Wilson, M., 1952. 'Keiskammahoek Rural Survey'. Vol 3. Social Structure. Pietermaritzburg: Shuter & Shooter.

Wilson, M., 1961. *Reaction to Conquest: Effects of Contact with Europeans on the Pondo of South Africa*. London: Oxford University Press.

Young, R., 1902. *African Wastes Reclaimed: The Story of the Lovedale Mission*. London: J.M. Dent.

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ILLEGITIMACY IN SOUTH AFRICA

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&

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10 'The child belongs to the bed': illegitimacy and Islamic law

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Introduction

Muslim juristic terminology describes an illegitimate child as a 'child of fornication' — *walad al-zinā*. This is the manner in which classical Muslim law, also described as the *Sharī'ah*, classifies a child born outside wedlock.

Two points have to be made by way of introduction. First, a brief explanation is necessary of how Islamic law formulates its view on illegitimate children, and how this is implemented in society. The second point is to distinguish between a *Sharī'ah* rule or value, and a juristic (*fiqh*) rule.

Sources of Islamic Law

Islamic law, described as the *Sharī'ah* law, derives from two principal sources, viz. the Qur'ān and the *sunnah* (tradition) of the Prophet (Moosa, 1991: 210–20).[1] Consensus of the jurists and the use of analogy to solve new cases are two other methods employed in Muslim jurisprudence. Together they are known as the legislative sources of Islam. The Qur'ān is the primary source, followed by the traditions, consensus and analogy in that order. While some rules and regulations are explicitly stated in the first two sources, the bulk of Muslim legislative practice is jurist's law. Since the Qur'ān is silent on the issue of illegitimacy, most of the laws are based on alleged prophetic traditions and the subsequent consensus and analogical conclusions of the jurists.

Traditions are those statements attributed to the Prophet Muhammad, or activities he personally engaged in, or approved by consent. Hence the tradition (*sunnah*) is very much the 'living tradition' of the Arabs in the seventh century. It embodies Arab cultural practices, with a host of regional customs and mores (*'urf*). These elements are very much in evidence in the law on illegitimate children.

What is generally described as *Sharī'ah* law, is therefore mainly the work of four mainline legal schools which crystallized from the prodigious

juristic activity in medieval Islam. These schools are named after their founders, who were respectively Abū Ḥanīfah (d. 767); Mālik ibn Anas (d. 795); Muḥammad bin Idrīs al-Shāfi'ī (d. 820) and Aḥmad ibn Ḥanbal (d. 855).

In terms of theology, the majority of South African Muslims[2] are adherents of the Sunni tradition. A very small group follow the Shi'ah tradition.[3] Most of the Sunnis follow the Ḥanafī and Shāfi'ī schools of law.[4] The Shāfi'ī school predominates in the Cape, while the Ḥanafī school flourishes among Transvaal and Natal Muslims.[5] Historically, the Ḥanafī school was known for its rational bent and gave greater legal credence to the customary and 'living' tradition of the environment in which the law operated. The Shāfi'ī school was characterized by its rigid observance of putative traditions attributed to the Prophet. In South Africa today, conservative interpretations prevail in both legal schools.

Definition of Legitimacy

Muslim law defines legitimacy as the conception of a child during the lawful wedlock of its parents. A child born outside wedlock is a product of fornication (*zinā*) and therefore suffers certain legal disabilities. The juristic determinant of legitimacy is the element of legal paternity (*nasab*), which only subsists in a proper marriage between the parents. The jurists consider legal paternity to be a 'virtuous gift from God'. (al-Zuḥaylī, 1985: 7, 556). And, in the words of Coulson, legitimacy of birth is 'the legal postulate for admission to the family group'(1971: 22).

The absence of legal paternity precludes any legal bond between the father and his blood relatives on one hand, and the illegitimate child on the other. The classical Muslim jurist al-Shāfi'ī (d. 820) took this view to its extreme conclusion. From a strictly technical point of view, he argued, a biological father (or his blood relatives) could marry his own illegitimate child, since no bar on affinity exists between them. (al-Shāfi'ī, n.d: 7, 143) Similarly one child from a legitimate union and another from an illegitimate union by the same man could also marry each other, the reason being that no bar on affinity arises out of a union which is prohibited, such as fornication, adultery or incest. Following this ruling, a Cape Town Muslim clergyman sanctioned the marriage in the mid-1980s between a half-brother and half-sister. One of the spouses was born outside wedlock, and hence was illegitimate, and the other was from a legal union. Both shared a common father but had different mothers. The Muslim Judicial Council (MJC), one of the ruling bodies on Muslim affairs in Cape Town, opposed this marriage by arguing that the majority of Muslim law schools opposed this ruling of al-Shāfi'ī. Even though no legal bond exists between a father and an illegitimate child in terms of technical legal reason, the force of social custom binds the jurist to recognize the biological father as the father. This is an example of how custom prevails to establish an effective rule.

It is evident that the paternal bond *ex parte paterna* is a determining sociological datum, while paradoxically the maternal bond is viewed as less significant. 'Maternity' says Mulla, the noted Anglo-Muhammadan lawyer, 'is immaterial whether the child is an offspring of marriage or *zinā* (fornication)' (1977: 355; Ḥanafī 1965: 8–9). This ruling clearly reflects the ancient patriarchal roots of Islamic law. At the same time, two types of juristic rationale and criteria are at work. The first type of rationale places the emphasis on the *juristic fact*. For this reason the ascription of maternity is regarded as infallible, in keeping with the practice of pre-modern societies. The second type of rationale places the stress on the abstract notion of *juristic reason*, which establishes legal paternity. (John Makdisi, 1985–6: 109–11) Simply put, legal paternity can be conferred only by a legal decree, while maternity is established by a material fact.

Determining legitimacy

Legal paternity is conferred by two methods: one, the presumption of paternity within a valid marriage; and two, by acknowledgement.

Marriage

The presumption of legitimacy derives from the pre-Islamic Arab maxim, later adopted in Islam, *al-walad li 'l-firāsh*, that 'the child belongs to the bed'. This rule has been variously interpreted with several implications. (Schacht, 1979: 181–2). It means that legitimacy is linked to 'ownership' of the nuptial bed. In other words, the husband is the legitimate father in the case of marriage; in the case of concubinage it is the slave-master, and, if outside either institution, the mother is the 'owner' of the bed.

A valid marriage is the ground for establishing paternity. However, the majority of the law schools also require that conception took place within marriage, and calculate the term of pregnancy from the time of consummation (al-Zuḥaylī, 1985: 7, 675). Only a minority of Ḥanafī scholars consider the marriage contract sufficient to establish paternity regardless of whether or when it was consummated.

The schools also differ over the term of pregnancy. According to Mālikī law, for example, the period varies between a minimum of six months and a maximum of up to seven years (Ibn Rushd, 1985: 2, 300). In general, current Muslim ruling is that a child born between at least six months and two years after consummation is legitimate. Even these exaggerated pregnancy periods could rightly be challenged by modern science. However, it appears that, by tolerating extraordinary long gestation periods, the classical

jurists were not actuated so much by an indifference to the laws of nature as by a humane desire to avoid unnecessarily imputing any child to be illegitimate (Fyzee, 1955: 164). A presumption of legitimacy applies in an irregular marriage arising out of a mistaken identity of the spouses or ignorance of procedural fact. In either case, a plea that the mistake or ignorance were in good faith is a complete defence of the validity of the marriage.

Acknowledgement

Acknowledgement has both a procedural and material aspect. It means the formal recognition of a status of legitimacy which already exists, and results in establishing paternity. This rule of evidence obviously comes into effect when the presumption of legitimacy does not apply. It is perhaps the most conclusive and incontrovertible means of creating an obligation on a person who makes the acknowledgement. The effective juristic principle is that an acknowledgment by a sane adult against his or her own material interests establishes the facts so acknowledged (Coulson, 1971: 26). Theoretically, this process legitimates children who are conceived outside wedlock but are born within the duration of a marriage. Thus a child born in less than six months or more than two years from the date of marriage would technically be illegitimate. But, an acknowledgement from the putative father would confer legitimacy on the child, provided that no confession or admission of unlawful intercourse has been made, according to an eighteenth century Ḥanafī legal digest (al-Shaykh Nizām, 1973: 1, 540). In fact, juristic ethics discourage any such probing that may produce incriminating evidence that delegitimizes the child.

The majority of jurists hold that an acknowledgement of paternity or a subsequent marriage of the parents cannot confer legitimacy. This means that the Roman law notion of *legitimatio per subsequens matrimonium* is unknown to the mainstream of Islamic law. However, a minority of leading medieval Muslim jurists suggested that a child could legally be attributed to the father, provided that the latter had duly confessed to his offence of illicit union and/or was punished for it. (Ibn Rushd, 1985: 2, 300; Ibn Qudāmah, n.d. 6, 266) Again, the rule is that an acknowledgement establishes the facts and the resultant obligation: namely, the juridical fact of paternity, making the father liable for financial obligation towards the child.

Disabilities

An illegitimate child in Islamic law is subject to several disabilities. In terms of Muslim personal law, illegitimacy affects the rules related to parental power, custody, agency and succession; and in terms of public law it affects

the right of an illegitimate child to lead prayers, invalidates his or her testimony in some instances, and obstructs the manumission of such a person in the case of a slave. In other words, an illegitimate child is also a disadvantaged child. This fact can hardly be denied, despite the ratiocinations of contemporary Muslim lawyers, who in a curious way, argue that although the child is not the offender, the disabilities it suffers are 'unavoidable' (Mahmood, 1982: 158).

It is little known that, theoretically, the parental power of an illegitimate child is vested in the mother. She is entitled to exercise guardianship and custody. The child will also assume her surname and domicile. In patriarchal societies this responsibility was intended to have a punitive effect, whereas in modern times such powers may be viewed positively. However, in practice, and in keeping with the patriarchal character of many Muslim societies, the mother would still generally transfer parental power to a male relative. In the case of a legitimate child the parental power is assumed by the father.

An illegitimate child does not inherit from the father on intestacy or *vice versa*. Like Judaism, Islam has retained its patriarchal roots. Transmission of property takes place primarily, though not exclusively, along the male line. For this to happen, a valid marriage and legitimate offspring are imperative. An illegitimate child does however, succeed the mother and her relatives on intestacy.[6]

In the public sphere illegitimacy also displays its burden. Leadership in prayer (*imamah*) by a person of illegitimate birth is, in the view of at least three of the four popular law schools, deemed 'reprehensible' or 'blameworthy' (*makruh*) (al-Juzayrī, n.d 1, 430–1). This, however, does not categorically prohibit such a person from leading prayers. Further, the Ẓāhirite scholar Ibn Ḥazm (d. 1064), considers this disability an unjustifiable prejudice (Ibn Ḥazm, n.d. 4, 213). One explanation for the persistence of this disability may be that the social stigma of illegitimacy had prevailed in the law.

The testimony of illegitimate offspring is generally accepted. However, the influential Mālikī school judges such testimony to be inadmissable in cases involving fornication and adultery (al-Qudūrī, n.d. 237; Ibn Ḥazm, n.d. 9, 430).[7]

Illegitimacy and eschatology

Investigations show that many legal verdicts are founded upon traditions attributed to the Prophet. However, research has also shown that some traditions are spurious or taken out of context. For instance, the Prophet is alleged to have said that an illegitimate child will not enter Paradise (al-Dārimī, n.d. 2, 112). In other traditions the illegitimate child is said to

be simply 'the most evil of the three'. This triad referred to in the tradition of (*ḥadīth*) literature is said to consist of the mother, father and child (al-Sijistānī, n.d. 4, 29).

Apart from the fact that the textual sources fail satisfactorily to explain the context in which these statements were made, they stand in glaring contradiction to certain Qur'ānic values. The latter, the primary source of Islam, categorically state that each individual is responsible for his or her own actions. Neither is one person's sin transferable to another, according to Qur'ān 6: 164. It is an established scholarly practice to harmonize apparent interpretive contradictions betweem the Qur'ān and the tradition. Failure to resolve glaring discrepancies in the sources forces the jurist to disregard weak traditions. These are regarded as either distorted communications which fail to meet the criteria of authenticity, or ones that are context-bound.

Scholars are virtually unanimous that the Prophet, in terms of most of the reliable traditions, did not discriminate against the illegitimate child. The critical phrase attributed to the founder of Islam is that he said: 'the illegitimate child is the worst of the three'. Most experts say that by this he meant that an illegitimate person will not attain Paradise if that person also commits adultery like his or her parents did. (This applies to cases of unrepentant adulterers. Those who repent are forgiven by God's grace.) The child's adultery is curiously viewed as 'worst' because it perpetuates a cycle of sexual offences. This interpretation of the tradition should be viewed in the light of the general policy in Islam to deter sexual offences in Arab society.

Another interpretation says the report refers to a man of illegitimate origins who committed a murder. When this case of homicide was reported to the Prophet, the offender was introduced as an illegitimate person — *walad al-zina*. It was in that context that he made his remark about the 'illegitimate one' being the worse of the three, meaning that while his parents violated the sexual code of society, the child partook in a more repugnant criminal act. Regarding these seemingly pejorative remarks of the Prophet, some reports mention that he immediately reminded himself of the Qur'ānic verse: 'Every soul earns only to its own account; no soul laden bears the load of another'(Qur'ān, 6: 164). This suggests an awareness on the part of the Prophet that his opinion could be viewed as a value-judgement on the person and a wish to avoid stigmatizing him.

Very early in medieval Islam, the leading Muslim jurist al-Ḥasan al-Baṣrī (d. 728) seemed to have regarded the illegitimate child as blameless. In one place he said:

> God does not punish fornicators for their children. Rather, he punishes them for contradicting His command: it is [in] their fornication, not their children (that the blame lies) (Rippin & Knappert, 1986: 120).

Despite the views of several *ḥadīth* scholars and early authorities disapproving of discrimination against persons of illegitimate origin, the juristic tradition of Islam has not heeded such calls. This may be due to several factors. It could mean either that the jurists did not accept the convictions of the *ḥadīth* experts, or that customary social prejudices were too pervasive to be excluded from the law.

Illegitimacy among Muslims in South Africa

The attitude of Cape Muslims towards illegitimacy is well illustrated in oral tradition, which has it that a well-known *imām* (official prayer leader), who died around the middle of this century, was of illegitimate birth.[8] Although a prominent civic figure who was much involved in the activities of the Cape Malay Association, his alleged illegitimate status frequently counted against him. From the strict view of the law, he did not qualify as an *imām*, but despite the attitude of the legists, he managed to secure a position as religious and prayer leader, and served the community for several years. It was not infrequent, however, for him to be referred to in the local Afrikaans slang as a '*run eier*' — a strayed egg — a term reportedly used more by his opponents than his supporters! Another way of making the same point would have been to say that '*hy makeer aan*', meaning, that 'he needs to be supplemented' for the deficiency of his birth. Both expressions are still to be heard today.

In order to investigate the contemporary situation for such people, interviews were held with members of the major Muslim religious institutions and social workers from leading community organisations. The unanimous opinion was that pre-marital pregnancies not only occur regularly, but according to the Islamic Social Workers' Association (ISWA), which runs extensive marriage and youth counselling services, about 10 per cent of all social problems are related to illegitimacy (Mintin 1990). Although they were unable to provide statistical information on the actual incidence in the population, the Muslim Judicial Council (MJC) and the Islamic Council of South Africa (ICSA) have described illegitimacy as rife in the Cape (Karaan, 1990; Najaar, 1990). Among more affluent and conservative Muslims pre-marital pregnancies are, however, often kept secret, and the pregnancies may be terminated by abortion. In the Transvaal and Natal, illegitimate births seem to be less visible than in the Cape and it is clear that class, and particularly greater affluence, may affect the situation. Statistics for the Cape Town area indicate a generally low rate of illegitimacy among Indians (including Indian Muslims) compared with the situation in the

'coloured' community (including Malay Muslims), where it is high.

The reasons given for teenage pregnancies and births range from the effects of rapid westernization, to deteriorating economic conditions in many sections of the Cape Muslim community. Clergymen aver that some Muslim youths are much influenced by western culture and mores which condone the unqualified integration of the sexes, and pre-marital intercourse. The lack of sex education at home and at school is also given as a reason for early pregnancies, as are the breakdown of the extended family, the high cost of living and other economic pressures which discourage couples from marriage and result in unwanted children. In several cases it has been observed that such children occur also when parents withold consent for a marriage. This is particularly true when one of the partners, especially the male, is a non-Muslim. Such couples often continue their relationship in secret or elope. If the girl becomes pregnant, the options are either a forced marriage — generally referred to as a 'shot-gun marriage' or a 'must-get-married' (MGM) — or a future of single parenting.

According to Davids (1990), in the past the primary consideration for a forced marriage was family honour and reputation. Few people considered the deprived status of the future child in terms of religious law as a reason for such a marriage. In Davids' observation the social taboo on illegitimacy is waning in the Cape. While parental and peer pressure used to force couples to marry once pregnancy was detected, today many families would consider it undignified to ask or try to force an alleged father to marry their daughter unless he were willing. In most cases it is the maternal relatives, (and particularly the child's maternal grandmother) who care for and support such a child.

Despite the frequency of illegitimacy among Muslims in the Cape, many people were reluctant to speak to the author about how they dealt with the issue. During discussions with clergymen and social workers it became apparent, however, that many parents of illegitimate children were either young or not religious when a child was conceived. Some subsequently marry but the stigma remains. At a later stage in life they may be overcome by remorse and religious guilt, and may feel obliged to tell the child of their past 'error' and the irrevocable disadvantages which he or she may suffer throughout life as a result. The ways in which some of these problems may be dealt with are indicated by the case of Zakī and Ḥamīdah and their daughter Ḥasīnah.[9]

Ḥasīnah was born four months after her parents' 'shot-gun marriage'. As was common knowledge in the community, Zakī and Ḥamīdah had been having pre-marital sex on the principle of 'try before you buy'. When, some twenty-three years later, they became conscientious Muslims, in terms of Islamic law Zakī could not be recognized as Ḥasīnah's father. This meant that he could not automatically act as her guardian (*walī*) in marriage, as he would have done had she been born in wedlock. The normal procedure is for a father to announce in the mosque that he consents to his daughter's marriage. Alternatively, the *imām* makes it known that the girl's father has consented, and empowered him by way of agency (*wakālah*) to marry his daughter to the proposed bridegroom. In this case, however, either Ḥasīnah, as an illegitimate adult virgin, or her mother would have to consent to the marriage. However, such a departure from custom would reveal publicly that she is illegitimate and would thus cause embarrassment to all concerned. To avoid this, Ḥasīnah will probably appoint her biological father as her *wakīl*, and he will proudly announce his daughter's marriage without being reminded of the events twenty-three years ago. Zakī has also had to make special arrangements for Ḥasīnah in his will. The Islamic law of intestate succession excludes an illegitimate child from being an heir. In legal terms Ḥasīnah is, as we have seen, a 'stranger' to him, and not a proper heir. To enable her to inherit, he made a special bequest in her favour. This could not, however, in terms of Muslim rules of succession, exceed one-third of his estates.

A moral dilemma

The legal disabilities illegitimate offspring face in Islamic law tend to reinforce and exacerbate the mental trauma such persons experience. Papers on the psychological consequences of illegitimacy in this volume have shown how distressing illegitimacy can be for the offspring even where legal consequences are virtually absent. Such people are made to feel less than others for an error in which they had no part or responsibility. A Muslim man, aged thirty-four, confessed during a counselling session that he could never come to respect or love his father because he himself was illegitimate. He added that he was taught in religious school that there were no reciprocal rights between him and his father, because filial obligations did not exist between them by religious decree. Despite the deep psychological discomfort of this relationship, he said he was prepared to resign himself to the decree of religion.

On the other hand, parents who may have genuine remorse for having contravened societies' religious strictures in the past, also find themselves in a legal and ethical *cul-de-sac*. The deed of having illegitimate offspring appears irreversible. The perpetual legal disabilities on their children are a constant reminder of their guilt. This undoubtedly has unhealthy consequences on their mental and moral psyche.

These cases place the Muslim social worker, clergyman and counsellor in an excruciating moral dilemma. How does one help such clients overcome their problems without violating the religious law, which has inherited an aura of immutable sanctity? Short of suggesting the unsatisfactory course

of disregarding the law, few other solutions come to mind. An analysis of classical Muslim legal discourse shows that, in order to overcome the letter of the law, jurists frequently resorted to legal subterfuges (*hiyal*). For example, as discussed above, a child born less than six months after the date of marriage, even though conception took place outside wedlock, was deemed legitimate if the spouses did not admit to having engaged in prohibited sex. There are also several minority opinions that tend to alleviate the disabilities of illegitimacy. However, mainstream Muslim juristic practice is reluctant to give currency to non-canonical views that may bring about relief in this matter.

Further, the question of discrimination against illegitimate persons in South Africa clashes with the preliminary public draft of a Bill of Rights for a future constitution. It will be interesting to observe how the leadership of the Muslim community reacts to proposals that discrimination on the grounds of legitimacy of birth be regarded as a violation of an individual's human and constitutional rights. Articles 7 (2) and 9 (3) of the proposed Bill of Rights of the African National Congress (ANC) declare that 'discrimination on the grounds of gender, single parenthood, legitimacy of birth ... shall be unlawful', and that ' ... no child shall suffer discrimination or enjoy privileges on the grounds of ... legitimacy ...'.[10] These are some of the serious challenges that religion in general, and Islam in particular, will have to address in the 1990s.

Conclusion

The issue of illegitimate children raises the crucial question of legal reform in Islam. On the matter of reform, sharp differences between orthodox and modern opinions come to the fore. Revisionist or reformist approaches to Islamic law give greater weight to the higher concerns of public interest, context and the spirit of the law. Orthodox opinion tends to give effect to the letter of the law, and fidelity to the established legal consensus, rather than to advocate innovation. This seems to confirm what one astute observer of Muslim law has said:

> It appears that in the second half of the nineteenth century and the beginning of the present century, many Muslims preferred to maintain the *Sharī'ah* 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. (Anderson, 1971: 18)

Whether Muslim law can continue for much longer on the basis of inertia without fundamental reforms, while effectively being displaced, remains a

question for debate. Muslim jurists distinguish between laws which have been abrogated, repealed or suppressed by other laws in the Islamic canon. Following this precedent, legal reformists could, for instance, distinguish between laws which incorporate moral and ethical principles that are context-specific or transitional, and those laws that reflect general and fundamental principles. Criminalizing innocent children as illegitimate certainly contradicts the Islamic ethos of justice and equal life-chances for each individual. Muslim scholars will have to examine the juristic rulings of the past in the light of new thinking. They will have to consider the fact that what is regarded as a discriminatory social practice today was once part of a particular socio-economic situation in which it may have been suitable. All indications are that this was the case with illegitimate children in Islamic law.

A bid to de-criminalize illegitimacy in Muslim law will inevitably be viewed by conservative orthodoxy as an attempt to condone sexual promiscuity and encourage extramarital relations. Baseless as such charges may be, conservative opposition and antagonism to reforms in Islamic law is inevitable, and a force to be reckoned with. To the advantage of reformists is the fact that Islamic law has several redeeming features, one of which is its diversity of opinions. This diversity can be ascribed to the internal dynamism inherent in the law, as well as the multiple changes that have occurred in Muslim society over the centuries. While consensus opinions were considered binding in the juristic literature, minority views were also preserved in the hope that they might be of use in later centuries. Several such minority views which may bring relief to the fate of illegitimate children have been cited in this chapter as possible measures for legal reform. In addition, it should be borne in mind that change in Islam has always related to the socio-political and economic context. What is certain is the fact that changes in the legal tradition took place more frequently than conservative contemporary jurist-theologians would care to admit.

In the case of illegitimacy the law is not entrenched by either the Qur'ān or incontrovertible *ḥadīth* sources. Modern circumstances and changing contexts once again demand that the legal ordinances be reviewed and reformed to fulfill the objectives of the law, which are justice and fairness. Commitment to the spirit rather than the letter of the law, coupled with the desire to promote the higher goals of human welfare (*maṣlaḥah*), are accepted tests of juristic policy. Not only will such an approach end discrimination towards illegitimate children; it will also make Islamic law consistent with the best Islamic traditions of equity and justice.

Notes

1 Tradition is called *sunnah* or *ḥadīth* in legal parlance. *Sunnah* literally means the 'trodden path', and refers to practised and living social customs. From the eighth

century onwards it more specifically meant the practice of the Prophet of Islam. *Ḥadīth* literally means a 'speech', and is the documentation of the verbal utterances of the Prophet.

2 Islam reached the shores of South Africa as early as 1658, after the arrival of the first Dutch colonizers in 1652 (see Davids, 1980: xv). As slaves or political prisoners, the early Muslims came from the south east Asian region, from among others, Bengal, Sri Lanka, (Ceylon), Amboina, Salawasi (Celebes) and islands in the Malay Archipelego. Today Islam in South Africa has an official following of between 353 248 according to 1980 census figures, and over half a million according to unofficial estimates. In terms of ethnicity some 176 406 belong to the 'coloured' community and are termed 'Malay', while 165 843 are designated 'Indian'. A small number of Muslims from the black (9 000) and white (2 000) population groups are also to be found. (All statistical information issued by the Department of Statistics.)

3 The Shī'ah are mostly Iranians who had settled in South Africa, or Indians who followed the Ismā'īli school, whose spiritual head is the Agha Khan. Recently a few individuals have also converted to the Ithna 'Ashari school of Shi'ism, to express loyalty to the Iranian revolution of 1979.

4 There are a small group of Muslims in the Reef area, especially in Soweto near Johannesburg, and Laudium near Pretoria, who adhere to the Māliki school. They are followers of the *Murābiṭūn* group, headed by the British-born Shaykh 'Abd al-Qadir al-Darqawi, previously Ian Dallas.

5 The demographic distribution of the legal schools stems from the historical ancestry of South African Muslims. In south east Asia, except India, the majority of Muslims are Shāfi'ī, and most Muslims in the Cape come from these regions. Hence the Shāfi'ī dominance in the Cape. The Indian subcontinent is primarily a Ḥanafī region. The Muslims in the Transvaal and Natal are mainly of Indian origin, and brought with them their Ḥanafī rites, although there are also some Shāfi'īs among them. Similarly, some followers of the Ḥanafī school are found in the predominantly Shāfi'ī Cape Province.

6 There are also minority views which make it possible for the child to succeed the father, but these opinions have not gained acceptance in modern Muslim society.

7 Some schools are reluctant to allow manumission of slaves of illegitimate birth when the owner is required to free a slave in penance for violating certain laws of ritual piety. The rationale behind this is that such slaves are inferior and that he should free only the best.

8 My source for this interesting piece of information is Achmat Davids, a social worker and prominent cultural historian on Cape Muslims.

9 Fictitious names have been used to protect the identity of informants.

10 ANC Constitutional Committee, 1990.

References

English

ANC Constitutional Committee, 1990. *Bill of Rights*. Bellville, Cape: Centre for Development Studies.

Anderson, J. N. D., 1971. 'The Role of Personal Statutes in Social Development in Islamic Countries'. *Comparative Studies in Society and History*, 13: 16–31.

Coulson, N. J., 1971. *Succession in the Muslim Family*. Cambridge: Cambridge University Press.

Davids, A., 1980. *The Mosques of the Bo-Kaap*. Athlone, Cape: The South African Institute of Arabic and Islamic Research.

Department of Statistics, 1980. 'Religion by Statistical Region and District, Report No 02–80–06; Geographical Distribution of the Population, Report No. 02–80–13'. *Population Census*. Pretoria: Government Printers .

Fyzee, A. A., 1955. *Outlines of Muhammadan Law*. London: Oxford University Press.

Makdisi, J., 1985–6. 'Formal Rationality in Islamic Law and the Common Law'. *Cleveland State Law Review* 34: 97–112.

Mahmood, T., 1982. *The Muslim Law of India*. Allahabad: Law Book Company.

Moosa, E., 1991. 'Islam'. In *A Southern African Guide to World Religions*, ed. J. W. de Gruchy and M. Prozesky, 203–37. Cape Town: David Philip.

Mulla, D. F., (1906) 1977. *Principles of Mohamedan Law*. Bombay: N.M. Tripathi.

Rippin, A. and **Knappert, J.**, 1986. *Textual Sources for the Study of Islam*. Manchester: Manchester University Press.

Schacht, J., (1950) 1979. *The Origins of Muhammadan Jurisprudence*. Oxford: Clarendon Press.

Arabic

al-Dārimī, Abū Muḥammad, n.d. *Sunan al-Dārimī*. 2 Vols. Beirut: al-Maktab al-'Ilmiyyah, n.d.

Ḥanafī, Muḥammad al-Husaynī, 1965. *Al-Aḥwāl al-Shakhsiyyah: Ḥuqūq al-Awlād wa 'l-Aqārib*. Cairo: Dār al-Fikr al-'Arabī.

Ibn Ḥazm, Abū 'Alī, n.d. *Al-Muḥalla*. 11 Vols. Beirut: Dār al-Fikr.

Ibn Qudāmah, Muwaffaq al-Din, n.d. *Al-Mughnī*. 10 Vols. Riyaḍ: Maktabat al-Riyāḍ al-Ḥadīthah.

Ibn Rushd, Muḥammad, 1985. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtasid*. 2 vols. Istanbul: Dār Qahramān.

al Juzayrī, 'Abd al-Raḥmān, n.d. *Al-Fiqh 'alā 'l Madhāhib al-Arba'ah*. 6 Vols. Beirut: Dār al-Fikr.

al-Qudūrī, Aḥmad bin Muḥammad, n.d. *Mukhtaṣar al-Qudūrī*. Karachi: Asaḥḥ al-Matābic.

al-Shaykh Nizām, 1973. Commission of Sulṭān Muḥyī al-Dīn Awrangzeb 'Ālamgir (reg.1659–1707). *Fatāwā Ālamgīriyyah*. 6 Vols. Turkey: al-Maktabat al-Islāmiyyah.
al-Shāfi'ī, Muḥammad, n.d. *Kitāb al-Umm*. 7 Vols. Bombay: Molvi Moḥammed bin Gulamrasul Surtis & Sons.
al-Sijistāni, Abū Dawud Sulaymān, n.d. *Sunan Abī Dāwud*. ed. Muhammad Muḥyī al-Dīn 'Abd al-Ḥamīd, Cairo: Matba'ah Muṣtafā Muḥammad.
al-Zuḥaylī, Wahbah, 1985. *Al-Fiqh al-Islāmī wa Adillatuhu*, 8 Vols. Damascus: Dār al-Fikr

Interviews cited

Achmat Davids, Social worker and historian, 26 September 1990.
Moulana Yusuf Karaan, chairman of the (MJC) Muslim Judicial Council (Cape) *fatwā* Committee, 31 August 1990.
Shaykh Abubakr Najaar, President of the Islamic Council of South Africa, 31 August 1990.
Nouranahaar Mintin, Director Islamic Social Workers' Association, 25 September 1990.

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11 *Birth outside marriage among whites in Cape Town*

Denise Rubinsztein

'Plus ça change, plus c'est la même chose'
Alphonse Karr, *Les guêpes*, 1849

Introduction

The rising number of births to unmarried women, both in this country and overseas, and the fact that some women choose to have children outside marriage, has bred a more tolerant attitude to unwed motherhood among white South Africans over the past decade. In some quarters, however, there remains a belief that birth outside wedlock is contrary to religious and moral principles; this can make the lot of a girl who inadvertently becomes pregnant far from easy. Nor is it only attitudes which create the problem: many support structures which have recently come into existence in Europe and America to facilitate single parenthood, are absent in this country. Thus, while in August 1990 *Cape Style* (Michell, 1990) published an article entitled 'Motherhood without Marriage — suddenly there's a new generation of go-it-alone mothers, mothers who choose to be single parents', Jane Raphaely argued, in an editorial in *Cosmopolitan* (1990: 8) that 'the growing number of women who choose to go it alone as single parents deserve a great deal more support from society than they currently receive'.

It is instructive to realize that even in the United Kingdom the lot of unwed mothers is not always enviable. Adele Cherreson, in writing about single parenthood in *New Woman*, chose to title her report simply 'What a bastard'. She maintains that 'if some attitudes are steadily changing, they are not changing as fast as the media might have us believe' (1991: 12). In similar vein, Elizabeth Winkler in the July 1991 number of *Options* (1991: 41) emphasizes that although 'attitudes towards unmarried mothers have relaxed ... nevertheless women who choose to go it alone are stepping outside the norm and that takes courage'.

Changes in the attitude of white South Africans towards sexual matters tend to lag behind those of Europeans, so the adage at the head of this