NIKAH IS THE CONTRACT

OUR RESPONSE TO THE FLOTSAM OF A LEGAL AUNT

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NO NEED FOR LEGALISATION OF MUSLIM MARRIAGES

Aunt Waheeda Amien who happens to be a law professor at the University of Cape Town has written some silly and lamentable drivel pertaining to Muslim marriage contracts. From the bunkum the aunt has penned to paper, it is quite clear that her *jahaalat* regarding the Shariah is colossal. While the aunt may be a professor of kuffaar law, her awareness of Islamic Law is scandalously meagre, hence she blunders from blunder to blunder. Let us scrutinize what she disgorges in her article in the Cape Argus, captioned: *It's time to legalise Muslim marriages.*

The *khala* says: *"In particular, Muslim women are disproportionately affected by not being able to either enforce all the sharia rights that arise from a Muslim marriage or legally challenge decisions of the ulama (religious authorities) that discriminate against them."*

Firstly, the aunt herself does not subscribe to all the Shariah rights that arise from a Nikah. Thus, mentioning these shariah rights is hollow and deceptive. There is no validity in the aunt's contention. To which 'sharia' rights does she refer. She has not defined these rights which in all probability due to her *zanaadiqah* she does not subscribe to, hence she audaciously and baselessly maligns the ulama with discrimination against women for handing down decrees commanded by the Qur'aan and Sunnah as propounded by the illustrious Fuqaha and Aimmah-e-Mujtahideen of the Salafus Saaliheen era.

Disgruntled wives, and even those who have valid grounds for divorce, generally, by far and large, resort to the Ulama primarily to enlist their aid in pressurizing the husband to issue

Talaaq or to obtain Faskh (annulment. They at least do understand that minus Talaaq/Faskh they can never remarry. It is indeed rare that disgruntled wives come to the Ulama for resolving maintenance and custody issues. Only such women who have some fear for Allah Ta'ala and who believe in the accountability in the Divine Court on the Day of Qiyaamah, approach the Ulama on such issues should the husband be recalcitrant.

The disgruntled woman who has no intention of reneging from Islam, is only interested in obtaining Talaaq/Faskh when she approaches the Ulama. As far as maintenance and custody of the children are concerned, she sells her Imaan and betrays Allah Ta'ala and the Rasool for the miserable crumbs of the dunya. She takes the route to the kuffaar court, and she enlists the aid of legal *khalas* who are Muslim in mere name.

The legal aunt cannot produce a single case of Ulama discrimination against a woman in a matter of divorce and custody. On the contrary, we have seen that evil ulama generally discriminate against the husband when a woman cries on their shoulders. Without following the due Shar'i process, the ulama-e-soo' grant 'faskh' which is not valid in the Shariah. They discriminate against the husband by denying him his Shariah rights to even state his case. They will debase their intelligence and compromise their Imaan by even advising the woman to run to the kuffaar court for maintenance, etc.

The contention that Muslim women are 'disproportionately affected' is a monumental LIE. The reality is that the disgruntled woman of weak or of no Imaan believes that Allah Ta'ala is discriminating against her, hence she is not satisfied with the decree of the Shariah which the Ulama hand down.

This unfortunate legal aunt is in abnegation of the Law of Allah Ta'ala – the Law which for her is discriminatory – but she tries to dexterously ascribe the Shariah's decrees to the personal views of the Ulama in order to save herself from blatant *irtidaad* which rejection of the immutable Law of Allah Azza Wa Jal entails.

"The shariah rights that arise from a Muslim marriage" are unacceptable to the *khala*. Her harping on it is devious and odious. She should delete this aspect from her equation of 'disproportionate affect'.

Legally challenging the decrees of the Shariah is *kufr* which expels the challenger from the fold of Islam, and this is precisely what the aunt is advocating. The Qur'aan Majeed firmly and explicitly rejecting and denouncing the ilk of the aunt, says:

"By the Oath of your Rabb! They will not be Mu'min (i.e. they will not have valid Imaan) until they appoint you (O Muhammad!) to judge their mutual disputes, and then they find no aversion in their hearts for what you have decreed, and they wholeheartedly submit (to Allah's decree)."
(An-Nisaa', Aayat 65)

Those who are clamouring for the kufr MMB (so-called 'Muslim' Marriages Bill) are in stark contravention of this Qur'aanic Aayat, as well as other Aayaat, Ahaadith and explicit rulings of the Shariah.

A incontrovertible fact of the Shariah is that no MMB measure and no secular law will ever be able to release a Muslim woman from her Nikah. This right remains immutably in the hands of the husband for Talaaq, and in the hands of the Ulama for Faskh. So it matters not what the courts will decree and what any so-called

'Muslim' marriages Act may be promulgated, the bottom line is clearly defined.

Disgorging another stupidity, the legal aunt avers: *"It is unfortunate that although sharia allows parties to enter into written marriage contracts, South African Muslims seldom enjoy that privilege. One reason could be that prospective brides fear that their fiancés will not marry them if they insist on having a marriage contract."*

Whilst this averment is bunkum, let's entertain the aunt's proffered reason for not enjoying the 'privilege'. How will any MMB promulgation alter the reality? Just as the men refuse now, so too will they refuse then. This brings the aunt back to square one.

It is not only in South Africa that marriage contracts are not in vogue. 99% of the Ummah does not believe in encumbering the Nikah with contracts. It is only in exceptional cases that contracts are considered. From the very inception of Islam to this day, marriage contracts have never been part of Islamic custom. Ignorance of this fact has caused the aunt to utter drivel in this regard. Marriage contracts are rarities in the Ummah, world wide. A smattering of modernist zindeeqs and liberals may be indulging in such western kuffaar type contracts.

While there are valid reasons for valid Shar'i marriage contracts, these are exceptional, and cannot be forged into a norm. The Islamic system has its roots in the Qur'aan and Sunnah. Islam places neither emphasis nor virtue on such contracts which are customary with the kuffaar, especially western kuffaar whose culture has been adopted by the modernists in the Muslim community.

Stating another ambiguity, the legal aunt avers: *"This fear is usually borne out of imbalances of power between couples."*

If the aunt eliminates the ambiguity by defining the 'imbalances', it will enable us to present a Shar'i rebuttal of whatever bunkum 'imbalances' she is able to conceive of. In all probability, the hallucinated 'imbalances' relate to the Qur'aanic concept of inequality between man and woman, the foundational principle stated in the Qur'aan being: *"And, for men is a rank over them (women)."* There is no consequential imbalance to any Law of Allah Azza Wa Jal.

Uttering more confusion, the *khala* says: *"Yet a marriage contract does not only provide protection to women. It enables both parties to assert their rights when a marriage terminates upon divorce."*

In Islam the Nikah contract is the be-all contract which provides protection to both parties. In normal circumstances there is no need for an extra contract to encumber the marriage. Such encumbrance is of the ways of the kuffaar. The Shariah has attached rules, regulations, rights and obligations to the Nikah contract. All of these are cast in rock and may not be tampered with.

The rights and obligations stemming from Nikah and Talaaq are well defined by the Shariah. There is no contract required for the application of these rights and obligations. A marriage which comes without an inherent contract requires a contract, not an Islamic marriage. Both parties are able to assert their rights presently on the basis of the Nikah contract. The problem is that some parties are not happy with the rights and obligations defined by the Shariah, hence their unjustified grievances which are tantamount to kufr.

Let us examine the terms of a marriage contract suggested by the *khala*. She says: *"While many South African Muslims follow a practice of maintaining separate estates, the contractual nature of a Muslim marriage enables them to regulate their estates differently."*

This is a red herring concocted to hoist kuffaar systems on Muslims. Firstly, the vast majority of Muslims, not just "many", maintain separate estates, and this is the Islamic norm. The veiled suggestion of fusion of estates suggested by the aunt is baseless. It is devoid of Shar'i substance. The estates of the parties always remain separate. No system of fusion of estates of the husband and wife is valid in the Shariah.

Then the aunt says: *"For example, they could include a term that enables them to have a combined estate so that if the marriage must end, there would be a 50-50 split of the assets accrued during the marriage."*

This is a palpable LIE. The aunt is arguing for the kufr community of property system. It is haraam to include any such term in a Muslim marriage contract. There is absolutely no basis in the Shariah for this haraam concoction. The "contractual nature of a Muslim marriage" does not allow for this kufr system.

All assets accrued during the subsistence of the marriage belong to their respective owners when such ownership is specified at the time of the acquisition of the assets. If the family – husband, wife and children - jointly work in a family business, then all accrued assets belong to the husband/father. The 50-50 kufr concept does not apply.

Income generated by the wife in her personal capacity belongs solely to her. Gifts made to her and the proceeds of inheritance

are her property solely. Her assets will not be fused with the husband's assets to produce a joint kufr type estate. The 50-50 ruse proffered by the *khala* as a subterfuge for promoting the kufr community of property concept is just not acceptable to the Shariah.

Expounding another preposterously haraam term, the aunt avers: *"Or they could decide to keep their estates separate throughout the marriage, but agree that if one contributed to the maintenance or increase of the other's estate, then the contribution should be compensated for by the other part."*

This term is false and baseless in terms of the Shariah. The aunt has merely offered a figment of her whimsical imagination which is bereft of even a vestige of Shar'i substance. Both estates are inherently and automatically separate. There is no need for any decision to cleave an imaginary fused estate. It should be well understood that In Islam marriage is not a business partnership nor is the husband-wife and the father-children relationships an employer-employee system. The head of the family is the man. All members of the family work together, eat together and live their lives together. This family system in Islam is not governed by trade and commerce principles. At the end of the day whatever the chief of the home owns belongs to his wife and children by way of Inheritance.

According to Islam, the family members working in the family's business are not entitled to remuneration nor profit. What they are given and whatever they eat from the business are by way of rights stemming inherently from the Nikah contract which remains unencumbered in terms of the Shariah. Thus, the kufr concept of accrual cunningly posited by the aunty is baatil and haraam.

The *khala* says: *"...It would be advisable for the parties to keep a record of purchases made during the marriage so that each has updated proof of whatever contributions she or he made. This becomes important when there is a legal dispute as a judge will only be able to make an award for contributions if, first there is proof of payment, and second, there was an agreement that the contributions should be compensated for."*

It appears that the legal aunt has no conception of what Nikah entails. She appears to be ignorant of the Islamic ethos which has to permeate marriage, and of the consequences of marriage, hence she suggests that the marriage be fitted into a stupid, cold straightjacket with the shadow of divorce perpetually looming over the family. Imagine keeping receipts for loaves of bread and claiming compensation after decades in the event of the break-up of the marriage. The aunt's thinking is grotesquely bizarre.

Furthermore, the arrangement suggested by the *khala* is untenable even in terms of the dry and cold juridical precepts of the Shariah. Fiqh too does not condone this stupid system suggested by the aunt. A clear-cut loan will be a debt, not impromptu contributions of loaves of bread, litres of milk, bottles of haraam coke and carrion chickens. Whatever the wife spends on the family of her own wealth will be by way of kindness and love unless she specifies the loan amount and leaves no ambiguity in the fact that the amount she is giving is a loan to the husband. There is a difference in the Shariah between loans and impromptu contributions. The former is a debt, not the latter.

The aunt displays a ludicrous lack of awareness of Islamic custom in her statement:

"The parties could record the mahr (dowry) that is agreed upon and stipulate when payment will be made."

Why is the aunt ignorant of the simple fact that what she is suggesting has been the norm in the Ummah for many centuries. All Nikah certificates state the Mahr amount and the terms of payment. What has induced the legal aunt to suggest a term which is an entrenched practice in the Ummah since time immemorial?

Another ludicrous suggestion by the aunt is: *"The contract could also record the wife's right to obtain khula (compensation) without requiring her husband's consent in exchange for the return of the mahr. Although some members of the South African ulama think that khula can only be granted with the husband's consent, there are many fuqaha (legal jusrists) in Muslims countries who believe otherwise. For example, Egypt has codified Khula into its family laws as a form of divorce available to the wife that does not require her husband's consent."*

The effect of this hybrid, convoluted, haraam and baatil concept of 'khula' is ultimate zina should the woman strike up a relationship with another man on the understanding that 'marriage' to him is valid on the basis of the hallucinated termination of her Nikah with her husband.

The *khala* does not know what is *khula'.* She has displayed lamentable ignorance of the meaning of *Khula'.* She translates *Khula'* as "compensation". This is incorrect. Literally *khula'* means to take out, to draw out, to remove. In the context of divorce it is a ***mutual agreement*** between the husband and wife to terminate the marriage in lieu of a monetary sum to be paid by the wife to gain her freedom. The Qur'aan describes it as a

system of "ransom" whereby the wife pays a "ransom' to gain freedom from the Nikah captivity of the husband.

Without the *mutual agreement* of the parties, *Khula'* is not valid in terms of the Shariah. It cannot be imposed on the husband against his wishes nor can a husband impose it on the wife. Due to massive ignorance, modernists have understood that *Khula'* is an automatic right which the wife can impose on the husband.

The example of Egypt proffered by the aunt is laughable. Egypt is a kufr state. It is governed by secular kuffaar, anti-Shariah laws. It is not an Islamic government. The example of Egypt is devoid of Shar'i substance, and has to be discarded from the equation. The same applies to each and every other Muslim country, for all of these countries are governed by kuffaar, fujjaar, murtad and zindeeq rulers. There is not a single Muslim country where Shariah law is implemented.

As for the so-called 'fuqaha' of this era mentioned by the *khala*, they are not Fuqaha in terms of the Shariah, they are liberal morons. The legal aunt has no understanding of the meaning of the term Fuqaha. When we say Fuqaha, the reference is to the Fuqaha of the Salafus Saaliheen – the Mutaqaddimeen and Muta-akh-khireen Fuqaha (Jurists). The modernists and liberal of this age mentioned by the *khala* are not even at kindergarten level in relation to the Fuqaha of Islam. There is complete *Ijma' (Consensus)* of the Fuqaha that *Khula'* cannot be imposed on the husband nor does it require his consent. It requires ***mutual agreement of the husband and wife.*** The aunt should educate herself better before barging into a domain for which she is not qualified. We advise that she should adhere to secular law for which she appears to be qualified.

She further blunders with her baseless contention that only *"some members of the South African ulama think khula can only be granted with the consent of the husband".* From whence did she extravagate this information which she baselessly disgorges? Her extrapolation is ludicrous. There is consensus of all genuine Ulama of South Africa that the validity of *Khula'* is reliant on ***mutual agreement of the parties.*** The aunt should present the names of the 'ulama' who are in denial of this fourteen century, immutable law of Islam. Morons are not ulama. Modernists/liberals who mutilate the laws of the Shariah with their whimsical opinions and convoluted interpretations concocted in the light of their western education, are not Ulama.

Making a mockery of her 'knowledge' of Islam, the aunt avers: *"The parties could agree, should the husband take a subsequent wife, that the consent of the existing wife should first be obtained, failing which she will have the right to end the marriage without requiring talaq from her husband."*

A marriage cannever end without Talaaq or Faskh. What the aunt suggests can be incorporated as a term in a *Tafweedhut Talaaq* agreement whereby the husband delegates to the wife or anyone else the right to pronounce Talaaq on his behalf. The marriage does not end without Talaaq. Talaaq has to be pronounced by the person to whom the husband has delegated this right. The fact remains that the one who will execute the Talaaq, be he/she the wife or anyone else, is empowered by the husband to do so. The aunt is trapped in confusion. Her pedantic arguments are silly and devoid of Shar'i substance.

Regarding HIV testing as a term in a marriage contract, the aunt says: *".....it is directly linked to circumstances involving multiple sexual partners."* The aunt has blurted out this drivel without applying her mind. The issue here is a man with one wife

intending to take a second wife. Where does the factor of "multiple sexual partners" enter into the equation? She is casting aspersions on the first wife, hence the need to submit to the debasement of HIV testing for the confidence of the second intended wife.

The factor of "multiple sexual partners" relates to zina – fornication and adultery. If a drug addict or a faasiq-faajir intends to take even a first wife, there is justification for a debasing test, not when an honourable man whose wife is not a prostitute nor is he a man given to the vagaries of moral turpitude, intends to take a second wife.

The legal *khala* proffers the following drivel advice as a term for an Islamic marriage contract:

"As part of the husband's maintenance obligation, the parties could agree that the wife will be remunerated for breast-feeding, child-rearing, services rendered in the husband's business, and all household work that she performs or has performed. The agreement could stipulate that failure by the husband to adhere to these terms would afford the wife sufficient grounds to obtain divorce."

No honourable Muslim man will marry a robot or a maid of this calibre portrayed by the legal aunt. It is the obligation of the wife to attend to the home affairs. Rasulullah (sallallahu alayhi wasallam) had explicitly imposed the work of the house on the wife. The terms suggested by the aunt are callous, stupid and baseless, and has absolutely no truck with Islamic or Sunnah culture. Marriage is not a dry, cold commercial transaction. The aunt has no understanding of Islamic culture and custom, hence she seeks to hoist on Muslims ideas which are nugatory of the spirit and morality of Nikah.

It is the Waajib obligation of the wife to breast-feed her baby and to care for the home. In the first instance it is haraam for a woman to work in the business of her husband since all businesses nowadays are venues where much haraam and total abandonment of Hijaab are the norm. Secondly, should she work in such a capacity where she will not have to intermingle with the opposite sex, then too, the husband is under no obligation to remunerate his wife for such services. She is his wife, not a maid and not some faasiqah, faajirah receptionist/secretary with whom almost all employers have haraam dalliances. The aunt is bewitched by western culture which cannot be imposed on the Ummah.

What she has proposed is never grounds for Talaaq or Faskh, and it is haraam to entertain such a kuffaar-inspired term.

Blurting out plain kufr and notoriety, the legal *khala* states: *"The contract could record that the relationship between the parties will be based on equality and not the subservience of one to the other."*

The aunt has explicitly portrayed her kufr mentality and irtidaad in this disgorgement which is in violent conflict with the Qur'aan and Sunnah. The concept of equality between man and woman – husband and wife – is a purely western kuffaar intellectual miscegenation which has no place in Islam. The relationship in an Islamic marriage is the ***subservience*** of the wife to the husband. The Qur'aan states with emphasis: *"For men there is a rank above them (women)."* Besides this Qur'aanic aayat, there is a mass of Qur'aanic and Hadith evidence confirming the superiority of the husband over the wife. These have been discussed in other books published by us. Muslim society is not western kuffaar society. It is an Islamic

society whose system of life is derived from the Qur'aan and Sunnah, and which is poles apart from westernism.

The condition suggested by the aunt is kufr and haraam. It may never be inserted in a Muslim marriage contract.

The aunt, suggesting another term, says: *"The contract could also note that any form of domestic violence would enable the victim to end the marriage without requiring the consent of the perpetrator."*

Clearly, this aunt does not know what she blurts out. A woman cannever end the Nikah unilaterally without having been authorized by the husband. Such authorization is in the form of *Tafweedhut Talaaq (Delegation of Divorce).* This measure has always been available to women. At the time of the Nikah or prior to the Nikah, a *Tafweedh* agreement could be enacted whereby the husband authorizes either the wife or any other person to issue Talaaq at her/his discretion. Once the husband has issued this authority, he cannot retract it. The issue is left to the discretion of the one who has been authorized by the husband to administer Talaaq.

It is not permissible for Muslim women to lend an ear listening to the haraam flotsam advice of the *khala.* Any matrimonial contract suggested by her is baatil and haraam.

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MATRIMONIAL PROPERTY SYSTEMS

"MY SUNNAH"

"NIKAH IS MY SUNNAH"

So said Rasulullah (sallallahu alayhi wasallam).

Rasulullah (sallallahu alayhi wasallam) said:

"THE NIKAH WITH THE GREATEST BLESSINGS IS THE (NIKAH) WITH THE LEAST EXPENSES."

*** Nikah may not be commercialized with the encumbrance of the western concept of matrimonial property regimes.**

*** The rights of women ordained by the Shariah are just and equitable. The Shariah's equitability and justice cannot be superseded with western or any other secular concept of justice. What the Shariah has ordained for women is the Divine dispensation.**

*** Transmuting the divine Sunnah system of Nikah is tantamount to transcending the prescribed limits of Allah Azza Wa Jal.**

**** ANY KIND OF PROPERTY REGIME MAY NOT BE FETTERED TO THE NIKAH, BE IT HIBAH OR SHIRKAT. SUCH AN IMPOSITION IS BID'AH SAYYIAH (EVIL INNOVATION) AND THE ABNEGATION OF THE DIVINELY ORDAINED INSTITUTION. THIS BID'AH IMPLIES DEFICIENCY IN ALLAH'S SHARIAH.***

PREFACE

The modernist MPL clique, in league with Shaitaan, has plotted a new fitnah – a new bid'ah – with which to contaminate the Shariah. Awed by the concepts of the western kuffaar, some of these miscreants from the MPL clique are labouring to overhaul what they believe to be an out-dated Shariah by 'streamlining' it with kuffaar concepts and styles. One such new bid'ah which the miscreants are fabricating is the concept of matrimonial property regimes.

Following the kuffaar into the *'lizard's hole'* as predicted by Rasulullah (sallallahu alayhi wasallam), these modernist *juhhaal* are craving to encumber Islam's simple institution of Nikah with western-type matrimonial property systems which they are labouring to peddle under guise of the bid'ah being a Shar'i institution. The western system has matrimonial property regimes such as community of property and ante-nuptial contract including the accrual system which encumber non-Muslim legal marriages.

Since western culture has depleted the brains of these miscreants of spiritual fibre, the awful malady of inferiority is gripping their thinking, hence every system and concept of the western cult of life exercise a magical appeal for their damaged intellect. The clamour of gender equality and women's rights having been dinned into their ears, these miscreant modernist MPL votaries, are in the process of miscegenating some confounded matrimonial property regime under Islamic guise for imposing on Muslim marriages. This miscegenation is in reality in abnegation of the sacred and simple Nikah system which the Ummah has inherited from Rasulullah (sallallahu alayhi wasallam).

The MPL miscreants presenting their fraudulent property systems for imposition on Muslim marriages are deceptively

marketing their bunkum under Islamic colours and portraying their western orientated idea as if it is a valid Islamic *shirkat (partnership)* venture.

This article is presented in refutation of this new fitnah and bid'ah. It is imperative for Muslims to shun any type of matrimonial property system with which these miscreants are plotting to ensnare the ignorant and the unwary. Those Muslims who for some reason desire to obtain legal recognition for their marriages in terms of the law of the land, should opt for the secular matrimonial property regime known as the ante nuptial contract which ***excludes*** the accrual system. This is the only system which is acceptable to the Shariah. This secular system allows both husband and wife to retain full ownership of their personal assets; it does not create a fusion between the estates of the husband and wife, and above all it allows Muslims to ensure that their estates after their demise are distributed in accordance with the Shariah's laws of Inheritance.

Be alert and don't become entrapped in the bamboozling talk of secular lawyers and secular MPL molvis who have treacherously stabbed Islam and the Ummah in the back, and who are fraudulently marketing this new bid'ah of matrimonial property regime under the false veneer of *shirkat, and other Islamic sounding terminology.*

MUJLISUL ULAMA OF S.A.

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MATRIMONIAL PROPERTY REGIMES

Nikah in Islam is a holy but extremely simple institution. It is devoid of complexities and encumbrances which are inimical to this holy institution whose primary purpose decreed by Allah Azza Wa Jal is the perpetuation of the human race on earth.

While Nikah gives rise to rights, it does not create property or ownership rights and regimes as does the western kuffaar culture. Since the very inception of Islam Nikah has remained the simple institution which it was during the era of Rasulullah (sallallahu alayhi wasallam) and the Sahaabah. The teaching and spirit of Islam require that this sacred institution retains its simplicity. The emphasis on simplicity in the Nikah precludes exorbitant Mehr amounts despite the mehr being integral to Nikah. The simplicity commanded by the Shariah permeates the integral constituents of Nikah as well as the external paraphernalia such as the Walimah, hence according to the Hadith the marriage in which there is the greatest blessing is a marriage in which the least expenses are incurred.

The concept of a matrimonial property regime encumbering the Nikah is an alien concept acquired from the western kuffaar. Encumbering the Nikah with a matrimonial property regime or with any other monetary contract other than the Mehr will be an unlawful encumbrance, a bid'ah and *Tashabbuh bil kuffaar.* Such an encumbrance will be in imitation of the matrimonial property regimes of western civilization.

The writer of the article has laboured to encumber the Nikah with a property regime. He has not even attempted to assist the community with advice to act in accordance with the Shariah. His only concern is to encourage the adoption of a property regime. Since the kuffaar matrimonial property regimes are generally in stark conflict with every tenet of Islam, the writer seeks to implement the very same goal of such regimes albeit in

the name of Islam, hence the Shar'i nomenclature of Hiba, Shirkatul Milk, etc.

Although hibah and shirkat are Islamic acts, they are entirely unrelated to Nikah. Islam never envisaged encumbering Nikah with these monetary transactions. The substratum for these monetary dealings is not Nikah. The writer has clearly borrowed the monetary regime idea from the kuffaar. They have matrimonial property regimes encumbering their marriages, so, according to the understanding of the writer Muslims too should have their brand of matrimonial property regime. This then is the objective of the article. The article does not provide any guidance as to how Muslims should conduct their marriages or how best to circumvent secular laws to enable them to remain fully within the confines of the Shariah.

It is noteworthy that while the writer purports to discuss matrimonial property regimes of South Africa, he ominously ignores the one system which allows Muslims to fully comply with the teaching and spirit of the Shariah. That system is the exclusion of the Accrual System. While he mentions marriage out of community of property and marriage out of community of property with *inclusion of the Accrual system,* he is peculiarly silent about *exclusion of the accrual system.* In fact, this is the one system which he should have explained and promoted. If any one for some reason wishes to obtain legal (secular) recognition for his marriage, the only system which will be Islamically lawful to adopt is the ante nuptial contract excluding the accrual clause.

Under this system, there is no violation with the Shariah. There is no fusion of estates of the husband and wife. Each one retains ownership of his/her assets. Whether at death or divorce, the one has no claim on any of the assets of the other. This system allows a Muslim to leave an Islamic Will to ensure

that his/her estate is distributed 100% in accordance with the Shariah.

The very idea of binding the Nikah with monetary contracts such as shirkat, etc. is untenable in Islam. It is foreign to Islam. It is an enactment in emulation of the kuffaar. It is a move calculated to appease the west. It is an obsequitious submission to the clamour of the gender mob. It is the effect of having lost one's Deeni bearings which has coalesced in deviation from Siraatul Mustaqeem.

While the writer has mentioned Shirkat, Hibah, etc. he has not as yet furnished the details of these suggested encumbrances. It is almost a forgone conclusion that once he has presented the full contract with all the conditions and stipulations, numerous Shar'i contraventions will be discovered in the same way as the so-called Islamic banks misuse Islamic nomenclature by dubbing their riba products *Mudhaarabah, Mushaarakah, Ijaarah, etc.*

The institution of Nikah is too simple to require any of the suggested encumbrances. Furthermore, there is absolutely no need to encumber the Nikah with western concepts irrespective of the contracts being allegedly Islamic. Those Muslims who have no desire for legal recognition, need not cast even a flitting glance at any matrimonial property regime. It is not at all a requisite of the Shariah. Those who for some reason need to obtain legal recognition for their Nikah, are constrained to adopt the antenuptial contract which excludes the accrual system. This system allows them to leave behind an Islamic Will while at the same time the estates of the husband and wife are not fused. At the time of divorce or death, usurpation of the deceased spouse's estate will not take place with the connivance of the secular courts. It is therefore imperative for Muslims who desire

legal recognition for their marriages to adopt the system which excludes the accrual requirement.

The advice of the writer must be discarded since it militates against the teachings and spirit of Islam.

The article, *The Ante Nuptial Contract* presented by the writer ostensibly is the work of 'Bowman Gilfillan Attorneys'. However, the writer does not indicate either the point of beginning nor the point of ending of Bowman's article. He did not insert inverted commas to differentiate between Bowman's article and his personal views. This is somewhat perplexing. It is not known if the 'three matrimonial regimes in South Africa' explained in the article are the exact words of Bowman or has the writer paraphrased the explanation of Bowman and amplified thereon. Anyhow for the purposes of our discussion we shall regard the explanation and the concomitant views expressed to be that of the writer and not of Bowman.

The community of property regime is clearly haraam in every aspect and requires no discussion to substantiate this averment.

The discussion of Marriage out of community of property is the factual position. However, the writer betrays a veiled aversion for this system in that he implies that the woman is disadvantaged. This is clear from the following statements:

* *"A party who contributed to the other party's estate whether in cash or otherwise would have a heavy onus to prove that he or she was entitled to anything from that party's estate on dissolution of the marriage."*

This is applicable in the western secular law context. It has no reality in terms of the Shariah. If the wife makes any financial contributions without an express agreement of it being a loan to the husband or buying a share in an asset, she will have no claim

at any time on the estate of her husband regardless of the degree of enrichment which her contributions bestowed to the husband's estate.

If her contribution is by way of an agreement as mentioned above, there will be no 'heavy onus' on her to prove her entitlement. It should also be understood that her entitlement will not be by virtue of the Nikah since marriage in Islam does not create property regimes. Her entitlement will be by virtue of the monetary transaction/contract.

* *"Where one party stays at home to raise children and does not contribute financially towards the marriage, and the other spouse works and accumulates assets, the former may find herself with nothing and no claim to the assets of the latter."*

Yes, in terms of the Shariah, the wife on dissolution of the marriage will have no claim in the assets of the husband. According to the Shariah the assets all belong to the husband since he had earned them. And, this is also the secular position in terms of 'marriage out of community of property which excludes the accrual system.'

The writer while a Muslim, has skimmed over this system which is the only one of the kuffaar matrimonial property regimes acceptable to the Shariah. It is clear that he is promoting some hybrid property regime with which to encumber the Nikah, hence instead of advising that the parties should opt for the ante nuptial contract which excludes the accrual system, he subtly promotes a system which gives rise to a matrimonial regime which entitles the wife to a claim in the assets on dissolution or death.

In his discussion under the caption **'The Application of the Accrual System in the Event of Divorce',** which is an explanation

apparently in the light of the Shariah', the writer states: *"At the time of divorce the husband is responsible to pay maintenance according to the Shariah principles and the husband has the choice to execute any previous undertakings to donate assets."* This statement is extremely ambiguous. What is the meaning of *'previous undertakings to donate assets'* ? This statement appears to be a subtle reference to an 'undertaking' with which the Nikah was encumbered. If so, then such an encumbrance is not permissible.

The averment of the husband's choice with regard to making donations is redundant and futile. Everyone knows that the husband as well as the wife have the right to make donations from their personal assets at any time. It is therefore meaningless to stipulate donations with the event of divorce and death.

In similar vein, the writer states: *"The wife may also exercise the choice to execute the undertaking to donate assets at the time of divorce."* This is indeed weird. To whom is she expected to make donations at the time of divorce? To her ex-husband? Sanity mocks this suggestion. There is an ulterior motive underlining this 'previous donation undertaking'. As weird as it appears due to the ambiguity, the haze will clear once the details of the 'previous undertaking' have been spelled out. We can then visit this issue again. For now it will suffice to say that the Nikah may not be encumbered with any 'donation undertakings' for execution in the event of death or divorce regardless of the 'choice' factor which anyhow renders this averment ludicrous and redundant.

The writer states: *"According to the Shariah the property arrangement can only be considered as an undertaking that*

makes provision for the spouses to combine their net increases in the assets upon dissolution of their marriage and thereafter distribute the assets equally between them."

There is no such 'property arrangement' in the Shariah, which is attached to Nikah. No one is expected even morally to make any such undertaking at the time of Nikah or before Nikah. No where does the Shariah hinge equal distribution of assets on the event of divorce, even if it is assumed that there exists a valid Shar'i 50-50 partnership agreement in the assets. If there exists a valid *shirkat* between the husband and wife, either one of them can terminate the partnership at any time he/she desires. The stipulation of divorce as the occasion of termination of the *shirkat* is *baatil.* This is indeed totally foreign to Islam.

Then, amplifying the abovementioned weird concept, the writer says: *"What is the effect of this undertaking: this can only be considered as a mutual undertaking. This undertaking is not binding due to it not meeting the requirements stipulated by the Islamic Fiqh Academy of Jeddah."*

Taqleed to the 'fiqh academy of Jeddah' is ludicrous and laughable. The writer has indeed descended to an extremely low level of taqleed. From the superior sublime Taqleed of the Aimmah-e-Mujtahideen to the ridiculous taqleed of a liberal, modernist consortium of western-orientated scholars! If the writer desires to be accepted as credible, he should not present this academy as the final word nor attempt to impose its taqleed on adversaries who reject their authority. The common basis for discussion and argument which we believe is acceptable to all parties is *Dalaail-e-Ar'ba-ah.*

In the aforementioned averment the writer has effectively neutralized his own concept. When the 'undertaking' is not binding, of what purpose is the exercise? Since there are no Shar'i grounds for making the 'mutual undertaking' binding, the writer himself confirms the redundancy of this bid'ah undertaking.

The writer further says: *"Parties can design Shariah alternatives to structure products that will cater more effectively for the proprietary requirements of the spouses."*

There are no monetary 'shariah structures' applicable to Nikah, other than payment of Mehr. The property structure regime with which the writer seeks to encumber the Nikah is a bid'ah in emulation of the kuffaar concept of matrimonial property regimes. If any such regime was a requisite of Nikah, the Divine Law would have issued a directive to this effect or would have made express provisions for it. But, we see that for 14 centuries, Nikah was a simple, pure and holy contract unencumbered with western-kuffaar type property regimes. Property regimes are not among the goals of Nikah. Any monetary product designed will be independent of Nikah and its consequences as well as independent of divorce and death and its consequences.

The statement, *'Shariah alternatives'* betrays the thinking process of the writer. For what will be the 'alternatives'? Is it an alternative to some Shar'i structure or to some secular/kufr structure? Obviously it is posited as alternatives to the conspicuously haraam western systems of community of property and accrual system. They are looking for alternatives to these haraam systems. There is no need to search for alternatives for the simple reason that the Shariah does not

envisage any kind of property regime for Nikah nor is there anything lacking in the Shariah's matrimonial system to warrant 'alternatives'. The introduction of structures which are alternatives to the kuffaar systems are interpolations which transmute the Shariah.

Referring to the 'alternative structures, the writer says: *"Such structures include, Shirkatul Milk, Shirkatul Mufawadhah, Shirkatul Inaan, etc."* The Shariah does not envisage the imposition of any of these structures on Nikah. Marriage may not be fettered with commercial transactions to create matrimonial property regimes in emulation of the kuffaar. That the imposition of these structures is presented as a binding condition on marriage is clear from the fact that if Nikah would not be performed, there would be no structure. The parties would be total strangers and *shirkat* of any kind would be furthest from their minds. But when Nikah is broached, then they are advised to enter into binding monetary contracts which are executed to 'protect' primarily the wife in the event of the dissolution of the marriage or death of the husband. Such an attitude is the effect of deficiency in *Aqeedah*. It seeks to supersede the Shariah which has not deemed it necessary to encumber the Nikah with any form of property regime for so-called 'protection' of the woman. This is an invention purely of the kuffaar, which the writer desires to emulate.

The writer avers: *"Therefore accrual system in its current form will contradict the principles of the Shariah."* There are two types of antenuptial contract – including and excluding the accrual system. The simple method is to exclude the accrual system should one desire to obtain legal recognition of one's marriage. All the rigmarole which the writer has presented to argue in favour of a hybrid property regime is obviated simply by

excluding the accrual system. Then there will be no clash with the Shariah. But it appears that the writer is not concerned with the Shariah. His objective is to hoist a western-type matrimonial property regime on the Nikah, disguised as a Shar'i product.

The writer says: *"Legal practitioners must consult competent Ulama to design Shariah structures that protect the proprietary rights of the spouses during the marriage and after the marriage as well."* What 'proprietary rights' is he referring to? Marriage creates no such rights in Islam. Both the wife and husband simply retain ownership of their assets during the subsistence of the marriage and thereafter as well. What exactly is being envisaged here by the writer with the ambiguity of his averment?

The protection of the wife's personal assets does not require the creation of a property regime. *Shirkat* is not necessary for such protection. Documentary evidence suffices to safeguard her assets. Despite the extreme ambiguity of the writer's averments it is clear that the agenda is not protection of the wife's personal assets with which she entered into the Nikah, and such assets as she may acquire during the subsistence of the marriage. The motive is to bind the Nikah with a property regime in the way the western kuffaar encumber their marriages with some sort of matrimonial property regime.

One of the 'structures' of protection mentioned by the writer is *'increased mehr'.* Yet, this is an accursed structure. The thrust of the Shariah's ta'leem is on an extremely low mehr. Islam frowns on large sums of mehr. Furthermore, Mehr is a natural consequence of Nikah. It is neither an extraneous imposition nor a manmade device, hence may not be confused with any

property regime. There is no partnership in mehr. It is the property exclusively of the wife. *Shirkat* may not be analogized on the basis of Mehr. It is the right of the wife to delay her demand for payment to the event of divorce or death of her husband. But *shirkat* has no resemblance with mehr. Imposing *shirkat* as a precondition for Nikah whether expressly or tacitly, is not permissible. It is in conflict with the teaching and spirit of Nikah as ordered by the Shariah.

The writer adds: *"The marriage couple can design a proprietary arrangement based on their specific requirements…."* Again, designing a proprietary regime is inimical to Nikah. It militates against the concept of this simple, holy bond, the aim of which is not the acquisition of financial gain. *'Specific requirements'* is another ambiguity. From the wife's perspective the 'specific requirements' which ensue in the wake of Nikah are nothing but maintenance, shelter and conjugal rights. There are no other incumbent rights or requirements or specific requirements other than these. To safeguard these 'specific requirements' which the Shariah awards her, there is no need for the creation of the encumbrance of a property regime in emulation of the kuffaar. All the requirements of the wife are the responsibility of the husband. A mutual property regime is not required for the fulfilment of her needs whether during the subsistence of the Nikah or after its dissolution. The Shariah has its own divine system to cater for the occasion of dissolution or death.

The writer, concluding his article, says: *"The current accrual system may be to the disadvantage to the female spouse if the wife has a higher net asset value than the husband. Shariah*

Scholars together will (with) legal practitioners can design a much equitable arrangement."

The only 'equitable arrangement' is the order of the Shariah. This order requires the Nikah to remain unfettered and not encumbered with a kuffaar-style property regime disguised with Islamic hue. Hoisting a property regime on to Nikah even if it be assumed that the contract is a valid *shirkat* device, is an unlawful interpolation, hence bid'ah.

The writer is conspicuously ignoring the Shariah. He acquits himself in a manner which conveys the idea that the Shariah is deficient in that it has failed to provide an 'equitable arrangement' to protect the assets of the woman. While harping on the accrual system, he adopts complete silence regarding the exclusion of accrual which is the only system acceptable to the Shariah for a Muslim who deems it necessary to obtain legal recognition for his marriage. What is preventing the writer from proffering the advice that Muslims who require legal recognition should opt for the antenuptial contract excluding the accrual system?

Why has the writer embarked on a fishing expedition which will plunge Muslims into a mire of incongruities from the Shar'i perspective? Why labour to create a property regime to encumber Nikah when the Shariah has not devised any such imposition. This imposition is clearly a design of the kuffaar which the writer has borrowed and is keen on portraying it with Islamic hues. But it remains a bid'ah. Islam does not envisage any matrimonial property regime for Nikah, and this is the final word of the Divine Code.

NIKAH – LEGAL RECOGNITION?

When a marriage is registered in accordance with the secular laws of the country it is legally recognized. Islamic marriages although not legally recognized have been awarded by the courts with the effects of legal marriages, albeit in terms of kufr law, not Shar'i law. Thus, such 'legal' recognition of Islamic marriages is meaningless For example, when a court confers legal recognition or even if the marriage is legally registered, the only effect is that the children and the wife are 'legitimate' in law, and they will inherit in the intestate estate. But such inheritance will be according to kuffaar secular law, not according to the Shariah. Similarly, maintenance for the woman will be in terms of the law and the spirit of the atheist constitution. Custody of the children too will be in terms of secular law, not in compliance with the Shariah. Thus, 'legal' recognition of Muslim marriages should not be the concern of Muslims.

The recognition of the Shariah is adequate for Muslims. If for some reason, a Muslim feels constrained by circumstances to obtain legal recognition, then it will be *Waajib (Compulsory)* according to the Shariah for him to opt for the antenuptial contract which ***excludes the accrual system.*** Adoption of this secular system ensures that the estates of the husband and wife remain separate, and the Islamic Will is valid. This ensures that one's estate will be distributed in compliance with the Shariah.

However, it is important to remember that it is also *Waajib* to have an Islamic Will prepared. This applies to all Muslims whether married or unmarried, male or female, and whether the marriage has been legally registered or not. An Islamic Will is *Waajib*.

Do not be misled and hoodwinked into any property system

besides the abovementioned antenuptial contract. There are two types of antenuptial contracts: (a) The one which *includes* the accrual clause, and (b) The one which *excludes* the accrual clause. It is not permissible to adopt the former. Only (b) is permissible.

It is also essential not to be ensnared by an Islamically portrayed matrimonial system described as *hibah, shirkat* or any other Islamically sounding title. No matter how kosher the matrimonial product under Islamic guise may appear, remember that it is a haraam accretion in violation of Allah's Law.

"What! Do you search for the law of Jaahiliyyah?" – Qur'aan

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