

# The Law of Divorce and Dissolution of Life Partnerships in South Africa

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## PREFACE

Some four years ago, Edmund Beerwinkel and Stephen Allcock of Juta conceptualised a specialist work on the law of divorce in South Africa. *The Law of Divorce and Dissolution of Life Partnerships in South Africa* is the culmination of their vision.

This book is aimed at the subject specialist. It consists of in-depth treatment of the South African law relating to divorce and the dissolution of life partnerships. As commissioning editor, I was tasked with inviting subject experts who have particular knowledge of the topics identified for inclusion in the book, to participate in the project. Because each author is an expert on the particular topic entrusted to him or her, I provided only general guidelines as to content and technical requirements. Exact content and style were left to each individual author. As may be expected, the chapters reflect diverse opinions, approaches, perspectives and styles.

I would like to express my heartfelt appreciation and gratitude to all the authors who so readily accepted the invitation to contribute to the book. Their expertise lends a particular quality to the final product. A special word of thanks must go to Amanda Catto, who agreed to join the team of authors when the project was already well underway.

All the chapters were subject to blind pre-publication peer review. The authors and I are indebted to the reviewers who so willingly and selflessly performed this time-consuming task. I would also like to thank Edmund Beerwinkel and Stephen Allcock for conceptualising the book. Further thanks must go to Mark McClellan for editing the book, Daphne Burger for compiling the Table of Statutes and Index and Wouter Reinders for typesetting the book and extracting the Tables of Cases. Last, but definitely not least, I would like to thank Jopie for his unwavering support in all my academic efforts.

Jacqueline Heaton

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# LIST OF ABBREVIATED REFERENCES TO FREQUENTLY CITED WORKS

- Ahmad *Muslim Law of Divorce*: Ahmad, KN *The Muslim Law of Divorce* (Kitab Bhavan 1978)
- Barnard *Egskedingsreg*: Barnard, AH *Die Nuwe Egskedingsreg* (Butterworth 1979)
- Barratt (ed) *Law of Persons and the Family*: Barratt, A (ed) *Law of Persons and the Family* (Pearson Education South Africa 2012)
- Bennett *Customary Law*: Bennett, TW *Customary Law in South Africa* (Juta 2004)
- Black et al *A Practical Approach to Family Law*: Black, JM, Bond, T & Bridge, J A *Practical Approach to Family Law* 8 ed (Oxford University Press 2007)
- Boezaart (ed) *Child Law in South Africa*: Boezaart, T (ed) *Child Law in South Africa* (Juta 2009)
- Boezaart *Law of Persons*: Boezaart, T *Law of Persons* 5 ed (Juta 2010)
- Bonthuys & Albertyn (eds) *Gender, Law and Justice*: Bonthuys, E & Albertyn, C *Gender, Law and Justice* (Juta 2007)
- Brock & Saks *Contemporary Issues in Family Law and Mental Health*: Brock, MG & Saks, S *Contemporary Issues in Family Law and Mental Health* (Charles Thomas Publishing 2008)
- Burman (ed) *The Fate of the Child*: Burman, S (ed) *The Fate of the Child. Legal Decisions on Children in the New South Africa* (Juta 2003)
- Cameron et al *Honoré's Law of Trusts*: Cameron, E, De Waal, MJ, Wunsch, B, Solomon, P & Hahn, E *Honoré's South African Law of Trusts* 5 ed (Juta 2002)
- Clark (ed) *Family Law Service*: Clark, B (ed) *Family Law Service* loose-leaf (LexisNexis 1988)
- Currie & De Waal *The Bill of Rights Handbook*: Currie, I & De Waal, J *The Bill of Rights Handbook* 6 ed (Juta 2013)
- Davel (ed) *Children's Rights in a Transitional Society*: Davel, CJ (ed) *Children's Rights in a Transitional Society* (Protea Book House 1999)
- Davel (ed) *Introduction to Child Law in South Africa*: Davel, CJ (ed) *Introduction to Child Law in South Africa* (Juta 2000)
- Davel & Skelton (eds) *Commentary on the Children's Act*: Davel, CJ & Skelton, AM (eds) *Commentary on the Children's Act* loose-leaf (Juta 2007)
- Desai *Mulla's Principles of Hindu Law*: Desai, SA *Mulla's Principles of Hindu Law* 21 ed (LexisNexis Butterworths 2010)
- Diesel & Maxwell *Hinduism in Natal*: Diesel, A & Maxwell, P *Hinduism in Natal: A Brief Guide* (University of Natal Press 1993)
- Diwan & Diwan *Modern Hindu Law*: Diwan, P & Diwan, P *Modern Hindu Law: Codified and Uncodified* 21 ed (Allahabad Law Agency 2014)
- Doi *Shari'ah*: Doi, ARI *Shari'ah: The Islamic Law* (Ta Ha Publishers 1984)
- Du Plessis *Unjustified Enrichment*: Du Plessis, J *The South African Law of Unjustified Enrichment* (Juta 2012)

- Edwards *Conflict of Laws*: Edwards, AB in WA Joubert et al (eds) *LAWSA* vol 2 part 2 'Conflict of Laws' (updated by E Kahn) 2 ed (LexisNexis 2003)
- Erasmus *Superior Court Practice*: Van Loggerenberg, DE, Bishop, M & Brickhill, J *Erasmus Superior Court Practice* loose-leaf (Juta 1994)
- Fenrich et al (eds) *The Future of African Customary Law*: Fenrich, J, Galizzi, P & Higgins, T (eds) *The Future of African Customary Law* (Cambridge University Press 2011)
- Folberg, Milne & Salem (eds) *Divorce and Family Mediation*: Folberg, J, Milne, AL & Salem, P (eds) *Divorce and Family Mediation — Models, Techniques, and Applications* (Guildford Press 2004)
- Forsyth *Private International Law* 4 ed: Forsyth, CF *Private International Law* 4 ed (Juta 2003)
- Forsyth *Private International Law* 5 ed: Forsyth, CF *Private International Law* 5 ed (Juta 2012)
- Gandi *Hindu Law*: Gandi, BM *Hindu Law* 3 ed (Eastern Book Company 2008)
- Hahlo *Husband and Wife* 2 ed: Hahlo, HR *The South African Law of Husband and Wife* 2 ed (Juta 1963)
- Hahlo *Husband and Wife* 4 ed: Hahlo, HR *The South African Law of Husband and Wife* 4 ed (Juta 1975)
- Hahlo *Husband and Wife* 5 ed: Hahlo, HR *The South African Law of Husband and Wife* 5 ed (Juta 1985)
- Hahlo & Kahn *South Africa*: Hahlo, HR & Kahn, E *The Union of South Africa: The Development of its Laws and Constitution* (Juta 1960)
- Hahlo & Sinclair *Reform of the Law of Divorce*: Hahlo, HR & Sinclair, J *The Reform of the South African Law of Divorce* (Juta 1980)
- Harms *Civil Procedure in the Superior Courts*: Harms, DR *Civil Procedure in the Superior Courts* (Butterworths 1990)
- Heaton *Family Law*: Heaton, J *South African Family Law* 3 ed (LexisNexis 2010)
- Heaton *Law of Persons*: Heaton, J *The South African Law of Persons* 4 ed (LexisNexis 2012)
- Herbstein and Van Winsen*: Cilliers, AC, Loots, C & Nel, HC *Herbstein and Van Winsen — The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta 2009)
- Himonga & Nhlapo (eds) *African Customary Law*: Himonga, C & Nhlapo, T (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press Southern Africa 2014)
- Kahn (ed) *Fiat Iustitia*: Kahn, E (ed) *Fiat Iustitia – Essays in Memory of Oliver Deneys Schreiner* (Juta 1983)
- Kahn *Jurisdiction and Conflict of Laws*: Kahn, E 'Jurisdiction and Conflict of Laws in the South African Law of Husband and Wife' Appendix to HR Hahlo *The South African Law of Husband and Wife* 4 ed (Juta 1975)
- Keightley (ed) *Children's Rights*: Keightley, R (ed) *Children's Rights* (Juta 1996)
- Kesari *Modern Hindu Law*: Kesari, UPD *Modern Hindu Law* 9 ed (Durgesh Law House 2013)



- Kruger & Skelton (eds) *Law of Persons*: Kruger, H & Skelton, A (eds) *The Law of Persons in South Africa* (Oxford University Press Southern Africa 2010)
- Lee and Honoré: Erasmus, HJ, Van der Merwe, CG & Van Wyk, AH *Lee and Honoré Family, Things and Succession* 2 ed (Butterworths 1983)
- Lee *Roman-Dutch Law*: Lee, RW *An Introduction to Roman-Dutch Law* 5 ed (Clarendon Press 1953)
- LSSA—LEAD *Practical Manual (2011)*: LSSA—LEAD *Practical Manual: Matrimonial Matters 2011* (LSSA—LEAD 2011)
- LSSA—LEAD *Practical Manual (2014)*: LSSA—LEAD *Practical Manual: Matrimonial Matters 2014* (LSSA—LEAD 2014)
- MacBeth *The Art of Family Mediation*: MacBeth, LE *The Art of Family Mediation: Theory and Practice. A Foundational Text for Mediation Training* (Vandeplas Publishing 2010)
- Macfarlane (ed) *Rethinking Disputes*: Macfarlane, J (ed) *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing 1997)
- Menkel-Meadow et al *Dispute Resolution*: Menkel-Meadow, CJ, Love, L, Schneider, A & Sternlight, J *Dispute Resolution: Beyond the Adversarial Model* 2 ed (Aspen-WoltersKluwer 2011)
- Menski *Hindu Law*: Menski, WF *Hindu Law: Beyond Tradition and Modernity* 3 ed (Oxford University Press 2008)
- Misra & Kumar *Mayne's Hindu Law and Usage*: Misra, R & Kumar, V *Mayne's Hindu Law and Usage* 16 ed (Bharat Law House 2009)
- Mofokeng *Legal Pluralism in South Africa*: Mofokeng, LL *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (Van Schaik Publishers 2009)
- Moosa *Comparative Study*: Moosa, N *Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman* (unpublished LLM dissertation, University of the Western Cape 1991)
- Moosa *Human Rights and Gender Consequences*: Moosa, N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (unpublished LLD thesis, University of the Western Cape 1996)
- Moosa *Unveiling the Mind*: Moosa, N *Unveiling the Mind. The Legal Position of Women in Islam — A South African Context* 2 ed (Juta 2011)
- Nagpal *Modern Hindu Law*: Nagpal, RC *Modern Hindu Law* 2 ed (Eastern Book Co 2008)
- Nasir *Personal Status*: Nasir, JJ *The Islamic Law of Personal Status* vol XXIII Arab and Islamic Laws Series 3 ed (Kluwer Law International 2002)
- Nasir *Status of Women*: Nasir, JJ *The Status of Women under Islamic Law and Modern Islamic Legislation* vol I Arab and Islamic Laws Series 3 ed (Brill NV 2009)
- Pearl & Menski *Muslim Family Law*: Pearl, D & Menski, W *Muslim Family Law* 3 ed (Sweet & Maxwell 1998)

- Pete et al *Civil Procedure*: Pete, S, Hulme, D, Du Plessis, M, Palmer, R & Sibanda, O *Civil Procedure: A Practical Guide* 2 ed (Oxford University Press Southern Africa 2012)
- Pistorius Pollak on *Jurisdiction*: Pistorius, D Pollak on *Jurisdiction* 2 ed (Juta 1993)
- Pollak *Jurisdiction*: Pollak, W *The South African Law of Jurisdiction* (Juta 1937)
- Rautenbach et al *Introduction to Legal Pluralism*: Rautenbach, C, Bekker, JC & Goolam, NMI *Introduction to Legal Pluralism in South Africa* 3 ed (LexisNexis 2010)
- Robinson & Kruger (eds) *The Law of Children and Young Persons*: Robinson, JA & Kruger, JM (eds) *The Law of Children and Young Persons in South Africa* (Butterworths 1997)
- Robinson et al *Family Law*: Robinson, JA, Human, S, Boshoff, A, Smith, BS & Carnelley, M *Introduction to South African Family Law* 4 ed (Printing Things, 2009)
- Roy & Rizvi *Tribal Customary Laws*: Roy, S & Rizvi, SHM *Tribal Customary Laws of North-East India* (BR Publishing Corporation 1990)
- Saksena *The Hindu Marriage Act*: Saksena, KP *The Hindu Marriage Act, 1955* 3 ed (Eastern Book Company 1964)
- Schäfer *Child Law in South Africa*: Schäfer, L *Child Law in South Africa. Domestic and International Perspectives* (LexisNexis 2011)
- Sen *Hindu Law*: Sen, AN Rameshwar Dayal Agarwala on *Hindu Law* 15 ed (Sri Sai Law Publications 2008)
- Sinclair *Matrimonial Property Act*: Sinclair, JD *Introduction to the Matrimonial Property Act 1984* (Juta 1984)
- Sinclair assisted by Heaton *Law of Marriage*: Sinclair, JD assisted by Heaton, J *The Law of Marriage* vol 1 (Juta 1996)
- Singer & Murphy (eds) *Resolving Family Conflicts*: Singer, JB & Murphy, JC (eds) *Resolving Family Conflicts* (Ashgate Publishing 2008)
- Skelton & Carnelley (eds) *Family Law*: Skelton, A & Carnelley, M (eds) *Family Law in South Africa* (Oxford University Press Southern Africa 2010)
- Sloth-Nielsen & Du Toit (eds) *Trials and Tribulations*: Sloth-Nielsen, J & Du Toit, Z (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law* (Juta 2008)
- Smith *Rubric*: Smith, BS *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* (unpublished LLD thesis, University of the Free State 2009)
- South African Law Commission *Report on Customary Marriages*: South African Law Commission Report (Project 90) *The Harmonisation of the Common Law and the Indigenous Law – Report on Customary Marriages* (1998)
- South African Law Reform Commission *Report on Domestic Partnerships*: South African Law Reform Commission Report (Project 118) *Report on Domestic Partnerships* (2006)
- Toefy *Divorce in the Muslim Community*: Toefy, MY *Divorce in the Muslim Community of the Western Cape: A Demographic Study of 600 Divorce Records at the Muslim Judicial Council and National Ulama Council [at the Time*

- also Known as the Islamic Unity Convention (IUC)] between 1994 and 1999* (unpublished MA dissertation, University of Cape Town 2001)
- Toffar *Administration of Islamic Law of Marriage and Divorce*: Toffar, AK *Administration of Islamic Law of Marriage and Divorce in South Africa* (unpublished MA dissertation, University of Durban-Westville 1993)
- Van den Heever *Breach of Promise*: Van den Heever, FP *Breach of Promise and Seduction in South African Law* (Juta 1954)
- Van der Vyver & Joubert *Persone- en Familiereg*: Van der Vyver, JD & Joubert, DJ *Persone- en Familiereg* 3 ed (Juta 1991)
- Van Heerden et al (eds) *Boberg's Law of Persons and the Family*: Van Heerden, B, Cockrell, A & Keightley, R (eds) *Boberg's Law of Persons and the Family* 2 ed (Juta 1999)
- Van Niekerk *Patrimonial Litigation*: Van Niekerk, PA *A Practical Guide to Patrimonial Litigation in Divorce Actions* loose-leaf (LexisNexis 1999)
- Van Zyl *Divorce Mediation and the Best Interests of the Child*: Van Zyl, L *Divorce Mediation and the Best Interests of the Child* (HSRC Press 1997)
- Van Zyl *Handbook*: Van Zyl, L *Handbook of the South African Law of Maintenance Including the Maintenance Act 99 of 1998, the Regulations, A Summary of Cases in Point, the Reciprocal Enforcement of Maintenance Orders Act and Policy Directives of the Department of Justice* 3 ed (LexisNexis 2010)
- Visser & Potgieter *Family Law*: Visser, PJ & Potgieter, JM *Introduction to Family Law* 2 ed (Juta 1998)
- Voet: Voet, J *Commentarius ad Pandectas, Translated with Explanatory Notes and Notes of All South African Cases by Percival Gane Under the Title The Selective Voet Being the Commentary on the Pandects [Paris Edition of 1829] by Johannes Voet [1647–1713] and the Supplement to That Work by Johannes van der Linden [1756–1835]* (Butterworths 1956)
- Wardle & Williams (eds) *Family Law*: Wardle, LD & Williams, CS (eds) *Family Law: Balancing Interests and Pursuing Priorities* (Hein & Co Inc 2007)
- Webb & Ousky *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids — Without Going to Court* (Hudson Street Press 2006)
- Wille's Principles*: Du Bois, F (ed) *Wille's Principles of South African Law* 9 ed (Juta 2007)
- WLUML *Knowing Our Rights*: WLUML *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World* 3 ed (Women Living Under Muslim Laws (WLUML) 2006)



## CHAPTER 8

# *The Dissolution of a Muslim Marriage by Divorce\**

Najma Moosa<sup>#</sup>

### 1 INTRODUCTION

Although Muslims first arrived in South Africa more than 350 years ago and two decades have passed since the advent of democracy, their religious marriages are currently not formally recognised in terms of the (common) law. Muslim marriages are, however, in the process of being recognised through proposed legislation in the form of a 2010 'code' of Muslim personal law.<sup>1</sup>

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<sup>1</sup> Muslim personal law refers to religion-based family law and pertains to marriage, polygyny, divorce, maintenance, custody (care), guardianship and succession: Moosa *Unveiling the Mind* 10 and 82. Matters of Muslim personal law are regulated by the basic prescriptions of the eighth century classical Islamic law (*Shari'a*) as established in the two seventh century binding and immutable primary sources of Islam, namely the *Qur'an* (holy book revealed to Prophet Muhammad partly in the cities of Mecca and Medina) and *Sunna* (traditions (*hadith*) of Muhammad), from which Islamic law is derived and on which it is based. To provide legislative guidance for solutions to new problems,

Islam, through its primary sources, the *Qur'an*<sup>2</sup> and *Sunna*, does not prohibit divorce, but strongly discourages and disapproves of it. Where divorce is inevitable, the *Qur'an*<sup>3</sup> repeatedly encourages spouses to depart from the marriage in a dignified and decent manner, and exhorts honourable, equitable and kind treatment of divorced women.<sup>4</sup> Two key objectives of the 2010 Muslim Marriages Bill<sup>5</sup> are therefore to regulate the termination of Muslim marriages<sup>6</sup> and the consequences flowing from such termination<sup>7</sup> according to these broad guidelines. However, although it contains a dedicated definition clause — clause 1 — which categorically defines Islamic law as including the primary (immutable) and secondary (less immutable) sources, the Bill does not spell out the (classical) Islamic law (*Shari'a*)<sup>8</sup> in this regard. The main purpose of this chapter is therefore to systematically outline and critically analyse all aspects relating to Muslim divorce in terms of Islamic law and to more broadly examine the two primary sources of Islam. Given that, although there are many areas of congruence, the later Islamic law pertaining to divorce is often at variance with the provisions of the earlier primary sources, it is necessary and important to do so since the proposed legislation does not reform divorce laws but accords

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two further secondary 'sources' were developed from and added to the primary sources by human endeavour, namely *ijma* (consensus of opinion of either legal scholars or the community) and *qiyas* (analogical deductions through independent reasoning or *ijtihad* and *ijma*): Moosa *ibid* at 30.

<sup>2</sup> Q.4:19–20; Q.4:130 and Q.33:37. The *Qur'anic* references in this chapter refer to the translation by Ali, *AY The Holy Qur'an (Text, Translation and Commentary)* (Islamic Education Centre 1946), unless otherwise indicated. The first number in the citation refers to the number of the chapter (*surah*) and the second number indicates the verse (*ayat*). All divorce verses are later Medinan verses. Although women in pre-Islamic Arabia already had the power to initiate divorce, there appear to be no earlier Meccan verses relating to divorce: see Moosa *Unveiling the Mind* 19 and 21–3.

<sup>3</sup> See, for example, Q.4:19–20; Q.2:228–229; Q.2:231–232 and Q.65:2. See also the text accompanying note 333 below.

<sup>4</sup> The Prophet Muhammad's first wife was a divorcée and he too was not immune from the human factors at play in making and breaking marital ties.

<sup>5</sup> The 2010 Muslim Marriages Bill is an amended version of the 2003 Muslim Marriages Bill. Since the 2010 Muslim Marriages Bill is the latest published version, it forms the focus of this chapter. Unless otherwise specified, all further references to 'the Muslim Marriages Bill' or 'the Bill' relate to the 2010 draft Bill. The 2010 Muslim Marriages Bill was published for public comment in January 2011: General Notice 37 GG 33946 of 21 January 2011. It is also available at [http://www.justice.gov.za/legislation/bills/2010\\_muslim-marriages-bill.pdf](http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf) (accessed 23 February 2014). The 2001 Islamic Marriages Bill and the 2003 Muslim Marriages Bill are available at [http://www.justice.gov.za/salrc/reports/r\\_prj59\\_2003jul.pdf](http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf) (accessed 23 February 2014).

<sup>6</sup> Clause 9.

<sup>7</sup> Clauses 10 and 11.

<sup>8</sup> The elaborate *Shari'a* divorce rules were developed by four male jurists, namely *Imams* (literally 'leaders') Abu Hanifa, Malik, Shafi'i and Hanbal, who were the founders of the four *Sunni* schools (*madhhabs* or versions) of law, namely *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*: Moosa *Unveiling the Mind* 56. This chapter focuses on these schools and, where relevant, on the differences of opinion among the founding jurists, even within the same school. South African-born Muslims and their religious authorities (*ulama*) are essentially followers of the *Hanafi* and *Shafi'i* schools: Moosa *ibid* at 151.



with Islamic law as it is currently understood and implemented in practice in the Muslim world. This analysis is also undertaken in order to assess the current informal regulation of Muslim divorces in quasi-judicial religious tribunals, and the indirect recognition of such divorces by secular courts and in legislation in South Africa, and to compare it with the proposed regulation through formal recognition and integration as part of state law.

As will become evident below in this chapter, the laws pertaining to a Muslim divorce are complex and varied in nature and therefore lend themselves to confusion and misunderstanding. Misinformation about and misinterpretation of divorce laws have not only had a negative impact on the status of women as well as the image of Islam, but have also resulted in several flawed, though ultimately beneficial, rulings by South African courts. A secondary purpose of this chapter is therefore to demystify a subject that is usually under the pontifical monopoly of essentially conservative local male Muslim leaders (*ulama*) who also serve on religious tribunals, with a view to both clarifying and/or refuting some of the more controversial aspects. This becomes especially important because the proposed legislation envisages that termination of a Muslim marriage officially occurs through secular courts only and therefore religious law will be subject to judicial scrutiny. While such scrutiny is not novel in South Africa, the rulings of the courts have always been made in the context of non-recognition and have therefore justified an avoidance of any 'interpretation' of Islamic law, though not necessarily precluding it. With recognition and its regulation through secular courts, Muslim and non-Muslim judges, marriage officers (who may include 'any [accredited and qualified] Muslim person')<sup>9</sup> and family advocates, regardless of their religion and gender, all will have a role to play in several respects. These roles will inevitably include the formal interpretation and resolution of disputes in the context of Islamic law. Situating a Muslim divorce in a South African and a current religious context are therefore essential first steps in this regard.<sup>10</sup> Mindful of its religious nature, an attempt is made to interrogate complex *Shari'a* issues sensitively and objectively. Divorce, unfortunately, remains a contentious issue because many divorce-related provisions are of a gender-insensitive nature and not all of them can be attributed to later Islamic law. Some discriminatory provisions are divinely attributed. It is therefore inevitable that the implications of these laws for women form an integral part of this chapter.

In order to avoid a duplication of information, the chapter follows an integrated approach when dealing with Islamic law and comparable provisions in the proposed legislation that is based on it. While an integrated approach is also followed with South African law, the respective and different roles of the judiciary and legislature in giving effect to some of the consequences flowing from Muslim divorces are emphasised in this chapter.<sup>11</sup>

<sup>9</sup> See cl 1 of the Muslim Marriages Bill.

<sup>10</sup> See paras 2 and 3 below.

<sup>11</sup> See para 9 below.

## 2 MUSLIM DIVORCE IN THE SOUTH AFRICAN CONTEXT

In the (colonial and apartheid) past, Muslim marriages were not recognised at all because they permit polygyny<sup>12</sup> and are in most cases not solemnised by accredited marriage officers in terms of the Marriage Act 25 of 1961. The provisions of the Marriage Act do not apply to persons married only in terms of Islamic law. Muslims in such marriages therefore cannot approach a secular court for a judicial decree of divorce in terms of the Divorce Act 70 of 1979. Currently, polygyny is no longer an obstacle to recognition and partners to a polygynous marriage are not excluded from the protection of various Acts just because the legal form of their relationship is not consistent with the Marriage Act.<sup>13</sup>

While the consent of both parties and the presence of two witnesses (rather than the presence of the wife) is required for entering into a valid Muslim marriage contract, Islamic law deems the consent of the wife, her presence and the presence of witnesses unnecessary for the valid termination of such a marriage. Because Muslim marriages are more focused on their religious dimension as a sacrament,<sup>14</sup> the majority of such marriages in South Africa are solemnised in a religion-based context. These marriages are either informally (extra-judicially) but validly dissolved by the husband himself by independently exercising his unilateral right to divorce or repudiate (*talaq*)<sup>15</sup> his wife, or unofficially, but more formally, regulated by *ulama* in religious tribunals variously located in the provinces of South Africa.<sup>16</sup> Tribunals are approached by either a husband, to facilitate the *talaq* on his behalf, or the wife, to grant her a judicial divorce in the form of a *faskh*, or even by both parties when the termination is mutually sought. The unfettered right and unqualified power to divorce belongs only to the husband and is not reciprocal.<sup>17</sup> Given that this position is entrenched as a norm in most of the Muslim world, the tribunal, when approached by either or both parties, can be deemed to be stepping into the shoes of the husband when facilitating the *talaq* or granting the *faskh*. The religious stature and qualifications

<sup>12</sup> Polygyny refers to a plurality of wives. A Muslim man may marry up to four wives at any one time, but strict monogamy is enjoined on a Muslim woman: Moosa *Unveiling the Mind* 33.

<sup>13</sup> See note 271 and its accompanying text.

<sup>14</sup> Moosa *Comparative Study* 24–5.

<sup>15</sup> '*Talaq*' literally means 'to set free' in Arabic and is rather archaically translated in English as 'repudiation' and not 'divorce' (as understood in secular parlance). The modern equivalent for the word '*talaq*' would be 'the rejection of the wife and the contract [of marriage]': Nasir *Status of Women* 120. For the sake of simplicity and convenience, I have not followed any of the various systems of Arabic transliteration. For example, the verb 'to divorce' or '*talāq*' (pronounced '*talaaq*') becomes '*talaq*'. I also use '*talaq*' to interchangeably refer to 'divorce' per se or to denote its usage in noun form; that is, 'the divorce'. It is also not uncommon for the terms '*talaq*', 'repudiation', 'dissolution' and 'divorce' to be used interchangeably in various sources. I have, however, added certain selected transliterated words and authors' names where they have occurred in the various sources.

<sup>16</sup> See paras 5 and 6 below.

<sup>17</sup> See para 5.1 below.



of these *ulama* differ. Their interpretations and rulings on divorce (like the triple *talaq*) usually, but not necessarily, accord with the school of Islamic law that dominates in the tribunal, and may therefore also vary. It does however appear that tribunals follow a standard process regarding divorce which, more or less, is uniform.

A small number of these religious marriages are subsequently also solemnised in terms of the Marriage Act. When Muslim couples also get married in terms of South African 'civil' law, women have the same legal rights to divorce as men in terms of the provisions of the Divorce Act. In South African law, a divorce, whether initiated by the husband or the wife, ultimately involves both parties to the marriage and can only be granted judicially by a secular court of law and on specified grounds that are available equally to both spouses. Once divorced, both parties have the immediate right to remarry others, and even each other, without any impediment. Couples may, however, encounter difficulties in being immediately granted a secular divorce if they are also simultaneously married in terms of Islamic law because the Divorce Act was amended in 1996<sup>18</sup> by the insertion of section 5A. In order to obviate the existence of a hanging marriage, this section requires that the spouse within whose power it is to have the religious marriage dissolved or a religious barrier to remarriage removed first take the necessary steps for dissolution or removal of the barrier to remarriage. Whilst well intended, section 5A obstructs a civil divorce by requiring that a religious marriage that is not formally recognised and therefore does not fall within the ambit of the Divorce Act, be dissolved. In the case of the Muslim wife seeking a civil divorce, such religious divorce is not always easy to obtain. Nonetheless, once the civil decree of divorce has been granted, it effectively brings an immediate end to the marriage.<sup>19</sup>

A very different picture emerges in practice, in several respects, where parties who are married only in terms of Islamic law get divorced in terms of Islamic law. Unlike a secular divorce, a Muslim divorce, while it becomes effective from the moment it is pronounced, is not necessarily final at that stage. While a *faskh* ends a marriage with finality, a *talaq* is manifested in several forms, including recommended and innovated forms and further subdivisions. Depending on the form of *talaq* used, the personal status of parties may or may not immediately revert to being unmarried. A marriage may therefore remain valid in all respects, with a view to terminating it at a later stage or, for that matter, not even ending it at all if the husband has a change of heart.<sup>20</sup> While Muslim women have equal access to divorce, the right to divorce is not equal. Forms of divorce are also differently and not equally available to women.<sup>21</sup> While this is exacerbated by the historical introduction of the now entrenched innovated instant or triple

<sup>18</sup> Divorce Amendment Act 95 of 1996.

<sup>19</sup> On s 5A, see further para 4.2(a) below in this chapter and Chapter 2 above.

<sup>20</sup> See further paras 5.1(c) and 6.2(a)(i) below.

<sup>21</sup> See further para 5 below.

divorce<sup>22</sup> and the divergence evident in the various classical juristic schools of Islamic law (even among the views of jurists of the same school) pertaining to divorce,<sup>23</sup> it appears that many of these changes, including the triple *talaq*, were intended to emphasise the integrity of marriage and to protect rather than harm women. It is unfortunate that these initial considerations appear to be lost on most Muslims today, often leaving wives with little protection and even less recourse to the law.

The primary sources, by contrast, encourage divorce through a mutual process rather than a single act; emphasise equitable, informed and witnessed separation; and strongly advocate reconciliation. In sharp contrast, a Muslim man may, in terms of *Shari'a*, on his own volition and without any restrictions or reason, unilaterally and extra-judicially bring an end to his marriage. His wife, by contrast, may usually only divorce him for good reason, on defined grounds, and through an authoritative religious (judicial) body, which usually involves a cumbersome and lengthy process before a divorce may or may not eventually be granted. Thus, it is not uncommon for Islamic divorces to not involve both parties (or even others in efforts toward reconciliation), to take place both judicially and extra-judicially and, depending on the form used, for a marriage to be 'suspended' in one instance or brought to an immediate end in another. Parties may or may not remarry each other after the divorce has become finalised. Regardless of whether a divorce is in the process of being finalised (revocable divorce) or has in fact been finalised (irrevocable and de facto divorce) a wife is also not immediately free to remarry someone else. The husband, however, is free to do so in both these instances.<sup>24</sup> He may in any event also enter into a further marriage even while the spouses are married and while there is as yet no question of divorce.

In cases where religious tribunals do facilitate *talaqs* and issue *faskhs*, it is an inexpensive exercise, and certificates to this effect are recognised as proof of divorce for official purposes — for example, as is required in terms of section 5A of the Divorce Act. However, in South Africa, the decisions of tribunals, although morally binding, are not legally enforceable. Recalcitrant husbands therefore cannot be legally compelled to abide by the decisions of these tribunals or to give effect to the usually limited consequences flowing from such divorces. The available and restricted Islamic law protections in this regard are also not optimally utilised or interpreted by these tribunals to the benefit of women. This has often resulted in Muslim women, left with no other option, seeking relief from secular courts in terms of South African law. However, this is an expensive exercise and doing so has not always been without obstacles. When provided by secular courts, relief is usually, although not necessarily, limited to the confines of Islamic law. The main reason for the difficulties faced by women is attributed to the non-recognition of Muslim marriages.

<sup>22</sup> See para 5.1(c)(ii) below.

<sup>23</sup> See paras 5 and 6 below.

<sup>24</sup> See the discussion of the *idda* in para 6.2(d) below.

The South African legislature<sup>25</sup> and judiciary,<sup>26</sup> increasingly since the demise of apartheid and the introduction of our first democratic interim<sup>27</sup> and current<sup>28</sup> Constitutions, have indirectly and in a piecemeal fashion recognised both monogamous and polygynous Muslim marriages (and therefore Muslim divorces) by giving effect to some of the consequences flowing from the termination of Muslim marriages by death or divorce in order to provide relief to women and children.<sup>29</sup> Interim relief, which in terms of Uniform Rule 43 ought only to be available to spouses in civil marriages, has also been extended by the courts to include Muslim marriages within its ambit. The courts have been criticised for doing so and for going beyond the provisions of Islamic law in granting such relief, although this may not necessarily be the case.<sup>30</sup> South African courts have, however, not directly recognised Muslim marriages or resolved interpretational complexities in this regard. The judiciary maintains that it is the role of the legislature to do so.

Cognisant of the practical realities of non-recognition, the legislature in its turn hopes to change the *status quo* by formally giving direct statutory recognition to monogamous and polygynous Muslim marriages in South Africa. It proposes to do so by adjusting South African law, not by amending the existing Marriage Act, but through a separate enactment as it did with polygynous African customary marriages in 1998 and heterosexual or same-sex monogamous civil unions in 2006. Following a protracted<sup>31</sup> process which has proved to be quite hard work, given the religious nature of the subject, a statement of Muslim personal law that can satisfy and synthesise both diverse Muslim (ideological)<sup>32</sup> perspectives and the constitutional guarantees of religious freedom and equality to all South Africans has been framed by way of the Muslim Marriages Bill. The Bill is

<sup>25</sup> Various Acts, or specific sections of Acts, expressly provide that they apply to de facto monogamous or (potentially) polygynous religious marriages: see Heaton *Family Law* 232; Rautenbach et al *Introduction to Legal Pluralism* 192.

<sup>26</sup> The courts have also interpreted the wording of several other statutory provisions to extend to Muslim marriages and, in several other decisions which did not pertain to the interpretation of legislation, they also extended limited recognition to Muslim marriages: see Heaton *Family Law* 232–5; Moosa *Unveiling the Mind* 147–9; Rautenbach et al *Introduction to Legal Pluralism* 198–203. See also Mbatha, L, Moosa, N & Bonthuys, E ‘Culture and Religion’ in Bonthuys & Albertyn (eds) *Gender, Law and Justice* 162 and 171–2.

<sup>27</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>28</sup> Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

<sup>29</sup> See further para 9.1 below.

<sup>30</sup> See further para 9.6 below.

<sup>31</sup> For a detailed history of the government’s engagement with Islamic law and the three (2001, 2003 and 2010) draft Bills, see Moosa *Unveiling the Mind* 143–62.

<sup>32</sup> While, in terms of the Muslim Marriages Bill, *talaq* remains available only to the husband, the fact that the Muslim Marriages Bill recognises three further forms of Islamic divorce was considered by some to be a compromise to appease progressives: see Moosa *Unveiling the Mind* 84–112; Goolam, NMI, Badat, JGH & Moosa, N ‘Religious Legal Systems: Law of Marriage — Muslim Law’ in Rautenbach et al *Introduction to Legal Pluralism* 308.

essentially a *Shari'a* compliant code and is based in part on existing progressive interpretations rather than on any radical reformulation of Muslim personal law. The proposed legislation does not reform divorce laws but accords with divorce rules developed by the *Sunni* schools of Islamic law as they are currently understood and implemented in practice in the Muslim world.<sup>33</sup> Islamic law is not being reformed with the proposed recognition of Muslim marriages, but South African law will be adjusted in order to give effect to such recognition.

The only area of law that the secular South African Constitution expressly permits to be governed by religious law is personal and family law.<sup>34</sup> The Constitution therefore expressly affords such personal and family law constitutional protection, *if recognised*. As a result, a court cannot deem (discriminatory) religious personal and family law as inherently in violation of the Constitution's freedom of religion clause.<sup>35</sup> However, a court can rely on the provisions in the Constitution that Muslim personal law must be consistent with the Constitution and its Bill of Rights,<sup>36</sup> especially equality and human dignity.<sup>37</sup>

Given certain proposed amendments to the Muslim Marriages Bill which curtail the previously extended roles of religious authorities and tribunals envisaged in the 2001 Islamic Marriages Bill and the 2003 Muslim Marriages Bill, the 2010 Muslim Marriages Bill was understandably not met with the same enthusiasm by *ulama*. Nonetheless, the Muslim Marriages Bill seeks to ensure knowledge of the divorce on the part of the wife and finalisation of the process of divorce.<sup>38</sup> The judicial officers who are expected to interpret and apply the provisions of the Bill will be able to do so with the assistance of a tangible and coherent code. However, since the Bill does not spell out the Islamic law in this regard, *ulama* are expected to continue to play an integral role in giving effect to and interpreting its provisions. The status of religious tribunals is acknowledged and allowances are made for their decisions to have more than just the moral force that they currently enjoy.

No legislation has as yet been enacted despite predictions that the Muslim Marriages Bill would become reality by the end of 2012.<sup>39</sup> It is contended that

<sup>33</sup> Following the apparent closing of the doors to independent reasoning or interpretation (*ijtihad*) by *Sunni* jurists in the tenth century, the interpretation and application of the primary sources were considered complete until reforms were introduced through codification. Since the 1950s the number of states that have adopted their own codes of Muslim personal law has increased. The law was codified, amended or reformed based on re-interpretation of the *Shari'a*. Today almost every Arab state has its own personal law code, with *Shari'a* still forming the basis of Muslim personal law, albeit reformed, codified and applied by modern legal structures: see Moosa *Unveiling the Mind* 68–9 and 74–5.

<sup>34</sup> Section 15(3)(a).

<sup>35</sup> Section 15(1).

<sup>36</sup> Section 15(3)(b) and s 39(3) (interpretation clause).

<sup>37</sup> Sections 9 and 10 of the Constitution, respectively.

<sup>38</sup> See para 8 below.

<sup>39</sup> See Karaan, M 'MMB: This is the Year' *The Voice of the Cape* 12 January 2012, available at [http://www.vocfm.co.za/index.php?option=com\\_k2&view=item&id=2925:mmb-this-is-the-year&Itemid=146](http://www.vocfm.co.za/index.php?option=com_k2&view=item&id=2925:mmb-this-is-the-year&Itemid=146) (accessed 23 February 2014).

formal statutory recognition, when it happens, will provide a necessary bridge between South African law and Islamic law and bring with it a new dimension to the nature and current (indirect) standing of Muslim divorces in South African law. Many Muslims, including members of *ulama* bodies, remain optimistic about recognition.

### 3 MUSLIM DIVORCE IN THE CURRENT RELIGIOUS CONTEXT

The *Qur'an*,<sup>40</sup> as a moral code, is intended to be a normative source of guidance and not a lawbook with clear-cut answers to all legal questions. Nonetheless, divorce in the primary sources and its later codification (*Shari'a*) generally favours men over women. Codes of Muslim personal law were introduced to overcome those juristic doctrines which were unfavourable to women. However, reform has been minimal and proved to be only partly effective. Through the expansion of women's rights, in some instances modestly and in others dramatically, divorce was acknowledged as an area of discrimination. For example, the abolition of men's right to unilateral divorce (*talaq*) — which all schools of law agree belong to men — and a provision to enable women to request dissolution of a marriage are indicators of relative improvement in the status of women based on Islamic principles. More radical examples include the expansion both of the types or forms of divorce (including access to judicial *faskh*) and of the grounds for divorce initiated by women,<sup>41</sup> as well as the introduction of the concept of the 'best interests of the child'. The latter concept enables a woman to retain care of her children in the event of divorce even though she may have remarried, or even to retain care for longer than she would normally have been entitled to in terms of Islamic law.<sup>42</sup>

The following conflicting factors must therefore be taken into consideration as far as these divorce laws are concerned in the 21st century. On the one hand, the primary sources either allude to or clearly contain some contentious provisions pertaining to divorce and therefore cannot be deemed to have been 'imagined' by jurists into the law because of any misogynistic tendencies. Since Islamic law is also based on the primary sources, it cannot be amended or reformulated to remove all discrimination against women. Some of the juristic interpretations pertaining to divorce, especially minority views, were open to, and indeed did, offer women the protection they often needed as then dependants<sup>43</sup> of economically superior men. It could therefore not reasonably have been expected that equality between the sexes in these matters be a serious consideration for jurists at that time, nor could gender equality have been expected to be part of any aspirations that those jurists might have had for an 'imagined future' such as we are currently experiencing. While the jurists may have

<sup>40</sup> Q.2:184.

<sup>41</sup> See paras 5.2 and 5.4 below.

<sup>42</sup> See para 9.5 below.

<sup>43</sup> Q.4:34.

considered their strivings to be open to endless possibilities and to be a platform that was always meant to be under construction,<sup>44</sup> it is unfortunate that the spirit and freedom implicit in these considerations have often been overlooked.

On the other hand, whilst Islamic law is based on the primary sources, it also provides for a restrictive divorce law by way of interpretations that often vary from the primary sources. These interpretations have often been given precedence over more equitable divine Islamic injunctions,<sup>45</sup> and have been either blindly followed since the Middle Ages or positively tempered by modern day considerations and circumstances. Furthermore, the classical jurists (even within the same school) offer different, often discriminatory, views on divorce law, ranging from one extreme to the other.<sup>46</sup>

Ultimately, variations between the various sources' rulings pertaining to divorce do not bode well for Muslim wives since *Shari'a* also forms the principal 'source' of modern legislation and is an integral part of the substantive rules of Muslim personal law of many Muslim countries. This effectively means that in the constitutions of most Muslim countries religion trumps gender equality.<sup>47</sup> Its divine origin has also meant that Muslim personal law is an area of law that is unlikely to undergo any major change. The main grievances against Muslim personal law are directed at the arbitrary and unilateral rights of a husband to divorce his wife and to marry more than one wife, as well as against the laws relating to care, guardianship and maintenance. The wife is often the last to know that her husband has divorced her or that he has also married someone else, is often the first to be burdened with the duty of care of their children, and is entitled to very limited maintenance and other assets upon divorce.<sup>48</sup>

## 4 GENERAL SCOPE AND APPLICATION OF THE MUSLIM MARRIAGES BILL, 2010

### 4.1 General scope

#### (a) *Regulating aspects of Muslim personal law: Polygyny and inheritance*

Should the Muslim Marriages Bill become law in South Africa, most (but not all) aspects of Muslim personal law will be regulated by it. While inheritance is not formally regulated by the Bill, it may impact on divorce.

Clause 8 of the Bill regulates the practice of polygyny in South Africa. Polygyny is creatively curtailed by complying with *Qur'anic* injunctions of justice and by

<sup>44</sup> Moosa *Unveiling the Mind* 58.

<sup>45</sup> Moosa *Unveiling the Mind* 56.

<sup>46</sup> Engineer, AA *The Rights of Women in Islam* (New Dawn Press Inc 2004) 167; Rahman, F 'The Status of Women in Islam: A Modernist Interpretation' in H Papanek & G Minault (eds) *Separate World Studies of Purdah in South Asia* (South Asia Books 1982) 302–3.

<sup>47</sup> Moosa *Human Rights and Gender Consequences* 170ff; Moosa, N 'Human Rights in Islam' (1998) 14 *SAJHR* 508 at 509–10.

<sup>48</sup> See para 9 below.



secular court intervention to prevent abuse. The Bill indicates that each wife in a polygynous Muslim marriage can insist on just and equal treatment between wives, and that failure by the husband to treat his wives justly and equally provides a wife with valid grounds for divorce.<sup>49</sup> Men who enter into polygynous marriages must be able to support their wives upon marriage and even after they divorce them.<sup>50</sup> Whether these provisions will have an impact on reducing the number of polygynous marriages and the divorce rate remains to be seen.

**(b) Matrimonial property system**

Clause 8(1) of the Bill provides that the default matrimonial property system of an Islamic marriage is complete separation of property (that is, marriage out of community of property without the accrual system), unless the parties have mutually and expressly regulated otherwise in an antenuptial contract. In Islam, an antenuptial contract that provides for the accrual system is allowed and valid.<sup>51</sup> While Islam is amenable to the accrual system, many women are ignorant of this fact and therefore do not give it consideration as a viable alternative. The few who are aware of it, are often discouraged by their future husbands and family from giving the accrual system any consideration for reasons which include the fact that the husband is deemed solely responsible for the maintenance of the family, including the wife, during marriage and for their children upon divorce. Nonetheless, practical reality highlights that the default matrimonial property system usually has a negative impact on the limited financial status of women following an Islamic divorce or the death of their husband.

**(c) Heterosexual Muslim marriages, same-sex civil unions, interreligious marriages, and customary marriages**

While Muslims and the South African courts approached by them have had difficulty defining a Muslim in the past,<sup>52</sup> the Muslim Marriages Bill, in its list of definitions,<sup>53</sup> actually defines a 'Muslim'. It also defines a 'Muslim marriage' as meaning 'a marriage between a man and woman . . .'. While it may be easier to presume that only Muslims, and men and women only, would want to be parties to a Muslim marriage in terms of the Bill, this does not detract from the fact

<sup>49</sup> See cl 1 of the Muslim Marriages Bill, relating to ground (g) for divorce under the definition of 'Faskh'.

<sup>50</sup> Clause 8(7)(a) and (b).

<sup>51</sup> Toffar *Administration of Islamic Law of Marriage and Divorce* 261. A marriage in community of property is also possible: see Moosa *Comparative Study* 73. On the division of assets upon divorce in marriages subject to the accrual system and those that are in community of property, see Chapter 4 above.

<sup>52</sup> Other than secular courts dealing with matters of a Muslim personal law nature, there are documented cases of a Muslim religious tribunal, the Western Cape-based Muslim Judicial Council ('MJC'), resorting to secular courts to resolve issues of a religious doctrinal nature: see Moosa *Human Rights and Gender Consequences* 322–3 and 326–8.

<sup>53</sup> Clause 1.

that potential human rights-related implications might arise from heterosexual monogamous or polygynous interreligious marriages (both those permitted and not permitted by Islam),<sup>54</sup> and same-sex civil unions (recognised in South Africa since 2006 but deemed to be not permitted by Islam).

Apart from stating in clause 5(8) that the prohibition of a Muslim marriage between persons can also be based on 'any other reason . . . determined by Islamic law', the Bill is silent on interreligious marriages, which, although only permitted for Muslim men, do occur among Muslims of both sexes locally. The polygynous marriages of a Muslim man may be entered into with non-Muslim *kitabī* (mainly Christian and Jewish) women who, because they practise a monotheistic religion, do not have to convert to Islam. A Muslim woman may, however, only marry a Muslim man and only one at a time.<sup>55</sup> While the *Qur'an* extols freedom of religion and emphasises non-compulsion as regards religious belief,<sup>56</sup> a study by Toefy on divorce in the Muslim community in the Western Cape highlights that in reality '[t]he majority of converts [non-Muslim men and women who adopt Islam] are forced to become Muslims in order to marry their Muslim partners'.<sup>57</sup> For a Muslim woman or man to marry someone from a 'non-revealed' religion is deemed to be out of the question unless such person converts to Islam. If, for example, during the marriage of a Hindu couple, only the husband converts to Islam (wife non-Muslim and non-*kitabī*) or only the wife converts to Islam (husband non-Muslim), the marriage must be dissolved.<sup>58</sup>

Apparently a change of religion (apostasy) by either a Muslim wife, *kitabī* wife or a Muslim husband automatically (and coercively) dissolves the marriage by operation of law.<sup>59</sup> If, during the marriage of a non-Muslim couple, the husband alone converts from a revealed or monotheistic religion to Islam, the marriage can continue but this is not the case if it is the only wife who so converts to Islam. During a Muslim marriage, apostasy on the part of the Muslim husband dissolves the marriage because a Muslim woman cannot be married to a non-Muslim man.<sup>60</sup> Since the marriage only becomes invalid after it has been concluded, this does not appear to be a case of annulment of the marriage. It is unclear whether a Muslim marriage is automatically dissolved if the wife converts from Islam to another monotheistic religion and in so doing becomes a *kitabī* wife, or whether this is merely a ground for divorce. As is indicated below,<sup>61</sup> such apostasy of the

<sup>54</sup> See also Moosa *Unveiling the Mind* 32–6 where juristic views of apostasy in the context of interreligious marriages, including in a South African context, are detailed and where the human rights implications of interreligious marriages are referred to. See also paras 8 and 9.1 below.

<sup>55</sup> Moosa *Unveiling the Mind* 33.

<sup>56</sup> Q.2:256 and Q.18:29.

<sup>57</sup> Toefy *Divorce in the Muslim Community* 136.

<sup>58</sup> Ahmad *Muslim Law of Divorce* 526.

<sup>59</sup> Ahmad *Muslim Law of Divorce* 25; Nasir *Personal Status* 134 and *Status of Women* 154.

<sup>60</sup> Ahmad *Muslim Law of Divorce* 526.

<sup>61</sup> See paras 9.4 and 9.5 below.



mother and such conversions usually have implications for the wife's right to maintenance and care of the children. For a Muslim woman seeking to exit from a bad marriage, apostasy beckons as a liberating prospect of freedom and might therefore not necessarily be viewed in a bad light by her.<sup>62</sup>

While the Muslim Marriages Bill recognises that 'a Muslim marriage may be dissolved by a court on any ground permitted by Islamic law' or 'on any ground which is recognised as valid for the dissolution of marriages under Islamic law',<sup>63</sup> and although it clearly spells out an extensive list of grounds in clause 1 under the definition of '*Faskh*',<sup>64</sup> the clause does not include all such grounds. Mindful of the constitutional and human rights implications for freedom of religion, the Bill shies away from dealing directly with interfaith marriages and therefore it is not surprising that, for example, apostasy (or conversion from Islam, which implicitly would also include the right to change one's religion or belief<sup>65</sup>), although interpreted to automatically terminate a Muslim marriage in some Muslim and non-Muslim countries (and not in others), is not mentioned as a ground for divorce in the Bill. This, however, does not mean that it will not be relevant as a ground for divorce once Muslim marriages are formally recognised. This much becomes evident from the abovementioned study on divorce by Toefy.<sup>66</sup>

The Muslim Marriages Bill is not applicable to African customary marriages.<sup>67</sup>

#### (d) *Changing of schools of law (talfiq)*

As far as *talfiq* is concerned, the provisions of the Muslim Marriages Bill are not restricted to any school of law other than by the fact that only the *Sunni* schools of law are taken into consideration. As is evident from *Ryland v Edros*,<sup>68</sup> a case that is discussed below in this chapter,<sup>69</sup> parties have in the past agreed that the judge apply the rules of divorce pertaining to one particular school, and it would make practical sense for parties to decide on and select only one of the four schools to apply to both of them for the purposes of regulating the consequences flowing from their marriage even though one or both of them may privately adopt a different school or no school at all. This equals 'school shopping'! A Muslim is permitted to justifiably change from one school to another when doing so would provide a better solution to a legal matter. The preferred solution would obviously favour the party making the change and this could be regarded

<sup>62</sup> Mayer, *AE Islam and Human Rights: Tradition and Politics* 4 ed (Westview Press 2007) 171–2.

<sup>63</sup> Clause 9(2), (5)(a) and (5)(d). See also para 5.4(b) below.

<sup>64</sup> Clause 1.

<sup>65</sup> See Moosa *Human Rights and Gender Consequences* 125–34 for a discussion of freedom of religion in the context of international human rights instruments.

<sup>66</sup> Toefy *Divorce in the Muslim Community*.

<sup>67</sup> Clause 2(4)(c). On the dissolution of a customary marriage by divorce, see Chapter 7 above.

<sup>68</sup> 1997 (2) SA 690 (C).

<sup>69</sup> See para 9.1 below.

as opportunistic. However, the practice of following the opinion of a jurist of a school other than the one to which one subscribes, although allowed, is generally not encouraged. The Muslim Marriages Bill, through its incorporation of an already reformed Muslim personal law, has indirectly addressed this matter. As explained below in this chapter,<sup>70</sup> this is especially evident in its treatment of the grounds for divorce and its provision of an extensive list of grounds for divorce which is not limited to any particular school but has been adopted for justifiable reasons. The practice of *talfiq* can therefore be utilised to overcome stringent laws of divorce because it makes it possible to provide the best interpretative solution based on the *Qur'an* and *Sunna*.<sup>71</sup>

## 4.2 General application

The Muslim Marriages Bill addresses the situation where parties marry in terms of Islamic law either prior to or after its commencement and where parties also enter into a civil marriage.

Cognisant of the practical problems then (and still) faced<sup>72</sup> by women upon the termination of their unregistered African customary marriages in cases where their husbands refused to register these marriages, the Bill, in seeking to directly redress past injustices of non-recognition, will by default apply to all Muslim marriages already in existence prior to its commencement, unless the parties jointly opt out of it.<sup>73</sup> *Ulama* question the fairness of this position to the spouse who does not want to be bound by the Bill but would be because the other spouse wants it to apply to the marriage. The automatic application of the Bill to Muslim marriages will, however, make it easier for the courts to give effect to the consequences of the marriage both during its existence and upon its termination. While the lack of freedom of choice is understandably a matter of concern for *ulama*, it is submitted that this has less to do with being 'forced' or 'coerced' into applying the Bill to marriages and more to do with the fact that Muslim husbands will for the first time be held legally accountable for the consequences of their marriages. If parties do not want the Bill to apply to their marriage and choose to exclude the marriage from its ambit, the marriage is not invalidated, nor is it considered illegal, and the spouses are certainly not placed beyond having recourse to existing constitutional and common-law rights and protections.<sup>74</sup>

More in alignment with freedom of choice, the Bill also places a clear responsibility on Muslims who wish to get married in terms of Islamic law, to

<sup>70</sup> See para 5.4(b) below.

<sup>71</sup> See Moosa *Unveiling the Mind* 57, 70 and 75. For examples of how the various approaches are utilised to effect such a change as far as divorce is concerned, see Moosa *ibid* at 64–5.

<sup>72</sup> Manyathi, N 'Registration of Customary Marriages Still Creates Confusion' May 2012 *De Rebus* 24 at 24–5.

<sup>73</sup> Clause 2(2).

<sup>74</sup> Clause 2(3).

regulate their marital affairs in accordance with a number of options available to them after the commencement of the Bill. The Bill will apply to Muslim marriages contracted after its enactment where parties elect to have it apply.<sup>75</sup> In this case, women will at least be aware beforehand of what these choices entail should their marriages terminate through divorce.

The Bill also makes provision for parties who have, in addition to a Muslim marriage, entered into a civil marriage whether before or after the commencement of the Bill. Currently, the Muslim marriage of spouses who are married both in terms of Islamic law and South African ('civil') law is valid in terms of Islamic law but the proprietary consequences of the marriage, for example, are regulated by South African law.<sup>76</sup> As indicated above in this chapter,<sup>77</sup> Muslims usually enter into a Muslim marriage and remain married only in terms of Islamic law. However, in some cases, they also thereafter enter into a civil marriage with each other to guarantee the validity of their relationship in terms of South African law. They usually do so for personal and professional reasons. The Bill allows spouses in such existing dual marriages an opportunity to elect to apply its provisions to the consequences of their existing civil marriage without affecting any vested proprietary rights arising from the civil marriage (whether in community of property or subject to the accrual system or complete separation of property).<sup>78</sup> Should both parties fail to exercise a choice within a specified time limit, the *status quo* remains; that is, South African law will apply to *all* the consequences of their marriage. This implies that South African law will also apply when spouses seek a secular dissolution of their secular marriage. However, as explained under the next heading, section 5A of the Divorce Act poses a fundamental problem in this regard.

The Bill will not apply to a civil marriage concluded after its commencement.<sup>79</sup> After the commencement of the Bill, parties will also not be allowed to simultaneously enter into a legal Muslim marriage and a legal civil marriage, as is currently the case. Parties who elect to get married in terms of the Bill will not subsequently be allowed to enter into a civil marriage as well, and vice versa.

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<sup>75</sup> Clause 2(1).

<sup>76</sup> For complications that currently arise in this regard, see *Ismail v Ismail* [2007] ZAECHC 3, 8 February 2007, available at <http://www.saflti.org/za/cases/ZAECHC/2007/3.html> (accessed 23 February 2014). In this case, the applicant was the second wife of the first respondent. The spouses later became estranged. Subsequently, the applicant received notice that their marriage had been unilaterally terminated by her husband through *talaq*. This was conveniently done during the time that the applicant was in the process of bringing an urgent application for an interim interdict prohibiting the sale of property belonging to the first and second respondent (first wife) in respect of which the applicant had an unregistered 99-year lease. The first and second respondents were the parties to a civil marriage.

<sup>77</sup> See para 1 above.

<sup>78</sup> Clause 2(4)(a).

<sup>79</sup> Clause 2(4)(b).

**(a) Simultaneous civil and Muslim marriages and the current and proposed application of section 5A of the Divorce Act 70 of 1979<sup>80</sup>**

Section 5A of the Divorce Act is only applicable to the divorce proceedings of spouses who have concluded both a civil and religious marriage. Jewish and Muslim religious authorities apparently collaborated in support of the insertion of section 5A into the Divorce Act.<sup>81</sup> As the law stands, section 5A effectively provides that a court has a discretion to refuse to dissolve an existing civil marriage until a Muslim marriage between the same parties has also been irrevocably dissolved *or* unless a barrier to the wife's remarriage has been removed. In the case of a Muslim marriage, it is submitted that this means that the *idda* that a Muslim wife must observe and during which she may not remarry, must have elapsed because the completion of the *idda* effectively finalises a revocable divorce. This interpretation is supported by the fact that the Muslim Marriages Bill not only confirms the current position as far as section 5A is concerned, but also specifically indicates, in its definition of *idda*,<sup>82</sup> that a wife may not remarry during the *idda* period.<sup>83</sup> The purpose behind section 5A is to avoid the desperate situation in which Muslim women often find themselves when their husbands, in whose hands lies the sole and unilateral power to religiously divorce them, unreasonably refuse to do so. Thus, the idea behind refusing a civil divorce is to avoid a situation where the continued existence of the Muslim marriage would effectively result in both a hanging Muslim marriage and a hanging civil divorce. The Bill confirms the current position by providing that when a spouse to an existing civil and Muslim marriage files for a civil divorce after the commencement of the Bill, the court may not dissolve the civil marriage by granting a decree of divorce until it is satisfied that the Muslim marriage has been dissolved.<sup>84</sup> This will presumably also be the case even after the parties have elected that the Bill not apply to their Muslim or civil marriage.

Some academics and lawyers understandably argue that the object of section 5A is not to violate the constitutional right to equality, and that a limitation of the right to freedom of religion is justified because the purpose in both instances is to achieve substantive gender equality.<sup>85</sup> One can also understand the purpose and rationale of section 5A and the proposed provision in the Bill, namely that finalisation of a religious divorce is ensured in cases where a husband may unreasonably and unjustifiably withhold a divorce from a wife, and the wife is spared from having to deal with the moral implications and social discomfort

<sup>80</sup> On s 5A, see also Chapter 2 above.

<sup>81</sup> Keraan, Y personal communication April 2012. The personal communication from a senior *ulama* member of the MJC, *Moulana* Yusuf Keraan, is referred to with his permission. The insertion of s 5A was brought about by the Divorce Amendment Act 95 of 1996.

<sup>82</sup> Clause 1.

<sup>83</sup> See para 6.2(d) below for detail regarding *idda*.

<sup>84</sup> Clause 13(1).

<sup>85</sup> Heaton *Family Law* 122.

and uncertainty associated with a hanging divorce (religiously married but civilly divorced). However, it is difficult to be convinced<sup>86</sup> of the legal soundness and logic of section 5A, and even more so today, in the case where parties have elected the secular regulation of their marriage over that of recognition in terms of the Bill.

Given that a Muslim marriage contract merely requires the consent of both parties and (two) witnesses to ensure its validity, it would have made more practical sense if the Bill had simply deemed the secular divorce of a couple who married in terms of both civil and Islamic law and who got divorced in terms of the Bill after having elected that its provisions apply to their religious marriage, to be effective automatically (with due regard to its proprietary consequences), and vice versa. Thus, if a Muslim couple elected not to have their existing Islamic marriage regulated by the Bill and instead opted to continue to have their civil marriage regulated by South African law, and then wished to divorce each other, the Bill could have streamlined and simplified matters considerably had it provided that on the granting of a civil divorce by a secular court (the one and same court which, with recognition, will have jurisdiction in the case of a Muslim judicial divorce (*faskh*)), the Islamic marriage would be automatically dissolved by *faskh* as well. In so doing, two birds would have been killed with one stone. Why should the couple be 'forced' to have to make the provisions of the Bill apply to their divorce and undergo further inconvenience when they have both elected the secular route? Transposing the same scenario into the current position where Muslim marriages are as yet unrecognised, the same logic should have applied to a couple seeking a civil divorce in a secular court. Instead of such court denying the couple a civil divorce *until* they first get divorced religiously (when the Muslim marriage itself is not as yet formally recognised, thus effectively putting the 'cart before the horse'),<sup>87</sup> the civil divorce should be granted and at the same time the religious marriage should automatically be deemed to be dissolved by judicial divorce (*faskh*). This form of divorce is available to both parties independently of the cooperation of the other. In this way the absence of any intention (for example, for fraudulent reasons) other than a serious intention to dissolve the marriages is assured. Furthermore, while the court may refuse to grant the civil divorce until a Muslim divorce has been granted, section 5A does not authorise the court to compel a husband to divorce his wife or even to penalise him if he unreasonably fails to cooperate with her in this regard. She may have difficulty in obtaining a *talaq* from her husband or even a *faskh* from a religious tribunal whose *ulama* may prefer instead to reconcile the parties or, based on their conservative interpretation of the grounds for divorce, may not believe that the marriage has sufficiently or irretrievably broken down to justify its termination. The support by the Muslim religious tribunals for the

<sup>86</sup> See Moosa, N 'Muslim Divorce and the 1999 Divorce Amendment Act: The Cart before the Horse?' October 1999 *De Rebus* 32 at 32-7.

<sup>87</sup> See Moosa op cit note 86 at 32-7 for a detailed discussion in this regard.

amendment of the Divorce Act by the insertion of section 5A may therefore have been selfishly motivated.

## 5 FORMS (METHODS) OF DIVORCE

### 5.1 Divorce by the husband

Dissolution of the marriage by the husband can occur in three forms: *talaq* (repudiation); *ila* (vow of continence); and *zihar* (injurious assimilation).<sup>88</sup> The focus is placed on *talaq* because the latter two forms of dissolution, although described by classical jurists and regulated in the *Qur'an*, are considered to have little practical relevance today and are not even mentioned in the Muslim Marriages Bill. However, they remain valid forms of divorce and are applied in several Muslim countries;<sup>89</sup> therefore they need some elaboration. Although already in existence in pre-Islamic Arabia, with the advent of Islam, *ila* and *zihar* were regulated in the *Qur'an* and underwent some reform. This was also the case with the mutual form of divorce called *li'an* (mutual imprecation), which is also not entirely obsolete.<sup>90</sup>

#### (a) *Ila*<sup>91</sup>

*Ila* refers to a husband making an oath of sexual abstinence of his wife for four or more months. In this case, we have a hanging or limping marriage. The husband may withdraw the oath (revoke the divorce) and resume the marriage. He may also opt to uphold his oath and in this way give effect to the divorce. The *Hanafis* maintain that after four months have elapsed, the divorce amounts to one irrevocable pronouncement of divorce. The three other schools (*Maliki*, *Shafi'i* and *Hanbali*) make the separation subject to the husband actually pronouncing the divorce or to the wife applying to court for the divorce, after which it is considered to be a revocable divorce.<sup>92</sup>

#### (b) *Zihar*

*Zihar* refers to a husband comparing his wife in a derogatory manner to a female relative within a prohibited degree, for example, ('the back of') his mother. This form of divorce can be withdrawn by the husband against the performance of a specified and particularly heavy expiation. As a penalty he must either pay the price of freeing a slave or fast for two months in succession<sup>93</sup> or feed 60

<sup>88</sup> Nasir *Personal Status* 106.

<sup>89</sup> For examples of the use of *ila* and *zihar*, see Nasir *Status of Women* 118–19.

<sup>90</sup> See para 5.3(a) below.

<sup>91</sup> Q.2:226–7.

<sup>92</sup> Nasir *Personal Status* 114 and *Status of Women* 119; Pearl & Menski *Muslim Family Law* 282–3. See paras 5.4 and 5.4(a) below for details on the revocability of a judicial divorce.

<sup>93</sup> This is double the obligatory one month of fasting during the holy month of Ramadaan (ninth month in the Islamic lunar calendar).



poor people before he may resume the marriage by, for example, having sexual relations with his wife.<sup>94</sup>

**(c) The divisions and subdivisions of talaq**

A *talaq*, besides being one of several forms of divorce, may itself also be effected in one of a number of forms, some being more meritorious than others. The forms of *talaq* are generally grouped into two methods and are followed by *Sunni* Muslims. One method is recommended by the primary sources and is known as *talaq al-Sunna* (divorce according to the rules laid down in the traditions of Muhammad). The second and least meritorious method (divorce in its worst form) is known as the *talaq al-bid'a* (innovated divorce not according to the rules laid down by Prophetic tradition). This *talaq* is 'sinful' or 'irregular' but is nonetheless deemed to be valid. As is explained below, the reason for this negative labelling is that during the time of the Prophet and for some time thereafter, there was no practice of pronouncing three divorces or repudiations in one sitting; even if they were so pronounced, they were treated as one (revocable (*raji'i*)) divorce. The rules were later altered for historical reasons and, unfortunately for women, this form of *talaq* continues to date to remain an acceptable form of repudiation despite the provisions in the primary sources to the contrary. As also indicated in its definition of *talaq*, the Muslim Marriages Bill recognises both the above methods of *talaq*.<sup>95</sup>

**(i) Talaq al-Sunna**

This form of *talaq* is further divided into two kinds: *talaq al-ahsan* ('most proper' or 'better mode') and *talaq al-hasan* ('proper' or 'good mode'). The latter is essentially a variation of the former. Both are approved methods of repudiation, accepted by all schools, and both forms allow for revocation.

The *ahsan* mode is deemed better because the process of divorce is slow and cautious but not unduly so. It essentially amounts to a single pronouncement of *talaq* by a husband during a period when the wife is not menstruating. This starts the *idda*. He then abstains from sexual intercourse for the duration of the wife's *idda* (usually three months). He can revoke the divorce by changing his mind at any point during this period and resuming the marriage. Once the *idda* has been concluded, the marriage terminates (the divorce becomes irrevocable). However, even if the divorce is final, the *ahsan* mode (assuming one pronouncement) allows the spouses to remarry each other since it amounts to a minor (*sughra*) irrevocable divorce.

In the *hasan*<sup>96</sup> mode, the husband utters three separate pronouncements of divorce in three consecutive periods between — not during — menstruations and abstains from sexual intercourse. This form of *talaq* is also revocable until the third

<sup>94</sup> Q.58:1–4. See Nasir *Status of Women* 3 and 113–14.

<sup>95</sup> See the definitions of '*Talāq*', 'irrevocable *Talāq*' and 'revocable *Talāq*' in cl 1 of the Muslim Marriages Bill.

<sup>96</sup> See Nasir *Status of Women* 126 for more detail. See Ahmad *Muslim Law of Divorce* 65 for the different views of jurists in this regard.

pronouncement. The final pronouncement ends the marriage irrevocably and the wife has thereafter to observe an additional three months of *idda* before she is completely free.<sup>97</sup> This is a major (*kubra*) irrevocable divorce and therefore the couple may not remarry each other unless the wife undergoes an intervening marriage (*halala*).

(ii) *Talaq al-bid'a*

This form of *talaq* is not as recommended and has long been subject to much controversy. The *talaq al-bid'a* is commonly known as the three-in-one, triple, or instant divorce (although it can also be instituted as a single divorce followed by an indication of finality). On its pronouncement, the marriage is dissolved immediately, irrevocably and in one sitting. It therefore disregards any attempts at reconciliation either through the *idda* or through mediation.<sup>98</sup> While it is 'sinful' or 'irregular', it is nonetheless valid.<sup>99</sup>

This form of *talaq* is also of two kinds as regards time and number. In the first form, the husband pronounces three divorces at once (in one sitting) or at short intervals within one *tuhr* (period when wife is not menstruating). The wife then immediately starts observing her *idda* after she has already been irrevocably divorced. In this case, should the couple wish to remarry each other, the woman would first have to undergo an intervening marriage. In the second form, the husband utters a single pronouncement of divorce and makes it clear that the divorce is final and therefore immediately irrevocable.<sup>100</sup> However, if he pronounces the divorce while the wife is menstruating, the divorce is still revocable.<sup>101</sup>

In the case of the *talaq al-bid'a*, it is not uncommon for a husband to regret his decision, especially when made in a state of anger or jest, and for couples to continue to have sexual relations with each other as if the divorce had not happened. However, in this case the husband has divorced his wife and therefore both he (assuming he has no other wives) and she are now unmarried persons. Therefore their sexual relationship cannot be labelled adultery (*zina*), which is sexual intercourse between a married person and someone other than his or her spouse. Any children conceived during this period are regarded as born of unmarried parents. It is also possible for the husband to deny having divorced his wife, and without witnesses to prove the contrary this leaves the wife faced with a moral dilemma. It is not surprising then that *zina* laws are often linked to inequitable divorce laws.<sup>102</sup>

The *talaq al-bid'a* was condemned by Prophet Muhammad and, after his death,

<sup>97</sup> Tucker, J *Women, Family, and Gender in Islamic Law* (Cambridge University Press 2008) 86–7.

<sup>98</sup> On mediation, see further paras 6.2(c) and 7 below in this chapter and Chapter 13 below.

<sup>99</sup> Nasir *Status of Women* 126.

<sup>100</sup> *Ibid.*

<sup>101</sup> Pearl & Menski *Muslim Family Law* 281. See also para 6.2(e) below with regard to the timing of *talaq*.

<sup>102</sup> Mir-Hosseini, Z & Hamzi'c, V *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts* (Women Living Under Muslim Laws (WLUML) 2010) 3. On the position if the husband fails to inform his wife of the divorce but continues to have sexual relations with her, see also the text accompanying note 335. See further para 5.1(c)(ii) above and para 6.1 below.



by the first caliph<sup>103</sup> of Islam, Abu Bakr, and, for the first two years of his reign, also by the second caliph, Umar. They all considered three pronouncements of divorce in one sitting as amounting to or counting as only one or a single or first pronouncement and therefore revocable, like the second pronouncement but unlike the third pronouncement which would make the divorce irrevocable (and require a former wife to undergo an intervening marriage should the husband wish to remarry her). In fact, the Prophet, on being informed that a man (also named Umar) had so divorced his wife, and while she was menstruating as well, 'told him he had acted wrongly and advised him to cancel the divorce by *raj'ah* (cancellation) and then proceed in the proper manner if he still persisted in his desire to divorce the wife'.<sup>104</sup> However, *talaq al-bid'a* was apparently later validated by Umar himself as an irrevocable divorce.<sup>105</sup> Umar 'decreed that one declaration of repudiation associated with the number three should count as three pronouncements and render repudiation irrevocable'.<sup>106</sup> Umar's validation was intended to serve as a punitive measure imposed on Muslim men, who, being impatient to remarry, took divorce lightly. It was also intended to protect women from insult — not only the women to whom the men were married but upon whom they pronounced a revocable divorce with the actual intention of taking the women back, but also the women for whom, because the men wished to marry them, the men had divorced their wives in the first place.<sup>107</sup> It is unfortunate, however, that something which was intended to serve a socio-historical need during times when extraordinary conditions prevailed, later came to be regarded as an integral part of Islamic law.

While it is difficult to reconcile notions of 'impermissible' and 'valid' (also reflective of extreme differences in interpretation), *Imam* Shafi'i was the only one of the four jurists who categorically approved of the permissibility and therefore

<sup>103</sup> After the death of the Prophet legal decisions were given by four men (caliphs or representatives) who were amongst his closest Companions. They were, in order of 'succession', Abu Bakr, Umar, Uthman and Ali. The Caliphate dates from 632–661 AD: see Moosa *Unveiling the Mind* 48–9 and 51.

<sup>104</sup> Ahmad *Muslim Law of Divorce* 67–8. At 88, Ahmad mentions two other Prophetic traditions to the effect that mere repetitions of the pronouncements simply, for example, to emphasise them, but without the necessary intent, do not amount to a final divorce.

<sup>105</sup> Ahmad *Muslim Law of Divorce* 86–7; Nasir *Personal Status* 111.

<sup>106</sup> Nasir *Personal Status* 111.

<sup>107</sup> Engineer op cit note 46 at 149–50 explains the apparent rationale behind Umar's decision to enforce the triple *talaq* as an irrevocable divorce as follows: During wars of conquest many beautiful women were captured from surrounding areas and brought to Medina. While Arab men wanted to marry these women, the latter did not want to be regarded as co-wives in a polygynous marriage and often made it a condition that men divorce their existing wives thrice (irrevocably). Knowing that the primary sources (Prophet and the *Qur'an*) treated three pronouncements of divorce in one sitting as one divorce (and therefore revocable), these men would outsmart the foreign women (who were unaware of this) by pronouncing the divorce thrice and then later take back their 'former' wives. Needless to say, this gave rise to many disputes. See further the discussion of revocable and irrevocable divorces in para 6.2(a) below.

the legitimacy or effectiveness of the instant divorce. The others<sup>108</sup> were of the opinion that this form of divorce was impermissible. *Imam* Hanbal later changed his mind and considered such a divorce invalid. This, surprisingly, is also the view endorsed by Ibn Taymiyyah, a jurist of the fourteenth century, who was well-known for his very conservative views. *Imams* Abu Hanifa and Malik considered the triple divorce valid and effective, albeit impermissible, because divorce was pronounced thrice, thus making it irrevocable.<sup>109</sup> Similar to the differences of opinion among the various schools, the *Hanafi* and *Shafi'i ulama* (who constitute the regional religious tribunals) in South Africa also hold different views in this regard. Interestingly, some even deviate from the view of their own school and align themselves with the *Sunna* in order to provide a more humane outcome for spouses wishing to reconcile.<sup>110</sup> This favourable option has resulted in some forum shopping occurring from one region where such divorces are deemed to be irrevocably effective to another where they may be deemed to be revocable. This is an issue that has thus far been avoided by judges in South African courts because of the non-recognition of Muslim marriages; however, upon recognition, judges will definitely have to concern themselves with the issue and even address it in the future.

The fact that the primary sources of Islam frown upon this form of divorce and most countries have either banned or regulated its use does not mean that it is no longer applicable. It is still practised by the common man and recognised by certain religious authorities as a valid *Shari'a* form of divorce, and is often exercised to the detriment of Muslim women. As already indicated, it is set to become part of the proposed legislation in this regard in South Africa.

## 5.2 Divorce by the wife

### (a) *Talaq al-tafwid*

A husband may delegate the power to pronounce the *talaq* to another male (as agent or third party). This man then has the power to divorce the husband's wife on the husband's behalf. He can also delegate this power to his wife and in this way she acquires the ability to choose to divorce her husband. It can, however, be questioned whether the husband's delegation of his right to his wife is really a delegation. It seems to be an agreement between the parties that on the happening of some event (such as the husband taking another wife), the wife is entitled to divorce her husband — divorce by mutual agreement subject to a suspensive condition. Nonetheless, the *Hanafi* school, for example, permits a wife to stipulate in her marriage contract that her husband shall not take another wife, and she may in this way retain for herself the (delegated) right to terminate the marriage on her own should he take another wife. The *talaq al-tafwid* or

<sup>108</sup> *Imams* Abu Hanifa, Malik and Hanbal.

<sup>109</sup> Engineer op cit note 46 at 147–9. See also Ahmad *Muslim Law of Divorce* 70–1.

<sup>110</sup> This was gleaned from an electronic copy of a *fatwa* (ruling or legal opinion) supplied by the MJC Fatwa Committee in April 2012.

delegated (right of) divorce is therefore typically a female-instigated divorce. It is an example of a conditional or suspended divorce.<sup>111</sup> The same right to divorce that her husband has is given to the wife either as a condition in the contract of marriage at the time of the marriage or at a later stage during the marriage. It can be likened to a wife pre-empting an emergency exit strategy for a marriage that is only at its beginning or which may only later become problematic. The wife has to stipulate that she be granted the power in the contract and the husband has to agree. If the husband, on his own initiative, should stipulate the wife's right to effect her divorce, the condition would be void.<sup>112</sup>

In some Muslim countries where provision is made for this type of divorce, it may be conditional or suspended (exercised by the wife only upon the occurrence of a specific event, for example, when the husband takes a second wife)<sup>113</sup> or unconditional (the wife may utilise it immediately with irrevocable effect or whenever she wants to). It appears that the schools of law are not clear on the question of the revocability of such a divorce and on the issue of whether it is the wife or the husband who has the power to revoke the divorce. *Malikis* and *Shafi'is* rule that the husband cannot retract such a right once 'ceded' (granted).<sup>114</sup>

This form of divorce, although under-utilised for lack of awareness, is a very effective tool (more so than the *khul'*)<sup>115</sup> at the disposal of a wife trapped in an unhappy marriage. It serves to partly redress the power imbalance in a marriage. Without depriving the husband of his inalienable right to *talaq*, it allows the wife to irrevocably terminate her marriage in order to obtain her freedom expeditiously and without the intervention of any court and, furthermore, without having to relinquish her right to claim the full dower (*mahr*). Support for it is found in both the *Qur'an*<sup>116</sup> and *Sunna*.<sup>117</sup>

Divorce on the wife's initiative has, without good reason, been portrayed as being not particularly difficult. While knowledge on the part of women of the various forms of divorce at their disposal can certainly be used to their advantage, practical realities indicate otherwise. The delegated divorce is under-utilised. Many Muslims, especially women, are unaware, for example, that Islamic law

<sup>111</sup> Pearl & Menski *Muslim Family Law* 283. A conditional divorce is also referred to as '*ta'liq*' or '*taklik*': WLUML *Knowing Our Rights* 12.

<sup>112</sup> Nasir *Personal Status* 108. Apart from briefly alluding to it when dealing with the conditional divorce, the author pays surprisingly little attention to the delegated divorce in his chapter dealing with divorce. This is also the case in his latest book dealing specifically with the status of Muslim women: Nasir *Status of Women* 117–18 and 123.

<sup>113</sup> The suspended divorce will automatically be activated by the husband's second marriage: Moosa *Unveiling the Mind* 65.

<sup>114</sup> Toffar *Administration of Islamic Law of Marriage and Divorce* 149–50. See also WLUML *Knowing Our Rights* 267–8.

<sup>115</sup> On the *khul'*, see para 5.3(b) below.

<sup>116</sup> Q.33:28.

<sup>117</sup> Rahman, TA *Code of Muslim Personal Law* vol I (Islamic Publishers 1978) 340; Ahmad *Muslim Law of Divorce* 184–5.

allows women to include a protective stipulation against polygyny in their marriage contracts, which would entitle them to divorce their husband if he breached the stipulation. Even though the delegated divorce is seen as being an especially favourable option for wives and is recognised and regulated in the Muslim Marriages Bill,<sup>118</sup> the use of stipulations is not popular in South Africa in Muslim marriage contracts. Apparently, of the 295 Muslim women in the Western Cape who participated in a recent study about their marriages and who also reported having marriage contracts, none had negotiated stipulated clauses for themselves which would have allowed them to divorce their husbands if the latter, for example, were to subsequently enter into a polygynous marriage.<sup>119</sup> Furthermore, in some countries where a provision to this effect is automatically incorporated in the marriage contract to make it easier for the wife, it is not uncommon for this particular clause to be deleted to the detriment of the wife. Given that romantic notions usually play a bigger role than practical contractual considerations (especially pertaining to divorce) at the inception of a marriage, it is not unreasonable for women to think that the incorporation of such stipulations might be deemed to signal lack of trust and to be in bad taste. This is especially true when the intention is to create new family ties. It should therefore not be surprising if women themselves do not want to include such stipulations in their contracts.

### 5.3 Divorce by mutual consent or agreement of spouses

Divorce by mutual consent includes *li'an* (mutual imprecation or 'cursing'), *khul'*<sup>120</sup> and *mubara'a* (mutual discharge).

#### (a) Li'an

*Li'an* occurs where a husband, in the absence of witnesses, accuses his wife of having committed adultery and that a child born of her is not his, and attests to this under oath, and she, in turn, also under oath, testifies that he is lying.<sup>121</sup> Although rarely used and not even mentioned in the Muslim Marriages Bill, *li'an* is not entirely obsolete in the Muslim world.<sup>122</sup> In fact, marital infidelity is

<sup>118</sup> See the text accompanying note 177.

<sup>119</sup> Moosa, N 'Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS' (2009) 12 *PELJ* 65 at 68 and 80. See also Shaikh, S, Hoel, N & Kagee, A *Submission. The Research Report South African Muslim Women: Sexuality, Marriage and Reproductive Choices* unpublished paper submitted to the Minister of Justice and Constitutional Development (2011) 14.

<sup>120</sup> '*Khul'*' literally means 'to take off one's dress' and refers to a metaphoric description of the spouses serving as garments for one another: Q.2:187.

<sup>121</sup> Q.24:6–10.

<sup>122</sup> In Pakistan, such a false accusation by the husband provides a wife with the right to sue him and obtain a judicial divorce: Nasir *Status of Women* 119. See the text accompanying note 90 and para 5.3 for more detail on *li'an* as a form of divorce.

reportedly on the increase in the Western Cape and Muslim wives are, by their own admission, not exempt from committing adultery.<sup>123</sup> Committing adultery may also be a cause of the irretrievable breakdown of a civil marriage in terms of South African law.<sup>124</sup> A judicial divorce (*faskh*) can probably be sought by the wife on the basis of her husband's marital infidelity under the ground of divorce which encompasses the irretrievable breakdown of the (trust in the) marriage which is dealt with under '*shiqaaq*' in the Bill.<sup>125</sup>

### (b) *Khul'*

While there are variations of definition in the four schools of law, divorce by *khul'* refers to the desire by the wife alone not to continue with an often unhappy marriage, regardless of how minor the issue or reason might be or whose fault it is. It is concluded by an offer of compensation (usually monetary or 'property or other permissible consideration'<sup>126</sup>) from the wife and acceptance of the offer by the husband. The wife is required to make a financial sacrifice in order to leave the marriage and the husband ought not to unreasonably refuse the amount of compensation offered. This compensation, often likened to a ransom where the wife buys her way out of the marriage, is intended to serve as a worthwhile incentive by the wife in an unhappy marriage to persuade her husband to agree to, rather than refuse, the divorce. Grounds or reasons cited by the primary sources of law to secure such a divorce range from one extreme to another and include the wife 'fearing cruelty and desertion'<sup>127</sup> on the part of the husband; the wife simply being 'disinclined' towards her husband, to 'disliking',<sup>128</sup> and even 'hating'<sup>129</sup> him; and the wife and/or husband 'fearing' that they might become unfaithful to each other and commit adultery if they remained married to each other.<sup>130</sup> The wife seeks release from the marriage or 'rids' herself of a cruel or

<sup>123</sup> Adultery has been cited in an early (2001) study as the primary reason for women requesting a divorce at two Western Cape-based religious tribunals: Toefy *Divorce in the Muslim Community* 103. That marital infidelity is on the increase among Muslim husbands (and to a lesser extent wives) in the Western Cape is borne out by the findings of a recent study by Shaikh, S, Hoel, N, & Kagee, A 'Research Report South African Muslim Women: Sexuality, Marriage and Reproductive Choices' (2011) 31 *Journal for Islamic Studies* 96 at 114.

<sup>124</sup> Skelton & Carnelley (eds) *Family Law* 123–4.

<sup>125</sup> On *shiqaaq*, see para 5.4(b) below.

<sup>126</sup> See the definition of '*Khula*' (as *khul'* is referred to) in cl 1 of the Muslim Marriages Bill.

<sup>127</sup> See Q.4:128.

<sup>128</sup> Her 'disliking' of her husband led to a divorce between the Prophet's cousin Zainab and his adopted son Zaid: Moosa *Unveiling the Mind* 38n32.

<sup>129</sup> Based on a reported *hadith* of the Prophet Muhammad cited by Doi *Shari'ah* 193.

<sup>130</sup> Based on a reported *hadith* of the Prophet Muhammad cited by Doi *Shari'ah* 194. The phrase in the *hadith* to the effect that 'something might happen to the wife contrary to Islam' is similar to the phrase found in the *Qur'an* where 'both spouses fear that they would be unable to keep the limits ordained by God': Q.2:229. The latter phrase has variously been interpreted to mean that the spouses would be unable to deal with each other on a fair basis (Nasir *Status of Women* 129) and also to refer to extra-marital relations (Pearl & Menski *Muslim Family Law* 284). The

undesirable husband by compensating him. The parties mutually agree that the husband foregoes his right to divorce for certain compensation paid by the wife to him. The husband still has to pronounce the *talaq* and the wife usually has to return part or all of her dower in exchange for the divorce.<sup>131</sup> It could, for that matter, also mean that the wife forego any outstanding or deferred dower or be expected to pay a further financial consideration in addition to returning the dower. It appears that a husband may, in exchange for his consent to the divorce, also strike himself a good bargain by requiring the wife to forego maintenance payments due to their children (or to her for services rendered, like breastfeeding the children) during their period of care with her<sup>132</sup> — which effectively means that she takes care of the children (and herself during this time) at her own expense.<sup>133</sup> In comparison to the delegated divorce and even the *talaq*, this form of divorce requires women to have the financial capacity to literally buy their freedom. In most cases, couples are not in an equal bargaining position. With *talaq* a wife would at least be entitled to dower and maintenance during *idda*.<sup>134</sup> Although subject to debate, apparently neither party may change their mind and the *khul'* divorce is deemed irrevocable in most Muslim countries.<sup>135</sup>

*Khul'* and *li'an* are deemed to be both extra-judicial and judicial forms of divorce. Whilst technically an extra-judicial divorce, since 2000 in most countries a woman has had to access *khul'* through the courts,<sup>136</sup> in which case legislation grants the right to a court to declare the marriage to be dissolved. This means that some of the grounds for *khul'* (for example, cruelty and desertion) overlap with those of judicial divorce, which can lead to some confusion.

### (c) Mubara'a

In this case, the desire to not continue with the marriage is mutual and existing rights are deemed to be mutually waived.<sup>137</sup> This form of divorce ought therefore not to involve any payment of compensation to the husband by the wife. The

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latter interpretation of this much-used phrase, which deems the mere consideration of becoming unfaithful as a threat to the stability of the marriage, is preferred.

<sup>131</sup> Q.2:229. This verse, while it also pertains to *khul'*, does not specify a precise form of compensation. Ali op cit note 2 at 91n258 in his commentary to his translation that 'she give something for her freedom' is of the opinion that 'it is permissible to give some material consideration to the husband, but the need and equity of this should be submitted to the judgment of impartial judges ...'. The amount can be determined by a court.

<sup>132</sup> See paras 9.4(b) and 9.5 below.

<sup>133</sup> Doi *Shari'ah* 97; Nasir *Status of Women* 131.

<sup>134</sup> See paras 9.3(b) and 9.4(a) below.

<sup>135</sup> WLUML *Knowing Our Rights* 276.

<sup>136</sup> For examples, see WLUML *Knowing Our Rights* 273 and 279; Welchman, L *Women and Muslim Family Laws in Arab States: A Comprehensive Overview of Textual Development and Democracy* (Amsterdam University Press 2007) 112 and 116. See also Doi *Shari'ah* 193. Since Muslim women also campaigned for the inclusion of *khul'*, it is regulated in the Muslim Marriages Bill: see para 8 below.

<sup>137</sup> Doi *Shari'ah* 193.



husband is also exempted from having to pay outstanding dower and so forth to the wife. It does however appear in practice that a wife often has difficulty in securing her husband's consent. Given that he can always exercise his right of *talaq*, he may withhold his consent and pretend that he is still interested in saving the marriage in order to save money. The wife therefore often makes some payment of compensation to the husband and even foregoes entitlements due to her in order to secure her husband's consent.<sup>138</sup> If the husband is the one who makes the initial offer of a mutually agreed divorce, he may not take back his offer before the wife has given him an answer. If the wife accepts the offer, the divorce is effective immediately. However, if the wife initiates this process, she may take back her offer at any time prior to its acceptance by her husband.<sup>139</sup> Even though the couple mutually agree to divorce, the husband is still expected to pronounce the *talaq*.

Given the undue attention given to *talaq* as the first form of divorce and its contentious nature, *mubara'a*, where the parties mutually consent to divorce each other without having to (publicly as is often the case in secular law) establish fault on the part of either party, is less contentious and is to be welcomed in modern times. This is especially so since it also allows spouses (assuming they are in an equal bargaining position) to negotiate the conditions and financial effects of their divorce themselves.<sup>140</sup> However, for a Muslim husband this type of divorce also has a certain stigma attached to it in that his honour or reputation might be tarnished by it, and this might explain why it is rarely used.

#### 5.4 Divorce by judicial process (*tafriq*)

While Islam does not deem the presence of a judge to be essential either at the time of the solemnisation of a marriage contract or at its dissolution, Islamic law does recognise divorce by the intervention of a court or judicial body to bring some legal finalisation to the process. In the context that it is used in this chapter, a court or judicial body also includes a religious tribunal. In most Muslim countries, there is a formal twofold administration of justice where jurisdiction is vested either in a secular or in a *Shari'a* (Islamic) court. *Shari'a* courts, constituted by religious judges (*qada*, singular *qadi*), are usually solely responsible for adjudicating Muslim personal law issues.

While a suit for a judicial order of separation (*tafriq*) can be brought by either the husband or the wife on various grounds, juristic opinions on the application of some of the grounds for an order of divorce vary. This subjects *tafriq* to some controversy and confusion. Nasir highlights that the process itself also appears to vary from country to country: in some Muslim countries, a 'divorce can only

<sup>138</sup> Pearl & Menski *Muslim Family Law* 284–5.

<sup>139</sup> Pearl & Menski *Muslim Family Law* 284.

<sup>140</sup> WLUML *Knowing Our Rights* 246 and 251.

be effected before a court and by order of the judge', in other countries a certain form of divorce 'only becomes effective from the time of its being recorded with the local court of jurisdiction, even if it were not heard before a judge', while in yet another country, 'every divorce, or revocation of divorce, before it is actually effected, shall be registered with the prescribed authority'.<sup>141</sup> It appears therefore that the intention behind the judicial process is to provide legal certainty as regards the divorce in terms of the law of the country concerned, especially in cases where the divorce may only have Islamic law status.

Above,<sup>142</sup> several modes of divorce, such as *talaq* by the husband (in terms of all four main schools), *khul'*, *li'an* and *ila* are set out. It is not uncommon for these, usually non-judicial forms of divorce, to be treated as judicial divorces in certain countries. It is therefore important in the case of *talaq* to distinguish between *talaq* per se (when the husband chooses to end the marriage) and its usage as part of the term '*tafriq*'. As I understand it, *tafriq* refers to the divorce occurring through a judicial process and takes the form of a judicial order. The judicial order may either be a judicial *talaq* (only in terms of the *Maliki* school) or a judicial *faskh* (in terms of all four schools). While the consequences of a judicial *talaq* would be the same as the consequences of a *talaq* by the husband, the consequences of the *faskh* would be those pertaining to a *faskh*. For example, while a judicial *talaq* may, depending on the ground relied on, be either revocable or irrevocable in effect, a *faskh* is always irrevocable in effect regardless of the ground relied on. A divorce may also be revocable when the form relates to *ila*. In the case of *li'an* (mutual imprecation), it is usually the husband who brings the application (although the wife is not necessarily precluded from doing so), but it is the court that grants an irrevocable dissolution 'for life'. This means that the spouses, during their lifetime, are never able to marry each other again.<sup>143</sup> While the *Hanafi* school, for example, treats the *khul'* as a *faskh* and not as a *talaq*, it is indicated below<sup>144</sup>

<sup>141</sup> Nasir *Status of Women* 134. See also the text accompanying note 185. Nasir *Personal Status* 106 and 119 uses the more modern Arabic term '*tafriq*' (literally 'separation') to denote dissolution of a marriage by the court. Although he initially does not give the Arabic equivalent, Rahman op cit note 117 at 645n31 does so indirectly when he looks at the word 'separation' in the context of non-maintenance (in Syrian law), which he says is a separation (*tafriq*) by a judge and equivalent to a revocable divorce. Judicial dissolution of marriage is deemed to have its basis in Q.4:35 and the *Sunna* of Muhammad: see note 149 below.

<sup>142</sup> See para 5 above.

<sup>143</sup> The Prophet Muhammad's termination of such a marriage apparently set the precedent for the *Hanafi* rule that a *qadi* must intervene: Pearl & Menski *Muslim Family Law* 285. This is important because it means that, in terms of the *Hanafi* school of law, if the *qadi* did not execute the divorce as required, spouses would still be able to inherit from one another when one of them subsequently died, even if the *li'an* was performed. However, this is not the case in terms of the other schools: see Nasir *Personal Status* 118. See paras 5.1, 5.1(a) and 5.3(a) above for earlier references to *ila* and *li'an* as forms of divorce and the text accompanying notes 136 and 145 for references to *khul'* and *li'an* as judicial divorces.

<sup>144</sup> See para 8 below.



that the Muslim Marriages Bill deals with *khul'* as an extra-judicial form of divorce and with *faskh* as the only judicial form of divorce.<sup>145</sup>

**(a) Tafriq: Judicial talaq or judicial faskh**

Depending on the school of law and ground of divorce relied on, the judicial *talaq* and *faskh* indicate two different routes to separation through the judicial process. As indicated above,<sup>146</sup> the consequences of a judicial *talaq* differ from those of a *faskh* — in the case of a judicial *talaq* the separation is either revocable (which means that the marriage contract, although weakened, remains intact for a certain period) or irrevocable, while in the case of a *faskh* the separation is always irrevocable. When a court intervenes to effect the dissolution of a marriage through a *faskh* it does so independently of the husband's *talaq*. However, when a judicial *talaq* is issued, the process 'mixes' with the *talaq* process and the consequences are those of a *talaq*.

While, according to most schools of law, the *talaq* is usually only issued by a husband, the *Maliki* school also makes provision for a judicial *talaq* that, depending on the ground relied on by the judge to issue it, may be either revocable or irrevocable. For example, while both the *Shafi'i* and *Maliki* schools of law provide for a *tafriq* based on the ground of non-maintenance,<sup>147</sup> the *Shafi'i* (and *Hanbali*) school provides for a judicial *faskh* on this ground, while the *Maliki* school provides for a judicial *talaq* on this ground. According to the *Maliki* school, the type of judicial *talaq* that would be issued in this instance would be a single, revocable *talaq*. The consequences of a judicial *talaq* in terms of the *Maliki* school would be that the husband can revoke the *talaq* during the wife's *idda* if he can prove, upon subsequent application to the court, that his financial circumstances have in the meantime improved to the extent that he can now maintain his wife; in other words that the only reason for the wife requesting the *talaq* no longer exists. The spouses may reconcile with each other because the judicial *talaq* constitutes only one of the three *talaqs* belonging to the husband. The same would apply after a second pronouncement but not after a third, because the *talaq* would then become irrevocable (final or completed). The husband's number of pronouncements of divorce decreases from three to two (if it was the first divorce) or from two to one if it was a second one. A revocable *talaq* therefore does not require an intervening marriage (*halala*) by the wife with another man, and so forth. However, a *halala* would be needed after a third *talaq* has been pronounced. In terms of the *Shafi'i* school, the consequences of the (irrevocable) judicial *faskh* would be that the husband does not have the right to revoke the *faskh* during the *idda*. However,

<sup>145</sup> On judicial divorce in general, see Juzairee, A *Al-Fiqh Alaa Al-Mathaahib Al-Arba'ah* [Jurisprudence According to the Four Schools of Thought] vol 4 (Darul Fajr Lil Turaath 2000) 381; Subae, M *Sharh Al-Qanun Al-Akhwal Al-Shakhsyah* [Explanation of the Code of Muslim Personal Law] vol 1 (Darul Waraq 2000) 231n1; Zuhaylie, W *Al-Fiqhul Islaam Wa Adillatuho* [Jurisprudence of Islam and its Proofs] vol 7 (Darul Fikr 1989) 347–56.

<sup>146</sup> See para 5.4 above.

<sup>147</sup> See para 5.4(b) below.

since the *faskh* (where the word '*talaq*' is not used) does not constitute one of the three pronouncements of divorce belonging to the husband, the spouses may also remarry one another without the need for a *halala*. The *Maliki* school is also the only school (of the four) to have made allowance for the irretrievable breakdown of the marriage (*shiqaaq*) as a ground of divorce, and in this instance an irrevocable judicial *talaq* will be issued.<sup>148</sup>

Since it is only a husband who is deemed to be able to issue a *talaq*, the rationales used by the schools of law to explain a Muslim judge's (*qadi*) capacity to 'override' this power vary. The *Maliki* school is apparently of the opinion that the arbitrators appointed in terms of a *Qur'anic* injunction which deals with mediators,<sup>149</sup> in a bid to reconcile divorcing parties, are deemed to be representatives of the court. If they are unable to reconcile the parties and believe that the marriage should be terminated, they can order the husband to issue the *talaq*. He may, however, refuse, leaving it to the court to take the initiative and dissolve the marriage contract. Thus, when a judge, on the basis of the *Maliki* school, grants a decree of divorce to the wife, he does so by stepping into the shoes of the husband and exercising the right of *talaq* on the husband's behalf. This divorce may be revocable or irrevocable depending on the ground relied on. In so doing he does not detract from the exclusive right of the husband to divorce his wife, and at the same time the wife is able to obtain a divorce which, under normal circumstances, might have been difficult to secure. In the view of the three other schools, the arbitrator's role is merely conciliatory and, if possible, reconciliatory.<sup>150</sup> These three schools recognise the doctrine of the *faskh* (divorce by judicial authority). As indicated below,<sup>151</sup> while the *Hanafi* school does allow for other grounds, such as apostasy by one of the spouses, it generally only allows the wife one ground (pertaining to consummation of the marriage) for a judicial divorce and then only in a case which can be likened to the annulment of a marriage rather than divorce. The reason for this is that the *Hanafi* school subscribes to the view that divorce is the exclusive right of the husband. In addition to this ground, these three schools follow a more liberal approach by not only allowing the wife to approach a court on several more grounds but also adopting the view that the judge in such a case is being requested to act on behalf of the husband<sup>152</sup> and does so without in any way derogating from his right to divorce his wife.

<sup>148</sup> See Ahmad *Muslim Law of Divorce* 739–45; Rahman op cit note 117 at 641–5; Zuhaylie op cit note 145 at 347–56. Ahmad and Rahman do not clearly express the *Shafi'i* view in this regard. See also the text accompanying note 169. In terms of the *Maliki* school, when imprisonment is relied on as a ground, the divorce may also be deemed to be revocable: see Rahman ibid at 639–41 for detail. See also note 168 for reference to *shiqaaq*.

<sup>149</sup> Q.4:35, which refers to mediators rather than arbitrators. See the text accompanying note 141. Another *Qur'anic* verse used in this regard is Q.2:229, and see note 131, where in his commentary to this verse, Ali refers to 'impartial judges'.

<sup>150</sup> Pearl & Menski *Muslim Family Law* 285–6.

<sup>151</sup> See para 5.4(b) below.

<sup>152</sup> Nasir *Personal Status* 119.

It is only through utilising *faskh* that a wife can currently obtain a ‘proper’<sup>153</sup> or irrevocable divorce (as understood in secular law) from a religious authority in South Africa without her husband’s consent and participation. A *faskh* is available to both a husband and a wife, but since the husband already has access to *talaq* as of (exclusive) right, it is usually only women who apply to a judicial body for a *faskh* — which can be granted only by a judge. Of the various grounds of divorce discussed below,<sup>154</sup> some pertain to the wife only and some to both spouses.

However, ‘*faskh*’ is also usually the term used to denote the formal judicial *rescission* of a Muslim marriage. ‘*Faskh*’ has also been variously translated to mean ‘annulment’, ‘abrogation’ and ‘cancellation’ of a marriage. It is deemed to either terminate a marriage that is invalid from the outset or to prohibit the continuation of the marriage from the time of the annulment. However, referring to *faskh* as annulment gives rise to much confusion even among local religious tribunals and secular courts as is, for example, demonstrated in *Ismail v Ismail*.<sup>155</sup> Although both dissolution and annulment of a marriage have legal consequences (for example, children born of the marriage may need to be maintained and/or their status as being born of married or unmarried parents may need to be determined), an annulled marriage is null and void *ab initio*. The annulment merely legally confirms the non-existence of the marriage and therefore the marriage does not need to be dissolved. Divorce, by contrast, presupposes a valid marriage. A non-valid marriage therefore cannot end in divorce but only in annulment.<sup>156</sup> Since the parties are not husband and wife and cannot live as such, they usually agree to separate of their own accord, failing which a court will intervene to order them to do so.<sup>157</sup> There is no maintenance for a woman under a non-valid, irregular marriage contract even if the marriage has been consummated.<sup>158</sup>

As is the position with *talaq*, the wife retains her claim to any outstanding dower and divorce (*idda*) maintenance if she utilises the judicial divorce even though the divorce is initiated by her.<sup>159</sup> While this would seem to be the case where it is

<sup>153</sup> Ibid.

<sup>154</sup> See para 5.4(b) below.

<sup>155</sup> 1983 (1) SA 1006 (A). The confusion of a *faskh* with annulment is clearly evident in this case where Trengove JA states that “[a]nnulment” refers to the termination of the marriage by the Moulana in the event of the husband ... refusing or failing to divorce the wife by the issue of “*talaaqi*”: at 1018E. See Subae op cit note 145 at 231n1.

<sup>156</sup> Nasir *Personal Status* 107; Pearl & Menski *Muslim Family Law* 284–5.

<sup>157</sup> Nasir *Personal Status* 133 and *Status of Women* 108. Nasir *Personal Status* 133–4 also explains with regard to yet another form of divorce called ‘dissolution of marriage by operation of law’, that a marriage that started out as valid but later became invalid because of, for example, a change of religion or an act that created a prohibited degree, may automatically be dissolved by operation of law. The husband does not need to pronounce the divorce, nor is it necessary for a court to intervene: see note 358.

<sup>158</sup> Nasir *Status of Women* 108.

<sup>159</sup> This would be the case in normal circumstances, for example, where the marriage has been consummated: Ahmad *Muslim Law of Divorce* 26; Tucker op cit note 97 at 95.

assumed that the fault lies on the part of the husband, it appears from a study of Muslim divorce in the Western Cape that, in an attempt to dissuade her from using the *faskh*, the wife is often led to believe that she would have to repay the dower.<sup>160</sup>

'*Faskh*' is also the term used by classical jurists to refer to the dissolution or cancellation of a contract or agreement. This appears to add to the confusion and the treatment of *faskh* as distinct from, rather than as part of, *tafriq*.<sup>161</sup>

**(b) Grounds for judicial divorce<sup>162</sup>**

While judicial dissolution is allowed by all the schools of law, the schools differ in their opinions on the (usually stringent) grounds of dissolution and the procedure to be followed.<sup>163</sup> Once again the view of the *Hanafi* school is considered the most restrictive, making it virtually impossible to get out of a marriage. For example, in terms of this school, a wife cannot divorce her husband because of his failure to maintain her. *Hanafi* jurists have tried to overcome this difficulty and others through the adoption of the laws of especially the *Maliki* and *Shafi'i* schools. While it was later also supplemented by reforms to include more grounds (such as mental illness), classical *Hanafi* law generally afforded a wife only one ground to pursue a judicial divorce (*faskh*), namely that her husband was unable to consummate their marriage, for example, because of impotence or castration.<sup>164</sup> However, this ground has all the signs of a classic case of annulment rather than divorce.<sup>165</sup> Besides this ground, the other schools, especially the *Maliki* school, are more liberal in that they acknowledge several further grounds, which include, but are not limited to, the following four broad categories (and in the examples used here, mostly pertaining to and used by the wife): non-payment or insufficient payment of maintenance by the husband; various physical and mental defects on the part of the husband; the husband causing undue harm (*darar*) to the wife, usually in the form of ill-treatment and cruelty; and unacceptable or unexplained absence (desertion) by the husband or the husband's imprisonment.<sup>166</sup> The Muslim Marriages Bill, through its incorporation of an already reformed Muslim personal law, has made provision for an extensive list of ten grounds, including these and additional grounds, which are not limited to any particular school.<sup>167</sup> The Bill lists these grounds in clause 1 under the definition of '*Faskh*'. While

<sup>160</sup> Toefy *Divorce in the Muslim Community* 146.

<sup>161</sup> The confusion is evident in, for example, WLUML *Knowing Our Rights* 281. In *Administration of Islamic Law of Marriage and Divorce* 174 and 192, Sheikh Toffar, a member of the South African *ulama* fraternity, also distinguishes between these forms (*faskh* and *tafriq*) of judicial divorce.

<sup>162</sup> In South Africa, '*faskh*' is the term popularly used to denote a judicial divorce; it is also used as such in the Muslim Marriages Bill. The Bill therefore lists these and additional grounds under '*faskh*'.

<sup>163</sup> See para 5.4(a) above.

<sup>164</sup> Ahmad *Muslim Law of Divorce* 17–18; Nasir *Personal Status* 119; Pearl & Menski *Muslim Family Law* 285.

<sup>165</sup> Pearl & Menski *Muslim Family Law* 285.

<sup>166</sup> For a detailed discussion of these and other grounds, see Nasir *Personal Status* 120–33.

<sup>167</sup> See para 4.1(d) above.

the extensive list of grounds, which includes irretrievable breakdown (*shiqaaq*),<sup>168</sup> will certainly strengthen the case of the wife, the use of the word ‘may’ in the clause, rather than ‘must’ (which is used in many instances in the Bill), points to an increase rather than a narrowing of the scope of the secular courts’ discretion in this regard. A court may therefore refuse a woman a divorce even if she has a valid ground for it and in this way continue in the vein of the religious authorities who, bent on reconciliation, often refuse to grant women a *faskh*.

The failure to understand that there is a distinction between a judicial *talaq* and *faskh*, and that they have very different outcomes,<sup>169</sup> has caused much confusion in South Africa, as is evident from the misapplication of Islamic law in *Hassam v Jacobs*<sup>170</sup> and the different local academic opinions on the case.<sup>171</sup> In this case, expert opinion was not sought on the matter and the uninformed secular court accepted the wife’s explanation that her *faskh* was revocable. The Bill effectively resolves any future uncertainties by treating a *faskh* as an irrevocable divorce.<sup>172</sup>

## 6 GENERAL REQUIREMENTS (CRITERIA) AND ENVISAGED PROCESS OF DIVORCE: CONGRUENCE AND DISCORDANCE BETWEEN SOURCES OF LAW

While the Muslim Marriages Bill contains some explanatory definitions, it does not spell out the criteria or requirements that have to be satisfied before a divorce can be deemed to be valid.

<sup>168</sup> The term ‘irretrievable breakdown’, as understood and applied in South African law as a ground or reason for a woman applying for a *faskh*, proved to be problematic for both conservative sectors within the community and *ulama*. The Islamic concept of ‘*shiqaaq*’ is used instead to achieve the same result, namely that a *faskh* can be obtained by a wife from the court if ‘*discord between the spouses* has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that dissolution is an option in the circumstances (*Shiqāq*)’: cl 1 of the Muslim Marriages Bill, ground (j) for divorce under the definition of ‘*Faskh*’. The Arabic word ‘*shiqaaq*’ literally means ‘breaking into two’. It can also mean ‘disagreement’ or ‘breach.’ My emphasis in italics highlights its use and formulation in the Muslim Marriages Bill as a ground of divorce, to indicate ‘discord’ between spouses. Ahmad *Muslim Law of Divorce* 278 also points out that ‘*shiqaaq*’ ‘means conflict between the couple of such a serious character that the bond of marriage is strained to breaking point. It is immaterial as to who is at fault.’

<sup>169</sup> See the text accompanying note 148.

<sup>170</sup> 2008 (4) SA 350 (C). See the text accompanying note 243 and see note 271.

<sup>171</sup> See, in general, Bakker, P ‘Toepassing van Islamitiese Reg in Suid-Afrika — Hassam v Jacobs [2008] 4 All SA 350 (C)’ (2008) 29 *Obiter* 533; Denson, R & Van der Walt, G ‘Cold Comfort for Parties to a Muslim Marriage — Hassam v Jacobs NO [2008] 4 All SA 350 (C) (30)’ (2009) 30 *Obiter* 188; Denson, R & Van der Walt, G ‘Cold Comfort for the Parties to a Muslim Marriage — The Saga Continues: Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women’s Legal Trust as *Amici Curiae* [2009] ZACC 19’ (2010) 31 *Obiter* 201; Osman-Hyder, M ‘The Impact and Consequences of *Hassam v Jacobs NO* on Polygynous Muslim Marriages [A Discussion of *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC)]’ (2011) 22 *Stell LR* 233. See also note 242 below.

<sup>172</sup> See also para 8 below.

Although *talaq* is only one of a variety of (usually) extra-judicial divorce procedures, it has a dominant role in the hierarchy of the forms of divorce and, ultimately, forms the basis of an Islamic divorce. Akin to a generic form of divorce, *talaq* is deemed the primary and most common of the extra-judicial divorce procedures. Its requirements and legal implications permeate and have a general impact on all the other forms of divorce which derive from and function through it. *Talaq* is considered to be the unilateral and exclusive right of the husband. Strangely enough, it appears that even after he has increased her access to divorce by 'ceding' or 'transferring' this right to his wife (delegated divorce), he still retains it. Even after having 'disposed' of it, the husband's unilateral right to divorce his wife at will (at least before she utilises the delegated right) is not restricted in any way. It is because of this unilateral right that wives, in all modes of divorce apart from judicial divorce, require the cooperation of their husbands in order for the divorce to be effective. However, while the *Qur'an* so empowers men, it does not provide them with absolute power to divorce women because they have to exercise their power to divorce subject to certain criteria being met. Although the *Qur'an* stipulates criteria for divorce which allude to a methodical *process* of divorce, it does not prescribe any specific procedure for divorce.

Because it is prioritised in both Islamic law and the Muslim Marriages Bill, more attention is paid to the definition and requirements of *talaq* in the discussion below. Most of the requirements inform and overlap some of the other forms of divorce. In the discussion below, areas of congruence and discordance between Islamic law and the primary sources are also highlighted. While there are many areas where (later) Islamic law and (earlier) primary sources of Islam intersect and accord in this regard, there are also many areas of dissonance which have resulted in divorce being made unnecessarily difficult to access, especially by Muslim women. Further, an elaboration of terms in the definition of '*Talāq*' (like 'revocable' and (degrees of) 'irrevocable' divorces) and concepts which may be linked to it (like the 'intervening marriage' (*halala*) and the 'waiting period' (*idda*)) also makes for an easier understanding of the corresponding definitions and provisions of the Bill.

The treatment of divorce in this paragraph focuses on the standard, commonly agreed (classical *Sunnite* law) principles and does not provide any progressive or revised interpretation of Islamic law, nor does it seek to defend or dispel the negative image usually attributed to an Islamic divorce. Although these common principles are derived from the primary sources of Islam, they not only deviate from these sources, but have in some instances replaced some of the requirements of divorce. Furthermore, there does not appear to be any unanimity among jurists and the various schools of law as to whether the statement of divorce ought to be oral or in writing (or both); the number of pronouncements to be made; when exactly the *idda* starts; the revocability or not of a *talaq* by the husband; and if or when a divorced wife must enter into a *halala* before a divorced couple may remarry. In the result, divorce, although not desirable, is made very easy for men and difficult for women, as is evident from the practical examples given above in



this chapter of these deviations,<sup>173</sup> including the variations between the various sources' rulings pertaining to divorce.

## 6.1 *Shari'a* definition and requirements of *talaq*

*Shari'a* defines *talaq* as

the dissolution of a valid marriage contract forthwith [instantaneous or irrevocable] or at a later date [consequential or revocable] by the husband, his agent, or his wife [when] duly authorised by him to do so [*talaq al-tafwid*], using the word *talaq*, a derivative or a synonym thereof.<sup>174</sup>

This standard definition, replicated practically verbatim in clause 1 of the Muslim Marriages Bill, is almost universally adopted in codes of Muslim personal law and apparently includes all the conditions for the repudiation to be valid, binding and effective. These conditions are a valid marriage contract, with a sane, adult husband who pronounces the *talaq*, in accordance with a formula (oral, written, or by gesture in the case of, for example, dumb persons).<sup>175</sup> Given that the husband may be in a polygynous marriage, and also for purposes of identification, it 'is necessary . . . that there should be a clear reference to the wife in the pronouncement of divorce so that there may be no uncertainty as to the woman who is being divorced'.<sup>176</sup> Other than this 'reference' to her, the wife is, for all intents and purposes, a silent and irrelevant partner in her own divorce! While the right to pronounce the divorce vests only in the husband, he may delegate it to his wife or an agent. When the delegate exercises the right by making such pronouncement, he or she acts on the husband's behalf. Even though the delegated divorce is seen as being an especially favourable option for wives, the Muslim Marriages Bill excludes the delegated divorce from its definition of *talaq* although it does recognise this form of divorce and makes provision for it.<sup>177</sup> It was, however, not so excluded from the definition in the 2003 Bill where, instead, it was emphasised.

The husband must act of his own free will and not under coercion. Thus, in accordance with the majority of jurists in this regard,<sup>178</sup> a repudiation pronounced whilst intoxicated is deemed to be void. The *Hanafis* regard a divorce pronounced under coercion or duress, in anger, whilst intoxicated, under the influence of drugs, or even as a joke, as valid on the basis that a husband would have a choice

<sup>173</sup> See para 5 above.

<sup>174</sup> Nasir *Personal Status* 106.

<sup>175</sup> Nasir *Personal Status* 107–10. See also Toffar *Administration of Islamic Law of Marriage and Divorce* 137.

<sup>176</sup> Ahmad *Muslim Law of Divorce* 29.

<sup>177</sup> See definition cl 1 and cl 9(3)(c).

<sup>178</sup> But see the *Hanafi* jurists.



in this regard.<sup>179</sup> In their defence, this view can also be construed to imply that divorce is not a matter that should be trifled with, especially in view of the sanctity of marriage. Today, Islamic law considers such a repudiation to be void.<sup>180</sup>

It becomes apparent from the definition of *talaq* that there is no requirement that witnesses be present as proof of the divorce or that the wife consent or be present, or that it be addressed to her or even someone else or even that she be informed of the divorce in order for it to be valid. It is still not uncommon for wives to be informed that they have been divorced by letter or telephone or even by email or cell phone text message (short message service or sms).<sup>181</sup> It is indicated below<sup>182</sup> that, while not essential for the divorce to be effective, informing the wife is ultimately crucial to recognition in South Africa — so much so that if the wife is not informed, the divorce cannot be registered and officially confirmed. While such formal regulation is welcomed and necessary precisely to avoid disputes that may arise in this regard, non-registration of a *talaq* by the husband, while it subjects him to a fine, will not affect the fact that the divorce will remain effective, regardless of whether the wife was informed. There are, however, additional financial and other consequences for the husband who does not inform his wife of the divorce or who may even conceal the divorce from her. While the divorce remains effective from the time of pronouncement, the *idda* of the wife also starts at this point. Absence of knowledge of the divorce implies that such period can effectively start and even end without the wife, on whom this is obligatory, being aware that she is in *idda* or even irrevocably divorced for that matter! The question of concealment of a divorce from everyone is very different from failing to inform the wife (and where other parties may be aware of the divorce) and also has a different outcome. The point of not having to inform the wife about the divorce is often the subject of much confusion even among local Muslims.<sup>183</sup>

Until recently, *talaq* (especially in its arbitrary form) has been the most

<sup>179</sup> *Imam* Abu Hanifa is of the opinion that if a person voluntarily became intoxicated (even though Islam bans the consumption of alcohol) and then pronounced the divorce, the pronouncement should be regarded as valid: see Moosa *Unveiling the Mind* 25; Nasir *Personal Status* 107–8; Toffar *Administration of Islamic Law of Marriage and Divorce* 136–7.

<sup>180</sup> See Doi *Shari'ah* 174.

<sup>181</sup> Whilst the precedent for an e-divorce by means of a cell phone text message was apparently first established in Dubai (in the United Arab Emirates) and although subject to much contention and debate, South African religious authorities also approve of modern electronic tools (which would include email messages) as a means to terminate a marriage by divorce: for detail, see Mathee, S 'The Moral and Legal Dimensions of *Talaq* (Divorce) by SMS: A Critical Reading' (2001), available at [http://web.uct.ac.za/depts/religion/documents/ARISA/2001\\_O\\_Talaq.pdf](http://web.uct.ac.za/depts/religion/documents/ARISA/2001_O_Talaq.pdf) (accessed 23 February 2014) at 1–5. Although considered to be legal in Dubai, these divorces must be proved in court. This presumably means that they cannot be considered to be final until so proven: WLUMML 'Divorce via E-mail or Sms' (2011) 23 (3) *Newssheet* 11.

<sup>182</sup> See para 8 below.

<sup>183</sup> Ahmad *Muslim Law of Divorce* 92. See para 8 below for the provisions of the Muslim Marriages Bill in this regard.

commonly used (and abused) divorce procedure.<sup>184</sup> Modern personal law legislatures have since intervened to control and curb the indiscriminate power of the husband 'to the extent that, under some legislation, no divorce shall be effective, or even allowed, outside the court'.<sup>185</sup> In terms of the Muslim Marriages Bill, a divorce which a husband effects by informally exercising his right of *talaq* outside a court (or even with the assistance of a religious tribunal) is effective (and may even be irrevocably confirmed by the tribunal), but it still has to be registered and confirmed by a secular decree of divorce before it is deemed to be legally finalised.<sup>186</sup>

## 6.2 *Qur'anic* criteria (requirements) for divorce

By contrast to the classical law, the *Qur'an* envisages divorce as a *process* and discourages arbitrary repudiation by requiring that certain criteria and conditions be met before a divorce has final effect. The *Qur'anic* requirements allude to divorce as a process occurring through several stages and therefore restricting a husband's power to divorce his wife. While it explicitly empowers men to divorce (repudiate) their wives, it tempers or restricts this power by subjecting the power to conditions and criteria that highlight equitable, informed and witnessed separation and also strongly advocate reconciliation. Divorce is not considered as occurring through a quick act, but as taking place through various stages of a slow and methodical process which, given the fact that the revocable *talaq* itself can occur in various forms, cannot be specifically delineated and defined. Although effective upon pronouncement, the divorce ought, for example, only to become final after the following steps have been followed:

- (a) pronounce (revocable) divorce (thus, the divorce is effective but only provisionally so);
- (b) attempt to reconcile through the intervention of others;
- (c) if reconciliation is not possible and the divorce is being proceeded with, the spouses themselves must make further attempts at reconciliation during a probationary *idda*;
- (d) failing the successful conclusion of these attempts, the divorce ought to be finally effective.

### (a) *Number of pronouncements*

The *Qur'an* limits the number of pronouncements of divorce to three.<sup>187</sup> While the relevant verse clearly states that 'a divorce is only permissible twice' after which the wife is either retained on reasonable terms or released with kindness,

<sup>184</sup> Nasir *Status of Women* 116.

<sup>185</sup> Nasir *Personal Status* 106 and *Status of Women* 117. See para 5.4 and the text accompanying note 141 above.

<sup>186</sup> See para 8 below.

<sup>187</sup> Q.2:229.

its application is not as straightforward. The third pronouncement is therefore implied in the last part of the verse that pertains to 'releasing' the wife. It appears that the verse also has to be considered in the context of the form of (revocable or irrevocable) divorce used, the number of occasions on which a divorce can be effected, the number of pronouncements to be made on each occasion of divorce, and whether or not the *idda*, which a wife is obliged to start observing once a revocable or irrevocable divorce has been pronounced, has expired or lapsed.

(i) *Revocable (raji'i) 'divorce'*

A *raji'i* 'divorce' is usually one that does not immediately dissolve the marriage as it does not become effective until the end of the *idda*. Given that the right to divorce vests in the husband alone, he may, after beginning the process of divorcing his wife, unilaterally change his mind. Thus, the husband may revoke the dissolution before the *idda* expires either by expressly stating so or implicitly by resuming (sexual) marital relations with his wife.<sup>188</sup> In the case of a revocable divorce, we have an unusual combination of a hanging or limping marriage (until it is resumed), on the one hand, and a hanging divorce (until it is finalised), on the other. Leaving aside the fact that 'almost' getting a divorce and then 'saving' the failing marriage at the last moment can be an emotionally traumatic experience for any woman, the wife apparently has no choice in whether or not she wants to resume the marriage, let alone have sexual intercourse with her husband. The question of marital rape (not to mention her other freedoms pertaining to security of person<sup>189</sup> and association), which is a statutory crime<sup>190</sup> in South Africa, does not even enter the equation. While the wife may have recourse to *faskh* if the husband is guilty of adultery, this does not obviate any immediate risk of her contracting HIV/AIDS and other diseases.

Thus, during one marriage, the husband may use up one or two pronouncements of divorce and may reconcile with his wife on each occasion.<sup>191</sup> It is submitted that this means that while the reconciliation effectively reverses the divorce, any pronouncement of divorce simultaneously remains valid and is to be subtracted from the three pronouncements to which a husband is limited. This,

<sup>188</sup> Nasir *Personal Status* 112.

<sup>189</sup> See *Omar v Government of the Republic of South Africa* 2006 (2) SA 289 (CC), which involved an abusive relationship between a couple who were married to each other according to Islamic law but had become estranged. The fact that several protection orders were issued by the High Court against the applicant in terms of the Domestic Violence Act 116 of 1998 highlights that Muslim women seek protection from the courts against the effects of domestic violence. Section 1 of the Act, in its definition of a domestic relationship, includes parties married 'according to any ... religion'. On domestic violence, see further Chapter 11 below.

<sup>190</sup> In terms of s 56(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the existence or former existence of a marriage between parties is not a defence to a charge of rape.

<sup>191</sup> See Moosa *Unveiling the Mind* 114–15. This view also appears to accord with the interpretation of verse Q.2:229 by Ali op cit note 2 at 90n256 and 91n260–261.

it is submitted, highlights that the husband's intention at the time the divorce is effected cannot be to simulate or pretend to divorce his wife or for that matter to have a limping marriage.

Since the woman is still deemed to be the legal wife of the husband, there is no need for the parties to enter into a new marriage contract or to stipulate a new dower or even that she consent to the revocation.

*(ii) Irrevocable (ba'in) divorce*

A *ba'in* divorce refers to dissolution of a marriage that has become final. It dissolves the marriage with immediate effect and leaves no room for the husband to change his mind. The wife has been irrevocably divorced and, once she has completed her *idda*, she is free to marry whomsoever she wishes. However, it appears that an irrevocable divorce may be subdivided into minor and major irrevocable divorces. In other words, there are degrees of irrevocability. Some irrevocable divorces are of a more major degree or of greater finality (*kubra*) than others which are of a minor degree or of lesser finality (*sughra*).

*(iii) Irrevocable divorce of a minor degree or lesser finality (sughra) and remarriage*

In the case of a minor degree irrevocable divorce, the husband may remarry his divorced wife by entering into a new marriage contract with a new dower and only with her consent. In this case, a divorce has been pronounced once or, at most, twice and each was followed by an *idda* which has expired.<sup>192</sup> There is also *Qur'anic* authority for allowing former spouses to remarry each other after the *idda* has expired.<sup>193</sup> This effectively also means that a husband may divorce his wife twice and the divorced spouses may remarry each other twice.

*(iv) Irrevocable divorce of a major degree or greater finality (kubra) and intervening marriage*

In the case of a major degree irrevocable divorce, which occurs when a divorce has been pronounced for a third time, the wife becomes 'temporarily prohibited for the husband to re-marry'<sup>194</sup> until she agrees to undergo a humiliating process known as an intervening marriage (*halala*). As a now former wife she has the power to decide whether or not she wishes to reconcile with her now former husband and whether she wishes to endure the *halala* process. The process highlights the gravity of divorce. By making it difficult for a husband to easily reconcile with a former wife once their divorce is final and irrevocable, a deterrent is created for him. An intervening marriage effectively means that a former wife must first marry someone else, consummate the other marriage and then either be granted a divorce from the other person or become a widow of the other person. If she is granted a divorce or the other husband dies, she still

<sup>192</sup> Nasir *Personal Status* 113.

<sup>193</sup> Q.2:232.

<sup>194</sup> Nasir *Personal Status* 113.

has to undergo another *idda*.<sup>195</sup> Only then will the process come to a natural end and the husband be allowed to remarry his former wife. When he does so, he has three new pronouncements of divorce at his disposal.<sup>196</sup> The arduous process of *halala* highlights that the intervening marriage should be bona fide and not one of mere convenience. The woman may even decide to remain with her new ('intervening') husband, that is, if she decided to undergo the process in the first place. It is submitted that if, after three consecutive attempts (including the original marriage), the marriage is still unsuccessful, the couple should not be allowed to remarry each other. In its attempt to save what has clearly become a farcical marriage, this (major) form of irrevocable divorce takes reconciliation to heights that were clearly not intended by the primary sources — it is neither reasonable nor kind.

**(b) Witnesses**

The pronouncements of divorce must be made before two witnesses to facilitate proof of the divorce.<sup>197</sup>

**(c) Informal mediation (tawassut) (as opposed to formal arbitration (tahkim))**

Mediation and arbitration are alternative methods of dispute resolution that, much like formal litigation in a court, also involve third parties. However, unlike litigation, these processes are less time consuming and less expensive. Mediation is also distinguished from arbitration. The process of mediation is less formal and more private than arbitration. The main aim of a neutral mediator is to reconcile parties to a dispute and to this end the mediator merely offers opinions and makes suggestions that are legally non-binding on the parties.<sup>198</sup> With arbitration the process is more formal and the arbitrator, much like a judge in regular court proceedings, is more interested in passing judgment as to which party is right in order to reach a decision that is (usually) binding on both parties.

In terms of the *Qur'an*, mediation, rather than formal arbitration, before the dissolution of a marriage is compulsory. Therefore, parties do not have a choice in this regard. Mediators, one representing each spouse, must be appointed before the marriage is dissolved to either attempt to reconcile the spouses or, if this is not possible, to assist them to dissolve the marriage amicably and respectfully.<sup>199</sup> One party is not treated as a winner and the other as a loser. Mediation therefore plays both a conciliatory and reconciliatory role and also, albeit indirectly, ensures that the wife will have knowledge of the impending divorce prior to it actually happening.

<sup>195</sup> Q.2:230.

<sup>196</sup> Nasir *Status of Women* 129.

<sup>197</sup> See Q.65:2.

<sup>198</sup> For a detailed discussion of mediation, see Chapter 13 below.

<sup>199</sup> Q.4:35 is the main *Qur'anic* reference in this regard. Other indirect references include Q.4:59 ('obey those charged with authority among you'); Q.4:114 ('do so privately rather than publicly'); Q.49:9–10 and Q.2:224, all of which encourage reconciliation: see Goolam et al op cit note 32 at 309.

While both mediation and arbitration are viable mechanisms of alternative dispute resolution, mediation is seen as an alternative to divorce litigation. While there is a clear distinction between the less formal process of mediation and the more formal process of arbitration, these processes are often referred to interchangeably and the terms used synonymously in material on Islamic law and even in *Qur'anic* translations. While it is therefore not uncommon for the respective roles of a mediator and an arbitrator to be blurred, in most cases the sources and translations actually mean 'mediation' when referring to 'arbitration'.

Arbitration per se is also an area that lends itself to much confusion and differences of opinion among jurists and caliphs.<sup>200</sup> Much to the dissatisfaction of religious authorities who currently perform both the role of mediators and arbitrators in religious tribunals, the Muslim Marriages Bill<sup>201</sup> makes provision for mediation only and not for the more formal process of arbitration (*tahkim*) where an arbitrator makes a formal and binding ruling.

Whilst forming part of the 2003 Bill, the *tahkim*, which was proposed as a further step following an unsuccessful mediation (disputing parties unable to reach a settlement agreement), is no longer compulsory or even necessary since it has been removed from the 2010 Bill. The Bill now provides that the dispute will be adjudicated through the court itself in cases where mediation proves unsuccessful. While the 2003 Bill envisaged that *ulama* would play a role in both mediation and arbitration, the 2010 Bill restricts their role to that of mediators, provided that they have acquired the necessary accreditation to be mediators. *Ulama* disapprove of especially this change.

While it is not clear from the main *Qur'anic* verse in question<sup>202</sup> whose responsibility it is to appoint the mediators, it is clear that the mediators are usually family members who are not necessarily knowledgeable in the rules of divorce but are familiar with the parties and the issues in dispute. This position is reflective of a more informal process. However, a mediator may include a third party or agent who is someone with authority. This could, for example, be a member of the *ulama* fraternity who is presumably knowledgeable in matters of divorce and therefore fits the description of an arbitrator and whose presence would be indicative of a more formal process. The verse also does not clearly indicate whether spouses should be consulted or, given that it is compulsory, even be required to consent. It does, however, clearly indicate that both spouses must want to reconcile before there can be any question of reconciliation. Reconciliation is thus a collective decision of both husband and wife. Given that the right to divorce vests in the husband and that a *khul'* can be mutually agreed to by the parties, it is submitted (even though Ahmad<sup>203</sup> states the opposite) that ultimately it is the parties and not the arbitrator who has to decide whether the

<sup>200</sup> See Ahmad *Muslim Law of Divorce* 277–94 for a detailed discussion of arbitration.

<sup>201</sup> Clause 12(1)–(4). See paras 5.4(a) above and 7 and 8 below.

<sup>202</sup> Q.4:35.

<sup>203</sup> *Muslim Law of Divorce* 282.



marriage is to be dissolved or maintained. The arbitrator may act as the agent of the husband in granting the divorce only if the husband has vested the power to divorce the wife in his agent. A wife, in turn, may also authorise her representative to acquire or negotiate a *khul'* on her behalf.

**(d) Idda and its multiple purposes**

A defined mandatory *Qur'anic* waiting or 'probationary' period called '*idda*' (literally 'to count') must be observed by a wife whose *consummated*<sup>204</sup> marriage has either been suspended by a revocable divorce or definitively terminated by an irrevocable divorce. The period is intended to start and end during the process of divorce but while the marriage still subsists and not thereafter. However, this is not so in practice in all cases. For example, in the case of an irrevocable divorce like the triple *talaq*, *idda* is only observed after the marriage has ended. Once the *idda* expires it completely severs all ties and the effects of marriage between the husband and wife. However, it is clear that, regardless of how revocable or irrevocable the divorce, or in whatever form she may have been divorced, a wife does not completely break away from her marriage, at least not immediately, because the *idda* serves to bind her to her marriage. For a wife to start the *idda* period, she has to have knowledge or be informed of the divorce. The period therefore implies equal participation by the spouses in the process of divorce. The *idda* period is effectively a grey area for a woman. During this period she may still be a wife in the case of a revocable divorce or a divorcée in the case of an irrevocable divorce, but she is still annexed to her former husband because of the *idda* period during which she may not remarry someone else — a wife (not a husband) is temporarily prohibited from remarrying until the expiry of her *idda*.

This period varies in length, but is three lunar<sup>205</sup> months in most cases. If the marriage has not been consummated, there is no need to serve the *idda* and in this instance the divorce is always irrevocable even if it was effected by only one pronouncement of *talaq*.<sup>206</sup> In the case of a revocable divorce, the *idda* period starts once the first divorce has been pronounced. The divorce has to be pronounced when the wife is not menstruating. As also specified in the Muslim Marriages Bill, the length of *idda* varies with regard to women's menstrual status. The *idda* for a woman who menstruates is three successive menstrual cycles<sup>207</sup> or, if she was pregnant or a pregnancy becomes apparent, comes to a close with the end of the pregnancy (whether by birth or miscarriage).<sup>208</sup> The *idda* of a wife who has as yet not begun to menstruate, does not menstruate, has reached

<sup>204</sup> Q.2:228.

<sup>205</sup> The Islamic calendar is based on lunar months. The Islamic lunar year has 354 days and is therefore 11 or 12 days shorter than the 365 or 366 days of the solar year: Moosa *Unveiling the Mind* xxxii.

<sup>206</sup> Q.33:49.

<sup>207</sup> Q.2:228. See cl 1 of the Muslim Marriages Bill under '*Iddah*' (a)(i).

<sup>208</sup> Q.65:1, 2 and 4. See cl 1 of the Muslim Marriages Bill under '*Iddah*' (a)(iii).



menopause or has irregular periods is three lunar months.<sup>209</sup>

*Idda* has a purpose and has been prescribed for several reasons. For a divorced woman, *idda* buys time to effect reconciliation between the spouses in the case of a revocable divorce. However, reconciliation requires the cooperation of both parties in order to mean anything. In the case of an irrevocable divorce like the triple *talaq* where this purpose cannot be given effect to, completing the *idda* serves, albeit as a secondary or indirect purpose, 'as a mark of sorrow for the dissolved marriage'.<sup>210</sup> Yet, making it compulsory only for the wife and allowing the husband (but not the wife) to remarry during this period, implies that it would only be the wife and not the husband who would be 'mourning' the loss of their marriage. *Idda* also provides time to determine whether or not the wife is pregnant in order to establish paternity of the child. With *idda* only ending on the birth of the child, the social stigma attached to birth out of wedlock is avoided. Because Muslim marriages were (and still are) not recognised, Muslim children in South Africa were for many years stigmatised as born of unmarried parents even though their parents were married to each other in terms of Islamic law. The question whether an *idda* is still necessary to ascertain pregnancy especially in view of today's advances in medical technology is often raised. While the practical aspect of ascertaining pregnancy is important, it cannot cover all eventualities and is furthermore only one of the purposes of *idda*. It is submitted that reconciliation, which can only occur in the case of a revocable divorce, is probably the most important purpose of *idda* as far as divorce is concerned, and for this reason *idda* per se (and in its totality) must not be overlooked. In some forms of (irrevocable) divorce, the marriage is terminated immediately and before the *idda* is observed by the wife, and while the wife may still be entitled to *idda* maintenance during this period,<sup>211</sup> this results in there no longer being an opportunity to reconcile during this period. Another practical issue that arises in this regard concerns the status of a child conceived during marriage where the former wife's pregnancy is only ascertained during the *idda* that she observes after she has been irrevocably divorced. While, technically, this may mean that the child will be born of unmarried parents, given that at the time of its conception the wife was still married to her husband, it is assumed that the child is her husband's, especially since she may not remarry during the *idda* period. Naturally, this does not rule out the possibility of pregnancy resulting from an extramarital sexual encounter. In the event of a divorce, the Muslim Marriages Bill clearly limits the husband's duty of support and the question of interim care or contact to a 'child born of the marriage' [emphasis added].<sup>212</sup> Notwithstanding similar issues pertaining to inheritance (an area which is not formally dealt with in the Bill),<sup>213</sup> maintenance

<sup>209</sup> Q.65:4. See cl 1 of the Muslim Marriages Bill under 'Iddah' (a)(ii).

<sup>210</sup> Ahmad *Muslim Law of Divorce* 844.

<sup>211</sup> Maintenance for the wife for the period of *idda* is discussed in para 9.4(a) below.

<sup>212</sup> See, respectively, cl 11(2)(c)(iv) and 9(3)(g)(i). See also paras 9.4 and 9.5 below.

<sup>213</sup> See para 4.1(a) above.

and guardianship of such children are not directly provided for in the Bill. In the event of a dispute of this nature arising after an irrevocable divorce, Islamic law provides that the parentage (maternity and paternity) of children of spouses, besides being established through marriage, may also be established through acknowledgement by the father or evidence of parentage (for example, through paternity tests or the witnessing of the birth by a midwife).<sup>214</sup> It is submitted that the purpose of *idda* should be seen in conjunction with its timing and that *idda*, ultimately, was intended to be observed during the process of divorce rather than after the marriage has ended when it would seem like an afterthought and serve little purpose other than to be deemed a practical hindrance to the daily life of a woman. In any event, in South Africa, children are no longer labelled 'legitimate' or 'illegitimate'; their parents are referred to simply as being married or unmarried and the term 'children born of unmarried parents' is used. In terms of South African law, a child is regarded as being born of married parents 'if the biological parents were *legally* married to each other at the time of the child's conception, or at his or her birth, or at any time between conception and birth'.<sup>215</sup>

#### (e) *Timing of divorce*

As already indicated, a husband may pronounce a valid divorce without his wife even being aware of it. It is, however, submitted that the *Qur'an*, by being very specific with regard to the timing of *talaq*,<sup>216</sup> appears to encourage the wife's knowledge of the divorce and an involvement in the process of divorce that is both unencumbered by the physical discomfort of menstruation, and, if properly timed, also encourages possible reconciliation between parties.

A divorce must be pronounced by the husband during a period of menstrual purity (*tuhr*)<sup>217</sup> (and during which no sexual intercourse occurs). It is submitted that the husband can only accurately determine whether or not his wife is actually menstruating if she truthfully confirms this to be the case. A divorce may be pronounced before or after but not during the time that the wife is menstruating, nor for that matter, during the flow following childbirth (*nifas*). This is also confirmed by Prophetic tradition (*Sunna*). In a case where a husband had pronounced the divorce whilst his wife was menstruating, the Prophet ordered him to retract the divorce through the process of revocation (*raji'i*) described above.<sup>218</sup> However, if revocation is required, it suggests that the divorce pronouncement is valid. While the *Hanafis* consider such a divorce to be effective, the Prophetic dictum indicates that the husband should revoke it and pronounce

<sup>214</sup> Nasir *Personal Status* 145 and 150. See also s 21 of the Children's Act.

<sup>215</sup> Section 20 of the Children's Act read with s 1, in terms of which 'marriage' is broadly defined to include Muslim marriages. For further detail in this regard, see Boezaart *Law of Persons* 94–5.

<sup>216</sup> Q.65:1.

<sup>217</sup> Nasir *Status of Women* 126.

<sup>218</sup> See para 6.2(a)(i) above.

the divorce afresh during a period of purity.<sup>219</sup> It can be inferred from this that sexual relations are deemed to be the (primary) indicator of reconciliation. The timing requirement, however, does not apply to a delegated divorce or a *faskh*.<sup>220</sup> The requirement that no sexual intercourse occur during this period of purity, implies that the husband is not permitted to divorce the wife during a period of purity in which he has had sexual relations with her. While the *Sunni* jurists apparently regard a pronouncement of divorce in such a case as having effected a valid *talaq al-bida*, Ahmad indicates that 'a divorce cannot be properly given under such circumstances' but that nonetheless '[t]he prohibition does not apply when the wife is incapable of pregnancy whether on account of tender [for example, under nine years] or old [for example, 55 years or older] age'.<sup>221</sup> Of course, in a (properly timed) revocable divorce, the husband may resume sexual relations with his wife during the *idda* and so resume the marriage. One of the purposes of *idda* is to encourage such reconciliation. It therefore makes sense that a divorce is not pronounced while the wife is menstruating since sexual intercourse is not allowed during this time because menstruation is considered to be a physical illness.<sup>222</sup> In a marriage that has irrevocably broken down, *idda* will usually pass with no sexual contact occurring. However, in view of the fact that menstruation is considered to be an illness which can have a debilitating emotional (hormonal) and physical effect on some women, it also makes further sense that divorce is not pronounced while the wife is menstruating and unable to participate optimally in the decision to end the marriage, as it has been contended, should be the case.

## 7 CURRENT AND PROPOSED ROLES OF RELIGIOUS AUTHORITIES AND TRIBUNALS IN THE REGULATION OF DIVORCE

Both *talaq al-tafwid* and *khul'* are not commonly used by religious tribunals in South Africa when the marriages of persons married only in terms of Islamic law irretrievably break down. Unless the wife's marriage contract includes permitted conditions or stipulations which allow her the delegated right to pronounce the *talaq* or she has negotiated such termination with her husband through *khul'*, a wife who wishes to end the marriage — preferably, but not necessarily, after initial attempts at informal mediation between families and/or professional mediation — may encounter difficulties if her husband refuses

<sup>219</sup> Ahmad *Muslim Law of Divorce* 70. This would apparently also be the case with regard to a *talaq al-bida*. See para 5.1(c)(ii) above.

<sup>220</sup> Ahmad *Muslim Law of Divorce* 66–7.

<sup>221</sup> *Muslim Law of Divorce* 69.

<sup>222</sup> See Q.2:222 in Pickthall, M *The Meaning of The Glorious Koran. An Explanatory Translation* (George Allen & Unwin 1930) 53.

to cooperate. This often leaves her with little option but to approach one of the unofficial and informal Muslim religious tribunals variously located in the provinces of South Africa to enlist the assistance of their essentially conservative male *ulama* who have varying degrees of status and qualifications and regulate religious matters and legal disputes.<sup>223</sup> These bodies mainly, and almost exclusively, deal with divorce in the form of a *talaq* or *faskh*. While a *faskh* is, in terms of Islamic law, available to both a husband and a wife, it appears that in these tribunals it is only used by women and is usually not readily granted to them. The majority of South African Muslims, both men and women, utilise these tribunals to seek official ratification, through religious decrees of divorce and judgments, of their decision to divorce.

In attempting to reconcile parties, *ulama* act as both mediators and arbitrators, and when authorised by the husband to act on his behalf, *ulama* may also act as the husband's nominee or agent to divorce his wife. While the 2003 Muslim Marriages Bill conferred a major role in the application of the law as accredited mediators, arbitrators, marriage officers and assessors on *ulama*, these roles have been drastically reduced in the 2010 Bill.<sup>224</sup> While retaining their roles of marriage officer and mediator, the 2010 Bill has effectively removed arbitration, Muslim judges, and Muslim assessors from the picture. As is explained below,<sup>225</sup> the Bill proposes that a secular court should adjudicate divorces. While this means that a non-Muslim judge could preside over a matter involving Muslim personal law (and, therefore, Islamic law), it does not preclude parties from presenting evidence by *Shari'a* experts to guide the court, especially in the complex area of divorce, as has been the case in the past and still is.<sup>226</sup>

## 8 REGULATION OF DIVORCE IN THE MUSLIM MARRIAGES BILL, 2010

Clause 9 of the Muslim Marriages Bill accords with Islamic law in recognising four (not all) forms of divorce: the *talaq* of the husband<sup>227</sup> (in both *Sunna* (recommended) and innovated (*bida*) subdivisions), *talaq al-tafwid* (husband

<sup>223</sup> See Moosa *Unveiling the Mind* 143–62 for a detailed discussion of the number, formation and role of such bodies in South Africa. See, in general, Toefy *Divorce in the Muslim Community* for an outline of the procedure usually followed in order to obtain a Muslim divorce. See also paras 5(1)(c)(ii) and 5.4 above.

<sup>224</sup> See para 6.2(c) above.

<sup>225</sup> See para 8 below.

<sup>226</sup> Moosa *Unveiling the Mind* 158 and 160. Expert witnesses were called in, for instance, *Ryland v Edros* 1997 (2) SA 690 (C). *Hassam v Jacobs* 2008 (4) All SA 350 (C) is a typical example of the difficulties a court will be faced with if such expert opinion is not sought. See also the comments by Revelas J in *AM v RM* 2010 (2) SA 223 (ECP) para 2.

<sup>227</sup> Clause 9(3)(a). See also the definitions of '*Talāq*' and 'revocable' and 'irrevocable' *talāq* in cl 1.

delegating his right to divorce to his wife),<sup>228</sup> *khul'* (dissolution at the instance of the wife),<sup>229</sup> and *faskh*<sup>230</sup> (dissolution granted by a court and available to both spouses), and regulates all these forms as irrevocable divorces.

*Talaq* is regulated in a way that ensures both knowledge on the part of the wife through registration<sup>231</sup> and official finalisation of the process of divorce through the confirmation of the divorce by a secular court in the case of *talaq* or *faskh*.<sup>232</sup>

If parties elect to opt out of the provisions of the Bill, religious tribunals will continue to play a role in their divorces but the parties will not be precluded from seeking secular relief as is currently the case. However, the Bill makes it easier for parties who have elected to subject their marriage to its provisions and who wish to obtain relief in respect of the consequences flowing from these marriages,<sup>233</sup> whether during the marriage or after divorce, to do so. The provisions of the Bill allow for confirmation of both the marriage and the divorce by a secular court.

Clause 9(3)(a) of the Bill deals with the registration of an irrevocable *talaq* as follows:

The husband must register an irrevocable *Talāq* (which takes effect as from the time of pronouncement thereof) immediately, but . . . not later than 30 days after its pronouncement, with a marriage officer in the magisterial district closest to his wife's residence, in the presence of two competent witnesses, and after due notice to the wife.

By virtue of the definition in clause 1 of the Bill, a marriage officer may include an *ulama* member or any Muslim person (of either sex) with knowledge of Islamic law and who is accredited as such officer. As indicated above,<sup>234</sup> there is a distinction between an irrevocable *talaq* (which results in a de facto, final divorce) and a *talaq* that is effective from the time of its pronouncement (which results in a divorce that can be either revocable or irrevocable). The wording of clause 9(3) makes it clear that the provision applies only to a *talaq* that is irrevocable. A husband alone must register an irrevocable *talaq*, either immediately (that is, the *talaq* or delegated *talaq* must be pronounced as irrevocable at the same time that it is registered) or within 30 days after it was pronounced as irrevocable (either extra-judicially by the husband himself or with the assistance of a religious tribunal). While tribunals may continue to facilitate *talaqs* to the point that they are confirmed to be irrevocable (finally effective), these divorces will only be deemed officially (legally) finalised once registered and confirmed by an order

<sup>228</sup> Clause 9(3)(c).

<sup>229</sup> Clause 9(6)(a) and (b). See also the definition of '*Khula*' in cl 1.

<sup>230</sup> Clause 9(5)(b) and (d).

<sup>231</sup> She is required to be notified of the divorce at the time of its registration: cl 9(3)(a) and (b).

<sup>232</sup> Clause 9(3)(e).

<sup>233</sup> See para 9 below.

<sup>234</sup> See para 6 above.

of the secular court. All three forms, namely the *talaq*, delegated divorce, and *khul'*, will already upon registration be deemed irrevocable. The judicial *faskh*, once granted by the court, will also be irrevocable. However, while there seems to be some contradiction in this exposition and duplication evident in the role of secular courts, the whole idea behind the secular courts' confirmation of a registered divorce is to officially bring the process to an end and thus to provide legal certainty of the divorce. One may, for example, have as (one?) possible route: (1) Muslim divorce; (2) its registration; and (3) its confirmation. Steps (2) and (3) are *always* necessary.

The same registration and notice requirements of *talaq* apply to a wife who exercises her delegated right<sup>235</sup> to divorce. It would appear from the provisions of the Bill that because the wife (not the husband) has pronounced the *talaq* in terms of a delegated divorce, her presence would be required before such registration can take place. Her presence is naturally required in the case of the *faskh* for which she has applied and also in the case of the registration of the *khul'* where the Bill specifically says that '[s]pouses who have effected [such a divorce] must personally and jointly appear' at the time of its registration in the presence of witnesses.<sup>236</sup> A *khul'* is registered as 'one irrevocable *talaq*'<sup>237</sup> after which the same confirmation and interim relief provisions apply. Since it is regarded as a minor degree irrevocable divorce, spouses may remarry each other with no *halala* being necessary.

The Bill does not provide for a husband to be compelled<sup>238</sup> to divorce his wife through *talaq* (unless of course he delegated the right to divorce to her). While a court grants a decree of divorce *confirming* both a *talaq* and a *faskh*, and in fact also grants the *faskh* itself, the court does not *grant* a *talaq* to the wife (the husband does). The court merely confirms an already registered irrevocable *talaq* and, since both spouses are in possession of a certificate that serves as proof of such registration, it may confirm the divorce at the instance of either the wife or the husband. The Bill provides for the speedy finalisation of the divorce by indicating that '[a] spouse' (either the husband or wife) must institute an action for confirmation of the *talaq*.<sup>239</sup>

Only a secular court may grant a *faskh*. When the court grants a husband or wife a decree of divorce in the form of a *faskh*, it 'has the effect of terminating the marriage, in accordance with Islamic law'.<sup>240</sup> The fact that this method is equally available to both spouses also reduces the stigma<sup>241</sup> that is usually attached to a divorce, whether instituted by a husband, who is seen to be abandoning his wife (especially when he does so for another woman) or by a wife, who is seen to be abandoning her husband. This does not, however,

<sup>235</sup> Clause 9(3)(c).

<sup>236</sup> Clause 9(6)(a).

<sup>237</sup> Clause 9(6)(b).

<sup>238</sup> In this regard, see the discussion of s 5A in para 4(2)(a) above.

<sup>239</sup> Clause 9(3)(e).

<sup>240</sup> Clause 9(5)(b) and (d).

<sup>241</sup> See Toefy *Divorce in the Muslim Community* 146.



necessarily mean that the function of the religious tribunal to grant a *faskh* is effectively terminated. While it may seem to be a duplication of the process, even parties who are bound by the Bill are not precluded from obtaining a *faskh* from a religious tribunal. However, the *faskh* certificate provided by a religious tribunal, and especially the reasons given for requesting the *faskh*, will only be of evidentiary and theoretical value in assisting the secular judge whose decree of divorce will ultimately be the only officially recognised document. This will avoid any future uncertainty and a repeat of the situation in *Hassam v Jacobs*<sup>242</sup> where the (successful) applicant averred that the *faskh* that she had obtained 'became ineffectual' because of the conduct of her deceased husband who had apparently 'rejected' the *faskh* 'by tearing up the document evidencing it when presented to him' and that they had subsequently reconciled during her *idda* period.<sup>243</sup> As indicated above,<sup>244</sup> the *faskh* was treated as revocable as a result of a misdirected and flawed application of Islamic law. Given that reconciliation ought not to be possible once an irrevocable *faskh* has been granted by an unofficial religious tribunal or member of the *ulama* fraternity, together with the fact that her husband was (morally but) not legally compelled to accept as valid such a ruling, her husband's rejection could also have been construed as deliberately not wanting to abide by the ruling. The subsequent reconciliation of the spouses could therefore initially also have been construed as amounting to 'living in sin' and, since her husband later also married another woman, it could also have been construed as adultery on the part of both parties. In terms of Islamic law, and therefore the Bill, the fact that a *faskh* terminates the marriage irrevocably would also mean that the couple who wish to reconcile must enter into a new marriage contract after the completion of the *idda* of the former wife. The intervening process of *halala* would not apply in such a case since it was the court that granted the decree of divorce.

Deliberate failure by a husband to register an irrevocable *talaq* does not alter the fact that the divorce is effective from the time of its pronouncement.<sup>245</sup> However, the husband's contravention of the provisions of the Bill in this regard would amount to a criminal offence that could result in a steep fine.<sup>246</sup>

While not immediately clear from clause 9(3)(a), it would seem that a divorce may only be registered 'after due notice to the wife' of the registration and not the divorce itself (which may have been pronounced earlier). This is evident from clause 9(3)(b) and the fact that Islamic law does not require notice to be given to a wife in order for a divorce to be effective (it is effective from the time of

<sup>242</sup> 2008 (4) All SA 350 (C). For a critical analysis of this case, see Moosa, N & Abduroaf, M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' 2014 *Acta Juridica* 160. See also notes 170 and 171 above.

<sup>243</sup> See para 2 of the High Court judgment.

<sup>244</sup> See para 5.4(b) above.

<sup>245</sup> Clause 9(4)(b).

<sup>246</sup> Clause 9(4)(a).



pronouncement).

Unlike clause 9(3)(a) of the 2003 Bill, which required the presence of the wife or her representative at the registration of an irrevocable *talaq*, the 2010 Bill does not require such presence. While the 2010 Bill<sup>247</sup> requires two witnesses to be present at the time of the conclusion of a marriage in order for the contract of marriage to be valid, two witnesses are not necessarily required at the time of the termination of the marriage. The 2010 Bill merely requires two witnesses to be present at the time of the registration of an irrevocable *talaq*.<sup>248</sup> As already indicated, registration may or may not coincide with termination; it will coincide if registration and termination occur simultaneously, while it will not coincide if termination precedes registration.

The 2010 Bill also acknowledges that a spouse may dispute<sup>249</sup> the validity of an irrevocable *talaq* and that this may delay registration of the *talaq* until the dispute has been resolved through compulsory mediation and the parties' reaching a written settlement or, failing this, by the secular court itself. The court will have to resolve such a dispute directly in the context of Islamic law, which includes the primary sources on which Islamic law is based and from which it may deviate. In doing so, the secular court judges, although guided by the provisions and definitions of the Bill, will also be expected to engage with and interpret Islamic law and may even find themselves preferring one of the varied interpretations over the others in order to pronounce on Muslim personal law-related matters. *Ulama* will invariably continue to play a pivotal role as mediators<sup>250</sup> and in giving their expert opinions in disputed matters. When they choose one or other of the religious views, non-Muslim and Muslim judges invariably are also accepting a particular interpretation of Islamic law. As explained below in this chapter,<sup>251</sup> the bold reasoning and innovative decision of Farlam J in *Ryland v Edros*,<sup>252</sup> decided when the interim Constitution was still in operation, is instructive in this regard and is a far cry from the decision reached in *Ismail v Ismail* in 1983 by the then Appellate Division.<sup>253</sup>

<sup>247</sup> Clause 5(1)(c).

<sup>248</sup> Clause 9(3)(a).

<sup>249</sup> Clause 9(2)(d).

<sup>250</sup> See para 6.2(c) above.

<sup>251</sup> See para 9.1 below.

<sup>252</sup> *Ryland v Edros* 1997 (2) SA 690 (C).

<sup>253</sup> See Rautenbach, C 'Islamic Marriages in South Africa: *Quo Vadimus?*' (2004) 69 *Koers* 121 at 130–1 and 136–7 for further elaboration of the interpretative role of judges and their role in pronouncing on religious matters, including an analysis of *Ismail* and *Ryland v Edros*, both of which involved a Muslim divorce.

## 9 OVERVIEW OF THE LEGAL CONSEQUENCES OF DIVORCE IN THE CONTEXT OF SOUTH AFRICAN LAW, ISLAMIC LAW AND THE MUSLIM MARRIAGES BILL, 2010<sup>254</sup>

### 9.1 Introduction

An Islamic marriage contract is not only a private matter but also a social and economic contract. Knowledgeable parties may protect themselves by setting the terms for the marriage and also deciding on the terms for its ending. Given the public and social nature of the marriage contract, it is understandable that an Islamic divorce also involves a complicated entanglement of personal, economic and legal ties that become difficult to re-arrange and sever in order to enable spouses to lead their lives independently of each other and without the stigma which is usually attached to divorce, whether achieved at the initiative of the husband or the wife.

In terms of Islamic law, and premised on what today is considered an outmoded and patriarchal Islamic ideal, especially in the current South African constitutional context, economic superiority is attributed to Muslim husbands and fathers as a result of their being sole providers (breadwinners) and maintainers of dependent wives and children during the subsistence of their Muslim marriage(s). In terms of what is deemed to be a controversial *Qur'anic* injunction,<sup>255</sup> the husband is duty bound to unilaterally support and maintain (*nafaqa*)<sup>256</sup> his family. Non-payment of maintenance during the normal course of a marriage is itself a ground for a wife to initiate a judicial divorce (*faskh*).<sup>257</sup> That a Muslim woman is a financially independent being who is permitted to own, earn and dispose of wealth and to regulate her proprietary affairs as she may deem fit is of no consequence during the marriage. Thus, no matter how well-off the wife is, she is not legally obliged to 'win' the 'bread' and where she has so contributed, it is considered to be a debt that she may reclaim from her husband on divorce.<sup>258</sup> All that is expected as a *quid pro quo* from the wife, to justify her religious entitlement to such maintenance, is that she be a dutiful and obedient wife and good mother.

The husband's increased responsibilities are, in turn, deemed to justify, on the one hand, his unilateral right to divorce and sole guardianship of the children and therefore their continued maintenance upon divorce, and, on the other

<sup>254</sup> The Muslim Marriages Bill deals with maintenance of wives, children and divorcees under one heading (cl 11) and therefore an overlap between the present discussion and other references to marriage maintenance (*nafaqa*) is inevitable.

<sup>255</sup> Q.4:34. For further reference to this verse and a discussion of the controversies pertaining both to it and to Q.2:228 (divorce verse), see Moosa *Unveiling the Mind* 26, 46 and 106–107n99. See also Nasir *Status of Women* 105.

<sup>256</sup> In terms of Islamic law, *nafaqa* covers maintenance generally owed by a man to his dependants. It is also understood as such in terms of the Muslim Marriages Bill (cl 11(2)(a) and (b)). It usually includes, but is not limited to, food, clothing and lodging.

<sup>257</sup> See further para 5.4(b) above.

<sup>258</sup> Nasir *Status of Women* 107; Toffar *Administration of Islamic Law of Marriage and Divorce* 105.

hand, the temporary maintenance of his wife and her limited right to care of the children upon divorce. According to Islamic law, *nafaqa* is the lawful right of a woman in a Muslim marriage regardless of her (*kitabī*) religion and the extent of her wealth.<sup>259</sup> As is the case with contracts in general, the husband's obligations regarding marriage maintenance (*nafaqa*) come to an end with regard to his wife (but not their children) upon the termination of the marriage. The financial claims of a Muslim woman to the wealth of her husband are very limited once she is divorced. In terms of the strictest *Shari'a* provisions, the legal consequences which follow the arbitrary repudiation of a wife by her husband are usually minimal; in complying with *Shari'a*, these provisions are also reflected and generally incorporated in the Muslim Marriages Bill. While not important during the marriage, the wife's limited economic entitlement upon divorce is justified on the grounds that a Muslim woman is not precluded from being financially independent and the fact that she is deemed to be entitled to further support by the men in her family upon divorce. Her limited right to care allows her to remarry without any such related encumbrances tying her to her former marriage. While, theoretically, it seems that the rights and duties of husbands and wives offset each other quite evenly, practical reality dictates otherwise.

In addition to their financial responsibilities as husbands and fathers, Muslim men are, in terms of a general Islamic law rule, deemed also to be responsible for the financial welfare of single, divorced and widowed women in their family (including their divorced daughters), who are struggling to make ends meet. While the rights and duties of men and women are unequal in this regard and generally appear to favour the wife, they have to be seen in the context of the unequal inheritance rights of women and the unilateral right to divorce granted to Muslim men. The increased financial responsibility of men may be justified on the basis of their entitlement to an increased share (usually double that of a female) of an inheritance in terms of Islamic law.<sup>260</sup>

It is submitted that the majority of South African Muslim women can be deemed to fall into the category of conservative-Islamist Muslims. Most are encouraged to be home-makers and stay-at-home mothers as this is deemed to be the Islamic ideal. Whilst theoretically well provided for during marriage, the nature of the marriage contract, which by default is an antenuptial contract providing for complete separation of property, also means that the wife, who did not work outside of the home, whether by choice or because she was not permitted to do so by her husband, and who is also not in possession of much education and self-generated or inherited wealth, is often left with few resources upon divorce. Given this reality and the fact that her entitlement upon divorce is both limited and temporary, it should not be surprising that even when they are not content in their marriages, some women have no option but to endure the marriage rather than divorce their husbands and face literal destitution. This

<sup>259</sup> Nasir *Personal Status* 173 and *Status of Women* 105.

<sup>260</sup> See Moosa *Comparative Study* 135ff.

is often the case even though, once divorced and finding herself in a position of need, the former wife's male blood relatives who may inherit from her, for example, her adult son, her father and brothers (and usually in that order of precedence), are in the first instance deemed to resume the responsibility for her maintenance, at least until she remarries (which they would encourage as ideal for everyone concerned). In a negative economic climate which also affects former husbands who struggle to earn a decent income, many South African Muslim women find themselves in dire straits and faced with the possibility of destitution when divorced since they cannot depend on their blood relatives who no longer live as extended families but as modern nuclear families. Former husbands often fail to pay the limited divorce (*idda*) maintenance, let alone any outstanding marital debts (including the *mahr*). Fearing possible destitution, the wife may as a measure of last resort turn to welfare, as has been suggested should be the case in South Africa.<sup>261</sup> While a sense of collective accountability is ideal, it can provide little more than short-term relief. It is submitted that recognition of Muslim marriages remains a necessary first step in solving this problem and that neither welfare organisations nor the broader Muslim community can and should be solely relied on or expected to carry this responsibility. Such reliance is bound to be problematic since, as is currently the case, South Africa already does not have adequate funds to support those already in even more dire straits.<sup>262</sup>

Practical realities also dictate that in cases where wives have contributed to the financial upkeep and maintenance of the family, it is very difficult for them to prove this and to reclaim such debt. While the wife is not required to make such contributions, this does not detract from the fact that women do so, if not out of necessity then simply because they have the means and want to do so. This is supported by the data contained in the recent study conducted among a sample of 295 Muslim women in the Western Cape.<sup>263</sup> If the husband cannot afford to maintain the children or reneges on this duty, the children's mother is usually duty bound to do so in spite of the clear *Qur'anic* injunction<sup>264</sup> that she is not so obliged.

Thus, in spite of the Islamic ideal, the South African reality is that Muslim women and children are often not only inadequately maintained during marriage but also unable to secure the limited financial resources that they are entitled to upon divorce, and this is so even if religious tribunals have decided in their favour. While they await the formal recognition of their Muslim marriages, women are therefore often forced

<sup>261</sup> Toffar *Administration of Islamic Law of Marriage and Divorce* 262–4 suggests that, as a last resort, maintenance can be provided for divorcees and widows through the legal establishment of a special fund, under the administration of a Muslim Family Court, for this purpose and to which all employed Muslims must contribute. He also suggests that such fund be annually augmented by the State Treasury. However, the establishment of separate courts for the administration of Muslim marriages is no longer an option. See also Moosa *Human Rights and Gender Consequences* 49–50.

<sup>262</sup> See Skelton & Carnelley (eds) *Family Law* 351n149 and the view of Toffar *Administration of Islamic Law of Marriage and Divorce* in the previous footnote.

<sup>263</sup> See Shaikh et al op cit note 119 at 4.

<sup>264</sup> Q.4:34.

to seek relief for themselves and their children from South African courts in terms of secular legislation. Given that approaching the courts is a costly affair, most of the cases where significant gains have been made were test cases instituted on an *ad hoc* basis, and all were initiated by women. While the precedents that have been set ultimately benefit all Muslim women and their children, the successful party herself has often gained very little real (financial) benefit. Muslim women, desperate in their quest for relief, continue to resort to relying on handy tools like the universal partnership in order to ensure due rights in terms of Islamic law, as is evident from the 2006 Constitutional Court case of *Du Toit v Seria*.<sup>265</sup>

While post-democracy court cases have provided relief, pre-democracy and even earlier court cases were varied in outcome and mostly did not do so. One such early divorce case, *Ismail v Ismail*,<sup>266</sup> is instructive in this regard. A husband had divorced his wife by means of three irrevocable *talaqs* and she claimed, among others, arrear marriage maintenance (*nafaqa*) and divorce (*idda*) maintenance. Although a Muslim cleric (*moulana*) had decided in her favour, the husband did not abide by the ruling. Since he could not legally be compelled to give effect to the ruling, his wife was forced to seek relief in the secular court.<sup>267</sup> The wife had met with success in a religious tribunal but with no relief, and she was also unsuccessful in the secular court due to the non-recognition of her Muslim marriage.

An example of an early post-democracy case relating to a Muslim divorce is *Ryland v Edros*.<sup>268</sup> The wife had been unsuccessful in procuring a fair settlement in a Cape-based religious tribunal but, because these decisions are not finally binding and can therefore be contested in South African courts, met with some success in a secular court in spite of the non-recognition of Muslim marriages. The *Ryland* case was the first post-apartheid case to explicitly give effect to some of the consequences flowing from a de facto monogamous Muslim marriage. In this case, the court innovatively enforced parts of a Muslim marriage contract after the marriage was terminated by the husband through serving three *talaqs* on his wife. The husband instituted an action to evict his wife from their common home. She defended the action and instituted a counterclaim in which she claimed arrear maintenance for the duration of their sixteen years of marriage, a consolatory gift (*mata'a*) for unjustified repudiation and an equitable share of the growth of her husband's estate to which she had contributed. At a pre-trial

<sup>265</sup> *Du Toit v Seria* 2006 (8) BCLR 869 (CC). In this case, the Constitutional Court refused an application for leave to appeal to it against a judgment of the High Court. The applicant was a party (only) to a Muslim marriage that had lasted for 28 years but which had ended by irrevocable *talaq*. She unsuccessfully instituted an action in the High Court claiming an order that, at common law, a universal partnership had existed between herself and the respondent (her husband) during the subsistence of their marriage, and that she was therefore entitled to a half-share of his property. While she also claimed rehabilitative maintenance for twelve months, the court noted that such claim had not been pursued. For reference to this more recent case and other much earlier cases, see Moosa *Unveiling the Mind* 153.

<sup>266</sup> 1983 (1) SA 1006 (A).

<sup>267</sup> See Rautenbach op cit note 253 at 130–1.

<sup>268</sup> 1997 (2) SA 690 (C). See also Moosa op cit note 86 at 36.

conference the parties agreed that the rules of the *Shafi'i* school would apply since both of them were adherents of this school. The court found that the wife was entitled to marriage maintenance (*nafaqa*) during the subsistence of the marriage in accordance with the means of the husband and to maintenance for the three months of her *idda* after the marriage was terminated by the third *talaq*. However, the court only granted her limited arrear *nafaqa* because, even though the *nafaqa* debt does not prescribe in terms of Islamic law, consideration was given to prescription in terms of South African law. The court further awarded her *mata'a* because her husband had divorced her without just cause. Both claims were limited in accordance with Islamic law. The court however found that she was not entitled to a share in the growth of her husband's estate.<sup>269</sup> Since a husband's legal duty of support could only arise from a legally recognised marriage in South Africa, the wife was not treated as a spouse but, based on the contractual nature of the Muslim marriage, the marriage was treated as a contract which could be enforced as between the parties.

The reasoning underlying the decision in the *Ryland* case has subsequently been adopted in other cases. The courts, including the Constitutional Court, have afforded limited recognition to Muslim marriages and have extended the meaning of the word 'spouse' in several Acts, including the Maintenance Act 99 of 1998, to partners in both de facto monogamous<sup>270</sup> and polygynous<sup>271</sup> Muslim marriages in order to

<sup>269</sup> See Goolam et al op cit note 32 at 300–1; Rautenbach op cit note 253 at 139.

<sup>270</sup> Following *Ryland v Edros* 1997 (2) SA 690 (C), the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) also gave consideration to the religious nature of a Muslim marriage after it reversed the decision in *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D) and found that Mrs Amod's deceased husband had a legal duty to support her. The Supreme Court of Appeal extended the dependant's action for loss of support to the surviving spouse in a monogamous Muslim marriage. Although the courts, in part, continued with this positive trend in *Daniels v Campbell* 2003 (9) BCLR 969 (C), it was the Constitutional Court in *Daniels v Campbell* NO 2004 (5) SA 331 (CC) that specifically extended the meaning of the word 'spouse' in both the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 and the word 'survivor' in the latter Act to include Muslim spouses and surviving spouses in monogamous Muslim marriages. For more detail, see Heaton *Family Law* 232–4; Rautenbach et al *Introduction to Legal Pluralism* 198–201; Moosa, N & Karbanee, S 'An Exploration of *Mata'a* Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re)-opening a Veritable Pandora's Box?' (2004) 8 *Law, Democracy and Development* 267 at 281–2 and 287.

<sup>271</sup> *Khan v Khan* 2005 (2) SA 272 (T) was the first post-apartheid case to expressly state that if the consequences flowing from a de facto monogamous Muslim marriage were recognised (as had been done in *Ryland v Edros* 1997 (2) SA 690 (C) and *Amod v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)), such recognition should also be extended to polygynous marriages. This was confirmed by the Constitutional Court in 2009 in *Hassam v Jacobs* NO 2009 (5) SA 572 (CC). The court *a quo* in *Hassam v Jacobs* 2008 (4) All SA 350 (C) extended the application of the Intestate Succession Act and the Maintenance of Surviving Spouses Act to spouses in de facto polygynous marriages. While the ambit of the word 'survivor' in the latter Act proved unproblematic in the court *a quo*, this was not the case with the word 'spouse' in the former Act and it was left to the Constitutional Court to confirm an order of constitutional invalidity made in this regard. The Constitutional Court held that the exclusion of widows from such de facto polygynous marriages from the ambit of the Intestate Succession Act



provide relief to Muslim women in cases of death or divorce of their spouses. The Muslim Marriages Bill<sup>272</sup> also makes provision for relevant amendments to current legislation to include Muslim spouses. The piecemeal development and protection of the rights of Muslim women by the judiciary, though necessary and therefore to be welcomed, is nonetheless unsatisfactory and not sustainable in the long term.

Cognisant that in terms of Islamic law effective care and guardianship ultimately remain vested in the former husband, whose financial and maintenance obligations to the former wife, though generous upon and during marriage, are severely curtailed upon and after divorce, clauses 10 and 11 of the Bill regulate the usually limited consequences that flow from Muslim divorces and synthesise them with the provisions of South African law. In doing so, the Bill succeeds in making generous provision for children. The Bill also ensures a wife equitable and adequate, though not necessarily optimal, protection with regard to maintenance. These provisions have proved less contentious than those relating to the grounds of and procedure for divorce. In terms of the Bill, a divorced woman would not have to depend on her family because her marriage will be afforded legal recognition. It is also envisaged that the extensive maintenance provisions of clause 11 of the Bill, which also give courts considerable discretion in calculating and even amending the amount of maintenance that 'must be fair and just having regard to all the circumstances of the case',<sup>273</sup> will assist in alleviating some of the practical problems and hardships experienced by Muslim women.

However, as will become evident under the next few headings, it is a matter of debate whether dower and temporary *idda* (divorce) maintenance amount to real privileges for women and real deterrents to ensure that men take divorce seriously. Since the right to divorce vests in the husband, the wife may herself negatively influence the extent of her support in order to secure a divorce from him. She may have to sacrifice her right to dower and maintenance in order to extricate herself from the marriage when using certain forms of divorce that are only available to her with his assistance, for example, a *khul'* divorce initiated by her. Thus, when factors such as the form of divorce, the issue of which party initiated the divorce, and whether or not the marriage was consummated are taken into consideration and all calculations have been made, the wife may effectively walk away from her marriage (regardless of its duration) with little more than three months' maintenance and a usually once-off consolatory gift

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amounted to unjustifiable and unfair discrimination on the grounds of gender, religion and marital status. For more detail on the decision of the court *a quo*, see para 5.4(b) above and para 9.2(b) below. See also Heaton *Family Law* 233–4; Mbatha et al op cit note 26 at 162 and 172; Rautenbach et al *Introduction to Legal Pluralism* 201–3.

<sup>272</sup> Clause 17 of the Muslim Marriages Bill, read with its Schedule, provides for amendments to current legislation to include Muslim spouses, including an amendment to s 1 of the Intestate Succession Act to include a Muslim spouse in the definition of 'spouse'. It also calls for the amendment of s 1 of the Maintenance of Surviving Spouses Act to include a Muslim surviving spouse in the definition of 'survivor'.

<sup>273</sup> Clause 11(3)–(4). See further para 9.4(a)(i) below.



(*mata'a* in its narrow sense). Often she has difficulty in securing even this limited maintenance. The consolatory gift is not mandatory and is often treated as little more than a parting gift to serve a social purpose. Although there is also a wider meaning that may be attributed to the term '*mata'a*' that lends itself to a more favourable and long-term post-divorce extension of maintenance for the wife, this meaning is not commonly favoured.<sup>274</sup>

The financial support in the case of dower and inheritance is due to her as of right and as effects of a valid marriage, not as a consequence of divorce.

## 9.2 The personal consequences of divorce

### (a) Competency to remarry

Unless exempted from observing it, an irrevocably divorced wife is temporarily prohibited from remarrying anyone else (including her former husband) until the expiry of her *idda* period.<sup>275</sup>

### (b) Wife's right to inheritance

A wife is entitled to inherit from her husband, and he from her, if either one of them should die during the *idda* following upon a revocable divorce, because they are still married to each other during this period. However, neither spouse may inherit from the other should one of them die after an irrevocable divorce.<sup>276</sup> The only exception to the latter rule is that the wife may inherit if she is divorced by a 'mortally' ill husband.<sup>277</sup> While the four schools of law differ in their opinions with regard to a woman who *has* been irrevocably divorced by her ill husband who subsequently dies from the same illness,<sup>278</sup> it is generally accepted that she would be entitled to inherit if she can prove that her husband, knowing that he was in the process of dying, deliberately brought about the irrevocable divorce before he died in order to deprive her of her inheritance.<sup>279</sup> She may also have to share her portion with other wives if her husband entered into further polygynous marriages.<sup>280</sup>

<sup>274</sup> On *mata'a*, see further para 9.3(c) below.

<sup>275</sup> On the *idda*, see para 6.2(d) above.

<sup>276</sup> In *Hassam v Jacobs* 2008 (4) All SA 350 (C), a *faskh* which would generally have been considered to be irrevocable, was treated as revocable. This allowed the wife to be treated as an heir in terms of the Islamic law of inheritance and therefore to be able to inherit from the deceased estate of her former husband. See para 5.4(b) and notes 243 and 271 above.

<sup>277</sup> The terms 'death illness' or 'mortal sickness' are used in the sources cited in this regard.

<sup>278</sup> For detail on the varied opinions of jurists in this regard, see Engineer *op cit* note 46 at 165–6.

<sup>279</sup> Nasir *Status of Women* 129.

<sup>280</sup> See para 4(1)(a) above.

### 9.3 The proprietary consequences of divorce

#### (a) Pensions, default matrimonial property system, redistribution, and settlement agreements

A wife may reclaim, as a debt owed by the husband, any maintenance contribution that she may have made during the subsistence of the marriage and even any arrear maintenance (*nafaqa*) that was due to her during the marriage. If the wife has financially contributed to the household, the contribution is considered to be a debt in terms of the Muslim Marriages Bill.<sup>281</sup> In terms of the Bill, any arrear maintenance due to the wife does not prescribe.<sup>282</sup>

In terms of the Pension Funds Act 24 of 1956, one of the requirements for paying part of a member's pension benefit or minimum individual reserve to his or her non-member spouse is that the amount must have been assigned to the non-member spouse by a court in terms of an order under section 7(8) of the Divorce Act.<sup>283</sup> This requirement effectively excludes most Muslim divorces since Muslim marriages are generally not dissolved by an order of court and an order can therefore not be made in terms of section 7(8) of the Divorce Act. However, in terms of the Bill, a court granting or confirming a decree for the dissolution of a Muslim marriage has the powers granted in section 7(1), (7) and (8) of the Divorce Act.<sup>284</sup> This means that a court may make an (divorce) order in accordance with the terms of a settlement agreement between the spouses and that it may have regard to a spouse's pension interest in connection with the division of assets and maintenance on divorce.<sup>285</sup> In a March 2012 ruling, the Pension Funds Adjudicator was proactive in ruling that Muslim divorcees are entitled to a share of their spouse's pension interest upon divorce.<sup>286</sup> Whilst beneficial and to be welcomed, the rationale on which the decision is based may be subject to criticism, given the non-recognition of Muslim marriages.<sup>287</sup> Ultimately, this point makes the case for recognition all that much stronger.

In terms of the Bill, the negative consequences of the default matrimonial property system of a Muslim marriage (complete separation of property)<sup>288</sup> can

<sup>281</sup> Clauses 9(8)(b)(ii) and (f) and 11(5).

<sup>282</sup> Clause 11(5).

<sup>283</sup> Section 37D(1)(d)(ii). See the amendment to s 37D of the Pension Funds Act by s 28(b) of the Pension Funds Amendment Act 11 of 2007.

<sup>284</sup> Several subsections of s 7 govern the division of assets of divorcing parties. Section 7(7) and (8), in particular, relates to the distribution of pension interests between parties on divorce. Section 7(1) applies to settlement agreements. On s 7(1), (7) and (8), see further Chapter 4 above.

<sup>285</sup> Clause 9(8)(a).

<sup>286</sup> *Tryon v Nedgroup Defined Contribution Pension and Provident Funds* PFA/GA/8796/2011/TCM, available at <http://www.pfa.org.za/index.php/determinations?task=document.viewdoc&id=2316> (accessed 23 February 2014).

<sup>287</sup> See Wiid, Y *An Evaluation of Parametric Amendments of Legislation Relating to the Distribution of Retirement Benefits upon Divorce* (unpublished LLM dissertation, University of the Western Cape 2011) 95–101.

<sup>288</sup> See para 4(1)(b) above. See also the comment by Goodey AJ in *Khan v Khan* 2005 (2) SA 272 (T) paras 4.6–4.7 that the finding of the magistrate in the maintenance court (the court *a quo*) that

only be tempered or alleviated by a court upon divorce if the spouses have failed to reach a settlement agreement regarding the division of their assets. In such a case, the court must, 'if it deems it just and equitable', order that the assets be divided equitably between the parties<sup>289</sup> and may exercise this power only in the following circumstances: when one party may have in fact assisted<sup>290</sup> or rendered services in the family business or may have actually contributed<sup>291</sup> to the maintenance or increase of the other's estate. The judicial discretion of the court means that it is not obliged to grant relief to the wife in all instances where she may have assisted or contributed to the maintenance or increase of her husband's estate.

**(b) Payment of the whole or outstanding dower due to the wife**

Dower is an important ingredient of the marriage contract. It is a sum of money, property or anything of value which becomes payable by the husband to the wife exclusively as an ex lege effect or consequence of marriage unless she has voluntarily waived her right to it.<sup>292</sup> The *Qur'an* instructs that even if a husband had given his wife 'a whole treasure [translated as boundless wealth] for dower', he 'take not the least bit of it back'.<sup>293</sup> It must be made clear — and this is also recognised in the Muslim Marriages Bill<sup>294</sup> — that the payment of dower is a debt flowing from the marriage itself and the husband is legally obliged to pay it to his wife. It is not something 'extra' that the husband is giving the wife because of considerations of generosity or remorse for having (arbitrarily) divorced her. While payment of dower usually is prompt and is paid at the time of marriage or on demand, it may be deferred and payable on the dissolution of the marriage by divorce. Once a divorce in a consummated marriage has become final (irrevocable), the wife is entitled to her whole dower. The husband therefore has to immediately settle in full any unpaid (deferred) balance of the dower. It is also possible that the wife may have to return the dower to her husband or that she may receive a reduced dower from him or no dower at all on divorce if she has waived her right to it in order to secure a divorce from her husband. If the marriage was not consummated, she is only entitled to half of a validly specified dower.<sup>295</sup>

**(c) Mata'a: Consolatory gift or maintenance beyond the idda period?**

Although there are opposing views on whether the consolatory gift is property

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the parties, married only according to Islamic law, had entered into a marriage in community of property, was incorrect.

<sup>289</sup> Clause 9(8)(b).

<sup>290</sup> Clause 9(8)(b)(i).

<sup>291</sup> Clause 9(8)(b)(ii).

<sup>292</sup> Q.4:4. See Moosa *Unveiling the Mind* 43n60.

<sup>293</sup> Q 4:20. For more information on the Arabic translation of 'treasure', see Ali op cit note 2 at 185n529 read with 125n354.

<sup>294</sup> See, in general, cll 1 and 6(3)(c) of the Muslim Marriages Bill.

<sup>295</sup> Q.2:237. See Nasir *Status of Women* 98.

or post-divorce spousal support, it is discussed as a proprietary consequence for present purposes.

As far as an irrevocable divorce is concerned, the schools of law have divergent opinions on the extent of the maintenance to which the wife is entitled. Distinct from both the dower (which pertains to the contract of marriage and not divorce)<sup>296</sup> and divorce (*idda*) maintenance, *mata'a* is yet another financial entitlement or element that has been introduced into divorce law by Islamic law based on the *Qur'an*.<sup>297</sup> It is usually awarded to the wife as compensation when she is divorced by her husband through *talaq* without just cause, that is, where the husband is 'at fault'.

'*Mata'a*' has variously been interpreted to have two meanings. The narrow interpretation is that it refers to a once-off consolatory gift. It has been construed as such in *Ryland v Edros*<sup>298</sup> (which applied the *Shafi'i* school of law in this regard) and in terms of the Bill.<sup>299</sup> In what can be described as a means test, this gift may vary in value according to the husband's financial means — the *Qur'an* left the amount open to interpretation.<sup>300</sup> According to the wider interpretation, '*mata'a*' relates to opening the door to long-term post-divorce maintenance of a divorced woman. In its wider interpretation, it effectively allows a divorced woman to receive maintenance beyond the *idda* period (after an irrevocable divorce). However, the latter interpretation is not commonly accepted and its application is not without controversy in both Muslim and non-Muslim countries.<sup>301</sup>

In terms of the *Hanafi* school, every divorcee whose marriage has been consummated ought also to be given a consolatory gift (*mata'a* in its narrow sense) in addition to her dower and her *idda* maintenance.<sup>302</sup> If the marriage has not been consummated and no amount of dower has been specified, it is also deemed desirable, though not mandatory, that she be given a consolatory gift.<sup>303</sup>

#### 9.4 Post-divorce spousal maintenance<sup>304</sup>

The husband's maintenance (*nafaqa*) responsibilities towards his wife terminate when the marriage ends. As a general rule a wife, once irrevocably divorced, has limited care of the spouses' children and is entitled to maintenance for herself for only a limited and temporary period. Such maintenance includes the following:

<sup>296</sup> See the previous paragraph.

<sup>297</sup> See Q.2:236 and apparently, albeit indirectly, also Q.2:41.

<sup>298</sup> 1997 (2) SA 690 (C).

<sup>299</sup> Clause 9(8)(g).

<sup>300</sup> Q.2:236.

<sup>301</sup> For a detailed exploration and analysis of *mata'a* as post-divorce or *continued* (long-term) maintenance of the divorcee, see Moosa & Karbanee op cit note 270 at 267–88, where it is contended that, especially given the social reality of women, there is enough scope for the primary sources (*Qur'an* and *Sunna*) to be interpreted in support of such maintenance.

<sup>302</sup> See Nasir *Personal Status* 135 and *Status of Women* 156.

<sup>303</sup> *Ibid.*

<sup>304</sup> See also para 9.3(c) above where the *mata'a*, which can also be categorised as post-divorce spousal support, is discussed as a proprietary consequence.

- (a) an amount of divorce (*idda*) maintenance for the mandatory period of *idda*, which varies from case to case depending on the length of the wife's *idda*;
- (b) maintenance for herself while she is caring for their children; and
- (c) 'inadvertent' post-divorce maintenance in cases of deliberate non-notification and concealment of the divorce.

However, in terms of South African law, Muslim women currently may have access to spousal maintenance after divorce which often exceeds the limited or temporary period provided for in terms of Islamic law. This is explained below in this chapter.<sup>305</sup>

**(a) Limited and temporary divorce (*idda*) maintenance**

As a general rule, following an irrevocable dissolution of a Muslim marriage by divorce, a husband is obliged to maintain his wife during the mandatory *idda*.<sup>306</sup> As long as the divorce is irrevocable, this maintenance is due to the wife regardless of whether the divorce becomes irrevocable upon the expiry of the *idda* or whether it is pronounced as irrevocable before the *idda* commences.<sup>307</sup> Payment of this maintenance is possible because *idda* is a grey period between marriage and divorce.

Although, for the sake of convenience, divorce maintenance is referred to here as *idda* maintenance and although the amount due to the wife may be linked to the length of the *idda* period, such maintenance is separate from and must be distinguished from marriage maintenance (*nafaqa*). The maintenance that is paid to the wife during her *idda* after her husband has pronounced a *revocable* divorce (which results in a hanging marriage and a hanging divorce) is marriage maintenance (*nafaqa*). Although the marriage is 'suspended' by the revocable divorce, the woman is still a wife and not a divorcee because the marriage still subsists; therefore, this *nafaqa* is not a separate or additional amount of maintenance. *Nafaqa* must be distinguished from the *idda* maintenance which is due to a wife for the period of *idda* following an *irrevocable* divorce. In both instances where *idda* precedes or follows an irrevocable divorce, the divorce becomes effective from the time of such pronouncement. The divorce may only become irrevocable upon the wife's completion of her *idda*; for example, in a recommended (*Sunna*) divorce, *idda* precedes irrevocability and the woman therefore starts her *idda* while she is still a wife. In other cases the divorce may become irrevocable immediately upon being pronounced; for example, in an innovated (*bida*) instant or triple divorce, *idda* only follows after the divorce has become irrevocable and the woman therefore starts her *idda* after she has become a de facto divorcee. In the former case (*Sunna* divorce), it is marriage maintenance (*nafaqa*) that is due to the woman because the marriage remains valid in all respects; her divorce (*idda*) maintenance is due to her after the divorce

<sup>305</sup> See para 9.4(a)(i) below.

<sup>306</sup> Clause 11(2)(c)(i) of the Muslim Marriages Bill.

<sup>307</sup> A divorce may be irrevocable even before registration: see cl 9(4)(b) of the Muslim Marriages Bill and the definition of '*Iddah*' in cl 1.

becomes irrevocable. There is no question of double dipping. In the latter case (triple divorce), it is divorce (*idda*) maintenance in the true sense of the term since the divorce is already irrevocable. If the husband did not maintain her during the *idda* of a revocable divorce (that is, while the marriage still subsisted) she may claim this maintenance as arrear marriage maintenance (*nafaqa*). This is also how matters are provided for by the Muslim Marriages Bill, which only deals with a divorce in its irrevocable form.

Divorce (*idda*) maintenance is only due to the woman once, whether or not it is paid in advance in the form of interim relief during a disputed divorce or paid after the divorce's confirmation as final.<sup>308</sup> If after a dispute has been settled and it is found that the husband has paid more than he should have, he is entitled to be reimbursed or the amount of the overpayment may be offset against any other maintenance due to her.

In its definition clause, the Bill defines and appears to confine *idda* to 'arising from the dissolution of the marriage by [divorce through] *Talāq* [and] *Faskh*'. However, *idda* is mandatory regardless of the form of divorce used and, in any event, the Bill makes provision for two additional forms of divorce, namely delegated divorce and *khul'*. By virtue of the recognition of these other forms of divorce by the Bill, the same rules that are set out above also apply to these forms. Thus, in the case of the delegated divorce, the divorce becomes irrevocable and the wife's *idda* commences when she exercises her right to divorce or when the condition upon which the delegated divorce depends is fulfilled. In the case of *khul'*, the divorce becomes irrevocable and the wife's *idda* commences when the husband accepts the wife's offer and gives effect to it. *Faskh* is the only form of divorce that depends on a court's intervention to be effective and therefore it is only once the court has dissolved the marriage that the divorce is deemed irrevocable and the *idda* commences.

The husband's legal duty to provide such *idda* maintenance varies according to the length of the *idda* period<sup>309</sup> and lasts until the expiration of the *idda* or, in the case of a pregnant wife, until the birth of the child.<sup>310</sup> *Sunni* jurists are unanimous<sup>311</sup> that following the birth of her child, a divorced mother may breastfeed her baby for the duration of the nursing (fosterage) period (which is up to, but not necessarily, two years)<sup>312</sup> regardless of whether or not she is irrevocably divorced from the child's father. She is entitled to separate remuneration while she breastfeeds her own child.<sup>313</sup> This is also provided for by the Bill.<sup>314</sup> By contrast, the mother's effort which goes into the process of bottle-

<sup>308</sup> Clauses 9(3)(g)(iii) and 11(2)(c)(i). See also para 9.6 below.

<sup>309</sup> See para 6.2(d) above on the duration of the *idda* period.

<sup>310</sup> Q.2:233.

<sup>311</sup> Nasir *Status of Women* 183–4.

<sup>312</sup> Q.31:14 (Meccan) and Q.2:233.

<sup>313</sup> Q.65:1.

<sup>314</sup> Clause 11(2)(c)(iii).



feeding a child will presumably be calculated as part of her additional expenses falling under post-*idda* maintenance,<sup>315</sup> while the actual costs of bottle-feeding will form part of the general maintenance due to the child by the father whilst in the mother's care. It is submitted that the mother should also be compensated for bottle-feeding her child *during* the *idda* period. *Sunni* jurists oblige the mother to breastfeed her own child as a duty and for no (additional) remuneration where she is in the *idda* of a revocable divorce (in which case she will in any event be entitled to marriage maintenance (*nafaqa*)).<sup>316</sup> During the nursing period following an irrevocable divorce, the father must maintain and house both the child and mother and this is also provided for by the Bill.<sup>317</sup> The parents may also decide that the father will employ a salaried wet-nurse (or foster mother) to breastfeed the child if the mother is unable or unwilling to do so herself.<sup>318</sup>

*(i) Extending maintenance after divorce in terms of South African law*

When a civil marriage ends in divorce it does not preclude either spouse from being granted further maintenance by the other, and such maintenance may even continue after the death of the liable spouse.<sup>319</sup> However, in terms of Islamic law, divorce maintenance is intended to be limited and is neither reciprocal nor gender neutral. Since South African courts also have the discretion to grant spousal maintenance after a divorce, and given the harsh economic climate of life in a secular society, it seems to have become more common for Muslim women to approach maintenance courts to grant them spousal maintenance beyond the *idda* period in order to assist them in becoming self-sufficient. In *Khan v Khan*,<sup>320</sup> a unique combination of facts presented itself. The husband disingenuously, through exercising his unilateral right to divorce, converted a claim for marriage maintenance (*nafaqa*) made during the subsistence of a marriage into a claim for divorce (*idda*) maintenance. However, the High Court held that a Muslim wife, whether married in a monogamous or polygynous marriage, is entitled to maintenance during the marriage and can enforce such maintenance in terms of the Maintenance Act. In this case, Mrs Khan had successfully applied to a maintenance court for a maintenance order while she was still married to Mr Khan. Mr Khan appealed against the ruling of the court *a quo* in terms of which he had agreed to pay his former wife a paltry sum of R1 000 per month and the premiums of a policy belonging to her. To add insult to injury, shortly before judgment in the court *a quo* was handed down, but after the proceedings were concluded, the appellant gave notice that he had in fact already divorced his wife

<sup>315</sup> See para 9.4(b) below.

<sup>316</sup> Nasir *Status of Women* 185 and 196.

<sup>317</sup> Clause 11(2)(c)(ii).

<sup>318</sup> See Q.2:233, Q.65:1 and Q.65:6.

<sup>319</sup> See Heaton *Family Law* 46–7; Skelton & Carnelley (eds) *Family Law* 348–9. See also Chapter 5 above.

<sup>320</sup> 2005 (2) SA 272 (T).



through exercising his right of *talaq*. He then indicated that he therefore only had a legal duty to provide the respondent with divorce (*idda*) maintenance for at least three months thereafter.<sup>321</sup> Goodey AJ aptly stated:

One can only imagine to what injustice it would lead if a Moslem [sic] husband, upon receipt of a subpoena to appear in the maintenance court files a notification of the Islamic divorce and is thereby allowed to escape scot-free from maintaining his wife, especially if they have been married (like in this instance) for more than 24 years.<sup>322</sup>

Whilst Mr Khan's actions were certainly not within the moral framework and spirit of Islam, they were technically within the ambit of Islamic law. The beneficial decision in the *Khan* case effectively meant that the marriage maintenance (*nafaqa*) awarded to Mrs Khan would extend beyond the period of *idda*.<sup>323</sup>

The Muslim Marriages Bill expressly stipulates that the provisions of the Maintenance Act apply if a maintenance court makes a maintenance order, 'with the changes required by the context'.<sup>324</sup> This means that a court must take into consideration the Islamic law provisions in this regard and as outlined in the Bill.<sup>325</sup> In terms of Islamic law, due regard must be had to the husband's (and in the case of children, the father's) financial means and capacity (including the genuine effort he ought to make to ensure that he acquires the means to be able to earn a living) and incapacity (for example, due to chronic illness) to provide maintenance. This is also reflected in the Bill, which provides that the amount of maintenance for which a husband is responsible 'must be' determined in a 'fair and just'<sup>326</sup> manner and with due regard to 'his means' and the 'reasonable needs' of wives.<sup>327</sup> Thus, the amount will vary from case to case.

**(b) Maintenance for additional expenses incurred when caring for minor children post-divorce after expiry of the *idda* period**

In the case of an irrevocable divorce, and after expiry of the *idda* period and in the case when she is nursing her children,<sup>328</sup> the former wife is entitled to 'custody' maintenance as remuneration for taking care of the children during their limited period in her care. The period the children spend in her care may vary depending

<sup>321</sup> Paras 3.5–3.6, 3.9, 3.12.5 and 6.4–6.5.

<sup>322</sup> Para 6.6.

<sup>323</sup> See further para 9.4(a) above.

<sup>324</sup> Clause 11(1).

<sup>325</sup> Clause 11(2).

<sup>326</sup> Clause 11(3).

<sup>327</sup> Clause 11(2)(a). See also Nasir *Personal Status* 97–8.

<sup>328</sup> See para 9.4(a) above.

on their ages and sex.<sup>329</sup> This is also provided for by the Muslim Marriages Bill,<sup>330</sup> which includes the provision by the husband of a separate residence for the former wife if she is not able to provide for one, during this period of care only. During this time she may also be entitled to any additional expenses which she may incur. However, it should be borne in mind that she might have waived this entitlement in order to obtain a divorce and her freedom.

A point that is often overlooked in legislation is that the *Qur'an*, in the first verse of a chapter specifically dedicated to divorce, prescribes or rather categorically commands (when addressing the Prophet as representative of the community and, in the context of the verse, also men), that an *irrevocably* divorced woman has a right to stay in the house of her husband (in fact, the verse speaks of 'their [the women's] houses') and should not be turned out of *their* home.<sup>331</sup> Women in a *revocable* divorce are still deemed to be married and are therefore in any event entitled to stay in the marital home. This verse clearly speaks of a revocable divorce that has become irrevocable through the expiration of the *idda*. In other words, it refers to a continued right of a woman to stay in the home to which she had grown accustomed, at least until she is able to become self-sufficient, and further, that the husband 'part with the wives on equitable terms' (which also implies that it should rather be the husband who vacates the home). In the case of mothers who care for minor children, keeping them under one roof would also allow such children to retain a sense of stability and normalcy rather than having to relocate with their mothers. This would also obviate the need for some women to remain in unhappy marriages in order, literally, to keep a roof over their head and to ensure that the children's financial needs are met by their father. It is, however, unfortunate that the *Qur'anic* verse in question is generally understood to encourage only women in a revocable divorce to be kept in the marital home and for the period of *idda* only, and that this applies with a view to reconciliation. Reconciliation, however, is encouraged as a possibility and not as a foregone conclusion!

Even though the *Qur'an* more than encourages the former husband to house and maintain the former wife until she is able to be self-sufficient, and while it has also been interpreted differently to only apply during the *idda*<sup>332</sup> period,

<sup>329</sup> For detail, see para 9.5 below and Nasir *Status of Women* 196–7.

<sup>330</sup> Clause 11(2)(c)(ii).

<sup>331</sup> 'O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed period: And fear God your Lord: *and turn them not out of their homes, nor shall they (themselves) leave*, except in case they are guilty of some open lewdness, those are the limits set by God: and any who transgresses the limits of God, does verily wrong his (own) soul. *Thou knowest not if perchance God will bring about thereafter some new situation ...* Thus when they fulfill their term appointed, either take them back on *equitable terms* or *part with them on equitable terms ... He (ever) prepares a way out, and provides for him from (sources) he never could imagine*. And if any one puts his trust in God, sufficient is (God) for him ... Verily, for all things has God appointed a *due proportion ... Let the women live ... in the same style as ye live, according to your means: annoy them not, so as to restrict them*' [emphasis added]: *Sura al-Talaq*, Q.65:1–3 and 6.

<sup>332</sup> '[T]urn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye come to a friendly understanding, and practise self-restraint ...': Q.4:129.

the *Qur'an*, it is submitted, is not averse to a living arrangement in terms of which former spouses live in the same house without sexual contact after the divorce, especially where economic and other circumstances may necessitate it. It is submitted that because the global negative economic climate, housing crisis and overpopulation make maintaining and affording separate homes for multiple wives a luxury few men can afford, the idea and possibility that even divorced couples continue to live together in the same house because neither former spouse can afford otherwise should be given serious consideration in South Africa rather than being ruled out. The Prophet Muhammad himself, as financially constrained as he then was, offered to set his wives free 'in a handsome manner' should they decide to divorce him.<sup>333</sup>

**(c) *Post-divorce maintenance beyond idda for the wife in cases of non-notification or concealment of divorce***

If the wife is not informed that she has been divorced (while other parties may be aware of the divorce), the divorce is and remains valid and effective as soon as it has been pronounced. The compulsory *idda* of the wife *usually* begins after such pronouncement. However, if the wife was not informed of the divorce, her compulsory *idda* period, during which she may not remarry, may have elapsed without her even knowing that she was actually in *idda*. In such event, she would be irrevocably divorced by her husband without her knowledge. The only consequence for the husband of his failure to inform her, is that up *until such time that the wife is informed by the husband that he has divorced her*, 'his liability in respect of his wife in certain matters continues . . . [for example,] the wife shall be entitled to her maintenance . . . [and] her claim for deferred dower shall not be affected'.<sup>334</sup> Any children born during this period are deemed to be born of married parents and, because the woman was unaware of the divorce, she is not guilty of adultery (*zina*) although her husband is.<sup>335</sup> This may also mean that her maintenance may extend to include post-divorce maintenance and even beyond, notwithstanding the *idda*. This point is clarified in Ahmad's book,<sup>336</sup> which although confined to *Hanafi* law, makes no reference to the other schools as differing from the *Hanafi* school in this regard. Ahmad's definition of *talaq* also accords with that in Nasir's 2002 book as the definition is applied in various Arab countries. Ahmad<sup>337</sup> indicates that 'if she does not receive any information about the divorce . . . *till such time as when the prescribed period of 'iddah has already expired then it shall not be necessary for her to observe any 'iddah at all [emphasis added]*', because she did not know that she was in *idda*.

<sup>333</sup> See Mayer op cit note 62 at 128–9. See Q.33:28–29 and the text accompanying note 3.

<sup>334</sup> Ahmad *Muslim Law of Divorce* 30.

<sup>335</sup> See also the text accompanying note 102.

<sup>336</sup> Ahmad *Muslim Law of Divorce*.

<sup>337</sup> Ahmad *Muslim Law of Divorce* 845.

With regard to concealment of a divorce, which is very different from not informing the wife and also different in outcome, Ahmad<sup>338</sup> indicates that if the husband pronounces three divorces with the result that the divorce is irrevocable but *conceals* this fact (seemingly from everyone) even from his wife and continues to be intimate with her, he alone is guilty of adultery and the children born after the divorce are born of married parents.<sup>339</sup> If the husband pronounces three divorces, whether with or without the intention of ending the marriage, but continues marital relations with his wife and she later becomes aware of it or the matter is brought before a court, an irrevocable divorce shall be effected. However, the marriage shall continue if the court does not set it aside or for as long as the wife remains ignorant of the divorce.

### 9.5 The position of minor and dependent children: Guardianship (*wilaya*),<sup>340</sup> care (*hadana*),<sup>341</sup> contact, and maintenance (*nafaqa*)

In South Africa, religious marriages, including Muslim marriages, are recognised for the purposes of several Acts. One of these Acts is the Children's Act 38 of 2005,<sup>342</sup> which inter alia deals with the protection of the rights of a child. The concept of the 'best interests of the child' is very much a part of South African law, including the Children's Act,<sup>343</sup> and also plays a pivotal role in the Muslim Marriages Bill and legislation in other Muslim countries. South Africa has moved away from the concept of parental power to parental responsibilities and rights (which include caring for, maintaining contact with, acting as guardian for, and contributing to the maintenance of the child).<sup>344</sup> The Act uses the terms 'care' and 'contact' instead of 'custody' and 'access' and provides that guardianship may be co-exercised or shared by parents.<sup>345</sup> By contrast to the Children's Act, Muslim countries still refer to concepts like 'custody' (which is also treated as a form of guardianship) and 'access' in their traditional usage when referring to

<sup>338</sup> Ahmad *Muslim Law of Divorce* 92.

<sup>339</sup> See para 6.2(d) above for a discussion of *idda*, which also deals with the position of such children in terms of the Muslim Marriages Bill.

<sup>340</sup> See, respectively, Moosa, N 'Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa' (1998) 115 *SALJ* 479 and 'An Overview of Post-Divorce Support for Muslim Children in the Context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill' (2013) 6(1/2/3) *International Journal of Liability and Scientific Enquiry* 27-41 for earlier and recent publications in this regard. See also WLUML *Knowing Our Rights* 337-41.

<sup>341</sup> This word literally means 'caring' in Arabic. A female custodian of a child is referred to as a '*hadina*', whilst a male custodian is referred to as a '*hadini*': Nasir *Personal Status* 263.

<sup>342</sup> See the definition of 'marriage' in s 1(1) of the Children's Act.

<sup>343</sup> See, for example, s 28(2) of the Constitution and s 9 of the Children's Act. See further Chapter 6 above.

<sup>344</sup> Section 18(2) of the Children's Act.

<sup>345</sup> See s 1 (interpretation), s 18(2) (parental responsibilities and rights) and s 18(3) (shared guardianship) of the Children's Act.

Islamic law in state legislation pertaining to children. Since this is also the case in South Africa in both the Bill and the Divorce Act,<sup>346</sup> these terms will be used below under this heading for the sake of convenience.

Muslim children begin their first (natural) phase of life under female custody. Once this limited period ends, they enter a new phase under male guardianship. Having regard to both the Islamic and South African contexts, clause 10(1) of the Bill clearly indicates:

In making an order for the custody of, or access to a minor child, or in making a decision on guardianship, the court must, with due regard to Islamic law . . . Islamic norms and values, consider the welfare and best interests of the child.

Clause 10(1) does not specify which parent, if any, gets awarded custody and/or guardianship, nor does it stipulate the period of such custody or guardianship. Since the term 'parent' is not used in the clause, it can be inferred that either parent (therefore, both parents have equal rights), both parents, neither parent, or someone other than a parent can be granted custody and/or guardianship. It is also important that any decision in terms of the Bill must be guided by considerations and interpretations of Islamic law in this regard.

The *Qur'an* itself does not specify which parent gets custody of the children in the event of a divorce but it does appear to accept the father's perpetual (legal) right of guardianship. Although not without controversy, the latter is inferred from the *Qur'anic* economic superiority attributed to Muslim men as maintainers of the family (and also by reference to the Prophet Muhammad himself<sup>347</sup>).<sup>348</sup> Islamic jurisprudence recognises the father alone as the natural guardian of his minor children and provides that the divorced father (and his male relatives) generally has both more (albeit supervisory) guardianship rights and more (financial) duties than the (caretaker) divorced mother (and her relatives) in this regard. That women are usually attributed the initial (and therefore also limited) and natural role of custody of children, is clear from Islamic law, which defines custody as 'caring for the infant [of either sex] during the period *when it cannot do without the women*'<sup>349</sup>

<sup>346</sup> Although the Divorce Act refers to these terms, it does not define them and therefore needs to be aligned with the Children's Act.

<sup>347</sup> This is based on an inference drawn from an extract in the Prophet's last sermon given in 632 AD to the effect that the child belongs to the (father's) bed on which it was born (rather than the mother who gave birth to him or her): Moosa *Unveiling the Mind* 41.

<sup>348</sup> Q.4:34.

<sup>349</sup> This refers to the mother of the child, in the first instance, and other female custodians. If the mother dies or is disqualified from custody (she loses her limited right to custody if she is unable or unwilling to take care of her children), there is great variation in the rulings of the schools of law as to who replaces her. The *Hanafi* school, for example, rules that since the mother has first claim to custody, her relatives, rather than those on the side of her child's father, should be given preference: Nasir *Status of Women* 187.

related to it in a prohibited<sup>[350]</sup> degree [of marriage] who have the lawful right to bring it up [emphasis added].<sup>351</sup>

Rather than necessarily distinguishing between the terms 'custody' and 'guardianship', Islamic law effectively treats custody as (a form of) guardianship. The mother's right to and duty of custody of her child during the early years of the child's life is therefore limited and is regarded as one (usually the first) of three categories of guardianship of the child. However, this does not mean that Muslim women and men have equal rights in this regard. Women are often under the mistaken impression that they lose custody of their children if they divorce their husbands and it is not uncommon for Muslim men to capitalise on this ignorance and to use custody as leverage against their wives to discourage them from divorce. The reality is that divorced mothers often find themselves having the actual (physical) responsibility involved in exercising custody but few supervisory rights. The other two categories, namely guardianship of the education and property of the child, are usually entrusted to the father (or other male relatives).<sup>352</sup> Paradoxically, the fact that the mother may be financially competent and is allowed by Islam to control and own property unaided is of little consequence. The mother of the child, whether married to or divorced from the father, always has the first claim (and duty) to custody of her (infant) child.<sup>353</sup> Although not explicitly stated, and with due regard to the father's unilateral duty to support his children and the mother's initial right to custody, it seems that the Muslim Marriages Bill also supports the Islamic law view that custody be awarded to the mother in the first instance and also in the case of interim custody.<sup>354</sup> Custody may, however, be entrusted to someone other than the mother, which may include the father. In terms of the Bill, in the absence of both parents, a court must also consider Islamic law when awarding custody or guardianship to anyone else.<sup>355</sup>

According to the *Sunni* schools of law, the mother (or any other female custodian (*hadina*)) loses her limited right to custody if she marries a man who is a stranger to (that is, not a blood relative of) the child. There ought to be a close but different familial connection between the mother and the child and between the man and the child (which does not extend to the mother).<sup>356</sup> This condition is based on a Prophetic tradition which effectively granted a divorced wife the custody of her son *unless she married*. While this tradition is said to imply that a divorced woman loses custody if she marries any man who is not

<sup>350</sup> Prohibited degrees refer to those persons related by blood, marriage or fosterage (breastfeeding or nursing) who are forbidden to marry each other.

<sup>351</sup> Nasir *Status of Women* 186.

<sup>352</sup> Nasir *Personal Status* 158-9.

<sup>353</sup> Nasir *Personal Status* 159.

<sup>354</sup> Clause 10(1) and (2) read with cl 11(2)(c)(ii) and 9(3)(g)(i) (interim custody).

<sup>355</sup> Clause 10(3).

<sup>356</sup> Moosa *Unveiling the Mind* 42.



the child's father even if the man is a blood relative of the child, it has not been interpreted so sweepingly by jurists.<sup>357</sup> The above categories make it clear that Islamic law separates the custody of the mother (to which she is entitled irrespective of her (*kitabī*) religion)<sup>358</sup> from the sole and legal guardianship of the father. Regardless of whether or not she may want this role, the mother's custody is clothed as a right but actually amounts to a duty. It encompasses the daily grind of responsibility for and physical care of the child, by contrast to the more supervisory guardianship role of the father over the person, education and property of the child.

In terms of Islamic law, and as is in fact legislated in some Muslim countries, parents — regardless of who has custody — may not prevent each other from seeing their children. They are bound to give each other access.<sup>359</sup> This is also the case in terms of the Bill<sup>360</sup> with regard to both custody and guardianship.

The Bill does not specify periods of custody and guardianship. Therefore, guidance must be sought in Islamic law rulings, which may vary according to the schools of law. The mother's period of custody (form of guardianship) of her child in respect of which there is no limitation in the *Qur'an* and *Sunna*, has been determined as a result of the independent reasoning (*ijtihad*) of early jurists who also held different views in this regard. According to these views, women are usually denied custody of their children beyond a certain age depending on the sex of the child and school of law (*madhhab*) that the family subscribes to. The *Hanbalite* school does not distinguish on the basis of the sex of the child and rules that the mother's custody is from birth until the age of seven, at which time the child may choose between his or her parents. The ruling of the *Shafi'ite* school is more complicated. Like the *Hanbalites*, it also does not make a distinction between the sexes while the child is in the custody of the mother, nor do these jurists set a definite term. The mother's custody is deemed to continue until the child reaches an age of discretion and is able to choose between the

<sup>357</sup> Nasir *Status of Women* 193.

<sup>358</sup> Whilst the *Hanafis* consider apostasy a sufficient reason to deny a woman her right (and duty) to custody, the schools of law are not unanimous that apostasy of the mother should necessarily be a ground for disqualifying her from her right to custody: Nasir *Personal Status* 164. It appears that, on the basis of the Islamic law presumption that a child follows the father's religion, a non-Muslim mother is not easily granted custody by courts: WLUML *Knowing Our Rights* 340. I am uncertain of the gender neutrality of this disqualification with regard to a father who has renounced Islam, although the disqualification can be inferred from the fact that the same general conditions of eligibility that apply to a female custodian in this regard (which include religion) apply to male custodians: Nasir *Personal Status* 164–5. Nasir *Status of Women* 196 also indicates that if the male custodian (*hadin*) of a ward is a male agnate (through the male line of the father's family), he must be of the same religion as his ward, because his right to custody is based on his right to inheritance.

However, a non-agnate relative is not required to be of the same faith as the child because in this case his right to custody is based on a kinship within the prohibited degree (and not on inheritance). On *kitabī* and interreligious marriages, see also para 4.1(c) above.

<sup>359</sup> Nasir *Status of Women* 198–201.

<sup>360</sup> Clause 10(2) read with cl 10(1).



parents. However, the matter is not as clear-cut as that. If a boy chooses his mother, he resides with her during the night but spends the day with his father (who is responsible for his education). A girl who chooses her mother resides with the mother for the duration of the period of custody. A child who chooses both parents gets to spend time with them according to lots drawn by them. If the child remains silent (undecided?) on the matter, he or she stays with his or her mother. According to the *Malikite* school, a son stays with his mother from birth until puberty and a daughter until she gets married.<sup>361</sup> According to the *Hanafite* school, custody for both sexes starts at birth and ends for a son when he reaches an age where he is (independently) able to do certain basic things, such as eat, dress and keep himself clean. While this age may range from seven to nine years, the mother's custody of her son (or that of any other caregiver of the boy) usually ends at seven years of age. The period of custody of a girl differs among the *Hanafite* jurists. The prevailing opinion is that it ends with her reaching puberty, which may range from nine to eleven years. Others are of the opinion that she may stay with her mother or grandmother until the 'age of womanhood' but only until the age of puberty if she is in the custody of another female.<sup>362</sup> While the terms 'womanhood' and 'puberty' are generally construed in secular parlance to have the same meaning (that is, when a girl starts to menstruate), Nasir<sup>363</sup> points out that this need not necessarily be the case since some women menstruate at a very young age (and well before they can be considered to have reached majority or a marriageable age) while others do so at a much later age (well past their adolescence).

Some Muslim countries have reformed their laws by increasing the respective ages and even go as far as equalising the rights to custody and guardianship of parents.

While *Sunni* jurists differ on the ages when the mother's (or other female's) custody of the children should terminate, they assume that, after a limited period of time with their mothers, children of divorced (or widowed) women pass into the care of the father or nearest male agnate relative (through the male line of the father's family) in the event of the father's death.<sup>364</sup>

The guardianship rights of fathers have deprived mothers of the right to bring up their children as equal parents. However, and with due regard to the fact that men who may be excellent caregivers may also suffer from gender stereotyping in matters pertaining to custody and guardianship, Muslim women who are forced to, or may even choose to, leave their children with their father upon divorcing him or remarrying could view this 'freedom' from or 'rejection' of

<sup>361</sup> See the text accompanying note 367 where it is indicated that, in terms of cl 11(2)(b)(i) of the Muslim Marriages Bill, the father is also obliged to provide maintenance for daughters until they marry.

<sup>362</sup> Nasir *Personal Status* 171.

<sup>363</sup> Nasir *Status of Women* 203.

<sup>364</sup> See Moosa *Human Rights and Gender Consequences* at 488–90 and 492 and Nasir *Status of Women* 188 for detail on this aspect of Muslim personal law affecting children.

'natural' parental responsibilities and duties as a re-balancing of priorities and a redressing of past inequalities rather than as discrimination in reverse,<sup>365</sup> or even as some traditionalists would like them to believe, as being liberated from a burdensome role.

While there are variations in the laws pertaining to custody and guardianship of children, in recent years the rules relating to custody of the mother (and to a much lesser extent guardianship of the father) have been relaxed in most Muslim countries in favour of the mother, with the welfare or best interests<sup>366</sup> of the child being the decisive factor.

Concerning the post-divorce maintenance of children, in terms of the Muslim Marriages Bill, a father is obliged to maintain his daughters 'until they are married'<sup>367</sup> and sons 'until they reach the age of majority or otherwise for the period that they are in need of support'.<sup>368</sup> As indicated above,<sup>369</sup> in terms of Islamic law a divorced (unmarried) daughter who is in need of support once again becomes the responsibility of the father until her remarriage. An adult male child may, however, also be in need of further maintenance, for example, due to chronic illness or a mental or physical handicap which prevents him from earning a living.<sup>370</sup> Unlike the case of the mother, the child who is in possession of his or her own wealth is precluded from claiming maintenance. In terms of Islamic law, indigent parents are entitled to claim maintenance from their children who have the means to support them.<sup>371</sup>

Given the broader guardianship rights and duties of the father, he has to maintain the children during marriage even if he is separated (divorced) from their mother or if the children live elsewhere or are in the custody of another person (including the mother).<sup>372</sup> Accordingly, more generous provision is made for support of children in the Bill, which stipulates that the father's duty to maintain children born of the marriage continues when the marriage ends and 'includes the provision of food, clothing, separate accommodation, medical care and education'.<sup>373</sup>

<sup>365</sup> Moosa *Human Rights and Gender Consequences* 49.

<sup>366</sup> Judges have made use of independent reasoning (*ijtihad*) to do so, especially in cases where there was no clear *Qur'anic* guidance or where the schools of law expressed divergent views on the topic: WLUML *Knowing Our Rights* 344–5 and Nasir *Status of Women* 191. See also Moosa *Human Rights and Gender Consequences* 26–7.

<sup>367</sup> Clause 11(2)(b)(i).

<sup>368</sup> Clause 11(2)(b)(ii).

<sup>369</sup> See para 9.1 above.

<sup>370</sup> Nasir *Personal Status* 177.

<sup>371</sup> See Nasir *Personal Status* 174–6 and 178–9. See also para 9.4(a)(i) above for the means test that applies to the man in his capacity as husband and father.

<sup>372</sup> See para 9.1 above. See also Nasir *Status of Women* 183 on maintenance and Nasir *ibid* at 198–201 on access.

<sup>373</sup> Clause 11(2)(c)(iv) above. See the text accompanying note 212 for possible implications and reference to children who are born of unmarried parents and are therefore not directly covered by the Muslim Marriages Bill.

## 9.6 Extension of Uniform Rule 43(1) to Muslim marriages<sup>374</sup>

Uniform Rule 43(1) empowers a spouse to apply for several forms of interim relief for himself or herself or the spouses' children in matters pertaining to maintenance, care of and contact with a child, and a contribution towards costs whilst a matrimonial action is pending. Recent reported<sup>375</sup> and earlier unreported<sup>376</sup> cases have extended Uniform Rule 43 to Muslim marriages where the wife had instituted a (civil) divorce action against her husband or was disputing an allegedly irrevocable Islamic divorce and was seeking, inter alia, an order declaring the Muslim marriage to be legally valid. The fact that the applications concerned unrecognised Muslim marriages, and not civil marriages, was deemed irrelevant. Without making any decision on the validity of Muslim marriages, the recent reported cases highlight that the courts have been prepared to consider applications in terms of Uniform Rule 43 brought by Muslim women and have provided them with interim relief in the form of a contribution towards costs and interim maintenance for themselves and their children. These decisions may be criticised<sup>377</sup> — some more than others — for not being technically legally sound. However, given the nature of a Muslim marriage where the default matrimonial property system is complete separation of property and the requirements and practical effects of the consequences of a Muslim divorce, and with due regard to the constitutional implications of unfair discrimination, it is submitted that the courts must be commended for continuing with the current and democratic trend of providing Muslim women and children with interim relief until Muslim marriages are formally recognised, as proposed by the Muslim Marriages Bill. While the rationale of these decisions may be criticised, their beneficial outcome can be supported.

Cognisant of the practical financial realities of Muslim women, the Bill also makes provision for interim relief. However, these provisions are more restrictive and in accordance with Islamic law. The Bill provides that after the registration of a divorce (in the form of an irrevocable *talaq*<sup>378</sup> or *faskh*<sup>379</sup>) and after failed attempts at compulsory mediation,<sup>380</sup> a spouse may, before the dispute is adjudicated by the court, seek interim relief in matters pertaining to interim custody or access to minor children of the marriage or 'for the payment of

<sup>374</sup> For a more detailed discussion of Uniform Rule 43, see Chapter 12 below.

<sup>375</sup> These cases include *Hoosain v Dangor* 2010 (4) BCLR 362 (WCC) and *AM v RM* 2010 (2) SA 223 (ECP). See Kruuse, H 'Drawing Lines in the Sand: *AM v RM* 2010 2 SA 223 (ECP)' (2009) 23(2) *Speculum Juris* 127 at 127n1. For detail and further reference to these and other unreported cases in this regard, see Heaton *Family Law* 235; Rautenbach et al *Introduction to Legal Pluralism* 203; Skelton & Carnelley (eds) *Family Law* 197n18.

<sup>376</sup> *Jamalodeen v Moola* (unreported, NPD case no 1835/06, 13 June 2006). See also *Cassim v Cassim (Part A)* (unreported, TPD case no 3954/06, 15 December 2006).

<sup>377</sup> See Kruuse op cit note 375 at 127–43 for criticism of *AM v RM* 2010 (2) SA 223 (ECP).

<sup>378</sup> Clause 9(3)(g).

<sup>379</sup> Clause 9(5)(b) and (c).

<sup>380</sup> See cl 12(1) together with cl 4, 9(3)(e) and 9(5)(b).

maintenance',<sup>381</sup> contribution towards costs,<sup>382</sup> and maintenance for the wife during the *idda* period.<sup>383</sup>

## 10 SOME CONCLUDING COMMENTS

Acknowledging discrepancies between the sources of Islamic law, state legal systems in various Muslim countries have sought to exercise some, if not much, control over Islamic law of divorce and its consequences. The trend of reform in Islamic law has been, through judicial regulation, to reduce the ease and facility with which the process of *talaq* has been customarily practised and to both strengthen and expand women's access to divorce. Although long overdue, South Africa is in the process of following suit with its Muslim Marriages Bill. The Bill, through its provisions, envisages that the limited rights guaranteed to women in terms of Islamic law will be utilised optimally and in so doing will allow Islamic law rights to be upheld secularly with the force of law and with the cooperation of religious authorities. What sets the Bill apart from other codes of Muslim personal law is that it recognises the unique realities of South African Muslims and therefore both accords with traditional Islamic law and embodies a synthesis between it and relevant provisions of constitutional and South African law. However, the future of Muslim personal law in South Africa remains uncertain. The legislature should take the lead and enact the Bill. Failing this, the *status quo* remains. *Faro v Bingham NO*,<sup>384</sup> a case involving both *talaq* as a form of Muslim divorce and the incorporation of secular South African intestate succession rights for vulnerable Muslim spouses, serves as a recent example of judicial intervention which clearly highlights this point.

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<sup>381</sup> Clause 9(3)(g)(i).

<sup>382</sup> Clause 9(3)(g)(ii).

<sup>383</sup> Clause 9(3)(g)(iii).

<sup>384</sup> Unreported, [2013] ZAWCHC 159, 25 October 2013, available at <http://www.saflii.org/za/cases/ZAWCHC/2013/159.html> (accessed 18 September 2014).

# Bibliography

## BOOKS

- Adler, E *Der Name im deutschen und österreichischen Recht* (F Vahlen 1921)
- Ahmad, KN *The Muslim Law of Divorce* (Kitab Bhavan 1978)
- Ali, AY *The Holy Qur'an (Text, Translation and Commentary)* (Islamic Education Centre 1946)
- Allgemeines Landrecht für die Preußischen Staaten von 1794* with introduction by H Hattenhauer (Luchterhand 1994)
- Alston, P (ed) *The Best Interests of the Child — Reconciling Culture and Human Rights* (Oxford University Press 1994)
- Arkin, AJ, Magyar, KP & Pillay, GJ (eds) *The Indian South Africans* (Owen Burgess 1989)
- Arntzenius, JH *Institutiones Iuris Belgici de Conditione Hominum (Introduction to the Civil Law of the Netherlands)* (translated by FP van den Heever) (The Government Printer 1963)
- Atkin, B (ed) *The International Survey of Family Law 2008* (Family Law 2008)
- Atkin, B (ed) *The International Survey of Family Law 2010* (Family Law 2010)
- Badenhorst, PJ, Pienaar, JM & Mostert, H *Silberberg and Schoeman's The Law of Property* 5 ed (LexisNexis Butterworths 2006)
- Bagga, V (ed) *Studies in the Hindu Marriage and the Special Marriage Acts* (NM Tripathi 1978)
- Bainham, A & Pearl, D (eds) *Frontiers of Family Law* (Chancery Law Publishing 1993)
- Barnard, AH *Die Nuwe Egskeidingsreg* (Butterworth 1979)
- Barnard, AH, Cronjé, DSP & Olivier, PJJ *The South African Law of Persons and Family Law* (Butterworths 1986)
- Barratt, A (ed) *Law of Persons and the Family* (Pearson Education South Africa 2012)
- Bayer, W *Der Name des Kindes im Internationalen Privatrecht: Geltendes Recht, Reformvorschläge, ausländische Lösungen* (Universität Regensburg 1984)
- Bennett, TW *Customary Law in South Africa* (Juta 2004)
- Beri, BP *Law of Marriage and Divorce in India* 2 ed (Eastern Book Company 1989)
- Bill of Rights Compendium* (LexisNexis 1996)
- Black, JM, Bond, T & Bridge, J *A Practical Approach to Family Law* 8 ed (Oxford University Press 2007)
- Boele-Woelki, K, Miles, J & Scherpe, JM (eds) *The Future of Family Property in Europe* (Intersentia 2011)
- Boezaart, T (ed) *Child Law in South Africa* (Juta 2009)
- Boezaart, T *Law of Persons* 5 ed (Juta 2010)
- Boezaart, T & De Kock, P (eds) *Vita Perit, Labor Non Moritur Liber Memorialis: PJ Visser* (LexisNexis 2008)
- Bonthuys, E & Albertyn, C *Gender, Law and Justice* (Juta 2007)
- Bosman, F & Eckard, MM (eds) *Welsynsreg* (Lex Patria 1982)
- Brock, MG & Saks, S *Contemporary Issues in Family Law and Mental Health* (Charles Thomas Publishing 2008)

- Burman, S (ed) *The Fate of the Child. Legal Decisions on Children in the New South Africa* (Juta 2003)
- Cameron, E, De Waal, MJ, Wunsch, B, Solomon, P & Hahn, E *Honoré's South African Law of Trusts* 5 ed (Juta 2002)
- Chanock, M *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985)
- Charlton, R & Dewdney, M *The Mediator's Handbook: Skills and Strategies for Practitioners* (LBC Information Services 1995)
- Cheadle, H, Davis, D & Haysom, N (eds) *Constitutional Law: The Bill of Rights* (LexisNexis 2002)
- Christie, RH & Bradfield, GB *Christie's The Law of Contract in South Africa* 6 ed (LexisNexis 2011)
- Cilliers, AC, Loots, C & Nel, HC *Herbstein and Van Winsen — The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta 2009)
- Claassens, A & Cousins, B (eds) *Land, Power and Custom* (UCT Press 2008)
- Clark, B (ed) *Family Law Service* loose-leaf (LexisNexis 1988)
- Cooke, E (ed) *Modern Studies in Property Law: Volume II: Property* (Hart Publishing 2003)
- Corbett, MM, Hofmeyr, G & Kahn, E *The Law of Succession in South Africa* 2 ed (Juta 2001)
- Corpus Iuris Civilis* translated by Spruit, JE, Bezemer, CH, Chorus, LMJ, Forrez, R, De Ligt, L & Slob, E (KNAW Press Koninklijke Nederlandse Akademie van Wetenschappen 2006)
- Corpus Iuris Civilis* translated by Spruit, JE, Bezemer, CH, Chorus, LMJ, Forrez, R, De Ligt, L & Slob, E (KNAW Press Koninklijke Nederlandse Akademie van Wetenschappen 2010)
- Cronjé, DSP & Heaton, J *South African Family Law* 2 ed (LexisNexis 2004)
- Currie, I & De Waal, J *The Bill of Rights Handbook* 6 ed (Juta 2013)
- Davel, CJ (ed) *Children's Rights in a Transitional Society* (Protea Book House 1999)
- Davel, CJ (ed) *Introduction to Child Law in South Africa* (Juta 2000)
- Davel, CJ & Skelton, AM (eds) *Commentary on the Children's Act* loose-leaf (Juta 2007)
- De Zulueta, F (ed) *The Institutes of Gaius* (Oxford University Press 1946)
- Desai, SA *Mulla's Principles of Hindu Law* 21 ed (LexisNexis Butterworths 2010)
- Dhupelia-Mesthrie, U *From Cane Fields to Freedom: A Chronicle of Indian South African Life* (Kwela Books 2000)
- Diesel, A & Maxwell, P *Hinduism in Natal: A Brief Guide* (University of Natal Press 1993)
- Diwan, P & Diwan, P *Modern Hindu Law: Codified and Uncodified* 21 ed (Allahabad Law Agency 2014)
- Doi, ARI *Shari'ah: The Islamic Law* (Ta Ha Publishers 1984)
- Du Bois, F (ed) *Wille's Principles of South African Law* 9 ed (Juta 2007)
- Du Plessis, J *The South African Law of Unjustified Enrichment* (Juta 2012)
- Du Toit, F *South African Trust Law: Principles and Practice* 2 ed (LexisNexis 2007)



- Ebr.-Vally, R *Kala Pasni: Caste and Colour in South Africa* (Kwela Books 2001)
- Edlbacher, O *Das Recht des Namens in systematischer Darstellung: Ein Handbuch vor allem für die Praxis* (MANZ'sche Verlag 1978)
- Eekelaar, J & Nhlapo, T (eds) *The Changing Family: International Perspectives on the Family and Family Law* (Hart 1998)
- Eekelaar, J & Sarcevic, P (eds) *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (Martinus Nijhoff 1993)
- Eiselen, S & Pienaar, G *Unjustified Enrichment. A Casebook* (Butterworths 2008)
- Engineer, AA *The Rights of Women in Islam* (New Dawn Press Inc 2004)
- Erasmus, HJ, Van der Merwe, CG & Van Wyk, AH *Lee and Honoré Family, Things and Succession* 2 ed (Butterworths 1983)
- Falender, CA & Shafranske, EP *Clinical Supervision: A Competency-Based Approach* (APA 2004)
- Fenrich, J, Galizzi, P & Higgins, T (eds) *The Future of African Customary Law* (Cambridge University Press 2011)
- Folberg, J, Milne, AL & Salem, P (eds) *Divorce and Family Mediation — Models, Techniques, and Applications* (Guildford Press 2004)
- Forsyth, CF *Private International Law* 4 ed (Juta 2003)
- Forsyth, CF *Private International Law* 5 ed (Juta 2012)
- Fremantle, MP (ed) *The South African Encyclopaedia of Forms and Precedents* (Butterworths 1976)
- Gandi, BM *Hindu Law* 3 ed (Eastern Book Company 2008)
- Gaul, HF, Habscheid, WJ & Mikat, P *Festschrift für Friedrich Wilhelm Bosch zum 65. Geburtstag, 2. Dezember 1976* (Gieseking Verlag 1976)
- Goethe, JW *Dichtung und Wahrheit: Zehntes Buch* (Tempel Verlag 1811)
- Graycar, R & Morgan, J *The Hidden Gender of Law* 2 ed (Federation Press 2002)
- Großfeld, B *Macht und Ohnmacht der Rechtsvergleichung* (Mohr Siebeck 1984)
- Grotius, H *Inleidinge tot de Hollandsche Rechts-geleerdheid* with notes by SJ Fockema Andreae 3 ed by LJ van Apeldoorn (S Gouda Quint 1926)
- Grotius, H *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (Lund edition by F Dovring, HFWD Fischer & EM Meijers) (Universitaire Pers Leiden 1965)
- Grotius, H *The Introduction to Dutch Jurisprudence of Hugo Grotius with Notes by Simon van Groenewegen van der Made, and References to Van der Keesel's Theses and Schorer's Notes* translated by AFS Maasdorp (Juta 1878)
- Hahlo, HR *The South African Law of Husband and Wife* 2 ed (Juta 1963)
- Hahlo, HR *The South African Law of Husband and Wife* 4 ed (Juta 1975)
- Hahlo, HR *The South African Law of Husband and Wife* 5 ed (Juta 1985)
- Hahlo, HR & Kahn, E *The Union of South Africa: The Development of its Laws and Constitution* (Juta 1960)
- Hahlo, HR & Sinclair, J *The Reform of the South African Law of Divorce* (Juta 1980)
- Harms, DR *Civil Procedure in the Superior Courts* (Butterworths 1990)
- Harms, LTC *Amler's Precedents of Pleadings* 7 ed (LexisNexis 2009)
- Heaton, J *Casebook on South African Family Law* 3 ed (LexisNexis 2010)
- Heaton, J *South African Family Law* 3 ed (LexisNexis 2010)
- Heaton, J *The South African Law of Persons* 4 ed (LexisNexis 2012)



- Herberger, M, Martinek, M, Rußmann, H & Weth, S (eds) *Juris PraxisKommentar BGB* (Juris 2013)
- Himonga, C & Nhlapo, T (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press Southern Africa 2014)
- Hinz, MO & Patemann, K (eds) *The Shade of New Leaves. Governance and Traditional Authority: A Southern African Perspective* (LIT Verlag 2006)
- Hodgkin, R & Newell, P *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF 2007)
- Hubmann, H *Das Persönlichkeitsrecht* (Böhlau 1967)
- Hutchison, D & Pretorius, CJ (eds) *The Law of Contract in South Africa* (Oxford University Press Southern Africa 2009)
- Huxham, K & Haupt, J *Notes on South African Income Tax* 28 ed (H & H Publications 2009)
- Jhabvala, NH *Principles of Hindu Law* 19 ed (C Jamandas & Co 1999)
- Johnston, JR & Campbell, LRG *Impasses of Divorce: The Dynamics and Resolution of Family Conflict* (Free Press 1988)
- Joubert, DJ *General Principles of the Law of Contract* (Juta 1987)
- Juzairee, A *Al-Fiqh Alaa Al-Mathaahib Al-Arba'ah [Jurisprudence According to the Four Schools of Thought]* vol 4 (Darul Fajr Lil Turaath 2000)
- Kaganas, F & Budlender, D *Family Advocate* (Law, Race and Gender Research Unit University of Cape Town 1996)
- Kahn, E (ed) *Fiat Iustitia Essays in Memory of Oliver Deneys Schreiner* (Juta 1983)
- Keightley, R (ed) *Children's Rights* (Juta 1996)
- Kernick, LA *Administration of Estates & Drafting of Wills* 4 ed (Juta 2006)
- Kerr, AJ *The Principles of the Law of Contract* 6 ed (LexisNexis 2003)
- Kesari, UPD *Modern Hindu Law* 9 ed (Durgesh Law House 2013)
- Keuter, W *Das familienrechtliche Mandat Statusrecht — Abstammung — Adoption — Namensrecht* (Deutsche Anwaltverlag 2014)
- Kierkegaard, S (ed) *Law, Governance and World Order* (International Association of IT Lawyers (IAITL) 2012)
- Koch, E (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 7 Familienrecht I §§ 1297–1588* 6 ed (CH Beck Verlag 2013)
- Kohli, HD *Hinduism and Divorce: From Dharmasastras to Statutory Law* vol 1 (Decent Books 2000)
- Krause, L *Das Familienheim bei Trennung und Scheidung* (Nomos 2007)
- Kruger, H & Skelton, A (eds) *The Law of Persons in South Africa* (Oxford University Press Southern Africa 2010)
- Lee, RW *An Introduction to Roman-Dutch Law* 5 ed (Clarendon Press 1953)
- Legal Aid South Africa *Legal Aid Guide* 13 ed (Legal Aid South Africa 2014)
- LSSA—LEAD *Practical Manual: Matrimonial Matters 2011* (LSSA—LEAD 2011)
- LSSA—LEAD *Practical Manual: Matrimonial Matters 2014* (LSSA—LEAD 2014)
- Ludsin, H & Vetten, L *Spiral of Entrapment: Abused Women in Conflict with the Law* (Jacana 2005)
- MacBeth, LE *The Art of Family Mediation: Theory and Practice. A Foundational Text for Mediation Training* (Vandeplas Publishing 2010)

- Macfarlane, J (ed) *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing 1997)
- Mackay, Lord, of Clashfern *Halsbury's Laws of England* vol 88 (LexisNexis 2012)
- Maidment, S *Child Custody and Divorce* (Croom Helm 1984)
- Mayer, AE *Islam and Human Rights: Tradition and Politics* 4 ed (Westview Press 2007)
- Mayer, B *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (John Wiley & Sons 2004)
- Menkel-Meadow, CJ, Love, L, Schneider, A & Sternlight, J *Dispute Resolution: Beyond the Adversarial Model* 2 ed (Aspen-WoltersKluwer 2011)
- Menski, WF *Hindu Law: Beyond Tradition and Modernity* 3 ed (Oxford University Press 2008)
- Meyersfeld, B *Domestic Violence and International Law* (Hart 2010)
- Mikat, P *Die Polygamiefrage in der frühen Neuzeit* (Westdeutscher Verlag 1988)
- Mir-Hosseini, Z & Hamzi, V *Control and Sexuality: The Revival of Zina Laws in Muslim Contexts* (Women Living Under Muslim Laws (WLUML) 2010)
- Misra, R & Kumar, V *Mayne's Hindu Law and Usage* 16 ed (Bharat Law House 2009)
- Mofokeng, LL *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law* (Van Schaik Publishers 2009)
- Moosa, N *Unveiling the Mind. The Legal Position of Women in Islam — A South African Context* 2 ed (Juta 2011)
- Nagel, C (ed) *Huldigungsbandel vir JMT Labuschagne* (LexisNexis Butterworths 2006)
- Nagpal, RC *Modern Hindu Law* 2 ed (Eastern Book Co 2008)
- Nasir, JJ *The Islamic Law of Personal Status* vol XXIII Arab and Islamic Laws Series 3 ed (Kluwer Law International 2002)
- Nasir, JJ *The Status of Women under Islamic Law and Modern Islamic Legislation* vol I Arab and Islamic Laws Series 3 ed (Brill NV 2009)
- Nathan, CJM, Barnett, M & Brink, A *Uniform Rules of Court* 3 ed (Juta 1984)
- Neumann, D *Divorce Mediation: How to Cut the Cost and Stress of Divorce* (Henry Holt & Co 1989)
- Oxenford, J *The Autobiography of Goethe. Truth and Poetry: From my Own Life* (Henry G Bohn 1848)
- Pace, RP & Van der Westhuizen, WM *Wills and Trusts* (LexisNexis 2013)
- Pachai, B (ed) *South Africa's Indians: The Evolution of a Minority* (University Press of America 1979)
- Papanek, H & Minault, G (eds) *Separate World Studies of Purdah in South Asia* (South Asia Books 1982)
- Parentee, P, Artz, L & Moul, K *Monitoring the Implementation of the Domestic Violence Act: First Report* (Institute of Criminology University of Cape Town 2001)
- Parker-Jenkins, M *Sparing the Rod: Schools, Discipline and Children's Rights* (Trentham 1999)
- Payne, JD & Payne, MA *Canadian Family Law* (Irwin Law 2001)
- Pearl, D *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh* (Stevens and Sons 1981)
- Pearl, D & Menski, W *Muslim Family Law* 3 ed (Sweet & Maxwell 1998)

- Pete, S, Hulme, D, Du Plessis, M, Palmer, R & Sibanda, O *Civil Procedure: A Practical Guide* 2 ed (Oxford University Press Southern Africa 2012)
- Pickthall, M *The Meaning of The Glorious Koran. An Explanatory Translation* (George Allen & Unwin 1930)
- Pistorius, D *Pollak on Jurisdiction* 2 ed (Juta 1993)
- Pollak, W *The South African Law of Jurisdiction* (Juta 1937)
- Pothier, RJ *A Treatise on the Contract of Partnership with the Civil Code and the Code of Commerce relating to that Subject in the Same Order; Translated from the French with Notes referring to Decisions of the English Courts by OD Tudor* (Butterworth 1854, reprint Butterworth 1970)
- Pothier, RJ *Traité du Mariage* (Chez Debure Pere 1771)
- Probert, R *Family Law in England and Wales* (Wolter Kluwers 2012)
- Rahman, TA *Code of Muslim Personal Law* vol I (Islamic Publishers 1978)
- Rasool, S, Vermaak, K, Pharoah, R, Louw, A & Stavrou, A *Violence Against Women: A National Survey* (Institute for Security Studies 2002)
- Rautenbach, C, Bekker, JC & Goolam, NMI *Introduction to Legal Pluralism in South Africa* 3 ed (LexisNexis 2010)
- Reinecke, MFB, Van Niekerk, JP & Nienaber, PM *South African Insurance Law* (LexisNexis 2013)
- Riemer, HM, Walder, HU & Weimar, P (eds) *Festschrift für Cyril Hegnauer zum 65. Geburtstag* (Stämpfli 1986)
- Robinson, JA, Human, S, Boshoff, A, Smith, BS & Carnelley, M *Introduction to South African Family Law* 4 ed (Printing Things 2009)
- Robinson, JA & Kruger, JM (eds) *The Law of Children and Young Persons in South Africa* (Butterworths 1997)
- Rohrbaugh, JB *A Comprehensive Guide to Child Custody Evaluations: Mental Health and Legal Perspectives* (Springer 2008)
- Roy, S & Rizvi, SHM *Tribal Customary Laws of North-East India* (BR Publishing Corporation 1990)
- Saksena, KP *The Hindu Marriage Act, 1955* 3 ed (Eastern Book Company 1964)
- Schäfer, L *Child Law in South Africa. Domestic and International Perspectives* (LexisNexis 2011)
- Schwab, D & Dose, HJ (eds) *Familienrecht in Praxis und Theorie — Festschrift für Meo-Micaela Hahne zum 65. Geburtstag* (Gieseking 2012)
- Schwikkard, PJ & Van der Merwe, SE *Principles of Evidence* 4 ed (Juta 2012)
- Sclater, SD & Piper, C (eds) *Undercurrents of Divorce* (Ashgate 1999)
- Sen, AN *Rameshwar Dayal Agarwala on Hindu Law* 15 ed (Sri Sai Law Publications 2008)
- Silberberg, H *The Recognition and Enforcement of Foreign Judgments in South Africa* (Institute of Foreign and Comparative Law University of South Africa 1977)
- Sinclair, JD *Introduction to the Matrimonial Property Act 1984* (Juta 1984)
- Sinclair, JD assisted by Heaton, J *The Law of Marriage* vol 1 (Juta 1996)
- Singer, JB & Murphy, JC (eds) *Resolving Family Conflicts* (Ashgate Publishing 2008)
- Skelton, A & Carnelley, M (eds) *Family Law in South Africa* (Oxford University Press Southern Africa 2010)

- Sloth-Nielsen, J & Du Toit, Z (eds) *Trials and Tribulations, Trends and Triumphs. Developments in International, African and South African Child and Family Law* (Juta 2008)
- Snyman, CR *Criminal Law* 5 ed (LexisNexis 2008)
- Soanes, C & Stevenson, A (eds) *Concise Oxford English Dictionary* revised 11 ed (Oxford University Press 2006)
- Sonnekus, JC *Die Privaatregtelike Beskerming van die Huwelik* (Dutch Efficiency Bureau 1976)
- Sonnekus, JC *The Law of Estoppel in South Africa* 2 ed (Butterworths 2000)
- Spiro, E *Conflict of Laws* (Juta 1973)
- Spiro, E *Law of Parent and Child* 3 ed (Juta 1971)
- Spiro, E *Law of Parent and Child* 4 ed (Juta 1985)
- Steyn, N & Van Zyl, M (eds) *The Prize and the Price: Shaping Sexualities in South Africa* (HSRC Press 2009)
- Subae, M *Sharh Al-Qanun Al-Akhwal Al-Shakhsiyah [Explanation of the Code of Muslim Personal Law]* vol 1 (Darul Waraq 2000)
- Talbot, R *The Faust of Goethe Part I Translated into English Rhyme* (Wacey 1839)
- Tsanga, AS & Stewart, JE (eds) *Women and Law: Innovative Approaches to Teaching, Research and Analysis* (Weaver Press 2011)
- Tucker, J *Women, Family, and Gender in Islamic Law* (Cambridge University Press 2008)
- Van den Heever, FP *Breach of Promise and Seduction in South African Law* (Juta 1954)
- Van der Keessel, DG *Theses Selectae Juris Hollandici et Zelandici* (F Muller 1860)
- Van der Linden, J *Regtsgeleerd, Practicaal en Koopmans Handboek: Ten Dienste van Regters, Practizijns, Kooplieden en Allen, die een Algemeen Overzicht van Regtskennis Verlangen* (Alart 1806)
- Van der Linden, J *Verhandeling over de Judicieele Practijcq, of Form van Procederen, voor de Hoven van Justitie in Holland Gebruikelijk* (A en J Honkoop 1794)
- Van der Vyver, JD & Joubert, DJ *Persone- en Familiereg* 3 ed (Juta 1991)
- Van Heerden, B, Cockrell, A & Keightley, R (eds) *Boberg's Law of Persons and the Family* 2 ed (Juta 1999)
- Van Leeuwen, S *Het Rooms-Hollands-Regt, waar in de Roomse Wetten met het Huydendaagse Neerlands Regt, in Alles dat tot de Dagelijkse Onderhouding kan Dienen, met een Bysondere Kortheit, so wel in de Vaste Regts-stoffen, als in de Manier van Regts-vordering over een Gebragt Werden: Met Allerhande Ordonnantien, Placaten, Hand-vesten, Keuren, Gewoonten en Gewijsden Deser en Omleggende Landen Bevestigt* 8 ed (Boom 1708)
- Van Loggerenberg, DE, Bishop, M & Brickhill, J *Erasmus Superior Court Practice* loose-leaf (Juta 1994)
- Van Niekerk, PA *A Practical Guide to Patrimonial Litigation in Divorce Actions* loose-leaf (LexisNexis 1999)
- Van Wyk, AH *The Power to Dispose of the Assets of the Universal Matrimonial Community of Property* (Dutch Efficiency Bureau 1976)
- Van Zyl, L *Divorce Mediation and the Best Interests of the Child* (HSRC Press 1997)
- Van Zyl, L *Handbook of the South African Law of Maintenance Including the*

- Maintenance Act 99 of 1998, the Regulations, A Summary of Cases in Point, the Reciprocal Enforcement of Maintenance Orders Act and Policy Directives of the Department of Justice* 3 ed (LexisNexis 2010)
- Verbeke, A, Scherpe, JM, Declerck, C, Helma, T & Senaevé, P (eds) *Confronting the Frontiers of Family and Succession Law Liber Amicorum/Festschrift für Walter Pintens* (Intersentia 2012)
- Visser, D *Unjustified Enrichment* (Juta 2008)
- Visser, PJ & Potgieter, JM *Introduction to Family Law* 2 ed (Juta 1998)
- Voet, J *Commentarius ad Pandectas, Translated with Explanatory Notes and Notes of All South African Cases by Percival Gane Under the Title The Selective Voet Being the Commentary on the Pandects [Paris Edition of 1829] by Johannes Voet [1647–1713] and the Supplement to That Work by Johannes van der Linden [1756–1835]* (Butterworths 1956)
- Waldner, W & Künzl, R *Erlanger Festschrift für Karl Heinz Schwab* (Bodner Verlag 1990)
- Wardle, LD & Williams, CS (eds) *Family Law: Balancing Interests and Pursuing Priorities* (Hein & Co Inc 2007)
- Webb, SG & Ousky, RD *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids — Without Going to Court* (Hudson Street Press 2006)
- Welchman, L *Women and Muslim Family Laws in Arab States: A Comprehensive Overview of Textual Development and Democracy* (Amsterdam University Press 2007)
- Wessels, JW (Roberts, AA (ed)) *The Law of Contract in South Africa* vol 1 (Hortors 1937)
- Wiarda, TD *Über deutsche Vornamen und Geschlechtsnamen* (Nicolai Verlag 1800)
- Witzleb, W, Ellger, R, Mankowski, P, Merkt, H & Remien, O (eds) *Festschrift für Dieter Martiny zum 70. Geburtstag* (Mohr Siebeck 2014)
- WLUML *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World* 3 ed (Women Living Under Muslim Laws (WLUML) 2006)
- Zuhaylie, W *Al-Fiqhul Islaam Wa Adillatuhoo [Jurisprudence of Islam and its Proofs]* vol 7 (Darul Fikr 1989)

### JOURNAL ARTICLES

- Albertyn, C 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 *Stell LR* 591
- Aldana, R & Saucedo, LM 'The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua' (2008) 55 *Buffalo LR* 1261
- Alston, P 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law and the Family* 1
- Armstrong, A, Chuulu, M, Himonga, C, Letuka, P, Mokobi, K, Ncube, W, Nhlapo, T, Rwezaura, B & Vilakazi, P 'Towards a Cultural Understanding of the Interplay Between Children's and Women's Rights: An Eastern and Southern African Perspective' (1995) 3 *International Journal of Children's Rights* 333



- Artz, L & Smythe, D 'Bridges and Barriers: A Five Year Retrospective on the Domestic Violence Act' 2005 *Acta Juridica* 200
- Ayrapetova, Y 'HB 004: Mandatory Divorce Mediation Program Passed in Utah' (2005) 7 *Journal of Law and Family Studies* 417
- Babulal, A 'Hindu Marriages' August 2011 *Without Prejudice* 64
- Bakker, P 'Nature of Ownership in Immovable Property of the Joint Estate on Divorce' (2007) 70 *THRHR* 515
- Bakker, P 'Toepassing van Islamitiese Reg in Suid-Afrika — Hassam v Jacobs [2008] 4 All SA 350 (C)' (2008) 29 *Obiter* 533
- Bakker, P 'Die *Civil Union Act, Draft Domestic Partnership Bill* en Moontlike Deregulering van die Huwelik' (2009) 34 *JJS* 1
- Barker, H 'New Heights in Religious Freedom' November 1998 *De Rebus* 55
- Barnard, AH & Van Aswegen, A 'Swart v Swart 1980 4 SA 364 (O)' (1981) 34 *THRHR* 199
- Barratt, A 'The Child's Right to be Heard in Custody and Access Determinations' (2002) 65 *THRHR* 556
- Barratt, A "'Whatever I Acquire will be Mine and Mine Alone": Marital Agreements Not to Share in Constitutional South Africa' (2013) 130 *SALJ* 688
- Batagol, B 'Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution' (2008) 8 *Queensland University of Technology Law and Justice Journal* 24
- Bekink, B & Bekink, M 'Defining the Standard of the Best Interests of the Child: Modern South African Perspectives' (2004) 37 *De Jure* 21
- Bekker, JG, Van Zyl, GJ, Wakeford, E & Labuschagne, JMT 'Legal Remedies Available to an Aggrieved Parent: Observations on the Parental Alienation Syndrome in Custody and Access Litigation' (2004) 5(1) *Child Abuse Research in South Africa* 26
- Bennett, TW 'The Best Interests of the Child in an African Context' (1999) 20 *Obiter* 145
- Bennett, TW 'Re-introducing African Customary Law to the South African Legal System' (2009) 57 *American Journal of Comparative Law* 1
- Beyer, EF 'A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation' (2008) 40 *St Mary's LJ* 303
- Bilchitz, D & Judge, M 'For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa' (2007) 23 *SAJHR* 466
- Boniface, A 'African Style Mediation and Western Style Divorce and Family Mediation: Reflections for the South African Context' (2012) 15 *PELJ* 378 (online), available via a link at <http://www.nwu.ac.za/p-per/index.html> or <http://www.saflii.org/za/journals/PER/>
- Bonthuys, E 'Of Biological Bonds, New Fathers and the Best Interests of the Child' (1997) 13 *SAJHR* 622
- Bonthuys, E 'Familiar Discourses of Parenthood' (1999) 62 *THRHR* 547
- Bonthuys, E 'Spoiling the Child: Domestic Violence and the Interests of Children' (1999) 15 *SAJHR* 308

- Bonthuys, E 'Clean Breaks: Custody, Access and Parents' Rights to Relocate' (2000) 16 *SAJHR* 486
- Bonthuys, E 'Epistemological Envy: Legal and Psychological Discourses in Child Custody Evaluations' (2001) 118 *SALJ* 329
- Bonthuys, E 'Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce' (2001) 64 *THRHR* 192
- Bonthuys, E 'The South African Bill of Rights and the Development of Family Law' (2002) 119 *SALJ* 748
- Bonthuys, E 'Family Contracts' (2004) 121 *SALJ* 879
- Bonthuys, E 'Parental Rights and Responsibilities in the Children's Bill 70D of 2003' (2006) 11 *Stell LR* 482
- Bonthuys, E 'The Best Interests of Children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23
- Bonthuys, E 'Child Maintenance and Child Poverty in South Africa' (2008) 71 *THRHR* 194
- Bonthuys, E 'Realizing South African Children's Basic Socio-economic Claims against Parents and the State: What Courts can Achieve' (2008) 22 *International Journal of Law, Policy and Family* 333
- Bonthuys, E 'Forfeiture of Benefits at Divorce and the Rule that a Spouse Cannot Forfeit What She or He has Contributed: An Argument for Change' (2014) 131 *SALJ* 439
- Bonthuys, E & Pieterse, M 'Still Unclear: The Validity of Certain Marriages in Terms of the Recognition of Customary Marriages Act' (2000) 63 *THRHR* 622
- Boshoff, A 'The Fractured Landscape of Family Law' (2001) 117 *SALJ* 312
- Bridge, C 'Family Mediation and the Legal Process: An Unresolved Dilemma' (1997) 17 *New Zealand Universities LR* 231
- Brooks, PEJ 'The Wife's Residence and Domicile as Jurisdictional Factors in Divorce Actions' (1979) 42 *THRHR* 103
- Bryant, D & Faulks, J 'The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93
- Burman, S, Derman, L & Swanepoel, L 'Only for the Wealthy? Assessing the Future for Children of Divorce' 2000 (16) *SAJHR* 535
- Burman, S, Dingle, E & Glasser, N 'The New Family Court in Action: An Initial Assessment' (2000) 117 *SALJ* 111
- Burman, S & McLennan, F 'Providing for Children? The Family Advocate and the Legal Profession' 1996 *Acta Juridica* 69
- Carbonneau, TE 'A Consideration of Alternatives to Divorce Litigation' 1986 *Univ of Illinois LR* 1119
- Carnelley, M 'The Right to Legal Representation at State Expense for Children in Care and Contact Disputes — A Discussion of the South African Legal Position with Lessons from Australia' (2010) 31 *Obiter* 638
- Carnelley, M & Easthorpe, J 'Judicial Discretion in the Determination of Post-divorce Child Support: A Brief Overview of the Application of the South African



- Maintenance Act 99 of 1998 as Compared to the Canadian Federal Child Support Guidelines of 1997' (2009) 30 *Obiter* 370
- Chenwi, L & McLean, K "A Woman's Home is Her Castle?" — Poor Women and Housing Inadequacy in South Africa' (2009) 25 *SAJHR* 517
- Chirwa, D 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157
- Church, J 'The Dichotomy of Marriage Revisited: A Note on *Ryland v Edros*' (1997) 60 *THRHR* 292
- Clark, B 'No Holy Cow — Some Caveats on Family Mediation' (1993) 56 *THRHR* 454
- Clark, B "A Golden Thread?" Some Aspects of the Application of the Standard of the Best Interests of the Child in South African Law' (2000) 11 *Stell LR* 3
- Clark, B 'Families and Domestic Partnerships' (2002) 119 *SALJ* 634
- Cockrell, APH 'Adjudication Styles in South African Private Law' (1993) 56 *THRHR* 590
- Cohen, C 'Mediation: Giving Law a Human Face' 1992 *De Rebus* 126
- Cohen, C 'Arbitrating Matrimonial Property Disputes — Will It Work?' February 2000 *De Rebus* 7
- Cohen, C 'Mediation and the Attorneys' Profession' May 2011 *De Rebus* 40
- Cohen, CH 'The Many Faces of Arbitration: Why Not Use It for Property Disputes in Divorce?' 1993 *De Rebus* 642
- Cohen, CH 'Divorce Mediation — The SCA Gives Its Stamp of Approval' January/February 2011 *De Rebus* 7
- Combrinck, H 'The Dark Side of the Rainbow: Violence against Women in South Africa after Ten Years of Democracy' 2005 *Acta Juridica* 171
- Cooke, A 'Choice, Heterosexual Life Partnerships, Death and Poverty' (2005) 122 *SALJ* 542
- Cooper, C 'Women and the Right to Work' (2009) 25 *SAJHR* 573
- Cooper, D & Brandon, M 'How can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes?' (2007) 21 *Australian Journal of Family Law* 288
- Costa, A 'He Loves Me Not — And What Was It Worth?' September 2005 *De Rebus* 17
- Costa, A 'Section 7(2) of the Divorce Act — How Much Elasticity?' December 2006 *De Rebus* 28
- Cumes, JW & Lambiase, EAA 'Do Lawyers and Psychologists have Different Perspectives on the Criteria for the Award of Custody of a Child?' (1987) 104 *SALJ* 704
- Cumes, JW & Lambiase, EAA 'Legal and Psychological Criteria for the Determination of Custody in South Africa: A Review' (1987) 17 *South African Journal of Psychology* 119
- Davel, CJ & Boniface, A 'Cross-border Relocation of Children and Custodial Parent' (2003) 66 *THRHR* 138
- Davel, T 'The African Charter on the Rights and Welfare of the Child, Family Law and Children's Rights' (2002) 35 *De Jure* 281

- Davel, T & De Kock, P 'In 'n Kind se Beste Belang' (2001) 34 *De Jure* 272
- Davey, J 'Pension Interest and Divorce. *K v K and Another* — A Critique' September 2013 *De Rebus* 26
- Davis, A 'Mediating Cases Involving Domestic Violence: Solution or Setback?' (2006/2007) 8 *Cardozo Journal of Conflict Resolution* 253
- De Boer, J 'Familierechtelijke Vernieuwingen' (1998) 31 *Nederlands Juristenblad* 1
- De Jong, M 'New Trends regarding the Maintenance of Spouses upon Divorce' (1999) 62 *THRHR* 75
- De Jong, M 'An Acceptable, Applicable and Accessible Family-Law System for South Africa — Some Suggestions Concerning a Family Court and Family Mediation' 2005 *TSAR* 33
- De Jong, M 'Judicial Stamp of Approval for Divorce and Family Mediation in South Africa' (2005) 68 *THRHR* 95
- De Jong, M 'Giving Children a Voice in Family Separation Issues: A Case for Mediation' 2008 *TSAR* 785
- De Jong, M 'International Trends in Family Mediation — Are We Still on Track?' (2008) 71 *THRHR* 454
- De Jong, M 'Ten-year Anniversary of the Maintenance Act 99 of 1998 — A Time to Reflect on Improvements, Shortcomings and the Way Forward' (2009) 126 *SALJ* 590
- De Jong, M 'The Newly Introduced Public Mediation Service in the Maintenance Court: Does it Make a Difference in the Short Term?' (2009) 72 *THRHR* 274
- De Jong, M 'A Pragmatic Look at Mediation as an Alternative to Divorce Litigation' 2010 *TSAR* 515
- De Jong, M 'The Cut-off Date for Determining Accrual Claims: A Cruel Decision and a Better Decision' (2011) 74 *THRHR* 472
- De Jong, M 'The Need for New Legislation and/or Divorce Mediation to Counter Some Commonly Experienced Problems with the Division of Assets upon Divorce' (2012) 23 *Stell LR* 225
- De Jong, M 'Is Parenting Coordination Arbitration?' July 2013 *De Rebus* 38
- De Jong, M & Heaton, J 'A Missed Opportunity to Achieve Justice in Respect of Maintenance for Divorced Spouses whose Former Spouses Die: *Kruger NO v Goss*' (2011) 128 *SALJ* 211
- De Matos Ala, C 'The Taxation of Spousal and Child Maintenance arising from Marital Disputes and Child Maintenance Orders' (2011) 128 *SALJ* 17
- De Ru, H 'The Value of Recommendations Made by the Family Advocate and Expert Witnesses in Determining the Best Interests of the Child: *P v P* 2007 5 SA 94 (SCA)' (2008) 71 *THRHR* 698
- De Ru, H 'A Critical Analysis of the Retention of Spousal Benefits for Permanent Same-sex Life Partners after the Coming into Operation of the Civil Union Act 17 of 2006' (2009) 23(2) *Speculum Juris* 111 (online), available via a link at <http://www.speculumjuris.co.za>
- De Villiers, B 'The Rights of Children in International Law: Guidelines for South Africa' (1993) 4 *Stell LR* 289

- De Vos, P 'Same-sex Sexual Desire and the Re-imagining of the South African Family' (2004) 20 *SAJHR* 179
- De Vos, P 'The "Inevitability" of Same-sex Marriage in South Africa's Post-Apartheid State' (2007) 23 *SAJHR* 432
- De Vos, P & Barnard, J 'Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga' (2007) 124 *SALJ* 795
- Denson, R & Van der Walt, G 'Cold Comfort for Parties to a Muslim Marriage — Hassam v Jacobs NO [2008] 4 All SA 350 (C)' (2009) 30 *Obiter* 188
- Denson, R & Van der Walt, G 'Cold Comfort for the Parties to a Muslim Marriage — The Saga Continues: Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women's Legal Trust as *Amici Curiae* [2009] ZACC 19' (2010) 31 *Obiter* 201
- Dewdney, M 'The Partial Loss of Voluntariness and Confidentiality in Mediation' (2009) 20 *Australasian Dispute Resolution Journal* 17
- Diederichsen, U 'Der Vorname — Identifikationssymbol oder Pseudonym?' (1989) 42 *Das Standesamt* 337
- Diederichsen, U 'Teilhabegerechtigkeit in der Ehe' 1992 *Zeitschrift für das gesamte Familienrecht* 1
- Domingo, W 'For the Sake of the Children: South African Family Relocation Disputes' (2011) 14 *PELJ* 159 (online), available via a link at <http://www.nwu.ac.za/p-per/index.html> or <http://www.saflii.org/za/journals/PER/>
- Dorf, PA, Hendler, MG & Alion, RG 'Mediating Family Law Disputes' (1995) 28 *Maryland Bar Journal* 19
- Douglas, KJ 'Change of Matrimonial Property System Without an Order of Court' 1991 *De Rebus* 205
- Douglas, S 'Questions of Mediator Neutrality and Researcher Objectivity: Examining Reflexivity as a Response' (2009) 20 *Australasian Dispute Resolution Journal* 56
- Du Toit, L 'Citizenship and Care in South Africa: A Materialist Feminist Stance Against Liberalism' (2001) 34 *De Jure* 459
- Du Toit, L 'Integrating Care and Justice in South African Family Law: Laying the Theoretical Foundation' 2002 *TSAR* 46
- Du Toit, L 'Integrating Care and Justice in South African Family Law: Dealing with Maternal and Paternal Vulnerabilities' 2002 *TSAR* 526
- Dugard, J & Mohlakoana, N 'More Work for Women: A Rights-based Analysis of Women's Access to Basic Services in South Africa' (2009) 25 *SAJHR* 546
- Eekelaar, J 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161
- Eggermont, S 'De Houdbaarheid van het Belgische Naamrecht' (2009) 36 *Tijdschrift voor Privaatrecht* 1759
- Escott-Watson, D "'Divorce of Cohabitees": Can Pension Benefits be Shared?' April 2012 *De Rebus* 22
- Field, R 'Using the Feminist Critique of Mediation to Explore "the Good, the Bad and the Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20 *Australian Journal of Family Law* 45

- Flaccus, JA 'Mediation of Divorce Disputes — Is This the Solution?' 2009 *Arkansas Law Notes* 79
- Francken, PHG 'Foreign Informal Antenuptial Contracts and S 7(3) of the Divorce Act 70 of 1979' 1993 *TSAR* 180
- Fredericks, IN & Davids, LC 'The Privacy of Wife Abuse' 1995 *TSAR* 471
- Fredman, S 'Engendering Socio-economic Rights' (2009) 25 *SAJHR* 410
- Fredman, S 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 *Stell LR* 566
- Freeman, MB 'Divorce Mediation: Sweeping Conflicts under the Rug, Time to Clean House' (2000) 78 *University of Detroit Mercy LR* 67
- Geldenhuis, M, Korn, M & Kopping-Pavars, N 'Collaborative Law: A New Approach to Family Law' April 2009 *De Rebus* 27
- Giesen, D 'Der Familienname aus rechtshistorischer, rechtsvergleichender und rechtspolitischer Sicht' (1993) 4 *Familie und Recht* 65
- Glasser, N 'Can the Family Advocate Adequately Safeguard Our Children's Best Interests?' (2002) 65 *THRHR* 74
- Glasser, N 'Taking Children's Rights Seriously' (2002) 65 *De Jure* 223
- Goldberg, V 'Family Courts in South Africa and the Implication for Divorce Mediation' (1995) 58 *THRHR* 276
- Goldberg, V 'Family Mediation is Alive and Well in the United States of America: A Survey of Recent Trends and Developments' 1996 *TSAR* 358
- Goldberg, V 'Practical and Ethical Concerns in Alternative Dispute Resolution in General and Family and Divorce Mediation in Particular' 1998 *TSAR* 748
- Goldblatt, B 'Regulating Domestic Partnerships — A Necessary Step in the Development of South African Family Law' (2003) 120 *SALJ* 610
- Goldblatt, B 'The Right to Social Security — Addressing Women's Poverty and Disadvantage' (2009) 25 *SAJHR* 442
- Gottfried, S 'Virtual Visitation: The Wave of the Future in Communication between Children and Non-custodial Parents in Relocation Cases' (2002) 37 *Family Law Quarterly* 475
- Grasmann, G 'Zur Verfassungsmäßigkeit des einheitlichen Ehenamens' (1988) 42 *Juristenzeitung* 595
- Greatbatch, D & Dingwall, R 'The Marginalization of Domestic Violence in Divorce Mediation' 1999 *International Journal of Law, Policy and the Family* 175
- Greenberg, EE 'Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence' 2009/2010 *St John's Journal of Legal Commentary* 603
- Grillo, T 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale LR* 1545
- Grobler, T 'The Mediation in Certain Divorce Matters Act, 1987' (1990) 3 *Consultus* 133
- Hahlo, HR 'The Law of Concubinage' (1972) 89 *SALJ* 321
- Hahlo, HR 'Non-variation Clauses in Maintenance Agreements: A Commentary on *Claassens v Claassens*' (1981) 98 *SALJ* 330
- Hahlo, HR 'When is a Benefit not a Benefit?' (1984) 101 *SALJ* 456
- Hahlo, HR & Kahn, E 'Recent Cases: A Matter of Breach of Promise' (1961) 78 *SALJ*

- 355
- Hamilton, F 'ADR Professional: Mediation — Lessons to be Learnt from Australia' (2010) 40 *Family Law* 1328
- Hastings, H 'Dispute Resolution Options in Divorce and Custody Cases' (2005) 46 *New Hampshire Bar Journal* 48
- Hatwood, M 'Maintenance: Where Are We Now?' (2010) 40 *Family Law — Bristol* 636
- Hawkey, K 'Mandatory Mediation Rules to Shake Up Justice System' December 2011 *De Rebus* 20
- Heaton, J 'Some General Remarks on the Concept "Best Interests of the Child"' (1990) 53 *THRHR* 95
- Heaton, J 'An Overview of the Current Legal Position regarding Heterosexual Life Partnerships' (2005) 68 *THRHR* 662
- Heaton, J 'Striving for Substantive Gender Equality in Family Law: Selected Issues' (2005) 21 *SAJHR* 547
- Heaton, J 'Termination of Post-divorce Maintenance for a Spouse or Civil Union Partner in terms of a Settlement Agreement' (2007) 70 *THRHR* 641
- Heaton, J 'The Law of Persons and the Family' 2007 *ASSAL* 885
- Heaton, J 'The Marriage Act 25 of 1961, the Divorce Act 70 of 1979, and the Dissolution of a Hindu Marriage [Discussion of *Singh v Ramparsad* 2007 3 SA 445 (D)]' (2008) 19 *Stell LR* 452
- Heaton, J 'An Individualized, Contextualized and Child-centred Determination of the Child's Best Interests, and the Implications of such an Approach in the South African Context' (2009) 34 *JJS* 1
- Heaton, J 'Family Law' 2009 *ASSAL* 440
- Heaton, J 'Family Law' 2010 *ASSAL* 435
- Heaton, J 'Family Law' 2011 *ASSAL* 414
- Heaton, J 'Family Law' 2012 *ASSAL* 328
- Heaton, J 'Family Law' 2013 *ASSAL* (forthcoming)
- Heaton, J & Schoeman, E 'Foreign Marriages and Section 7(3) of the Divorce Act 70 of 1979; *Esterhuizen v Esterhuizen* 1999 1 SA 492 (C)' (2000) 63 *THRHR* 141
- Heilbrun, K 'Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests' (1995) 29 *Family Law Quarterly* 63
- Helman, S 'Step-by-Step Guide to Drawing Settlement Agreements in Divorce Cases' September 2002 *De Rebus* 38
- Henry, WJ, Fieldstone, L & Bohac, K 'Parenting Coordination and Court Relitigation: A Case Study' (2009) 47 *Family Court Review* 682
- Hepting, R 'Der Name der ehelichen Familie in der Reform — Was bringt der Regierungsentwurf des neuen Familiennamensrechtsgesetz?' (1992) 45 *Das Standesamt* 201
- Hermann, R 'Über das Recht der Namensführung und der Namensänderung' (1862) 62 *Archiv für die civilistische Praxis* 153
- Himonga, C 'The Right to Health in an African Cultural Context: The Role of *Ubuntu* in the Realization of the Right to Health with Special Reference to South Africa' (2013) 57 *Journal of African Law* 165

- Himonga, C & Bosch, C 'The Application of Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *SALJ* 306
- Himonga, C & Pope, A '*Mayelane v Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications*' 2013 *Acta Juridica* 318
- Hlophe, MJ 'The Judicial Approach to "Summary Applications for the Child's Return": A Move Away from "Best Interests" Principles?' (1998) 115 *SALJ* 441
- Hoening, JK 'Divorce Mediation Basics' (1997) 43 *The Practical Lawyer* 39
- Hutchings, S & Delpont, E 'Cohabitation: A Responsible Approach' 1992 *De Rebus* 121
- Jessani, AD 'A Step-by-Step Approach to the Divorce Mediation Process: From Soup to Nuts' (2002) 16 *American Journal of Family Law* 118
- Jessani, AD 'Representing Your Client during the Divorce Mediation Process' (2011) 24 *American Journal of Family Law* 189
- Jessani, AD & James, L 'Mediators and Parenting Coordinators: Comparing and Contrasting — 20 Questions/40 Answers' (2006) 20 *American Journal of Family Law* 180
- JMT 'Change of Child's Name' (1981) 97 *Law Quarterly Review* 197
- Jordaan, B 'The Potential of Court-based Mediation' March 2012 *De Rebus* 18
- Joubert, N 'Skenkings tussen Man en Vrou, Simulasie en Artikel 21 van die Insolvensiewet 24 van 1936' 1992 *TSAR* 345
- Julyan, J 'Of Mothers-in-Law and Motor Cars' (1988) 105 *SALJ* 404
- Kahn, E 'Divorced Abroad: Still Married Here' 1986 *TSAR* 1
- Kahn, E 'Conflict of Laws' 1987 *ASSAL* 472
- Kahn, E 'Conflict of Laws' 1991 *ASSAL* 585
- Kassan, D 'The Voice of the Child in Family Proceedings' (2003) 36 *De Jure* 164
- Kelly, JB 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13 *Mediation Quarterly* 85
- Kelly, JB 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law* 129
- Kerr, JA 'The Role of Courts in Developing Customary Law' (1999) 20 *Obiter* 41
- Kirkland, K & Sullivan, M 'Parenting Coordination (PC) Practice: A Survey of Experienced Professionals' (2008) 46 *Family Court Review* 622
- Knoetze, E 'The Modern Significance of *Lobolo*' 2000 *TSAR* 539
- Koen, WJ, Saccuzzo, DP & Johnson, NE 'Custody Mediation in Violent and Nonviolent Families: Pitfalls and Perils' (2006) 19 *American Journal of Family Law* 253
- Krüger, H 'Die Name der Frau nach bürgerlichem Recht' 1958 *Archiv für die civilistische Praxis* 232
- Kruk, E 'Practice Issues, Strategies, and Models: The Current State of the Art of Family Mediation' (1998) 36 *Family and Conciliation Courts Review* 195
- Kruuse, H "'Here's to You, Mrs Robinson": Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships' (2009) 25 *SAJHR* 386
- Kruuse, H 'Drawing Lines in the Sand: *AM v RM* 2010 2 SA 223 (ECP)' (2009) 23(2) *Speculum Juris* 127 (online), available via a link at <http://www.speculumjuris.co.za>



- Labuschagne, E 'Die Universele Vennootskap in die De Facto Samewoningsverhouding: *Ally v Dinath* 1984 2 SA 451 (T)' 1985 TSAR 219
- Labuschagne, JMT & Van der Linde, A 'Omgangsreg (Toegangsreg) van Siblings Onderling, Verwyderde Verwante en Sosiale Ouers met Minderjarige Kinders' (2003) 36 *De Jure* 344
- Lambiase, EAA & Cumes, JW 'Child Custody Decisions: How Legal and Mental Health Professionals View the Concept of the "Best Interests of the Child"' (1987) 17 *South African Journal of Psychology* 127
- Levy, MH & Mowatt, JG 'Mediation in the Legal Environment' (1991) 24 *De Jure* 63
- Lind, C 'The Changing Face of Divorce (I): Background' (1989) 18 *Businessman's Law* 149
- Lind, C 'The Changing Face of Divorce (II): Real Reform?' (1989) 18 *Businessman's Law* 163
- Lind, C 'Domestic Partnerships and Marital Status Discrimination' 2005 *Acta Juridica* 108
- Logan, TK, Walker, R, Horvath, LS & Leukefeld, C 'Divorce, Custody, and Spousal Violence: A Random Sample of Circuit Court Docket Records' (2003) 18 *Journal of Family Violence* 269
- Louw, A 'The Power of a Custodian to Remove a Child from the Country after Divorce: Some Comments' (2003) 36 *De Jure* 115
- Louw, A 'The Acquisition of Shared Parental Responsibility by Same-sex Civil Union Partners' (2007) 28 *Obiter* 321
- Malherbe, R 'The Constitutional Dimension of the Best Interests of the Child as applied in Education' 2008 TSAR 267
- Mamashela, M & Carnelley, M 'Cohabitation and the Same-sex Marriage. A Complex Jigsaw Puzzle. Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 3 BCLR 355 (CC)' (2006) 27 *Obiter* 379
- Manyathi, N 'Registration of Customary Marriages Still Creates Confusion' May 2012 *De Rebus* 24
- Margulies, P 'The Lawyer as Caregiver: Child Client's Competence in Context' (1995–1996) 64 *Fordham LR* 1473
- McEwen, CA, Maiman, RJ & Mather, L 'Lawyers, Mediation, and the Management of Divorce Practice' (1994) 28 *Law & Society Review* 149
- McEwen, CA, Rogers, NH & Maiman, RJ 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce' (1994–1995) 79 *Minnesota LR* 1317
- McIsaac, H 'Focus on Family and Divorce Mediation' (2001) 39 *Family Court Review* 405
- Meyersfeld, B 'If You Can See, Look: Domestic Partnerships and the Law' (2010) 3 *Constitutional Court Review* 271
- Meyerson, D 'Who's in and Who's out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa' (2010) 3 *Constitutional Court Review* 295

- Mnookin, R 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226
- Mnookin, RH & Kornhauser, L 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 950
- Montiel, JT 'Is Parenting Authority a Usurpation of Judicial Authority? Harmonizing Authority for, Benefits of, and Limitations on this Legal-Psychological Hybrid' (2011) 7 *Tennessee Journal of Law and Policy* 364
- Moodley, S 'Mediation — The Increasing Necessity of Incorporating Cultural Values and Systems of Empowerment' (1994) 27 *CILSA* 44
- Moosa, N 'Human Rights in Islam' (1998) 14 *SAJHR* 508
- Moosa, N 'Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa' (1998) 115 *SALJ* 479
- Moosa, N 'Muslim Divorce and the 1999 Divorce Amendment Act: The Cart before the Horse?' October 1999 *De Rebus* 32
- Moosa, N 'Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS' (2009) 12 *PELJ* 65 (online), available via a link at <http://www.nwu.ac.za/p-per/index.html> or <http://www.saflii.org/za/journals/PER/>
- Moosa, N 'An Overview of Post-Divorce Support for Muslim Children in the Context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill' (2013) 6(1/2/3) *International Journal of Liability and Scientific Enquiry* 27
- Moosa, N & Abduroaf, M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' 2014 *Acta Juridica* 160
- Moosa, N & Karbanee, S 'An Exploration of *Mata'a* Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re)-opening a Veritable Pandora's Box?' (2004) 8 *Law, Democracy and Development* 267 (online), available via a link at <http://www.saflii.org/za/journals/LDD/>
- Mosikatsana, T 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution' (1998) 193 *Michigan Journal of Race and Law* 341
- Mothupi, S 'Some Practical Effects of the Financial Services Laws General Amendment Act 2008 on Amending Section 37D(4) of the Pension Funds Act' (2010) 22 *SA Merc LJ* 214
- Mowatt, JG 'The Mediation in Certain Divorce Matters Act 1987: News, But Nothing New' 1987 *De Rebus* 611
- Mowatt, JG 'Are We Ready to Mediate?' (1988) 105 *SALJ* 314
- Mtshengu, S 'Parental Responsibilities and Rights Agreements and Parenting Plans' March 2011 *De Rebus* 14
- Mudie, G 'Custody and Access Determination in Divorce: A Family and Developmental Approach' September 1989 *De Rebus* 686
- Müller, K & Tait, M 'The Best Interests of Children: A Criminal Law Concept' (1999) 32 *De Jure* 322
- Murithi, T 'Practical Peacemaking Wisdom from Africa' (2006) 1 *The Journal of Pan African Studies* 25

- Neels, JL 'Die Internasionale Privaatreg en die Herverdelingsbevoegdheid by Egskeiding' 1992 *TSAR* 336
- Neels, JL & Wethmar-Lemmer, M 'Constitutional Values and the Proprietary Consequences of Marriage in Private International Law — Introducing the *Lex Causae Proprietatis Matrimonii*' 2008 *TSAR* 587
- Nelle, D 'Der Familienname — Perspektiven für eine rechtsvereinheitlichende Reform' 1990 *Zeitschrift für das gesamte Familienrecht* 810
- Nicholson, CMA 'The Hague Convention on the Civil Aspects of International Child Abduction — Pill or Placebo?' (1999) 32 *CILSA* 228
- Nkosi, T 'A Receiver and Liquidator in Matrimonial Affairs: A Legal Entitlement or a Drastic Measure?' November 2011 *De Rebus* 22
- Nolan, LC 'Identifying Parents Who May Kill their Children in Highly Contested Custody Cases: Can Mental Health Providers Help Judges Avoid the Deadly Game of Russian Roulette?' (2009/10) 9 *Whittier Journal of Child & Family Advocacy* 227
- Norrie, K McK 'The Children Acts in Scotland, England and Australia: Lessons for South Africa in Rhetoric and Reality' (2002) 119 *SALJ* 623
- Nuytinck, AJM 'De onder Uitsluitingsclausuleverkrege Grond en de daarop Gebouwe Nieuwe Woning' 2008 *Ars Aequi: Juridisch Studentenblad* 628
- O'Connor, J 'Roman Catholic Divorcees could also be Disadvantaged by New Law' April 1998 *De Rebus* 24
- Opet, O 'Das Namensrecht des Bürgerlichen Gesetzbuches' (1897) 87 *Archiv für die civilistische Praxis* 313
- Osman-Hyder, M 'The Impact and Consequences of *Hassam v Jacobs NO* on Polygynous Muslim Marriages [A Discussion of *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC)]' (2011) 22 *Stell LR* 233
- Pantazis, A 'Domestic Violence in Lesbian and Gay Relationships' (1998) 115 *SALJ* 379
- Paquin, G & Harvey, L 'Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection' 2001–2002 *Florida Coastal LJ* 166
- Parkinson, L 'Family Mediation: Ideology or New Discipline? Part II' (2011) 41 *Family Law* 196
- Payne, JD 'A Practitioner's Guide to Spousal Support in Divorce Proceedings' (1988) 19 *Revue Générale de Droit* 701
- Peeples, RA, Reynolds, S & Harris, CT 'It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High-Conflict Custody Cases' (2008) 43 *Wake Forest LR* 505
- Picarra, L '*Gory v Kolver NO* 2007 (4) SA 97 (CC)' (2007) 23 *SAJHR* 563
- Pieterse, M 'Killing it Softly: Customary Law in the New Constitutional Order' (2000) 34 *De Jure* 33
- Pillay, R & Zaal, N 'Child-interactive Video Recordings: A Proposal for Hearing the Voices of Children in Divorce Matters' (2005) 122 *SALJ* 684
- Pont, D 'Boekbespreking: Hahlo HR: The South African Law of Husband and Wife' (1955) 18 *THRHR* 14
- Powell, C 'Family Mediation' 2009 *New Zealand LJ* 381

- Quigley, L 'The Intersection between Domestic Violence and the Child Welfare System: The Role Courts can Play in Protection of Battered Mothers and their Children' (2006/2007) 13 *William & Mary Journal of Women and Law* 867
- Ratiba, MM 'Divorcing and Checking Out of the Mortal and Physical World Domain — Online Assets in Limbo: A Call for the Regulation of the Digital Legacy' (2013) 38 *JJS* 27
- Rautenbach, C 'Islamic Marriages in South Africa: *Quo Vadimus?*' (2004) 69 *Koers* 121
- Rautenbach, C 'Phenomenon of Personal Laws in India: Some Lessons for South Africa' (2006) 39 *CILSA* 241
- Rautenbach, C 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 143
- Rautenbach, C & Van der Linde, A 'The Requirements for a Valid Pactum Successorium in an Antenuptial Contract: The Curious Case of *Radebe v Sosibo NO*' (2012) 129 *SALJ* 22
- Reed, T 'Divorce Settlement Agreements: What Every Attorney Should Know about the Financial Services Industry' September 2005 *De Rebus* 20
- Reed, T 'What Impact does an Antenuptial Contract have on a Pension?' October 2010 *De Rebus* 31
- Reich, C 'The New Property' (1964) 73 *Yale LJ* 733
- Richler, J 'Court-Based Mediation in Canada' (2011) 50 *Judges' Journal* 14
- Robinson, JA 'The Child's Right to Parental and Family Care: Some Brief Remarks' (1998) 19 *Obiter* 329
- Robinson, JA & Ferreira, GM 'Die Reg van die Kind om Gehoor te Word: Enkele Verkennende Perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)' (2000) 33 *De Jure* 54
- Robinson, R 'Wanneer is Huweliksverbrokkeling Onherstelbaar? Coetzee v Coetzee 1991 4 SA 702 (K)' (1993) 14 *Obiter* 206
- Robinson, R & Horsten, D 'The Quantification of "Labour of Love": Reflections on the Constitutionality of the Discretion of a Court to Redistribute Capital Assets in terms of Section 7(3)–(6) of the South African Divorce Act' (2010) 24(1) *Speculum Juris* 96 (online), available via a link at <http://www.speculumjuris.co.za>
- Rocher, L 'Hindu Conceptions of Law' (1978) 30 *Hastings LJ* 1283
- Rogers, RM & Palmer, JP 'A Speaking Analysis of ADR Legislation for the Divorce Neutral' (2000) 31 *St Mary's LJ* 871
- Roodt, C 'Conflict of Law(s) and Autonomy in Antenuptial Agreements' (2006) 69 *THRHR* 215
- Roothman, A 'Section 7(8) of the Divorce Act: Income Tax Implications' 1994 *De Rebus* 355
- Roseby, V 'Uses of Psychological Testing in a Child-focused Approach to Child Custody Evaluations' (1995) 29 *Family Law Quarterly* 97
- Rwezaura, B 'The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82

- Rycroft, A 'The Doctrine of *Stare Decisis* in Constitutional Court Cases' (1995) 11 *SAJHR* 587
- SABRA 'Die Indiërbevolking van Suid-Afrika' October 1968 *Journal of Racial Affairs* 3
- Saccuzzo, DP 'Controversies in Divorce Mediation' (2003) 79 *North Dakota LR* 425
- Salazar, LF, Baker, CK, Price, AW & Carlin, K 'Moving Beyond the Individual: Examining the Effects of Domestic Violence Policies on Social Norms' (2003) 32 *American Journal of Community Psychology* 253
- Sanchez, EA & Kibler-Sanchez, S 'Empowering Children in Mediation: An Intervention Model' (2004) 42 *Family Court Review* 554
- Schaaber, R 'Ehename: Welche Änderungen des geltenden Rechts empfehlen sich?' (1990) 43 *Das Standesamt* 282
- Schäfer, ID 'Alternative Divorce Procedures in the Interests of Children: Some Comparative Aspects' 1988 (51) *THRHR* 297
- Schäfer, L 'Marriage and Marriage-like Relationships: Constructing a New Hierarchy of Life Partnerships' (2006) 123 *SALJ* 630
- Schepard, A & Salem, P 'Forward to the Special Issue on the Family Law Education Reform Project' (2006) 44 *Family Court Review* 513
- Schneider, EM 'Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward' (2008/9) 42 *Fam LQ* 353
- Schoeman, E 'The Connecting Factor for the Proprietary Consequences of Marriage' 2001 *TSAR* 72
- Schoeman, E 'The South African Conflict Rule for Proprietary Consequences of Marriage: Learning from the German Experience' 2004 *TSAR* 115
- Schulze, HCAW 'Some Thoughts on the Interpretation and Application of Section 8(1) of the Matrimonial Property Act 88 of 1984' (2000) 63 *THRHR* 116
- Schwellnus, T 'The Legal Position of Cohabitees in the South African Law' (1995) 16 *Obiter* 133
- Schwenzer, I 'Namensrecht im Überblick' 1991 *Zeitschrift für das gesamte Familienrecht* 390
- Scott, J 'Erkenning van Deliktuele Vordering van Deelgenoot aan Permanente Heteroseksuele Verhouding Weens Doodslag van Ander Deelgenoot: *Paixão v Road Accident Fund* 2012 6 SA 377 (HHA)' 2013 *TSAR* 777
- Scott-MacNab, D 'Mediation in the Family Context' (1988) 105 *SALJ* 709
- Scott-MacNab, D 'Mediation and Family Violence' (1992) 109 *SALJ* 282
- Scott-MacNab, D & Mowatt, JG 'Mediation and Arbitration as Alternative Procedures in Maintenance and Custody Disputes in the Event of Divorce' (1986) 19 *De Jure* 313
- Scott-MacNab, D & Mowatt, JG 'Family Mediation — South Africa's Awakening Interest' (1987) 20 *De Jure* 41
- Shaikh, S, Hoel, N, & Kagee, A 'Research Report South African Muslim Women: Sexuality, Marriage and Reproductive Choices' (2011) 31 *Journal for Islamic Studies* 96
- Silberberg, H 'The Determination of Matrimonial Property Rights and the Doctrine of Immutability in the Conflict of Laws' (1973) 6 *CILSA* 323

- Sinclair, J 'Financial Provision on Divorce — Need, Compensation or Entitlement?' (1981) 98 *SALJ* 469
- Sinclair, J 'Marriage: Is it Still a Commitment for Life Entailing a Lifelong Duty of Support?' 1983 *Acta Juridica* 75
- Sinclair, JD & Kaganas, F 'The Law of Persons and Family Law' 1984 *ASSAL* 110
- Singh, D 'Cohabitation Relationships Revisited: Is It Not Time for Acceptance?' (1996) 29 *CILSA* 317
- Sloth-Nielsen, J 'Realising Children's Rights to Legal Representation and to be Heard in Judicial Proceedings' (2008) 24 *SAJHR* 495
- Sloth-Nielsen, J & Van Heerden, B 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' (1996) 11 *SAJHR* 264
- Sloth-Nielsen, J & Van Heerden, B 'The "Constitutional Family": Developments in South African Child and Family Law' (2014) *International Journal of Law, Policy and the Family* 100
- Slovin, SG 'The Collaborative Process: Divorce with Dignity' (2006) 16 *Experience* 13
- Smit, ME 'Divorce: A Typical Feature of a Contemporary Anti-child Culture' (2010) 11(1) *Child Abuse Research in South Africa* 11
- Smith, BS 'Rethinking *Volks v Robinson*: The Implications of Applying a "Contextualised Choice Model" to Prospective South African Domestic Partnership Legislation' (2010) 13 *PELJ* 238 (online), available via a link at <http://www.nwu.ac.za/p-per/index.html> or <http://www.saflii.org/za/journals/PER/>
- Smith, BS 'The Interplay between Registered and Unregistered Domestic Partnerships under the draft Domestic Partnerships Bill, 2008 and the Potential Role of the Putative Marriage Doctrine' (2011) 128 *SALJ* 560
- Smith, BS '*Parker*, Life Partnerships and the Independent Trustee' (2013) 130 *SALJ* 527
- Smith, BS & Heaton, J 'Extension of the Dependant's Action to Heterosexual Life Partners after *Volks NO v Robinson* and the Coming into Operation of the Civil Union Act — Thus Far and no Further?' (2012) 75 *THRHR* 472
- Smith, BS & Robinson, JA 'The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process' (2008) 22 *Brigham Young University Journal of Public Law* 419
- Smith, BS & Robinson, JA 'The South African Civil Union Act 2006: Progressive Legislation with Regressive Implications?' (2008) 22 *International Journal of Law, Policy and the Family* 356
- Smith, RM 'Mediating with Handkerchiefs: Facts, Myths, and Future Prospects' (2002) 31 *American Psychological Association* 69
- Sonnekus, JC 'Deliktuele Aanspreeklikheid en Gades' (1986) 19 *De Jure* 150
- Sonnekus, JC 'Die Grondslag van Aanspreeklikheid van Gades *inter se* (Getroud buite Gemeenskap van Goed) vir Huishoudelike Benodigdhede' (1986) 19 *De Jure* 325
- Sonnekus, JC 'Onderhoud na Egskeiding' 1988 *TSAR* 440



- Sonnekus, JC 'Onderhandse Wysiging van Huweliksvoorwaardekontrak Onaanvaarbaar' 1992 *TSAR* 683
- Sonnekus, JC 'Naamsvoering binne die Familiereg — Versoenbaar met Fundamentele Menseregte?' 1993 *TSAR* 608
- Sonnekus, JC 'Statutêre Begrensing van Versorgingsaansprake na Egskeiding — Die Nederlandse en Duitse Voorbeelde' 1994 *TSAR* 607
- Sonnekus, JC 'Uitsettingsbevel teen Gade uit Egtelike Woning?' 1998 *TSAR* 647
- Sonnekus, JC 'Reperkussies van Heimlike Skenkings deur 'n Vrygewige Gade' 2000 *TSAR* 576
- Sonnekus, JC 'Skadevergoedingseise by Huwelike in Gemeenskap van Goed' 2006 *TSAR* 848
- Sonnekus, JC 'Verlengde Onderhoudsaansprake na Hertroue — 'n Verpaste Geleentheid ter Aansluiting by Internasionale Beste Praktyk' 2007 *TSAR* 351
- Sonnekus, JC 'Grense aan Kontrakvryheid vir Eggenote én Voornemende Eggenote? (Deel 1)' 2010 *TSAR* 53
- Sonnekus, JC 'Grense aan Kontrakvryheid vir Eggenote én Voornemende Eggenote? (Deel 2)' 2010 *TSAR* 217
- Sonnekus, JC 'Huweliksgevolge Eindig in die Reël met Ontbinding van die Huwelik?' *Kruger NO v Goss* 2010 2 SA 507 (HHA)' 2010 *TSAR* 626
- Sonnekus, JC 'Terugvordering van Skenkings van Voormalige Skoonkinders en Leerjongens' 2010 *TSAR* 357
- Sonnekus, JC 'Verbeurdverklaring van Voordele — Welke Voordele?' *JW v SW* 2011 1 SA 545 (GNP)' 2011 *TSAR* 787
- Sonnekus, JC 'Huweliksvoorwaardes en Kontrakteervryheid Onder Druk' 2014 *TSAR* 580
- Spiro, E 'Recognition of Foreign Decrees of Divorce' (1974) 37 *THRHR* 340
- Stoll, H & Visser, PJ 'Aspects of the Reform of German (and South African) Private International Law' (1989) 22 *De Jure* 330
- Strous, M 'Post-divorce Relocation: In the Best Interests of the Child?' (2007) 37 *South African Journal of Psychology* 223
- Ten Cate, R 'Het Ratio van het Polygamieverbod' (2013) 25 *Nederlands JuristenBlad* 2250
- Thomas, Ph J 'Konkubinaat' (1984) 47 *THRHR* 455
- Thomashausen, A 'The Matrimonial Property Act 1984: Some New Aspects for Marriages out of Community and Marriages Governed by Foreign Law' 1985 *De Rebus* 167
- Thompson, MG 'Mandatory Mediation and Domestic Violence: Reformulating the Good Faith Standard' (2007) 86 *Oregon LR* 599
- Tolman, RM & Wang, HC 'Domestic Violence and Women's Employment: Fixed Effects of Models of Three Waves of Women's Employment Study Data' (2005) 36 *American Journal of Community Psychology* 147
- Van Aswegen, A 'Transactions between a Spouse and a Third Party: The Effect of the Matrimonial Property Act 88 of 1984' 1984 *Modern Business Law* 140
- Van der Waal, CS 'Formal and Informal Dispute Resolution in the Limpopo Province, South Africa' (2004) 27 *Anthropology Southern Africa* 111

- Van Loggerenberg, C 'Enkele Opmerkings oor die Verhouding tussen Artikels 4 en 5 van die Wet op Egskeiding' (1982) 45 *THRHR* 174
- Van Mourik, MJA 'Postrelatiese privaatrechtelike solidariteit rondom de woning' 2012 *Weekblad voor Privaatrecht, Notariaat en Registratie* 803
- Van Schalkwyk, LN 'Ex parte Critchfield; Denston v Denston: Aspekte van die Funksie van die Gesinsadvokaat in Egskeidingsaangeleenthede' (2001) 34 *De Jure* 203
- Van Schalkwyk, LN 'Sempapalele v Sempapalele 2001 2 SA 306 (O)' (2002) 35 *De Jure* 170
- Van Schalkwyk, LN 'Odendaal v Odendaal 2002 1 SA 763 (W)' (2002) 35 *De Jure* 368
- Van Schalkwyk, LN 'Herverdeling van Bates ingevolge Artikel 7(3) van die Wet op Egskeiding 70 van 1979: Het Ons 'n Nuwe Uitgangspunt?' (2006) 39 *De Jure* 632
- Van Schalkwyk, LN 'Botha v Botha 2005 5 SA 228 (W)' (2007) 40 *De Jure* 425
- Van Schalkwyk, LN 'Duur van Onderhoudsbevelingevolge 'n Onderhoudsooreenkoms na Hertrouwe van Onderhoudsgeregtigde — Skikkingsooreenkoms nie in Hofbevel Opgeneem nie' (2008) 41 *De Jure* 215
- Van Schalkwyk, LN 'Nahuwelikse Onderhandse/Buitegeregtelike Verandering van die Huweliksgoederebedeling *Stante Matrimonio*' 2013 (10) *LitNet Akademies (Regte)* 11 November 2013 (online), available at <http://www.litnet.co.za/Archive/litnet-akademies-regte#1-0>
- Van Schalkwyk, LN 'Wanneer Vind Artikel 7(7) van die Wet op Egskeiding, 70 van 1979, Toepassing?' (2013) 14 *De Jure* 849 (online), available via a link at <http://www.dejure.up.ac.za/> or <http://www.saflii.org/za/journals/DEJURE/>
- Van Schalkwyk, LN & Van der Linde, A 'Onderhoudspelig van Stiefouer' (2003) 66 *THRHR* 301
- Van Schalkwyk, N 'n Stiefkind se Aanspraak op Onderhoud van 'n Stiefouer' 2012 *TSAR* 205
- Van Schalkwyk, N 'Aantekening: Huwelik binne Gemeenskap van Goed: Die Effek van 'n Egskeidingsbevel op 'n Bateverdelingsooreenkoms' 2012 (9) *LitNet Akademies (Regte)* 27 September 2012 (online), available at <http://www.litnet.co.za/Archive/litnet-akademies-regte#1-0>
- Van Wyk, AH 'Skenkings in *Fraudem Uxoris*' (1972) 35 *THRHR* 252
- Van Wyk, AH 'Community of Property and Accrual Sharing in terms of the Matrimonial Property Act, 1984 (Part 2)' 1985 *De Rebus* 59
- Van Zyl, GJ 'The Family Advocate: 10 Years Later' (2000) 21 *Obiter* 372
- Van Zyl, L 'Post-divorce Support — Theory and Practice' (1989) 22 *De Jure* 71
- Van Zyl, L 'Whitehead v Whitehead: Fair Comment on the Family Advocate?' 1994 *De Rebus* 469
- Wagenitz, T 'Grundlinien des neuen Familiennamensrechts' 1994 *Zeitschrift für das gesamte Familienrecht* 409
- Wagenitz, T & Bornhofen, H 'Wahl und Qual im Namensrecht' 2005 *Zeitschrift für das gesamte Familienrecht* 1425
- Weimar, P 'Zur Kritik des neuen Eherechts' (1985) 83 *Schweizerische Juristenzeitung* 205

- Wheeler, L 'Mandatory Family Mediation and Domestic Violence' (2001/2002) 26 *Southern Illinois University LJ* 559
- Wides, D 'Family and Equality in Post-constitutional South Africa: An Argument for Same-sex Marriage' 2003 *Responsa Meridiana* 81
- Wildenboer, L 'Marrying Domestic Partnerships and the Constitution: A Discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC)' (2005) 20 *SA Public Law* 459
- Williams, LA 'The Legal Construction of Poverty: Gender, "Work" and the "Social Contract"' (2011) 22 *Stell LR* 463
- WLUML 'Divorce via E-mail or Sms' (2011) 23(3) *Newsheet* 11
- Wood-Bodley, MC 'Intestate Succession and Gay and Lesbian Couples' (2008) 125 *SALJ* 46
- Wood-Bodley, MC 'Establishing the Existence of a Same-sex Life Partnership for the Purposes of Intestate Succession' (2008) 125 *SALJ* 259
- Yassari, N 'Das Eheverständnis im Islam und in ausgewählten islamischen Ländern' 2011 *Zeitschrift für das gesamte Familienrecht* 1
- Yeats, JP 'Die Algehele Huweliksgemeenskap van Goedere' (1944) 7 *THRHR* 142
- Zaal, N 'When Should Children Be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution' (1997) 116 *SALJ* 334
- Zaal, N & Skelton, A 'Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts' (1998) 14 *SAJHR* 539

#### **PUBLICATIONS BY COMMISSIONS**

- Commission for Gender Equality *Report to the Committee on the Elimination of All Forms of Discrimination Against Women Committee on South Africa's Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 1998–2008* (2010)
- Hoexter Commission *Fifth and Final Report Part B Commission of Inquiry into the Structure and Functioning of the Courts* (1983)
- Law Commission (England and Wales) *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007)
- Law Reform Commission of Mauritius *Background Paper Reform of Codes* (2010)
- South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997)
- South African Law Commission Report (Project 90) *The Harmonisation of the Common Law and the Indigenous Law — Report on Customary Marriages* (1998)
- South African Law Commission Report (Project 94) *Domestic Arbitration* (2001)
- South African Law Commission *Report on the Law of Divorce and Matters Incidental Thereto RP 57/1978* (1978)
- South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003)
- South African Law Reform Commission Report (Project 118) *Report on Domestic Partnerships* (2006)

South African Law Reform Commission Report (Project 110) *Review of the Child Care Act* (2002)

South African Law Reform Commission *Thirty Fifth Annual Report 2007/2008*

#### **UNPUBLISHED THESES AND DISSERTATIONS**

Faris, J *An Analysis of the Theory and Principles of Alternative Dispute Resolution* (unpublished LLD thesis, University of South Africa 1995)

Kassan, D *How Can the Voice of the Child be Adequately Heard in Family Law Proceedings?* (unpublished LLM dissertation, University of the Western Cape 2004), URI: <http://hdl.handle.net/11394/1475>

Louw, AS *Acquisition of Parental Responsibilities and Rights* (unpublished LLD thesis, University of Pretoria 2009), URN: *etd-09102009-170707*

Moosa, N *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (unpublished LLD thesis, University of the Western Cape 1996)

Moosa, N *Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman* (unpublished LLM dissertation, University of the Western Cape 1991)

Nicholson, CMA *Recognition and Enforcement of Foreign Custody Orders and the Associated Problem of International Parental Kidnapping: A Model for South Africa* (unpublished LLD thesis, University of South Africa 1998)

Rautenbach, C *The Legal Position of South African Women Under the Law of Succession* (unpublished LLD thesis, Potchefstroom University for Christian Higher Education (now North-West University) 2001)

Smith, BS *The Development of South African Matrimonial Law with Specific Reference to the Need for and Application of a Domestic Partnership Rubric* (unpublished LLD thesis, University of the Free State 2009), available via a link at [http://etd.uovs.ac.za/cgi-bin/ETD-search/view\\_etd?URN=etd-08162010-110543](http://etd.uovs.ac.za/cgi-bin/ETD-search/view_etd?URN=etd-08162010-110543)

Toefy, MY *Divorce in the Muslim Community of the Western Cape: A Demographic Study of 600 Divorce Records at the Muslim Judicial Council and National Ulama Council [at the Time also Known as the Islamic Unity Convention (IUC)] between 1994 and 1999* (unpublished MA dissertation, University of Cape Town 2001)

Toffar, AK *Administration of Islamic Law of Marriage and Divorce in South Africa* (unpublished MA dissertation, University of Durban-Westville (now University of KwaZulu-Natal) 1993)

Wiid, Y *An Evaluation of Parametric Amendments of Legislation Relating to the Distribution of Retirement Benefits upon Divorce* (unpublished LLM dissertation, University of the Western Cape 2011), URI: <http://hdl.handle.net/11394/3030>

#### **UNPUBLISHED PAPERS AND REPORTS**

Centre for Child Law *Draft Guidelines for Legal Representatives of Children in Civil Matters*, unpublished paper prepared for consultation with Legal Aid South Africa at a colloquium held in Braamfontein (10 and 11 March 2010)

- Du Rand, P *Prospects for Mandatory Mediation in South Africa*, unpublished paper presented at the Goedgedacht Forum for Social Reflection Debate on 'Justice for the Poor? Could Mandatory Mediation Offer better Access to Justice and the Protection of the Law to all Citizens?' (12 June 2004)
- Melton, GB *Background for a General Comment on the Right to Participate: Article 12 and Related Provisions of the Convention on the Rights of the Child*, unpublished report prepared under contract to the United Nations Children's Fund for submission to the United Nations Committee on the Rights of the Child (2006)
- O'Leary, J *A Critical Reflection on Mediation and Facilitation Practice*, unpublished paper presented at the 12th Annual Family Law Conference presented by Miller Du Toit Cloete and the University of the Western Cape (May 2009), available at [www.famac.co.za/resources/documents/doc\\_download/1-a-critical-reflection-on-mediation-and-facilitation-practice](http://www.famac.co.za/resources/documents/doc_download/1-a-critical-reflection-on-mediation-and-facilitation-practice) (accessed 7 May 2013)
- Shaikh, S, Hoel, N & Kagee, A *Submission. The Research Report South African Muslim Women: Sexuality, Marriage and Reproductive Choices*, unpublished paper submitted to the Minister of Justice and Constitutional Development (2011)
- Smith, BS *The Dependant's Action in the Context of Heterosexual Life Partnerships: A Consideration of the Verheem and Paixão Cases*, unpublished paper presented at the Annual Conference of the Society of Law Teachers of Southern Africa, Port Elizabeth (10 July 2012)
- Smith, BS *South African Cohabitees and the Right of Intestate Succession*, unpublished paper presented at the 11th Annual International Conference on Law, Athens Institute for Education and Research, Athens, Greece (14 July 2014)

### INTERNET SOURCES

- AFCC Task Force on Parenting Coordination *Guidelines for Parenting Coordination* (May 2005) 13, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2006.00074.x/abstract> (accessed 6 February 2014)
- Alliance for the Legal Recognition of Domestic Partnerships *Submission to the Department of Home Affairs on the draft Domestic Partnerships Bill, 2008* (2008), available at <http://www.tlac.org.za/wp-content/uploads/2012/01/domestic-partnership-alliance-submission-on-the-draft-domestic-partnerships-bill.pdf> (accessed 9 May 2014)
- Chauke, P 'Obtaining a Court Order Made Easier' *The Citizen* 29 March 2014, available at <http://citizen.co.za/151585/obtaining-a-court-order-made-easier/> (accessed 31 March 2014)
- Department of Justice and Constitutional Development *Annual Report 2012/2013*, available via a link at [http://www.justice.gov.za/reportfiles/report\\_list.html](http://www.justice.gov.za/reportfiles/report_list.html) (accessed 8 August 2014)
- DiSAC *Dispute Settlement Accreditation Council*, available at [http://www.usb.ac.za/disputesettlement/dispute\\_settlement\\_accreditation\\_council.html](http://www.usb.ac.za/disputesettlement/dispute_settlement_accreditation_council.html) (accessed 6 February 2014)
- Hansen, T 'The Narrative Approach to Mediation', available at <http://www.mediate.com/articles/hansent.cfm> (accessed 6 February 2014)



- International Academy of Collaborative Professionals 'What is Collaborative Practice?', available at [http://www.collaborativepractice.com/\\_T.asp?T=WhatIs&M=1&MS=2](http://www.collaborativepractice.com/_T.asp?T=WhatIs&M=1&MS=2) (accessed 7 May 2013)
- Joubert, J 'Mandatory Mediation Will Soon Arrive in South Africa, and Should be Warmly Welcomed by the Legal Profession' *Legalbrief Today* 9 November 2011, available at <http://www.legalbrief.co.za/article.php?story=20111109093439544> (accessed 6 February 2014)
- Karaan, M 'MMB: This is the Year' *The Voice of the Cape* 12 January 2012, available at [http://www.vocfm.co.za/index.php?option=com\\_k2&view=item&id=2925:mmb-this-is-the-year&Itemid=146](http://www.vocfm.co.za/index.php?option=com_k2&view=item&id=2925:mmb-this-is-the-year&Itemid=146) (accessed 23 February 2014)
- Mathee, S 'The Moral and Legal Dimensions of *Talaq* (Divorce) by SMS: A Critical Reading' (2001), available at [http://web.uct.ac.za/depts/religion/documents/ARISA/2001\\_O\\_Talaq.pdf](http://web.uct.ac.za/depts/religion/documents/ARISA/2001_O_Talaq.pdf) (accessed 23 February 2014)
- Ministry of External Affairs *The Indian Diaspora Report* (19 December 2001), available at <http://indiandiaspora.nic.in/contents.htm> (accessed 20 February 2014)
- NABFAM *National Accreditation Board for Family Mediators*, available at [http://www.saam.org.za/uploads/NABFAM\\_Standards\\_11111.pdf](http://www.saam.org.za/uploads/NABFAM_Standards_11111.pdf) (accessed 6 February 2014)
- NABFAM *National Standards for Family Mediation 11 November 2011*, available at [http://www.usb.ac.za/disputesettlement/pdfs/NABFAM\\_Standards.pdf](http://www.usb.ac.za/disputesettlement/pdfs/NABFAM_Standards.pdf) (accessed 6 February 2014)
- National Treasury *National Budget Review, 2012: Taxation of Divorce Order-related Retirement Benefits* 13 March 2012, available at [http://www.treasury.gov.za/comm\\_media/press/2012/2012031303.pdf](http://www.treasury.gov.za/comm_media/press/2012/2012031303.pdf) (accessed 4 May 2014)
- SANews.gov 'Full Legal Status for Muslim Marriages in South Africa', available at <http://www.southafrica.info/services/rights/muslim-020514.htm> (accessed 31 July 2014)
- Statistics South Africa *Census 2011 Census in Brief*, available via a link at <http://www.statssa.gov.za/Census2011/Products.asp> (accessed 31 July 2014 for Chapter 1) (accessed 26 July 2014 for Chapter 10)
- Statistics South Africa *Census 2011 Fact Sheet*, available via a link at <http://www.statssa.gov.za/Census2011/Products.asp> (accessed 31 July 2014)
- Statistics South Africa *Census 2011 Key Results*, available via a link at <http://www.statssa.gov.za/Census2011/Products.asp> (accessed 31 July 2014)
- Statistics South Africa *CPI Headline*, available at <http://beta2.statssa.gov.za/publications/P0141/CPIHistory.pdf> (accessed 31 July 2014)
- Statistics South Africa *General Household Survey 2011*, available at <https://www.statssa.gov.za/publications/P0318/P0318April2012.pdf> (accessed 26 July 2014)
- Statistics South Africa *Marriages and Divorces 2011 P0307*, available at <http://www.statssa.gov.za/publications/P0307/P03072011.pdf> (accessed 8 August 2014)
- Statistics South Africa *Mid-year Population Estimates 2013 Statistical Release P0302*, available at <http://www.statssa.gov.za/publications/P0302/P03022013.pdf> (accessed 20 February 2014)
- Statistics South Africa *Poverty Trends in South Africa. An Examination on Absolute Poverty between 2006 and 2011 Report 03-10-06* (2014), available at <http://>



- beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf* (accessed 3 April 2014)
- Statistics South Africa *Primary Tables South Africa Census '96 and 2001 Compared Statistics South Africa*, available at <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf> (accessed 31 July 2014 for Chapter 1) (accessed 26 July 2014 for Chapter 10)
- Statistics South Africa *Social Profile of South Africa, 2002-2009 Report 03-19-00*, available at [http://www.statssa.gov.za/publications/Report-03-19-00/Report\\_03-19-002009.pdf](http://www.statssa.gov.za/publications/Report-03-19-00/Report_03-19-002009.pdf) (accessed 3 April 2014)
- Statistics South Africa *South African Statistics 2013*, available at <http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2013.pdf> (accessed 31 July 2014)
- Statistics South Africa *Stats in brief 2013* (2013), available at <http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2013.pdf> (accessed 3 April 2014)

