

## MPL IN SOUTH AFRICA

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A.

The issue of MPL in a Muslim minority situation is a complex and daunting matter. The main problem experienced herein is the issue of sovereignty of the State and its law apparatus as well as the scope of the application and functioning of MPL.

In our Islamic order, Nonmuslim minorities in Muslim majority countries had and still have separate legally recognised family and personal law codes enacted on their prescription by Muslim majority governments. Muslim governments have no say in the content of these codes. There is even non-interference in the sectarian setup of these faiths and each sect has its own system legally recognised by the State. In fact, the process is more widespread in that all matters of religious education, endowments etc are all run by these minorities according to their Faiths' requirement.

This unusual form of the practice of the freedom of religion and religious values virtually do not reach the media in all its forms; probably for obvious reasons. The UN and thus international law only intervened herein from 1945 onwards.

However, when the process is reversed, a Muslim minority anywhere has no such right – it must take what the majority Nonmuslim authority is prepared to give. Very few Muslims concern themselves with this very important point.

The only exception here is the government of Singapore who has enacted a law, called the Muslim Administration Act in 1968 governing Muslim affairs which Muslims themselves control. A *shari`ah* court already exist in Singapore since 1966. This despite Muslims accounting only for 16% of the Singaporean population.

Islam started off in South Africa in opposition to the governing authority, the latter of which, initially at least, was imbued with the awful legacy of Crusader thought and active anti-Islam and anti-Muslim philosophy in government. As such it did not enjoy full legal recognition of its system of MPL. In fact, the Dutch ruling colonial authority was at war with some of their countries of origin and it is unthinkable that any form of tolerance to Islam would be found.

There are no records on the early Muslim system of application of MPL in South Africa. The system followed the prescriptive regulations thereof as contained in the *fiqh* works and practice was strictly sectarian being either *ḥanafī* or *shāfi`ī*. There are no written records of MPL be it marriage, baptism or divorce to be found in the government's archives, nor, to my knowledge has any mosque or Muslim institution any such records dating from 1666 till 1940. This contrasts sharply with certain Christian denominations that have such records dating from the 1700's.

Religious bodies were formed rather late in Muslim existence at the Cape where the MJC was founded in 1945<sup>1</sup> at a meeting of Muslim religious leaders held at the St George's Hall in Victoria Street, Cape Town primarily to solve the *ḥanafī* / *shāfi`ī* dispute. There was a call then from that meeting to have Muslim marriages recognised by the State. A clear indication then already of the legal status and resultant problems non-recognition caused. The northern 'Ulamā' councils were founded in 1923 in Natal (now KZN) and in the former Transvaal in 1950<sup>2</sup>. Since then many other Muslim organisations and persons called for the recognition of MPL<sup>3</sup> in various forms and at various times till this present day.

These were all unheeded by the governing authorities then. Since *apartheid* was the governing law and since MPL could never be applied racially, the governing authority would not respond positively to MPL recognition without creating a crack in its governing policy. Thus all calls for recognition which had the remotest chance of cracking the *apartheid* wall were rejected.

In the 1980's, when the end of *apartheid* was in sight, the SA government gave an instruction to the SALC to see how far Muslim marriages and resultant consequences could be incorporated into the SA legal system. The instruction was for incorporation/assimilation and not for a separate form of MPL recognition and functioning

At the fall of *apartheid* and with it the white minority administration of SA, a new democratic system of government based on universal suffrage was introduced.

The process started with CODESA (Convention for a Democratic South Africa) which came into being with the Declaration of Intent of 20/12/1991<sup>4</sup> and finally culminated with the adoption of the South African Constitution Act, Act 108 of 1996 by the first democratically elected parliament of South Africa.

The CODESA process laid the foundation for the later product of the Interim Constitution of South Africa, Act 200 of 1993 under which the first inclusive general election based on adult universal suffrage was held.

This constitution, for the first time in South African constitutional history, recognised other than civil marriages as lawful and it states: *Nothing in this chapter shall preclude legislation recognizing a system of personal and family law adhered to by persons professing a particular religion...concluded under a system of religious law subject to specified procedures.*<sup>5</sup>

However, after the elections, the Working Committee drafting the new constitution which would replace Act 200 of 1993 changed this clause fundamentally. It now added marriages of "other recognised traditions" as well as restricting all religious and customary personal law systems to be "consistent with the Bill of Rights"<sup>6</sup>

The interim constitution allowed participation in cultural life of a person's choice<sup>7</sup> but the Working Draft of the new constitution added to this rule that such can only be done without violating the rights of anyone else.<sup>8</sup>

<sup>1</sup> Davids A: *Mosques of Bo-Kaap*, p. 56

<sup>2</sup> Mahida: *History of Muslims in South Africa* pp 56 & 70.

<sup>3</sup> South African Law Commission: Note and Appendages, Pretoria, Re: 7/2/1/59 dated 07/07/1993.

<sup>4</sup> Hough M & Du Plessis A: *Selected Documents and Commentaries on Negotiations & Constitutional Development in the RSA 1989-1994*, Pretoria: Institute for Strategic Studies, University of Pretoria, 1994,

<sup>5</sup> Act 200 of 1993, Chapter 3, Clause 3(a)(b).

<sup>6</sup> *Working Draft of the New Constitution*, Chapter 2, Clause 3.

<sup>7</sup> Act 200 of 1993 Chapter 3, Clause 31.

There was no way the public could express an opinion herein through the ballot box as the election was over already.

The issue that would fundamentally affect MPL was the equality clause which prohibits what it calls discrimination on the grounds of gender, sex and sexual orientation, amongst other things.<sup>9</sup> However, the new constitution confirmed that equality clause but added a rider that “*Discrimination on one or more of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair.*”<sup>10</sup>

With the State now subjecting all religious, customary and traditional marriages to the BOR, the die had been cast that MPL will only be allowed to function within the limitation of the SA constitution and specifically the BOR. It appears that some of the *‘ulamā’* were not really aware of this.

This in turn virtually obligated the SALRC<sup>11</sup> (South African Law Reform Commission), when considering the incorporation of Islamic marriages and consequences into South African law, to do so as to conform to the new constitution i.e. Act 108 of 1996, as amended, and especially the BOR.

The issues of *wilāyah*, *ḥaḍānah*, *ṭalāq*, and *mīrāth* as well as marital property division after ending of a marriage would be affected. For some this could be quite serious.

The main argument I have against the conducting of the enquiry by the SALRC is that it concentrated mostly on organisations, although some individuals also responded. This is a fundamental flaw as organisations, including judicial bodies, represent their members who mandate them to serve their organizational interests.

A better way to have gone was to have a public commission of enquiry so that all those who dealt with MPL could give their views as well as those on whom it was applied. This would have laid bare the problems as well as wishes and expectations of those who came forward to present their views.

This proposition was made to the late Mr Omar, first Minister of Justice in the Mandela cabinet. It was refused on the grounds that it will be too costly. A separate MPL system for Muslims was not acceptable either as duplicating will be costly. The SALRC rejected *sharī`ah* courts which were requested by many organisations including the Muslim judicial bodies of South Africa, virtually on the same grounds.<sup>12</sup>

The consequences hereof would be felt later as, due to the delay in bringing the MPL enquiry to a final practical conclusion would give rise to historic, but painful, representations to the courts for relief by aggrieved Muslim wives and widows married only according to Islamic Law in matter of either Islamic marital property, succession, compensation and the like. However, in the absence of actual Islamic compliant legislation on these issues, the danger exist that the ruling may be anti-*sharī`ah*.

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<sup>8</sup> *Working Draft of the New Constitution*, Chapter 2, Clause 30.

<sup>9</sup> Act 200 of 1993, Chapter 3, Clause 8(1)(2)

<sup>10</sup> *Working Draft of the New Constitution*, Chapter 2, Clause 8(1)(2)(3).

<sup>11</sup> Previously known as the *South African Law Commission*.

<sup>12</sup> South African Law Reform Commission: *Project 106: Islamic Marriages and Related Matters Report*: Pretoria, July 2003. p. 6

B.

When the SALRC finally issued a report entitled *Report on Islamic Marriages and Related Matters*<sup>13</sup> in July 2003, as expected, strong objections were raised against some of its recommendations. These reflect, overall, the *fiqhī* school of thought the objectors belong to. South African Muslim society is, of course, still very strictly *madhhab* observant.

The actual report does not recommend any constitutional amendment(s) to facilitate MPL's functioning as a community's religious based law and thus all recommendations made in this regard were not positively acknowledged by SALRC. Whether this reflected the then governing authority's view is unknown.

However, within the framework of Act 108 of 1996 as amended, the Commission appears to have tried to accommodate quite divergent recommendations.

The report appears to be amenable to recommendations made in matter of marriage issues but not in divorce and issues consequential thereto. It is quite glaring that it recommends that the strict Quranic law on polygyny be observed but does not apply this same strict observation to other Quranic laws.<sup>14</sup>

The main issues which may cause varying degrees of problems in MPL, as set out in the said Report, are:

- Spousal status in a Muslim marriage.
- Children's status born outside a Muslim marriage.
- The ending of a Muslim marriage and its regulation.
- Enforcing obligations in a Muslim marriage including maintenance.
- Issues of custody and access.
- Proprietary consequences of a Muslim marriage and its termination.<sup>15</sup>

These are problems which all Muslim judiciaries as well as social welfare organisations deal with daily and for which no guaranteed enforceability exists. These institutions have only persuasory powers, which in our days have quite limited effect.

The basic issues the proposed Muslim Marriages Act deals with are:

- a. Situations under which this Act will apply; for example, a Muslim marriage contracted before and after this Act had been written into law but which will not apply to marriages registered in terms of the Recognition of Customary Marriages Act, Act 120 of 1998 nor to a civil marriage solemnize under the Marriage Act after the proposed Muslim Marriages Act had become law.<sup>16</sup>

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<sup>13</sup> South African Law Reform Commission: *Project 106: Islamic Marriages and Related Matters Report*, Pretoria, July 2003.

<sup>14</sup> *Report on Islamic Marriages* p. 9.

<sup>15</sup> *Ibid*, p. 6

<sup>16</sup> *Muslim Marriage Act* Section 2

- b. Both husband and wife will have equality in human dignity, full status, capacity and financial independence.<sup>17</sup>
- c. The Act pronounces on marriage age and rules it as prescribed in the Age of Majority Act, Act 57 of 1972.
- d. A certificate of registration of a Muslim marriage will be issued after solemnization of a marriage.<sup>18</sup>
- e. Only civil courts will be allowed to dissolve marriages contracted under the Act on any grounds permitted in Islamic Law. In this regard, the husband must register a *ṭalāq bā'in* (irrevocable divorce) with a marriage officer in the magisterial district nearest to the wife's residence and in her presence or her authorised representative and two witnesses. Willful and knowing disregard for this will incur a fine of R5000.00. The marriage officer cannot register the *ṭalāq bā'in* if there is a dispute in the validity of said *ṭalāq* until such had been resolved. Fourteen days after registering this *ṭalāq*, a spouse must institute legal proceedings in the required court for confirmation of the dissolution of the marriage by *ṭalāq*.<sup>19</sup>
- f. *Faskh* can only be granted by the court on application from the wife. The reasons for *faskh* is very wide and is obvious that not only one *madhhab* is reflected here. The court is under obligation to grant the *faskh* if the reason for granting it is found.<sup>20</sup> This effectively means that *faskh* procedures are taken away from all Muslim organizations.
- g. In the case of *khul'*, both parties must appear before the marriage officer and cause it to be registered in the presence of two competent witnesses.<sup>21</sup>
- h. On dissolution of the marriage the court will apply relevant sections of the Divorce Act, Act 70 of 1979, as amended, in matters of provision of minor children from the marriage and spousal maintenance in terms of the Divorce Act<sup>22</sup> and Matrimonial Property Act of 1984<sup>23</sup>. The mutually agreed division of marital property will be made an order of the court including the maintenance agreement for the other spouse. Pension interest is included in the distribution of marital assets at dissolution of the marriage. In the absence of a mutually agreed division of assets, the court will distribute the assets equitably. The court also has discretion of *mut`ah al-ṭalāq* (settlement) under circumstances permitted in Islamic Law.<sup>24</sup>

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<sup>17</sup> Ibid Section 3.

<sup>18</sup> Ibid Section 10.

<sup>19</sup> *Muslim Marriage Act* Section 9.

<sup>20</sup> Ibid Section 9(4)

<sup>21</sup> Ibid Section 9(5)

<sup>22</sup> Divorce Act, Act 70 of 1979, Sections 7(1), & (7) and 7(8).

<sup>23</sup> Matrimonial Property Act, Act 88 of 1984., Section 24(1)

<sup>24</sup> Muslim Marriage Act Section 9(7)(8).

- i. In custody and access to minor children in the case of dissolution of marriages, the view of Islamic Law herein as well as that of the Family Advocate of the High Court and the interest of the minor child shall be considered. A court order herein can be later varied or even rescinded.<sup>25</sup>
- j. For disputes there is compulsory mediation before a Mediation Council as well as for arbitration in terms of the Arbitration Act, Act 42 of 1965.<sup>26</sup>
- k. Matters arising from a registered Muslim marriage and referred to the court for adjudication shall be heard by a Muslim judge appointed by the Judge President of that specific court division and such a judge will be assisted by two Muslim assessors who have specialized knowledge in Islamic Law. If no Muslim judge is found then a Muslim advocate or if such is not found, then a Muslim attorney of at least 10 years standing will be appointed.<sup>27</sup>

There are other issues in the Act, but these are the main ones.

This is where the proposed law now stands.

As is known an application was brought to the Constitutional Court by the Women's Legal Centre for an order ordering the government to enact enabling legislation which will recognise Muslim marriages primarily to give effect to constitutional obligations of government in this matter and specifically for Muslim women in Muslim marriages.<sup>28</sup>

Government will probably not do anything until such time as the Court issues a ruling. In fact, in papers before the Constitutional Court, the respondents are opposing the application and ask that it be dismissed with costs.<sup>29</sup>

C.

Possible future of MPL:

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<sup>25</sup> Ibid Section 11(1)(2)(4)

<sup>26</sup> *Muslim Marriage Act* Sections 13 & 14.

<sup>27</sup> Ibid Section 15.

<sup>28</sup> The applicant states the following in its submission to the Constitutional Court (Case No: 13/09: *On 19 February 2009 the applicant instituted proceedings in this Court in terms of section 167(4)c) of the Constitution of the Republic of South Africa ('the Constitution), alternatively in terms of section 167(6)(a) of Constitution, against the President and Parliament. The application arises from the absence of an Act of Parliament providing for all Muslim marriages to be valid marriages for all purposes in South Africa and regulating the consequences of such recognition. The applicant alleges that between them the President and Parliament are constitutionally obliged to prepare, initiate, enact and implement such an Act. The application is aimed at orders requiring, ultimately, the implementation of the Act within 18 months.*” See applicants paper dated 15<sup>th</sup> April 2009 Paragraph 2 pp 2 – 3.

<sup>29</sup> Case No: CCT 13/09, Submission for and on behalf of the President and Ministers of Home Affairs and of Justice of the Republic of South Africa dated 30<sup>th</sup> April 2009, p. 32 Paragraph 49.

- a. The very first point to note is that the SALRC's report on Muslim Marriages was presented to the government in July 2003 and till today government made no decision on it. This is, by any standards, a dereliction of governmental duty. Whether the present application to the Constitutional Court is the best way to tackle this issue or not is actually immaterial as serious problems with MPL application are still found.
- b. It is suggested that the CODESA round of talks did not really have open and united Muslim participation in the process of laying down principles for the new interim constitution. That flaw will haunt the entire process and application for MPL for many years in this country.
- c. If Muslims want *sharī`ah* courts in South Africa for the application of *sharī`ah* based MPL, then there must be constitutional amendments and especially exemptions in the BOR. That, at this point in time, seems too far off. It must further be borne in mind that a *sharī`ah* court can only function properly if Muslims have an autonomous national body which governs all Muslim matters intimately related to their religion as is the case with Singapore where the Muslim Administration Act brought forth such a national body for Muslims. This national Muslim council of Singapore administers all issues pertaining to Muslims' personal law, its application and administration, including the *sharī`ah* courts and appointing the *quḍāt* of these courts. They also collect the *zakāh* and, *zakāh al-fīṭr* as well as seeing to the *awqāf* and all *masājid* and related social institutions. This is presently impossible in South Africa. What the Constitutional Court will decide we do not know, but we should know that some form of MPL recognition will have to be effected sooner than later. In this regard, even with the present proposed Muslim Marriages draft bill, some points of which had been raised previously, it is possible to continue with the application of MPL. The other and only alternative is to leave matters as it is and that is untenable even in a *sharī`ah* sense. In this matter the following is proffered:
  - d. I personally feel we can find some way of improving the situation of the application of MPL here in SA with the present proposed bill.
    - a. One cannot find fault with the spousal status in the setup such as human dignity for each, full status, capacity and financial status. There is nothing in *sharī`ah* that causes a Muslim woman to lose her status on marriage, nor is her husband her agent or representative in any matter of contract or the like. The only issue that arises may be the issue of custodial guardianship, but even here, we may note that the pre-invasion Iraqi law gave her full right of decision making when she is the custodial guardian and acts in the interest of the minor.
    - b. Children born in a Muslim marriage will be legitimate with all the consequences that entails. The only problem we may have is with the issue of children born out of wedlock. There are, of course, various kinds of such children in *sharī`ah* – those born of fornication (which is sexual relations between unmarried persons),

those born of adultery (which is an issue from adultery between married persons or a married person and another) and those born from incest. The latter two cannot be legitimized while there is a majority and minority view in the case of fornication.

- c. There is nothing wrong with the process of registration of marriages nor its termination. Islam has never condoned sinful behaviour in this regard. Legitimate *ṭalāq* will have no problem as well as legitimate *faskh*. In fact, the reasons for *faskh* in the bill is *sharī`ah* compliant. In the matter of sinful *ṭalāq*, a deterrent is necessary and the proposed bill is silent on it.
- d. The issue of custody is different as reflected in *fiqhī* rulings on *ḥaḍānah*. However, the *shāfi`ī* ruling is choice by minors of both genders of 7 years and older with which parent to reside. In any event, according to all the *madhāhib*, the best interest of the minor is paramount in any case of *ḥaḍānah*. It is not an automatic right pasted onto any person. It should also be noted that the social fabric of Muslim society in Nonmuslim majority countries have changed. It is not like the 8<sup>th</sup> century Muslim world. It is a known rule in *fiqh* and *fatwā* that if the social conditions change and a ruling was based on social convention or structure, then that law changes with the change of practice.
- e. Maintenance of wives in marriage and that of minor children until they become self-sufficient is required *shar`an*. It is what is meant by maintenance that is important in a *sharī`ah* sense.
- f. The dissolution of marriage being registered with the court is not a problem. We are notorious for not keeping records of this kind. It is the proprietary consequences of dissolution that is so heatedly debated and it is very sharp in sections of communities where the males are rich. In this regard, to remove the sting from this requirement, the commission should have opted for imposing compulsory marriage contracts. Such contracts should then be required to mention the *ṣadāq* and the *mut`ah tafriq* (settlement at dissolution). To prevent short circuiting the aims of this process, a minimum *ṣadāq* should be imposed which should be adapted whenever necessary in the light of the CoL. For example, someone who earns R3000 a month must be liable for a *ṣadāq* of 20% of 3 year's gross wages which means the *ṣadāq* will be R21600, payable as the parties decide which is usually a nominal agreed down payment at marriage, say R500 and the rest either by agreed installments into an investment account in the name of the spouse or the full amount on divorce or paid into her estate at death if the spouse survives her. The issue of settlement is known in *sharī`ah*; in fact, the *Qur`ān* itself mentions it and some *fuqahā`* obligates it for all forms of *ṭalāq*. Such settlement can be decided before marriage or the law must impose percentages. This will keep this issue greatly *sharī`ah* compliant. This arrangement of a substantial *ṣadāq* will also act as a strong deterrent against sinful divorce i.e. divorce without valid cause. In addition to this, the law should obligate settling

*ṣadāq* debt of one spouse before being allowed to marry another. This in itself will also be a strong deterrent against sinful divorce. This is common practice in many Muslim countries nowadays.

Finally, it must be borne in mind that sovereign authority is required for enactment of many Islamic Laws. In a minority situation, you do not have any sovereign authority.

This is the big issue facing Muslim minorities world wide. There are only two ways of dealing with it. Live with a limited level of permissibility or, leave for somewhere else where you can find comfort with another system.

There is definitely not a third option in a minority situation.

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