

THE INCONGRUITY OF THE SHARIAH AND SOUTH AFRICAN FAMILY LAW



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INTRODUCTION

All praises are due to Allah Ta'ala, the lord of the worlds, the almighty, the wise and the most forgiving. Salutations upon our noble master, Muhammad (Sallallahu alaihi wasallam). May Allah Ta'ala bless him, his family and companions. Ameen.

The primary and main proof of the Quran being the word of God is the fact that it has remained unchanged. This is an undisputed fact which heretics will admit to themselves. However, in recent times, ironically, the foundation for the soundness of our beliefs is being advocated in a light contrary to its very nature, and a suggestion towards a modern and more redefined outlook of the unchanged text is being promoted instead. This by Muslims themselves too.

From amongst the many deficiencies in the 'moral claims' of atheists, is the fact that "morality" can never be objectively defined. Exactly what is the cornerstone of their beliefs? In Islam we have the Quran and Sunnat (practices of prophet Muhammad Sallallahu alaihi wasallam), and so the act of 'Qurbani' (animal sacrifice), albeit viewed negatively by many, is perfectly fine if the platform of our moral standings is something to justify its occurrence. However, an atheist will have a different view on things according to the era in which they are living in. It would be disastrous to pin point any change in ideas to an advancement of thought, as history has provided a plethora of great thinkers, which this current generation is evidently lacking.

Homosexuality for example, was never a contentious issue up until the 1970's. And perhaps in another 100 years' time the position will change further. Whatever it may be, an atheist can never claim **objective** morality, as there is no foundation or premise to such objectivity for them.

Unfortunately, in today's time, our own Muslim brothers and sisters have struggled to accept the orders of Allah Ta'ala and his Rasool (Sallallahu alaihi wasallam) and have begun remodeling the 'Shariah' (Islamic Law) to make it malleable to our current societal values.

I have provided a prologue somewhat unconventional to the current discussion but done in lieu of creating an understanding that the commands of Allah Ta'ala are universal and timeless. We cannot attempt to have it neatly fit the time in which we find ourselves in, as we then fall victim to the shortfalls of other religions. Furthermore, as mentioned, "morality" is always changing and so on this basis alone, we cannot presuppose that Allah Ta'ala expects us to interpret his commandments in accordance to our intelligence, wisdom and foresight. Instead, we should accept the commandments of Allah Ta'ala, and reconcile our values and morals to have it in line with the timeless commandments of Allah Ta'ala.

For this reason, I have attempted to briefly lay out the practical family laws of South Africa, in opposition to the Shariah and exposing the difference between the two.

In South Africa, the masses have become addicted to an intoxicating idea that “as Muslims we need to follow the law of the land”. PS: THERE IS NO SUCH HADITH.

If anything is in conflict with The Shariah we will never accept it. This is the basis of Taqwa (Fear of Allah). Regardless of a court of law ruling in favor of any party, husband, wife, child etc., if the Shariah holds a different view- we WILL adopt a different view. If a court of law rules that a woman must contribute to the household on a pro-rata basis and must thus find employment, her husband should never accept this as Allah Ta’ala has decreed unequivocally that women do not have any duty to provide to the household and a man is TOTALLY responsible.

Moulana Jalaluddin Rumi (Rahmatullah alaih), the great Sufi saint, narrates in his Mathnavi Shareef the story of the royal falcon which once flew from the royal palace and landed into the house of an old woman. The old woman looking at the falcon began to start clipping its long nails and big wings, considering the falcon unkempt and untidy. Due to her ignorance, she did not realize that it was such characteristics which gave it its majesty. Now when the falcon returned to the royal palace, the king viewed him as something which had lost its glory and virtue.

Moulana Rumi (Rahmatullah alaih), explains that the king depicts Allah Ta’ala. The Falcon represents mankind, its nails and wings represent the Sunnah and the Shariah. And the old woman is this dunya (world). The world will look at the Sunnah and Shariah and try to trim it and cut it to make it seemingly more attractive. But this trimming and changing the laws of Allah does not appeal to

Allah Ta'ala. And when man eventually returns to Allah Ta'ala after having its Sunnah and Shariah trimmed and cut, he will have no virtue and glory left in him.

NOTE: IT IS IMPERMISSIBLE FOR AN ATTORNEY/ADVOCATE TO ACT ON BEHALF OF A PERSON SEEKING AN ISLAMICALLY UNLAWFUL AWARD. HAVE THE COURAGE TO REJECT WORK AND ALLAH TA'ALA WILL REWARD YOU ON YOUR SACRIFICE FOR DEEN.

May Allah Ta'ala grant us Taufeeq to practice the deen according to the sunnat of our Nabi (Sallallahu alaihi wasallam) and not in a manner outlined by any government official. Inshallah.

Basheer Paruk
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PRE-MARRIAGE

“O ‘Ali, do not delay in three things; 1) Salah when its time arrives, 2) Offering the janazah Salah when the bier is present and 3) **Marriage of a woman whose match is found.**” – Prophet Muhammad (Sallallahu alaihi wasallam)

A. ENGAGEMENTS

SOUTH AFRICAN LAW

The South African law does not make provision for 'Engagements' per se, but rather, it is governed by the laws of contract instead.

1. REQUIREMENTS

- **CAPACITY** (As like any other contract i.e., Mentally stable, acting voluntarily etc., save the additional requirement not to be married already¹).

2. BREACH OF AGREEMENT

Those engaged can claim breach against the other, if for example, the other had a sexual affair with someone else, as an implied term of an engagement contract is the duty to be loyal.

- **DAMAGES CLAIM**

Couples have found themselves fortunate in that often courts rule in favor of an engaged member on the basis of, either placing the said person in the shoes of an engaged person and the benefits they would have received had it gone through² OR the costs they

¹ Friedman v Harris 1928 CPD 43

² Guggenheim v Rosenbaum 1961 (4) SA 21 (A)

would not have spent had the engagements gone through (Actual losses). The latter is more successful in court³.

- PERSONAL FEELINGS CLAIM (ACTIO INIURIARUM)

This is viewed objectively⁴. Perhaps a person who announces via television that they are dumping their girlfriend, whilst being with another girl live on air, would probably result in a damages claim being granted.

- RETURN OF GIFTS.

GIFT TYPE	DESCRIPTION/EXAMPLE	RULE
Sponsoltia Largitas	Appliances for use in future home	Innocent party retains, guilty party forfeits.
Arrhae Sponsolatie	Wedding ring, watch etc	Innocent party retains, guilty party forfeits
Small tokens of appreciation	Chocolates, flowers, etc	Non-returnable.

³ Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA).

⁴ Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA).

SHARIAH

Lengthy drawn-out engagements are not permissible in Islam. In fact, the Prophet Muhammad (Sallallahu alaihi wasallam) advised his cousin, close companion and Son-In-Law, Hazrat Ali (Radiallahu anhu) that a man must not delay in three things: (1) The offering of obligatory prayer; (2) The offering of the funeral prayer when the deceased's body is present; (3) **The marriage of a woman when her husband is found**⁵.

However, the 'fixing' of a couple prior to the marriage with the intention of the two families meeting, and setting a date for the subsequent marriage is permissible. This, however, is subject to the prohibition of intermingling of sexes, which includes the prospective groom and bride NOT intermingling.

The general ruling is that the exchanging of gifts, rings, 'parcels' are however a BID'AT (Innovation) and is forbidden. It may seem that 'it doesn't hurt anyone' but the reality is that was never a practice of Islam and finds its roots within western culture. Nabi (Sallallahu alaihi wasallam) has prohibited emulating the ways of the non-muslims and prophesized that muslims would follow the ways to the extent that, "most certainly you will follow the ways of those before you, cubit by cubit to such an extent that if they enter into a lizard's hole, you will follow them (into the hole)".

⁵ "Jami'at at-Tirmidhi" by Abu Isa Muhammad ibn Isa as-Sulami ad-Darir al-Bughi at-Tirmidhi (9th Century) Hadith 171 & 1075.

However, provided that the gifts are not accompanied by any un-Islamic custom as the customs in vogue these days, it will be permissible to accept them otherwise not.

Nevertheless, prior to the marriage 'ceremony', the husband usually invests money in household appliances and furniture for the prospective household and sometimes the wife does too. In the laws of Shariah, each item spent on will be deemed the property of that specific person and if the engagement breaks off, the item must be returned to its owner.

THE INCONGRUITY

Unlike South African Law, The Shariah prohibits lengthy periods of engagements and prohibits fancy wasteful events.

Furthermore, gifts, rings, parcels etc. are not permissible to exchange on the day of the permissible 'fixing'.

Notably, should the engagement break off – there is no claim for damages such as the monies spent on preparation for marriage or the hypothetical position of placing the aggrieved spouse in the position as if they were married. E.g., A woman cannot claim a car on the basis that the man was wrong and had he not breached the engagement agreement he would've bought her a car.

Furthermore, any item spent on will be returned to the person who bought it. However, 'gifts' which were not permissible in the first place to give to the other, will not be able to be claimed back

e.g., Rings and watches. These are deemed as donations/gifts and cannot be claimed back.

Lastly, a claim for 'personal feelings' in the event that a person humiliates the other in breaking the engagement e.g., Announcing on social media – will NOT be permissible. This is a blanket ruling on defamation as well. Both are impermissible to claim. It is impossible to place a monetary value on feelings. NOTE: Bringing an application for an interdict will be permissible and claiming the costs in bringing it too.

MARRIAGE

And among His signs is this, that He created for you mates from among yourselves that you may dwell in tranquility with them and He has put love and mercy between your hearts: Verily in that are signs for those who reflect – Surah Ar Rum: Aayah 21

B. HUSBAND- WIFE

I. Requirements for a valid marriage

SOUTH AFRICAN LAW

Marriages, often referred to as “court marriages” are primarily governed in terms of the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006.

The basic requirements are:

1. Capacity

Capacity to marry can be viewed in two different lights. Namely, absolute capacity and relative capacity.

Absolute capacity

This deals with factors which are deemed as factors enough to prohibit a marriage between two persons. Such as: mental illness⁶, age⁷ (below 12 for girls and 14 for boys- if below 18 years consent by parents are required), state of intoxication, persons married to others⁸ etc.

Homosexuals are permitted to get married by forming a civil union as opposed to being married by means of the Act.

⁶ Lange v Lange 1945 AD 332

⁷ Marriage Act 25 of 1961

⁸ Civil Union Act 17 of 2006

Relative capacity

This deals with relationships which are too closely related and therefore prohibits the relationship. Certain relationships are deemed too close to be married, either by blood or through marriage. E.g., One cannot marry their daughter in law even after her divorce to your child.

2. Consensus

Consent must be provided voluntarily, and informed. One under duress will be able to have his marriage annulled if duress was reasonably serious⁹.

3. Formalities

The prescribed formalities are serious, and failure can lead to invalidation.

1. Duly appointed and qualified marriage officers must solemnize a marriage¹⁰.
2. If any objections are taken to the marriage, the marriage officer must investigate and make a determination¹¹.

⁹ Smith v Smith 1948 (4) SA 61 (N).

¹⁰ Section 11 (2) of The Marriage Act.

¹¹ Section 23 of The Marriage Act.

3. Valid ID documents are required¹².
4. The commonly known marriage formula must be pronounced¹³, “Do you accept him as your lawfully wedded husband?”. “I do.”
5. At least 2 competent Witnesses present¹⁴.
6. Must not be a clandestine marriage¹⁵. The Act reads that the venue must have “open doors” indicating that it must not be done secretly¹⁶.
7. Must be registered in the prescribed manner¹⁷.

SHARIAH

As in civil marriages, the three requirements are found in Islamic marriages too. Save for certain exceptions:

1. CAPACITY

Absolute capacity

¹² Section 12 of the Marriage Act.

¹³ Section 30 of The Marriage Act.

¹⁴ Section 29(2) of the Marriage Act.

¹⁵ Ex Parte Dow 1987 (3) SA 829 (D).

¹⁶ Section 29(2) of the Marriage Act.

¹⁷ Section 29A of the Marriage Act.

This deals with factors which are deemed as factors enough to prohibit a marriage between two persons. Such as: insanity and homosexual marriages¹⁸. Furthermore, it is not valid for a woman to marry a disbeliever (non-muslim) whereas, whilst it is valid for a man to marry a woman 'of the book' i.e., a Jew or Christian, it is impermissible and ill advised¹⁹. It was none other than Hazrat Umar bin Khattaab (Radiallahu anhu) (The second Caliph in Islam) who ordered Hazrat Huzaifah (Radiallahu anhu) (a senior companion of the prophet Muhammad Sallallahu alaihi wasallam) to divorce a Jewess whom he had married. Upon receiving the order, he divorced the Jewess²⁰. Hazrat Umar's (Radiallahu anhu) concerns were based on the fear of immoral practices and un-Islamic ways entering the household. Regardless of the piety of a father in the household, almost all people who have had the privilege of being raised in a home headed by a woman can vouch for the fact that a child learns their basic etiquettes from their mother. If their mother is not making istinja (purification in the toilet according to Islamic rites) then who will teach the children? This is what Hazrat Umar Al Farooq bin Khattaab had feared. Nevertheless, the marriage remains valid.

NOTE: IMPERMISSIBILITY AND INVALIDITY ARE TWO DIFFERENT THINGS. E.g., It is impermissible (SINFUL) to give your wife a talaaq while she is menstruating, however the talaaq remains valid.

¹⁸ Al Quran – Chapter 11 – “Surah Hud”, Verse 78.

¹⁹ “Marriage to women of ‘Ahlul-Kitaab’” by Mujlisul Ulama of South Africa.

²⁰ “Ahkaamul Qur’aan” narrated by Jassaass (Rahmatulahi Alayh) who narrates from Shafeek Bin Salmah.

Relative capacity

This deals with relationships which are too closely related and therefore prohibits the relationship. Certain relationships are deemed too close to be married, either by blood or through marriage, or by zina/ hurmat musaaharat/ breastfeeding/ combining between certain close relations such as marrying two sisters, etc., and the nature of the relationship is thus deemed "My Mahram". E.g., One cannot marry their daughter in law even after her divorce to your child, as you remain as a Mahram to her. Furthermore, one cannot marry his/her foster mother²¹.

2. CONSENSUS

Consent must be provided.

3. FORMALITIES

1. There must be an offer (Ijaab)²².
2. There must be acceptance (Qabul)²³.
3. Uttering words in the Arabic language, which express the past tense²⁴.

²¹ Al Quran 4:23.

²² Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 54, page 475.

²³ Ibid.

²⁴ Ibid.

4. Two muslim, sane, free and major witnesses or One male and two women²⁵.

THE INCONGRUITY

1. MINIMUM AGE TO MARRY

In terms of the requirement of a party's capacity to enter into a marriage, The Shariah and South African Family law differ in that Shariah allows for marriages below the stipulated age. In Shariah, if a child has reached the age of maturity, they can marry even if they are below 18 years of age. There is no minimum age for validity of marriages in Islam. Furthermore, in Shariah, parents can betroth their children at young ages, if it is in the child's best interest. Furthermore, should they enter into a Nikah without parental consent, the Nikah will be valid (provided certain conditions are met) although this is against the Islamic method of Nikah under normal circumstances.

2. POLYGAMY

Polygamy, just like the age of marriage, and homosexuality are moral dilemmas which over time evolves according to the values of the society of the time. In certain countries it is viewed as despicable to have two wives, whilst in others it is viewed as

²⁵ Ibid.

commendable as it implies that one less single woman is left to care for herself and her children.

There are many reasons as to why polygamy is permissible. However, it should be borne in mind that such reasons only attempt to understand the orders of Allah Ta'ala and that reliance upon such reasons solely, implies an uncertainty with the laws of Allah Ta'ala.

Perhaps Allah Ta'ala could have made it such that people viewed polygamy as the default position and that those who only had 1 wife would be frowned upon on the basis that he has taken upon himself to only care for 1 woman as opposed to many others.

This brings us back to the point, **WHO DECIDES WHAT IS MORAL??**

Nevertheless, the benefits of polygamy will be highlighted:

- I. The joining of 2 families/tribes with the intention of uniting the two families/tribes with the end goal of inviting them to Islam.
- II. It promoted the sanctity of women by enabling them to continue living at home without the necessity of finding employment. Polygamy enabled for women's needs and maintenance to be taken care of by men who wedded them.
- III. Allah Ta'ala has declared in the Quran Shareef that our objective in this world is to worship Allah Ta'ala. Not for any

other purpose. When any social dilemma is viewed with the lens of Imaan, a different perception is achieved. In relation to polygamy, it permits for an increase of the Ummat, and for more children to be born from further marriages with the intention that they will become ambassadors of Islam.

- IV. NOTABLY, according to the Bible, the prophet Solomon had **hundreds** of wives, so too did the prophet Abraham have a plurality of wives.
- V. Ironically, the West has viewed adultery as more respectable, as well as a relationship out of wedlock BUT taking a second wife as despicable. In fact, disappointingly, even Muslim women in today's times plead with their husbands to continue sleeping with other women as opposed to taking them as their second wife.
- 3. A further incongruity between the Shariah and South African Family law is that South African Law now permits for a homosexual couple to enter into civil union, whereas Islam totally prohibits this.

HOMOSEXUALITY

Homosexuality is **totally forbidden** in Islam. There are many Muslims in today's time who seek to pull wool over the eyes of others in issues where a slight margin of doubt can creep in. However, on the issue of homosexuality I find it interesting to hear

of people who are Muslim but believe homosexuality is fine. I find this peculiar because the Quran Shareef is not silent, but expressly and conspicuously clear on this issue. The details of the punishment meted out to the nation of Lut (Alayhis Salaam) for the act of Sodomy is categorically, and unequivocally described. Which leaves the genuine confusion as to how there is any room for doubt.

On dealing with the issue of Homosexuality, it begs the first question:

Why should it be fine?

If it is said:

Because this person loves so and so and such feelings are inherent.

We will say:

So, then what about a sociopath who loves killing. He kills because his disposition demands for him to kill to derive satisfaction.

If it is said in reply:

Because inherently, killing is bad (which is a sophisticated response- Regardless of religion we all should, as per our *fitrah* i.e., disposition – know that killing is bad)

We will then say:

So then is marrying your mum fine (incest) because of love?

If it said:

Because of the nature of the dynamics between the two i.e., mother and child (this is clutching at straws now).

We will then say:

Okay, so what about sexual intercourse with an animal out of love?

Now if it said:

Because biologically it wouldn't make sense.

We comfortably allege that:

Biologically it doesn't make sense for man to sleep with a man.

Honestly, if every human was homosexual and didn't rely on sperm cells (as it would literally defeat their argument for homosexuality) mankind would abruptly end.

However, if the discussion begins with proving the Quran's validity, then simply, all which is required to be said then is merely "Because Allah Ta'ala ordered it to be that way".

My humble opinion on this matter, without any reliance on texts, but *aq'l* (intellect):

Homosexuality is something you're not born with. Humans are born with plastic brains and rely on observation to create their own version of reality. Unfortunately, in today's time, their only exposure is through parents who find it easy to dump iPads and TVs on their children to pacify them. These iPads are filled with cartoons and movies which now are heavily, indirectly and directly

promoting homosexuality or at least have normalized it. So, children grow up thinking (contrary to the natural biological belief of man needing to be with woman) a man can be with a man. Furthermore, it's more complex. How many people, which you can probably list, are homosexual and came from households of many girls. Can we attribute this to the womb or the circumstances?

If you ask a person hooked on drugs to "give up drugs" you'd be naïve to assume that "it's mind over matter". That person is going through so much trying to quit addiction, the days feel longer, hours drag when without their "fix". But at no point will that addict claim its permissibility on the strength of their inability to quit or abandon their desire to take. Rather they will understand that this is the sacrifice which they now need to endure as they are aware that it is something totally impermissible. So similarly, for he who 'loves' other men. This is now their sacrifice.

Someone who is tempted by men, like an addict loves drugs, but acknowledges that it is wrong, and lives a life resisting such temptations will find himself amongst the righteous, inshaAllah. May Allah Ta'ala grant strength to all those Muslim brothers and sisters who are embroiled in this.

4. A further incongruity is that marriages in the Shariah do not need to be registered as civil marriages and failure to register it does not invalidate it. This is significant in that if a civil marriage is not registered, quite simply, it fails to exist. Hence, there will be no marital obligations and consequences attached to it. Whereas, whilst Islamic marriages are not recognized in the Court of Law, and

hence a police official cannot enforce an obligation, it remains an obligation which such person will be answerable in a far greater court than a local court i.e., The Court of Allah Ta'ala.

NOTE: IF THERE IS A NEED TO REGISTER YOUR MARRIAGE IN COURT IT IS COMPULSORY FROM THE SHARIAH PERSPECTIVE TO SIGN AN ANTE-NUPTIAL CONTRACT EXCLUDING THE ACCRUAL.

5. Whilst it remains a sunnah (practice of the Prophet Muhammad Sallallahu alaihi wasallam) to announce a marriage so that everyone can attend, a clandestine, secret marriage will still be valid provided the requirements of witnesses and contacting parties are present.
6. The requirement of witnesses also differs in civil and Islamic marriages. In Shariah, 2 women witnesses equal to one male witness. This is not discrimination, but rather based on the inherent nature of man and woman. Women are generally forgetful and emotional, unlike men. The operative word is GENERALLY. Producing proof of a woman with a better memory than a man does not disprove the requirement. The shariah has been formulated in general terms, and cannot be applied subjectively. It could **not** be formulated: "In terms of witnesses, one male, and two females. However, if the female indeed shows she obtained A+ in school, then one female will be sufficient as opposed to two". The fallacy is self-evident.

II. Marital system

SOUTH AFRICAN LAW

In South Africa, there are different systems in which a husband and wife can marry each other. These systems deal with the manner in which the respective spouse's estates will operate. E.g., After divorce who will retain which assets, or if one spouse is owing a debt, can the other spouse be liable for such debts. Accordingly, there are three systems in South Africa, namely:

1. MARRIAGES IN COMMUNITY OF PROPERTY (ICOP)

The default position in South Africa is that any persons who marry each other 'IN COURT' will have their marital system as a marriage in community of property UNLESS they sign an ANTENUPTIAL CONTRACT a.k.a 'PRENUP' which states that they do not wish to have their marriage in terms of a marriage-in-community-of-property (ICOP).

Basically, without delving too far into the nitty gritty of the system, once a couple marries in community of property, everything owned by one becomes the property of the other. There are certain exceptions however. Hence, upon dissolution (divorce) of the marriage, the estate will be divided into half and be awarded in equal shares to each spouse. Even if the husband or wife had earned everything, while the other stayed at home, a 50% division will take place and be awarded to the other. Furthermore, if one spouse has an outstanding debt, the other can be held liable as well. Notwithstanding the above, a further

implication is that certain contracts entered into will require the signature of both spouses as opposed to just one.

2. MARRIAGE OUT OF COMMUNITY OF PROPERTY (OCOP)

A marriage concluded out-of-community-of-property (OCOP) can be almost viewed as the total opposite to marriages ICOP. Basically, each spouse has their own separate estates and do not share ownership in the other's estate.

It is important to remember, as mentioned above, if a couple wish to have their marriage concluded in this manner, they are required to sign an ANC (Ante-nuptial Contract) otherwise the default position will be ICOP. This is important and should be contracted BEFORE marriage as if it is done after the marriage is concluded then automatically upon the marriage being solemnized all of the other spouse's assets will be deemed as a joint estate (ICOP) and if the other spouse refuses to agree to an ANC which results in a subsequent divorce, he/she will be owed half of the estate immediately.

3. MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH THE INCLUSION OF AN ACCRUAL SYSTEM.

A marriage OCOP with the inclusion of an accrual system basically means that upon marriage, each party will retain its own estate as in the case of a marriage OCOP. However, the inclusion of an accrual system means that after marriage, any increase in the

NOTE: UPON DIVORCE, COURTS MAY MAKE AN ORDER THAT BENEFITS FROM THE DIVISION OF THE MARITAL SYSTEM BE FORFEITED FROM ONE SPOUSE TO ANOTHER IF THE CIRCUMSTANCES WARRANT.

estate of each spouse from date of marriage will be treated as a joint estate. Basically, if Ebrahim has R1000, and Mariam has R500 at date of marriage, but Ebrahim's estate increases to R3000 while Mariam's stays at R500, then upon divorce the increase of Ebrahim's estate ($R3000 - R1000 = R2000$) will be shared between the two ($R2000/2 = R1000$). Hence, Ebrahim will be awarded R1000 and Mariam R1000. The end result will be Ebrahim is left with the initial R1000 + the increase R1000 = R2000 while Mariam will be left with the initial R500 + the increase of R1000 = R1500. Mariam would have increased despite not working or contributing to the estate.

NOTE: In terms of section 21 of the Matrimonial Property Act, spouses may apply to court for permission to change their matrimonial property system.

SHARIAH

In the Shariah, there is only one default position, which even by permission and consent of spouses to have it otherwise, remains the **ONLY** permissible marital system: **MARRIAGES-OUT-OF-COMMUNITY-OF-PROPERTY-WITH-THE-EXCLUSION-OF-THE-ACCRUAL**²⁶.

MARRIAGES-IN-COMMUNITY-OF-PROPERTY is **FORBIDDEN**²⁷.

²⁶ "Matrimonial Property Systems, A BAATIL, BID'AH ENCUMBRANCE" by MUJLISUL ULAMA OF S.A., page 14.

²⁷ Ibid at page 8.

MARRIAGES-OUT-OF-COMMUNITY-OF-PROPERTY-WITH-THE-
INCLUSION-OF-THE-ACCRUAL is **FORBIDDEN**²⁸.

The default position in the Shariah is MARRIAGES-OUT-OF-COMMUNITY-OF-PROPERTY-WITH-THE-EXCLUSION-OF-THE-ACCRUAL. Parties need not stipulate this. However, if couples wish to have their marriages legally recognized and get ‘court married’ it will be compulsory for them to complete an ante-nuptial contract which excludes the accrual system.

See above for an explanation of the three systems.

THE INCONGRUITY

Whilst the law in South Africa permits for a marriage to be regulated by means of either one of three marital systems, the Shariah only allows for one system: **MARRIAGES-OUT-OF-COMMUNITY-OF-PROPERTY-WITH-THE-EXCLUSION-OF-THE-ACCRUAL**²⁹. This is COMPULSORY. Even if both spouses wish and consent to another system, it will be impermissible and sinful. This is not a rule decided by the Ulama, but by Allah Ta’ala and this is the system which our Prophet Muhammad (Sallallahu alaihi wasallam) lived by. It is naïve and extremely shortsighted of us in today’s time to assume that the laws of Allah Ta’ala are subjected to social pressures and social norms of the time. It is the

²⁸ Ibid at page 9.

²⁹ “Resolving a Community of Property Estate” – Jamiatul Ulama by Mufti Suhail Tarmahomed, confirmed by Mufti Advocate Emraan Vawda at <https://jamiat.org.za/resolving-a-community-of-property-estate/>

universality and timelessness of the laws of Allah Ta'ala found in Quran and Sunnah which epitomizes the veracity of Islam.

III. Duties of the spouses during marriage

SOUTH AFRICAN LAW

Upon marriage, an important consequence which follows is the “consortium omnis vitae” which are the reciprocal duties between spouses which are automatically created. These include duties such as: the duty to live together, be loyal and faithful to one another, to assist and support each other, and to have sexual intercourse with each other.

These are duties which have legal protection and can result in claims against the other, or against third parties.

These claims include claims against the state for deporting foreigners with expired permits on the basis that they are married to local citizens, whom have the right to live with their husband/wife (the foreigner)³⁰. Furthermore, damages claims have been historically brought by a spouse (husband/wife) against a 3rd party (male or female) in cases of adultery on the basis of infringing on their right to loyalty³¹. Notwithstanding the above, the courts have also ruled in favor of claims brought against 3rd parties for loss of support, where negligent third parties injured/killed the breadwinner of the house, and which had resulted in a loss of support for the surviving spouse³².

³⁰ Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

³¹ Wiese v Moolman 2009 (3) SA 122 (T).

³² Union Government v Lee 1927 AD 202.

NOTE: The courts will not entertain claims such as forcing the other spouse to be more loving to the other. Neither will they entertain claims against the other for adultery, nor interdicts brought against the other to prevent them from sleeping with third persons. Such claims are generally brought against third parties. Nevertheless, aspects such as maintenance is a legitimate claim which can be brought by one spouse against the other. Maintenance falls within the ambit of 'duty to support'.

a) DUTY OF SUPPORT

- Typical examples would include:
- Food
- Clothing
- Accommodation
- Day-Day necessities
- Medical & Dental expenses
- Litigation expenses

NOTE: THESE EXPENSES MUST BE REASONABLE. HOWEVER! REASONABLENESS WILL BE DETERMINED IN LIGHT OF THE OTHER SPOUSES FINANCIAL STANDING. IN SOME INSTANCES, DENTAL EXPENSES MAY BE VIEWED AS EXCLUDED FROM THE AMBIT OF THIS SECTION, WHILE IN OTHER MORE PROSPEROUS CIRCUMSTANCES AS A HOLIDAY HOME ON THE BEACH MAY BE INCLUDED.

The High Court has inherent jurisdiction for maintenance claims, however, the more common route taken is Maintenance Courts which orders provides for both civil and criminal sanctions for non-compliance. Generally, 'arrear maintenance' will not be granted, unless the spouse can prove that debts were incurred in the process. Maintenance claims can be brought against the spouses deceased estate as well. Furthermore, maintenance claims can be brought by third parties who provided maintenance to a woman, whose husband had not³³. E.g., John can sue David for a sum incurred in looking after David's wife as the duty was on David to.

NOTE: EVEN IF COUPLES ARE LIVING APART THE DUTY TO SUPPORT CONTINUES TO SUBSIST. HOWEVER, IF ONE SPOUSE UNILATERALLY ABSCONDS WITHOUT MERIT, THEY CANNOT CLAIM MAINTENANCE THEREAFTER.

b) HOUSEHOLD NECESSARIES

Traditionally, women were in charge of the household. Hence, they had the power to buy household necessities which the husband would be liable for. However, a modern development now holds that spouses share the duty on a pro-rata basis according to their means.

³³ Gammon v McClure 1925 CPD 137.

- Typical examples would include:
- Food
- Plumbing services
- Domestic worker wage
- Electricity
- Pet food
- Petrol
- Medication
- Small pieces of furniture e.g., Pots, pans, linen, stationary etc.

NOTE: AS IN THE CASE OF DUTY OF SUPPORT, HOUSEHOLD NECESSARIES AND ITS REASONABLENESS WILL BE JUDGED IN ACCORDANCE WITH THE FINANCIAL STANDING OF THE RESPECTIVE SPOUSES³⁴.

NOTE: BOTH PARTIES ARE LIABLE ON A PRO-RATA BASIS ACCORDING TO THEIR MEANS. IMPORTANTLY, IN THE EVENT OF A DEBT INCURRED DUE TO A HOUSEHOLD NECESSITY, A CREDITOR IN SUCH EVENT, CAN SUE EITHER THE SPOUSE WHO CONTRACTED FOR SUCH ITEMS OR THE NON-CONTRACTED SPOUSE, REGARDLESS OF THEIR MATRIMONIAL SYSTEM (ICOP /OCOP)

c) MATRIMONIAL HOME

³⁴ Reloomel v Ramsay 1920 TPD 371.

A further consequence of marriage is the right to a joint household³⁵, which includes use of the furniture within such household³⁶. This does not mean that there is a right for a husband to provide a private home for his wife. But rather that if a party has a home, he/she should not deprive their spouse access to same. Hence, spouses cannot evict each other from the matrimonial home, nor can they unilaterally dissipate the household furniture or deprive them from use of same³⁷.

d) MONOGAMY

South African Law has totally banned polygamous marriages, which is enshrined in the Marriage Act, Civil Union Act and further in the Recognition of Customary Marriages Act. This is an automatic consequence of marriage.

NOTE: CONTRARY TO POPULAR BELIEF, IT IS NOT NECESSARY TO TAKE YOUR HUSBANDS SURNAME AFTER MARRIAGE.

³⁵ Badenhorst v Badenhorst 1964 (2) SA 676 (T).

³⁶ Whittingham v Whittingham 1974 (2) SA 273.

³⁷ Owen v Owen 1968 (1) SA 480 (E).

SHARIAH

Duty of Support

- According to the laws of Shariah, the duty of support vests on the husband **entirely** and must, according to his means³⁸, provide maintenance and clothing³⁹. However, if the wife without valid Shar'i reason or without the consent of the husband leaves the family home, she will have no claim to maintenance until she returns.

Matrimonial Home

- A husband has a duty to provide his wife her own private quarters (including a bedroom, kitchen, toilet, bathroom and yard facility) (which does not necessarily have to be a separate home) according to the laws of the Shariah⁴⁰.

THE INCONGRUITY

Whilst Shariah also makes provision for a duty of support according to means, this must be distinguished from excessiveness. A man who is wealthy may be ordered to provide more than a poor husband can, however, this will never result in

³⁸ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 76, page 86.

³⁹ Ibid at page 85.

⁴⁰ Ibid at page 91.

holiday homes and luxury cars etc. Luxury is often deemed as wastefulness in Islam, which is sinful.

Furthermore, there will never be a duty of support placed on the wife, regardless of her earning capacity. It will always remain the husband's duty.

As outlined above, monogamy is not a consequence of Islamic Marriages, and hence, a maximum of 4 wives will remain as a consequence of marriage.

In respect of the matrimonial home, the Shariah confers more rights in respect of their wives' privacy, as opposed to South African Family Law.

DIVORCE

“AMONG LAWFUL THINGS, DIVORCE IS MOST HATED BY ALLAH” – PROPHET MUHAMMAD Sallallahu alaihi wasallam

IV. Grounds for divorce

SOUTH AFRICAN LAW

Primarily regulated by the Divorce Act 70 of 1979.

As per section 3 of the Act, the TWO grounds are:

1. Irretrievable breakdown of marriage⁴¹ – There must be no reasonable prospect of restoring a happy marriage⁴². Section 4(2) of the Act mentions factors deemed as sufficient to equate to 'irretrievable' such as the couple not living together, adultery, a spouse declared a criminal and or imprisoned.
2. Mental illness and continuous unconsciousness⁴³.
3. Impotence⁴⁴.

A COURT MAY GRANT OR REFUSE A DIVORCE ORDER. IT IS THEIR DISCRETION.

⁴¹ Section 4(1) of the Divorce Act 70 of 1979.

⁴² Naidoo v Naidoo 1985 (1) SA 366 (T).

⁴³ Section 5 of the Divorce Act 70 of 1979.

⁴⁴ Van Niekerk v Van Niekerk 1959 4 SA 658 (GW).

SHARIAH

1. Impotence. A husband will be granted 1 year to see if the issue is remedied as it may be temporary⁴⁵.
2. Physical or emotional harm.
3. Failure by the husband to provide maintenance to wife.
4. A spouse changing his/her religion. If the husband becomes an apostate, the marriage is automatically annulled. If the wife becomes an apostate, the Ulama should be consulted for further directives. NOTE: HOUSING REMAINS OWED TO ONES WIFE EVEN IF SHE CHANGES RELIGION UNTIL DIVORCE IS EFFECTED.

THE INCONGRUITY

It is very difficult to outline an incongruity as divorces are very context specific and a Judge (South African Law) or Qadhi (Islamic Judge)/Aalim (Islamic Scholar) will consider the subjective factors before granting an order. In practice, aspects which may not be listed above will lead to a divorce whereas in other instances grounds of divorce listed above may not lead to a divorce. However, that being said, change of religion would not be a ground for a divorce in South African Law.

⁴⁵ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 71, page 29.

V. Requirements for divorce

SOUTH AFRICAN LAW

1. Capacity- The spouses must be sane and acting voluntarily.
2. Formalities- In order for two persons to have their divorce effected in South Africa, they would be required to issue a summons in the relevant court, and have it served on the other party. If there are disputes e.g., division of assets, then the matter will be deemed opposed, and the other party i.e. The Defendant would be required to file a plea to the summons. If, however, the matter is unopposed, the court will hear the matter and grant a decree of divorce thereafter.

NOTE: IF THERE ARE CHILDREN, AND THE MATTER IS UNOPPOSED, A SETTLEMENT AGREEMENT WHICH IS APPROVED AND STAMPED BY THE FAMILY ADVOCATE MUST BE IN THE COURT FILE WHICH SUFFICIENTLY ADDRESSES THE NEEDS OF THE CHILDREN.

Once a court grants an order, the order serves as proof of divorce, and every effect incidental to divorce is thereafter accordingly effective.

SHARIAH

1. Capacity- The spouse must be sane and Baaligh.
2. Formalities- The Husband may either give a talaq in writing, orally, impliedly, by means of expression and also by means of a gesture.
3. Expressly- Whether effected by writing, orally, by means of implication etc., the intention must be express, only if the words/ gestures of talaaq used are ambiguous. If it is unambiguous, the divorce occurs regardless of having to express intent.

THE INCONGRUITY

In South African Family law, a requirement is that the party must have acted voluntarily and not under coercion. According to Shariah, Hanafi Muslims (Those who follow the jurisprudence of Imam Abu Hanifa) hold out that coercion does not invalidate the act of divorce and the divorce remains. Whereas Shafi Muslims (Those who follow Imam Shafi) believe that a pronouncement of divorce under duress does not invalidate the marriage and divorce has not commenced⁴⁶.

A further incongruity is that in South Africa Law as a formality, a summons must be issued, served etc., until the trial date. Only

⁴⁶ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 62, page 566.

after the order is granted is the formalities completed and the divorce is effected. In Shariah, the pronouncement of the required words by the husband is sufficient to validate a divorce.

South African Law does not validate a divorce on the pronouncement of “I divorce you”. It must follow the ordinary course until the trial date. Until then, the couple remains married.

VI. Types of divorce

SOUTH AFRICAN LAW

In South African law, there is only one divorce which is outlined above, the straight forward divorce of issuing summons against the other and awaiting the trial date, either on an unopposed or opposed basis.

SHARIAH

There are accordingly, the following types of divorce in Islam.

BY THE HUSBAND

1. Talaaq Ahsan – This is when the husband issues one *talaaq raji* in such a period of purity wherein neither talaaq was issued nor did any sexual relations take place, nor was (an impermissible) talaaq issued in the haidh period preceding this nor did (haraam) sexual relations take place in that haidh period. If he wishes, he may take his wife back before the Iddat period ends.
2. Talaaq Hasan- This is when the husband gives his wife *raji* when she is NOT menstruating and has not had intercourse with her since she completed her last menstrual cycle. Thereafter he does not cohabit with her, and after each 'period' he gives a further talaq. Once he has given three in

total, he cannot take his wife back. If he gives two, he can take her back before the iddat period ends.

3. Talaaq Bid'ee- This is when the husband gives two or three talaqs at once or during one period. IT IS SINFUL TO DO THIS BUT REMAINS VALID NEVERTHELESS. It is also talaaq Bid'ee if a man has intercourse with his wife and then issues talaaq within the same non-menstruating period or during a menstruating period (even if he did not have intercourse with her).
4. ILA – This occurs when a husband takes an oath not to have sexual intercourse with his wife, and thereafter for a period of 4 consecutive months they do not, the marriage irrevocably terminates.
5. ZIHAR⁴⁷- This is where the husband compares his wife to a relationship prohibited for him to marry. “You are (haraam) unto me like the back of my mother” (i.e., I Won't have sexual intercourse with you) Thereafter for a period of 4 months he does not, the wife will be entitled to approach an organization of Ulama and request a divorce. If, however, the Husband after making such a statement wishes to revoke such statement, and have sexual relations with his wife, he needs to free a slave, if he cannot, then he has to fast 60 days consecutively, and if he cannot, he needs to provide food for 60 persons.

⁴⁷ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 70, page 37.

BY THE WIFE

1. FASKH

This is where a wife approaches a group of Ulama and requests a divorce from her husband. Factors which influence the granting of a divorce include: A husband not providing reasonable maintenance and shelter to his wife, as per Islamic law and subject to other factors.

A further type of divorce which a woman is entitled to is:

2. TALAQ-IT-TAFWEED⁴⁸

This is where a husband grants the woman power to divorce him in the event of a certain occurrence. Example, a husband stipulates prior to their marriage that he delegates power to his wife to divorce him in the event he takes a second wife. The wife would then have the OPTION to divorce him and this is not an automatic consequence.

BY AGREEMENT

This is referred to as “Khula” which is an agreement between husband and wife to dissolve the contract of marriage⁴⁹.

⁴⁸ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 64, page 593.

⁴⁹ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 69, page 29.

In certain events the husband is unwilling, but then his wife offers to buy herself out of his marriage. This is typically where the wife is unhappy and the husband does not wish to divorce her. Commonly, she will pay back the dowry paid to her as compensation of terminating the marriage.

The wife of the famous companion Hazrat Thaabit Bin Qais (Radiallahu anhu), Hazrat Habeebah Bint Sahl (Radhiyallahu Anha) wished to divorce her husband Hazrat Thaabit. He was unwilling. She was advised by the Prophet Muhammad (Sallallahu alaihi wasallam) to offer to pay her dowry back in lieu of divorce. This was accepted and the divorce was terminated.

THE INCONGRUITY

The incongruous nature lies in the fact that in South Africa there is one type: VIA CIVIL PROCEDURE. Whereas in Shariah, the different types are numerous as expounded above.

VII. Maintenance after divorce (“ALIMONY”)

SOUTH AFRICAN LAW

Upon divorce, spouses are often approaching courts to divide the marital property in accordance with the marital system (mentioned above). Furthermore, wives often approach courts to request an order in respect of an on-going maintenance award in their favor⁵⁰.

However, with the recent trend of mediation becoming increasingly popular and courts becoming more in favor of parties mediating, coupled with litigation fees being exorbitant, parties are opting to settle their disputes during mediation instead. As a result, parties will attend at courts with written agreements after mediating and have the court make it legally binding⁵¹.

NOTE: PARTIES MAY AGREE ON MOST ASPECTS AND HAVE AGREED IT IN WRITING AND STILL CONTINUE AT COURT TO ARGUE ON ISSUES UNRESOLVED.

Historically, it was common practice that courts granted life-long maintenance orders against ex-wives. However, the recent trend of the “**clean break**” model has seen spouses obtaining a divorce without a duty of support against the other, at all. Whilst women may view this as a regressive change, it was in fact favoring a more

⁵⁰ Section 7(2) of the Divorce Act 70 of 1979.

⁵¹ Section 7(1) of the Divorce Act 70 of 1979

modernist view that women should not be viewed as 'dependent' and a presumption made that she wouldn't be able to find work was in fact viewed as discriminatory.

Nevertheless, courts continue to grant spousal maintenance awards if the circumstances warrant for it. In most cases it is for a temporary period, and not life long as previously ordered by courts. Factors such as, the interests of the children, and whether it is in their interest to have their mothers be stay at home mothers⁵², as well as factors such as, the wife struggling to find work, the wife perhaps never being able to find a job (age, disability etc.), as well as other factors such as the reason for the divorce are taken into account by courts when making awards.

NOTE: THESE AWARDS HAVE TO BE GRANTED AT THE TIME OF THE DIVORCE!! EX SPOUSES CANNOT APPROACH COURTS AFTER DIVORCE AND REQUEST MAINTENANCE.

Furthermore, in terms of the Act, spouses may approach both the Maintenance and High Court and apply for a variation of the Court order, to either increase or decrease the maintenance amount⁵³.

Upon the ex-wife remarrying, the maintenance duty falls away immediately. Furthermore, if the husband dies, then, the duty falls away too, of course.

⁵² Kooverjee v Kooverjee 2006 (6) SA 127 (C).

⁵³ Section 8(1) of the Divorce Act 70 of 1979.

SHARIAH

The Shariah makes it a requirement for males to pay reasonable maintenance (considering societal norms, within the confines of the Shariah)⁵⁴, to their ex-wife for the duration of their **IDDAT** period⁵⁵.

Should the reason for divorce be due to the wife changing her religion, the husband will only be liable for housing during the iddah period and not clothing and food⁵⁶.

Iddat period refers to a period in which women must remain confined to their household for a period of 3 menses (in the event of divorce) (unless she has experienced menopause, in that event = 3 months) and 4 months and 10 days (in the event of their husband's death).

THE INCONGRUITY

While in certain instances South African Law permits an on-going award of alimony towards the ex-spouse, which can be for a

⁵⁴ Al-Bahr Al Raiq Sharh Kanz Al-Daqaq (190/4) publishing house: Dar Al-kutub al-islami.

⁵⁵ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 76, page 93.

⁵⁶ Durr al-Mukhtar (Page 263), publishing house: Dar Al-Kutub al-islami.

stipulated period by the court or for an indefinite period too, the laws of Shariah expressly forbid Alimony and only permits for the husband to pay his ex-wife maintenance for the period of her Iddat⁵⁷. Unlike the South African Law, even in the event that the ex-wife is wealthy and has a high earning capacity, the Shariah does not place any obligation on woman to provide maintenance to her ex-husband.

⁵⁷ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 76, page 93.

VIII. TRANSFER OF ASSETS

SOUTH AFRICAN LAW

According to the Divorce Act, couples who entered into a marriage OUT OF COMMUNITY OF PROPERTY ('OCOP'), **prior to the commencement of the Matrimonial Property Act**, have the option of approaching the court requesting a transfer of assets between the parties⁵⁸.

For the mere reason that prior to the Matrimonial Property Act, there was no Accrual System. Hence, the Court will in some instances, considering the relevant factors, grant an order that e.g., some of the husband's assets, will be transferred to the wife upon divorce.

NOTE: ONLY MARRIAGES ENTERED IN TERMS OF 'OCOP' **BEFORE** THE COMMENCEMENT OF RELEVANT ACTS, AS AFTER = COUPLES HAD THE OPTION TO ENTER INTO THE ACCRUAL SYSTEM OR NOT, AND THEREFORE, RESPECT MUST BE SHOWN TO THEIR FREEDOM TO CONTRACT.

SHARIAH

As mentioned above, the default position in the Shariah for marital systems is Marriages-**Out-of-Community-of-Property-With-The-Exclusion-of-the-Accrual-System**. Hence, any 'Transfer of Assets' will not find relevance in the Shariah, and thus, it will be forbidden to request such an order.

⁵⁸ Section 7(3) of the Divorce Act 70 of 1979.

THE INCONGRUITY

South African Law permits for females who were married prior to the Matrimonial Property Act, and who had their marriages regulated by the **Out**-of-community-of-property system to apply for transfer of assets after divorce as they were not afforded the opportunity to have their marriages regulated with the option of an accrual system at the time (this system was only formulated after the said Act). **HOWEVER**, the Shariah does **not** allow for such an arrangement.

PARENT – CHILD

“Your children have the right of receiving equal treatment, as you have the right that they should honor you” – Prophet Muhammad (Sallallahu alaihi wasallam)

A. PARENT-CHILD

It must be noted that all rights and duties which will be expounded on below, are automatic duties of parents. Whether married, unmarried, planned, unplanned etc. THESE RIGHTS ARE AUTOMATICALLY CONFERRED ON THEM.

i. Care (“CUSTODY”)

SOUTH AFRICAN LAW⁵⁹

Previously referred to as ‘custody’, the term adopted in terms of s1(1) is now referred to as ‘care’. The ambit of care extends further than custody. Further than providing the needs of a child, which include love, shelter, food and education, it also includes ensuring, and promoting the child’s best interest. Guiding, advising, protecting from harm, all fall within this category. These duties are owed to the child by both mother and father on a pro-rata basis.

AFTER DIVORCE:

After spouses divorce each other, the duty of ‘care’ becomes somewhat problematic. Reason being, the child will live with one parent primarily, and hence, to agree on whom the child will reside with and further to consult with the other spouse for small decision making becomes problematic. Hence, in practice, the

⁵⁹ Children’s Act 38 of 2005, s18(2)(a).

parent which the child lives with will have the right to make the decisions for small household decisions.

Should a former spouse refuse to allow their former spouse any right of care/custody to the child (living with them), they will be in contempt of court (if there is a court order) and can be imprisoned/fined.

The general position in South African Law is that it is in the child's best interest (unless the circumstances warrant otherwise) to reside with the mother.

SHARIAH

The dictates of Shariah are somewhat different to South African Law. According to the Shariah, a mother is entitled to custody of a son until he reaches the age of 7, and of a daughter until she reaches the age of 9⁶⁰. Thereafter, custody will be awarded to the father until the son reaches the age of puberty and the daughter until she is married. The son will thereafter have the option to decide whom to live with after he reaches the age of puberty⁶¹.

⁶⁰ Jawharatun Nayyirah, Sharah of Mukhtasar al Qudoori 91/2.

⁶¹ Al Binayah Sharah of Al Hidaaya 654/5; Durrul Mukhtaar 256; Al Muheet al Burhaani Fi Fiqhun Nu'maani 178/3.

It should however be noted that an agreement between the parties can be reached contrary to the ruling above if it is in the interests of the children⁶².

Furthermore, the right to custody can be lost by either party if certain factors are prevalent. Examples include, a parent addicted to drugs, or physically/verbally abusive⁶³.

Notably, should a mother remarry a person who is not a mahram to the child (not related to the child on his/her father's side) then custody will automatically lapse and the child must be handed over to the father's custody regardless of the age of the child at the time⁶⁴.

THE INCONGRUITY

As in the case of maintenance in both husband-wife and parent-child relationships, the father is always liable solely for financial contributions. This is of course subject to certain requirements such as the extravagance of the need. This is vastly different to South African Family law which places such duties on both parents.

⁶² Darul Ifta, Madrasah Arabia Islamia, Darul Uloom Azaadville – Answered by Mufti Ibrahim Noorgat, approved by Mufti Muhammed Saeed Motara Saheb (27th September 2021).

⁶³ Ibid.

⁶⁴ Radd Al-Muhtār 'alā Al-Durr Al-Mukhtār 565/3; Al- Nahr Al- Fā'iq sharh al-Kanz al-Daqā'iq(501/2) publishing house: Dār al-Kutub al-'ilmiyyah; Majma' al-Anhur fī Sharh al-Multaqā al-Abhur (481/1) Publishing house: Dār ihyā al-Turāth al-'Arabī

Notably, one of the most eye-catching differences in South African Family law compared to the Shariah is the issue of custody. South African law deems it in the interest of the child to live with the mother indefinitely. Whereas the Shariah, as expounded above, differs.

A further incongruity is that a mother remarrying a man not mahram to her daughter (on her biological father's side) would not result in a change of custody in South African Law.

In my humble opinion, we have become very apologetic towards societal values, and have been indoctrinated to adopt similar moral values. Although the wisdom of Allah Ta'ala cannot be comprehended by our fickle minds, in my humble opinion, having a son live with his mother until the age of 7 enables for him to gain the love and nurturing of a mother whereas thereafter, the discipline, the masculinity of his father, and a precedent of how to engage in daily practices e.g., work, is necessary in the context of the child's life. Furthermore, in respect of a daughter living with her mother until the age of 9, this enables her to learn the biology of a woman, which includes the menstruation period and how to approach it. Thereafter, she, on the principles of equality must live with the father as well, who, too, as the father, has rights to custody over his child.

NOTE: In South African Law, refusal of custody does not justify refusal of maintenance as a result thereof. However, according to the Shariah, in which the father is solely liable, should the daughter or mother refuse to allow the custody rights to the father after the age of 9, or in the case of a son between the age

of 7 and puberty, it is his right to refuse to pay maintenance as an infringement of his right has taken place.

ii. Contact

SOUTH AFRICAN LAW⁶⁵

Traditionally, the right of contact was referred to as 'access'. However, a shift towards 'contact' has been adopted recently instead. These duties refer to the duty to maintain a personal relationship with the child, which includes communication, and visitation rights in the event that one's child lives with someone else.

AFTER DIVORCE:

It should be borne in mind that the right of contact is more of a responsibility than a right. A court can never compel someone to visit their child. However, any parent SHOULD understand the necessity to. Not out of compulsion, but out of love. 'Contact' is a clause generally placed in parenting plans which captures the days and hours which the parent not living with the child will have contact. Typical examples include fathers being able to fetch their child for the weekend every second weekend.

HOWEVER, if for example a child lives with the mother who refuses contact with the father, she will be in contempt of court and can be imprisoned for refusing contact.

⁶⁵ Children's Act 38 of 2005, s18(2)(b).

Nevertheless, according to the laws of South Africa, a husband cannot refuse to pay maintenance because of his right of contact being denied. There is a total and clean separation of issues.

SHARIAH

The Shariah echoes a similar situation as in South African Law. The duty of 'contact' is not something imposed on someone. HOWEVER, if for example a child lives with the mother which the father consents to, but the child refuses to contact the father, refuses to take the fathers calls or allow him to visit, or the mother is guilty of all of such, the father is entitled to withhold paying maintenance.

THE RIGHTS OF A FATHER IN ISLAM ARE SUCH THAT IT IS MORE OF A DUTY TO CONTACT YOUR FATHER THAN TO WAIT FOR HIM TO CONTACT YOU.

THE INCONGRUITY

Unlike in South African Law, if a father is refused the rights he has to his child by either child or mother, he can withhold maintenance.

Furthermore, it is an Islamic duty for a child to respect his mother/father. Hence, it is more the duty of the child to contact his/her mother/father than the other way.

If the mother undertakes to have the children stay by their father every 2 weeks, she must ensure that they are ready and dropped off/collected by him timeously as the agreement between them was binding.

iii. Guardianship

SOUTH AFRICAN LAW⁶⁶

Primarily, this involves the administrative affairs of a child. These include administering the child's property, or representing the child in contractual, administrative and legal matters.

It is common that guardians will be appointed/ applied for on behalf of a minor child, either through a will or court.

AFTER DIVORCE:

By virtue of being the parents, a parent will retain his right of guardianship over his/her child. Very rarely will the court grant sole guardianship to one parent. However, there are instances where, in considering the child's best interests, the court will order sole guardianship⁶⁷. Factors such as: A parent becoming violent, involved in drugs, convicted of a violent crime, has a psychiatric disorder⁶⁸ etc. It is important to note that the natural consequence, i.e., only the consent of the sole guardian will be binding on juristic and administrative acts.

⁶⁶ Children's Act 38 of 2005, s18(2)(c).

⁶⁷ Section 6(3) of the Divorce Act 70 of 1979.

⁶⁸ R v H 2005 (6) SA 535 (C).

SHARIAH

In terms of administrative decisions in respect of the child, both parents must consult each other (via a permissible medium) as consultation is beneficial. Whilst the general ruling is that the father would have the final say⁶⁹, the binding factor is the decision viewed in light of Islam. Hence, a father who wishes for his son to become an underwear model will not trump in making the decision if the mother wants her son to become an Aalim. In any event, the local ulama should be consulted for direction on the decision. The father's final say is prevalent in other decisions however, e.g., the mother wants her son to attend Darul Uloom Benoni while the father prefers Darul Uloom Lenasia. The father will have the final say.

THE INCONGRUITY

Whilst both parents must consult each other, in terms of the Shariah, the father, who will be solely liable for any decision made must accordingly have the final say too. The father will be liable for payment of permissible education, unlike the mother who the Shariah does not impose financial burden on, and hence, he must then have the final decision on which education the child pursues. This position applies even in the event that he agrees for the child to live with the mother. He will still have the final say. Again, it is important to add that this will be subject to the decision being in conformity with the religion, and if his decision is haram, the mother can approach a trusted group of ulama for further assistance.

⁶⁹ "Shuraa: Islamic Consultation" by Moulana Muhammed Masihullah Khan, translated by Mujlisul Ulama of South Africa, page 22.

iv. Maintenance

SOUTH AFRICAN LAW⁷⁰

One of the most fundamental rights a child has over his/her parents, which has resulted in a copious amount of litigation historically.

This includes the duty of parents to support their children by providing for their NEEDS, such as food, shelter, health care, and education. Depending on the earning capacity of a parent, this right might include WANTS as well⁷¹.

The basic rule is that in order to claim maintenance, it must be established that:

1. A legal relationship exists i.e., Father and child.
2. The person claimed from has the necessary means. NOTE: parent must make an effort to work.
3. Person claiming must be in need of support.

Duties are shared between spouses on a Pro-rata basis⁷².

⁷⁰ Children's Act 38 of 2005, s18(2)(d).

⁷¹ Mentz v Simpson 1990 (4) SA 455 (A).

⁷² Lamb v Sack 1974 (2) SA 670 (T).

Duty is extinguished based on the child's capabilities. Hence, a minor who is rich may not claim from a parent, while a poor major, despite being 18 (major) might still have a claim for maintenance⁷³.

AFTER DIVORCE:

Regardless of whether married, unmarried, divorced etc. the duty to provide maintenance does NOT extinguish, not even at the age of majority, UNTIL the child can sufficiently support himself⁷⁴.

NOTE: THE MAINTENANCE IS PAID DIRECTLY TO THE PARENT WITH WHOM THE CHILDREN RESIDE, AND IS OFTEN COMBINED WITH SPOUSAL MAINTENANCE AWARD.

Important: In most cases, the child lives with the mother and the mother approaches the court for a maintenance order against her ex-husband/boyfriend on behalf of her minor child. However, if the child is above 18, while the duty to support continues in some cases⁷⁵, the major child must approach the court on his own, and the mother cannot act on his behalf any longer⁷⁶.

⁷³ Butcher v Butcher 2009 (2) SA 421 (C).

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

SHARIAH

The duty of maintenance rests upon the father solely and no one else is obliged to participate regardless of the earning capacity⁷⁷.

“But he (the father of the child) shall bear the cost of their food and clothing on equitable terms⁷⁸” – Al Quran.

Even if the child changes his faith, as long as he is in need of money, the duty remains on the father to provide money to his child⁷⁹.

The duty of maintenance terminates upon: Majority or if the child has the means whether he is a major or minor. Furthermore, the duty to provide maintenance to his daughter terminates upon her marriage⁸⁰.

If the son has reached puberty, the father will not be obliged to provide maintenance UNLESS⁸¹:

- The son is incapable of earning a livelihood.

⁷⁷ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 76, page 95.

⁷⁸ Al Quran 2: 233.

⁷⁹ Al-Hidayah fi Sharh Bidayat al-mubtadi (1197), by Burhan al-Din al-Marghinani, Chapter 76, page 97.

⁸⁰ Durrul Mukhtaar 263; Raddul Mukhtaar ala Durrul Mukhtaar 612/3; Fathul Qadeer 410/4

⁸¹ Fataawa Qadhi Khan Fataawa Hindiya 563/1; Ahsanul Fataawa 462/5; Imddadul Fatawa 5/482.

- The son is deeply engrossed in Islamic studies, which studies the father had consented to.

However, it is important to note that maintenance is reasonable maintenance and a father is only liable to provide things which are termed necessary e.g., Housing, clothing, food, basic deeni education.

AFTER DIVORCE

Divorce has no effect in Islamic law in relation to maintenance and parental duties. The father remains solely liable for maintenance and the mother remains absolved of such duties. There is no pro-rata apportioning regardless of the earning capacities.

However, very importantly, as mentioned above, upon a child reaching puberty, or a mother remarrying, the right to primary custody (now referred to as care) is transferred to the father. IF the mother refuses to allow or the child himself/herself refuses to live with the father despite him/her being required to, the father is not obliged to provide maintenance.

THE INCONGRUITY

The duty to provide maintenance is the duty of the father solely. Unlike South African Law, Allah Ta'ala has made it obligatory for only the father to provide maintenance. Even if a mother agrees

to contribute, this is merely a donation and an obligation shall never be binding. Whilst a signed agreement in South Africa is enough to execute on, in the court of Allah it is otherwise. Hence if the mother was compelled by the law to unwillingly sign an agreement in conflict with the Shariah, her renegade from this 'agreement' is not breach of agreement since there was no genuine agreement from the very beginning. And thus, the husband must have Taqwa (Fear of Allah) NOT to approach an attorney to take legal action against her.

Furthermore, should a child themselves or mother refuse permission (in respect of the child) to go into the custody of the father at the prescribed time and age, the father will be entitled to refuse payment of maintenance as per the laws of Shariah. This is a major difference from South African Law which separates issues absolutely i.e., failure to provide custody cannot lead to failure to give maintenance.

If a mother provides maintenance with the agreement that the husband must pay her back, it will be obligatory for him to pay her back as soon as he has the means.

It is important to note that maintenance in terms of the Shariah, in comparison to the South African Law, is vastly incongruent. Shariah requires only 'necessary' maintenance. It would not be reasonable to claim amounts for football academy training, or baking lessons.

MEDIATION

Primarily governed by the Act⁸², the role of mediators during divorce proceedings have become increasingly popular, and in fact, are becoming slowly necessary. In a landmark case⁸³, the judge in fact capped the fees of the attorneys involved in the matter due to their failure to advise their client to mediate before they decided to litigate.

The cost of litigation is unaffordable to the masses, and remain payable by a party even in the event of failure. For this reason, mediation is invoked, in which an impartial mediator is appointed, in a setting which is non-adversarial and rather, more affable and amicable. This can be conducted in an informal setting wherein spouses voice their demands and the mediator attempts at finding a settlement between the parties.

The Mediator does not play the role of a judge but merely finds a solution fitting for both parties.

Mediation, besides being far less expensive than litigation, is advisable to any couple going through a divorce especially where there are children involved. This is due to the emotional strain which litigation causes, which mediation seeks to eradicate. Furthermore, with children involved, it means a 'clean break' in communication is often unachievable and necessitates for a more

⁸² The Mediation in Certain Divorce Matters Act 24 of 1987

⁸³ MB v NB 2010

cordial relationship between the parties for the interest of their children.

“Settling the matter in court generates grudges between people. If they reach a settlement, it is in accordance with the Laws of Allah, let the judge (scholar) approve it, and if their agreement is not in accordance with the rulings of Shari’ah, let the judge cancel it⁸⁴” – Hazrat Umar Bin Khattaab (Radiallahu anhu).

“Strive to work out agreements among people when it is not clear who is in the right, or if they are related, for settling issues in court generates grudges⁸⁵” – Hazrat Umar bin Khattaab (Radiallahu anhu) advice to Hazrat Muaawiyah (Radiallahu anhu).

NOTE: ANYTHING SAID IN MEDIATION IS NOT BINDING, AND STRICTLY CONFIDENTIAL. A MEDIATOR CANNOT BE SUBPOENAD TO TESTIFY IN COURT EITHER. ONLY UNTIL A SETTLEMENT AGREEMENT IS SIGNED CAN ANY AGREEMENT BE BINDING. UNTIL THEN, IT IS A FRIENDLY, LESS EXPENSIVE AND EMOTIONALLY CONDUSIVE ENVIRONMENT. HOWEVER, IF THE AGREEMENT IS VALID IN TERMS OF THE SHARIAH, IT MAY BE BINDING REGARDLESS OF THE COURT HAVING PASSED JUDGEMENT OR NOT.

⁸⁴ Tareekh al Madeenah, 2/769; Mawsoo’ah Fiqh Umar Ibn al-Khatab, p726.

⁸⁵ I’lam al-muwaqqi’een, 1/108.

PARENTING PLANS

The end goal of a mediation process is in reaching a settlement between the parties, which would incorporate within it a 'Parenting Plan'. Regulated by the Act⁸⁶, these plans seek to provide certainty between parents (mainly those not living together) to avoid future disagreements. A Parenting Plan must be approved by a Family Advocate to ensure it is in the best interests of the child, before the Court will approve of such agreement.

Section 33(3) provides the typical aspects addressed in a parenting plan such as:

- a) Where and with whom the child is to live.
- b) The maintenance of the child.
- c) Contact between the child and parties involved.
- d) The schooling and religious upbringing of the child.
- e) Where the child will spend birthdays, mothers' day, fathers' day etc.

⁸⁶ Section 33 of the Children's Act

SHARIAH

Consent and agreement between spouses in regards to their children is preferable in Shariah. It must, however, be borne in mind that the agreement is required to remain in compliance with the Shariah. It cannot, for example be agreed between the spouses that the father will pay for Piano Lessons, as music is haram. Whilst a parental plan is binding in terms of the law, if the couple discover from a trusted Aalim (Islamic Scholar) that a certain aspect of the agreement was not in compliance with the Shariah, both spouses must agree to amend the parental plan to have it in line with the Shariah.

LEGAL LEGITIMACY TO CONCERNS OVER A PROPOSED MUSLIM MARRIAGES BILL

There have been attempts by some religions to have their marriages constitutionally recognized whereas other religions have not.

Post democracy, there were attempts by individuals in the African communities to have their marriages legally recognized. This led to the advent of The Recognition of Customary Marriages Act⁸⁷.

African marriages – referred to as ‘customary marriages’ have now had their marriages recognized, albeit in a more regulated manner. According to the Act⁸⁸, a man, married in terms of customary laws, must apply to the court if he wishes to marry a further woman so that the court may make a determination into how the matrimonial system will be governed. Furthermore, notice must be given to the first wife in this regard. In the case of *MM v MN*⁸⁹, the judge ruled that where a husband marries a second wife without prior application to court, the second marriage is void.

The above is mentioned to provide the reader with the practical implication which must necessarily flow from constitutional recognition. Quite frankly, any person looking for legal recognition cannot request ‘legal’ recognition – (which standard is based upon

⁸⁷ 120 of 1998.

⁸⁸ Ibid at Section 7(6).

⁸⁹ 2010 (4) SA 286 (GNP) at para 27

the constitution) without being subjected to the constitution. This is a logical fallacy.

In the Islamic environment, there has been an attempt to pass the so-called Muslim Marriage Bill. Unfortunately, without even lamenting over the implicit or future legal consequences which will follow, the Bill itself has been requesting such provisions expressly.

- I. According to clause 8, whilst **polygamy** is permitted, application must be made to the court for prior approval, and existing wives must be joined to the application. Then, a secular judge, without an iota of Imaan, will need to verify whether the husband is able to maintain equality as per the Quran Shareef.

ISSUES:

1. How is he learned? Who is learned?

A fundamental issue, above many others, is how a judge would be able to make a determination of what constitutes equality. An ignorant response to this would be “Equality is objective, it requires merely a consideration of facts”. However, when a fact finding is done, it would most certainly evaluate the life of the first wife. Hence, if for example the first wife is merely living on bread, barley and milk, despite the court being able to conclude that the husband will be able to provide such basic items to the second wife, the court will most certainly hold the view that based on the adversity of the man, he should rather use the funds intended to

be used on the second wife, on the first wife and improve her condition instead. This leads to the problem of HOW IS HE LEARNED?

Our Nabi Sallallahu alaihi wasallam's wives did not have luxury. They would go days without food, but there was no one who prohibited a further marriage on this basis. Hence, practically speaking, had Nabi (Sallallahu alaihi wasallam) been alive in this society, in South Africa, his polygamous marriages would have been annulled in a court of law. Na'uzu Billah.

2. OBLIGATION DOES NOT SUGGEST ENFORCEABILITY

A further issue is that, it is not for the court to ensure 'equality' prior to the solemnization of a marriage. This 'equality' is a duty of the husband after his marriage. If he fails to do it, he will be answerable to Allah Ta'ala. Just as equality to co-wives are mandatory, so too are aspects such as praying. Do the courts assume the position of researching whether a prospective wife reads her 5 times prayer before they enforce a marriage?

- II. Despite the fact that marriages OUT of community of property with the exclusion of the accrual system is OBLIGATORY in Islam, and whilst the default position of this will remain, spouses will be able to choose whether they wish to have their matrimonial system regulated otherwise.
- III. A further issue is that in terms of clause 8 (3) of the Bill, a court will be able to make a ruling on the division of the

estate which it deems fair regardless of the fact that marriages in Islam is done out-of-community-of-property.

- IV. **The duties of a woman**- Almost all women who leave the home early in the morning will confirm their unwillingness to do so. Half of which cry before and after work, and wish they needed not to. In corporate, a woman will further confess to the sexual perversion which she has to endure. Islam has upheld the sanctity of a woman, understanding the nature of their being (I assume this will be viewed as sexist), and has promoted the relationship between the mother and her child to the level that NO (ZERO) obligation is on the mother to provide for her children, and the husband is SOLELY responsible. However, ironically, in an abortive attempt, with the primary underlying motive of promoting women's rights, masked in a term called "Muslim Marriage Bill" the Bill in fact creates an onerous duty on woman in that woman who earn more will have to provide more as maintenance will be conducted on a pro-rata basis.
- V. A further problem which the promoters of the bill have raised is the inequality in terms of the **talaaq** period for men and women. And further, that in terms of **witnessing**, one male = two women. I have somewhat addressed this issue, partially, under the requirements of marriages above. However, I would like to voice my dismay at this so-called conundrum. In my opinion, objections to these aspects are tantamount to kufr. These were requirements which were not formulated by the Ulama (who have become

scapegoats in today's time) but rather by Allah's Nabi (Sallallahu alaihi wasallam). Which means that it was ordered by the Almighty Allah Ta'ala himself. During inter-religious debates, it is more understandable when issues as such are raised, as in such events, debaters have to explain the underlying wisdom behind such injunctions in lieu of explaining the wisdom behind the requirement. However, as Muslims, we need not know the wisdom behind certain rulings, and merely "because Allah Ta'ala has willed it" is sufficient and an adequate reason to obey it. Allah Ta'ala can rule arbitrarily should he wish to. This does not, and cannot affect our subservience to him, JALLAJALAHU. Hence, my sincere reproach to those persons who are finding issues in the laws of Allah Ta'ala and are trying to modify and revamp it in accordance to man-made idiot laws.

In my humble opinion, one of the underlying root causes of the proposed marriage bill, and its underlying motive i.e., destitute helpless women, is society's dislike and aversion towards **polygamy**. A sunnat of our beloved Nabi (Sallallahu alaihi wasallam) has fallen prey to: (1) public lectures advising the masses against it by muslim scholars themselves, (2) 'memes' and (3) 'vines' mocking the sunnat which, contrary to popular belief, was to uphold the rights of woman, and an instrument in spreading the deen. Allah Ta'ala announces "Marry from the women with whom you are pleased, two, three or four"⁹⁰

⁹⁰ Chapter 4-Surah An-Nisaa- Verse 3

In our secularized minds we have concluded “It was okay then but not now” without the intervention of the angel Hazrat Jibraeel (Alayhi salam) giving us wahi (divine revelation only given to prophets) in this regard. Allah Ta’ala has declared “Today I have perfected your religion for you, and I have completed my blessing upon you, and I have approved Islam as your religion⁹¹” Hence, there is no possibility of any ignoramus to conclude that in their foolish minds they “feel in today’s society it should not be acted on”.

Women are suffering from extreme adversity, and are rendered destitute with kids with no one to look after. As opposed to the promotion of men with means and capability to look after and care for these women, which is a practice sanctioned, not by “the Ulama” (as people like to mock), but by Allah Ta’ala himself, we are instead ready to splurge millions in legal fees looking to recreate and change the laws of Allah Ta’ala.

⁹¹ Chapter 5-Surah Al-Maidah – Verse 3

CONCLUSION

InshaAllah the above has clearly outlined the vast differences between the laws in South Africa in regards to Family Law when viewed against the Shariah.

One of the most commonly used phrases in today's time is "we have to follow the law of the land". It should be clearly and unequivocally announced that NO SUCH HADITH EXISTS. This is an intoxicating and misleading phrase used by people to justify their miscreant acts.

It begs the question, if the law forced one to abandon the act of praying, fasting etc. would one abandon such on the strength of "follow the law of the land"? As Muslims we have utterly failed to withstand governmental pressures in their attempts to gradually alter our deen to have it in line with the constitution.

If a court of law orders for maintenance to be paid by the wife to her ex-husband on the basis of her earning capacity, it is the DUTY of the husband to refuse this on the basis that he is totally liable and no duty rests on the wife whatsoever. No court of law needs to advise you to uphold the deen of Allah Ta' ala.

"WHAT! DO YOU SEARCH FOR THE LAW OF JAAHILIYYAH?" – Al- Quran.

ADVICE TO:

All: Family is an amaanat. More than a duty, love should be incidental.

Men: Women are a precious delicate creation and are far more emotional than we are. It is truly pathetic to drive women to an act of sin based on an act of neglect on your part. Look after your women, and do not drive them to a point in which they are willing to find haraam means of financial protection. At the time of Hazrat Umar Bin Khattaab (Radiallahu anhu), a woman came to complain to him that her daughter was to be divorced. He immediately asked the husband as to the cause. The man submitted that it was his right as he had grown out of love for her. At this Hazrat Umar Bin Khattaab (Radiallahu anhu) famously remarked **“Must every house be built upon love? What about Loyalty & Appreciation?”**. He advised that the man’s wife had raised the kids, given up other pursuits in lieu of running the household and to now leave her on the basis of falling out of love would be dishonorable.

Women: Never act upon, or seek legal relief in instances which go against the deen of Allah Ta’ala. As hard it may be to swallow, rather die a beggar and in a state of helplessness than gain so called success at the expense of your deen.

All attorneys/advocates and akin: It is NOT permissible to act on behalf of someone who is seeking relief contrary to what the Shariah has outlined. You will be aiding in an act of sin, and will be sinful too. Rizq (wealth/sustenance) has been predestined for you already, and you will not be losing out on the strength of turning

down haraam unlawful work. In fact, Allah Ta'ala will reward you for your abstention.

“And whoever fears Allah - He will give him a way out and provide for him from where he does not expect. Whoever puts his trust in Allah, He will be enough for him. Allah always achieves His aim. Allah has appointed a measure for all things” (Al-Qur'an 65:2-3).

May Allah grant us all taufeeq to practice upon the deen correctly, without cutting corners when it suits us.

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As a law student, I had studied at The Witwatersrand University. The prescribed textbook for Family Law was the one cited above. In fact, certain of our lecturers had actually written certain chapters in the book. For this reason, it was in my possession, and included references, which made it a credible source.

2. *Al-Hidayah fi Sharh Bidayat al-mubtadi* (1197), by Burhan al-Din al-Marghinani.

When I was growing up if I did something unusual, which led to a reaction by someone, I would justify my action by advising that such behavior was sanctioned by “my moulana”. This was a full stop to the debacle. However, and rightfully so, this no longer stands, as people now ask “which moulana” and then “what is his proof”. I don’t view this as problematic as growing up we did a lot of things which we thought was religious but were merely... nothing. A classic example would be how we folded our musala (prayer mat) after salah thinking that shaitan (the devil) would read on it otherwise. Quite frankly, it would be lovely if shaitan prayed.

However, problematically in today’s time, even saying “because Imam Abu Hanifa said so” does not satisfy the demands of man. And in fact, many are they who no longer deem it necessary to ascribe to a particular Imam.

Quite briefly, for those not aware of what the schools of jurisprudence refers to: The Quran was sent to mankind as a book of guidance. It laid down certain rules and regulations. However, the Qur'an does not mention things specifically and particularly. For example, specific drugs and whether they can be consumed or not. Rather, principles are derived from broader injunctions and then applied to provide a ruling on the specific issue. E.g., the Qur'an does not mention that weed is haram. Rather that intoxication is haram. Hence, weed is haram. These deductions were made by jurists who would study the injunctions of the Qur'an, and the teachings of the prophet Muhammad (Sallallahu alaihi wasallam) (The Sunnah) and then lay down certain rulings. It should be borne in mind that often both jurists would have the same information but rule differently on it. E.g., When the Negus of Ethiopia, who provided refuge to Muslim expats, had died in Ethiopia, the prophet Muhammad (Sallallahu alaihi wasallam) performed the funeral prayer in Medina for him. The famous Imam Abu Hanifa (Rahmatullah alaih), ruled that generally this is not permissible, but that it was a concession made for the Negus. Whereas Imam Shafi (Rahmatullah alaih), ruled that based on this occurrence, it is deemed permissible to perform the funeral prayer despite the dead's absence in that area. This brief summary should outline that the difference in opinion is not a matter of belief or disbelief but rather both were rightly guided but arrived at different outcomes.

Anyways, from amongst the 4 famous schools of jurisprudence, the Hanafi school is the most common in the Muslim world. I have grown up following the jurisprudence of Imam Abu Hanifa (Rahmatullah alaih), and the book chosen as referenced above is

written in the 12th century by a scholar who had followed his creed as well. The author of the book is accepted by all Hanafi scholars as it is a codified written version of the Hanafi jurisprudence. NOTE: There are minor differences between certain Madhabs, and this is why it is important to remember that the above rulings are for the Hanafi Madhab, which make up the bulk of South Africans.

Failure to accept a ruling as per the book will result in a rejection of the Hanafi school on its whole. One cannot claim “I follow Imam Abu Hanifa but, on this issue, I differ”. This is rejection then of the entire creed. Which will then obviously surmount to saying that, YOU, in the 21st century, are claiming that YOUR opinion (which most times are not even remotely backed by texts) hold a better opinion than Imam Abu Hanifa (Rahmatullah alaihi), himself, who was alive at the time of certain companions of the Prophet Muhammad (Sallallahu alaihi wasallam) himself. This, in my opinion, is idiocy.

3. Mujlisul Ulama of South Africa publications.

More commonly known as “The Majlis” is an organization headed by Honorable Mufti A.S Desai. Mufti A.S Desai is world renown and has published hundreds of books. Due to his steadfastness to the deen, and his unwavering nature, I have grown particularly fond of him and have been awe-struck by the amount of ILM which Allah Ta’ala has honored him with. “But he’s very aggressive” is perhaps the most commonly used phrase when discussing the Honorable Mufti Sahib. To which my common response is “If your math teacher smacked you and told you $1+1 = 2$, no matter how harsh

the teacher was, the fact remains $1+1 = 2$.” We need to learn how to separate SUBSTANCE ($1+1=2$) from FORM (The alleged harshness). Often the substance is diluted by virtue of the form. Mufti AS Desai has his proofs for his alleged harshness, this should not negate the substance which he professes.

From a legal perspective, anything claimed, must be backed by authority. To date, every text written by Mufti AS Desai always has authority to back the claim. There is never reliance on inference where there is clear precedent. May Allah honor Mufti Sahib, and keep him as one of Allah’s protectors of the deen.

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