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## Evolution of Muslim personal law in the South African constitutional dispensation<sup>1</sup>

### INTRODUCTION

This paper was presented by a representative of the Muslim Judicial Council, South Africa. The paper is about the evolution of Muslim personal law in the South African Constitutional dispensation. This paper looks at the advancements of Muslim personal law in the South African courts, and also the advancements as regards to statute law.

First it is very important to understand what is meant by Muslim personal law within the South African context.

### WHAT IS MUSLIM PERSONAL LAW?

Muslim personal law is a selected part of the broader body of *Sharee'ah* Law, or which is better known as Islamic law.

Islamic law finds its basis in two primary sources known as the Quran and Sunnah. The Quran is the Divine Revelation that was sent down from the heavens to Prophet Muhammad (Peace be upon him) via an angel by the name of Jibreel. The Sunnah comprises the oral traditions, practical actions and tacit approvals of the Prophet Muhammad (Peace be upon him) from the age of forty until his demise.<sup>2</sup> Muslim Personal Law limits itself, and primarily covers matters of Marriage, divorce and succession.<sup>3</sup> Other parts of Islamic law include commercial law; criminal law; laws of purification; laws of prayer and many other topics concerning a Muslims life, and which does not necessarily fall under the scope of Muslim personal law.

The history of Muslim personal law within the South African context will now be looked at.

### HISTORY OF MUSLIM PERSONAL LAW IN SOUTH AFRICA

Historically, and until the 1999 Supreme Court of Appeal (SCA) decision in the *Amod v Multilateral Motor Vehicle Accidents Fund*<sup>4</sup> case, a marriage contracted according to Muslim personal law was regarded by the South African Courts as null and void, and as being contrary to public policy (*contra bona mores*), with the result that the Muslim marriage and its consequences were not legally recognized in any form at all.<sup>5</sup>

I will now confirm this statement by mentioning a few cases in this regard.

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2 See Kamalie (1997: 14 ff).

3 Seedat (2011: 2).

4 See *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

5 Mokgoro (2003: 5).

## MPL case law before the Constitution

In 1917, in the case of *Seedat's Executors v The Master of the High Court*, the Appellate Division held that foreign polygamous marriages are not to be recognized.<sup>6</sup> This ruling encompassed all marriages, including marriages in terms of Muslim personal law.

In 1983, in the case of *Ismail v Ismail* the Appellate Division (AD) confirmed this position and held that marriages under which polygamy is permitted are regarded as *contra bona mores* under South African Law and are accordingly not recognized.<sup>7</sup>

In 1991, in the case of *Solomons v Abrams* it was confirmed that a marriage contracted in terms of Muslim personal law was not a putative marriage, and could also not be recognized on that basis.<sup>8</sup>

These cases are related to court decisions before the enactment of the Interim<sup>9</sup> or the Final Constitution<sup>10</sup> of the Republic of South Africa. It can be seen that the courts did not at all recognize marriages contracted in terms of Muslim Personal Law in any way prior to the enactment of the Interim or Final Constitution of the Republic of South Africa.

However, in 1993, the Interim Constitution of South Africa was enacted, which provided therein, the right to freedom of religion, the right to freedom of equality, and also the right not be discriminated against.<sup>11</sup> Since the enactment of the 1993 Constitution, the Muslim Community in South Africa made use of these rights that were provided therein, and litigated on the basis thereof. A few cases in this regard will now be looked at.

## MPL case law after the Constitution

In 1996, after the enactment of the Interim Constitution of South Africa, in the *Ryland v Edros* case, the then Cape High Court looked at the issue regarding the enforceability *inter partes* of a marriage contract in terms of Muslim personal law. The Court held that a marriage in terms of Muslim personal law is a legal marriage and that it generates a legal contractual duty to support the wife.<sup>12</sup> This was an extension of the common law duty of support.<sup>13</sup>

In 1998, in the case of *Amod v Multilateral Motor Vehicle Accidents Fund*, the Supreme Court of Appeal held that public policy since 1982, in the *Ismail v Ismail*<sup>14</sup> case, has changed, and that there is now a requirement to recognize Muslim marriages. The court thus gave legal recognition to a Muslim marriage for purpose of duty of support.<sup>15</sup>

In 2004, in the case of *Daniels v Campbell*, the Constitutional Court held that parties to a *de facto* monogamous marriage contract in terms of Muslim personal law are recognized as survivors

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6 *Seedat's Executors v The Master* (Natal) 1917 302 (AD).

7 *Ismail v Ismail* 1983 (1) SA 1006 (A).

8 *Solomons v Abrams* 1991 (4) All SA 437 (W).

9 See Interim Constitution, Act 200 of 1993.

10 See Final Constitution, Act 108 of 1996.

11 See Chapter 3 of the Interim Constitution of the RSA, Act 200 of 1993.

12 *Ryland v Edros* 1996 (4) All SA 557 (C).

13 See *McDonald v Young* Case, 24 March 2011 Case No. 292/10 (SCA).

14 See *Ismail v Ismail* 1983 (1) SA 1006 (A)

15 *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

in terms of the Maintenance of Surviving Spouses Act<sup>16</sup> and the Intestate Succession Act<sup>17,18</sup>

In 2005, in the *Khan v Khan* case, the court held that marriages contracted in terms of Muslim personal law, whether monogamous or not, were covered by the Maintenance Act<sup>19,20</sup>

In 2008, in the most recent case of *Hassam v Jacobs*, the Cape High Court issued a declaration that the word 'survivor' as used in the Maintenance of Surviving Spouses Act, includes a surviving partner to a polygamous Muslim marriage. It was further declared that section 1(4) (f) of the Intestate Succession Act<sup>21</sup> was inconsistent with the Constitution, to the extent that it made provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.<sup>22</sup>

The above-mentioned cases might seem to the average person as advancements to Muslim personal law within South Africa. However, that is not necessarily the case, as the judgments passed down by the courts were at times in total conflict with the classical and majority understanding of Muslim personal law.

To take the example of the 2004 Constitutional Court case of *Daniels v Campbell*, the court held that parties to a marriage in terms of Muslim personal law would be regarded as 'spouses' and 'survivors' in terms of the Maintenance of Surviving Spouses Act and Intestate Succession Act respectively.<sup>23</sup> However, the provisions provided in these two Acts are not necessarily in accordance with Muslim personal law, as parties to a Muslim marriage contract are only entitled to maintenance for a specific, limited period, and have rights to inheritance to specific amounts. The period and amounts as provided in the said Acts are in conflict with Muslim personal law, and the judgments are thus in contradiction to Muslim Personal Law.

It should also be noted that the case at hand is a Constitutional Court Case, and based on the doctrine of *stare decisis*, the whole of the Republic of South Africa is bound by that decision. The consequence of this would be that the legal right that a spouse or survivor has in terms of South African Law is now in conflict with the legal rights a spouse or survivor has in terms of Muslim personal law.

The same can be said regarding the 2005 *Khan v Khan* case, where it was held that an ex-spouse of a marriage contract in terms of Muslim personal law is entitled to maintenance in terms of the Maintenance Act.<sup>24</sup> Muslim personal law allows an ex-spouse, in the case of divorce, maintenance for the duration on three months only, whereas the Maintenance Act allows for much more than the prescribed three months. If a Muslim spouse makes use of this judgment, he/she would be overstepping the limits as provided in Muslim personal law.

A final case example in this regard would be the 2008 case of *Hassam v Jacobs*, which was

16 Maintenance of Surviving Spouses Act 27 of 1990.

17 See Intestate Succession Act 81 of 1987.

18 *Daniels v Campbell No and Others* 2004 (7) BCLR 735 (CC).

19 See Maintenance Act 99 of 1998.

20 See *Khan v Khan* 2005 (2) SA 272 (TPD).

21 See s (1) (4) (f) Intestate Succession Act 81 of 1987.

22 *Hassam v Jacobs & Others*, July 18 2008, Case 5704/2004 (C). The Indian case of MOHD. AHMED KHAN V. SHAH BANO BEGUM & ORS [1985] RD-SC 99 (23 April 1985) should be looked at in this regard.

23 See *Daniels v Campbell No and Others* 2004 (7) BCLR 735 (CC).

24 See *Khan v Khan* 2005 (2) SA 272 (TPD).

another landmark case for Muslims in the Republic South Africa, and it was seen to the average person to be a great accomplishment for Muslims living within South Africa. The court held the terms 'spouse' and 'survivor' include marriages, be it monogamous or polygynous contracted in terms of Muslim personal law.<sup>25</sup> Again, the maintenance and the inheritance received as provided in these two acts goes against the laws as found in Muslim personal law.

These are but some of the challenges that are faced by the Muslim Community in the Republic of South Africa when enforcing their rights via the court systems.

For the above-mentioned reason, among others, the Muslim Community made various attempts in order to enact laws as Acts of Parliament that would govern certain aspects of Muslim personal law and would also guide the courts when giving judgment. The endeavours of the Muslim Community in this regard will now be looked at.

### **Legislation regulating MPL in South Africa**

It should be noted that the political transformation in South Africa which commenced with the adoption of the Interim Constitution on 27 April 1994, and a Final Constitution, which came into force on 04 February 1997, was the catalyst for renewed attempts at legal recognition and enforcement of aspects of Muslim personal law in South Africa.<sup>26</sup>

Both the interim and final Constitutions guarantee freedom of religion. It further provides that the State may pass legislation that recognizes systems of personal and family law, but subject to the Constitution.<sup>27</sup>

Based on the aforesaid, the Muslim community of the Republic of South Africa endeavoured to seek legal recognition of certain aspects of MPL. The efforts led to the establishments of a Project Committee of the South African Law Commission, to investigate Islamic Marriages and related matters. The then Minister of Justice established this Project Committee on 30 of March 1999. The committee was established in terms of s 7 (A) (b) (ii) of the South African Law Commission Act of 1973.<sup>28</sup>

The Project Committee, which was also known as Project Committee 59, was mandated to investigate Islamic marriages and related matters from 1 March 1999 for the duration of the investigation. The deliberations of the committee led to the compilation of an Issue Paper (better known as Issue paper 15) which was circulated for public comment in July 2000. The purpose of the Issue Paper was to identify issues and problem areas arising out of the investigation, and also with a view to maximize consultation with all interested parties, and to further obtain their responses and input in order to arrive at an appropriate solution to the issues and problems identified in the issue paper. The circulation of the issue paper led to many responses from interested parties. These responses were then used as an aid to compile a discussion paper which included a proposed draft bill which would give effect to the legal recognition of Muslim marriages.<sup>29</sup>

The proposed bill received positive and negative feedback from the Muslim community of the Republic of South Africa. Some scholars and public organizations rejected the bill, stating that

<sup>25</sup> *Hassam v Jacobs N.O. Master of the High Court & Others*, July 18 2008, Case No. 5704/2004 (C).

<sup>26</sup> Mokgoro (2003: 1).

<sup>27</sup> S 15 of Act 108 of 1996.

<sup>28</sup> Mokgoro (2003: 1-2).

<sup>29</sup> Mokgoro (2003: 3-4).

it went totally against the classical and majority understanding of Muslim personal law. Others, were interested in engaging the process and hoped that the bill would be enacted at the soonest time possible. There was in the past, and currently still is no unanimous agreement by the Muslim community as to what the content of the bill should be. Issues such as the equality clause as found in the Constitution, administrative processes, the possibility of constitutional attack, whether or not an inheritance provision should form part of the bill still up till today forms part of the debate.

Untill today, over a decade since the establishment of the Project Committee in 1999, no agreement has been reached as to the content of the bill; however, the process is still on the way.

## CONCLUSION

In conclusion, it can be said that Muslim personal law within the South African context has faced many challenges, and it has come a long way since the *Ismail v Ismail* case in 1983. The case law and the proposed bills bear testimony to this. The reason for the change in face of Muslim personal law within the Republic of South Africa is primarily due to the enactment of the Interim Constitution and Final Constitution of the Republic of South Africa which gave all individuals within the republic equal rights. Cases like the *Ryland v Edros*, *Daniels v Campbell*, and the more recent *Hassam Jacobs* cases, testify to the fact that our courts are very much in favour of granting Muslims in South Africa their rights. However, judges cannot pass judgment arbitrarily, as they have to apply the law. It is therefore, in the absence of any legislation that governs Muslim personal law within the Republic of South Africa being available; judges will continue granting orders in terms of South African Law Statutes, and as it has been said, many a time is in conflict with Muslim personal law. It is for this reason that it becomes of paramount importance that some type of statute is enacted that governs and regulates Muslim personal law within the Republic of South Africa. This should be done at the soonest time possible as more and more cases are finding their way to the highest courts of our country.

We hope and pray that this becomes a reality. Thank You.

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