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Traditional Muslim Family Law and the Compatibility of the Proposed Muslim Marriage Legislation with *Shari'ah*

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INTRODUCTION

The South African Law Reform Commission compiled a draft Bill on Muslim Marriages in 2003.¹ Similar to the Recognition of Customary Marriages Act of 1998² with regard to customary marriages, the draft Bill proposes recognition of all Muslim marriages irrespective of the date of commencement of the proposed Act. Different from the Recognition of Customary Marriages Act the proposed Act is not automatically applicable to all Muslim marriages. The parties have the option to elect that the proposed Act should be applicable to their marriage.³ A Muslim marriage entered into after the commencement of the proposed Act will have to comply with the requirements for a valid Muslim marriage contained in the proposed Act.

Although the legislature has not responded to the publication of the draft Bill on Muslim marriages, the draft Bill still forms the only indication of the intended framework in which Muslim marriage law will be recognised in South Africa.⁴ There are numerous publications on the compatibility of Muslim family law with the Bill of Rights.⁵ The publications usually focus on the question of whether

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1 South African Law Reform Commission *Islamic Marriages and Related Matters Project 106* (2003) Appendix A.

2 Act 120 of 1998.

3 Clause 2(1). However, parties in an existing Muslim marriage will have to opt out of the draft Bill if they do not want the proposed Act to be applicable to their marriage (clause 2(2)).

4 A second Bill, entitled "Recognition of Religious Marriages Bill", was drafted by the Commission on Gender Equality in 2005. The Bill is more generic in nature and does focus on all religious marriages and not only Muslim marriages.

5 Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" 1993 *THRHR* 401; Moosa "Muslim personal law – to be or not to be" 1995 *Stell LR* 423; Motala "The draft bill on the recognition of Muslim marriages: an unwise, improvident and questionable constitutional exercise" 2004 *CILSA* 327; Denson and Carnelley "The awarding of post-divorce maintenance to a Muslim ex-wife and children in the South African courts: the interaction between divine and secular law" 2009 *Obiter* 679; Carnelley "Enforcement of the maintenance rights of a spouse, married in terms of Islamic law, in the South African courts" 2007 *Obiter* 340; Goolam and Rautenbach "The legal status of a Muslim wife under the law of succession: is she still a whore in terms of South African law?" 2004 *Stell LR* 369; Gabru "Dilemma of Muslim women regarding divorce in South Africa" 2004 *PER* 1.

Muslim family law may be recognised in a constitutional dispensation. The focus of this contribution is not merely to evaluate the principles of Muslim family law against the Bill of Rights but to ascertain whether the draft Bill is compatible with the basic principles of traditional Muslim family law. The question that arises is whether the content of the draft Bill is compliant with *Shari'ah*.⁶ *Shari'ah* does not differentiate between religious and legal issues. There is a higher duty on every Muslim to follow the laws of Allah above any secular laws. It is therefore imperative that legislation recognising Muslim marriages should comply with the principles of *Shari'ah*. If the proposed Act is not compliant parties will not opt for the proposed Act to be applicable to their marriage and will mean that the proposed Act will be mere paper law which will not be adhered to by the community it intends to serve.

In this article traditional Muslim marriage law of the *Sunni* schools of thought is examined and compared to the provisions in the draft Bill.⁷ Thereafter an alternative to the draft Bill is proposed and briefly discussed. Due to a constraint of space the proposal will be expounded upon in a future publication.

2 SHARI'AH AND THE DRAFT BILL ON MUSLIM MARRIAGE

2.1 Introduction

The general family law principles of the different *Sunni* schools are mostly similar although they vary in detail of application.⁸ It is therefore possible to use similar aspects as common denominator in determining whether the draft Bill and *Shari'ah* are compatible. Under this heading the basic principles of *Shari'ah* with regard to marriage is compared to the principles contained in the draft Bill on Muslim Marriages.

6 *Shari'ah* can be described as an "...all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects": Schacht *An Introduction to Islamic law* (1964) 1. See also Vesey-Fitzgerald *Muhammadan Law* (1931) 55; Nadvi "Islamic legal philosophy and the Qur'anic origins of the *Shari'ah* law" 1989 *TRW* 90; Badawi "Islam" in Holm J (ed) *Women in religion* (1994) 84.

7 Islam consists of two main sects, namely the *Sunni* and *Shi'ah* sects. 85% of the world's Muslims are *Sunni*. The *Sunni* sect consists of four schools: *Hanbali*, *Hanafi*, *Shafi'i* and *Maliki*. In South Africa the Muslim community consists of 1,4 % of the total South African population according to the figures of the 1996 Census (Simalane "The population of South Africa: an overall and demographic description of the South African population based on Census 1996" *Occasional Paper* 2002/01 www.statssa.gov.za (accessed 19-03-2010)). The majority of South African Muslims are *Sunni*. The margin of South African followers of the *Shi'ah* sect in context to worldwide statistics is negligible. The publication is therefore limited to a discussion of the *Sunni* sect.

8 The four schools of thought are *Hanbali*, *Hanafi*, *Shafi'i* and *Maliki*. Of these schools the *Hanafi*, *Shafi'i* and *Maliki* schools are present in South Africa. The majority of South African Muslims are *Hanafi* or *Shafi'i* (Vahed "Should the question: 'what is in a child's best interest?' be judged according to the child's own cultural and religious perspectives? The case of the Muslim child" 1999 *CILSA* 373; Dangor "The establishment and consolidation of Islam in South Africa: from the Dutch colonization of the Cape to the present" 2003 *Historia* 210). For a detailed discussion see Khan *The Schools of Islamic Jurisprudence* (1991). For a discussion of the sources of Islamic law see Tanzil-ur-Rahman *A Code of Muslim Personal Law* (1978) 3; Hodkinson *Muslim Family Law* (1984) 2.

2.2 Requirements for a valid Muslim marriage

2.2.1 Capacity

The draft Bill sets the marriageable age at 18 years for prospective spouses⁹ which coincide with the age of majority in accordance with the Children's Act.¹⁰ The marriageable age is in accordance with international requirements.¹¹ Eighteen is further the marriageable age in terms of the Recognition of Customary Marriages Act and the Civil Union Act.¹²

Criticism from certain Muslims quarters against the marriageable age set by the draft Bill is that no minimum marriageable age is required in *Shari'ah* and that a person is marriageable if he or she comprehends the consequences of marriage.¹³ According to *Shari'ah* however parties do not only have to comprehend the consequences of their actions but also have attained puberty to be able to contract a valid marriage.¹⁴ There are however two exceptions to this rule; a guardian may ratify a marriage entered into before puberty after the child attains puberty and a child may be contracted into marriage before puberty but will only move in with his or her spouse after attaining puberty. Majority was traditionally attained at puberty in *Shari'ah*.¹⁵ The age of puberty and majority therefore usually coincided. The *Sunni* schools disagree on the age when a minor can be presumed to have reached the age of puberty.¹⁶ Irrespective of this disagreement most Muslim countries have legislation determining the marriageable age.¹⁷ If legislation determining the marriageable age is acceptable in predominantly Muslim countries it cannot be regarded as contrary to the principles of *Shari'ah*.

Marriage below the predetermined marriageable age is allowed in *Shari'ah* if puberty was attained before the predetermined age, usually on request of the guardian (*wali*) with consent of the court.¹⁸ The draft Bill contains similar provisions in clause 5(6):

“The *Minister* or any *Muslim* person or *Muslim* body authorised in writing thereto by him or her, may grant written permission to a person under the requisite age to enter into a *Muslim marriage* if the *Minister* or the said person or body considers such marriage desirable and in the interests of the parties in question.”

9 Clause 5(1)(d).

10 Act 38 of 2005.

11 Article 1 United Nations Convention on the Rights of the Child (1989); art 21 of the African Charter on the Rights and Welfare of the Child (1990).

12 Act 17 of 2006.

13 The criticism was against clause 5(1)(a) in the draft Bill on Islamic Marriages of the South African Law Reform Commission *Islamic Marriages and Related Matters Project 59 Discussion Paper 101* (2001) see *Collation of Submissions on Discussion Paper 101* 12. The clause appears *verbatim* in the draft Bill on Muslim Marriages as clause 5(1)(d).

14 Tanzil-ur-Rahman 62; Esposito *Women in Muslim family law* (1982) 16; Hodkinson 92; Pearl *A Textbook on Muslim Personal Law* (1987) 42.

15 Tanzil-ur-Rahman 62; Esposito 16; Hodkinson 92; Pearl 42.

16 Tanzil-ur-Rahman 63; Hodkinson 92; Pearl 42.

17 Algeria; Iraq; Jordan; Lebanon; Palestine; Israel; Libya; Syria; Indonesia; Pakistan (“Islamic family law” <http://law.emory.edu/ifl/index2.html> (accessed 07-01-2010); Mahmood *Statutes of Personal Law in Islamic Countries* (1995)). The most progressive personal status code is the Moroccan Family Code (*Moudawana*) 70 of 2003 which was promulgated on 05-02-2004. Section 19 requires that both spouses have to be 18 years of age.

18 “Islamic family law” <http://law.emory.edu/ifl/index2.html> (accessed 07-01-2010). See for example s 20 of the Moroccan Family Code (*Moudawana*) 70 of 2003.

In accordance with the draft Bill a Muslim marriage entered into without the required consent may be ratified by the minister of home affairs. The minister may also authorise a Muslim body or person to provide such ratification in terms of clause 5(8). This clause is similar to s 26(1) of the Marriage Act¹⁹ which allows the minister or officer in the public service with delegated power to consent to a marriage of a female under 15 years of age and a male under 18 years of age.²⁰ Civil marriages concluded by minors under 15 or 18 without ministerial consent may be ratified.²¹ Consent in terms of this section may only be provided if such a marriage is desirable. It might, however, be advisable not to delegate the power to non-governmental entities or religious bodies but keep the provision similar to s 26 of the Marriage Act. Such delegation could create opportunity for abuse of power.²²

Marriage below the age of puberty is possible in *Shari'ah*. A marriage may be ratified by a child's guardian at the time that the child reaches puberty if the child entered into a marriage before attaining puberty without the consent of his or her guardian. This is only allowed if the child understood the consequences of his or her actions at the time of marriage.²³ In *Shari'ah* the guardian of a minor may also contract the minor into marriage before puberty.²⁴ Under such an arranged marriage the child will only move in with her spouse on attaining puberty.²⁵ Such a marriage may be repudiated by the minor on attaining puberty if the marriage was not consummated before the age of puberty.²⁶ Although child marriages before puberty are allowed in traditional *Shari'ah*, it is prohibited by most Islamic countries.²⁷ Such a prohibition can therefore not be regarded as against the basic principles of *Shari'ah*. Child marriages are prohibited by art 16(2) of the Convention on the Elimination of all Forms of Discrimination against Women to which South Africa is a party and should not be allowed.

19 Act 25 of 1961.

20 The draft Marriage Amendment Bill GG 30663 (14-08-2008) proposes that the differentiation between sexes should be removed and that ministerial consent for both boys and girls of 15 is required.

21 Section 26(2).

22 Delegated power of consent to a Muslim body was a compromise made by the SALRC after objections were made regarding the set minimum age of marriage (SALRC *Islamic Marriages and Related Matters Project 106* (2003) par 3.117).

23 Tanzil-ur-Rahman 62; Hodkinson 92; Pearl 42.

24 Tanzil-ur-Rahman 62; Hodkinson 92.

25 Tanzil-ur-Rahman 467; Hussain *Islam* (2004) 78. The marriage cannot be consummated before the child reaches puberty (al-Hibri and Mubarak "Marriage and Divorce" *The Oxford Encyclopedia of the Islamic World. Oxford Islamic Studies Online* <http://www.oxfordislamicstudies.com/article/opr/t236/e0507> (accessed 21-12-2009)).

26 The option is only available if the marriage of the minor was prearranged by a guardian other than her father or grandfather: Vesey-Fitzgerald 60; Tanzil-ur-Rahman 467; Esposito 17; Hodkinson 92; Pearl 44; Rahim *The Principles of Islamic Jurisprudence: according to the Hanafi, Maliki, Shafi and Hanbali schools* (1994) 315.

27 Hodkinson 92 and Pearl 42. Child marriages are illegal in Algeria, Iraq, Kuwait, Lebanon, Libya, Malaysia, Morocco, Somalia, Syria, Tunisia, and Yemen even if permission is provided by the child's father: al-Hibri and Mubarak "Marriage and Divorce" *The Oxford Encyclopedia of the Islamic World. Oxford Islamic Studies Online* <http://www.oxfordislamicstudies.com/article/opr/t236/e0507> (accessed 21-12-2009).

The draft Bill does not contain a minimum marriageable age and the common law will therefore be applicable.²⁸ Boys younger than 14 and girls under 12 will not be competent to enter into a Muslim marriage. The minimum marriageable age in *Shari'ah* is puberty and this coincides with the minimum marriageable ages in common law. It is highly unlikely that a person will have attained puberty below the common law ages.

According to the *Sunni* schools, with exception of the *Hanafi* school, women do not have the capacity to enter into a marriage contract without the assistance of a guardian.²⁹ The exception to the rule is that divorced women and widows may contract a marriage without assistance.³⁰ According to the *Hanafi* school men and women are equal in their capacity to act.³¹ Therefore, when a girl reaches majority she can contract her own marriage without the assistance of a guardian.³² It is however preferred that she enter into marriage negotiations with a guardian's assistance.

Under the draft Bill women will be able to contract their own marriage without the assistance of their guardian.³³ The clause is contrary to the approach of three of the four *Sunni* schools. The *Hanafi* school allows a girl who has reached puberty to conclude her own marriage. However nothing in the draft Bill prevents a woman from appointing a guardian (*wilayat-il-ujbar*)³⁴ to assist her in

28 Muslim personal law does not enjoy the same recognition as customary law. Customary law is recognised on the same level as the common law, whereas no official recognition of Muslim personal law exists. If there is a gap in the Recognition of Customary Marriages Act 120 of 1998 the traditional customary law can be applied whereas the same does not hold in respect of Muslim personal law. Legislation validating Muslim marriages codifies Muslim personal law and therefore an amendment or extension of the common law and customary law. If there is a deficiency in the legislation recognising Muslim marriages, the common law or customary law will have to be applied and not Muslim personal law. See ss 39(2)–(3) of the Constitution of the Republic of South Africa, 1996; Lourens “Inheemse reg: aard en inhoud ingevolge die Grondwet” 1994 *De Rebus* 856; Himonga and Bosch “The application of African customary law under the Constitution of South Africa” 2000 *SALJ* 306; Pieterse “Killing it softly: customary law in the new constitutional order” 2000 *De Jure* 36; Bakker “Towards the recognition of diversity: Muslim marriages in South Africa” 2009 *THRHR* 396–398). See *contra* Bakker “Toepassing van Islamitiese reg in Suid-Afrika” 2008 *Obiter* 537.

29 Vesey-Fitzgerald 58; Tanzil-ur-Rahman 38; Pearl 43; Nasir *The Status of Women Under Islamic Law* (1994) 9; Rahim 314.

30 Tanzil-ur-Rahman 38, 43; Esposito 17; Hodgkinson 92; Pearl 43; Nasir 10; Al-Jaza'iri *Minhaj al-Muslim* (2001) 321; Rushd *The Distinguished Jurist's Primer vol 2* (2003) 5.

31 Tanzil-ur-Rahman 38; Hussein 81; Rahim 314.

32 Vesey-Fitzgerald 57; Tanzil-ur-Rahman 38; Hussein 81. The guardian is the nearest male relative of the woman entering into a marriage, determined in the order of inheritance. The guardian is usually the father or grandfather of the woman. In absence of such a male, a judge (*qadi*) will be appointed as guardian: Schacht 161; Tanzil-ur-Rahman 192; Nasir 10, Al-jaza'iri 322; Hussein 81. Section 29 of the Moroccan Family Code 70 of 2003 provides that a major woman may enter into her own marriage or delegate the power to her father or another relative. She has the choice of her guardian and may make the choice in her interest (s 24).

33 Clause 5. In Morocco a woman may contract her own marriage at the age of majority (s 25 of the Moroccan Family Code 70 of 2003).

34 There are two forms of guardianship, namely: compulsory guardianship (*wilayat-il-ujbar*) and voluntary guardianship (*wilayat-un-nadb*). The *il-ujbar* form is utilised where the woman has limited or no capacity to act, whereas the *un-nadb* form is applicable where the woman has full capacity to act but still wants a male representative. A *wilayat-il-ujbar* may

continued on next page

concluding the marriage contract. This clause can therefore be seen as a compromise between the different *Sunni* schools of thought. A woman can elect whether she wants to enter into a marriage with or without a guardian in accordance with the Muslim tradition she follows. Valid criticism against this approach is that it appears that the legislature prefers the approach of the *Hanafi*-school above the other *Sunni* schools.

2 2 2 Agreement

The draft Bill requires that Muslim marriages have to be contracted in terms of the formulae prescribed in *Shari'ah*.³⁵ In *Shari'ah* the marriage contract (*nikah*) is concluded through two essential requirements of offer (*ijab*) and acceptance (*qabul*) by two competent parties or their proxies.³⁶ Marriage by proxy is allowed in the draft Bill but the marriage officer has to ascertain from the proxy whether the parties have consented to the marriage.³⁷

The draft Bill requires that witnesses as determined by *Shari'ah* have to be present at the time of conclusion of the marriage.³⁸ In accordance with *Shari'ah* the witnesses have to be two competent Muslim witnesses. According to the *Hanafi* school the witnesses do not need to be Muslim where the marriage is between a Muslim man and a woman of "the people of the Book" (*kitabiyah*).³⁹ In *Shari'ah* the witnesses have to be two male witnesses or one male and two female witnesses.⁴⁰ *Shari'ah* equates the evidence of one male to that of two females. The draft Bill therefore requires two male or one male and two female witnesses.⁴¹ The current clause is in accordance with *Shari'ah* but it is highly unlikely that it will withstand a constitutional attack on the ground of gender discrimination. The principle comes from *Qur'an* 2:282:

"...[a]nd get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her..."

The verse refers to commercial matters. Women were traditionally not part of commercial transactions and did not have any knowledge thereof and it is therefore clear why two women witnesses were required.⁴² However, it can be argued that the verse merely considers the competence of the witness in the relevant matter and not necessarily the sex of the witness. Competence is therefore determined by the knowledge a person has in the relevant transaction irrespective of the person's sex. Where a woman is actively involved in commercial transactions

conclude a marriage contract without the permission of his pupil. See Vesey-Fitzgerald 57; Schacht 161; Hodkinson 92; Pearl 43 and 98; Esposito 17; Nasir 10; Hussein 81.

35 Clause 6(4).

36 *Qur'an* 2:228, 2:282; Vesey-Fitzgerald 37; Hodkinson 112; Esposito 16; Nasir 6; Pearl 41; Hussain 83.

37 Clause 5(1)(b). With regard to consent see part 2 2 3.

38 Clause 5(1)(c).

39 A person of the Christian or Jewish faith: Tanzil-ur-Rahman 82; Hodkinson 112; Nasir 13; Hussain 79.

40 *Qur'an* 2:282.

41 Clause 5(1)(c).

42 Dangor "Historical perspective, current literature and an opinion survey among Muslim women in contemporary South Africa: a case study" 2001 *Journal of Muslim Minority Affairs* 114; Mustapha "Law: Women as Witnesses" *Encyclopedia of Women & Islamic Cultures* (2010) <http://www.brillonline.nl> (accessed 04-01-2010).

she will be competent to act as witness without the assistance of another female witness.⁴³ This will also apply to witnesses to a marriage. If a woman is competent to act as witness on her own, an additional witness will not be required. To merely require two competent witnesses regardless of gender is compatible with a modern approach to *Shari'ah* but will be highly controversial for conservative Muslims. However, clause 5(1)(c) merely states that “witnesses must be present as required by Islamic law” and does not truly qualifying how many witnesses are required this will enable the parties to determine the nature and number of witnesses they would choose to be present in accordance with their preferred tradition.

2 2 3 Consent

The Muslim marriage is a contract and consent of both parties is therefore required.⁴⁴ Consent can be tacit or express. In certain circumstances only express consent is allowed. Express consent is required from a woman when another person than her father or grandfather acts as guardian.⁴⁵ A divorced woman or widow can enter into a marriage agreement without the assistance of a guardian. Her express consent is required if she acts without a guardian.⁴⁶ The draft Bill requires consent of the prospective spouses to the marriage.⁴⁷ The Bill does not clearly indicate whether consent needs to be express. It can therefore be presumed that tacit consent can be provided. The clause complies with *Shari'ah*.

2 2 4 Registration

The draft Bill provides for the registration of a marriage contract.⁴⁸ Registration is however not a requirement for a valid Muslim marriage, even though a marriage officer is required.⁴⁹ *Shari'ah* does not provide for the registration of marriages, but does not prohibit it either.⁵⁰ Registration is not unfamiliar to *Shari'ah* and is required in some of the Islamic countries.⁵¹

2 2 5 Polygyny

Limited polygyny is practised in *Shari'ah*.⁵² A man may not marry more than four wives. In accordance with *Shari'ah* the legislature is allowed to limit polygyny to protect women against hardship, abuse and oppression.⁵³ The draft Bill

43 Hussain 73.

44 Ali A *Manual of Hadith* (1944) 271; Vesey-Fitzgerald 37; Tanzil-ur-Rahman 67; Schacht 161; Hussain 80. The consent of both parties is required in Algeria (s 9 Family Code 1984); Indonesia (s 6 Law of Marriage 1974); Malaysia (s 8 Islamic Family Law [Federal Territory] Act 1984); and Morocco (s 12 and s 13 Moroccan Family Code 70 of 2003).

45 Tanzil-ur-Rhaman 38.

46 See n 29.

47 Clause 5(1)(a).

48 Clause 6.

49 Clause 6(10).

50 Tanzil-ur-Rhaman 88; Hodkinson 112; Pearl 42.

51 Registration is required in Bangladesh (s 3 Muslim Marriages and Divorce (Registration) Act, 1974); India (s 5(3) Muslim Family Laws Ordinance, 1961); and Morocco (s 65 of the Moroccan Family Code 70 of 2003).

52 Qur'an 4:3.

53 South African Law Reform Commission *Islamic Marriages and Related Matters Project 106* (2003) para 2.25; Mansurizade Sa'id "The Muslim Woman: Polygamy Can Be Prohibited in Islam" *Oxford Islamic Studies Online* <http://www.oxfordislamicstudies.com/article/book/islam-9780195154672/islam-9780195154672-chapter-24> (accessed 14-09-2010).

recognises polygyny, but limits its application. If a man intends to conclude a second or further Muslim marriage under the draft Bill, he has to approach the court for approval of a contract which will regulate the future matrimonial property system for all his marriages.⁵⁴ This clause is similar to s 7(6) of the Recognition of Customary Marriages Act. There is however an additional requirement in the draft Bill. A Muslim man has to prove to the court that he will treat his wives equally before such a contract will be approved.⁵⁵ On approval the existing matrimonial property system will be terminated and the property will be divided if the first marriage is a marriage in community of property or subject to the accrual system.⁵⁶ This provision is problematic. It is unclear what the consequences will be if a man concludes a second marriage without approaching the court for approval.⁵⁷ It would be detrimental to the second wife if her marriage is declared void. The second wife has no control over the actions of her husband yet she is punished for his inaction if such a marriage is void.⁵⁸ Equal treatment of all the wives in a Muslim marriage is part of *Shari'ah*. It is however not required of a man to prove that he will be able to treat all wives equally before he is allowed to conclude a further marriage.⁵⁹ There are however countries which require such proof.⁶⁰ No such limitation exists in the Recognition of Customary Marriages Act where a second customary marriage is concluded. The burden on a Muslim man to prove equal treatment of his wives can be regarded as discrimination due to the fact that no similar duty exists for a man entering into a second customary marriage.

Further uncertainty with regard to the appropriate property system for polygynous marriages exists.⁶¹ The default matrimonial property system in the draft Bill is complete separation of property.⁶² If a further marriage is concluded the property system of the first marriage is dissolved and a new property system is determined by contract. The only suitable matrimonial property regime for polygynous marriages seems to be the exclusion of community of property and the exclusion of accrual.⁶³ The proposed Act should determine that all Muslim marriages are out of community of property. The process of changing the matrimonial

54 Clause 8(6).

55 The principle of equality is discussed in part 2 3 5.

56 Clause 8(7).

57 Heaton *South African Family Law* (2010) 212; Bakker "The new un-official customary marriage: application of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998" 2007 *THRHR* 481; Maithufi and Moloi "The need for the protection of rights of partners to invalid matrimonial relationships: a revisit of the 'discarded spouse' debate" 2005 *De Jure* 152; Maithufi and Moloi "The current legal status of customary marriages in South Africa" 2002 *TSAR* 609; Bronstein "Confronting custom in the new South African state: an analysis of the Recognition of Customary Marriages Act 120 of 1998" 2000 *SAJHR* 562. In *MM v MN* 2010 4 SA 286 (GNP) the North Gauteng High Court found that a further customary marriage concluded without consent in terms of s 7(6) is void.

58 Contrary to this, court in *MM v MN* para 32 held that the first wife's rights are more worthy of protection than the second or further wife under s 7(6) of the Recognition of Customary Marriages Act and that a voidable second or further marriage will lead to a "morass of uncertainty".

59 Pearl 77.

60 For example Morocco, Iraq and Pakistan: Hussain 87.

61 See fn 57.

62 Clause 8(1).

63 Heaton 212-214.

property regime should take place on conversion of an existing marriage to a Muslim marriage and all marriages concluded after the promulgation of the Act should be out of community of property with exclusion of the accrual. The accrual cannot be included due to practical problems with regard to the calculation of the accrual in polygynous marriages.⁶⁴ A marriage out of community of property corresponds with the traditional Islamic property system.⁶⁵

2.3 Consequences of a Muslim marriage

2.3.1 Maintenance (*naḥqah*)

In *Shari'ah* a wife's right to maintenance is absolute.⁶⁶ Her husband has to maintain her irrespective of her means and she has no duty to maintain him.⁶⁷ The wife's right to maintenance receives preference above children from the marriage and other relatives.⁶⁸

There is no express indication in the draft Bill that *Shari'ah* is applicable to maintenance. However, clause 12(2) incorporates *Shari'ah* maintenance principles into the draft Bill. For example clause 12(2)(a) states that in determining the amount of maintenance to be paid the court has to take into consideration the fact that the husband is obliged to maintain his wife during the subsistence of their marriage in accordance to his means and her reasonable needs.⁶⁹ The court has to consider the principles under clause 12(2) in making a maintenance order. It is, however, not under an obligation to make such an order. Although a reciprocal duty of maintenance is unknown under *Shari'ah* it would be possible for a husband in a Muslim marriage to succeed with a maintenance claim against his wife if he is in need of maintenance and she can afford to pay maintenance. Maintenance under the draft Bill is regulated by the Maintenance Act.⁷⁰

In *Shari'ah* a woman is entitled to maintenance⁷¹ during the subsistence of a valid (*sahih*) marriage if her husband has access to her at all lawful times and if

64 Pienaar "African customary wives in South Africa: is there spousal equality after the commencement of the Recognition of Customary Marriages Act?" 2003 *Stell LR* 265; Heaton 213–214; Bakker 2007 *THRHR* 486. Van Schalwyk "Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 of 1998" 491–492 argues that a polygynous marriage can be in community of property and that accrual can be part of a polygynous matrimonial property regime.

65 Cachalia "Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry" 1993 *THRHR* 401; Moosa "Muslim personal law – to be or not to be" 1995 *Stell LR* 423. In terms of clause 9(7)(b) of the draft Bill the court has a wide discretion to divide the assets equitably upon divorce if one spouse has contributed towards the growth of the other spouse's estate.

66 Vesey-Fitzgerald 95; Tanzil-ur-Rahman 259; Esposito 62; Hodkinson 147; Pearl 69; Nasir 63.

67 Vesey-Fitzgerald 95.

68 Vesey-Fitzgerald 97; Esposito 26; Hodkinson 147.

69 With regard to the calculation of maintenance during the subsistence of a Muslim marriage see Tanzil-ur-Rahman 269; Hodkinson 147; Ibn Rushd 63; Pearl 69; Nasir 66.

70 Act 99 of 1998 is incorporated by clause 12(1).

71 Maintenance includes the provision of food, clothes, accommodation and other necessities. A woman is entitled to her own private residence and cannot be forced to share accommodation with other wives: Vesey-Fitzgerald 95; Schacht 167; Tanzil-ur-Rahman 258; Esposito 26; Hodkinson 147; Pearl 69; Nasir 59; Al-Jaza'iri 387.

she obeys all his lawful commands.⁷² The draft Bill does not contain any provisions regarding the right of a husband not to pay maintenance if his wife does not follow his lawful commands.⁷³ To succeed with a maintenance claim the wife will have to prove the normal common law requirements for maintenance, that is the existence of a valid marriage, a need for maintenance and that her husband is able to provide such maintenance. This is opposed to the requirements under *Shari'ah* where she will only succeed if she is available to her husband at all lawful times and obeys all his lawful commands. It is clear why such a provision cannot be included in the draft Bill as it will not hold under constitutional scrutiny.

Upon divorce section 7 of the Divorce Act is applicable.⁷⁴ The parties may therefore enter into a settlement agreement providing for maintenance which may be made an order of court or in the absence thereof the court may make an order with regard to maintenance. In terms of clause 12(2) of the draft Bill the court will have to consider that the husband is only obliged to maintain his wife during *iddah* or for two years if she breastfeeds. Payment during the time the wife breastfeeds is in the strictest sense not maintenance but remuneration for the fact that she takes care of their child. Where the wife has custody of the child the husband will be obliged to provide his wife with a separate residence if she does not own a residence and remunerate her for the period of custody. The principles of *Shari'ah* are therefore incorporated in clause 12. Although the court is obliged to consider these principles, it does not necessarily have to abide by them.

The traditional Islamic position is therefore significantly changed. The common law maintenance principles are applied to Muslim marriages. If such a clause is passed into law it will place a moral duty on Muslim spouses not to claim more than they are entitled to under *Shari'ah*.

2 3 2 *The husband's right of control*

A Muslim husband has an extensive right of control over his wife. The right is, however, not absolute.⁷⁵ He can for example determine where his wife should live but he cannot force her to share her home with other family members or wives.⁷⁶ The husband can prohibit his wife from having a career but he cannot force her to work.⁷⁷ The wife loses her right to maintenance if she ignores reasonable demands of her husband without a valid excuse.⁷⁸ The draft Bill does not contain any provisions regarding the husband's right of control. In fact clause 3 provides that a wife is equal in status and capacity.

2 3 3 *Patrimonial consequences*

The draft Bill provides that the default matrimonial property system is out of community of property without accrual.⁷⁹ The parties are however free to enter

72 *Qur'an* 4:34; Tanzil-ur-Rahman 260; Esposito 26; Hodkinson 148; Pearl 69; Nasir 64; Hussein 92.

73 *Qur'an* 4:34; Vesey-Fitzgerald 95; Tanzil-ur-Rahman 265, 267; Esposito 26; Hodkinson 147; Pearl 70; Nasir 65.

74 Clause 9(7)(a).

75 Schacht 166; Hodkinson 146; Pearl 59.

76 Vesey-Fitzgerald 44; Hodkinson 146; Pearl 60; Nasir 67.

77 Hodkinson 146; Nasir 62.

78 *Qur'an* 4:34; Schacht 166; Vesey-Fitzgerald 95; Tanzil-ur-Rahman 265, 267; Esposito 26; Hodkinson 147; Pearl 70; Nasir 63.

79 Clause 8(1).

into an agreement regarding the patrimonial consequences of their marriage or a partnership agreement recognised in *Shari'ah*.⁸⁰ Community of property is unknown in *Shari'ah* and it therefore complies with *Shari'ah*.⁸¹ The wife has full control and ownership over her own property, including *mahr*.

2 3 4 *Mahr*

All forms of *mahr* are recognised by the draft Bill.⁸² *Mahr* is money paid or property delivered to a woman by her husband as a result of their marriage contract (*nikah*).⁸³ The draft Bill describes *mahr* as an *ex-lege* consequence of the marriage contract.⁸⁴ *Mahr* is payable to the wife and not her father or guardian.⁸⁵ In *Shari'a* the duty to pay *mahr* is an obligation arising from the marriage and a consequence thereto, it is however not a requirement for a valid Muslim marriage.⁸⁶ This is also the position in the draft Bill as *mahr* is not listed under the requirements for a valid Muslim marriage. The draft Bill acknowledges the existence of *mahr* by referring to it in the definitions clause and by providing for a marriage officer to register the agreed *mahr*. The draft Bill does however not contain the requirements and practices surrounding *mahr*. It is presumed that the *Shari'ah* principles surrounding *mahr* will be applicable.⁸⁷ If these principles are not applied the inclusion of the definition of "dower" in the Act becomes meaningless.⁸⁸

2 3 5 *Equality of the wives*

A man may marry more than one wife, up to a maximum of four, if he can treat them equally.⁸⁹ The test for equality of the wives is objective in nature. All the wives are entitled to maintenance and an equal amount of their husband's time.⁹⁰ A spouse can claim restitution of her marital rights or even request a divorce if her husband does not treat her equal to the other wives.⁹¹ She is entitled to leave the family home and still claim maintenance from her husband if he treats her unequal to the other wives.⁹² The draft Bill makes provision for a divorce under these circumstances in terms of clause 1(x)(h) and under clause 8(7) regarding the application by the husband for permission to conclude a further

80 SALRC Islamic Marriages and Related Matters Project 106 (2003) par 2.33.

81 *Qur'an* 4:7; Schacht 167; Esposito 24; Hodkinson 131; Pearl 75; Hussain 98. See discussion in part 2 2 50 with regard to the possible matrimonial property systems of polygynous marriages.

82 The draft Bill refers to "*mahr*" as "dower": clause 1 definitions of "dower", "deferred dower" and "prompt dower" and clause 6(4)(a).

83 Tanzil-ur-Rahman 218; Esposito 24; Hodkinson 132; Nasir 46.

84 Clause 1 definition of "dower".

85 Vesey-Fitzgerald 62; Hodkinson 132.

86 Hodkinson 132; Nasir 47.

87 For general principles regarding *mahr* see *Qur'an* 4:4, 30:50; Vesey-Fitzgerald 63; Tanzil-ur-Rahman 233; Schacht 167; Hodkinson 132; Pearl 64; Ali (vol 2) 187; Nasir 45; Diwan *Dowry and protection to married women* (1995) 142; Ibn Rushd 20.

88 However see n 28 with regard to the application of *Shari'ah* in South Africa.

89 Vesey-Fitzgerald 44; Hodkinson 151; Pearl 77.

90 The amount of maintenance is determined by the living standard the wife was accustomed to before the marriage. Equality with regard to maintenance does therefore not imply that the wives should receive equal amounts of maintenance: Vesey-Fitzgerald 44; Hodkinson 151.

91 Hodkinson 151.

92 *Ibid.*

marriage. The word “justly” is used instead of “equally” under the divorce clause but reference is made to “equality” under clause 8(7). Although no explanation is provided by the SALRC for the use of “justly” under the definition of “*faskh*” one can presume that it intends to cover more matters than merely the equality of spouses. The grounds for divorce under clause 1(x) are an open list and equality can be recognised as a ground for divorce if it does not fit under clause 1(x)(h).

2 4 Dissolution of the marriage

In *Shari'ah* a marriage can be terminated by *talaq* (repudiation), agreement, a court order or death. The draft Bill recognises all four forms of termination of a Muslim Marriage.

2 4 1 *Talaq* (repudiation)

Talaq is an express unilateral repudiation by the husband of his wife.⁹³ Only the husband has a right to use *talaq*.⁹⁴ He may delegate his right to one of his wives or a third party.⁹⁵ There are three forms of *talaq*: *as-sunna*; *al-bida* and *tawid*. The draft Bill recognises all three forms of *talaq*.⁹⁶

The only limitation placed on *talaq* in the draft Bill is the requirement that an irrevocable *talaq* has to be registered.⁹⁷ The same limitation exists in Egypt.⁹⁸ An irrevocable *talaq* has to be registered with a marriage officer in the magistrate's district where the wife lives within 30 days of its invocation.⁹⁹ In terms of clause 1(xii) a revocable *talaq* becomes irrevocable after the expiry of the wife's *iddah*. The *talaq as-sunna* therefore has to be registered within 30 days after the expiry of the wife's *iddah*, whereas the *talaq al-bida* and *tawid al-talaq* have to be registered within 30 days after its invocation. The wife or a duly authorised representative and two witnesses have to be present.¹⁰⁰ If the wife or her duly authorised representative is not present the marriage officer will register the *talaq* only if the man can prove that notice in the prescribed form was duly served on his wife.¹⁰¹ It is unclear from the draft Bill whether failure to register an irrevocable *talaq* will lead to invalidity

93 Vesey-Fitzgerald 73; Tanzil-ur-Rahman 309; Hodgkinson 220; Pearl 100.

94 Schacht 163; Vesey-Fitzgerald 73; Tanzil-ur-Rahman 309; Esposito 31; Hodgkinson 220; Pearl 100.

95 Vesey-Fitzgerald 77; Tanzil-ur-Rahman 339; Hodgkinson 222; Pearl 100; Nasir 72.

96 Clause 9. The forms are the *talaq al-ashan*; *talaq al-hasan*; *talaq al-bida*; *tawid al-talaq*. *Talaq al-ashan* and *talaq al-hasan* are both forms of the *talaq as-sunna*. The *talaq al-ashan* is pronounced once during the wife's *thur* cycle, *iddah* (waiting period) starts immediately and the marriage dissolves immediately after *iddah*. This is the most acceptable form of *talaq*. The *talaq al-hasan* is pronounced in the wife's *thur* cycle and then in each *thur* cycle during *iddah*. The marriage is terminated at the end of *iddah*. *Talaq al-bida* is the most reprehensible form of *talaq*. The *talaq* does not comply with the requirements of the *talaq as-sunna* due to some form of deficiency. It is however still a valid form of divorce. The marriage is terminated immediately after pronouncement and cannot be recalled during *iddah*. Where the husband has delegated use of *talaq* to his wife it is known as *tawid al-talaq*.

97 An irrevocable *talaq* is a first or second *talaq* after the period of *iddah* has expired or a third *talaq* or *talaq al-bida*.

98 “Islamic family law” <http://law.emory.edu/ifl/index2.html> (accessed 07-01-2010).

99 Clause 9(3)(a).

100 Clause 9(3)(a).

101 Clause 9(3)(b).

thereof.¹⁰² In the light of the imperative language of the clause and the fact that a fine is payable on failure to register the *talaq*,¹⁰³ the *talaq* should be invalid if not registered within the prescribed period.

The draft Bill does not clearly stipulate when a Muslim marriage is terminated by *talaq*. Traditionally a Muslim marriage is terminated upon the pronouncement of a *talaq al-bida*, a third *talaq* or after *iddah*. However, if the draft Bill requires registration for the validity of an irrevocable *talaq* a Muslim marriage will only be terminated upon registration.

Where there is a dispute regarding the validity of a *talaq* the marriage officer is not allowed to register the *talaq* until the dispute is dissolved by written agreement, by arbitration or by court order.¹⁰⁴ Within 14 days from registration of the *talaq* a spouse has to institute legal proceedings for a court order confirming the dissolution of the marriage by *talaq*.¹⁰⁵ Legislation in Tunisia,¹⁰⁶ Somalia¹⁰⁷ and Pakistan¹⁰⁸ limits the *talaq* to such an extent that only a court order can give effect to the *talaq*. The draft Bill only requires that the *talaq* has to be confirmed by the court.¹⁰⁹ The rationale behind the confirmation of *talaq* by court is merely to provide the court with an opportunity to ensure that maintenance and proprietary issues are properly regulated and the best interests of the children are safe guarded. This will also provide the court with an opportunity to provide ancillary relief.¹¹⁰ A Muslim marriage is therefore terminated extra judicially through *talaq*. The marriage is terminated on registration of an irrevocable *talaq*.¹¹¹ The court can only provide a declaratory order that the marriage has indeed resolved and provide further relief as prescribed in clause 9(7). The validity of the *talaq* will therefore not be affected by the failure to approach a court within 14 days after registration of the *talaq*. The same procedure is followed if the wife uses *tawid al-talaq*.¹¹²

2.4.2 Divorce by agreement

Marriage is contractual in nature and can be terminated by agreement between the contracting parties: the husband and wife.¹¹³ There are two forms of divorce by agreement: *khula'* and *mumbara'a*.

102 Clause (9)(3)(e) implies that the validity before registration of the *talaq* is determined by *Shari'ah*.

103 Clause 9(3)(d).

104 Clause 9(3)(e). An option for mediation of the dispute should be added to this clause.

105 Clause 9(3)(f).

106 Personal Status Code of 1956.

107 Family Code 23 of 1975.

108 Muslim Family Laws Ordinance 8 of 1961.

109 Clause 9(3)(f).

110 SALRC *Islamic marriages and related matters Project 59 Discussion Paper 101* (2001) para 5.32.

111 The position of Muslim marriages is similar to customary marriages concluded outside Kwa-Zulu Natal before the Recognition of Customary Marriages Act, see *Khoza v Nkosi* 1980 NAH 82 (N-O).

112 Clause 9(3)(c).

113 *Qur'an* 2:229; Vesey-Fitzgerald 78; Hodkinson 228; Pearl 121; Moinuddin 96.

If the wife initiates the agreement to divorce it is known as *khula'*.¹¹⁴ The wife offers compensation in return for an agreement with her husband to terminate the marriage.¹¹⁵ The compensation is usually not more than the agreed upon *mahr* if the full amount was paid.¹¹⁶ If the husband did not pay the full amount, compensation would normally not be more than the paid amount of *mahr*.¹¹⁷ If the divorce agreement is initiated by both parties it is *mumbara'a*.¹¹⁸ The husband is not entitled to compensation under *mumbara'a*.¹¹⁹

The consequences of a divorce by agreement are the same as the consequences of an irrevocable *talaq*.¹²⁰ The draft Bill provides for consequences similar to the irrevocable *talaq* for divorce by *khula'*.¹²¹ Similar to the irrevocable *talaq*, *khula'* has to be registered and confirmed by court order.¹²² A marriage will therefore terminate on registration of *khula'* irrespective of whether the court is approached for a declaratory order.¹²³

The draft Bill does not recognise *mubara'a* as a form of termination of a Muslim marriage. If a marriage is therefore terminated by agreement it will always be considered that the wife initiated divorce. The wife will be responsible for compensation unless the spouses agreed that she does not have to pay compensation. This is clearly an oversight by the Commission. Provision should be made for *mubara'a*.

2 4 3 Judicial divorce (*tafriq*)

2 4 3 1 *Faskh*

In *Shari'a* the wife may terminate her marriage by court application on certain grounds, this is known as *faskh*.¹²⁴ The draft Bill provides for termination of a Muslim marriage by court order or *faskh*.¹²⁵ Either the husband or wife can apply. It is unlikely that a man would use *faskh* if he is able to terminate his marriage by *talaq*. A woman may terminate her marriage on any ground recognised by *Shari'ah*. Most of the traditional grounds are listed under clause 1(x) of the draft Bill. The list is not a *numerus clausus* and therefore leaves opportunity for development.

114 Schacht 164; Vesey-Fitzgerald 78; Bulbulia "Women's rights and marital status: are we moving closer to Islamic law?" 1983 *De Rebus* 432; Hodkinson 228; Pearl 121; Moinuddin 96.

115 Schacht 164; Tanzil-ur-Rahman 520; Vesey-Fitzgerald 78; Esposito 33; Hodkinson 228; Pearl 121; Mionuddin 96.

116 Esposito 34; Hodkinson 228; Pearl 121.

117 Pearl 121. Muslim jurists have different opinions concerning the question whether compensation can be more than the agreed amount of *mahr*: see Tanzil-ur-Rahman 518; Hodkinson 229; Pearl 121.

118 Vesey-Fitzgerald 78; Tanzil-ur-Rahman 552; Schacht 164; Esposito 34; Hodkinson 228.

119 *Qur'an* 4:20.

120 Tanzil-ur-Rahman 552; Esposito 34; Hodkinson 228.

121 Clause 9(5) states that the provisions of clause 9(3)(c) which requires registration of the irrevocable *talaq* is applicable to *khul'a*.

122 Clause 9(5).

123 See part 2 4 1.

124 The procedure has its origin in *Qur'an* 4:35. On the nature of *faskh* see Bakker 2008 *Obiter* 534.

125 Clause 9(4).

2 4 3 2 *Li'an*

Under *li'an* the marriage is terminated by court after the husband accused his wife of adultery without sufficient evidence and does not want to withdraw his accusation.¹²⁶ The draft Bill does not provide for this form of divorce.

2 4 4 *Death*

In *Shari'ah* death of one of the spouses terminates the marriage.¹²⁷ A widow has to maintain her *iddah* before she can remarry.¹²⁸ Deferred *mahr* has to be paid.¹²⁹ A widow is not entitled to maintenance.¹³⁰ She is expected to support herself from the deferred *mahr* and inheritance received from her deceased husband's estate.¹³¹ The draft Bill provides for termination of marriage on death of one of the spouses and provides for *iddah* after divorce. In terms of clause 9(8) the widow may claim unpaid *mahr* from her deceased husband's estate.

2 4 5 *Apostasy*

The *Sunni* jurists agree that a marriage is terminated if one of the spouses denounces Islam.¹³² The marriage terminates automatically and no court order is necessary.¹³³

Automatic dissolution of a Muslim marriage by apostasy is not recognised by the draft Bill. It will however not be possible to add such a clause to the Act as this will severely limit the spouses' right to freedom of religion. The husband will have to use *talaq* to terminate his marriage. Where the husband changes his religion his wife will have to use the *tawid al-talaq* or if the power of *talaq* was not delegated to her she will have to end the marriage with *faskh*. Although apostasy is not one of the listed grounds for *faskh* under clause 1(x) it is a permitted ground under *Shari'ah* for divorce and would therefore be allowed.¹³⁴

2 4 6 *Iddah*

Iddah is the mandatory waiting period in which a woman is not allowed to marry after divorce or death of her husband.¹³⁵ *Iddah* is recognised by the draft Bill.¹³⁶ *Iddah* performs three functions: to determine whether the wife is pregnant and to confirm paternity; to enable reconciliation where the divorce is revocable and to provide for a period of mourning.¹³⁷

126 Vesey-Fitzgerald 82; Schacht 165; Tanzil-ur-Rahman 504; Esposito 34; Hodkinson 234.

127 Hodkinson 219.

128 *Qur'an* 2:234.

129 Hodkinson 133; Pearl 63; Nasir 49; Diwan 146.

130 Hodkinson 219.

131 The widow is entitled to a quarter of her husband's estate if no children were born from the marriage. If there are children she is entitled to an eighth of his estate: Vesey-Fitzgerald 121; Hodkinson 219.

132 Schacht 165; Vesey-Fitzgerald 84; Tanzil-ur-Rahman 653; Esposito 35; Hodkinson 233.

133 Tanzil-ur-Rahman 653.

134 Clause 1(x) provides for *faskh* on "any ground or basis permitted by Islamic law".

135 *Qur'an* 2:228; 2:234; 2:235; 65:4; Schacht 166; Vesey-Fitzgerald 52.

136 Clauses 1(xi), (xii) en (xxii); 9 and 12(2).

137 *Qur'an* 2:228; *Qur'an* 2:234; Vesey-Fitzgerald 52; Esposito 36.

Iddah starts immediately after divorce or death of the husband, even where the woman is not aware of the divorce or death of her husband.¹³⁸ *Iddah* of a divorced woman lasts for three menstrual cycles or three months if she does not menstruate.¹³⁹ If a woman is pregnant her waiting period will last until birth of the child.¹⁴⁰ A widow's *iddah* lasts for four months and ten days, irrespective of whether her marriage was consummated.¹⁴¹ These periods are contained in the draft Bill.¹⁴²

A woman is entitled to maintenance during her *iddah*, including accommodation.¹⁴³ The draft Bill under clause 12 provides for maintenance during *iddah*. A rule 43 application can be brought for maintenance during *iddah*.¹⁴⁴

2.5 Minor children

A divorced woman receives custody over her male children until they are seven years of age and her female children until puberty.¹⁴⁵ The *Maliki* school allows male children to stay with their mothers until puberty and the *Shafi'i* school allows a male child of seven to decide whether he wants to stay with his mother until puberty or move in with his father.¹⁴⁶ After the age of seven or puberty depending on the facts custody settles in the father's family. The family household traditionally consisted of sufficient women to care for the children.¹⁴⁷ No male is allowed custody over a female child who does not fall in the prohibited degrees of affiliation.¹⁴⁸ The father is the guardian of his minor children.¹⁴⁹

Clause 11 of the draft Bill emphasises that the best interest of the child is the determining factor when considering care and guardianship. This is in compliance with s 28(2) of the Constitution and s 9 of the Children's Act. The court has to determine the best interest of the child by considering *Shari'ah* and the report of the family advocate. *Shari'ah* can therefore be considered but the best interest of the child will be the determining factor.

3 POSSIBLE ALTERNATIVE TO THE DRAFT BILL¹⁵⁰

The draft Bill is an attempt to codify Muslim marriage law. Codification of Muslim marriage law might not be the correct route to the recognition of Muslim marriages. Where the law is codified it does not leave space for development.

138 Tanzil-ur-Rahman 683.

139 *Qur'an* 2:228, 2:234, 2:235, 65:4; Schacht 166; Vesey-Fitzgerald 52. In the *Shafi'i* school *iddah* lasts for three periods of *thun* and not three menstrual cycles: Tanzil-ur-Rahman 685.

140 *Qur'an* 65:4; Schacht 166; Vesey-Fitzgerald 52.

141 *Qur'an* 2:234; Schacht 166; Vesey-Fitzgerald 52; Pearl 54; Nasir 102.

142 Clause 1(xi).

143 *Shafi'i* jurists are of the opinion that a woman is not entitled to maintenance during her *iddah* if the divorce is irrevocable. The *Hanafi* jurists state that she is indeed entitled to maintenance. Majority of countries today follow the *Hanafi* principle: *Qur'an* 65:1; Vesey-Fitzgerald 52–53; Nasir 105; Ahmed *The Muslim law of divorce* (1978) 850.

144 Clause 9(3)(f).

145 Vesey-Fitzgerald 99; Tanzil-ur-Rahman 718; Esposito 37; Hodgkinson 311; Pearl 92.

146 Vesey-Fitzgerald 99.

147 Vesey-Fitzgerald 99; Tanzil-ur-Rahman 718; Esposito 37; Hodgkinson 311; Pearl 92.

148 *Ibid.*

149 Pearl 97.

150 This is merely a cursory glance at an alternative to the draft Bill which will be developed further in future.

Traditionalists create the impression that *Shari'ah* is immutable but there are reformists who argue for change.¹⁵¹

A cursory glance at the content of the draft Bill clearly indicates that Muslim women will be at a disadvantage and some of the clauses might not survive constitutional scrutiny. This will lead to the striking down of sections of the Act, leaving a lacuna that will need to be filled with legislation, common law or customary law. A secular institution will consequently have to amend religious doctrine.

Further criticism against the draft Bill is that preference is provided to certain schools of thought above others and that the state thereby implies that the relevant schools are preferred, which will lead to discrimination on the ground of religion and freedom of association and thought. An Act codifying Muslim marriage law therefore creates a judicial minefield.¹⁵²

It is however important to recognise Muslim and other religious marriages to provide protection for disadvantaged persons, usually women and children, in strong patriarchal religious systems. It might be preferable to create one secular law recognising all marriage and marriage like relationships in South Africa.¹⁵³ Provision should be made for a marriage contract in which the parties can regulate the consequences of their marriage according to their own culture or religion. No preference will exist to any particular system of law. Such an Act will provide the parties with a choice to approach their religious institutions or the court during a dispute. It is however true that parties to a marriage are usually not in the same bargaining position. The creation of a default contract providing basic protection to the disadvantaged spouse may partly alleviate such inequality. With regard to marriage there will unfortunately always be an inequality in bargaining power. True forum shopping will not exist due to the weaker bargaining power of women. They will be forced to resolve disputes through the traditional religious councils which are usually patriarchal in nature. However, by recognising religious marriages the option at least exists to take the matter to court.

151 The reformist approach differentiates between religious and secular aspects of *Shari'ah*. This is done by distinguishing between eternal and immutable aspects of *Shari'ah* and aspects that were the result of human interference and therefore subject to change. The traditionalists however prefer to regard *Shari'ah* in its totality as eternal and immutable and disregard the fact that a majority of aspects in family law where the result of human interpretation: An-Naim *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990) 11; Cotran and Sherif *Democracy, the Rule of Law and Islam* (1999) 444; Kamali *Freedom, Equality and Justice in Islam* (2002) 77; Esposito "Contemporary Islam" *The Oxford History of Islam* Esposito (ed) *Oxford Islamic Studies Online* <http://www.oxfordislamicstudies.com/article/book/islam-9780195107999/islam-9780195107999-div1-132> (accessed 20-12-2009). A strong argument for reform can be found in the article by Syekh Ahmad Surkati (1872–1943) in "Ijtihad and Taqlid" *Oxford Islamic Studies Online* <http://www.oxfordislamicstudies.com/article/book/islam-9780195154672/islam-9780195154672-chapter-48> (accessed 20-12-2009).

152 Motala 2004 *CILSA* 327.

153 See Bakker "Die Civil Union Act, Draft Domestic Partnership Bill en moontlike deregulerings van die huwelik" 2009 *JJS* 45 in this regard. A similar Act was proposed by the Commission on Gender Equality in 2005 called the "Recognition of Religious Marriages Bill". The proposed Act does however not contain a default marriage system but merely applies the religious patrimonial system to religious marriages unless the parties exclude it by ante-nuptial contract.

A further drawback might be the lack of knowledge on the part of judges in respect of religious law. This can only be addressed through training of the judiciary.¹⁵⁴

CONCLUSION

The draft Bill largely complies with *Shari'ah*. There are, however, problem areas where the draft Bill does not comply with *Shari'ah* or where it proposes liberal reforms to the traditional position, or where it complies with *Shari'ah* but the relevant section will not pass constitutional scrutiny. These problem areas include the following:

- (a) On majority a woman does not need her guardian's consent to enter into a valid Muslim marriage.¹⁵⁵
- (b) The requirement of competent Muslim witnesses in the traditional sense discriminates on the grounds of sex and infringes on the right of dignity and will not be valid under the Constitution.¹⁵⁶
- (c) The husband's right of control over his wife is not recognised, although such a right will not withstand constitutional scrutiny should it be included.¹⁵⁷
- (d) A Muslim marriage is terminated by registration of an irrevocable *talaq* and not by the mere declaration thereof.¹⁵⁸
- (e) The common law principles of maintenance and the Maintenance Act are applicable to spouses in a Muslim marriage. Section 7 of the Divorce Act is applicable with regard to post divorce maintenance. In both instances the wife can be required to pay maintenance which is unknown in *Shari'ah*. The wife will be able to claim maintenance even where she is *nashiza*.¹⁵⁹
- (f) *Mumbara'a* and *Li'an* are not recognised forms of divorce under the draft Bill.¹⁶⁰
- (g) Apostasy does not dissolve a Muslim marriage automatically although the parties will still be able to divorce each other by *talaq*, agreement or court order.¹⁶¹ Such a clause will however amount to severe limitation of the right to freedom of religion.

Cultural and religious pluralism is a reality in South Africa and protected under the Constitution. The Muslim community will live in accordance with their religion irrespective of whether it is legally recognised. It is however desirable to recognise Muslim marriage law. True protection to those in a weaker position can only be provided if their personal legal system is recognised. The proposed draft Bill might not provide the desired results. The approach to the legislating of marriage and marriage like relationships should be reconsidered.¹⁶²

¹⁵⁴ Bakker 2008 *Obiter* 533.

¹⁵⁵ See part 2 2 2.

¹⁵⁶ *Ibid.*

¹⁵⁷ See part 2 3 2.

¹⁵⁸ See part 2 2 4.

¹⁵⁹ See part 0.

¹⁶⁰ See parts 0 and 0.

¹⁶¹ See part 0.

¹⁶² Bakker 2009 *JJS* 28.