PERSONAL LAWS

An Analysis on Legal Gaps and Context

December 2023

Working Paper

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Acknowledgments

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Introduction

Justice C.G. Weeramantry describes Sri Lanka's legal system as a 'coloured mosaic, which represents the co-existence of diverse elements, than their fusion into one.'[1] Justice Weeramantry in his statement highlights the presence of distinct customary or personal laws, such as the Kandyan Law, Tesawalamai Law and Muslim Law, which complement and coexist alongside the General law of Sri Lanka.[2]

The 1978 Constitution of Sri Lanka recognises all written and unwritten laws including the personal laws of the country in Article 16.[3] As such, it gives effect to the operative nature of the personal laws, to continue in force.[4] Article 10 on *freedom of thought, conscience and religion* and Article 12 on equality, are intended to protect the cultural rights of ethnic and religious minorities as fundamental rights, which in theory creates a further safeguard towards the operative personal laws.[5] These laws govern areas including but not limited to marriage, divorce, adoption, and succession to personal property.[6]

The personal laws are applicable to those from specific communities/ethno-religious groups, of whom some are at liberty to subscribe to these laws: a) Kandyan law is a personal law applicable to persons of the Sinhala race, and those who could claim descent from the original inhabitants of the Kandyan provinces at the date of the Convention (1815),[7] b) Muslim law is applicable to all Muslims who are inhabitants of Sri Lanka[8] and c) Tesawlamai law applies to all lands within the Northern Province, regardless of the ethnicity or cultural background of the landowner and to Tamils who have inhabitancy in the Northern Province.[9] This plural legal feature of the Sri Lankan legal system has not only been recognized for 'protecting and upholding rights of all communities and racial groups', but viewed as a 'medium of national integration'.[10] The tenets of cultural pluralism are intended to be upheld through the plural legal aspect of personal laws.

However, one of the most significant critiques of Sri Lanka's personal laws is that certain provisions are seen as discriminatory in nature, therefore incompatible with constitutional and human rights standards.[11] As such, there have been both local and international calls for the removal or reform of these provisions.[12] The apparent discriminatory aspects of personal laws seem to stem from entrenched historical cultural norms and social structures within societies.[13] Notably, failing to consider these cultural norms when proposing reforms to these personal laws could itself be construed as discriminatory and unjust. Some of these norms, which form the bases of such personal laws, are explored in successive sections of this report.

In light of the perception that certain provisions in Sri Lanka's personal laws are discriminatory and inconsistent with human rights standards, this report will evaluate the disparities between operational personal laws and international standards, proposing potential reforms. The assessment will focus on provisions relating to gender discrimination and those that adversely impact women and children's rights. Recommendations for the reform of these personal laws to comply with relevant international standards

will be drawn from this assessment. Accordingly, this report intends to make a case for the evolution of the personal laws with contemporary standards, and not for the exclusion of Sri Lanka's plural legal aspects.

Mixed legal systems (also known as plural legal systems) in most countries came into existence as a result of post-colonialism[14]. Sri Lanka has a rich history with a flux of culture, religion and colonial influences as depicted in the brief history outlined under each personal law in every chapter of this report. The current legal system of Sri Lanka has and Kandyan law under the common state judiciary while Muslim laws has its own state judiciary, known as the *Quazi* courts for matters such as marriage, divorce and maintenance. This combination of customary and religious laws exist parallel to the General law of the country and the application of these laws are dependent on the hierarchy of the laws,[15] which will also be analyzed in each chapter. Oftentimes there are conflicts between the personal laws and general laws due to the unique nature of each law. For instance, if a comparison of Sri Lanka's personal laws were to be made to a neighboring country with a plural legal system, there are inconsistencies in the Indian plural legal system on the subject of minimum age of marriage, divorce and consent.[16] These inconsistencies are also reflected in the Sri Lankan plural legal system which will be addressed in the report.

In order to explore different perspectives on the inconsistencies in the personal laws, interviews across the laws were conducted. The overall finding of the interviews revealed that there were concerns of inconsistency, human rights and violations of the rule of law due to the coexistence of all the laws.[17] This position is also reflected at times in the context of Sri Lankan law which will be delved into under each personal law of this report.

Whilst Sri Lanka once advocated for a uniform legal system without multiple personal laws under the motto of "one country one law,"[18] it is important to understand that a plural-legal system encapsulates the diversity of different ethnicities and preserves their culture and traditions. Furthermore, the differences help to concoct solutions to address challenges that the laws face. For instance, managing plurality while maintaining a united community.[19] Parallel to many advocates of reform, this report also advocates to reform the specific problematic provisions of the law by analysing each personal law for inconsistencies with international standards while retaining a plural legal system.

Sri Lanka is a party to several international conventions that promote human rights, equality and non-discrimination based on gender, and the rights of children. The obligation to conform to these international standards requires an assessment of the compliance of all laws in Sri Lanka with these standards, including the personal laws of Sri Lanka. The relevant standards of international law which will be looked at across all 3 personal laws, include the International Covenant on Civil and Political Rights (ICCPR)[20], the International Covenant on Economic, Social and Cultural Rights (ICESCR),[21] the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW)[22], and the Convention for the Rights of the Child (CRC).[23]

The personal laws will be presented in three chapters. Chapter 1 - Kandyan law, Chapter 2 - Muslim law and Chapter 3 - Tesawalamai law.

Methodology

This report is primarily based on desk-based qualitative research conducted both online and using books from the De Soysa House library. Primary research was conducted through limited Key Informant Interviews (KIIs). The team conducted four key informant interviews (KIIs) from November 2022 to September 2023 with individuals familiar with the personal laws. 2 interviews were conducted in person and 2 were conducted using virtual platforms and telephones. The limited number of KII's is a limitation of the working paper.

Chapter 1
Kandyan Law

The first chapter on Kandyan law will briefly outline in the first section, the applicability of the Kandyan law, its application in conjunction with the General law, and contextualise the cultural norms that underpin the Kandyan law system. The second section will explore specific provisions of Kandyan law that are operative and may be inconsistent with international standards. The third section will highlight positive features of the Kandyan law, in comparison to the General law, that are relatively more progressive and in line with modern day human rights values. The fourth section will provide concluding observations and recommendations on how Kandyan law can improve to better comply with relevant international standards.

1.1. Historical sources and applicability of Kandyan law

Kandyan law is the customary law that originated from Sinhala law that ceased to be applicable in the maritime provinces during the colonial period and was retained only in Kandyan provinces.[24] During the early years of British rule, Historian and Jurist Sir Edward Creasy conceded that the Kandyan Convention of 2 March 1815 preserved the Kandyan laws and customs for the indigenous inhabitants of the Kandyan provinces.[25]

Kandyan law commenced to operate as a territorial law and subsequently was restricted to personal law applicable to persons of the Sinhala race, and those who could claim descent from the original inhabitants of the Kandyan provinces at the date of the Convention (1815).[26]

In *Kershaw v. Nicoll*[27] it was held that the wife of a Scotsman who was domiciled within the Kandyan provinces had acquired personal status of a wife governed by Kandyan law. Thus, this case upheld the territorial nature of the application of Kandyan law. However, several judicial decisions subsequently reduced the scope and applicability of Kandyan law. In *Williams v. Robertson*, the Supreme Court overruling *Kershaw v. Nicoll* held that one cannot acquire 'a purely Kandyan domicile of choice as opposed to 'Ceylon domicile' as the former lacks 'supreme or sovereign power'.[28] Subsequently, the character of Kandyan law changed permanently from being a territorial law to becoming a personal law applicable to Kandyan inhabitants.[29]

Presently, Kandyan law applies to 5 aspects of private life relating to donation, adoption, marriage, divorce, and intestate succession (division of property). Kandyan law is governed by two statutes: the Kandyan Law Declaration and Amendment Ordinance (KLDAO) No. 39 of 1938, and the Kandyan Marriage and Divorce Act (KMDA) No. 44 of 1952.

1.2. Customary/normative understandings embedded in Kandyan law

Across the globe, norms and customs undergird societies and serve to mediate social life and social disputes.[30] Similarly, customary Kandyan laws, especially in relation to marriage (that determine rights and obligations of parties to the marriage), were formulated to protect the family and property belonging to the family.[31] The law was mainly designed to prevent the 'fragmentation of land', which was the 'economic base of the primarily Sinhala agrarian society' at the time.[32] As a measure to safeguard the ownership of property and to ensure they remained with the family, customary law evolved to weave these safeguards into Kandyan marriages.

dyan law recognises two types of marriages: i) *Diga* marriages and ii) *Binna* marriages.

1. **Diga marriage:** A marriage in which the woman is given away (departs from her paternal home) and is settled in the house of her husband.[33] In doing so, the woman severs all inheritance rights to her ancestral property on account of her 'union with a different family to bear children who will belong to different gens.'[34] Frank Modder contended that a *diga* marriage would appear to take place in a household where there was 'plurality of daughters with the common property being too limited to be enjoyed by numerous family [members].'[35]

2. **Binna marriage:** A marriage in which the man is received into the house of his wife and resides there permanently.[36] In this arrangement, the woman assumes the role of the head of the household, retaining full control over her own property. The husband does not gain any rights over her property through this union.[37] Modder identified that this type of marriage occurs mostly in cases 'where the bride is an heiress or daughter of a wealthy family in which there are few or no sons.'[38] Justice Amerasinghe in *Jayasinghe v Kiribindu*[39] described a *binna* married daughter as 'akin to the Indian institution of raising an heir [to inherit ancestral property] through an appointed daughter.'[40]

The discussion above illustrates that customary Kandyan law (which founded modern Kandyan law legislation) embeds elements of cultural norms and social structures that arose out of socio-economic necessities at the time.[41] These elements on the face of it appear to be at odds with constitutional and international human rights standards. However, the act of marrying under KMDA has become uncommon in modern society.[42] In one of the KIIs conducted for this report, the informant was of the view that one of the main factors contributing to this decline in marriages under KMDA, is the restricted/limited property rights held by certain spouses, such as a *diga* married daughter (elaborated further in subsequent sections of this report).[43] The informant was of the view that this limitation dissuades them from choosing the KMDA for marriage, and instead prompts them to opt for marriage under the General law.[44] This report argues for consideration and understanding of these elements in seeking reform of incompatible provisions within the modern Kandyan law while maintaining its cultural context. Such an approach may potentially foster a greater inclination towards marriages under the KMDA.

1.3. Interrelationship with the general law

Academics contend that the enactment of the KMDA has further narrowed the scope of the application of Kandyan Law. Jurist Savitri Goonesekere points out that Section 3(1)(b) of the 1952 Act effectively prevents the formalisation of mixed marriage (between a Kandyan and non-Kandyan). Such marriages must instead be formalised under the General law, and the children of such unions do not qualify to be governed by Kandyan law.[45]

Notably, the application of Kandyan law to any individual, is an 'opt-in' system or a matter of choice and not automatic.[46] Accordingly, an individual subject to Kandyan law is entitled to choose to enter into a marriage under the Marriage Registration Ordinance No. 19 of 1907 or KMDA. In instances where the Kandyan law is silent, the General law of the country steps in. For instance, at present the custody of children of a Kandyan marriage is typically determined in accordance with the principles of the General law.[47]

1.4. An assessment of the compliance of Kandyan law with international standards

Table 1 below identifies some of the key provisions of Kandyan law that are incompatible with the corresponding international convention that is being offended.

Table 1 Summary of the assessment of the compliance of Kandyan Law with international standards

Issue	Kandyan Law Provision	International Law Being Breached	Gap analysis
Grounds for the dissolution of marriage	Section 32 of **KMDA** stipulates that the dissolution of a Kandyan marriage shall be granted on any of the following grounds: (a) Adultery by the wife after marriage. ***(b) Adultery by the husband, coupled with incest or gross cruelty.*** (c) Complete and continued desertion by the wife for two years. (d) Complete and continued desertion by the husband for two years. (e) Inability to live happily together, of which actual separation from bed and board for a period of one year shall be the test. (f) Mutual consent.	Article 16 **CEDAW** notes that there must be equal rights and obligations in relation to marriage and family relations, including in relation to the dissolution of the marriage. Article 2 **ICCPR** states that no distinction must be made based on sex and that states must take measures to protect equality. Article 2 **ICESCR** contains an identical provision to the **ICCPR.** Article 23 **ICCPR** states that there must be equality of rights and responsibilities of spouses as to marriage, during its subsistence and its dissolution.	Section 32 of the **KMDA** outlines unique grounds for ending a marriage based on gender, alongside shared reasons for divorce. For instance, grounds for husband's dissolution of marriage require to prove adultery by the wife after marriage. By contrast, grounds for a wife's dissolution of marriage require proving adultery by the husband coupled with incest or gross cruelty. This gender-specific approach highlights an inequality in the rights and duties of spouses, which contradicts widely accepted international norms seeking equality within marital relationships.

Issue	Kandyan Law Provision	International Law Being Breached	Gap analysis
Intestate succession/ inheritance to spouse's property and paternal ancestral property (distribution of rights and property where there is no will)	Section 11 of **KLDAO** provides that when a man shall die intestate leaving a spouse then the surviving spouse [the widow] shall be entitled to an estate for life in the acquired property of the deceased subject to conditions. Section 12 of **KLDAO** provides that the *diga* marriage of a daughter after the death of her father shall not affect or deprive her of any share of his estate to which she shall have become entitled to upon his death, provided that if within a period of one year after the date of such marriage the brothers and *binna* married sisters of such daughter tender to her the fair market value of the immovable property...and shall call upon her to convey the same to them, such daughter ***shall be compellable by action so to do.*** Section 19 of **KLDAO** provides that on the death intestate of a woman married in *diga*, leaving a surviving spouse but no child, such a ***surviving spouse [the diga widower] shall not be entitled, and shall not be deemed to have been at any time entitled, to any part of the immovables property of the deceased other than to the acquired property*** to which the deceased became entitled subsequent to and during the subsistence of such a marriage in *diga*.	Article 2 **ICCPR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 26 **ICCPR** states that the law must guarantee equal and effective protection to all, against discrimination on any grounds including birth or other status. Article 2 **ICESCR** contains an identical provision. Article 3 **ICESCR** provides that State parties must ensure the equal enjoyment of all economic, social, and cultural rights in ICESCR between men and women. Article 15 **CEDAW** provides that states shall take necessary measures to ensure that women have equal rights as men before the law, especially to conclude contracts and to administer property and treat them equally in all stages of procedure in courts and tribunals. Article 16 **CEDAW** notes that there must be equal rights and obligations in relation to marriage and family relations, including in relation to the disposition of property.	Under customary Kandyan law, a *binna* married husband (widower) has no claim to his deceased wife's property, a position potentially reinforced by the gender-specific language in Section 11 of **KLDAO**.[48] This disparity in rights between widows and widowers may stem from gender stereotypes contradicts principles of gender equality and non-discrimination in international law. Section 12 of **KLDAO** discriminates against *diga* married daughters on two fronts[49]: (a) A daughter given in *diga* marriage before the death of the father forfeits her rights to his estate (b) If a daughter contracts a *diga* marriage after the death of the father, she can inherit the father's property. However, if within a period of one year after the date of her marriage, her brothers and *binna* married sisters tender her fair market value of the immovable property, she is **bound to convey** the property to them. Both aspects of Section 12 leave a *diga* married daughter in a disadvantaged position and thereby violate the international law principles of gender equality and non-discrimination. Section 19 of **KLDAO** prescribes a less privileged entitlement to a *diga* married husband to the property of his wife upon her death in violation of the principles of gender equality.

Issue	Kandyan Law Provision	International Law Being Breached	Gap analysis
Intestate succession rights of extra-marital children (distribution of rights and property where there is no will)	Section 15 of **KLDAO** provides that when a man shall die intestate leaving an illegitimate child or children, such child or children ***shall have no right of inheritance to paraveni property*** of the decreased. Section 18 of **KLDAO** provides that when a woman married in *binna* dies intestate, an illegitimate child or children ***shall not be entitled to success to the paraveni property*** of the deceased.	Article 2 **CRC** provides that states Parties shall respect and ensure the rights of a child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's status relating to race, sex, ethnic or social origin, among others. This right to equality and non-discrimination has direct implications for access to property and inheritance.[50] Article 27 **CRC** provides that State parties should take appropriate measures to assist parents and others responsible to implement a child's right to housing, nutrition and clothing. Article 11 **ICESCR** provides that State parties must recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing. Article 17 **ICCPR** provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, and everyone has the right to the protection of the law against such interference or attacks. Both articles guarantee the rights mentioned therein to "everyone", including children.[51]	Sections 15, and 18 of **KLDAO** place limitations on the rights of an extra-marital child (or children) to succeed / inherit ancestral property of their fathers and *binna* married mothers, in violation of the international convention's right to inherit without discrimination.

1.4.1. Grounds for the dissolution of marriage

Section 32 of KMDA stipulates different grounds for the dissolution of marriage for the husband and wife, in addition to the common grounds of divorce available to them both. The distinct grounds for dissolution of the marriage available to men and women points to the inequality of the rights and responsibilities of spouses, which runs contrary to well accepted international standards that aim at equality in the marriage relationship (see Table 1). For instance, the husband may file for the dissolution of his marriage to his wife on the grounds of: adultery by the wife after marriage or complete and continued desertion by the wife for two years.[52] By contrast, the wife may file for the dissolution of her marriage to her husband on the grounds of: adultery by the husband coupled with incest or gross cruelty; or complete and continued desertion by the husband for two years. This discrepancy in the grounds of dissolution places an additional burden on Kandyan women that Kandyan men are not subject to.[53]

1.4.2. Intestate succession/inheritance to spouse's property (upon their death) and paternal ancestral property

In Sri Lanka, testate succession (distribution of rights and property through a will) is governed under a uniform common law. Accordingly, all the properties should be distributed according to the absolute will of the testator. By contrast, intestate property (distribution of rights and property where there is no will) of persons is distributed among their heirs according to applicable personal laws or General law. Kandyan law recognises intestate property under two different categories: (i) immovable and (ii) movable properties. However, variances of the Kandyan law with international standards predominately relates to the succession to immovable property, which will be explored in this section of the report. Immovable property in Kandyan law is twofold: (a) *paraveni* property, and (b) acquired property.[54] Notably, Kandyan law in relation to intestate succession rights depends on: (a) whether the property belongs to a male or female as *paraveni* or acquired property, and (b) the form of marriage—whether *diga* or *binna* marriage.

Against this backdrop, this section of the report will focus on three main areas of incompatibility with international standards that prevail in the Kandyan law of intestate succession relating to immovable property.

a. Discrimination against the binna married husband/widower

As per customary Kandyan law, a *binna* married husband (widower) has no rights to the deceased wife's property—whether ancestral or acquired.[55] It appears that this customary position is left intact and in fact reinforced by the deficiencies in Section 11 of KLDAO. Namely, Section 11 fails to use a gender-neutral term to encapsulate the surviving spouses' right elsewhere in the Act (E.g., Section 22). [56]Therefore, it is arguable that Section 11 only speaks to the widow's rights and not the widower's rights. Consequently, it is evident that the *binna* widower's rights are weaker in comparison to its female counterpart, a *diga* widow, who is entitled to life-interest in the acquired property of her husband.[57] It has been argued that this position of the *binna* married widower is likely to be influenced by gender stereotypes[58] (i.e., males could support themselves economically), which offends the principles of equality and non-discrimination between sexes entrenched in international law.

b. Discrimination against the diga married daughter

Section 12 of the KLDAO imposes discriminatory measures against *diga* married daughters based on two factors.[59] Firstly, if a daughter enters a *diga* marriage prior to the father's demise, she is compelled to relinquish her rights to her father's estate. Secondly, if a daughter enters a *diga* marriage subsequent to the father's death, she is obligated to transfer her father's inherited property to her brothers and *binna* married sisters upon receiving a fair market value for it. These provisions in the law seem to be designed to exclude *diga* married daughters from inheriting paternal ancestral property. Academics have attributed this exclusion as a means of ensuring the paternal ancestral property doesn not fall into the possession of another family (i.e., the *diga* married daughter's husband's family).[60] Furthermore, the KII has also brought to light the practical ramifications of these provisions. They have facilitated situations where siblings of a *diga* married daughter can sell her land without the need to allocate a share of the proceeds to her, resulting in her disadvantaged position.[61]

Customary Kandyan law justifies this exclusion by asserting that if a *diga* married daughter were to inherit paternal property, it would end up in the possession of another family.[62] Such a scenario would lead to the fragmentation of the *diga* married daughter's paternal property, contradicting the prevailing socio-economic needs of the time. Furthermore, at the time customary Kandyan law was in effect, *diga* married daughters were given a dowry to protect them from poverty and/or impoverishment.[63] Consequently, in present times, when a *diga* married woman's husband passes away, she faces further disadvantage by being entitled only to a life interest in her husband's acquired property—especially in the absence of dowry.[64]

c. Discrimination against the diga married husband/widower

Section 19 of KLDAO prescribes that a *diga* widower, upon the death of his wife (intestate and childless) is only entitled to the wife's acquired property, which she acquired during the subsistence of the marriage. However, Section 11 of KLDO does not prescribe similar constraints on the acquired property the *diga* widow is entitled to. As such, upon the death of her husband, a *diga* widow is entitled to the acquired property of the husband without any limitation as to when the property was acquired.[65]

1.4.3. Intestate succession rights of extra-marital children

Table 1 lists international conventions that pertain to the right to equality, non-discrimination, and the right to adequate housing. These conventions imply the right to inheritance without discrimination.[66] Academics have argued that Sections 15 and 18 of KLDAO impose limitations and discriminate against the rights of an extramarital child to inherit immovable property from their parents. These provisions appear to directly violate the internationally recognized right of a child to inheritance. For instance, an extra-marital child is prevented from inheriting their maternal grandfather's property, and their natural father's *paraveni* property.[67] Moreover, they are only entitled to succeed to their natural father's acquired property subject to the interests of the surviving spouse.[68]

1.5. Analysing the favourable nature of Kandyan law in comparison to the general law: A case for retaining Kandyan law within a plural legal system

This section of the report will highlight provisions within Kandyan law which are compatible with international standards, and provisions which are relatively more progressive than the General law of Sri Lanka and in line with modern-day human rights values. Accordingly, this section will focus on two positive features of Kandyan law pertaining to the dissolution of marriage and intestate succession (distribution of rights and property where there is no will) relating to extra-marital children.

1.5.1. Liberty of the divorce system

Currently, Sri Lanka's General law on divorce requires parties to have to prove matrimonial fault of the spouse for the dissolution of marriage on either one of the three grounds provided in the General Marriage Registration Ordinance No.19 of 1907. They are: (1) adultery subsequent to marriage, (2) malicious desertion; or (3) incurable impotency at the time of such marriage. In addition to these three primary grounds of divorce, caselaw on the statutory interpretation of malicious desertion has introduced a fourth ground of divorce under General law, namely constructive malicious desertion.[69]

By contrast, the KMDA recognises both matrimonial fault and irretrievable breakdown of the marriage. Section 32 of the Act provides six grounds for the dissolution of marriage: (1) adultery by the wife after marriage, (2) adultery by the husband coupled with incest or gross cruelty, (3) complete and continued desertion by the wife for two years, (4) complete and continued desertion by the husband for two years, (5) inability to live happily together, of which actual separation from bed and board for a period of one year shall be the test, or (6) mutual consent.

The latter two grounds of Section 32 of KMDA – 'inability to live happily together of which actual separation from bed and board for a period of one year shall be the test and mutual consent' - are based on the principle of irretrievable breakdown of marriage. This concept allows parties to dissolve their marriage without having to prove 'fault'/guilt of the other party. The recognition of this concept makes Kandyan law far more liberal and progressive than the General Marriage Registration Ordinance, which fails to recognise the concept of

divorce based on the breakdown of marriage or mutual consent. This stance was also articulated during the KII.[70]

Furthermore, procedural law for the dissolution of marriage under Kandyan law is far more flexible in comparison to General law. Under the General law, parties can only dissolve their marriage upon the judgement of a competent court.[71] By contrast, parties married under Kandyan law can simply file an application for the dissolution of marriage with the District Registrar.[72] Thus, it has been argued that the informal and non-inquisitorial approach also helps maintain the dignity and protect the individual rights of parties, which makes it a feature unique to Kandyan law.[73] However, one informant who was interviewed as part of this study shed light on a practical discrepancy. The informant was of the view that district Registrars have primarily confined themselves to the administrative process of marriage dissolution, akin to the role of a marriage register in recording a marriage.[74] Thus, they have encountered challenges in effectively mediating matters concerning divorce on the grounds of adultery, maintenance, and child custody.[75]

1.5.2. Recognising the right of extra-marital children to inherit intestate property of the biological father

Under General law, Section 33 of the Matrimonial Rights and Inheritance Ordinance provides that an extra-marital child inherits the property of their mother but not of the father. Furthermore, the extra-marital child is not permitted to succeed to the estate of any relative on the maternal side other than the mother herself. However, under Kandyan law, extra-marital children have the right to inherit intestate property of their mother and biological father although with some limitations (outlined in the preceding section).[76] Moreover, in the cases of *Rankiri V Ukku*[77] and *Ranhamy V Menik Ethana*[78] the court recognised the right of extra-marital children to be entitled to the entirety of the father's acquired property if there were no legitimate children.

Overall, the position of extra-marital children inheriting the property of their biological parents under Kandyan law is not fully compatible with international standards (as noted in previous sections of this report). However, their position is significantly favourable under Kandyan law than under the General law as a limited right to the father's acquired property is recognised.

1.6. Conclusion and recommendations: Retaining a reformed Kandyan law system

This report sets out to assess inconsistencies of the Kandyan law with ratified international standards, and how these provisions may be improved upon. Accordingly, the report highlighted three key areas of inconsistencies, mainly on the grounds of inequality and discrimination, concerning: (1) grounds for the dissolution of marriage, (2) intestate succession to spouse's property and paternal property, and (3) intestate succession rights of extra-marital children. The report also highlights two positive features of Kandyan law which are both more progressive in comparison to the General law of the country: (i) the liberty of the divorce system, and (ii) intestate succession rights that are extended to extra-marital children.

This section of the report will recommend reforms to the areas of inequality and discrimination identified in the preceding sections of this report. The recommendations are not intended to make a case for the implementation of a uniform law across separate communities to advocate the exclusion of Sri Lanka's plural legal system with its personal laws.

The November 2022 amendment to Kandyan law has repealed Section II of the KMDA, which previously required parental consent for the marriage of a minor.[79] This amendment also eliminated other provisions in the Act related to parental consent in the marriage of a minor. The repeal of these provisions represents a positive step towards aligning Kandyan law with international standards by addressing its inherent inconsistencies. Before the passing of this amendment, the issue of obtaining parental consent for the marriage of a minor had become redundant.[80] However, the existence of Section II of the KMDA, which granted the father more authority than the mother to consent to the marriage of their minor child, served as a reminder of the unequal parental responsibility within a marriage governed by Kandyan law.[81] Therefore, the repeal of these provisions resolved both the inconsistencies concerning the marriage of minors and the unequal parental responsibilities. Building upon the November 2022 amendment's repeal of these provisions, the following are some general recommendations to remedy the areas of incompatibility. The

recommendations are divided into short-term and long-term categories, considering the feasibility and time required for their implementation.

1.6.1. Recommendations for short-term implementation

- Replace distinct grounds for the dissolution of marriage with common grounds for divorce.

- Remove limitations placed on extra-marital children's right to inherit immovable property of their biological parents and to succeed equally with their marital children.

- Introduce provisions that provide individuals subject to KMDA the option to refrain from initiating the dissolution of their marriage through the District Registrar and instead exercise the choice to pursue legal proceedings in court.[82]

1.6.2. Recommendations for long-term implementation

- Provide clarity and guidelines on the role that should be adopted by the District Registrar who grants the dissolution of the Kandyan marriages to ensure there is equal and equitable distribution of property and provision of maintenance when dissolving the marriage.

- Amend provisions related to intestate succession specific to disadvantaged spouses to ensure property (especially paternal inheritance) is distributed according to the concept of substantive equality (based on equitable outcomes) and economic necessity of the spouse concerned.[83]

Chapter 2

Muslim Law

This chapter of the research report is divided into four sections. Section one briefly explains the historical sources of Muslim law as it is in Sri Lanka. Further, its application today and an assessment of its interrelationship with the General law is also be provided. In the second section, the relevant international standards that are possibly infringed upon by personal laws are recognized. A detailed gap analysis of the differences between Muslim law and the international standards are discussed in the third section. Section four outlines recommendations for potential areas of improvement to better adhere to international obligations.

2.1. Historical sources and applicability of Muslim law

The Muslims in Sri Lanka centuries ago had a great system of jurisprudence, whereby the Portuguese and Dutch recognized Muslim laws and customs and administered them as separate systems.[84] Islamic law has never been static because a series of different interpretations have been made across different nations.[85] Sri Lanka is not an exception. The diversity of its application is encapsulated in the term *ikhtilaf* which means disagreement or diversity of opinion amongst experts of Islamic law.[86] Although the term *shar'iah* encapsulates the revealed law of Islam, the term *fiqh* is the human attempt at understanding *shar'iah*. The application of *fiqh* to *shar'iah* allows the manifestation of positive law and jurisprudence, grounded in universal human rights. History is evident of the capability within Muslim law to keep with the times.[87]

Muslim law is applicable to all Muslims regardless of race or community. The criterion is based on whether the person professes the Islamic faith.[88] To be Muslim, the bare minimum is belief that there is only one God and that Mohammed, the prophet, is God's final messenger. Such a belief in Islam may be attached from birth or by conversion. For conversion, a formal declaration of a belief in Islam is sufficient. However, if evidence is provided to the contrary, the genuineness of the conversion is a question of fact for the courts to decide on a case-by-case basis.

The main sources of Sri Lankan Muslim law, first and foremost is the Code of Muslim law which was compiled by the Dutch.[89] The Code has now been superseded by modern legislation. A secondary source are the general principles of Muslim law,[90] which were initially embodied in decisions enforced by the 'Kathi Courts' (now known as '*Quazi* Courts').[91] Certainly though, where Muslim law is silent and no customs can be proven, the General law applies.[92]

Today, the main source of Muslim law is statutory. Two Ordinances were passed in 1929 and 1934 dealing with Muslim marriage and divorce but these were replaced by the now operative law, the Muslim Marriage and Divorce Act (MMDA).[93] Furthermore, the Muslim Intestate Succession and Wakfs Ordinance of 1931 (MISWO) was instituted as well but Chapter II of this Ordinance was amended by the Muslim Mosques and Charitable

Trusts or Wakfs Act No. 51 (MMCTWA).[94] It is the content of these statutes that will be assessed against the international law in the latter parts of this chapter.

The Muslims of Sri Lanka belong to different ethnicities. The Ceylon Moors (they are of Arab descent), the Coast Moors (they are of Indian descent) and the Malays who were brought to Ceylon by the Dutch and British. Additionally, the Borahs and the Memons are also a part of the Muslim community in Sri Lanka.

2.2. The interrelationship with the general law

The Marriage Registration Ordinance (MRO) governs the subject area of marriage except for Muslim marriages which are governed under Muslim law. This is evidenced by the preamble of the MRO which states that it is an Ordinance "to consolidate and amend the law relating to marriages other than the marriages of Muslims…" The MMDA, as well as the MMCTWA remain independent and unaffected by the General law, specifically on issues of marriage, rights to property in marriage, maintenance, divorce, succession etc. However, in instances where the Muslim law is silent, the General law is utilized. For example, Muslim law does not address adoption and as a result, the Adoption of Children Ordinance[95] under General law is applicable instead. [96]

2.3. An assessment of the compliance of Muslim law with international standards

There have been continuing inconsistencies of international standards by specific Muslim personal laws (relating to gender discrimination and the rights of children), which are still largely unamended. The following table identifies some of the key provisions of Muslim law that are inconsistent with the relevant international conventions.

Table 2 Summary of the assessment of the compliance of Muslim Law with international standards

Issue	International Law Being Breached	Gap Analysis
Role of *wali* in the Marriage Contract in place of the wife's consent.	Article 23 **ICCPR**, Article 10 **ICESCR and** Article 16 **CEDAW** requires full and free consent by contracting parties to marriage.	Section 25 **MMDA** requires a *wali* to enter into the marriage contract on behalf of the wife but not the husband.[97] This negates full and free consent of the bride to the marriage contract.
Child Marriage	Article 16 **CEDAW** specifies that states must impose a minimum age for marriage. Article 10 **CEDAW** demands equality in education. Article 24 **CRC** requires states to achieve the highest attainable standard of health for children. Articles 28 and 29 **CRC** require equality in education. Article 34 **CRC** provides that states must take measures to prevent the sexual exploitation of children.	Section 23 and section 47(1)(j) of the **MMDA**, provide that the permission of the *Quazi* is required for the marriage of girls below the age of 12. This makes the minimum age ineffective and introduces the possibility of "child brides/grooms" being unable to fulfill their early education due to marriage and face health issues due to pregnancies at early ages.

Issue	International Law Being Breached	Gap Analysis
Polygamy	Article 2 **ICCPR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 23 **ICCPR** states that there must be equality of rights and responsibilities before, during and after marriage between spouses. Article 2 **ICESCR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 2 **CEDAW** makes it incumbent on states to eliminate discrimination against women to embody a principle of equality. Article 16 **CEDAW** states that that there must be equality of rights and responsibilities before, during and after marriage between spouses.	Section 24 **MMDA** allows polygamy for the husband (i.e. up to four wives) but a prohibition on polyandry for the wife[98] which violates the principle of equality.
Maintenance	Article 2 **ICCPR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 23 **ICCPR** states that there must be equality of rights and responsibilities before, during and after marriage between spouses. Article 2 **ICESCR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 2 **CEDAW** makes it incumbent on states to eliminate discrimination against women to embody a principle of equality. Article 16 **CEDAW** states that that there must be equality of rights and responsibilities before, during and after marriage between spouses.	A husband is obligated to maintain his wife. If not, she can take action for maintenance under Section 47(1)(b) and 47(1)(g) **MMDA**. However, the wife has no reciprocal obligation.
Divorce	Article 23 **ICCPR** states that there must be equality of rights and responsibilities on dissolution of marriage between spouses. Article 16 **CEDAW** notes that there must be equal rights and obligations at the dissolution of the marriage.	Section 28(1) **MMDA** requires that a wife establish fault on the part of the husband to obtain divorce. A husband has no such requirement to obtain a divorce.[99]

Issue	International Law Being Breached	Gap Analysis
Property Rights in Marriage	Article 15 **CEDAW** requires that women have equal rights to administer property and enter contracts. Article 16 **CEDAW** states that both spouses shall have equal rights in the ownership, acquisition, administration, etc. of property.	The payment of *kaikuli*[100] upon marriage to the husband as regulated under Section 91 **MMDA** customarily allows him the ability to control and administer that property on behalf of the wife.[101] The *mahr*[102] paid to the wife upon marriage oftentimes is also held by the husband on behalf of the wife. The principle of equality is infringed as the bride does not have equal rights over property as the husband.
Succession/Inheritance	Article 2 **ICCPR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 2 **ICESCR** contains an identical provision. Article 2 **CEDAW** makes it incumbent on states to eliminate discrimination against women to embody a principle of equality.	The **Muslim Intestate Succession and Wakfs Ordinance** allows greater portions of property to pass to male heirs on intestate succession which infringes the right to non-discrimination based on sex and equality in inheritance.
Quazi Court System	Article 7 **CEDAW** requires eliminating discrimination against women in the political and public life of the country. Article 2 **ICCPR** provides that no distinction must be made based on sex and that states must take measures to protect equality. Article 2 **CEDAW** makes it incumbent on states to eliminate discrimination against women to embody a principle of equality.	Section 12 **MMDA** states that to be a *Quazi*, a person has to be a male Muslim of good character and position and of suitable attainment which is discriminatory towards women presiding in public office.

2.4. Analysis of the inconsistencies

As briefly noted within table 2 above, all 8 aspects of Muslim law analysed above are inconsistent with international standards. This section identifies the discriminatory provisions within the Muslim Marriage and Divorce Act (MMDA) and elaborates on how they are inconsistent with international standards.

2.4.1. The Consent of a *Wali*

In Muslim law, the consent of a *wali* is required on behalf of the bride in the civil marriage contract ('*nikah*').[103] This is stated in section 25 of the MMDA. At a certain point in the historical evolution of Islamic history, a *wali* existed for both the bride and bridegroom. The position of *wali* could be held by either the father or mother of the spouses.[104] However, the currently the need for the *Wali* for the bridegroom has been removed even though it continues to apply to the bride.

This provision of the *wali* for the bride is inconsistent with international law which require a marriage to be entered into with the 'full and free consent' of both parties. The idea of full and free consent is elaborated in the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, which requires consent to be provided by the intending spouse in person "after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses."[105] Although Sri Lanka has signed this Convention on 12 December 1962, it has not been ratified.[106] Moreover, the ICCPR, the ICESCR and CEDAW all require full and free consent from both intending spouses. Yet, a bride under Muslim law is rendered incapable of providing 'full and free' consent due to the requirement of a *wali* acting on her behalf. The MMDA requires the *wali* to obtain the bride's consent, however she may not herself register the marriage[107] by being physically present and signing the contract. Section 47(2) of the MMDA deals with instances where the *wali* unreasonably withholds consent to the marriage on the woman's behalf and section 47(3) deals with situations where the woman has no *wali*. In both cases, the *Quazi* may make necessary inquiries and dispense with the need for the presence or consent of a *wali*.[108] There have been various reported decisions where the complaint against the *wali* have been made on behalf of the woman.[109] MMDA makes a distinction in terms of the requirement for the *wali* for different sects within Islam. More specifically, Section 25 states that in order for a marriage of a bride from the Shafi sect to be valid, a *wali* is physically required to act on behalf of the bride to communicate the consent of the bride. Moreover, section 26 states that only individuals entitled under the Muslim law governing the sect to which the bride belongs can knowingly act as a *wali* at the marriage of a Muslim woman. However, women belonging to the Hanafi sect can dispense with the need for a *wali*.[110]

There is no procedure or provision in place to require or to prove that the bride's consent was provided. In actuality, the bride may not have consented to the marriage at all.[111] There is also the possibility of the bride being coerced into the marriage.[112] There are intersecting issues when it comes to child marriage and harmful practices, such as polygamy and forced marriage. In terms of the bride being coerced to consent/ forced into the marriage, the idea that the girl/child is unable to leave and becomes a commodity, is raised by the paper published by UNICEF.[113]The key issue in terms of forced marriage/coerced consent, is that it isn't the bride who signs her own marriage contract[114] and the bride herself ought to be able to legally partake in her marriage with full and free consent without the involvement of a third party. As per a Key Informant Interview (KII) that was conducted, historically, the *wali* was assumed to be in place because 'young' women would like there to be a person transacting on their behalf who are usually their fathers, if their fathers are alive and around.[115] An inference can be drawn to the need for a *wali* on behalf of 'young women' or child brides who may not have the capacity to enter a marriage. However, the KII noted that 'older' women take decisions for themselves and in those circumstances the requirement for the *wali* becomes less of a necessity.[116] The inference is that 'older women' who are adult[117] women, do not need a guardian as they are legally capable of entering a marriage by themselves. However, the KII noted that while the requirement for a *wali* be optional, the presence of the *wali* may make the bride feel like there is someone in her corner, and one can preserve the need for the *wali* as long as the most fundamental element of choice and consent are prioritized. KIIs also emphasized that the bride's signature and the bride's consent are non-negotiable.[118] The requirement of the *wali* even if it is to give the bride away or to ensure the rights of the bride are protected in the marriage, is secondary to the requirement of providing full and free consent by the bride herself. Additionally, there is also no requirement for the *wali* to be male.[119] Although the requirement for the *wali* may reflect a religiously

sanctioned cultural practice, the potential harm of the *wali* which infringes on a woman's right to consent is higher.[120] A KII indicated that there have been instances where brides have been coerced or given away in marriage where there is no transparency of the consent being provided by the bride, and it may also pave way for child marriages. Hence the requirement for the *wali* ought to be optional.

2.4.2. Child Marriage

There is no minimum age of marriage specified in the MMDA which gives rise to child marriages. Section 25(1) of the MMDA provides that only persons of sound mind and those who have reached the majority age are able to contract a marriage. Though the General law in the MRO sets a minimum age of 18, this does not apply to the Muslim law. Notably, sections 23 and 47(1)(j) of the MMDA require the consent of a *Quazi* to register the marriage of a girl under 12 years of age. However, this implies the ability to marry even below the age of 12 and the lack of any legal barriers to prevent it. The ability to marry underage children undermines section 363 of the Penal Code which makes it an offence to have sexual intercourse with a girl below 12 years of age.[121] An exception is provided under Islamic law which states that a minor girl given in marriage by her guardian, may use the doctrine of *khyar-ul-bulugh* (the option of puberty) which gives the girl the right to ratify or rescind the marriage contracted on her behalf, upon attaining puberty. Whether this is an unconditional right however remains in doubt.[122]

The concept of child marriage itself is inconsistent with international laws. Firstly, the Child Rights Convention defines a child under Article 1, as "a child…below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Secondly, the lack of any specific minimum age for marriage directly contravenes Article 16(2) CEDAW. This article provides that the betrothal and marriage of a child shall have no legal effect and that states must endeavour to specify a minimum age for marriage.[123] In a demographic and health survey conducted in Sri Lanka in 2016, 471 marriages that involved Muslim children under 15 was recorded.[124] Resistance to establishing a minimum age of marriage in Sri Lanka may be due to three reasons[125]: a) mere resistance to reform and change, b) resistance to giving up a power dynamic c) resistance by communities with financial difficulties who may offer their children up for marriage to escape from poverty. There is anecdotal evidence from a KII that when migrants leave the country, due to financial hardship, they give up their children aged 15/16 for marriage, thinking this will be in the best interest of that child. However, in practice, the child may not be able to pursue her education and become financially independent and/or she may be subject to physical harm due to reproduction at an early age etc.[126]

The provision for child marriages under the Muslim law contravenes an equal right to education for the child bride/groom espoused by Article 10 CEDAW and Articles 28 and 29 CRC. The chances of a young girl married below the age of 16 (minimum age for compulsory education in Sri Lanka) of accessing education during her childhood is highly unlikely.[127] Contrastingly, boys' education is prioritized over girls' education.[128]

The physical dangers on a girls' health associated with young girls married below age 18 giving birth before they themselves have reached adulthood along with the mental toll has been highlighted as problematic by international organisations. Article 24(3) of the CRC requires states to take positive measures to eliminate traditional practices that contravene the health of the child. It is the position held by the United Nations Population Fund (UNFPA)–United Nations Children's Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme), that health risks faced by child brides due to their physical immaturity can include maternal mortality risks as well as issues in pregnancy and childbirth. Moreover, emphasis is placed on the intergenerational nature of the harm i.e. the inability of young mothers who have not fully developed to make sure that their own children's development is not stifled.[129] As stipulated in the preamble of the CRC, children require special care and attention, which is also highlighted in the Universal Declaration of Human Rights. Child marriage deprives children of their childhood in conjunction with the right to education and health.

The Human Rights Committee's General Comment 28 on the 'Equality of Rights between Men and Women' specifies that tradition, religion, and culture cannot be used as an excuse to continue the propagation of discrimination. In Sri Lanka, there has been disagreement on amending the MMDA to include a minimum age of marriage despite the efforts of many activists and stakeholders for over ten years due to religious and political issues.[130] The following countries have legislation in place for minimum age of marriage based on different categories:[131]

Minimum age	Gender	Country	Exceptions
18 years		Bangladesh[132] and Kyrgyz Republic[133],	No exceptions
17-19 years	Females	Turkey[134],Uzbekistan,[135] Tajikistan,[136] Jordan,[137] Morocco,[138] Algeria,[139] Tunisia[140]	Possible exceptions
21 years	Females and males	Fiji,[141] Gambia,[142] Indonesia,[143] Nigeria[144]	Possible exceptions
16 years	Females	Senegal,[145] Pakistan,[146] Egypt,[147] Malaysia (except Perak State)[148] Nigeria[149]	Possible exceptions
15 years	Females	Cameroon[150]	Possible exceptions
Below 15 years	Females	Iran,[151] Nigeria[152]	
Puberty	Females	Nigeria,[153] Philippines[154]	
No fixed minimum age of marriage		Sri Lanka,[155] Gambia[156] Malaysia (Perak State)[157]	

Sri Lanka should create legislation providing protection to minors susceptible to child marriage.[158]

2.4.3. Polygamy

As per Section 24 of the MMDA, a male Muslim may marry any number of wives not exceeding four but there remains an absolute prohibition on a female contracting a second marriage during the subsistence of her first marriage. As identified in table 2, Article 2 of the ICCPR, the ICESCR and CEDAW all reiterate that states must take measures to eliminate discrimination based on sex. Article 23 of the ICCPR and Article 16 of CEDAW notes that states must take measures to eliminate inequality in rights during marriage. The dichotomy in the allowance of polygamy for only men creates clear inequality between men and women in their rights.

The legality of polygamy within Sri Lanka raises the concern that all wives may not be treated equally by the husband which contravenes a woman's right to dignity.[159] A KII noted that in practice there is currently no criteria required to be fulfilled by the husband to prove that he is capable of looking after his current family as well as the family/wife he is about to bear responsibility for. The only paperwork that takes place is the registration of another marriage.[160] Hence, there is no way to keep track of the marriages and whether the second marriage is in fact a polygamous marriage. Importantly, KII's stated that there is no requirement in the MMDA to communicate in person or obtain the consent of the first wife before entering a second marriage. In a lot of the cases what has been seen is the fact that the first wife finds out about the second marriage of the husband much later.[161] The MMDA only requires that notice be given to the first wife, by way of putting up the notice on the mosque bulletin board which women may not have access to.[162] Moreover, KII's also indicated that in their experience, there have been instances where the first wife had no knowledge that their husband has taken a second wife.[163] Polygamy can result in four different types of harm faced by Muslim wives and children: (i) empty threats to the first wife, of marrying a second wife by the husband to solicit non-consensual sex, unfettered obedience etc;[164] (ii) abandonment of the wife and children both physically and emotionally once a second marriage materializes; (iii) unregistered marriages leading to issues of birth certificates for the children conceived in the secondary marriage;[165] and (iv) children resulting from polygamous marriages[166] having limited amounts of their father's time and resources, creating a danger that the full extent of their rights as propounded within the CRC are not respected.[167]

Poverty could be both a driving factor of polygamy and polygamy can also result in poverty.[168] Firstly, polygamy could occur due to existing conditions of poverty. For instance, there has been findings from Bangladesh that young girls are given away in marriage to alleviate them from their existing poverty-stricken lives.[169] Moreover, in a survey conducted by Sri Lanka Red Cross Society, economic difficulties faced by families due to the currency collapse has increased the risk of early marriages for girls.[170] This is cyclical in nature where child marriage may be fueled by poverty resulting in polygamous marriages.[171] Secondly, since the husband

has to divide his resources among multiple families, poverty could come into play or could increase if it had already existed.

Many proponents of polygamy use religious texts as their foundational document. Some proponents refer to Surah Nisa 4:3 in the Quran to argue that the right to polygamy should be an 'inviolable right of men. Verse 4:3 Surah Nisa states that "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, three or four, but if you fear that you shall not be able to deal justly [with your wives], then marry only one ... That will be more suitable, to prevent you from doing injustice."[172]

The All Ceylon Jamiyyathul Ulama (ACJU) is a group of religious leaders that have an all male constitution,[173] and is of the view that polygamy should be allowed by the Government under strict conditions.[174] The ACJU has also argued that if it is an injustice and a violation of equality for the government to permit polygamy for only one community (Muslim community), then the General law should also allow polygamy under strict conditions.[175] However, opponents to polygamy in Sri Lanka have noted that Islam does not encourage polygamy,[176] and Surah Nisa 4:3 is supposed to be a warning 'against committing an injustice.'[177] A KII recommendation was to abolish polygamy in light of the harmful effects of polygamy on women.[178] Additional recommendations for aligning this section on polygamy with international standards will be considered in section 2.6.3.

2.4.4. Maintenance

A Muslim wife has the right to be maintained during her marriage ('*nafaqah*'), consisting of the provision of food, clothing, shelter, etc. by the husband. Further, a duty is imposed on the husband to provide separate accommodation for the wife, failing which, he provides her with a separate room with separate access during the marriage.[179] The quantum of maintenance will depend exclusively upon the financial position of the husband.[180] Additionally, in the following circumstances the wife can claim maintenance:

a. *Where the husband brings another woman into his house as his mistress,*[181]

b. *Failure to provide suitable accommodation as stated above,*

c. *Ill treatment by the husband,*

d. *Non-payment of Mahr.*[182]

However, if the husband fails to provide maintenance, the wife can make an application to the *Quazi* Courts to obtain adequate maintenance. Maintenance will only be ordered to be paid starting from the date of application, therefore the wife cannot make a claim for maintenance prior to the date of application.

The burden of maintenance being the implicit duty of the male in marriage could be regarded as being inconsistent with international standards on equality during marriage (Article 23 ICCPR and Article 16 CEDAW). This inequality is only emphasized when the method of payment of maintenance for children is analyzed. The father has an obligation towards his son only up until the age of puberty, while the obligation continues towards his daughter until she is married. The father's obligations towards his son until puberty and towards his daughter until marriage, are only transferred to the mother if he is indigent and unable to fulfill his obligations.[183]

Unlike in many other aspects of Muslim personal law, where the onus is on the wife having the burden to prove fault in the marriage[184], the onus is only on the husband when it comes to providing maintenance.[185] Muslim law's discriminatory nature seems to be premised on the unequal rights and obligations vested in both parties, where men are solely responsible for the provision of dowry and maintenance for the wife and child, and women have limited rights when it comes to marriage and divorce.

However, in terms of claiming maintenance, there are many challenges faced by a wife. This further reduces the situations where the husband has to exercise his responsibility in paying maintenance, placing the woman in a more unequal position. For instance, a wife is not entitled to maintenance from her husband after the iddat[186] period or after registration of divorce, regardless of the fact that many women are reliant

on their husband's income for maintenance during marriage.[187] The payment of what is termed *mahr*, which is the "dower (goods and/or cash) to be given by the groom to the bride as a requisite of a valid Muslim marriage"[188], here is considered sufficient. The concept of *mahr* will be elaborated upon in section 2.4.6. Yet, the argument justifying gender discrimination persists. Therefore, the obligations to pay maintenance in conformity with international standards should be made an equal burden or an equitable burden based on the breadwinner. According to KII's, if the husband has not been paying maintenance, it is then difficult for a wife to claim it in courts.[189] Under the General law, wives can claim maintenance in the Magistrate's court under the Maintenance Act where the procedure is very straightforward.[190] The consequence of non-payment of maintenance under the Maintenance Act, can result in imprisonment.[191] Whereas, under Muslim law, the authority to determine maintenance has been given to the *Quazi* under the MMDA.[192] Therefore, the wife will have to go to the *Quazi*, and make the application.

However, unlike the Magistrate's court, the *Quazi* courts don't have enforcement power: there is no jail sentence for non-payment of maintenance or for the husband/respondent not coming before the court.[193] Under Section 64 of the MMDA, any sums of maintenance except for *mahr* and *kaikuli* can be ordered through the *Quazi*. In the case of default of payment, Section 64 also allows the sum to be recovered on application made to the Magistrate. Additionally, under Section 66 If a person subject to a maintenance order by a *Quazi* under this Act fails to comply, the Magistrate, upon the *Quazi*'s application, can issue a warrant for the amount owed. The warrant allows for the levy of the outstanding amount, following the legal procedures for fines imposed by Magistrates. Additionally, the person may be sentenced to imprisonment for up to one month for any remaining unpaid monthly allowance after the warrant's execution. Moreover, the KII's studies were stated to show that in spite of hurdles such as non-enforcement of sanctions and inability to summon a husband in the event of non-payment, the *Quazi*'s have a tendency to award very low sums of maintenance.[194]

2.4.5. Establishing Fault in Divorce

Under the Muslim Marriage and Divorce Act, there are four methods by which a divorce may be obtained:

a. *Talaq – Application for divorce by the husband.*

b. *Fasah – Application for divorce by the wife.*

c. *Khula – Husband and wife obtain divorce together on consideration.*[195]

d. *Mubarat – Husband and wife obtain divorce together without consideration.*[196]

The key issue here comes down to the difference between *talaq* and *fasah*. A wife need not be present when a husband pronounces *talaq*.[197] Section 27 of the MMDA provides for *talaq* by reference to the procedures contained in the Second Schedule of the Act. In addition, *talaq* does not require the husband to point out any fault on the wife's part. Hence, after the pronouncement of *talaq* to the *Quazi*, the *Quazi* may attempt to effect a reconciliation between the husband and wife. However, a *fasah* can only be obtained by the wife when the husband is guilty of an act or omission which would amount to a fault under Muslim law.[198] Section 28(1) of the MMDA refers to a divorce being obtained by the wife based on the husband's fault without usage of the term *fasah*. The procedural aspects of obtaining a *fasah* are contained within the Third Schedule to the MMDA and in many respects, this has many similarities to the procedure undertaken by husbands under *talaq*. The pivotal difference is that a wife must substantiate fault on the part of the husband to obtain a divorce but not vice versa.

This creates great difficulty for the wife because there are only 4 of grounds available for establishing fault. Judicial precedent in Sri Lanka includes a failure to maintain by the husband, malicious desertion, cruelty, ill-treatment, etc. but it is integral that such fault be demonstrated.[199] It is possible to obtain divorce through non-fault-based grounds, such as demonstrating the leprosy of the husband,[200] but these situations are far and few in-between. Moreover, as per a KII, there is no requirement in the law that states the burden of proof for the wife in establishing fault during the divorce as the burden to be established or discharged.[201] Hence, every *Quazi* exercises discretion about what constitutes the burden of proof.[202] The only requirement for the divorce is two witnesses even though the criteria for what they witness is also not stated in the law.[203] As per the KII, usually if the witnesses have not resided in the house of the bride's parents or family, they do

not witness any ill treatment or abandonment that the wife had experienced.[204] The KII's practice in divorce matters pertaining to witnesses called by the bride, is to write affidavits of witnesses, stating what the bride had experienced.[205] (E.g.: 'she told us that this is what happened to her, we helped her go to the police station'). Such affidavits have been accepted by *Quazi*s.[206]

The requirement that the wife must substantiate fault on the part of the husband in divorce when the husband does not have to establish fault on the part of the wife, contradicts Article 16 of CEDAW which provides that state parties must ensure equality during marriage and upon its dissolution. While a husband may terminate the civil contract of marriage at his own pleasure (provided the procedural aspects are adhered to), a wife does not have the same freedom. Moreover, as per a KII, *Quazi*s are usually more inclined towards conciliation.[207] *Quazi*s also have relationships with counselors, particularly in Colombo and Mount Lavinia, where the wife is directed to meet the counselor before the divorce hearing.[208] Sometimes if the divorce is by way of talak, there may not be a push for counselling.[209]

Consequently, unless one of the fault-based grounds are established, the Muslim wife will continue to be entrenched in marriage until the husband concedes to *khula* or *mubarat*. This fault-based element must be removed so as to comply with Article 16 of CEDAW. However, the concept of *mata'a/mutaah/mut'ah* in Muslim law is a provision for the husband to pay compensation to the wife on divorce through *talaq* or in the event the fault lies with the husband.[210] The KII conducted with the representative from the Muslim Women's Research and Action Forum (MWRAF) highlighted the positive aspect of women being able to demand payment of *mata'a*. As per the MWRAF, it is a provision intended for the protection of the wife in addition to the concept of *mahr* which is explored in section 2.4.6 below.

2.4.6. Property Rights in Marriage

Under Muslim law, a woman is 'femme sole', i.e. capable of acquiring and holding separate property from their husband and entering into legal transactions and litigation.[211] Justice Dias eloquently explained that "the husband and wife are independent persons in Muslim personal law, who may deal with their respective property independent of each other."[212] Such a view to property rights was certainly ahead of its time and in the current context, aligns with Articles 15 and 16 of CEDAW. However, concepts of *mahr* and *kaikuli* are of concern in this context.

Mahr can be viewed as financial security or insurance for the wife against divorce, as illustrated in *Kandu v Lebbe*[213] which states that it is a "set off against the capriciousness of divorce." *Mahr* is viewed as important to the marriage contract and Sri Lankan judicial precedent has accepted that "prompt dower" should be paid on demand. [214]However, the major trend constituted through Sri Lankan case law is that *mahr* is accepted to be paid on demand instead of it being payable on consummation.[215] This would remove any concerns of gender-based discrimination on that front. Nonetheless, customarily, the husband is conferred with powers of management and control over *mahr*.[216] The independent control of the wife over her property as required by Articles 15 and 16 of CEDAW is not very clearly aligned in this context. The KII with MWRAF on this subject emphasized the intention of the *mahr* being financial security for the wife in the event of a divorce.[217] Saudi Arabia was cited as a country where the value of the *mahr* can be quoted as a substantial amount, fulfilling the initial purpose of financial security.[218] As per a KII, what is supposed to be a promise of providing for the bride, which is the *mahr*, has become reduced in Sri Lanka and sometimes it is not paid as promised.[219] In such instances, sometimes the wife is able to recover the *mahr* at the time of the divorce by asking for it specially because the husband has failed to pass on the *mahr* from his side to her side at the time of the marriage.[220]

The concept of *kaikuli* has seemingly overtaken *Mahr* as the more significant marriage gift. *Kaikuli* is the customary cash/money consideration paid by the bride's parents or relatives to the man for marrying the girl, which has been interpreted as being held for the wife.[221] This is now recognized as the wife's marriage portion within the MMDA. This codification has been criticized though, on the basis that it may infringe a woman's right to represent herself in court and exercise proprietary rights over *mahr* and *kaikuli* as this codification authorizes the *Quazi* to permit a fit and proper person to appear on behalf of a woman claiming *mahr* or *kaikuli* in *Quazi* courts.[222] A Muslim wife's right to control what is legally hers, i.e., *mahr* or *kaikuli*, has

not been conceded so far. As per a KII, *kaikuli* may be sometimes written in the name of the husband for him to manage on her behalf.[223]

2.4.7. Succession to Property in Muslim Law

The Muslim Intestate Succession Ordinance simply sets out that the law relating to intestate succession and donations is that which governs each sect.[224] This Act repealed the Mohammedan Code of 1806 which was based on Shafi law and replaced it with the Shariat law. Prima facie, the Code seems to protect women in succession, with the heirs being divided into three classes, i.e. *Zav-il-Furuz* (Sharers), *Asabah* (Residuaries or agnates), *Zav-il-Arham* (distant Kindred/uterine relations).[225]

Exemplarily, of the 12 Sharers, 8 are female (widow, daughter, son's daughter or the daughter of a lineal male descendant how low-so-ever, mother, grandmother, full sister, consanguine sister, half-sister on the father's side, uterine sisters, half-sisters on the mother's side) and 4 are male (father, grandfather, uterine brother and husband). [226]On the face of it, the law seems to recognize more female heirs than male heirs from the 'sharers' sect and this can be seen as prioritising shares given to women. However, in actuality the issue is that in many situations the female relations inherit a lesser share (percentage) than the males of the same degree of relationship to the deceased.[227] Though the international law does not specify equality within the laws of succession, this is implied by its wide-ranging demand for states to eliminate inequality between men and women irrespective of their marital status in human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[228] Muslim law in Sri Lanka should strive to match the same international standard in ensuring equal rights in the division of property, to the same degree, for both male and female heirs. Moreover, the law should also ensure that the criteria for becoming an heir remains the same for both males and females as well.

2.5. The Quazi Court System

The current system of *Quazi* courts has the special jurisdiction to administer Muslim law in Sri Lanka, this being traceable to the Muslim Marriage and Divorce Ordinance of 1929.[229] *Quazi* courts have a less formal structure in place where legal representation is not permitted.[230] The *Quazi* is required to adopt an inquisitorial approach where he plays an active role to gather necessary information from the parties before delivering a decision.[231] A KII with MWRAF underscored the positive impact of the informal nature of *Quazi* courts for women.[232] Additionally, because legal fees are not required due to the lack of legal representation, it does not place a financial burden on the woman and she can speak for herself in an less formal setting in comparison to the regular court setting.[233]

Section 12 of the MMDA states that to be a *Quazi*, a person must be a male Muslim of good character and position and of suitable attainment. His jurisdiction will be territorially defined and for a specific period of time. Two key issues arise from this provision. First it prevents suitable women from being appointed to the position of a *Quazi*, even though the Holy Quran or the hadiths[234] make no prohibition against female *Quazi*s. The prevention of females from being eligible for a *Quazi* has been defended on the basis that Muslim women in Sri Lanka belong to the Shafi sect, which prohibits women from being appointed as *Quazi*s.[235] Moreover, female registrars have also been prevented from application for office on the basis that it would contradict the Islamic principle of segregation, where marriage functions are traditionally segregated.[236] The perspective of the KII on the prevention of women for public office in relevant positions, is that it is non-negotiable.[237] Women are different in the ways that in they may differ in their life experiences and biology but that does not disqualify their ability to think and respond and adjudicate on matters. It is also the KII's perspective that there are female Muslim doctors who operate on Muslim men and non-Muslim men as well as other professions where Muslim men and women cross paths.[238] Similarly, there will be no cultural shock nor will it destroy the culture. In fact, seeing Muslim women in positions of administration and positions of decision making, will only help Sri Lankan Muslim men because there has been such an erosion of the idea of what Sri Lankan Muslim women are capable of over the years.[239]

The second issue with *Quazi* courts is the requirement of "of good character and position and of suitable attainment"[240] which specifies no minimum qualification for knowledge of Islam to be a *Quazi* or minimum work experience.[241] The latter may be a general defect within the Muslim legal system, but the former is directly inconsistent with Article 7(b) CEDAW which requires states to allow women to hold public office and

perform all public functions at all levels of government. By excluding Muslim women from becoming *Quazi*s, they are expressly prohibited from public office in the capacity of a *Quazi*.[242]

Other issues that are prevalent in the current system include: a) *Quazi*s can have a limited, inconsistent schedule, which are changed at their discretion;[243] b) *Quazi*s are often not accessible during the month of Ramadan;[244] and c) infrastructure and other facilities are sometimes not provided by the state (Some *Quazi*s conduct their work in their own homes/parts of public buildings).[245]

2.6. Recommendations for improved compliance with international standards

The literature on Muslim law recommendations for change in the law is vast and the recent history of Sri Lanka has seen multiple attempts made to reform the controversies within Muslim law.[246] Examples include the Farouque Committee recommendations in 1973, the Muslim Personal Law Reforms Committee chaired by Justice Wanasundera from 1984 to 1986, the committee headed by Dr.A.M.M. Shahabdeen in 1990[247] the 17 Member Committee appointed by the Cabinet Ministry of Justice chaired by Justice Marsoof[248] and the 10-member advisory committee on Muslim Law Reforms put together by the then Minister of Justice, Hon. M.U.M. Ali Sabry.[249] This particular section of the report has identified multiple issues that are prevalent and possible legal amendments to areas that give rise to gender discrimination. The aim of the report as stated initially is not to advocate removing or keeping the personal laws of Sri Lanka but to facilitate change for these personal laws to best comply with international standards. The following are a summary of possible avenues for change:

2.6.1. The Reformulation of the Statutes

It is clear that amendments are necessary to uphold women and child rights and despite many movements on reform over the last few decades, these have been limited. After the Muslim Marriage and Divorce Ordinance was passed in 1929, law reform commissions were appointed between 1956 and 2020 to amend the MMDA. However, amendments were not made due to a lack of consensus.[250] The MMDA has left certain issues unaddressed or unspecified, such as the absence of a specific minimum age of marriage, a wife's right to control *mahr* and *kaikuli*. Raising the minimum age of marriage is of the greatest concern, particularly in light of the social impacts child marriage has on the girl- child brides. By amending the current law on these areas of concern, Muslim laws can align better with the relevant obligations under the CRC.

The MMDA also has certain provisions that infringe laws on equality between men and women. This is apparent in matters of polygamy, maintenance and divorce. The finding that Muslim law does not offer equal reciprocal rights and obligations between the sexes must be addressed by an amendment to the MMDA. This problematic argument extends to the laws of intestate succession which on the face of it protects women but in practice, is more favourable for men. Ideally, minor amendments to the Muslim Intestate Succession and Waqfs Ordinance must be made to ensure that proportional shares are passed to the testator's relatives, free of constrains based on gender.

2.6.2. Raising the minimum age of marriage

The report formulated by the Commission appointed by previous Minister of Justice Ali Sabry advocated for the minimum age of marriage to be standardized as per the General law to be 18 years. Additionally, an amendment was to be made to remove an inconsistent part of the Penal Code Section 363[251] in order for the General law and Muslim law to be consistent and in line with international standards (CRC).[252] The minimum age of marriage should be clearly set out in the MMDA to act as a safeguard against child marriage and to reflect the General law provision of the minimum age which is 18 years.[253]

It should not be a battle between the prioritization of the laws but that the State should have uniform express legislation that is clear across all laws which does not leave room for different interpretation in order to safeguard children. These laws should also make clear provisions and set a minimum age of marriage as 18 years to ensure that the guardians of children cannot consent to marriage on behalf of children which paves way for forced marriages.[254]

Failing the imposition of a minimum age, the law can introduce sanctions to deter child marriage. Sanctions can be introduced into the legal framework for the guardians who force the children under their care into marriage, for the judges or *Quazi*s who facilitate child marriages, for the underage children who enter

unlawful marriages. Sanctions can take the form of fines and/or imprisonment. In order to introduce such punishment, the first step would be to ensure that the law does not legalize underage marriage.

The government with help of religious specialists can also try to facilitate change by imparting knowledge on a community level to discuss the dangers faced by children who are married off underage. Respectful discussions can be held with religious leaders where awareness can be raised on the negative effects of child marriage. Different interpretations of religious texts can also be promoted to move away from the justification of child marriages based on religion.[255]

2.6.3. Abolition of polygamy

Taking into consideration the harmful effects of polygamy that were outlined in section 2.3.4, and the unfair position that women are subject to, the concept of polygamy should be abolished altogether. In a religious context, polygamy was introduced in Islam after a historic battle which left many women as widows.[256] In order to address the issue of multiple widowed women and many men who died in battle, polygamy was introduced.[257] On this premise, if there is no requirement in the current era for polygamy, it removes the religious justification to retain it.

The stance to abolish polygamy is also supported by the report on the reforms of MMDA published in June 2021 which considers abolishing polygamy altogether, in light of supporting fair and equal rights. Moreover, the Muslim Personal Law Reform Action Group (MPLRAG) which is an informal volunteer-led collective of young Muslim women lawyers, activists, researchers and journalists on twitter, also recommend abolishing polygamy while taking the historic origins into account.[258] The position paper by MPLRAG on polygamy states that Islam as a religion does not promote polygamy and promotes monogamy instead,[259] which adds more weight to the argument of the lack of religious justification to retain polygamy.

The position to abolish polygamy is the same position taken by the publication endorsed by UN Women – Arab states, in the publication "ending polygamy in Muslim marriages."[260] The Arab States covered under the organization include Algeria, Bahrain, Egypt, Emirates, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Syria, Saudi Arabia, Tunisia, and Yemen.[261] The publication also advocates for equality before the law, monogamy as per Islamic principles and the harm caused by polygamy to women and their families.[262]

Other jurisdictions that practice Muslim law such as Tunisia and Turkey have also banned polygamy altogether.[263] While some jurisdictions have allowed strict conditional polygamy such as Bangladesh, Morocco, Singapore and Pakistan. In Algeria, Bahrain, Egypt, Jordan, Lebanon, Mauritania, and Palestine, a woman can expressly state in her marriage contract that another wife would not be allowed for the husband, which if breached, the wife has the right to seek a divorce.[264] Based on the practices of the other Islamic and plurilegal jurisdictions such as Singapore, polygamy is a practice that usually has some restrictions around it. However, in addition to Sri Lanka, Saudi Arabia is also a country that has lawful unconditional polygamy without restrictions or criteria for polygamous marriages.[265] Sri Lanka should also endeavor to follow best practices from other country jurisdictions to either abolish polygamy or at the very least implement conditional polygamy. Conditional polygamy would ideally include the imposition of criteria which would require to be fulfilled before entering a secondary marriage. For instance in Djibouti, the current wife/wives' opinions on new marriages are taken into account by the Judge and the husband's socioeconomic is also assessed before a marriage contract with an additional wife is approved.[266]

2.6.4. Divorce

In order to comply with Article 16 of CEDAW, fault-based divorce for women which currently gives more rights to the husband in should be amended. Recommendations to achieve equality in divorce rights include the introduction of divorce by mutual consent, divorce without consent of the other and without disclosing any matrimonial fault whilst marriages entered into with minors are declared null and void at the onset.

The pronouncement of *talaq* not requiring the wife to be present, as outlined in section 2.4.5 is disconcerting and links back to the concept of the wife being unable to personally be involved in her marriage contract, with the requirement of a *wali* and the inability to sign the marriage contract. In both these situations, the rights of the female are neglected in entering the marriage contract as well as rescinding the marriage contract.

Sri Lanka can look to two other jurisdictions - Turkey and Tunisia[267] that do not recognize the pronouncement of *talaq*, and amend the MMDA accordingly.

Unlike MMDA, the General law gives equal rights to both the wife and husband in the grounds that divorce may be sought upon.[268] Moreover, Kandyan law provides exemplary provisions on providing for no-fault grounds of divorce which are available to both parties. Both matrimonial fault and irretrievable breakdown of the marriage are recognized by the Kandyan Marriage and Divorce Ordinance. Sri Lanka can also look to other Islamic jurisdictions, such as Jordan as well Morocco which also include no-fault divorce for both spousal parties.[269]

The six grounds for divorce provided In Section 32 of the KMDO are: (1) adultery by the wife after marriage, (2) adultery by the husband coupled with incest or gross cruelty, (3) complete and continued desertion by the wife for two years, (4) complete and continued desertion by the husband for two years, (5) inability to live happily together, of which actual separation from bed and board for a period of one year shall be the test, or (6) mutual consent. The six grounds mentioned are equally available for both the wife and the husband under Kandyan Law, deeming the law progressively on par with international standards in comparison to the inequal divorce rights discussed under Muslim Law. Hence, amendment of the current MMDA provisions to mirror the provisions of the KMDO will provide an equal footing to both men and women, in line with Article 16 of CEDAW.

In the 10-member advisory committee on Muslim Law Reforms appointed by the then Minister of Justice, Hon. M.U.M. Ali Sabry, a proposition is made to introduce Prenuptial Agreements. It was initially proposed by the 1992 Committee appointed by Dr.Shahabdeen. Prenuptial Agreements can establish clear marital rights and safeguard and strengthen the rights of both parties. These rights deriving from the Prenuptial Agreement will dictate the rights of both parties in the event of a divorce.[270] If the MMDA does not reform its provisions on divorce, it would be beneficial to introduce this type of Agreement if the law would allow it to have legal effect over the divorce provisions of the MMDA. As per a KII, prenuptial Agreements, is like a marriage contract similar to the concept of marriage in Islam which is contractual in nature.[271] Almost all other Islamic jurisdictions apart from Sri Lanka, encapsulate the marriage contract in prenuptial agreement such as Indian Muslims and Pakistani Muslims.[272] Conditions in the prenup can include the completion of higher education, not leaving the country etc...[273] Women have the opportunity to incorporate such conditions into their contracts to emphasize that they can and should also have decision-making powers over their futures.[274]

2.6.5. Restructuring the Quazi Courts

The Commission headed by Justice Marsoof, PC, in 2019, advocated the restructuring of the *Quazi* Courts.[275] This report made about 122 recommendations under 20 topics for reforming the *Quazi* Courts, such as increasing membership, a requirement for minimum qualifications, etc. The most important of these however was a recommendation to "change the public perception of unfairness to women", this included opening up *Quazi* Courts to offer legal representation to both men and women, and further, removing the disqualification of females from holding office.

The Muslim Law Reforms report put together by the then Justice Minister – Ali Sabry in June 2021, reflects a similar position. The committee report identified the problematic interpretation behind the words "*Quazi*" in relation to women not being allowed to participate in the Court structure. "*Qadi*" in Arabic would refer to someone who administers Shari'a law whilst "*Quazi*" in the local context denotes an administrator of Muslim matrimonial law. The recommendation put forth has been to change the term used currently to "adjudicator/ Muslim Marriage and Divorce Adjudicator," whilst the "Board of *Quazi*s" be changed to "Muslim Marriage and Divorce Tribunal."[276]

If the *Quazi* court structure were to employ qualified judges and operate in the same manner as the District court with representation by attorneys for the parties involved, this court system can co-exist with the current Sri Lankan justice system's court structure.

For instance, the legal system in Malaysia which is also a plural legal system, maintains two parallel justice systems: the Syariah Court System in each of the thirteen states, and the Civil Court System for the whole

Federation.[277] Each state in Malaysia has its own Syariah court system, which deals with matters relating to Islamic law in which all parties are Muslim.[278] Similarly, the *Quazi* Courts and the current judicial system of Sri Lanka can exist parallelly.

According to the Federal Constitution of Malaysia, Islamic law is a matter falling within the State List, meaning that the state legislatures are empowered to enact the law. Exceptions to this are the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, in which Islamic law is enacted by the Parliament.[279]

Another option for reform in the report is to abolish the *Quazi* court structure altogether and have the subject of Muslim marriage and divorce be dealt with at the District Court. It should be noted that Kandyan marriage and divorce is administered through District Registrars and hence, Muslim law can also be dealt with in the same manner, provided that it is handled by skilled judicial officers. There are also instances where injustices against women occur due to the communication of Muslim marriages being conducted only through a notice in the mosque and the registration is done through *Quazi* Courts. This may not happen if the only avenue of registration of marriages were the District courts, where the Registrar of Marriages will have all the records of marriages. Additionally if a previous marriage already exists in the case records, a subsequent marriage should not be allowed, which would give more visibility to the wrongdoing.[280] Oftentimes, *Quazi* Courts would be an avenue for polygamous marriages to gain less publicity as the requirement of registering a marriage does not account for previous marriages or communication to the previous wife in an accessible manner (notice of the marriage is often posted in a mosque and is not communicated to the wife as mentioned above).

On the topic of the *Quazi* court being abolished and its jurisdiction being moved under the purview of the District court, as per a KII, the District courts, as they stand today, are not geared for just Muslim law, but family law in general.[281] Proceedings and matters conducted are fairly insensitive, fairly slow and resource consuming.[282] Hence it is the opinion of a KII that the district courts are not equipped to handle family matters, let alone personal law and Muslim law matters.[283] However, if the law is clear, then administering the law would not be a difficult task for any court.[284] In the same manner, changes to the law will need to ensure that both the family law approach as well as the sensitivity to Muslim law is taken into consideration.[285]

Muslim law is not preserved by ensuring that it stays within the *Quazi* court or by ensuring that it does not transfer to the District Courts (which deal with all laws governed by Judges who are not specialized specifically in Muslim Law).[286] It is preserved by ensuring that it is in the language of the law and also ensuring that non-Muslim judges are also aware of Islam's faults.[287] It then becomes integrated into the system.[288] For instance, Muslim testamentary cases are adjudicated by the District court and there are non-Muslim judges applying Islamic law.[289] The ultimate difficulty is in ensuring that Islamic values and Sharia is encapsulated in the language of the law and the appreciation for it.[290]

However, in consideration of the long-drawn disagreement between stakeholders of the Muslim community and members of parliament, if there is no consensus to reform the MMDA,[291] an opt-out system could be provided for Muslims.[292] Kandyan law affords the same option to Kandyans, for those who wish to either be governed by Kandyan law or the General law of Sri Lanka.[293]

2.6.6. A Campaign for Awareness

Due to the insularity of Muslim law within the Muslim community where authority is held in the hands of specific members of the muslim community and not persons of other religions, there is room for misinformation or a lack of information on what Muslim law entails. Provided legal change is instituted to address the issues stated above, in addition to the current individual efforts underway, it would be ideal for government and even non-governmental organizations and Civil Society Organizations to adopt a joint national awareness campaign to notify and clarify the application of Muslim law today. This may serve to dissuade any discrimination against the Muslim community based on stereotypes and further, would be useful in demonstrating the maintenance of Sri Lanka's diverse plural legal system in compliance with international standards on gender discrimination. Additionally, the propagation for the changes that are required to reform the MMDA do not need to be restricted to the Muslim community. If the government as well as CSO's and NGO's raise awareness, all persons can join the cause to reform MMDA to comply with the international standards analysed in this report. The sentiments echoed by KII's infer that the politics of Muslims and/or certain Muslim politicians have been insular in restricting all Muslim issues to the community.[294] Oftentimes politicians in particular are the sole authorities in power who prevent non-Muslims commenting on Muslim issues by sealing Muslim issues in a vacuum within the Muslim community.[295] As a result of being insulated, the inability to be open has fostered a lot of uncertainty about Muslims and also fosters a lack of awareness about Muslims and appreciation for Islam.[296] This results in a lack of sharing positives of Islam, the logic behind Islamic principles and Islamic values.[297]

A lot of the dialogue is lost as a consequence of the insularity, and it has also become the main barrier and challenge to having an open dialogue on Muslim issues.[298] The Muslim community should be able to support the participation of non-Muslims in furthering their rights.[299]

Additionally, the KII conducted with MWRAF underscored the need for intellectual freedom, the ability to free the Muslim mind and acknowledge that women can also be part of the process of reasoning in: a) the challenge to free the Muslim mind, and b) in advocating for reform of unfair provisions of the law/the interpretation of it.[300] It was also noted that other countries whom Sri Lanka had borrowed Muslim Law from, (Mohammedan Code from Batavia, modern day Indonesia) have made reforms whereas Sri Lanka still has not.[301] The observation in relation to the statement by MWRAF is that several countries in Asia such as Malaysia, Indonesia, Bangladesh and India have made reforms to problematic areas of Muslim law as referred to in the report.

2.6.7. Civil Society Efforts

Outside of law reform, MWRAF conducts mobile legal clinics and trains paralegal legal counsellors (PLC's) who are not lawyers but who are in between the community and the system. PLC's are trained to prepare and support affidavits. Trainings were previously conducted across seven districts and are currently active in four districts.[302]

The KIIs with MWRAF explored the work undertaken and currently being conducted specifically on *Quazi* trainings. MWRAF initiated dialogues with Quazis in 1994 which continued till 2003, when trainings were regularly conduced until 2013.[303] Quazi trainings were held every year in lots of 30.[304]

Chapter 3
Tesawalamai Law

This chapter of the report presents a summary of provisions of Tesawalamai law that have been identified as discriminatory in comparison to international standards, specifically focusing on gender-based discrimination. This chapter is presented in four sections. The first section briefly introduces the historical sources and applicability of Tesawalamai. The second section explains the application of Tesawalamai today in conjunction with the General law. The third section expands on the specific provisions of Tesawalamai that may be inconsistent with international standards, focusing on the different types of properties, which are *muthusam*,[305] *cheedanam*[306] and *thediathettam*.[307] The fourth section provides a summary of recommendations and concluding comments on how Tesawalamai can enhance its compliance with relevant international standards.

3.1. The historical sources and applicability of Tesawalamai

"Tesawalamai" traces back to the customs and usages of the Dravidians from the Malabar coast of India and may be simply translated to "customs of the land".[308] These customs were codified by 1707 during the Dutch colonization and enacted by the British through a regulation in 1806.[309]

In terms of its applicability, Tesawalamai law has a combination of an aspect of: (1) a territorial law and (2) a personal law.[310] Its territorial law aspect is that applies to all lands within the Northern Province, regardless of the ethnicity or cultural background of the landowner. Its personal law aspect is that Tesawalamai law applies to Tamils who have inhabitancy in the Northern Province.[311]

The Tesawalamai Code applies to the "Malabar inhabitants of the Province of Jaffna".[312] The 'Province of Jaffna' encompasses the Northern Province, including the Mannar district,[313] but not the Trincomalee or Batticaloa districts.[314] Importantly, "Malabar" means Tamil, as indicated by Claas Isaacsz.[315] The rule laid down in *Chetty v Chetty* is that Tesawalamai applies to Tamil individuals in Sri Lanka who are inhabitants of a specific province, and the term 'inhabitant' refers to someone who has acquired a permanent residence resembling domicile in that province.[316] This was affirmed in *Velupillai v Sivakamipillai*.[317] and in *Sivagnanalingam v. Suntheralingam.*[318]

The application of the Tesawalamai Code has been impacted by the Jaffna Matrimonial Rights and Inheritance Order, No. 1 of 1911 (JMRIO), which applies to all Tamils governed by Tesawalamai but it repeals any provisions of the Tesawalamai that are inconsistent with it.[319] Two other statutes which fundamentally altered the Tesawalamai include the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance No. 58 of 1947 and the Tesawalamai Pre-Emption Ordinance No.59 of 1947. Other provisions of Tesawalamai have been altered by statutes such as the Prescription Ordinance No. 22 of 1871 and the Partition Ordinance No. 18 of 1863. Currently many provisions in the Tesawalamai Code are already considered obsolete and the General law has been used to fill these gaps in certain areas.[320] This is expanded on in Table 3 of the report.

3.2. The interrelationship with the general law

Section 64 of the Marriage Registration Ordinance (MRO) expressly excludes its applicability to Kandyan law and Muslim law. However those governed by Tesawalamai law are subject to the MRO's provisions which creates overlap between marriage and divorce under the MRO and Tesawalamai law.[321] To provide clarity regarding the relationship between the Tesawalamai and the General law of Sri Lanka, the following table provides a summary of the current superseding provisions of General law that apply over Tesawalamai provisions:

Table 3 Summary of the law presently applicable.

Issue	Tesawalamai	General Law	What Applies Today
Consent to marry	A woman above age 13 need not obtain consent of parents to marry.[322]	Section 21 Marriage Registration Ordinance only requires consent from the father/mother/guardian if it is a minor being married. Otherwise, consent is unnecessary. However, according to the case of *Gunaratnam v Registrar-General*, the parents' consent is irrelevant in the case of a minor and such a marriage would be considered invalid. This sets the minimum age of marriage in Sri Lanka for all citizens except Muslims at 18 years, without exception.[323] In the current context, only persons who have attained the age of majority can get married. Parental consent is invalid for minors attempting to get married.	Section 21 Marriage Registration Ordinance.
Minimum age of marriage	Initially no minimum age of marriage. Later statutes clarified minimum age for males at 14 and females at 10. This was amended to 16 and 12 respectively.[324]	Section 15 Marriage Registration Ordinance sets the minimum age for marriage at 18.	Section 15 Marriage Registration Ordinance.

Issue	Tesawalamai	General Law	What Applies Today
Polygamy	Polygamy was practiced as evidenced during the Dutch period,[325] and in the Tesawalamai Code.[326]	Section 18 Marriage Registration Ordinance prohibits polygamy.	Section 18 Marriage Registration Ordinance.
Divorce	No express right to divorce was recognized but a wide liberty to divorce by separation existed.[327]	Section 19 Marriage Registration Ordinance provides the grounds for divorce as adultery, malicious desertion and incurable impotency.	Section 19 Marriage Registration Ordinance.
Right to sue and be sued	It has been held that a wife cannot sue a third party or be sued by a third party without her husband being joined to the action.[328] Section 6 of the Jaffna Matrimonial Rights and Inheritance Order provides that any woman married after the commencement of the Ordinance may not deal and dispose of her separate property without the consent of her husband. Initially the wife could not bring an action *against her husband* in respect of her separate property, but this was later allowed.[329]	A wife has the right to sue and be sued under the General law.[330]	The General law applies, except where the Jaffna Matrimonial Rights and Inheritance Order, No. 1 of 1911 applies.
Adoption	Part II of the Tesawalamai Code provides for ceremonies of adoption and succession for adopted children. Furthermore, it also provides provisions related to situations where the adopted child belongs to a higher or lower caste.	The Adoption of Children Ordinance provides for the procedures of adoption.[331]	The Adoption of Children Ordinance predominantly applies today.

The analysis in Table 3 reveals that Tesawalamai law is usually superseded by General laws, unlike Kandyan law and Muslim law. Certain aspects within Muslim Law and Kandyan Law spark controversy and debate on the international stage due to their autonomy over General law. For example, under the General law a minor cannot enter into a marriage even with parental consent. However, under Kandyan Law, until 2022,[332] a minor could get married with the consent of a 'competent authority' i.e. the father of the minor.[333] Similarly, in Muslim law, girls below the age of 12 can be married with the permission of the *Quazi*, in deviation from the General law. In contrast, Tesawalamai law does not entail significant deviations from the General law in many areas. However, there have been inconsistencies within Tesawalamai law in comparison to international standards. These international standards will be briefly identified in the following section and are detailed in Table 4.

3.3. The compliance of Tesawalamai with international standards

Table 4 below identifies some of Tesawalamai law the key provisions of that are incompatible with provisions of international law and pr.

Table 4 Summary Tesawalamai Law Provisions that are inconsistent with International Standards

Issue	Provision	International Standards	Summary of identified inconsistencies with international standards
Property Rights	Section 6 **JMRIO** [Any woman married after the commencement of this Ordinance] shall... have as full power of disposing of and dealing with such property by any lawful act *inter vivos* without the consent of the husband in case of movables, <u>or with his consent in the case of immovables</u>, but not otherwise, or by last will without consent, as if she were married. Section 19 **JMRIO** No property other than the following shall be deemed to be the *thediathettam* of a spouse; a. Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse b. <u>Profits arising during the subsistence of the marriage from the separate estate of that spouse.</u>	Article 15 **CEDAW** states that women must have equal rights to administer property and enter contracts. Article 16 **CEDAW** states that both spouses shall have equal rights in the ownership, acquisition, administration, etc. of property.	Section 6 **JMRIO** restricts a wife's ability to dispose of, or deal with her separate property (*muthusam* and *cheedanam* property) without her husband's consent. This limitation contradicts the principles outlined in Article 15 of CEDAW, which calls for gender equality in property administration and contract rights. Under customary law, *thediathettam* property was recognized as being communal property of the spouses and each spouse could inherit one half of the other spouse's *thediathettam*. Therefore, the ownership of *thediathettam* under customary law promoted equality. This was recognised in the **JMRIO** 1911 as well. However, the amendment to the **JMRIO** in 1947 created confusion as to whether *thediathettam* was joint or separate property of the spouses. If *thediathettam* is treated as separate property of the spouses, the concept of matrimonial partnership and the wife's contributions as a homemaker would no longer be recognized.

Table 4 above identifies two key aspects of property rights in Tesawalamai law that are inconsistent with international standards: (1) section 6 of the JMRIO which restricts a wife's ability to deal or dispose of her property without her husband's consent and (2) *thediathettam* property is identified as separate property of the spouses rather than communal property. Section 3.3.1 below elaborates on how section 6 of the JMRIO is inconsistent with international standards, in terms of *muthusam* and *cheedanam* property in . Section 3.3.2 elaborates on how *thediathettam* property being identified as separate property of the spouses is inconsistent with international standards.

3.3.1. Property rights in marriage – section 6 JMRIO

Under Roman Dutch Law, women married under General law, could not sue and be sued without making her husband a party to the action.[334] The influence of Roman Dutch law on Tesawalamai led to the court acknowledging the applicability of the Roman Dutch Law to women governed by the Tesawalamai law, particularly in terms of the right to sue.[335] The Married Women's Property Ordinance 1923 amended the General law, granting women governed by Tesawalamai law the General law the right to sue and be sued.[336] However the failure to extend the application of the Ordinance to persons governed by Tesawalamai law meant that women governed by Tesawalamai law would continue to lack the right to sue and be sued, creating adverse implications for their property rights.[337]

Tesawalamai law recognizes three distinct categories of property, which are:

a. *muthusam or hereditary property, which is the ancestral property of the husband or the wife;*

b. *cheedanam or dowry property brought by the wife into the marriage; and*

c. *thediathettam or property acquired by the husband and wife during the course of the marriage.*[338]

Muthusam was initially defined by the Tesawalamai Code as being "modesium or hereditary property, when brought by the husband", but in application, the judiciary found this definition to be confusing.[339] For more clarity, the meaning of *muthusam* was extended by adding the words "…whether strictly called *muthusam* or not."[340] The JMRIO has re-defined *muthusam* to extend to the hereditary property of the wife.[341]

Cheedanam or dowry property generally constitutes a daughter's share in the family inheritance. *Cheedanam* finds its origins in the initial matrilineal system of society instituted by the customs and practices of the *Marumakkalthayam* Law.[342] This property, historically, always remained with the female heirs, for example Part I of the Tesawalamai Code states that the daughter or daughters must receive dowry or *cheedanam* from the mother's property upon their marriage.

There are multiple objectives of *cheedanam*. These objectives include that *cheedanam* was provided as provision for a new household, as consideration of marriage and constitutes a daughter's share in the family inheritance. Initially *cheedanam* was perceived as a provision to set up a new household. This perspective is highlighted in *Murugesu v Subramanium* where it was stated that *cheedanam* is provided for the daughter with the purpose of enabling her to set up her own home.[343] However by the date of codification of Tesawalamai, *cheedanam* was simply regarded as a dowry payment for marriage.[344] The significance of *cheedanam* for the new household was thus overridden by the idea that it existed as consideration made to a man for marrying a woman. This shift in attitude may have been caused by the socio-economic condition of the male being burdened with providing for the family and the influences of the Roman Dutch Law.[345]

Although *cheedanam* was initially devised to protect women, it has over time become detrimental as women need the consent of their husbands to administer such property due to the influence of Roman Dutch Law.[346] For instance, a wife is unable to deal with or dispose of her *cheedanam* property without her husband's consent according to section 6 of the JMRIO. This creates a clear disparity between the spouses with regard to equality in dealing with property, which is inconsistent with Articles 15 and 16 of CEDAW.[347] Mutukisna notes that the Tesawalamai recognizes the wife's property rights as well as her economic independence over *cheedanam*, just as her husband is the owner of his *muthusam*.[348] However a husband's has the ability to control the *cheedanam* as a trustee over such property on behalf of the wife for the duration of the marriage and may even invest such property in his name.[349] Thus, it is clear that this practice, which was influenced by Roman Dutch Law infringes upon the rights outlined in Articles 15 and 16 of CEDAW. Article 5, which provides that state parties must eliminate all practices based on the superiority or inferiority of either of the sexes, is also infringed. However, in practice, a transfer of *cheedanam* property by the husband without the consent of the wife would be a void transaction because the husband is not permitted to deal with *cheedanam* property without his wife's consent.[350]

The lawful ability for the husband to control the wife's property is inconsistent with international law and thus should be amended. As outlined above, the husband being vested with the ownership rights of the wife's

property is inconsistent with the requirements for equality between the spouses in international law. Article 15 of CEDAW requires equality between men and women in concluding contracts and administering property. In comparison to *muthusam* - which accords the husband complete independence to deal with his own separate property without the impediment of obtaining the consent of his wife - *cheedanam* limits the wife's autonomy to administer property. Article 16(1)(h) of CEDAW requires equality between spouses in dealing with all aspects of property but the very existence of a limitation over the wife to deal with that property and none over the husband to deal with their separate property, negates equality. It is important to highlight that Tesawalamai Law originally did not envision this discriminatory practice, which was introduced by Roman Dutch Law.

The possible abuse of *cheedanam* by husbands converting *cheedanam* to *thediathettam*, which husbands are able to then administer without consulting their wives, is analysed in the following section.

3.3.2. Property Rights in Marriage – aspects of *thediathettam*

The concept of *thediathettam* was aptly explained by Bertram CJ when he stated that the rights that emerge between husband and wife in relation to all property acquired during their marriage, is governed under Tesawalamai.[351] This concept can be traced back to the joint family structure existing in the agricultural society of the early settlers of Malabar where the earnings were pooled together. *Thediathettam* is not confined to acquisitions alone and even the profits from the wife's or husband's property that was brought into the marriage can be considered as *thediathettam*.[352] The aspects of *thediathettam* that are inconsistent with international standards are: (1) the lack of clarity on what constitutes 'consideration' in the definition of *thediathettam*, and (2) whether *thediathettam* should be treated as the separate property of the spouses rather than communal property.

1. Lack of clarity on what constitutes 'consideration'

Section 19 of the JRMIO defines *thediathettam* as property acquired for valuable consideration or profits arising during the subsistence of the marriage from the property of the husband or wife. Section 19 raised great controversy regarding what should or shouldn't constitute "consideration".[353] Tambiah identified that many married men sold the dowry properties (*cheedanam*) which they were meant to administer on their wife's behalf. They then acquired lands with what was earned from that sale and ultimately claimed that they were entitled to half of that property.[354] This was evidenced by the number of cases on this issue from 1933 to 1969.[355] The wife consequently lost her dowry property, and this was implicitly condoned by the law due to its obscurity. However as mentioned above, in practice, a transfer of *cheedanam* property by the husband without the consent of the wife would be a void transaction.[356]

2. *Thediathettam* is separate property rather than communal property

There is confusion as to whether *thediathettam* is the common property of the spouses or whether it is their respective separate properties. *Thediathettam* in Teswalamai law originally embodied the belief that the economic contributions made by both partners in a marriage were considered equal and recognized a concept of matrimonial partnership.[357] Nagendra explains that in ancient Jaffna, where agriculture prevailed as the primary occupation of the early settlers in the North, women actively engaged in farming alongside their husbands and sons.[358] Additionally, the benefits of joint efforts extended to endeavors where the wife did not directly participate, such as her husband's involvement in trade or business.[359] This aligns with modern day assessments of the homemaker's role and makes it clear that the original principles of *Tesawalamai Law* recognized the wife's role in contributing to her husband's income.[360]

Many cases, including *Nagaratnam v Suppiah*, observed the principle of 'matrimonial partnership'.[361] The rule derived from the case is that in a marriage a divorced wife was entitled to one half of the profits generated from the business initiated by the husband prior to the marriage. Equal entitlement to the *thediathettam* would often be the final decision of these cases.

However, Nagendra points out that "rules alien to Tesawalamai came to be applied and made to appear as though they were principles inherent in the Tesawalamai itself".[362] Sections 6 and 7 of the JMRIO 1911 discussed the separate properties of the spouses and expressly excluded *thediathettam* from the category of 'separate

properties'. Further the JRMIO 1911 provided "The *thediathettam* of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled hereto".[363] Therefore Tesawalamai law originally recognised *thediathettam* as being communal property of the spouses.[364] The amendment to the JMRIO in 1947 removed this reference to *thediathettam* being the common property of the spouses.[365] The amendment to the JMRIO in 1947 als removed the clause excluding *thediathettam*, effectively incorporating *thediathettam* into the definition of separate properties.[366] This enabled the incorporation of a new species of property which could not have been included in *thediathettam* under the customary law and created controversy with the court adopting two different approaches interpreting it.[367]

Section 19 under the Amendment Ordinance No. 58 of 1947 states that no property apart from the following will be deemed the *thediathettam*: (a) property acquired by that spouse during marriage and not forming part of the separate estate and (b) profits arising from the separate estate of the spouse. Section 20 then provides that upon death of a spouse, half will be allocated to the surviving spouse and the other half will devolve to the heirs of the deceased spouse.

The amendment to the JMRIO in 1947 led to differing judicial opinions on the interpretation of *thediathettam*.[368] Graetian J in Kumaraswamy v Subramanium interpreted section 20 of the JMRIO to mean that where one spouse acquires property after 4th July 1947, the other spouse would not automatically acquire a share of that property.[369] Through this interpretation Graetian J clearly propounded that the acquisition belonged entirely to the individual spouse as their separate property.[370]

However, Sharvananda CJ subsequently disagreed with this position and argued that community of property continue to be maintained under the new section 19 in the same way that it applied under the original principles of Tesawalamai law.[371] In the case of *Manikkavasagar v Kandasamy*, Sharvananda CJ stated that it was only profits derived from the property of the spouses or property acquired by the earnings of either spouse during marriage that could come within the concept of *thediathettam*.[372] In addition, the Tesawalamai restricts *thediathettam* to what was acquired during wedlock. But property following the marriage by one of the spouses and paid for with money which formed part of his or her separate estate, was regarded as a property of the spouse who purchased it and did not constitute *thediathettam* property.[373]

What is apparent from the disagreement between Sharvananda CJ and Graetian J is that the concept of community has not been clearly abolished by the amendments to the JMRIO and so the concept of equal entitlement is still demanded by those governed by the Tesawalamai.[374]

Therefore due to the ambiguity in the JMRIO, it remains uncertain whether the *thediathettam* is the common property of the spouses or whether it is their respective separate properties. Recognizing *thediathettam* as separate property of the spouses would fail to recognize the wife's contributions in an agricultural economy and as a homemaker.[375] In addition, until the meaning of *thediathettam* is clear, Articles 15 and 16 of CEDAW which demand equality will not be fully observed.

It is evident that although, under the original principles of Tesawalamai law, *thediathettam* was devised to protect women and recognise their contributions in the duration of the marriage, it has over time become detrimental as it is now uncertain whether *thediathettam* is separate or communal property.

3.4. Recommendations for improved Compliance with international standards

Since the amendment to the JMRIO, there have not been significant efforts taken to amend Tesawalamai with the purpose of amending its faults and gaps. As evidenced in sections 3.3.1 and 3.3.2 above, the lack of a married woman's right to deal with property, treating *thediathettam* as separate property of the spouses and the lack of clauses and practical possibilities for opting out contribute to Tesawalamai law's inconsistency with international law. Recommendations for improving these inconsistencies are summarized below. It is important to highlight that these recommendations suggest reverting to the original "spirit" of Tesawalamai law rather than abolishing or removing these principles.

3.4.1. An Amendment to the Amendment

It is conclusive from the analysis of property rights in marriage in Tesawalamai law that a certain portion of the problems arise from the lack of a right to sue and be sued for Tesawalamai wives, which was introduced by the Roman Dutch Law. Further the inconsistent application of vague provisions of the JMRIO, such as that of Section 19 have also contributed in this regard. It is important that necessary amendments are made to (1) grant Tesawalamai wives the right to sue and be sued and (2) restore *thediatthetam*'s status as communal property recognising the concept of matrimonial partnership. In addition, the task of clarifications must be seen as restoring the true character of Tesawalamai which is a unique blend of cultural traditions, customary practices, and legal principles that are specific to the Jaffna Tamil community. Customary Tesawalamai recognised the role of the wife in supporting her husband and gave her equal entitlement to properties acquired during the marriage. However, it is evident that external influences resulted in the law deviating from its original intent.

There are also aspects of the JMRIO which directly contravene Articles 15 and 16 of CEDAW, specifically in relation to *cheedanam* and a husband's control over the wife's separate property to promote equality, as introduced by Roman Dutch Law. Therefore the need of the hour is clear reform and amendments that revert to the original Tesawalamai principles without creating further confusion.[376] An amendment to the Tesawalamai law must be made in order to ensure the protection of women's rights within the framework of this customary law system while restoring the true character of Tesawalamai.

3.4.2. Acknowledge the Changing Roles of Women in Society

Marasinghe and Scharenguivel note that the modern woman adopts a dual-career role, as a wage earner and a housewife (in the care economy), and therefore should be rewarded for both roles.[377] However, many of the judicial decisions on property rights in Tesawalamai seem to be based on the preconceived notion that the husband is the de facto breadwinner of the family, whereas the wife is restricted to the private sphere of domestic work. Although the history of *thediathettam* accorded equal value to both the roles of breadwinner and homemaker in its division of property, how such value may change in light of the dual role of women in society today is questionable. Sharvananda CJ's interpretation of *thediathettam* being classified as communal property aligns with the principle of equal entitlement as originally envisioned in . However, the absence of a definitive decision on this matter creates uncertainty, leaving the issue unresolved.

3.5. Conclusion

In conclusion, the summary above underscores the shortcomings in Tesawalamai law in terms of its alignment with international standards, specifically in terms of gender-based discrimination. The examination of key provisions of Tesawalamai law reveals certain disparities against international standards, particularly in married women's property rights and the rights of women to sue and be sued. However, these disparities stem from external influences and amendments to Tesawalamai and do not necessarily encapsulate the "original" Tesawalamai law. The recommendations emphasize the need for targeted amendments to address these inconsistencies by granting Tesawalamai wives the right to sue and be sued, and acknowledging the evolving roles of women in society, in order to bring in line with international standards, within its cultural context.

Endnotes

1 Minattur, J., 'Contractual Remedies in Asian Countries', Indian Law Institute, (1975), p.273.

2 Ibid.

3 Article 16 of the Constitution of Sri Lanka states that all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of fundamental rights chapter in the Constitution.

4 Ibid.

5 Article 10 of the Constitution of Sri Lanka - Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka' (2000), p.12

6 Table 1, Table 2 and Table 4

7 Ibid.

8 Section 2 Muslim Marriage and Divorce Act

9 Ibid.

10 Committee on the Elimination of Racial Discrimination (CERD), Consideration of reports submitted by States parties under article 9 of the Convention, Combined tenth to seventeenth periodic reports of States parties due in 2015, Sri Lanka, CERD/C/LKA/10-17, (CERD Consideration of reports under article 9), 7 December 2015, para.11, at https://www.mfa.gov.lk/wp-content/uploads/2018/03/CERD-3.pdf [last accessed 29 March 2023].

11 The Women and Media Collective Colombo, Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women , July 2010, p.28, at https://www2.ohchr.org/english/bodies/cedaw/docs/ngo/wmd_srilanka48.pdf [last accessed 20 November 2023].

M.H.M. Firdous, 'Sri Lankan personal laws between justice and freedom – A value based perspective', Groundviews, 12 January 2016, at https://groundviews.org/2016/12/01/sri-lankan-personal-laws-between-justice-and-freedom-a-value-based-perspective/ [last accessed 29 March 2023].

CERD Consideration of reports under article 9, para.72.

Civil Society Collective in Sri Lanka (CSCS), Factsheet – UPR 2017 – Sri Lanka 3rd cycle universal periodic review, women's rights, 2017, (CSCS Factsheet Women's Rights), at p.2, at https://www.upr-info.org/sites/default/files/documents/2017-10/women_s_rights_factsheet_srilanka_2017.pdf [last accessed 29 March 2023].

12 Ibid, p.2.

Zahrah Imtiaz, 'CEDAW Asks Sri Lanka to Amend Personal Laws', Daily News, 8 March 2017, at https://www.dailynews.lk/2017/03/08/local/109743/cedaw-asks-sri-lanka-amend-personal-laws [last accessed 29 March 2023].

13 CERD Consideration of reports under article 9, para.77.

14 Riya Jain, The Opportunity for Legal Pluralism in Jordan, The Yale Review of International Studies, 2021, at <http://yris.yira.org/winter-issue/4650> accessed 21st June 2023

15 The United Nations Population Fund (UNFPA)–United Nations Children's Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme), Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage" 2020, pg 4-5, at <https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf> accessed 19th June 2023

16 Ibid

17 Riya Jain, The Opportunity for Legal Pluralism in Jordan, The Yale Review of International Studies, 2021, at http://yris.yira.org/winter-issue/4650 accessed 21st June 2023

18 P.K.Balachandran, 'One Country One Law' vs legal pluralism, Counterpoint.lk, November 4th 2021, at <https://counterpoint.lk/one-country-one-law-vs-legal-pluralism/> accessed 21st June 2023

19 Tamar Herzog, The Uses and Abuses of Legal Pluralism: A View from the Sideline, Harvard University, Cambridge, MA, USA, Law and History Review (2023), pg 1–12, at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/603BD5BBB2D3710424C283FC5DDDA327/S0738248023000160a.pdf/the-uses-and-abuses-of-legal-pluralism-a-view-from-the-sideline.pdf> accessed 21st June 2023

20 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol.999, at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [last accessed 29 March 2023].

21 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol.993, at https://www.ohchr.org/

en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [last accessed 29 March 2023].

22 UN General Assembly, Convention for the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women [last accessed 29 March 2023].

23 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series,

vol.1577, at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx [last accessed 29 March 2023].

24 W. Rajapakshe, Family Law, (February 2020), pp.480-481.

25 Ibid.

26 Ibid.

27 Kershaw v. Nicoll, 1860-1862, Ramanathan Reports, p.157.

28 Williams v. Robertson, 1886, (8) S.C.C. 36.

29 L. Marasinghe and S. Scharenguivel, Compilation of selected aspects of the special laws of Sri Lanka, (June 2015), p.11.

30 L. Chirayath, C. Sage and M. Woolcock, p.2.

31 L. Marasinghe and S. Scharenguivel, p.17.

32 D.T. Koggalage, Effectiveness of British Legislation regarding Kandyan Law: the Kandyan Marriage Ordinance of 1859, (Kalyani, Journal of Humanities & Social Sciences, University of Kelaniya 2010-2012), pp.62-63, at http://repository.kln.ac.lk/bitstream/handle/123456789/5523/Effectiveness%20of.pdf?sequence=3&isAllowed=y [last accessed 29 March 2023].

33 F. Modder, The Principles of Kandyan Law Stevens and Haynes, (1914), pp.224-225.

L. Marasinghe and S. Scharenguivel, p.27.

34 F.A. Hayley, The Laws and Customs of the Sinhalese, (1923), p.333.

L. Marasinghe and S. Scharenguivel, p.27.

35 F. Modder, Comment on Section 127.

L. Marasinghe and S. Scharenguivel, p.27

36 F. Modder, pp.232-235.

L. Marasinghe and S. Scharenguivel, p.28

37 Ibid.

38 Ibid.

39 Jayasinghe v Kiribindu, 1997, (2) S.L.R. 01.

L. Marasinghe and S. Scharenguivel, p.29.

40 Ibid.

41 L. Marasinghe and S. Scharenguivel, p.3.

42 Key Informant Interview

43 Ibid.

44 Ibid.

45 Ibid.

S. Goonesekere, The Roman Dutch Law in a Plural Legal System, (Colombo Law Review 1 Vol 9 1995), p.14-15.

46 E. M. Y. G. Ekanayaka, Rethinking the grounds for divorce in general law of Sri Lanka: A comparative analysis, International Journal of Business, Economics and Law, (International Journal of Business, Economics and Law Vol. 10, Issue 4, August 2016), p.21, at https://www.ijbel.com/wp-content/uploads/2016/09/K10_45.pdf [last accessed 29 March 2023].

47 L. Marasinghe and S. Scharenguivel, p.33.

48 P.W. Rupesinghe, Inheritance Rights of Children in Sri Lanka, Centre on Housing Rights and Evictions (COHRE) supported by UNICEF Sri Lanka, (COHRE Inheritance Rights Children Sri Lanka), December 2008, p.55, at https://landportal.org/node/99485 [last accessed 29 March 2023].

49 Ibid.

50 Ibid.

51 Section 32, Kandyan Marriage and Divorce Act No. 44 of 1952 (KMDA).

52 Ibid.

53 P. Rajendran, Adultery as a ground for the dissolution of marriage: Status of a Kandyan Woman in Sri Lanka, (Asian Journal of Multidisciplinary Research and Review Vol.2 Issue No.3 June-July 2021), p.147, at https://thelawbrigade.com/wp-content/uploads/2021/07/AJMRR_Pavithra-Rajendran.pdf [last accessed 29 March 2023].

54 *Paraveni* (ancestral) property means immovable property which a deceased person was entitled to by succession to another. This includes any property received through succession (inheritance); donation; or last will. There are two types of *paraveni* property: paternal *paraveni* property deriving from the father, and maternal *paraveni* property deriving from the mother. Meanwhile, all immovable property except *paraveni* property is deemed to be acquired property.

55 Key Informant Interview

56 L. Marasinghe and S. Scharenguivel, pp.61-62.

57 L. Marasinghe and S. Scharenguivel, pp.63-64.

For instance, Section 22 of KLDAO, which concerns inheritance rights relating to movable property, specifically starts with the words 'when any person [widow or widower] shall die intestate…', whereas Section 11 of KLDAO, which concerns inheritance rights relating to immovable property, is phrased as 'when a man [widow] shall die intestate…'].

58 Section 11, Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 (KLDAO).

59 L. Marasinghe and S. Scharenguivel, pp.61-62.

60 COHRE Inheritance Rights Children Sri Lanka, p.55.

61 D.T. Koggalage, p.63.

62 Key Informant Interview

63 D.T. Koggalage, p.63.

64 Legal aid commission, 'Dowry in Kandyan Law', Daily News, 20 April 2012, available at http://archives.dailynews.lk/2012/04/20/fea10.asp [last accessed 19 May 2023].

65 Section 11, KLDAO.

COHRE Inheritance Rights Children Sri Lanka, pp.49-55.

66 L. Marasinghe and S. Scharenguivel, pp.61-62.

67 COHRE Inheritance Rights Children Sri Lanka, p.6.

68 Sections 15 and 18, KLDAO.

69 Section 15, KLDAO.

70 Constructive malicious desertion is where the conduct or speech of the spouse who is alleged to be guilty of malicious desertion gives his or her spouse no reasonable alternative other than to depart from the matrimonial home or to cease matrimonial consortium. See Guneshi Mallika Gomes vs. Jammagalage Ravindra Ratnasiri Gomes, S.C. (Appeal) No. 123/14 (Supreme Court of Sri Lanka), judgement delivered on 7 June 2018.

71 Key Informant Interview

72 Section 19, General Marriage Registration Ordinance No 7 of 1907; see also Section 596, Civil Procedure Code.

73 Section 33, KMDA.

74 E. M. Y. G. Ekanayaka, p.23.

75 Key Informant Interview

76 Ibid.

77 Section 15, KLDAO.

78 Rankiri V Ukku, 1907, (10) N.L.R. 129.

79 Ranhamy V Menik Ethana, 1907, (10) N.L.R. 157.

80 Kandyan Marriage and Divorce (Amendment) Act, No. 37 of 2022.

81 S. De Soysa, Transformation of the family, an agenda for reform: The Sri Lankan experience, (Sri Lanka Journal of Social Sciences 1998 21(1&2): 83-104), p.91 at http://dl.nsf.gov.lk/bitstream/handle/1/5036/JSS_21_83.pdf?sequence=2&isAllowed=y [last accessed 29 March 2023].

Section 4, KMDA No.19 of 1995.

82 S. De Soysa, p.92.

83 This recommendation has taken into account concerns raised during the KII conducted for the Kandyan Law chapter of this report. These concerns primarily revolved around the practical constraints related to the dissolution of marriages through the District Registrar.

84 This recommendation draws on recommendations made by the Family Law Review Committee (2010) and the Civil Society Collective in Sri Lanka.

CSCS Factsheet Women's Rights, p.5-7.

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Concluding observation on the eights periodic report of Sri Lanka, CEDAW/C/LKA/CO/8/ADD.1, 15 October 2019, paras.27-29, at

https://digitallibrary.un.org/record/3836254?ln=en [last accessed 29 March 2023].

85 LJM Cooray, 'An Introduction to the Legal System of Sri Lanka' (2003) Stamford Lake (Pvt) Ltd, p.3.

86 Kali Robinson, 'Understanding Sharia:The Intersection of Islam and the Law', Council on Foreign Relations, (March 2021), at < https://www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law>, last accessed 20 November 2023

87 Zacky Ismail and A.Jamaldeen, "Muslim Family Law and Practices: Perspectives CEDAW" (2013)

88 Ibid

89 Section 2 Muslim Marriage and Divorce Act

90 FH De Vos, "Intestate Succession Among the Moors of Ceylon" (1905, Galle), p.2.

Azhar Ghouse v Mohamed Ghouse and others, page 52,

'In 1806 the Governor Maitland commissioned the Chief Justice Alexander Johnstone to make a collection of such special laws administered in different parts of the island. Thus, in 1806 Chief Justice Johnstone submitted to the Governor "the code of Mohamedan laws" observed by the Moors in the province of Colombo, and the Governer in Council resolved that it should be published and observed throughout the whole of the province of Colombo'

91 De Sampayo J in Narayen v Saree Umma (1920) 21 N.L.R. 439 argues that the original sources of Mohammedan law have always been authoritative.

92 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000), p.8.

93 Weerasekara v Peiris (1931) 34 N.L.R. 281.

94 Muslim Marriage and Divorce Act of 1951.

95 Muslim Mosques and Charitable Trusts or Wakfs Act No.51 of 1956.

96 Adoption of Children Ordinance No.24 of 1941

97 Daily News, 'Intestate Succession under Muslim law', (2016) at < http://archives1.dailynews.lk/2016/06/13/law-order/84410>, last accessed 20 November 2023

98 M.S. Jaldeen, 'The Muslim Law of Marriage Divorce and Maintenance in Sri Lanka' (1990), Published by FAMYS, p.10.

99 Section 24, Muslim Marriage and Divorce Act No.22 of 1955

100 Kaikuli - dowry given from bride's side to bridegroom

101 Mahr and Kaikuli refer to money and gifts given by the parents of the bride, to the bridegroom to be kept in trust for the bride.

102 financial security or insurance for the wife against divorce - Kandu v Lebbe (1947) 1 MMDLR 36

103 *Mahr* and *Kaikuli* refer to money and gifts given by the parents of the bride, to the bridegroom to be kept in trust for the bride.

104 Noorul Naleefa v Marikkar Hajida (1947) S. C. 170 D. C. Kalutara, 26,076.

105 Amira El-Azhary Sonbol, "Adults and Minors in Ottoman Shari'a Courts and Modern Law in Sonbol; Women, the Family and Divorce Laws in Islamic history" Syracuse University Press (1966), pp.236-59.

106 Article 1, Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages 1962

107 WhatConvention.org, " Convention on Consent to Marriage, Minmum Age for Marriage and Registration of Marriages, 1962"

at < > [accessed on 23 September 2023]

108 Chulani Kodikara, 'Muslim Family Law in Sri Lanka – Practice and Issues of Concern to Women' (1999), p.6.

109 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka' (2000), p.31.

110 MWRAF, 'Between Two Worlds' (1999) , p.3

111 Ibid

112 The Morning, Nuskiya Nasar, "#LetHerSign – the case for reforming the MMDA!", (2023), at < https://www.themorning.lk/articles/MpZppltOodAdh5vjgwNO> [accessed 24 September 2023]

113 The Sunday Times, Asiff Hussein, "Marriage guardianship: Why the deathly silence?", (2016), at < https://www.sundaytimes.lk/210704/plus/we-sign-everything-else-except-our-own-marriage-document-447726.html>, [accessed 24 September 2023]

114 Clara Rodríguez Ribas, UNICEF and UNFPA,

"Child Marriage and Other Harmful Practices" 2020 <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/child_marriage_and_other_harmful_practices_unfpa_apro_and_unicef_rosa_2020.pdf> accessed 19th June 2023

115 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000), p.30

116 Key Informant Interviews

117 Key Informant Interviews

118 As per the Child Rights Convention (CRC), childhood is separate from adulthood and childhood lasts till the age of 18

119 Key Informant Interviews

120 Key Informant Interview with MMDA activist

121 Key Informant Interview

122 Section 363 and 364, Penal Code of Sri Lanka

123 Chulani Kodikara, 'Muslim Family Law in Sri Lanka – Practice and Issues of Concern to Women' (1999), p.19.

124 Girls Not Brides, https://www.girlsnotbrides.org/about-child-marriage/ , last accessed 25.03.2023

125 South Asia Monitor, Dr. Koyel Basu, " Child marriages in South Asia: Gross violation of girl rights that needs urgent regional attention", (2023), at< https://www.southasiamonitor.org/spotlight/child-marriages-south-asia-gross-violation-girl-rights-needs-urgent-regional-attention#:~:text=Child%20marriage%20has%20spiked%20in,Health%20Survey%2C%20Sri%20Lanka).>, [accessed 24 September 2023]

126 Key Informant Interview

127 Key Informant Interview

128 EMYG Ekanayaka, 'Ensuring the Rights Of The Girl Child By Amending 'The Minimum Age Of Marriage' Under Muslim Law In Sri Lanka' (2017).

129 World Bank, "Educating Girls, Ending Child Marriage", (2017), at < https://www.worldbank.org/en/news/immersive-story/2017/08/22/educating-girls-ending-child-marriage>, [accessed 24 September 2023]

130 The United Nations Population Fund (UNFPA)–United Nations Children's Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme), Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage" 2020, at <https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf> accessed 19th June 2023, pg 1

131 Soraya M.Deen, The Colombo Telegraph, "For Muslims, The Chickens Have Come To Roost" (2020), at < https://www.colombotelegraph.com/index.php/for-muslims-the-chickens-have-come-to-roost/> [Accessed 18June 2023]

132 Women Living under Muslim Laws, "Knowing our rights, Women, family laws and customs in the Muslim World", (2006), p.70-72

133 Under the CMRA, 1929 (amended in 1984), the minimum age for marriage is 18 for females and 21 for males.

134 The minimum legal age of marriage is 18 for both males and females.

135 Under the amended CC, marriageable age has been raised from 15 to 18 for females. Under exceptional circumstances, the minimum marriageable age can be lowered to 16 with court permission.

136 The minimum age for marriage is 17 for females and 18 for males (a drop from the minimum of 18 years for both males and females under Soviet law). Under A. 15 of the FL, under special circumstances the local authorities may provide permission for the age to be reduced by a maximum of one year.

137 Under A. 12 of the Family Code, the minimum legal age for marriage is 17 for both females and males, but this may be reduced by a maximum of one year in exceptional cases (for example, if the female is pregnant or the parents are missing)

138 The Civil Status Temporary Law of 2003 raised the age of marriage to 18 for males and females

139 Under A.19 of the 2004 Moudawana, the age of legal capacity for marriage is over 18 Gregorian years, raised from 15 for females under the old Moudawana. Under A. 20, a judge may authorize a marriage below this age but is required to substantiate the decision, explain the reasons having heard the parents or *wali*, and be assisted by medical expertise or having conducted a social enquiry

140 Under A. 7 of the 2005 amended CF, capacity for marriage is considered valid at the age of over 19 for both females and males. The judge can grant an exception to the minimum age of marriage for females and males on the grounds of benefit or necessity provided it is established that the parties understand the meaning of marriage.

141 The minimum age of marriage is 17 for females and 20 for males. Below these ages, both females and males must have the consent of a male or female guardian (A. 6 of the CSP), or they may obtain court permission, but only 'for pressing reasons and for the obvious benefi t of both spouses' (A. 5 of the CSP).

142 Under the Marriage Act, parties marrying when below the age of 21 require parental consent. If the female is over 16 and the male over 18, the spouses can seek written permission from the Magistrate if the parents unreasonably withhold consent. All parties are to be heard.

143 (marriages under the CMA and ChMA): Under S. 7(b) of the CMA and S. 11 of the ChMA, the minimum age for both males and females to marry is 21. If one of the spouses is below 21, parental consent must be given

144 Under the LM, the minimum age of marriage is 16 for females and 19 for males. Spouses under 21 require the consent of the parents.

145 (marriages under the MCA): The MCA does not specify the age of marriage, and resort is to the English law that prevailed at the time of colonial incorporation to Nigeria (1960). Under this law, the minimum marriageable age is 21, or 18 with parental consent for both males and females. However, the federal Child Rights Act 2003 sets age of marriage as 18 for females and males

146 Under A. 111 of the CF, the minimum age for marriage is 16 for females and 20 for males. Only a judge may authorize a marriage below this age for 'grave reasons' (usually interpreted as pregnancy). An enquiry and parental consent are also required. Under A. 138, a parent can have an under-age marriage annulled. But under A. 140, the parent loses this right if the marriage was later approved expressly or tacitly or where, before the spouses reached majority, the parent failed to act for more than 1 year after knowing of the marriage, or where the spouses complete 19 years of age without a complaint being registered.

147 Under the CMRA, 1929 (amended through the Muslim Family Laws Ordinance, 1961), the minimum age of marriage is 16 for females and 18 for males. Above this age, a Muslim female's right to choice in marriage is clearly established through case law, although the lower courts occasionally give unfavourable judgments that are overturned on appeal. Case law has accepted that even females of 15 years have capacity to independently contract a marriage unless it is established that they lacked the mental capacity to understand the meaning of consent. The courts have argued that while the marriage of a female below 16 constitutes an offence, the marriage is valid if the female has attained puberty, as under principles of Muslim laws (Behram Khan v Mst. Akhtar Begum PLD 1952 Lahore 548; Allah Diwaya v Mst. Kammon Mai PLD 1957 Lahore 651; Bakhshi v Bashir Ahmed PLD 1970 SC 323; Zafar Khan v Muhammad Ashraf Bhatti and another in PLD 1975 Lahore 234).

148 The minimum age of marriage is 16 for females and 18 for males. Under A. 9 of the LMA, any marriage between spouses who are below the age of maturity needs a *wali*. If he refuses, the judge will decide if the objection is reasonable

149 The minimum age of marriage is 16 for females and 18 for males. However, in certain circumstances (undefi ned and therefore discretionary), the Syar'iah Judge can give written permission for the marriage of minors

150 The 1956 Bill of the former Eastern region (colonial era, dominantly Christian populations) sets 16 years as the minimum marriageable age. The law is silent concerning the effects of marriages involving spouses below the minimum age.

151 Females younger than 15 and males younger than 18 can marry if they have permission from the President of the Republic and their parents. Lack of permission renders the marriage voidable, i.e., it can be rectifi ed if permission is given later

152 Under A. 1041, marriage before reaching the age of puberty is prohibited. A 2003 amendment to A. 1210 raised the age of marriage for females to 13 solar years from 9 full lunar years. A marriage below the age of 13 for females and 15 for males requires the approval of the court.

153 The Native Authority (Declaration of Idoma native marriage law and custom) Order S. 49(3) of 1959 (a colonial law in a Christian majority state) sets the minimum age at 12 years.

154 In Kano and Sokoto States (with Muslim majority populations), the minimum age of marriage is puberty.

155 Under the CMPL, minimum marriageable age is defined as puberty for females and 15 for males. A female is presumed to have reached puberty at the age of 15. The Shari' a District Court may, upon petition of a proper *wali*, order the solemnization of a marriage in which the bride has reached puberty but is younger than 15, but not younger than 12. The proper *wali*'s consent is sufficient for the validity of the marriage. Sudan: Marriageable age for females is 10 years or attainment of puberty.

156 There is no minimum age of marriage for Muslims but the

marriage of a female below the age of 12 requires that a *quazi* give his permission. However, since intercourse between an adult and a child below the age of 12 is defi ned as statutory rape, the law effectively limits marriages of children below this age

157 The law is unclear. Under the 1997 Constitution, males and females of full age and capacity shall have the right to marry and form a family, but full age and capacity are not defi ned in law. The MCA 1986 (Cap. 43) is silent on the minimum age of marriage but renders a marriage void where the parties are not of marriageable age. Recognition of customary law adds further complications. Under S. 7(e) of the 1997 Constitution, the laws of Gambia consist of both constitutional law and customary laws

158 There is no minimum age for marriage.

159 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000), p.18. Pearl op.cit. P.43;Child Marriage Restraint Act (1929) as amended by Muslim Family Law Ordinance (1961) s. 12.

160 Zacky Ismail and A.Jamaldeen, "Muslim Family Law and Practices: Perspectives CEDAW" (2013).

161 Key Informant Interview

162 Key Informant Interview

163 Key Informant Interview

164 Ibid

165 The United Nations Population Fund (UNFPA)–United Nations Children's Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme), Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage" 2020, at <https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf> accessed 19th June 2023, pg 13

166 Ermiza Tegal, The Morning.LK, "Final question for MMDA reforms in Sri Lanka: Is the practice of polygamy Islamic?" 2023, at <https://www.themorning.lk/articles/225176> accessed 19th June 2023

167 The United Nations Population Fund (UNFPA)–United Nations Children's Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme), Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage" 2020, at <https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf> accessed 19th June 2023, pg 13

168 Ibid

169 Clara Rodríguez Ribas, UNICEF and UNFPA,

"Child Marriage and Other Harmful Practices" 2020 <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/child_marriage_and_other_harmful_practices_unfpa_apro_and_unicef_rosa_2020.pdf> accessed 19th June 2023, p.13.

170 Ibid

171 Economy Next, Chanaka Jayasinghe, " Sri Lanka girls at risk of early marriage as currency collapse makes people poorer", (2022), at < https://economynext.com/sri-lanka-girls-at-risk-of-early-marriage-as-currency-collapse-makes-people-poorer-101296/> [accessed 24 September 2023]

172 Ibid

173 Ermiza Tegal, The Morning.LK, "Final question for MMDA reforms in Sri Lanka: Is the practice of polygamy Islamic?" 2023, at <https://www.themorning.lk/articles/225176> accessed 19th June 2023

174 Acju.lk, Executive Committee of ACJU, at

<https://acju.lk/en/acju-committee>

175 fham Nizam, Make polygamy legal for all, under strict conditions – ACJU, Morning.lk, 2021, at

< https://island.lk/make-polygamy-legal-for-all-under-strict-conditions-acju/ > accessed 21st June 2023 June 2023

176 Ibid

177 Ermiza Tegal, The Morning.LK, "Final question for MMDA reforms in Sri Lanka: Is the practice of polygamy Islamic?" 2023, at <https://www.themorning.lk/articles/225176> accessed 19th June 2023

178 Ermiza Tegal, The Morning.LK, "Final question for MMDA reforms in Sri Lanka: Is the practice of polygamy Islamic?" 2023, at <https://www.themorning.lk/articles/225176> accessed 19th June 2023

179 Key Informant Interview

180 Abdul Carim Alim v Umma Salama [1944] 3 MMDR 19.

181 Kamer v Sithy Zain [1954] 4 MMDR 92

182 M.S. Jaldeen, 'The Muslim Law of Marriage Divorce and Maintenance in Sri Lanka' (1990), Published by FAMYS, pg 95. Asia Umma v Segu Mohamedu (1881) (SC) MMDR 1.27. Chief Justice Calyley stated that the Mohommedan Code 1806 recognizes concubinage as legal, "but there is nothing in these laws to justify concubinage with another man's wife…. the wife cannot be compelled to acquiesce in the shame and disgrace that must attach to another married woman".

183 M.S. Jaldeen, 'The Muslim Law of Marriage Divorce and Maintenance in Sri Lanka' (1990), Published by FAMYS, p.94.

184 Rohanee Machae, Abdul Basir Mohamad & Mutsalim Khareng 'Children Maintenance: The Rights in Islamic Family Law and the Law of Thailand ' (2015), Mediterranean Journal of Social Sciences, Vol 6 No 4, p.194,197.

185 Section 28, Muslim Marriage and Divorce Act

186 Section 34, Muslim Marriage and Divorce Act 1951

187 A specified period of time that must elapse before a Muslim widow or divorcee may legitimately remarry.

188 'Iddat' refers to the waiting period observed by a woman after a divorce or the death of her husband, during which she may not marry another man.

189 Women Living under Muslim Laws, "Knowing our rights, Women, family laws and customs in the Muslim World", (2006), p.10.

190 Key Informant Interview (KII) conducted with MMDA activist and Muslim Women's Research and Action Forum (MWRAF)

191 Key Informant Interview (KII) conducted with MMDA activist

192 Key Informant Interview (KII) conducted with MMDA activist and Muslim Women's Research and Action Forum (MWRAF)

193 Key Informant Interview (KII) conducted with MMDA activist and Muslim Women's Research and Action Forum (MWRAF)

194 Key Informant Interview (KII) conducted with MMDA activist and Muslim Women's Research and Action Forum (MWRAF)

195 The compensation to be given by the wife is an amount decided by the Quazi and is usually the mahr. See Muslim Women's Research and Action Forum, Divorce, (2001) p.10.

196 Key Informant Interview (KII) conducted with MMDA activist

197 Bhartiya V. P. "Muslim Law", Eastern Book Company, (2017)

198 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000), p.75

199 Ameer Ali v Jameela Umma 3 MMDLR 65.

200 Faiz Mohamed v Elsie Fathooma (1939) 2 MMLDR 98 at 101

201 Section 28(2), Muslim Marriage and Divorce Act

202 Key Informant Interview (KII) conducted with MMDA activist

203 Key Informant Interview (KII) conducted with MMDA activist

204 Key Informant Interview (KII) conducted with MMDA activist

205 Key Informant Interview (KII) conducted with MMDA activist

206 Key Informant Interview (KII) conducted with MMDA activist

207 Key Informant Interview (KII) conducted with MMDA activist

208 Key Informant Interview (KII) conducted with MMDA activist

209 Key Informant Interview (KII) conducted with MMDA activist

210 Key Informant Interview (KII) conducted with MMDA activist

211 Women Living under Muslim Laws, "Knowing our rights, Women, family laws and customs in the Muslim World", (2006), p.10.

212 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000)

213 Natchia v Marikkar (1889) 1 MMDR 28

214 Kandu v Lebbe (1947) 1 MMDLR 36

215 Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000), p.64.

216 Umma v Marikkar (1912) 1 MMDLR 53; Hashim v Sithy Fathima (1951) 3 MMDLR 135.

217 Beebi v Pitche (1924)

218 Key Informant Interview (KII) conducted with Muslim Women's Research and Action Forum (MWRAF)

219 Key Informant Interview (KII) conducted with Muslim Women's Research and Action Forum (MWRAF)

220 Key Informant Interview (KII) conducted with MMDA activist

221 Key Informant Interview (KII) conducted with MMDA activist

222 Pathuma v Cassim (1919)

223 "The Act authorizes the *Quazi* to permit and "fit and proper person" authorized by the woman to institute proceedings or appear on behalf of a woman who is claiming *Mahr* or *Kaikuli* in *Quazi* Courts", Savitri Goonesekere, 'Muslim Personal Law in Sri Lanka'(2000), p.67

224 Key Informant Interview (KII) with MMDA activist

225 Section 2, Muslim Intestate Succession and Wakfs Ordinance 1931

226 C.H Withers Payne, 'The Mahomedan Law of Inheritance', (1932)

227 MS Jaldeen, "The Muslim Law of Succession, Inheritance and Waqf in Sri Lanka" (1990), FAMYS Publication p.197

228 Ramani Muttetuwegama, "Parallel Systems of Personal Laws in Sri Lanka" (1997), p.19.

229 Article 1, Convention for the Elimination of All Forms of Discrimination Against Women 1979

230 Chulani Kodikara, "A Review of the *Quazi* Court System in Sri Lanka" (2010), p.1.

231 Ermiza Tegal and Hasana Cegu Isadeen, "Inside the *Quazi* Courts of Sri Lanka", March 2021, at <https://www.mmdasrilanka.org/wp-content/uploads/2022/06/Inside-the-*Quazi*-Courts-System-in-Sri-Lanka-by-CHANGE-Humanitarian-Organization-English.pdf>, p.51.

232 MPLRAG, "Position Paper: Family Court System", (2021), at < https://www.mmdasrilanka.org/imagining-a-family-court-system/> [accessed 16 September 2023]

233 Key Informant Interview (KII) conducted with Muslim Women's Research and Action Forum (MWRAF)

234 Ibid

235 Corpus of the sayings or traditions of the Prophet Mohammed, revered by Muslims as a major source of religious law and moral guidance. It comprises many reports of varying length and authenticity.

236 Daily Mirror, Female *Quazi*s allowed in Islam, but not under MMDA, 29th June 2019, at https://www.dailymirror.lk/opinion/Female-*Quazi*s—allowed-in-Islam—but-not-under-MMDA/172-170251 , [last accessed 23rd May 2023]

237 The detail report on proposed Amendment Act to amend the Muslim Marriage and Divorce Act, Unanimously agreed by the Muslim Members of Parliament, 8 June 2023

238 Key Informant Interview (KII) conducted with MMDA activist

239 Ibid

240 Ibid

241 Ermiza Tegal and Hasana Cegu Isadeen, "Inside the *Quazi* Courts of Sri Lanka", March 2021, at < https://www.mmdasrilanka.org/wp-content/uploads/2022/06/Inside-the-*Quazi*-Courts-System-in-Sri-Lanka-by-CHANGE-Humanitarian-Organization-English.pdf>, p.7.

242 Faizun Zackariya, 'A Woman's Right To Be A Quazi Judge In Sri Lanka: Re-Reading Verse 4:34', Colombo Telegraph, <https://www.colombotelegraph.com/index.php/a-womans-right-to-be-a-quazi-judge-in-sri-lanka-re-reading-verse-434/> 2017 [last accessed 30th November 2023

243 Ibid

244 Key Informant Interview (KII) conducted with MMDA activist

245 MPLRAG, "Position Paper: Family Court System", (2021), at < https://www.mmdasrilanka.org/imagining-a-family-court-system/> [accessed 16 September 2023]

246 MPLRAG, "Position Paper: Family Court System", (2021), at < https://www.mmdasrilanka.org/imagining-a-family-court-system/> [accessed 16 September 2023]

247 'What is the Muslim Marriage and Divorce Act (MMDA) 1951' at < https://www.mmdasrilanka.org/aboutmmda/> [last accessed 02 November 2023]

248 Musawah, Global Repository of Muslim Family Laws Sri Lanka,at < https://campaignforjustice.musawah.org/repository/sri-lanka/> Last accessed 20 November 2023

249 Muslim Women's Research and Action Forum, 'Women Claiming Rights and Spaces – Activism to Reform Muslim Personal Law in Sri Lanka' (2014), p.12.

250 Report of the Advisory Committee Appointed to Propose Reforms on Muslim Personal Laws in Sri Lanka, Muslim Marriage and Divorce, 16th June 2021, at <https://www.moj.gov.lk/images/2023/muslim-Marriage&Devorce.pdf>

251 Musawah, Global Repository of Muslim Family Laws Sri Lanka,at < https://campaignforjustice.musawah.org/repository/sri-lanka/> Last accessed 20 November 2023

252 S.363(e) of the Penal Code - A man is said to commit " rape " who enactment has sexual intercourse with, a woman under circumstances falling under any of the following descriptions:

(e) with or without her consent when she is under sixteen years of age, "unless the woman is his wife who is over twelve years of age and is not judicially separated from the man". - Removal of provision within quotes.

253 Report of the Advisory Committee Appointed to Propose Reforms on Muslim Personal Laws in Sri Lanka, Muslim Marriage and Divorce, 16th June 2021, https://www.moj.gov.lk/images/2023/muslim-Marriage&Devorce.pdf pg 83

254 Section 15, Marriage Registration Ordinance No.19 of 1907 as amended by Act No.22 of 2013

255 The United Nations Population Fund (UNFPA)–United Nations Children's Fund (UNICEF) Global Programme to End Child Marriage (the Global Programme), Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage" 2020, at <https://www.unicef.org/media/86311/file/Child-marriage-the-law-2020.pdf> accessed 19th June 2023, pg 1

256 Ibid pg 8

257 Justice Saleem Marsoof, The *Quazi* Court System in Sri Lanka and its impact on women, 2011 at <https://www.academia.edu/30277198/The_*Quazi*_Court_System_in_Sri_Lanka_and_its_Impact_on_Muslim_Women> pg 29

Hira Shahjehan and Sami Ur Rahman, Laws Relating To Polygamy in Pakistan: Rights of the Polygamous Wives, Islam. Law. Review. Vol. 5 Issue 2 2021, pg 30, at <https://www.iiu.edu.pk/wp-content/uploads/2022/04/ILR-Vol-5-Issue-2-Article-2-15042022.pdf> accessed 21st June 2023

BBC News, Polygamy: Muslim women in India fight 'abhorrent' practice, 10th May 2022, at

<https://www.bbc.com/news/world-asia-india-61351784> accessed 21st June 2023

258 Ibid

259 MPLRAG, Position paper Issue 3, February 2022 at <https://www.mmdasrilanka.org/polygamy-in-sri-lanka/> accessed 13 June 2023

260 MPLRAG, Position paper Issue 3, February 2022 at <https://www.mmdasrilanka.org/polygamy-in-sri-lanka/> acccessed 13 June 2023

261 UN Women, Arab States, 'Ending polygamy in muslim marriages' at < https://arabstates.unwomen.org/en/digital-library/publications/2021/05/ending-polygamy-in-muslim-marriages> [accessed 13 June 2023]

262 UN Women, "GenTrack Arab States", at < https://data.unwomen.org/arab-states/overview> [accessed 26 September 2023]

263 UN Women, Arab States, 'Ending polygamy in muslim marriages' at < https://arabstates.unwomen.org/en/digital-library/publications/2021/05/ending-polygamy-in-muslim-marriages> [accessed 13 June 2023]

264 BBC News, Polygamy: Muslim women in India fight 'abhorrent' practice, 10th May 2022, at <https://www.bbc.com/news/world-asia-india-61351784> accessed 21st June 2023

265 Musawah, Musawah Policy Brief #03, Ending Polygamy in Muslim Marriages, 2021 pg 5, at <https://www.musawah.org/wp-content/uploads/2021/04/Policy-Brief-3-Ending-Polygamy.pdf> accessed 21st June 2023

266 Sumanto Al Qurtuby, "BETWEEN POLYGYNY AND MONOGAMY Marriage in Saudi Arabia and Beyond", (2022) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4197532> , [accessed 26 September 2023] p.32.

267 Stephanie Kramer, 'Polygamy is rare around the world and mostly confined to a few regions', Pew Research Center, (2020), at < https://www.pewresearch.org/short-reads/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions/>, last accessed 20 November 2023

268 Muslim Personal Law Reform Action Group (MPLRAG), Unequal Divorce under the MMDA – Position Paper 4, December 2020, pg 7, at <https://www.mmdasrilanka.org/unequal-divorce/> [accessed 21st June 2023]

269 Section 19, General Marriage Ordinance No.19 of 1907

270 Ibid

271 Report of the Advisory Committee Appointed to Propose Reforms on Muslim Personal Laws in Sri Lanka, Muslim Marriage and Divorce, 16th June 2021, pg 82 at <https://www.moj.gov.lk/images/2023/muslim-Marriage&Devorce.pdf>

272 Key Informant Interview (KII) conducted with MMDA activist

273 Key Informant Interview (KII) conducted with MMDA activist

274 Key Informant Interview (KII) conducted with MMDA activist

275 Key Informant Interview (KII) conducted with MMDA activist

276 Report of the Committee Appointed to Consider Amendments to the Muslim Marriage and Divorce Act, 2009, p.33.

277 Report of the Advisory Committee Appointed to Propose Reforms on Muslim Personal Laws in Sri Lanka, Muslim Marriage and Divorce, (16th June 2021), at <https://www.moj.gov.lk/images/2023/muslim-Marriage&Devorce.pdf> [accessed 26 September 2023] p. 37.

278 Federal Constitution of Malayisa, Ninth Schedule. Pg 181

279 Federal Constitution of Malayisa, Ninth Schedule. Pg 181

280 Dr. Sia Chin Chin and Ms Suzanna Abdul Hadi, UPDATE: Researching Islamic Law – Malaysian Sources, Hauser global law school program, (2021), at <https://www.nyulawglobal.org/globalex/Researching_Islamic_Law_Malaysian_Sources1.html> [accessed 21 June 2023]

281 Riya Jain, The Opportunity for Legal Pluralism in Jordan, The Yale Review of International Studies, 2021, at http://yris.yira.org/winter-issue/4650 accessed 21st June 2023

282 Key Informant Interview (KII) conducted with MMDA activist

283 Key Informant Interview (KII) conducted with MMDA activist

284 Key Informant Interview (KII) conducted with MMDA activist

285 Key Informant Interview (KII) conducted with MMDA activist

286 Key Informant Interview (KII) conducted with MMDA activist

287 Ibid

288 Key Informant Interview (KII) conducted with MMDA activist

289 Key Informant Interview (KII) conducted with MMDA activist

290 Key Informant Interview (KII) conducted with MMDA activist

291 Key Informant Interview (KII) conducted with MMDA activist

292 MPLRAG, FAQs – What is happening with the MMDA? 2020 at < https://www.mmdasrilanka.org/faqs-what-is-happening-with-mmda-reform/> [Last accessed 10th August 2023]

293 CEDAW, Concluding observations on the eight periodic report of Sri Lanka, 2017 at pg 14

294 E. M. Y. G. Ekanayaka, Rethinking the grounds for divorce in general law of Sri Lanka: A comparative analysis, International Journal of Business, Economics and Law, (International Journal of Business, Economics and Law Vol. 10, Issue 4, August 2016), p.21, at https://www.ijbel.com/wp-content/uploads/2016/09/K10_45.pdf [last accessed 29 March 2023].

295 Key Informant Interview (KII) conducted with MMDA activist and Muslim Women's Research and Action Forum (MWRAF)

296 Key Informant Interview (KII) conducted with MMDA activist and Muslim Women's Research and Action Forum (MWRAF)

297 Key Informant Interview (KII) conducted with MMDA activist

298 Key Informant Interview (KII) conducted with MMDA activist

299 Key Informant Interview (KII) conducted with MMDA activist

300 Key Informant Interview (KII) conducted with MMDA activist

301 Key Informant Interview (KII) conducted with Muslim Women's Research and Action Forum (MWRAF)

302 Key Informant Interview (KII) conducted with Muslim Women's Research and Action Forum (MWRAF)

303 Key Informant Interview (KII) conducted with Muslim Women's Research and Action Forum (MWRAF)

304 Ibid

305 Ibid

306 *Muthusam* is property given upon the demise of a man or woman's parent or of any other ancestor in the ascending line, Section 15, Jaffna Matrimonial and Rights Inheritance Ordinance 1911.

307 *Cheedanam* is synonymous with dowry which is provided as a symbol of a daughter's family inheritance, Section 17 and 33, Jaffna Matrimonial and Rights Inheritance Ordinance 1911.

308 *Thediathettam* is property acquired for valuable consideration or profits arising during the subsistence of the marriage from the property of the husband or wife, Section 19, Jaffna Matrimonial and Rights Inheritance Ordinance 1911.

309 LJM Cooray, 'An Introduction to the Legal System of Sri Lanka' (2019), p.140.

310 Sri Lanka: Legal Research and Legal System' (2009), GlobaLex, at https://www.nyulawglobal.org/globalex/Sri_Lanka.html#:~:text=Thesawalamai%2C%20which%20was%20codified%20by,18%20of%201806 [last accessed 15 August 2023].

311 Dr. H.W. Tambiah, 'The Laws and Customs of the Tamils of Jaffna', Revised Edition, Published by Women's Education and Research Centre, p.67.

312 Ibid.

313 Section 2 and 3, Tesawalamai Code 1806.

314 Marshall v Savari, 1 S.C.C.9.

315 Wellapulla v Sitambelem (1872-76) Ram Rep. 114, as cited in Dr. H.W. Tambiah, 'The Laws and Customs of the Tamils of Jaffna', Revised Edition, Published by Women's Education and Research Centre, p.63,

316 Savundranayagam v Savundranayagam (1917) 20 N.L.R. 274.

317 Chetty v Chetty (1935) 37 N.L.R. 253.

318 Sivagnanalingam v. Suntheralingam (1988) 86 SLR 1

319 Velupillai v. Sivakamipillai 13 NLR 74 – 1910.

320 Section 40, Jaffna Matrimonial Rights and Inheritance Order No.01 of 1911.

321 Tesawalamai Commission 1930, Sessional Paper 3 of 1930, pp 35-36, [last accessed 21 June 2023].

322 Section 64, Marriage Registration Ordinance No.19 of 1907.

323 Dr. H.W. Tambiah, 'The Laws and Customs of the Tamils of Jaffna', Revised Edition, Published by Women's Education and Research Centre, p.99.ISBN 955-9261-16-9. (year Of publication), [last accessed 21 June 2023].

324 Gunaratnam v Registrar-General (2002) CA NO. 1031/01.(this is a reported decision)

325 Ibid, p.103.

326 Dr. H.W. Tambiah, 'The Laws and Customs of the Tamils of Jaffna', Revised Edition, Published by Women's Education and Research Centre, p.103, [last accessed 21 June 2023].

327 Section 1, Tesawalamai Code 1806.

328 Dr. H.W. Tambiah, 'The Laws and Customs of the Tamils of Jaffna', Revised Edition, Published by Women's Education and Research Centre, p.129, [last accessed 21 June 2023].

329 Sinnepodien v Sinnnapulle, widow of Kandi and others M.263.

330 Marshall's Judgements, p.160-161 [cited from Tambiah, p.129].

331 Married Women's Property Ordinance No.18 of 1923 , Sec 24.

332 Adoption of Children Ordinance No.24 of 1941.

333 Section 2, Kandyan Marriage and Divorce (Amendment) Act, No. 37 of 2022.

334 Section 8, Kandyan Marriage and Divorce (Amendment) Act, No. 44 of 1952.

335 Section 9 Matrimonial Rights and Inheritance Ordinance No.15 of 1876 required a married woman to get her husband's written consent in dealing with and disposing of her property by any lawful act.

336 Savitri Goonesekere, 'Status of Women in the Family Law of Sri Lanka'. (1990) ICES Sri Lanka; see also, Piragasam v. Mariamma (1952) 55 NLR, p.114.

337 'Discriminatory Laws, Regulations and Administrative Practices Affecting/Impacting on Land and Property Rights of Women', Law and Society Trust, February 2010, at https://www.adb.org/sites/default/files/project-documents//37402-012-reg-tacr-04.pdf p..61 [last accessed 27 September 2023].

338 Ibid.

339 Viyanga Gunasekera, 'Women and Land in Sri Lanka: A Literature Review', 2021, at https://thegenderhub.com/wp-content/uploads/2021/01/Livlihood-Land-and-Rights_Gunasekera.pdf p.16 [last accessed 15 September 2023].

340 Nalliah v Ponnamali (1920) 22 NLR 198 at p.204.

341 L.Marasinghe and S.Scharenguivel, "Compilation of Selected Aspects of the Special Laws of Sri Lanka", 1st Edition June 2015, p.412, [last accessed 21 June 2023].

342 Murugesu v Subramanium, (1967) S.C 453/64—.D. C. Jaffna, 1668/L.

343 Ibid. Judge Burleigh's pronouncement encapsulates this, where he states that "young men marry here solely to obtain a dowry.".

344 L.Marasinghe and S.Scharenguivel, "Compilation of Selected Aspects of the Special Laws of Sri Lanka", 1st Edition June 2015, p.412, [last accessed 21 June 2023].

345 Ibid at p. 413.

346 Article 15 CEDAW states that women must have equal rights to administer property and enter contracts.

Article 16: CEDAW states that both spouses shall have equal rights in the ownership, acquisition, administration, etc. of property.

347 HF Matukisna, "The Tesawalamai", p.257 [Cited from Marasinghe and Scharenguivel, p.419], [last accessed 21 June 2023].

348 HF Matukisna, "The Tesawalamai", p.269 [Cited from Marasinghe and Scharenguivel, p.419], [last accessed 21 June 2023].

349 HF Matukisna, "The Tesawalamai", p.257 [Cited from Marasinghe and Scharenguivel, p.419], [last accessed 21 June 2023].

350 HF Matukisna, "The Tesawalamai", p.269 [Cited from Marasinghe and Scharenguivel, p.419], [last accessed 21 June 2023].

351 KII with an Attorney at Law practicing Tesawalamai law.

352 Seelachchy v Visuvanathan (1992) 23 NLR p.97.

353 Justice Withers in Jivaratnam v Murugesu (1895) 1 NLR p.251 and 254.

354 See alternative approaches in Nalliah v Ponnamah (1920) 22 NLR p.198 and Avitchy Chettiar v Rasammah (1933) 35 NLR 313.

355 Dr. HW Tambiah, "The Laws and Customs of the Tamils of Jaffna", 2nd Edition, p.175, [last accessed 21 June 2023].

356 Kamala Nagendra, 'Matrimonial Property and Gender Inequality' (2008), Stamford Lake Publication, p.209; see also Avitchy Chettiar v Rasamm (1933) 35 NLR 313; Velan Alvan v Pony (1939) 41 NLR 105; Sachchithananthan v Sivaguru (1949) 50 NLR 293; Kandavanam v Nagammah (1952) 46 CLW p.104; Sellappah v Sinnadurai (1951) 53 NLR p.117; Kathirithamby v Subramaniam (1950) 52 NLR p.62; Theivanapillai v Nalliah (1961) 65 NLR p.346; Subramaniam v Kadirgaman (1969) 72 NLR p.289.

357 Key informant interview

358 Kamala Nagendra, 'Matrimonial Property and Gender Inequality' (2008), Stamford Lake Publication, p.200.

359 Ibid.

360 Ibid.

361 Ibid.

362 Nagaratnam v Suppiah (1967) 74 NLR p.54.

363 Kamala Nagendra, 'Matrimonial Property and Gender Inequality' (2008), Stamford Lake Publication, p.201.

364 Jaffna Matrimonial Rights and Inheritance Ordinance 1911, Section 20(1).

365 'Discriminatory Laws, Regulations and Administrative Practices Affecting/Impacting Land and Property Rights of Women' (2010), Law and Society Trust, at https://www.adb.org/sites/default/files/project-documents//37402-012-reg-tacr-04.pdf p.59 [last accessed 22 November 2023].

366 Jaffna Matrimonial Rights and Inheritance Ordinance 1947, Section 19, 20.

367 Ibid p.233.

368 Ibid p.233.

369 'Discriminatory Laws, Regulations and Administrative Practices Affecting/Impacting Land and Property Rights of Women' (2010), Law and Society Trust, at https://www.adb.org/sites/default/files/project-documents//37402-012-reg-tacr-04.pdf p.59 [last accessed 22 November 2023].

370 Kumaraswamy v Subramanium (1954) 56 NLR 44 p.47.

371 Kamala Nagendra, 'Matrimonial Property and Gender Inequality' (2008), Stamford Lake Publication, p.244.

372 Manikkavasagar v Kandasamy (1986) 2 Sri LR p.08.

373 Ibid.

374 Manikkavasagar v Kandasamy (1986) 2 Sri LR p.11.

375 Kamala Nagendra, 'Matrimonial Property and Gender Inequality'

(2008), Stamford Lake Publication, p.266, [last accessed 21 June 2023].

376 Ibid p.237.

377 KII with an Attorney practicing Tesawalamai law.

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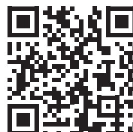

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