PROPRIETARY CONSEQUENCES OF A MUSLIM MARRIAGE AND DIVORCE

with a brief excursus on the history of Muslim Personal Law in South Africa

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1. ISLAMIC LAW

1.1 The Shariʿah

Muslims believe their religion to prescribe both a set of beliefs, and a code of law whereby their mundane lives are regulated. This code of law is referred to as the *Sharīʿah*.

Its range covers the entire spectrum of traditional law, and beyond: in addition to areas such civil law, family law, judicial procedure, penal and international law, it also deals with ritual acts of worship and dietary regulations.

The Sharīʿah was the law by which Muslim polities governed themselves for over a millennium, from the time of the Prophet to the rise of European colonialism.

1.2 Sources of the Sharīʿah

The Sharīʿah is drawn primarily from—

- the Qurʾān, which is the holy scriptures of Islam;
- the Sunnah, which is the example of the Prophet as documented chiefly in the Ḥadīth literature;
- *ijmāʿ*, or the consensus of suitably qualified scholars;
- and *qiyās*, or analogical deduction.

1.3 Schools of law

Methodological differences in the development of the law led to the emergence, in the second century of the Islamic era (corresponding roughly to the 8th century CE) to the emergence of law schools called *madhāhib* (singular, *madhhab*). The most important of these, and the only ones to have withstood the test of time, are:

- the ḤANAFĪ school, founded by Imam Abū Ḥanīfah (died 150AH/767AD)
- the MĀLIKĪ school, founded by Imām Mālik (died 179AH/795AD)
- the SHĀFIʿĪ school, founded by Imām al-Shāfiʿī (died 204AH/820AD)
- the ḤANBALĪ school, founded by Imam Aḥmad ibn Ḥanbal (died 241AH/855AD)

At present the Hanafī school holds sway over central Asia, Afghanistan, the Indian subcontinent and Turkey. The Mālikī school predominates in North and West Africa. In regions such as Indonesia, Malaysia and East Africa it is the Shāfiʿī school that is followed; while the Ḥanbalī school holds sway in Saudi Arabia.

South African Muslims of Indian origin generally tend to follow the Ḥanafī madhhab, while those of Indonesian origin follow the Shāfiʿī madhhab.

1.4 Administration of Islamic law

The jurisprudence through which Islamic law was developed is called *fiqh*. The development of the law within the various schools resulted in the emergence of a rich corpus of fiqh literature, embracing multiple legal genres. The formal administration of justice under Islamic law came to rest primarily upon the fiqh literature: *qāḍīs*, or judges, were typically appointed by the head of state to administer the law as interpreted by a specific madhhab and documented in its fiqh literature. Colonial ascendancy resulted in Islamic law receding from the courtroom, to be replaced by Western legal codes and systems. The waning of colonialism saw the reinstatement, in many Muslim countries, of specifically Muslim family law.

Outside the courtroom, however, the non-judicial administration of Islamic law remained unaffected by political vicissitudes. Since they believe it to be a divinely ordained law, Muslims will live by the Sharīʿah even when it is unrecognised by the official judicial institutions of the country in which they live. The institution of *iftā*, whereby jurisconsults known as *muftīs* issue rulings called *fatwās*, existed side by side with the formal judicial administration of the law called *qaḍā*; in the colonial period and within Muslim minorities this institution continued the function of interpreting and applying the law.

For such applications of the law that do require some form of judicial authority (eg. the judicial annulment of marriage) Muslim scholars in minority situations formed non-governmental organisations in which a form of quasi-judicial power was vested. In South Africa, associations of Muslim scholars such as the Muslim Judicial Council (Cape), the Jamiatul Ulama (Johannesburg)

and the Jamiatul Ulama (Durban) all have departments invested with this type of quasi-judicial authority.

2. MARRIAGE IN ISLAMIC LAW

2.1 Marriage

Marriage in Islam is seen as more of a contractual undertaking than a sacrament. As such, it gives rise to an array of legal consequences. Prominent among these consequences is a set of proprietary rights and obligations, some of which come into existence at the inception of marriage, while others assert themselves upon its dissolution.

2.2 Proprietary consequences of marriage

2.2.1 Mahr

The combination of solemnisation and consummation gives rise to the duty of payment by the husband to the wife of the *mahr*, or dower: a gift, the form and amount of which is left to be agreed upon by the parties before solemnisation. The Ḥanafī school, however, stipulates a minimum monetary limit equivalent to the value of 29,7 grams of silver.

2.2.2 Nafaqah

For as long as the marriage subsists, the duty of providing *nafaqah*, or maintenance to his wife, rests upon the husband. This duty of support combines, essentially, the duty to provide accommodation, clothing, and food. *Nafaqah* is an absolute right which may not be prospectively waived. Failure to fulfil leads to it accruing as a debt upon the husband in all schools but the Ḥanafī school: to them the debt prescribes immediately upon completion of the month in which the failure to maintain occurred. In terms of quantification consideration is given to the general concept of what would constitute sufficiency, although the Shāfiʿī school does set a limit.

2.3 Proprietary consequences of divorce

2.3.1 Nafaqah

Where marriage terminates through *ṭalāq*, which is the unilateral pronouncement of divorce by the husband to the wife only, the duty of support continues to run for three menstrual cycles after which all obligations of maintenance upon the husband cease.

2.3.2 Mutʿah

The *mutʿah* is a consolatory gift to be provided by the husband to the wife upon termination of the marriage. There is a considerable degree of divergence between the schools as to the situation in which its payment becomes manadatory. The Hanafī school holds it to be mandatory in instances where the marriage was unconsummated, and non-mandatory for consummated marriages. The quantification of the *mutʿah* is essentially a matter of agreement between the parting spouses, but where they fail to come to an agreement it will be judicially quantified with consideration being given to the financial situation of both husband and wife.

2.4 Proprietary regime

Community of property as a consequence of marriage is foreign to Islamic law.[1] This law, whilst recognising a number of proprietary rights as arising out of the marriage contract, does not recognise a community of acquests and gains. This position is enshrined in section 8 (1) of the Muslim Personal Law Draft Bill as follows: "A Muslim marriage entered into before or after the commencement of this Act shall be deemed to be a marriage out of community of property excluding the accrual system."

2.5 Universal partnership

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[1] It is equally unknown to Roman Law. In the case of *Cole's Widow vs His Executors*, 7 Martin, N.S., 41 the Louisiana Court said: "The doctrine of the community of acquests and gains, was unknown to the Roman Law; and, although now common, we believe to the greater number of European naions, its origin can not be satisfactorily traced. The best opinion appears to be that it took its rise with the Germans, among whom at a very early period in their history, the wife took, by positive law, the one-third of all the gains made during coverture." Cited in Howe, W.W., "The Community of Acquests and Gains", *The Yale Law Journal*, vol. 12 no. 4, February 1903, p. 216.

If the formation of a universal partnership is conceived of, not as a specific consequence of marriage, but as an act of proprietary disposition, its validity under Islamic law is undermined by the element of *gharar* (uncertainty) in that it prospectively disposes of unidentified, and therefore uncertain, future assets.

Where both partners had contributed physical assets to the household, each retains ownership of what he/she had contributed; the estate thus formed is considered one in which separate assets are mixed, but not merged into one estate. The non-tangible contribution by one partner, where such non-tangible contribution was not pre-agreed to be remunerated by the other, would not, under Islamic law, be deemed equivalent to tangible contribution.

What further makes the claim of a universal partnership within an Islamic marriage untenable is the fact that the duty of support (*nafaqah*) is one of the major proprietary consequences of marriage in Islam. In a universal partnership, since the partners share joint control and equal ownership over the estate, there is no duty of support.

3. MUSLIM PERSONAL LAW IN SOUTH AFRICA

3.1 1652-1961

Ever since the arrival of Islam at the Cape in the mid-1600s, Islamic law has been administered outside of the country's official judicial structures. Although there appears to have been some limited application of Islamic family law by the Batavian Republic in the East Indies, this does not appear to have been given any sort of practical implementation at the Cape.[2] For over three

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[2] In his judgement in *Ryland v Edros*, Farlam J states: "During the course of the trial Mr Trengove provided me with an extract from the *Nederlandsch-Indisch Plakaat Boek* (edited by J A van der Chijs) vol IX at 417-31, in which is printed a placaat codifying the

> 'civile wetten en gewoontes, waarna de Mahometanen zig reguleeren in het decideeren der onder hen opkomende verschillen, in zo verre de sucessiën, erf- en besterffenissen, item hunne huwelyken en egtscheydingen, enz, betreffen, sodanig als uyt het Mohametaanse wetboek by een versamelt en in Rade van India geapprobeert zyn'.

centuries Islamic law was administered to Muslims at the Cape, and later in the rest of South Africa, either in the form of *iftā*, or the quasi-legal *qaḍā* structures.

3.2 1961-1994

3.2. 1 Ismail v Ismail 1983

Trengove JA in his 1983 judgement in *Ismail v Ismail*, in consonance with the Eurocentrism inherent in South African law at the time, held that marriages solemnized in accordance with Islamic law did not enjoy the status of marriage in the civil law, because they were "potentially polygamous" and therefore, *contra bones mores*.

3.2.2 Moola v Aulsebrook 1983

The decision by Friedman J in the same year, in *Moola v Aulsebrook*, was more charitable in that it declared Muslim marriages to be putative marriages. The learned judge was careful to point out, however, that the concept of putative marriage held no legal significance for parties themselves as they can resort to the universal partnership remedy. He concluded that "[t]he true importance of the concept of putative marriage lies therefore in the fact that children of such a union are legitimate with all legal advantages of legitimate children."

According to the copy of the *Statuten van Indien* in the Supreme Court library, this code was adopted by a resolution passed on 25 March 1760. Although some writers have suggested that only the 1642 edition of the Statutes of Batavia (and not the new Statutes of Batavia promulgated by Governor Van der Parra in 1766, in which is included the Code of Muslim Law approved by the Council of India in 1760) was applied at the Cape before 1795, the archival researches of Professor G G Visagie have proved that the new Statutes (of which there is still a copy in the library of the Supreme Court) were applied in practice by the Raad van Justitie: see G G Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* at 67.

It is not clear to what extent, if any, the Code of Muslim Law approved by the Council of India in 1760 could have applied to Muslim slaves at the Cape (cf De Beer *Aspekte van die Regsposisie van die Slawe aan die Kaap*, unpublished LLM dissertation, University of the Western Cape, 1992); it is clear, however, that there were Muslims at the Cape who were not slaves and to whom the Code would have been applied by the Raad in disputes arising among them."

3.2.2 Solomons v Abrams 1991

Eight years after *Moola v Aulsebrook*, the decision in *Solomons v Abrams* in 1991 represents a shift back to a more doctrinaire position on the status of Muslim marriages. It was held that a putative marriage cannot come into existence unless the parties go through a marriage ceremony performed by a marriage officer.[3]

3.3 Post-1994

The introduction of the new Constitution heralded a fresh direction in South African jurisprudence—a direction Farlam expresses in these words: "I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution. In my view those values 'irradiate'... the concept of public policy and *boni mores* that our Courts have to apply."

3.3.1 Ryland v Edros 1996

Farlam J in 1996 rejected the decision in *Ismail v Ismail* because he was "satisfied that the *Ismail* decision no longer operates to preclude a Court from enforcing claims such as those brought by the defendant in this case."

While his decision stops short from conferring full legal recognition on Muslim marriages, he found, in the perception of the Muslim marriage as a contract from which flow certain proprietary obligations, reason enough to enforce some of those consequences, chiefly the obligation of maintenance.

About the defendant's claim to entitlement to an equitable share of her tangible and intangible contributions to the growth of the plaintiff's estate, he states significantly: "On the third issue on which a ruling is sought I rule that the defendant is not entitled to an equitable share of her tangible and intangible contributions to the growth of the plaintiff's estate."

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[3] For criticism of the decision in *Moola v Aulsebrook*, see Keyser B, *1991 Annual Survey* 19, and Cronje & Heaton, *Casebook*

3.3.2 Other cases

Ryland v Edros was followed by a number of other landmark cases with a bearing on Muslim Personal Law: *Amod v Road Accident Fund* 1997, *Daniels v Campbell & Others* 2003, *Hassam v Jacobs & Others* 2009. However, these cases were chiefly concerned with the recognition of a wife in a monogamous or polygamous Muslim marriage as a spouse for legal purposes under certain statutes.

3.3.3 Du Toit v Seria 2006

In 2002 Nazeema Du Toit, who was married in 1974 by Islamic rites only to Nazeer Ahmed Seria, was divorced through irrevocable *talāq*. In the same year she instituted action proceedings in the Cape High Court for an order declaring that at common law a universal partnership had existed between herself and the respondent during the subsistence of their Muslim marriage, and that accordingly she was entitled to a half share of property held by him. She also claimed rehabilitative maintenance for twelve months. The High Court held, in a judgement on 5 February 2004, that she had not established that a tacit universal partnership had existed during the marriage, and noted that he claim for rehabilitative maintenance had not been pursued.

On 20 July 2004 the Supreme Court of Appeal refused an application for leave to appeal against the decision of the Cape High Court. On 5 April 2006 Du Toit lodged her request for leave to appeal to the Constitutional Court. She acknowledged that in the High Court the constitutional issues concerning the recognition of Muslim marriages were not pleaded and that the issue of the consequences of the termination of a Muslim marriage was therefore also not raised in the pleadings. She contended, however, that the High Court should on its own initiative have given consideration to these questions and developed the common law in the light of the equality and dignity provisions of the Constitution. Had it done so, she averred, it would have enlarged the concept of tacit universal partnership to embrace her situation as a divorced Muslim wife.

The Constitutional Court decision states:

> The issues underlying the application, and in particular questions concerning the recognition of Muslim marriages and the consequences of divorce, are important and complex, and touch

> on a great range of diverse interests. As indicated above, they were not raised on the pleadings or argued in this case. The High Court correctly dealt with the matter according to the pleadings, the evidence before it and the argument presented. The result is that there are no prospects of the appeal from the High Court judgment being successful.

The application was refused by the Constitutional Court on 23 May 2006.

3.4 The Muslim Personal Law Project

The matter of Muslim Personal Law has been investigated by the South African Law Reform Commission since 1990. The first Muslim Personal Law Board was elected in 1995, but did not make much progress. Renewed interest by the SALRC in 1996 led to the appointment by the Minister of Justice of a project committee under the leadership of Justice Mohamed Navsa. In 2001 this committee published Discussion Paper 101 containing a proposed Draft Bill on Islamic Marriages.

> The Draft Bill made provision for, *inter alia,* the recognition of Muslim marriages in South Africa, the requirements for a valid Muslim marriage, the registration, proprietary consequences and dissolution of Muslim marriages, and the status and capacity of spouses in Muslim marriages. All responses received up to and including 10 April 2000 were published by the SALRC in a special document referred to as "Collation of Submissions on Discussion Paper 101: Islamic and Related Matters." The SALRC considered the responses and, as a result, an amended version of the Draft Bill included in a Report was submitted to the Minister of Justice and Constitutional Development in July 2003.[4]

With the process having of codifying and implementing Muslim Personal Law in South Africa having progressed to this extent, any judgements by South African courts on issues affecting Muslim marriages will be premature and will inevitably affect the manner in which Muslim Personal Law will be received and perceived by the South African Muslim community.

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[4] Rautenbach C., *Muslim Marriages in South Africa*, http://www.rechten.vu.nl/en/Images/7-1%20-%20Muslim%20marriages%20in%20South%20Africa_tcm23-46101.pdf