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The Interim and Final Constitutions and Muslim Personal Law : Implications for South African Muslim Women

1) INTRODUCTION

*A*ll women face similar status problems in the private and public spheres of life but it is alleged that, as members of a religious community, Muslim women experience another inequality. This double inequality has resulted in a dichotomy between their public role as citizens of a nation and their private role as members of a religious community which up to today remains unresolved in various Muslim and non-Muslim countries. As will be indicated, commercial, criminal and penal codes were easily secularised but personal codes remained governed by religion. It is as a result of this that personal law codes conflict with the constitutions of Muslim majority and minority countries because while the constitutions of these countries guarantee equal rights to all citizens, the personal law codes privilege men over women in the areas covered by these personal laws resulting in the inequality of the sexes (Kandiyoti 5). There does not, however, appear to be any Islamic justification for this state of affairs. The practice of Muslims today, as opposed to the spirit of equality in Islam as contained in its primary sources, discriminates against women.

2) DEFINITIONS (PRIVATE LAW)

These definitions serve to facilitate my presentation :

Private Law: in terms of South African law, this would pertain to the laws of marriage, divorce, contracts, etc.

Muslim Personal Law (MPL)¹: MPL is a religiously based private law. It has its origin in the *Qur'an* which was revealed during the seventh century of the Christian era (C.E) and which is a religious text considered by Muslims to be the literal word of God. The *Qur'an* is a primary source of Islamic law and not a lawbook as it contains approximately eighty verses dealing with legal matters, most of which pertain to personal laws of family and inheritance.² It is in the areas explicitly referred to by these verses that one finds little or no change in various Muslim countries. These countries were, however, quite prepared to follow secular codes in other areas such as commercial and criminal law. The term "MPL" has been coined by various Muslim countries and jurists because it pertains to, among others, marriage, divorce, inheritance, polygyny, custody and guardianship which falls under the category of family law. Minor reforms were introduced in the twentieth century when these verses were transformed into codes of MPL. These reforms have remained relatively conservative when compared with the liberal adoption of secular commercial and criminal codes. It appears then that reforming the law is not necessarily the total answer to the plight of women. Moreover, it is interesting to note that *all* laws affecting the status of Muslim women have historically been relegated to MPL (private sphere). This leads to the inference that discrimination against women is religiously based. It would, however, appear that this perception is as a result of patriarchal interpretations of Islam, cultural and customary influences, the refusal of some Muslim countries to reform, illiteracy and ignorance of the law, that the position of Muslim women today is less favourable today when compared and contrary to what early Islam and the *Qur'an* had imposed on its adherents (Honarvar 355, 365; Shaheed 38; Gordan 31; Engineer v-vi).

¹ Hereinafter abbreviated to MPL.

² Interestingly, it has more verses dealing with issues affecting women than with legal matters *per se*.

Islamic law (*Shari'ah*): the *Qur'an* is separated from the classical formulation of Islamic law or *Shari'a* by a process of legal development lasting more than two centuries (200 years). During this period the *Qur'anic* norms underwent considerable dilution, often to the detriment of women (Coulson and Hinchcliffe 38). It is common for Islamic law, which is the conservative interpretation and application of the primary sources (*Qur'an* or *Sunna*³) by early Muslim jurists like *Hanafi*, *Shafi'i*,⁴ to be mistaken with Islam itself. There is therefore a difference between Islam (original) and Islamic law (interpretations of original).

Examples of MPL discriminations faced by women: the triple divorce (or what is commonly known as the 3-in-1 divorce) which allows a husband to unilaterally divorce his wife in one sitting making the divorce immediate and irrevocable is but one such example. This practice is contrary to the *Qur'anic* waiting period or *iddat* which seeks to effect a reconciliation between the spouses. The *Qur'an* has a strong bearing towards monogamy. However, polygyny or the practice of having more than one wife at the same time is restricted in Pakistan while Tunisia prohibits it. This reflects how *Qur'anic* interpretations can differ from country to country.

3) POSITION OF MPL IN SOUTH AFRICA UP TO THE PRESENT

The first Muslims arrived at the Cape from Indonesia and Southern India around 1652-1658 (Davids xv). For 300 years Muslims have always practised their religion but despite having been granted formal freedom to practise their religion since 1804 (xxi), Muslims could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently. The new democratic dispensation now allows for a change to the *status quo*. Muslims

³ This is the received customs associated with the Prophet Muhammad embodied after his death in book form called Hadith.

⁴ In the eighth century the four major Islamic schools of law were established and named after its founders namely, Hanafi, Maliki, Shafi'i and Hanbali (Esposito 2). These together comprise the Sunni (traditionalist) schools.

constitute an estimated 1.1 % ⁵ of the total South African population compared to the approximately 66.5 % Christians. South African Muslims in general belong to the *Sunni* school of law and are more or less equally divided between the *Hanafi* and *Shafi'i* schools (Naudé 25).

There are several conservative *Ulama* or religious bodies of experts on Islamic law located in the various provinces in South Africa (Naudé 28). Although their decisions are of a binding nature upon the conscience of the Muslims, they lack the legal power to enforce it. This is due to the non-recognition of MPL. Their competence to apply Islamic law is questionable because members of these bodies do not necessarily have accredited local legal training. The previous minority government enquired into MPL through the South African Law Commission in Project 59 on Islamic marriages and related matters where a start was made on a comparative legal study of South African to the final Bill of Rights appears to be present government of national unity took this one step further. Both the interim (Act 200, 1993) and final (1996)⁶ South African Constitutions now not only guarantee freedom of religion and belief (S 14 (1)) (now S 15 (1)) but also make provision within the bill of rights that legislation can be provided by the state for the recognition of religious personal law (S 14 (3)(a)) (now S 15 (3)(a)(ii)) and for the recognition of Muslim marriages (S 14 (3)(b)) (now S 15 (3)(a)(i)). The *right* to have MPL recognised is, however, not constitutionalised in both these Constitutions.

The present government has as yet not given any directive to any official body to investigate the legal recognition and formulation of MPL although it is expected that a Law Commission will be set up for this purpose. Various Islamic bodies, *Ulama* and relevant organisations have now, in the light of the new political dispensation in South Africa, reached consensus on the need for the recognition of MPL and its

⁵ Demographic Statistics, 1993 (9). This figure is approximated at 500,000 (Cachalia 7).

⁶ The Constitution of the Republic of South Africa, 1996. The Constitution has undergone some revision and is at this stage awaiting final approval by the Constitutional Court. This will be followed by certification. Should the Court approve of the revised text, most of the provisions of the final Constitution will come into effect between January and July 1997.

implementation. 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 a reformed MPL and its implementation and separate regulation (code) in the South African legal system as part of its statutory law because, besides the potential conflicts with the Constitution, definite conflicts exist between the MPL and South African law.⁷ *Ulama* are also asking for MPL to be implemented in special *Shari'a* courts.⁸ As a consequence of such consensus being reached, a Muslim Personal Law Board was established late in 1994 to initiate the incorporation of MPL into the South African legal system.⁹ Draft bills were prepared by this Board to provide interim relief in the areas of marriage and divorce. However, these bills were based on traditional interpretations of Islamic law and left much to be desired as far as women's rights were concerned. The Board proved problematic and was soon disbanded only to be replaced by two new controversial bodies. The Muslim community in South Africa is thus not united under one national Muslim Personal Law body.

⁷ It appears that the best option and solution to the application of MPL lies in codifying Islamic law and enacting a comprehensive bill or "uniform Muslim code" applicable to Muslims. This code should address minor variations in the four major schools of legal thought (jurisprudence) as well as considerations of desirability of reform to the present MPL with due regard to the peculiar circumstances existing in South Africa. Regard must also be had to the effective application of alternate tools to improve the status of women where reform might not be appropriate (see Moosa: 1991 152-68). The answer to the South African situation does not lie in adopting a secular uniform civil code because it will be rejected by the Muslim community and has failed to really redress the plight of women in countries where it does exist.

⁸ The implementation of MPL is not, however, the focus of this paper.

⁹ "Board gets established and prepares to draw up MPL bills" (*al-Qalam* 4). As indicated *infra* the possibility of dual/parallel systems of courts and the fact that it could invariably contradict the concept of equality and the serious constitutional implications this might have for Muslim women who might seek redress to constitutional inequalities originating from MPL will not be addressed in this article.

4) DEFINITIONS (PUBLIC LAW)

These definitions will facilitate the rest of my presentation :

Constitution: a constitution is a set of laws by which a country is governed.

Human Rights: the human rights are those universal natural rights which belong to all human beings irrespective of sex, race and religion. For example, freedom of religion, equality, movement, the right to food.

Bill of Rights: this is a statement of human rights in a constitution protected from interference by the state or government (vertical operation) and sometimes even extends its protection to exclude interference from other private individuals and organisations (horizontal operation). In this way a bill of rights can include private law or an unrecognised MPL within its ambit.

International human rights instruments or documents: countries either support documents like the Universal Declaration of Human Rights (UDHR) and the Women's Convention (CEDAW) by becoming a signatory to it or are bound to it by ratifying it. These documents provide equally for freedom of religion and equality without realising that these two human rights may conflict with each other.

5) MPL AND THE INTERIM SOUTH AFRICAN CONSTITUTION (1993)

It would appear that, whilst almost every major Muslim organisation agrees that MPL should be recognised by the civil law, as the interim Bill of Rights proposes, different opinions exist as to whether or not Muslims should be subjected to its provisions. Muslims have varying interpretations of the Bill of Rights. One view is that it governs all legislation (therefore MPL ought to be subject to it) and another is that it protects religious and customary provisions only and that its equality

clause (S 8)¹⁰ does not affect or interfere with the interpersonal relations of MPL (therefore MPL ought to be exempt from it). Although freedom of religion and equality between the sexes are both human rights guaranteed by the Constitution, the interim Bill of Rights has failed to address the apparent conflict between these two rights and hence it was possible that MPL, once recognised, could be treated as inviolable and exempt from the Bill of Rights. This would be the case in spite of the fact that the Constitution is the Supreme Law (S 4). The government became a signatory of CEDAW,¹¹ a United Nations document that embodies women's rights, in January 1993. CEDAW makes provision for states "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle."¹² However, even though S 35 (1) of the interim Constitution states that a court of law must take cognisance of all international law applicable to the protection of human rights when interpreting the provisions of a Bill of Rights, CEDAW was at this stage not as yet not ratified. These uncertainties had serious implications for Muslim women because the traditional formulation of MPL accords them an unequal status to that of men. It has to be clarified that while Islamic law and MPL endorses this inequality, Islam does not. It thus appeared from the interim Constitution that the position of Muslim women in South Africa will not be any different, or better, than that of their international counterparts.

6) CAN MUSLIM AND NON-MUSLIM COUNTRIES HELP?

A study of the historical background of Islamic constitutions will reveal that there is no real certainty as to what constitutes Islamic constitutional law and there appears to be about five different strands of thought in this regard (Nolte 278; Maudoodi 5; Hasan: 1978; Ishaq 5-6;

¹⁰ S 8, or the equality clause, demands equal protection and equality before the law for all men and women.

¹¹ "The Convention on the Elimination of All Forms of Discrimination Against Women."

¹² Part 1: Article 2 (a), GA Res. 34/180;1979.

Hamidullah 334; Taji 26). Some Muslim countries have therefore opted for Western models in this regard.¹³ This uncertainty has had dire consequences for Muslim women. Although all modern Islamic governments claim to entrench equality in their constitutions they rarely uphold these ideals in reality. This applies equally to "reforms" to MPL.

In Muslim countries, women are perceived to be equal in public rights and duties but not in the private sphere of the family which is mainly or only regulated by MPL. However, a closer examination of some of the constitutions and other pertinent legislation in this regard of Muslim countries, reveals that the professed equality in the public sphere is not unqualifiedly accepted. In Egypt, for example, the conflict between MPL and the constitution has not been resolved. The 1971 Egyptian Constitution, as amended in 1980, provides for equality between the sexes but adds the qualification that the state will ensure women's equality with men only in so far as it does not conflict with the Islamic law in this regard.¹⁴ This pattern is evident in, for example, Egypt, Algeria, Nigeria, India, Pakistan and Malaysia although countries like Indonesia do deviate from it.

The same pattern is evident with UN human rights instruments. The United Nations Charter (1945) which is purported to be legally binding on all modern Islamic states and the Universal Declaration of Human Rights (1948) which follows it provide equally for religious and women's rights but neither document foresees a potential conflict between these two kinds of rights. Other international measures include CEDAW (1980) of which many modern Muslim countries, like Egypt for example, and non-Muslim states like India, are signatories but have placed reservations on certain of its Articles where it conflicts with MPL. It appears as if the United Nations' goal of equality between the sexes can never see fruition in Muslim countries as it is inconsistent with Islam as it is practised today and to the detriment of women (Bruce 365-66). While the problem remains unresolved in the interim South

¹³ Reference to a "Muslim country" implies that the majority of its population are followers of Islam. 39 of the approximately 41 Muslim countries have adopted written constitutions. Asia has 22 Muslim countries, Africa 16 and Europe 3 (Jain 303, 305).

¹⁴ Articles 11 and 40 (Hill 279, 296).

African Constitution, it also appears that Muslim and non-Muslim countries and their treatment of UN instruments cannot be of much help to us but it remains to be seen whether South Africa was going to follow the trend set by these countries.

7) THE FINAL CONSTITUTION (1996) AND THE POSITION OF SOUTH AFRICAN MUSLIM WOMEN

A call for MPL to be subject to the final Bill of Rights and other constitutional provisions, once it is recognised, has been successfully used to inform the submissions of various organisations to the Constitutional Assembly¹⁵ as is evident from the provisions of the final Constitution which now subjects a recognised MPL to the Bill of Rights (S 15 (3)(a)-(b)) (see Moosa: 1995).

The fact that our Constitution specifically makes provision for recognition of religious laws and that regard be had to UN instruments when interpreting the Constitution (and further the ratification of some of these instruments like CEDAW ¹⁶) shows a strong commitment on the part of the South African government to protecting the rights of religious minorities. However, by subjecting MPL to the final Bill of Rights and ratifying CEDAW without any reservations, the State reinforces its commitment to ensure the birth of a transparent and equitable MPL.

As predicted and like the (broad provisions of the) interim Constitution, the final Constitution does not constitutionalise the right to have MPL recognised. However, once recognised, such laws must conform to the spirit of equality foundational to our Constitution. The challenges facing South African Muslims in this regard are enormous

¹⁵ This is the Constitution-making body responsible for the adoption of the final Constitution.

¹⁶ CEDAW was ratified by South Africa on 15 December 1995. In accordance with the procedure as set out in Parts Five and Six of CEDAW, this document is now undergoing a process of simplification to place it in the South African context.

and unless Muslims succeed in their task MPL will continue to function independently of the South African law.¹⁷ Reform of personal (private) law must interact with and take cognisance of public law in order that they be able to accommodate each other. Thus, even if MPL is applicable to Muslims in South Africa, Muslims will have to face and come to terms with the constitutional and human rights implications of that MPL. Personal laws which discriminate against women cannot be given constitutional protection. At the very least, non-recognition of MPL would enable a few privileged Muslim women who are educated and informed to theoretically exercise a choice between MPL and South African law in regulating their personal affairs. However, for the vast majority of Muslim women there is no such choice. In addition, these women are divided over the question of gender and equality. The *State*, by setting such *minimum* ground rules, has taken the initiative in directing the process of MPL (independent of content). This implies that it is not going to be an agent in women's oppression as is the case in various Muslim and non-Muslim countries. It also guarantees that whatever the final shape of a code of MPL, it will provide for equality between the sexes and, moreover, allow for the achievement of this goal to be left in the hands of Muslims. Even though some *Qur'anic* references *do* allude to inequality of the sexes, it is argued in this paper that the spirit of equality implicit in Islam is compatible with the equality foundational to our Constitution and Bill of Rights and therefore such subjection.

Ultimately the ability of Muslims to resolve their differences will allow for a sustained recognition. Failure on the part of Muslims to comply with this condition will result in such a recognition being challenged and, if it still fails to conform, its ultimate dissolution. An unrecognised MPL will, however, force Muslims to utilise the secular law to overcome legal and practical difficulties. Conservative religious authorities would prefer a recognised MPL to be exempt from the Bill of Rights over a reformed MPL in line with secular law. It is contended that allowing such a state of affairs to continue is not at all conducive to the human rights culture we are working towards and establishing in

¹⁷ This happened in Britain where special emphasis was placed on the human rights dimension of the issue (Poulter: 1990 147, 159).

South Africa. The avaricious behaviour of Muslim religious authorities and their failure to expedite this process of recognition because of an inability to deal effectively with the constitutional implications of a recognised MPL, could thus sabotage any hope to constitutionalise the recognition of MPL.

Subjecting a code of MPL to the final Bill of Rights appears to be a real safeguard for women only if and when MPL is in fact recognised. While an effective MPL remains unrecognised, the status problems faced by Muslim women whose lives are governed by both religious and secular laws, will continue. While it might be possible to bring such private relationships within the ambit of the Bill of Rights (and some human rights instruments) in view of the greater scope for horizontality in the final Constitution,¹⁸ Muslims (especially women) should not have to resort to alternative constitutional interpretational tools and other mechanisms to eventually «get to» their rights. Furthermore, comparative experience highlights that legislative and judicial intervention is not enough to secure effective change. Women will have to contend and deal with the fact that there is no guarantee that legal reform, whether constitutional or via statute law, will result in the equality of the sexes. International efforts in reforming MPL proved to be only partly effective in redressing the plight of Muslim women. Even though the final Constitution promotes and protects the human rights of women through national machinery, their powers do not extend beyond the Constitution. Gradual social reform within the Muslim community, along with active participation by Muslim women, appears to be the more realistic safeguard and long term solution for effective improvement to the status of Muslim women. Religious and customary institutions need to co-operate with each other to achieve such reform. Patriarchal, cultural and customary practices must be distinguished from purely religious practices even though they do overlap. Societal conscientisation of rights, effective access to justice and enforcement of decisions should be considered as important factors to achieve this goal.

¹⁸ See, for example, S 8 (1) (application clause), S 9 (4) (equality clause) and S 39 (2) (interpretation clause).

This paper concludes that constitutions should not just be viewed as the means with which to protect individual rights but should also be regarded as the means through which social change can be achieved (Mohamed 7; "President's Council Report" 43). Because the lives of most Muslim women are governed by cultural and religious restraints, the effective participation of an informed Muslim society in achieving this change is of more practical value than bills of rights embodied in these constitutions. Muslim women, as an integral part of Muslim society, should not underestimate the importance of their role in the achievement of gender equality.

Finally, women, Muslim and otherwise, need "to ask afresh who we [really] are, what we [really] want, and if we are [really] willing to begin to create a new order of things (Garvey 409)."

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