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24. MUSLIM LAW

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I. Introduction

24.1 Muslim law in Singapore represents a uniquely autochthonous Singapore regime, in which "a minority population has developed and instituted its own practice and system of personal laws, in harmony with the secular laws of the land".[1] Unsurprisingly, however, over time, in line with the desire to forge a common national identity while respecting the unique features of Muslim law, similarities in jurisprudential developments across both civil and Islamic spheres have emerged,[2] complemented by "similarities in the specific practices adopted by the Syariah and Family Justice Courts".[3]

24.2 As has been the case in recent years, the cases in 2022 build on these themes and further illustrate the clear convergence in norms across the two regimes while being respectful of the obvious differences in certain key respects for which no parallels with civil jurisprudence are sensible or even possible (because, often, no civil analogue is even in existence, from which any parallel can even be considered).

24.3 Three decisions were issued by the Appeal Board in 2022. Each of these brings to fore some of the tensions alluded to above. In the first of these cases, Appeal Case No 3/2021, the Appeal Board had to grapple with the question of whether there are unique evidential requirements in certain forms of Muslim law cases. The second decision, Appeal Case No 30/2020, raises vexing issues of jurisdiction involving transnational marriages (raising issues not unique to Muslim marriages but which become slightly more complex in view of that fact), while the third case, Appeal Case No 19/2021, confronts issues of valuation fluctuations that are of equal relevance in both the civil and Muslim law spheres.

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1 Ahmad Nizam Abbas *et al*, *Muslim Family Law in Singapore* (Academy Publishing, 2022) at p IX.

2 See, *eg*, the author's comments in (2021) 22 SAL Ann Rev 702 at 702–703, paras 24.1–24.3.

3 Justice Valerie Thean, keynote address at Practice and Procedure in the Administration of Muslim Family Law (18 October 2022).

II. Evidential standards and matrimonial property in Islamic law

24.4 Appeal Case No 3/2021 involved an appeal by a husband against an order by the Syariah Court that the parties be divorced as a result of a breach of *taklik* and *vis-à-vis* some of the ancillary orders made consequent to such order. For context, under Islamic law, the marriage contract can include *taklik* or conditions, the breach of which may found the basis or grounds for a divorce as it effectively serves as a breach of the marriage contract.

24.5 In that case, the wife had filed for divorce from a seven-year-old marriage in 2020 but the husband declined to pronounce the *talak* (essentially, an act of the husband pronouncing the divorce).[4] Pursuant to s 50 of the Administration of Muslim Law Act 1966[5] ("AMLA"), the matter was ordered to undergo arbitration (or *hakam*) in order to assess whether the parties ought to be divorced by way of a breach of a *taklik*. The wife's claim during the arbitration was that the husband had been abusive to her, including inflicting violence on her (in breach of a written *taklik* which stipulates, *inter alia*, that a *talak* would be effected if the Syariah Court finds true any allegation by the wife that the husband had "commit(ted) any act that hurts her body"). The husband denied the factual assertions advanced by the wife and contended, in any event, that the allegations must necessarily fail as they did not cohere with the requirement under the Muslim law of evidence that any such assertion must be supported by the sworn testimony of a witness (or a *shahadah*). The husband also contended that any breach of *taklik* must be proven beyond reasonable doubt.[6] The Syariah Court found that there were no such legal requirements as advanced by the husband under the auspices of Muslim law, and that, on the facts, the breach of a condition of the marriage had been proven by the wife. The Syariah Court therefore ordered the divorce. On the matter of ancillary orders, in effecting a division of assets, the Syariah Court found that the wife's properties did not fall under the combined pool of properties that were subject to division, by virtue of s 120(1) of the AMLA.[7] Section 120(1) "deems", *inter alia*, wages, earnings, moneys and properties acquired by a wife throughout the course of marriage as being her property. The husband appealed.

24.6 Appeal Case No 3/2021 raises a couple of interesting evidential questions, as well as the proper interpretation to be had to s 120(1) of

4 Appeal Case No 3/2021 at [2] and [3].
5 2020 Rev Ed.
6 Appeal Case No 3/2021 at [9].
7 Appeal Case No 3/2021 at [58].

the AMLA. On the matter of evidential standards, two questions arise: first, whether there is in fact a requirement for there to be witnesses to asserted facts by the wife in order for such facts to be accepted by the court; and second, the evidential burden on her part to prove a breach of the *taklik* or condition and whether it is necessary, as the husband asserted, to prove this beyond reasonable doubt.

24.7 On the matter of whether eyewitness testimony is necessary, the Appeal Board observed that s 42 of the AMLA specifically requires the court to have regard to the "law of evidence for the time being in force in Singapore".[8] Section 42(1) of the AMLA reads as follows:

> **Evidence**
>
> **42.**—(1) The Court is to have regard to the law of evidence for the time being in force in Singapore, and is to be guided by the principles thereof, but is not obliged to apply the same strictly.

24.8 The Appeal Board found that, notwithstanding the fact that the court is empowered under the provision to depart from this where there is a need to do so, and that the common law and Muslim laws of evidence would still apply to the extent that they are not inconsistent with the civil laws of evidence, the starting point in approaching the issues of evidence in Muslim courts would be that as set out in the Evidence Act 1893.[9] Having regard to this, the Appeal Board observed that a *taklik* can be proved by either *shahadah* or by way of *qarinah* (that is, the use of circumstantial evidence, which would not involve direct eyewitness testimony).[10] In any event, the Appeal Board opined that Muslim law (surveying Malaysian Syariah jurisprudence indicating the same) allows for the use of *qarinah* to prove *taklik*.[11]

24.9 On the issue of whether any breach of *taklik* must be proven beyond reasonable doubt, the Appeal Board found no basis for this under the common law, Evidence Act or Muslim law. In the Appeal Board's view, such a requirement would be "unfairly onerous and unjust" given the realities that many of these breaches "take place behind the opaque walls of domestic privacy".[12] In the absence of any express statutory requirement, the Appeal Board opined that a breach of *taklik* should be proven on a balance of probabilities without the strict requirement of third-party corroboration (the latter point being for the reasons set out

8 Appeal Case No 3/2021 at [15].
9 2020 Rev Ed. See Appeal Case No 3/2021 at [17].
10 Appeal Case No 3/2021 at [21].
11 Appeal Case No 3/2021 at [20].
12 Appeal Case No 3/2021 at [30].

above).[13] Having regard to these conclusions, the Appeal Board found that the Syariah Court did not err in fact or in law in granting the decree of divorce.

24.10 Turning then to the issue of whether the wife's properties are subject to division, the Appeal Board observed that s 120 of the AMLA, similar to other provisions in the AMLA, was not intended to confer on the wife an immunity from her properties being included in the pool of matrimonial assets liable for division. Instead, it sought merely to make clear that a Muslim woman, upon her marriage, would continue to be an independent legal entity from that of her husband, as she would have been if she were a *feme sole*. The Appeal Board further observed that any other construction (such as that advanced by the Syariah Court in this case) would be contrary to the intent of the powers of division of property found in the AMLA, which envisages no difference in treatment *inter partes* between husband and wife on the matter of division of matrimonial assets.[14] The Appeal Board therefore concluded that the Syariah Court erred on this front in not treating the wife's assets as part of the matrimonial property pool that would be liable for division.

24.11 The Appeal Board's reasoning in Appeal Case No 3/2021 helpfully clarifies that s 120 of the AMLA was never intended to immunise the properties of a wife from the powers of division in matrimonial matters; it also usefully clarifies some of the evidential principles that are engaged in dealing with Syariah Court matters and provides much needed guidance on how to understand the intersection between Muslim law and civil law in the context of evidential principles. Appeal Case No 3/2021, however, is unlikely to be the last word on some of the difficult evidential issues that may arise in a Muslim law case having regard to the need to navigate potentially conflicting principles in Muslim and civil law – two points in particular may have to be grappled with by the Appeal Board in future cases.

24.12 The first pertains to the proper interpretation of s 42 of the AMLA. In the event a factual scenario before a Syariah Court reflects a clear and irreconcilable conflict between the evidential principles under the Evidence Act (or civil law) and the evidential principles under Islamic law, which should triumph, and how would the evidential question be resolved? In Appeal Case No 3/2021, there was, of course, no need to deliberate on this as the Appeal Board found that there had been alignment between the Muslim law and civil law evidential principles at play. It would be interesting to see how a future Appeal Board may have

13 See paras 24.7–24.8 above. Appeal Case No 3/2021 at [20].
14 Appeal Case No 3/2021 at [61].

to deal with the issue when it does arise, given that the Muslim court does not appear, under s 42, to be "obliged to apply" civil law evidential concepts "strictly".

24.13 The second point pertains to the question of whether the Appeal Board may consider the application of a strand of civil jurisprudence on evidence in which although the standard required remains that of balance of probabilities, where the allegations underlying those assertions are criminal, quasi-criminal, or otherwise relate to fraud or dishonesty, whether "more evidence is required than would be the situation in a normal civil case"[15] for a matter to be found to be proved on a balance of probabilities. Simply put, does the proposition that the more repugnant the allegation, the more evidence is needed apply in the Muslim law context? On a related note, it would also be interesting to see whether an Appeal Board might find that, in some circumstances, a less conventional approach of requiring *some* intermediate standard between beyond reasonable doubt and a balance of probabilities might be appropriate, having regard to the allegations before it. While such an approach would not cohere with the conventional understanding of what the law of evidence in the civil context presently requires,[16] it is not entirely clear that an approach recognising that there are potentially an infinite number of degrees of probability for facts to be found to be "proved" would be inconsistent or otherwise be at odds with the intent of the drafter of the Evidence Act.[17]

III. Jurisdictional issues in Islamic law

24.14 In an ever-globalised world, it is inevitable that marriages involving cross-jurisdictional elements would be on the rise. To state some examples, some statistics from slightly less than a decade back suggests that transnational marriages, or marriages where one spouse is from overseas, form about one in three marriages, a rise from about a decade prior when it was just about 20%.[18] More recent statistics suggest that approximately one out of four citizen marriages involves a non-

15 *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39].

16 See, *eg*, the comments of the High Court in *Chua Kwee Chen v Koh Choon Chin* [2006] 3 SLR(R) 469 at [22] and the comments of the Court of Appeal in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR(R) 263.

17 For an especially illuminating discussion on the historical genesis of legal burdens and the extent to which the current civil laws are aligned to the initial legislative intent by Sir James Fitzjames Stephen (the original drafter of the Evidence Act 1893 (2020 Rev Ed)), see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2020) at paras 12.094–12.096C.

18 Lim Yan Liang, "New Marriage Prep, Support Programmes for Singaporeans Marrying Foreigners" *The Straits Times* (20 October 2014).

resident spouse.[19] The increasingly interconnected nature of the world is, of course, not without its own implications and ramifications, including resulting in difficult jurisdictional questions that a court must confront in the event of a breakup of such marriages involving transnational elements. Appeal Case No 30/2020 reflects an illustration of some of the jurisdictional issues that can arise from the reality of globalisation, albeit engaging a different variant of transnationality, that is, one in which the parties initially got married overseas, relocated to Singapore, but certain acts overseas subsequently raised questions about whether an effective divorce overseas deprives the Singapore Syariah Courts of jurisdiction.

24.15 In that case, the parties married in India (as Indian citizens) but eventually relocated to Singapore and became Singapore citizens.[20] Thereafter, in 2016, the husband sought to terminate the marriage by sending to the wife a letter containing a pronouncement of three *talaks*. The husband then proceeded to enter into a new marriage in Singapore with another woman.[21]

24.16 The wife proceeded to file for a divorce and sought ancillary orders from Singapore's Syariah Court. The husband then applied to stay such proceedings under s 36 of the AMLA or to strike them out altogether under s 35(2) of the AMLA. In support of the argument that the matter of the divorce had already taken place in India and the Singapore courts therefore should not be seised of jurisdiction,[22] the husband produced a copy of a divorce certificate issued around that time by the district *Kazi* (a judicial officer from the Syariah courts, ostensibly from Tamil Nadu) and a letter from a solicitor in India indicating that the marriage was dissolved.[23] The wife, in response, obtained an expert opinion that the divorce was not valid under Indian law.[24] The Syariah Court heard and dismissed the husband's application, finding that the status of the divorce in India was not proved such that the Singapore courts continued to possess jurisdiction to preside over the matter of a possible divorce.[25] The husband then proceeded to file an appeal.

24.17 The Appeal Board dismissed the appeal. Of especial significance on the current facts were the Appeal Board's findings *vis-à-vis* the matter of whether it had jurisdiction under s 35(2) of the AMLA, whether the

19 Ang Hwee Min, "1 in 4 Singaporeans Marrying Non-residents, Increasing Proportion Involves Non-resident Men" *Channel NewsAsia* (22 April 2021).
20 Appeal Case No 30/2020 at [2].
21 Appeal Case No 30/2020 at [3].
22 Appeal Case No 30/2020 at [15].
23 Appeal Case No 30/2020 at [3].
24 Appeal Case No 30/2020 at [6].
25 Appeal Case No 30/2020 at [14].

marriage was dissolved upon the pronouncement of the three *talaks* and whether the wife could commence proceedings for dissolution of the marriage based on the *talaks* pronounced in India.

24.18 On the first point, the Appeal Board was of the view that, given that the parties were married under the provisions of Muslim law and domiciled in Singapore, the court had the jurisdiction to hear the wife's application in relation to the matter of divorce.[26]

24.19 On the question of whether the parties' marriage dissolved upon the pronouncement of the three *talaks*, the Appeal Board declined to disturb the Syariah Court's decision that the status of the divorce in India was not proved as such a finding did not go against the weight of the evidence.[27] In response to the husband's alternative argument that the fact remained that the *talaks* did factually take place in India, the Appeal Board noted that it would appear that, under the law in India, the *talaks* do not have legal effect. In that sense, the questions of whether they were valid under Islamic law, and whether they resulted in the dissolution of the marriage, had not yet been determined and should be determined by subsequent proceedings before the Syariah Court.[28]

24.20 To the husband's contention that s 102(5) of the AMLA (which states that "in every case of a divorce effected in Singapore … the husband and wife shall attend personally at the Syariah Court within 7 days beginning from the date of the divorce" to make the necessary application for a decree or order for divorce) would appear to define the jurisdiction of the court very narrowly to only include divorces effected in Singapore, the Appeal Board observed that this was beside the point as the provision in question did not preclude the Syariah Court from having jurisdiction to hear or determine an application where the *talak* or facts that related to the divorce occurred somewhere else. As the Appeal Board observed, this could not have been the intent of the provision since it would result in absurd situations where, for example, "a couple domiciled in Singapore will not be able to apply to the Court for a divorce if, for example, the husband pronounces a *talak* while they are on an overseas holiday".[29]

26 Appeal Case No 30/2020 at [12].
27 Appeal Case No 30/2020 at [14].
28 Appeal Case No 30/2020 at [16].
29 Appeal Case No 30/2020 at [18].

IV. Valuation of matrimonial assets in the division exercise

24.21 In a significant proportion of the cases before the Syariah Court and Appeal Board, the primary asset (by way of value) subject to the powers of division of the court would be the residential property assets owned by the married couple. That this is often the case should be unsurprising, given that, as of 2022, such residential assets make up over 40%[30] of household assets in Singapore.[31] The exercise of effecting a "just and equitable" division of such residential assets, while superficially simple, can, even in unexceptional cases, often in reality turn out to be quite complex: in many instances, it involves having an eye to the fact that much of the equity in the property stems from the use of Central Provident Fund ("CPF") moneys for its purchase, and necessitating adopting a valuation of the property at a specific point of time, a valuation that may very well almost immediately be rendered non-reflective of market realities given the fast-evolving and sensitive nature of housing pricing in Singapore.

24.22 These were just some of the matters that the Appeal Board had to grapple with in Appeal Case No 19/2021. In that case, one of the questions that arose related to the matter of the appropriate orders to be made in relation to the matrimonial home, a Housing and Development Board flat ("the matrimonial home"), owned by the parties as part of the ancillary orders for the court to make pursuant to a divorce. At first instance, in part because both parties agreed that the value of the matrimonial home at the time of the hearing, of between $405,000 and $412,000,[32] would have meant no sale proceeds as there would be a loss if it were sold on the open market (after accounting for the relevant CPF refunds and repayment of the mortgage loan) and the sensibility of ensuring no break in their children's living arrangements, the Syariah Court ordered for the property to be transferred to the wife.[33] In doing so, the Syariah Court ordered for the CPF moneys put into the asset by the husband to be refunded to him, *save that* she deducted a sum of money from such refund to account for his share of the loss in the event the house were to be sold on the open market.

30 See the data from the second quarter as found in the Singapore Department of Statistics (https://tablebuilder.singstat.gov.sg/table/TS/M700981) (accessed on 13 November 2022).

31 The residential properties owned by a married couple ostensibly take on even more significance in the division exercise once one appreciates that about a fifth of household assets are Central Provident Fund funds which would therefore not be immediately available for deployment or use, given their *raison d'être* to assist with expenses incurred during retirement.

32 Appeal Case No 19/2021 at [10(c)].

33 Appeal Case No 19/2021 at [24]–[26] and [27(a)].

24.23 On appeal against the findings of the Syariah Court, the husband filed a motion to adduce various new pieces of evidence. Of especial significance in the present discussion was further evidence adduced by the husband to show that, in the interim, the housing market had picked up such that the matrimonial home was now worth $517,000.[34] The Appeal Board allowed the inclusion of the further evidence on the premise that it "could have a material impact on our final orders in relation to the matrimonial home".[35]

24.24 On the matter of the substantive appeal itself, the Appeal Board observed that it was wrong, as a matter of principle, for the Syariah Court to have attributed a portion of the paper loss arising from any sale of the matrimonial home, noting the observations in *TIC v TID*,[36] in which the High Court noted that the starting principle is that ownership of a matrimonial property is divided on the date the court makes the order and that the risk of any rise or fall in value subsequently should be on the transferee post-order.[37] The Appeal Board also declined to make adjustments to the value of the matrimonial home on the basis of the further evidence of the valuation of the matrimonial home appreciating in the interim, noting that "where the valuation and net equities of [a property] have been crystallised, parties are, for better or worse, bound by it".[38]

24.25 While the substantive conclusions arrived at in Appeal Case No 19/2021 are, it is submitted, unimpeachable, one could query whether, conceptually, it would have been neater for the Appeal Board to disallow the admission of the further evidence sought to be adduced by the husband to show an increase in the price of the matrimonial home. After all, if, as the Appeal Board noted, the parties' "rights and obligations in respect of the transfer crystallised at the time the orders were made",[39] then in substance (as was indeed the outcome here), any variation in valuation should be of tangential relevance, if at all, in determining the matter of division on appeal.

24.26 It may, perhaps, be more appropriate in such circumstances for the Appeal Board to generally disallow the adduction of such evidence of price movements in the housing market on the premise that, given the prevailing stance of the crystallisation of values at the time of a first-instance order, variations in value subsequent to such order are, by and

34 Appeal Case No 19/2021 at [36(a)].
35 Appeal Case No 19/2021 at [44].
36 [2017] SGHCF 30 at [18], affirmed in *TIC v TID* [2019] 1 SLR 180.
37 Appeal Case No 19/2021 at [60(b)]–[60(e)].
38 Appeal Case No 19/2021 at [65].
39 Appeal Case No 19/2021 at [94].

large, legally irrelevant. Such an approach has much to commend it as given the inevitable vicissitudes of the housing market, it is going to frequently be the case that the value of a residential property on appeal would be different (sometimes significantly so) from that at first instance in view of the not insignificant passage of time between these two events. Allowing applications to adduce such evidence of changes in valuation raises the prospect of potentially precipitating unproductive (and cost-inefficient) satellite litigation on issues that are of little relevance to the division exercise. As the Appeal Board itself appeared to conclude, such unexceptional variations across time should not generally serve as an invitation for an appellate body to disturb an otherwise legitimate division at first instance predicated upon the prevailing valuation of the property at the time. Such a stance on refusing leave to allow such fresh evidence as a matter of course would have the salutary effect of reminding parties that such inevitable fluctuations in property values cannot, generally speaking, be a matter that a court revisits *ad nauseum*.