

THE LAW GOVERNING MARRIAGE, DIVORCE AND RELATED MATTERS IN SRI LANKA: WITH SPECIAL REFERENCE TO MUSLIMS

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Sri Lanka is a multi-ethnic, multi-religious and multi-cultural country where Buddhists, Hindus, Muslims, Christians, and Burghers inhabit. The major ethnicity of the country is Sinhalese who represents more than 70 percent of the population. Tamils and Muslims are main minorities of the country. At present, almost nine pieces of legislation govern matrimonial matters in Sri Lanka. Hence, the general law and personal laws are significant. While marriages of Tamils are governed by the general law, Sinhalese may choose either general law or customary law. For Muslims, marriages are governed by Muslim personal law that is based on the Muslim Marriage and Divorce Act 1951. In this sense, different laws govern different ethnicity of the country and there is no uniformity in regulating family matters which render the issues more complicated. Therefore, this paper strives to investigate family law in Sri Lanka covering whole societies and proposes some suggestions based on need of the modern times. For this purpose, a qualitative research methodology is adopted. The study reveals that although a number of reforms are introduced from time to time, there is still a need to adopt more practical approach in implementing the legislation on matrimonial matters. Especially, the Muslim Marriage and Divorce Act that was enacted in 1951 has not been revised for long time and it needs to be reformed in order to give effect to needs in line with social changes taking place globally. Although the law governing family issues of other ethnicities has gone through some important changes, there are lots to be reformed.

INTRODUCTION

Marriage is an institutional organ that is structured for the wellbeing

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of an individual and a society. Marriage contract imposes mutual rights as well as the obligations binding on spouses and children. Accordingly, the parties to the marriage contract may incorporate into their contract of marriage any terms within the framework of law.¹ The Marriage Registration Ordinance of 1907 governs the general law on marriage in the country. This Ordinance is applicable to the marriage between Tamils and other ethnic groups. Kandian Sinhalese either may choose the general law or the Kandian Marriage and Divorce Act. Marriages between Muslims are not governed by this ordinance, but the Muslim Personal Law. Under this law, the Muslim Marriage and Divorce Act 1951 is considered an important piece of legislation. Therefore, it clears that different laws govern different ethnic group pertaining to their matrimonial matters in Sri Lanka.

AGE OF MARRIAGE AND PROHIBITED RELATIONSHIP

In accordance with the amendment made to the Registration Marriage Ordinance in 1995, the minimum age of marriage is 18 for both men and women. However, the law enables parent to give consent for a marriage of a minor. Although consent is required, the marriages contracted under the Ordinance without consent are still considered valid. This exception is not applicable to the customary marriage.² The Muslim Marriage and Divorce Act does not provide for minimum age for a valid marriage. However, the girl under 12 years old must obtain the consent of the *Qazi*.³ In Islamic law, the girl who attains puberty has the right to repudiate the marriage that took place when she was a minor.⁴ At the same time, according to the Penal Code of the country, sexual intercourse with a wife who is under 12 is considered rape.⁵

The minimum age of marriage may be included in the Act in order to avoid child marriages. However, such practice is very rare in any community in Sri Lanka. But, in many Muslim countries such as Yemen and Afghanistan child marriages are very common.⁶ According to a study conducted by the United Nations Children's Fund (UNICEF) between 2000 and 2008, 43 percent of women

in Afghanistan were married under age, some before puberty.⁷ However, age of marriage has been fixed in many Muslim countries. For example, in Morocco, this has been increased from 15 to 18 now.⁸ Meanwhile, the Ordinance prohibits marriages between two individuals within prohibited close relatives. It also prohibits the cohabitation which is punishable with imprisonment.⁹ It is notable that the Penal Code has penalised such marriages. In addition, the polygamy is prohibited under the Ordinance.¹⁰ The prohibited relatives to marry in Muslim law include affinity, consanguinity and fosterage.¹¹

REGISTRATION OF MARRIAGE AND CONSENT

Registration of marriage is not mandatory according to the Ordinance. However, it could be a best evidence of marriage if it is recorded in the register of marriage. The customary marriages, inclusive of those took place in accordance with the Hindu, Buddhist and Christian rites, are accepted as valid although they are unregistered. A marriage by habit and repute is recognised by the law. For example, if a man and woman cohabites as husband and wife, a presumption may be established that they are living in a valid marriage although it is not a conclusive proof. However, the Act requires specified persons to register a marriage and non-compliance with that will constitute an offence.¹²

Consent of marriage is given in the form of signature in general law where there is a column in which the bride must place her signature whereas in Muslim law the consent of bride is obtained by her *Wali* (custodian or guardian) by placing his signature.¹³ However, it is not sure whether the real consent is obtained from the bride. There are occasions where a number of marriages are consummated against the will of bride. This is one of the pitfalls that the Muslim Act consists. According to Islamic law, the bride has a right to refuse any marriage that she does not like to continue. There is a documented decision by the Prophet Muhammad (*s.a.w.*) where a girl approached him stating her father forced her into marriage. The Prophet Muhammad (*s.a.w.*) gave her the choice to either accept the marriage or overturn it

immediately due to the duress involved. Although Islam provides many rights to women regarding marital issues, cultural traditions can greatly influence the proposal and acceptance process beyond the Islamic requirements and, in some cases, directly contradict Islamic practices.¹⁴ The concept of *Wali* still plays a significant role in Muslim marriages of *Shafie* sect. The Act requires that consent of *Wali* must be obtained. In case of *Hanafi* sect, this rule is not necessary. In Islamic law, generally couples are allowed to negotiate regarding the marriage and related matters such as the place to live after marriage in order to ensure that their marriage goals are achieved.

POLYGAMY

Polygamy is generally prohibited for all others except for the Muslims in Sri Lanka. However, the Muslim Marriage and divorce Act requires the husband to give notice to the *Qazi* of his intention to contract a second or subsequent marriage. The courts are concerned about the equal treatment of co-wives with regard to facilities given by the husband. The *Qazi* has no authority to determine the actual ability of the husband.¹⁵ In order to curtail the ill practice of non-Muslim males converting into Islam merely to circumvent rigid divorce law under the general law, the Supreme Court held in a landmark judgment in 1988 that a second marriage upon such conversion would be void during the subsistence of the first marriage.¹⁶ In this sense, the rigidity of general law must be reduced or abolished in order to pave the way to separate a couple who are no more interested in living together. It is unfair to force them to maintain their matrimonial relationship while they are distant mentally from each other. In this sense, Islamic law may give guidelines with regard to the divorce of other ethnic groups in Sri Lanka.

DIVORCE

The Marriage Registration Ordinance and the Civil Procedure Code establish the general law on divorce. The provisions of the Ordinance constitute divorce as a fault-based and this fact has

been reiterated by case laws.¹⁷ As such, adultery is considered as one of factors to obtain divorce. Standard of proof in this respect is beyond the reasonable doubt. The specification of the date and the place of the act may be required by the courts. It has to be noted that an aggrieved party may demand damages from the person with whom the adultery is committed.

Another ground for obtaining divorce is malicious desertion. It is defined by courts that the deliberate and unconscientious, definite and final repudiation of the obligations of a marriage and it clearly implies something in the nature of a wicked mind. The intention to terminate the matrimonial relationship and the willful termination of cohabitation are to be established. The constructive desertion is also recognised by the law, that is, the innocent spouse is forced to leave because of the behavior of the other spouse. One more ground for divorce is incurable impotence at the time of marriage.

In addition to them, under the Civil Procedure Code, either spouse may make a petition to terminate the marriage following two year judicial separation decreed by the court. However, the current practice of the court suggests that mere separation may not be sufficient. Moreover, it has to be noted that a draft Matrimonial Causes Act is underway whereby divorce can be obtained on the ground of irretrievable breakdown of marriage.¹⁸ The Kandians married under the Kandian Marriage and Divorce Act may obtain their divorce on the following grounds as prescribed by the Act: (a) adultery by the wife (b) adultery by the husband coupled with incest or gross cruelty (c) continued and complete desertion for two years (d) inability to live together of which actual separation from bed and board for one year, and (e) mutual consent.¹⁹

In case of a Muslim, the divorce is governed by Muslim Marriage and Divorce Act 1951 or Muslim Personal law. It recognises different grounds of divorce for the husband and the wife. It recognises fault and non-fault based grounds. Rights and duties are determined based on the sect the person follows.²⁰ Divorce by the husband is called as *Talaq*. It means that

repudiation of the marital relationship by the unilateral act of the husband. It is done by making a pronouncement that the marriage is terminated. The husband is allowed to pronounce the *Talaq* without resorting to any prescribed judicial procedures. In addition, such pronouncement no needs to be communicated or made in the presence of the wife. This view is endorsed by the Board of *Qazi* and the Supreme Court.

A *Qazi* has a role to play with regard to divorce. *Qazi* should attempt to reconcile the couple with the assistance of relatives and community leaders. In accordance with guidelines provided in the Holy Quran, arbitrators may be appointed from both parties for the purpose of reconciliation. "If you fear breach between them two, appoint two arbitrators, one from his family and the other from her. If they wish for peace Allah will course their reconciliation".²¹ It is notable that the provision with regard to this issue has been included in Muslim family law in many countries. For example, such provision could be seen in Muslim family law in Malaysia.²² This provision may be made available for both Muslim and non-Muslim in family law in the country as the reconciliation may convince the couple in dispute to commence a new life after realisation of their mistakes.

Similarly, divorce rate among Muslims is increasing and, in most cases, it takes place without a just cause. In this circumstance, the innocent women must be compensated. Islamic law provides for such compensation in accordance with the rule of fair and just. This sort of provision is also available in Muslim family law in Malaysia which may be included in the Muslim family law in the country.²³ Accordingly, a husband may be ordered to pay a sum as may be fair and just based on the Islamic family law. Dissolution of a marriage by wife is known as *Fasah*. The grounds on which a *Fasah* could be sought are (a) failure or inability of the husband to provide the support; (b) malicious desertion; (c) cruelty and ill-treatment; (d) continued dissension and quarrels; (e) husband's leprosy; (f) husband's insanity and importance.

Ill-treatment may include mental ill-treatment, slanderous and false accusation of adultery. It is observed that social conditions

and actual life situations are considered by the courts when cruelty is assessed. Failure to provide maintenance and desertion are main grounds that lead into *Fasah* divorce. In the process of *Fasah* divorce, notice must be served on the husband and evidence must be upheld by minimum two witnesses. Another form of divorce is *Kul'u* which is initiated by the wife who would pay the husband for her release from the marriage. It would normally suffice if she returns her *Mahr*. There is another kind of divorce which could be agreed by both parties without involving any monetary payment. This is called *Mubarrad*. A woman who could be falsely accused of adultery by her husband may divorce her husband on the ground of *Lian*. Meanwhile, Tamils are governed by the Marriage Registration Ordinance and the Civil Procedure Code in relation to matters of divorce.

JUDICIAL SEPARATION

The Civil Procedure Code enables the parties to make a petition demanding separation on any ground allowed under the general law. If the situation becomes worse and it indicates that further cohabitation is impossible or intolerable due to the conduct of either party, the order for separation can be obtainable.²⁴ This option is not available to those who are married under Kandian Marriage and Divorce Act or Muslim Marriage and Divorce Act. However, under Muslim Personal Law, there are various options to dissolve the matrimonial ties and there is no need for such judicial separation.

MAINTENANCE AND FINANCIAL SUPPORT

The main legislation in relation to maintenance and financial support for spouses during the subsistence of marriage is the Maintenance Act 1999. The Act enables the spouse who is unable to maintain him/her to demand financial support from the spouse who has sufficient means. Previous law was requiring only the husband to pay the maintenance. Wife had no such responsibility although she may be financially sound. The order for such maintenance is not applicable if the applicant spouse is living in

adultery or both are living separately by mutual consent. The applicant spouse has to prove other spouse's financial ability while convincing the court that he/she is in need of financial support.²⁵

Besides this Act, common law principles also provide for civil action that could be taken for maintenance. Under these principles, maintenance could be continued even during a period of consensual separation. According to these principles, either of spouses may demand financial support while an action for divorce is pending. The Kandian Marriage and Divorce Act consists of provisions on maintenance in case of divorce. Husband may be ordered to pay maintenance for wife and children. Husband's financial ability and wife's needs are taken into account when the amount of maintenance is determined.

In case of Muslims, the concept of *Nafaga* is applicable under which food, clothing and accommodation have to be provided by the husband who has the primary obligation on maintenance even though the wife is financially sound. Maintenance after divorce is irrelevant under the Muslim personal law. This is consistent with Islamic law in general. However, according to the Muslim Marriage and Divorce Act, divorced wife is entitled to get maintenance during *Iddat* or until delivery if she is expectant.

ADOPTION AND CUSTODY OF A CHILD

The principles of custody are based on the Roman-Dutch laws. However, according to common law principles, fathers are given preference to the custody of a child unless there is an assumption that such option is danger to the life, health and morals of a child. Nevertheless, case laws demonstrate that child's welfare is given priority. The laws relating to custody of children are criticised as they give no proper attention or give a little attention to the best interest of children. The statute does not provide clear criteria on which the custody of a child could be determined. Earlier, courts were concerning on child's mental health and now they are also considering the security of a child as well.

According to the Adoption of Child Ordinance, adoption of a child can be made. Child's welfare, his age, adoptee's wishes are

taken into consideration by the courts. Following an amendment to the ordinance in 1992, commercialised adoption that is carried out by foreign parents from wealthy countries has come to an end. The amendment also proscribes the receiving or giving any kind of payment in return to the adoption. Adoption by foreign parents is strictly scrutinised by the courts and it is allowed on exceptional circumstance such as if he/she is not adopted by a local parent.

Under Muslim Personal law, mother is given priority in relation to custody of minor children. The School of thought to which parents belong to plays a significant role in this respect. According to *Shafie* sect, a female child will remain with the mother till she marries. However, in accordance with the *Hanafi* sect, she can be with mother until she reaches puberty. In case of a male child, it is with mother till he reaches seven years according to the both sects. Under *Shafie* sect, a male child has an option to choose either to be with mother or father after reaching seven, but it goes to father when he reaches seven years under *Hanafi* sect. Muslim Personal law does not provide for the adoption.

PROPERTY RIGHTS

The governing law on property in Sri Lanka is also Roman-Dutch law. Matrimonial property rights are based on the 1923 Married Women's Property Ordinance. The Ordinance enables women to hold, acquire and dispose of any movable property without her consent of her husband. Meanwhile 1876 Matrimonial Rights and Inheritance Ordinance forms the general law on inheritance rights. Equal rights for male and female spouses have been provided under the Ordinance. In case of either spouse's death, the surviving spouse is entitled to half of the deceased spouse's property.²⁶

Kandian Sinhales are governed by the 1938 Kandian Law Ordinance in matrimonial property issues. Under this law, women have no equal rights with men. The ordinance entitles legitimate children to get equal shares from the parent's property. Tamils are governed by the 1911 Matrimonial Rights and Inheritance (Jaffna) Ordinance in relation to matrimonial property matters. This

Ordinance enables a woman to maintain her property that was acquired before marriage even after her marriage. However, with respect to the immovable property, a woman must obtain written consent of her husband for disposing it.²⁷

Muslims are governed by Muslim personal law that enables a Muslim woman to acquire, hold and dispose with property independently. In case of inheritance, the 1931 Muslim Interstate Succession Ordinance is applicable. Here, the sect to which a spouse belongs plays an important role in inheritance issues. However, according to all sects, female heirs are entitled to lesser share compared to male heirs.

CONCLUSION

In a nutshell, there are a number of legislations governing matrimonial matters in Sri Lanka, namely, the General Marriage Ordinance, the 1952 Kandian Marriage and Divorce Act, the Muslim Marriage and Divorce Act 1951, the 1931 Muslim Intestate Succession Ordinance, the 1911 Matrimonial Rights and Inheritance Ordinance, the 1923 Married Women's Property Ordinance, the 1938 Kandian Law Ordinance, the 1999 Maintenance Act and Adoption of Children Ordinance. Besides these legislations, there are many provisions relating to family issues in the Civil Procedure Code. Although it is appreciated that different society has different legislation based on the respective community's cultural and religious background, it is very complicated to find a right laws pertaining to family issues. Therefore, it is suggested to bring them all under one title "Family Law of Sri Lanka" where different chapters can be allocated for different community. While reforming these laws, law can also be updated and unnecessary things may be removed from the statute.

The minimum age of marriage for Muslim can be set based on the practices in other Muslim countries as discussed above. The rigidity for obtaining divorce that is seen in the general law must be relaxed in order to ease the process due to the fact that this rigidity does not serve any benefit, but there are many disadvantages. There are some unfortunate incidents took place in

the country such as some has killed even his wife to marry a second marriage. In addition, this rigidity is used to revenge the innocent spouse. The legislators may refer to the Muslim family law in this respect to get a flexible view. Under Muslim law, consent of bride is not obtained in a proper manner in some marriages. Current practice is that the *Wali* gives consent on behalf of bride. There are occasions where forced marriages have taken place due to this practice. Instead of this practice, the bride may give consent by placing her signature in the marriage certificate with the recommendation of *Wali*. Finally, the laws discussed here were enacted long ago and it is time to review all and replace them with updated legislations that befit to the modern times and needs.

Notes

- 1 Saleem Marsoof, "The Muslim Law of Marriage Applicable in Sri Lanka", *Law College Review*, 2006.
- 2 Section 15, the Marriage Registration Ordinance No. 19 of 1907 (CLE 1956 Official Ed. Cap 112) as amended by Act No. 11 of 1963, Act No. 3 of 1970, Act No. 18 of 1995, Act No. 12 of 1997, Act No. 11 of 2001, Act No. 36 of 2006 and Act No. 38 of 2006.
- 3 He is similar to a judicial officer. Sixty-five people serve as *Qazi* in Sri Lanka.
- 4 Imani Jaafar Mohammad and Charlie Lehmann, "Women's Rights in Islam regarding Marriage and Divorce", *Journal of Law and Practice*, 2011, Vol. 4, No. 3, pp. 1-13.
- 5 Section 363(e), the Penal Code, No. 2. of 1883.
- 6 See also Ashgar Ali Ali Mohamed, Mohammad Naqib Ishan Jan, Muhamad Hassan Ahmad and Sodiq Omoola, "Criminalising child marriage with special focus on Malaysia", *Journal of Islamic Law Review*, 2018, Vol. 14, No. 1, pp. 155-180.
- 7 Evening Standard, "Girl, eight, sold to an Afghan police officer as his bride" (06 October 2011) <<https://www.standard.co.uk/news/girl-eight-sold-to-afghan-police-officer-as-his-bride-6450999.html>> (accessed on 11 April 2020).
- 8 Rashad Hoda, Magued Osman and Farzaneh Roudi-Fahimi, "Marriage in the Arab World", *Population Reference Bureau*, (01 December 2005).

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- 9 Section 17, the Marriage Registration Ordinance No. 19 of 1907.
- 10 Section 15, the Marriage Registration Ordinance No. 19 of 1907.
- 11 Section 80(1) and (2), the Muslim Marriage and Divorce Act 1951.
- 12 Section 15, the Marriage Registration Ordinance No. 19 of 1907.
- 13 *Yaseem v. Noor Naeema* 3 MMDLR 113.
- 14 Imani Jaafar Mohammad, n. 4.
- 15 Sections 27-33, the Muslim Marriage and Divorce Act 1951.
- 16 Saleem Marsoof, “The Abeysundera Decision: Polygamy v Bigamy: An Area for Reform”, *Meezan*, 2005, p. 89.
- 17 Section 19, the Marriage Registration Ordinance No. 19 of 1907.
- 18 Helplinelaw, “Family Laws Sri Lanka” <<http://www.helplinelaw.com/article/sri%20lanka/167>> (accessed on 11 April 2020).
- 19 Sections 32-34, the Kandian Marriage and Divorce Act No.41 of 1975.
- 20 Sections 27-33, the Muslim Marriage and Divorce Act 1951.
- 21 Quran, 4:35.
- 22 Section 48, the Islamic family law (Federal Territories) Act 1984.
- 23 Section 56, the Islamic family law (Federal Territories) Act 1984.
- 24 Section 608, the Civil Procedure Code No. 12 1895.
- 25 Section 2, the Maintenance Act No. 37 of 1999.
- 26 Sections 4-12, the Matrimonial Rights and Inheritance, No 15 of 1976.
- 27 Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911.



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