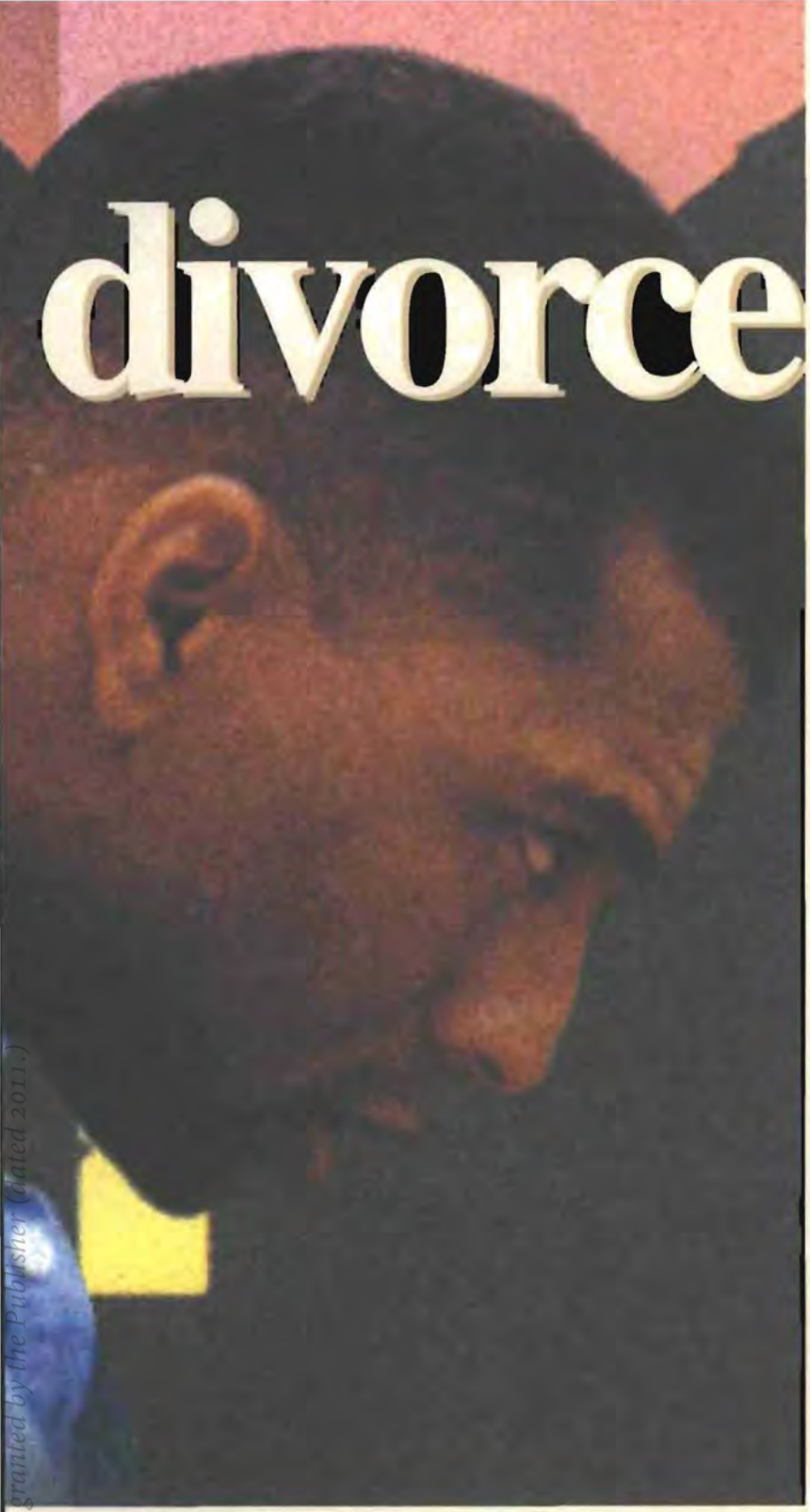

Amendment Act

the horse?

Najma Moosa

The purpose of this article is to clarify some issues regarding Muslim divorces which have been the topic of debate in previous issues of *De Rebus* (1997 *DR* 495; 1998 (Jan) *DR* 55; 1998 (Aug) *DR* 31). The Divorce Amendment Act 95 of 1996 as it is discussed in this article has relevance only for Muslim parties who intend to terminate a lawful civil marriage but who have also entered into a religious union with each other only. Polygynous unions as such are therefore not discussed here. (For detail in this regard see my LLM thesis *A comparative study of the South African and Islamic law of succession and matrimonial property with especial attention to the implications for the Muslim woman* (University of the Western Cape 1991).) Nonetheless, because practitioners often confront legal problems when dealing with matters of Muslim Personal Law (MPL), I find it necessary also to elaborate on the status of that law in South Africa. Furthermore, while a brief background of Muslim divorces is provided, a detailed analysis will be the subject of an article intended to be published elsewhere later this year.

MPL in South Africa

MPL is a religiously based private law which has its origin in the primary sources of Islam, namely the Koran (Muslim religious text) and *Sunna* (tradition) of Prophet Muhammad. It pertains, among other things, to marriage, divorce, inheritance, polygyny, custody and guardianship which falls under the category of family law. For about 300 years Muslims have practised their religion although they could not give legal effect to their personal laws. The new democratic dispensation now allows for a change to the status quo.

Non-recognition of MPL in South Africa causes problems which include abuses of certain 'privileges' relating to polygyny, divorce, maintenance and custody of children in Muslim family relationships. While the state gives partial legal validity to Muslim marriages, for example for tax purposes, non-recognition of MPL generally means that marriages solemnised according to Islamic law are not recognised by the state. While this point is debatable, Islam allows a man to marry up to four wives. Islamic marriages are thus regarded as 'potentially' polygynous even when they are *de facto* monogamous and on this basis our courts have refused to give them recognition. Consequently children born from such marriages (and therefore legitimate in terms of Islamic law) were until recently given the status of illegitimate persons and parents of such children were stigmatised as 'natural father', 'common-law' wife, etc. Because of this status of illegitimacy these children experienced problems regarding succession, maintenance, custody and adoption. In terms of s 1(a) and (b) of the Births and Deaths Registration Amendment Act 40 of 1996, these children are now to be registered as children 'born out of wedlock' and

> '[for] the purposes of this Act [the Births and Deaths Registration Act 51 of 1992] "marriage" includes a .. marriage solemnised or concluded according to the tenets of any religion ...'.

Furthermore, in terms of s 1(d) of the Child Care Amendment Act 96 of 1996, 'marriage' in the principal Child Care Act 74 of 1983 includes

> 'any marriage .. which was concluded in accordance with a system of religious law subject to specified procedures, *and* any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly .. ' (my italics).

It must, however, be stressed that the substantive legal status of, for example, children born of marriages by religious rites remains unaffected. Also, formal 'concessions' by the government in terms of which, for example, children born from religious marriages are no longer stigmatised and registered at birth as 'illegitimate' serve to slow down further the process of reform. This is also true of legislation such as the Divorce Amendment Act in terms of which courts can refuse a civil divorce on religious grounds (see below).

Muslim women are particularly disadvantaged by non-recognition because they have no recourse to the law of the land and are subject to the jurisdiction of an unsympathetic informal judiciary manned by religious authorities. The Cape Supreme (now high) Court in the test case of *Ryland v Edros* 1996 (4) All SA 557 (C) gave limited recognition to the Muslim marriage contract, provided that it was a monogamous union. It remains, however, to be seen whether such recognition would extend to other areas of MPL such as custody and guardianship. This landmark ruling in favour of a Muslim wife now means that Muslim women and men can have recourse to civil courts for the enforcement of Islamic law rights during and upon the dissolution of their marriages. While Farlam J questioned whether it was appropriate for the court to deal with matters of religious law, both parties agreed that for a decision in this case the judge would not be required to interpret any religious doctrines. At present the Department of Justice is preparing draft legislation on the recognition of marriages contracted in terms of MPL. These are but first steps towards the full recognition of a reformed MPL as provided for in the Constitution.

Impact of the Constitution

As a point of clarification MPL, although influenced by custom, is essentially religious in nature. The Constitution highlights this distinction by making separate provision for religious law and customary law. The Constitution makes provision for the possible recognition (s 15(3)(a)(i)–(ii)) and implementation (s 34) of MPL as part of the South African legal system. The Constitution not only guarantees freedom of religion and belief but also makes provision within the Bill of Rights that legislation can be provided by the state for the recognition of any religious personal law (s 15(3)(a)(ii)) and for the recognition of Muslim marriages (s 15(3)(a)(i)). In my opinion it is vital that s 15(3) should be used to recognise Muslim marriages *as well as* MPL since a distinction between the two is unwarranted. Muslim marriages should not be recognised in isolation because they form an integral part of MPL. The consequences of Muslim marriages, for example their dissolution, are directly linked to other aspects of MPL, like inheritance, custody and maintenance (see my article on children's rights in 1998 *SALJ* 479).

Although as yet unrecognised in South African law, MPL would need to be reformed in line with constitutional provisions, including equality, once it is so recognised. The *right* to have MPL recognised is therefore not constitutionalised. MPL therefore needs to be reformed before it will be officially recognised. Muslim women in South Africa suffer from various discriminatory practices with regard to religious divorce to which they are often denied access and/or

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are ignorant of their Islamic rights in this regard. In view of the Constitution and its commitment to human rights these practices have to be reviewed. Direct legislation on MPL is needed and it cannot be left to secular courts and indirect provisions in legislation as elaborated above, including the Divorce Amendment Act (see below), to provide superficial relief. Furthermore it is only once MPL is recognised that one can implement it (whether it be in a secular court or religious tribunal).

Divorce (*talaq*) in a nutshell

An Islamic marriage contract may be dissolved by the death of one of the spouses or by the act of divorce (*talaq*). While Islam disapproves of the notion of divorce, it is recognised as a necessary social evil and tolerated under certain circumstances. In general *talaq*, which literally means 'to set free', can take place by repudiation or legal process (this refers to a legal or judicial process in terms of MPL). A husband may pronounce divorce without specified reasons and in the absence of his wife. While the right to institute divorce is regarded as the unilateral right of the husband, he may delegate this right to his wife either as a condition of the marriage contract or at a later stage. The delegated divorce (*talaq al-tafwid*) is a typically female-instigated divorce but is underutilised for lack of awareness of its existence. There are also other less advantageous options of divorce available to her. An example of the latter would be *khul'* (divorce by mutual agreement of the spouses). The delegated divorce offers women equal access to divorce in that it allows the wife to 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. However, if the wife asks for a *khul'* she has to return all or part of her dower. Inability to 'pay' for her freedom often results in this form of divorce being of more theoretical than practical value (see 1998 (Aug) *DR* 31). Nonetheless in South Africa, as elsewhere, many Muslim women are unaware of these rights to initiate a divorce.

Islamic law *(Shari'a)* is the conservative interpretation and application of the primary sources of Islam by early Muslim jurists like Abu Hanifa and Imam Shafi (founding fathers of the major *Sunni* (traditionalist) schools of law named after them). My research highlights the fact that the *Islamic* law of divorce is a complex matter, posing severe legal, financial, social and emotional problems. It is especially difficult to analyse the concept of *talaq*. Considerable differences of opinion between *Sunni* schools of Islamic law, between approaches of conservative and modernist scholars and between legislation in Muslim countries on divorce (sometimes at variance with primary

sources of *Islam*) highlight the extent of this difficulty. However, a closer study of the subject reveals that the basis for a rational, realistic and contemporary law of divorce can be found in the primary sources. I contend, however, that the limitations imposed by the primary sources of Islam on the husband's unilateral right of divorce (which limitations include a disapproval of the innovated triple divorce and the introduction of the dower, maintenance and *iddat*) provide only limited checks on the husband's powers. This has placed Muslim countries under pressure to introduce reforms to safeguard the rights of the wife and to ensure a real opportunity for reconciliation.

If we look at some of these checks we will see that even though the husband, on pronouncing a divorce, is obliged to maintain his wife and pay any outstanding dower, these rights have more theoretical than practical value.

Dower, a sum of money or other property which becomes payable by the husband to the wife exclusively as a result of marriage, may be prompt or deferred. Although the husband has to settle in full any unpaid portion of the wife's dower upon divorce, the wife often has to forego this for lack of resources.

Islam introduced a waiting period called *iddat* which starts after 'divorce' has first been pronounced. Briefly then, this period is variable and the divorce becomes effective only once the *iddat* has been completed. Maintenance (*nafaqa*) is limited to the *iddat* period. The whole question as to whether maintenance should be extended to the period beyond *iddat* is subject to interpretation. The *Koran*, however, while making maintenance for divorcées compulsory, does not limit it to the *iddat* period nor does it stipulate any quantum which should serve as a cut-off point.

In the *Ryland* case (see above) the husband had repudiated his wife by issuing the extra-judicial triple *talaq*. As the wife was unable to procure a fair settlement in a Cape-based religious tribunal, the Legal Resources Centre took the matter further. The court, although it awarded Mrs Edros (Ryland) her claims for arrear maintenance for three months (*nafaqa*) (that is, for the required period of *iddat* only (not thereafter)) and a consolatory gift (*mata'a*) for unjustified repudiation on the basis of *Shafi'i* law, denied her claim for an equitable share of her husband's estate (which claim was based on Malaysian legislation and custom and therefore peculiar to Malaysia only, as opposed to other Muslim countries) as not applicable in the South African context (more particularly the Western Cape). If the Muslim marriage is dissolved by death, it is also uncertain whether the provisions of the Maintenance of Surviving Spouses Act 27 of 1990 would apply to such marriages. It is submitted that it should so apply.

In his article 'In defence of the undefended' in 1998 (Aug) *DR* 3, Ashraf Mahomed contends that Islamic law grants parties equal rights of divorce. My research, however, reveals that it would be more correct to state that Muslim women have *equitable*, not equal, rights of divorce. This raises the further question whether this position accords with the South African Constitution, which allows for the recognition of Muslim marriages – provided that such recognition is consistent with constitutional provisions, including the guarantee of equality. It must also be emphasised that the debate around divorce should be considered in the formulation of legislation regarding Muslim marriages. The ramifications of the Divorce Amendment Act will also be briefly considered in this article.

Issues raised in *De Rebus*

One of the main concerns raised by Mr Mahomed in his article – which was a rejoinder to the views expressed by Harry Barker in his article on 'The Divorce Amendment Act 95 of 1996' in 1998 (Jan) *DR* 55 – is that Mr Barker had failed to distinguish between Islamic doctrine and Muslim practice, the latter and not the former being prejudicial. On the contrary and by Mr Barker's own admission, this does not appear to be the case. This is evident from his letter to the editor in 1998 (Nov) *DR* 25 where he quotes an excerpt from my article in the 1998 *Stell Law Review* 196 to the effect that '[t]he practice of Muslims ... as opposed to the Spirit of Islam ... discriminates against women.' In effect then, both Mr Barker and Mr Mahomed actually concur on this point. Islam in the seventh century provided the Arabian community with numerous improvements with regard to the rights of women. With time, however, these improvements were curtailed. There is thus a distinction between Islam and later traditional interpretations thereof, namely Islamic law.

One further point that needs clarification is that, in his letter to the editor, Mr Barker refers to my discussion in the *Stell LR* on divorce procedures and the role of menstruation in the waiting period called *iddat* to the effect that it has 'the *insulting* implication that the menstruating woman is not pure ...' (my italics). One of the primary purposes of *iddat* is to provide time to effect reconciliation between spouses, in other words to provide them with an opportunity for a change of heart/second thoughts (see above). One of the ways of doing this is to be sexually intimate. In terms of Koranic injunction, spouses are not allowed to have sexual intercourse with each other while the wife is menstruating as menstruation is considered to be an illness (*Koran* Chapter 2 v 222). This then is one of the reasons why divorce must be pronounced during a period of *tuhur* (cleanliness) that is, while the wife is not menstruating. She must therefore be free from/cleansed of any such kind of physical impurities. While Islam does *not* provide women with equal rights to initiate a divorce, as I have said, it nevertheless provides them with equitable rights. Furthermore (arbitrary) divorce, although permitted, is frowned upon. I therefore contend that this imbalance as far as any restraints on ending a marriage is concerned should be rectified in order to reflect this equity in considering any MPL legislation in South Africa in this regard.

MPL and South African law on divorce

Regardless of non-recognition, Muslims in South Africa are particularly loyal in observing their MPL of marriage and divorce. In South Africa, as evident from the Divorce Act 70 of 1979, there is only one way of obtaining a (civil) divorce and that is through a decree granted by a civil court (mainly on the ground that the marriage has irretrievably broken down). Although this principle of 'irretrievable breakdown' is not foreign to Islamic law, local Muslims regard it as less stringent in its application and

therefore it cannot serve as a substitute for the Islamic law of divorce. Furthermore, in addition to judicial dissolution, Islamic law recognises several extra-judicial forms of dissolution. Generally in South Africa conservative religious authorities (*Ulama*) currently regulate and administer MPL. Although s 34 of the Constitution makes provision for parties to have access to religious tribunals by *Ulama* are merely binding on the conscience of Muslims and have no force of law. However, a recent legislative amendment to the Divorce Act, namely the Divorce Amendment Act 95 of 1996, appears to give the decisions of these tribunals some validity to the detriment of women. The amendment furthermore creates the impression that an Islamic marriage is a valid marriage (contract). As indicated above, the fact that the court in the test case of *Ryland v Edros* gave limited recognition to a Muslim marriage contract does not change this fact even though Mr Mahomed in his article in the 1997 (July) *DR* 495 at 496 contends that the Divorce Amendment Act should not be seen in isolation from this decision. By Mr Mahomed's own admission (1998 (Aug) *DR 31*), the *Ryland* case did not validate Muslim marriages as such as is also clear from the recent case of *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) BCLR 1716 (D)* at 1762E. What is intended to be achieved by this amendment is in effect tantamount to 'putting the cart before the horse'.

Legislative provisions should first be made for the recognition of Muslim marriages before consideration is given to their dissolution. The amendment concerned (s 5A) (intended to pertain to Jewish law and based on the recommendations of the South African Law Commission in its *Report on Jewish Divorces* (Project 76, October 1994)) effectively empowers a (secular) high court to refuse to grant a *civil* decree of divorce it it appears that one or both of the spouses must, according to the prescripts of their religion, also obtain a religious divorce and has or have not taken all the necessary steps to obtain such a religious divorce. This amendment has been construed by certain authors to apply to other religious groups (including Muslims) as well (see Mahomed 1997 *DR* 495). If due regard is had to the Muslim husband's unilateral and unfettered right to divorce and other related realities as explained in this article, then Joan Church (and others (Barker 1998 *DR* 55 and Jane O'Connor (1998) 363 *DR* 24) who endorse her view) are quite correct in asserting that this amendment

'[while it might] seem to be a laudable recognition of Jewish law may well prove to be unconstitutional on the ground of infringing the right to religious freedom or possibly the right to equality in the broad sense' (1997 *THRHR* 292 at 295).

Furthermore, while I concede that there are similarities between Islamic and Jewish family law, there are also striking differences. An *agunah* is a Jewish wife who, although secularly divorced, remains bound to her husband in terms of Jewish law until she obtains a letter of divorce (*get*) from him. A Muslim wife and the Jewish *agunah* are most definitely not in the same position. For example, for more than half a century Muslim women in the subcontinent of India and Pakistan have had access to a judicial divorce granted under the Dissolution of Muslim Marriages Act VIII of 1939 which does not require the husband's consent or approval. Why then should Muslim women in South Africa be treated any differently from their counterparts in the subcontinent and now also be subject to a more conservative interpretation of Islamic law in this regard?

While there is some merit in the arguments and views espoused by both Messrs Mahomed (1997 *DR* 495–496) and Barker (1998 *DR* 55–56), I must admit that given the reality of the situation Mr Mahomed (1997 *DR* 496) is too idealistic in asserting that this amendment

'disempowers manipulative parties from using certain inequitable and patriarchal precepts of their religions to deny innocent parties (mainly women) their full and unencumbered freedom and individual human rights ... . With this move, our legislature has taken religious freedom and individual human rights to new heights ... .'

While I concede that there are other options like judicial dissolution of their marriages at the disposal of local Muslim women, the fact of the matter is that the right to initiate (and therefore also to *withhold*) a divorce vests in the husband and Muslim women have no choice but to approach these tribunals when their husbands refuse or make it difficult for them to obtain a divorce. Furthermore, these judicial dissolutions are not statutorily regulated (as in other countries) or easily obtainable as the wife has to provide sound reasons therefor. There are also no such restrictions on the husband's (extra-judicial) right of *talaq*.

Mr Barker (1998 *DR* 55) seems to be more on track with his argument that the amendment confirms discrimination against women in that it

'indirectly recognises the power of a religious group to maintain a barrier to the grant of a [civil] decree of divorce which, before the enactment of the [amendment] would have been granted ... even if for religious reasons a limping marriage was the result ...'.

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*An appeal was to be heard in the Supreme Court of Appeal on 13 September – *Editor*.