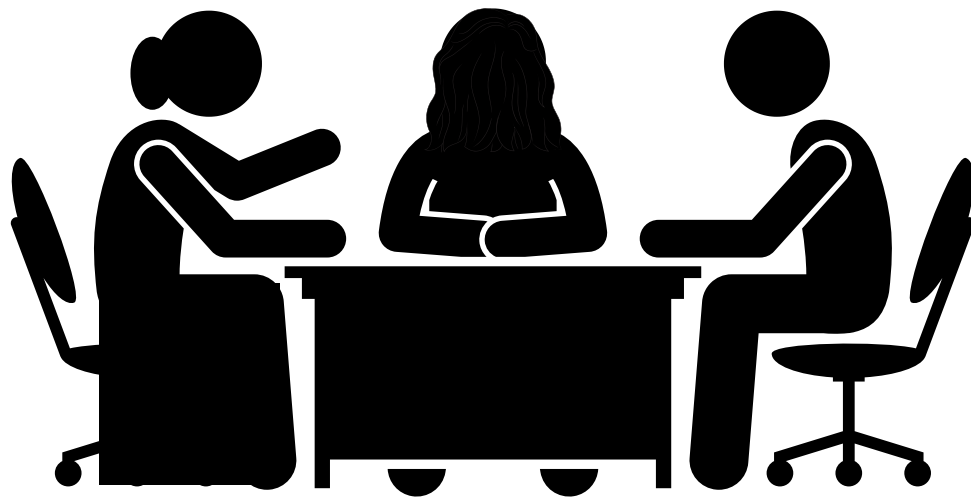


# FAMILY COURT SYSTEM FOR A REFORMED MUSLIM MARRIAGE AND DIVORCE ACT (MMDA)



## INTRODUCTION

On 8th March 2021, the Cabinet of Ministers decided to abolish the Quazi system. There has been much debate about this issue since. The decision has been received by some quarters as a hostile move to abolish the entire Muslim Marriage and Divorce Act of 1951 (MMDA) and by others as a progressive move towards reform.

For those advocating for reform of the Quazi system for many years, the Cabinet decision has presented an option that was not on the table previously. MPLRAG recognises a false binary dilemma in the arguments presented - abolish or not to abolish the Quazi system. MPLRAG also recognizes that racist and anti-Muslim sentiments are also taking cover under Muslim women's demands and are advocating for reform in pursuit of their own malicious agenda. This is why it is important to approach this debate with an understanding of the multiple consequences involved. The experience of the Quazi system must be evaluated against the District Court system that will then likely adjudicate the reformed MMDA.

A decision at this juncture, must be based on an assessment of what would provide an acceptable system of justice for spouses and families, after considering the information and experience available from both institutions. Any response to the Cabinet decision must consider the complexities involved with both options, and the debate should not be reduced to a simple binary choice. Another challenge, in navigating this debate, is the complete lack of public information on the proposed reforms regarding the procedure and system to be adopted.

The MMDA is currently administered by Quazis. Only males considered to be of 'good character' can be appointed to this office. They are empowered to make decisions on maintenance, divorce and return of Mahr (gift to bride) and Kaikuli (dowry). They cannot decide on custody of children, as those matters come under the purview of the District Courts of Sri Lanka. A Board of Quazis (sitting in Colombo and Kalmunai on Saturdays) hears appeals and, thereafter, appeals are heard by the Court of Appeal and Supreme Court of Sri Lanka. The District Court system: (i) consists of trained judicial officers, (ii) is procedurally mainly governed by the Civil Procedure Code, (iii) has original jurisdiction to hear all civil cases and (iv) provides for two appeals - to the High Court for Civil Appeals and the Supreme Court.

This paper is presented as follows:

A.MPLRAG's Conceptual Framework for Reform

B.Features and Criteria of a Good Family Law System

C.Comparing the lived realities of women using the two systems - Quazi system and District Court

D.Addressing myths to understand the context of the current Quazi system

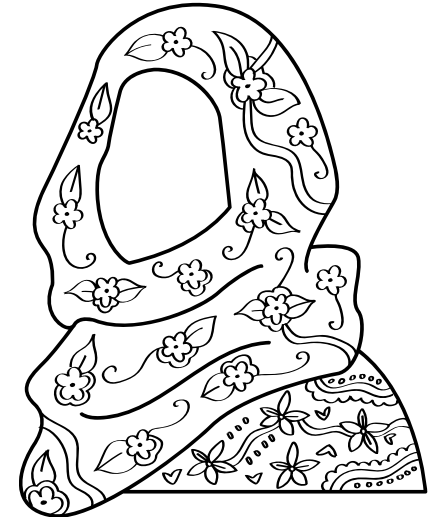
E.MPLRAG's Position

## A. MPLRAG'S CONCEPTUAL FRAMEWORK FOR REFORM

MPLRAG's conceptual framework, which we apply to all reforms that we discuss, requires the following to be substantively achieved:

### 1. Contemporary lived realities of Sri Lankan Muslim women

The system must respond to the lived realities of Sri Lankan Muslim women as experienced within the Quazi system as described above. It will also need to respond to the realities faced by Sri Lankan families in general before the current District Court.



### 2. Islamic principles and the diversity of Islamic jurisprudence and legal tradition

The Qur'an considers justice to be a supreme virtue. There is a very close relationship between justice and other noble values such as ihsan (kindness) and taqwa (Allah consciousness).

“Indeed, God commands you to render trust to whom they are due and when you judge between people to judge with justice. Excellent is that which God instructs you. Indeed, God is ever Hearing and Seeing.” [Qur'an - Surah 4, Verse 58]

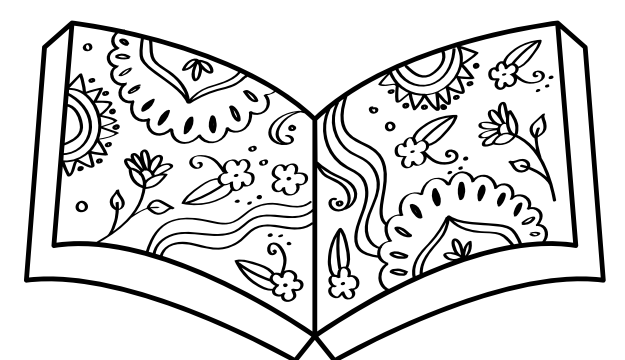
This verse contains two obligations: the first one is the rendering of trust to those to whom they are due, and secondly is judging with justice. The significance of mentioning 'trust' before the 'judging with justice' is, according to some exegeses, that the Qur'an begins with the responsibility towards oneself before that towards others.



Additionally, the system adjudicating Muslim law must recognize marriage as a partnership of equals fostering love and compassion (mawaddah wa rahma), consultation and mutual consent (tashawur wa taradi), kindness (ihsan) and dignity (karamah) amongst women and men. Therefore, equality in substantive and procedural law must be guaranteed in the family court system that adheres to Islamic principles. Justice may only be realized through efficient, just and impartial administration of the legal system.

### 3. Constitution

The Sri Lankan state is obligated to ensure justice and equality. Article 12(1) of the Sri Lankan Constitution states that “All persons are equal before the law and are entitled to the equal protection of the law.” Article 12(2) states, “No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds”. This means that the Sri Lankan state must ensure equal treatment of citizens including in matters of procedure and quality of family law adjudication.



### 4. International human rights frameworks

Sri Lanka ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1981 and is obliged to take all appropriate measures, including legislation, to ensure the full development and advancement of women in all fields, in particular in the political, social, economic and cultural fields. In 2017, CEDAW Committee raised the issues of existing barriers to women's access to justice and limited knowledge of gender equality on the part of legal practitioners.

In 2019, the Colombo Declaration on the Role of the Judiciary in Advancing Women's Right to Equality in Marriage and Family Relations stressed that all judicial officers and those involved with the judicial system must comply with fundamental human rights including in family and marriage related matters. The system had a responsibility to be gender aware and gender sensitive, ensure that the courtroom is not a hostile and intimidating environment for women seeking redress and protect the privacy of parties and children.

## B. FEATURES AND CRITERIA OF A GOOD FAMILY LAW SYSTEM

Keeping the above in mind, we looked closer at the specific requirements of a good family law system. Available frameworks for access to justice helped us identify that the three important features are (1) Access to Justice (2) Substantive Fairness and (3) Procedural Fairness.

We have adapted the three features to describe in detail the criteria that are necessary to achieve each feature.

| FEATURES                    | CRITERIA   |
|-----------------------------|--|
| <b>ACCESS TO JUSTICE</b>    | <p>A system is said to secure access to justice if it has the following qualities:</p> <ol style="list-style-type: none"><li>1. <b>PHYSICAL AND LANGUAGE ACCESSIBILITY</b></li><li>2. <b>SECURITY</b></li><li>3. <b>AFFORDABILITY</b> - Free or low cost processes and robust legal aid schemes.</li><li>4. <b>NON-ADVERSARIAL AND FAMILY FRIENDLY (INCLUDING PRIVACY)</b> - Family disputes require an inquisitorial approach to reach solutions or compromise - this is to ensure that the procedure does not encourage disputes and acrimony between parties and secures the best interest of spouses and children. It is an approach that reduces risks and harms.</li><li>5. <b>CHOICE FOR SELF-REPRESENTATION</b>- Opportunity for parties to express experience and views (at least at the first instance mediation stage)</li><li>6. <b>GENDER-SENSITIVE</b> - The lived realities of women and girls are a key consideration.</li></ol> |
| <b>SUBSTANTIVE FAIRNESS</b> | <p>Equitable justice is a deeply enshrined principle in Islam. The reformed MMDA must conform to Islamic jurisprudence and the system must apply the said Islamic standards as outlined in the MMDA with an appreciation for Islamic jurisprudence and the principles of justice, dignity and fairness. This also means that there should be fairness and consistency in the application of the law.</p>   |
| <b>PROCEDURAL FAIRNESS</b>  | <p>The system must have specified procedures, reasonable maximum timelines for cases and a robust oversight mechanism. This will limit judicial discretion and ensure that decisions are given in a timely manner.</p>   |



**“And the heaven God raised and imposed the balance. That you not transgress the balance. And establish weight in justice and do not make deficient the balance.”**

**Qur'an: Surah 55, Verse 7 -9**

## C. COMPARING THE LIVED REALITIES OF THE TWO SYSTEMS

The Quazi system and District Court system are significantly different. Let us consider how each adjudicates family matters. Let us consider how each system adjudicates family matters. The following observations are made based on the contemporary lived realities of Muslim women, experiences of legal practitioners and available studies documenting the practical functioning of the two systems.

We have evaluated the systems on 1. Access to Justice 2. Substantive Fairness and 3. Procedural Fairness. \*The cells in the table below are color coded as follows: **GREEN (positive features)** and **PINK (negative features)**.

### 1. ACCESS TO JUSTICE

#### AREA OF CONCERN: PHYSICAL ACCESS (distance to forum, days and times of access, and language)

##### QUAZI SYSTEM

- There are 65 part-time Quazis.
- One Quazi on average serves about 30,000 persons.
- People access services in the language of their choice, mainly Tamil speaking.

- Quazis have a limited and unpredictable schedule, schedules are changed at their discretion, they are often not accessible during the month of Ramadan, AND there is also no consistency in dates for sittings.

- Building and other facilities are not provided by the State. Some Quazis conduct their work in their own homes, some in parts of public buildings.

##### DISTRICT COURT

- There are 54 District Courts functioning full time.
- On a very rough average, the court serves over 300,000 persons and handles all civil cases (land, money recovery, testamentary, etc).
- Has transparent and consistent access - open throughout the work week.
- State provides building and other facilities.

- Tamil speaking people cannot always access services in the language of their choice.

#### AREA OF CONCERN: PHYSICAL SECURITY

##### QUAZI SYSTEM

- The Quazi system has failed to ensure security to Quazis and people who come before the Quazi.

##### DISTRICT COURT

- The District court system provides physical security to people and to judges.

## AREA OF CONCERN: AFFORDABILITY

### QUAZI SYSTEM

- Free or low cost system (at the stage of Quazi).
- The fact that legal representation is not required at the Quazi means that initiating and completing a case does not cost anything in terms of procedure.
- However, legal representation is required when decisions of the Quazi are appealed and financially powerful people (usually men) are once again favoured by the legal system.
- There are also many instances where Quazis have charged for forms and to process applications, taken bribes to expedite cases, etc.

### DISTRICT COURT

- Costly.
- The requirement of a lawyer to initiate a case before the District Court means that people must be able to bear the legal fees which can be prohibitive. This also means that financially stronger people are able to secure better legal representation.
- Legal aid systems have not developed to ensure that all persons who need legal aid are provided with good quality legal aid.

## AREA OF CONCERN: APPROACH OF ADJUDICATION

It is well established that family disputes require an inquisitorial approach to reach solutions or compromise - this is to ensure that the procedure does not encourage disputes and acrimony between parties and secures the best interest of children. It is an approach that reduces risks and harms.

### QUAZI SYSTEM

- The Quazi is required to adopt an inquisitorial approach (Quazi is supposed to have an active role to gather necessary information from the parties and decide).
- People have reported experiencing an adversarial approach from the Quazi. Consequently, the Quazi system does not always guarantee an inquisitorial approach to family dispute resolution. In some districts, third parties like Mosque Committees are also involved.

### DISTRICT COURT

- The District Court adopts an adversarial approach (court allows parties to contest (fight) each other). This is not the best approach when dealing with marriage and family matters.

**AREA OF CONCERN: FORMALITY VS INFORMALITY**

Both forums fail to provide publicly accessible, informative material for people to understand the process and have realistic expectations of timelines.

**QUAZI SYSTEM**

- The Quazi system does not permit lawyers. This means that people speak for themselves. Their stories are not changed into legal language that often alienates people. This also means people know exactly what is said on their behalf.

- However, the informality also means that sometimes women are not permitted to speak (silenced by the Quazi). Informality, without supervision, also leads to risk of corruption and abuse.

**DISTRICT COURT**

- Formality ensures procedural fairness including both parties being heard.

- The formality of legal process and arguments often alienates people.

**AREA OF CONCERN: GENDER SENSITIVITY**

**QUAZI SYSTEM**

- No gender sensitivity.
- No measures to ensure gender sensitivity.

**DISTRICT COURT**

- No gender sensitivity.
- Judicial training available to deliver gender sensitivity training, but not effectively utilized.

**2. SUBSTANTIVE FAIRNESS**

**AREA OF CONCERN: FAIR AND CONSISTENT APPLICATION OF LEGAL PRINCIPLES AND HOW THE LAW IS APPLIED**

**QUAZI SYSTEM**

- Quazis receive no training and are not required to have any qualifications or experience. Testimonies and studies show that Quazis adopt arbitrary standards and have made unjust decisions, which in turn has made it a system of highly unpredictable outcomes. There are documented case studies including complaints before the Judicial Service Commission of bribery and corruption by Quazis who have charged money for issuing forms, withheld maintenance amounts or taken bribes for granting divorce.

**DISTRICT COURT**

- Trained and qualified judicial officers. As a consequence of the training, experience and the strict adherence to set standards and precedent, the law is applied with predictability in the District Court.

### 3. PROCEDURAL FAIRNESS

#### AREA OF CONCERN: DELAYS

##### QUAZI SYSTEM

##### DISTRICT COURT

- Quazis have been known to provide relief in terms of divorce in a timely manner.

- The District Court has evolved a practice of no-contest divorce to avoid prolonged litigation.

- Prolonged delays in securing divorce, particularly in heavily contested matters, especially affecting women, when the Quazi orders are appealed in Fasah divorce cases.
- It is reported that the Board of Quazis also has a backlog of appeal cases.
- Quazis have delayed decisions of divorce or refused to enforce maintenance orders.

- Prolonged delays in securing divorce, particularly in heavily contested matters.

#### AREA OF CONCERN:

- Trained, experienced and supervised adjudicators -
- Predictability of how the law is applied

##### QUAZI SYSTEM

##### DISTRICT COURT

- Quazis receive no training and are not required to have any qualifications or experience.
- Testimonies and studies show that Quazis adopt arbitrary standards and have made unjust decisions, which in turn has made it a system of highly unpredictable outcomes.
- There are documented case studies including complaints before the Judicial Service Commission of bribery and corruption by Quazis who have charged money for issuing forms, withheld maintenance amounts or taken bribes for granting divorce.

- Trained and qualified judicial officers. As a consequence of the training, experience and the strict adherence to set standards and precedent, the law is applied with predictability in the District Court.

## C. ADDRESSING MYTHS TO UNDERSTAND THE CONTEXT

Context is a valuable consideration. Whilst it is easy to take an ideal or preferred position and defend it while ignoring the context, MPLRAG believes in constructive and meaningful solutions. Our understanding of the context can be found in our answers to some key questions and myths that have surfaced in the course of the debates.

### 1. Is the Quazi system based on ‘divine’ Shari’ah law? Is it part of the Sri Lankan Muslim identity?

The Quazi system was formally introduced to Sri Lanka by British colonizers in 1929 and implemented in 1937. Since its introduction, the State and Muslim decision-makers have not taken any substantive measures to properly supervise and introduce standards. A study in 2016 revealed that some Quazis did not even know about the MMDA and had no formal qualifications with some only versed in O’level Islam. The claims that the Quazi system forms an integral part of the identity of the Muslim communities of Sri Lanka is misplaced. A system that has failed Muslim women cannot be part of the Sri Lankan Muslim identity.



“Qadi” is the name by which adjudicators in early times were known, and often were required to be a “Mujtahid” (a person accepted as an original authority in Islamic law often having knowledge of all schools of law). The development of legal systems, civil and criminal law, means that the role of the Qadi, as known traditionally to Islamic jurisprudence or fiqh-based systems, is fundamentally changed. Today, in Sri Lanka, the office of Quazi has neither the character (training and qualities), nor scope (required to interpret Islamic jurisprudence) of the traditionally envisioned Islamic judge (Qadi). Therefore, the Quazi system is neither a traditional religious based institution of substance, nor can it be meaningfully claimed as part of the Sri Lankan Muslim identity.

### 2. Will it help to upgrade the Quazi system? Is upgrading the Quazi system possible?

Upgrading means addressing many issues - training, introducing a requirement of basic qualifications, and investing state resources to pay reasonable salaries, hiring support staff and securing proper buildings and other facilities. The argument that upgrading the Quazi system will solve the administrative problems of adjudication is tempting because it certainly might.

However, it is important to also evaluate whether the investment in upgrading the system will be made. Unfortunately, we observe that there is no political will to upgrade the existing Quazi system. In fact, the many years in which this upgrade, together with rigorous supervision, has not been done sheds light on the continued failure by successive governments and leaders of the Muslim communities.



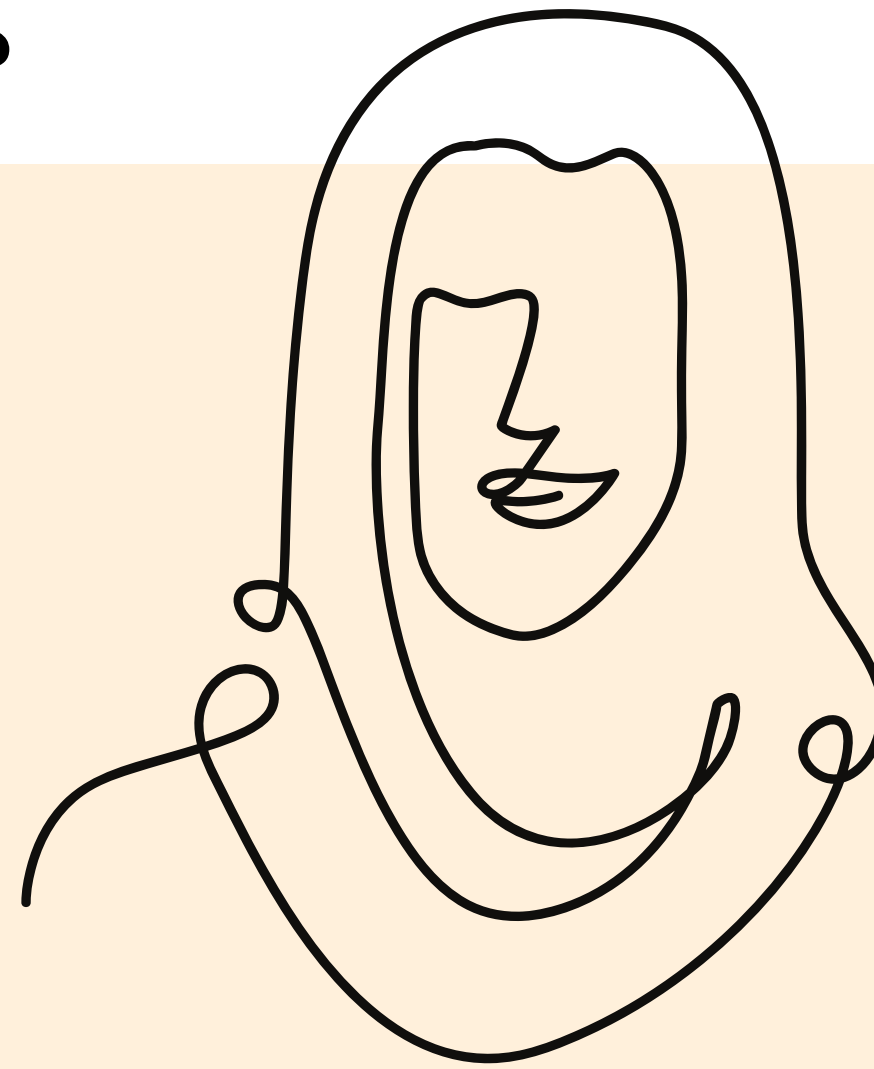


### 3. Is the District Court the solution to the problems in the Quazi system?

We acknowledge that the District Court has failed to provide a family-friendly infrastructure or procedure. But we also recognize that it has predictability of access, security, is capable of applying substantive law consistently, has defined procedures and a robust oversight mechanism. In order for the District Court to be a suitable forum for the MMDA, or in fact for any family law matter, the following will need to be addressed: improved physical access; inquisitorial procedure including opportunities for mediation; privacy; opportunity to express views in their own words and language; gender sensitivity and; improve timelines for cases and reduction of delays.

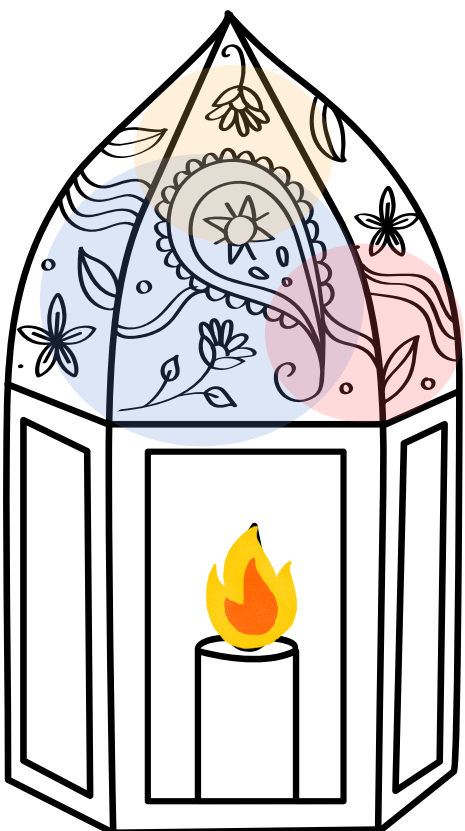
### 4. Does the MMDA have to be adjudicated by a Muslim?

Technically, the law can be applied by any qualified judicial officer. Even today, the law is applied for matters in appeal in the Court of Appeal and the Supreme Court by judges (without consideration of their religious belief). The Muslim Intestate Succession Ordinance dealing with Muslim inheritance issues has been dealt with at the District Court since 1931. For the (reformed) MMDA, It would be useful to have a person who is a Muslim, who is also trained and qualified, to engage in the mediation component before the matter goes to court. This can help the parties feel comfortable with a mediator who understands the personal details of their dispute including habits, rituals and meanings attached to the acts.



## E. MPLRAG'S POSITION

As always, MPLRAG centres the lived realities of Muslim women and girls. It is the capacity of the system to deliver justice, equality, fairness and dignity that is important, NOT the name of the system. From the analysis above, it is clear that although it has features that could have been useful to adjudicating family disputes, the current Quazi system is not delivering justice, equality, fairness or dignity. It has proved to be an unjust, unequal, corrupt system that functions on patronage, and requires a complete overhaul. The current system must be replaced by a Family Court system.



**"O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let enmity and hatred of others prevent you from being just. Be just; that is nearer to righteousness...."**

Qur'an: Surah 5, Verse 8

## MPLRAG'S POSITION IS:



**ESTABLISHMENT OF A FAMILY COURT**, with original jurisdiction, having power to adjudicate over all family matters (general and personal law) must be the ultimate goal of reform.



**IN THE INTERIM** - Until a fully functioning 'Family Court' is established, the District Court may apply the MMDA (substantively reformed). The rationale is that the District Court is a court with original jurisdiction over civil matters, and Muslims as equal citizens of a country ought to have equal access to such a judicial institution, currently available for testamentary and custody of children. Further, the District Court has some general features required for a good family court, such as transparent and predictable access, procedural fairness, qualified judges and predictable application of the law.

However, it is imperative that the current District Court is improved if it is to apply family law. There must be concrete short and medium-term goals to improve access including language accessibility, affordability, privacy, the introduction of an inquisitorial approach and ensuring timely decisions.

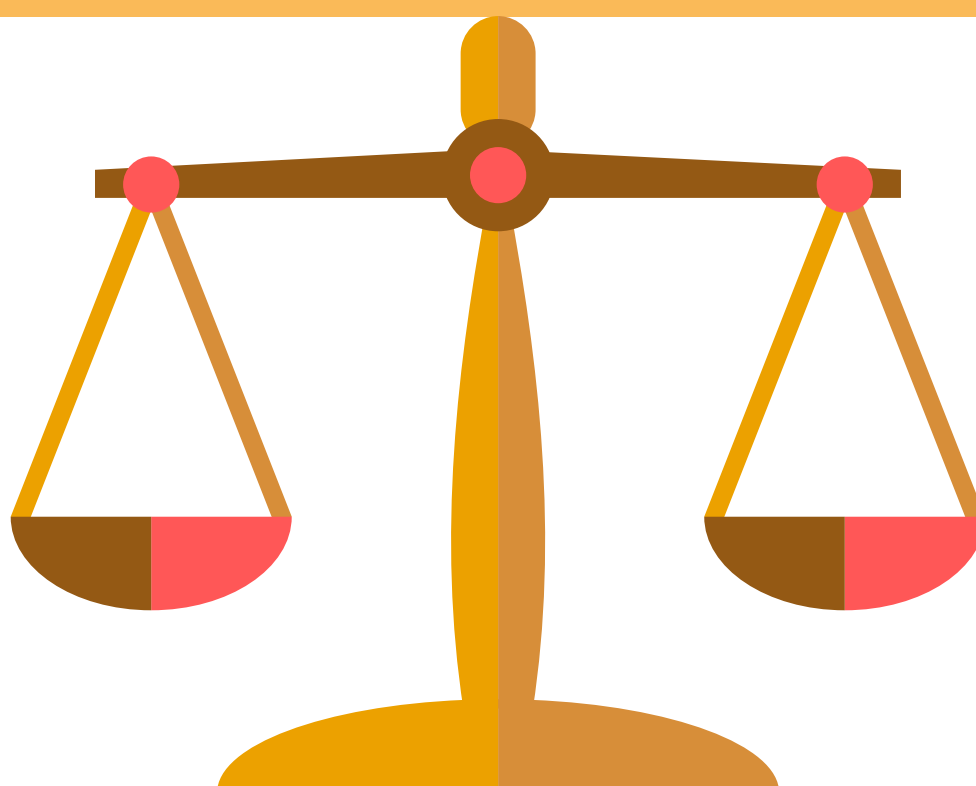


**EFFECTIVE AND EFFICIENT FAMILY MEDIATION** must be introduced into the application of the MMDA. The features of accessibility, affordability and the space to express views in one's own words and language must be available. Mediators, female and male, must be properly qualified, trained and supervised, and maintain high standards of family mediation. Muslim mediators must be available for Muslim couples. As the Quazi system has features of physical access, affordability, space to express views in own words and language, it can be adapted for this purpose with due regard to training, supervision and standards.

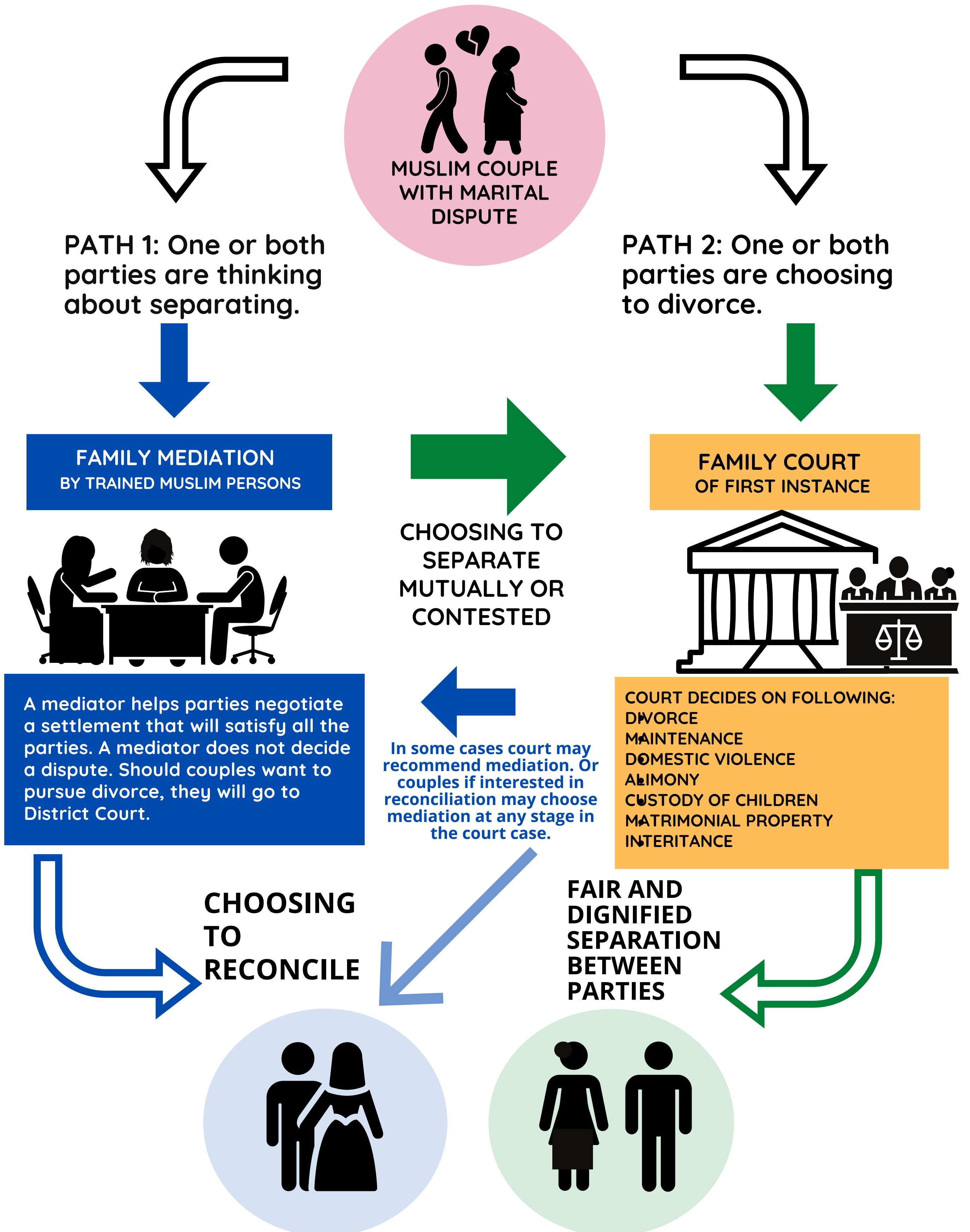
This is a historic opportunity to change this debate of a simple binary choice (Quazi or No Quazi) into a genuine conversation about creating an effective family court system that promotes justice and equality within the family for all.



**Let's move towards a Family Court for all Sri Lankans.**



# IMAGINING A FAMILY COURT SYSTEM



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**The MMDA must be reformed comprehensively & urgently to ensure equality & justice for Sri Lankan Muslim women.**  
[www.mmdasrilanka.org/demands/](http://www.mmdasrilanka.org/demands/)



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