

# UNEQUAL DIVORCE UNDER THE MMDA



This position paper is the fourth in a series of position papers analysing the recommendations in the report of the 2009 Committee Appointed to Recommend Amendments to the Muslim Marriage and Divorce Act (MMDA), (or MMDA Reform Committee), which was officially released by the Ministry of Justice in July 2018.

The analysis for this paper is structured on the adaptation of a holistic framework\* which takes into consideration:

- 1) Contemporary lived realities of Sri Lankan Muslim women
- 2) Islamic principles and diversity of Islamic jurisprudence and legal tradition
- 3) The Constitution and national laws
- 4) International human rights frameworks

Such a holistic approach is necessary in the context of MMDA reform in Sri Lanka in order to ensure that any and all amendments to the MMDA are based on Shari'ah principles of justice, fairness and dignity, while also achieving rights entailed in the Constitution and international human rights treaties.

Most importantly, each and every recommendation and amendment must consider, respond to and address the discrimination, issues and challenges currently faced by Sri Lankan Muslim women and girls in their daily lives.

*Muslim women all around Sri Lanka have been advocating and agitating for reform of the MMDA for the past 30+ years. Muslim Personal Law Reform Action Group (MPLRAG) is an advocacy group of Muslim women who seek to continue this effort to lobby for justice and equality in our family law.*

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## A. DIVORCE RIGHTS UNDER THE CURRENT MMDA

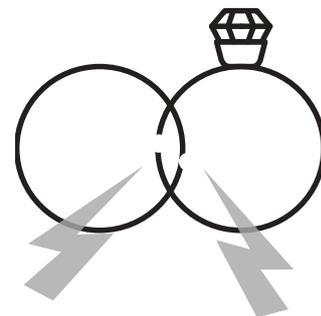
The Muslim Marriage and Divorce Act (MMDA) 1951 of Sri Lanka differentiates between the types, conditions and procedures for divorce for men and women. Husbands have the provision to proclaim ‘Talaq’ divorces, while wives have the provision to obtain ‘Fasah’ divorces. The table below outlines the differences in the two main types of divorces recognised under the MMDA:

Type	TALAQ	FASAH
Grounds	<p>'Talaq' is initiated by the husband and he requires no reason or just cause.</p> <p>(Note: The lack of reason or recording of a reason is justified as “protecting the flaws of a wife”. Case studies demonstrate ample evidence of this being used as a legal loophole permitting husbands to divorce arbitrarily and/or use the threat of divorce in the matrimonial relationship.)</p>	<p>'Fasah' is initiated by a Sunni wife, without the consent of the husband, on the basis of a matrimonial fault on the part of the husband.</p> <p>Grounds for 'Fasah' include: ill-treatment, cruelty, domestic violence (including verbal abuse), failure to maintain and desertion on any other grounds amounting to “fault” under “Muslim law governing the sect to which the parties belong”. 'Fasah' can also be obtained on non-fault grounds such as impotency and insanity.</p>
Applies to	<p>Muslim men of all sects and madhabs (schools of jurisprudence) can obtain a 'Talaq' divorce.</p>	<p>Applies to Muslim women of the Sunni sect and only Shafi'i, Maliki and Hanbali madhabs.</p> <p>Since Hanafi jurisprudence (of the Sunni sect) and Shia sect law does not recognise women’s right to divorce, there is no provision for women of these sects/madhabs to initiate divorce under the MMDA.</p>
Process	<p>The MMDA allows for a revocable form of divorce called ‘Talaq ahsan’ whereby ‘Talaq’ is pronounced by the husband thrice over a three-month period (once every month for three months).</p> <p>After the husband gives notice, the Quazi needs to begin a 30-day process of reconciliation.</p> <p>In the event that reconciliation does not happen, the divorce is finalised only upon completion of the three months (also known as the <i>iddat</i> period), and in the case of the wife being pregnant, after the delivery of the child.</p>	<p>The Third Schedule of the MMDA outlines that if mediation fails, the Quazi is required to hold hearings with both parties for adjudication by himself and three Muslim male jurors.</p> <p>Witnesses (at least two) from the wife’s side are required to corroborate the evidence and claims of the wife, unless the husband admits to being guilty of the fault.</p> <p>Divorce is granted 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 Quazi after the Board of Quazi has allowed a divorce. In the case of a further appeal to the Court of Appeal and if the order of the Court of Appeal allows such a divorce, then only can the Quazi register the divorce.</p>
Appeal process	<p>There is no provision for wives to appeal the granting of a 'Talaq' divorce, even on procedural technicalities.</p>	<p>Husbands can appeal a 'Fasah' divorce granted by a Quazi on grounds of procedural technicalities at the Board of Quazi. Furthermore, they can also appeal to the Court of Appeal from the decision of Board of Quazi and technically make another appeal to the Supreme Court.</p>

## 'Mubarat' and 'Khula': Two other forms of divorces permitted under Sunni madhabs and practiced to different degrees in Sri Lanka under the MMDA:

The MMDA does not explicitly refer to other forms of divorce recognised under Muslim law, such as 'mubarat' (mutual consent) and 'khula' (divorce by redemption). Yet, as the law does not exclude them and the MMDA refers to permitting other forms of divorce in accordance with the rules of respective sects. 'Mubarat' & 'Khula' are recognised under Shafi'i madhab.

'Mubarat' refers to divorce by mutual agreement. 'Khula' entails a divorce initiated by the wife when she is no longer happy in the marriage and requires her to make a compensatory payment to the husband. Under the MMDA, a woman can apply for 'Khula' divorce under Section 28(2), if she is willing to pay compensation. Citing Shafi'i jurisprudence, Quazis in Sri Lanka often require the consent of her husband for the divorce and place the onus on the wife to 'establish that it is impossible for the parties to live together in peace and harmony'.



## B. RECOMMENDATIONS BY THE 2009 MMDA REFORMS COMMITTEE

On unilateral 'Talaq' divorce by husbands, the 2009 Committee Appointed to Recommend Amendments to the Muslim Marriage and Divorce Act (MMDA), ('MMDA Reform Committee') expressed the following unanimous opinion in the report submitted in January 2018:

### TALAQ DIVORCE - UNANIMOUS RECOMMENDATION BY ALL 18 MEMBERS

No amendments were recommended to Section 27 of current MMDA which allows for unilateral 'Talaq' divorce, except incorporating a reconciliation mechanism to a revised Second Schedule, along with the payment of 'Ma'taa' as compensation to a wife who may be unjustly divorced by the husband. (see Paragraph 06.10.05 of the MMDA Committee Report).

### FASAH DIVORCE - RECOMMENDATION BY CHAIRPERSON AND EIGHT MEMBERS

Section 28(1) relating to 'Fasah' and the schedules applicable thereto relating to the granting of 'Fasah' divorce be amended to provide for the wife a right of divorce on certain additional grounds sanctioned by Shariah which are not spelt out currently in that section, as well as on the ground of the violation of any term of the contract of marriage. Committee also suggested incorporation of the 'Mubarat' and 'Khula' divorce expressly into the MMDA.

## C. POSITION OF MPLRAG

MPLRAG notes that the recommendation of the MMDA Reform Committee attempts to address only the harm that is caused in the 'Talaq' divorce procedure by recommending the incorporating of a) a reconciliation mechanism and b) mandating a Ma'taa payment (alimony) to the wife, the Committee seeks to bring due consideration into the decision to divorce and fairness by requiring compensation to be paid.

The fact that the husband raises faults of the wife in the 'Talaq' divorce proceedings in practice and uses 'Talaq' divorce as a sword or threat to compel the wife to bear harm, is not addressed.

## We demand equal access to divorce and fair and standardised divorce procedures.

MPLRAG firmly believes that reform must be directed at addressing harms caused under the MMDA. For this, we must look at the lived realities of Muslims and understand the harms caused by the unequal divorce provisions, especially the unilateral right of the husband to get a divorce.



Therefore, in addition to the recommendations in the Chairperson's report, amendments to the MMDA must include conditions for 'Talaq' divorce and fair and standardised procedure for 'Talaq' and 'Fasah' divorce, including in the appeal process.

### GROUNDINGS FOR DIVORCE:

We propose the following grounds for 'Talaq' and 'Fasah' divorce:

Where a husband desires to effect a 'Talaq' divorce from his wife, on the grounds of:

- a) Ill-treatment by the wife;
- b) Violation of a term of the marriage contract;
- c) Disappearance of wife resulting in her whereabouts not being known or desertion by her for a period exceeding two years;
- d) Imprisonment of the wife for more than seven years;
- e) Irretrievable breakdown of the marriage relationship for stated reasonable reasons including infertility.

Where a wife desires to effect a 'Fasah' divorce from her husband, on the grounds of:

- a) Ill-treatment by the husband;
- b) Violation of a term of the marriage contract;
- c) Unwillingness or inability of husband to maintain spouse and/or minor children;
- d) Disappearance of husband resulting in his whereabouts not being known or desertion by him for a period exceeding two years;
- e) Imprisonment of the husband for more than seven years;
- f) Irretrievable breakdown of the marriage relationship for stated reasonable reasons including impotency.

### PROCEDURES FOR DIVORCE

- 'Talaq' and 'Fasah' divorce procedures must provide for a mediation process and access to counselling if required.
- However, in order to prevent harm caused by exposure to abusive behaviour by either party (e.g.: victim-survivors of domestic violence), parties must consent to participating in the mediation process.
- There must be an equal appeal process for 'Talaq' and 'Fasah' divorce. Grounds on which appeals can be obtained must be clearly laid out in the MMDA and be limited to failure to observe administrative procedure.

## DIVORCE PROCEDURES SHOULD BE ACCESSIBLE TO ALL SRI LANKAN MUSLIM WOMEN REGARDLESS OF SECT

It is extremely unfair that some segments of Sri Lankan Muslim women are unable to institute divorce proceedings on the basis of their sect or madhab (schools of scholarly jurisprudence). Therefore, reforms to the MMDA must ensure uniformity of divorce for husband and wife, with valid grounds for divorce, and effective and efficient process of divorce applicable to all Muslim men and women across sexes and sect/madhab.

## D. CONTEMPORARY LIVED REALITIES OF MUSLIM WOMEN

### TALAQ DIVORCE

There is ample evidence in the lived realities of Muslim women in Sri Lanka of unfairness and injustice:

- Husbands divorce their wives for a broad range of reasons including for convenience.
- There are multiple lived experiences of divorce initiated hastily, perceived as being for frivolous reasons and perceived to be initiated when the husband himself engaged in wrongdoing and did not want to be held accountable.
- The broad range of reasons, whether reasonable or unreasonable, is all permitted as a result of the husband not having to formally record reasons for initiating divorce. Women experienced the 'Talaq' procedure in which allegations are publicly made about their behaviour, contribution to the marriage and character.
- Women also experience a procedure that failed to give priority or adequate consideration of the impact of the decision to divorce on the lives of women and children.
- Similar to polygamy, the threat of 'Talaq' divorce is used to cause harm within the marriage and coerce or blackmail wives and their families.
- 'Talaq' is also sought in instances of polygamous marriages when maintaining multiple wives and families becomes burdensome.
- Procedurally, the pronouncement of 'Talaq' does not require the presence of the wife, Muslim women's groups have reported many instances when the wife was unaware of her husband's intention to divorce until either after proceedings were initiated or much after divorce was pronounced.

#### CASE 1: MUMTAZ'S STORY

*Mumtaz was 16 when she was given in marriage. Her husband was possessive and abusive, didn't allow her to talk to anyone and made her cut ties with her father and sister. When Mumtaz got pregnant, her husband abandoned her. She was compelled to seek maintenance through the local Quazi court and received Rs. 7,000 a month. After Mumtaz had her baby, her in-laws forced them to reconcile. The abuse continued, and she lived in a constant state of fear and depression, eventually becoming physically ill. Her family finally took her away.*

*When Mumtaz went to the Quazi to seek maintenance for her baby, she was told that her husband had filed for 'Talaq' divorce and she was asked to come for the divorce proceedings. At the proceedings she was not allowed to speak and was asked by the Quazi to get a mental health check. She was so affected by the Quazi's treatment of her that she did not even want to fight for the 'Ma'taa' (compensation).*



## FASAH DIVORCE

There is also ample evidence in the lived realities of Muslim women in Sri Lanka, of the harms of current 'Fasah' divorce provisions and procedure:

- 'Fasah' divorce procedure places a sometimes unreasonable burden on women to prove harm, including experiences of Quazis insisting on male witnesses or the woman being compelled to participate in mediation regardless of emotional abuse and physical threats from the husband.
- Women who are in abusive marriages face additional barriers and challenges in obtaining divorce in terms of presenting evidence, witnesses and giving testimony before adjudicators. Women who have faced severe emotional abuse or psychological trauma may not have ready witnesses to support their case and face significant problems in obtaining a divorce.
- Women and girls presenting their cases in hearings on some issues, which could range from lack of maintenance to serious physical and sexual abuse, experience mental distress at having to speak in the presence of an all-male panel, the members of which are not professionally trained to evaluate, respond appropriately and give judgment in such cases.
- According to women activists, there are cases where husbands force/compel their wives (through domestic violence) to get a 'Fasah' divorce, instead of proclaiming a 'Talaq', so that they don't have to pay compensation to their wives, which some Quazi judges mandate for 'Talaq' divorce.

### CASE 2: FAZIA'S STORY

*Fazia belongs to a minority Shi'a sect and was married to a man from the same community. Shortly after marriage, she experienced emotional abuse and controlling behaviour from her husband, which culminated in physical abuse as well. Unable to continue being in such a marriage, Fazia had to separate from her husband.*

*Despite attempts at reconciliation, Fazia decided that she would not return to the marriage given her adverse experiences, but was unable to get a Fasah divorce under the MMDA as the law of the sect requires the consent of the husband for divorce, regardless of circumstance. She received strong support from her family, community and religious leaders in this regard and they put immense pressure on the husband to permit the divorce. However, despite this, the husband did not grant her a divorce for three years, simply because he was able to withhold it as a right granted to him by (unwritten) provisions in the law pertaining to the sect.*

### CASE 3: RIYAZA'S STORY

*Riyaza and her husband were married for five years and they have a three-year-old child together. The marriage was unhappy and oppressive and caused a lot of trauma for Riyaza. When she was unable to bear living with her husband, she separated from him and filed for a Fasah divorce. The Quazi kept postponing the proceedings for the divorce because her husband refused to attend counselling. The proceedings were further postponed due to COVID-19-related lockdowns.*

*On one occasion, Riyaza's husband threatened that if she doesn't stop the Fasah divorce process and return to his house, he will appeal the Fasah divorce once it is granted. Riyaza is living in constant fear that despite the Quazi granting the Fasah divorce, her husband will appeal the decision and drag the divorce process even further.*



## E. ISLAMIC JURISPRUDENCE & POSITIVE DEVELOPMENTS IN OTHER MUSLIM CONTEXTS

### Islam on fairness and equitable terms in divorce.

The Qur'an calls on parties to the marriage "...either hold together on equitable terms (ma'ruf), or separate with kindness (ihsan)" - Surah al-Baqarah 2:229.

The proceedings for mediation in Surah an-Nisa' 4:35 place both spouses on an equal footing: "If you fear a breach between a married couple appoint (two) arbiters, one from among his people, and the other from among her people."

The man's unilateral right to divorce his wife at will contradicts Quranic teachings, and specifically the message of kindness and equality. In the Quran, the one consistent theme with regard to divorce is that it takes place with kindness and 'on equitable terms'.

### Unilateral Talaq divorce (without reason) goes against the spirit of fairness & compassion in the Muslim family

**In ILR Madras 22, a Division Bench of the Madras High Court, consisting of Munro and Abdur Rahim, JJ., held:**

*"No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence."*

**Maulana Mohammad Ali, an eminent Muslim jurist, in his book The Religion of Islam, after referring to, and considering, the relevant verses on the subject has observed:**

*"...it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."*



**DIVORCE WAS INTENDED TO BE DONE IN A KIND & JUST MANNER**

### Positive Developments from other Muslim Contexts

**Turkey, Tunisia:** All divorces must go through the court. The grounds for divorce are equally available to both spouses. Divorce through unilateral repudiation ('Talaq') by the husband is not recognised.

**Jordan, Morocco:** A wife may petition the court for a divorce on the ground of "irreconcilable differences" or irretrievable breakdown of the marriage (shiqaq wa niza).

**A learning from a comparative jurisdiction, India, is the Indian High Court of Kerala (Must.Rukia Khatun v. Abdul Khaliq Laskar (1981) 1 GLR 375) holding:**

The High Court listed the following essential ingredients of a valid 'Talaq' under Muslim law. Firstly, 'Talaq' has to be based on good cause, and must not be at the mere desire, sweet will, whim and caprice of the husband. Secondly, it must not be secret. Thirdly, between the pronouncement and finality, there must be a time gap, so that the passions of the parties may calm down, and reconciliation may be possible. Fourthly, there has to be a process of arbitration (as a means of reconciliation), wherein the arbitrators are representatives of both the husband and the wife. If the above ingredients do not exist, 'Talaq' divorce would be invalid.

## F. FUNDAMENTAL RIGHTS AND STATE OBLIGATION

### Right to equal treatment in terms of the law (Article 12 of the Constitution)

The state's obligation is to respond to the abuse, ill treatment and impact of abandonment experienced by Muslim women as a result of the abuse of substantive provisions and gaps in the MMDA. Article 12 of the Sri Lankan Constitution guarantees equality to all persons; however, Muslim women are not covered under this protection on the question of divorce procedure. To this date, there has been no formal acknowledgement of these issues and the state has steered away from engaging constructively to advocate for solutions. One of the main reasons given is that Muslims must resolve these issues within their own community – and thereby abandoning any and all state responsibility to advocate on behalf vulnerable sections of its citizens.

### Obligations under International Human Rights Instruments

Sri Lanka has ratified the International Covenant on Civil and Political Rights (ICCPR). Article 23(4) of the ICCPR states that “State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.” Sri Lanka also ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1981. Article 16 of CEDAW states that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:... c) The same rights and responsibilities during marriage and at its dissolution...”

Sri Lanka's periodic review for CEDAW was in 2017. Family law reform was noted as a key issue of concern for the CEDAW Committee during the review and in the Concluding Observations. In this regard, the Committee gave the following recommendation to the Sri Lankan government and noted it as a 'Follow-Up Issue' for the government to prioritise before the next review:

13. b) Amend all Personal Laws, including the Muslim, Kandyan and Tesawalamai Personal Laws, to remove discriminatory provisions regulating ownership, inheritance, transfer and disposal of land and property, as well as provisions regulating legal capacity, marriage, divorce, and child custody. (CEDAW Committee Concluding Observations for Sri Lanka, February 2017)

**The MMDA must be reformed comprehensively & urgently to ensure equality & justice for Sri Lankan Muslim women.**

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## OTHER REFERENCES & RESOURCES

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