Shari'a in SOUTH AFRICA

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What will subjecting Muslim Personal Law to a bill of rights do for South African Muslim women?

Muslim Personal Law (MPL) is often practised to the detriment of Muslim women in many countries. 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 MPL has been coined by various Muslim countries and jurists because it pertains to, among other subjects, marriage, divorce, inheritance, polygyny, custody and guardianship which fall under the category of family law. Moreover, it is interesting to note that *all* laws affecting the status of Muslim women have historically been relegated to MPL (private sphere) 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. During this period the *Qur'anic* norms underwent considerable dilution, often to the detriment of women. 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.

The current situation in South Africa, where there is as yet no enacted code of MPL, presents a unique opportunity for its implementation to the advantage of women. South African Muslim women have the same status problems in the private and public spheres of life as their non-Muslim (Western) counterparts but it is alleged that, as members of a religious community, they experience another inequality. This double inequality has resulted in a dichotomy between their roles as citizens of a nation and as members of a religious community. The current position in South Africa will be assessed followed by a comparison with the constitutions of various Muslim countries.

History of MPL in South Africa

The first Muslims 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. Despite having been granted freedom to practise their religion since 1804, Muslims could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently, more than 300 years later. It is anticipated the rapid changes taking place in South Africa since the elections of 1994 will rectify this situation expeditiously.

Muslims only constitute an estimated 1.1% of the total population. This figure is approximated at 500,000.

There are various institutive bodies of experts on Islamic law, namely *Ulama* (religious) bodies located in the provinces of Natal, Transvaal, Western and Eastern Cape. Their decisions are of a binding nature on the conscience of Muslims, but their competence to apply Islamic law is questionable as they do not necessarily have accredited

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legal training and they also lack the legal power to enforce it. This is due to the non-recognition of MPL.

The previous minority government enquired into MPL through the South Africa Law Commission Project 59 on Islamic law marriages and related matters. The present government of national unity has taken this one step further in that the interim 1993 Constitution of South Africa, which is to be fully implemented by 1999, not only guarantees freedom of religion and belief (s.14(1)) but also makes 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)) and for the recognition of Muslim marriages (s.14(3)(b)). The government has as yet not given any directive to any official body to investigate the legal recognition and formulation of MPL.

It would appear that the various Islamic bodies, *Ulama* bodies and relevant organisations have now finally, in the light of the new political set-up in South Africa, reached consensus on the recognition of MPL. This process was concluded by the Muslim Personal Law Board being inaugurated on 14 August 1994 in Durban, South Africa. This Board was founded to initiate the incorporation of MPL into the South African judicial system and to deal with matters relating to its application, interpretation, scope, content, functioning, implementation and administration.

The possibility of dual/parallel systems of courts, and the fact that these could invariably contradict the concept of equality and the serious constitutional implications this might have for Muslim women who seek redress for constitutional inequalities originating from MPL, will not be addressed here.

Draft Bills are in the process of being prepared by members of the Board. Some controversy surrounds the founding, representativeness and composition of the Board. While this may highlight the issue of transparency, broader inclusivity and that *women's* experiences should have consideration in drafting any proposals that affect them, does not detract from the validity of the Board which emphasises participation by individual organisations.

Why is there a problem?

The big question now is whether MPL is going to be subject to or exempt from the same Bill of Rights which provided legitimacy for it in the first place? Is the South African Constitution going to be supreme (s.4) or is MPL, once recognised, going to be treated as inviolable? Emphasis is placed on the equality clause (s.8). There are varying interpretations of this. Problems arise in that this uncertainty has serious implications for Muslim women in the traditional formulation of MPL which accords them an unequal status to men. It has to be clarified that while Islamic law and MPL endorse this inequality, Islam and the South African Constitution do not. Hence, subjecting MPL to the Bill of Rights indirectly makes it compatible with Islam. Although freedom of religion and equality between the sexes are both rights guaranteed by the Constitution, the Bill of Rights has failed to address the apparent conflict between these two rights. What is going to be done about new laws in favour of women and covering the area of oppression within the family which fall outside the ambit of MPL?

Generally, Muslim women face an awkward dichotomy and duality between their roles as citizens of a nation and as members of a religious community. While commercial and other codes were easily secularised, MPL remains governed by religion. It is as a result of this that MPL conflicts with the constitutions of Muslim majority and minority countries because while MPL guarantees equal rights to all citizens, these constitutions privilege men over and above women in the areas covered by these personal laws, resulting in inequality of the sexes.

In the light of current constitutional developments in South Africa, it seems that local Muslim women will soon have to face and resolve the same problems encountered by Muslim women worldwide if MPL is given due recognition.

The United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) provide equally for religious and women's rights but neither document foresees a potential conflict between the two kinds of rights. Other international measures include the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1980 to which many modern Muslim (e.g. Egypt) and non-Muslim countries (e.g. India) are signatories but which have placed reservations on certain of its Articles where it conflicts with MPL.

South Africa has only very recently become a member of the United Nations and signatory to CEDAW. Although the Bill of Rights states that a court of law must take cognisance of all international law applicable to the protection of human rights when interpreting its provisions, it remains to be seen whether our newly established Constitutional Court will interpret the Bill of Rights with regard to CEDAW provisions.

Women in South Africa should be wary of legislation and reminded that the Bill of Rights is a double-edged sword whose high sounding language of equality and rights is not always translated into justice. Regard must also be had to the definite conflicts that exist between MPL and substantive South African law and potential conflicts with the Constitution.

It remains to be seen whether South Africa will follow the trend in Muslim countries and sanction the inequalities present in MPL. Although there is evidence in the Constitution to the contrary (e.g. ss.4(1), 35(1) and 35(3)), there is more evidence, constitutional and otherwise, to support the view that MPL will be exempt from the Bill of Rights once it is recognised. There is a limitation clause (s.33(1)) in the Constitution which implies that MPL, once recognised, could limit the Bill of Rights. Other supporting factors include the following. It appears that if the provisions of the Bill of Rights are only enforceable against the state (vertically) in South Africa then it would be very difficult for Muslims to challenge an 'unreformed' MPL. It is clear that potential conflicts between the two fundamental rights of gender equality and religious freedom have not been resolved by the new Constitution even though there existed an awareness of these conflicts. Neither has international human rights legislation succeeded in resolving the conflict between women's rights and religious rights.

What needs to be done?

In the final analysis, the issue of reform as far as MPL is concerned has been left squarely in the hands of Muslim religious authorities. In South Africa most of them have no real local legal expertise and therefore close co-operation between these authorities and the legal profession is essential. International efforts in this regard show that reforming

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this is not the case. 'Managed evolution' turns out to mean, centrally, the choice of one *economic* theory over another as the fundamental structuring decision.

The essentially economic nature of 'managed evolution' can be seen in the Report's recommendations for direct, if limited, Federal Government expenditure to create the demand — the 'consumer pull' — that the Report envisages is the fundamental structuring method. The first concerns expenditure: it commits the Federal Government to provide broadband connections for schools, libraries, medical and community centres, initially to the Telstra and Optus broadband cable networks as they are rolled out for Pay TV, on a dollar-for-dollar basis with the States/Territories. The second concerns consumption: it recommends that the Federal Government become a 'leading edge user' of the new interactive services as they become available.

If, as Beck points out, earlier expressions of the ideology of progress sought to efface the negativities that accompanied past techno-economic development by dealing with them as mere 'side effects', the BSEG Report illustrates that contemporary expressions of the ideology must admit the inevitable and structured character of 'bad effects', if only to dissolve them again in the solvent of appropriate management by the market.

Non decision 'decision making'

Implementation of the Report's recommendations is through new Federal Government administrative bodies capable of 'brokering' deals amongst economically significant interests.

Even if it is argued that the choice of economic strategies discussed above is itself political, the Report's resolution mode fails to invoke even the formal mechanisms of parliamentary decision making.

> Australia needs a strategy for dealing with the dilemma. A central element of that strategy should be a managed evolutionary approach, building on opportunities offered by existing services and infrastructure. The strategy must also be based on an environment in which the participants can be brought together in the public interest and policy developed in response to changing technologies and services. Coordination between all participants will be vital to ensuring that Australia is prepared for the future. [BSEG Final Report, p.ix]

Although this essentially corporatist mode of policy making is much favoured in Australia — e.g. the Accord — it has to be recognised that its peculiar 'politics' do not take place in any open forum, and are basically those of an executive 'deal' forged among the economically significant players and then presented for ratification by the majority party in Parliament as a *fait accompli.*

The Report's reliance on corporatism can be seen in its recommendation that the strategy for techno-economic development in our era not be widely debated amongst citizens, but be 'led' by an advisory and consultative council, the National Information Services Council which, under the chairmanship of the Prime Minister, would bring together 'industry, carriers, service providers, consumers and researchers'.

There is something more than a little 'ancient' in the picture painted here of god-titans battling overhead, while mortals quake in fright, awaiting their fate below.

References

1. The scheme is based on a National Classification Code to be administered by the Classification Board. The Board and Code will be created by the Classification (Publications, Films and Computer Games) legislation but will not operate until the States and Territories enacted complementary legislation.
2. Beck, U., *Risk Society: Towards a New Modernity,* Sage Publications, London, 1992.

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the law, although partly effective, is not necessarily the complete answer. Alternative means of improving the status of women should be looked at where law reform may not be appropriate. It may be that gradual social reform within the Muslim community is the only hope for Muslim women who need to become more effective participants in Muslim society and be made aware that while Islamic law and MPL endorse inequality, Islam and gender equality are not necessarily in conflict.

A review of the situation in a number of Muslim states supports the contention 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. 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 really redress the plight of women in countries where it does exist. Much can be learnt from the Indian and Turkish experiences in this regard. The process of reform needs to be set in motion and addressed in line with the true *Qur'anic* spirit. It must take place in the context of an evolving South Africa where regard must be had to its peculiar circumstances.

The relationship between constitutional law and MPL must be very carefully considered. The Constitution cannot protect MPL if the necessary justification and legitimation for it is lacking. Although there are arguments to the contrary, it is generally hoped that MPL, once in force, will be subject to and not exempt from the final South African Constitution in terms of the provisions of the Bill of Rights which made provision for its legitimacy in the first place. It is a foregone conclusion that the state has undertaken to guarantee freedom of religion and belief only in so far as it does not violate other fundamental rights of its citizens. Failure on the part of the newly established Muslim Personal Law Board to address and resolve the challenges facing it would result in upholding the *status quo* of MPL, namely, to continue to exist and function independently of the South African law. At the very least, it should enable Muslim women theoretically to exercise a choice in this regard.

In reality the vast majority of Muslim women are subjugated by men and male dominated *Ulama* bodies who continue to regulate their lives along the traditional interpretations of Islamic law. For these women there is no choice. Subjecting MPL to the Bill of Rights will guarantee that whatever the final outcome of a code of MPL will be, it will provide for equality between the sexes and simultaneously allow for the achievement of this goal to be left in the hands of Muslims. An opportunity exists in South Africa for the implementation of MPL to the advantage of women and it is the duty of the state to ensure this.