

MUSLIM PERSONAL LAW¹ — TO BE OR NOT TO BE?

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1 Introduction

The first Muslims had arrived at the Cape from the Dutch colonies in the East Indies (now Indonesia) and the coastal regions of Southern India from anywhere around 1652–1658.² Despite having been granted the freedom to practise their religion since 1804,³ Muslims could not give legal effect to their personal laws for three hundred years as social restrictions and political inequalities prevailed until recently. It is anticipated that the rapid changes taking place in South Africa since the democratic elections of 1994 will rectify this situation expeditiously.

2 Position of Muslim personal law in South Africa up to the present

Data from the Central Statistical Services⁴ reveal that Muslims constitute an estimated 1,1%⁵ of the total South African population (excluding the former TBVC⁶ states), compared to the approximately 66,5% Christians. South African Muslims in general belong to the *Sunni*⁷ school of law

¹ The *Qur'an* is a religious text considered by Muslims to be the literal word of God. It is a primary source of Islamic law and contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. It is in the areas explicitly referred to by these verses that one finds little or no change in various Muslim countries. The term "Muslim Personal Law" was coined by various Muslim countries and jurists because it pertains to, among other things, marriage, divorce, inheritance, polygyny, custody and guardianship which falls under the category of family law. This term must be distinguished from Islamic law. The *Qur'an* became separated from the classical formulation of Islamic law or *Shari'a* by a process of legal development lasting more than two centuries. During this period the *Qur'anic* norms underwent considerable dilution. It is common for Islamic law, which is the interpretation and application of the primary sources by early Muslims, to be mistaken for Islam itself.

² Davids *The Mosques of Bo-Kaap: a Social History of Islam at the Cape* (1980) xv.

³ Davids *The Mosques of Bo-Kaap* xxi.

⁴ *Demographic Statistics* (1993) 9.

⁵ The number is estimated to be 500 000: Cachalia *Legal Pluralism and Constitutional Change in South Africa: the Special Case of Muslim Family Laws* Unpublished paper read at a seminar *Approaches to the Study of Islam and Muslim Societies* hosted by the Department of Islamic Studies at the University of Cape Town 1991-7-17/19 7.

⁶ Transkei, Bophuthatswana, Venda and Ciskei.

⁷ In the eighth century the four major Islamic schools of law were established and named after their respective founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* (Esposito *Women in Muslim Family Law* (1982) 2). These together comprise the *Sunni* (traditionalist) schools.

and are more or less equally divided between the *Hanafi* and *Shafi'i* schools.⁸

A summary of the current position of Muslim personal law in South Africa follows. The South African Law Commission,⁹ in Project 59 on Islamic marriages and related matters, is presently examining Muslim personal law. In its latest progress report, the commission states that although a start was made on a comparative legal study of South African and Islamic law, the investigation had to be temporarily halted.¹⁰ The various bodies of experts on Islamic law, namely *Ulama* (religious) bodies, have responded favourably¹¹ to a questionnaire issued by this commission and supported its possible implementation as part of the South African legal system.¹² These *Ulama* bodies are located in each of the former provinces, namely the *Jamiats* of the Natal and Transvaal, the Muslim Judicial Council of the Cape and the *Madjlisul Ulama* of Port Elizabeth in the Eastern Cape.¹³ Although their decisions are of a binding nature upon the conscience of the Muslims, their competence to apply Islamic law is questionable,¹⁴ in addition to their lack of legal power to enforce it. This is due to the non-recognition of Muslim personal law. The interim Constitution of the Republic of South Africa,¹⁵ which is to remain in force until April 1999,¹⁶ not only guarantees freedom of religion and belief (section 14(1)), but also makes provision within the Bill of Rights for legislation to be provided by the state for the recognition of religious personal law (section 14(3)(a)) and for the recognition of Muslim marriages (section 14(3)(b)).

Assurances have been obtained from the former minority government, albeit at commission level only, that the *modus operandi* of Muslim personal law would be determined by Muslims themselves. Hence, the South African Law Commission preferred to leave its implementation to their discretion.¹⁷ The present government of national unity has as yet not given any directive to any official body to investigate the legal recognition and formulation of

⁸ Naudé 'Islam in South Africa: a General Survey' 1985 *Journal Institute of Muslim Minority Affairs* 21 25.

⁹ For more detail in this regard see Moosa *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman* (1991) 22.

¹⁰ SA Law Commission *Twentieth Annual Report 1992* (1993) 42.

¹¹ At this stage, and despite the enthusiasm displayed by these bodies as representatives of the Muslims, a large part of the community clearly expressed their objection to this proposal on the basis of politico-moral reasons: Lubbe *The Muslim Judicial Council: a Descriptive Analytical Investigation* (1989) 80–82; Moosa *Application of Muslim Personal and Family Law in South Africa: Law, Ideology and Socio-Political Implications* (1988) 24.

¹² Moosa *A Comparative Study* 1172–1188.

¹³ Naudé 1985 *Journal Institute of Muslim Minority Affairs* 28.

¹⁴ The members of these bodies do not necessarily have accredited (local) legal training.

¹⁵ Act 200 of 1993, hereafter referred to as the Constitution. See in this regard Bekker & Carpenter (ed) *Butterworths Selection of Statutes: Constitutional Law 2 ed* (1994); Basson *South Africa's Interim Constitution: Text and Notes* (1994).

¹⁶ Basson *South Africa's Interim Constitution* xxiii.

¹⁷ Moosa *A Comparative Study* 169.

Muslim personal law.¹⁸ It would appear that the various Islamic bodies, *Ulama* and relevant organisations have now finally, in the light of the new political setup in South Africa, reached *consensus* on the need for the recognition of Muslim personal law.¹⁹ While this hurdle has been overcome, Muslims still need to reach *consensus* as to whether Muslim personal law, which is based on traditional interpretations of Islamic law, should be reformed to bring it in line with the principles of equality as espoused in the Bill of Rights, in other words, whether it should be subject to the Bill of Rights or not.²⁰

Perceived from a purely legal point of view Muslims can only give practical legal effect to the religious freedom and protection of minorities as vouched for in the Constitution if due recognition is given to Muslim personal law and its implementation and separate regulation in the South African legal system as part of its statutory law because, besides the potential conflicts with the Constitution, definite conflicts exist between Muslim personal law and South African law. The substantive conflicts are outlined below.

What follows is a legal discussion of the conflicts between substantive South African law and Islamic law regarding the legal and proprietary effects of Islamic and South African marriages on the respective laws of succession. For the internal conflicts in the law of succession to become apparent, it must be viewed concurrently with the law of marriage itself.

3 General conflicts between Islamic and South African law of marriage

Generally traditional “marriages” according to Islamic custom are void in South African law because they are potentially polygynous and do not comply with the formalities prescribed by the Marriage Act.²¹ For example, Muslim marriage officers (*Imams*) are not registered as marriage officers and have no legal status to perform marriages. It must be noted that despite being void, polygynous marriages have certain legal consequences attached to them. For example, a Muslim marriage is recognised for the purposes of

¹⁸ Toffar *Muslim Personal Law in a Nonmuslim State* Unpublished paper presented at a workshop *Islamic Personal Law in South Africa: its Future Position* hosted by the Islamic Unity Convention in Cape Town 1994-10-16 1-2.

¹⁹ As a result of *consensus* being reached, a Muslim Personal Law Board was inaugurated in August 1994 in Durban to initiate the incorporation of Muslim personal law into the South African judicial system. This board has since disbanded because of serious internal problems.

²⁰ Muslims have varying interpretations of the Bill of Rights. One view is that it governs all legislation and another is that it protects religious and customary provisions only and that its equality clause (s 8) does not affect or interfere with the interpersonal relations of Muslim personal law. For a detailed discussion of problems in this regard see Moosa *The Interim Constitution and Muslim Personal Law: whither South African Muslim Women?* (1995) Unpublished paper read at a conference *Towards the Final Constitution: a Critique of the Present Constitution from a Gender Perspective — the Way Forward* hosted by the Community Law Centre at the University of the Western Cape, 1995-01-27.

²¹ 25 of 1961; Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 31.

insolvency and income tax. Interestingly, our courts have attached certain legal consequences to the marriages in the above-mentioned areas for the sake of “expediency”.²² Expediency in this instance is a substitute for economic advantage. If the state can profit from your marriage then it is recognised. Trengove JA holds the opinion that the non-recognition of such “unions” would cause hardly any hardship to Muslims.²³ In the light of the contents of the rest of this article, I must respectfully disagree with him.²⁴ Dlamini thinks that polygyny is more in conflict with a state policy which represents white views on what is acceptable behaviour than with the “notoriously vague concept” of public policy.²⁵ He also states that the courts have wrongly assessed a customary marriage on the basis of the criteria of a civil marriage and in so doing imposed white values on the black community. The very fact that the South African Law Commission examined Muslim personal law with a view to its possible implementation, confirms this.

4 Legal consequences of Islamic and South African marriages and their effects on the respective laws of succession

4 1 Married in terms of Islamic and South African law with a will stipulating Islamic law of succession

In Islamic law, freedom of testation is limited to one third of the estate and the rest (two thirds) must devolve according to compulsory *Qur’anic* rules of succession²⁶ which define heirs and fix the percentages they may inherit. For example, males inherit twice as much as females. The only way to protect the Islamic marriage in South Africa at present is to enter into a civil South African marriage as well, with the spouse making a will that his/her estate should devolve according to the Islamic law of succession.²⁷ Such a will allows for the disposition of one third of his/her property and the rest (two thirds) would devolve according to Islamic law. Naturally, a spouse could dispose of the whole estate in terms of Islamic law. If such a will is made, the South African law will honour the wishes of the testator/testatrix, provided of course that the will complies with the provisions and formalities of the Wills Act.²⁸ An oral (Islamic) will is not sufficient.

²² *Ismail v Ismail* 1983 1 SA 1006 (A) 1024B.

²³ *Ismail v Ismail supra* 1024–1025.

²⁴ It is interesting to note that in interpreting the provisions of the Constitution, the supreme court has decided in *Kalla v The Master* 1995 1 SA 261 (T) 270E that “. . . reliance upon s 14 (1) of the Constitution to validate retrospectively a marriage which was legally invalid [namely a marriage by Muslim rites which was potentially polygynous] in April 1992 when it was terminated by the death of the deceased, is misplaced”.

²⁵ Dlamini “The New Marriage Legislation Affecting Blacks in South Africa” 1989 *TSAR* 408 410.

²⁶ Or “intestate” succession as the term is understood today.

²⁷ Nadvi *Islamic Legal Philosophy and the Quranic Origins of the Islamic Law (a Legal-historical Approach)* (1989) 331.

²⁸ 7 of 1953; Bulbulia “How to draft a Will for a Muslim Client” 1982 *De Rebus* 411 412.

It must be noted that children born from traditional marriages are illegitimate and experience problems with regard to succession, maintenance, custody and adoption. Illegitimate children may now inherit in terms of the Intestate Succession Act.²⁹ Until recently a reference to “my children” in a will included only the illegitimate children of the mother but not of the father! However, the Wills Act now provides that, unless the context of the will indicates otherwise, the fact that any person was born illegitimate shall be ignored in determining his or her relationship to the testator or another person for the purposes of the will.³⁰

The attitude of the South African courts to Muslim marriages was to a large extent influenced by the English courts hearing similar cases. The trend in England regarding the recognition of foreign marriages has been to grant some recognition to foreign (outside of England) polygynous marriages only.³¹ By analogy our courts, which were in the past influenced by the English courts, should reassess their attitude towards Muslim marriages between Muslim South African citizens. However, it appears that the general trend in South Africa is indeed to steer away from English case law. The option then remains for the legislature to intervene, as happened in English law.³² As indicated, the Constitution now makes provision for such an option. It must be stressed that if this option is given the force of law, it must be Muslim personal law that will be applicable to Muslims. Assurances have been given that Muslim personal law will not be replaced by any secular code.³³

4 2 Married in terms of Islamic law only

The legal consequences flowing from an Islamic marriage have dire effects on succession in terms of South African law. If such a Muslim fails to make a will devolving his property in terms of Islamic law, he is deemed to have died intestate in terms of South African law, thereby excluding Islamic law. In addition, his own children are “illegitimate” and because his marriage is not registered in terms of the Marriage Act,³⁴ he is deemed to have died without a spouse. This doubly inequitable situation is a reality in South African law. Although section 1(2) of the Intestate Succession Act³⁵ allows his “illegitimate” children to be regarded as intestate heirs, their shares would be allotted in terms of South African law which treats males and females equally. This is in conflict with Islamic law in terms of which males inherit twice as much as females.

²⁹ 81 of 1987 s 1(2).

³⁰ The Wills Act 7 of 1953 s 2D(1)(b). This section was inserted in the Wills Act by the Law of Succession Amendment Act 43 of 1992.

³¹ Grant & Levin *Family Law* 4 ed (1982) 12–14.

³² Forsyth *Private International Law* 2 ed (1990) 247.

³³ Moosa *A Comparative Study* 169.

³⁴ 25 of 1961.

³⁵ 81 of 1987.

4 3 Married in terms of Islamic and South African law without a will

If a Muslim has married in terms of Islamic and South African law and subsequently dies intestate, the South African law of intestate succession is operative. The law of intestate succession provides for a distribution which conflicts with the fixed (compulsory) shares as set out in the *Qur'an*. Thus, although the wife and children are legally acknowledged, the Intestate Succession Act³⁶ provides for a distribution which goes contrary to *Qur'anic* directions in this regard. For example, his wife could be sole heir if he has no children, daughters share equally with sons, etcetera.

4 4 Married in terms of Islamic and South African law with a will according to South African law

One can also find the situation where a Muslim is married in terms of both Islamic and South African law and has also executed a will disposing of the whole of his estate according to South African law, a system which upholds the principle of freedom of testation. Islamic law, on the other hand, acknowledges limited freedom of testation (only up to one third of the estate). However, because South African law advocates freedom of testation, a Muslim would have this freedom irrespective of whether he is married in terms of South African law or Islamic law only, and even if the Islamic marriage were recognised. If Muslim personal law is recognised, the question as to whether it is desirable that Muslims have this freedom of testation must be addressed pertinently. It would appear that complete freedom in this regard is in direct conflict with Muslim personal law.

4 5 Husband has one marriage registered in terms of South African law and is also married to another wife in terms of Islamic law

An Islamic marriage, whether it precedes or follows a civil marriage, is unlawful in South African law. This causes problems as far as succession is concerned. The wife in terms of the civil marriage excludes her Islamic counterpart from inheriting, while the latter is not excluded in terms of Islamic law. However, children born from the Islamic marriage are not excluded.³⁷

In recognising Muslim personal law, the legislature must take cognisance of polygyny. This is not a major obstacle because it is possible for the parties to overcome this situation and retain monogamy *via* a stipulation in the marriage contract (in terms of Islamic law) or antenuptial contract (in terms of South African law) to the effect that the husband shall not enter into a second marriage while the first one is still in existence. If he breaches or wishes to breach this condition, it would automatically entitle the wife to sue for divorce. A marriage contract with such a condition should be given the recognition it deserves. Pakistan, for example, has regulated polygyny by requiring that the husband acquire the permission of his first wife before he

³⁶ 81 of 1987.

³⁷ Cf the Intestate Succession Act 81 of 1987 s 1(2) concerning illegitimate children.

can marry a second one. If, however, he is in breach of this regulation, which is often the case, this does not invalidate his second marriage and he merely has to pay a small fine and/or serve a short period of imprisonment — hardly a deterrent.³⁸

5 Proprietary consequences of the above marriages and their effects on the laws of succession

5 1 Marriages in community of property

When a Muslim couple enters into such a civil marriage, it appears that this conflicts in several ways with the proprietary consequences of an Islamic marriage. It must be stressed that the undivided half share, to which either “partner” is entitled by virtue of the marriage at its dissolution by death or divorce, is an automatic consequence of the marriage *and not* of the rules of succession. It can therefore be concluded that, contrary to what various Muslim scholars and sources have postulated in this regard, there is no automatic conflict between the Islamic and South African law of succession. The conflict lies in the fact that the partnership established by the Matrimonial Property Act³⁹ disturbs Islamic law, which allows the woman, single or married, the right of private and separate ownership.

5 2 Marriages out of community of property

As far as marriages out of community of property are concerned, they are seen as a viable alternative to the marriage in community of property only if the parties execute and register an antenuptial contract expressly excluding the accrual system (sharing of profits equally at death or divorce). Once again it seems that receiving half the profits is in conflict with the Islamic law of succession where the shares are defined. However, the argument concerning private and separate ownership advanced above applies *mutatis mutandis* (and perhaps with more validity) here. Thus, I am of the opinion that there is no conflict between the respective laws of succession in this regard. The marriage out of community of property excluding the accrual system can therefore be condoned by Muslims since there is no interference with the private ownership of the spouses and also no “partnership” as in the case of a marriage in community of property.

A significant portion of Muslims fail to make a will (either because of ignorance or sheer negligence) and depend on their families to sort out their estates in an Islamic manner or, overwhelmed by the intricacies of the two legal systems, deliberately make one contrary to Islamic law. Another potential advantage which would flow from the recognition of Muslim marriages *per se* would be to discourage these people from disobeying the *Qur’anic* laws. In the past Muslims have resorted to other solutions, *inter*

³⁸ Shaheed “The Cultural Articulation of Patriarchy: Legal Systems, Islam and Women” 1986 *South Asia Bulletin* 38 42.

³⁹ 88 of 1984.

alia the concept of universal partnership,⁴⁰ to approximate marriages in community of property. If Muslim personal law is given recognition, the need for Muslims to use South African law to remove “injustices” in Islamic law will be obviated and they can look at Islamic law as such for equitable solutions.

6 Conclusion

From a legal point of view, it is imperative that Muslim personal law be recognised and implemented in the South African legal system as part of its statutory law. Sections 14(3)(a) and 14(3)(b) of the Constitution, which make provision for legislation recognising Muslim personal law and marriages, are but small steps in the right direction. The relationship between the Constitution and Muslim personal law must be carefully considered. A review of the situation in a number of Muslim states supports the contention that the best option and solution to the application of Muslim personal law lies in codifying Islamic law and enacting a comprehensive bill or “uniform *Muslim* code” applicable to Muslims.⁴¹ The benefits of such a step by far outweigh its disadvantages. It should be seen as a means of resolving the many dilemmas with which Muslims are faced daily in their lives (and deaths!).

OPSOMMING

Suid-Afrikaanse Moslems ervaar situasies van konflik tussen die beginsels van die Suid-Afrikaanse Romeins-Hollandse erfreg en Islamitiese erfreg. Dus is die hele kwessie van die aanvaarding en toepassing van Islamitiese reg in Suid-Afrika van uiterste belang. Op die oomblik geniet Moslem persoonlike reg in Suid-Afrika die aandag van die Suid-Afrikaanse Regskommissie in Projek 59. Dié Projek geniet die steun van die verskillende *Oelema* (religieuse) groepe wat Moslems verteenwoordig. Hulle steun dit dat Moslem persoonlike reg (veral betreffende huwelike, egskeiding en erfreg) erken word as deel van die Suid-Afrikaanse regstelsel. Ten spyte hiervan het ’n groot deel van die Moslemgemeenskap beswaar hierteen geopper op politiek-morele gronde. Hierdie besware het egter as gevolg van die nuwe grondwetlike bedeling verval omdat artikel 14 (3) van die tussentydse Grondwet vir die wetlike erkenning van Moslem persoonlike reg voorsiening maak. Die sigbare interne verskille tussen die Islamitiese en Suid-Afrikaanse huweliksreg en erfreg word in hierdie artikel bespreek. Nadat statistieke en alternatiewe oplossings geëvalueer is, word voorgestel dat die aanbevelings insake die moontlike aanvaarding en toepassing van Moslem persoonlike reg geïmplementeer moet word omdat dit meer voor- as nadele vir die Moslemgemeenskap inhou: dit raak ’n kardinale aspek van die alledaagse lewe van Moslems in Suid Afrika.

⁴⁰ This is still the position today as is evident from *Kalla v The Master supra* 264B.

⁴¹ The answer to the South African situation does not lie in adopting a secular uniform civil code. Not only will it be rejected by the Muslim community, but it has failed to successfully address the plight of women in countries where it does exist. Much can be learnt from the Indian and Turkish experiences in this regard.