EJIMEL
Electronic Journal of Islamic and Middle Eastern Law

Vol. 4 (2016) pp. 97-108

Muslim Marriage and Divorce in Sri Lanka: Aspects of the relevant jurisprudence

by Muneer Abduroaf and Najma Moosa

University of Zurich[UZH]

EJIMEL Electronic Journal of Islamic and Middle Eastern Law

Vol. 4 (2016)

EJIMEL Vol. 4 (2016)

Published by
The Center for Islamic and Middle Eastern Legal Studies (CIMELS), University of Zurich, Zurich, Switzerland

Suggested citation style
Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), Vol. 4 (2016), pages, http://www.ejimel.uzh.ch

ISSN 1664-5707

Muslim Marriage and Divorce in Sri Lanka: Aspects of the relevant jurisprudence

by Muneer Abduroaf[*] and Najma Moosa[**]

Table of Contents

Abstract

Muslims form 10 per cent of the Sri Lankan population. The country applies a mixed legal system. For many decades Muslim marriages and divorces have been governed by a separate piece of legislation. Courts in Sri Lanka have interpreted some of the legislative provisions. The purpose of this article is to highlight the case law emanating from Sri Lankan courts interpreting the provisions of the Muslim Marriage and Divorce Act 13 of 1951 dealing with different issues: age for marriage; proof of marriage; co-existence of a civil marriage and a Muslim marriage; maintenance of children especially children born out of wedlock; and types of divorce.

[*] Lecturer in the Department of Criminal Justice and Procedure (University of the Western Cape, South Africa), L.L.B (Islamic University of Madinah, Saudi Arabia), L.L.B, L.L.M (University of the Western Cape), Doctoral Candidate (University of the Western Cape).

[**] Professor in the Department of Private Law (University of the Western Cape, South Africa), B.A (Law), L.L.B, L.L.M, L.L.D (University of the Western Cape).

I. Introduction

Muslims form 10 per cent of the Sri Lankan population.[1] The country applies a mixed legal system. Muslim law is one of the special laws applicable to the Muslim inhabitants of Sri Lanka.[2] It should be noted that Sri Lanka has been under a new government since January 2015. The new government brought about the nineteenth amendment to the Sri Lankan Constitution in June 2015. The Sri Lankan Constitution provides for freedom of religion. It states that every person is entitled to freedom of religion, which includes the freedom to have or to adopt a religion or belief of his or her choice. However, in the same chapter (dedicated to human rights) it also provides that existing written and unwritten law is to continue in force.[3] The latter provision implies that laws like Muslim law may be exempt from its provisions and for this reason may prove to be problematic. It should also be noted that the Sri Lankan Constitution states that the State "shall endeavour to foster respect for international law and treaty obligations in dealings among nations".[4] The court cases looked at in this article focus on the position before the 2015 amendment. Relevant issues within the amended Constitution are referred to where appropriate.

In the early twentieth century Muslim marriages were referred to as Muhammadan marriages.[5] In 1929 the Muslim Marriage and Divorce Registration Ordinance was passed.[6] In 1951 this Ordinance was renamed the Muslim Marriage and Divorce Act 13 of 1951.[7] Since then it has undergone several amendments. It has also been the subject of various court judgments interpreting its relevant sections. Different aspects of the Muslim Marriage and Divorce Act 13 of 1951 have been dealt with by the Sri Lankan courts including: the constitutionality of the appointment of the quazis;[8] whether the quazi is a public servant whose salary may not be seized;[9] the sale of property between Muslims;[10] the right to appeal to the Supreme Court against the quazis' decisions;[11] whether a Magistrate's Court has jurisdiction to make a maintenance order in terms of the Act 13 of 1951;[12] whether a quazi may be appointed by the

1 Opinion, Is Muslim identity a liability in Sri Lanka? Available at http://www.aljazeera.com/indepth/opinion/2014/06/muslim-identity-liability-sri-l-201462075937574567.html (20 June 2014).
2 Muslim Law in Sri Lanka. Available at http://archives.dailynews.lk/2012/01/27/fea10.asp (20 January 2012).
3 Sections 10 and 16 (1) respectively of the Constitution of the Democratic Socialist Republic of Sri Lanka (As amended up to 15th May 2015) Revised Edition – 2015)). Available at www.parliament.lk/files/pdf/constitution.pdf (14 October 2016).
4 Section 27 (15) of the Constitution of Sri Lanka. Available at www.parliament.lk/files/pdf/constitution.pdf (14 October 2016).
5 Ramupillai v. Festus Perera - SLR - 11, Vol 1 of 1991 [1991] LKSC 29; (1991) 1 Sri LR 11 (7 January 1991) Page 48.
6 Ramupillai v. Festus Perera - SLR - 11, Vol 1 of 1991 [1991] LKSC 29; (1991) 1 Sri LR 11 (7 January 1991) Page 48. For the history also see Panagoda v. Budinis Singho - NLR - 490 of 68 [1966] LKSC 8; (1966) 68 NLR 490 (22 July 1966) Page 493.
7 This is the short title of Act 13 of 1951 in terms of Cap 134.
8 Jaliabdeen v. Danina Umma - NLR - 419 of 64 [1962] LKSC 2; (1962) 64 NLR 419 (17 December 1962).
9 Mohamed v. Walker & Greig - NLR - 453 of 44 [1943] LKCA 66; (1943) 44 NLR 453 (17 March 1943).
10 Mohideen v. Sulaiman - NLR - 227 of 59 [1957] LKCA 67; (1957) 59 NLR 227 (4 September 1957).
11 Ansar v. Fathima Mirza - NLR - 86 of 73 [1970] LKSC 28; (1970) 73 NLR 86 (4 March 1970).
12 Ismail v. Muthu Marliya - NLR - 431 of 65 [1963] LKSC 10; (1963) 65 NLR 431 (30 September 1963).

Minister of Justice;[13] and the circumstances under which Muslims may take an oath before giving evidence as witnesses.[14] However, it is beyond the scope of this article to deal with all these issues as they do not directly relate to marriage and divorce. The purpose of this article is to highlight case law emanating from Sri Lankan courts interpreting the provisions of Act 13 of 1951 dealing with the following issues: age for marriage; proof of marriage; co-existence of a civil marriage and a Muslim marriage; maintenance of children especially children born out of wedlock; and types of divorces. Some of the cases discussed in this article date back to the 1960s. This is so because there has not been recent case law dealing with some of these issues and the legislation has not been amended to introduce any new changes. These cases therefore still reflect the current legal position on some of these issues.

II. Age for Marriage and Proof of Marriage

Section 23 of Act 13 of 1951 provides:

> "Notwithstanding anything in section 17,[15] a marriage contracted by a Muslim girl who has not attained the age of twelve years shall not be registered under this Act unless the Quazi

[13] Jaliabdeen v. Danina Umma - NLR - 419 of 64 [1962] LKSC 2; (1962) 64 NLR 419 (17 December 1962).

[14] Sooriya Enterprises (International) Ltd. v. Michael White and Company Ltd. - SLR - 371, Vol 3 of 2002 [1994] LKSC 45; (2002) 3 Sri LR 371 (27 July 1994) Page 372.

[15] Section 17 (1) of Act 13 of 1951: Save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith.
(2) In the case of each such marriage, the duty of causing it to be registered is hereby imposed upon the following persons concerned in the marriage: - (a) the bridegroom; and (b) in every case where the consent of the wali has not been dispensed with under section 47 and is required by the Muslim law governing the sect to which the bride belongs, the wali of the bride; and (c) the person who conducted the Nikah ceremony connected with the marriage.
(3) For the purpose of. causing the marriage to be registered, it shall be the duty of the person specified in subsection (2)- (a) to give to the registrar information of the date on which and the time and place at which the Nikah ceremony is to take place, and to request him to attend the ceremony for the purpose of registering the marriage ; and (b) immediately upon the conclusion of the Nikah ceremony, to call upon the registrar to register the marriage, and for that purpose to render him all such assistance and take all such other measures as may be necessary.
(4) Where the registrar, notwithstanding that the acts or measures required by subsection (3) have been done or taken, neglects or refuses to register the marriage, it shall be the duty of the persons specified in subsection (2) to send to the District Registrar, within the seven days next succeeding the date of the Nikah ceremony, a written report setting out the following particulars relating to the marriage :- (a) the names of the parties to the marriage, (b) the date on which and the time and place at which the Nikah ceremony was conducted, (c) the name of the wali, if any, (d) the name of the person who conducted the Nikah ceremony.
(5) Where any marriage which is required by this Act to be registered is not registered owing to default in doing or taking any act or measure required by any of the preceding provisions of this section, every person on whom the duty of doing or taking that act or measure is imposed by that provision shall be deemed to have failed to cause the marriage to be registered.
(6) The court convicting any person of the offence of failing to cause a marriage to be registered or of failing to send the District Registrar a report as to any marriage which the registrar has neglected or refused to register, shall send to the District Registrar, as early as may be after the close of the proceedings in respect of the offence, a report setting out such particulars relating to the marriage as are required by subsection (4).
(7) It shall be the duty of the District Registrar, on receipt of any report under subsection (4) or subsection (6), to satisfy himself by such inquiry or investigation as may appear to him to be adequate, that the marriage has taken place and that it has not been registered, to verify the particulars furnished in the report and amend them if they are not correct, and to make order directing that the marriage be registered with the particulars verified or amended; and it shall be the duty of the registrar specified in the order to register the marriage accordingly.

> for the area in which the girl resides has, after such inquiry as he may deem necessary, authorized the registration of the marriage."

In terms of section 23 of Act 13 of 1951, a Muslim girl can marry after attaining the age of twelve. However, the section also places an exception thereto. In terms of Muslim Personal Law (MPL), it is also possible for a Muslim girl to marry after reaching the age of puberty. However, the various sects deal differently with the issue of whether the guardian's consent is necessary. It has been held that: "A Muslim maiden, therefore, of the Hanafi sect who has reached the age of bulugh can enter into a contract of marriage without the intervention of a wali or marriage guardian, or appoint a wali herself for the purpose of her marriage. In the case of a maiden of the Shafi sect, whatever her age may be a wali is necessary."[16] The above discussion raises the issue of child marriages.

This is so because Sri Lanka is a State Party to the International Convention on the Rights of the Child which defines a child in Article 1 as a person under the age of eighteen years but at the same time qualifies it[17], and the Committee on the Rights of the Child has called upon State Parties to prohibit and eliminate child marriages.[18] It should also be recalled that some pieces of legislation in Sri Lanka also define a child as a person under the age of eighteen years.[19] International human rights bodies, such as, the Committee against All Forms of Discrimination against Women[20] and the Committee on Economic, Social and Cultural Rights[21], have called upon Sri Lanka to amend its MPL to eliminate early child marriages. It may therefore be necessary for Sri Lanka to strike a balance between its Muslim law and its international human rights obligations. Related to the above is the issue of proof of a Muslim marriage. It has been held that the existence of a valid Muslim marriage has to be proved by a certificate.[22] This is so because the marriage has to be registered in terms of Act 13 of 1951.[23] However, with or without registration a Muslim marriage is valid.[24]

[16] Abdul Cader v. Razik Et Al. - NLR - 156 of 52 [1950] LKCA 64; (1950) 52 NLR 156 (28 September 1950) Page 156.

[17] The Convention on the Rights of the Child was adopted on 20 November 1989 and entered into force on 2 September 1990. Article 1 of the Convention provides: "For the purposes of the present Convention, a child means every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier* (our emphasis)".

[18] Committee on the Rights of the Child General Comment No. 13 (2011) CRC/C/GC/13 18 April 2011.

[19] See s 14 of the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Act No. 30 of 2005 defines a child to mean "a person who has not attained the age of eighteen years".

[20] Concluding Observations of the Committee on the Elimination of Discrimination against Women on the combined fifth to seventh periodic reports of Sri Lanka (CEDAW/C/LKA/5-7) CEDAW/C/LKA/CO/7 8 April 2011 paragraphs 44-45.

[21] Concluding Observations of the Committee on Economic, Social and Cultural Rights on the combined second to fourth periodic reports of Sri Lanka on the implementation of the Covenant (E/C.12/LKA/2-4)E/C.12/LKA/CO/2-49 December 2010 paragraph 19.

[22] Beeran v. Minister Defence and External Affairs - NLR - 308 of 60 [1958] LKSC 7; (1958) 60 NLR 308 (3 October 1958).

[23] See s 8 of Act 13 of 1951.

[24] Section 16 of Act 13 of 1951 provides: "Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage or divorce which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage or divorce belong."

III. The co-existence of a civil marriage and a Muslim marriage

Act 13 of 1951 allows a Muslim man to contract more than one marriage. Section 24(1) of Act 13 of 1951 states:

> "Where a married male Muslim living with or maintaining one or more wives intends to contract another marriage, he shall, at least thirty days before contracting such other marriage, give notice of his intention to the Quazi for the area in which he resides, and to the Quazi or Quazis for the area in which his wife or each of his wives resides, and to the Quazi for the area in which the person whom he intends to marry resides."

The fact that Sri Lankan law allows polygynous marriages has been criticised by international human rights bodies, such as, the Committee against All Forms of Discrimination against Women[25] and the Committee on Economic, Social and Cultural Rights.[26] Although Act 13 of 1951 addresses the issue of the co-existence of more than one Muslim marriage, it is silent on the co-existence of a Muslim marriage and a civil marriage. The question of whether a person who is married in terms of Muslim law may also contract a civil marriage without committing the offence of bigamy has been addressed by courts in Sri Lanka. A Muslim marriage cannot co-exist with a civil marriage. This means that if a person enters into a Muslim marriage when his civil marriage is still valid, the Muslim marriage is invalid.[27] However, if a person who is married converts to Islam and enters into a second marriage with another person who is Muslim the second marriage is valid. For example, in *Reid v. Attorney General*[28] the appellant was convicted of bigamy and sentenced to three months imprisonment in that, while his lawful wife in a civil marriage was living, he married another women. His first marriage had been contracted in terms of the Marriage Registration Ordinance No 19 of 1907 as he was a Catholic. During the subsistence of his first marriage he converted to Islam and married another woman. The question before the Court was whether he had committed bigamy contrary to section 362 (B) of the Penal Code Ordinance which stated:

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine."[29]

[25] Concluding Observations of the Committee on the Elimination of Discrimination against Women on the combined fifth to seventh periodic reports of Sri Lanka (CEDAW/C/LKA/5-7) CEDAW/C/LKA/CO/7 8 April 2011 paragraph 44-45.

[26] Concluding Observations of the Committee on Economic, Social and Cultural Rights on the combined second to fourth periodic reports of Sri Lanka on the implementation of the Covenant (E/C.12/LKA/2-4)E/C.12/LKA/CO/2-49 December 2010 paragraph 19.

[27] Beeran v. Minister Defence and External Affairs - NLR - 308 of 60 [1958] LKSC 7; (1958) 60 NLR 308 (3 October 1958).

[28] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963). See also Katchi Mohamed v. Benedict - NLR - 505 of 63 [1961] LKHC 28; [1961] 5; (1961) 63 NLR 505 (20 December 1961).

[29] Section 362 (B) of the Penal Code Ordinance which is an Ordinance to provide a general Penal Code for Ceylon (now Sri Lanka) which came into effect on 1 January 1885. In terms of its short title, the Penal Code Ordinance may be cited as the Penal Code.

The Court found that "In the instant case the appellant had a wife living. Therefore the first element of the penal provision is satisfied. The second element is also satisfied because he contracted a second marriage".[30] The issue for the Court to decide was whether "the third element is that the second marriage should be void by reason of its taking place during the life of the first husband or wife".[31] In resolving this issue the Court referred to section 18 of the Marriage Registration Ordinance No 19 of 1907[32] which provides that "no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void", and held that:

> "The section declares that no "marriage" shall be valid where there is a prior "subsisting marriage". Now what is a marriage for the purpose of section 18. That expression is defined in section 64 and it means- "any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance 1870 or the Kandyan Marriage and Divorce Act [44 of 1952[33]], and except marriages contracted between persons professing Islam". There is nothing in the context of section 18 which renders the definition inapplicable. That section has therefore no application to marriages contracted under the Kandyan Marriage Ordinance 1870, the Kandyan Marriage and Divorce Act [44 of 1952], and marriages "contracted between persons professing Islam". Although Kandyan marriages are excluded from the definition and therefore from the ambit of section 18, a Kandyan is not free to marry a second time while the first marriage is subsisting as section 6 of the Kandyan Marriage and Divorce Act [44 of 1952] declares invalid a second marriage under the Act where the spouse of the previous marriage is alive and the marriage is subsisting. Now the appellant's second marriage was registered under the Muslim Marriage and Divorce Act 13 of 1951. Although that Act is not specially mentioned in the definition, marriages contracted by persons professing Islam are accepted. Persons professing Islam can now marry only under the Muslim Marriage and Divorce Act 13 of 1951. So that marriages under that Act are not marriages within the definition of the expression marriage in the Marriage Registration Ordinance [No 19 of 1907]."[34]

On appeal to the Privy Council the High Court's decision was upheld.[35] However, that legal position would change after over a quarter of a century later in the Supreme Court decision of *Natalie Abeysundere v. Christopher Abeysundere and Another*[36] where the Court observed that "[t]he material facts in the present case are almost the same as the facts in Reid's case".[37] Overruling *Reid v Attorney General*, the Court held:

[30] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963) Page 98.
[31] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963) Page 99.
[32] In terms of its short title, this Ordinance may be cited as the Marriage Registration Ordinance.
[33] This is the short title of Act 13 of 1951 in terms of Cap 132.
[34] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963) Page 99. See also The Attorney General v. A.E. Reid - NLR - 25 of 67 [1964] LKCA 8; (1964) 67 NLR 25 (15 December 1964) where the court arrived at the same decision as in Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963).
[35] The Attorney General v. A.E. Reid - NLR - 25 of 67 [1964] LKCA 8; (1964) 67 NLR 25 (15 December 1964).
[36] Natalie Abeysundere v. Christopher Abeysundere and Another - SLR - 185, Vol 1 of 1998 [1997] LKSC 8; (1998) 1 Sri LR 185 (16 December 1997).
[37] Natalie Abeysundere v. Christopher Abeysundere and Another - SLR - 185, Vol 1 of 1998 [1997] LKSC 8; (1998) 1 Sri LR 185 (16 December 1997) Page 188.

> "Reid's case… was wrongly decided and must be overruled. As stated earlier, the material facts in Reid's case and in the present appeal before us are almost identical and the legal issues are the same. I accordingly hold that the second purported marriage … during the subsistence of the prior valid marriage contracted under the Marriage Registration Ordinance [No 19 of 1907] is void, notwithstanding the respondent's conversion to Islam. It follows that the charge of bigamy (section 362 (B) of the Penal Code) preferred against the respondent is proved."[38]

It should also be noted that a Muslim man who marries according to Act 13 of 1951 and enters into a second marriage in terms of the Marriage Registration Ordinance No 19 of 1907 while his first marriage still subsists, commits bigamy.[39]

IV. Maintenance

Child maintenance is provided for under section 35 of Act 13 of 1951 which provides:

> "(1) A child or any person on behalf of a child shall not be entitled to claim or to receive maintenance in respect of any period during which the child is or was living with or supported by the father. (2) In allowing any claim for maintenance by or on behalf of a child a deduction shall be made of the sums which may have been paid by the father for the use or support of the child between the date of the claim and the date of the order allowing the claim."

Section 34 deals with the maintenance of a wife. It provides that "[a] wife or any person on behalf of a wife shall not be entitled to claim or to receive maintenance in respect of any period during which the wife lives or has lived with her husband whether on the orders of a Quazi or otherwise". Act 13 of 1951 does not address the issue of the maintenance of children born out of wedlock. However, courts have dealt with this issue. In the event of a divorce, the husband has a duty to pay maintenance to the former wife and the children if the woman has custody. However, a court will only make an order against the husband in his presence. This means that he has a right to be heard before a maintenance order may be made.[40] It should also be noted that in *Seyed Mohamed v. Mohamed Ali Lebbe*[41] the High Court held that "a wife who leaves her husband's house without valid and sufficient reason is not entitled to claim maintenance from her husband". In addition, an order for maintenance is valid from the date of the order as opposed to the date of the application.[42] A maintenance order has to be made by a court with jurisdiction otherwise it is invalid.[43]

[38] Natalie Abeysundere v. Christopher Abeysundere and Another - SLR - 185, Vol 1 of 1998 [1997] LKSC 8; (1998) 1 Sri LR 185 (16 December 1997) Page 200.
[39] Katchi Mohamed v. Benedict - NLR - 505 of 63 [1961] LKHC 28; [1961] 5; (1961) 63 NLR 505 (20 December 1961).
[40] Wahid v. Naleera - NLR - 210 of 76 [1972] LKHC 15; [1972] 27; (1972) 76 NLR 210 (5 July 1972).
[41] Seyed Mohamed v. Mohamed Ali Lebbe - NLR - 307 of 54 [1953] LKSC 16; (1953) 54 NLR 307 (5 February 1953).
[42] Seyed Mohamed v. Mohamed Ali Lebbe - NLR - 307 of 54 [1953] LKSC 16; (1953) 54 NLR 307 (5 February 1953).
[43] Ismail v. Muthu Marliya - NLR - 431 of 65 [1963] LKSC 10; (1963) 65 NLR 431 (30 September 1963).

An interesting issue arose in the case of *Nizam v. Beebi*[44] where the Court dealt with the question of whether a Muslim practice which did not impose an obligation on a father to pay maintenance to an illegitimate child was contrary to Act 13 of 1951. The Court referred to the relevant legislation[45] and held:

> "It is quite clear therefore that in this country an illegitimate child is conferred the right to claim maintenance from the putative father by section 47 (1) (cc)[46] of the Muslim Marriage and Divorce Act 13 of 1951 and the Muslim law to the extent that it does not impose a liability on a father to maintain his illegitimate child has thereby been abrogated."[47]

Over fifty years ago in the case of *Umma Saidu v. Hasim Marikar*[48] the Supreme Court of Sri Lanka had held that a Muslim man has a duty to pay maintenance for his illegitimate child. It should also be remembered that as early as 1969 the Supreme Court of Sri Lanka had held that even if Muslim law did not impose an obligation on a father to pay maintenance for an illegitimate child, he had an obligation to pay such maintenance if the relevant legislation required him to do so.[49] It should be noted that the High Court has held that under Muslim law there are different categories of illegitimate children. In *Ismail v. Latiff* [50] the High Court stated:

> "At first sight, the Muslim Marriage and Divorce Act 13 of 1951 would appear in section 47 to contain provisions, empowering a Quazi to entertain applications for maintenance of illegitimate children, which are inconsistent with section 2 of Act 13 of 1951, limiting his powers to matters connected with Marriages and Divorces. Under the Roman-Dutch law, illegitimate children are confined generally to those children whose parents are unmarried;

[44] Nizam v. Beebi - SLR - 47, Vol 1 of 1998 [1997] LKCA 51; (1998) 1 Sri LR 47 (1 December 1997).

[45] See s 47 of Act 13 of 1951.

[46] Section 47 of Act 13 of 1951 provides: (1) The powers of the Quazi under this Act shall include the power to inquire into and adjudicate upon- (a) any claim by a wife for the recovery of mahr; (b) any claim for maintenance by or on behalf of a wife ; (c) any claim for maintenance by or on behalf of a legitimate child (whether legitimate or illegitimate); (d) any claim by a divorced wife for maintenance until the registration of the divorce or during her period of iddat, or, if such woman is pregnant at the time of the registration of the divorce, until she is delivered of the child ; (e) any claim for the increase or reduction of the amount of any maintenance ordered under this section or under section 21 of the Muslim Marriage and Divorce Registration Ordinance, 1929; (f) any claim for kaikuli; (g) any claim by a wife or a divorced wife for her lying-in expenses; (h) any application for mediation by the Quazi between a husband and wife; (i) any application for a declaration of nullity of marriage either by a husband or by a wife; (j) any application for authority to register the marriage of a girl who has not passed the age of twelve years: (2) A Quazi may inquire into and deal with any complaint by or on behalf of a woman against a wali who unreasonably withholds his consent to the marriage of such woman, and may if necessary make order authorizing the marriage and dispensing with the necessity for the presence or the consent of a wali. (3) Where a woman has no wali, a Quazi may, after such inquiry as he may consider necessary, make [an] order authorizing the marriage and dispensing with the necessity for the presence or the consent of a wali (4) Where an order is made under subsection (2) or subsection (3) authorizing any marriage, a permit authorizing the registration thereof shall be issued by the Quazi, but no such permit shall be issued until the expiry of a period of ten days from the date of the order, or, where an appeal is preferred against such order, unless such order is confirmed by the Board of Quazis, or, in the event of a further appeal, by the Court of Appeal. (5) In this section "divorced wife" includes a wife against whom the talak has been pronounced, and who has not been taken back by the husband. (6) Every inquiry under this section shall be held as nearly as possible in accordance with the rules in the Fourth Schedule, but no Muslim assessors shall be empanelled for the purpose of assisting the Quazi at such inquiry.

[47] Nizam v. Beebi - SLR - 47, Vol 1 of 1998 [1997] LKCA 51; (1998) 1 Sri LR 47 (1 December 1997) Page 50.

[48] Umma Saidu v. Hasim Marikar - NLR - 165 of 43 [1941] LKSC 12; (1941) 43 NLR 165 (16 September 1941).

[49] Pallithamby v. Saviriathumma - NLR - 572 of 73 [1969] LKSC 32; (1969) 73 NLR 572 (28 October 1969). See also Aliyarlebbai v. Pathummah - NLR - 571 of 63 [1961] LKSC 35; (1961) 63 NLR 571 (7 July 1961).

[50] Ismail v. Latiff - NLR - 172 of 64 [1962] LKHC 7; [1962] 3; (1962) 64 NLR 172 (3 April 1962).

> but under the Muslim law, unlike as in the Roman-Dutch law, there exist categories of children who are deemed to be illegitimate even though their parents are married… [There are] several instances where under the Muslim law, though the parents get married, the children remain illegitimate… Not only are children of marriages where the parents are within prohibited decrees illegitimate but children born prior to marriage of parents who are free to get married would despite subsequent marriage remain illegitimate… [A] child conceived out of wedlock but born after marriage [is] illegitimate…but any acknowledgment by a father that such a child or a child born even before wedlock is his would make the child legitimate …It will thus be seen that even in cases where Muslim parties are married they can have children who are illegitimate and…section 47 when it refers to illegitimate children must necessarily be construed to refer to such children."[51]

A wife can institute a civil action against her husband to recover her mahr (dower) should he fail to pay it.[52] However, she has to approach the correct court and that court has to make the correct order.[53] In the same vein, in the event of a divorce, the wife may also institute a civil action against her husband to recover the money that her family gave to the husband to contribute to her maintenance (this money is normally known as kaikuli).[54] With implicit negative connotations of a bride price, this practice can hardly be attributed to Islamic law. It appears to be based on custom and has more in common with a dowry and little, if anything, to do with dower. Nonetheless, in terms of section 37, a woman who is unable to claim kaikuli or mahr may be represented.[55]

Section 97 defines kaikuli to mean "any sum of money paid, or other movable property given, or any sum of money or any movable property promised to be paid or given, to a bridegroom for the use of the bride, before or at the time of the marriage by a relative of the bride or by any other person". In *Zainabu Natchia v. Usuf Mohamadu*[56] the Court defined kaikuli to mean "a sum of money given by the parents of the bride to the intended husband, which the husband possesses and owns but which he has to pay over to the wife, if she demands it, or to her heirs, on death".[57] The definition in this case appears to be more limited compared to the one under section 97. This is so because it indicates that the money must only originate from the bride's parents. However, a civil action for kaikuli cannot succeed unless the wife's demand for the return of the same was clear and unambiguous.[58]

[51] Ismail v. Latiff - NLR - 172 of 64 [1962] LKHC 7; [1962] 3; (1962) 64 NLR 172 (3 April 1962) 174. See also Jiffry v. Binthan - NLR - 255 of 62 [1960] LKHC 19; [1960] 25; (1960) 62 NLR 255 (1 September 1960) (The court held that a child born out of wedlock was illegitimate even if both parties were Muslims).

[52] Sithy Raheem v. Hafeel - NLR - 34 of 59 [1957] LKSC 27; (1957) 59 NLR 34 (11 April 1957); Marikkar v. Habeeba Umma - NLR - 238 of 50 [1943] LKCA 50; (1943) 50 NLR 238 (24 December 1943).

[53] Marikkar v. Habeeba Umma - NLR - 238 of 50 [1943] LKCA 50; (1943) 50 NLR 238 (24 December 1943).

[54] Manzil v. Mihilar and Others - SLR - 69, Vol 2 of 2002 [2001] LKCA 24; (2002) 2 Sri LR 69 (21 June 2001); Sharifdeen v. Rahuma Beebi - NLR - 138 of 60 [1958] LKHC 19; [1958] 25; (1958) 60 NLR 138 (29 September 1958).

[55] Section 37 of Act 13 of 1951 provides: "Where it is proved to the satisfaction of a Quazi that a woman claiming or intending to claim mahr or kaikuli is, through sickness, infirmity or other reasonable cause, unable to appear in person, the Quazi may permit any fit and proper person authorized in that behalf by the claimant and approved by the Quazi, to institute proceedings or to appear on behalf of the claimant."

[56] Zainabu Natchia v. Usuf Mohamadu - NLR - 37 of 38 [1936] LKCA 47; (1936) 38 NLR 37 (11 March 1936).

[57] Zainabu Natchia v. Usuf Mohamadu - NLR - 37 of 38 [1936] LKCA 47; (1936) 38 NLR 37 (11 March 1936) Page 37.

[58] Haseena Umma v. Hashim - NLR - 239 of 57 [1955] LKCA 72; (1955) 57 NLR 239 (13 October 1955); Sowdoona v. Abdul Muees - NLR - 75 of 57 [1955] LKCA 31; (1955) 57 NLR 75 (4 March 1955).

It should also be noted that a court will not make a maintenance order against a father if he would not be able to pay the maintenance. In other words a proper assessment of the father's income and expenditure has to be made before an order may be made.[59] Before an enforcement order is made to compel the father to pay maintenance, he must be given a chance to be heard.[60] Under Muslim law a father has a duty to maintain his son until the son reaches the age of puberty. However, that duty continues even after puberty if the son has a disability.[61] Failure to pay maintenance is a criminal offence.[62] It should be noted that the maintenance laws raises the question of discrimination based on sex. The Sri Lankan Constitution provides that the State must protect children from discrimination based on sex.

V. Types of divorce

Act 13 of 1951 provides for two types of divorce: divorce by the husband[63] and divorce by the wife.[64] There are detailed procedures for each type of divorce. Act 13 of 1951 also provides for grounds of divorce. Section 28 of Act 13 of 1951 states:

> "(1) Where a wife desires to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on account of any act or omission on his part which amounts to a "fault" under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed. (2) Where a wife desires to effect a divorce from her husband on any ground not referred to in subsection (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure."

In terms of Act 13 of 1951, a Muslim man is not required to give the ground for divorce.[65] If there are grounds for more than one type of divorce the petitioner may be granted both. For example, in *Ansar v. Fathima Mirza*[66] the special quazi granted the petitioner both a faskh divorce and a khul divorce. However, on appeal the board of quazis held that the petitioner was entitled to a faskh divorce. It is important to note that in this case the board of quazis did not question the legality of the special quazis' powers to grant two types of divorce to the same person. However, on the facts it found that the grounds for a faskh divorce were established and those for a khul divorce were not.

[59] Umma Saidu v. Hasim Marikar - NLR - 165 of 43 [1941] LKSC 12; (1941) 43 NLR 165 (16 September 1941).
[60] Thahir v. Shafi - NLR - 19 of 72 [1968] LKSC 37; (1968) 72 NLR 19 (7 December 1968).
[61] Ummul Marzoona v. Samad - NLR - 209 of 79I [1977] LKSC 1; (1977) 79 NLR 209 (24 October 1977).
[62] Abdeen v. Alavia - NLR - 313 of 75 [1972] LKHC 8; [1972] 11; (1972) 75 NLR 313 (16 May 1972).
[63] Section 27 of Act 13 of 1951.
[64] Section 28 of Act 13 of 1951.
[65] Section 27 of Act 13 of 1951 read with Schedule 2 paragraph 3.
[66] Ansar v. Fathima Mirza - NLR - 86 of 73 [1970] LKSC 28; (1970) 73 NLR 86 (4 March 1970).

In *Mirza v. Ansar*[67] the Supreme Court held that a wife cannot be granted a khul divorce without the husband's consent. Muslim law provides for different types of talaq and the type of talaq will determine whether or not the wife has to be present for the husband to pronounce the talaq.[68] In the event of a faskh divorce an appeal against the order of the quazi can only be made by one of the parties to the divorce proceedings, unless such a party grants a power of attorney to another person.[69]

One of the grounds upon which a wife may be granted a faskh divorce is that the husband is cruel. The Supreme Court held in *Ansar v. Mirza*[70] that actual violence is not required for the treatment to amount to legal cruelty. What is important is for the wife to show that "life together was fraught with danger to the health of the wife and tended to reduce her to a state of nervous prostration". The Court of Appeal held that habitual physical ill-treatment is not necessary for cruelty to be established.[71] In *Rasheeda v. Usoof Dheen*[72] the Court granted the wife a faskh divorce on the ground of cruelty because the husband habitually made false allegations of adultery against her. Although somewhat out of context, the following arguments from other cases are included because they pertain to divorce. A wife would also be granted a divorce if the husband is suffering from an incurable disease.[73] A wife's father may not prevent her from requesting a divorce from the quazi.[74] For a Muslim divorce to be valid it does not have to be registered.[75]

Once a talaq divorce has been pronounced, a wife cannot be granted a faskh divorce in respect of the same marriage, because once a talaq divorce has been pronounced and becomes irrevocable; the marriage has ceased to exist.[76] The husband may pronounce a talaq (divorce) before a quazi in the absence of the wife and the divorce would be valid. What matters is that the wife will be informed later of the divorce.[77] However, a wife may not be granted a khul divorce without the consent and participation of the husband.[78] In all matters affecting people governed by Act 13 of 1951, the respondent has the right to be heard. This is the case even if the relevant legislation does not expressly say so. It is a rule of natural justice.[79] It should be noted that the divorce laws in this section raise the question of discrimination based on sex. The provision favours men and not women. This position goes against the Convention on the Elimination of all Forms of Discrimination Against Women.

[67] Mirza v. Ansar - NLR - 295 of 75 [1971] LKSC 33; (1971) 75 NLR 295 (10 November 1971).
[68] Khan v. Moomin and Others - SLR - 107, Vol 1 of 1995 [1992] LKCA 35; (1995) 1 Sri LR 107 (16 September 1992).
[69] Ameera Jabir v. Yasmin Jabir Nee Nazick - SLR - 282, Vol 1 of 1991 [1991] LKCA 51; (1991) 1 Sri LR 282 (2 August 1991).
[70] Ansar v. Mirza - NLR - 279 of 75 [1971] LKSC 8; (1971) 75 NLR 279 (10 November 1971).
[71] Deen v. Rauff - SLR - 253, Vol 2 of 1997 [1997] LKCA 53; (1997) 2 Sri LR 253 (9 May 1997).
[72] Rasheeda v. Usoof Dheen - NLR - 570 of 61 [1958] LKSC 28; (1958) 61 NLR 570 (29 September 1958).
[73] Noorul Naleefa v. Marikar Hadjiar - NLR - 529 of 48 [1947] LKCA 52; (1947) 48 NLR 529 (2 October 1947).
[74] Deen v. Rauff - SLR - 253, Vol 2 of 1997 [1997] LKCA 53; (1997) 2 Sri LR 253 (9 May 1997).
[75] Abdul Cader v. Weeraman - NLR - 190 of 70 [1965] LKSC 31; (1965) 70 NLR 190 (22 September 1965).
[76] Nansoora v. Jaria - NLR - 441 of 47 [1946] LKSC 17; (1946) 47 NLR 441 (22 August 1946).
[77] Khan v. Moomin and Others - SLR - 107, Vol 1 of 1995 [1992] LKCA 35; (1995) 1 Sri LR 107 (16 September 1992).
[78] Mirza v. Ansar - NLR - 295 of 75 [1971] LKSC 33; (1971) 75 NLR 295 (10 November 1971).
[79] Mohamed Mustapha v. Ibrahim Alim - NLR - 478 of 40 [1938] LKSC 8; (1938) 40 NLR 478 (12 October 1938).

VI. Conclusion

This article has highlighted case law emanating from Sri Lankan courts interpreting the provisions of Act 13 of 1951 in respect of several different issues. The part on the age for marriage provisions raised the issue of child marriages. Act 13 of 1951 allows a girl to marry at the age of 12 years even though Sri Lanka is a State Party to the International Convention on the Rights of the Child. It was stated above that the Committee on the Rights of the Child is calling for the prohibition of child marriages. Act 13 of 1951 further permits polygynous marriages. As indicated above, this issue has been criticised by many international human rights bodies. It makes provision for a customary practice (kaikuli) that is unrelated to Islamic law and therefore questionable. Act 13 of 1951 also provides that maintenance must be paid by the father and not by the mother of the children. The Sri Lankan Constitution does however prohibit discrimination based on sex. The issue of divorce was also looked at in Act 13 of 1951. The position is that females find it much more difficult to obtain a decree of divorce; this also goes against the Convention on the Elimination of all Forms of Discrimination Against Women. It is therefore recommended that Sri Lanka should strike a balance between its Muslim law and international human rights obligations.