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MUSLIM FAMILY LAW IN SUB-SAHARAN AFRICA

COLONIAL LEGACIES AND POST-COLONIAL CHALLENGES

Shamil Jeppie, Ebrahim Moosa & Richard Roberts (eds.)

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11 Muslim Family Law in South Africa: Paradoxes and Ironies

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A proposed draft bill on Muslim Personal Law (MPL) for South Africa's Muslim minority might pass the country's rigorous constitutional standards of justice and equality, but it might not get approval from all Muslim organizations. An influential and disgruntled group of ultra-conservative religious leaders (*'ulama*) opposed to the content of the proposed draft bill have managed to stymie the process for nearly six years. In doing so they postponed the aspirations of several generations of Muslim South Africans to have MPL recognized and legislated by the government. As the internecine disputes within the Muslim religious leadership continue, there is a likelihood that petitions from women's groups and other organs of civil society might restart the process to submit the proposed draft bill for consideration to the South African parliament. In 2009, the Women's Legal Centre Trust, a non-governmental organization, unsuccessfully petitioned South Africa's Constitutional Court, arguing that the government had failed to enact laws recognizing Muslim marriages.

Ironically, the Muslim religious leadership, namely the *'ulama*, who previously energetically petitioned for the recognition of MPL, were now divided. A minority of ultra-conservative *'ulama* were opposed to a reformist version of MPL, one consistent with South Africa's constitutional order and human rights safeguards. It appeared that the South African government was loath to antagonize minority communities or be caught in the crossfire of divisions. Now, the future of MPL might well be in the hands of the country's various courts and, finally, the government's willingness to enact legislation.

In the absence of legislation, the judiciary, from the Supreme Court of Appeal, the various High Courts and the Constitutional Court, have since 1996 addressed different aspects of Islamic law related to the family and provided relief to petitioners who would otherwise have faced hardship, especially women.

In order to understand the most recent developments surrounding MPL in South Africa, some of the history surrounding the demand for MPL, from the apartheid era to the post-apartheid period, is instructive in several respects.[1] Not only does it show how governments used the special interests of religious minorities in order to elicit compliance, but this story also demonstrated the ideological contestation centered around MPL between different Muslim role-players and constituencies. The last part of the chapter will examine how the post-apartheid courts have effectively given recognition to aspects of MPL.

Attempts to Recognize MPL under Apartheid

Towards the end of 1987, the South African Law Commission (SALC), under the then-apartheid government, circulated a questionnaire to several Muslim organizations and individuals, inviting comment on certain matters affecting MPL.[2] Muslim efforts to have MPL recognized dated back to the middle of the twentieth century.[3] Another trigger for MPL in the last quarter of the twentieth century was the advent of the internationally discredited tricameral parliament in 1984, which gave parliamentary representation to coloureds and Indians, with several Muslim participants. Politicians at the time hoped to gain credibility with the Muslim community by highlighting MPL as an electoral issue.[4]

Foremost among the supporters of the SALC initiative were the established clergy groups, like the Jamiat al-Ulama (Association of Muslim Theologians), representing the province of Transvaal, now Gauteng, and Natal, now Kwazulu-Natal; the Cape-based Muslim Judicial Council (MJC); the Majlisul Ulama of the Eastern Cape; and the Islamic Council of South Africa (ICSA). The *'ulama* groups were joined by an influential group of professionals, known as the Association of Muslim Accountants and Lawyers (AMAL). The SALC inquiry raised the expectation of the recognition of MPL.[5] The *'ulama* bodies in turn were reluctant to co-operate with other role-players

and viewed the entire enterprise to be their exclusive domain. As a harbinger of what was to come a few decades later, the Port Elizabeth-based conservative *'ulama* grouping called the Majlisul 'Ulama had already cautioned in the 1980s that the lobbying for MPL could only occur under the auspices of the *'ulama*. This body urged the Muslim public to reject the proposals of the non-*'ulama* groups, whom it labeled 'modernists'. They staked their claim on the theological presumption that the *'ulama* alone were rightly the *'ulul-amr* (legitimate authority) in terms of Islamic theology to give guidance in matters of doctrine, of which MPL was one such matter.[6]

A cross-section of Muslim religio-cultural and political organizations involved in civil society and anti-apartheid activities were opposed to the SALC proposal.[7] They viewed it as the apartheid government's ploy to co-opt sectors of the Muslim community, and they thus resisted the *'ulama* groups' claim to a monopoly on matters related to MPL. Among the most vocal were progressive groups like Muslim Youth Movement (MYM), the Call of Islam (COI), and the Qibla Mass Movement, as well as the Muslim Students' Association (MSA).

Both the *'ulama* and politically active Muslim groups understood the recognition of MPL would bring relief to the lives of ordinary Muslims. Non-recognition of Muslim family law meant that children from Muslim marriages were declared to be illegitimate, female spouses were often denied patrimonial benefits on divorce, and intestate succession resulted in costly litigation. Some activists agonized in having to choose 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 during the 1980s were the class differences: generational divides that shaped the disparate 'readings' and 'strategies' vis-à-vis the apartheid government and the proposal to recognize MPL. These differences were informed by the historical tensions evident among Muslims, which had shaped their varying attitudes towards colonial rule as discussed by Allie in this book and later under apartheid. During the tumultuous 1980s, there were frequent stand-offs, alliances, between sections of the educated elite and the politicized youth against some 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 group of nouveaux *'ulama* who

served as ideologues for anti-apartheid political activism.[8] Conservative elements among the *'ulama* saw Muslim liberation theology as compromising 'pure' Islam, as a result of its association with Christian, communist, socialist and secular ideologies.[9] Clearly, the controversy over MPL only heightened the existing tensions and exacerbated intra-Muslim rivalry.

That burst of MPL-related activity in the 1980s was short-lived. Dramatic political developments that changed the face of modern South Africa eclipsed all law reform activities. Once negotiations between the formerly banned parties in the liberation movement, like the African National Congress (ANC), and the apartheid-era National Party began, the demand for the recognition of MPL became part of the quest for a democratic future. All the major Muslim organizations petitioned political parties involved in the multiparty Conference for a Democratic South Africa (CODESA). Such successful lobbying made it possible for the recognition of religion-based family laws, like MPL, to be written into the constitution. The ANC, as the major political party, made an electoral pledge to legislate MPL if it succeeded at the polls in the first democratic elections in 1994.

Once in power, the ANC realized that the Muslim community was not as unified as they expected. Furthermore, the claims by the traditional *'ulama* as the sole representatives of a diverse Muslim community were hotly contested by Muslim organizations who did not share such 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, the tensions between the traditional *'ulama* and the progressive Muslim groupings that were noted earlier dramatically re-emerged. The *'ulama* participating in the MPLB were often more inclined to please their more conservative colleagues, like the Majlisul Ulama, rather than reach compromises on constitutionally viable interpretations of family law with Muslim progressives. Not only reasonable interpretation; the conservative *'ulama* objected to the participation of Muslim women in the MPLB or objected to the fact that women were not sequestered in gender-segregated spaces during MPLB meetings.

The MPLB finally imploded once irreconcilable differences between the *'ulama* and progressive Muslims became manifest over the place of human rights in any envisaged MPL framework. There were two main reasons for the breakdown. Firstly, the *'ulama* found the constitutional constraints on any MPL so offensive that they contemplated petitioning the Constituent Assembly to exempt Muslim family law legislation from the human rights provisions of the new constitution. They also made futile appeals to President Nelson Mandela to exempt MPL from adhering to the requirement of the constitution. Secondly, the Muslim progressive groups like the MYM and Call of Islam maintained that Muslim family law, if it were properly interpreted, did not have to conflict with the values of the constitution.

Mr. Shuaib Omar, a lawyer representing the *'ulama*, made it abundantly clear that gender equality, a notion distinct to reformed versions of MPL as envisaged by the Muslim progressives would be incompatible with the *'ulama*'s interpretation of Islamic law or shari'a. In fact, the *'ulama* lobby viewed their own interpretation of the shari'a to be final but failed in their insistence that all other stakeholders in the MPLB sign a document endorsing the supremacy of the shari'a as they understood it. Following acrimonious divisions among the various stakeholders in the consultation process, by April 1995, the majority *'ulama* grouping met privately and unilaterally dissolved the MPLB.

After further delay, in March 1999 the Minister of Justice established an eight-person committee of the now renamed South African Law Reform Commission (SALRC) to investigate the feasibility of Muslim marriages and related matters. Representation on the committee included all persons of Muslim background: two from the *'ulama* community, Moulana A.A. Jeena and Sheikh M.F. Gamieldien; a female academic, Professor N. Moosa; a sitting female parliamentarian, Mrs. F. Mohamed; a veteran politician, R.A.M. Saloojee; and two practising attorneys one male, Mr. M.S. Omar, and one female, Ms. Z. Seedat, under the chairmanship of Judge Mohammed S. Navsa.[10]

The Aftermath of the Law Reform Commission Proposals

In July 2003, the SALRC released a report, known as Project 59, on 'Islamic Marriages and Related Matters' to announce its findings. The widely circulated draft bill in Discussion Paper 101 issued by the SALRC elicited an energetic response from a cross-section of respondents and stakeholders, a summary of which was included in the final report. The final report also included a proposed draft bill called the Muslim Marriages Act, and it was left to the legislature to contemplate the future of MPL, based on the findings of the SALRC report.

Two years later, in October 2005, the Commission for Gender Equality (CGE) in South Africa, a statutory commission, proposed an alternative draft bill called the Recognition of Religious Marriages Bill, hereafter referred to as the CGE Bill. This bill aimed at recognizing all religious marriages, with no reference to any specific religious law, in a bid to adhere to South Africa's constitutional and international law obligations.[11]

However, the South African government and parliament have yet to respond to either the SALRC-proposed draft bill or the CGE Bill. Unofficially, the word was that the government was reluctant to take sides in the matter of MPL, given the extensive divisions within the Muslim community. There was, however, no explanation of why the government did not entertain the secular CGE proposal, since it was designed to recognize all religious marriages in terms of the existing secular statutes regulating marriage, divorce and succession. One can only speculate as to reasons for the reluctance. Recognizing religious marriages might elicit objections from religious communities, like Muslims, that secular legislation and not religion-specific laws would regulate their family practices. In other words, the South African government was in a precarious position: on the one hand, it had a duty to fulfill a constitutional mandate to legislate family laws based on religion, and on the other hand, it had to be impartial and not take sides in instances when religious communities were divided among themselves.

The Proposed SALRC Draft Bill

The authors of the proposed draft bill clearly tried to provide outlines for legislation that would pass constitutional muster. The proposed draft bill has a declaratory statement affirming the equality in status and capacity of spouses. 'A wife and a husband in a Muslim marriage are equal in human dignity, and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate'.[12] If this provision survived legislation, then it would enable future judges on the grounds of equality and human dignity to strike down aspects of MPL interpretation that would discriminate against women.

Apart from approving existing Muslim marriages retroactively, the proposed draft bill recognized polygyny but made the practice subject to certain

conditions. While the SALRC did use the term polygyny in an earlier draft, the final draft bill does not use this term, but it does contemplate a Muslim man having more than one wife. If a husband was contemplating polygyny, then he was required to apply to a court in order to satisfy the authorities that he could 'maintain equality' between his spouses.[13] Failing to get permission from a court when marrying a second spouse can result in a penalty. In making the practice of polygyny subject to an assessment by an impartial court and with a stiff penalty for non-compliance, the authors of the proposed SALRC bill have turned towards reformist thinking on this matter. For orthodox traditionalists, Muslim men have a right to take more than one spouse, with the burden of equality between the spouses being more of an ethical guideline rather than an enforceable standard. The SALRC has in the case of polygyny followed the lead of modernist thinking, as applied in Pakistan and a few other countries, but has also added additional deterrents to polygyny; and, they have made material affordability and fairness between multiple wives an enforceable requirement.

One of the most controversial differences between modernizing reformist thinking and traditional orthodox modes of thinking in matters related to MPL was the place of the male unilateral right to repudiation (*talaq*) to end the marriage. This practice took place extra-judicially; in other words, the husband pronounced the formula, and the separation between the spouses was effective immediately. If the husband uttered the *talaq* formula three times, in one meeting, even in a state of anger or distress, then according to some Islamic law authorities the marriage was irrevocably severed. A minority of Muslim authorities have argued that three utterances in one meeting were equal to a single revocable repudiation. Legal refinements aside, this practice often caused great hardship to families. Women were frequent victims, since they had no say in the dissolution of the marriage when this procedure was used.

The proposed SALRC draft bill provided a variety of procedures for the dissolution of a marriage. While the bill retained the practice of *talaq* as one mode of dissolution, among others, it did introduce regulations to make *talaq* partly a judicial matter. Unlike Tunisia, where the dissolution of marriage can only be a formal judicial procedure, the proposed SALRC draft bill partly reformed a traditional practice by requiring the husband to register an irrevocable *talaq* immediately and within thirty days after its pronouncement. The pronouncement had to be done in the presence of a mag-

istrate, along with witnesses and the presence of the wife and/or her representatives.

The bill did not make any mention of a revocable *talaq*, since spouses had an opportunity to reconcile among themselves if such a form of repudiation was practised. However, another positive move that the proposed bill did contemplate was the possibility that on or during the course of a marriage, the husband could delegate his power of *talaq* (*tafwid al-talaq*) to his wife or another institution or person, to be exercised according to prior agreements and stipulations the spouses might have reached. In delegating the power of repudiation (*talaq*), the husband renounced the right to unilaterally end the marriage.

The proposed bill also made provisions for women to initiate the dissolution of a marriage by way of judicial dissolution (*faskh*) and by mutual agreement (*khul'*), the latter involving a financial incentive for a husband to agree to the dissolution of the marriage tie. Despite these improvisations, which might offend the sensibilities of conservative Muslim authorities, there was still a chance that the legislator, feminist and women's groups could object that *talaq* was an unfair practice towards Muslim women. However, the matter was a delicate one, a balancing act between radical reform and gradual reform. The use of the *talaq* procedure could be easily minimized if the standard marriage contract had a default option that automatically delegated the power of *talaq* to a court or a Muslim arbitration council. Such a provision could substantially reduce objections to the proposed draft bill, and the constitutional hazards the practice might pose if it was not subject to further revision.

Another advance in the proposed draft bill was the distribution of marital property upon divorce. Classical Islamic law assumed as a default position that spouses maintained separate marital estates and property. In other words, the husband had to financially maintain the wife, and spouses had control over their personal wealth and property. Modern marriages functioning like economic partnerships between spouses make different kinds of assumptions. Spouses jointly contribute to their family wealth through a variety of direct and indirect means. On the dissolution of such marriages, there was a need for the equitable distribution of wealth accrued during the subsistence of the marriage. The proposed SALRC draft bill made provision for the 'just and equitable' distribution of marital assets in the absence of any express agreements. Courts will be able to distribute assets equitably if

a spouse has contributed towards the operation and conduct of a family business or businesses during the subsistence of such a marriage. The courts will also be required to equitably adjudicate on marital assets in which a spouse had actually contributed to an estate during the subsistence of a marriage. This was a major departure from traditional interpretations of MPL, and it also met the constitutional criteria of fairness and justice. In practice, women often received the short end of the stick at the end of Muslim marriages. In many households the major asset, like the family home, was registered in the name of the husband, but in reality an income-earning wife often contributed to expendable household needs. If she indirectly contributed to the payment of the property, often at the end of the marriage she was unable to quantify her share of contributions to the household estate. This proposed draft bill clearly attempted to rectify such a practice.

A wife will also be able to claim maintenance in arrears under the terms of the proposed bill. Courts will be able to make an order for a conciliatory gift, *mut'ah al-talaq*, especially if the husband initiated the termination of a marriage. There are also elaborate provisions made for compulsory mediation prior to the dissolution of the marriage. Parties can either refer disputes to a court, where a Muslim judge will attempt to resolve them, or they could seek the help of an arbitrator.

All in all, the proposed draft bill offers guidelines for MPL that will enable Muslim family laws to pass constitutional muster. In doing so, the SALRC had reached for some of the best interpretations of Islamic law, signaling a departure from the more patriarchal interpretations unofficially in practice among Muslims in South Africa and as regulated by the informal Islamic family law tribunals. If there was one silver lining in this long and arduous process in search of a viable MPL regime, then the proposed SALRC draft bill had clearly shown that Islamic law could be compatible with human rights criteria and constitutional governance. If the proposed draft bill made it into legislation, then the South African experience could also serve as a viable model for other Muslim minorities, especially those living in Europe and North America, should they seek recognition for Muslim family law. There have already been calls for such recognition in Britain, controversial as it might be.

The Politics of MPL in SA

Anxieties with respect to MPL are far from over. A sector of the conservative *'ulama* have rejected the SALRC report and proposed bill despite the fact that some of the major *'ulama* councils have blessed the bill. It seems that a large sector of the *'ulama* have recognized that to have some version of MPL is better than having none. Furthermore, even if they at first resisted reformist and modernist interpretations of MPL, they also recognized that the political and constitutional conditions in South Africa made no other version of MPL a realistic option. Denunciatory charges that *'ulama* bodies once hurled at their progressive Muslim opponents were now directed at the moderate *'ulama* by their ultra-conservative colleagues. Leading the charge against the proposed SALRC draft bill was the Majlisul 'Ulama of South Africa. This group had managed to split the *'ulama* councils affiliated to the Deoband school in South Africa over MPL. The Muslim Judicial Council of the Cape, for instance, favored the proposed SALRC draft bill. The ultra-conservative Majliusl 'Ulama managed to convince sections of the Deoband-aligned *'ulama* councils that the MPL proposals were totally un-Islamic. Using trenchant and condemnatory language, the Majlisul 'Ulama effectively denounced those *'ulama* participating in the MPL process by labeling them demonic.[14] In fact, the Majlisul 'Ulama argued that it was actually preferable not to have any family law legislation recognized by the government. The political dispensation in South Africa in the twenty-first century, the Majlisul 'Ulama argued, allowed Muslims to practise the shari'a in the private sphere without state supervision or secular interference.

All the issues pertaining to Islamic law addressed in the proposed SALRC draft bill, ranging from the regulation of polygyny, the distribution of marital property, to the regulation of repudiation (*talaq*) involved alterations to traditional interpretations of the shari'a. In the view of the Majlisul 'Ulama, this was an anathema and a complete distortion of 'pure shari'a'. The Majlisul 'Ulama ridiculed the *'ulama* groups who supported the proposed SALRC draft bill, saying it was the handiwork of 'evil learned scholars' (*'ulama-i su'*), which amounted to strong jeremiads and heresy-mongering.

The Majlisul 'Ulama's leader, Mawlana Ahmad Sadick Desai, had also managed to convince a younger generation of *'ulama* to join him in opposing the proposed draft bill, with the result that the Councils of Theologians

for the Gauteng and Kwazulu-Natal provinces were split into anti-MPL radicals and pro-MPL moderates.

The dispute among the *'ulama* groups was in part exacerbated by the fact that reformist interpretations of shari'a were introduced by stealth. How? It appears that representatives of the *'ulama* groups who served on the SALRC committee, especially Moulana Abbas Jeenah of the Jamiatul 'Ulama of the Gauteng, and Mr. Shuaib Omar, a lawyer in private practice close to the Jamiatul 'Ulama of Kwazulu Natal, often rhetorically trumpeted claims that the proposed MPL draft bill was going to be shari'a compliant. In doing so, they raised expectations that a very orthodox and conservative version of shari'a doctrine would inform MPL. When the conservative *'ulama* realized that there was considerable dissonance between the rhetoric of their colleagues on the SALRC and the outcome of the proposed MPL draft bill, they raised objections. In order to convince the conservative *'ulama* about the viability of the proposed SALRC draft bill with reformist content, a senior traditional authority figure, Mufti Taqi Usmani, a former shari'a court judge from Pakistan, was invited in order to quell the concerns of the shari'a hardliners. The conservative *'ulama* were not swayed by Mufti Usmani's endorsement of the proposed MPL draft bill following a number of workshops that were convened; in the end, it only helped fuel the divisions among the *'ulama* who were affiliated to Indo-Pakistan networks of the *'ulama* tradition.

For the conservative *'ulama* led by the Majlisul 'Ulama, the pursuit of MPL was now regarded as an irreligious act, since what was proposed as MPL draft legislation was in their view no longer 'pure shari'a' but rather an amalgam of secular laws masquerading as shari'a. The issues that specifically raised their ire were the regulation of male repudiation (*talaq*) powers by means of mandatory court procedures, the division of marital property, and the regulation of polygyny, among other controversial issues.

Similar concerns were expressed, albeit in more nuanced juristic discourse, by US-based Howard University law professor Ziyad Motala. Motala argued that the proposed MPL draft bill amounted to the state prescribing religion and coercing particular forms of religious behavior on its citizens.[15] He also took exception to the fact that the legislature would decide on the content of Islamic law, while the judiciary would have the final word as to what constitutes shari'a. In so doing, MPL legislation would take away the autonomy of Muslim communities to decide on matters of religion, which Motala believed properly belonged in the realm of the private. He also en-

visaged instances where the constitution, the legislature and the judiciary would be in a position to amend or reject aspects of Islamic law stemming from a conflict of laws and values. Motala was totally opposed to the proposed MPL draft bill. What Motala failed to recognize was that the South African constitution enabled and welcomed the possibility of legislating as well as promulgating family laws based on religion. His objections might be more properly directed at the Constitution, which enabled the family law dispensations in the form that he finds objectionable. It is interesting to note that the objections Motala invoked were more compatible to the United States' constitutional order that created a wall of separation between religion and state, which was on occasion breached as in the case of New York where Jewish husbands had to obtain a religious decree of divorce, called a 'get', before the secular court gives a final ruling. In South Africa a democratic and consultative process determined the contours of the constitution and the mode of relationship between religion and state. The objections Motala raised amounted to an anomalous claim that the South African constitution itself was unconstitutional! This would then beg the rhetorical question: by which standards?

While he opposed MPL legislative efforts in South Africa, Motala instead proposed an arbitration process related to family law that would be available to Muslims and regulated exclusively by Muslims.[16] His model for such a system of arbitration was the Jewish tribunal in Ontario, Canada, and the fact that several states in the US accepted the decisions of an arbitrator in matters related to family law. One of the weaknesses of the proposed SALRC draft bill was that it made no provision for transforming the existing informal regulatory tribunals, managed by a variety of *'ulama* organizations adjudicating family law matters in accordance with Islamic law. While women's organizations were at times skeptical of the fairness of the process in such arbitration councils, if arbitration were to be accepted, then the procedures and practices of such bodies could be subject to proper regulation and oversight.

It was not the first time that Muslim stakeholders objected to secular institutions and courts regulating matters of family law inspired by the shari'a. The concerns were raised by the conservative *'ulama,* who balked at the prospect that MPL would be regulated by non-Muslim legislators and judges who they assume will violate the shari'a. Such objectors assume that there is a singular interpretation of the shari'a. The fact that different *'ulama*

groups either support what they view to be a shari'a-compliant proposed MPL draft bill, or oppose it since it violates the shari'a, is itself suggestive that the meaning of shari'a is contested, even among the *'ulama* themselves. That is notwithstanding the views of Muslim women's groups and activists, who will differ with the *'ulama* about the substantive meaning and content of the shari'a.

In pre-partition India, *'ulama* who were aligned to the same Deoband seminary network to which many of the conservative *'ulama* in South Africa belonged, had for decades recognized that MPL in India was far from ideal. They recognized that it was administered by secular authorities, yet they never decreed the MPL legislation to be un-Islamic or unworthy of eliciting compliance. In fact, senior *'ulama* aligned with the Deoband school in India, like Mawlana Ashraf 'Ali Thanvi for instance, submitted proposals to reform MPL in India in the first half of the twentieth century. Unlike the conservative South African *'ulama*, Thanvi did not challenge the legitimacy of MPL in India for use by Muslims.

One major cause for confusion was the fact that a whole range of stakeholders, in order to gain the consent of lay Muslims, unfortunately marketed MPL as their religious code, the shari'a. The truth is that in the case of MPL, the state selectively facilitated the application of certain elements of the shari'a, not its totality, as a matter of prudent statecraft. Realist advocates of MPL recognize that a 'pure' version of the shari'a, meaning a doctrinaire construction of it, will often be impossible to implement in a secular nation-state context. Asaf A. Fyzee, a leading Indian lawyer, long ago addressed the conundrum of whether MPL as a version of religion might enhance doctrinal entanglement, where the state adjudicates in matters of religion. Fyzee stated that the application of shari'a required a political authority that was distinctly Islamic, but the application of family law did not require such type of authority. In Fyzee's view, enforcing MPL in India during his day or in South Africa later was a move mandated by the constitution and not by the shari'a. When a secular government enforced MPL, Fyzee argued, it did so as a 'matter of policy', not as a matter of religion.[17] This might sound to some like a matter of semantics, but then the entire question of family law in relation to the state was a matter centered around symbolism and reality. In South Africa, the case could well be made that it was the Muslim community in that country who petitioned the constituent assembly to recognize MPL. When the state facilitated practices informed by

religion, then it did so as a matter of public policy; the state did not act as an arbiter of religious practice or by prescribing a specific version of religion. Therefore, as a matter of public policy, a state was within its rights to require that religiously informed practices conform to certain standards of scrutiny and adjudication. It might be hard for opponents of MPL to mount a constitutional challenge and make the case that MPL infringed on religious freedom. Firstly, citizens were free to choose their marital regime and were not coerced to be subject to the mandate of MPL to regulate their family relations. They could opt for civil law marriage and its consequences. Secondly, MPL could not be challenged on grounds of religious freedom, since there was strong international precedent in many Commonwealth countries for its enforcement. While MPL no doubt created a great deal of political strife and legal consternation from time to time, it had yet to be viewed as a violation of religious freedom.

Even in Motala's envisaged MPL arbitration tribunals, managed by Muslim experts, it can hardly be conceivable that judicial and political oversight will be absent. It seems unlikely that the state would relinquish its judicial sovereignty, nor would such arbitration councils be immune to public interest litigation if there were constitutional violations. If the authority of the arbitration councils is to be recognized, courts would invariably adjudicate settlements and pronounce on the content of Islamic law. In other words, any version of MPL, whether in the form of legislation or arbitration within a nation-state context that also had a justiciable constitution, cannot avoid a degree of doctrinal entanglement.

Muslim Personal Law in South African Courts

Preceding the inter-Muslim wrangling over the content and future of MPL, the post-apartheid South African courts made the first interventions in giving relief in family law matters derived from Islamic law.[18] Prior to 1996, Muslim marriages were stigmatized by British colonial courts, a juridical policy that was upheld by successive apartheid-era courts. Muslim marriages were deemed 'repugnant', as were many African customary and Islamic practices by colonial regimes in other parts of Africa. Under apartheid rule the country's courts judged Muslim marriages to be *contra bones mores* of society. The chief reason for repugnancy was that Muslim marriages were po-

tentially polygynous. The two leading case-law precedents were determined in *Seedat's Executors v. Master* (Natal-1917) and *Ismail v. Ismail* (1983).[19] In both these cases, these aforementioned reasons were proffered as grounds for non-recognition of Muslim marriages. Only legislation could authoritatively instruct the courts how to proceed with aspects of Islamic law. Yet as the experience with MPL recounted above showed, it would take some effort, political will and a great deal of time before such legislation was actualized.

The 1996 constitution created an opening for South African courts to entertain aspects of Islamic law. Section 15 of the 1996 constitutional text enshrining freedom of religion, belief and opinion also redressed the practical aspects of religion and culture that were denied by apartheid rule. Paragraph 3 (a) & (b) of Section 15 added:

> (3) (a) This section does not prevent legislation recognizing
> (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.[20]

Some lawyers have interpreted the key phrase 'does not prevent legislation' to mean that the recognition of marriages based on religion, tradition, family and personal law was not a constitutional right per se.[21] This clause served as an advisory, some experts argued, and it only made a recommendation to the legislature that culture, tradition and religion should not be stigmatized for legislative purposes. However, when Section 15 of the constitution is read teleologically and contextually, together with the clauses on 'rights' (Sect. 7), 'equality' (Sect. 9), 'human dignity' (Sect. 10), 'children' (Sect. 28) and 'cultural, religious and linguistic communities' (Sect. 31), then it would be difficult to conclude that the recognition of a family law regime based on religion or custom was not a right. What supported such an affirmative reading was Section 39 (3), which proclaimed that 'the Bill of Rights does not deny the existence of any other rights or freedoms that are recognized 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 had ensured that these must

comply with the general framework of constitutional values in terms of which rights were claimed.

Thus, Section 3 of the constitution framed the legal groundwork in order to challenge the judicial bias against entertaining cases involving Islamic law. So the constitution helped to breach the impregnable barrier established by case law against the recognition of anything remotely related to Muslim marriages.

The facts of *Ryland v. Edros* showed that the parties ended their marriage when Mr. Ryland pronounced the repudiation (*talaq*) formula, and notified his ex-wife through one of the informal Muslim tribunals in the Cape Town area that she was no longer his spouse. In terms of the prevailing informal practice of Islamic law, Mrs. Ryland (nee Edros) was not entitled to any patrimonial benefits, save for maintenance for a mandatory period of three months after the date of repudiation. In order to secure further entitlements, she approached a secular court to claim the following in terms of the Shafi'i school of Islamic law: maintenance in arrears owed to her by her ex-husband; a conciliatory payment for unjustifiable termination of the marriage; and an equitable share of her contributions to the joint marital estate.

Imaginative lawyering and the ethos of the new constitution made it possible for a favorable judgment in support of Ms. Edros to be issued. Since Muslim marriages were not recognized in South African law, the court was asked to take note of the Muslim marital *contract* and its consequences in terms of which the partners entered into a marriage. Once the court was persuaded that the marriage contract in Muslim law was functionally similar to a contract in Roman-Dutch and common law, the effects of such a contract could be enforced. In rebutting previous judgments, which deemed Muslim marriages to be offensive to public policy, Judge Ian Farlam said:

> Can it be said, since the coming into operation of the new Constitution, that a contract concluded by parties which arises from a marriage relationship entered into by them in accordance with the rites of their religion and which as a fact is monogamous is 'contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society' or is 'fundamentally opposed to our principles and institutions?' ... it is quite inimical to all the values of the new South Africa for one group to impose its values on another ... [A]nd that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all

> right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account.[22]

In his verdict, Judge Farlam went on to explain that no 'right-thinking person' would say that two Christians married in a church of their choice by a minister who was not a recognized marriage officer in terms of the Marriage Act were acting immorally if they lived as husband and wife. If the parties to such a union were to agree to support each other, then such an agreement could not be rendered unenforceable. By the same analogy, Judge Farlam said, Muslims who agreed to live in terms of an agreement decreed by their religious law can also enforce such an agreement, even though the marriage was invalid in terms of the Marriage Act.

Following his bold reasoning, Judge Farlam awarded Ms. Edros a limited amount of arrears maintenance owed to her, as well as a consolatory gift, as the dissolution of the marriage was at the unjustified behest of the husband. Both claims awarded were in accord with Islamic law. The court did not award her claim to an equitable share of her tangible and intangible contributions to the growth of her husband's estate because the issue was not entirely acceptable among all contemporary Muslim jurists.

Ryland v. Edros signaled a judicial change of heart in accommodating the 'other' law within the dominant legal system. Liberalizing and culturally inclusivist tendencies in judicial attitudes impacted legal thinking in favor of Islamic law, but it also affected the Roman-Dutch and common law heritage of South African law in the years after *Ryland v. Edros* was decided.[23]

Two subsequent cases, one heard in the Supreme Court of Appeal and the second heard in the Constitutional Court, both systematically began to undo the discriminatory jurisprudence that dated back to the colonial and the apartheid regimes with respect to Muslim marriages.

Amod v. Multilateral Motor Vehicle Fund 1999 was an appeal heard by the full bench of the Supreme Court of Appeals, in which chief justice Ismail Mahomed wrote the judgment. The case involved Mrs. Hafiza Amod, married by Muslim rites to her late husband, who was killed in a motor vehicle accident. A lower court refused her claim for damages suffered from her loss of her late husband's income from the Accidents Fund. The reason given why she was denied the right to claim was that her marriage to her late husband did not enjoy the status of a marriage in the civil law. Therefore, the duty

that the deceased had to support his surviving wife, Mrs. Amod, flowed from a contractual consequence between them, not as a consequence of their marriage per se. Lawyers for the Accidents Fund argued that given that Mrs. Amod was not recognized as the deceased's wife in terms of the law, her action for loss of support was irrelevant. A lower court upheld that viewpoint, based on earlier case law.

On appeal, Mrs. Amod was joined by the Commission for Gender Equality as amicus curiae. In his judgment, Judge Mahomed examined the history of Roman Dutch law and case law in order to develop the common law. The proper test, he argued, was to establish whether a deceased person was under a legal duty to support his dependent during the subsistence of a marriage, and whether that right also applied to his widow. He disagreed, Mahomed stated, with earlier precedent that made the test about the lawfulness or unlawfulness of a customary marriage.

Courts had previously pronounced on the unlawfulness of Muslim marriages on the grounds that they were contrary to the *boni mores* of society. The implication of this standard, said Mahomed, was that only marriages solemnized by one faith, namely Christianity or a philosophy approximating that faith, were acceptable. Refuting this presumption, Mahomed stated: 'This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending the repeal of all legislation inconsistent with a negotiated bill of fundamental rights.'[24]

Mahomed further argued that it was not the enforceable contractual duty alone that sustained Mrs. Amod's claim. In his view, she had shown that:

a. the deceased had a legally enforceable duty to support the dependent [Mrs. Amod]
b. it was a duty arising from a solemn marriage in accordance with the tenets of a recognized and accepted faith
c. it was a duty which deserved recognition and protection for the purposes of the dependent's [Mrs. Amod] action.

While Judge Mahomed established the duty to support a dependant, he simultaneously removed any discriminatory grounds whereby the status of a marriage could become an obstacle and serve as a cause for disqualification. In so doing, he scripted marriages solemnized according to Muslim rites as part of the new ethos and good mores of South African society.

In *Daniels v. Campbell* 2004, a Muslim wife was deprived from inheriting from her deceased husband's estate.[25] The Cape High Court reluctantly denied her the right to inherit, since Muslim marriages did not meet the requirement of the meaning 'spouse' in terms of South African law. That discriminatory practice also deprived Ms. Daniels from qualifying to inherit under the Intestate Succession Act 81 of 1987. The matter was referred to the Constitutional Court for deliberation as to whether widows married only according to Muslim rites were denied the protections of the statute under the new constitution.

Writing for the majority, Justice Albie Sachs invoked the legal reasoning in the *Amod* case, but supplemented it by also appealing to the constitutional values of 'equality, tolerance and respect for diversity' all of which in his view pointed to the fact that the word 'spouse' had a broad and inclusive construction.[26] The constitutional goal was also to achieve substantive equality, Sachs argued. Drawing on the new ethos of the new society was central to Sachs' judgment, and he concluded that the word 'spouse' in the legislation could no longer exclude women who were married according to Muslim rites. Justice Dikgang Moseneke grounded his judgment not on an interpretation of the word spouse, but rather appealed to the constitutional value of equality. Not only did the non-recognition of Muslim marriages advance 'unfairness' towards Muslim women, argued Judge Moseneke, but he added: 'It has created real disadvantage and violated dignity and freedom. Its impact on the applicant and on other surviving spouses in her position is most adverse and demeaning. It treats her as undeserving of the legal recognition enjoyed by other religious and civil marriages. The Acts withhold from Muslim widows economic protection they extend to socially vulnerable widows of Christian, Jewish and secular civil marriages and, recently, customary unions.'[27]

Lessons from Elsewhere

MPL in its various manifestations can provide volatile shocks to the political systems of nation-states, as evidenced in recorded experiences from India to Mauritius. Even though the state facilitates a select number of religious practices as a matter of public policy, not as matter of religion, to meet the needs of its religiously conscientious citizens, the results are often different. Often faith communities view MPL to be the equivalent of a religious practice and do not tolerate any alteration or amendment to the law irrespective of the validity of such change. In post-independence India, the famous case of Shah Bano in 1985 demonstrated the agonies of judicial reform attached to MPL. A 60-year-old plaintiff, Mrs. Shah Bano Begum, demanded maintenance from her husband, Mr. Muhammad Ahmad Khan, in excess of the statutory three-month period that traditional Muslim law allowed. Her special circumstances required additional maintenance, and her case was in the final instance referred to the Indian Supreme Court, consisting of Justice Y.V. Chandrachud, Justice Murtaza Fazal Ali and Justice A. Vardarajan. The court in its decision did two things: firstly, it invoked the objectives of the Indian constitution and the desirability of having a uniform civil code; secondly, 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, resulting in widespread riots, death and mayhem, and forced the Rajiv Gandhi government to pass legal amendments to isolate the provisions of MPL from the intrusive effects of other statutes, such as the one by which Shah Bano and her lawyers succeeded.[28] The lesson from this episode was that, rightly or wrongly, many Indian Muslims believed that such judicial activism was tantamount to the abrogation of their religious-based personal laws.[29]

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 South African Muslim communal life. Personal law matters were mainly in the non-state domain and supervised by the *'ulama'* organizations.

Recognition of MPL has several implications for Muslims. For the first time, their legal values and norms 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 their intense desire to have Muslim law recognized by the state system, it remains unclear whether the Muslim leadership has contemplated the fact that they would have to forego the control they had over their legal 'subjects' when MPL would become a reality.

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

Conclusion

The future of MPL in South Africa still remains undecided, despite a great deal of progress, and it would be hazardous to predict its outcome. It will depend on the will of the government and whether it will enable a minority group to maintain its nomos: the normative universe in which law and cultural narrative are inseparably related, of which MPL is a prime exemplar.[30] At another level it will also depend on whether those groups who most oppose the proposed draft bill can be appeased by adding arbitration councils for those who prefer such an option, while also giving citizens an option to access MPL. Another variable is the extent to which the human rights community can move the constitutional court to instruct the government to fulfill its constitutional obligations to provide for MPL. It will remain to be seen to what extent the courts will continue to provide relief in the realm of Islamic law in the absence of laws devised by parliament. Courts might well reach a point after which they could say that beyond redressing discrimination, it would be the duty of the legislature to provide guidance. The future of MPL in South Africa might still have some surprises in store for observers.

Notes

1 See Ebrahim Moosa (1996), 'Prospects for Muslim Law in South Africa: A History and Recent Developments,' in *Yearbook of Islamic and Middle Eastern Law*, eds. Eugene Cotran and Chibli Mallat (London), 130-155; also see Abdulkader Tayob (2005), 'The Demand for Shari'ah in African Democratisation Processes: Pitfalls or Opportunities?', in *Comparative Perspectives on Shari'ah in Nigeria*, eds. Philip Ostien, Jamila M. Nasir, and Franz Kogelmann (Abuja, Benin City, Lagos & Owerri), 27-73. Abdulkader Tayob ed. (2004), 'Race, Ideology, and Islam in Contemporary South Africa', in *Islam in World Cultures: Comparative Perspectives*, ed. R. Michael Feener (Santa Barbara & Denver: ABC Clio).

2 South African Law Commission (SALC), 'Islamic Marriages and Related Matters', Project 59 (Questionnaire), (i).

3 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. Also see Gert Johannes Alwyn Lubbe (1989), *The Muslim Judicial Council – a Descriptive and Analytic Investigation* (Pretoria: University of South Africa).
In 1975 the Director of the Cape Town-based Institute of Islamic Shari'a Studies, Shaykh Abdulkarim Toffar, made representations to then Prime Minister B. J. Vorster, urging the government to 'recognize' aspects of Islamic law relating to marriage, divorce, succession and custody. The response of the SALC at the time was 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'. SALC, Project 59: ii.

4 The inquiry included 1. an investigation into the position of illegitimate children [Project 38]; 2. marriages and customary unions of Black persons [Project 51]; 3. a review of the law of evidence [Project 6]; and 4. the law of intestate succession [Project 22], SALC, op. cit. The SALC also mentioned that among the motivating factors was a private Bill proposed in 1987 by Mr. Pat T. Poovalingam MP (Indian-House of Delegates) to grant recognition to the Islamic law of succession.

5 Other independent efforts by some Muslim academics and lawyers also supported the introduction of MPL in the 1980s. 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. Habibul Haq Nadvi (1990), 'Towards the Recognition of Islamic Personal Law', in *The Internal Conflict of Laws in South Africa*, ed. A.J.G.M. Sanders (Durban), 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.

6 'Announcement: Muslim Personal Law', title of an undated pamphlet issued by the Secretary, Central Committee, *'ulama'* of South Africa, stated: 'Muslims have been yearning for the introduction of Islamic Law in some form or another to govern their affairs ... under the leadership of 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]'.

7 An indication of government awareness of Muslim resistance is well encapsulated in this quotation of then President P.W. Botha, who addressed parliament after a group of 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, 3590)

8 The nouveaux *'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.

9 See Ebrahim Moosa (1979), 'Muslim Conservatism in South Africa', *Journal of Theology for Southern Africa* 69: 73-81.

10 The committee consisted of the Honorable Mr. Justice M.S. Navsa, Sheikh/Advocate M.F. Gamieldien, Moulana A.A, Jeena, Mrs. F. Mahomed (MP), Professor N. Moosa, Dr R.A.M. Salojee, Mrs. Z. Seedat, and Mr. M.S. Omar.

11 Rashida Manjoo (2007), 'The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights', in *Human Rights Program at Harvard Law School Working Paper* (Cambridge), 4.

12 'South African Law Reform Commission, Project 59, Islamic Marriages and Related Matters Report' (Pretoria, 2003), 113-114.

13 Ibid., 120.

14 Mujlisul (nd) *'Ulama* of South Africa, 'Muslim Personal Law: An Attempt to Introduce a New Shariah'.
www.inkofscholars.com/print.php?file=article.php&id=192.

15 Ziyad Motala (2004), 'The Draft Bill on the Recognition of Muslim Marriages: An Unwise Improvident and Questionable Constitutional Exercise', *The Comparative and International Law Journal of Southern Africa* 37, 332.

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18 Ashraf Mahomed'-Ryland v. Edros [1996] 4 All SA 557 (C', *De Rebus* (March 1997).
19 *The South African Law Reports* (1917), Appellate Division (ed.) A.F. Russell (Johannesburg: Digma Publishers, 1973), 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), 261-271.
20 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.
21 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,* (November 1996): 69.
22 1997 (2) SA 690 (C) at 707 E-H.
23 See David Pearl (1985-86), 'Cross-Cultural Interaction between Islamic Law and Other Legal Systems: Islamic Family Law and Anglo-American Public Policy', *Cleveland State Law Review* 34: 113-27; Carlos Esplugues (1984) 'Legal Recognition of Polygamous Marriages', *Comparative and International Law Journal of Southern Africa* 17: 302-21.
24 'Amod v. Multilateral Motor Vehicle Accidents Fund' (1999).
25 'Daniels v. Campbell NO and Others' (2004).
26 Ibid.
27 Ibid.
28 'The Muslim Women (Protection of Rights on Divorce) Act, 1986', *Islamic & Comparative Law Quarterly* 6 (1986): 96-100. Also see Janak Raj Jai (1986), *Shah Bano* (New Delhi); Gregory C. Kozlowski (1990), 'Shah Banu's Case, Britain's Legacy and Muslim Politics in Modern India', in *Boeings and Bullock-Carts: Law, Politics and Society in India,* eds. Yogendra Malik and Dhirendra Vajpeyi (Delhi).; A.R. Momin (1986), 'Conflict of Law and Religion in Contemporary India', *Social Compass* xxxii, 2-3: 223-237; Arun Shourie (1986), 'The Shariat', *Illustrated Weekly of India,* 12 Jan. & 19 Jan.; also see Rafiq Zakaria's rejoinder in the same publication of 9 March 1986.
29 Abdullah Ahsan (1985), 'A Late Nineteenth Century Muslim Response to the Western Criticism of Islam – an Analysis of Amir 'Ali's Life and Works', *American Journal of Islamic Social Sciences* 2. See in particular the view of Moulana Said Akbarabadi, 174-178; also Momin, 'Conflict of Law and Religion in Contemporary India', 228.
30 Ayelet Shachar (2001), *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge; New York), 2.

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