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Muslim Marriages: From Constitution to Legislation?

Abdulkader Tayob

Muslim marriages are in principle recognised in the post-apartheid South African Constitution of 1996, but they have yet to be promulgated in law. The workshop was designed to consider the long and complicated history that has until now prevented this particular outcome. We start with Amien's comprehensive essay that documents this history, followed by different perspectives and analyses of the history of the process, and of possible future developments.

The workshop on Muslim marriages is part of larger research projects conducted at UCT on publics, religions and values in African societies. These projects examine what we call Muslim publics brought into existence through communication flows and exchanges. We focus on inter-human relations, media, markets and technologies that impact and are impacted upon by religious traditions. Our research sites are South Africa, Tanzania (with some concession to Kenya) and Ghana. On 20 March 2010, we organised a similar workshop on Kadhis courts in Kenya that have adjudicated Muslim marriages, divorces and inheritance since the beginning of the 20th century. With the writing of the new constitution since 1998, some Christians raised objections to the presence of Kadhis' courts as they allegedly privileged one part of the population. The new constitution was successfully confirmed in a referendum in 2010, the debate revealed much about Muslims and Christians in Kenyan society. These public debates have far-reaching consequences for relations within religions, and also within broader societies. And thus the need for publications, public discussion and dialogue cannot be over-estimated.



The question of Muslim marriage in a democratic human rights-based society touches both directly and indirectly on some very important issues. For Muslims, it defines and potentially frames the relationship between Islam and the secular democratic state. Muslim marriages and related personal status issues affect every Muslim. Getting married and raising families is an important human activity framed by Islamic law, on the one hand, and by constitution and laws on the other. Whatever position taken, individual Muslims stand sandwiched between these two frames. Thus, for example, many middle-class families insist that Muslims register their marriages at a magistrate's office, before or after the religious ceremony (*nikāh*). In reality, there are two marriages taking place with slightly different forms and divergent consequences. In our modern language, we call one religious and the other civil. This name-game obscures a balancing act between the social benefits that are desired from an Islamic *nikāh*, and the financial arrangements that families attempt to guarantee through a civil contract. For most, the religious marriage is enough but the legal benefits that accrue from civil marriages are expected. This brief example illustrates the difficulty of escaping either the Islamic legal frame, or the legal and constitutional frame. It also shows how some are able to play both registers to great benefit and alas, points to the pitfalls of ignoring one or the other.

It may help Muslims to compare their predicament with that shared by other communities of culture in South Africa. The debates on Muslim marriages share similarities with African customary marriages in a most obvious way. Both sat uneasily with a Eurocentric law imposed in the country since the 17th century, and are now given due recognition in the new constitution. Now, all cultural expressions are given dignity and freedom to flourish and to develop.

An Imam reminded me in 2006, that one should not limit this matter to previously denigrated systems of law. He compared the rights demanded in terms of Islamic law and African customs for marriages; with gay and lesbian rights to marriages and civil unions. He argued that both should be protected by the constitution:

... we would share the same sentiments like all other religious organisations ... because any one ... committed



and dedicated to their religion ... would ... abhor those kind of things. But at the same time, we have to understand that we have a democratic dispensation [that] would have to dispense the needs of all its citizens. So if certain citizens have made their claim, and if they have a right of staying in the country, we would expect that, the democratic dispensation facilitates for them as well.

Usually, religious and gay/lesbian communities do not seem to belong to each other. The one group seems embattled against the demands of the constitution, and the other embodies and extends the constitution and yet, there is a case to be made that rights guaranteed in the constitution extend themselves in many interesting and diverse ways. The Imam clearly appreciated that this was an elementary principle of rights.

The Muslim Marriage question touches on another important aspect of a democratic rights-based state. This is particularly true of the South African constitution. There is an inherent paradox at work in the constitution with regard to culture. On the one hand, the modern state makes provision for the promotion of private development of culture, religion and identity. Cultures attacked and denigrated by the colonial and apartheid state have been celebrated, and supported in one way or another. The demand for *Shari'a*, particularly its implication for personal and family life, is a reflection of this empowerment. On the other hand, the constitution also facilitated a critique of that cultural life. As cultural expressions, *Shari'a*-based practices were open to scrutiny by the state, by civil society opposition groups, and by individuals who did not feel compelled to conform. When we look closely at these critiques of culture, we cannot fail to notice that they too emanate from the enabling powers of the constitution. In some respect, they may also be closely and directly related to the fundamental responsibilities of the state. Thus, for example, a woman repudiated (through *ṭalāq*) by her husband may demand shelter and other support from the state, which in turn will have to examine the conditions and circumstances that gave rise to this situation. The state may decide to apply standards of justice and equity to this hypothetical, but very probable case. *Shari'a* might be empowered by the constitution, but faces robust debate as a necessary part of that empowerment.



A comparative approach may help to appreciate the paradox in the constitution. It may be easier for Muslims to accept the critique directed at the initiation rites for young boys and adults that sometimes lead to infections or even deaths. However, the same applies in principle to common Muslim marriage practices that leave women and girls with limited access to education, or rights to work, or destitute after a marriage of thirty or forty years. Rights work for and against Islamic law, just as they do with respect to cultural practices in general.

In this collection, Moosagie has represented the argument that this process of give and take, this robust public debate, will completely erode the Islamic way of life. Against this scenario, he seems to project a discourse of Islamic law that generates a community and a way of life that does not share questions and concerns with other cultural expressions. In my view, this view is highly problematic, as both Islamic law and Muslims cannot be dissociated from contexts. Just as much as one cannot ignore the repudiation issued by a husband, one cannot ignore the child or hapless wife from turning to the government court for redress. Both are part of an inseparable reality that Abrahams-Fayker and Shabodien's contributions illustrate remarkably well.





In his contribution, Fareed has challenged the supposed unchanging nature of Islamic law. He argues that there seems to be an underlying conviction that Islamic law can be retraced to fixed standards. In a fascinating step, he argues that this feature is not unique to Islamic law, but also to secular law. In both systems, change is accommodated somewhat grudgingly and yet change in Islamic law is accepted without acknowledgment. Thus, in order to keep sane and feel secure, the idea of a fixed framework is embraced.

Perhaps this works and this might also be an opportunity to examine what is the essence of cultural production that is worth protecting and preserving. It is clearly true that the South African constitution enables culture, but communities have the right, the duty and the capacity to give shape to cultures. This is already happening, and merely calls for acknowledgement of a process that is well on its way. The important point, though, is to realise that change can go both towards or against greater rights and responsibilities. In Islamic law in South Africa at present, it seems that the choice is directed towards the way shown by Moosagie. However, there are other ways as indicated by the other contributors in this publication.



A chronological overview of events leading up to the formulation of the Muslim Marriages Bill

Waheeda Amien*



Introduction

Muslim Family Law (MFL) has been practised within the South African Muslim community since about the 17th century.¹ However, due to its potentially polygynous nature it has never been legally recognised.²

For approximately the past eighty years, South African Muslims have been advocating for the recognition of Muslim Personal Law (MPL).³ Recent advocacy initiatives have centred on two aspects of MPL namely, marriage and divorce.⁴ Various reasons appear to motivate these advocacy initiatives including the following:

- An acknowledgement that *Shari'a*, upon which MFL is based, plays a significant role in the lives of South African Muslims on individual and communal levels;⁵

* BA LLB (Cape Town) LLM (Western Cape). Lecturer in Law at the University of Cape Town and Ph.D. candidate at the University of Ghent.

- 1 Ebrahim Moosa, "Prospects for Muslim Law in South Africa: A History and Recent Developments," *Yearbook of Islamic and Middle Eastern Law* 3 (1996): 134. Muslim Family Law encompasses monogamous and polygynous marriage, divorce, access, custody and guardianship of minor children.
- 2 *Bronn v Frits Bronn's Executors and Others* 1860 3 Searle 313 at 318, 320, 321, 333; *Seedat's Executors v The Master(Natal)* 1917 A.D. 302 at 307-308; *Ismail v Ismail* 1983 (1) SA 1006 (AD) at 1024A-F.
- 3 *ibid.*: 135. In 1996, Ebrahim Moosa noted that Muslims have been agitating for the legal recognition of MPL for the past 60 years. Thus, at the date of writing this paper, at least another 10 years would have elapsed.
- 4 C. Rautenbach, N. M. I. Goolam, and N. Moosa, "Constitutional Analysis," in *Introduction to Legal Pluralism in South Africa*, eds. J. C. Bekker, C. Rautenbach and N. M. I. Goolam. Anonymous (Durban, South Africa: LexisNexis Butterworths, 2006), 151.
- 5 Moosa *op cit* 1, 150.

- MFL has become an “institutional focus of identity [for] Muslims as a religious group”;⁶
- The *ulamā* would like their MFL related decisions to be legally enforceable;⁷ and most importantly;
- Muslim parties have suffered adverse effects as a result of non recognition of MFL.⁸ For example: Muslim husbands and wives are unable to access certain civil law benefits that their civil law counterparts enjoy; Muslim children bear the social stigma of illegitimacy; and Muslim women are unable to challenge discriminatory decisions rendered against them by the *ulamā*.

Muslim Personal Law Board

In 1994, the ANC government established the Muslim Personal Law Board (MPLB), which was mandated to draft legislation to recognise MPL.⁹ The

6 *ibid.*: 147.

7 *ibid.*: 136-138. Na'eem Jeenah, *The MPL Battle in South Africa. Gender Equality vs. "Shari'ah"*, Anonymous, Presented at an international workshop entitled “Shari'ah Debates and its Perceptions by Muslims and Christians in Selected African Countries”. Organised by the German Institute for Middle Eastern Studies, University of Bayreuth, Germany. Held in Limura, Kenya.ed., July 2004), 2.

8 Moosa *op cit* 1, 136-138. Jeenah *ibid.*

9 Moosa, *ibid.*, 139. Suleman E. Dangor, “The establishment and consolidation of Islam in South Africa: from the Dutch colonisation of the Cape to the present,” *Historia* 48, no. 1 (May 2003): 217. Najma Moosa, “The interim and final constitutions and Muslim Personal Law: Implications for South African Muslim Women,” *Stellenbosch Law Review* 9, no. 2 (1998): 201. Najma Moosa, “The Interim Constitution and Muslim Personal Law,” in *The Constitution of South Africa from a Gender Perspective*, ed. Sandra Liebenberg. Anonymous (Cape Town: The Community Law Centre, University of the Western Cape in association with David Philip, 1995), 169. Jeenah, *ibid.*, 5. In fact, in about 1987, during the apartheid era, the South African Law Commission (SALC) had already begun thinking about whether or not Muslim marriages should be afforded legal recognition. The SALC circulated a questionnaire within the South African Muslim community to gauge its opinion regarding the incorporation of MPL within the secular legal system. The questionnaire received a mixed response: Members of the ‘*ulamā*’ welcomed the initiative because they wanted legal enforceability for their MPL related decisions. However, progressive organisations such as the Muslim Youth Movement, Call of Islam, Qibla Mass Movement and the Muslim Student’s Association (MSA), which were actively involved in the struggle against apartheid perceived the initiative as a state based attempt to divide and conquer by drawing Muslims into apartheid structures. Therefore, the aforementioned progressive organisations rejected the SALC’s proposal and indicated that they would only consider dialoguing with a democratic South African government. See Moosa *ibid.*, 396; Jeenah, *ibid.* 2.

establishment of the MPLB was a result of an electoral promise to afford recognition to MPL that the ANC had made to the South African Muslim community during the negotiations process leading up to South Africa's first democratic elections.¹⁰ The MPLB's mandate was based on the freedom of religion clause in the interim Constitution, which enabled the enactment of legislation to recognise *inter alia* MPL and Muslim marriages.¹¹

The MPLB was comprised of members of the *ulamā* and progressive Muslim organisations namely, the Muslim Youth Movement and the Call of Islam.¹² Within a year of its establishment, the MPLB was disbanded at the insistence of the *ulamā* due to ideological differences among its members.¹³ The main points of contention centred on the manner in which MPL ought to be recognised, which courts should interpret and apply MPL and whether or not Muslims should have a choice regarding their marital system.

In the first instance, the *ulamā* members argued that the *Qur'an* is supreme therefore MPL should not be subordinated to the Constitution.¹⁴ They also contended that a constitutional framework based on human rights values conflicts with *Shari'a*.¹⁵ Thus, they felt that the freedom of religion clause should be exempted from the application of the general limitation clause to prevent MPL from being subordinated to the Bill of Rights.¹⁶ In contrast, progressive organisations on the MPLB accepted the supremacy of the Constitution within South Africa's legal framework

10 Moosa, *ibid.*, 139. Johan van der Vyver, "Constitutional Perspective of Church-State Relations in South Africa," *Brigham Young University Law Review* (1999): 659.

11 Section 14(3) of the interim Constitution. See also Van der Vyver *ibid.*: 659.

12 The *'ulamā* were represented by the United *'Ulama* Council of South Africa (UUCSA), which was a coalition consisting of the following Muslim bodies: Muslim Judicial Council (Western Cape), *Jamiatul 'Ulama* (Natal), *Jamiatul 'Ulama* (Transvaal), Islamic Council of South Africa (ICSA), *Sunni Ulama* Council and *Sunni Jamiatul 'Ulama*. The MPLB also comprised two progressive Muslim organisations namely the Muslim Youth Movement and the Call of Islam. See Moosa, *op cit* 1, 139; Jeenah, *op cit* 7, 5.

13 Moosa, *ibid.*, 217. Jeenah, *ibid.*; Abdulkader Tayob, "The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study," *Recht Van De Islam* 22 (2005): 3. It appears that ICSA was not a part of the initiation to disband the MPLB.

14 Jeenah, *ibid.*, 8-9.

15 Moosa, *op cit* 1, 139.

16 Jeenah, *op cit* 7, 5, 9. The general limitation clause was contained in section 33 of the interim Constitution.

and did not see a conflict between the Constitution and Islam since a progressive interpretation of MPL is arguably reconcilable with human rights values.¹⁷ Consequently, they did not have any difficulty with MPL being subordinated to the Bill of Rights.¹⁸ Furthermore, 'ulamā' members suggested that different MPL codes should be adopted to cater for those who follow different schools of thought.¹⁹ The progressive organisations were of the opinion that one uniform code should be adopted that would incorporate the "most appropriate views of the various schools [of thought] to the South African context and which would be applicable to all Muslims, regardless of their individual schools".²⁰

The second point of contention related to which courts should interpret and apply MPL. While the 'ulamā' members called for the establishment of a separate system of *Shari'ah* courts, the progressive organisations contended that MPL should be administered through the secular court system.²¹ Thirdly, the 'ulamā' members insisted that all South African Muslims should be subjected to a formal recognition of MPL. However, the progressive members of the MPLB argued that Muslims should have a choice between the application of either MPL or civil systems of marriage so that Muslim women could opt out of a repressive MPL system if an alternative was available.²²

South African Law Reform Commission Project Committee and Muslim Marriages Bill

In 1999, the process to legally recognise Muslim marriages resumed with the establishment of a Project Committee of the South African Law Reform

¹⁷ *ibid.*, 8.

¹⁸ *ibid.*, 6, 8-9. Moosa, *op cit* 1, 139. Bangstad also observes that the Cape Muslim community reflects "a contestation between a historical quietist conservative interpretation of Islam and a politicised and liberatory interpretation of Islam." The conservative interpretation "favours aloofness from the political processes of post-apartheid South Africa and the creation of private 'Islamic spaces'." However, the more progressive interpretation "aligns Islam with the struggle for a non-racial and egalitarian society." See Sindre Bangstad, "The changed circumstances for the performance of religious authority in a Cape Muslim community," *Journal of Religion in Africa* 34, no. 1-2 (2004): 39.

¹⁹ Jeenah, *ibid.*, 8, 10.

²⁰ *ibid.*

²¹ *ibid.*, 8.

²² *ibid.*, 8-9.

Commission (SALRC).²³ The Project Committee was founded through a democratic process of nominations by the South African public,²⁴ which resulted in the appointment of nine Muslims as members of the Project Committee, three of whom were women.²⁵ The Project Committee was headed by Justice Mohammed Navsa who is a judge at the Supreme Court of Appeal and the remaining members consisted of three members of the *'ulamā'* two members of the South African Parliament, an advocate, a Professor of Law and a member of the SALRC.²⁶

The Project Committee was mandated to draft legislation to recognise only Muslim marriages, as opposed to drafting legislation to recognise a system of Muslim Personal Law.²⁷ This mandate accorded with the freedom of religion clause in the final Constitution, which enables the legislature to recognise *inter alia* Muslim Personal Law or Muslim marriages.²⁸ In addition, the final Constitution contains an internal limitation within the freedom of religion clause, which requires that such legislation not infringe any other constitutional provision (implicitly including gender equality).²⁹ The internal limitation on the freedom of religion clause was presumably included because the South African government had recognised the potential for human rights abuses within religious traditions.

From 1999 until 2002, the Project Committee conducted extensive consultations with different sections of the South African Muslim

23 Rautenbach et al, op cit 4, 162. C. Rautenbach, "Some comments on the current (and future) status of Muslim Personal Law in South Africa," *Potchefstroom Electronic Law Journal* 2 (2004): 4; Christa Rautenbach, "Islamic marriages in South Africa: *Quo vadimus?*," *Koers* 69, no. 1 (2003): 147; Jeenah, *ibid.*, 10.

24 South African Law Reform Commission, *Islamic Marriages and Related Matters: Report*, Project 59, 2003), 1-2 footnote 2. Available at http://www.doj.gov.za/salrc/reports/r_prj59_2003jul.pdf. Accessed 17 October 2007. See also Jeenah, *ibid.*, 10; Rautenbach et al, op cit 4,162. Rautenbach, *ibid.*, 3-4; Rautenbach, *ibid.*

25 Jeenah, *ibid.*, 10. See also South African Law Commission, *Islamic Marriages and Related Matters: Issue Paper 15*, Project 59, 2000), ii. Accessed 17 October 2007. South African Law Commission, *Islamic Marriages and Related Matters: Discussion Paper 101*, Project 59, 2001), iii. Accessed 17 October 2007. South African Law Reform Commission, *ibid.*, iii.

26 Jeenah, *ibid.*; Rautenbach et al., op cit 4, 162. Rautenbach, op cit. 23, 4. Rautenbach, op cit. 23, 147.

27 Rautenbach, *ibid.*, 3-4, 20. Rautenbach, *ibid.*

28 Section 15(3)(a) of the final Constitution.

29 Section 15(3)(b) of the final Constitution.

community as well as secular human rights organisations. Initially, it appeared that the Project Committee had consulted mainly with members of the 'ulamā'. However, at the insistence of progressive Muslim organisations such as the Muslim Youth Movement and *Shura Yabafazi* ('Consultation of Women'), the Project Committee extended its consultations to women's rights and human rights groups. The consultation process eventually culminated in the formulation of a Report in July 2003, which contained a Draft Bill for the recognition and regulation of Muslim Marriages.³⁰ The Draft Bill represents an arguably reasonable compromise between extreme views relating to MFL.³¹

The Report and Draft Bill were subsequently submitted to the Ministry of Justice and Constitutional Development for consideration in the parliamentary process. Prof. Abdulkader Tayob suggests that the Project Committee had enjoyed greater success than the MPLB because it had directed its focus to the recognition of Muslim marriages thereby concentrating its efforts on redressing the needs within the Muslim community instead of being caught up in the quagmire of ideological debates, which contributed to the downfall of the MPLB.³² Yet, seven years on, the Muslim Marriages Bill still has not been enacted. One reason appears to be the government's perception that the Bill is not supported by all sections within the South African Muslim community.³³ In particular, two fundamentalist groups namely the Islamic Unity Convention (Western Cape) and the *Majlisul Ulama* (Eastern Cape) do not support the Bill because they claim that it is not sufficiently *Shari'ah* compliant. However, the views of the aforementioned two groups comprise a minority within the South African Muslim community. Although other members of the Muslim community are not satisfied with the Bill in its entirety, Jeenah observes that "most feel that it is a document that they can live with".³⁴ Therefore, the majority of South African Muslims including moderate

30 South African Law Reform Commission, op cit. 24. See also Rautenbach et. al, op cit. 4, 163. Rautenbach, op cit. 23, 4.

31 Amien, W. 'A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context', *International Journal of Law, Policy and the Family* 24, no. 3 (2010): 374.

32 Tayob, op cit. 12, 3, 6-7.

33 Presentation by Enver Daniels at the Muslim Marriages Workshop, 22 May 2010.

34 Jeenah, op cit. 7, 14.

members of the ‘*ulamā*’ and progressive Muslim organisations are in favour of the Bill’s enactment. It would thus be fair to say that there is general consensus within the South African Muslim community that the Bill should be enacted.

South African judiciary

Since 1994, the South African judiciary has attempted to provide some relief to Muslim claimants in cases involving aspects of MPL under the auspices of the new constitutional dispensation.³⁵ In some instances, the courts have recognised the Muslim marriage as a contract and have been willing to enforce proven terms of that contract.³⁶ In other instances, the courts have extended certain civil law benefits to Muslim spouses such as the right to benefit under the Multilateral Motor Vehicle Accidents Fund Act and to inherit from their deceased spouse’s intestate estates.³⁷

However, the relief provided by the courts is on an *ad hoc* basis and the process requires that a Muslim litigant enter the judicial system each time s/he wishes to enforce a term of the Muslim marriage contract or if s/he wishes to challenge legislation and the common laws for excluding her or him from their benefits.³⁸ Due to the costs involved, many indigent Muslims are denied access to justice. Moreover, judicial relief in MPL related matters has not amounted to recognition of Muslim marriages because the courts have indicated that this is a function best left to the legislature.³⁹

Conclusion

It is imperative that the South African government move forward with

35 *Ryland v Edros* 1997 (2) SA 690; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Khan v Khan* 2005 (2) SA 272 (T); *Fatima Gabie Hassam v Johan Hermanus Jacobs N.O. and Others (with the Muslim Youth Movement of South Africa and the Women’s Legal Centre Trust as Amicus Curiae)* CCT 83/08 [2009] ZACC 19.

36 *Ryland and Khan* *ibid*.

37 *Amod, Daniels and Hassam* *op cit*. 35;

38 *Moosa*, *op cit*. 9, 203.

39 Rautenbach, *op. cit* 23, 10. Rautenbach, *op. cit* 23, 139-140. Brigitte Clark and A. J. Kerr, “Dependant’s action for loss of support: Are women married by Islamic rites victims of unfair discrimination?” *The South African Law Journal* 116, no. 1 (1999): 22. Joan Church, “The dichotomy of marriage revisited: A note on *Ryland v Edros*,” *THRHR* 60 (1997): 294.

the process for recognition of Muslim marriages as soon as possible and that the South African Muslim community increase their mobilisation efforts around the issue of recognition of Muslim marriages.

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Is the Muslim Marriage Bill Absolutely Essential?

Mohammed Allie Moosagie

The Interim and Final Constitutions, in guaranteeing freedom of religion, provides that the South African State, subject to the Constitution, may pass legislation recognising systems of personal and family law. The sheer diversity of the Muslim community of South Africa has complicated the introduction of any legislation aimed at giving legal status to Muslim Marriages. This diversity is also reflected in the varied expectations of the Muslim Marriage Bill (Bill). In this short exposition I explore the question of whether the proposed Bill is able to meet the various competing expectations. I shall attempt to briefly sketch the aspirations and concerns of the major groups. I will then examine whether the Bill will be able to satisfy such a diverse set of competing expectations. Secondly, I will argue that the current secular legal dispensation is more likely to satisfy such diverse expectations and deliver those guarantees, rather than the proposed Muslim Marriage Bill. Provocative as it may sound; my exposition will ultimately question whether the Bill is essential or whether it is time to look at other legal ways of satisfying the diverse and competing aspirations amongst Muslims.

The majority of those who have been vocal and active on the Muslim Personal Law scene could be placed into three distinct groups. Although all three groups share the desire for formal recognition of Muslim marriages, they have very different views on how best to achieve this vital recognition. Each group entertains a different and sometimes mutually exclusive set of expectations, while seeking different legislative guarantees and protective measures.

The first group I will refer to as “secular” Muslims though my use of



the term “secular” is not used in any pejorative sense, but merely as a descriptive term. This group will comprise of all those who firmly believe that the Constitution of South Africa is the supreme law and together with the Bill of Rights must dictate and shape the ethos of all legislation. Any right enshrined in the Constitution cannot be compromised in order to accommodate a religious dictate. Essentially, this group comprises of feminists and women’s rights organisations seeking to ensure that the gender equality guaranteed by the Constitution is incorporated in all legislation including the Muslim Marriage Bill.¹

The second major group comprises of all those who are firmly opposed to the adoption and implementation of the Bill and spearheading the opposition to the Bill, is the Majlisul ‘*ulamā*’ of South Africa.² They may be called “ultra-conservatives” who have concluded that the South African secular courts are not allowed to adjudicate matters pertaining to the *Sharia*. The secular courts do not have the necessary expertise or the investiture (*wilāya*) to adjudicate and rule on matters of the *Sharia* and for completely different reasons both “secular” Muslims and “ultra-conservatives” oppose the adoption of the proposed Bill.

The third major group comprises of all those who in principal support the proposed Bill, albeit with some reservations. Essentially, they do not find any fundamental objections to abandon the Bill. This group is represented by the United ‘*Ulamā*’ Council of South Africa (UUCSA).³

“Secular” Muslims

In seeking legislative redress for the enforcement of maintenance, termination of marriage, propriety and custody rights, the “secularists”

- 1 The concerns, the expectations, and the fears of this group are outlined in “The Recognition of Muslim Personal Law in South Africa: Implications for Women’s Human rights”, Rashida Manjoo, July 2007
- 2 The Majlisul ‘*ulamā*’ is an ultra conservative and orthodox organization, operating from Port Elizabeth in the Eastern Cape. It has consistently campaigned against adoption of the Muslim Marriage Bill. Members of the Majlisul ‘*ulamā*’ have written several extensive articles expressing their firm opposition to the Bill.
- 3 Members of the United ‘*ulamā*’ Council of South Africa are: The Muslim Judicial Council (MJC); The Sunni ‘*ulamā*’ Council (SUC); The Jamiatul ‘*ulamā*’ KZN (JUKZN); The Jamiatul ‘*ulamā*’ (JU); The Sunni ‘*ulamā*’ Natal (SJUN) Eastern Cape Islamic Congress (ECIC); Council of ‘*ulamā*’ Eastern Cape (CUEC). The Jamiatul ‘*ulamā*’ KZN has withdrawn its support for the proposed Bill.



have emphasised the supremacy of constitutional law over all other laws, be it religious or customary. They are unwilling to consider any exemptions and this point was clearly spelt out by the late, gender activist, Shamima Shaik:

Muslim personal law cannot be exempted from the Bill of Rights and be allowed to perpetuate inequalities. To even consider exempting any sector of society from being covered by the Bill of Rights is an injustice and makes a mockery of the Bill.⁴

Where a tension exists between women's equality rights and religious law, the former must be given preference. Constitutional supremacy is further illustrated:

South Africa's courts have stressed that this history of discrimination and the push to remedy the real-world impact of such wrongs must inform any interpretation of the Constitution, especially the provisions on equality⁵

In adopting legislation to recognise Muslim marriages; balancing the rights of women and the rights of religious groups is at the heart of staying true to the Constitution and overcoming the history of discrimination. As indicated earlier, where the fundamental rights collide, the equality of women must take precedence.⁶

According to the secularists, the proposed Muslim Marriage Bill would invariably clash with Constitutional rights.⁷ Other areas of concern raised by the "secularists" include the stipulation of Muslim Judges and Muslim experts as assessors.

It is argued that by creating special roles for Muslim judges and attorneys as judicial officers, the Bill "may convey existing distributional problems into the courtroom."⁸

4 "A Marriage made in Parliament: South Africa's Muslim Personal Law Bill", Part 1, Safiyya, 5th May 2009

5 *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at 33, 40

6 *Manjoo*, p. 16

7 *Ibid*, p.10

8 *Ibid*, p. 25



The proposed codification of Islamic law is also rejected:

Many problems arise from this [codification] approach. At one level the concerns raised over the codification of religious laws reflect a broader concern that practices of many religious laws, including Muslim Personal Laws, are biased against women.⁹

Codification would confer state sanction on any underlying bias.¹⁰ For example, the husband has greater freedom to terminate the marriage in terms of Islamic law. Such terms would violate gender equality:

The Bill, in codifying different forms of divorce and post-divorce practices, openly spells out and formalises inequality in the law by giving the husband greater freedom to end the marriage. This is a violation of both domestic and international laws. One example is a provision in divorce which prohibits remarriage, for a woman who is not pregnant, a mandatory waiting of 130 days and for a woman who is pregnant, until the time of delivery (i.e. the *'idda* period).¹¹

The “secularists” see the proposed Bill as an official sanction for gender inequality based on religious doctrine.

The Supporters of the Bill

The main protagonists of the Bill have been the *'ulamā'* bodies. Since a Muslim marriage is essentially regarded as an extension of a Muslim's religious life, traditionally its adjudication was solely left to the *'ulamā'* who have organised themselves into judicial bodies and tribunals. Without the support of the *'ulamā'* bodies, the proposed Bill will stand very little chance of gaining wide acceptance among the Muslim public.

Among the most essential functions of these *'ulamā'* bodies is the adjudication of matters arising out of Muslim marriages. There are, however,

9 *Ibid*, p.21

10 *Ibid*, p. 23

11 *Ibid*, p.24



limitations to the effectiveness of such adjudication. Owing to the fact that these organisations lacked official state recognition and are devoid of legal power, the implementation of its rulings and findings were not enforceable. Their rulings, under the current dispensation, cannot be legally enforced. Currently, these organisations and tribunals limit their adjudication to matters of divorce and *fasakh* (judicial annulment of a marriage) and all other propriety matters including child custody are referred to the secular courts, who have the necessary legal authority to rule and implement their verdicts.



Not surprisingly, the *'ulamā'* have been clamouring for official state recognition of the rulings of the judicial bodies which would enhance the adjudication process, and could be extended to other areas like child custody, maintenance, and all other propriety consequences of a divorce. It was, however, not difficult to garner support from the *'ulamā'* bodies for a Bill that would both recognise Muslim marriages and provide for the implementation of aspects of Muslim Personal Law. Most of the *'ulamā'* bodies envisaged, that through the implementation of the proposed Bill enforceable rulings would be based on Islamic Law.

The *'ulamā'* together with custodians of the Muslim community wanted to be actively involved in drafting the content of the Bill, as they regarded themselves as the only experts capable of interpreting Islamic Law. It would be fairly accurate to say that the drafters of the Bill were in full and constant consultation with them. A senior member of UUCSA, Mawlana Yusuf Patel writes:

The United *'ulamā'* Council of South Africa (UUCSA) had after wide consultation with leading *'ulamā'* - both local and abroad - made substantive inputs regarding the proposed Bill. UUCSA at present holds the view that the MMA [Muslim Marriage Act]¹² as a regulated system will best serve the

12 Mawlana Yusuf Patel refers to the proposed Muslim Marriage Bill (Bill) as the Muslim Marriage Act (MMA). They are one and the same document.



interests of the Muslim community of South Africa.¹³

Arguing in favour of legal recognition of Muslim Marriages, he pointed to the prevailing practice of referring marital disputes to secular courts, resulting in establishing un-Islamic judicial precedents. This will impact on all Muslims in similar situations, and not only the litigants to the original dispute.

A good example for the need of the MMA is Khan's¹⁴ Case where the court ruled that the second spouse in a polygamous marriage is entitled to maintenance in accordance with common law. This means that the courts have ruled for maintenance of the divorced wife to extend beyond the period of *'idda* which is clearly non Islamic. In the case of Daniels¹⁵ the court ruled that she has the right to bring a claim of maintenance against the estate of her deceased husband under the Maintenance Act... which again is non Islamic.¹⁶

Looking into the future, Patel painted a bleak picture:

A distorted set of laws will eventually emerge governing our marriages. Our choice is to either have a regulated system which will be governed by the Muslim Marriages Act setting out the relevant Islamic Law or to have an unregulated system which allows courts to develop law pertaining to Muslim marriages on a haphazard basis with far reaching consequences for the whole community.¹⁷

13 Yusuf Patel, Unpublished document in the form of question and answer. Its aim was to educate the public on the matter of the propose MMA. P. 1

14 In the case of Khan v Khan TPD case no: 82705/03 / A 2705/2003 a Muslim woman who was party to a polygamous Muslim marriage was given the right to claim maintenance from her spouse in terms of the Maintenance Act.

15 In the case of Daniels v Campbell N.O. and Others 2004 (5) SA 331 (CC), the plaintiff was given the right to claim maintenance from the estate of her deceased husband to whom she had been married by Muslim law, in terms of the Maintenance of Surviving Spouses Act

16 *Ibid*, p.4

17 *Ibid*, p.4

Generally, the *'ulamā'* are united in their fear that as custodians of the Sharia, their sole right to interpret Islamic Law is seriously compromised by the increasing number of Muslims referring disputes arising out of their marriages to secular courts. The Khan and the Daniels case are but two of a growing number of landmark rulings. The fear is genuine and indeed there is no doubt that secular courts would continue with their judicial activism in order to deliver what is regarded as just and equitable rulings based on secular principles of justice. The secular courts are in no way bound to deliver verdicts that reflect religious doctrine. In the case of the Minister of Home Affairs v. Fourie and Another, the court declared:

It is one thing for the court to acknowledge the important role that religion plays in our public life. It is another to use religious doctrine as a source for interpreting the Constitution¹⁸.

The *'ulamā'* of UUCSA believed that the adoption of the proposed Bill would spare secular courts of the need to engage in judicial activism, as disputes would be referred to Muslim judges and Muslim assessors whose verdicts are governed by the Bill.

Discussion

It is fair to assert that the fear of secular judicial interference in the religious affairs of the Muslims has supported the adoption of the Bill. In the aftermath of rulings that hold dire consequences for Muslims (as in the Daniels case), the arch protagonists felt an urgent need to expedite the adoption of the proposed Bill.

I believe the general supporters, as well as the protagonists of the Bill, in general, UUCSA, have overestimated the potential of the Bill to stem the secular tide of judicial activism. It is in my view that the Bill may appear to limit judicial discretion by codifying relevant laws, and that it will not in any substantial way stem the tide of secular influence and interpretation of the Bill. Moreover, I am of the opinion that there exists a distinct potential for the Bill to become the ideal instrument through which modern secular precepts of gender equality, human rights and

18 Minister of Home Affairs v. Fourie and Another, CCT 60/04, para 92

individual freedom may be channelled. This may sound like an outrageous claim but I shall proceed to justify it.

Combining Muslim Personal Law content with secular court procedures is bound to create some tension especially within the area of judicial review. As much as it is the firm intention of the architects of the proposed Bill to restrict judicial discretion through codification, the problem arises when the matter is taken on appeal. The proposed Bill attempts to direct the appeal process by stipulating that written comment must be sought from two accredited Muslim institutions and that “due regard” be given to such written comment. This stipulation will not be sufficient. Any attempt to fetter the discretionary power of the Supreme Court of Appeal will not be acceptable, for their deliberations are profoundly shaped by the secular principles of fairness, equity and justice enshrined in the Constitution. They are bound to those secular values and will not abandon them to accommodate any cultural or religious practice. In deciding any matter placed before the Supreme Court of Appeal or the Constitutional Court, judges are obliged to take into account those secular legal principles and values which transcend religion, race, and gender; and to expect these courts to jettison any of those fundamental principles in favour of any religious practice is naive. This legal quagmire and its dire ramifications for Muslim Personal Law have unfortunately been overlooked or have been seriously underestimated by the protagonists of the proposed Bill. The very fear that drives the need for the adoption of the Bill, i.e. stemming the tide of judicial activism, and if adopted, will invariably result in the opening of the floodgates of secular judicial interpretations on matters that were previously the sole preserve of the ‘*ulamā*’. Once the Bill is adopted, promulgated and comes into effect, it will assume a life of its own and at that stage, will be beyond the control and influence of any person or institution. Effectively, Muslims will lose control over how the Bill will be interpreted by the Supreme Court of Appeal or the Constitutional Court. Merely to stipulate that the court should have “due regard” for the written comment of two accredited institutions will not be enough to stem the tide of secular judicial interpretation, or provide the desired safeguards that the protagonists are hoping for. Moreover, any ruling handed down by these senior courts is instantly applicable and binding upon all those who have opted for it. This is indeed a scary

scenario, for no person can possibly predict what the ultimate Bill would be like after being subjected to constitutional challenges and Supreme Court decisions. The *'ulamā'* who actively campaign for the adoption of the Bill can in no way guarantee that the Bill they now support in its current form will remain true to the values they infused into it. Even if it is adopted and promulgated, the current proposed Bill is nothing more than “a work in progress”, or a beginning and not yet a tried and tested alternative to what is currently available. After facing the Constitutional gauntlet, the Bill would not be very agreeable to the conservative component of the protagonists of the Bill.

An obvious feature of the propose Bill is the extent to which it relies upon existing acts and legislation for the implementation of numerous vital aspects of marriages, including religious ones. It is claimed that reliance of existing acts and statutes is confined to matters of procedure, but this is not entirely correct. Here are some examples of how the Bill is heavily reliant on existing legislation. Section 9 (1), which is the provisions of section 2 of the Divorce Act¹⁹ shall apply. Also applicable would be section 9 (6), The mediation in Certain Divorce Matters Act 1987 (Act 24 of 1987), and sections 6 (1) and (2) of the Divorce Act relating to safeguarding the welfare of any minor or dependent child. In Section 9 (7) A court granting or confirming a decree for the dissolution of a Muslim marriage - (a) has the powers contemplated in section 7 (1), 7 (7) and 7 (8) of the Divorce Act and section 24 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984). Under Maintenance, section 12 (1), the provisions of the Maintenance Act, 1998 (Act 99 of 1998) shall apply. Also section 12 (4), a maintenance order made in terms of this act [Bill] may at any time be rescinded or varied or suspended by a [secular] court if the court finds that there is sufficient reason therefore.

The consequences of this reliance may not be immediately perceived as a threat because ignorance of the specifics of those acts may have warded off any serious objections. I shall venture to assert that it is ignorance of the precise content together with its legal consequences, rather than deep understanding of those acts that allowed them to be incorporated

19 Under definitions the “Divorce Act” means the Divorce Act, 1979 (Act 70 of 1979)

into the proposed Bill.

In short, any expectation that Muslim Personal Law, founded essentially on religious doctrine, would withstand the scrutiny and ultimate approval of a secular court whose discretion is not only shaped and influenced by secular values, many of which are the very anathema of religion, is an exercise in futility. While there is still time for the protagonists of the proposed Bill, I would suggest they not take proposed Bill as an accomplished piece of legislation reflecting Islamic values, but ponder into the possible future legal ramifications that may ensue as a direct result of its promulgation. In the current legal dispensation, a ruling of a secular court on matters arising out of Muslim marriages is only legally binding on the litigants and not on Muslims at large. A separate action must be brought each time an individual wants redress in terms of that ruling. When the Bill is promulgated, and a secular court is asked to rule on a specific aspect of the Bill, its ruling will be automatically applicable to all those who opted for it.

Conclusion

In this brief exposition I have avoided the task of scrutinising the content of the proposed Bill and opted to firstly focus, on the competing aspirations of those who have been active and vocal on the Muslim Personal Law front. I then proceeded to briefly sketch the fears of both the “secularists” and the protagonists of the proposed Bill. In the case of the “secularists”, fears have been expressed on a number of issues and it is believed that the adoption of the proposed Bill will entrench gender inequality, with official sanction. The protagonists, on the other hand, are advocating the adoption of the proposed Bill suggesting that the Bill would sufficiently “regulate” the interpretation and application of Islamic Law and this in turn would stem the growing tide of undesirable secular rulings emanating from the courts. Unfortunately, they have seriously underestimated the influence of the secular judicial system under whose aegis the Bill will operate.



Making Haste Slowly: Legislating Muslim Marriages in South Africa

Rosieda Shabodien



In entering into the conversation about the recognition of Muslim marriages in South Africa it is important to be clear about the platform you are speaking from, and whose views you represent. Although I wear many hats (or more specifically, many scarves), I am entering the discussion from a practitioner's perspective. I am at the coalface of engaging with Muslim women and men about the impact of the non-recognition of Muslim marriage by the South African State on their lives. I speak for and on behalf of the Muslim women who enter the Commission for Gender Equality (CGE) offices desperately seeking recourse or some kind of relief from their predicament due to the dissolution of their marriage. I speak for and behalf of Muslim women who interact with me at events, shopping malls, and religious functions who tell a story of abuse and ill-treatment at the hands of their spouses. I speak about the Muslim women who I advise that they ought to protect themselves by having a marriage contract and to ensure that assets accumulated together are in both spouses' names.

I speak of Muslim women who shy away from thinking that divorce could ever happen to them or that their husband would be unjust to them. Often, my advice is met with resistance and disbelief because "It-will-never-happen-to-me!" I speak on behalf of the Muslim woman I met just two days ago who said to me: "Ek loop langs my skoene" (a colloquial Afrikaans expression to express that she is completely forsaken and destitute). Her case is a familiar story in the Muslim community. She is the second wife in a Muslim marriage, now widowed. Her husband died and the inheritance is distributed amongst the first wife's family.



I recall her case deliberately because what continues to abide with me about this woman and other Muslim women engaging with divorce proceedings or trying to gain access to resources accrued during the marriage, is the sheer hopelessness, powerlessness and disbelief that emanate from them. Like many other women, they never imagined at the beginning of their marriages that they would find themselves in this position. The reality is that in South Africa, when divorce proceedings are instituted, the husband generally has the power to decide how the spoils of the marriage will be distributed and in most instances, women get the short end of the stick. The situation is far worse when the spouses were married only according to Islamic rites.

When Muslims are married according to Islamic rites in South Africa, their marriages are solemnised by a learned person, a Muslim cleric or whoever has a marriage certificate book. The marriage officer is not a registered official, and therefore has no obligation to adhere to any regulations. As Muslim marriages are considered by default “out-of-community-of-property”, no nuptial contract forms part of the ceremony. Since Muslim marriages are still not legally recognised by the state no legislation exists to accommodate this kind of marriage union. The consequences of this non-recognition and non-regulatory framework are not evident at the sanctification of the marriage, however, in the event that such a marriage is dissolved; the consequences for the women are particularly dire.

This is the reality that we are confronted with. For Muslim marriages, the rules of engagement governing issues such as the annulment of marriage, assets accumulation, children, and the marriage template (i.e. whether the union will be monogamous or polygamous) have not been formalised. It is only on the annulment of the marriage, which is often fraught with conflict and emotional adversity, that the lack of a marriage contract and legal regulatory framework creates a perilous situation. The only framework that can then be drawn upon is the moral conscience of spouses. Recourse can only be sought through ‘*ulamā*’ (Muslim clergy) bodies or individuals. These ‘*ulamā*’ bodies have no legal recognition and although they profess to have moral authority over the Muslim community they are unable or unwilling to intervene when injustices are committed against women. Moreover, given the patriarchal nature of



these institutions, women who seek recourse through these institutions are sometimes subjected to secondary victimisation. Often women seeking recourse at the *'ulamā'* level, feel that they have been unjustly treated and then turn to pursue other legal avenues. An important issue, often swept under the carpet, but loudly whispered about in the community, is that some individuals that make up the *'ulamā'* are often themselves not above reproach, since some of them are guilty of precisely the issues which the women coming to their office are seeking assistance for.

A disturbing trend is also emerging: the selective quotation of Qur'anic texts. Conscious amnesia is cultivated regarding the Prophet Muhammad's (peace be upon Him) perspective on women's rights. Polygamy presents a clear example. The right to polygamous marriage unions in Islam is often quoted, but the responsibility which accompanies this polygamous marital template (such as equal treatment of all spouses) is not enforced. In most cases women become part of polygamous marriages without their knowledge.

One cannot discuss the issue of the recognition of Muslim marriages in South Africa without paying attention to the issues of gender equity and women's rights in Islam. This is the elephant in the room that represents the heart of the debate regarding the recognition of Muslim marriages in South Africa. Whether they are in the majority or minority, the global Muslim Ummah increasingly finds itself living in a world where it does not make the rules. Given this context, Muslims are under tremendous strain as we attempt to define our identity and assert our power. Under these circumstances, it makes sense that a community would seek to take charge of what is within its control; the members of the community. In Islam, it is the women that bear the brunt of these attempts. For the Muslim Ummah, the length of a man's beard and one's thobe (religious dress for men) is not enough anymore to express the identity and power of Islam. Instead, the focus has shifted to women. It is has now been visually and morally assigned to women. Placing demands and restrictions on women's modesty, their dress, and freedom of movement and access to public life are important means utilised to restore so-called order in the Ummah.

The West, on the other hand, justifies its invasion and assault on the Muslim heartlands on the basis of taking democracy to the Muslim world,



the core of which is the liberation and education of Muslim women. On the one hand, Muslim women are forced to prove their Islamic credentials by the way they dress, talk, their social interaction, and the way they carry themselves. On the other hand, the West measures its invasion success in a Muslim country by measuring the liberation of Muslim women from the veil. Ironically, in response to hold on the last vestige of their power, the Muslim Ummah is prepared to go against the principles of justice in Islam by committing atrocious crimes against women. Muslim women, willingly or unwillingly, have therefore been thrown into the vortex of the global contention.

Even in Islamic countries where Muslim personal law provides the countries' legal framework, the situation for Muslim women is not any better. Often Muslim personal law interpretations are biased towards patriarchal and misogynistic leanings and women are often discriminated against, humiliated and even killed on the basis of these interpretations. An example of this is the stoning of women because of alleged adulterous relationships and honour killings of women. These practices illustrate how laws are interpreted to ensure that women are disempowered and silenced, both literally and figuratively.

Given these facts, why do progressive Muslim activists support the implementation of laws to regulate Muslim marriages in South Africa? The simple answer is that the current Muslim Marriage Bill, although not entirely liberal, contains elements that will ensure that, in the very least; individuals married under Islamic law will have some form of regulation in place. One provision of this Bill is that, in the case of the annulment of a marriage, one does not first have to prove that you were indeed married. This is currently the case since nothing exists to provide proof of a marriage and because of this lack of proof, women often get the short end of the stick when their marriages are dissolved.

Another reason for calling for the regulation of Muslim marriages is because the same situation prevailed under the apartheid autocratic regime. In addition to its ideology of white race supremacy and black race inferiority, the apartheid regime also maintained a Christian theocratic state in which it regarded Christianity as the only 'legitimate' faith in South Africa. This meant that other religions, traditions and cultural practices and their particularities were rejected and even vilified. The



apartheid state acted as if all people in South Africa were Christians and therefore made this the dominant state-supported religion. All other religions and traditional practices were regarded as a private affair, not worthy of State respect or support. An example is the apartheid state's non-recognition of customary marriages performed by adherents of the African traditional religions, Hindu and Islam¹, as well as the fact that all children in public schools were force-fed a Christian theology education.

In the spirit of redressing the past injustices related to religious and traditional discrimination, South Africa's constitution was crafted to ensure that the right to freedom of religion, belief and opinion was secured, and that traditional leaders were recognised. Importantly, the Constitution states that legislation and policy could be enacted to ensure that legal recognition is given to these religious and traditional particularities. It is with this constitutional mandate that the state is currently pursuing various pieces of legislation to accommodate the particularities of faith and traditional communities. As a result, we have a peculiar secular state model which does not have a neutral stance towards matters of religion and faith.

South Africa did not follow the path of other secular states such as France and Turkey, where no form of religious and traditional expression could be accommodated by the state, and where religion and its practices were therefore denoted as private affairs. France and Turkey, both democratic states, do not allow Muslim and Jewish women and men to wear their traditional headdress, or Christians to display crosses at state events or government institutions. Because these countries consider religion to be a personal matter, they ban any expression of faith allegiance in public state domains.

This extreme interpretation of secular democracy would not have been possible in South Africa given the country's oppressive history and the powerful role of faith and traditional communities. Between these two extremes, the complete rejection of any faith allegiance or becoming a theocratic state, the new democratic South African Government adopted a state-religion-citizen model that respects faith and traditional

1 Budlender, D., Chobokoane, N., and Simelane, S. (2005). Marriage patterns in South Africa: methodological and substantive issues. *Southern African Journal of Demography* 9(1): p3



communities, and that requires the state to become a conduit to protect these faith and traditional communities. At the same time, the state assumes and ensures that religious and traditional communities will live within the constitutional framework of South Africa. Alfred Stepan's 'twin tolerations' model best describes the option South Africa pursued. As an alternative to the extreme secular model or theological state model he proposes in his 'twin tolerations' model that "Religious authorities must 'tolerate' the autonomy of democratically elected governments without claiming constitutionally privileged prerogatives to mandate or to veto public policy. Democratic political institutions, in turn, must 'tolerate' the autonomy of religious individuals and groups not only to complete freedom to worship privately, but also to advance publicly their values in civil society and to sponsor organizations and movements in political society, as long as they do not violate democratic rules and adhere to the rule of law".²

Advocating for the Recognition of Muslim Marriages

It is in this spirit of the 'twin toleration' model that a call was made to legally recognise Muslim marriages. It was done in the spirit of respecting diversity, and affirming the fact that Muslim marriages are equally valid and worthy of legal arrangements. Armed with the vision of a multicultural society in which each faith and traditional community would be respected and incorporated into the legislative framework, the Muslim Personal Board was formed in 1994 to work towards the recognition of Muslim marriages. Organisations such as, Call of Islam, Muslim Youth Movement and 'ulamā' bodies served on this forum. Cracks in the Muslim Personal Board begun to appear soon after it was formed and despite its good intentions, the Board soon fell apart. One of the contributing factors was the emergence of two diametrically opposite views regarding the status of women in Islam. The reason for the ultimate demise of the forum in 1995, was the fact that organisations such as, Call of Islam and

2 Alfred Stepan, *The World's Religious Systems and Democracy: Crafting the 'Twin Tolerations'*, in *Arguing Comparative Politics* (Oxford: Oxford University Press, 2001), p.217 as cited in Jose Casanova, 2009, *Religion, Politics and Gender Equality: Public Religions Revisited*, Draft Working Document, United Nations Research Institute for Social Development. Found on website: <http://www.unrisd.org> Accessed on 18 May 2010

Muslim Youth Movement were in discussion about the formulation of laws regulating Muslim marriages and refused to accede to the incorporation of practices that would discriminate against women, and sought to include more liberating aspects of Muslim personal law. Another area of contestation was the representation of women in the decision-making structures of these religious institutions. In particular, the discussion about a possible structure or judiciary that would oversee the particularities of Muslim marriages caused a deadlock. The Call of Islam and Muslim Youth Movement refused to accept the exclusion of women from any structure or judiciary and the represented *'ulamā'* rejected the representation of women on any structure.

Even after the demise of the Muslim Personal Board, continued advocacy for Government to recognise Muslim marriages was pursued by some *'ulamā'* bodies, Muslim academics, and Muslim civil society organisations. In response to advocacy pressure by these entities, government then tasked the South African Law Reform Commission (SALRC) in 1999 to establish a committee to draft legislation for the legal recognition and regulation of Muslim marriages. After four years of deliberations and consultation, the process was concluded and the SALRC submitted a report to the Minister of Justice and Constitutional Development in July 2003³. The process then lost momentum, and the Bill was shelved. At different times over the last few years, the proposed Bill was discussed, but the process to get it legislated never materialised. In the meantime, new Muslim organisations emerged and mobilised against the enactment of the Bill. In the run up to the 2009 elections, the Bill emerged again on the political agenda and the, then Minister of Justice and Constitutional Development, Enver Surty, engaged with Muslim clergy bodies and committed himself to pursue the enactment of the MM Bill. True to his word, the Bill was submitted to cabinet but was rejected at this level and the reason for its rejection has not been formally established. In my engagement with various political entities, it was indicated that the Bill contained ill-considered clauses. In a meeting with the Recognition of Muslim Marriages Forum, the, then Chairperson of the Portfolio Committee, Yunus Carriem, also indicated that the Bill was very

3 South African Law Reform Commission, *Islamic Marriages and Related Matters: Report-Project 106(2003)*,

controversial given that there are such opposing views in the community about the Bill. In response, it was pointed out to him that many Bills were controversial, and should not necessarily mean that the state does not engage with enacting them. Some examples of controversial Bills that the state has enacted include the Abortion Bill and Civil Union Bill. It is my contention that the state is reluctant to engage with the Bill because they are fearful that they will be accused of interfering with the affairs of the Muslim community. However, given the precedent set in enacting the Customary Marriage Act which regulates customary marriages in the African traditional communities, it is unacceptable that the state should now get cold feet and refuse to deal with the Muslim Marriages Bill.

In discussing a way forward with regard to the recognition of Muslim marriages, it is important to distinguish between those who benefit from, and those who are negatively impacted because of the current impasse that exists regarding the Bill. The Islamic Unity Convention opposes the Bill, noting that “for the past 350 years or more we have successfully regulated our Muslim marriages” (excerpt from an interview with an IUC representative). Other newly formed organisations that have joined forces to oppose the Bill include the Muslim Women’s Association, Women’s Cultural Group and Eastern Cape ‘ulamā’. The reason for their opposition to the Bill is that they believe that the state should allow them to establish Sharia (Islamic Law) Courts to manage the legal affairs of the Muslim community. Those supporting the Bill and the regulation of Muslim marriages are the Commission for Gender Equality (CGE), Women’s Legal Centre, Muslim Judicial Council, Muslim Youth Movement, Call of Islam and Shura Yabafazi. These organisations participated in lobbying Government in the first instance to pass the Bill to provide a regulatory framework in which Muslim marriages may operate. The position of the CGE is that when a legislative vacuum exists, it is the state’s duty to ensure regulations are introduced to ensure that all citizens have access to civil liberties.

In our gendered analysis of the current situation we believe that non regulation is not viable since often the burden falls on Muslim women to access the courts to ensure that their rights are protected. This is both a costly and emotionally draining affair for the women who have to initiate these legal proceedings. The current reality of entering into

a marriage contracted under Muslim rites in South Africa is that the marital bond is fragile and easily breakable and so, for Muslim women the marriage union is an insecure place. One of the major factors that contributes to this tenuous position is the fact that the continuation or discontinuation of the marriage lies within the hands of the husband. This means that a married man can unilaterally leave the marriage, with little or no consequence for his own financial wellbeing. By simply uttering the words 'I divorce thee' three times, a marriage is dissolved. Within this legal vacuum, a man can abandon his responsibilities to his wife and children without ever having to deal with a legal process or its consequences. It is ironic that the righteousness, compassion and care by which the Muslim community prides itself in fail in this instance and the vulnerable parties (women and children) are disregarded. In addition to the ease with which a marriage can be dissolved, Muslim women have to contend with the ever-present threat of polygamy. When a husband, at the drop of a hat, can take another spouse, it creates a tenuous situation for women. Women can suddenly find themselves in a polygamous marriage they never signed up for. Given this reality, it is imperative that we seek to bring an end to legal vacuum within which Muslim marriages currently exist in South Africa, and that we insist that the state enact regulation.

The state cannot wait for the 'ulamā' bodies to step to the mark. Due to lack of political will they squandered their chance to create systems to regulate Muslim marriages. When confronted with the reality of gender discrimination in their own faith communities they become defensive or fall back on the justification that our laws and customs are 'Divinely-inspired' and therefore immutable and lack the moral will to ensure women are treated fairly and are not discriminated against. If they had the political will and foresight they would have committed significant resources to ensure the regulation of Muslim marriages. The argument that they do not have the wherewithal does not stand. For example, in ensuring Muslims are able to identify Halaal food a vast amount of resources was spent to operate a Halaal certification system in South Africa. No energy was spared for this project. However, the same moral will was sorely lacking in advocating for and ensuring the provision of regulations for Muslim marriages. Similarly, the lack of moral will in this regard meant that they also failed to explore Islamic jurisprudence

options that would provide relief for women in the event that a marriage was dissolved. The current legislative vacuum suits some of the *'ulamā'* just fine because due to the absence of a regulatory framework they are able to maintain their kingpin status.

The Recognition of Muslim Marriage Bill is not the panacea for the ills facing the Muslim community. The fundamental ideological issues regarding the role and position of women in Islam are not going to change just because we pass this Bill. However, it will make a difference as it will provide a regulatory framework that we can utilise, contest and amend. When the time comes for the Muslim Marriage Bill to be enacted, the state has to be unambiguous with the following message: practicing one's faith, tradition and culture cannot happen at the expense of the civil rights of women, or perpetuate the disempowerment of women. Religious, cultural and traditional practices have every right of expression but *within* a human rights framework and without minimising any other values as expressed in the Constitution. Simply put: when the particularities of religion, culture and tradition are practiced in a way that are patriarchal, misogynist and/or discriminatory, this cannot be allowed with the state's consent. Self-regency in the arena of personal family law system comes with a commitment to ensure it does not go against the equality principles in the Constitution and Bill of Rights.

It is my contention that the debate regarding this matter should be informed by the highest authorities that we draw on in Islam, namely the Quran and the principles taught by the Prophet Muhammad (peace be upon him). If we take guidance from these teachings, we would agree that there is no justification for denying any individual justice, equality and dignity. Therefore, the debate around whether the South African constitution, given its equality clauses, is in contradiction with Islam needs to be seen for what it is: misogynistic and patriarchal ideology dressed up as religious edict. It is the duty of the South African government to ensure that the civil liberties of all citizens are protected, and to intervene when religious and traditional dogma perpetuates oppression and discrimination. It is the duty of Muslim community and those in leadership of this community to ensure that oppression of women does not continue in the name of Islam.



WOMEN'S LEGAL CENTRE¹

Hoodah Abrahams-Fayker

Introduction

The core objective of the Women's Legal Centre ("WLC") is to advance the rights of women through public interest litigation and to assist those women who are socially and economically disadvantaged. Muslim women fall into this category as they are discriminated against and marginalised by the fact that their Muslim marriages are not recognised. This means that Muslim women do not have the same rights on the dissolution of marriages through death or divorce than women who are married by civil law or in terms of African customary law.

There has been a steady stream of women coming to our offices seeking assistance with serious issues: not being able to obtain an Islamic annulment of the marriage despite their husband having wronged the wife (by committing adultery, abusing them, abusing drugs, gambling); a husband issuing a divorce unilaterally without the proprietary consequences being addressed (leaving his wife with only the clothes on her back and the children not provided for). Often women have nothing to show for the contributions that have been made during the marriage and are left impoverished and without a remedy on dissolution of their marriages.

An Islamic marriage entered into in accordance with Islamic religious rites is not a marriage in terms of South African law and therefore Muslims have no legal redress to take the matter further. Prior to the new dispensation Muslim marriages were considered to be contrary to

1 Women's Legal Centre, 7th Floor Constitution House, 124 Adderley Street, Cape Town. Tel: (021) 424 5660; Fax: (021) 424 5206; E-Mail: hoodah@wlce.co.za



the norms and morals of the South African community because Islam made provision for polygamy (*Ismail v Ismail* 1983). However, subsequent to the democratic Constitution, African customary law was automatically recognised, thereby also recognising polygamy as advocated by African custom. Furthermore, the rights to equality, dignity and freedom of religion, just administrative action and the right to have a dispute heard by the courts were entrenched in the Constitution.

This begs the question as to why Muslim marriages cannot be recognised.

Does the Muslim community support the idea of having legislation to govern their marriages?

Muslim Personal Law is a thorough and detailed legal system derived from the Holy Quran and the *Sunna* and because of its divine nature, the preservation and implementation of Muslim Personal Law is integral to the belief system of Muslims. As a result, the Muslim community has responded differently to the idea of legislation governing Muslim marriages:

- There are those that vehemently oppose the Bill saying that enacting legislation will render Islamic law subject to the Constitution (in terms of the doctrine of constitutional supremacy) which contradicts the Quran as the supreme law;
- Others favour legal pluralism, wanting legislation which must be governed independently by establishing Shariah Courts to ensure that adjudication is strictly according to Islam;
- Then there are those who favour legislation governing Muslim Personal Law so that the South African Muslim community may benefit from living in a democratic country which guarantees fundamental rights to all.

In the absence of legislation dealing with Muslim marriages, the WLC, (amongst others) has sought to use the constitutional obligation to develop the common law in line with the constitution as a way of providing remedies for Muslim women. Strategic litigation is used as a tool to create social change. Judgments may have long-term positive effects when successfully challenging the interpretation of existing laws to redefine rights and/or questioning the constitutional validity of existing laws. The

courts have played a significant role in developing this area.

Let us look at some of the cases that have come before the courts relating to Muslim Personal Law.

Ismail v Ismail 1983(1)SA1006(A). This decision reflected the court's unwillingness to recognise marriages prior to constitutional supremacy. Arising out of the termination of a marriage solemnised according to Islamic Rites, the appellant contended that while her union did not constitute a valid civil marriage, the Court should grant her the proprietary consequences flowing from the marriage. The Court held that the union could not be regarded as a valid civil marriage because it was potentially polygamous and had not been solemnised by a marriage officer in terms of the Marriage Act 25 of 1961. It was held that polygamous unions should be regarded as void, and the consequences that flowed from such marriages should also be unenforceable. The union (marriage according to Islamic rites) was *contra bonos mores*, contrary to the accepted norms that are morally binding on our society.

Ryland v Edros 1997(2) SA 690(C). Married by Muslim rites in a *de facto* monogamous union which had subsequently been terminated by her husband in accordance with Islamic law, a woman asked the Court to enforce 'the contractual agreement' constituted by the marriage according to Muslim rites between the parties. The Court was not asked to recognise the marriage by Muslim rights as a valid marriage, but rather to enforce certain terms of a contract made between the two parties. The Court considered whether the spirit, intent and objects of Chapter 3 of the interim Constitution were in conflict with the views of public policy expressed and applied in *Ismail*. Recognising the values of equality and tolerance of diversity that lie beneath the interim Constitution, Judge Farlam found there was nothing offensive to public policy or good morals in the contract which the defendant was seeking to enforce. As such, the Cape High Court recognised a *de facto* monogamous marriage by Islamic rites as a valid contract under the Constitution and demonstrated that the Court could be called upon to ensure that parties to a monogamous Muslim marriage comply with the terms of the contractual engagement. Here, the court decided to enforce a contract to protect the vulnerable

spouse. This case is known as the one that gave legal recognition to the consequences of an Islamic marriage. Even though it did not recognise the union as a marriage, it was hailed as a breakthrough because it removed the uncertainty of spouses married according to Islamic rites from having to prove their contributions to the marital estate.

Amod v Multilateral Motor Vehicle Accidents Fund 1999(4) SA1319 (SCA1).

In this case, a woman brought an action against the insurer of a driver who had negligently killed her husband. She and her husband had been married according to Muslim rites in a *de facto* monogamous marriage, which had not been registered in terms of the Marriage Act 25 of 1961. The Supreme Court of Appeal found that since the marriage had been a *de facto* monogamous marriage and undertaken according to the customs of a major religion through a very public ceremony, the appellant's marriage, in the spirit of plurality, equality, and freedom of the new Constitution, could not continue to be found to be offensive to the *bonos mores* of society.

Daniels v Campbell NO and Others 2004(5)SA 33(CC) The widow of a monogamous Muslim marriage challenged the interpretation of 'spouse' in the Intestate Succession Act and 'survivor' and in the Maintenance of Surviving Spouses Act. The Constitutional Court ruled that the words 'spouse' and 'survivor' must include parties to monogamous Muslim marriages. The Court held that the purpose of the Acts would not be furthered if widows were excluded simply because the legal form of their marriage adhered to Muslim Personal Law and not the Marriage Act. Even so, this protection was, once again, only extended to parties in monogamous Muslim marriages. Daniels approached the court asking to be declared a "spouse" in order to be able to claim maintenance against her deceased husband's estate, and to be able to inherit from her husband's estate in terms of the Intestate Succession Act. The court held that until such time that the Muslim Law of Succession was legally recognised and regulated in a manner consistent with the Constitution, there was no justification for the limitation of the Applicant's equality.

Khan v Khan 2005(2)SA272(T). In this case, the Court considered whether

there was a legal duty on the appellant, in terms of the Maintenance Act of 1998, to maintain the respondent, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygamous one. The Court held that the preamble to the Maintenance Act emphasised the establishment of a fair system of maintenance premised on the fundamental rights in the Constitution; that the common law duty of support was flexible and had expanded over time to include many types of relationships; that the purpose of family law was to protect vulnerable family members and ensure fairness in disputes arising from the termination of relationships; that polygamous marriages were a family structure and should thus be protected by family law; and held that partners to Muslim spouses – whether monogamous or not – were entitled to maintenance.

In *Jamalodien v Moola 2006 NPD*, the applicant sought relief to apply the Divorce Act 70 of 1979 to order a decree of divorce to parties in a monogamous Muslim marriage; make an award for custody and maintenance of the child of the marriage and that the joint estate subsisting between the parties should be divided. The basis of the Respondent's defence was that the parties never conducted a marriage as contemplated in the Marriage Act and the Divorce Act and as a consequence thereof, there was no joint estate. The applicant made an application in terms of Rule 43 (Interim order for maintenance) which applies to pending matrimonial matters.

The Constitutional challenge of the divorce action was settled. In terms of Rule 43 interim maintenance application, it was ordered that interim maintenance had to be paid subject to two conditions:

1. in the event of the trial and finding that the ex-husband was not obliged to pay her maintenance, she would be obliged to repay her husband all the amounts paid to her;
2. and she had to enter into good and sufficient *security de restitue do*, to the satisfaction of the Registrar of the court and failure to provide security would result in the automatic lapse of the obligation to pay maintenance.

In *Cassim v Cassim 2006 TPD* it was held that there was a duty for a

husband to maintain his spouse (to whom he was married in terms of Muslim law) in accordance with a general standard of living by providing for her reasonable needs. Relief in terms of Rule 43 was granted, where the main application sought an order directing that the Marriage Act was unconstitutional because it failed to include Islamic Marriages.

Hassam v Jacobs . The applicant was a party to a polygamous Muslim marriage where the husband died intestate. She lodged claims with the executor of the deceased's estate which were rejected because the deceased's second wife was recorded as the spouse. She then applied to the High Court challenging the validity of some of the provisions of the Intestate Succession Act (ISA) and the Maintenance of Surviving Spouses Act (MSSA) on the grounds that they unfairly exclude widows in polygamous Muslim marriages from the benefits provided for in those statutes by excluding them from the concepts of "spouse" and "survivor".

The High Court declared, section 1(4)(f) of the ISA, to be inconsistent with the Constitution to the extent that it made provision for only one spouse in a Muslim marriage to be an heir. The court held that the term "spouse" in that Act should be interpreted to include spouses in polygamous Muslim marriages and that the mechanism used to calculate the share of the estate to which such spouses are entitled must be reformulated to give effect to such spouses' constitutional rights. The High Court further declared that the word "survivor" in the MSSA should be read to include surviving partners of polygamous Muslim marriages. The Constitutional Court confirmed the order by the High Court and went further to order that it had retrospective effect. This was confirmed by the Constitutional Court.

Mahomed v Mahomed 2008 ECP. In an interim application for maintenance in terms of Rule 43, Judge Revelas recognised that an increasing tendency has developed in our courts to enforce maintenance and other rights to spouses married in terms of Islamic law, even though the legislature does not legally recognise an Islamic marriage as a marriage in terms of the Marriage Act. On that premise the Rule 43 Application was granted in terms of which the Respondent was ordered to pay maintenance for

the applicant and his minor child and had to pay a contribution towards costs, pending the hearing of the main action for divorce.

Hoosain v Dangor 2009 CPD . In an application for interim maintenance in terms of Rule 43 of the uniform rules of court, Ms Hoosain sought interim maintenance for herself and her minor daughter and a contribution towards costs in the main divorce action. The court found that interim maintenance arose from the general duty of a husband to support his wife and children and she was not precluded from doing so because she was married by Muslim rites.²

Strategic litigation has made huge inroads towards recognising the consequences of Muslim marriages: such as the duty of support in the case of the death of a breadwinner (Amod case), the right to inherit from the husband when he dies without a will, in monogamous marriages (Daniels case), and polygamous marriages (Hassam case), spousal maintenance in polygamous marriages (Cassim) and interim maintenance pending a divorce (Mahomed and Hoosain). This illustrates the advantages of strategic litigation and the extensive impact it can have legally and socially through setting precedents. The WLC has pending cases challenging the constitutionality of the Marriage Act and the Divorce Act for not including marriages solemnised according to Muslim rites.

Notwithstanding the piecemeal remedies granted by the courts, it is of limited applicability because change through litigation can only be done with the matters that have been adjudicated. It can cost time and money (which a Muslim woman who does not have a roof over her head and who doesn't know how she's going to feed her children their next meal does not have). Legislation to govern Muslim marriages is necessary. There seems to be no justification for not regulating Muslim marriages. Recently the Minister of Justice confirmed that the Divorce Act should be read to include parties married according to Muslim rites. This is a significant departure from the past where the state used to initially oppose such extended application of the Marriage and Divorce Acts to Muslim marriages.

- 2 Apart from these cases, Muslim marriages are also recognised in legislation for tax purposes, in terms of criminal procedures where spouses cannot testify against one another and in terms of the Child Care Act.

Muslim Class Action

Despite all the talk about legislation being passed, there is still no legislation recognising Muslim Marriages. This non-recognition has marginalised Muslim women, rendering them vulnerable, unequal and suffering undue hardship. Due to the continued vulnerability of Muslim women with no legal recourse, the Women's Legal Centre brought an application directly to the Constitutional Court in 2009. In terms of Section 167 of the Constitution, it asked the court to compel the President and Parliament to pass legislation recognising Muslim Marriages and regulating the consequences of such marriages within eighteen (18) months.

The court first considered the preliminary issue relating to jurisdiction. The Constitutional Court has concurrent jurisdiction with the High Courts and Supreme Court of Appeal to enquire into the constitutionality of legislation, but has exclusive jurisdiction in certain instances inter alia in terms of Section 167(4)(c) where it may decide that Parliament and the President have failed to fulfil a constitutional obligation. Also, in terms of Section 176(6), one may approach the Constitutional Court directly in extraordinary circumstances where the matter is of sufficient public importance or urgency that direct access will be in the interests of justice. The Women's Legal Centre brought its application in terms of Section 167 applying for an order declaring that the President in his capacity as the head of the National Executive has failed to fulfil the obligation imposed on him by Section 7(2) of the Constitution to protect, promote and fulfil the rights of the Constitution, which required him to prepare and initiate diligently without delay a Bill to provide for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa, and regulating the consequences of such recognition. We submitted that the adjudication of the dispute involved important questions that related to the sensitive areas of separation of powers, and would require a decision on a critical political question, and thus precisely fall within the ambit of Section 167(4)(e) of the Constitution. Alternatively, we made an application in terms of Section 167(6)(a) that the failure of the President (in his capacity as head of National Executive and head of State) and Parliament to pass legislation, was not in the interests of justice. Section 167(6)(a) of the Constitution provides that

“National legislation or the rules of Constitutional Court must allow a person to bring a matter directly to the Constitutional Court when it is in the interests of justice.”

When considering the application in terms of this provision, the court highlighted that it contains a significant “agent-specific” focus in that the provision refers to “Parliament” only, in terms of which it should be interpreted that exclusive jurisdiction would relate to obligations resting on them only. The court held that the obligations sought by us as the Women’s Legal Centre were obligations imposed by the Constitution on the “State” which encompasses a broad assemblage of duty-bearing organs and institutions. The court advocated that the provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament *alone*. The Courts must allow a person, when it is in the interests of justice and without leave of the Constitutional Court, to bring a matter directly to the Constitutional Court.

The decisions of the Constitutional Court on application for direct access make it clear that there must be compelling reasons to use this exceptional procedure to persuade the Constitutional Court that it should exercise its discretion to grant access. It was our considered opinion that the consequences of having no legislative framework for Muslims married according to the tenets of their faith, was considered a compelling reason for direct access. The Constitutional Court found that this was a matter that would benefit from the comments of other courts and that a multi-stage litigation process would have the advantage of isolating and clarifying issues. Further, the matter may require the resolution of conflicting expert and other evidence which the Constitutional Court was reluctant to do as court of first and last instance. It was the considered opinion of the Women’s Legal Centre that the delay in passing the bill relating to Muslim marriages was deemed extraordinary, justifying that the court hear the matter on direct access. A number of lower courts, and indeed the constitutional court itself, have considered the non-recognition of Muslim marriages and stated that there was an urgent need for regulation.

There has been limited application of this provision and we were obviously disappointed that the Constitutional Court did not use this opportunity to develop the law. Had we applied to the High Court we

would have risked the same jurisdictional challenge and could maybe have been referred to the Constitutional Court.

Strategic litigation has advantages besides winning a court order. The case in question illustrates this, while we obviously have been set back by having to re-submit our application we do not consider that we had “lost” our application. The procedural hurdle did not undermine the substantive application. The application in fact seems to have spurred the Ministry of Justice on to resuscitate the process which had stalled; and attracted an enormous amount of national and international interest.

Alas, the public undertaking by the Department of Justice that the Bill would be on the legislative time table for 2010 and was to have been introduced to cabinet in April has come to nought.

Will the Bill ever be passed?



Overcoming Legal Tradition: The ‘Ulamā’ and the Potential for Change

Muneer Fareed



What is it about law and religion that embroils jurists and theologians in deep, sometimes acrimonious discussions that too often, critics say, deliver less than was promised? Well, for one, they both make progress without making discoveries. Their aim, in other words, is rarely to unearth the unknown in their particular vocations, but rather, to focus on that which is familiar, and yet escapes notice. And that is not entirely an exercise in futility! To quote Wittgenstein, throwing a different light on the familiar, has epistemic value as well, if only because, “the aspects of things that are most important for us are hidden because of their simplicity and familiarity”. (One is unable to notice something - because it is always before one’s eyes).¹ The other similarity that law and religion share, and to which I will focus more attention with particular reference to Islam, is that they are both in their own ways quite traditional. While both religion and the law are steeped in legacies of tradition, and both work towards preserving their respective traditions, only religion is generally recognised as being traditional in that way. As for law, ever since Hobbes, it has been described as living ‘time-free’ in an “ever-present world of sovereigns, commands, sanctions, more recently norms, rules, principles, policies and (for critically inclined theorists) interests, domination and

1 Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Oxford, 1967) p. 50. in, Martin Krygier “Law as Tradition” in *Law and Philosophy*, Vol. 5, No. 2 (Aug., 1986), pp. 237-262. Krygier, to whom I refer in making these observations focused only on the peculiarities of the law, and not religion. I believe however, that his conclusions apply to both religion and law.



power”.² But, as Krygier points out, the law is as much part past and part present as is religion, and for at least three reasons. The first has to do with law’s historical substratum which almost always resides in some momentous past filled with revolutionary legal opinions and legislative rulings that in hindsight would seem to have changed the course of human history. The second has to do with the authority tradition wields in the present, without which law can lay no claim to being a normative living tradition. And the third has to do with the powers that determine the authenticity and continuity of the tradition, and what passes from past to present, and more importantly what of the present is to be read into the past. In a democracy that task is performed by mainly the *vox populi*, and by politicians when seeking office; the legislature merely recognises the voice of the people and legislates accordingly. In Islam however, it is the *‘ulamā’* who maintain the integrity of the content of tradition, and ensure its authentic transmission. However, they are increasingly being challenged by a cacophony of competing voices no longer willing to defer passively to any single authority. Multiculturalism today has so entangled the traditional authority of the *‘ulamā’* with the secular *vox populi* that they are both being forced to grudgingly accommodate each other’s claims. How they might want to do so is the topic of this particular paper.

Among Muslims the strains of living an entangled existence between the traditions of faith and the laws of a secular dispensation are most evident where constitutional democracies prevail. Those living in such societies increasingly find that the very legal system meant to protect them from societal excesses elsewhere will often do so only if they compromise key elements of their own cherished traditions. In France, therefore, it is the tradition of the veil that must be compromised, in the United States, that of speaking truth to American foreign policy, and in Denmark that of denying others the right to speak blasphemously about Islam’s cherished icons. In each case, it seems, it is not so much the letter of the secular law itself, but rather the spirit of its founding traditions that block civil society’s willingness to yield to religious traditions. In South Africa this is less the case for at least two reasons: firstly, the local tradition of the

2 Krygier, p.239

African majority, itself a backdrop to the country's current constitutions makes accommodating other traditions so much easier. And secondly, Islam's traditions in this country have not threatened law and order, or undermined the structures of civil society as might have happened elsewhere. The issue, however, remains vexatious if only because it tests the extent to which the traditions of a secular democracy and the flexibilities of a religious tradition are able to accommodate each other. While it is true that not all Muslims are enthused by the idea of the State involving itself in their religious life, and not many non-Muslims care one way or the other, the underlying issues that inform this discussion will impact all citizens of this country. One important group that has been at best ambivalent to the issue of state entanglement in Muslim affairs, and to which we now turn attention, is Islam's religious hierarchy.

In examining the lack of social development in the Muslim world, D.E. Smith concluded that Islam's promise of material wellbeing, and societal felicity based on social justice, have been hobbled by its static legalism. According to Smith, this is because every effort to exercise its universal norms within given social paradigms has failed to "receive ecclesiastical recognition, legitimation and support."³ Smith suggests that the blame lies with the custodians of Islam's legal tradition, the '*ulamā*', and in particular, with their persistence in privileging tradition over change. Smith is certainly not the first to come to this conclusion: almost every Muslim reformist from the past century and a half has in similar vein blamed the '*ulamā*' for all of the Islamic world's calamities.

That the Muslim world lags in terms of human rights is clearly evident by the endemic poverty Muslims suffer as a whole, and which their women and children are forced to endure disproportionately. But to hold the '*ulamā*' responsible for retarding development, both social as well as material, is to misunderstand their role in the law, and consequently, to search for the levers of change in the wrong places. To make the point I would suggest we first understand the historical tipping point of this discussion, the Enlightenment, and its pre-eminent product, modernity. Without understanding how pre-modern and modern society changed perceptions on the merits of tradition, the role of the '*ulamā*' in retarding

3 D. E. Smith, *Religion and Political Development: An Analytical Study*, The Brown, Little Series in Comparative Politics (Boston, 1970), p. 25.

or advancing society's shift away from the past and towards the future would remain murky.

The modern and the traditional represent not just time, but also space. The one therefore is partial to the universal and the other to the local. To the modern it is the individual who is all important, and to tradition, it is society. And in terms of knowledge, the triumph of the modern over the traditional is best exemplified by the triumph of the "... truths of science over the truths of the emotion."⁴ The jury is still out as to whether the relationship between the two is benignly dichotomous, or dialectical in the Hegelian sense, or even positively symbiotic. Put differently, we know not whether modernity was inevitable and good, inevitable and bad, or was an essentially dystopic cataclysm that unhinged us from the wisdom of our past and left us in free fall towards a perilous future.

To pre-moderns prior to the Enlightenment, and the *'ulamā'* today, —in fact, one could argue, to all people of faith—authority and tradition are largely seen as positive and worthy of emulation. This is more the case with Islam than it is with other faiths, some argue, for the following reasons: (1) because Islam is more text-centred than the others—which of course means that its ideal is in the text and not in creative thinking; (2) because its theology is reified through law—and law, whether sacred or secular, is also in the business of preserving tradition; and (3) because its kingdom of heaven lies in the Medina of the Prophet rather than in John Rawls' overlapping utilitarian future.

Given that the *'ulamā'* are by conviction devoted to tradition and by practice committed to its preservation, how then will they adapt to the inevitable change that society demands for its well being? Change, they have succumbed to, of this there is no doubt; for how else could they have wielded authority over three major empires for over a millennium! To answer that question we turn firstly to Werblowsky's observation on a related matter. Global transformations, he tells us, are often related to religion; "but when change is made in or in the name of religion, it must

4 Lloyd I. Rudolph and Susanne Hoeber Rudolph, *The Modernity of Tradition: Political Development in India* (Chicago, 1967) in Marilyn Robinson Waldman *Tradition as a Modality of Change: Islamic Examples: History of Religions*, Vol. 25, No. 4, vol. (May, 1986), p. 320

usually be legitimised as non change”⁵ This is precisely how the ‘ulamā’ have in the past grudgingly acceded to change . . . as no change! But will they continue to do so today, now that the secular tightens its grip on the world and inexorably squeezes religion out of the public space?

According to Waldman some religions are better equipped to handle secularisms’ ‘big squeeze’ than others. The relationship of religion to the secular state, Waldman suggests, falls into two models, the organic and the church. In the church model a unitary polity allows for the coexistence of the secular and the sacred, but with the head of the temporal state overseeing the implementation of all laws; the ecclesiastical hierarchy is largely subordinated to temporal authority, except perhaps in matters purely ritualistic. In the organic model, by contrast, religion is fused to the state, with the head of state exercising both “temporal and spiritual authority; his chief function is to maintain the divine social order according to sacral law and tradition”.⁶ Where organic models still loosely exist, as in large parts of the Muslim world, religion, as well as the religious community has to accept modernity’s first order of business, the separation of religion from state, and then grow accustomed to its inevitable outcome, the subordination of religious law to the secular constitution. This, as will be shown hereunder, is what the ‘ulamā’ find most objectionable. But for those who follow the church model, temporal and sacerdotal authorities are always separate, either in form or in purpose. In cases where common objectives overlap as in the case of Europe’s colonial expansion, the relationship becomes complementary. In all other cases the state dictates and the church follows.

Given the limitations that the organic model places on change, and the extent to which the ‘ulamā’ further limit such change, how then does change take place under these circumstances? Can the ‘ulamā’ themselves become an instrument of change, and what in such a case would serve as the fulcrum of change? If current rhetoric in ‘ulamā’ circles and even some strikingly innovative rulings are anything to go by then yes, some

- 5 R. J. Werblowsky: *Beyond Tradition and Modernity: Changing Religions in a Changing World*, Jordan Lectures in Comparative Religions 11 (London Press, 1976) cited in Marilyn Robinson Waldman *Tradition as a Modality of Change: Islamic Examples: History of Religions*, vol. 25, No. 4, (May, 1986), pp. 318-340
- 6 Marilyn R. Waldman: *Tradition as a Modality of Change: Islamic Examples History of Religions*, vol. 25, No. 4, (May, 1986), pp. 329.

change is indeed taking place. With regard to rhetoric, there have always been in classical Islam buzz words of change, of which *ijtihād* (juridical reasoning), and *tajdīd* (renewal), and more recently *maṣlaḥa* (juridical utilitarianism) and *talfīq* (legal eclecticism) are striking examples. The use of these terms after the classical period of the law declined as Islamic law moved from being a revolutionary instrument in the hands of jurists (*ijtihād*) to becoming an instrument of state administration (*taqlīd*). For centuries thereafter, these dynamic terms lay dormant, until colonisation challenged Islam with secular humanism and liberal democracy. Suddenly, those very terms gained coinage not in the sermons of the *‘ulamā’* but in the reform language of liberals and fundamentalists. But while these groups had the intellectual capacity to justify change by invoking the language of the past, they lacked the credibility to pull off Werblowsky’s earlier mentioned “change as no change”. However, now that the *‘ulamā’* themselves undertake human rights reforms it is not just rhetoric that resurfaces but in some cases actual juridical change disguised as “no change”. Thus we find for example, a prominent South Asian scholar, Ashraf ‘Alī Thanwī engaging in all of *ijtihād*, *maṣlaḥa* and *tajdīd* in his quest to overturn established laws on divorce in Hanafi jurisprudence. His campaign to protect the rights of married women culminated in the Dissolution of Muslim Marriages Act (1939), but it did so without recourse to the buzz words of change. This was because the school to which he belonged was notorious for its opposition to reform movements that invoked these very buzz words. There was also no need for this because the state itself to which the appeal was ultimately being made was not just non-Islamic, but also considered hostile to Islam. Contrast this with the situation in the Middle East where no substantive tension pitted the *‘ulamā’* against social reformists who invoked the rhetoric of classical Islam. Also, legal reform in the Middle East was often initiated by the Muslim state, in collaboration with a limited number of the *‘ulamā’* or with the silent approval of dissidents after the fact.

South Africa, I would argue is different in that the state has no particular interest in the reformation of Islamic law; and the *‘ulamā’* it seems, are either not convinced that reform is needed, or that it should be forthcoming via the state. This lack of motivation on both sides is certainly unacceptable to human rights activists, but for now their



options seem limited. Their quest for marital reform is being blocked by a state not willing to interfere in matters purely religious, and the *'ulamā'* afraid that state-sponsored relief to aggrieved spouse could quickly become state control of religion. Until both the state and the *'ulamā'* set constitutional limits to the authority each wields in matters otherwise religious, Muslims suffering injustices in marriage would continue to have limited options.



Report on the meeting

Abdulkader Tayob

The purpose of the workshop was to discuss the apparent deadlock on the proposed Bill to recognise Muslim marriages conducted only according to Muslim rites. The meeting invited a number of speakers to address the issue.

Enver Daniels, the Chief State Law Advisor, opened the meeting with some reminiscences of the challenges that began with the interim constitution in 1994. He had worked with the former Minister of Justice and Constitutional Development, Mr Dullah Omar, who had predicted that recognising Muslim marriages was not going to be easy. Mr Daniels suggested that without a Bill of Rights, many practices associated with cultural and religious life in South Africa could easily be accommodated in law. But this was a thought exercise that merely emphasised the impossibility of thinking beyond the Bill of Rights, and beyond culture. Both were non-negotiable features of South African public life. The right to practice religion and develop culture were enshrined in the constitution and such rights were part of a whole set of rights.

Ms Hoodah Abrahams-Fayker followed with a paper on the steady stream of women, Muslims included, who sought assistance from the Women's Legal Centre. Muslim women, it seems, did not find relief at the informal mediation institutions established by Muslims. The support provided by '*ulamā*' was found to be particularly inadequate. Abrahams-Fayker shed light on how the Centre challenged the Ministry to stop procrastinating on the issue of the recognition of Muslim marriages. There was no need to have a perfect piece of legislation acceptable to all, as amendments could be accommodated later on the basis of specific experiences.

One of the important questions that emerged from this second session was the reasons for the long delay in passing legislation according to the Constitution. The delay could not be justified, as other contentious laws have been passed after 1994.

Dr Moosagie's sharp and focused paper divided Muslims into three groups. Secularists wanted Islamic law to conform to the constitution, while "ultra conservatives" rejected any law that would be incorporated in South Africa law. The middle ground was occupied by the majority that was prepared to work with a compromise. However, Moosagie warned that this third group opened the door to rampant secularisation of Muslim marriages. Values of justice, freedom and equality would completely change Muslim marriage practices. For Moosagie, such values spelt the death-knell of the *Sharī'a* as a divinely ordained legal system.

Dr Moosagie's paper got to the heart of the conflict, and responses were quick and decisive. Participants pointed out that the practice of the *Sharī'a*, it would imply,

was governed by everything other than justice, freedom and equality and not many participants were able to accept that conclusion.

Rosieda Shabodien began with some fear that there was nothing more to be said on the matter. Her presentation, however, helped in turning the attention to real experiences of women in society. The *Sharī'a* arrangements in South Africa had failed women. Most clerics were selective in what they took from the traditions, and completely ignored its provisions for the rights of women. For example, South African women were discouraged from demanding and stipulating limitations in their contracts. Shabodien pointed out, that whilst the history of Islam had emphasised the contractual nature of *Sharī'a*, today's society and clergy did not want a contract to stand in the way of love. For example, in a contract, a bridegroom could accept that he would not take a second wife without the express permission of his bride, or give her the right of divorce. Shabodien stated further that gender equality was a deep fear stalking the corridors of the *Sharī'a* as practised in South Africa.

The final presentation by Dr Muneer Fareed brought the day's discussion into sharp perspective. He homed in on the idea of tradition in modern society. Dedicated to preserving community, looking back and upholding the values of the past, tradition ignored the violation of

rights on a day-to-day basis. And yet, whilst advocating preservation, tradition could not stem the tide of social change. In fact, Fareed showed how the *Sharī'a* was continually changing. Perhaps one could say that change came from the back door while the front door proclaimed that no change was permitted. More directly, Fareed seemed to suggest, there was plenty room for change within tradition.

Was there a solution in sight? Participants felt that the discussion could not and should not be stopped. This time, as many voices as possible, should be kept in earshot of each other and more importantly, experiences with other religious traditions or of Muslims in other parts of the world should be included into the debate.



