

SHADOW REPORT

**TO UNITED NATIONS COMMITTEE ON ELIMINATION OF
ALL FORMS OF DISCRIMINATION AGAINST WOMEN
(CEDAW)**

MUSLIM WOMEN'S ISSUES IN SRI LANKA

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This Shadow Report is submitted by **Muslim Personal Law Reforms Action Group (MPLRAG)** in a consultative process with **Musawah**, the global movement for equality and justice in the Muslim Family.

MPLRAG is a lobby group in Sri Lanka consisting of individual rights advocates, women's rights activists, lawyers and researchers. Our core belief is that all Muslims in Sri Lanka should have equal access to legal rights, justice and redress on matters of marriage and divorce and be treated as equal citizens under State laws and the Constitution of Sri Lanka.

For more information on MPLRAG: www.mplreforms.com

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This Shadow report is endorsed by the following organizations and networks:

- Mannar Women's Development Federation (MWDF), Sri Lanka
- Program for Women's Economic, Social and Cultural Rights Sri Lanka (PWESCR), Sri Lanka
- South Asia Feminists Alliance (SAFA)

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SHADOW REPORT ON MUSLIM WOMEN'S ISSUES IN SRI LANKA

1. BACKGROUND

Muslims in Sri Lanka constitute 10% of the population. They are governed by the general law of the land with the exception of the application of 'personal laws' which govern marriage, family, divorce and inheritance. There are also several different sects of Muslims in Sri Lanka and the personal law on marriage and divorce makes allowances for the nuanced application of the law of the Sect on selected issues. As a political minority, Muslim representatives have represented community interests within coalition governments. Being a minority, Muslim communities have been subjected from time to time to acts of religious intolerance and violence.

In 2016, an island-wide public consultation process carried out by the Public Representations Committee (PRC) sought to document the needs of the people for the purpose of constitutional reform. This created the space for people to voice a variety of concerns. Muslim women were a constituency that voiced a clear need for change and protection of their rights. Therefore in 2016 there was high visibility for Muslim personal law reform.

1.1. Long-standing call for reforms

Over the past many decades, various groups especially Muslim women's groups have been advocating and lobby for various aspects of reforms of the MMDA. Since 1970, few official attempts at reforming the Muslim Marriage and Divorce Act (MMDA) to no avail. The last significant attempt was a Committee appointed by the Minister of Justice in 2009 to consider reforms to the MMDA. Two previous committees failed to produce any changes demonstrating the lack of commitment by leaders of the community as well as the State to address the issues of Muslim women suffered on a day-to-day basis.

Under the previous government led by then President Mahinda Rajapakshe reform was felt to be impossible. The patriarchal and Islamophobic nature of the government at the time, and the perceived support received by violent extremists groups for action against Muslim communities and impunity thereafter were strong deterrents against hope for reform. With the present government taking power in 2015, and the space for consultation opening up the possibility for reform and the commitment of the new government to good governance and accountability raised the hopes of the public. However, the trend of State agencies failing to address minority community concerns continues. The patriarchal attitudes embedded in the State apparatuses and the blatant patriarchy of the system of administration of Muslim law continues to be the obstacles to reform.

1.2. The State lacks leadership and is evading responsibility

Despite voices calling for reforms of the MMDA from within the Muslim community for the past many decades, the State has hesitated to engage with anyone beyond the usual primarily male conservative interlocutors who claim to represent the community and/or also claim to argue the 'Islamic perspective'. State actors have placed the obligation on the Muslim community to

come up with solutions to problems affecting Muslim women, as well as build consensus on reforms. Dissenting viewpoints within the Muslim community, both with regard to Islamic jurisprudence and public opinion, have been ignored by the State¹.

Concerns surrounding the MMDA have been raised repeatedly in Shadow Reports submitted to the CEDAW Committee by Sri Lankan civil society organizations. However, the State has chosen to put the onus of responsibility for MMDA reforms back onto the Muslim community.

The Sri Lankan government has the **primary duty** to address issues faced by Muslims under the MMDA and the Quazi court system, which was established, administered and is funded by the state. It has the foremost responsibility to ensure that State laws protect the rights of citizens and does not result in discrimination and injustice. It cannot suspend the individual and fundamental rights of citizens in the name of the cultural and religious rights of any group.

On certain issues such as minimum age of marriage, the Sri Lankan government is mandated to establish an age that is suitable for all citizens and protect child rights and promote education, health and wellbeing. Putting perceived cultural and religious rights before gender equality and child rights and legally allowing for Muslim minors to be given in marriage at an earlier age and legally exempting their protection under the Constitution and Penal Code is a serious violation of this State responsibility.

2. ARTICLE 1 DISCRIMINATION, ARTICLE 15 LAW, ARTICLE 16 MARRIAGE AND FAMILY LIFE

The 1951 Muslim Marriage and Divorce Act (MMDA), governs all Muslims in Sri Lanka who marry another Muslim including persons who convert to Islam. The MMDA contains provisions pertaining to registration and procedures of marriage and divorce, including wife and child maintenance. There are serious concerns that the MMDA violates the rights of Muslim women and limits access to justice, due process and redress. These concerns are with regard to provisions within the Act itself as well as practical problems with procedures and implementation via the Quazi court.

2.1 LACK OF MINIMUM AGE OF MARRIAGE:

2.1.1. A primary and pertinent concern emanating from the current MMDA is that it legally allows child marriage for Sri Lankan Muslims under the MMDA a Quazi (Muslim judge) can permit the marriage of a girl below 12 years. The cases coming to the attention of women's organizations working at the community level, as well as Quazi courts, indicate a practice of early marriages arranged by guardians are occurring between 14 and 17 years of age, in districts including Puttalam and Batticaloa. Records of Muslim marriage registration in

¹ Isadeen. H, Hamin. H, December 2016. *Study: 'Unequal Citizen: Muslim women's struggle for justice and equality in Sri Lanka'* www.mplreforms.com/unequal-citizens-study

Kattankudy indicate that in 2015 - 22% of all registered marriages were with a bride below 18 years of age. This is a considerable increase from 2014 when the figure was 14%.

2.1.2. According to women volunteers who assist affected women, one of the main reasons that husbands seek divorce from wives who are minors is because they are “unfit to have sex” and “unable to do housework”. The plight of young girls who are divorced becomes precarious. Education of young women and girls who get married early is often discontinued²thereby significantly limiting their higher educational and economic opportunities. This compels them to be highly susceptible to grave financial difficulties in the event that husbands are unable or unwilling to provide maintenance, in case of death of husbands, polygamy, divorce or abandonment.

It has been observed that national level discussions by State actors on ‘zero tolerance’ for child abuse or about minimum age of marriage and teenage pregnancies leave out the Muslim community under the pretext that the issue is ‘too complicated’.

2.1.3. At the same time Muslim politicians³, religious leaders, as well as some individuals and organizations in support of MMDA reforms believe that the minimum age of marriage for Muslims should be decided from within the Muslim community and mandated by the MMDA. However, the minimum age of marriage is a contested topic even within the Muslim community and is highly subjective, dependent upon the theological viewpoint of the various parties supporting or opposing the establishment of a minimum age.

2.1.4. Therefore, in the current context, it is unlikely that all the stakeholders in the Muslim community in Sri Lanka would agree and reach consensus on 1) raising the minimum age of marriage to 18 years and 2) deciding that the State should set the minimum age of marriage for all citizens.

² Case 11 – Source: Gul, Begum Safana, 2014. ‘*Is Equal Justice Possible*’, Islamic Women’s Association for Research and Empowerment (IWARE), Batticaloa, Sri Lanka

³ See comments made by Minister Rauff Hakeem in March 2015 <http://www.sonakar.com/?p=80151>

Critical questions to government:

(1) Why is this issue under the discretion of Muslim family law and not a girl-child rights concern?

(2) Who is given authority to decide what the minimum age of marriage should be for the Muslim community? Do they represent the best interest of women and children?

(3) When there is a difference of opinion about minimum age of marriage within the Muslim community and strong calls for reform, why is the government giving legitimacy to the voice of only the patriarchs within the community and not the voice of affected women?

KEY RECOMMENDATION: Standard minimum age of marriage for all citizens

Regardless of the number of cases, whether isolated or many, child marriage is unacceptable and for the Muslim community this needs to be addressed by removing the legal cover that MMDA accords. As per CEDAW, early and forced marriage is considered a “harmful practice” that the state needs to take serious action to reduce and eliminate.

If the State determines that adolescents and children marrying before 18 years is detrimental to their health, education and wellbeing then it should apply to all children in the country irrespective of which ethnic or religious group they belong to. It is important for the Sri Lankan state to recognize and protect the rights of all citizens to enjoy his/her culture, traditions and freedom of religion. However in provisions such as establishing a minimum age of marriage – it is the responsibility of the State to ensure that child rights are not compromised in the name of culture and religion.

The Sri Lankan government needs to challenge and counter the arguments of interlocutors and conservatives within the Muslim community, when they use Islam and Islamic practices to justify child marriage. While there is enough support within Islamic jurisprudence (see MUSAWAH Statement below) to support raising age of marriage to 18 years, State is the primary duty bearer of protecting child rights of all children and this issue must be dealt with as establishing one age for all.

(Statement of MUSAWAH to OHCHR on age of marriage:

<http://www.musawah.org/sites/default/files/MusawahStatementOnChildMarriageForOHCHR.pdf>)

2.2 LACK OF EQUALITY, AUTONOMY AND DECISION MAKING FOR MUSLIM WOMEN IN ENTERING MARRIAGE

2.2.1 In the MMDA adult Muslim women are considered minors, as they are unable to enter a marriage of their own free will and require the permission of a male guardian or '*wali*'. The concept of *wali* 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.

2.2.2 For a majority of Sri Lankan Sunni Muslims, the MMDA does not mandate bridal consent as a prerequisite for a marriage to be contracted and as per the Act, the *wali* (closest male guardian)⁴ of the woman has the right to give a woman/girl in marriage. In cases where the woman has no *wali*, the Quazi is required to make an order authorizing the marriage⁵. The marriage documents required for a Muslim marriage have no provision for the bride's signature or thumbprint.

2.2.3 There are cases where this has resulted in forced marriage of girls by *walis* who abuse their legal authority and compel women and girls into marriages even at a young age. A young divorcee in Mullaitivu said that she had been forcibly given in marriage at the age of 14 by her *wali*. She had been informed that it was the wedding of her aunt's daughter and had no indication of her marriage until the first night when she was locked into a room with her husband. She continues to be highly traumatized by the experience.

2.2.4 Practically, the lack of mandatory provisions in ensuring the consent of the bride significantly increases the chances for women and girls to be coerced into marriage or forced to marry with or without their knowledge. The denial of women's right to consent to marriage denies women their right to personhood and citizenship.

2.3 UNEQUAL PROVISIONS FOR DIVORCE

The MMDA differentiates between the types, ground and procedures for divorce for men and women. Under the MMDA husbands have the provision to proclaim '*talaq*' divorces, while wives have the provision to obtain '*fasah*' divorces. The differences are extremely prejudicial to women.

2.3.1. *Talaq* (divorce by husband) - *Talaq* (which literally translates as a proclamation of "I divorce you") is a type of divorce that is initiated by the husband. *Talaq* does not require the husband to have any specific basis or reason to divorce. Because the pronouncement of *talaq*

⁴ "*Wali* - In the context of marriage, a marriage guardian. Usually recognized by some Schools as the father or paternal grandfather who has authority to contract the marriage on behalf of the bride".(Source: Women Living Under Muslim Law 2006, *Knowing our Rights: Women, Family and Law in the Muslim World* http://www.mediterraneas.org/IMG/pdf/kor_2006_en.pdf)

⁵ MMDA Section 47(3) - In instances where the woman does not have a *wali* such as in the case of a female head of household with no male relatives, or a convert to Islam, the male Quazi is required to make an order authorizing the marriage.

does not require the presence of the wife, women’s groups have reported many instances of women being unaware of her husband’s intention to divorce until the Quazi informs her of it.

Talaq is also sought in instances of polygamous marriages when maintaining multiple wives and families becomes burdensome. There are cases where Quazis have granted divorce prior to establishing payment of maintenance for children or return of *dowry*, leaving women (and girls) in difficult and vulnerable situations financially and socially.

2.3.2 *Fasah* (divorce by wife) - *Fasah* is a type of divorce that 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. Grounds for *fasah* include ill-treatment, cruelty, domestic violence (including verbal abuse), failure to maintain and desertion, and other grounds amounting to “fault” under “Muslim law governing the sect to which the parties belong”⁶.

2.3.3 Under the MMDA there is provision for the (unwritten) law of the sect to apply for *fasah* divorces. Therefore, if a particular sect does not recognize initiation of divorce by the wife (*fasah*) then women of those sects (eg: Shia) are unable to initiate divorce. Only *talaq* divorce by the husband is recognized. As a result women would require ‘permission’ from their husbands for divorce no matter the circumstance. Therefore the provision for divorce is also not equal to women across sects in Sri Lanka.

KEY RECOMMENDATION FOR MMDA REFORMS ON UNEQUAL DIVORCE:

- MMDA should not allow unilateral divorce by either bride or groom, therefore conditions for *talaq* (divorce by husband) must also be stipulated;
- Equitable and progressive provisions on divorce from the different madhabs must be considered and included in the MMDA;
- 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* for all women across governed by MMDA.

SOURCE: Muslim Women’s Demands on Reforms to the MDMA

www.mplreforms.com/2016/11/20/muslim-womens-demands

2.3.4 The problems and consequences: 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 and who may not have ready witnesses to support their case face significant problems in obtaining a divorce. Furthermore, women and girls presenting their cases in hearings, which could range from non-maintenance to serious physical and sexual

⁶ Section 24, 1951 Muslim Marriage and Divorce Act (MMDA)

abuse, are put through the additional traumatic task of articulating to an all-male panel, the members of which are not professionally trained to evaluate and give judgment in such cases.

2.3.5 According to women activists, there are cases where husbands force/compel their wives to get a *fasah* divorce, instead of proclaiming a *talaq*. In a particular case - a husband wanted to divorce his wife, but didn't want to pay *matah* (compensation) that he would be obliged to pay if he opted for a *talaq* divorce. Instead he resorted to severe domestic violence to compel his wife to apply for a *fasah* divorce. As per the conditions of *fasah* divorce she obtained no compensation, and similarly there were no legal consequences for her husband.

2.4 POLYGAMY

2.4.1 The MMDA allows for a Muslim man to marry up to four wives legally and any subsequent marriage thereafter is not considered illegal, but 'irregular' (temporarily invalid without any legal repercussions). Unlike in countries like Malaysia, for husbands deciding to enter into plural marriages, the MMDA does not require prior consent of the current wives nor does it require an inquiry by the Quazi into whether or not the husband has the ability to maintain and provide for multiple wives and families. In Sri Lanka polygamous marriages account for one of the main reasons for abandonment and non-maintenance of Muslim women by their husbands, as well as the high rate of divorce among Muslims.

2.4.2 The problems and consequences: The provisions under the MMDA leaves the sole decision making power of taking multiple wives at the discretion of the husband without in any way considering the psychological, social and financial impacts of such a marriage on the previous wives and children. Many Muslim women who find themselves in polygamous marriages were unaware that they were part of plural marriages and were unable to exercise any agency and autonomy on the matter.

2.4.3 For women, attempts at speaking out about the husband's decision to take another wife is likely to result in ill-treatment, domestic violence and mental trauma. In some instances women are threatened and forced to live in plural marriages. Thus there are also serious financial consequences for wives and children in polygamous marriages. Anecdotal evidence suggests that husbands have divorced previous or subsequent wives on the basis of being financially incapable of sustaining plural marriages. Men are also engaging in plural marriages in order to obtain *dowry (kaikuli)* from the new bride. It is also highly improbable that women willingly consent to polygamous marriages should they have a clear, unforced and informed choice.

KEY RECOMMENDATION FOR MMDA REFORMS ON POLYGAMY:

Polygamy as a practice has adverse impacts on women and children and therefore should be abolished. However in the event of sufficient, reasonable justification in current context - responsibility must be assigned to prevent abuse and accordingly it is recommended that:

- A woman should be informed in advance 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 inquiry into the husbands' capacity to maintain equally (especially financial capability), and after obtaining written approval of current wife/wives and wife to be;
- It should be made mandatory to record in the marriage registration forms all previous marriages that are currently active.

SOURCE: Muslim Women's Demands on Reforms to the MDMA

www.mplreforms.com/2016/11/20/muslim-womens-demands

2.5 DISCRIMINATION AND ILL TREATMENT FACED BY MUSLIM WOMEN IN THE QUAZI COURT SYSTEM

2.5.1 Muslim women's access to justice is severely restricted in Quazi courts. Affected women have articulated in multiple forums that they are discriminated against by the sub-par Quazi court system, which is significantly different from the civil court system and doesn't allow for clients to have legal representation. Women are often mistreated by incompetent Quazis and the jurors of the courts; not given equal treatment as their husbands; are unable to express their side without fear of being verbally abused, threatened and humiliated in courts throughout their case processes. More often than not all-male jurors (with no qualifications) are selected by Quazis arbitrarily.

2.5.2 **Lack of sensitivity and inappropriate behavior and attitude of Quazis:** The most problematic issue with regard to the Quazi court system is the behavior and attitude of many Quazis towards women who access the courts. Women's organizations note numerous cases where treatment has been biased against women seeking divorce or maintenance orders. Certain Quazis are entrenched in preconceived notions of the specific roles of women/wives, are against divorce and/or in favor of practices like polygamy. This bias and the lack of professional training contribute towards prejudiced judgments against women. For instance, women and girls who have faced domestic violence and cruel treatment at the hands of husbands are often dismissed by the Quazis and asked to tolerate this treatment from their husbands.

2.5.3 The lack of state oversight and monitoring mechanism into the functioning of the Quazi court system has meant that other than complaints referred to the Judicial Service Commission (JSC), there are no other means through which supervision and rectification can be provided by the state.

2.5.4 There are also highly disturbing cases of Quazis who have taken bribes from one or both parties appearing before the Quazi courts and giving judgments based on the desired outcome of the said parties. It is unclear at this time to what extent the JSC pursues inquiry into the complaints brought to the JSC and the nature of follow-up action taken with regard to the respective Quazis.

2.5.5 Significant gap in knowledge about MMDA, procedures and jurisdiction amongst Quazi judges: There is no formal, structured and mandatory training about the MMDA or code of conduct and etiquettes for Quazis by the JSC, unlike for other judicial officers in national courts who are given training periodically. This is highly problematic especially as prior knowledge about or experience of working with the MMDA is not a requirement to be a Quazi. As a result many Quazis enter the position and undertake duties with little or no knowledge about the MMDA and are thereby unable to implement the provisions and procedures outlined. Quazis do not not officially receive a copy of the MMDA when they assume duties. Most of the Quazis are also unaware of their realm of legal jurisdictions and the limits to it.

Critical questions to the State:

(1) Why despite strong calls for reforms for over two decades, is the government choosing to ignore the demands of women for a state remedy to issues affecting the Muslim community?

(2) How will government ensure that MMDA reforms will occur in line with State commitments for gender equality and harmonized to ensure that the Act does not infringe fundamental rights enshrined in the Constitution?

KEY RECOMMENDATION TO STATE

Substantive reform to Muslim Personal Law has to be undertaken swiftly to ensure that no provision or procedure entailed within it violates rights of Muslim women and girls and ensures equality for husband and wife.

The MMDA should be amended to reflect women as equal partners in a marriage, with full capacity to consent, formulate and negotiate a marriage contract and make decisions regarding her partner and her marriage. Muslim women as Sri Lankan citizens are entitled to equal autonomy and decision-making with regard to their own marriages. Muslim women should also be able to be Quazi (judges) in a Quazi court – which is a state funded position and as such cannot be discriminated on the basis of gender.

2.6. QUAZI INTERVENTION IN GENDER-BASED VIOLENCE CASES

2.6.1 There are added complexities in addressing gender-based violence, within the Muslim community, especially with how the cases of affected women and children are addressed at the Quazi courts. The MMDA and the Quazi system do not hold any legal mandate to deal with cases of domestic violence, rape or incest. However, the predominant perception is that Muslim women should not seek state remedies, or approach 'non-Muslim' institutions for support with these violations, because solutions need to be sought 'within the community'.

2.6.2 **Community interventions in domestic violence:** Physical violence is a criminal offence under the Penal Code and the Prevention of Domestic Violence Act. No 34 of 2005 (PDVA) recognizes other forms of domestic violence such as emotional abuse and grants a civil remedy through the provision of protection orders. Previous study conducted on domestic violence interventions indicate that a small fraction of women victim-survivors⁷ access protection orders through the PDVA, but less so among Muslim women.

2.6.3 Organizations working with community women speak of many cases where women go to Quazi courts for *fasah* divorce - the reason is usually on grounds of cruelty and domestic violence. As Quazis have a duty to mediate divorce cases, they often refer these to mosque committees, mosque federations and/or other counseling groups for mediation and possible reconciliation. In many instances, mosque committee or federation members also act as jurors who advise Quazis on cases. Serious concerns thus are whether or not informed decisions are being made about the nature, extent and degree of violence that determine invoking police intervention or sending for counseling on reconciliation, who is making the decisions, and whether or not women are informed of their options.

2.7. 'Hadd' punishments – flogging for adultery

The MMDA of Sri Lanka does not acknowledge or have any provision outlining regulations or punishments relating to adultery as it is not considered a criminal offence under the Penal Code. However over time the Quazi court system has fostered an environment whereby violations occur with impunity at the community level.

2.7.1. There are cases to indicate that flogging punishments on persons suspected of adultery is occurring at the community level, either commissioned by mosque committees⁸ and mosque

⁷ Chulani, Kodikara, 'Domestic Violence Intervention Services in Sri Lanka: An exploratory mapping 2009-2011'. International Center for Ethnic Studies, Colombo, Sri Lanka.

⁸ Civil society groups working in the areas stated that the community perceives the practice as a norm and a legal and legitimate punishment as part of *Sharia* and therefore allowed under the MMDA, hence it has not been questioned or challenged. A case from the Puttalam emerged in the media. A twenty-five year old woman who had been a victim-survivor of rape was accused of alleged adultery and given 100 lashes by members of an administrative panel at her local mosque. With the help of a lawyer she had filed a case, and due to the intervention of the judge had gotten the four men remanded. Women, who are courageous to seek redress from these issues, often face severe intimidation by the community.

federations or Quazis. The exact nature of how the punishments are carried out for men and women, or the number and frequency of such incidents are unclear⁹. As adultery is not a criminal offence, flogging punishments rendered by the Quazi could amount to torture¹⁰ i.e. cruel, inhuman or degrading punishment and a violation of fundamental rights, carried out by the Quazi who is a government employee.

2.7.2. It is a concern that in addition to the physical and psychological trauma, the social stigma and 'shame' that is placed upon individuals (both men and women) can have serious consequences on their wellbeing. Therefore further inquiry into whether or not this practice is occurring and immediate steps towards criminalizing it is warranted.

KEY RECOMMENDATION FOR MMDA REFORMS ON QUAZI COURT SYSTEM:

- Appointments of Quazis must be based on a set qualifications and competencies;
- Quazis should be a Muslim person of good standing in society who has had an unblemished record of service over 10 years in the field of law, public service, social service, mediation and counseling or in a relevant profession and has a sound knowledge of religion;
- A systematic recruitment process with application backed by community references, interview including written component and comprehensive training both before placement and thereafter on a regular basis;
- 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;
- Procedures of different types of divorce/maintenance etc. must be explained by Quazi to those accessing cases;
- Domestic violence cases have to mandatorily be referred to the police.
- There needs to be a systematic oversight mechanism by the Judicial Services Commission of the Quazis and the operation of the Quazi courts.
- All courts must have compulsory female counselors to support Muslim women during cases.

SOURCE: Muslim Women's Demands on Reforms to the MDMA

www.mplreforms.com/2016/11/20/muslim-womens-demands

⁹ Organizations such as Muslim Women's Research and Action Forum (MWRAF) raised the issue in the 1999 publication 'Between Two Worlds' wherein it was noted that the punishments are usually 'symbolic' and carried out with a coconut husk.

¹⁰ Article 11 of the 1978 Constitution states that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

2.8. OTHER LAWS DISCRIMINATING AGAINST MUSLIM WOMEN

2.8.1 PENAL CODE: MUSLIM GIRLS ARE NOT PROTECTED BY LAW ON STATUTORY RAPE:

According to the Sri Lankan Penal Code¹¹ sexual intercourse with a girl below 16 years of age, with or without consent, amounts to statutory rape. However, pushback from mainly Muslim religious leaders and politicians, during the time the Penal Code was being amended in 1995 to include statutory rape provisions, meant that the provision does not apply to married Muslim girls under the age of 16 and above the age of 12, unless judicially separated¹². As a result, in the case of Muslims, the relevant age for statutory rape is 12 years¹³. Furthermore, because there is no provision for judicial separation in the event of a *talaq*¹⁴ divorce and the wife is required to stay at the husband's residence for a period of up to three months (*iddat* period) after the first pronouncement of divorce. Women are not protected by the Penal Code provision even in the event that forced sexual intercourse (marital rape) occurs during this time.

2.8.2. EXCLUSIONS FOR MUSLIMS UNDER THE GENERAL MARRIAGE REGISTRATION ORDINANCE (GMRO):

The General Marriage Registration Ordinance (GMRO) is applicable to all citizens of the country with the exception of Muslims who marry within their faith-group. The only other community with a special family law pertaining to marriage is the Kandyan Sinhalese who have the option to marry under the Kandyan Marriage and Divorce Act (1952), or the GMRO. Sri Lankan Muslims do not have this option, unless they marry someone from another ethnicity and religion. Given the various issues with regard to the MMDA and the delay in reforms, Muslims who marry other Muslims have no choice but to marry under the MMDA and follow the Quazi court system should issues in marriage come up.

KEY RECOMMENDATIONS TO STATE

Penal Code must be amended to ensure that the statutory rape provision covers all children regardless of marital status. General Marriage Registration Ordinance must be amended to ensure that Muslims too have the choice to marry under the general law.

¹¹ [1] Section 363 of the Penal Code of Sri Lanka.

¹² In 1995 after extensive lobby by civil society organizations including women and child rights groups, the Penal Code (Section 363) was amended for statutory rape to mean sexual intercourse with any girl below the age of 12, with or without her consent "...unless the woman is his wife who is over twelve years and not judicially separated from the man", thereby applicable only to Muslim girls.

¹³ UNICEF Sri Lanka, July 2013, 'Emerging Concerns and Case Studies on Child Marriage in Sri Lanka' http://www.unicef.org/srilanka/2013_Child_Marriage_Case_Studies.pdf

¹⁴ [4] Divorce initiated by husband.

3. ARTICLE 3 GUARANTEE OF BASIC HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

3.1 Article 16(1) of the Sri Lankan Constitution together with no constitutional provision for judicial review effectively precludes Sri Lankan Muslims, and Muslim women in particular, from utilizing the fundamental rights guaranteed under the Constitution.

3.1.1. Article 16(1) proclaims any law dated prior to 1978, which includes Muslim personal laws, as being consistent with the fundamental rights provisions of the Constitution, including the equality provision, regardless of the explicit or implicit impact of the law. For example the fact that the Muslim Marriage and Divorce Act specifically states the position of Quazi, a state funded public service position, cannot be held by a woman cannot be challenged by virtue of Article 16(1).

3.1.2. Recent moves to present a new Constitution to the country has raised the debate on Article 16 the singular public position against its repeal in a new constitution has come from the Muslim male politicians, who seek to retain Article 16(1) for all personal laws. This will in effect, regardless of the new constitution recognizing judicial review post enactment, constitutionally preclude any challenge to discriminatory Muslim personal laws.

Critical questions:

- (1) Why has perceived 'religious and minority rights' been allowed to trump equality and human rights which the state must guarantee?*
- (2) How is the Sri Lanka government going to ensure that minority Muslim women are also equally protected under the state laws and able to access the civil court system for redress?*
- (3) How is the government going to ensure that the new Constitution guarantees equal protection of rights from being violated by discriminatory laws and practices?*

KEY RECOMMENDATIONS TO STATE

It must be ensured that the new Constitution does not have an Article 16(1) type provision so that pre-existing written and unwritten law (including the MMDA) are valid and operative so long as they do not violate fundamental rights of equality and non-discrimination. Judicial review of gender discriminatory laws must be allowed.

4. ARTICLE 7 (POLITICAL AND PUBLIC LIFE) AND ARTICLE 8 (REPRESENTATION)

4.1 At present, there are no Muslim women representatives in Parliament. As a consequence, the Cabinet Sub Committee appointed on 27th October 2016, considering reform of the Muslim Marriage and Divorce Act consists of 5 Muslim men and 2 non-Muslim women. It is assumed that the inclusion of two women parliamentarians was a nominal measure as in reality the male representatives will give little or no credibility to their contribution on the basis that they are

not versed in the religious doctrine. There has been no measure by the State to ensure participation of Muslim women in a reform process that fundamentally affects women.

4.2 Attacks against public activism by Muslim women: In the last few months in particular (November and December 2016), women activists across Sri Lanka have come under threat, from some Muslim individuals and groups, have escalated in the recent past, for advocating changes to the Muslim Marriage and Divorce Act (MMDA). Abusive anonymous phone calls warning activists to ensure their wives, sisters and daughters refrain from pursuing this campaign have been received by family members of women activists. Muslim women activists have also been named and abused in social media campaigns. These attacks, abuse and intimidation are organised and targeted against specific women's rights activists.

5. ARTICLE 10 EDUCATION

5.1 According to cases noted by community based Muslim women's groups, many girls who are married before the age of 18 are compelled to drop out of school. There are documented cases of Muslim girls and women who drop out of school because of early marriage and when they try to resume their education (during marriage or after divorce) they are not permitted by school authorities back into normal Ordinary and Advanced Level classes with their peers should they choose to do so. Instead, they have to do register for exams privately.

6. ARTICLE 11 EMPLOYMENT

6.1 Muslim women legally prevented from holding public offices created under the MMDA

6.1.1 In Sri Lanka, there are no restrictions for Muslim women to pursue legal careers as judicial officers and judges within the state court system, but they are unable to become Quazis, Board of Quazi members, adjudicators or marriage registrars as per the MMDA. Section 8 of the MMDA on 'Registrar of Muslim Marriages', Section 12 on Quazis and Section 15 on Board of Quazis members all restrict these respective positions to 'male Muslims'. Thus, as a result of this restriction qualified Muslim women are unable to apply for these positions. The position of Quazi is a state-salaried and tax-funded position that is allowed to discriminate against women simply on the basis of sex, but yet again due to Article 16(1) of the constitution, this State discrimination is 'legalized'.

6.1.2 The provision for whether or not Muslim women can be Quazis under the MMDA is by far the most controversial and a highly contested issue with regard to MMDA reforms. It is to be noted that certain aspects of the MMDA such as enforcement of maintenance orders, recovery of *kaikuli* and *mahr* and child custody cases as well as inheritance cases under the Muslim Intestate Succession and Ordinance (1931) are taken up in civil courts. These courts also have female judges, who decide on cases. In the case of inheritance, presiding judges (both Muslim, non-Muslim, male and female) also interpret Islamic law-based legal jurisprudence as per the Muslim Intestate Succession Ordinance.

KEY RECOMMENDATION FOR MMDA REFORMS ON QUAZI COURT SYSTEM:

- Women should be eligible to be appointed as Quazis, as Members of the Board of Quazis, Marriage Registrars and adjudicators;
- Excluding or disqualifying women 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).

7. ARTICLE 12 HEALTH

7.1 FEMALE GENITAL MUTILATION

7.1.1. The practice of female genital mutilation (FGM) or 'Khatna' appears to be widespread and common-place among sections of the Dawoodi Bohra community in Sri Lanka. General perceptions from people interviewed is that FGM is still practiced among 80-90% of the community, possibly more. Case studies indicate that the practice is being done to young girls who are 7 years of age, and by registered medical practitioners from within the community itself, thereby adding to its acceptance within the community and its secrecy outside of it.

7.1.2 Women experience a range of negative psychological and physiological impacts as a result of the practice – the trauma of the cutting itself and the memory of it; pain and/or reduced pleasure during sexual intercourse as an adult and/or taking very long to climax; consequent difficulties in relationship with partners; and feelings of being violated because the act had been carried out on them as children, without their consent, and without them being able to understand its consequences.

7.1.3 The practice is shrouded in secrecy and propagated by its worldwide leadership located in India. In Sri Lanka increasing numbers of Bohra women are coming forward to speak out against the practice but are doing so anonymously due to a strong fear that identifying oneself will lead to ostracisation. FGM is practiced among other sects of the Muslim community in Sri Lanka as well. However, in most cases it is done at infancy by midwives or elderly women in private homes. There have been instances when women converts from other religions into Islam had to undergo FGM after conversion or before marriage to Muslim men. Attempts to document the extent of the practice have been limited due to the secrecy and stigma associated with it.

7.1.4 **Lack of State action:** There is currently no law prohibiting the practice of female genital mutilation in Sri Lanka. There exists written edicts promoting the practice and the state of Sri Lanka has not responded to any of them. As a result of fears of ostracization there is no public

debate. The attention of national institutions such as the National Child Protection Authority and the Human Rights Commission have been drawn to this issue to no avail.

7.1.4. There is palpable hesitancy on the part of public institutions to engage with what is seen as a “community” issue and have expressed concern of publicly engaging with the issue based on anonymous complaints. It is clear that there is a fear of engaging in controversy and perhaps prompting religio-political tensions particularly with Muslim community mainly male leadership, is causing State institutions to refrain from engagement. As a result there is no means of redress for the girl children who have to undergo this mutilation.

KEY RECOMMENDATION TO STATE

As a child abuse situation there should be no hesitancy on the part of State institutions to intervene and protect the rights of these girl children. Agencies like the National Child Protection Authority must look into eliminating this practice as a matter of priority.

In order to eliminate any doubt/debate on the matter legislation must be introduced in Sri Lanka specifically making FGM (in any form) an offence punishable by law. It will also empower more families to say choose not to do the practice in the face of communal and family pressure for it to be done to their children

7.2 TEENAGE PREGNANCY AND RELATED HEALTH RISKS ASSOCIATED WITH CHILD MARRIAGE

7.2.1 Data from a 2011 UNFPA report ‘Extent, Trends and Determinants of Teenage Pregnancy in Three Districts in Sri Lanka’ revealed that, "An increased risk for teenage pregnancy was observed when the ethnicity of the women or the spouse was Muslim and/or were followers of the Islamic faith". Girls who marry young are also at a higher risk of reproductive and maternal health problems given lack of bodily maturity and decision making over sexual, reproductive choices and family planning. They are also at an increased risk of gender-based violence, including domestic violence and forced sexual intercourse (marital rape).

7.2.2 Muslim interlocutors and religious leaders put forward the argument that girls who are given in marriage are deemed ‘mature’ and able for married life, by her guardians. However this argument is highly problematic as it does not ensure a full childhood, right to education, bodily maturity and the ability to consent freely to marriage and sexual intercourse (which is determined by the Penal Code and should be one age for all citizens).