



Reforming the Muslim Marriage and Divorce Act

POLITICS

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1. Background

One of Maithripala Sirisena's key promises leading to the January 2015 Presidential Election included improving the lives, and increasing the rights, of women across the nation. His pledges to women included increased representation of women in local authorities; maternity benefits; and legal status for female labour in the domestic and informal sectors. Although Sirisena's campaign did not specifically refer to the Muslim Marriage and Divorce Act, No. 13 of 1951 (MMDA), civil society organisations and women's rights activists have campaigned to include reform of this legislation within the '*yahapaalanaya*' government's legislative reform agenda.

Attempts to reform the MMDA are not recent. Efforts to amend the Act date back to the 1950s.ⁱ In 2009, a reform committee was appointed by then Minister of Justice Milinda Moragoda to address the shortcomings of the Act. After nine years, the report of the Muslim Personal Law Reforms Committee (the Committee) was submitted to the Ministry of Justice on 22 January 2018.ⁱⁱ However, as at 13 March 2018, the contents of the report have yet to be made public.

This briefing note is presented in three sections. The first section identifies the key stakeholders in the current reform process, mainly the proponents and opponents of reform. The second section discusses the key provisions of the Act including its contested aspects. The section also discusses proposed reforms to the Act. The final section discusses proposed reforms to other laws that either (a) impede MMDA reform, or (b) stem from contested aspects of the MMDA.

2. Key stakeholders in the MMDA Reform Process

The Muslim Marriage and Divorce Act (MMDA) was enacted in 1951, replacing the Dutch Code (later known as Muhammadan Code) of 1806.ⁱⁱⁱ The MMDA instituted a Quazi (Muslim judge) court system, which currently has 65 courts.^{iv} The Act pertains to all Muslims marrying within the faith, and defines legal rules on marriage and divorce according to Shari'a, Islamic legal practice and local custom.^v

Since the law's inception there have been efforts to reform it by bringing it in line with national and international standards on issues such as the minimum age of marriage. In this context, proponents and opponents of MMDA reform have emerged.

2.1 Opponents of reform

All Ceylon Jamiyyathul Ulama (ACJU)

The ACJU was established in 1924, and is incorporated under Act No.51 of 2000. It comprises Islamic scholars, and is meant to serve as a source of spiritual guidance. The ACJU maintains that it refrains from participating in active politics on principle. It claims to offer opinions and advice on policymaking and guidance in times of crisis.^{vi}

In 2017, President of the ACJU Ash Sheikh Rizwe Mufthi – a member of the MMDA Reforms Committee established in 2009 – declared that the MMDA is 'perfect in its present state'.^{vii} In April 2017, the ACJU responded to criticisms of Rizwe Mufthi's remark, clarifying that:

[W]hat he wanted to express was that our predecessors who were involved in formulating the MMDA had taken great efforts to make it near perfect. Of course, given the circumstances of that period. This does not imply that there need not be any reforms today to the Act, mainly in the administration of [the] Quazi court system.^{viii}

Furthermore, the ACJU expressed a willingness to listen to the issues faced by women in the community and to consider necessary reform.^{ix}

In October 2017, the ACJU made a submission to the Muslim Personal Law Reforms Committee. This 37-page document rejected almost all the proposed reforms to the MMDA, on the grounds that it would contradict Shari'a.^x

Sri Lanka Thawheed Jama'ath (SLTJ)

In November 2016, the SLTJ organised a protest against proposed reforms to the MMDA.^{xi} It was organised on the misinformation that the reforms were proposed in order to comply with the European Union's conditions for Sri Lanka to regain its GSP+ trade concession facility.^{xii} According to press reportage, the General Secretary of the SLTJ, Abdul Razeek, claimed:

[T]he [MMDA] Act currently in place specifies the criteria which must be followed when getting married. The main three conditions that must be followed when a male and a female are to be married are that the guardian of the female approves of the marriage, the approval of the girl and the fact that the girl has reached puberty. As long as these three conditions are met the age of the girl does not matter. These laws were established by our forefathers after much struggle and we will not let them be changed.^{xiii}

2.2 Proponents of reform

Muslim Personal Law Reforms Action Group

The Muslim Personal Law Reforms Action Group (MPLRAG) is an advocacy group comprising individual rights advocates, women's rights activists, lawyers, and researchers.^{xiv} Hyshyama Hamin, a lawyer and activist working with MPLRAG, co-authored 'Unequal Citizens: Muslim women's struggle for justice and equality in Sri Lanka' with Hasanah Cegu Isadeen in 2016.^{xv} The study examined the challenges faced by Muslim women in Sri Lanka, using interviews and case studies to identify and illustrate issues within the MMDA, and recommended reforms to address them.^{xvi} MPLRAG meanwhile released a list of demands for MMDA reform in March 2017. The list included the demand to make the MMDA consistent with the generally applicable minimum age of marriage (eighteen years).^{xvii}

In February 2017, representatives of MPLRAG contributed to the joint civil society statement made at the 66th session of the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW).^{xviii} Moreover, in April 2017 it released a statement demanding that the government respond to the comments made by the ACJU chairman. 307 individuals and 13 organisations endorsed this statement.^{xix}

Women and Media Collective

The Women and Media Collective (WMC) was established in 1984 by a group of Sri Lankan feminists. It is a research and advocacy organisation that aims to advance women's rights.^{xx}

In addition to contributing to the statement to CEDAW in February 2017,^{xxi} and endorsing MPLRAG's statement in April 2017,^{xxii} WMC produced a shadow report for CEDAW in 2017. This report identified concerns surrounding the MMDA, and proposed reforms to address these concerns.^{xxiii}

Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) is the body of independent experts that monitors implementation of CEDAW,^{xxiv} which Sri Lanka ratified in 1981.^{xxv} On 3 March 2017, CEDAW released its concluding observations on Sri Lanka's eighth periodic report. The observations (a) made special note of efforts to reform the MMDA, (b) suggested particular reforms, and (c) questioned the lack of reform to other personal laws and the delay in releasing the report of the Commission appointed to deal with MMDA reform in 2009.^{xxvi}

2.3 Other Stakeholders

Sri Lanka Muslim Congress

The Sri Lanka Muslim Congress, established in 1981, is a political party comprising Muslim politicians.^{xxvii} It claims to focus on 'giving voice to the Muslim minority'^{xxviii}, whilst committing to fostering 'multiracial amity and collective prosperity for all Sri Lankans'^{xxix}. The SLMC currently holds seven seats in Parliament.

The SLMC is yet to take an official stance on MMDA reform, although individual members have commented on the topic. In November 2016, Minister Rauff Hakeem, the leader of the SLMC, spoke in support of progressive reform while maintaining that any change must come from within the community.^{xxx} However, no further action has been taken by the SLMC in support or opposition of proposed reforms.

Human Rights Commission of Sri Lanka

The Human Rights Commission of Sri Lanka (HRCSL) is an independent commission that was created to promote and protect Human Rights in the country. The commission was set up under the Human Rights Commission of Sri Lanka Act, No.21 of 1996.^{xxxi}

In a letter dated 19 October 2016 to the Chairman of the Sub-Committee on Fundamental Rights of the Constitutional Assembly, the Chairperson of HRCSL Dr. Deepika Udagama asserted HRCSL's position, that:

[T]he future Constitution of Sri Lanka must recognise the principle of supremacy of the Constitution. All written and customary laws will be

invalid to the extent of inconsistency within the Constitution of Sri Lanka.^{xxxii}

In March 2017, Dr. Udagama reiterated the HRCSL's position with particular regard to personal laws, i.e. that the Constitution should be supreme. She further commented that consultation with the relevant communities must be encouraged as 'a strategic means to ensure that [a] community has a say over matters that affect them'.^{xxxiii}

3. Proposed MMDA Reforms

Proponents of MMDA reform have put forward the following proposed reforms to address certain provisions of the MMDA, which they argue are discriminatory towards women.

Minimum age of marriage

Section 23 of the MMDA stipulates that a girl below the age of twelve years cannot be registered under the Act unless the Quazi for the area has – pursuant to investigations he deems necessary – authorised the registration of the marriage.^{xxxiv} This provision implies that marriage of girls over the age of twelve years is permissible without the authorisation of a Quazi. It also implies that there is no minimum age for marriage under the MMDA, as even a girl under the age of twelve years could be married with prior authorisation.^{xxxv}

In their list of demands, MPLRAG suggested amending the MMDA to be consistent with the General Marriage Registration Ordinance's (GMRO) stipulation of eighteen years as the minimum age for marriage.^{xxxvi} Such consistency would require that MMDA provisions that permit marriage below the age of eighteen years be amended. This view has also been supported in the CEDAW report.^{xxxvii} Additionally, MPLRAG recommends that the date of birth of both parties to the marriage be included on the marriage registration form.^{xxxviii}

Legal requirement for the woman's consent

The MMDA does not require a woman's consent to be recorded before the registration of any marriage under the Act. Section 18 requires only the male party to the marriage and the *wali* (guardian) of the woman (subject to some exceptions under section 47) to make written declarations prior to the registration of the marriage; a woman is only expected to sign the *wali's* declaration if he is someone other than her father or paternal grandfather.^{xxxix}

MPLRAG recommends amending the MMDA to require the signature or thumbprint of the woman concerned as a mandatory component of marriage documentation.^{xl} It further suggests removing provisions of the MMDA that require the presence and consent of a woman's *wali* before the registration can be accepted.^{xli}

Legal requirement for wife's/wives' consent in instances of polygamy

The MMDA permits a Muslim man to marry up to four women. When a married Muslim man plans to take on a second, third, or fourth wife, section 24 of the MMDA only requires that he notify the Quazis for the area in which (a) his current

wife/wives reside, (b) his intended wife resides, and (c) he resides, 30 days before the registration of the marriage.^{xlii}

MPLRAG has expressed its disapproval of the practice of polygamy. However, it recommends that if the MMDA continues to recognise polygamy the following safeguards be included:

- (1) A woman should be informed in advance of marriage registration whether or not her husband plans to practice polygamy, and should have the opportunity to have her acceptance or rejection recorded in a marriage contract,
- (2) All wives and wives-to-be should give their consent before the husband takes another wife in marriage, and
- (3) A man's capacity to maintain multiple wives must be checked by a Quazi prior to a polygamous marriage.^{xliii}

Eliminating differences in divorce procedure for men and women

The second schedule of the MMDA requires a husband to initiate a divorce (*talak*) in the presence of the relevant Quazi and two witnesses, and that the Quazi inform the wife in the divorce if she is absent at the time. The schedule does not require the Quazi to record the alleged grounds for divorce.^{xliv} Meanwhile, the conditions for divorce initiated by a woman (*fasah*) are covered by the Third Schedule. Accordingly, the wife is required to submit an application for divorce to the relevant Quazi, whereupon a hearing will be called and the wife, a minimum of two witnesses, and the husband will provide their testimonies. The evidence will be recorded and deliberated upon by a panel of Muslim assessors together with the Quazi before the divorce can be granted.^{xlv}

MPLRAG's reform proposals recommend that (a) the husband provide reasons for divorce in the case of unilateral divorce requested by the husband, and (b) ensure that effective and efficient processes for divorce are open to all those governed by the MMDA.^{xlvi}

Appointment of women as Quazis and Marriage registrars

Sections 8,^{xlvii} 9, 10, 12, 14, and 15^{xlviii} of the MMDA stipulate the conditions for appointing marriage registrars, Quazis and members of the Quazi Board. These sections specify that only male Muslims may be appointed to these positions.

MPLRAG argues that, since these are government-salaried, tax-funded positions, they should not be discriminatory, and women should be permitted to hold the positions.^{xlix} The CEDAW concluding observations support this stance.¹

4. Proposed Reforms to other Legislation

Provision to opt out of MMDA if both parties are Muslim

There is some doubt as to whether Muslims can register under the GMRO rather than the MMDA. The long title of the GMRO states that it is a law to ‘consolidate and amend the law related to marriages other than the marriages of Muslims.’^{li} Moreover, the definition of ‘marriage’ in section 64 of the GMRO states that it does not include ‘marriages contracted between persons professing Islam.’ However, the law itself does not explicitly bar Muslims from registering their marriage under it.

MPLRAG^{lii} and the CEDAW concluding observations^{liii} recommend that the GMRO be amended to clearly permit Muslims to register marriages under the GMRO.

Repealing article 16 of the Constitution

Article 16 of the Sri Lankan Constitution states: ‘All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.’^{liv} This is applicable to the MMDA since it was introduced prior to the promulgation of the current Constitution. Thus sections of the Act that may be inconsistent with fundamental rights, such as the right to non-discrimination guaranteed under article 12(2) of the Constitution, remain valid.

MPLRAG,^{lv} WMC,^{lvi} and the CEDAW concluding observations^{lvii} call for either the repeal of article 16, or an amendment that allows constitutional supremacy over discriminatory laws.

Amending section 363 of the Penal Code

Under section 363 of the Penal Code, a man is said to commit ‘rape’ if he has sexual relations with a girl under the age of sixteen years whether or not she gives consent, unless she is above the age of twelve, and is his wife who has not been judicially separated from him.^{lviii} MPLRAG^{lix} and the CEDAW concluding observations^{lx} recommend amending this section so that the offence of statutory rape applies to all girls under the age of sixteen with no exceptions.

Muslim Personal Law Reforms Committee Report on MMDA Reform

The Muslim Personal Law Reforms Committee is chaired by Justice Saleem Marsoof. Following nine years of deliberation, the Committee’s report on MMDA reforms was submitted to the Ministry of Justice on 22 January 2018. According to media reports, a consensus on the final contents of the report was not reached

among committee members, highlighting the divisive nature of the ongoing debate.^{lxi}

MPLRAG issued a statement on 24 January 2018, expressing support for the submission of the report, as a progressive step towards promoting discussion on equality and justice for Muslim women.^{lxii} Furthermore, the statement advocated for (i) the report to be made publicly available and translated into Sinhala and Tamil, and (ii) for a timeline to be agreed upon for the relevant Cabinet Sub-Committee to present a bill to Parliament to amend the MMDA accordingly.

Endnotes

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ii 'Statement by MPLRAG on the release of the report on MMDA reforms', accessible at: <https://mplreforms.com/2018/01/24/statementjan24/>.

iii 'FAQs about MMDA', accessible at: <https://mplreforms.com/aboutmmda>.

iv *Ibid.*

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vi 'About Us', accessible at: <http://www.acju.lk/en/about-us>.

vii 'ACJU and the MMDA – A statement of clarification', accessible at: <http://www.acju.lk/en/news/acju-news/item/1108-acju-and-the-mmda-a-statement-of-clarification>.

viii *Ibid.*

ix *Ibid.*

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xi SLTJ, Poster announcing protest against Muslim Personal Law Reform, accessible at: <https://tinyurl.com/y8urgsr7>.

xii 'Marriage & Divorce Laws Muslims protest against proposed changes', *Ceylon Today*, accessible at: <http://www.ceylontoday.lk/print20160701CT20161030.php?id=8622>.

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xv Hyshyama Hamin & Hasanah Cegu Isadeen, *Unequal Citizens: Muslim women's struggle for justice and equality in Sri Lanka* (2016), accessible at: <https://mplreformsdotcom.files.wordpress.com/2016/12/unequal-citizens-study-hyshyama-hamin-hasanah-cegu-isadeen1.pdf>.

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xvii 'Muslim Women's Demands on Reforms to the Sri Lankan MMDA', accessible at: <https://mplreforms.com/2017/03/12/muslim-womens-demands/>.

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- ^{xxvi} CEDAW, *Concluding observations on the eighth periodic report of Sri Lanka* (2017), accessible at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fLKA%2fCO%2f8&Lang=en.
- ^{xxvii} 'Our History', accessible at: <http://slmc.lk/about-us/sri-lanka-muslim-congress/>.
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