

MUSLIM WOMEN'S DEMANDS

FOR REFORM OF THE SRI LANKAN MUSLIM MARRIAGE AND DIVORCE ACT (MMDA) 1951

The MMDA must be reformed to guarantee equality and justice for all Muslims. It should be reformed to respond to the grievances of Muslims, particularly Muslim women and girls and in order to address contemporary and diverse challenges facing Sri Lankan Muslims living in a multi-cultural society. According to the Holy Quran (Surah 4: Verse 58) equality before the law is one of the key principles of the Islamic justice system as God commands human beings to render trust to whom they are due and to “judge with justice”. While the substantive law must ensure equality and justice for all, procedural law must be sensitive to needs of all members of the community including women. While taking this as the basic tenet we outline below four guiding principles that we believe should be adhered to in the substance and process of reform initiative.

GUIDING PRINCIPLES FOR REFORM

1. State's responsibility to ensure Equality, Justice and Non-Discrimination

The Sri Lankan state has a role and the responsibility to ensure all its citizens are treated equally and without discrimination. Equality before the law and equal treatment under the law is a fundamental right. The MMDA and the Quazi court system is a special law and cannot be utilized to deny any Muslim citizen of Sri Lanka his/her fundamental rights and protections under the Constitution. If this is permitted some Muslim citizens will effectively be rendered second-class citizens. Therefore the reforms process must ensure that the MMDA provisions, procedures and implementation do not violate fundamental rights. Women are individuals with full autonomy and free will to consent to marriage and divorce and MMDA has to recognize and mandate this principle.

2. Women as key stakeholders in reform

Muslim women have been the most affected by the MMDA and Quazi court system and the mandate for reform is principally derived from their call for changes to MMDA. Therefore women's experiences of the law and its implementation procedure and their just expectations must inform and shape the reform agenda. In the current reform initiatives which are underway, Muslim women must have a place at the table. Their voices and demands should be heard and engaged with as the key constituency that is most affected.

3. Respect for the heterogenous character of Muslim community and diversity of opinion

Muslims living in Sri Lanka are diverse and not homogenous (on the basis of ethnicity eg. Moors, Malays, Bohra's, Memons and others) as well as on the basis of sect, madhab (school of jurisprudence) and religious ideologies. The reform process and the resultant law must recognize, respect and reflect this heterogeneity within the community. The scope of reforms should not be held hostage to the singular and narrow interpretations and opinions of a few, albeit a powerful and vocal, group of very conservative men.

4. Recognition of the dynamism of Islamic jurisprudence

Islamic jurisprudence is not static and has evolved in response to social, economic and cultural changes and the different contexts. There is myth of homogeneity of Muslim laws that we believe is one of the biggest stumbling blocks to reform. A close look at the Muslim legal systems around the world reveal a diverse and immense range of interpretations of Quranic injunctions. Reform of Muslim laws to ensure justice and equality for women is possible through *ijtihad* (reinterpretation of Islamic jurisprudence) and through selection of the most gender progressive laws and principles from the different schools of law (eclectic choice or *Takhayyur*).

Lack of minimum age of marriage

- Ensure that the MMDA reflects the application of the State stipulated age of 18 years as minimum age of marriage for all without exceptions;
- Remove from the MMDA all provisions and inferences that refer to children over or below 12 years of age being eligible to marry. Age of marriage cannot be decided arbitrarily and/or by an unrepresentative committee, group or individuals;
- Date of birth of bride and groom has to be mandatorily recorded in the marriage registration forms.

Lack of mandatory consent & signature of the bride

- No marriage can be legally entered into without full and free consent of bride and groom, which is expressed by them in person and in presence of marriage registrar to solemnize the marriage before witnesses;
- Signature/thumbprint of bride and groom must be mandatory in all official marriage documentation. Other individuals (women and men) can sign as witnesses;
- It must be mandatory for all Muslim marriages to be registered and legally recognized;

Lack of autonomy for women to enter into marriage

- Adult Muslim women as Sri Lankan citizens are entitled to equal autonomy and decision-making in entering into their own marriages and need not require the 'permission' by law of any male relative or Quazi to enter into a marriage;

Does not include provisions for Marriage contracts

- As mandated by Islamic law, MMDA must recognize and allow for both parties to the marriage to mutually draw up marriage contracts prior to marriage registration;
- Eg: Matters such as polygamy & related conditions, must be stipulated in the contract prior to marriage.

MMDA allows unconditional polygamy for men

Polygamy as a practice has adverse impacts on women and children and therefore should be abolished. If for whatever reason, it is decided that polygamy will continue within the MMDA, reform must ensure that this right is not abused and the duties and responsibilities attached to the right are made explicit. Accordingly it is recommended that:

- A woman should be informed at time of marriage registration whether or not her husband may opt for polygamy and have the opportunity to reiterate her acceptance or non-acceptance in a marriage contract;
- Prior to taking subsequent wives, the husband should get the informed consent of all wives and to-be wife/wives;
- Quazi must authorize or reject an application by husband for a polygamous marriage after verifying husbands' capacity to maintain equally (especially financial capability), and after obtaining written approval of current wife/wives and wife to be;
- It should continue to be mandatory to record all previous marriages that are currently active, in the marriage registration forms.

Divorce provisions unequal for men and women

- Provisions & procedures of divorce must apply equally to women & men;
- MMDA should not allow unilateral divorce by either wife or husband therefore it must be provided that reasons be recorded for *talaq* (divorce by husband);
- Equitable and progressive provisions on divorce from the different *madhabs* (schools of Islamic jurisprudence) must be considered and included in the MMDA, with provisions for parties right to choose the *madhab* applicable;
- Types of divorce, grounds for divorce and effective and efficient process of divorce should be applicable to all who are governed by MMDA. MMDA must recognize right to *fasah* (divorce by wife) for all Muslim women governed by MMDA.

Women prevented from appointment as Quazi, Assessors (jurors), Marriage Registrars or to the Board of Quazi

- Women should be eligible to be appointed as Quazis, as Members of the Board of Quazis, Marriage Registrars and assessors (jurors);
- Excluding or disqualifying women from these positions by law is a direct violation of the equal right of a Muslim woman as a Sri Lankan citizen to pursue her profession of choice;
- These are government salaried and tax- funded positions from which women are excluded on the basis of gender and therefore also amounts to direct discrimination by the State against Sri Lankan Muslim women;
- The MMDA must make it mandatory that in cases requiring a jury panel, that at least two of the jurors are women (as quorum);
- 3 of 5 (60%) of members of the Board of Quazi have to be lawyers and must at least have 2 of 5 (40%) women.

Poor standards for Quazi courts

- Appointments of Quazis must be based on an agreed set of qualifications and competencies;
- Quazis should be a Muslim man or woman of good standing in society who has had an unblemished record of service (eg: over 10 years in the field of law, public service, social service, mediation and/or counseling or in a relevant profession) and have a sound knowledge of the MMDA;
- A systematic recruitment process must be provided for - an application with community referees and an interview process including written component must be required and
- Comprehensive training both before placement and thereafter on a regular basis must be provided;
- Quazis must be provided enhanced remuneration that benefits the judicial nature of the office they hold;
- Provision must be made for the mandatory training of all Quazis on MMDA, law, procedures, gender sensitivity and ethics prior to taking up duties;
- Improvement of Quazi courtrooms to ensure privacy and confidentiality;
- Quazi's must be required to explain to those accessing the court the procedures involved in different types of divorce, maintenance etc.;
- Domestic violence cases have to mandatorily be referred to the police;
- There needs to be a systematic oversight mechanism by the Judicial Services Commission (JSC) of the Quazis and the operation of the Quazi courts;
- All courts must have compulsory female counselors to support Muslim women during cases.

No monitoring mechanism of Quazi courts

- Establish a system for regular monitoring of Quazi court proceedings and records;
- Observations from the visits to be fed into updating the continuous training and if serious/urgent correction is required the officer responsible for the monitoring visit to be able to make direct recommendations to the relevant Quazi;
- Ensure that the public accessing these courts are made aware of complaints mechanisms/formats that will be entertained by the JSC. The nature of the complaints entertained must be clear, all complaints regarding conduct of the Quazi and NOT complaints that form grounds for appeal. For example, abuse and/or ill treatment of persons appearing before court (whether within the court or outside), sexual or other forms of bribery, etc;
- The JSC must inquire into complaints and take appropriate disciplinary action against any Quazi found to be guilty of misconduct or criminal conduct.

Advisory Board has not been implemented

- Qualified individuals who have MMDA related expertise and experience and are able to advise the Registrar General on related matters must be appointed to the Advisory Board;
- The Advisory Board must comprise of at least 50% women.

Inadequate provisions for recovery of *Mahr* (gift to bride)

Procedures must be clearly stipulated to recover the *mahr* promised at the time the marriage is registered in the event the husband fails to pay it. This right should be exercisable at any time of the marriage and also as part of divorce proceedings.

No mandatory provision for payment of *mata'a* (Alimony)

The MMDA must make mandatory provision for payment of *mata'a* by the husband to the wife in all cases of *talaq* as well as in cases of *fasah* divorce, based on the fault of the husband.

Absence of guidelines to calculate quantum of maintenance

- The MMDA must provide specific guidelines for assessment /calculation of maintenance payments for women and children;
- Powers similar to the Magistrate's under the Maintenance Act of Sri Lanka for enforcement, including enforcement against employer, enforcement regardless of spouse being out of the country to be made available to the Quazi;
- Provision must be made to recover maintenance from the time the maintenance was stopped and not limited to maintenance from the time the application was filed;
- A spouse should be permitted to file an application for maintenance in the area where she is resident;
- Provision must be made, where the applicant requests, for maintenance to be deposited directly into a bank account.

Un-Islamic practice of *Kaikuli* (dowry) allowed

- Granting and obtaining *kaikuli* must be penalized as it is an un-Islamic practice and often adversely affects women;
- If it is to be maintained for some reason, in order to discourage/eliminate the practice it must be made mandatory that all *kaikuli* dealings (moveable and immovable assets) are recorded during the registration of the marriage;
- There must be clear procedures to recover *kaikuli* during any point of time in the marriage, separation period or divorce;
- *Talaq* should not be finalized until the return of *kaikuli* and obtaining of *mahr* (Islamic dowry by husband to wife).

Law of the sect causes undue confusion

- The MMDA must apply uniformly for all Muslims across Sri Lanka regardless of sect or madhab;
- *Takhayyur* or exercising preference between the different schools Islamic Law (eg: between the four *madhabs*) and choosing the most desirable rule from the perspective of women and children, must be applied;
- Equitable and progressive provision from the different *madhabs* must be considered and included in the MMDA;
- The right to belong to any *madhab* (eg.Shafi, Hanafi, Maliki, Hanbali, Isma'ili) or not, must be recognized as a personal decision, and an individual right that cannot be interfered with.

No provision to opt out of MMDA

Make MMDA optional for Muslims. If both parties to a marriage choose to, they must have the right to opt out of registering marriage under the MMDA and the right to register a marriage under the General Marriage Registration Ordinance (GMRO). This position is similar to other non-Muslim countries where Muslims register under the general law, but have Islamic marriage ceremonies should they choose to do so.