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South Africa

By: Ebrahim Moosa

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South Africa

Islamic law has an onerous and paradoxical relation to the South African legal system dating back centuries. The legal system under Dutch rule (1652–1795; 1803–1806), followed by the British (1795–1803; 1806–1946) periods of colonial rule, and later under Apartheid (1948–1994) treated Islamic law differentially. At times Islamic law was viewed ambiguously with some degree of accommodation, and on other occasions it was viewed as outright repugnant. The Apartheid regime succeeded in cultivating the support of some Muslim religious leaders by facilitating mosque development, the establishment of seminaries (*madāris*), and offered to recognize Muslim family law at various periods in exchange for their political quietism. In the post-Apartheid period of democratic governance (1994–), the situation has improved, with constitutional recognition for all religious values and traditions, including those of Islam. The right of Muslim families to slaughter animals at home for ʿĪd al-Aḏḥā, for example, is protected under the same rubric as the ritual slaughter customs of African traditional religions.

South African Muslims near 1 million from a total population of 50 million and enjoy a rich, diverse, and complex history. The first Muslims arrived from East Asia in the second half of the seventeenth century, from regions that are part of Indonesia today. Muslims from the Indian subcontinent followed them, particularly as laborers brought by the British in the nineteenth century. While Muslims of “Malay” and Indian extraction are most visible and integrated into the national culture, smaller numbers of adherents of African, Middle Eastern, and European heritage have always been part of the Islamic mosaic. In post-Apartheid South Africa the visibility of Muslims from other parts of the globe, especially from north and sub-Saharan Africa has dramatically increased.

Islamic law in South Africa has both a community face and a more general public face. East Asian Muslims wrote and published pedagogical texts on Islamic law that were written in Arabic-Afrikaans. This was a script crafted from Arabic and Javanese but vocalized in the Afrikaans language. These same Muslims brought with them the Shāfiʿī interpretation of Islamic law, while those of South Asian and Turkish descent adhered to the Ḥanafī law school. Today followers of the Mālikī and Jaʿfarī law schools as well as the nonconformist Ahl al-Ḥadīth and Salafī trends can also be found in varying numbers.

Muslim South Africans have developed an extensive Sharīʿah-inflected discursive repertoire in civil society, which is widely dispersed in the community and in public media outlets. Islamic legal teachings impact the daily lives of Muslims and frequently spill over into the larger multi-religious public sphere. The ritual Islamic slaughter of animals at commercial abattoirs for *dhabīḥa* meat, food production, debates whether the Islamic lunar calendar should be determined on naked-eye sightings or scientific calculations, health and bioethics, education, Sharīʿah-compliant Islamic banking and finance and family law matters, all offer a snapshot of the circulation of Islamic law in the country apart from state law.

The most public face of Islamic law and its intersection with the state is an ongoing effort to legislate Muslim family law, also known as Muslim Personal Law (MPL), in parliament. Generations of South African Muslims have petitioned successive past governments to recognize their marriages conducted according to Islamic rites dating back to Mahatma Gandhi's brief tenure in the late eighteenth century. Certainly Muslims can have their religious marriages recognized if they also conclude a civil marriage in the courts, but a long history of exclusion, marginalization, and discrimination against Muslims has turned the recognition of Islamic marriages into an important issue of status and religious identity: the official recognition of their faith signals the recognition of Islam as part of the country's juridical and political culture.

This tension stems from British colonial and Apartheid-era treatment, when the government stigmatized Muslim marriages as repugnant for being potentially polygamous. South African courts in *Seedat's Executors v. Master* (1917), in a verdict reaffirmed in *Ismail v. Ismail* (1983), ruled that even a monogamous Muslim marriage was contrary to public policy due to the inherent repugnancy of Islamic rules. It was only in 1997, under the writ of South Africa's new constitution, that these discriminatory rulings were overturned in the landmark *Ryland v. Edros* case. Rebutting previous judgments, in which white judges determined the substance of public policy and thereby deemed Muslim marriages to be offensive, Judge Ian Farlam wrote in *Ryland*, "[I]t 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.” South African courts have since recognized the contractual obligations of spouses under Muslim law but have argued that only legislation can confer the recognition of Muslim marriages conducted solely according to religious rite.

Draft Muslim family law legislation has been made possible under the provisions of the constitution. If it becomes law at some point, the legal system will recognize family law derived from religion and as separate from civil marriages. This draft legislation is now lost in a quagmire of internecine Muslim squabbles about the substance of Muslim family law. The nub of the controversy centers on the constitutional requirement that all laws in South Africa be human-rights compliant. Muslim clerics, the *‘ulamā’* once vocal advocates for Muslim family law, are now divided among themselves. Hard-line clerics have balked at the prospect that women will enjoy equal status and criticize measures regulating polygamy in the draft legislation. The process is now stalled, but Muslim women’s civil society groups periodically petition for the recognition of Muslim family law.

Even though the Muslim marriage is thus far not officially recognized, it paradoxically enjoys semiofficial recognition. Persons married only by Islamic rites qualify for employee housing benefits, spouses qualify as beneficiaries for insurance and pension payouts, and spouses can make end-of-life proxy decisions on behalf of their loved ones.

Rihlīnārānhv

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