SUBMISSION ON SOUTH AFRICAN LAW COMMISSION'S ISSUE PAPER NO. 15: ISLAMIC MARRIAGES AND RELATED MATTERS

1. INTRODUCTION

'*And women shall have rights similar to the rights against them, according to what is equitable…*'[1]

1. Background to submission

This submission is a joint project of the Gender Project of the Community Law Centre and the Gender Unit at the Legal Aid Clinic, both based at the University of the Western Cape.

The **Gender Project** forms part of the Community Law Centre, a human rights research and advocacy institute. The Project has as its vision the achievement of substantive gender equality and the realisation of women's rights in South Africa. The Project's aims include the translation of gender-related rights into progressive legislation and policies.

The **Gender Unit** forms part of the university-based Legal Aid Clinic and offers litigation with a gender-based approach to indigent clients. The Unit also provides practical and theoretical training to final-year law students in gender-related areas, and is involved in relevant research and advocacy work.

In preparation for this submission, the Gender Project and the Gender Unit identified four final-year law students who had expressed an interest in working on the submission, and requested the students to identify problem areas and conduct research around these problems. The students based their research not only on literature reviews, but also interviewed women in the Muslim communities in Cape Town, Mitchell's Plain and Worcester. The submission was also informed by research conducted by Ms Zil-e-Huma, who worked with the Gender Project in the capacity of visiting researcher from Pakistan during from March - May 2000.[2] These contributions were subsequently compiled, and edited by the coordinators of the respective units.

The purpose of this working methodology was not only to ensure that the submission would be based on the reality of women's lives, but also to provide students with an opportunity to be

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1. **Sura II**, verse 228.
2. Ms Zil-e-Huma is employed at the Aurat Foundation in Peshawar, Pakistan. Her visit to the Gender Project was made possible through the financial assistance of the International Human Rights Internship Programme.

involved in the Law Commission's process of public consultation. It therefore also served an important capacity-building function. The presentation of this written submission will be followed up by an evaluation workshop with the students.
The preparation of this submission also benefitted from discussions and ideas exchanged at various workshops and meetings held to debate the contents of the Issue Paper.[3]

2. Focus on identification of issues

This submission does not purport to provide 'final' answers to the questions posed by the Law Commission in its Issue Paper. Rather, it attempts to outline specific aspects that should, in our opinion, be considered by the Project Committee (and ultimately, the Commission) in its deliberations on the recognition of Muslim marriages. In addition, we attempt to identify issues that may not have been raised in the Issue Paper, but that we believe deserve attention.

In compiling this submission, we have decided to focus on five key areas: choice of marital system and matrimonial property regime for new marriages; registration of existing marriages; formalities for valid marriages; polygyny; and divorce. This choice does not imply that we consider the other issues outlined in the Issue Paper as unimportant, but a selection was dictated by time and resource constraints.

3. Substantive equality

We commend the Law Commission for the approach taken in the Issue Paper, and its sensitivity to the questions of gender equality that inevitably arise from a discussion of the recognition of Muslim marriages. However, we believe that the Law Commission needs to be more specific about adopting a gender sensitive approach based on substantive equality in evaluating potentially contentious provisions of Muslim Personal Law.

This submission is based on the ideal of attainment of substantive sex and gender equality in our current democratic dispensation. The achievement of substantive equality would take into account the different circumstances of people living in this country, and would therefore focus on the ***impact*** of legal provisions to ensure 'equality of outcome'. When considering the adoption of specific provisions, it is essential to consider not only the formal 'face' of such provisions, but also to determine what the impact of such provisions would be on the lives of people in a specific context. It is for this reason that we have attempted to bring the real concerns of women living in Muslim communities in South Africa to the attention of the Law Commission.

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[3]. During July - August 2000, the coordinators attended a workshop conducted by the Commission on Gender Equality on 12 July 2000, a seminar conducted by the Women's Legal Centre on 15 August 2000 and a workshop held at the Claremont mosque on 25 August 2000.

South African Muslims have suffered dire negative consequences as a result of the non-recognition of Muslim marriages. In considering the recognition of such marriages, the Law Commission should also be mindful of the fact that Muslim women have been disproportionately affected by this lack of recognition, and that mere recognition on a formal level will not be sufficient to address these historical (and current) disadvantages. Any forthcoming legislation must provide for gender-sensitive provisions that will address and redress the inequalities suffered by Muslim women not only as a result of non-recognition, but also because of discriminatory practices that have become entrenched in Muslim communities.

We also urge the Law Commission to be mindful of the provisions of article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women.[4] This article enjoins states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. States parties must *inter alia* ensure, on a basis of equality of men and women -

(1) the same right to enter into marriage;
(2) the same right freely to choose a spouse and enter into marriage only with their free and full consent; and
(3) the same rights and responsibilities during marriage and at its dissolution.[5]

In addition, we believe that the Promotion of Equality and Prevention of Unfair Discrimination Act[6] provides a further guiding principle. The Act states that no person may unfairly discriminate against any other person on the grounds of gender, including 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men'.[7]

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4. Adopted 18 Dec 1979, G.A. Res 34/180, U.N. GAOR, 34th Session, Supp. No. 46, U.N. Doc A/34/36 (1980) (entered into force 3 Sept 1981).
5. Article 16(1)(a)-(c).
6. Act 4 of 2000.
7. Section 8(d).

4. Informed discussions within Muslim communities

In our preparation for this submission, one area of persistent concern was the fact that many communities were not informed and were unaware of the publication of the Issue Paper and the invitation to comment on its contents. The issues under discussion form part of religious and cultural perceptions that are held in such high regard by Muslim communities that it becomes almost unthinkable to question or challenge these perceptions of how Muslim law should be practised. The next phase of the Law Commission's inquiry should therefore be founded on consultation with Muslim communities to raise awareness, to educate and to help inform the process of investigating how the recognition of Muslim marriages can best be achieved. In this regard, we wish to draw the Commission's attention to the fact that the time-frame for submission of comments was too short to elicit sufficiently widespread and representative participation from South African Muslims.

5. Conceptual framework

It should be noted that in our comments, we have attempted to analyse the issues presented in the Issue and divorce. Paper on two levels, viz compliance with the provisions of the Constitution[8] (most notably, the Bill of Rights) as well as potential conformity with existing provisions of South African civil law of marriage.

2. CHOICE OF MARITAL SYSTEM AND MATRIMONIAL PROPERTY REGIMES FOR NEW MARRIAGES

Proposal by the Law Commission

The Law Commission proposes that couples should have the right to choose a marital system which is compatible with their religious beliefs and the Constitution.[9] The proposal is therefore

[8]. The Constitution of the Republic of South Africa Act 108 of 1996 [hereinafter referred to as 'the Constitution'].

[9]. Issue Paper at p 11.

that marriages could be governed either by way of Muslim Personal Law or by secular (civil) law.

Discussion

We support this proposal in principle, since it accords with the constitutional right to freedom of religion and belief[10]. However, we submit that the Issue Paper does not clearly indicate which matrimonial property regime would apply automatically in respect of new marriages where the parties elect to have their marriage regulated by Muslim Personal Law.

It is common cause that Muslim marriages are generally ***out of community of property***. However, Muslim law recognizes the rights of the parties to 'contract out' of this regime on whatever terms they agree upon, either before or after the commencement of the marriage.

Marriages concluded in terms of South African law are automatically ***in community of property*** unless the parties specifically choose the other two available options, viz marriage out of community of property excluding accrual; or marriage out of community of property subject to the accrual system.

We propose that legislation should conclusively provide for an automatic (or 'default') matrimonial property regime in respect of new marriages, while at the same time giving parties the option to contract out of this automatic regime. We submit that irrespective of which automatic or default matrimonial property regime the legislation would provide for, this suggestion would not be inconsistent with Muslim law since the latter acknowledges that a Muslim marriage is essentially based on a contract, and that parties have the right to contract their marriage on whatever terms they choose and agree upon.

Which marital regime should be prescribed?

[10]. Section 15(1) of the Constitution.

We do not support an automatic or default 'out of community of property' matrimonial regime, since this has to date proved to be disadvantageous to Muslim women. Experience has shown that on dissolution of a Muslim marriage, the woman may end up with virtually nothing since her non-patrimonial contributions throughout the duration of the marriage are, in practice, not considered at all.[11] Furthermore, properties acquired during the subsistence of the marriage are usually registered in the husband's name, which means that the wife inevitably does not have anything to claim as her own on termination of the marriage. Even if the parties are given the option to contract out of this type of matrimonial property regime, we submit that women do not usually contract from a position of strength. They are generally not aware of their choices or rights and may find themselves pressurized to conform to whichever regime their husbands choose.

The two remaining options which could be legislated automatically are: 'in community of property', or 'out of community of property subject to accrual'. We believe that far more research needs to be undertaken in respect of both regimes, to determine their respective impact, and to see which of the two would be most beneficial to women. Nevertheless, some Muslim women have indicated that they would prefer an automatic regime encompassing 'out of community of property subject to accrual', while giving the parties the option to contract out of this option.[12] These women felt that, given the fact that Muslim law permits parties to contract the terms of their marriage, this option would not be inconsistent with Muslim law.

We, however, submit that it would be premature at this stage of the process to make a definitive suggestion in respect of either an automatic regime of 'in community of property' or 'out of community of property subject to the accrual system' until more research has been done.

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11. Although Muslim law actually recognises 'unpaid labour' of women and makes provision for payment for such labour by the husband, in practice this is not considered when determining the division of assets upon divorce.

12. These comments were made at a workshop conducted with the congregants of the Claremont mosque on 25 August 2000.

Recommendation:

We propose that the Law Commission considers the formulation of an automatic or default matrimonial property regime in respect of new (monogamous)[13] marriages contracted in terms of Muslim Personal Law. Additional research needs to be undertaken to determine which of the existing regimes in South African law will be the most appropriate and beneficial to women as the automatic or default regime.

3. REGISTRATION OF EXISTING MUSLIM MARRIAGES

Proposal by the Law Commission

The Law Commission proposes that parties who 'choose to register existing marriages' must reach agreement regarding the appropriate matrimonial property regime.[14] In addition, it recommends that existing *de facto* monogamous marriages which have not been solemnised in terms of the Marriage Act would require registration upon satisfactory proof to a designated Marriage Officer that there is an existing Islamic marriage.[15]

Discussion

We do not support the proposal that existing marriages should be registered. To date, Muslim marriages have not received legal recognition[16] because it has not conformed to the Western Christian notion of marriage as a '… union of one man with one woman to the exclusion while it

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13. Our position regarding polygynous marriages is set out below in Section E.
14. Issue Paper at p 18.
15. Issue Paper at p 16.
16. See *Ebrahim v Mahomed. Essop* (1905 T.S. 59); *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Docrat v Bhayat* 1932, 125; *Estate Mehta v Acting Master*, *High Court* 1958 (4) SA 252 (FC); *Kader v Kader* 1972 (3) SA 203 (RA); *Brey v SIR* 1978 (4) 399 (C); *Ismail v Ismail* 1983 (1) 1006 (AD); *Solomons v Abrahams* 1991 (4) SA 437 (W); *Kalla and Another v The Master and Others* 1994 (4) BCLR 79 (T).

lasts of all others.'[17] As a result of this non-recognition of Muslim marriages, Muslim men, women and children have suffered extreme adverse consequences[18], including -

- The duty of support which is owed to a wife by her husband had up until very recently not been recognized;
- Muslim women have not been able to access their husbands unemployment benefits from the Department of Labour in the event of their husbands deaths;
- Muslim women suffer negatively in respect of both testate and intestate succession, and their access to housing is impeded as a result of their Muslim marriage;
- Muslim women bear the brunt in respect of proprietary consequences on termination of the marriage;
- Muslim men have to make application to the High Court to gain guardianship, custody and/or access rights to their minor children because these rights are not automatically recognized; and
- Muslim children still bear the stigma of illegitimacy.

In light of the aforegoing, we submit that existing Muslim marriages should not be stigmatized any further by requiring them to be registered. They should be considered legally valid without the necessity of registration.

Furthermore, the matrimonial property regime of these marriages should automatically revert to the default regime provided for in the legislation. It is only in the event that parties reach agreement that their matrimonial property regime should be something other than the statutory default position that the parties should then be required to register such written agreement.

Recommendation:

We propose that all existing Muslim marriages (both monogamous and polygynous) should be regarded as valid without the requirement of registration. Upon commencement of legislation regulating Muslim marriages, the matrimonial property regime of existing marriages should revert to the automatic or default regime applicable to new marriages. Parties to an existing marriage who wish to have a different regime regulating their marriage, will be required to register a written agreement to that effect.

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17. *Ebrahim v Mahomed. Essop* (1905 T.S. 59).
18. Fatimah Essop *Discussion Paper on the Recognition of Muslim Marriages – Gender Consequences* (Unpublished paper: Women's Legal Centre) 1999 at p 1-3.

4. FORMALITIES REQUIRED FOR A VALID MARRIAGE CONTRACT (in respect of new marriages)

1. ISSUES RAISED IN THE ISSUE PAPER

1.1_ Age of consent

Proposal by the Law Commission

The Commission proposes that the age of consent should be 18 years.[19]

Discussion

Section 24(1) of the Marriage Act[20] provides that no minors may be married without the required written consent. In the case of minors under the age of 21 but over the age of 18 (in the case of boys) or over the age of15 (in the case of girls), the written consent of both parents is required.[21] In the case of boys under the age of 18 and girls under the age of 15, the written permission of the Minister of Home Affairs is required.[22]

We accordingly propose that legislation regulating Muslim marriages should be brought in line with the current provisions of the Marriage Act regarding the age of consent to marriage. There appear to be no cogent reasons for a differentiation between the marriages of Muslim minors and the rules regulating the marriages of minors under civil law.[23]

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19. Issue Paper at p 12.
20. Act 25 of 1961.
21. See section 2(a) of the Guardianship Act 192 of 1993.
22. Section 26(2) of Act 25 of 1961.
23. It is significant to note that section 3(1)(a)(i) of the Recognition of Customary Marriages Act 120

However, we believe that there should be no differentiation between men and women, and that all minors (irrespective of sex) ***under the age of 18*** should obtain the consent of the Minister of Home Affairs. Correspondingly, minors between the ages of 18 and 21 should only require the written consent of their parents or guardians.[24]

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of 1998 requires that both spouses must be above the age of 18 years. If either if the prospective spouses is a minor, both his or her parents must consent to the marriage (section 3(2)(a)). Section 4(a) provides that the Minister of Home Affairs may grant written permission to a person under the age of 18 years to enter into a customary marriage. This is essentially the proposal we put forward here.

[24]. Although some schools of thought require the consent of the guardian (i.e. the father only) of the woman, including an adult woman, before a marriage contract can be concluded, the Hanafi school does not regard it as a requirement. We therefore believe that a provision allowing parties over the age of 21 years to contract a marriage without the consent of their guardians would not be inconsistent with Muslim law.

Where both parents are alive, ***both*** have to consent to the marriage (except where one of the parents holds exclusive guardianship). This would be in accordance with the Guardianship Act,[25] which provides that both the mother and the father of minor children are regarded as co-guardians. (It should be noted that in terms of Muslim law, the consent of only the father or other male guardian is regarded as valid. However, we submit that this restriction is not constitutionally viable and that there are no cogent reasons for retaining this limitation.)

Recommendation:

We propose that -

(1) legislation regulating Muslim marriages should be brought in line with the current provisions of the Marriage Act regarding the age of consent to marriage (subject to the recommendation set out in (b) below);

(2) section 26(1) of the Marriage Act should be amended to provide that the consent of the Minister of Homes Affairs should be obtained where boys and girls under the age of 18 wish to get married; and

(3) the consent of both parents should be required for all persons under 21 and over 18.

1.2 Actual and informed consent in written form

Proposal by the Law Commission

The Law Commission proposes that provision be made in legislation to ensure that there is actual and informed consent. Such consent should be in written form and should follow a specific enquiry by the marriage officer.[26]

Discussion

We support this proposal as a measure to protect women from forced marriages. However, the legislation should clearly indicate that marriages entered into under duress or undue influence will be invalid. Furthermore, clear guidelines need to be set out as to what is meant by 'actual' and 'informed' consent.

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[25]. Act 192 of 1993.

[26]. Issue Paper at p 12-13.

We propose that a prescribed form ('consent form') should be provided, which the parties should fill in and sign. In addition, a mechanism needs to be put in place in terms of which the parties are informed about exactly what they are giving their consent to.[27] Special provision should also be made for illiterate parties.

The 'consent form' should provide for parties to stipulate what matrimonial property regime they have agreed to, and it should stipulate if the parties have concluded a contract other than the standard automatic or default regime between them regarding the matrimonial property regime. The consent between the parties must therefore also reflect that the parties are *ad idem* regarding the matrimonial property regime which they would be entering into.

In addition, the 'consent form' should also make provision for the dower agreed upon by the parties, or reflect if the dower is to be deferred and what agreement has been reached between the parties in respect thereof.

Recommendation:

We propose that:

(1) clear guidelines need to be set out as to what is meant by 'actual' and 'informed' consent;
(2) a standard 'consent form' should be filled in by both the parties;
(3) the parties should be informed about what they are consenting to, and special provision should be made for illiterate parties;
(4) the 'consent form' should reflect that the parties are *ad idem* regarding the matrimonial property regime which they are entering into; and
(5) the 'consent form' should make provision for the dower agreed upon by the parties, or reflect if the dower is to be deferred and what agreement has been reached between the parties in respect thereof.

1.3 Designation of marriage officers

[27]. The Domestic Violence Act 116 of 1998 provides for information to be furnished to complainants in domestic violence cases by police and court officials, and also prescribes the contents that should be conveyed to complainants by those officials. This may provide a useful model for legislation regulating Muslim marriages.

Proposal by the Law Commission

The Law Commission proposes that provision be made for the recognition and designation of marriage officers who are entitled to perform Muslim marriages.[28]

Discussion

- Muslim law does not require an independent third person to officiate a marriage. It recognizes a marriage as valid if it is simply concluded by the two parties in the presence of two witnesses (two men or one man and two women). However, for practical purposes, we agree that a designated marriage officer should officiate at the conclusion of the marriage contract.

- It is not clear whether these officers would be designated in terms of section 3 of the Marriage Act 25 of 1961 or if the new legislation would make provision for this.

- Clear guidelines need to be set out as to who would be entitled to be designated as marriage officers. We recommend that persons other than recognized Muslim religious leaders or members of the ***ulama*** should also be eligible, and that in accordance with the principle of gender equality, women should also be permitted to be so designated.

Recommendation:

While we support the recognition and designation of marriage officers, we propose that the guidelines for designation should clearly allow for the inclusion of women and persons other than members of the *ulama*.

1.4 Registration of marriages by signing marriage register

Proposal by the Law Commission

The Law Commission proposes that the marriage officer solemnising a marriage and the parties thereto as well as two competent witnesses should sign the marriage register. The marriage officer has a duty to transmit the marriage register to the designated representative.[29]

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[28]. Issue Paper at p 13.

[29]. Issue Paper at p 13.

Discussion

We support this proposal, but we recommend that where the parties agree on a matrimonial property regime other than the statutory automatic or default regime, this should be specifically noted at the time that the marriage is registered. The material provisions of the marriage contract (***nikahnama***) entered into by the parties should also be reflected in the register.

Recommendation:

We propose that the material provisions of the marriage contract (*nikahnama*) entered into by the parties should be reflected in the marriage register and that the register should reflect whether or not the parties elect a marital regime different from the automatic or default matrimonial property regime.

1.5 Formalities pertaining to time, place and manner of solemnization

Proposal by the Law Commission

The Law Commission proposes that similar provisions to section 29 of the Marriage Act[30] be incorporated into any new statute, subject to the proviso that they be appropriately changed for the purposes of Muslim law.[31]

Discussion

We support this proposal. However, we recommend that **marriage by proxy** be done away with, and that both parties should be present for the conclusion of the marriage. There is no Islamic requirement for marriage by proxy. This has become a practice of the Muslim community and its replacement with the aforesaid recommendation will ensure that women are given more certainty regarding the offer and the acceptance. Also, we recommend that both parties should give their consent clearly in words in the presence of the marriage officers and the required witnesses.

We further recommend that legislation should make provision for a minimum of two witnesses

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30. Act 25 of 1961.
31. Issue Paper at p 14.

irrespective of gender, which would accord with the requirement of the number of witnesses required for the conclusion of any other marriage.[32] This would remedy the prevailing gender inequality regarding the number of female witnesses as opposed to the number of male witnesses that are required in terms of Muslim law.[33]

Recommendation:

We propose the inclusion of a requirement that both parties should be present in person at the conclusion of the marriage contract. Furthermore, we recommend that the presence of two witnesses should also be required (without any stipulation regarding the sex or gender of the witnesses).

1.6 Prohibitions on certain marriages

Proposal by the Law Commission

[32]. Section 29(2) of Act 25 of 1961.

[33]. Some schools of thought, such as Maliki and Ithna Ashari, recommend the presence of witnesses but do not see it as a necessary requirement for the conclusion of a valid marriage contract. Therefore, our recommendation that two (female) witnesses will be sufficient should not necessarily be inconsistent with Muslim law.

The Commission proposes that consideration should be given to prohibiting certain types of marriages, such as marriages of persons related to each other within certain prohibited degrees, including the rules of fosterage according to Muslim Personal Law.[34]

Discussion

We support this proposal. However, we recommend that express provisions, stipulating the permanent or temporary impediments to a valid marriage contract should be set out in legislation, provided that such impediments do not conflict with provisions of the Constitution. For example, the prohibition on Muslim women concluding a Muslim marriage with non-Muslim men ***should expressly be done away with***, since this constitutes a grave form of gender inequality. (Muslim men are not precluded from contracting Muslim marriages with non-Muslim women 'of the Book', i.e Christians or Jews.)

Recommendation:

We propose that express provisions, stipulating the permanent or temporary impediments to a valid marriage contract should be set out in legislation, provided that such impediments do not conflict with provisions of the Constitution.

1.7 The marriage contract

Proposal by the Law Commission

[34]. Issue Paper at p 14.

The Law Commission proposes that a marriage contract may contain a provision establishing a Muslim Personal Law system.[35]

Discussion

It is unclear from the Issue Paper what is meant by a 'Muslim Personal Law System'. We believe that the Law Commission needs to define what is meant by a Muslim Personal Law system in the current South African context.

It is also unclear what is envisaged by the inclusion of such a provision, when clearly, if parties choose to have their marriages registered in terms of the new legislation, they would have made the choice to have their marriage governed by Muslim Personal Law as regulated and codified by statute.

This raises the question of whether the proposed legislation should in fact be a codification of specific rules applicable to Muslim marriages, or whether each couple should be in a position to contractually determine which rules should apply to their marriage. We propose that the former avenue should be followed, which implies that the legislation will set out the specific rules applicable to various aspects of Muslim marriage. It should also provide for a standard marriage contract (***nikahnama***) as well as a standard consent form to be completed by the parties. An example of such a standard marriage contract is attached to this submission as ***Appendix A***. This would still leave the parties at liberty to
determine the terms of their marriage contract if these are to differ from the provisions of the standard contract.

Recommendation:

We propose that the Law Commission needs to define what is meant by a Muslim Personal Law system in the current South African context.

2. ADDITIONAL ISSUE TO BE CONSIDERED

We submit that the question of ***dower*** as a requirement for marriage is not dealt with in the Issue Paper, and we believe that the Law Commission should consider the issue of dower in more detail. In considering this, the Law Commission should be mindful that the historic purpose of dower is to provide security for the wife independent of the husband, and it should not be given merely as a token
(as has become the practice).

[35]. Issue Paper at p 14.

5. POLYGYNY[36]

1. Accommodation of polygynous marriages

Proposal by the Law Commission

The Issue Paper raises the question of whether it is 'legally technically feasible to prohibit the taking of a second wife',[37] and then proposes a consideration of sections 7(6) – (9) of the Recognition of Customary Marriages Act 120 of 1998.[38] The question is posed whether polygyny in Muslim Personal Law can be accommodated by means of a similar mechanism.

Discussion

The first question to be resolved is whether the practice of polygyny is compatible with the constitutional prohibition of unfair discrimination on the grounds of sex or gender. (We submit that this is the crucial question here, rather than whether it is 'legally technically feasible to prohibit the taking of a second wife'.)

The practice of polygyny is considered at some length by the South African Law Commission in its report on the recognition of customary marriages.[39] It states succinctly that the crisp constitutional issue is 'not about the intensity of public feelings for or against, but rather involves an objective assessment of the practice'.[40] The Law Commission however stops short of making this assessment,

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[36]. Although the Issue Paper employs the term 'polygamy' (denoting the practice of marriage to more than one ***spouse***), we have elected to use the term 'polygyny' (marriage to more than one ***wife***), since this reflects the provisions of Muslim law more accurately.

[37]. Issue Paper at p 22.

[38]. These sections impose a regulatory mechanism for polygynous marriages, based on judicial approval of a written contract relating to the future matrimonial property system of the man's marriages.

[39]. South African Law Commission ***Harmonisation of the common law and indigenous law: Report on customary marriages*** Project 90 (August 1998).

[40]. Par 6.1.21.

and replies that the answer to the questions around the constitutionality of this practice may have to await a ruling by the courts.[41]

The Law Commission cautions that judging from the emerging constitutional jurisprudence on issues of culture customary law and religion, the courts are not prepared to strike down a customary practice merely because it is controversial or under attack from various interest groups.

[41]. *Ibid.*

> 'These recent judgments suggest that it is now unsafe to assume that a kind of hegemonic western orthodoxy will prevail over African customs which do not fit comfortably within the dominant cultural frame. More seems to be needed: namely, that the custom in question must, on a cold, objective assessment, fail all the tests set out in the Constitution.'[42]

The Law Commission concludes that it would be unwise to pre-empt possible rulings on these issues by the 'hasty prohibition' of polygyny in customary law, when the same issue may weigh heavily in debates about religious marriages, which are themselves soon due for recognition.[43]

Interestingly, the Law Commission raises the question of 'appearances'. It explains that there is considerable controversy in South Africa over emerging family forms such as same-sex relationships and cohabitation, and that these raise complex issues of a legal and moral kind which are far from resolved. It states that to rush in with an irrevocable ban on the one 'peculiarly African mode of constituting a family', while entertaining public debate on these other forms runs the risk of sending the wrong message to a large part of the South African population.[44]

The Law Commission eventually recommends that customary marriages should continue to be potentially polygamous. This recommendation is based on the foreseen difficulties of enforcing a prohibition and the fact that polygyny 'appears to be obsolescent'.[45]

It is unfortunate that the Law Commission does not see its way clear to embark on the 'cold, objective' constitutional assessment of the practice of polygyny. We submit that a constitutional scrutiny of polygyny can lead to only one conclusion, i.e. that the practice offends against the principle of gender equality. There are different aspects of the practice that need to be considered, most notably the fact that the taking of more than one spouse is the exclusive right of men. In addition, it is our submission that except in circumstances where the estate of the husband may be large enough to 'absorb' the impact of additional marriages, the conclusion of a second or further marriage can only lead to deleterious financial and economic consequences for the first wife. In addition, it is necessary to contextualise the historic origins of polygyny as a Muslim practice.

The relevant Qur'anic verse reads as follows:

> 'If you fear that you will not be able to deal justly with the orphans, marry the women of your choice, two or three or four. But if you fear that you will not be able to deal justly with them,

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42. Par 6.1.22.
43. Par 6.1.23.
44. Par 6.1.24.
45. Par 6.1.25.

then only one.'[46]

[46]. **Sura** 4, Verse 3.

Doi explains that the above rule on polygyny was introduced conditionally.[47] He notes that the verse specifically relates to 'the justice to be done to orphans', and that it was revealed immediately after the Battle of Uhud when the Muslim community was left with many orphans and widows and some captives of war. In this situation, polygyny seemed a reasonable alternative to meet the needs of women for protection and care.[48]

> 'Thus polygamy is a sort of remedial law in Islam which a person may use only if they so desire.'[49]

We contend that whereas polygyny served a specific societal purpose at the time of its Qur'anic recognition, this purpose does not exist in modern communities.

If one applies the test set out in *Harksen v Lane NO*[50] in order to determine whether a particular legal provision violates the prohibition of equality in section 9(3) of the Constitution, the first question is whether the differentiating provision amounts to 'discrimination'. The differentiation in question (i.e. the rule in Muslim law which recognises the right to take more than one spouse) is applicable to men only, and is therefore based on sex and/ or gender. These constitute 'prohibited' grounds of discrimination as set out in section 9(3), and we therefore submit that the differentiation amounts to discrimination.[51]

The next question is to see whether this discrimination is unfair, and this should be answered by having regard to the ***impact*** of the discrimination on the complainant. The impact of the discriminatory provision or conduct is measured by various factors, including -

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
(b) the nature of the provision or power and the purpose sought to be achieved by it; and

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47. Abdur Rahman I Doi ***Woman in Shari'ah*** (1989) at p 50-51.
48. Doi points out that Muslim law does not tolerate any woman seeking refuge under the roof of any man unless she is married to him or he is within the prohibited degrees of relationship to her (at p 50).
49. Doi *op cit* at 50.
50. 1998 1 SA 300 (CC).
51. Par 46 of the judgment.

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[52]

We submit that an assessment of the impact of the practice clearly shows that the discrimination in question is unfair. We similarly believe that this instance of unfair discrimination does not withstand scrutiny in terms of the limitations prescribed in section 36 of the Constitution, and our conclusion is therefore that the continued practice of this custom is inconsistent with constitutional provisions. It is also instructive to consider the view of Muslim women on polygynous marriages. In preparation for this submission, five women who are currently in such marriages were interviewed. Their ages ranged between thirty and forty three. The women interviewed all belong to the Shafi'i school of thought and had differing views regarding polygyny. All of these women were informed by their husbands that they were taking second wives. However, the women did not have much choice about the second marriage. They felt that although they might have had an option to leave their husbands, they were financially dependent on them and therefore opted to stay in the marriage. One of the women, being a second wife, was led to believe that her husband had divorced his first wife. Only after the marriage she realised that she was in fact the second wife.

Recommendation:
We propose that legislation on Muslim marriages should not make provision for the contracting of new polygynous marriages, based on our assessment that this practice in its current form violates the constitutional principle of sex and gender equality.

2. Narrowly circumscribed grounds for polygynous marriages

Proposal by the Law Commission

[52]. Par 51 of the judgment.

The Law Commission proposes that any legislation stipulating the grounds on which the conclusion of a polygynous marriage would be permissible has to be narrowly circumscribed in recognition of Qur'anic limitations.[53]

Discussion

The Qur'an sets out a very narrowly delineated right to contract a second (or further) marriage. We are of the opinion that if this right were to be given statutory recognition, the Qur'anic limitations should similarly be included in the legislation. The provisions of the Pakistani Muslim Family Law Ordinance are instructive in this regard. Section 6 states that the husband intending a second or further marriage must apply in writing to the Chairman of the Arbitration Council, stating the reasons for the proposed additional marriage. The acceptable grounds for permission include:

- Failure of the present wife to have children;
- Mental illness or physical disability of the present wife;
- Inability of the present wife to have sexual intercourse; or
- Refusal by the present wife to live with the husband after he has obtained a decree of conjugal rights from the court.

The husband should also state whether the consent of the existing wife/wives has been obtained. The Chairman then calls a meeting of the parties or their representatives and has to be satisfied that the proposed marriage is 'necessary'. However, the wife's refusal to consent will not prevent the subsequent marriage. The Arbitration Council can give him permission if it believes there are valid reasons for the husband taking another wife. (In practice, the Council usually accepts whatever reason the husband gives.)

The second question is how the Qur'anic limitations should be implemented in practice, and how it should be determined whether or not a husband who intends to contract a further marriage complies with these requirements.

If the provisions of the Recognition of Customary Marriages Act were to be adopted by analogy, it is clear that further provisions should be introduced which would require the court considering the husband's application to establish, as a point *in limine*, whether or not the husband 'qualifies' in terms of the limited right to polygyny. In addition to the limitations imposed by the Qur'an, we propose that the written consent of the 'first' wife should also be required (in the interests of gender equality). If the statutory requirements are not met, the matter rests there. If the requirements are satisfied, the court will then proceed to the second leg of the application, i.e. to consider the proprietary consequences of the intended marriage.

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[53]. Issue Paper at p 22-23.

Recommendation:
We propose that if a right to enter into a new polygynous marriage were to be recognised by statute, the statute should also set out strict limitations in compliance with the Qur'an, with the written consent of the current wife as an additional requirement. A procedure similar to the one set out in the Recognition of Customary Marriages Act could be considered, provided that an initial test should determine whether the proposed husband complies with the limiting requirements.

6. DIVORCE

1. ISSUES RAISED IN THE ISSUE PAPER

1.1_ Grounds for divorce

Proposal by the Law Commission

The Law Commission proposes that parties to a Muslim marriage ought to be able to obtain a divorce on the same grounds as those contained in the Divorce Act, and states that there are compelling reasons of public policy to preclude the dissolution of marriages save on the type of grounds contemplated in the Divorce Act. It also poses the question whether it is necessary to recognise additional grounds of divorce to cater for special facts and circumstances which may arise in an Islamic marriage, eg where the husband takes a second wife in terms of Muslim law contrary to the suggested standard contractual provisions.[54]

Discussion

We support the Law Commission's statement that there are compelling policy reasons for limiting the dissolution of marriages to the grounds contemplated in the Divorce Act.

Section 3 of the Divorce Act 70 of 1979 states that the only grounds on which a decree of divorce may be granted are –

(1) the irretrievable breakdown of the marriage as contemplated in section 4 of the Act; or
(2) the mental illness or the continuous unconsciousness of a party to the marriage.

Section 4(1) sets out the 'test' for determining whether a marriage has irretrievably broken down: the court must be satisfied that the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties.

Section 4(2) provides that (without excluding any facts or circumstances which may be indicative of the irretrievable breakdown of a marriage) the court may accept evidence that –

(1) the parties have not lived together as a husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
(2) the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or

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[54]. Issue Paper at p 20.

(3) the defendant has in terms of a sentence of court been declared a habitual criminal and is undergoing imprisonment as a result of such sentence.

It is clear that the court may also consider other evidence in its determination of whether the first ground for divorce, i.e. irretrievable breakdown of the marriage, exists. We therefore submit that the recognition of additional ***grounds*** of divorce is not required, since the current formulation allows the court to consider, for example, the fact that the husband has taken a second wife contrary to the terms of the marriage contract. (We submit that the existing provisions will allow the court to make a finding of irretrievable breakdown even if the marriage contract contains no prohibition of a second marriage, but where the first wife finds the taking of a second wife so offensive as to effectively imply an irretrievable breakdown of this marriage.)

It may, however, be advantageous to include a further factor that may be considered in section 4(2) of the Act, to the effect that the defendant has contracted or intends to contract a second marriage in terms of Muslim law where such second marriage is contrary to the provisions of where the plaintiff finds such second marriage irreconcilable with a continued marriage relationship.

It should be noted, however, that this does not constitute the addition of a further ground of divorce: the existing grounds of divorce would still be either irretrievable breakdown and/ or mental illness or continuous unconsciousness. In order to determine the former, the court would still have to consider whether the effect of the second marriage resulted in 'such a state of disintegration that there is no reasonable prospect of the restoration of the marriage relationship'.

Recommendation:

We propose the addition of the following factor to the provisions of section 4(2) of the Divorce Act:

(1) That the defendant has contracted or intends to contract a second marriage in terms of Muslim law where such second marriage is contrary to the provisions of the marriage contract or where the plaintiff finds such second marriage irreconcilable with a continued marriage relationship.

1.2 Appropriate forum for termination of marriage

Proposal by the Law Commission

The Commission proposes that marriage officers should be required to recognise a ***talaq*** in the presence of the parties. Further, it is suggested that a ***talaq*** should be confirmed by a court.[55]

Discussion

In its report on the recognition of customary marriages, the Law Commission notes that there are cogent reasons for requiring legal intervention in the dissolution of African customary marriages.[56] It states that in earlier times, the arrangements around divorce (eg an equitable settlement around ***lobolo*** and the return of wives to their own families) would probably not have caused women and children any undue distress.[57] Through changes in family structure, however, divorces under customary law may now work to the serious disadvantage of vulnerable parties. Because of the fragmentation of the extended family, not to mention the heavy burdens of educating and supporting children, the wife is unlikely to be welcomed back to her natal family. With no help forthcoming from their guardians, women have had to shoulder the full responsibility of supporting themselves and their children.[58]

The Law Commission comes to the following conclusion:

> 'The principle seems clear: courts need to become engaged in divorce proceedings in part to protect the interests of women and children and in part to represent the state's more general concern in marriage. If… the state should determine the formation of a valid union, then it should in addition decide when and on what terms a marriage may be ended.'[59]

We submit that these comments are also apposite to the issue of judicial dissolution of Muslim marriages.

It is important to note that Muslim personal law recognises different methods for the dissolution of marriages. A distinction should be drawn between the extra-judicial methods of divorce (which include *inter alia* ***talaq*** and ***khul***) and judicial dissolution (***fasakh***). We submit that it is necessary to consider whether these different methods of divorce should be given statutory recognition. One

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55. Issue Paper at p 21.
56. Par 7.1.7.
57. Par 7.1.18.
58. *Ibid.*
59. Par 7.1.12.

factor to be considered in making this determination is that the methods of dissolution available to a spouse depends, among other aspects, on the sex of such spouse.
The right to divorce or ***talaq*** is generally regarded as an exclusive right of the husband. ***Talaq*** may be instituted by a unilateral pronunciation of the husband without the provision of reasons. There is also no need to have it recognised by a court of law. The Sunni schools allow divorce either in accordance with the ***Sunna*** or ***talaq al-bid'a.***[60] The Hanafi school divides ***talaq*** into two categories, viz ***ahsan*** (best) and ***hasan*** (good). ***Ahsan*** refers to the pronunciation of one ***talaq***, with the ***idda*** period commencing immediately. This waiting period will be three months or, if the wife is pregnant, it will last until the end of the pregnancy. After the husband has issued her one ***talaq***, reconciliation is still possible. Yet, once the three months waiting period has expired, the divorce is irrevocable and in the event of reconciliation, the parties would have to remarry. The husband has to maintain her during the ***idda*** period and if the husband dies she has the right to inherit from his estate.

Hassan refers to when the husband pronounces three ***talaqs*** during three successive periods of purity. The wife's ***idda*** will commence immediately and there would be no possibility of reconciliation once he has announced his three ***talaqs***. In order for him to remarry her, she would have to complete the process of ***halala***, which means that she would have to get married to another man and have their marriage consummated. Yet, in terms of the Hanafi school, he would have to maintain her for the last ***idda,*** that is after the third pronouncement.[61] The other three Sunni schools and the Shiites provide that only pregnant women will be maintained in this period. Sunni schools maintain that triple divorce is morally reprehensible but it is permissible. Yet, in most Muslim countries today, the triple divorce has the legal effect of the single ***talaq***.

A delegated divorce ***(talaq al-tafwid)*** can be instigated by the wife. In terms of the different schools of law, a wife may initiate divorce where the husband has delegated his right to her to enforce such a procedure either by way of a condition in a marriage contract or by mutual agreement after marriage. The consequence of this procedure is that whilst the wife is under ***idda***, the divorce may still be revoked.

The ***khul*** procedure commences through an offer (usually by the wife) to terminate the marriage and acceptance of the offer (by the husband). The wife will offer compensation (usually in the form of repayment of her dower) so as to be released from the marriage by her husband. In terms of Shafi'i law, this compensation need not be monetary. It is provided in the Hanafi school that if it is the husband who makes the offer, he may not retract it until the wife has given her answer, whereas in

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60. This is also known as the 'triple' divorce.

61. The motivation for this arrangement is that the wife is entitled to maintenance since the observance of ***idda*** (which is aimed at determining whether or not the wife is pregnant) is for the benefit of the husband.

the case of the wife making the offer, it may be revoked and she has the option of three days within which she may revoke such an offer. In terms of the Hanafi school, all debts arising between the parties are annulled. The ***idda*** period is also three months and the wife would therefore also be entitled to three months maintenance.
In the interest of gender equality, we recommend that legislation regulating Muslim marriages should allow both spouses an equal right to institute divorce, and that no ***quid pro quo*** (for example, in the form of return of the dower) should be required.

The recognition of ***fasakh*** implies that the notion of judicial dissolution of marriage is not foreign to Muslim personal law. In order to reconcile the institution of extra-judicial dissolution of marriage with the need for civil courts to be involved in divorce, we propose that a gender-neutral synthesis of ***talaq al-ahsan, talaq al-tafwid*** and ***fasakh*** should be provided for by means of statute.

This mechanism should entail the following: the party seeking a divorce will be required to pronounce the divorce in the presence of his or her spouse and a designated marriage officer. The plaintiff will then be required to have the matter placed on the court roll for confirmation of the divorce by the court. During this intervening period the divorce will be regarded as revocable; the divorce will only become final once it has been confirmed by a civil court. Upon such confirmation, the ***idda*** waiting period will commence. Such a provision will also bring the dispensation relating to Muslim marriages in line with the corresponding provisions of the Recognition of Customary Marriages Act.[62]

Recommendation:

We propose that legislation relating to Muslim marriages provide that -

(1) A party seeking a divorce will be required to pronounce the divorce in the presence of a designated marriage officer.
(2) The plaintiff will be required to have the matter placed on the court roll for confirmation of the divorce by the court.
(3) The divorce will only become final once it has been confirmed by a civil court.
(4) Upon confirmation by the court, the *idda* waiting period will commence.
(5) A civil court may only issue a decree of divorce on the ground of the irretrievable breakdown of the marriage.

1.3 Dispute resolution

[62]. Section 8(1) states that a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

Proposal by the Law Commission

The Law Commission proposes that legislation which recognises aspects of Muslim law must also provide for an effective system of dispute resolution.[63]

Discussion

[63]. Issue Paper at p 21.

Arbitration is an important requirement in Muslim law where the possibility of divorce arises. The Qur'an provides that two arbitrators from either side has to be appointed in order to open discussion for reconciliation.[64] In terms of the dominant Sunni schools, the role of the arbitrators is to try to resolve the discord. The arbitrators have no say in whether or not the marriage should be dissolved. According to the Maliki school, these arbitrators do have the power to recommend that the marriage should be dissolved, as they are not held to be representatives of the parties in dispute but of the court.

However, it is important to bear in mind that the arbitrators are virtually always male.[65] This may imply that women could be at a disadvantage in the arbitration process. For this reason, we propose that arbitration process should not be imposed by statute, but should be left open for parties to observe according to choice.

Recommendation:

We propose that a system of arbitration or dispute resolution should not be included as a statutory prerequisite for divorce.

2. ADDITIONAL ISSUES TO BE CONSIDERED

2.1 Differences between schools of thought

It should be noted that the different Sunni schools (Maliki, Shafi'i, Hanbali, and Hanafi) and the Shiite school adopt varying views on the issue of divorce. While the essence of ***talaq*** remains the same irrespective of which school is followed, the conditions or grounds differ from school to school. Moosa notes that the Maliki and Shafi'i schools can be described as the most lenient, while the Hanafi school is the most restrictive towards women as far as divorce is concerned.[66] In practice,

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64. **Sura 4**, Verse 35.
65. It should be noted that Muslim law does not prescribe that the arbitrators should be men.
66. N Moosa *Muslim Personal Law of Divorce (talaq): Implications for South African Muslim Women (*Unpublished paper: Community Law Centre) 1998 at p 7.

this has resulted in predominantly 'Hanafi' jurisdictions (such as India and Egypt) adopting Maliki and Shafi'i rules in relation to certain aspects of divorce.[67]

We therefore recommend that in considering the provisions of Muslim law in relation to divorce, the Law Commission firstly considers the differences between the schools of thought, and secondly, where the schools are at variance, the approach most likely to be consistent with the right to gender equality should be adopted.

Recommendation:

We propose that the Law Commission -

(1) considers the differences between schools of thought in relation to divorce; and

(2) where the schools are at variance, adopts the approach most likely to be consistent with the right to gender equality.

2.2 *Idda* (waiting period)

[67]. *Ibid.*

Muslim law requires a wife to undergo a waiting period (***idda***) after the death or pronunciation of divorce by her husband. (Husbands are not required to observe the ***idda***.) During this period, she is not allowed to remarry. Moosa notes that the threefold purpose of ***idda*** is firstly to provide time to effect reconciliation between spouses (by providing an opportunity for a change of heart or 'second thoughts') in revocable divorces; to establish whether or not the wife is pregnant (to determine paternity); and to mourn the dead husband, in the case of a widow.[68] The different schools of thought differ in relation to the length of the ***idda*** period, as well as the question of ***nafaqa*** (maintenance) and whether or not one spouse may inherit from the other if he or she dies during this period.

We recommend that the Law Commission should consider the implications of the ***idda*** period, specifically in relation to maintenance and succession. The Law Commission should however also be mindful of the fact that Muslim law imposes certain restrictions on women who are observing the ***idda*** period (for example, limitations of the right to freedom of movement) and for this reason we do not do not believe that strict observance of the ***idda*** period should be imposed by statute. Rather, the matter should be left open, giving women a choice whether or not they want to observe this waiting period.

Recommendation:

We propose that the Law Commission should consider the implications of the *idda* period, with specific reference to maintenance and succession. However, legislation should not impose a mandatory *idda* period.

2.3 Remarriage of former spouses (*halala*)

The concept of ***halala*** can be described as a process which requires a woman who has been party to a final or irrevocable divorce from her husband to marry someone else, consummate this marriage and secure a divorce from the second husband (or wait until he dies) before she can remarry the first husband.

We recommend that the Law Commission should examine the ***halala*** process, with specific reference to whether or not this practice is consistent with the Constitution. We submit that this is not the case, both because it offends against the principle of gender equality (husbands are not subject to similar restrictions), and because it places an unacceptable limit on personal autonomy – most notably, the freedom to enter into a relationship and/ or marriage.

Recommendation:

[68]. Moosa *op cit* at p 4.

We submit that the practice of *halala* offends against the principle of gender equality and places an unacceptable limit on personal autonomy, and that the practice should accordingly expressly be done away with in legislation.

2.4 Maintenance of former wife

Muslim personal law recognises the payment of ***nafaqa*** to the wife during the existence of the marriage, as well as during the ***idda*** period (where the divorce is still revocable). The notion of ***nafaqa*** does not correspond exactly with the civil law concept of maintenance, in the sense that while it does encompass the basic concept of food, clothes and lodging, it also includes a form of payment for what is usually described as women's 'unpaid labour'. This second component balances what might otherwise have appeared to be an instance of unfair discrimination in that the right to ***nafaqa*** extends only to the wife.

A further difference between ***nafaqa*** and the concept of maintenance is that in terms of Muslim law, the husband is primarily liable to pay ***nafaqa*** according to his means, rather than according to the needs of the wife (the latter being the primary consideration under South African civil law).

A significant difference between a Muslim husband's duty to pay ***nafaqa*** and the duty to support former spouses in terms of civil law, is that the former encompasses only the three months of the ***idda*** period, while the latter may potentially extend to the remarriage or death of the dependent spouse. However, experience has shown that the burden of proof that a dependent spouse must meet in order to 'qualify' for maintenance following divorce is a relatively high one,[69] and in practice few women receive any substantial support in this manner. In this sense, the right to three months' of ***nafaqa*** may realistically place Muslim women in a better position than they would have been in under civil law.

The judgment in *Ryland v Edros*[70] drew attention to the potentially negative impact of prescription on the right to claim arrear maintenance from a former spouse. In this regard, we recommend that the Law Commission should consider an amendment to the Prescription Act[71] in order to expressly exclude all claims for arrear maintenance (whether under legislation regulating Muslim marriages or in terms of civil law) from the operation of prescription.

Recommendation:

We propose that the Law Commission should have regard to the right of a wife to claim *nafaqa* from her husband, and we propose that this right should be given statutory

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69. See section 7(2) of the Divorce Act 70 of 1979.
70. 1997 1 BCLR 77 (CC).
71. Act 18 of 1943. See specifically section 3 of this Act.

recognition. In addition, the Prescription Act should be amended to exclude claims for arrear maintenance from the operation of prescription.

7. CONCLUSION

We hope that this submission will contribute to the deliberations of the Law Commission and its appointed Project Committee. We are aware of the fact that the task of compiling a Discussion Paper will indeed be a daunting one, and we wish the Project Committee well in this endeavour. We look forward to the publication of the Discussion Paper.

CAPE TOWN
5 September 2000

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APPENDIX A

NOTE:
This form is a copy of the standard ***nikahnama*** form used in Pakistan. All marriages where at least one of the parties is a Muslim citizen of Pakistan fall within the purview of the Muslim Family Law Ordinance 1961, and are to be recorded on this standard form and registered with the local ***Nikah*** Registrar.
[Source: Cassandra Balchin (ed) ***Women, Law and Society: An Actional Manual for NGO's*** (Shirkat Gah/ Women Living Under Muslim Laws, 1996)]

FORM OF NIKAHNAMA

1. Name of Ward _____ Town/ Union _____
   Tehsil/ Thana _____ and District _____ in which the marriage took place.

2. Name of bridegroom and his father, with their respective residence.

3. Age of bridegroom _____

4. The names of the bride and her father, with their respective residence.

5. Whether the bride is a maiden, a widow or a divorcee _____

6. Age of the bride _____

7. Name of Vakil, if any appointed by the bride, father's name and his residence

8. The names of the witnesses to the appointment of the bride's Vakil with their father's names, their residence and their relationship with the bride

9. Name of the Vakil, if any appointed by the bridegroom, his father's name and his residence

10. Names of the witnesses to the appointment of the bridegroom's Vakil with their father's names and their residence

11. Names of the witnesses to the marriage, their father's names and their residence

12. Date on which the marriage was contracted

13. Amount of dower

14. How much of the dower is *moajjal* (prompt) and how much *ghair moajjal* (deferred) _____

15. Whether any portion of the dower was paid at the time of marriage. If so, how much _____

16. Whether any property was given in lieu of the whole or any portion of the dower with its specification of the same and its valuation agreed to between the parties _____

17. Special conditions, if any _____

18. Whether the husband has delegated the power of divorce to the wife. If so, under what conditions _____

19. Whether the husband's right of divorce is in any way curtailed _____

20. Whether any document was drawn up at the time of marriage relating to dower, maintenance etc. If so, contents thereof in brief _____

21. Whether the bridegroom has any existing wife, and if so, whether he has secured the permission of the Arbitration Council under the Muslim Family Laws Ordinance, 1961, to contract another marriage _____

22. Number and date of the communication conveying to the bridegroom the permission of the Arbitration Council to contract another marriage _____

23. Name and address of the person by whom the marriage was solemnized and his father _____

24. Date of registration of marriage _____

25. Registration fee paid _____

Signature of bridegroom or his Vakil

_____

Signature of the witnesses to the appointment of the bridegroom's Vakil

_____

Signature of the bride

_____

Signature of the Vakil of the bride

_____

Signature of the witnesses to the appointment of the bride's Vakil

_____

Signature of the witnesses to the marriage

_____

Signature of the person who solemnized the marriage

_____

Signature and seal of the Nikah Registrar

_____