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CABINET MINISTERS FAIL TO ADEQUATELY ADDRESS MMDA REFORM CONCERNS

It is acknowledged that MMDA reform is progressing and the fact that the Cabinet of Ministers of Sri Lanka are engaging with the much needed for reform is a positive step. This momentum has been shadowed by the fact that the reforms proposed are not adequately addressing the issues. In the spirit of continuing to highlight the need for comprehensive and meaningful reform the table below engages with the proposed amendments the Muslim Marriage and Divorce Act (MMDA) as approved by Cabinet of Ministers on August 20th 2019. The approved recommendations contain highly problematic amendments on certain matters and have in effect failed to adequately address concerns raised by Muslim women's groups on some other matters.

Appeals to MPs from women's organisations to improve on the decisions of 11th July have gone unheard. It is devastating that pressures and threats from conservative community groups against reform have triumphed over principles of equality and justice and basic fundamental rights of Muslim women. It is utterly disappointing that Muslim MPs have backtracked on some of the previous progressive positions of 11th July.

Below is a comparison of the different positions held by Muslim MPs on 11th July and those approved by Cabinet Ministers on 20th August, along with our initial comments and observations.

**Shaded in pink are the most detrimental amendments proposed. Shaded in orange are amendments that are incomplete and/or problematic but to a lesser degree than those in pink. Please refer to accompanying comments.*

	Decisions taken at meeting of 11 th July 2019 at Parliament at 3.30 pm by Muslim MPs	Recommendations for MMDA reform passed by Cabinet of Ministers on August 20th 2019	Initial Comments and Observations based on women's demands for reform
1	Age of Marriage: Agree to provide for 18 years for both men and women without a difference	Age of Marriage: a. Provide for 18 years for both men and women without a difference. b. Exceptions are provided for 16 – 18 years with the approval of the Qazi.	Exceptions for 16 & 17 years is extremely problematic as data on registered Muslim marriages of girls below 18 years shows that throughout the country most underaged marriages involve girls between 16 and 17 years of age. In some districts 80 % - 100% are from this age group,

		<p>c. It shall be an offence if a marriage is solemnized without the permission of the Qazi or below 16 years.</p> <p>d. Penal Procedure - How /who should initiate penal procedure has to be deliberated</p> <p>e. Punishment – 1-2 years imprisonment and Rs. 100,000</p>	<p>leading to dropping out of critical education years (O’Levels & A’Levels).</p> <p>Having exceptions to the minimum age of marriage for 16 & 17 years will NOT solve the main issues pertaining to child marriage in the Muslim communities.</p> <p>It also continues to violate the rights of Muslim children who will still not receive the same protection of child rights related laws and policies as non-Muslim children of Sri Lanka.</p>
2	<p>Registration – validity / invalidity : Registration and Nikah are mandatory to validate a marriage</p>	<p>Registration</p> <p>a. Registration and Nikah are mandatory to be taken place at the same time</p> <p>b. Failure to register : Non-registration shall be a punishable offence</p> <p>c. Status of children: Children born out of unregistered marriages should be considered legitimate and all their rights must be ensured by law.</p>	<p>Cabinet Ministers have endorsed a more regressive stance than one proposed by Muslim MPs in July. Under the proposed amendments, marriages which happen without registration continue to be valid leaving loopholes for secret marriage, marriages of minors etc to occur without the option of nullifying such marriages.</p>
3	<p>Mata’a / Compensatory gift – lump sum compensation - Agree to Mata’a for Talaq, Khula and Faskh. Compensation for Faskh is possible only if it is proved that the wife has been compelled by duress exerted upon her by her husband to seek a Fashh in order to avoid paying Mata’a.</p>	<p>Mata’a /Compensation</p> <p>a. Provide for payment of Mata’a (lump sum compensation) for Talaq, and Khula’a.</p> <p>b. Provide for compensation (Consolatory payment) for Fasakh only if it is proved that the wife has been compelled by duress exerted upon her by her husband to seek a Fasakh divorce in order to evade the payment of Mata’a.</p>	<p>Muslim women’s groups asked for compensation to be provided by husband to wife in the case of fasakh (divorce initiated by wife based on fault of husband) where harm (eg domestic violence) had taken place.</p> <p>Case studies show that many instances of fasakh divorce is due to serious domestic violence (DV) and ill-treatment by husbands. However, women do not get any compensation in such cases currently and as proposed.</p>
4	<p>Sects / Mazhabs. Agree to keep the sect in-tact subjects to following amendments:</p>	<p>Sects / Mazhabs. Provide to keep the sect intact as per section 16, subject to introducing new provisions as follows:</p>	<p>MMDA must apply uniformly to all Muslims without causing disadvantage to persons based on sect or madhab (school of jurisprudence).</p>

	<p>(i) Parties to a Muslim marriage belong to two different sects, can mutually agree to be governed by a particular sect in the declarations made by them</p> <p>(ii) One or both parties to a Muslim marriage do not belong to any sect, or where the parties to the marriage belong to two different sects but they have not mutually agreed to abide by the Muslim law of any particular sect in the declaration made by them, all the matters relating to the said marriage shall be governed by the principles of Muslim law, without being confined to the law governing any particular sect.</p>	<p>a. Every Sri Lankan Muslim is presumed to be following Shafi Mazhab for the purposes of this Act, unless he/she declares to be otherwise. However, following any sect will be subject to the provisions of this act.</p> <p>b. Parties to a Muslim marriage belong to two different sects, can mutually agree to be governed by a particular sect in the declarations made by them prior to marriage</p> <p>c. One or both parties to a Muslim marriage do not belong to any sect, or where the parties to the marriage belong to two different sects but they have not mutually agreed to abide by any sect, in the declaration made by them prior to the marriage, all the matters relating to the said marriage, shall be governed by Muslim Law within the limits of four Mazhabs namely Shafi, Hanafi, Hanbali and Maliki</p> <p>d. Where in any situation falling within the provisions of the preceding subsections of this section, any question of difficulty arises in regard to the validity or otherwise of a marriage or the status, rights and obligations of the parties to the marriage in any proceedings in the Quazi Court or any other court that is required to make a decision or order, such court may consult the Muslim Marriage and Divorce Advisory Board by a reference addressed to the said Board. In making its determination, the said Board may consider the applicable principles of Muslim law within the limits of the four Mazhabs namely Shafi, Hanafi, Hanbali and Maliki and shall set out in its determination in clear detail the applicable principles with all necessary explanations.</p>	<p>The position on sects and madhabs is problematic. The primacy given in (a) to the Shafi Madhab, over all others is an unnecessary and unfair position. It is this legal recognition sought to render superior one group over others that builds suspicion and disharmony and leads to inequality and also violence in some instances.</p> <p>The failure to recognise non-Sunni sects (see (b) across) legally reinforces discrimination of non Sunni Sects. This intolerance must not have a place in law.</p> <p>It is recommended that while the islamic jurisprudence relied on for developing the law must be able to draw from all sects equally to ensure that the best of islamic jurisprudence is available to inform reform, it must also be stressed that no jurisprudence that reflects inequality or disadvantages women should be considered valid. For example the jurisprudence of the Zeidi sect of the Shias that disempower women from initiating divorce must not be recognized.</p>
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<p>5</p>	<p>Women as Qazi – Agree to remove the gender discrimination by removing the word “male”</p>	<p><i>No mention.</i></p>	<p>Cabinet Ministers have endorsed the position that women cannot be Quazi judges, thereby perpetuating a direct violation of fundamental rights of Muslim women as Sri Lankan citizens to hold judicial professions for which there are qualified.</p> <p>The Quazi court positions are government salaried and tax- funded positions from which women are excluded on the basis of gender and therefore amounts to direct discrimination by the State against Sri Lankan Muslim women.</p> <p>Excuses given by the All Ceylon Jama'iyyatul Ulama (ACJU) to deny women of these positions have no religious basis are are purely patriarchal. There is no reference in the Qu'ran to any profession or activity, in society, leadership or otherwise, that is forbidden for women. The Qur'an does not differentiate between the value of a woman and a man. The Qur'an does not refer at any time to biological difference justifying unequal treatment.</p> <p>Muslim women are judges in Shari'ah and family courts in Sudan, Palestine, Egypt, Tunisia, Yemen, Malaysia, Pakistan and Indonesia.</p>
<p>6</p>	<p>Role of male Wali. - Agree to keep male wali, provided that in the event of the Qazi happens to be a woman, when there is no wali for the bride, a male Qazi of another jurisdiction can be invited to deputize the female Qazi of a particular jurisdiction. (Present position is that wali is required for all women other</p>	<p>Role of male Wali – Role of male Wali will remain as it is , subject to the inclusion of the consent of the bride</p>	<p>Cabinet Ministers have endorsed the position that Muslim women do not have equal capacity to enter into marriage as men, as they require 'consent' of their male guardians. Cases studies demonstrate that Muslim women and girls are forcibly married by their <i>wali</i> in abuse of <i>wali's</i> legal authority. Often used to compel girls into marry at a young age, for reasons of obtaining dowry, relieving financial burden of taking care of children or under the impression of discharging a parental obligation without considering the interest of the woman or girl.</p>

	<p>than those who have been married before while women can get Quazi approval and marry without Wali).</p>		<p>The concept of <i>wali</i> restricts women’s individual and equal agency, and autonomy in familial matters. These provisions are entrenched in the patriarchal notion that women’s decision-making ability in marriage is controlled by male members of her family and by extension - community.</p> <p>Brides belonging to the Hanafi madhab as well as Shia sect have the right to marry with their own free will and may sign their marriage certificate.</p> <p>In Afghanistan, Bahrain (Shia), Egypt, Iraq, Morocco, Tunisia, Turkey, the consent of a marital guardian (<i>wali</i>) is not required for adult brides and grooms.</p>
<p>7 and 8</p>	<p>Qualification of Quazis and Upgrade of Quazi courts - Agree to elevate the institution of Quazi to the status of a court, be recognized as an integral part of the Sri Lankan Judiciary and to enhance the status of a Quazi to that of a permanent and full time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission. The amending legislation to provide that persons to be appointed as Quazis, Temporary Quazis and Special Quazis, should be Attorneys-at-law having a sound knowledge of Muslim law.</p>	<p>Qualification of Quazis and Upgrade of Quazi courts – Provide to elevate the institution of Quazi to the status of a court, be recognized as an integral part of the Sri Lankan Judiciary and to enhance the status of a Quazi to that of a permanent and full time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission.</p> <p>The amending legislation to provide that persons to be appointed as Quazis, Temporary Quazis and Special Quazis, should be Attorneys- at-law having a sound knowledge of Muslim law. (Subject to keep section 74 intact /Lawyers cannot appear at Quazi Courts in their professional capacity)</p>	

<p>9</p>	<p>Lawyers Appearing at Quazi court : Do not agree to representation by Attorneys - at – Law in the Qazi courts. Either party can be accompanied by any individual during their court procedures but lawyers cannot appear in Quazi courts to represent clients in their legal capacity</p>		
<p>10</p>	<p>Polygamy with conditions: Agreed to keep the polygamy with conditions applied as follows (This will almost curtail polygamy)</p> <p>Quazi approval required based on following conditions for subsequent marriage:</p> <ol style="list-style-type: none"> 1. Adequately looking after wives 2. Adequately looking after children 3. Adequately looking after future wife 4. Financial capacity to look after all 5. Inform present wife/wives 6. Subsequent marriage contracted without Quazi’s permissions is punishable by imprisonment <p>If wife doesn’t give permission, wife can apply for a divorce.</p>	<p>Polygamy with conditions: Provide for the Polygamy to be restricted as follows:</p> <ol style="list-style-type: none"> a. A Muslim woman should be empowered at the time of registration to enter into a prenuptial contract stating that she is entitled to Fasakh divorce if he contracts another marriage without her consent while being married to her b. If wife doesn’t give consent, wife has the right to apply for Fasakh divorce c. For a subsequent marriage to solemnized, it is mandatory to obtain the permission of the Qazi d. Polygamy without Quazi’s approval and without fulfilling the conditions laid down in 8-e cannot be solemnized and registered e. Subsequent marriage without the approval of the Qazi, shall be a punishable offence f. Approval of the Quazi shall be subject to the fulfillment of following conditions for subsequent marriage: <ol style="list-style-type: none"> i. Adequately looking after wives ii. Adequately looking after children iii. Adequately looking after future wife iv. Financial capacity to look after all 	<p>Muslim MPs have failed to include the condition that the explicit consent of Muslim wives are needed in order for their husbands to partake in subsequent marriages.</p> <p>Currently most polygamous marriages are entered into without notice to and without consent of the existing wife/wives. This lack of knowledge and agreement of existing wives to a polygamous marriage is one of the main injustices faced by Muslim women under the MMDA. It undermines basic principles of respect and dignity.</p> <p>Many documented cases demonstrate that men engage in polygamy for reasons as arbitrary as interest in marrying a younger woman, finding another woman more physically attractive, acquiring dowry property or money, marrying a woman who will earn an income and contribute to his finances.</p> <p>The historic limitation of polygamy by Islam to reasons of supporting and maintaining socially vulnerable women is not practiced and moreover abused to render women emotionally and physically insecure, financially vulnerable and the subject of abandonment. There are multiple narratives of men who abandon their first wife and</p>

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	Polygamy without Quazi's approval and without fulfilling the conditions cannot be solemnized and registered. Such marriage should be invalidated.	v. Informing present wife/wives	children, deny their families maintenance and paternal care.
11	Consent / Signature of Bride – Agree to provides for Wali as well as bride to sign	Consent / Signature of the Bride a. Provide for the consent of the bride to be mandatory to validate the marriage in addition to the consent of the Wali b. Accordingly provide for the bride to place her signature or thumb print in the marriage register in addition to the signature of the Wali.	
12	Role of Women – Agree to provide for adequate representation for males/ females in MMD advisory board, Board of Quazis, Appointment of women registrars.	Role of Women a. Provide for adequate representation for males/ females in Muslim Marriage and Divorce Advisory Board and Board of Quazi's. b. Provide for a women to be Registrar of Muslim Marriage by removing the word "male".	
13	Maintenance – Agree to take out of the jurisdiction of Quazi court and bring under the District Court	Maintenance and Custody of the children a. Provide for the custody to be brought under the Qazi court if the Qazi courts are upgraded as proposed b. Set up a maintenance fund as proposed in the MMDA report	Muslim MPs have completely overturned their original position by suggesting that custody be brought under the Quazi courts. This stance is highly problematic. Child custody matters for Muslims families must remain with the District Courts, so as to ensure the principle of best interest of the child to apply without undue 'community' influences.

<p>14</p>	<p>All matters agreed upon by consensus - Agree to include all other matters agreed upon by consensus by both Justice Saleem Marsoof et al and Faiz Mustafa et al</p>	<p>All amendments agreed upon by consensus in the MMDA report: a. Provide for all unanimously agreed upon other matters in the MMDA committee report submitted by Justice Saleem Marsoof that should come in the Act to be included in the Bill b. Provide for all unanimously agreed upon other matters in the above MMDA committee report that fall within the scope of regulations should be gazetted by the Minister of Justice along with the Amendment Bill.</p>	<p>The proposed amendments which were agreed upon unanimously needs to be scrutinized as they contain some problematic recommendations, especially regarding procedures for divorce.</p> <p>The procedures for divorce outlined in the Schedules 2 & 3 of the MMDA report indicates that wives cannot appeal in cases of talaq divorce. While for fasah divorce (initiated by wife) on specified grounds and conditions, husbands can appeal twice, all the way to Supreme Court. A reading of the Schedules demonstrates that to obtain a talaq divorce there is a total of 9 steps (which experience dictates will span a few months), while to obtain a fasah divorce inclusive of mandatory counseling, inquiry and appeals there are 15 steps (which experience dictates will span a few years).</p> <p>Appeals prolong the negative impacts of the process and have been particularly debilitating in cases of husbands who have been abusive and used the legal process to cause grave hurt to their wives and children. The inability of wives to appeal in cases of talaq divorce has also left women vulnerable and sometimes even destitute.</p>
<p>15</p>		<p>Kaikuli /dowry and Mahar a. Provide for recovery of kaikuli /dowry to be expanded to include movable and immovable properties b. The definition of “kaikuli” in section 97 to be amended to mean “any sum of money paid, or other movable or immovable property given or any sum of money or any property promised to be paid or given to a bridegroom for the use of</p>	

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		<p>the bride, prior to, at the time of, or even after entering into the contract of marriage, by a relative of the bride or by any other person</p> <p>c. Mahar is to be determined by the bride.</p> <p>d. Provide for Mahar to be recovered subject to ruling of the sect</p>	
16		<p>Restructuring the Board of Quazis and making it more accessible to the Provinces. Provide to redesignate the Board of Quazis as the “Quazi Appellate Court”, and that its Chairman should be a full-time Judicial Officer of such class and grade as may be determined by the Judicial Service Commission with such qualifications and attainments that may be prescribed by the Judicial Service Commission. It is also recommended that the number of members of the Board (to be re-designated as the Quazi Appellate Court) be increased from the current 5 to 9 to facilitate more regular sittings in at least three outstation centres.</p>	