

GUIDEBOOK

GETTING A FASAH DIVORCE

UNDER THE MUSLIM MARRIAGE & DIVORCE ACT (MMDA) OF SRI LANKA



PROCEDURES AS AT DECEMBER 2020

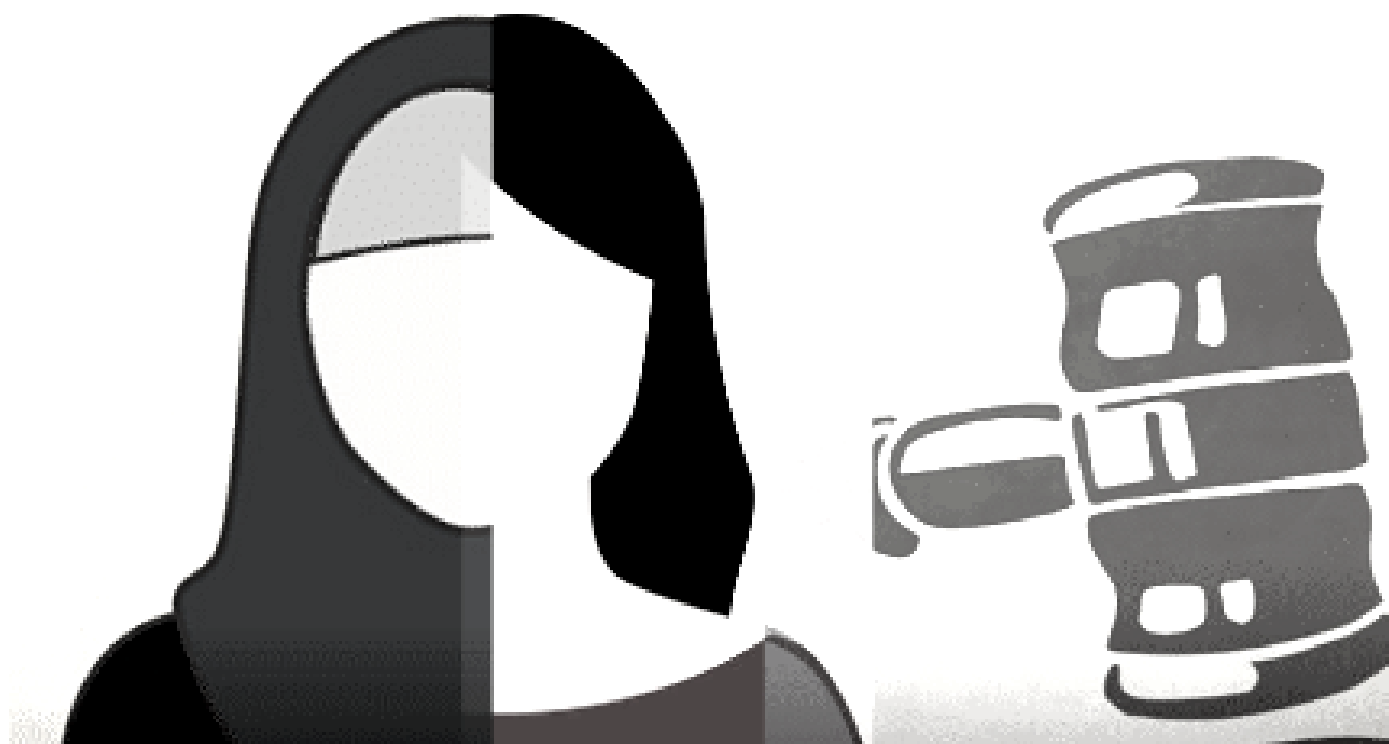


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INTRODUCTION

This guidebook is a result of the many requests for information about the procedure relating to Fasah divorce that Muslim Personal Law Reform Action Group (MPLRAG) receives on a weekly basis. It is not a substitute for legal advice for individual cases. It is meant as a guide designed to provide information about what is in the law and give some practical advice based on what women have experienced.

Muslim women may have a different experience for various reasons and an individual Quazi may use his own discretion to make the procedure more difficult or easier. There are many instances where the procedures adopted by the Quazi is not consistent with the procedure set out in the MMDA. It is because the experience before Quazi courts lack consistency and is sometimes arbitrary, unlawful or prevents people from accessing justice, that there has been a long-standing call for reform. We know that the MMDA itself does not provide enough safeguards for concerns of Muslim women in Sri Lanka. The Fasah divorce procedures are inherently unfair and discriminatory to women. This is why MPLRAG also advocates for comprehensive reform of the MMDA. However, most often the existing MMDA is not properly implemented and women experience additional hardships that are not even in the Act.

Until such reform is implemented, women who engage with the Quazi court system must be empowered to know the law and achieve justice within the current framework with all its limitations. With knowledge and understanding there is power. We hope this guidebook will support Muslim women and their families to better understand the law and more effectively navigate and negotiate their experiences at the Quazi court.

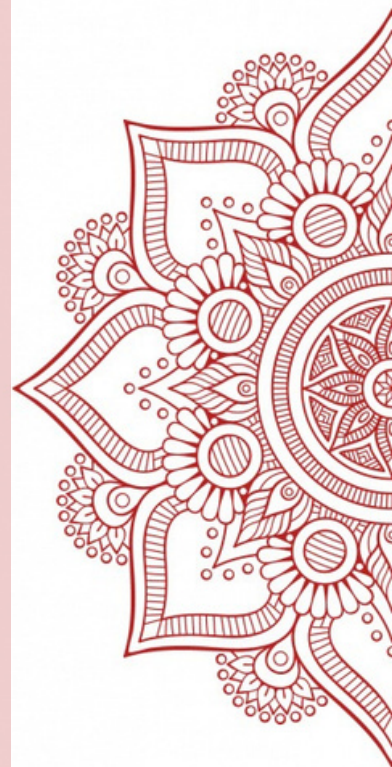
ETHICS OF MARRIAGE & DIVORCE IN ISLAM

Marriage in Islam is about mutual love, compassion, kindness, understanding and companionship. The Quran requires spouses to "Live with them in kindness" [Surah an-Nisa 4:19].

Islam recognizes divorce. Similar to marriage being entered into with due consideration, consent and an understanding of responsibilities, divorce too must be a carefully considered decision. Islam recognizes that there can be situations in which either the woman or the man can no longer continue in a marriage.

Instead of perpetuating harm, it permits parting and recommends that parting is done with kindness. The Quran calls on parties to the marriage "either hold together on equitable terms (ma'ruf), or separate with kindness (ihsan)" [Surah al-Baqarah 2:229].

Islam also promotes fairness in procedure. Surah an-Nisa 4:35 places both spouses on an equal footing in arbitration and mediation: "If you fear a breach between a married couple appoint (two) arbiters, one from among his people, and the other from among her people."



WHAT IS FASAH DIVORCE?

Fasah is a form of divorce that is initiated by the wife. There are many different Muslim sects and madhabs (schools of jurisprudence) in Sri Lanka and some don't recognise Muslim women's right to Fasah divorce. Within the Sunni sect, only Shafi'i, Maliki & Hanbali madhabs recognise Fasah. Hanafi madhab (of Sunni sect) and Shia sect law does not recognise women's right to divorce. So unfortunately, as the current MMDA allows for the sect law of Muslims to apply with regard to divorce, there is no provision for women of these sects/madhabs to initiate Fasah.

Under the MMDA, a wife can obtain a Fasah divorce on the basis of matrimonial fault on the part of the husband. It can be initiated without the consent of the husband. Section 28 of the Act specifically refers to Fasah divorce:

"28. (1) Where a wife desires to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on account of any act or omission on his part which amounts to a "fault" under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed,"

Proof of any one or more of the following grounds are accepted for Fasah:

- **physical ill-treatment or cruelty such as assault**
- **non-maintenance of the wife by the husband**
- **malicious desertion (eg: husband leaves wife and lives away from her, or causes her to leave and live away from the matrimonial home)**
- **adultery**

Certain non-fault grounds are also accepted for Fasah

- **impotency of the husband at the time of marriage,**
- **insanity or**
- **inability to maintain the wife**

Sri Lankan courts have held that Fasah can be obtained:

If a husband makes his wife miserable by cruelty of conduct even if it does not amount to physical ill-treatment:

"The method, degree and standard of ill-treatment required to constitute a 'fasah' divorce amongst Muslims belonging to the Shafie sect are much less than that is required under the common law. No physical ill-treatment is necessary for a fasah divorce according to Shafie Law. If a husband makes his wife's life miserable by cruelty of conduct even when it does not amount to physical ill-treatment, the wife can claim a 'fasah' divorce." Deen Vs. Rauf (1997 2 SLR 253)

If the husband habitually makes false allegations of adultery:

Under the Muslim Law a husband who habitually makes false allegations of adultery against his wife is guilty of cruelty and that such cruelty is a valid ground for divorce; Rasheeda v. Usoof Deen Vol 4 MM & DLR 162

"She is equally entitled to a separation when he charges her with unfaithfulness to him and yet refuses to establish the accusation by a formal proceeding"; Amir Ali in Muslim Law, 5th ed. at page 522

PRACTICAL ADVICE ON INITIATING A FASAH DIVORCE

STEP 1

DECIDING TO GET A FASAH DIVORCE

Some women make a conscious decision to obtain a divorce. Some women have experienced being forced to file for Fasah divorce by the husband and sometimes by the Quazi.

When thinking about divorce it is useful to:

- make sure it is a well considered decision. This means that you are not taking the decision hastily or lightly and have given it enough thought. That you have decided that this is the best decision to take considering all the circumstances.
- think about which divorce procedure is best suited.

MUBARAT - Divorce by mutual agreement where both parties discuss and agree to divorce. There is no requirement for either party to speak about or give evidence of fault by the other.

FASAH - where you have evidence of wrongdoing by the husband including two witnesses. Unfortunately, under the current MMDA, husbands are not required to compensate their wives for any harm caused if Fasah divorce is sought.

KHULA - you have decided to obtain divorce and you are willing to return the Mahr. Sri Lankan Quazis often require husband's consent to grant khula.

STEP 2

ONCE YOU HAVE DECIDED TO FOLLOW THE FASAH DIVORCE PROCEDURE

Fasah is based on evidence of fault. Consider what evidence you have. You will require two witnesses who can support your statements and have witnessed your husband's conduct or the suffering you have endured.

If there is any other evidence of cruelty, accusations or ill-treatment in the form of text messages, medical reports, photographs, police complaints, make sure you collect, take print outs and keep this documentation safely.

PRACTICAL ADVICE ON INITIATING A FASAH DIVORCE

STEP 3

REACH OUT FOR SUPPORT

If possible, ask a family member or two, or friends or even a women's support group in your community to support you through the process by accompanying you to the Quazi and to courts. They will also be witnesses to your experience and may be able to help you through the process.

STEP 4

IDENTIFY THE QUAZI FOR YOUR AREA, CALL AND MAKE AN APPOINTMENT

The Judicial Service Commission (JSC) will have the list of Quazis appointed and should be able to give you information on contacting the Quazi for your area. The general phone line as given on the JSC website (<http://www.jsc.gov.lk/>) is (+94)112433119/ (+94) 11 2451159.

Call the Quazi, verify that he is the Quazi for the area in which you are currently residing and make an appointment to make your application. It is best to ask specifically what documents the Quazi requires you to bring.

STEP 5

PREPARE FOR YOUR FIRST APPOINTMENT TO THE QUAZI

After you make an appointment with the Quazi, it is advised to take the following documents with you:

- Letter requesting divorce signed by you. Make sure to state the reason for asking for the divorce in your letter.
- Copy of national identity card.
- Copy of marriage certificate (keep the original in your custody to show, but don't hand this over).

PRACTICAL ADVICE ON INITIATING A FASAH DIVORCE

STEP 6

CONSIDER ALSO IF YOU NEED TO ASK FOR ANY OTHER RELIEF FROM THE QAZI, SUCH AS:

- Child maintenance (a monthly payment to be made by the father for the needs of the child).
- Return of Kaikuli (dowry).
- Wife maintenance (until divorce is granted).
- Expenses relating to child delivery.

IMPORTANT TO NOTE: Quazis have NO jurisdiction over child custody. This means Quazis cannot decide whether the children should be with the mother or the father. Custody is a question that can only be decided by the District Court.

STEP 7

AFTER THE QAZI HAS ACCEPTED YOUR CASE, HE HAS TO FOLLOW THE PROCEDURE* SET OUT IN THE THIRD SCHEDULE OF THE MMDA.

The procedure covers:

1. Giving notice to the husband
2. Conducting the hearing
3. Reaching a decision and making the order
4. Registering the divorce

****See the next section for a detailed account of the procedure.***

During the Quazi court hearings:

- Whenever possible, it is useful to be accompanied by someone to the hearings.
- Always keep a set of photocopies of the documents that you may give the Quazi during the hearing.
- Write down what happened at the hearing after you return home. Keeping a record of the dates and events may be useful for later in case there is an appeal.

DETAILED DIVORCE PROCEDURE FOR FASAH

For those of you who want to know the detailed legal procedure, provided below is the full detailed procedure as outlined in the Muslim Marriage & Divorce Act (MMDA) of 1951.

Section 28 (1) of the MMDA states:

Where a wife desired to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on any account of any act or omission on his part which amounts to a "fault" under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed.

The Third Schedule sets out a series of steps which are referred to as "Rules", which collectively form the procedure to be followed. Below, each of the most relevant rules are described. Not all rules may apply to your case (like Rule 3). There is also a column to help you track your case against the procedure set out in the law.

RULE #	FASAH PROCEDURE AS OUTLINED IN THE THIRD SCHEDULE OF THE MMDA	TRACK YOUR CASE! (Add dates & notes)
RULE 1	<p>The wife may make an application to the Quazi of</p> <ul style="list-style-type: none"> a) the area to which she is a resident or, b) where a special Quazi has been appointed for the area. 	
RULE 2	<p>After receiving the application, the Quazi will issue a notice. The notice will set out the date and place fixed for a hearing. This notice will be sent to the husband by the Quazi.</p> <p><i>Note as per Rules 3 - 4, there are different guidelines given for cases where the husband is not in the country and/or has no fixed abode in the country.</i></p>	
RULE 3	<p>If the husband is not in Sri Lanka and the notice cannot be sent to him, the Quazi can decide either to serve the notice to the nearest relative or dispense with the notice.</p>	

RULE #	FASAH PROCEDURE AS OUTLINED IN THE THIRD SCHEDULE OF THE MMDA	TRACK YOUR CASE! (Add dates & notes)
RULE 4	If the husband is in Sri Lanka but has no fixed place of residence and the notice cannot be sent, the Quazi may decide to not sent the notice directly to him (personal notice) and instead have the notice posted at each of the Jummah Mosques in the Quazi's area and at the house of the nearest relative of the husband if the address is known.	
RULE 5	The Quazi must record all steps taken to serve the notice to the husband in accordance with the procedures.	
RULE 6	If the husband is not present at the hearing, the Quazi must record evidence of proof of posting or other delivery or posting up of notice at the mosque or relative's residence.	
RULE 7	The Quazi must then empanel three Muslim assessors to assist him in the hearing of the case. This is mandatory.	
<p><i>Rules 8 - 9 are with regard to exemptions for and background of assessors.</i></p>		
RULE 10	<p>It is the duty of the Quazi and assessors before the hearing to try and "bring the parties to an amicable settlement and, with the consent of the parties, to abate or remove the real cause of trouble between them and to prevent it from recurring thereafter. But if the parties will not agree to such settlement, the Quazi and the Muslim assessors (if any) shall proceed to hear evidence and to determine the application."</p> <p><i>Note: This is the stage where the Quazi will get the two parties to appoint arbitrators, send the couple for counselling and speak to the couple himself separately and/or together.</i></p>	

RULE #	FASAH PROCEDURE AS OUTLINED IN THE THIRD SCHEDULE OF THE MMDA	TRACK YOUR CASE! (Add dates & notes)
RULE 11	<p>The Quazi must</p> <ul style="list-style-type: none"> • Maintain a record of proceedings in the case (details of key issues) • Record the statements made on oath or affirmation by the wife and her witnesses (at least 2 witnesses) and by the husband (if he is present) and his witnesses. • Ensure that every statement is read over by the Quazi to the person who has made it and after corrections, make sure the statement is signed by the person who stated it. If the person refuses to sign, the Quazi will record this too. <p><i>Note: Sometimes the Quazi may accept written affidavits of the witnesses.</i></p> <p><i>This step may be in the form of a 'hearing' before a panel of 3 persons and the Quazi.</i></p>	
RULE 12	<p>The Muslim assessors will express their opinion on the points raised during adjudication and then the Quazi will give his opinion. If there is a difference of opinion then the opinion of the Quazi will be the final decision. This will also be recorded.</p> <p>The Quazi will then make his order regarding the application.</p>	
RULE 13	<p>Immediately after giving the order, the Quazi will write it in the record of proceedings for the case. This record will be signed by the Quazi and Muslim assessors, the wife and the husband (if he is present).</p>	
RULE 14	<p>The Quazi, on payment of the prescribed fee, will give either party to the application a certified copy of the record of proceedings in the case.</p>	

RULE #	FASAH PROCEDURE AS OUTLINED IN THE THIRD SCHEDULE OF THE MMDA	TRACK YOUR CASE! (Add dates & notes)
RULE 15	<p>After the appealable time has elapsed, if there is no appeal from the order of the Quazi allowing divorce, or if there has been an appeal to the Board of Quazis, after the Board of Quazis has allowed a divorce and in the case of a further appeal to the Court of Appeal, if the order of the Court of Appeal allows such a divorce, it shall be the duty of the Quazi to register the divorce.</p>	

RULES FOR APPEALS ACCORDING TO THE FIFTH SCHEDULE OF THE MMDA 1951

	<p>For Fasah divorce, appeals can be made in writing within 30 days from the date on which the order was made. They can only be made on failure to follow the procedure outlined in the Third Schedule.</p> <p>NOTE: Sri Lankan case law has held that the following rules must be strictly followed:</p> <ul style="list-style-type: none"> • Rule 7 on empanelling of assessors, • Rule 10 on efforts to reconcile and • Rule 11 on the wife’s evidence to be supported by 2 witnesses <p>So please double check these steps in particular when going through the divorce process.</p>	
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ABOUT MPLRAG

Muslim Personal Law Reform Action Group (MPLRAG) was formed in 2016 and is a collective of Muslim women who are rights advocates, lawyers, researchers and writers. We are driven by our personal experiences, our accountability to those whose stories we represent, and our commitment to a positive Muslim family law framework in Sri Lanka. MPLRAG members engage on a voluntary basis and work closely with community-based women’s organizations across the country. Our primary motivation is reform of discriminatory laws and practices that apply to each of us as Muslim women and to our sisters in Sri Lanka.

CONTACT US

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