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Project 59

ISLAMIC MARRIAGES AND RELATED MATTERS

Issue Paper 15

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This issue paper (which reflects information gathered up to the end of January 2000) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 July 2000 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The project leader responsible for the project is Mr Justice M S Navsa. The researcher allocated to this project, who may be contacted for further information, is Mr J H Potgieter.

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SUMMARY OF PROPOSALS

The issues and proposals outlined in this Issue Paper ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the recognition of Islamic marriages will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this Paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the proposals made and to indicate whether there are other issues or options that must be explored. All relevant role-players and institutions that are likely to be affected by the proposed measures and any interested member of the public should therefore participate in this debate.

To facilitate a focused debate, respondents are requested to formulate submissions regarding the following proposals:

- * It is proposed that couples contemplating a marriage should have the right to choose a marital system which is compatible with their religious beliefs and with the Constitution. This implies that the marriage could, by way of contract, be governed by Muslim Personal Law, or by secular law.
- * To the extent that legislation is to give effect to the recognition of Islamic marriages, it is suggested that the new statute ought to provide for both new marriages and existing marriages.
- * In the case of new marriages, it is proposed that the legislation should provide at least for the following matters:
 - the age of consent, which should be 18 years;
 - actual and informed consent to the conclusion of a marriage in written form;
 - the designation of marriage officers who are entitled to perform Islamic marriages;
 - the registration of marriages by the signing of a marriage register;
 - the formalities pertaining to the time, place and manner of solemnisation of Islamic marriages;
 - the appropriate marriage formula for the solemnisation of an Islamic marriage;

- a prohibition on marriages within certain prohibited degrees of relationship, including the rules relating to fosterage according to Muslim Personal Law;
- a standard contractual provision in terms of which a Muslim Personal Law system is established in the event of parties contemplating a Muslim marriage;
- the prescription of penalties for false representations or statements.

* In the case of existing marriages, and in view of the recent decision in **Amod & Another v Multilateral Motor Vehicle Accidents Fund**, in which the Court gave legal recognition to a Muslim marriage for purposes of the duty of support, little difficulty arises in affording recognition to **de facto** monogamous marriages. It is suggested that such marriages would require registration upon satisfactory proof to a designated marriage officer that there is an existing Islamic marriage. Proposals are invited concerning the affording of recognition to polygamous marriages entered into before the commencement of a new statute, particularly in regard to potential complications such as existing proprietary rights, maintenance, succession and social welfare benefits.

* Regarding the consequences of registration of existing Islamic marriages, it is suggested that parties who choose to register existing Islamic marriages must reach agreement as to the appropriate matrimonial property regime. Again no particular difficulties are envisaged in respect of **de facto** monogamous marriages. The recognition and registration of existing polygamous marriages would, it is suggested, have to take account of the special position of the wives to such a marriage and the special need to provide protection of their proprietary rights and interests as well as the interests of the children born of the various marriages.

* The difficulties arising when there is an existing civil marriage and a subsequent Islamic marriage, or **vice versa**, need to be addressed.

* Regarding divorce and the potentially contentious issue of dissolution of a marriage by **Talaq**, it is submitted 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, 1979. It is suggested that marriage officers should be required to recognise a **Talaq** in the presence of the parties and that, for record and official purposes and for consonance with the Constitution, a **Talaq** should be confirmed by a court before it takes effect. Moreover, it is suggested that legislation which recognises aspects of Muslim

Personal Law must also provide for an effective system of dispute resolution.

- * In order to deal with constitutional concerns, it is suggested that any proposed legislation stipulating the grounds on which the conclusion of a polygamous marriage would be permissible, has to be narrowly circumscribed in recognition of the limitations set out by the **Qur'an** itself. Comment is required on whether a court should decide that the factual (**Qur'anic**) circumstances exist justifying a second marriage.

- * In view of the fact that wives and children frequently require special protection to ensure their continued welfare upon the dissolution of a marriage, it is proposed that protections similar to those in the Divorce Act, 1979, and the Recognition of Customary Marriages Act, 1998, should be included in any statute giving recognition to Muslim Personal Law.

The South African Law Commission has undertaken to investigate the legal recognition of Islamic marriages and other aspects of Islamic Personal Law. A research paper which examines the application of Muslim Personal Law in a number of countries was commissioned and it forms an annexure to this Issue Paper. The research paper was discussed and debated by the project committee. The recognition of Muslim Personal Law must be viewed against the Constitution. The parameters are discussed in more detail below.

If legislation is to be enacted which gives recognition to aspects of Muslim Personal Law it will be necessary, in the first instance, to establish the parameters of such recognition. This task is in itself difficult because of the problem of implementation within the dominant legal system. The challenge posed to the law and legal institutions within a democratic secular state is the manner in which and the extent to which it accommodates individual choice in matters of morality and religion. A tolerant society seeks to maximise individual liberty and freedom of choice. Implementation has to be technically feasible within the dominant system, whilst maintaining the integrity of Muslim Personal Law.

The State actively intervenes in many areas of private life. This is particularly evident in the realm of personal and family law. The State intervenes to regulate the formalities of the contract of marriage and the economic consequences of its dissolution to ensure that women are not dealt with unjustly. Even before the Constitution, legislative measures were introduced to ensure that women were dealt with justly and equitably and were not subject to vulnerability and discrimination. Many rules of Roman Dutch Common Law, however, relegated women to positions of vulnerability and exploitation. We have seen the consequences in our society where women have been treated abysmally and left destitute. We have witnessed how such women have been left without legal recourse. Across the cultural spectrum women in polygamous relationships have consistently voiced their grievances.

Under the Constitution, rules and situations which perpetuate unfair discrimination or which unjustifiably violate any of the provisions of the Bill of Rights are vulnerable to being struck down.

What is clear is that any proposed statute intended to grant recognition to Islamic marriages and to regulate the manner and consequences of their dissolution will be vulnerable to constitutional challenge if it unjustifiably conflicts with a right entrenched in the Bill of Rights. Proposed legislation would have to be explicit on the rules applicable to Muslim personal law. One of the requirements of the new constitutional dispensation is that the Constitution is founded upon the rule of law. This requires that the rights of citizens are regulated by clear and precise rules.

There are many statutes which currently regulate aspects of personal law. These include the Matrimonial Affairs Act 37 of 1953; the Marriage Act 25 of 1961; the Maintenance Act 23 of 1963; the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963; the Dissolution of Marriages on Presumption of Death Act 23 of 1979; the Divorce Act 70 of 1979; the Matrimonial Property Act 88 of 1984; the Mediation in Certain Divorce Matters Act 24 of 1987; the Maintenance of Surviving Spouses Act 27 of 1990. In addition, new legislation has been enacted but is not yet in force. This includes the Maintenance Act 99 of 1998 and the Recognition of Customary Marriages Act 120 of 1998. Many of these statutes confer important protection and benefits upon women and children.

THE ADVENT OF CONSTITUTIONAL DEMOCRACY

The transition to democracy in 1994 and the adoption of a Constitution with an entrenched Bill of Rights heralded a decisive break from a history of oppression and discrimination. For the

first time, all South Africans were vested with rights to dignity, equality and freedom which, in the past, were the preserve of an exclusive minority. The Constitution of the Republic of South Africa (Act 200 of 1993) (“the interim Constitution”) was adopted on 27 April 1994. It has been repealed and replaced by the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (“the Constitution”) which came into force on 4 February 1997.

The Constitution creates a unitary and secular state. It does not seek to prefer any particular religion above another. It protects individual liberty and freedom of religion alike.

The passing of the Constitution and before it, the interim Constitution, marked a radical and decisive turning point in South Africa’s political and legal tradition. For the first time in South Africa’s history, parliament was no longer free to pass any law it chose, no matter how unreasonable, arbitrary or capricious. Under a constitutional dispensation, it is the Constitution itself which is supreme. Section 2 of the Constitution forcefully conveys this concept:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Section 7 of the Constitution underscores the role of the Bill of Rights. It provides:

Rights

- 7 (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Section 7(2) is couched in imperative terms. It imposes a positive obligation upon the State to “respect, protect, promote and fulfil the rights in the Bill of Rights.”

Unlike the interim Constitution, which was intended primarily to act as a constraint upon the State in its relationship with the citizen, it is clear from the provisions of section 8 that the Constitution is also capable of application to individuals in their relationships with each other.

The Constitutional Court has expressed the vision of the Constitution in the following terms:¹

What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is ‘justifiable in an open and democratic society based on freedom and equality’. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.

LIMITATION OF RIGHTS

None of the rights enshrined in the Constitution are absolute. All such rights are subject to limitation provided that there is compliance with the limitations clause. Section 36 of the Constitution provides:

- 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,

1 **Shabalala & Others v The Attorney General of the Transvaal & Another** 1995 (2) SACR 761 (CC) at p 774 para. 26 per Mahomed DP.

equality and freedom, taking into account all relevant factors including -

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose;
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in sub-section (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The application of the limitation clause involves a process, described in **S v Makwanyane & Another**² as “the weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests.”

This case was decided under the interim Constitution. However, in **National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others**³ it was observed that -

the relevant considerations in the balancing process are now expressly stated in section 36(1) of the 1996 Constitution to include those itemised in paragraphs (a) to (e) thereof. In my view this does not in any material respect alter the approach expounded in Makwanyane, save that paragraph (e) requires that account be taken in each limitation evaluation of less restrictive means to achieve the purpose [of the limitation]'. Although section 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.

The Court stated further:⁴

The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation

2 1995 (3) S.A. 391 (CC) at para. 104.

3 1998 (12) BCLR 1517 (CC) at para 34.

4 At para 35.

between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.

FREEDOM OF RELIGION

Both the interim and final Constitutions guaranteed freedom of religion. The terms of the guarantee, however, are not identical. Section 14 of the interim Constitution provided:

Religion, Belief and Opinion

- 14
- (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
 - (2) Without derogating from the generality of sub-section (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
 - (3) Nothing in this Chapter shall preclude legislation recognising -
 - (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

Certain significant changes were introduced into the final Constitution. The guarantee is now contained in section 15 in the following terms:

Freedom of Religion, Belief and Opinion

- 15
- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
 - (2) Religious observances may be conducted at state or state-aided institutions provided that -
 - (a) those observances follow rules made by the appropriate public authority;

- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising -
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

The most significant difference between section 14 of the interim Constitution and section 15 of the final Constitution is the inclusion in the latter of section 15(3)(b). This makes it clear that any legislation recognising religious marriages and systems of personal and family law must comply with the other provisions of the Constitution.

THE CONSTITUTIONAL GUARANTEE OF EQUALITY

The issue of greatest concern for any legislation recognising aspects of Muslim Personal Law is the compatibility of such legislation with the Bill of Rights as a whole but particularly its compatibility with the guarantee of equality.

The right to equality contained in section 9 of the Constitution provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on

one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The equality jurisprudence developed by the Constitutional Court under Section 8 of the interim Constitution applies equally to the right to equality under Section 9 of the final Constitution.⁵

In a number of judgments the Constitutional Court has set out a framework for the interpretation and application of section 8, the equality clause of the interim Constitution.⁶

The approach to claims under section 8 of the interim Constitution, and applied to section 9 of the Constitution, is encapsulated in **Harksen v Lane NO and Others**:⁷

At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary when an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If not then there is a violation of s (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-

5 **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1998 (1) SA 6 (CC) at paras 15-19; 1998 (12) BCLR 1517 (CC) at pp 1530 - 1533 paras 15-19.

6 **Brink v Kitshoff** 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC); **Prinsloo v Van der Linde** 1997 (3) SA 1012 (CC), 1997 (6) BCLR 752 (CC); **President of the Republic of South Africa v Hugo** 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); **Larbi-Oadam and Others v Members of the Executive Council for Education and Another (North-West Province)** 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC); **City Council of Pretoria v Walker** 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

7 **Supra** at para 53.

stage analysis:

- (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- (ii) If the differentiation in question amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).

In order for differentiation not to constitute unfair discrimination, it must be rational:⁸

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.

In **Harksen v Lane NO**⁹ Goldstone J said:

What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or have been associated with, these attributes and characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between grounds. In some cases they relate to immutable biological attributes and

8 **Prinsloo v Van der Linde (supra)** at para 25.

9 **Supra** at para 49.

characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and some to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on criteria which may amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.

These sentiments are entirely consistent with Islamic law, for example:

‘And women shall have rights similar to the rights against them, according to what is equitable ...’¹⁰

‘To men is allotted what they earn and to women what they earn.’¹¹

‘The best of you are those who are best to their families and I am the best to my family.’¹²

‘Fear Allah with respect to the treatment of your women.’¹³

CHOICE OF MARRIAGE SYSTEM

It is proposed in this Issue Paper that couples be accorded the right to choose a marital system which is compatible with their religious beliefs and the Constitution.

Examples of the standard clauses to be incorporated in a marriage contract, are set out elsewhere in this document. Certain problems may, however, arise. For example, if one chose to have one’s marriage regulated by Muslim Personal Law, the question of inheritance by way of **Shari’ah** may have to be considered. Another example is the limitation of maintenance and custody issues. A further question that may arise is whether secular courts should, on an

10 **Sura II** verse 228.

11 **Sura IV** verse 32.

12 Hadith.

13 Hadith.

equitable basis, have the power to interfere in respect of these issues. Finally, the question of constitutional compatibility also arises.

RECOGNITION OF ISLAMIC MARRIAGES

To the extent that legislation is to give effect to the recognition of Islamic marriages after the commencement of a new statute, it is suggested that the legislation ought to provide for both new and existing marriages, and that it should at least provide for the following matters:

New Marriages

(a) The age of consent

In Muslim Personal Law marriages are permitted from the age of puberty onwards. In reality, in South Africa, marriage generally occurs between people above the age of 18 years.

It is suggested, having regard to modern conditions, that the appropriate age of consent for marriage should be 18 years for both parties, subject to consent by an appropriate authority in exceptional cases.

(b) Actual consent

In Muslim Personal Law true consent is always required for a valid marriage. If factual consent is not present, the marriage is void.

It is suggested that provision be made in legislation to ensure that there is actual and informed consent to the conclusion of an Islamic marriage which is to receive recognition from the State.

If regard be had to the proposal in this Issue Paper about the system of informed choice, the need for such provision is paramount. Such informed consent ought to be in written form, and subsequent to specific enquiry by the marriage officer.

(c) Muslim Marriage Officers

At present, the Marriage Act 25 of 1961 makes provision for the designation of ministers of religion and other persons to act as Marriage Officers.

It is suggested that provision be made in any new statute for the recognition and designation of Marriage Officers who are entitled to perform Islamic marriages.

(d) Registration of marriages

Section 29A of the Marriage Act provides that the Marriage Officer solemnising any marriage, the parties thereto and their duly authorised representatives and two competent witnesses shall sign a marriage register and that the Marriage Officer has the duty to transmit the Marriage Register to the representative designated in terms of the Identification Act 72 of 1986.

It is suggested that similar provisions be incorporated into any new statute recognising Islamic marriages.

(e) Time, place and manner of solemnisation

Section 29 of the Marriage Act prescribes certain formalities in relation to the time, place and manner of solemnisation of Islamic marriages.

It is suggested that similar provisions, appropriately changed for purposes of Islamic law, be incorporated into any new statute.

(f) Marriage formula

It is suggested that the legislation include the appropriate marriage formula for the solemnisation of an Islamic marriage.

Such provisions are presently contained in section 30 of the Marriage Act and would have to be appropriately modified.

(g) Prohibitions on certain marriages

It is suggested that consideration be given to prohibiting certain types of marriages.

Moreover, consideration would also have to be given to a prohibition on marriage of persons related to each other within certain prohibited degrees, including the rules relating to fosterage according to Muslim Personal Law.

(h) The marriage contract

Since much of Islamic Personal Law is based upon contract, it is important that a marriage

contract should protect both parties equally.

A marriage contract may contain a provision establishing a Muslim Personal Law system.

Such a provision is visualised as a standard contractual provision in the event of parties contemplating a Muslim marriage, and is perfectly consistent with the Constitution. In this regard, the provisions of section 6 of the Recognition of Customary Marriages Act 120 of 1998 are significant. It provides:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

In Muslim Personal Law a woman has full status and contractual capacity including the power to own and dispose of property for her own benefit.

The contract may also contain a provision to deal with the situation which might arise in the event of the husband taking a further spouse.

It may be necessary, in such circumstances, to stipulate that in such an eventuality, this would amount to a ground of divorce. This is permissible in terms of Muslim Personal Law.

- (i) Penalties for false representations or statements

Section 36 of the Marriage Act provides that any person who makes any false representation or false statement knowing it to be false shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

It is suggested that a similar provision be incorporated in any new statute.

Existing Marriages

In **Amod & Another v Multilateral Motor Vehicle Accidents Fund**¹⁴ the Supreme Court of Appeal gave legal recognition to a Muslim marriage for purposes of the duty of support. The facts of that case were confined to a **de facto** monogamous Muslim marriage. The Court left open the question as to the consequences of a polygamous marriage.

In principle, and following the decision of the Supreme Court of Appeal in **Amod**, little difficulty arises in affording recognition to existing **de facto** monogamous marriages. Potential complications arise, however, in affording recognition to polygamous marriages entered into before the commencement of the new statute.

Monogamous Marriages

It is suggested that existing **de facto** monogamous Islamic marriages which have not been solemnised in terms of section 3 of the Marriage Act would require registration upon satisfactory proof to a designated Marriage Officer that there is an existing Islamic marriage.

The question of which marital regime would apply, ie Muslim Personal Law or civil law, is a

14 Supreme Court of Appeal, Case No. 444/98, 29 September 1999, unreported.

matter for the parties to choose.

Polygamous Marriages

A variety of situations might arise. For example, there may be no civil marriage but an existing polygamous Islamic marriage. Alternatively, the first marriage may be solemnised according to the Marriage Act, but the second or subsequent marriage might be polygamous.

Where there is no marriage solemnised according to the Marriage Act, it is suggested that in principle such marriages ought to be recognised but made subject to a number of formal and substantive requirements to be designated by any new statute.

At a minimum, such recognition would require registration upon proof to the satisfaction of a designated Marriage Officer that there is an existing polygamous Islamic marriage. In these circumstances, existing proprietary rights would have to be acknowledged and dealt with by statute. There appears to be no bar to a statute stipulating, for example in respect of a polygamous marriage involving three wives, that each wife is entitled to maintenance in respect of her children. Enforcement is a matter to be debated. It is, however, difficult to envisage the vested rights of a historical civil law marriage being tampered with retrospectively *vis-a-vis* a Muslim marriage. The rules of succession in relation to the possible permutations will have to be carefully worked out. A problem will certainly arise in respect of social welfare benefits.

If three polygamous unions, for example, are recognised, are all dependants entitled to full benefits burdening the State more heavily than would be the case with monogamous marriages? Is this feasible? Should contributions by the employee or the employer be increased?

CONSEQUENCES OF REGISTRATION OF EXISTING ISLAMIC MARRIAGES

Where there is an existing Islamic marriage (whether monogamous or polygamous) which acquires recognition in terms of the new statute, it becomes important to clearly regulate the consequences of such recognition. Consideration would have to be given, *inter alia*, to the following:

Choice of matrimonial property regime

It is suggested that parties who choose to register existing Islamic marriages must reach agreement as to the appropriate matrimonial property regime.

In the case of *de facto* monogamous Islamic marriages this ought not to present any real difficulties. Similar issues arose with the passing of the Matrimonial Property Act 88 of 1984 which dealt with the establishment of the accrual system and its impact upon existing marriages in community of property.

Provisions similar to those incorporated in the Matrimonial Property Act ought to be provided in any statute which makes provision for an informed election concerning the appropriate matrimonial property regime.

Such provisions would have to define, *inter alia*, which marriages become subject to the accrual system or the system of community of property.

Where, however, the existing marriage is polygamous in nature, the matter becomes more complicated. Recognition and registration of such marriages would have to take account of the special position of the wives to such a marriage and the special need to provide protection of their proprietary rights and interests as well as the interests of the children born of the various marriages.

DIVORCE

One of the potentially contentious issues in Muslim Personal Law is the institution of **Talaq**. An Islamic marriage can be dissolved by **Talaq** by which a husband may pronounce divorce without specified reasons and in the absence of his wife.¹⁵ It is competent, however, in Islamic Law, to ensure that the wife enjoys a corresponding right in terms of **Talaq-i-Tafwid** and that a marriage may not only be unilaterally dissolved by the husband. Conferring an equal right to pronounce a **Talaq**, however, does not address the grounds upon which a marriage may be terminated nor does it address the question of the appropriate forum to terminate such a marriage. If the forum is to be a secular court, then it is envisaged to include a suitably qualified

15 See N Moosa *De Rebus* October 1999 at 35.

Muslim assessor on the bench who will oversee compliance with all the necessary formalities required by Muslim Personal Law.

The Divorce Act 70 of 1979 stipulates the grounds on which parties may obtain a divorce.

Section 4 of the Divorce Act 70 of 1979 provides:

Irretrievable Breakdown of Marriage as Ground of Divorce

- (1) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.
- (2) Subject to the provisions of sub-section (1), and without excluding any facts or circumstances which may be indicative of the irretrievable breakdown of a marriage, the court may accept evidence -
 - (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
 - (b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or
 - (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,as proof of the irretrievable breakdown of a marriage.
- (3) If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.

The Act also provides for divorce on grounds of mental illness or continuous unconsciousness.

In principle it seems that parties to an Islamic marriage ought to be able to obtain a divorce on the same grounds as those contained in the Divorce Act. However, it is probably necessary to recognise additional grounds of divorce to cater for special facts and circumstances which may arise in an Islamic marriage.

For example, it may well be appropriate to confer upon the wife the right to obtain a divorce where the husband takes a second wife in terms of Islamic law contrary to the suggested standard contractual provision. It is suggested that this should in itself constitute a ground for divorce.

Although the circumstances in which a **Talaq** may be pronounced in Islamic law are subject to differing interpretations, it seems that it is permissible for a **Talaq** to be issued by the husband for no apparent reason, in the absence of his wife and even without notice to her. This raises fundamental questions of public policy. Should the law permit the dissolution of a marriage in the absence of sound reasons to do so?

It is suggested that even if such rights are conferred on both husband and wife, there are compelling reasons of public policy to preclude the dissolution of marriages save on the type of grounds contemplated in the Divorce Act.

In respect of prospective scenarios this does not appear to be a problem, in view of the standard contractual provision. In respect of **Talaqs** which have been pronounced historically, it appears that that will have to be accepted. A problem that arises is that the Divorce Act only recognises the court's power to grant a divorce.

A suggestion in this regard is that marriage officers should be required to recognise a *Talaq* in the presence of the parties. Further, for record and official purposes and for consonance with the Constitution, it is suggested that a *Talaq* should be confirmed by a court.

The grounds of divorce will be set out in the proposed legislation. These will be grounds recognised at Islamic law and will be compatible with the Constitution.

Legislation which recognises aspects of Muslim Personal Law must also provide for an effective system of dispute resolution. In this regard there is also a constitutional imperative. Section 34 of the Constitution confers on every person the right “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum.”

Dealing with the equivalent provisions in section 22 of the interim Constitution, Ackermann J in **Bernstein and Others v Bester and Others NNO**¹⁶ stated the purpose of the section as follows:

It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional idea, the ‘regstaadidee’, for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into ‘courts’.

Another important purpose of the guarantee of access to courts is to ensure that “parties to a dispute have an institutionalised mechanism to resolve their differences without recourse to self-help”.¹⁷

16 1996 (2) SA 751 (CC) at para 105.

17 **Concorde Plastics (Pty) Limited v NUMSA and Others** 1997 (11) BCLR 1264 (LAC) at 1644 F.

POLYGAMY

Islamic law recognises the institution of polygamy but not the institution of polyandry. This creates a potential inequality which, it is suggested, can only be mitigated if the circumstances in which polygamy is permitted are narrowly circumscribed and subject to the informed consent of the existing wife. It should be considered that the *Qur'an* itself sets out strict prerequisites for the taking of a second wife:¹⁸

But if ye fear that ye shall not be able to deal justly (with them), then only one ... That will be more suitable, to prevent you from doing injustice.

It is suggested that any proposed legislation should stipulate the narrowly circumscribed circumstances in which the taking of an additional wife is permissible.

It should be borne in mind that the standard contract mentioned earlier in this document will allow the first wife to sue for divorce or to pronounce divorce upon herself. What has to be considered is whether it is legally technically feasible, in the face of such a stipulation, to prohibit the taking of a second wife. In this regard, the provisions of the **Recognition of Customary Marriages Act 120 of 1998** should be considered. Section 7(6) - (9) of that Act provide:

- (6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the Court to approve a written contract which will regulate the future matrimonial property system of his marriages.
- (7) When considering the application in terms of sub-section (6) -
 - (a) the Court must -
 - (i) in the case of a marriage which is in community of property or which is subject to the accrual system -

18 **Sura IV** verse 3.

- (aa) terminate the matrimonial property system which is applicable to the marriage; and
- (bb) effect a division of the matrimonial property;
- (ii) ensure an equitable distribution of the property; and
- (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;
- (b) the Court may -
 - (i) allow further amendments to the terms of the contract;
 - (ii) grant the order subject to any condition it may deem just; or
 - (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.
- (8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of sub-section (6).
- (9) If a court grants an application contemplated in sub-section (6), the Registrar or Clerk of the Court, as the case may be, must furnish each spouse with an order of the Court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each Registrar of Deeds of the area in which the court is situated.

Having regard to the ***Qur'anic*** verse referred to above, it is not clear whether polygamy in Muslim Personal Law can be accommodated by means of provisions similar to section 7(6) - (9) of the **Recognition of Customary Marriages Act**, especially in view of the proprietary implications of these provisions.

It is suggested that any legislation stipulating the grounds on which the conclusion of a polygamous marriage would be permissible has to be narrowly circumscribed in recognition of the limitations prescribed in the *Qur'anic* verse referred to above.

It must be recognised that the taking of an additional wife can have deleterious consequences for the personal and proprietary rights of the existing wife and the personal and proprietary rights

of children born of such marriages. It is of fundamental importance, therefore, that the parties immediately affected by the institution of polygamy be heard on the issue and that their rights be fully protected.

CONSEQUENCES OF DIVORCE

Wives and children frequently require special protection to ensure their continued welfare upon the dissolution of a marriage. Thus, section 7 of the **Divorce Act** empowers a court, in the absence of written agreement, to effect an equitable division of assets and to ensure that appropriate provision is made for maintenance. Moreover, and by reason of changed circumstances, it frequently becomes necessary for a court to be approached to vary existing maintenance orders. As a matter of principle, similar protections ought to be included in any statute giving recognition to Muslim Personal Law.

The Recognition of Customary Marriages Act includes special provisions to cater for the consequences of a dissolution of a customary marriage. Section 8(4) of that Act provides:

A court granting a decree for the dissolution of a customary marriage -

- (a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, (Act 88 of 1984);
- (b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order and must make any equitable order that it deems just;
- (c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;
- (d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and
- (e) may, when making an order for the payment of maintenance, take into account any provision or arrangements made in accordance with customary law.

It is suggested that there is no reason in principle why any lesser safeguards should be permitted in the case of the dissolution of Islamic marriages.

Regard must be had to the mechanism proposed for dissolution by *Talaq* and its subsequent confirmation by a court as set out earlier in this document.

GENERAL

This Issue Paper has attempted to draw attention to the more compelling issues arising out of the potential recognition of Muslim Personal Law. It has not sought to address the details of any such law but rather to raise the general concerns with a view to broad consultation with all affected parties. If necessary, public workshops and debates will be held to facilitate consultation. Comment is specifically invited on the suggestions made in this document as reflected in highlighted blocks, but also on all other issues that have been raised. In addition, respondents should take this opportunity to raise any issues that have not been addressed and which are considered to be important for the recognition of Muslim Personal Law.

If legislative effect is given to recognition and dissolution of Islamic marriages, further consideration will have to be given to the consequential effects of such legislation. Thus, for example, the system of social welfare benefits may well have to be reconsidered to take into account potential beneficiaries who might previously have been excluded by reason of the non-recognition of their marriages. This, in turn, may well have consequences for children born of such marriages. The concept of a dependant may well have to be broadened to incorporate categories which might previously have been excluded.

Succession is a particularly complex issue still to be addressed. This may be affected by the choice of the parties and must of necessity be dealt with in any intended legislation. The Commission requests particular submissions on this important issue.

Similarly, the Commission requests particular input on the issue of custody and guardianship of minor children.