

POLYGAMY IN SRI LANKA



This position paper is the third in a series of position papers analyzing 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 Ministry of Justice in July 2018.

This 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) 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.

NOTE ON UPDATE TO THIS POSITION PAPER:

In September 2020, MPLRAG's position paper on polygamy reflected an alternative of strict conditions that relegated the practice to exceptional circumstances, for just cause, under specific conditions and with authorization of court, in the event permitting polygamy was under serious consideration.

However, having further studied policy, law reform and impacts of polygamy, particularly in majority Muslim countries, led us to review and revise the stance of having a fall back alternative of polygamy with conditions. We maintain that polygamy must be abolished.

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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Website: www.mplreforms.com

A. RECOMMENDATIONS OF THE MMDA REFORM COMMITTEE

With regard to polygamy, the 2009 Committee Appointed to Recommend Amendments to the Muslim Marriage and Divorce Act (MMDA) made the following recommendation.

RECOMMENDATION BY: Chairperson Justice Saleem Marsoof PC, Mrs. Safana Gul Begum, Deshabandu Mrs. Jezima Ismail, Mr Razmara Abdeen, Mrs.Faleela B Jurangpathy, Dr. Sharya Scharenguivel, Mrs. Sharmeela Rassool, Mrs. Dilhara Amarasinghe and Mr Suhada Gamlath PC.

Polygamy is permitted and authorization of Quazi is required to contract a polygamous marriage. The Quazi must be satisfied of the following criteria:

1. The man is living with and is justly and adequately maintaining and caring for his present wife or wives,
2. The man is looking after his children in an equitable manner,
3. The man has capacity to be just and equitable to his intended wife, and
4. The man has the financial capacity to maintain and provide suitable residence for his intended wife and any children.

B. POSITION OF MPLRAG

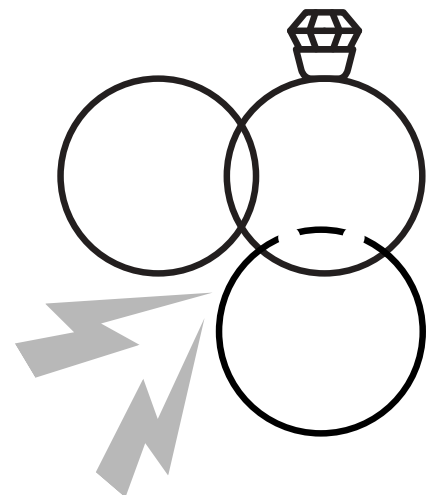
Polygamy must be prohibited.

MPLRAG recommends that polygamy is prohibited in Sri Lanka. This is based on the understanding that:

1. Islam paved the path to restricting and eventually abolishing the practice of polygamy
2. The social conditions that justified limited practice of polygamy in Islamic history, do not exist in Sri Lanka today
3. The practice has been shown to be abusive with long term negative impacts on lives of women.

The recommendation in the MMDA Committee Report protect the practice of polygamy. The Committee members have responded to the rampant abuse of the practice by recommending certain conditions to be ascertained by the Quazi.

MPLRAG finds that the language and formulation used by the members of the Committee in securing the continuation of the practice of polygamy does not reflect Shari'ah in spirit and principle. MPLRAG finds the conditions as recommended to be an inadequate response to addressing the problems faced by women. For instance, the basic criteria of consent of the existing wife or wives is not found in the recommendation.



EVIDENCE FROM OTHER COUNTRIES THAT ALLOW POLYGAMY WITH CONDITIONS OR ADDITIONAL PROCEDURES

MPLRAG notes that in Muslim countries in which polygamy is regulated by insistence on criteria and procedure (in Sri Lanka there is no regulation whatsoever) there has been continued impact on the lives of women and children.

Malaysia has some of the strictest conditions for polygamy from Muslim contexts that allow the practice. Studies in 2010, 2017 and 2019 study demonstrated that polygamy has serious negative impacts on wives and children, that husbands cannot afford to maintain wives in polygamous marriages, and the practice has cross-border consequences and has potential to generate intra-family conflict between co-wives, financial insecurity and mental distress.



In Indonesia, polygamous marriages must be authorised by the court and may only be concluded with the agreement of existing wives. Court permission is only be granted if the husband's existing wife: (i) is unable to perform her conjugal duties; (ii) suffers from a physical infirmity or an incurable disease; or (iii) cannot bear children. In 2021, Minister of Women's Empowerment and Child Protection, Bintang Puspayoga, asserted that this practice heavily affects women and causes them to experience "psychological violence and pressure which one of its reasons is because of unfair treatment." It was also noted that ultra conservative groups and training for polygamous marriage and that such marriages impacted women's access to income and property.

The family law in **Singapore** acknowledges that Quran 4:3 imposes a stiff condition because Muslim law does not encourage polygamy even though it permits polygamy. Permission for the practice requires "urgent reason or necessity" or there is "a good reason". The latter is defined as the "consistency with the principle, essence, spirit and purpose of the Islamic prescription of polygamy". the emphasis is on responsibility and not rights. The Appeal Board has held that an application for a polygamous marriage based on love and affection is insufficient. It was explained that "a marriage in Islam is about accepting responsibility and offering protection" and not just desire. The applicant "must be prepared to shoulder further responsibility". In 2019, an academic article acknowledges that abuse of the law takes place and considers imposing criminal liability and public education as a means of addressing challenges in the law.

In **Jordan**, a judge must assess a man's financial ability to enter into a polygamous marriage and consent of the wives must be obtained. A 2011 study highlighted the impact of polygamy on the upbringing of children.

All of the above demonstrates that introducing conditions and attempts to regulate have continued to face the challenge of men / husbands abusing the law. It is also clear that the original social purpose and responsibility for which polygamy was permitted is not contextually relevant today.

Reform of the MMDA must address the lived realities of Sri Lankan Muslim women, and the contemporary problems and challenges they face as a result of the practice of polygamy.

C. CONTEMPORARY LIVED REALITIES OF MUSLIM WOMEN

The alarming fact is that the practice of polygamy is undocumented and the abuse of the practice is hidden from state records. The Muslim marriage register fails to require a man, who is entering into a marriage, to state whether or not he is in an existing marriage. As such it is impossible to obtain official information on how many have entered into polygamous marriages in Sri Lanka.

However, the cases reported to Muslim women's rights activists, researchers and lawyers reveal the practice, its abuse and its impact. It is the only record of the practice which is testament to the abuse and its negative impact on the development of the Muslim community.

TESTIMONIES OF MUSLIM WOMEN AFFECTED BY POLYGAMY

These testimonies were gathered from field research in the Eastern and Northern provinces of Sri Lanka and have been anonymized to protect the identity of the affected person.

CASE 1: SHAMIRA'S STORY



Shamira married at 17 but the marriage ended in 3 months when her husband abandoned her after she got pregnant. She worked abroad for 10 years and on her return she married again. Her second husband had a wife but they had been estranged for nine years so she thought it would be okay.

After two years his first wife came back and he returned to her, visiting Shamira and her children only occasionally. She was pregnant and unhappy, and asked him to come back but he said she had to accept that he could have a polygamous marriage. He did not visit when she had their baby. He does not pay child maintenance even though the Quazi ordered him to do so. He ignores the Quazi and the Quazi said there was nothing he could do. Shamira was compelled to seek an enforcement order in the Magistrate court. She is tired of expecting her husband to support their children. She says she will find a way to survive on her own and take care of her children.

CASE 2: ZAINAB'S STORY

Zainab while schooling was harassed by a construction worker working close to her home. Even though her mother indicated that she preferred that Zainab complete her schooling, the man's family came with a proposal. Zainab's family agreed to the marriage on the grounds that she completed her O/Level exams. She was 17 when she married. She soon found out her husband was a drunkard, and he came home drunk every day.

When she was five months pregnant, her husband abandoned her and only returned 40 days after the birth of their child. He left again soon after. She came to know that he had married another woman. Zainab went to the Quazi who said her husband, by law, did not need her approval to get married. Her husband divorced her six months later and did not pay child maintenance. Although a warrant was issued for his arrest, Zainab was asked to find where her husband was hiding which she could not do.

Zainab mentioned to MPLRAG that it is sad that she got married young, could not finish her studies and lost an opportunity at gaining good employment to support herself and her child.





CASE 3: FATIMA'S STORY

Fatima had a difficult childhood after her father passed away and was hoping marriage would be a new beginning. However soon after her marriage, her husband started abusing her. She finally went abroad to sort out their financial difficulties. While she was away, her husband married another woman in Sri Lanka.

When Fatima returned, he promised to be a better husband, but soon he began to physically assault her and even threatened to throw acid on her. She lived in fear of him and his friends and tried several times to divorce him but was always pressured into reconciliation by the Quazi courts. Finally when he forced her to have an abortion of their youngest child, she ran away to a safe home. She now lives separated from him but with no support for her children or herself.

The above case studies demonstrate that the practice of polygamy exists in Sri Lanka. It further demonstrates that the belief in a right to polygamy has resulted in:

1. Numerous cases of husbands routinely threatening wives that they will take another wife which creates uncertainty. This further results in breaking of the marriage relationship of trust, love, and security. This threat is used to extract work, money, and non-consensual physical and sexual activity from the wife.
2. Abandonment of existing wife or wives at the time the next marriage is contracted. Sometimes children are forcefully removed from the custody of the now destitute first wife and taken into the second family, causing immense hurt to the first wife and loss or breakage of a relationship between the biological mother and the children.
3. Failure to maintain existing wife and children after the next marriage is contracted. Women left in situations of not being able to maintain, provide food, security and ensure proper education for their children - leading to a possible next generation that does not have the opportunity to secure employment or contribute meaningfully to their community or country.
4. Second and third marriages contracted without registration. Children from such marriages are left unable to demand their birth certificates that bear the name of their father. Thereby causing social issues with regard to schools, other official purposes and loss of inheritance.
5. Unregistered polygamous marriages result in wives not being able to obtain a fasah divorce, compensation or maintenance.
6. Subsequent wives, whether marriage is registered or not, are not entitled to collect pension and lose financial security because of this.
7. Encouraging and inculcating, amongst Muslim men the false sense that they do not need to afford Muslim women dignity and respect.
8. Loss or erosion of love, affection, kindness and tranquility as Islamic virtues of intimate relationship. This reinforces a hierarchical power based relationship rather than one of mutual respect and responsibility, compassion, security and dignity.

D. ISLAMIC JURISPRUDENCE & POSITIVE DEVELOPMENTS IN OTHER MUSLIM CONTEXTS

Islam promotes monogamy and only permits polygamy as an alternative in exceptional circumstances. The Quranic text referred to by those promoting polygamy is Surah an-Nisa' 4:3 which in its full reading is as follows:

“If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, three or four, but if you fear that you shall not be able to deal justly [with your wives], then marry only one ... That will be more suitable, to prevent you from doing injustice.”

A full and contextual reading of the verse clarifies the promotion of monogamy - “if you fear that you shall not be able to deal justly [with your wives] then marry only one ...” and the restrictions on polygamy that was practiced at the time. Thus, monogamy can be considered to be the rule in Islamic law and polygamy the exception. The proponents of polygamy invoke the provision that is favorable to polygamy and leave the rest in the background. According to them, man may not ban what Allah has allowed. However, this position is not unanimously supported by doctrine.

Polygamy is not intrinsically “Islamic”

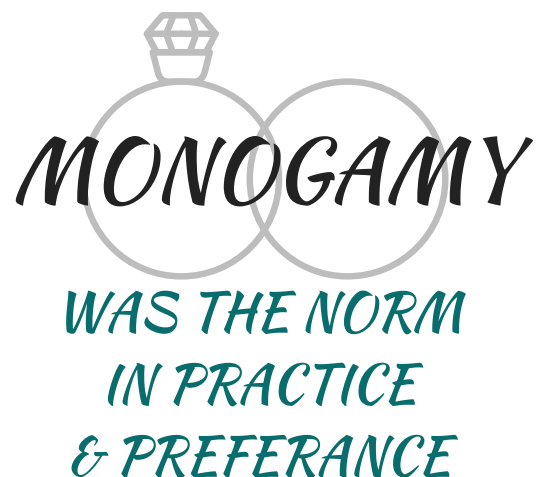
In fact, it was a practice that existed in various civilisations, religions and cultures in communities throughout the world. It predates Islam and existed as an excessive practice that Islam responded to by introducing restriction. In pre-Islamic Arabia, men practiced unlimited polygamy. Islam introduced reforms by restricting the maximum number of wives to four, as well as by commanding monogamy if there is fear of injustice to the women. In fact Surah an-Nisa', which speaks of polygamy, was revealed after a battle which had resulted in many men being killed, leaving behind many war widows and orphans. As men were chiefly breadwinners in that society, the widows found it difficult to provide for their children. It was a context of providing for the welfare of widows and the orphaned children. The religion does not force a wife to have to suffer in a polygamous marriage if she does not agree to her husband taking another wife.

Examples from the time of the Prophet Muhammed

Although the Prophet had multiple wives, he was monogamous for more than 25 years – i.e. throughout the lifetime of his first wife, Khadijah. This practice of the Prophet could be used as a source to emulate.

There is also an authentic tradition that the Prophet forbade his son-in-law, Ali ibn Abi Talib, from marrying another woman unless Ali first divorced the Prophet's daughter, Fatimah, his existing wife.

A great-granddaughter of the Prophet, Sakinah binti Hussayn, a granddaughter of Ali and Fatimah, included the condition in her marriage contract that her husband would not have the right to take another wife during their marriage.



MONOGAMY
WAS THE NORM
IN PRACTICE
& PREFERENCE

Positive Developments from other Muslim Contexts

Musawah - the global movement for equality and justice in the Muslim family - maintains that Islam promotes monogamy, as can be seen in Surah an-Nisa' 4:3. According to their global research on Muslim family laws, some Muslim countries have also prohibited polygamy on the basis of this verse. In others, women are entitled to add a stipulation in their marriage contracts that their husbands cannot take other wives without their permission and that a violation of this could be a ground for divorce. It is thus also possible for this clause to become a standard stipulation in marriage contracts.

Today, for Muslims in Tunisia, and in Muslim majority countries like Turkey, Kyrgyz Republic, Tajikistan and Uzbekistan polygamy is prohibited.

Most recently in August 2020, Pakistan Supreme Court made it mandatory for husbands to obtain consent of the wife in order to marry a second time.

In Bahrain (Sunni), Egypt, Jordan, Lebanon, Saudi Arabia and Syria, a woman can stipulate in the marriage contract that her husband cannot take another wife. If the husband breaches this term of the marriage contract, the woman has the right to divorce.

(Source: www.musawah.org)

E. STATE OBLIGATION OF EQUAL PROTECTION OF LAW

The State obligation is to respond to the abuse, ill treatment and impact of abandonment experienced by Muslim women as a result of the abuse of the practice of polygamy in Sri Lanka. 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 marriage. All other citizens subject to the law that bigamy is an offence. 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 the Muslim community must resolve these issues within their own community - and thereby abandoning any and all State responsibility to advocate on behalf of vulnerable sections of its citizens

CEDAW Convention

Sri Lanka ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in 1981. As per the Convention, Sri Lanka has an obligation 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.

With regard to polygamous marriage, the CEDAW Committee holds the opinion that such marriages contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents, and that such marriages ought to be discouraged and prohibited. (Source: CEDAW, General Recommendation No. 21: Equality in marriage and family relations (1994), para. 14.)

Sri Lanka's eighth periodic review for CEDAW was in 2017 in which 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.*

(Source: CEDAW Committee Concluding Observations for Sri Lanka, February 2017)

Sustainable Development Goals (SDG's)

SDG Goal 5 is to achieve gender equality and empower all women and girls. Under this goal, indicators 5.1.1. tracks a country's legal frameworks for gender equality and non-discrimination and "whether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex." (Source: [www.https://sdg-tracker.org](https://sdg-tracker.org))

As the case studies indicate, women in polygamous marriages are more likely to have limited educational and economic opportunities, and therefore, in precarious socio-economic conditions. Given this situation, it is unfair and unjust for Sri Lanka to allow polygamy for Muslims when (in this day and age) the harm it can cause is greater than any positive impacts of the practice. It goes against the government's sustainable development goals, as well as violates international human rights obligations to protect rights of all women and children.

The MMDA must be reformed comprehensively to respond to the grievances of Muslims, particularly Muslim women and girls, in order to address contemporary and diverse challenges facing Sri Lankan Muslims living in a multi-cultural society.

Our full set of demands:

www.mmdasrilanka.org/demands/

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