

MUSLIM PERSONAL LAW IN SOUTH AFRICA: “UNTIL TWO LEGAL SYSTEMS DO US PART OR MEET?”

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SUMMARY

South Africa is one of the most prominent examples of pluralism providing recognition to traditional customary and religious law. South Africa's commitment to legal pluralism is an important development because it reflects not only constitutional dedication to multiculturalism but also a political and functional need for incorporating traditional and religious legal systems.

The legal recognition of Muslim Personal Law in South Africa provides an ideal case study on legal pluralism supported by a multicultural constitutional process. Over 15 years of democracy have passed and the draft Muslim Marriages Act has not yet been introduced into legislation. The issue of legal recognition of Muslim Personal Law in South Africa has highlighted the difficulties that arise when balancing the commitment to individual human rights and religious rights.

This paper explores the question: What is the future of Muslim Personal Law in South Africa? Since the draft Muslim Marriages Act has not yet been enacted into legislation, it presents an opportunity to re-examine and rethink how to implement religious law effectively in a secular state. This is discussed in the paper by presenting various multicultural and pluralistic jurisdictional family law models, which look at the key relationship between civil and religious authorities.

1 INTRODUCTION

Dr Nelson Mandela, the first democratic president of South Africa, said in a public address to Muslims in Cape Town that, “We (ANC) regard it highly insensible and arrogant that the culture of other groups can be disregarded. The ANC has pledged itself to recognize Muslim Personal law.”¹ The South African Law Reform Commission was tasked to investigate the legal recognition of Muslim personal law.² In July 2003 the Commission released a

¹ Toffar *Islamic Family Law in South Africa* (A talk given at the International Islamic University of Malaysia) 2 July 2008.

² See South African Law Reform Commission Report on Islamic Marriages and Related Matters, Project 106 (2003).

draft Muslim Marriages Act.³ To date the Bill has not yet been introduced into legislation.

South African literature abounds with a plethora of articles dealing with the recognition and implementation of Muslim Personal Law in the context of the Bill.⁴ The central debate in almost all of these articles is the difficulties that arise when balancing the commitment to individual human rights and religious rights. Kristin Henrad⁵ correctly points out that in regard to the recognition of Muslim marriages:

“The central discussion is focused on gender discrimination in its manifold expressions within Islam and thus raises the difficult question of how to find an appropriate balance between the right to religious identity (section 31) and religious freedom (section 15) on the one hand and the central principle of equality in the constitutional order on the other hand. In other words, the central question is how the integrity of Muslim principles can be maintained while being in conformity with the dominant legal system.”

Most of these authors simply theorize how the Bill can be accommodated within a constitutional democracy. They all support the idea of the recognition of Muslim personal law through the implementation of the Bill. In my paper I break ranks with my learned colleagues by suggesting that the fact that the Bill has not yet been enacted into legislation, presents an opportunity to re-examine and rethink how to implement religious law effectively in a secular state. This is done in the paper by presenting various multicultural and pluralistic jurisdictional family law models. The paper generally explores the question: What is the future of Muslim Personal law in South Africa?

The paper proceeds as follows: Part 2 deals with an overview of legal pluralism in South Africa, which provides the foundation for the recognition of Muslim Personal Law⁶. Part 3 deals with various multicultural and pluralistic jurisdictional family law models, namely, the present Draft Muslim Marriages Act; Shariah Courts; Arbitration Councils; Independent Tribunal Councils; and Ayelet Shachar's Transformative Accommodation Model⁷ by which South African law can accommodate religious law while upholding group rights and individual liberties and interests. My aim in the paper is not only to focus on the relationship between the state and the Muslim community, but also to take into account the dynamic relationship that exists but is sometimes overlooked amongst the state, the group and the individual.

³ Draft Muslim Marriages Act will hereinafter be referred to as the Bill.

⁴ Denson “Non-Recognition of Muslim Marriages: Discrimination and Social Injustice” 2009 *Obiter* 243; Amien “Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages” 2006 *Human Rights Quarterly* 729; Rautenbach “Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa” 2004 2 *PER* 1; and Cachalia “Citizenship, Muslim Family law and a Future South African Constitution: A Preliminary Enquiry” 1993 *THRHR* 392.

⁵ “The Accommodation of Religious Diversity in South Africa against the Background of the Centrality of the Equality principles in the New Constitutional Dispensation” 2001 *Journal of African Law* 63.

⁶ Hereinafter “MPL”. MPL deals with marriage, divorce, custody, maintenance and inheritance.

⁷ Shachar *Multicultural Jurisdictions Cultural Differences and Women's Rights* (2001) 117.

2 OVERVIEW OF THE OPERATION OF LEGAL PLURALISM IN SOUTH AFRICA

South Africa today is one of the most prominent examples of pluralism providing recognition to traditional customary and religious law.⁸ The history of colonial legal pluralism in South Africa is documented in many books and articles.⁹ A historical and in-depth discussion and analysis of legal pluralism is beyond the focus and scope of this paper.

Muslims coming from all parts of the world have occupied the soil of South Africa for more than 300 years. Throughout the colonial period the personal law of Muslims was given no recognition. If Muslims wanted a legally recognized marriage and legitimate children, they had to enter into a civil marriage, recognized under the secular law of the land. The large majority of Muslims resorted to marrying in mosques according to the prescripts of Islamic law and in the presence of a male congregation. There was no registration of these marriages and regrettably no official archive records exist. This process of marriage still operates today, except that registration of marriages took place by Muslims from around the 1950s. Owing to the social and political inequalities prevailing in South Africa, improvements occurred within the Muslim community with the formations of informal judicial councils. Initially the councils concerned themselves with mosque affairs but later dealt with marriage and divorce.¹⁰ These judicial councils still regulate the operation of MPL to date.

This unofficial operation of MPL is referred to by legal pluralism scholars as "strong legal pluralism".¹¹ According to Griffith,¹² in "strong" legal pluralism not all law is state law not administered by state institutions, and law is therefore neither systematic nor uniform. It is rather the coexistence of legal orders in a social setting which do not belong to a single system.

The Constitution of South Africa¹³ creates a comprehensive system of rights to cultural, religious, linguistic and traditional communities. Section 15(1) of the Constitution states that, "everyone has the freedom of conscience, religion, thought, belief and opinion." In addition s15(3)(a) states that this section does not prevent legislation from recognizing marriages or systems of personal or family law under any tradition, so long as such recognition is consistent with this and other provisions of the Constitution. Furthermore, section 31 provides for cultural, religious and linguistic communities to enjoy and practice their cultures, religion and language. The

⁸ See, eg. the Recognition of Customary Marriages Act 120 of 1998.

⁹ See generally Hooker *Legal Pluralism An Introduction to Colonial and Neo-colonial Laws* (1975) 1; Prinsloo "Regspluralisme" 1994 *Journal of South African Law* 696ff; and Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* (2006) 5-14.

¹⁰ There are many informal Muslim judicial councils in South Africa. To name a few, there is the Jamiatul Ulama (Gauteng); Muslim Judicial Council (Western Cape); The Majlis (Port Elizabeth) and the Jamiatul Ulama (Natal).

¹¹ See Bekker, Rautenbach and Goolam 6.

¹² Yilmaz *Muslim Laws, Politics and Society in Modern Nation States* (2005) 17 quoting Griffith "What is Legal Pluralism? 1986 24 *Journal of Legal Pluralism and Unofficial Law* 1-56.

¹³ Constitution of the Republic of South Africa, 1996.

proviso is that this is not done in a manner inconsistent with any provisions in the Bill of Rights.

This is a clear example of “state-controlled legal pluralism”.

“In a simplistic sense, this type of pluralism exists where European/Western law (in South Africa, common law) and traditional forms of law operate in a single society and are officially recognized by the state. In other words, at least two officially recognized legal systems run parallel and interact in limited prescribed circumstances.”¹⁴

This state-controlled pluralism plays an important political and functional role by incorporating traditional and religious systems of law. South Africa, therefore, provides an ideal case study on legal pluralism supported by a multicultural constitutional process.

Over the years, South African courts have consistently held Muslim marriages to be invalid because of their potentially polygynous nature.¹⁵ The end of apartheid introduced a new phase of constitutional jurisprudence based on the democratic principles of equality, tolerance and social justice. This has been evident in the landmark decisions of *Ryland v Edros*;¹⁶ *Amod v Multilateral Vehicles Accident Fund*;¹⁷ and *Daniels v Campbell*.¹⁸ In these cases the courts expressed their recognition of the contractual terms of *de facto* monogamous Muslim marriages. Chief Justice Mohamed highlighted this in the *Amod* case when he said the following:¹⁹

“I have deliberately emphasized in this judgment the *de facto* monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not hereby wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open. Arguments arising from the relationship between the values of equality and religious freedom – now articulated in the Constitution in the immediate period preceding the interim Constitution – might influence the proper resolution of that issue.”

The question of duty of support arising from a polygynous Muslim marriage was dealt with by the Transvaal Provincial Division in *Khan v Khan*.²⁰ There, for the first time, a South African court recognized that a legal duty of support exists between parties who have a polygamous marriage.²¹ The court stated that public policy considerations have changed.

“[T]he argument that it is *contra bonos mores* to grant a Muslim wife, married in accordance with Islamic rites, maintenance where the marriage is not monogamous, can no longer hold water. It will be blatant discrimination to

¹⁴ Bekker, Rautenbach and Goolam 6.

¹⁵ See *Seedat's Executors v The Master* 1917 AD 302 and *Ismail v Ismail* 1983 1 SA 1006 (A).

¹⁶ 1997 1 BCLR 77 (CC).

¹⁷ 1999 4 SA 1319 (SCA).

¹⁸ 2004 5 SA 331 (CC).

¹⁹ Par 24.

²⁰ 2005 2 SA 272 (T).

²¹ A common law duty of support exists, as well as the fact that a second wife may claim maintenance in terms of s 2(1) of the Maintenance Act 99 of 1998.

grant, in one instance, a Muslim wife in a monogamous Muslim marriage a right to maintenance, but to deny a Muslim wife married in terms of the same Islamic rites (which are inherently polygamous) and who has the same faith and beliefs as the one in the monogamous marriage, a right to maintenance.”²²

The dilemma of the exclusion of a further wife or wives has also been remedied by the Cape Provincial Division decision of *Hassam v Jacobs NO*,²³ where the court recognized the right of surviving spouses of a Muslim polygamous marriage to inherit in terms of the Intestate Succession Act.

It must be noted that in all of these cases the judiciary has left open the question of the formal recognition of Muslim marriages, deferring the matter of recognition or non-recognition to the legislature. This is one of the motivating reasons why the Women’s Legal Centre Trust²⁴ lodged a constitutional court application to compel Parliament and the President to enact legislation that would recognize Muslim Marriages within 18 months by “preparing, initiating, enacting and implementing an Act of Parliament providing for the recognition of all Muslim Marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition.”²⁵ The Women’s Legal Centre Trust lost the application on the issue of direct access to the Constitutional Court.²⁶ The case received considerable press coverage and raised public awareness about the issues of the recognition of MPL. To date the South African Law Reform Commission’s Draft Muslim Marriages Act is still a Bill.

From all of the above we can see that state-controlled legal pluralism in South Africa does make provision for the official recognition and implementation of MPL. The dynamic relationship that exists between state-controlled legal pluralism and strong legal pluralism provides us with the foundation to re-examine and rethink how we accommodate religious law (in our case MPL) in a secular state.

3 MULTICULTURAL AND PLURALISTIC FAMILY LAW MODELS

Since the Bill is merely a draft and has not yet been enacted into legislation, the South African Law Reform Commission, South African Muslim community and various stake holders need to think how to implement MPL effectively. To path the way forward, it would be useful to examine various other pluralistic and multicultural family law models, which look at the key relationship between civil and religious authorities. These models will be discussed briefly in the paragraphs below, highlighting their strengths and weaknesses. I would like to place a caveat here, that this is by no means an exhaustive list of models, neither is it an in-depth analysis of each model.

²² Par 11.1.

²³ [2008] 4 All SA 350 (C).

²⁴ *Women’s Legal Centre Trust v President of the Republic of South Africa* 2009 6 SA 94 (CC).

²⁵ *Women’s Legal Centre Trust v President of the Republic of South Africa supra* par 1.

²⁶ *Women’s Legal Centre Trust v President of the Republic of South Africa supra* par 3.

3 1 South African Law Reform Commission Proposal: Draft Muslim Marriages Act: Codification of MPL and its enforcement through South African Courts

The present model for the recognition and implementation of MPL is the proposed Draft Muslim Marriages Act (Bill). Before I proceed to discuss other models of religious accommodation, I believe it is important to provide a cursory overview of the Bill and very briefly highlight some of its challenges, as the adoption of the Bill may possibly take place at some time in the future.

The following is a brief overview of some of the provisions in the Bill:

It provides for the recognition of all existing marriages, namely monogamous, polygynous and a civil marriage to a second wife, as well as future monogamous and polygynous marriages. A man who enters into a polygynous marriage has to make an application to court; if he fails to do this he "shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000". The consent of the court is required, and must be granted if the court is satisfied that the husband is able to "maintain equality between the spouses as is prescribed by the holy Quran".²⁷

Registration of all marriages, both monogamous and polygynous, is dealt with in section 6 of the Bill. For marriages entered into before the commencement of the legislation registration is required unless the parties have elected not to have the provisions of the Act apply, while for those entered into after the Act registration is required if the parties have elected to be bound by the Act. Marriage officers are not to register any marriages unless specified identification is produced by the spouses. Unlike other marriage officers they are obliged to inform the parties that they may enter into a contract regulating their marital regime and to provide samples of standard contracts.²⁸ Thus, spouses in future and existing marriages may elect to opt out of the Bill.

Proprietary regime/consequences of all marriages – a Muslim marriage to which the Bill applies shall automatically be out of community of property, excluding the accrual system, unless the parties enter into an antenuptial contract.

Divorce – There are three forms of dissolution of marriage defined in the Bill.²⁹

1. *Talaq*, defined as the dissolution of a Muslim marriage, forthwith or at a later stage by a husband, his wife or agent, duly authorized by him or her to do so, using the word *talaq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *talaq* to a *tawfid al-talaq*.

²⁷ See ss 8(6) and 8(7)(a) of the Bill.

²⁸ Sinclair and Bonthuys "Law of Persons and Family" (2003) *Annual Survey of South African Law* 157.

²⁹ See s 9(2) of the Bill which deals with dissolution of marriages.

2. *Faskh* which means a decree of dissolution of a marriage by a court upon the application of either husband or wife. The Bill also provides a list of grounds on which a *faskh* may be granted – disappearance of the husband, failure to maintain, imprisonment for three years or more, mental illness, impotence, cruelty which renders cohabitation intolerable, withholding of sexual intercourse, polygyny that leads to unjust treatment in terms of the Quran and discord.³⁰
3. *Khula* which is the dissolution of a marriage at the instance of the wife, in terms of an agreement for the transfer of property or other permissible consideration between the spouses according to Islamic Law.

Enforcement of divorce and marriage takes place through courts and marriage officers. A Muslim judge (“Muslim” is defined in section 1(xvii) as a person “who has faith in all the essentials of Islam”) will preside over the proceedings, assisted by two Muslim assessors with specialized knowledge of Islamic Law. If there is no Muslim judge, a practising advocate or attorney with at least ten years’ experience will act as the presiding officer. There is a proviso that in urgent matters a non-Muslim judge may preside over a matter without the assistance of court assessors. Appeals will lie with the Supreme Court of Appeal, but the decision taken on appeal is to be submitted to two specially accredited Muslim institutions for comment on questions of law, to which the Supreme Court of Appeal is required to have due regard.

The Bill introduces compulsory mediation in terms of section 13. In the event of a dispute arising in a Muslim marriage “any party to such marriage shall refer such dispute to a Mediation Council, accredited as prescribed”.³¹ Upon resolution of the dispute, the Council is to submit the mediation agreement to a court, which, if satisfied that the interests of any minor children are duly protected, has to confirm the agreement. If the Council cannot effect a resolution of the dispute, the matter is adjudicated by a court.³²

The Bill also includes arbitration. Section 14 provides that parties to a Muslim marriage in which a dispute arises may refer the dispute to an arbitrator for resolution by arbitration. In terms of section 14(4), “no arbitration award affecting the welfare of minor children or the status of any person shall come into effect unless it is confirmed by the High Court upon application to such court and upon notice to all parties who have an interest in the outcome of the arbitration”. Section 14(5) sets out the considerations that the court must take into account in such an application and also sets out the range of orders it may make. Interestingly, the range of orders the court may make includes not merely confirmation or rejection of the arbitration award but extends also to declaring the whole or parts void, and the right to substitute a different award that the court deems fit.³³

Equality of spouses is provided for in section 3 of the Bill. The Bill also further regulates issues dealing with custody and maintenance. The Bill in

³⁰ Sinclair and Bonthuys 159.

³¹ S 13(1).

³² See Sinclair and Bonthuys 163.

³³ *Ibid.*

addition calls for the amendment of the Deeds Registries Act 47 of 1937, Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990, where the new Muslim Marriages Act will be read into these Acts, thereby recognizing spouses married according to Islamic rites.³⁴

The Bill may provide a few constitutional challenges. For, example: A Muslim marriage is defined as one between a “man and woman” only. This provision may be challenged on the basis that it violates the right to equality in terms of sexual orientation. Some women may feel that polygyny is discriminatory and that polyandry should also be allowed, enabling women to take second husbands. The Bill provides that a husband has to provide maintenance for his wife, but there is no reciprocal duty of maintenance. Muslim men may argue that this provision violates gender equality, as women who are breadwinners should maintain their husbands.³⁵

The Muslim community is split on the issue whether they should recognize the draft Muslim Marriages Bill. Some Muslims are hesitant, even hostile, to the idea. There have been comments such as “allow us to practise our religion without interference from anybody”, the “draft should remain a draft, in fact, shelved for good”, the “discussion paper should be shredded and recycled for use as toilet paper”.³⁶ These feelings manifest themselves within the community because acceptance and acknowledgment of the Bill raise in the minds of many Muslims the question of sovereignty and authority. One of the foundational beliefs in Islam is rooted in the concept of Shahadah, it is that

“God and God alone has the authority to confer rights and impose obligations, which then certainly means that a man-made constitution that does not derive its authority from God is a violation of God’s rightful monopoly on authority. By the same token, any Muslim who recognizes the validity of such a constitution is guilty of attributing legal authority and sovereignty to someone other than God, a clear violation of Islamic monotheism (*tawhid*) and an open act of polytheism (*shirk*)”.³⁷

They therefore believe that it is not possible for non-Muslim judges even though assisted by Muslim assessors to determine matters of Muslim personal status.

However, within this discourse there are Muslims who have no problem with MPL operating in a constitutional dispensation. They believe that the Shariah/Islamic law can operate in tandem with South African constitutionalism without the former being subverted. This, it is argued, may be achieved by invoking mechanisms of Islamic jurisprudence and general principles of Islamic law to render an MPL regime compatible with South African constitutionalism and international instruments concerning the family.

³⁴ See South African Law Reform Commission Report on Islamic Marriages and Related Matters, Project 106 (2003) 131-133.

³⁵ Domingo “Marriage and Divorce: Opportunities and Challenges Facing South African Muslim Women with the Recognition of Muslim Personal Law” 2005 *Agenda Special Focus* 75.

³⁶ Domingo 2005 *Agenda Special Focus* 103.

³⁷ Jackson “Muslims ‘Islamic Law and the Sociopolitical Reality’ in the United States” 2002 *The American Journal of Islamic Social Sciences* 18.

It involves a process of legal reasoning and a theological interpretive methodology which do not infringe upon the sanctity of the Shariah.³⁸

3 2 Shariah courts model

To provide some certainty within the law, there has been the suggestion to have the legislative recognition of a codified system of MPL under the jurisdiction of Shariah/Islamic courts. These Islamic courts would operate alongside South African courts. Proponents of this model argue that Islamic law will be protected from secular law, since it would remain in the hands of the Muslim community.

Dr Toffar in his discussion on the possibility of Shariah courts in South Africa, makes the point that Shariah courts can only

“function properly if South African 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”.³⁹

If Shariah courts are to operate in South Africa based on MPL, constitutional amendments have to be made and once again this court would have to be subject to the supreme law of the land, the Constitution. Another issue would be that of an appeal system. Would the Constitutional Court be the court of final instance? MPL jurisdictionally would therefore not be completely in the hands of the Muslim community.

Although this model is

“plausible, South Africa should be cautious of a plurality of legal systems. Experience in other countries has shown that such a model leads to conflict of laws. Courts are often so caught up in issues dealing with conflict of laws that the real issues disappear in a mist of confusion and perplexity”.⁴⁰

For example, in Kenya Muslim marriage and divorce law is codified, but with great deference to Islamic law generally. The Muslim Ordinance states that Muslim marriages are valid if contracted according to Islamic law. The Ordinance does not define the nature of that law, except to state that the burden of proof is on the party alleging that a practice is in accordance with Islamic law.⁴¹ The Kenyan Constitution also provides for the recognition of Kadhi courts (Islamic courts). These courts are also caught up in issues of conflict of laws, which is further compounded by the fact that appeals from the Kadhi courts are heard by the secular Kenyan Supreme Court. If South Africa

³⁸ Allie *Ulama Meet to Discuss MPL: A Response* <http://muslim.co.za/mplsa/article>.

³⁹ Toffar 7.

⁴⁰ Rautenbach 2004 PER 23.

⁴¹ Nichols “Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community” 2007 40 *Vanderbilt Journal of Transnational Law* 182. See also Mohammedan Marriage, Divorce and Succession Ordinance, Laws of Kenya, CAP 156 (1962) s 2-3.

adopts the implementation of MPL through Shariah courts, we must be wary of the conflict of laws problems.

3 3 Shariah councils model

There has been the call from some South African Muslims for the establishment of a

“National Islamic Council comprising of Islamic Law jurists and supporting personnel from a legal, judicial, family and related backgrounds which should have overall control of the entire issue of Islamic family law and personal law. The judicial functioning and application of this law should be in this body’s hands with the said Islamic law jurists setting the pace.”⁴²

Similar efforts have been embarked upon by Muslim minorities in the United States, United Kingdom and Canada.

“The Muslim community in America has in recent years begun to examine the viability of establishing local Muslim tribunals. In the United Kingdom there has been the establishment of the Muslim Shariah Councils (MLSC) whose aim is to keep the identity of the community, to keep its laws, to keep it whole, while at the same time not breaking the laws of the state.”⁴³

One of the similarities between the South African and American model and difference from the United Kingdom experience is that Muslims in South Africa have been interested in a more broader and egalitarian model, which includes Muslim lawyers and social workers. “The English MLSCs on the other hand, are predicated on the role of (qadi) judge as mediator or judge in the process of Muslim marriage dissolution.”⁴⁴

This model raises many difficult questions. Will these Shariah councils be the present informal judicial councils clothed in another name? Will there be a central Shariah council with sub-branches? In regard to these Shariah councils it is unclear how enforcement of their decisions will take place.

Nevertheless, this model sits comfortably with those who believe that the Muslim community should have complete jurisdictional control over MPL, with no state interference.

3 4 Arbitration councils model

Religious arbitration is gaining much popularity in secular states such as the United States, Canada and the United Kingdom. The South African Law Reform Commission has advocated for the use of arbitration in matrimonial disputes except in cases where there is a property dispute involving the interest of a minor child.⁴⁵ This is also in line with the proposed Bill, which

⁴² Toffar *Administration of Islamic Law, Marriage and Divorce in South Africa* (1993) 240.

⁴³ Quraishi and Syeed-Miller *No Altars: A Survey of Islamic Family Law in the United States* <http://www.law.emory.edu/IFL/cases/USA.htm> 25.

⁴⁴ *Ibid.*

⁴⁵ See the law reform Commission Project 94 on Domestic arbitration, Draft Bill s 5(1).

recommends the use of Arbitration Councils to settle disputes (see discussion above).

A strong advocate for the implementation of arbitration councils to regulate MPL in South Africa is Prof Ziyaad Motala. He suggests,

“an alternative model for the resolution of conflicts involving MPL based on the introduction of arbitration over matters of family law. Arbitration would serve as an alternative mechanism allowing the implementation of MPL in a way that preserves religious autonomy of the Muslim community. It better serves freedom of religion in that Muslims themselves, through their religious leaders and organization, identify what constitutes religious law thereby preventing the state from getting embroiled in religious doctrine.”⁴⁶

In the religious arbitration model proposed, the parties will agree contractually to refer disputes dealing with MPL to a religious authority, arbitrator or independent religious organizations. Note that Islam is not a monolithic religion. There are a plurality of interpretations of the Quran. One of the criticisms of the current Bill is that judges would be pronouncing on one particular version of Islamic law. The arbitration model allows parties to agree on the jurisprudential school that will govern their dispute.

Prof Motala states that the flexibility of arbitration offers a number of advantages over traditional litigation.⁴⁷ Some of these are the following:

- “(a) Family disputes often involve emotional issues. A court room setting adds to the adversary nature of the conflict. Arbitration can be conducted in a more friendly and conducive environment mitigating the stress on the parties.
- (b) Arbitration reduces congestion in the court.
- (c) The traditional court system imposes solutions based on the views of judges, lawyers and bureaucrats that may be incompatible with the religious norms of the parties. In arbitration the parties could choose to be adjudicated in terms of their own religious beliefs.
- (d) A settlement arrived at through a process, which both parties consented to, and which is more in tune with their religion is more likely to be respected by the parties than a court-imposed settlement.
- (e) Arbitration is speedier and less costly.
- (f) Arbitration better serves confidentiality, which prevents the details of private disputes from being ventilated in public. It also protects modesty which is extremely important in Islam.”⁴⁸

Prof Motala concedes that there are some problem areas to the proposed arbitration model,

“such as conflict between Islamic Law and the Constitution with regard to inheritance, illegitimacy, custody and what is in the best interest of the child. He concludes, however, that MPL can be accommodated under the South African legal system in a way that preserves the religious autonomy of Muslims without the state prescribing and interpreting MPL. The way to do this he says is to

⁴⁶ Jazbhay and Vahed *Constitution and Human Rights in Islam* (2009) 183 quoting Motala *Discussion Paper: Proposals for Muslim Personal Law* unpublished article dated June 2005.

⁴⁷ Motala 13.

⁴⁸ Jazbhay and Vahed 185.

make amendments to the relevant laws on arbitration, mediation, family law, divorce law and inheritance law.”⁴⁹

Many critics of the arbitration tribunals, including Muslim women, reject the proposal of private arbitration tribunals because they fear the potential adverse effects of these tribunals. They believe that the voluntary nature of these tribunals is a fallacy, and that the tribunals would coerce many women into participation. They recognize the reality of the power imbalances that exist between Muslim men and women. Prof Motala rebuts this fact by stating that:

“To some extent, these views reflect stereotypes of Muslim women not being capable of making important decisions on their own. Rightly or wrongly, there is a perceived power imbalance between men and women which might lead to the conclusion that an alternative dispute resolution mechanism through a community-based structure would prejudice the rights of women.”⁵⁰

An example of an American approach can be seen in the work of Amr Abdalla, who calls for an Islamic model of intervention in conflict based on three principles:

- (1) Restoring Islam to its message of justice, freedom and equality;
- (2) engaging the community in the intervention and resolution process, and
- (3) adjusting the intervention techniques according to the conflict situation.

Adalla’s model also calls for an Islamic Arbitration Council which includes elements that engage those who are not just Islamic scholars but the community at large. For instance, he names a new method of addressing disputes, such as the “*shura* jury” which is comprised of a volunteer group of Muslims who are asked by the mediator to research issues relevant to the dispute and share them with the third party interventionist.⁵¹ This inclusive arbitration model may allow for greater participation by women.

In Canada there are ongoing discussions and debates around the issue of legal pluralism in light of the recognition of Islamic Family Law by the state. In Canada, the model has not been direct co-opting and enforcement of religious law by the state itself, but rather a reliance on firm notions of contract such that individuals could “opt” into an arbitral board of their choosing to resolve disputes – including a religious arbitral board with binding authority.⁵² Ontario

⁴⁹ Jazbhay and Vahed 186.

⁵⁰ Motala 17.

⁵¹ *Ibid.*

⁵² Nichols 63, The Ontario Arbitration Act of 1991, which allowed for religious arbitration, functioned without a problem until 2003. A public announcement was made that the Islamic Institute of Civil Justice (IICJ) had been established to ensure “that Islamic principles of family law and inheritance law could be used to resolve disputes with the Muslim community in Canada”. These statements to the press created in the minds of many Canadians that Ontario had granted special rights to Shariah courts to settle disputes between Muslims. This resulted in an investigation by the Attorney General, Marion Boyd, who concluded that the present system of arbitration should continue and certain recommendations for improvement were also provided. Despite the endorsement by the Attorney General, Ontario passed an amendment in September 2005 to the Arbitration Act that puts an end to the arbitration of family law matters under religious principles.

passed an amendment in September 2005 to their Arbitration Act that puts an end to the arbitration of family law matters under religious principles. This has effectively cut off not only the rights of Muslims to settle disputes under Islamic law, but has eliminated the rights of other religious denominations. To date there are still calls from the Muslim community for the implementation of arbitration councils in Canada.

Prof Anver M Emon, a Canadian scholar, deals with the issue of Canadian Muslims seeking space within the sovereign framework of Canada and its rule of law. He proposes that in "liberal democratic states where Muslim wish to observe Sharia values in the area of family relations, the government can regulate non-profit Muslim family service organizations that offer arbitration services". By utilizing existing legislation and the power of judicial review, the government can create venues for Muslims to create their own civil institutions through which they can critically evaluate the historical Sharia doctrine, determine how it fits within the state's legal system, and arbitrate family disputes in light of their *de novo* analysis of Shariah.⁵³

Parties who choose the arbitration route will also have the right to appeal the arbitral decree in a court of first instance. Emon interestingly points out that the appeal process presents an ideal opportunity to engage in "dialogue, where state values and the values of a religious community, for instance are balanced".⁵⁴ Like Motala, Emon acknowledges the concerns of Muslims who fear that civil law will imposed on Shariah. He states that:

"There may be some Muslims who believe that to have their vision of Islamic law subjected to the State's standards of judicial review will unduly interfere with their religious freedom. These Muslims are not compelled to form or seek the services of a state-regulated family service organization. If they wish to resolve family disputes on their own terms, they are free to use private mediation, but they will not enjoy the benefit the state confers through arbitral decrees."⁵⁵

These fears are also present within the South African Muslim community. Muslims question the nature of what is termed "religious autonomy." The argument is made that "when arbitration tribunals have to operate with the looming shadow of the constitution and have their verdicts set aside in the event of a clash with the constitution, the averment of 'religious autonomy' is not valid."⁵⁶

To stem these fears Emon states that:

"The efficiency of arbitration theoretically would provide an incentive for Muslims to create family service organizations and thereby enter into dialogue with the state. Those opting-out of the arbitration regime would not enjoy the

⁵³ Emon "Islamic Law and the Canadian Mosaic Politics, Jurisprudence and Multicultural Accommodation" 2008 87 *The Canadian Bar Review* 421. In order to ensure that these organizations represent and serve community interests, Emon proposes that "government can require an annual audit to ensure that a family service organization receives its financial support from an actual community of users, whose diversity and scope justifies that organization's existence".

⁵⁴ Emon 2008 87 *The Canadian Bar Review* 422.

⁵⁵ Emon 2008 87 *The Canadian Bar Review* 423.

⁵⁶ Mujlisul Ulama of South Africa *Response to the New Paradigm* (2005) 11.

benefit, nor would they engage in the dialogue. Yes, they might consider their position should another family service organization develop an approach to Islamic law that appeals to their values, is economically efficient, and does not violate the prevailing standards of judicial review.⁵⁷

He argues that his proposal will allow “multiple voices to express competing visions of Islamic communities in a liberal polity”.⁵⁸

“Those on the left might critically engage the Islamic legal tradition, concluding, for instance, that the Sharia can accommodate same-sex-marriage and divorce and offer those services to gay and lesbian Muslims. Those on the right might instead follow a more traditional or even patriarchal Sharia law regime. Other Muslim family service organizations might advocate positions between the poles. Ultimately, Muslim who desire religiously-based family law services would have different organizations to choose from, thereby giving them a choice between competing visions of Islamic Law. By advertising their services, reaching out the community, disclosing their philosophical approaches to Islamic family law, and effectively ‘competing for market-share’, the family service organizations would contribute to a ‘market place of Islamic legal ideas’. Furthermore, if one of the parties to arbitration considers the arbitral decree unfair or unjust given the liberal values of the state, he or she may appeal the decision to the courts. The Islamic legal philosophy adopted by the family service organization could then be presented in dialogue with the state and its values. Just as the courts would develop a doctrine of review over time, the family service centres and the government would gradually develop a mutually-shared understanding of how to observe religious values within a liberal state.”⁵⁹

It is clear that advocates of the arbitration tribunal believe that this alternative dispute resolution mechanism can create a space for deliberation *via* private sector assistance and government regulation. The long-term hope is that the arbitration model will provide Muslims with a spectrum of choices to settle their disputes through an Islamic-inspired dispute resolution service as an alternative to costly litigation.

3 5 Transformative Joint Governance Model

This model draws largely on the work of multiculturalist theorist and pragmatist, Ayelet Shachar⁶⁰ who strays away from the “either-or” approach that insists that an individual must either primarily be a citizen or primarily a religious person. It recognizes that individuals have allegiances to more than just the state while also recognizing that discrimination occurs within religious groups and that those vulnerable minorities within the group must be protected.⁶¹ Shachar advocates that the most attractive joint governance model is what she calls “transformative accommodation” which is based on four⁶² assumptions.

⁵⁷ Emon 2008 87 *The Canadian Bar Review* 423.

⁵⁸ *Ibid.*

⁵⁹ Emon 2008 87 *The Canadian Bar Review* 424.

⁶⁰ Shachar 117. See also Shachar “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law” 2008 9 *Theoretical Inquiries L* 573.

⁶¹ *Ibid.*

⁶² Shachar 117-118.

“First, since members of cultural groups are at the same time citizens of a larger political community, they always have multiple identities – creating affiliations. Second, both the cultural group and the state have legitimate claims of jurisdiction over their members/citizens. Third, both the group and the state are viable and mutable social entities that are constantly affecting each other through their ongoing interactions. Finally, it is in the self-professed interest of the group and the state to compete for the support of their constituents. Rather than see this conflict of interest as a problem, transformative accommodation ‘considers it as an occasion for encouraging each entity to become more responsive to all its constituents’ and even to adapt their power structures to accommodate their most vulnerable constituents.”⁶³

The underlying principle of this model is that neither the state nor the religious community must have monopoly or complete jurisdictional power – in our case over MPL. The state and community should share jurisdictional power, for example, the state will control certain submatters related to MPL – such as maintenance, custody, enforcement of matrimonial property divisions (matters that need powerful legal enforcement). The community on the other hand will maintain control over the Shariah rules of marriage and divorce. This will allow for checks and balances as well as accountability and transparency by both the state and community.

Members of the Muslim community will be able to practice their own interpretation of Shariah law. It will provide an equal playing field for diverse voices in the Muslim community to articulate competing visions of Shariah. MPL will not be subject to a state-sponsored single voice or idea of what MPL should be. This will allow for internal dialogue within the community and participation by the state, community and the individual.

A further principle of the transformative-accommodation model is that it requires that the individual always maintains a choice between competing options.

“When group members, whether they are in their citizen capacity or religious capacity, retain the right to ultimately opt-out of either, the group is encouraged to pay attention to its constituency. In order for the system to be viable, opting-out would be justified only when the group has failed to provide an adequate remedy to an individual within its governance seeking a solution. In seeking to establish a model of joint governance the delegation of some powers to a religious group can spark an internal debate and hopefully transformation.”⁶⁴

The transformative-accommodation model seeks to establish “an ongoing dialogue between different sources of authority as a means of eventually improving the situation of traditionally vulnerable group members”.⁶⁵ The model is a “pragmatic attempt to begin dialogues between and within communities and among society as a whole. Change, of course is not easy, but this approach provides a foundation to build meaningful transformation”.⁶⁶

⁶³ *Ibid.* See also book review by Pierik “Multicultural Jurisdictions: Cultural Differences and Women’s Rights by Ayelet Shachar” 2003 31 *Political Theory* 2.

⁶⁴ Blackstone “Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario” 2005 *Brooklyn Journal of International Law* 248.

⁶⁵ Shachar 118.

⁶⁶ Laurence 2005 *Brooklyn Journal of International Law* 251.

4 CONCLUSION

Muslims in South Africa are in a unique situation. They own and should be proud to own their rights as Muslims under Islamic law, and their rights as citizens of South Africa. To date the Draft Muslim Marriages Act proposed by the South African Law Reform Commission has not yet been enacted into legislation. Despite legal recognition or not, the Muslim community needs to address the challenges it is presently facing with regard to issues involving marriage, divorce, maintenance, custody and inheritance. The various pluralist and multicultural jurisdictional family models discussed above (Shariah courts, Shariah councils, arbitration tribunals and the transformative-accommodation model) provides us with an opportunity to re-examine and rethink how to implement religious law in a secular state effectively. Instead of resorting to the codification of MPL, through the Draft Muslim Marriages Act, perhaps we should be bold and take Robert Frost's road less travelled, as that could make all the difference.⁶⁷

⁶⁷ See Robert Frost's Poem "The Road Not Taken" 1916 *Mountain Interval*.