

Prospects for Muslim Law in South Africa: A History and Recent Developments

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1 INTRODUCTION

Political change has had a noticeable impact on the South African judicial system. An index of this change was the major turnaround in the attitudes of the courts towards Islamic law which had been stigmatized for centuries in this country. Following the landmark decision in 1996 by the Cape High Court in *Ryland v. Ekhos*, (see case note in Part IV on p. 515) the prospects for the further recognition of Islamic law have substantially improved. Previously the courts' approach was shaped by *Seedar's Executors v. The Master* (Natal) 1917 AD and *Ismail v. Ismail* 1983 (1) SA 1006 (A) in which it was ruled that marriages valid according to Islamic law and actually monogamous "must be regarded as void on the grounds of public policy".¹ But public policy in these instances in the past was necessarily "state policy" which was wedded to Christian notions of marriage and had little regard to the diversity of cultures and values in the country. South Africa's new Bill of Rights now explicitly recognizes cultural and religious plurality, with an emphasis on equality which prevents discrimination on the grounds of culture, religion, race or minority status. It is in this context, notwithstanding some of the practical difficulties, that aspects of Muslim family law may be incorporated into the general legal system.

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¹ *The South African Law Reports* (1917), Appellate Division (ed.), A.F. Russell, Johannesburg, Digma Publishers, 1973, pp. 302-316; *Ismail v. Ismail*, 1983, 1 SA 1006 A.

Bearing in mind that in all societies law is "one of the most explicit, concrete and institutionalized cadres of ethno-sociological discourse", it is appropriate to provide a detailed description of the history of Muslim law in South Africa.² Those who engage in legal history for the purpose of furthering a linear progress in policy or theory "tend to view legal history in isolation from other cultural developments, an isolation that often precludes insight into the deeper meaning of legal change."³ In order to ascertain the various domains of law outside of state law, in this case Muslim law, it is crucial to ponder on the politics of Muslim law and the social function of religious law in a multicultural and differentiated secular political context.

Contrary to the perception of outsiders, the religious and political tapestry of the Muslim community in South Africa is rich, diverse and differentiated.⁴ Islam may have arrived here as early as 1658 when the Dutch brought some of their subjects from their colonies in the Malay archipelago to the Cape. However, there is definite evidence that by 1667 a steady stream of political prisoners, convicts and slaves from South-east Asia made up the core of the earliest Muslim community. Later, in the middle of the nineteenth century, Indian indentured labourers imported to work on the sugar plantations of the British colony of Natal made up the second ethnic component of Islam. Conversion to Islam from members of the indigenous African communities and the European communities make up the other two ethnic elements of Islam. Today the numbers of Muslims are estimated to be between 0.5 to 1 million in the absence of accurate census figures. Most Muslims are members of the Sunni creed and either follow the Hanafi or Shafi schools (*madhabs*), *madhab* of Islamic law. There are also smaller groupings that would follow the Maliki school and some of the Shi'a creed who follow the Ja'fari school.

South African Islam can correctly be perceived to be a discourse on the "periphery" of the Muslim world. Yet this isolation is not entirely watertight. At another level, local Islam creatively and dynamically intersects with developments in the "centre" of the Muslim world from where ideas and practices are adapted and imported to meet local needs. Alongside this transnational Muslim interaction another intra-South African debate occurs, where Muslim communities and individuals perform within the fluid and challenging local context which in itself spawns discourses of great complexity, diversity and sophistication.⁵

² Sally Humphreys, "Law as discourse", *History and Anthropology*, 1, 1985, p. 242.

³ Nathaniel Berman, "Modernism, nationalism, and the rhetoric of reconstruction", in Dan Rortved and Karen Engle (eds.), *After Identity: A Reader in Law and Culture*, New York, Routledge, 1995, p. 230.

⁴ See Achmat Davids, *The Mosques of the Bo-Kaap: A Social History of Islam at the Cape*, Athlone, Cape: The South African Institute of Arabic and Islamic Research, 1980; Achmat Davids, *The History of the Tana Barru*, Cape Town: The Committee for the Preservation of the Tana Barru, 1985; Yusuf da Costa and Achmat Davids, *Pages from Cape Muslim History*, Pretoria: Shuter and Shooter, 1994.

⁵ See also Abdulkader Tayob, *Islamic Resurgence in South Africa: The Muslim Youth Movement*, Cape Town, University of Cape Town Press, 1995; Farid Esack, *Qur'an, Liberation and Pluralism: An Islamic Perspective of Interreligious Solidarity against Oppression*, London, OneWorld Publications, 1997.

With regard to the future of family law, Sachs and Cachalia have both argued the merits of a legal dispensation in which Muslim law, along with other religious laws, is given a legal status.⁶ Indeed, this reflects an innovative and sensitive approach to nation-building and legal reform. But, without a grasp of both the religion and politics underlying religious and cultural laws, much of the attempt to ascertain the different forms of non-state justice and ordering can be obscured.⁷ Any discussion of Muslim law should account for the range of social dynamics that impact upon the content of this law; questions relating to legal reform should be problematized.

2 EARLY LEGAL HISTORY

We know very little about the organization of Muslim legal affairs with the arrival of the first group of Muslims in 1667.⁸ The earliest known judicial procedures were those of the Commander's Court with the advent of the Dutch East India Company between 1652 and 1795 in the Cape. Although discriminatory practices were enforced in civic status between servants and master, slaves and owners, white and coloured, says Sachs, this court did recognize the applicability of Muslim personal law:

Save for limited recognition of Islamic law given to non-slave Moslems with regard to matters of family law and succession, all inhabitants, regardless of colour or status, came under Roman-Dutch law and such statutes as were of local operation.⁹

It is now reliably known that the Statutes of Batavia promulgated by Governor van der Parra in 1766, which included the code of Muslim law approved by the Council of India, were applied in the Cape before 1795 and applied in practice by the Raad van Justisie.¹⁰

⁶ Albie Sachs, "The future of Muslim family law in South Africa", in *Advancing Human Rights in South Africa*, Cape Town, Oxford University Press, 1992, pp. 83–90; Feroz Cachalia, "The future of Muslim family law in South Africa", Centre for Applied Legal Studies, University of the Witwatersrand, Johannesburg, Occasional Paper 12, August 1991.

⁷ See Winnifred Fallers Sullivan, "Finding a true story of American religion: comments on L.H. La Rue's *Constitutional Law as Fiction*: narrative in the rhetoric of authority", *Washington and Lee Law Review*, 53 (3), 1996, pp. 981–994; "Dismissing religion: is religion trivialized in American public discourse?" in *Journal of Religion*, 75, 1975, pp. 69–79; "Religion, law and the construction of identities", in *Nannen*, 43(2), 1996, pp. 128–138; "Competing theories of religion and law in the Supreme Court of the United States: an Hasidic case", *Nannen*, 43(2), 1996, pp. 184–212.

⁸ J. A. Nauke, "Islam in South Africa: a general survey", in *Journal of Muslim Institute of Minority Affairs* (JIMMA), 6(1), 1985, p. 21.

⁹ Albie Sachs, *Justice in South Africa*, London, Cato/Hinemann, 1973, p. 18.

¹⁰ G. G. Visagie, *Regulating on Reg aan die Kaap van 1652 tot 1806*, Kaapstad, Juta en Kie, 1969, p. 67; C. H. Van Zyl, "The Batavian and the Cape Plakaten: an historical narrative", *The South African Law Journal*, 24, 1907, pp. 241–383 is of the opinion that the Batavian and Cape Plakaten issued by the Dutch East Indian Company dealing with Muslim laws could only have been instructions and rules applicable to company officials or they were documented in collections "more for administrative purposes than for any positive law". Also see J. de V. Roos, "The statute law of the Cape in pre-British days, and some judicial decisions in relation thereto", *The South African Law Journal*, 23, 1906, pp. 242–254; J. de V. Roos, "Mohammedan law in South Africa", *The South African Law Journal*, 24, 1907, pp. 176–186.

The extent to which Muslims at the Cape made use of these official courts in matters of family law is yet unknown. What has been documented are cases of Muslims taking recourse to secular courts to settle disputes affecting the appointment of mosque leaders (*imams*) as well as the distribution of estates and litigation affecting property. It is possible that when exiled religious figures arrived at the Cape most Muslims turned to them, instead of the official courts, to settle family law matters such as marriage, divorce and succession.

When mosques were established at the Cape, the imams of the mosques began to assert their authority in managing matters of family law.¹¹ It was Imam 'Abd Allah bin Qadi 'Abd al-Salam (d. 1807),¹² better known as *Tuung Guru* (Mister Teacher) who founded the first mosque around 1805 in the Cape. It is also established that he taught Muslim law (*fiqh*) to his followers. Tuang Guru strongly promoted a legalistic Islam, since he was the son of a traditional South-east Asian *gadi* (judge).¹³ From the early part of the nineteenth century a form of informal judicial tribunal may have been operational within the Muslim community.

Some traces of an informal judicial organization also surface from the evidence given by two imams to the Colebrooke and Bigge Commission in 1825. In their submissions to the Commission they told of how religious offenders were dealt with and the steps they as imams took to discourage the practice of slavery and polygyny. Interestingly, one of them admitted that some offenders were flogged without specifying the circumstances for such punishment. However, the other imam when interviewed denied the claim that offenders were flogged. From the report one could glean that there may possibly have been more than one informal judicial tribunal and that they may have differed in their practices and procedures. It is also possible that the imam who had denied the practice of flogging may have been aware of state reprisals if he admitted that corporal punishment was being enforced by an unauthorized entity. Tentative as the evidence may be, it does suggest that by the early part of the nineteenth century some form of community judicial structures were in place which dealt with religious matters of a legal nature.

This is confirmed by the arrival of Abubakar Effendi (d. 1880), a jurist-theologian of Kurdish origin who made a dramatic impact on Cape Islam from 1863 onwards. P. E. de Roubaix who had been appointed as consul for the Ottoman sultan at the Cape and member of the Cape legislative assembly, requested through his British contacts that a scholar be sent here to resolve the series of religious and legal disputes among Muslims at the Cape. He wrote a legal treatise on devotional rituals, but left nothing that dealt with matters related to personal law – marriage, divorce and inheritance.¹⁴ One of the early Muslim writers on personal law in the twentieth century, Shaykh 'Abd al-Rahim ibn Muhammad al-Traqi (d. 1942) dealt

¹¹ See Shanili Jeppie, "Leadership and loyalties: the imams of nineteenth century colonial Cape Town, South Africa", *Journal of Religion in Africa*, 26(2), pp. 139–162.

¹² Imam 'Abd Allah bin Qadi 'Abd al-Salam, means Imam 'Abd Allah, son of *qadi* 'Abd al-Salam. From this it appears that Tuang Guru's father was a judge or magistrate in Tidore.

¹³ Robert C. H. Shell, *The Establishment and the Spread of Islam at the Cape from the Beginning of Company Rule till 1938*, unpublished University of Cape Town thesis, 1974, p. 34; Davids, *The Mosques of the Br-Kaap*, p. 44.

¹⁴ Maye Brandel-Syrie, *The Religious Duties of Islam as Taught and Explained by Abu Bakr Effendi*, Leiden, Pretoria Oriental Studies, 1960.

with issues of marriage and divorce. Interestingly these traces on religious law were written in Arabic-Afrikaans.¹⁵ Here we have incontrovertible evidence that knowledge of the law was transmitted in a written form and was made accessible by popular means to the community.

There are nevertheless indications that the community dispute resolution structures were not altogether effective. Davids has documented that between 1866 and 1900, over twenty cases dealing with mosque leadership disputes and ownership of mosque property were taken to the Cape Supreme Court for resolution. While many disputes were undoubtedly successfully managed by community tribunals, the statistics do indicate that complex cases of an adversarial nature were not always effectively managed at the informal level and had to be taken to another forum. Mosque leadership disputes were often acrimonious and involved the adversarial religious leaders themselves who were at the head of the informal organs of community justice. The limitations of the community justice system were evident. On the other hand very few cases of divorce, custody and succession were reported to have reached the secular courts and there is every reason to believe that the community organs had successfully handled these.

In the twentieth century Muslim clergy (*'ulama* – literally “the learned ones”) organized themselves into formal bodies in order to effectively deal with religious matters and disputes of a legal nature. The *'ulama* in this instance were males trained at seminaries in the Middle East, the Indo-Pakistani sub-continent, and locally, in aspects of Islamic law and theology. They provided religious services at mosques, taught children and adults the doctrines of religion and applied the informal personal law in the community. In the first half of the twentieth century three major *'ulama* bodies were established: the Jamiatul *'Ulama* of Transvaal (1935); the Muslim Judicial Council (1945) and the Jamiatul *'Ulama* of Natal (1955). Later, other bodies emerged: the Majlis Ashura al-Islami (1969); the Islamic Council of South Africa (1975); the Sunni Jamiatul *'Ulama* of South Africa (1978); the Majlisul *'Ulama* (1976) and the Sunni *'Ulama* Council (1994). Each of these formations has some form of judicial and social welfare division which deals with the resolution of personal law matters: marriage, divorce, custody, and succession, among other pastoral functions. This suggests that informal law or community justice has a long tradition within the Muslim community spanning some three centuries. Despite this exclusive control over personal law, there has been persistent efforts on the part of the *'ulama* groups to have Muslim law recognized by the state.

3 TOWARDS RECOGNITION

Towards the end of 1987 the South African Law Commission circulated a questionnaire to several Muslim organizations and individuals, inviting comment on

¹⁵ This involved the adaptation of the Arabic alphabet with additional Turkish vocalizations to produce a phonetic Afrikaans.

certain matters affecting Muslim personal law (MPL). The motivating introduction to the questionnaire said:

The South African Law Commission is presently engaged in an investigation into certain aspects of Islamic marriages and their legal consequences in South African Law.¹⁶

Muslim efforts to have MPL recognized in recent times go back as far as nearly two decades.¹⁷ In 1975 the Director of the Cape Town-based, Institute of Islamic Shari'a Studies made representations to then Prime Minister, B. J. Vorster, that aspects of Islamic law relating to marriage, divorce, succession and custody be “recognized”. At that time the SALC stated that it was,

unwilling to include the investigation in its program, firstly, because it was of the opinion that the recognition of the relevant aspects of Islamic law could lead to confusion in South African law and, secondly, because the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law.¹⁸

The Law Commission did not explain what had changed by 1987 that enabled it to entertain Muslim demands, given previous explanations that the introduction of Islamic law would cause “confusion” in South African law. But that there was a shift in the attitude of the state was evident. The SALC linked its renewed interest in Islamic law with a number of its own inquiries, which included an inquiry into Muslim law.¹⁹ The Commission added that the “question was posed time and again whether greater “recognition” should be granted in South African law to the Islamic marriage and its legal consequences.”²⁰ Another motivating factor for its inquiry the SALC said was a private bill in 1987 by Mr Pat T. Poovlingam MP (House of Delegates) which aimed at introducing legislation which granted some form of recognition to the Islamic law of succession.²¹ However, within the Muslim community, many people suspected that the state offer to recognize Muslim family law had much more to do with an attempt to purchase legitimacy for the disgraced tricameral parliament following the resistance that many Muslim groups offered the National Party government.

¹⁶ South African Law Commission (SALC), “Islamic marriages and related matters”, Project 59 Questionnaire, p. 1.

¹⁷ The Cape-based, Muslim Judicial Council in its founding statement issued in 1945 included among other goals to have Muslim personal law recognized by the state.

¹⁸ SALC, Project 59, p. ii.

¹⁹ The inquiry included (a) an investigation into the position of illegitimate children (Project 38); (b) marriages and customary unions of black persons (Project 51); (c) a review of the law of evidence (Project 6); and, (d) the law of intestate succession (Project 22), SALC.

²⁰ SALC, *op. cit.* My emphasis on “recognition” is to point out that the language employed presumes that a regime of legal pluralism will prevail. A dominant legal system “recognizes” a subservient legal system, but the former is accepted without question.

²¹ SALC, *op. cit.*

4 THE POLITICS OF MUSLIM LAW

Broadly speaking the Muslim response to the government's overtures in 1987 followed two main trends: those who supported the Law Commission's initiatives and those who opposed it. It is important to bear in mind when examining the responses to this family law initiative, that several registers of discourses reverberate at any one time. In an ongoing interaction between the apartheid state and one section of South African society, one can discern the texture of colonial and racial discourses which run concurrently with the variety of Muslim discourses. As a matter of refinement, it is also necessary to emphasize that none of these discourses are monolithic in intent or objective. Although the agents of these discourses – officials, missionaries, academics, bureaucrats, orientalisks, *ulama*, revolutionaries, fundamentalists – seemingly possess immense self-defining capacities, there is increasing evidence that each discourse is fractured and incomplete. It does not require much research to uncover the conflicting and subterranean discourses in each. The most striking upshot is that discrimination, resistance, religion and culture to mention a few issues, appear as moving categories whose political saliences shift in relation to one another.

Foremost among the supporters were the established clergy groups, like the Jamiat al-*Ullama* of Transvaal and Natal, the Cape-based Muslim Judicial Council (MJC), the Majlis al-*Ullama* of the Eastern Cape, the Islamic Council of South Africa (ICSA) and the Association of Muslim Accountants and Lawyers (AMAL). For these organizations this SALC inquiry raised the expectation of the recognition of Muslim family law. Other independent efforts by some Muslim academics and lawyers also supported the introduction of MPL in the 1980s.²² However, the majority of the *ulama* bodies made no attempt to cooperate with the efforts of non-*ulama* groups. In a statement published by the *ulama*, the SALC initiative was acclaimed in the following words:

For many years since the arrival of Islam in South Africa, Muslims have been yearning for the introduction of Islamic Law in some form or another to govern their affairs... We pray and hope for the cooperation of all Muslims in this endeavor and hope that it will not be long before we shall see Muslim Personal Law as part of the legal system of the Republic of South Africa.²³

Different but not less vocal, were a cluster of organizations who ventilated their scepticism and suspicion at the SALC initiative. These were some of the activist Muslim religio-political and cultural organizations.²⁴ They were chiefly represented by the

²² Here I have in mind Professor S. Habibul Haq Nadvi's proposal published as a working paper titled: "Problem of safeguarding Muslim personal law in South Africa", S.H.H. Nadvi, "Towards the recognition of Islamic personal law", in A.J.G.M. Sanders (ed.), *The Internal Conflict of Laws in South Africa*, Durban, Butterworths, 1990, pp. 13–24; Advocate A.B. Mohamed's research, Human Science Research Council Section for Political Science Research, *Research project – Muslim law*, Ref. No 3/10/121, 1984; also see the editorial of the *Journal for Islamic Studies*, 8, 1988, Centre for Islamic Studies, Rand Afrikaans University, which took unkindly to criticism directed at the Centre by Muslims critical of its conference on personal law.

²³ "Announcement: Muslim Personal Law", title of an undated pamphlet issued by the Secretary, Central Committee, *ulama* of South Africa.

²⁴ An indication of government awareness of Muslim resistance is well encapsulated in this quotation of the then President, P.W. Botha who addressed Parliament after a group of

Muslim Youth Movement, the Call of Islam, the Qibla Mass Movement as well as the Muslim Students' Association (MSA). The recognition of MPL had not until then been part of the agenda of any of these organizations. Being primarily on the side of the various liberation movements, these activist groups saw the issue of personal law being properly addressed at the conclusion of the liberation process. The MYM's mouthpieces, *al-Qalam*, in an editorial, however, conceded that the administration of MPL as currently administered by the clergy (*ulama*) left much to be desired and caused hardship to ordinary Muslims. While it called for consultation and public debate on the SALC's initiative, it added that there should be adequate vigilance in order to decipher the Nationalist government's political motives in coopting a minority community. For these groups, the political context and motives of the state warranted greater attention than the possible social benefits to be derived from the implementation of MPL.

In the entire MPL debate the *ulama* bodies postured themselves as the sole "authorities" on MPL to the exclusion of the other sectors of the Muslim community. The Port Elizabeth-based Majlis al-*Ullama*, represented by its publication *The Majlis*, advised Muslim organizations to continue to lobby for MPL under the guidance of the *ulama* and to reject the proposals of the non-*ulama* groups whom it labelled as "modernists". This stemmed from their claim that the *ulama* are rightly the *ulul-amr* (legitimate religio-political authority) in terms of Muslim constitutional doctrine. While the *Majlis*' ultra-orthodox and intolerant stance on religious issues may not always be representative, on this matter its statements reflected the general sense of *ulama* sentiment as being the only legitimate voice on matters of law in the Muslim community.

It was also the *ulama* who were much easily persuaded to accept the SALC initiative at face value. In fact, along with some other smaller groups the *ulama* saw it as a constructive move towards the religionization of Muslim civil society under their leadership. This posed a great opportunity especially when past approaches to the authorities had not met with "any measure of success".²⁵ An *ad hoc* formation of the key Muslim clergy groups called upon the

ulama of this country, representing and speaking for the overwhelming majority of Muslims, [who] should on this issue present a united front by replying with an unanimously agreed voice [to the SALC].²⁶

cont.

insurgents consisting of several Muslims were arrested in their attempt to enter the country from Botswana. "As you are aware we have a large Muslim community who, like all other religious denominations, enjoy complete freedom of religion. Furthermore, you also know that South African Muslims are respected citizens. However, a small group has emerged within this community who, under the influences of Libya, Iran and with funding from these quarters, have committed themselves, with the ANC (African National Congress) and PAC (Pan-Africanist Congress), to terror and violence. ... I have already issued instructions in this regard and our security and intelligence services are taking necessary countermeasures" (Republic of South Africa, *Debates of the House of Assembly*, Hansard, Third Session – Eighth Parliament, 14–18 April, p. 3590).

²⁵ Pamphlet on MPL issued by Central Committee, *ulama* of South Africa previously cited.

²⁶ *Ibid.*

For the anti-apartheid Muslim groups, the attempt by the SALC to offer recognition of Muslim law in the turbulent 1980s had a different meaning altogether. They viewed it as a state endeavour to dampen and defuse Muslim political anger, especially among the youth. During the 1980s, front-line civil resistance was spearheaded by urban youths in general, and the role of Muslim youth in areas like the Western Cape was highly visible. Even if the personal law initiative emanated from the SALC's investigation without any overt ulterior motive, an unlikely prospect as it may be, the more politically aware sections of the Muslim community approached it with suspicion. Muslim activists suspected that the state with its array of intelligence and security networks in collaboration with quietist and reactionary Muslim elements were planning to neutralize the Muslim community with MPL.²⁷ Exploiting the social needs of communities, under the guise of winning over the hearts and minds of people, was a familiar strategy employed by the apartheid state which was also aware of the intra-Muslim differences and the fractious nature of this community.²⁸ State propagandists continuously distinguished between the "good" subject and the "bad" subject, counterposing them as "peace-loving" versus "radical" Muslim and Christian clergy and their followers.

If there was one concern that both the *ulama* and political activists shared, then it was the prospect of relief that recognition of Muslim law would bring to the lives of ordinary Muslims. Non-recognition of Muslim family law resulted in children from Muslim marriages being legally declared to be illegitimate, female spouses being denied patrimonial benefits on divorce and intestate succession previously being affected. Any relief in these matters would therefore have been welcomed by the Muslim community. Some activists agonized over the difficult decision of choosing between delaying the implementation of MPL and the prospect of its immediate availability. However, it was the political atmosphere of the 1980s that made the issue politically controversial.

What surfaced in the intra-Muslim controversies was the differences in class, a generation gap and experiences which influenced their disparate political "readings" and "strategies". These differences were informed by the historical tensions among Muslims that had shaped their varying attitudes towards colonial rule and later apartheid, the West, westernization of society and Christianity. During this tumultuous period there were frequent stand-offs between sections of the educated elite, the politicized youth against most of the *ulama* groupings. The *ulama* groupings, obviously with notable exceptions, could not come to terms with the Muslim version of liberation theology that was being advocated by a small and younger group of *nuwama* *ulama* that served as ideologues for anti-apartheid political activism.²⁹ Conservative elements among the *ulama* saw Muslim liberation theology

²⁷ For the position of the Muslim Youth Movement see the organization's mouthpiece, *Al-Qalam*, "Comment, Muslim Personal Law: quo vadis?", 13, 1988, pp. 1-2. The Call of Islam's view was recorded in an undated pamphlet titled: "Ask the Ummah", issued in 1988. Part of the pamphlet read: "We must not and will not allow them [the state] to use our Personal Law to control and co-opt us ..."

²⁸ See note 24.

²⁹ The *nuwama* *ulama* are South Africans who were trained in traditional Muslim seminaries abroad. They differ from their general *ulama* counterparts in so far as their juristic-theology is also informed by the social sciences and they critically engage with the tradition.

as compromising "pure" Islam as a result of its association with Christian, communist, socialist and secular ideologies.³⁰ Clearly, the controversy over MPL heightened the existing tensions and exacerbated intra-Muslim rivalry.

The SALC initiative was short lived, with only a preliminary inquiry completed. It was effectively eclipsed in its work by the dramatic political changes of the 1990s. Now the demand for the recognition of Muslim Personal Law became part of the search for a democratic future. All the major Muslim organizations petitioned those political parties that were part of the multiparty Conference for a Democratic South Africa (CODESA) to include the recognition of MPL in the interim constitution. With this achieved, the major political parties, especially the African National Congress (ANC) and the fledgling Muslim parties that contested the 1994 elections, made the enforcement of MPL an electoral pledge.

As the major player in the government of national unity, the ANC tried to solicit advice and suggestions from the Muslim community on how to proceed with the recognition of MPL in the post-April 1994 period. It soon became clear that there was no unified voice that spoke on behalf of the entire Muslim community and that the claims of the traditional *ulama* to be representative were fiercely contested by Muslim organizations that did not share their convictions. At the behest of the ANC, an inclusive working structure known as the Muslim Personal Law Board (MPLB), consisting of nearly all the major role players was formed in August 1994. However, internal tensions between the traditional *ulama* and the progressive Muslim groupings surfaced once again. Those *ulama* participating in the MPLB were also pressurized by their more conservative colleagues to withdraw from a formation where they would have to reach compromises with diverse Muslim constituencies, especially the progressives, pejoratively labelled "modernists". The presence of women on the Board was another issue which made some of the *ulama* uncomfortable. In a country that has one of the most gender-sensitive constitutional dispensations it was evident that the traditional *ulama* were going to have difficulty in dealing with the new legal order. Predictably one of the main issues that led to the demise of the Board was the impasse reached between the *ulama* bodies and the progressives over human rights and the new constitutional values based on equality and freedom. The *ulama* were determined to petition the Constitutional Assembly to exempt Muslim family law legislation from the human rights provisions of the new constitution, arguing that these values conflicted with their version of Islamic law. The Muslim progressives in turn welcomed the fact that MPL had to pass constitutional muster since in their view no fundamental conflict existed between Islamic law and a constitution premised on human rights. Any differences between Muslims, progressives argued, stemmed from an interpretation of the law and not a matter of substantive law. By April 1995, the MPLB was unilaterally dissolved by the majority *ulama* groupings, an act which exposed the deep and acrimonious divisions within South Africa's small Muslim community. The future of MPL now largely rests in the hands of the government and its willingness to proceed with the issue. The ANC-led government has now appointed a High Court judge to chair a Law Commission investigation committee to explore the viability of implementing MPL in South Africa.

³⁰ See Ebrahim Moosa, "Muslim conservatism in South Africa", *Journal of Theology for Southern Africa*, 69, 1989, pp. 73-81.

In addition to the disagreement over the relationship between religious law and a human rights dispensation, there are also other fundamental issues that remain to be addressed with respect to the future of Muslim personal law. These issues range from the meaning of *shari'a* and who had the power and right to define it as well as the manner and mechanisms by which MPL would be enforced.³¹

5 DEFINING THE SHARI'A AND MUSLIM PERSONAL LAW

The intellectual divide within Muslim thought generally has persisted in various guises and this tension also becomes evident in contemporary times between traditionalist (*taqlidi*) and reformist (*ijtihadi*) approaches to the law. In general, traditionalists prefer to follow the doctrinal formulations of their respective legal schools, whereas reformers or progressives advocate the reformulation of law by taking a *de novo* approach to the Qur'an and the prophetic tradition (*sunna*) by means of *ijtihad* (independent reasoning), as was the practice in early Islam. The tension between traditionalist and reformist attitudes to the *shari'a* is captured in Anderson's perceptive observation:

It appears that in the second half of the nineteenth century and the beginning of the present century, however, many Muslims preferred to maintain the Shari'a intact and inviolable as the ideal law, even if this meant displacing it in practice, in the exigencies of modern life, by some other system, rather than allow any profane meddling with its immutable provisions.³²

What sets enlightened and dogmatic practitioners of Islamic law apart is their diametrically opposing views of the *shari'a* as a flexible and dynamic law that meets social changes as opposed to a system that it is inflexible and immutable. Reformists differentiate between the law proper, its objects and purposes (*maqasid*) and the socio-historical and ideological contexts of law, namely the para-legal dimensions, which are often mistaken as part of law.³³ For this reason reformist scholarship constantly disaggregates the history of the law to expose the ideological underpinnings of the law. Twentieth-century Muslim reformers like Shaykh Muhammad Abduh of Egypt (d. 1905), Muhammad Iqbal of India (d. 1938) and others were acutely aware of the modern context in which Islam found itself:

[T]he Holy Book of Islam cannot be inimical to the idea of evolution. Only we should not forget that life is not change, pure and simple. It has within it elements of conservation also. While enjoying his creative activity, and always focusing his energies on the discovery

³¹ See Cesar Adib Majul, "Problems in the implementation of sharia personal laws in Muslim minority countries in the Far East", *Journal of Islamic and Comparative Law*, 7, 1978, pp. 107-132.

³² J.N.D. Anderson, "The role of personal statutes in social development in Islamic countries", *Comparative Studies in Society and History*, 13, 1971, p. 18.

³³ See Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shari'ah al-Din al-Qarafi*, Leiden, E.J. Brill, 1996, pp. 124, 126.

of new vistas of life, man has a feeling of uneasiness in the presence of his own enfoldment ... but since things have changed and the world of Islam is today confronted and affected by new forces set free by the extraordinary development of human thought in all its directions ... The claim of the present generation of Muslim liberals to re-interpret the foundational legal principles, in the light of their own experience and the altered conditions of modern life is, in my opinion perfectly justified. The teaching of the Qur'an that life is a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.³⁴

For this reason reformists in this century intellectually revitalized the corpus of Islamic thought and argued for it to be receptive to the ethos of modernity. Their more conservative opponents resisted such moves in the name of preserving the immutable and sacred *shari'a*. It is in the context of a contested debate over the meaning and role of the *shari'a* that the issue of Muslim personal law in South Africa should be situated.

Historically, MPL was a product of empire. After the colonial conquest of Muslim lands, colonial law virtually replaced Muslim law.³⁵ The only area in which the colonizers tolerated Islamic law was in the area of personal status – divorce, marriage and inheritance: a deliberate move to distinguish between the social status of the colonized and colonizer.³⁶ In French occupied regions MPL became known as *shari'at musulmane*; in British territories it was known as Anglo-Mohammedan law, and, in the Dutch occupied areas in South-east Asia it was called *adat* law. In so far as MPL deals with a limited number of laws, it is thus a truncated version of *shari'a* law.³⁷ The attempt to equate MPL with *shari'a* law and vest it with a sense of immutability given its religious origins, only exacerbates the subtle distinctions that Muslim jurists made between *shari'a*, the revealed sources that define practice and *fiqh*, the contextual understanding of what these practices are in reality. These two categories are often conflated in an attempt to impute to MPL that status of the divinity of *shari'a*, part of the ideologization of law. "[T]he law – despite its appearances to the contrary", says Shaliced, "is not a neutral entity but reflects the ideology of society's dominant group as well as well as the existing power structure".³⁸ It is the ideological battles which provide the pretext for the intra-Muslim contestation of power to interpret the law.

The distinction between laws pertaining to persons, property and obligations as in French law or English common law is unheard of in classical Muslim

³⁴ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, Lahore, Shaikh Muhammad Ashraf, reprint 1960, pp. 166-168. Iqbal was acutely aware of the need for intellectual forward movement in Islam, namely *ijtihad*, while also considering the principle of conservation.

³⁵ See Herbert Liebesny, "English common law and Islamic law in the Middle East and South Asia: religious influences and secularization", *Cleveland State Law Review*, 34(3), 1985-86, pp. 19-33.

³⁶ See Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria*, Princeton, Princeton University Press, 1985, pp. 3-27.

³⁷ See Nadwi, "Towards the recognition of Islamic personal law", pp. 13-24. The author unerringly asserts that Islamic law is an integral part of Divine Revelation without distinguishing between *shari'a* and *fiqh*.

³⁸ Farida Shaliced, "Controlled or autonomous: identity and the experience of the network, women living under Islamic laws", *Signs*, 1994, p. 999.

jurisprudence. In Islamic law issues pertaining to personal status appear in virtually every section of classical legal texts.³⁹ The modern Arabic equivalent for MPL, *al-ahwal al-shakhsiyya* (matters of personal status) is a direct translation of the concept from a European perspective of law.⁴⁰ In India it was known that British lawyers and judges constantly moulded Muslim law by the principles of "justice, equity and good conscience" as understood in common law.⁴¹ The history of the colonial period bears testimony that some *ulamā* criticized the practice of non-Muslim judges ruling on Islamic law, as was the case in India. Nevertheless, MPL in the words of Kozłowski commenting on the situation in India but equally applicable to South Africa, "seems to survive from habit or inertia rather than by its close connection to the Islamic tradition".⁴² Given the fact that MPL is only a small part of what is called *shari'a* law, some discordant voices among Muslims from time to time call for the total application of *shari'a* rule in South Africa in line with trends in Iran, Pakistan, Sudan and Saudi Arabia.⁴³

Equating MPL with *shari'a* in a secular and non-Muslim context may require further reflection. In an Islamic state the *shari'a* is enforced by a legitimate ruler (*khaliif*, *imam*, sultan) as a matter of religion and a religious imperative.⁴⁴ Contrast this to the application of MPL in a secular state, where the state provides the enforcement of personal law as a matter of policy. For if MPL is enforced as a matter of religion then it raises questions of doctrinal entanglement and the permissible limits of state enforcement of religious policy. As a matter of policy, on the other hand, it raises questions as to how MPL fits into a constitutional framework and a secular judicial administration. This invariably leads to a paradox where communities expect and demand the recognition of MPL from the modern state in a multicultural and secular context; but at the same time they may express reservations about a secular authority implementing and interpreting religious law!

6 CODIFICATION IN A SECULAR CONTEXT

The sources and methods which inform Muslim law are the Qur'an, the prophetic traditions, consensus and juridical analogy. Over the centuries several legal traditions

have emerged which interpret these sources differently and have established themselves as formidable institutions. Of the four major Sunni legal traditions, two are dominant in South Africa, namely the Hanafi school and the Shafi'i school which date back to their eponymous founders in the eighth and ninth centuries.⁴⁵

Muslim law has undergone several changes from its heyday to its decline in the seventeenth century, and such transformations continue to the present day. And in the contemporary context Islam is experiencing a global restlessness with the *shari'a* being the main symbol for the revival of Muslim life. In many ways the rhetorical appeal to a reified and ahistorical *shari'a* ignores the transformation Muslim law and society has experienced in different settings. From being an oral law at its origins, Muslim law has made the transition to a written culture, with significant implications for the nature of the law. A written culture, for example, has introduced stability and consistency to the legal canon. Flexibility is achieved in practice when each case develops its own set of principles which are individualized to that particular case and context. *Shari'a*-law functioned according to an empirical and subjective system which Weber referred to as 'substantive justice' (*Kadhiyatiz*). In this legal system judges have recourse to a general set of ethical precepts which are unevenly employed on a case by case basis, relying on interpretative mechanisms.⁴⁶ Procedural formalism is, strictly speaking, absent. Some jurists with a modernist bent would judge such practice as expedient and highly unpredictable. Far from being unsystematic or arbitrary the lack of formalism reveals the dynamic interplay between society and law. Fixed and written codes, it has been argued, produce a stifling rigidity which is increasingly being criticized by leading contemporary jurists such as Ronald Dworkin.⁴⁷ In that sense traditional Islamic law partly shares postmodern legal sensibilities such as the importance of diversity and contextual differences with respect to people and institutions.

Over the ages, Muslim law had not been codified in the modern sense of the term. There was the notable, but unsuccessful attempt by Ibn al-Muqaffa (d. 757) to codify and incorporate it into the state. Roughly around that period strictly religious law and state law developed along separate lines. Public law remained the province of the state or the Caliph (*khaliif*) and his proclamations and tribunals. This law acquired the appellation of *qanun* law.⁴⁸ The jurists ceded administrative, criminal and fiscal law to the state. In most cases family law and laws affecting devotional rituals remained the domain of the jurists.

We are indebted to legal anthropology for shedding light on the interface between modernity and traditional legal systems. Research shows that MPL under colonial regimes led to the fusion, or sometimes an unhappy marriage, between Islamic law

³⁹ See David S. Powers, "Orientalism, colonialism, and legal history: the attack on Muslim family endowments in Algeria and India", *Comparative Studies in Society and History*, 31, 1989, pp. 535-571.

⁴⁰ *Ma'ammal 'Abd al-Tawwab Mansur al-Ahwal al-Shakhsiyya* [Encyclopedia of Personal Law - Arabic], 6th edn, Alexandria, Mansha' al-Ma'arif, 1995, p. 22.

⁴¹ Asaf Eyzzec, "Muhammadan law in India", *Comparative Studies in Society and History*, 5, 1963, p. 409.

⁴² Gregory C. Kozłowski, "Shah Bano's case, Britain's legacy and Muslim politics in modern India", in Yogendra Malik and Dhirendra Vajpeyi (eds.), *Boerings and Bullock-Carrs: Law, Politics and Society in India*, Studies in Change and Continuity in Indian Civilization: Essays in Honour of K. Ishwaran, vol. 3, Delhi, Chanakya Publications, 1990, p. 99.

⁴³ Gamal M. Badr, "The recent impact of Islamic religious doctrine on constitutional law in the Middle East", in Barbara Freyer Stowasser (ed.), *The Islamic Impulse*, London, Croom Helm, 1987, pp. 251-261.

⁴⁴ See Michael O. Mastura, "Legal pluralism in the Philippines", *Law and Society Review*, 28(3), 1994, pp. 461-487, esp. 462-463.

⁴⁵ Ebrahim Moosa, "Islam", in John W. de Gruchy and Martin Prozesky (eds.), *A Southern African Guide to World Religions*, Cape Town, David Philip, 1991, pp. 216-220.

⁴⁶ Lawrence Rosen, "Equity and discretion in a modern Islamic legal system", p. 217; also see Lawrence Rosen, "Islamic 'case law' and the logic of consequence", in June Star and Jane F. Collier (eds.), *History and Power in the Study of the Law*, Ithaca and London, Cornell University Press, 1989.

⁴⁷ Ronald Dworkin, "Law as interpretation", *Critical Inquiry*, pp. 179-200.

⁴⁸ Not to be confused with canon law which is the opposite of "secular" *qanun* law.

and formal bureaucratic rationality of the modern state.⁴⁹ The interaction between traditional and modern socio-legal forms had some far-reaching consequences. This is a datum often ignored by both Muslim legalists and non-Muslim scholars. Bureaucratization meant the denaturing of traditional Islamic law and an interruption of the historical political framework by the intrusion of modernity.⁵⁰ It is a fact of history that Muslim law rapidly became archaic when its own dynamic of evolution was retarded, if not finally ended. For the past century traditional *shari'a* law, more poignantly in post-colonial Muslim states, reflects a tendency towards bureaucratic specificity and ideological rigidity in family law. Nothing exemplifies this plight more starkly than the fact that today Muslim women can aspire to become heads of state, yet they face insurmountable difficulties in divorcing their husbands. If MPL in South Africa is severed from the dynamism of adaptation and change it may head for the same fate as African Customary Law, which has been reduced to an anachronism as a result of bureaucratic intervention.⁵¹

The colonial and post-colonial experience has demonstrated that the dominant law within a nation state system, normally Western law, enters into a political accommodation with the "subservient" law – e.g. African or Muslim law. It has a twofold discursive effect: it gives a semblance of autonomy to the servient law while it simultaneously preserves inequality.⁵² The logic of the dominant law does seem to advance such an inequality in power relationships between a plurality of legal communities and there is very little compelling evidence to show that it will be different in South Africa. Smith makes the point that the framework of legal thought derived from Western political systems is "preoccupied with the problem of centralisation and indivisible sovereignty".⁵³ It would not be wrong to suspect that this emphasis on sovereignty in the nation state model would finally triumph in transforming and assimilating the subservient legal systems. Those who demand the incorporation of customary or religious laws in a nation state model which is ill suited to pluralism often ignore the consequences that the logic of bureaucratization may have on the nature and practice of the subservient laws.

There are several reasons why caution should be exercised in the codification of Muslim law. First, it may entrench anachronistic laws which resist evolution and tend to make the law appear rigid, especially if a reformist route is ignored. It would mean imposing a set of laws followed by one class or group and not shared by everyone in a group or religious community. Second, is the dilemma as to which school of Muslim law would be applicable in a code. Even if one supports a reformist and eclectic approach to the law, all the *ulama* will not find such an approach accept-

⁴⁹ I am indebted to some of the novel insights of Hans-Dietrich Evers, "The bureaucratization of Southeast Asia", *Comparative Studies in Society and History*, 29, 1987, p. 667. Also see Amira El Azhary Sonbol, "Introduction", in Amira El Azhary Sonbol (ed.), *Women, the Family and*

Divorce Laws in Islamic History, Syracuse, Syracuse University Press, 1996, p. 11.

⁵⁰ See Christelow, *Muslim Law Courts*.

⁵¹ See Raymond Suttner, "African customary law: its social and ideological function in South Africa", also by Suttner, "Legal pluralism in South Africa", *International and Comparative Law Quarterly*, 19, 1970.

⁵² M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, Oxford, Clarendon Press, 1975, p. 1.

⁵³ M. G. Smith, *Corporations and Society*, London, Duckworth, 1974, p. 121.

able. Satisfying the *ulama* is an important consideration. One has to bear in mind Rahman's observation that "the influence of the conservative *ulama* is usually feared to be so strong that no authoritarian ruler has been able to face them squarely", in the same way that tribal chiefs have been able to force the hands of governments in Africa.⁵⁴ Third, as the main functionaries in matters of personal law the *ulama* may realize that official recognition of the law may lead to the undoing of their own power base and authority, as well as ceding their power to an inevitable amount of bureaucratic control.⁵⁵ Depending on how MPL is applied, they can either lose or gain autonomy and power.

7 LAW AND RELIGION: A TWENTIETH-CENTURY DILEMMA?

In secular societies law and religion or, to be more precise, the secular state and religion, have an awkward relationship. In terms of post-enlightenment thinking religion and state ought to be strictly segregated in a secular state as each one has its own autonomous domain and separate sources of authority. The United States is one model by which the establishment clause of the First Amendment prohibits government from advancing the religious beliefs of a particular religion, whereas the free exercise clause guarantees religious freedom. Subsequent interpretations by American courts have raised a great deal of controversy and most religious groups view it as a state hostile to religion, whereas the founders of the US constitution intended to protect religion from state interference.⁵⁶ Yet it appears that in the USA as well as elsewhere, our reading of religion and law increasingly leads to an aporia – a deadlock or a double-bind between contradictory or incompatible meanings which are undecidable since we lack any solid ground for choosing among them. Perhaps the relationship between religion and law should become less of a choice between one or the other since in real life people need both. In fact the meaning of each – law and religion – disseminates into a range of significations depending on the condition and context.

There are no establishment-type clauses in the South African constitution. On the contrary, section 15 of the Bill of Rights appears to be a kind of free exercise clause. In general religious rights enjoy substantial constitutional protection but they are not included in the list of non-derogable rights in section 37 (5) (c). Within this framework a permissible degree of doctrinal entanglement between religion and state is tolerated, allowing for religious observances to be conducted at state-aided institutions such as schools. It does, however, stipulate that religious observances

⁵⁴ Fazlur Rahman, "Islamic modernism: its scope, method and alternatives", *International Journal of Middle East Studies*, 1, 1970, p. 320.

⁵⁵ See Christelow, *Muslim Law Courts*, p. 22, where the *ulama* lose power as a result of changes to the judicial system and a loss of autonomy.

⁵⁶ See Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, New York, Anchor Books, 1993.

should be conducted on an "equitable", "free" and "voluntary" basis and subject to the rules made by the appropriate public authorities.

The full implications of the effect of religion on constitutional jurisprudence is still vague and unclear.⁵⁷ Furthermore, the extent to which freedom of religion can be limited by other constitutional values without negating and derogating the right to freedom of religion itself remains untested. Even when constitutions do guarantee freedom of religion it has been characteristic of secular states to subject religious rights to the limitations of public order, morality and health. When religious beliefs and practices clash with morally divisive policies and legislation it does lead to political instability directed at the legitimacy of the state and in certain instances even generates constitutional crises.

South African jurisprudence would be wise to avoid the American constitutional interpretation on religion. US courts have interpreted religion by relying and reducing the meaning of religion beyond the recognition of its practitioners. It is now adequately documented that the dominant operational definition of religion used by courts is a post-enlightenment and Protestant understanding which may not be applicable to all religious communities. The attempt to show that religion is distinct from law in its ideological sources and symbols may be a useful exercise, but in a secular context the two cannot be seen as being neutral to each other. "Law" and "religion" as rhetorical devices and intellectual problems are an acknowledgment of the human tendency to distinguish between the sacred and the profane.⁵⁸ While each is distinct they are structurally related and construct each other.⁵⁹ Lawyers, judges and legal scholars would enrich their legal discourse about religion if they participate in, and contribute to, a larger conversation about the nature of human religion and the relationship of religion, culture and society. Law as a privileged location for a secular discourse can and should talk and act about the religiousness of South Africans. "Law, too", in the words of Sullivan, "is embodied not just in statute books and case reports but in the people whose lives it shapes and distorts. The violence and physical power of religion and of law are evident in the physical shape of our existence".⁶⁰

8 LAW AND IDENTITY

Law not only shapes one's existence but also one's world view and that which is considered to be essential to personal and group existence, in the form of identity. In South Africa as elsewhere, MPL is increasingly being politicized as an issue related to Muslim identity. This process becomes even more intense when there is a per-

ception among followers of a religious code that a state is violating or ignoring the fulfilment of a sacred law – the *shari'a*. The degree to which a Muslim adheres to these rules also defines the intensity of his/her Islamic identity. Even as a truncated version of the *shari'a*, "the issue of personal law", in the words of Puri, "is in fact, closely linked with the Muslim urge for identity".⁶¹ Writing more pertinently to personal law, Shahced observes: "Throughout much of the Muslim world, therefore, the Muslim identity of a community appears to be hinged almost exclusively on the regulation of family and personal matters."⁶² Even in South Africa the practice of family law is viewed as essential for the formation and preservation of identity.⁶³ As recently as 1990 a local cleric solicited a judicial response (fatwa) from Egypt's al-Azhar University as to whether Muslims could reside in a territory where Muslim family law was not recognized.⁶⁴ The fatwa explicitly stated that it was permissible to stay in such a country provided that Muslims were not prohibited from practising their family law in private. What is significant, though, is the way the question frames MPL as a bulwark of identity against the threat of cultural assimilation. With the end of the apartheid state and the uncertainty of a society in transition, minority communities seek the security of religious and cultural identity formations. The issue of MPL becomes an important, if not the only, institutional focus of identity available to Muslims as a religious group.⁶⁵

From the efforts made by Muslims in South Africa for the recognition of family law it becomes evident that legal discourse is an important site of struggle about the meanings of identities. What has been observed is that more traditionalist Muslim groups seek to essentialize and freeze differences between Muslims, non-Muslims and other social groups. On the other hand, Muslim progressives are perhaps closer to a type of post-identity politics. Post-identity scholars articulate a set of strategies that acknowledge one's simultaneous and ambivalent desire both to affirm one's identity and to transcend it. In the words of Sachs, it is tantamount to "asserting the simultaneity of the right to be the same and the right to be different".⁶⁶ The diverse images of identities in everyday life suggest that there is no single doctrinal combination or political strategy or identity politics or mode of representation that captures the "reality" of multiple and complex identities. But the very awareness of this difficulty might involve a legal discourse that, through its very

⁶¹ Balraj Puri, "Muslim personal law: basis for a dialogue", *Islam and the Modern Age*, 16(4), 1985, pp. 205–214.

⁶² Shahced, "Controlled or autonomous", p. 1002. In the words of Tahir Mahmood, "[p]ersonal law is regarded as a distinctive possession symbolising the foundations of Islamic culture. To disown it, is in the view of those who so believe, to give up their cultural identity, their cherished traditions", see S. Tahir Mahmood, "Uniform civil code and Islamic law", *Religion and Society*, 26(4), 1979.

⁶³ See Peter du Preez, *The Politics of Identity*, Oxford, Basil Blackwell, 1980, p. 48.

⁶⁴ See the fatwa dealing with this question issued by the Shaykh al-Azhari, Jaf al-Haq, 'Ali Jaf al-Haq titled: "Fatwa on some rules affecting Muslim minorities", *Magallat al-Azhari*, Jamad al-Akhira 1411/January 1991, pp. 617–619. The fatwa was solicited by the Director of the Institute of Islamic Shariah Studies in South Africa.

⁶⁵ See Christelow, *Muslim Law Courts*, p. 15.

⁶⁶ Albie Sachs, *Protecting Human Rights in a New South Africa*, Cape Town, Oxford University Press, 1990, p. 44.

⁵⁷ See Lourens du Plessis, "A Christian assessment of aspects of the Bill of Rights in South Africa's final Constitution", *Journal of Theology for Southern Africa*, 96, 1996, pp. 59–74; S. Nadassan, "The search for national values in a transforming South Africa: a dialogue between law and theology", *Journal of Theology for Southern Africa*, 96, 1996, pp. 75–83.

⁵⁸ Winifred Fallers Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States*, Cambridge, Mass., Harvard University Press, 1994, p. 37.

⁵⁹ Marc Galanter, *Law and Society in Modern India*, Delhi, Oxford University Press, 1989, p. 249.

⁶⁰ Sullivan, *Paying the Words Extra*, p. 182. Also see Andrew W. Austin, "Faith and the constitutional definition of religion", *Cambridge Law Review*, 22(1), 1991, pp. 1–47.

indeterminacy, might be able to provide a space for complexity and difference to be represented but not determined.⁶⁷

The real difficulty actually arises when there is a conflict between religious law and the secular ethos of the dominant legal system. This happens in many countries when the constitution of the country is at variance with the traditional value systems of religions and cultures. When the two are irreconcilable or perceived to be so, this spawns one constitutional crisis after another. India is a good example. In the now famous *Shah Bano* case the Indian judiciary gave a purposive interpretation of the constitution providing greater scope to some aspects of MPL legislation. This judicial intervention generated serious political repercussions.⁶⁸ Critics of the Indian government took recourse in religious freedom and protested that judicial reforms effectively amounted to the abrogation of their religious-based personal laws.⁶⁹

9 MEDIATORS OF THE TRADITION

Who represents Islam and who determines what Islam means is an enigmatic question. Islam has no official *ecclesia*, but does have a *de facto* *‘ulama* class who act as a clergy. At the same time a host of other actors also influence the discourse of the tradition. These actors bring certain nuances to the debate on family law that are often overlooked by the politicians, ideologues, media and others, thus failing to understand the complexity of minority religious communities.

For instance the role of the *‘ulama*, (clergy), who in Max Weber's description qualify as the "administrators of the sacred", play a vital role in shaping the discourse of Muslim society. They become the mediators of the tradition and mediate between the past with the present. Their interventions stem from their functional roles at the mosques, religious education, and other social activities. At the same time, the religiously orientated non-*‘ulama* groupings play a decisive role in civil society. They also intervene at the level of fraternal organizations, professional associations and white-collar professions. While there is indeed a great deal of overlap and synergy between various sectors of Muslim society, their differences cannot be summarily overlooked. What unfortunately happens in most instances of social reconstruction and analysis, is that the largest sector of any community is considered as representative of the entire group, thereby further marginalizing the marginalized.

⁶⁷ Dan Danielson, "Identity strategies", in Dan Danielson and Karen Engle (eds.), *After Identity: A Reader in Law and Culture*, New York, Routledge, 1995, p. 58.

⁶⁸ For further details of this judgment handed down by Justice Y.V. Chandrachud joined by Justice Muraza Fazal Ali and Justice A. Vardarajan on 23 May, 1985 see Janak Raj Jai, *Shah Bano*, New Delhi, Rajiv Publications, 1986. Also see Gregory C. Kozlowski, "Shah Bano's case, Britain's legal legacy and Muslim politics in modern India", A. R. Momini, "Conflict of law and religion in contemporary India", *Social Compass*, 33(2-3), 1986, pp. 223-237; Arun Shourie, "The Shariat", a two-part article in the *Illustrated Weekly of India*, 12 January 1986 and 19 January 1986. Also see a rejoinder by Rafiq Zakaria, *Illustrated Weekly of India*, 9 March 1986.

⁶⁹ Momini, "Conflict of law and religion", p. 228, also see F.R. Faridi and M.N. Siddiqi (eds.), *Muslim Personal Law*, Bombay, Taj Publishers, 1985. See in particular the views of Maulana Said Akbarabadi, pp. 174-175 and 177-178.

Among Muslim professionals, educated elite and progressive workerist tendencies there is an increasing awareness of fostering gender equality and egalitarian social ideals. They also view themselves as being part of a common citizenry, while at the same time they espouse a modern and contextual Muslim identity. The world view represented by the *‘ulama*, in turn can be characterized as being primarily committed to patriarchal structures of social organization which are articulated in the language of religious exclusivism. At the same time, the *‘ulama* cannot be labelled as traditional, since tradition and modernity creatively coexist in the *‘ulama* discourse. This should be instructive in understanding that the relationship between group identity and group ideology is a highly complex one. People defend their ideology because they see the alternative as chaos, hence their commitment to *sharia*.⁷⁰

10 LEGAL REFORM

Given the history of Islamic law, it is appropriate to dwell on the issue of legal reform. There is an impressive tradition of legal reform in Muslim law where the *sharia* is applied to ever new and evolving contexts. The doctrines of "independent reasoning" (*ijtihad*) and religio-social "renewal" (*tajdid*) formed an intrinsic part of the legal tradition. However, many of these creative developments had already disappeared prior to the colonial interregnum in the Muslim world. The advent of the post-colonial phase provided fresh challenges to the reconstruction of the Muslim legal tradition in a world which differed greatly from when Islamic culture and civilization was at its zenith.

In post-independence India, for example, the famous case of *Shah Bano* in 1985 demonstrated the agonies of judicial reform to MPL. A 60-year-old plaintiff, Mrs Shah Bano Begum, demanded maintenance from her husband, Mr Muhammad Ahmad Khan, in excess of the three-month period that traditional Muslim law allowed. Her special circumstances required this and her case was in the final instance referred to the Indian Supreme Court, consisting of Justice Y.V. Chandrachud, Justice Muraza Fazal Ali and Justice A. Vardarajan. The court in its decision did two things: first, it invoked the objectives of the Indian constitution and the desirability of having a uniform civil code; second, it invoked the spirit of Islamic law and in so doing argued that Mrs Shah Bano was entitled to extended maintenance from her ex-spouse. This decision outraged Indian Muslims to the extent that the government of Rajiv Gandhi was coerced into passing legal amendments to isolate the provisions of MPL from the intrusive effects of other statutes, such as the one under which Shah Bano succeeded.⁷¹ The lesson from this episode was that,

⁷⁰ See du Preez, *The Politics of Identity*.

⁷¹ The Muslim Women (Protection of Rights on Divorce) Act, 1986 published in *Islamic and Comparative Law Quarterly*, 6(1), 1986, pp. 96-100. Also see Janak Raj Jai, *Shah Bano*, New Delhi, Rajiv Publications, 1986; Kozlowski, "Shah Bano's case"; Momini, "Conflict of law and religion", pp. 223-237; Arun Shourie, "The Shariat", also see Rafiq Zakaria's rejoinder in *The Illustrated Weekly of India*, 9 March 1986.

rightly or wrongly, many Indian Muslims believed that such judicial activism was tantamount to the abrogation of their religious-based personal laws.⁷²

The Indian experience holds valuable lessons for South Africa. The South African Muslim minority has a strong pan-Islamist sentiment. They are also readily influenced by experiences in other parts of the Muslim world. Throughout much of the limited public debate on MPL, it became evident that *shari'a* law plays an important role in their communal life. Until now, Muslim religious laws have been outside the purview of the state, which not only stigmatized them as repugnant but also viewed them as *contra bonos mores* as held in *Sedat's Executions v. Minister* (1917) and *Ismail v. Ismail* (1983).⁷³ Personal law matters were mainly in the non-state domain and supervised by the *ulama* organizations.

The recognition of Muslim law within a secular political structure in South Africa provides new challenges for both those entrusted with the administration of justice, and by implication the legal fraternity, as well as the Muslim community. For the state, in the widest sense it means coming to understand, as a social phenomenon, a community about which the larger society knows very little. More importantly, the secular state in active interaction with religious groups would have to arrive at a *modus vivendi* with Muslims and some of their religious concerns about secularism. It has been observed that secularism carries the cultural imprint and values of Christian civilization.⁷⁴ The crucial question is whether the secular accommodation of religious and cultural laws, like African customary law and Muslim law, can take place without incorporating these into a secularizing ethos. It would indeed be a novel and creative experience in modern statecraft, if a post-apartheid South Africa could have regime of legal pluralism and cease to be preoccupied with the notions of centralization and indivisible sovereignty.⁷⁵ Could this mean that South Africa would be a state in which both polygyny and monogamy had an equal legal status? South African jurisprudence is now well on its way to embracing a version of legal realism by eschewing Blackstonian positivism which dictates that "judges are authorized to only find the law and not to make it?"⁷⁶ Constitutional jurisprudence also makes it easier to view the law as a dynamic, purposive process for implementing human rights and constructive social change.⁷⁷ This may mean that the prospects for meaningful social change via legal reforms becomes a possibility, as may be the case with MPL.

⁷² F. R. Faridi and M. N. Siddiqi (eds.), *Muslim Personal Law*, Bombay: Taj Publishers, 1985. See in particular the view of Monirah Said Akbarabadi, pp. 174-178; also Momni, "Conflict of law and religion", p. 228.

⁷³ The South African Law Reports (1917), Appellate Division (ed.), A.F. Russell, Johannesburg, Digma Publishers, 1973, pp. 302-316; *Ismail v. Ismail*, 1983, 1 SA 1006 A; also see *Kalla and Another v. The Master and Others*, The South African Law Reports (1995) 1, January, Cape Town, Juta, 1995, pp. 261-271.

⁷⁴ While some would dispute that apartheid South Africa was a secular state, J.D. Van der Vyver, *Die Beëindiging van Menseregte in Suid-Afrika*, Cape Town, Juta and Company, 1975, observes that while the Roman-Dutch law may not be Christian in its origins, it unambiguously imprints the cultural values of Christianity on the law. Also see by the same author, "Religion", in W.A. Joubert and T.J. Scott (eds.), *The Law of South Africa*, vol. 23, notes 222-224.

⁷⁵ See Smith, *Corporations and Society*, p. 121.

⁷⁶ David Dyzenhaus, *Hard Cases in a Wicked Legal System: South African Law in the Perspective of Legal Philosophy*, Oxford, Clarendon Press, 1991, 217.

⁷⁷ See John Hundt, Hendrik W. van der Merwe, *Legal Ideology and Politics in South Africa: A Social Science Approach*, Cape Town, Centre for Intergroup Studies, 1986, p. 53.

A move towards the recognition of MPL has several implications for Muslims. For the first time, their legal system would be subject to public and judicial scrutiny. Codification and its accompanying problems as well as the training and preparation of personnel to implement the law could pose problems in the short term. Notwithstanding its intense desire to have Muslim law recognized by the state system, it remains unclear whether the Muslim leadership had contemplated the fact that they would have to forgo the control they had over their legal "subjects". Even if Muslims alone were designated to manage family law within the state system, it would mean sharing responsibility with the state and indirectly conceding a certain amount of their hitherto unfettered communal autonomy.

As religious communities negotiate their identities and ideologies in changing circumstances it is inevitable that paradigm shifts will also occur. Law, especially family law, has been the site of an intense conflict in various parts of the Muslim world and the focal point of measuring community traditions undergoing change.

Reform in family law means achieving a more just legal disposition that advances the status of women in society, women's rights, their capacity to get married, initiate divorce and manage the family and domestic space without the incursion of patriarchal authority.⁷⁸ Personal law covers marriage, divorce, succession and custody regulations. In most of these issues women and children feature prominently. In traditional Islamic law family law is status-based and based on contract.⁷⁹ Given the general context of traditional paternalism in Islamic law, in which patriarchy and blood relations form the basis of personal and social authority, many aspects of Muslim personal laws would radically differ from the Roman-Dutch contract-orientated laws. During its evolution over the centuries, several aspects of personal law have moved in the direction of contract at the hands of jurists who have increasingly eschewed status. In this century, many modern Muslim states like Tunisia, Egypt, Iraq, Algeria, Pakistan and other countries have adopted legislation which resembles the contractarian formulations of modern European legal systems.⁸⁰ In most instances these reforms were designed to be progressive and bring relief to disadvantaged groups such as women and children. Reforms were brought about by modernizing political elites who contested the authority of traditional elites and the orthodox religious leadership in many instances. Some studies have shown that the new *shari'a* that was codified, modernized and enacted by the predominantly male political elites was essentially designed to "favour the new hegemonic order coming to power as a nation-state structure".⁸¹ Ironically, these reforms were not always unproblematic and liberating. In some instances they created dual oppression by denying women freedoms that were available under traditional Islamic law without the modern secular and rational laws modelled after European standards bringing about a positive change to their status.⁸²

⁷⁸ Joan Church, "Constitutional equality and the position of women in a multi-cultural society", *Comparative and International Law Journal of Southern Africa*, 28, 1995, pp. 289-301.

⁷⁹ See Norbert Rouland, *Legal Anthropology*, Philippe G. Planet (trans.), London, The Athlone Press, 1994, p. 123 and p. 228.

⁸⁰ J.N.D. Anderson, "The role of personal statutes in social development in Islamic countries", *Comparative Studies in Society and History*, 13, 1971.

⁸¹ Sonbol, *Women, the Family and Divorce Laws*, p. 11. Also see John R. Schmidhauser, "Introduction: the impact of political change upon law, courts, and judicial elites", *International Political Science Review*, 13 (3), 1992, pp. 223-233.

⁸² Sonbol, *Women, the Family and Divorce Laws*, p. 2.

Informal Muslim judiciaries in South Africa have not demonstrated their sensitivity to issues of patriarchy and status laws, nor have reforms to existing practices been adequately debated. With the advent of a Bill of Rights many aspects of Muslim personal law may not be entirely justiciable in terms of anti-sexual-discrimination clauses. One example may help illustrate the point. In traditional Islamic law the oral repudiation (*talaaq*) of a wife was an extra-judicial act and was viewed as the exclusive prerogative of the husband. At any given instance the husband could notify his spouse of his intention to terminate the marriage, without providing reasons for the dissolution. Termination becomes effective at the instance of notification and the wife has no recourse to any meaningful remedial judicial procedures. While the single repudiation is revocable, a triple repudiation in one sitting irrevocably separates the spouses. The latter procedure, while being controversial, still remains widely practised. Women can only initiate a dissolution of a marriage by recourse to judicial procedures or dissolution by mutual consent of the spouses. Custody procedures also favour the ex-husband in that the mother only acts as a guardian of the child, until the age of puberty for boys or on attaining a marriageable age in the case of girls. Effective custody and guardianship remains vested with the ex-husband. These, and several other issues which cannot be discussed here, deserve greater attention before any suggestion of legislation in South Africa can occur. In short, an unreformed MPL dispensation when presented for legislation could find itself on a collision course with the human rights provisions of the constitution.

It is as yet unclear what model would be followed in order to regulate the application of MPL. Voices representing the *ulama* have suggested that they preferred autonomous *sharia* courts, implying thereby that regulation would be exclusively under their control. There have also been suggestions that any of the specialized family courts could be eligible to apply MPL. The options are therefore between a regime of legal pluralism or legal integration. In a bid to avoid the difficulties associated with legal pluralism, Cachalia has suggested his choice of legal integration. A regime of legal integration occurs when the dominant law is cognizant of other normative systems but regards these as being "private" and informal.⁸³ The idea is to fuse the elements common to both Muslim and Roman-Dutch law into one substantive rule. This is very different from legal unification or the implementation of a uniform civil code as attempted in India. Unification is a more authoritarian model where an undifferentiated and single code is imposed on diverse normative communities. Legal integration, in turn explores the commonality between diverse legal systems by trying to serve the optimal needs of society. Beita speaking about his multi-ethnic Nigerian context believes that "the development of plural societies can benefit more by evolving uniform or carefully integrated judicial systems than by maintaining multiple legal structures".⁸⁴ The drawback of this model is that it may not

⁸³ F. Cachalia, "Legal pluralism and constitutional change in South Africa: the special case of Muslim family laws", unpublished paper. The author is attached to the Centre for Applied Legal Studies, at the University of Witwatersrand.

⁸⁴ Yusuf Beita, "Legal pluralism in the northern states of Nigeria: conflict of law in a multi-ethnic environment", PhD, Department of Anthropology, State University of New York, 1976, p. 293. Also see David Pearl, "Cross-cultural interaction between Islamic law and other legal systems: Islamic family law and Anglo-American public policy", *Cleveland State Law Review*, 34,

be possible to find commonality in all areas of family law for integration. A residual pluralism would continue. Being an improvement on unfettered pluralism, it is possible that the outstanding Muslim laws which have not been accommodated in the substantive secular law may be viewed as the domain of the "private". These private domains would be regulated by the horizontal effect of the bill of fundamental rights and strike a balance between individual and community rights.

11 MUSLIM LAW AND THE 1996 CONSTITUTION

In section 15 of the 1996 constitutional text which enshrines freedom of religion, belief and opinion, paragraph 3 (a) and (b) states:

- (3) (a) This section does not prevent legislation recognising -
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.⁸⁵

Some lawyers have interpreted the key phrase "does not prevent legislation" to conclude that recognition of religious, family and personal law is not a constitutional right.⁸⁶ In other words, this clause serves as an advisory to the legislature and nothing else. However, if this section is read teleologically and contextually together with the clauses on "rights" (s. 7), "equality" (sect. 9), "human dignity" (s. 10), "children" (s. 28) and "cultural, religious and linguistic communities" (s. 31) then it would be difficult to conclude that the recognition of a family law regime is not a right. For clearly section 39 (3) goes on to say that "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill". Whatever the nature of the religious, personal or family law, the Constitution has ensured that these must comply with the general framework of constitutional values in terms of which rights are claimed.

Unlike the American constitutional jurisprudence, there is no impenetrable "wall of separation" between religion/tradition and the state in South Africa. If there is a wall, then it has doors and doorkeepers in the form of the constitutional values which regulate the flow of religion into the public arena. For this reason religious observances at schools for instance are required to ensure that: (a) the rules are made by the appropriate state authorities and that they are applied on an (b) equitable, (c) free and (d) voluntary basis. And all religious based practices must in all instances be (e) consistent with the constitutional values. It seems that the framers of the South

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1985-86, pp. 113-127; Carlos Esplagués, "Legal recognition of polygamous marriages", *Comparative and International Law Journal of Southern Africa*, 17, 1984, pp. 302-321.

⁸⁵ Constitution of the Republic of South Africa 1996, as adopted by the Constitutional Assembly on 8 May 1996 and as amended on 11 October 1996.

African constitution were confident that its values would regulate the propensity towards excessive doctrinal entanglement between religion and state. This means that religious practices, beliefs and opinions, at least in the public domain, will have to pass constitutional muster.

Invoking the constitution means those values which underlie "an open and democratic society based on human dignity, equality and freedom".⁸⁷ It will be left to the Constitutional Court to give content to the meaning of values with respect to religion. It is to be expected that certain aspects of traditional Muslim law and sectors of the community will find the constitutional test challenging. Let us look at a few possible instances.

In traditional interpretation of MPL a woman does not have the unrestricted right to petition for divorce in the same way that a man has the extra-judicial right to repudiate (*talaq*) his wife and sever the marital tie either revocably or irrevocably. She can only have her marriage annulled (*faskh*) under specific circumstances by a recognized Muslim judicial authority or make a financial offer to her spouse in order to exit the marriage, known as the procedure of *khul'*. Traditional juristic authorities in South Africa are reluctant to introduce more equitable measures of marital dissolution. Reformists would certainly look at judicial practices employed in Muslim countries like Tunisia, Syria and Egypt where all applications for divorce are made judicially. In so doing, the criterion of equality between the spouses are maintained. Judicial reforms in these countries were introduced in terms of the doctrine of public interest (*maslahah*) which gives effect to the intent, rather than the letter of the law.

Matrimonial property is another case in point. Historically, Muslim jurisprudence did not commence a notion of joint marital property arising out of a marital union. But neither is there any rule that precludes parties from regulating property relations between them in terms of a contractual regime of their choice. The absence of measures regulating marital property results in injustice and denial to ex-wives. Many of them contribute to the well being of the marital home through their labour and income, but at the termination of the marriage they are unable to make any patrimonial claims for an equitable portion of their contributions to the joint estate. At the end of such marriages women are left penniless and disadvantaged. Reformists propose solutions similar to Malaysia where *sharia* law was enacted to make a presumption that both parties contribute to a marital estate which is then equitably divided in terms of the respective contributions of the spouses. Although Malaysian reformers were motivated by the Malay custom of *harta sepantaran* where the wife shares the property of the husband, in the final instance the law was formulated on the basis of the Islamic law doctrines of equity and partnership. An MPL regime that does not cater for a fair outcome on the dissolution of a marriage may not be able pass constitutional muster in South Africa. There are several other instances where the current practice and procedures of MPL as applied in the informal judiciaries may fail the constitutional tests, but can be remedied by appropriate Islamic legal reforms.

⁸⁶ du Plessis, "A Christian assessment", p. 69.

12 CONCLUSION

If the engagement of the "other" law is to continue then it is most likely to generate hybrids of both Muslim law and the dominant South African law. In this reciprocal encounter our inherited perspectives about law, religion and culture are bound to be reshaped and redefined as diverse world views fuse to create an inclusive and integrated legal system. At the same time this will not be an exercise without serious challenges. The Constitution will certainly frame the outer limits of the debate but at the same time it will also be tested as to whether it can fulfill the ambitious project of cultural inclusiveness and is able to protect the dignity of all citizens in a multi religious society.

South Africa's Muslim community will undoubtedly experience the challenges of both the reform of Islamic law and integration into the human rights-oriented dominant legal system from which it seeks recognition for its family law system. Arriving at a consensus position within a divided and diverse religious community on controversial issues of family law will be no less a Herculean task, but one that will have to be faced squarely. Pessimists would say that the viability of MPL within a human rights framework would be an unrealistic prospect. A more optimistic view would be that South Africa may well pave the way for a reconciliation between Muslim family law and human rights dispensations.