoption of children seek to protect the child from any harm that could befall him or her in consequence of the adoption. One of the most fundamental rules contained in the Holy Qur' anis that adoption does not sever the ties the adopted child had with its natural or biological parents and other relations, and that the child's biological family should never be hidden or shrouded in secrecy. As has been noted, in Surah Al-Ahzab Allah specifically reminds adoptive parents that they are not the child's biological parents and also prohibits an adopted child from taking the name of his or her adopting father. History tells us how, by reason of this revelation, not only did the Holy Prophet' s adopted son, who was previously known as Zaid ibn Muhammad, revert to his original name of Zaib ibn Harithah, but the proclamation in Surah Nisaa (Holy Qur' anIV: 23) which only prohibited a person from marrying "the wives of your sons proceeding from your loins...." made it very clear that the Holy Prophet could even marry Zainab, the divorced wife of his adopted son Zaid.

Some of the rules in Islam surrounding this relationship are noted below:-

- (1) An adopted child retains his or her own biological family name (surname) and does not change his or her name to match that of the adoptive family;
 - (2) An adopted child inherits from his or her biological parents, but not intestate from the adoptive parents.
 - (3) When the child is grown, members of the adoptive family are not considered blood relatives, and are therefore not mahram or within prohibited relationship to him or her. "Mahram" refers to a specific legal relationship that regulates marriage and other aspects of life. Essentially, members of the adoptive family would be permissible as possible marriage partners, and rules of modesty exist between the grown child and adoptive family members of the opposite sex.
 - (4) If the child is provided with property or wealth from the biological family, adoptive parents are commanded to take care and not inter-mingle that property or wealth with their own. They serve merely as trustees
- Kafalah (Guardianship): Instead of adoption, Islam provides the concept of Kafalah, where a family takes in an orphaned or vulnerable child, providing care and protection.

- **Obligation to Maintain:** In Kafalah, there's a strong moral and ethical obligation to maintain the child as if they were one's own. This includes providing for basic needs, education, and ensuring their well-being.
- **No Automatic Inheritance Rights:** A child under Kafalah doesn't automatically gain inheritance rights from their guardian family. They retain their original lineage and identity.

Muslim Marriage and Divorce Act (MMDA) of Sri Lanka

- **Limited Provisions:** The MMDA doesn't contain extensive provisions specifically addressing adoption or Kafalah in the context of child maintenance.
- **Interpretation and Application:** Quazi courts may apply principles of Kafalah and the associated moral obligations towards maintenance when adjudicating cases involving children who are cared for by families other than their biological parents.

Common Law in Sri Lanka

- **Adoption Ordinance:** Sri Lanka's Adoption Ordinance outlines a formal, legal process of adoption, recognizing the adoptive parents' rights and obligations. This includes the full responsibility to maintain the adopted child.
- **Applicability:** Muslims in Sri Lanka can pursue formal adoption through the common law system. But in *Ghouse v Ghouse* [1988] 1 Sri LR 25 of Supreme Court case adopted child denied the instant.

Adoption of Children Ordinance No. 24 of 1941

Muslim Intestate Succession Ordinance No. 10 of 1931

Key Points

- Islamic law emphasizes care for vulnerable children but doesn't have a direct equivalent to Western-style adoption.
- The MMDA's lack of specific adoption provisions may lead to reliance on general principles of child well-being and moral obligations.

Payment of child maintenance, including criteria for determining amounts, in Islamic Law, Sri Lanka's MMDA, and the common law applicable in the country:

Islamic Law

- **Father's Financial Means:** The primary consideration is the father's financial ability to pay. The maintenance amount should be proportionate to his income and assets.
- **Child's Needs:** Maintenance should cover the child's basic needs, including food, clothing, shelter, healthcare, and education. The child's age and standard of living should also be considered.
- **Mother's Financial Situation:** If the mother has the means to contribute, she may be expected to share in the child's maintenance costs.
- **Duration:** The father's obligation generally continues until the child reaches the age of maturity or becomes financially independent. There might be variations based on the child's gender or specific circumstances under different schools of thought.

Muslim Marriage and Divorce Act (MMDA) of Sri Lanka

- **Principles of Islamic Law:** The MMDA draws heavily from Islamic jurisprudence in determining child maintenance.
- **Quazi Courts:** In disputes, Quazi Courts apply Islamic principles, assessing the father's financial capacity and the child's needs.
- **Challenges:** Critics argue that the MMDA lacks a standardized formula for calculating maintenance, leading to potential inconsistencies in rulings and difficulties in enforcement.

Common Law in Sri Lanka

- **Maintenance Ordinance:** The Maintenance Ordinance provides a more detailed and structured framework for determining and enforcing child maintenance payments.
- **Key Factors:** Calculations under common law typically consider:
 - Both parents' incomes and assets
 - Child's needs (educational, medical, etc.)
 - The standard of living the child enjoyed before the separation.

- Enforcement Mechanisms: Sri Lankan common law offers more robust enforcement mechanisms such as wage garnishment and seizure of assets in cases of non-compliance.

Key Points:

- Islamic principles guide maintenance provisions within the Sri Lankan MMDA, but there are calls for greater precision and standardization.
- Muslims in Sri Lanka can seek maintenance orders under the common law, benefiting from its more structured calculation approach and stronger enforcement mechanisms.
- The choice of legal system for maintenance claims requires careful consideration of both religious and practical implications.

7. Potential for Gravity and Discrimination in Applying Child Maintenance in Sri Lanka

Concerns have been raised regarding potential inconsistencies and discriminatory practices in determining child maintenance for Muslim children in Sri Lanka, particularly when comparing decisions made by Quazi Courts and District Courts. Here's a breakdown of the underlying factors and potential issues:

Legal Frameworks:

- Quazi Courts: These courts administer matters related to marriage, divorce, and inheritance within the Muslim community, applying principles derived from Islamic law.
- Magistrate Court: These courts operate under Sri Lanka's general law framework, including the Maintenance Ordinance, when handling child maintenance cases.

Current Legal and Practical Context

Child Maintenance: Sec 47 (1) © and (cc) provides for an application for maintenance to be made on behalf of the child whether legitimate or Not.

Maintenance Order: Sec 64 Provides that when there is a default of Maintenance the defaulted sum can be recovered by a magistrate of the area in which the person resides. The process involves making a applicataion to the Quazi, the Quazi making application for enforcement to the magistrate Court together with a certificate

stating amount due and the magistrate making such orders to recover it as if were fine.

Sec 66: A Breach of the Magistrates order may result in imprisonment.

8. Practical Problems Reported Under MMDA

1. No Standard Process to determine the Maintenance Amount.

1500.00, 3000.00 in AKP above grade Six 10,000.00, below Six 7500.00.

Government Circular: Ministry of Women Child Affairs and Social Empowerment.
Per person Expenses near 37000.00

2. Difficulties in Obtaining maintenance:

The Burdon of proofing the salary of father ---- Bank Details, etc...

Non-Payment Results --- father residing Magistrate – far away additional expenses..

Delay process... Quazi Corruption (No monitoring system), etc..

9. Recommendation by 2009 MMDA Reform Committee

Chairperson : Justice Saleem Marsoof.

1.Introduction of Interim maintenance.

2. Maintenance can be ordered from the date of spouses actually Separated .. not the application date (Sec -36)

3. Establishment of a Maintenance Fund for destitute divorced women.

4. the quazi court may directly implement its order to recover maintenance without referring the matter to the magistrate court, in the event that the money could not be so recovered the quazi court may issue a certificate to the DC to recover the money the seizure and sale of any immovable property.

Issues with Quazi Courts:

- **Lack of Standardization:** The MMDA doesn't provide a clear formula for calculating child maintenance, leading to potential inconsistencies in rulings across different Quazi Courts. This can result in unequal outcomes for children depending on the specific court and judge.
- **Limited Enforcement Mechanisms:** Critics argue that Quazi Courts have weaker enforcement mechanisms compared to District Courts, making it difficult to hold fathers accountable for non-compliance with maintenance orders.
- **Potential for Bias:** Concerns exist regarding potential biases based on cultural norms or socio-economic factors that might influence rulings, leading to discrimination against children from certain backgrounds.

Possible Advantages of District Courts:

- **Standardized Approach:** The Maintenance Ordinance provides a more structured and standardized approach to calculating child maintenance, potentially leading to more equitable outcomes for children.
- **Stronger Enforcement Mechanisms:** District Courts have access to more robust enforcement mechanisms such as wage garnishment and asset seizure, potentially improving compliance with maintenance orders.

Addressing the Issues:

- **Reforming the MMDA:** Calls exist for reforming the MMDA to establish a clearer and more standardized method for calculating child maintenance while ensuring compliance with Islamic principles.
- **Training and Sensitization:** Training and sensitizing Quazi Court judges on gender equality, child rights principles, and the importance of consistent application of Islamic law can potentially address potential biases and inconsistencies.
- **Enhancing Enforcement Mechanisms:** Strengthening enforcement mechanisms within Quazi Courts or improving communication and collaboration between Quazi Courts and District Courts in enforcing maintenance orders could be explored.

10. Rational Reforms on Child Maintenance in the Proposed Muslim Marriage and Divorce Act (MMDA) and their Justifications:

The current MMDA's shortcomings in addressing child maintenance have prompted calls for reform. Here's an exploration of potential rational reforms and their justifications:

1. Standardized Calculation Method:

- Current Issue: The MMDA lacks a specific formula for calculating child maintenance, leading to inconsistencies and unpredictable outcomes across different Quazi Courts.
- Proposed Reform: Implement a standardized formula that considers:
 - Father's income and assets
 - Child's needs (age, education, healthcare)
 - Local cost of living
 - Mother's potential income, if applicable
- Justification: Standardizing the calculation method promotes fairness, predictability, and transparency in determining child maintenance, ensuring all children receive adequate support regardless of the adjudicating court.

2. Strengthened Enforcement Mechanisms:

- Current Issue: The MMDA lacks robust enforcement mechanisms, making it difficult to hold fathers accountable for neglecting maintenance orders.
- Proposed Reform:
 - Introduce mechanisms like wage garnishment and asset seizure for non-compliance.
 - Establish clear procedures for enforcing maintenance orders.
- Justification: Strengthening enforcement mechanisms ensures children receive the financial support they are entitled to and reduces the burden on mothers. It discourages non-compliance and upholds the responsibility of fathers towards their children.

3. Regular Review System:

- Current Issue: The MMDA doesn't have a system for reviewing and adjusting maintenance awards as circumstances change (e.g., increase in the father's income, child's growing needs).
- Proposed Reform: Establish a systematic review process to periodically adjust maintenance awards based on:
 - Changes in the father's financial situation
 - Evolving needs of the child
 - Inflationary adjustments
- Justification: Regular reviews ensure that child maintenance remains adequate over time, adapting to changing circumstances and safeguarding children's well-being throughout their development.

4. Quazi court order relating to maintenance to be directly enforceable at the MC in the area of residence of applicant .

4. Improved Dispute Resolution Mechanisms:

- Current Issue: The MMDA's dispute resolution process for child maintenance can be lengthy and costly.
- Proposed Reform: Introduce alternative dispute resolution methods like mediation and conciliation, which can be:
 - Faster and less expensive
 - More amicable and conducive to reaching mutually agreeable solutions
- Justification: Streamlined dispute resolution processes can reduce litigation costs and delays for both parties. Additionally, promoting alternatives can encourage a more collaborative approach prioritizing the child's well-being.

5. Forming a Welfare Fund to Support to the cases of Non payment

5. Gender Sensitivity and Awareness Campaigns:

- Current Issue: Concerns exist regarding potential gender bias within the system, potentially disadvantaging mothers and children.
- Proposed Reform:
 - Sensitize Quazi Court judges and legal professionals on gender equality and child rights principles.
 - Launch awareness campaigns within Muslim communities on child maintenance rights and responsibilities for both mothers and fathers.
- Justification: Promoting gender sensitivity within the legal system and raising community awareness can combat potential biases, ensuring just and equitable outcomes for both children and mothers.

Justification for Incorporating Reforms into the MMDA:

- Protecting Children's Well-Being: These reforms prioritize the best interests of the child by ensuring they receive adequate financial support for their basic needs and development.
- Promoting Gender Equity: Addressing potential gender biases and ensuring fair outcomes for mothers contribute to greater gender equality within the system.

- Upholding Islamic Principles: The reforms aim to achieve the core Islamic objectives of justice, compassion, and parental responsibility towards children.
- Harmonizing with Legal Frameworks: Standardization and robust enforcement mechanisms can bring the MMDA's child maintenance provisions closer to aligning with Sri Lanka's broader legal framework.
- Fulfilling International Obligations: These reforms demonstrate Sri Lanka's commitment to upholding international child rights conventions, maintenance obligation of Hague Conference and ensuring the well-being of all children within its borders.

11. Conclusion:

Reforming the MMDA's child maintenance provisions is crucial to address existing shortcomings and ensure fair, predictable, and effective mechanisms that prioritize the well-being of children from Muslim families in Sri Lanka. These reforms can be implemented while upholding Islamic principles and fostering a more just and equitable legal framework for child maintenance within the Sri Lankan context.

1951 maintenance ordinance 36

MMDA 36/ 47 -1.c / 64- Enforcement

Adoption District Court , Supreme Court – Gouse vs Gouse