

**APPLICATION OF MUSLIM PERSONAL & FAMILY LAW IN SOUTH AFRICA:**

*Law, Ideology and Socio-Political Implications*

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## INTRODUCTION

### Muslim Personal Law

#### The Tensions

Joseph Schacht has adequately summarized the Muslim attitude towards the law in his statement:

"Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself. For the majority of Muslims, the law has always been and still is of much practical importance than dogma. Even today the law remains a decisive element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas."

The truism contained in the latter part of this statement is conceded, namely, the conflict between traditional and modern approaches to the law. This tension also affects Muslim Personal Law (MPL), even though it is a diluted part of the main corpus of Islamic law or Shari`a. Underlying the overall discussion of my thesis will be this constant tug-of-war between modern and traditional perceptions of the world, politics and the law of Islam. MPL deals primarily with one small part of the law, namely, the laws of marriage, divorce and inheritance. However, this thesis is not a treatise on MPL per se. It examines the relationship between religion, law and politics in contemporary South Africa. In other words, this thesis is about the 'politics' of MPL.

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1. Joseph Schacht, "Pre-Islamic Background and Early Development of Jurisprudence" in Khadduri & Liebesny (eds) Law in the Middle East: Origin & Development of Islamic Law, New York, Polity, 1984, p. 28.

## Method

What I have coined as 'politics' occur at two levels, namely at the level of the differing political perceptions of Muslims and at the level of how they interact with the modern-state. This study approaches the subject from two angles. The first deals with a community's self-perception in relation to its religious symbols and values. The second involves an understanding of the human reality we experience. Law, ideology, economics and a host of other forces dictate the destinies of people. It is against the backdrop of the above two levels that the implications of the implementation of MPL is examined in this thesis.

It must be said at the outset that MPL has as yet not been applied in South Africa. The debate regarding its implementation has only begun. This thesis thus looks into the dynamics of this experience. Some aspects of the debate is also based on projections and comparative studies.

## The Problem

I will introduce the problem of MPL by way of an example in recent Indian history. This example provides a suitable entry point to understanding religious law within an increasingly modernizing context. It illustrates the problems that arise when the religious and political fields intersect.

The verdict of Justice Y V Chandrachud of the Indian Supreme Court of India in the famous case of Mohammed Ahmed Khan, Appellant v. Shah Bano Begum and others, (respondents in 1985), incensed Muslims in India. The gist of the case centres around the notion of conflicting notions of what the Shari`a is. Is it evolutionary or is it static as some sections of orthodoxy believe? In addition, it relates to the problems of a religious law being adapted to a modern society and the political processes that accompany it.

The case involved a 75 year-old divorced woman, Shah Bano Begum of Indore, in the state of Madhya Pradesh. After being driven out of her matrimonial home in 1975 by her husband, Shah Bano filed a petition against him in terms of section 125 of the Indian Code of Criminal Procedure asking for a maintenance rate of Rs500 per month. The appellant, (the husband) refused to pay maintenance, arguing that she ceased to be his wife after he had irrevocably repudiated her in terms of the Muslim rule of talaq. And, that he had already paid her a sum of Rs200 per month for two years and had deposited a sum of Rs3 000 in the court by way of dower during the period of 'idda - a period of three menstrual cycles after the date of talaq. Her husband, the appellant, an advocate by profession, earned a salary of Rs60, 000 per year. In the 1979 the Indore magistrate's court directed the appellant to pay a princely sum of Rs25 per month, which the High Court of Madhya Pradesh increased to Rs179.20 per month in July 1980.

Justice Chandrachud in his verdict cited in obiter that the conflict between sections 125 of the Code of Criminal Procedure and section 127 (C) of the same Code was resolved

by an interpretation. This interpretation of the law was to become the focus of religious and political crises.

Chandrachud's statement as reported in the judgement deserves full quotation. Muslim Personal Law, he said, did not...

"...countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy and destitution...it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of 'iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of 'iddat, despite the fact that she is unable to maintain herself, has therefore to be rejected."<sup>2</sup>

The judge supported by four other judges cited verses from the Qur'an in support of his interpretation. However, the outcry over the decision had severe political repercussions. The ruling party Congress Party in the Indian parliament was forced to introduce a Bill entitled, "The Muslim Women (Protection on Rights of Divorce) Bill, 1986" in Parliament in order to take divorced Muslim women out of the purview of section 125 of the Code of Criminal Procedure. Chandrachud's judgement was premised on an interpretation of section 125<sup>3</sup> which took into consideration the general welfare of Indian citizens as additional protection in terms of civil law.

The problems here reflect the conflict between modernity and traditional systems of law. It also involves a political

2. Janak Raj Jai, Shah Bano, Rajiv Publications, New Delhi, 1986, pp. 32-33 from reproduced record of the Justice Chandrachud's judgement.

3. Ibid, p. 82.

debate between opposing religious groups which in turn have different political loyalties within a nation-state model. It also raises some questions regarding the future of MPL. With these questions in mind we proceed to examine the socio-political implications of MPL in South Africa.

## CHAPTER ONE

### WHAT IS THE SHARI`A?

#### Introduction

Societies carry the arduous responsibility of choosing laws that are consistent with their historical, traditional and intellectual values as well as their socio-economic mores. At the same time they also expect the law to provide them with optimal protection in two primary ways - through efficacy and convenience. By efficacy is meant that law be viewed as a value-system suitable to the social- context in which it functions. Convenience would imply that the demands of the law are not unduly harsh. Islamic Law or the Shari`a is no exception.<sup>1</sup>

The celebrated Spanish Muslim jurist, Abu Ishaq al-Shatibi (died 790/1308), points out that the element of convenience is an important feature of the Shari`a.

God made this righteous Shari`a accommodating and convenient and thus won the hearts of men and invoked in them love and respect for the law. Had they had to act against convenience they could not have honestly fulfilled their obligations.<sup>2</sup>

1. I will temporarily equate the term Islamic law with the Shari`a, although later in the chapter I will show that they are different.

2. Cited by Muhammad Khalid Masud, Islamic Legal Philosophy: A study of Abu Ishaq al-Shatibi's Life and Thought, Islamic Research Institute, Islamabad, 1977 p iii. Unfortunately Masud does not give any reference to the original source of the statement which I suspect is in al-Shatibi's major work on legal theory, al-Muwafaqaat.

Al-Shatibi's celebrated status within the mainstream of the Maliki<sup>3</sup> school of Islamic law precludes any hasty judgement to construe the above statement as being supportive of modern-day libertine 'legal liberalism'.

The element of convenience - yusr - is an expressed Qur'anic norm referring to God's will - iradah. The relevant verse of the Qur'an reads...

God desires/wills (iradah) ease<sup>4</sup> (yusr) for you, and desires not hardship for you.

In a well-known saying - Hadith- of the Prophet he is reported to have said...

Make things convenient and do not make things burdensome.

In this sense God's will itself ensures convenience for those who obey His law. The Divine will is the metaphysical or doctrinal feature and convenience is its manifestation in the socio-historical realm. The creative tension between iradah and yusr provides a dynamic feature to Islamic social practice of which Islamic law is an important aspect. In this sequence of ideas it is clear that convenience - yusr - is one component of the Divine will. Logically it implies that if the Shari`a is not convenient and efficacious it is possible that it may become burdensome and ineffective.

While the above sentiment reflected in al-Shatibi's exposition of Islamic law may be absent in the contemporary practice of Islamic law, it has nevertheless been an

3. Founded by Malik ibn Anas (d 179/795), a jurist of Madina and one of the four prominent Islamic legal schools (madhab pl. madhahib).

4. Al-Qur'an, 2:185

important component of Islamic legal philosophy in the past. In what follows I will argue that the flexible and contextual perspective of the Shari`a is historically valid. The continued relevance of this legal code rests on its flexibility and dynamism and its ability to adapt to socio-historical changes. To state that the Shari`a is totally immutable is as problematic as saying that its flexibility is unrestrained.

#### The Etymological and Linguistic Structure of the Shari`a.

Ibn Manzoor (630-711/1232-1311), the author of one of most authoritative Arabic lexicons explains that...

shir`a and shari`a [both derivatives] in the spoken language of the Arabs means a watering-place. It is the habitual drinking place of people who reside on a bank of a river and also that of animals. The Arabs do not call such a watering<sup>5</sup> place a Shari`a unless the water is abundant.

The inherent symbolism in the word Shari`a equates it with a life-giving source. An explanation of the word refers to...

that which God had patterned (sanna) in the religion (din) and commanded like fasting, prayer, pilgrimage, alms-tax and all acts of virtue (birr)...In this same sense is God's statement [in the Qur'an] `Then We made thee follow a Path from the Command ('amr) (45:18),...`for each one of you have We appointed a shir`a and a minhaj'. (5:48)<sup>6</sup>

In the first instance Ibn Manzoor relates shir`a to din or primordial religion. In this sense, Shari`a and its derivatives have a close relation to a primordial or metaphysical Path. The scope of this primordial Path is again further expanded by linking it to a Command ('amr),

5. Ibn Manzoor, Lisan ul-Arab, vol 4, Darul Ma`arif, Cairo p 2238.

6. Ibid.

giving it an additional dimension of being a 'Path from the Command' ('ala shari`atin min al-'amr)<sup>7</sup>. In this regard Rahman's explanation of the Command is most helpful...

This 'Command' must be what the Qur'an calls the 'Preserved Tablet' or the 'Mother of all Books'. It is called the 'Command' because although it contains everything,<sup>8</sup> the essence of it is its imperatives for man.

The word minhaj also connotes a road or Way but is to differentiate between itself and Shari`a (Path)<sup>9</sup>. Minhaj means a "clear and distinguished Way" - wadihan or "straight path" - al-tariq al mustaqim, whereas the Shari`a is only viewed as the "beginning of the Path" - 'ibtida' al-tariq.<sup>10</sup> Against this background Shari`a connotes a sense of 'sustenance' and the beginning of the Path, differing from minhaj which stresses the lucidity of the Way. The inter-related semantical field of shari`a, din and 'amr implies an essence and primordialness which I believe is coterminus with the eternal and immutable connotation of the Shari`a.

However, the link between Shari`a and minhaj signifies another dimension. The latter is also a Way, but is more defined, tangible, and practical, as opposed to the essentialist connotation of the Shari`a. Viewed as a practical Way - minhaj - leads us to some understanding of

7. Al-Qur'an 45:18.

8. Fazlur Rahman, Major Themes of the Qur'an, Bibliotheca Islamica, Chicago, 1980, p. 98.

9. Because of the subtle linguistic differences, but yet an important distinction, I have translated Shari`a as a Path, with a metaphysical implication, i.e. a metaphysical Path. Minhaj is translated as a Way, implying thereby a practical Way in which acts are done.

10. Ibn Manzoor, op. cit., vol. 4, p. 2238; vol 6, p. 4554.

how of the Shari`a actually discloses itself in practical terms.

A juristic excursus of the notion of Shari`a

Evidence that the Shari`a, or part of it, has always been flexible or contextual can be found in the way Muslim jurists have explained and practiced it. Most of the classical compendiums and glosses on Islamic law and legal theory do not enter into any philosophical definition of the Shari`a per se, except by elucidating its linguistic dimensions. However, the legal discourse only becomes effective when the positive law is brought into relationship with the sacerdotal or meta-legal requirements of the Shari`a<sup>11</sup>. It is for these reasons, briefly stated here, that it becomes extremely difficult, if not impossible, to propose a universal and monolithic technical definition of the Shari`a. At a practical level, a proliferation of legal theories abound in Muslim jurisprudence, applying variant methods to deduce Shari`a ordinances and rules from what Muslim jurists call the four chief sources of the Shari`a, the Qur'an, Hadith, consensus and analogy.

The principal science that determines knowledge of the Shari`a is known as usul al-fiqh, literally translated to mean 'sources or roots of the science of knowing the law'. Usul (sing. asl) means indicant(s) (daleel pl. adilla). Usul al-fiqh is thus the Islamic legal theory. It specifically deals with methods of analysing the four

11. Aziz al-Azmeh, (ed.) "Islamic Legal Theory and The Appropriation of Reality", in Islamic Law: Social and Historical Contexts, Routledge, London, 1988, p. 252.

universal indicants or sources of the Shari'a.<sup>12</sup> Legal theory deals not only with legal philosophy proper but also entertains questions of linguistics, logic, methodology, epistemology and theology.<sup>13</sup>

Differences in the understanding of Islamic law (fiqh) arises because scholars adopt different legal theories.<sup>14</sup> As mentioned earlier, legal theory involves a vast array of disciplines which are unlikely to result in unanimous opinions. It was precisely because of differences in legal theory that four major legal schools, known as the Hanafi<sup>15</sup>, Shafi', Maliki and Hanbali<sup>16</sup> schools, named after their founders, have survived to this day. This diversity in legal interpretation, arising out of theoretical differences, have

12. Wahba al-Zuhayli, Al-Wasit fi Usul al-Fiqh al-Islami, Darul Kutub, 1978, pp. 13-15; Nabil Shehaby, "Illa and Qiyas in Early Islamic Legal Theory", in Journal of the American Oriental Society, 102.1, 1982, p. 27; Wael B Hallaq, "Considerations on the Function and Character of Sunni Legal Theory", in Journal of the American Oriental Society, 104.4, 1984, pp. 679-680.

13. Shehaby, op. cit.

14. This has been well argued in a Ph D thesis submitted to the Al-Azhar University, Cairo by Dr Mustafa Sa'id al-Khinn, published as Athar ul-Ikhtilaaf fil Qawa'id al-Usuliyya fi Ikhtilaafil Fuqahaa, (The Effects of Differences in Legal Theories on the Disputations of the Jurists), Muassasa al-Risalah, Beirut, (fourth edition) 1406/1985.

15. Founded by Nu'man bin Thabit, better known by his agnomen, Abu Hanifa (d. 150/767), based in Kufa, Iraq. This school is known for its use of ra'y, free opinion and interpretation in the light of local customary practices. His school later favoured the Abbassids whose capital was in Baghdad. (see Fazlur Rahman, Islam, pp. 81-82.)

16. Initially a follower of Al-Shafi' who continued to push the latter's insistence on Hadith in law to the extremes. The school of ibn Hanbal (d. 241/855) started as a populist movement in opposition to the Abbassid court in Baghdad but later developed its own independent character. (see Fazlur Rahman, Islam, p. 82; R.S.Humphreys, Islamic History, p. 195.)

also been caused by the social contexts in which the jurists framed their paradigms.<sup>17</sup>

Some of the cardinal differences in legal theory arise because of the variant and often conflicting theories applied. These range from different linguistic methods which have an effect on legal interpretation<sup>18</sup>; the ability of words to include and exclude meanings<sup>19</sup>; conflicting logical arguments in understanding commands and prohibitions<sup>20</sup>; variant exegetical principles affecting the interpretation of Qur'an and Hadith texts<sup>21</sup>; differences in interpreting consensus and analogy;<sup>22</sup> the application of a host of controversial sources such as the status of the statements of the Prophet's Companions; the legitimacy of presumption of continuity (istishaab), and the validity of the notion of the public weal (masalih al-mursala)<sup>23</sup>. Furthermore, different emphases are placed on certain aspects of legal theory. For instance while analogy is generally accepted by the four legal schools, each allocates it to a status different to the other. What is generally overlooked is that theory of whatever kind is also a product of a specific socio-economic formation. The social context also shapes the character of the theory.

17. See Martha Mundy's essay, "The Family, Inheritance and Islam: A Re-Examination of the Sociology of Fara'id Law", in Islamic Law, (ed) al-Azmeh.

18. Al Khinni, op.cit., p. 121.

19. Ibid., p. 197.

20. Ibid., p. 295.

21. Ibid., p. 379.

22. Ibid., p. 453.

23. Ibid., p. 529.

Any discussion of Shari`a inevitably involves a discussion on fiqh. Linguistically, fiqh means, "understanding or cognition or discernment", - al-fahm. In juristic terms, using al-Shafi`s (150-204/767-819) popular definition, it means "the science of knowing the practical Shari`a rules which have been derived from their detailed indicants or sources".<sup>24</sup> Fiqh is then a set of derived rules from certain "detailed sources". Sources are considered to be detailed after they have been methodologically arranged and analysed by legal theory. Jurists also make it clear that the status of fiqh is not that of certain knowledge -qati`- but that of a probable category - zanni.<sup>25</sup> Since fiqh involves an element of 'probabilism' due to its derivative nature it can be substituted by another probable category<sup>26</sup> while perfect knowledge only rests with God.

Masud summarizes the contemporary debate in legal theory between those who tenaciously hold on to the view that Islamic law is immutable and those who propose that it is adaptable. The immutability-view claims that Islamic law does not change and in so doing cannot change. Rulings pronounced by the Shari`a in the past are "static, final, eternal, absolute and unalterable".<sup>27</sup> The adaptability-view, maintains that Islamic law changes, has changed and moreover can be changed further.<sup>28</sup> Adaptability means the law could be modified to meet new circumstances. In other words, it is theoretically possible to expand the existing body of law

24. Al-Zuhayli, op. cit., p. 16.

25. Al-Zuhayli, op.cit., p. 16.

26. See Kerr's levels 2 & 3 developed below.

27. Masud, op. cit., p 21.

28. Ibid.

and to regard it as open to change according to social conditions.<sup>29</sup>

In their bid to prove that the Shari`a undergoes change, the adaptability view collapses the juristic distinction between fiqh and Shari`a and reduce both to the category of fiqh.<sup>30</sup>

In terms of legal theory they do not make a distinction between the two, except at an epistemological level. The immutability-view "believes Shari`a and fiqh are distinct but are inseparably connected. The Shari`a being the law, and fiqh being the science of knowing the law."<sup>31</sup> Despite their claim to maintain a distinction between fiqh and Shari`a the immutability-view effectively elevates fiqh to the level of Shari`a, and for all practical purposes there is no distinction. The consequences of these views are that the adaptability-view suppresses the immutable dimension of the Shari`a in order to stress the mutability, openness and flexibility of the Shari`a. The immutability-view, in turn, emphasizes the immutable dimension of the Shari`a but fails to explain the relationship between immutability and flexibility in practical terms. Needless to say, both viewpoints fall short of a satisfactory explanation.

A fundamental distinction ought to be made between the adaptability versus immutability views. The former maintains that change is connected to the nature of Islamic law, while the latter rejects that assertion. The immutability-view concedes that while changes have taken place in early Islam

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29. Ibid.

30. Masud, op.cit., p. 22.

31. Ibid.

these were not recognized by the legal theorists. The differences in the two views, in Masud's opinion, is not about the historicity of legal changes but about the implications of change for legal theory.<sup>32</sup>

In practical terms it is difficult to pigeon-hole any particular legal school or institution in South Africa or elsewhere in the Muslim world under the rubric of these broad categories. A cursory glance at judicial statements - fatawa- indicate that there are many shades between the extremes of adaptability and immutability. This in itself lends weight to the argument that theoretically and even practically no uniform pattern of Shari`a interpretation prevails.

Malcolm Kerr, however, provides a formula that may assist us in eliminating the ambiguity between the immutability and adaptability views. In his discussion of juristic theory in Islam he describes four levels of meaning which have moral significance.<sup>33</sup>

These four levels of meaning are:

- 1) In relation to the Divine Will, a metaphysical reality upon which all existence is contingent as well as the original categorical imperative from which all values are derived.
- 2) The spiritual relationship between humans and God. Here, it is presumed that humans have a will and a conscience of

32. Ibid., p 22.

33. Malcolm H. Kerr, Islamic Reform: The Political and Legal Theories of Muhammad `Abduh and Rashid Rida, Cambridge University Press, 1966, pp. 21-22.

their own and have a capacity for rights and duties and power to enter into contracts.

3) The normative relationship between one human and another. This relationship is conceived in terms of the law provided by God through His perfect knowledge, but applied by the imperfect knowledge of humans.

4) In terms of non-normative relationships with the world of matter, appearances and circumstances.<sup>34</sup>

In relation to these four levels of meaning, Shari`a belongs to level 1, whereas fiqh covers levels 2 & 3. Social change occurs at level 3 and only has an effect on the relationship between humans and God at level 2 in an indirect manner.

Both the adaptability and the immutability viewpoints confuse levels 1 and 3. They either reduce Shari`a to fiqh (adaptability-view) or elevate fiqh to the level of Shari`a (immutability-view). A careful distinction between the two levels is necessary in order to make sense of the Shari`a/fiqh process<sup>35</sup>.

Rahman also raises the vexing problem that if the Shari`a is described as a "comprehensive principle of a total way of life" how is it known?<sup>36</sup> By maintaining the distinctions I have made above, one can confidently say that the Shari`a is known through fiqh.<sup>37</sup> But can also say that Shari`a does exist outside fiqh. In the words of al-Azmeh, fiqh "is the

34. Ibid.

35. I prefer to use the word Shari`a process rather than Shari`a because I have sufficiently laboured to distinguish it from fiqh. THE significance of this neologism is to indicate the effect of a religious law.

36. Fazlur Rahman, Islam, Chicago, 1966, p. 101.

37. Masud, op.cit., p. 23

domain of legislation" while Shari`a "is the utopia that partially inspires it in very determinate ways that are various and open to inquiry."<sup>38</sup> Kerr's levels of meaning and the linguistic insights of Shari`a gives us the elements to theorize the Shari`a as "a metaphysical reality known through the Qur'an and the sayings of the Prophet."<sup>39</sup> Fiqh is then the tangible and practical product of the minhaj referred to in the text of the Qur'an.

What is then regarded as the corpus of Islamic law, is in reality fiqh, and not the Divine Shari`a. In so doing the Divine Will remains immutable, while in pursuance of convenience and efficacy fiqh is open and flexible. It is with this attitude in mind that Rahman says that "whatever the Muslim 'understood' of God's Shari`a, he would naturally regard as his attempt at Din",<sup>40</sup> i.e. an attempt to follow the primordial religion in an imperfect manner. It would thus be preposterous to claim an understanding of the Shari`a as the Shari`a from God for "it is up to God to know whether it is really Shari`a, i.e. His will, or not."<sup>41</sup> Fiqh is the appropriation of reality by means of an approximation. Simply put, fiqh is the product of the human endeavour to realise the Divine will in probable terms, not absolutely. Shari`a is the ideal, the utopia. But even utopia is not beyond ideologisation. In the words of Al-Azmeh: "Utopia is a social and ideological fact from which the Shari`a cannot escape."<sup>42</sup>

38. al-Azmeh, op. cit., p. 250.

39. Ibid.

40. Rahman, op.cit., p. 102.

41. Ibid.

42. Al-Azmeh, op.cit.

### Historical excursus

As alluded to earlier, the social context to a large extent influences juristic thinking and practice. This includes the political context in particular.

By way of example I will demonstrate how fiqh, derived from the Shari`a sources, adapted to social and historical changes during the earliest period of Islam. `Umar, the second Caliph of Islam, refused to distribute vast tracts of land gained by military conquest - ghanima - among those who fought in the conquest of Egypt and Iraq. This ostensibly went against the explicit and obvious meaning of the text of the Qur'an, 8:41,<sup>43</sup> regarding ghanima. Defending his policy-decision, `Umar appealed to the spirit of 59:6-10<sup>44</sup> and a

43. The text of the Qur'an reads:

Know that, whatever booty [ghanima] you take, the fifth of it is God's, and the Messenger's, and the near kinsman's, and the orphan's, and for the needy, and the traveller, if you believe in God and that We sent down upon Our servant...[Arberry's translation. Insert mine]

44. The text of the Qur'an reads:

Whatsoever spoils of war [fa'y] God has given to His Messenger from the people of the cities belongs to God, and His Messenger, and the near kinsman, orphans, the needy and the traveller, so that it be not a thing taken in turns among the rich of you. Whatever the Messenger gives you, take; whatever he forbids you, give over. And fear God; surely God is terrible in retribution. It is for the poor emigrants, who were expelled from their habitations and their possessions, seeking bounty from God and good pleasure, and helping God and His Messenger; those - they are the truthful ones. And those who made their dwelling in the abode, and in belief, before them, love whosoever has emigrated to them, not finding in their breasts any need for what they have been given, and preferring others above themselves, even though poverty be their portion. And whoso guarded against the avarice of his own soul, those - they are the prosperers. And as for those who came after them, they say, `Our Lord, forgive us and our brothers, who preceded us in belief, and put Thou not into our hearts any rancour towards those who believe. Our Lord, surely Thou art the All-gentle, the All-compassionate. [Arberry's translation. Insert mine]

principle contained therein which deals with the distribution of property gained by peaceful means, known as fay'. He linked the two verses, using the latter to qualify the former and argued that 59:6-10 prevents the accumulation and monopoly of wealth among one group of people. In the words of the Qur'an, the spoils of war must "be not a thing taken in turns among the rich of you".

Instead of distributing the urban and rural lands of Egypt and Iraq among the soldiers as booty, he imposed a land-tax called kharaj on those who owned agricultural land as well as a poll-tax called jizya on non-Muslim subjects living in the new frontiers of the Islamic state.

One notes that `Umar deduced a legal ruling from a source or indicant of the Shari`a, a verse of the Qur'an. A superficial reading of his judgement might lead to the conclusion that he had failed to implement the letter of a Qur'anic ordinance. However, on reflection his judgement seems to have taken into consideration the social context in which the law had to be enforced in the interest of the public weal - maslaha.<sup>45</sup>

Later jurists, using different legal theories, differed on the same case treated by `Umar. Al-Shafi`, supported by his student Ahmad bin Hanbal, argued that conquered land must be distributed among the army. `Umar's action, he said, primarily derives its legitimacy from the fact that the people waived their right to booty and not because of his creative interpretation of the verses. Despite al-Shafi's

45. Al-Khinni, op.cit., p. 122.

retrospective to rationalization of his own legal theory the question still remains whether the text can be set aside if the people waived their rights in all cases. Malik ibn Anas, the jurist of Madina, was of the opinion that such land should not be distributed among the soldiers. However, if it is in the public interest it may be divided among the army<sup>46</sup>. Abu Hanifa argued that the ruler has the prerogative in such matters.<sup>47</sup>

Noting the differences in just one legal ruling it becomes clear that different sets of legal theories are implicitly at work in the interpretations. To what extent these legal theories are a product of the social context is beyond the scope of this thesis. This would then suffice to show that the differences in legal theory consistently gave rise to different legal ordinances known as fiqh. In the above example, al-Shafi`, Ahmad ibn Hanbal, Abu Hanifa, and Malik deduced at times both similar and contrasting Shari`a rules - ahkham al-shari`yya - from their detailed sources.

One of the reasons for diversity is because law is part of a social-context where a range of influences are at work. And, in this social-context power and authority invariably have an effect on the legal process. Hence, we find an interlocking network between law, power and political authority.

The twentieth century European scholar, Joseph Schacht, points out that at a particular stage of Abbassid rule (749

46. Ibn Rushd, Bidayatul Mujtahid, vol 2, p. 401.

47. Al-Khinni, op. cit., p. 69.

to 1051) there was a move for state control over the law. While this was nothing more than a phase, "orthodox Islam refused to be drawn into too close a connexion (sic) with the state".<sup>48</sup> The subsequent history of the relations between Islamic law and political power demonstrate that the governors, sultans and caliphs had considerable powers to dismiss and replace judges and magistrates - qadis<sup>49</sup>. In some way the Abbassids did exercise some influence over the executive arm of the judiciary and the unofficial jurists. These attempts at political manipulation had significant consequences.

Several jurists refused to take up official posts or resisted attempts by the governors to adopt their texts and writings as the official code and practice of the government. Abu Hanifa refused to become the chief justice of the Abbassid state. Some historians even link his death by poisoning to his political disagreement with the state. Malik ibn Anas turned down Harun al-Rashid's offer to allow his al-Muwatta, a digest of Hadith ordinances which record the positive law, to be made the official textbook for the judicial administration of the state. Although research into the dynamics of resistance and co-operation with the various dynastic states has not shed much light on the matter, it is generally assumed that the 'ulama were suspicious of the designs of the state. Yet, one finds that some jurists in the era prior to the Abbassids had good relations with the rulers, particularly during the reign of the Umayyads. Ibn

48. Joseph Schacht, An Introduction to Islamic Law, Clarendon Press, Oxford, 1965, p. 56.

49. Ibid.

Shihab al-Zuhri, (d. 124/742) a famous Traditionist, had close relations with Ibrahim ibn al-Walid, the ruler at the Umayyad court. It is believed that even though al-Zuhri's fiercest critics could not attribute any impious motive for his links to the royal court, "he could not gainsay the official circles".<sup>50</sup> At times, ostensibly for reasons of state stability, many 'ulama justified their links with the imperial courts of their times. Despite Abu Hanifa's refusal to serve the Abbassids in an official capacity, his most brilliant and influential student, Abu Yusuf, (d. 182/798), became chief qadi (chief justice) of the Abbassid Empire under Harun al-Rashid.<sup>51</sup> He was also the author of a major work on taxation, known as the kitab al-kharaj.

It must not be taken for granted that legal texts were chiefly written as scholastic exercises. While this may be true for some, many texts were commentaries on society at large. As Humphreys notes: "At all periods there were multitudes of legal writings which meant to address current political, social and economic issues."<sup>52</sup>

Obviously the fiqh developed by Muslims reflected the socio-political milieu in which jurists were working. If some juristic positions favoured state patronage then there were also other opinions opposed to it. Ibn Taymiyya, the Hanbali jurist and political theorist (661-1262/ 728-1328), introduced a new brand of juridico-political thought criticizing the political authorities, his contemporaries

50. Rahman, Islam, p. 49, citing Goldziher.

51. Humphreys, op. cit., p. 198.

52. Ibid., p. 194.

and previous jurists. There can be little doubt that his intellectual and legal writings were provoked by his context. The schools of law themselves emerged from a turbulent battlefield of ideas. Of course the balance between realism and idealism varies between schools and individual scholars.

### Conclusion

I have argued, that the Shari`a is a utopian ideal but that Islamic law, and more specifically fiqh, is open and flexible. This flexibility does not affect the immutability of the Shari`a. It has to be noted that there is a dialectical relationship between, what I have coined, the Shari`a/fiqh process and the socio-political milieu in which it operates. It is indeed problematic to say that the Shari`a/fiqh process determines the social milieu or vice-versa. However, it is valid to argue that the Shari`a/fiqh process has never been totally independent of the socio-political forces. Irrespective of whether the Shari`a/fiqh process is viewed as open and flexible or close and static, it will in any event have a relationship with the socio-political process. But, in each instance there will be significant differences in the relationship.

Fiqh can play a vital role in providing Muslims with a value-system rooted in their spiritual and ethical culture if it is understood as a dynamic system. However, if the distinction between Shari`a and fiqh is not maintained it could lead to a stasis and the absolutizing of the law. In

such an eventuality the social relevance of the law may increasingly be questioned.

In the following chapter, I will go on to show that MPL can become a vehicle for despotic repression at the level of both state and civil society. I have tried to show that the interpretations and tensions within Islamic law historically-speaking have political roots in addition to their other roots. If the content of MPL and the mechanics for implementing it do not take into account the socio-political realities of South Africa there is a danger that MPL will become repressive instead of liberating. In order to show this , I will deal in the next chapter with the impact that ideology and liberation has on the debate on MPL.

## CHAPTER TWO

MUSLIM PERSONAL LAW AS A PROBLEM IN POLITICAL DISCOURSELaw, Ideology, State and the Muslim 'subject'Introduction

In the previous chapter the concept of Shari`a was explored where it was stated that the distinction between the Shari`a and fiqh should be maintained. While Shari`a is absolute at one level, at the level of implementation it is flexible. History shows that the understanding of the Shari`a/fiqh process in its social context has often been influenced by socio-political developments. It was also concluded by way of suggestion that MPL faces this danger of being subject to a ruling political ideology.

Here the analysis will focus on the creation of a Muslim 'subject'<sup>1</sup> in order to show how a ruling political ideology may affect MPL. The possible implementation of MPL as proposed by the South African Law Commission (SALC) raises certain important questions related to the socio-political implications it would have on both the Muslim community in particular, and the process of liberation in South Africa in general.

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1. I use the word 'subject' in its specialized sense as one who had been interpellated by an ideological process. See further discussion below.

If there is a desire to establish an authoritative and contextual implementation of MPL then the methodological tools to do so ought to be developed. Due recognition must be given to the fact that religious symbols and doctrines play an important part in the ideological discourse examined here. The link between the problem in legal theory (see chapter one) and the political discourses discussed in this chapter is established in order to locate the contextual discourse of Muslims in South Africa. It is not sufficient only to expose the dominant political ideology but the groundwork for an alternative discourse and hermeneutic must also be explored.

For some theoretical tools of analysis in this chapter I have relied largely on the neo-Marxian interpretation of law and ideology which borrows some of its seminal ideas from the influential French thinker, Louis Althusser. Some of these concepts are complex and form an interlocking argument. It is for this reason that some concepts and terms are first outlined and will be applied in the analytical part of this chapter.

#### Discourse, Ideology and Law

It is appropriate to begin with a discussion of discourse. A discursive relationship is a power relationship. In addition to whatever else it might be, language forms the central part of human communication and the most effective medium in which power relations are formed. It is through discourse that ideological control is effected on subjects. Law as an apparatus is linked to the discursive process.

Althusser, believes that ideology is promoted by the Ideological State Apparatuses (ISAs)...

insofar as the ideology by which they function is always in fact united, despite its diversity and its contradictions, beneath the ruling<sub>2</sub> ideology, which is the ideology of the ruling class.

By this we understand that ideology is not a unitary entity. To understand the role of ideology in law the focus should be on the nature of discourse - its continuities and discontinuities - and to trace the resonances of the social, economic, and political struggles that "reside behind the smooth surface of legal reasoning and judicial utterance".<sup>3</sup> Ideology in terms of such reasoning is realized through and in social relations which in turn are constructed through discourse.<sup>4</sup>

Institutions and apparatuses like the army, courts, law, the state church and the state religion ensures "subjection to the ruling ideology". In this process all the agents of

2. Louis Althusser, "Ideology and the Ideological State Apparatuses (Notes Towards an Investigation), in Lenin and Philosophy, (trans. Ben Brewster), London, New Left Books, 1971, p. 139.

3. Allan Hunt, "The Ideology of Law: Advance and Problems in Recent applications of the Concept of Ideology to the Analysis of Law", Law & Society Review, 19:1, 1985, p. 16.

4. Mohamed Arkoun in an essay titled: "The Concept of authority in Islamic Thought", in Islam: State and Society, Klaus Ferdinand and Mehdi Mozaffari, (eds) Studies on Asian Topics No 12, Scandinavian Institute of ASian Studies, Curzon Press, London 1988, p. 68 says...

In the past, ideologies existed, but have been eliminated or criticized under the name of sects, heresies and religious error. The hard and suggestive polemic between Sunni and Shi'i is an excellent example of the ideological basis of theological reason. Only the modern critic of ideologies can show that each orthodoxy is ultimately founded on ideological postulates.

production, exploitation and repression and the functionaries or 'high priests' of the ruling ideology, reproduce the 'subjection' to the ruling ideology.

In analysing the relationship between law and ideology Althusser distinguishes between the politico-legal field which includes law and the state, known as the Repressive State Apparatuses (RSAs) and the variety of religious, ethical, legal and political ideologies, known as the Ideological State Apparatuses (ISAs) <sup>5</sup> Since the ISAs and RSAs constitute a whole range of activities, the discourses will also be multiple.

### The Subject

The notion of a 'subject' in the Althusserian scheme is created through a variety of discourses. The subject(s) of ideology are discursively constituted through interpellation. According to Althusser, interpellation is that process of summoning (hailing) individuals so that by recognising themselves to be the ones summoned, they are transformed as subjects of a universal Subject. The subjects misrecognise the process by which they are constituted by accepting the self-evidentness (obviousness) of their position. <sup>6</sup> In other words, the subjects accept the variety of influences that govern their actions without questioning in whose interests they actually do so. For example, a policeman signalling a motorist to stop or saying a prayer at the opening of a public meeting may both be seen as law-

5. Ibid., p. 129.

6. Althusser, op.cit., p. 161.

abiding and religious acts if they were complied to uncritically. If these acts are uncritically performed it could lead to a situation where the motorist stopping and praying could mean more than what both acts actually pretend to signify. The motorist may believe he is stopping for an alleged traffic offence but his act could be more significant in that he may be legitimating an illegitimate political authority by obeying the policeman. Or, the prayer may ostensibly be for spiritual upliftment but the devotee may in reality be satisfying an ideological impulse which he/she may not at all be happy about if it was not ideologically disguised in religious language .

Ideology represents for individuals their imaginary relations as opposed to their real relations in which they live <sup>7</sup> and in so doing hails them as subjects. The "imaginary" does not mean "illusory" or "false" in the Althusserian sense, but rather the "relation" to the material conditions of existence. Ideology gives us the world as "spontaneous". The subject acts insofar as s/he "is acted by ideology".<sup>8</sup> It means that individuals are "always-already" interpellated as subjects. It was Althusser who said: 'Man is an ideological animal by nature'.<sup>9</sup> However, ideology does not say out aloud : 'I am ideological'. What an analysis of subjectivity provides is a heightened sensitivity to the manipulative skills of power relations for the possession and control of the material conditions of

7. Althusser, op.cit., pp. 153-154.

8. Althusser, op.cit., p. 159.

9. Ibid.

existence. In a sense all discourse is ideological. In revolutionary societies, the discourse ideally favours the under-classes in order that they may establish direct possession and management over the material conditions of their existence. Control over the material conditions of existence is not easily achieved and at best remains the privilege of a few.

### State and the Law

The state is best described as a complex reality. Crucial to this analysis is the role of the ISAs which operate at different levels and appear as private institutions such as the Church, the legal system, the schools, the media, the trade unions, the political parties etc.<sup>10</sup> For our purposes the state is best described as a shifting complex of structures which involves a whole range of ideological and repressive institutions. In its complexity the array of apparatuses are united in the constitution of an ideological hegemony in the social formation.<sup>11</sup>

Law is close to the state, yet distinct from it. In other words, it has a relative autonomy to be an ISA while its proximity to the state also makes it an RSA. Hegemonic control of the ISAs is vital since no ruling-class can hold state power without exercising at the same time its hegemony over the ISAs.<sup>12</sup> It is for this reason, more than any

10. Ibid., p. 136.

11. Harold Wolpe, "Towards an Analysis of the South African State", International Journal of the Sociology of Law, vol 8, 1980.

12. Ibid., p. 139.

other, that the ISAs are the "site of class struggle" <sup>13</sup> or the sites of struggle for ideological hegemony on the part of both the state and its opponents.

The state maintains hegemonic control by creating a situation of unequal relationship. The political discourse interpellates the individual to create the facade of an equal "citizen" <sup>14</sup> while the legal discourse transforms both human beings and social entities, like companies, into "legal subjects".<sup>15</sup> The common element between the political discourse and the legal discourse is that both interpellate their subjects.

Hunt's statement on the interpellation of the legal subject adequately explains this phenomenon and deserves full replication...

The creation of legal subjects involves the recognition of "the law" as the active "subject" that calls them into being. It is by transforming the human subject into a legal subject that law influences the way in which participants experience and perceive their relations with others. Thus legal ideology provides a constituent of what Althusser called the "lived relation" of human actors. <sup>16</sup>

Seen in this way ideology is not only an external mechanism but, a "constituent of the unconscious in which social relations are lived".<sup>17</sup> Ideology through the state apparatuses constructs a 'subject' with certain characteristics that sustain the hegemonic function of the state.

13. Ibid., p. 140.

14. Hunt, op.cit., p. 15.

15. Ibid.

16. Ibid.

17. Hunt, op.cit., p. 16.

As part of the ideological process the discourse of MPL will be investigated in terms of 'subjectivity', in this specialized sense, and the relationship between the state and law in the political process.

Background to MPL: The S A Law Commission's Proposal

Towards the close of 1987 the South African Law Commission (SALC) circulated a questionnaire to several Muslim organisations and individuals soliciting their opinion on certain matters affecting MPL. The motivating introduction to the questionnaire (see Appendix 1) stated...

The South African Law Commission is presently engaged in an investigation into certain aspects of Islamic marriages and their legal consequences in South African Law.<sup>18</sup>

Representations for the recognition of MPL in recent times go back some 10 years. In 1975, the Director of the Institute of Islamic Shari'a Studies made representations to the then Prime Minister, B J Vorster, that aspects of Islamic law relating to divorce, succession and guardianship be recognised. At the time the SALC was...

unwilling to include the investigation in its programme, firstly, because it was of the opinion that the recognition of the relevant aspects of Islamic law could lead to confusion in South African law and, secondly, because the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law.<sup>19</sup>

The SALC has as yet not given any satisfactory explanation as to what had substantively changed in 1987 that it had decided to entertain Muslim demands. Neither did it explain

18. South African Law Commission, Islamic Marriages and Related Matters, Project 59 (Questionnaire), p (i).

19. Ibid., p. (ii)

how it did away with the feared "confusion" MPL would cause in S A law.

The SALC tries to make a coherent case for its renewed interest in Islamic law by trying to create a continuity between previous Muslim representations and a number of its own current inquiries. The inquiry into MPL is seen to be part of an investigation into the position of:

- 1) illegitimate children [Project 38]
- 2) marriages and customary unions of Black persons [Project 51];
- 3) a review of the law of evidence [Project 6]
- 4) the law of intestate succession [Project 22].<sup>20</sup> "
- 5) The SALC also took cognisance of a private Bill by Mr P T Poovalingam MP (House of Delegates) who wanted to introduce legislation in 1987 which "grant some form of recognition to the Islamic law of succession".<sup>21</sup>

#### Muslim Responses to the Questionnaire

Muslim responses to this SALC questionnaire varied from a feverish welcome to outright rejections. The conservative Ulama-bodies of the three provinces - the Muslim Judicial Council (MJC) of the Cape, the Jamiat ul-`Ulama of the Transvaal, the Jamiat ul-`Ulama of Natal, as well as the Mujlisul `Ulama of South Africa and the Islamic Council of South Africa (ICSA), have all made submissions to the SALC

20. Ibid., p. (ii)

21. Ibid., p. (ii)

as far as it could be ascertained. Other than the `ulama, the Association of Muslim Accountants and Lawyers (AMAL) is also believed to have submitted its response to the questionnaire. The `ulama bodies announced the MPL proposal with near-jubilation. In a pamphlet<sup>22</sup> the `ulama said:

For many years since the arrival of Islam in South Africa, Muslims have been yearning for the introduction of Islamic Law in some form or another to govern their affairs. Various approaches have been made to the relevant authorities in the past but without any measure of success...We pray and hope for the co-operation of all Muslims in this endeavour and hope that it will not be long before we shall see Muslim Personal Law as part of the legal system of the Republic of South Africa.<sup>23</sup>

On the opposite front the Muslim Youth Movement (MYM) in its monthly mouthpiece, Al-Qalam (The Pen), seems to have been cautious with regard to MPL. Al-Qalam warned Muslims that the Botha government faced a "legitimacy crisis" and was thus desperate to politically "co-opt" willing elements among Muslims by means of MPL.<sup>24</sup> The Call of Islam, a Cape Town-based group, also voiced its reservations about the issue in a pamphlet.<sup>25</sup>

The MYM admitted that severe problems were being experienced at a community level in matters such as arbitrary divorces, the lack of adequate maintenance for children and divorcees. However, it was contentious whether these problems could be

22. Announcement: Muslim Personal Law, pamphlet issued by the Secretary, Central Committee, `Ulama of South Africa. (See Appendix.)

23. Ibid.

24. Al-Qalam, Comment, "Muslim Personal Law: Quo Vadis?" February 1988, vol 13, pp. 1-2.

25. "Ask the Ummah!", undated pamphlet issued by The Call of Islam. A part of it read...

We must not and will not allow them [the state] to use our Personal Law to control and co-opt us...

overcome by legislation in the form of MPL. The Al-Qalam editorial called on Muslims to unite and discuss the issue and declared itself in favour of Muslim organisations setting up structures independent of the state to administer MPL.

A short-lived MPL Action Committee was also formed in the Western Cape. The aim of this body was to create awareness at a grassroots level to monitor the action of various 'Ulama groups who were privately entertaining the MPL proposal without public consultation. In the Western Cape the 'ulama were charged of taking decisions without a public mandate by several community organisations. This was largely due to the MJC's failure to inform the community about discussions held with the SALC or joint agreements reached with other 'ulama groups in the Transvaal and Natal regarding the MPL proposal.

The absence of public debate on a politically sensitive issue such as MPL does cause reason for concern among politically aware Muslims. The Action Committee's main criticism was that the 'ulama were willing to respond to the SALC questionnaire without considering the far-reaching political implications of their decision may have. The MJC was pressed by the Action Committee to explain their co-operation with a para-statal body like the SALC and outline their political strategy with regard to the state, if MPL was to become a reality. The MJC's oral reply was that the Treaty of Hudaibiya undertaken between the Prophet Muhammad in seventh century Arabia and his Makkan political enemies served as a precedent for co-operation with an unjust

regime. That implied that co-operation with the apartheid state was possible provided such co-operation served the vital interests of the Muslims.<sup>26</sup>

The ultra-conservative Port Elizabeth-based Mujlisul 'Ulama of South Africa in its contribution to the debate made a scathing attack on an unidentified "Co-Ordinating Committee of Johannesburg" for allegedly urging Muslims and the 'ulama bodies to refrain from answering the questionnaire. The Mujlisul 'Ulama described the content of the questionnaire to be related to "important matters affecting the Deeni (religious) life of Muslims in South Africa."<sup>27</sup> It further advocated that Muslim organisations should answer the questionnaire in consultation with the 'ulama, whom it said enjoyed the status of the 'ulul-amr, the people of authority, in the Muslim community.<sup>28</sup>

Two individual responses to the MPL proposal, that of Professor Habibul Haq Nadvi, Head of the Department of Arabic at the University of Durban Westville and advocate A B Mohamed of an ICSA spokesman from Durban, both recommend that the government recognize MPL in SA.<sup>29</sup> Nadvi believes that the "difficulties of Muslims in this country can be

26. This author was part of the delegation that met the MJC early in 1988. The information regarding the MPL Action Committee was gathered after attending meetings held by the Action Committee in various Cape Town mosques during the first part of 1988. The MJC's spokespersons at the meeting attended included its president, Sheikh Nazeem Mohamed and Moulana Yusuf Karaan, who heads the MJC's fatwa committee.  
27. Pamphlet issued by the Mujlisul 'Ulama of South Africa, dated 5 January 1988, P O Box 3393, PE. (See Appendix)  
28. See Appendix 2.

29. S. Habibul Haq Nadvi, Problems of Safeguarding Muslim Personal Law in South Africa, a published working paper submitted to the SALC in response to their questionnaire, 29 February 1988.; A B Mohamed, Human Science Research Council Section for Political Science Research, Research Project - Muslim Law, Ref. No 3/10/121. 1984.

removed only through official recognition of the Muslim Personal Law" <sup>30</sup> A B Mohamed proposes the establishment of Muslim Family Courts. <sup>31</sup> The gadis (judges and magistrates) of these courts are to be appointed by the State President <sup>32</sup> on the recommendation of the judicial committee of the Islamic Council of South Africa (ICSA). <sup>33</sup> Both studies oversimplify the matter and propose legislation as the solution. They also fail to address some of the more pressing socio-political issues linked to the implementation of MPL.

#### Analysing the Discourses: The State Discourse

The assertion that MPL is a problem in political discourse is supported by the opinion expressed by the Centre for Islamic Studies at the Rand Afrikaans University (RAU). The discourse can be traced to the moment when certain Muslim groups publicly criticised the Centre for convening a discrete conference to which only a very selected audience of local Muslims were invited. Those invited included only members of the two ulama-bodies in the Transvaal and Natal and two Durban-based Muslim academics. The Al-Qalam, the publication of the Muslim Youth Movement (MYM), came close to describing the conference as suspect and implicitly made the point that only persons favorably disposed towards the South African state qualified for an invitation. Since the

30. Nadvi, op. cit., p. 5.

31. Mohamed, op. cit. p. 93.

32. Ibid., p. 118.

33. Early in 1988, a meeting hosted by the Muslim Assembly, an affiliate of ICSA, ended in pandemonium when the chair person, Dr H Kotwal refused to entertain questions dealing with the political dimensions of the MPL proposal.

issue affected all Muslims in South Africa a representative cross-section of the community ought to have been consulted in discussions of such a sensitive and significant nature.

In response to these criticisms, an editorial in the Centre's Journal for Islamic Studies, following the said "international conference" held in July 1988, titled, Islamic Law and the Modern State, the Centre with the advantage of hindsight outlined the objective of the conference.

The conference was meant to give some perspective in academic context to an investigation of the Law Commission of South Africa into the possibility<sup>34</sup> of introducing Islamic Family Law in this country.

However, the opinion following the description of the conference deserves attention. The Journal accused a "small group" of Muslim "radicals" of "false propaganda" and "disgraceful" behaviour for their criticism of the conference. The criticism appeared to have been more specifically directed at the MYM for its vociferous criticism of the Centre in the Al-Qalam. But in responding to the criticisms levelled at it, the Centre disclosed more than what it had thus far managed to conceal. Its discourse implicitly distanced itself from a group of Muslims, "the radicals" who were overtly political. At the same time it implied the Centre's association with those Muslims who were not political. In other words, those who were favorably disposed towards the status quo, namely the Transvaal and Natal Jamiats.

<sup>34</sup>. Journal for Islamic Studies, no 8, 1988 (ed) J A Naude, Centre for Islamic Studies, Rand Afrikaans University (RAU), Johannesburg.

A subsequent Al-Qalam editorial observed that the Centre's discourse shared a striking resonance with the dominant state discourse against Muslims.<sup>35</sup> Such discourse implicitly tended to take sides with a specific group of Muslims after it had characterised the 'Muslim subject' in a manner befitting the self-interest of the dominant, the Al-Qalam said. In taking sides the discourse makes a conscious distinction between "radical" and allegedly law-abiding Muslims<sup>36</sup> and shows a bias towards one.

If the above discourse is juxtaposed alongside a statement made by President P W Botha in Parliament in April 1986, certain striking parallels are found. It highlights the main elements of the state discourse vis-a-vis 'radical' Muslims. It also reveals the state's political assessment of the Muslim community. The context of Botha's 1986 statement was the arrest of an insurgent group entering South Africa from Botswana which included a few persons of the Islamic faith. Identifying the Muslim elements among the insurgents, Botha told Parliament...

As you are aware we have a large Muslim community who, like all other religious denominations, enjoy complete freedom of religion. Furthermore, you also know that South African Muslims are respected citizens. However, a small group has emerged within this community who, under the influence of Libya, Iran and with funding from these quarters, have committed themselves, with the ANC and PAC, to terror and violence.<sup>37</sup>

In his discourse Botha constructs two Muslim 'subjects'. The one is the "respected citizen" which is law-abiding and does

35. Al-Qalam, November-December 1988, Editorial, "Blaming the Victims", p 8.

36. Ibid.

37. Republic of South Africa, Debates of the House of Assembly, Hansard, Third Session - Eighth Parliament, 14-18 April, 1986, No. 10, p3590.

not offer resistance to the state and its ideological apparatuses. The second 'subject' is a "small group" described as 'radical' which is linked to Iran and Libya who are seen dubbed as pariah states in the Western- world.

Disguised in this discourse is the state's own version of 'the Muslim' (respected citizen) to which it is favorably predisposed. Opposed to this group is another type of 'Muslim' (small group/ radical). In the ordinary sense of speech and media-reporting the attempt at constructing the monolithic Muslim 'subject' - the Law-abiding Muslim or 'good subject' - is not always noticeable for the focus is directed at the radical, the 'bad subject'.

Botha spelt out the state's modus operandi of dealing with the radicals...

I have already issued instructions in this regard and our security and intelligence <sup>38</sup>services are taking necessary countermeasures. (emphasis mine)

The discourse of the Centre for Islamic Studies at RAU echoes the state's discourse in stunningly identical terms and gives it further currency. Note the Journal's editorial tone towards its critics, the 'bad subject'...

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38. Ibid.

That the idea of this conference was drawn into the field of politics by a small group outside those mentioned, is something they have to account for themselves...radicals are weak, but seek strength in their extremism. They feed on conflict images and rejectionism, and seek a solution in the absolute, in total confrontation rather than in negotiation for a better future. There is after all little challenge in working destruction; any ignoramus<sup>39</sup> with a hammer in his hand can create chaos... (emphasis mine)

There are noticeable continuities in the discourse of the Centre and that of the state. They mutually reinforce the same discursive pattern, one as an ISA - an educational institution like RAU, and the other as the head of state. The noticeable absence (discontinuities) is that although the conference was titled "Muslim Law and the Modern State", not a single paper dealt with the modern South African state. No analysis or discussion of the political relationship between MPL and the modern South African state was entertained at the conference. In fact the Centre's discourse encourages "negotiation" in a reformist approach and at the same time tries to criminalize the radicals and deprive them of social legitimacy.

#### The 'Ulama's Discourse

Similarly, the discourse of the 'ulama implies the characterization of a Muslim subject of a 'universal' nature. The hidden text of such discourse is the understanding that there is one uniform Muslim subject which the 'ulama authoritatively interprets. The implication of this assertion is that the Muslim masses cannot represent themselves individually or collectively. They are to be

39. Journal for Islamic Studies, "Editorial", p. 2.

represented by the `ulama. Historically the `ulama claim to be the custodians of religious authority of a "precise dogmatic expression".<sup>40</sup> Anything opposed to this expression runs the risk of being termed heterodox since it disputes religious authority in terms of the interpretation and spread of religious practice.<sup>41</sup>

However, it would be incorrect to assume that orthodoxy is a monolithic unit. At times there is often a tacit assumption says Christelow, that ...

"the `ulama are a sort of timeless, invariable fixture in the Islamic world, and that, similarly, the Islamic institutions which they staff are unchanging over time, and invariable in their form from one setting to another."<sup>42</sup>

The notion of a monolithic category of `ulama has increasingly and correctly been challenged. In South Africa this class of the traditional Muslim elite vary from one province to the other differing on the basis of theological and scholastic loyalties, ethnicity, political and cultural differences. Despite their inherent differences they have in common a consistent claim to religious authority by virtue of their religious status. It in this sense that the `ulama is used as equivalent to the term orthodoxy<sup>43</sup>.

40. Aziz al -Azmeah, "Orthodoxy and Hanbalite Fideism", Arabica, xxxv, 1988, p. 253.

41. Ibid.

42. Allan Christelow, "The Transformation of the Muslim Court System in Colonial Algeria: Reflections on the Concept of Autonomy", in Islamic Law, (ed) Al-Azmeah, p. 217.

43. Al-Azmeah describes orthodoxy as an "intangible quality" and defines it as...

an attribute of all religious authority, an attribute which acquires veracity to the extent to which it can be made binding and paradigmatic and to the degree to which it can be consolidated, enforced, and endowed with the capacity for dissemination and continuity. (Arabica, xxxv, 1988, p. 253).

The statement of the Mujlisul 'Ulama epitomizes this attitude when it explicitly states that the 'ulama constitutes the 'people of authority'. This means that only those who are 'ulama have the exclusive authority to interpret the Islamic text.<sup>44</sup>

Anyone who ventures to interpret the text outside the circle of the 'ulama is a 'bad subject'. This is precisely the area of conflict between orthodoxy, and their rivals in religious authority, the modernists, fundamentalists and neo-fundamentalists. From the viewpoint of orthodoxy, the latter heterodox categories or 'bad subjects' can be declared heretical or quasi-heretical in discursive terms. In a strange coincidence the state also seeks to exercise some sort of monopoly over the right to authority. It is the state which in Calvinist terms is the locus of authority and which legitimates and de-legitimizes activities, organisations, people and behaviour. There are many similarities to be found in the discourse of power/authority of the 'ulama and the state in South Africa.

Leonard Binder's reading of Edward Said's critique of orientalism may throw some light on this veiled, but effective, ideological alliance between state and orthodox Muslim authority. Said states that the defect of orientalism is its imputation of a universal character to Islam. In his view this is a violent attack on Islam and Muslims in order to coerce them into conforming to roles imposed by Western

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44. See Appendix 2.

imperialism.<sup>45</sup> The question raised is whether the orientalist critique is inimical to Islam ...

because its interpretations have the effect of imprisoning the text of the Qur'an rather than liberating it. The insistence upon the essential, or orthodox, version of Islam in the critique of heterodox, or modernist, or fundamentalist Islam, is based on the notion that there is one authoritative meaning to the text. Consequently, there emerges a kind of double repression and violence of the original text and of the orientalist critique. Presumably the result of this combination of rigidities produces an unnatural ideological alliance between the orientalist and the traditional 'ulama, not because they have similar imperial interests, but because they have similar knowledge-interests (as Habermas following Kant may put it) in the same text. The text may be worldly in diverse ways.<sup>46</sup> (emphasis mine)

Knowledge interests imply power interests through channels of authority. It appears that Binder's analysis is valid in the South African context. The 'ulama may not have identical political interests with the South African state, but their "unnatural ideological alliances" with the state and pro-state actors at certain junctures disclose their knowledge-interests for purposes of religious authority and power. Similarly, the attempt to impute a standard and absolute definition of the Muslim in South Africa would enable the state to make the Muslim subject conform to certain roles which would be in its own ideological interests.

The Muslim 'subject' is the result of the skilful manipulation of legal, religious and ideological symbols. But the struggle for ideological hegemony is by no means one-sided. The politicised Muslim elite opposed to the state find themselves in confrontation with a powerful Muslim traditional and ethnic elite. The politically active elite

45. Leonard Binder, Islamic Liberalism: A Critique of Development Ideologies, University of Chicago Press, London, 1988, p. 96.

46. Ibid.

also seek hegemonic control over religious symbols. The politicized elite, however, overtly oppose the state. As a consequence they cannot disguise their appropriation of Islamic symbols as effectively as the traditional and ethnic elite do. The rhetorical concerns of the traditional/ethnic elite with Islamic legal issues in terms of MPL disguises an ideology which tacitly supports the status quo. To the advantage of the traditional/ethnic elite is that they reinforce their ideological claims with religious symbols and authority which are extremely resilient.

#### The Politico- Legal Discourse: Constructing the Subject

Colin Sumner has accurately stated the relationship between law and ideology...

A legal enactment is a hybrid form combining power and ideology...It originates within legalizing practices which are political in that they are geared to producing certain specific power relations. Once constituted, legal systems do not just produce laws, but exist as The Law. An ideology of legality develops which celebrates and elevates The Law to an exalted status as the expression of unity in the nation. It is most important to begin the study of the functions of ideology of legality in concealing political acts and domination.<sup>47</sup> (emphasis mine)

The argument thus far has been that ideology tries to interpellate its subjects in categories of 'good subjects' and 'bad subjects'. These ideological categories are designed to protect the security and political interests of the state which is crucial for hegemony.<sup>48</sup> Without separating the 'fish' from the 'sea', to use a Maoist metaphor, it is difficult to maintain political control.

47. Colin Sumner, Reading Ideologies, p. 293.

48. Adrian Vlok, Interview in Leadership, 1987.

Hence, the need to isolate the "revolutionaries", from the community and fulfill the needs of the 'good' citizens in terms of providing civic services, housing, jobs and institutions that will fulfill their limited religious and cultural requirements.

By introducing MPL the state stages an ideological intervention in the legal field. Ideologically a favourable minority (Muslims) is discursively constructed to understand its relations of obligation, MPL, in a definitive way and a manner approved by the state. By means of effective legal organisation the 'Muslim' is interpellated by "the law" and transformed into a 'legal subject' like any other legal entity, e.g. Anglo-American Corp, IBM etc. This definition of the 'Muslim subject' prevails irrespective of whether it corresponds with the community's self-definition, as explained by its theologians, jurists and intellectuals and their worldview.

#### The alternative discourse

It has been argued that a 'subject' is constituted by various discourses. Each subject is thus constructed differently reducing thereby the possibility of constructing all Muslims into subjects. In effect the interpellatory process creates its own contradictions by not being able to create a uniform subject.

A static and acontextualised Shari`a/figh process, of which MPL is part, is in danger of becoming fixated to a specific mode of ideologisation. In contemporary South Africa it means that MPL will become ideologised within a racial-capitalist economic mode. A contextual and open viewpoint of the Shari`a/figh process would allow MPL to shift its ideological compass in tandem with the changing political and economic formations in South Africa. It would further weaken the exclusive monopoly of one group, be it the traditional elite or the state over the law (and indirectly over the community) since it would enable public interest and the common good to alter the law without major social conflict and dislocation.<sup>49</sup>

From the above it becomes clear that the different notions of the Shari`a, discussed in the previous chapter, will ultimately determine the extent to which the interpellation of a Muslim subject could succeed. A notion of Islamic law with greater flexibility allows it to adapt to both changing political and socio-historical circumstances. A closed view of the law would facilitate the ideologisation of Islamic law with greater ease than what an open and flexible view would allow. The open view would invite and maintain a debate which would offset and balance attempts at hegemony.

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49. Note the political crises any amendment to MPL legislation causes in India.

The inability of the early imperial Muslim states, the Umayyads and Abbassids, to totally subject the law to serve their ideological tendencies did have some positive results. It allowed the law to develop a dynamism free from the strangling grip of the state. It also gave the law a momentum and a rootedness in the affairs of civil society since the earliest jurists occupied prominent social. Despite the problems Islamic law faces today it is still a feasible system. The last mentioned can be attributed to its dynamism and organic roots within society.

No single legal school - madhab - succeeded in dominating the Muslim world, except at rare instances. Malik's refusal to allow his Madinan interpretation of the law to become the dominant is significant in many ways. One explanation might be that law is culturally and socially specific. It would be unwise to impose a Madinian perspective of the law on regions that are non-Arab. In such cases the imposed law may conflict with the customary laws and values of the non-Arab societies. Each area has its specific socio-economic formation in which the law would operate differently. <sup>50</sup> This type of appreciation of in the study and practice Islamic law is found lacking in modern times.

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50. Classical development of commercial law is a superb example where a variety of commercial and trade practices were sanctioned in different geographical areas which were largely based on customary practice.

Islamic law itself has various layers of discourses which are indicative of its mutations through different socio-historical and economic modes. It is not surprising that today both socialists and capitalists can find texts to legitimate their respective positions within the framework of Islamic law.<sup>51</sup> This reveals the layers of discourses within Islamic law which also reflects its ability to adapt to different social contexts.<sup>52</sup> If the Shari`a/figh process is seen as an open system these mutations and influences with the use of critical analysis are easily detectable. If it is seen as static and closed then these culturally specific socio-economic practices will be absolutised in ideology.

The argument for an open ended Shari`a/figh process has been forwarded to prevent MPL from becoming a servant of a particular ideology, be it capitalist, socialist or other. This would on the one hand ensure that the discursive frame, which is in reality the power component, remains within the grasp of the populace and does not become the monopoly of the state and its repressive and ideological apparatuses. On the other hand, Islamic law will be consistent with its historical legacy.

51. See the debate between the Egyptian Marxist writer, `Abd al-Rahman al-Sharqawi and the Shaykh al-Azhar, `Abd al-Halim Mahmud, over the appropriation of the Prophet's companion, Abu Dharr, as the first socialist of Islam. (Ulrich Haarman, "Abu Dharr - Muhammad's Revolutionary Companion", in The Muslim World, vol LXVII, October 1978, No 4, p. 286)

52. The forms of commercial law espoused during the Umayyad, Abbassid and Fatimid caliphates, did not inhibit the development of protocapitalist economic activity in the form of petty commodity production and mercantile capitalism. See Joel Benin, "Islamic Responses to the Capitalist Penetration of the Middle East," in The Islamic Impulse, (ed) Barbara Freyer Stowasser, Croom Helm, London, 1987, p. 87; also see Maxime Rodinson, Islam and Capitalism.

### A Dilemma

Can the formal autonomy provided by MPL be broadened to provide substantive autonomy for the Muslims and other members of the disfranchised community in the long-term? Or would the acceptance of apartheid-style pluralism legitimise the subordinate and subject-status of the Muslims? This dilemma of choosing between two options that incorporates both pragmatic and strategic considerations for critical legal theorists is, in Hunt's words, the "radical predicament"<sup>53</sup>. This predicament is linked to two different theories of legal analysis. One theory suggests that the dominant ideology inheres in specific laws and not the entire legal system. If this is correct, then the option of seeking gradual autonomy may be viable since the legal system still contains other elements that are useful. The other theory states that dominant political ideology pervades the entire legal system. Accepting or complying with any portion of the legal system would imply its legitimisation. In the end the politics of the law, namely strategic and tactical considerations, would determine which of the above mentioned two theories are applicable in a given instance.

Denis Davis, drawing on the work of Nicos Poulantzas, believes that the "state and the law are shaped by the level of intensity of the political struggles within a social formation."<sup>54</sup> In his seminal analysis of legal and

53. Hunt, op. cit., p. 23.

54. Denis Davis, "Legality and Struggle: Towards a Non-Instrumentalist View of Law" in Essays on Law and Social Practice in South Africa, Juta, Cape Town, 1988, p 82.

political struggles in South Africa, Davis, following Wolpe in periodizing the post-1948 state, points out some significant developments in the third phase from 1973 till the present. After the 1973 Durban strikes "increased trade union activity forced concessions from the state culminating in the re-emergence of extra-parliamentary opposition to the state."<sup>55</sup> In this case trade union struggles in 1970's shaped the nature of popular politics in the 1980's. The thrust of Davis' argument is that the nature of law in a post-apartheid society is determined by the political and legal struggles which take place within apartheid society.

It remains to be seen which of the options the Muslims of South Africa will choose. To a large extent the current legal and political struggles over MPL will determine its nature and content in the future. This will depend on the strength of the political alliances between the apartheid state and its Muslim allies, on the one hand and the ability of the politicized Muslim elite and their alliances with the broad anti-apartheid democratic movement to mobilize against the state on this issue on the other hand. It also depends on the dynamics of anti-state political activity and the extent to which Muslim activists could succeed in making MPL into a full-scale anti-state political issue. The traditional and ethnic Muslim elite are already focussing attention on the laws of personal status with an indifference towards political issues. The responses of the 'ulama groups, AMAL and ICSA, documented earlier, reflect a willingness to have MPL recognized irrespective of political considerations.

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55. Ibid, p 83.

## Conclusion

In this chapter I have tried to point out that the legal discourse cannot be separated from the ideological discourse since law is an ideological intervention. In concert with political, economic and cultural factors, ideology sustains hegemony over the social formation.

In the debate on MPL the Shari`a/figh process is also part of an ideological discourse. In MPL, the state is trying to include it into the dominant political ideology. An analysis of the variety of discourses point toward increasing state hegemony over religious minorities. Two discourses within the Muslim community emerge. A pro-state discourse and an alternative anti-state discourse. The alternative discourse must root itself within the historical tradition of Islamic law by showing that the law has consistently evaded total ideological manipulation by the state. Where it was manipulated it has been to the detriment of the law and the community.<sup>56</sup>

The next chapter will begin to explore that process through a comparative analysis of African Customary Law (ACL) and MPL. To a significant degree ACL finds itself in a similar situation as MPL because both are seeking to articulate new socio-political symbols to be applied in a rapidly developing and politicised social context. Some of the conceptual tools developed in this chapter and the previous

<sup>56</sup>. The political resentment the imposition of a rigid Hanafi law on all the subjects of the Ottoman Empire has been cited by historians as one of the factors that contributed to its political decline in 1924. Also see Richard C.Repp, "Qanun and Shari`a in the Ottoman Context", in Islamic Law, (ed) Al-Azmeh, 1988, p. 124.

one will also be utilised in order to investigate how a modern state organizes a subject community. The case of ACL would be a convenient starting point for such an investigation.

## CHAPTER THREE

THE MODERN STATE AND LEGAL PLURALISMMuslim Personal Law (MPL) and African Customary Law (ACL)Introduction

This chapter is really a continuation of the last in that it explores how legal ideology actually has constructed an African legal subject in South Africa. The experience gained in African Customary Law can be useful towards understanding the prospects of MPL. One of the difficulties in dealing with a topic such as MPL is, that it has not yet been implemented. For this reason the discussion is to some extent theoretical and hypothetical.

The South African state is a modern state since its values, with the exception of some, are based on those of post-Enlightenment and European values. While large sections of the country and its people may as yet not have been modernized, the character of the state displays modern tendencies. Modernity is a social process with multiple facets which will not be examined here. It suffices to say that the legislative process adopted in South Africa is a modern one. In terms of the law it has specific features of which legal pluralism is a major one.

The modern state and legal pluralism

The colonial interregnum in various parts of the pre-modern world, beginning in about the seventeenth century, signalled the non-Western world's tryst with modernity. Societies in which many cultural and social systems coexist can be

described as socially and culturally plural or pluralist societies. This is not a new phenomenon since history bears testimony to inter-civilizational exchanges, political and military domination, migration and a host of other forms of interaction leading to pluralism. Socio-political plurality is thus not new. In effect, the colonial expansion added to the cultural plurality of the occupied territories.

A unique experience in non-Western societies however, was the process of Europeanization or modernization. Based on the nation-state model, unknown before the eighteenth century, modernization and the rise of the nation-state was part of the same process. Modernization is the term used to explain social change whereby less developed societies acquire characteristics common to more developed societies.

<sup>1</sup> The nation-state becomes the indispensable framework for all social, cultural and economic activities. The main features of this model of political organization are popular sovereignty, government by active consent, the growth of secularism, the lessening of the older religious, tribal or feudal loyalties, rapid urbanization, industrialization and communication. <sup>2</sup> The modern state is thus a nation-state, a model which has been appropriated by all ideologies, capitalist, socialist, communist, fascist and even religious ideologies.

In the wake of colonization the processes of modernization came into contact with non-Western systems of law and obligation of an ethical, religious and unwritten nature.

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1. David Lerner, "Modernization", International Encyclopedia of the Social Sciences, (ed) David L Sills, The Macmillan Company and Free Press, 1968, vol. 10, p. 394.  
2. Hans Kohn, Ibid., vol 11, p. 64.

Unable to replace the indigenous legal systems completely through the process of modernization, the nation-state accommodated indigenous legal systems in varying degrees. When in addition to socio-cultural plurality, a number of legal systems also exist, we can speak of legal pluralism. Ideally a nation-state seeks to be legally monist by establishing a system whereby the institutions of the state are the exclusive sources of law. The nation-state however, faces a problem in dealing with sources of law extraneous to itself which legal pluralism admits. The chief reason for this is because the nation-state is totalizing in its political organization. In such instances the indigenous or non-state law is accommodated while "the written, rational state system is the only one which is 'properly law,'" <sup>3</sup> says Hooker.

The logic of modernization is to encapsulate all socio-political organization within the framework of the nation-state. This is called bureaucratization. It is intimately connected to state formation, stratification, cultural change and a number of other processes. For the German sociologist, Max Weber, bureaucratization meant, in short, the increasing use of formal and rationally constructed rules and regulations; the spread of a new ethos of legality and rational action; the separation of official from private life and the institutionalization of all this in a modern administration. <sup>4</sup>

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3. Hooker, op.cit., p. 1.

4. For an excellent study of bureaucratization see Hans-Dieter Evers, "The Bureaucratization of Southeast Asia", Comparative Studies in Society and History, vol 29, 1987, p.667, to whom I am indebted to some novel insights on bureaucratization.

### Phenomenology of legal pluralism

When referring to the law of the state in legally plural societies we may speak of the "dominant" law as the law propounded by the nation-state and the legal system which is being accommodated as the "servient" law.

Legal pluralism incorporates certain fundamental ideological tendencies. Some of these are, that 1) the national system or the dominant law is "politically superior" and able to abolish the indigenous system[s]; 2) when there is a clash of obligation the rules of the national system prevails and allowances made for the servient law would be made on the premisses and forms required by the dominant system, and, 3) the analysis and classifications used will be that of the national system. <sup>5</sup>

Of course the discourse of legal pluralism is geared towards promoting the ideological interests of the nation-state by utilizing the dominant legal system to achieve that end. Observers of legal pluralism believe it serves many purposes. These include:

a) to administer indigenous peoples as a disadvantaged class, such as the administration of indigenous people in the USA, Canada (Indians), Australia (Aborigines), New Zealand (Maoris) and South Africa (the African people). In these instances the status of the indigenous people is ambivalent in terms of the law and they are largely subject to the dominant law.

<sup>5</sup>. Hooker, op.cit., p. 4.

b) to demonstrate that it is incompatible with modernization and replace it with one uniform civil code, after it has been given due "recognition", as in the case of Turkey, Thailand and Europe; or to abolish it by penal statute in favour of a new system to realise a revolutionary ideology, as in the case of the Soviet Union.

c) to have an "amalgam" of the indigenous laws and the dominant legal system in a uniform national law.

In short, the nation-state strives to encapsulate the servient legal systems within the state. In terms of its bureaucratic logic, the nation-state is not reluctant to abolish the servient law if it is politically opportune to do so. In the end, legal pluralism does not seem to survive but is only a temporary phase towards the evolutionary fulfillment of the nation-state's ideal of uniform political organisation.<sup>6</sup>

#### Legal pluralism in South Africa

In South Africa legal pluralism came into existence when the British common law theory accorded recognition to African

6. See Yusuf Ahmed Beita, Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a multi-ethnic Environment, PhD Thesis submitted to the Dept of Anthropology, State Univ. of New York, published by University Microfilms International, Ann Arbor, Michigan, January 1976. Beita is of the opinion that the "development of plural societies can benefit more by evolving uniform or carefully integrated judicial systems than by maintaining multiple legal structures..." p. 293. In post-colonial India the political and social upheaval caused by problems experienced in the dispensation of legal pluralism, especially MPL has encouraged many thinkers to advocate a uniform and integrated civil code.

polities and customs on the basis of ethnicity and race.<sup>7</sup>

The amalgamation of the Roman-Dutch law and the British common law, which later formed the South African law, was a relatively coherent fusion of two legal systems which favoured the nation-state model.

The discussion of legal pluralism emerges within a conflict perspective between indigenous and introduced legal systems. Raymond Suttner and others believe that ethnic forms of law like ACL in South Africa are designed to make the oppressed classes accept their subjection and accept that "there is no alternative" to the existing relations of production and domination.<sup>8</sup> The inefficacious application of customary law and the consequent frustration it causes Africans inevitably forces a large section of urbanized Africans to opt for the civil law provisions.<sup>9</sup>

However, the encapsulation of servient systems into the modern state is in reality a political accommodation which has a two-fold discourse to disguise its ambiguous nature. They are the discourse of autonomy and the preservation of inequality. Sally Falk Moore's anthropological paradigm of law as a process is helpful<sup>10</sup>. She envisions a society in terms of multiple layers where each layer makes its own

7. Hilda Kuper & Leo Kuper, "Introduction", in African Law: Adaptation and Development, University of California Press, 1965, p. 12; Leslie Rubin, "The Adaptation of Customary Family Law in South Africa," in African Law, (ed) Kuper & Kuper, p. 197.

8. Raymond Suttner, "African Customary Law - Its Social and Ideological Function in South Africa" in Tom Lodge (ed), Ideology in Settler Societies, Southern African Studies, volume 4, Johannesburg, Ravan Press, 1986.

9. Raymond S. Suttner, "Legal Pluralism in South Africa," International and Comparative Law Quarterly, vol. 19, Jan. 1970, p.14i.

10. S. F. Moore, Law as A Process: An Anthropological Approach, New York, 1978, pp. 13-30.

rules and adapts to rules or laws impinging upon it from a higher level. In this model every level has a semi-autonomous relationship with the social field of the nation-state. In South Africa this semi-autonomous social field is visible in terms of the limited legal space given to ACL and the proposed MPL. However, promising as autonomy may seem, in reality it falls between marginal independence and subordination.

M. G Smith, an outstanding contributor to the theory of plural societies, stresses the discourse which preserves inequality between constituent communities in plural societies. Says Smith...

In the plural society, whether protectorate, colony, or racially exclusive union, the state seeks to constitute a new society within a legal framework which it legitimizes independently.<sup>11</sup> (emphasis mine)

Since the nation-state cannot legitimate the new society (ACL or MPL - African or Muslim) within the mainstream of political organisation it will do so "within a legal framework" which is legitimated "independently". Bearing in mind that the legitimation takes place in terms of a superior-inferior axis, it does nevertheless create an institutional cleavage to reinforce the inequalities between those who are fully part of the nation-state and those who are not fully part of it.

A key word in the legal and political jargon of legal pluralism is the word "recognition". In the discourse of legal pluralism this phrase repeatedly discloses the

<sup>11</sup> M.G. Smith, "The Sociological Framework of Law," in African Law (eds) Kuper & Kuper, p. 27.

ideological appropriation of language in which the 'subject' is subtly constructed. The law of the land is 'properly law', while the law of the indigenous or minority communities has to be recognized.<sup>12</sup> This recognition has definite political connotations and signifies the power relations between the nation-state and the minority or indigenous communities who are accommodated and legitimated independently of the mainstream activities of the nation-state.

Due to the unique political dispensation in South Africa which has been based on the policy of separate development the political impact of legal pluralism towards reinforcing that ideology must also be considered. Separate development finds its roots in ethnographic studies of the nineteenth century and scriptural legitimation advocating the separateness and self-determination of people on a racial basis. Even in the late 1980's the ruling National Party in South Africa has as yet not principally shifted its political blueprint from this ideological position, despite several attempts to make it more acceptable. The ideology of separate development shares some of the key discursive features of legal pluralism, namely, that of autonomy coupled with the preservation of inequality.

Given the above it becomes evident that legal pluralism is an effective political strategy employed in strengthening the political organization of the nation-state. Through a process of gradual encapsulation the servient systems are totally absorbed by the dominant legal system. But that

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12. Suttner, 1986, p. 126; also see Hooker, op. cit., p.p. 1-2.

process of encapsulation is not problem-free. India is a good example. There issues related to MPL often cause major constitutional crises. This happens on those occasions when the Indian government attempts to reform or amend MPL legislation to make it compatible with the country's needs. Muslim protests and outcries on such instances prevent reforms, amendments or progressive interpretations of the MPL statutes since this is seen to be a religious issue over which the secular institutions of society have no jurisdiction. MPL is elevated to a position of a religious symbol, unchangeable and static. At the same time the ability of the nation-state to encapsulate a segment of society is also tested.

Communities in multi-ethnic and multi-religious societies fail to understand the logic of the nation-state and tend to accept the mechanisms and institutions offered by the state at face value. Institutional cleavages such as MPL in the case of India are seen as tokens of religious symbolism with which communities identify, as in the case of India. With increasing modernization the content and utility of these symbols either undergo change or lose social relevance. Any changes made to these symbols, such as amendments to certain ordinances of MPL in India, are viewed with suspicion as moves to deprive people of their religious values and generate violent social conflict. The problem evidently is one of amnesia that it is not the purpose or part of the logic of the nation-state to preserve the servient systems with integrity. On the contrary it tends to preserve them with inequality. What other purpose could this type of preservation serve other than unifying the social

organization of the nation-state and then finally phase out those systems that conflict with the grundnorm of the state.

Thus far the genealogy of legal pluralism has been briefly traced against the backdrop of the process of modernization. Furthermore, after formulating an analytical grid, we are in a position to apply it to some concrete manifestation, namely ACL. The reason for doing so in this thesis with its focus on MPL is firstly, there are lessons to be learnt from ACL and its interaction with the modern nation-state. Secondly, the status of Muslim law or the Shari`a/figh process, as it is practised in the lives of the community, is ambivalent as far as the dominant South African law is concerned.<sup>13</sup> ACL finds itself in a similar position, within the peculiar and unique apartheid system.<sup>14</sup> Thirdly, within the overall conflict perspective of politics in South Africa the majority of Muslims are structurally disadvantaged and share that experience with Africans. From this analysis of ACL several projections could be made as to the possible future of MPL.

#### Major Problems in ACL

The discourses of autonomy and inherent inequality find themselves tailor-made to the experience of ACL. Dr

13. See M.S.Omar, The Islamic Law of Succession and its application in South Africa, Butterworths, Durban, 1988, cf. "Conflict between South African Law and Islamic Law", p. 5. A Muslim marriage solemnized by Islamic contract fails to fulfill the formalities laid down in the Marriage Act 25 of 1961 in terms of which the marriage is void and the children thereof illegitimate. However, for taxation purposes Muslim marriages are recognized as valid.

14. Hooker, op.cit., p. 5.

H.F.Verwoerd, the architect of petty apartheid and the policy of separate development in 1935 rebuked the liberals for surreptitiously replacing the tribal customs with the Roman-Dutch law. Championing the cause of African autonomy, Verwoerd lamented the idea that ...

there was really a deliberate attempt - especially through liberalistic influence- to lead the Native away from what was fine in his Native rights and customs...I want to allow him [the African] to develop his own law according to changed circumstances, but starting from a system of law which is his."<sup>15</sup>

The 1927 Bantu Administration Act which ensured uniformity in the recognition of customary law as a separate legal system applicable to Africans only provoked Raymond Suttner to comment in the following words...

I say that recognition [of customary law] is separate but unequal, because, although government spokesmen periodically eulogize the tribal heritage and exhort Africans to take pride in that which is "their own", customary legal institutions, particularly in regard to marriage are often not accorded the same degree of recognition as the Roman-Dutch counterparts.<sup>16</sup>  
(emphasis mine)

In both these statements the two discourses inherent in legal pluralism can be traced. From the pro-state political actor, Verwoerd, the ostensive autonomy of the legal subject is stressed. Suttner, a fierce critic of the apartheid state, highlights the preservation of inequality between constituent communities. His reference to the inequality in marriages on a comparative scale in ACL and Roman-Dutch law is a practical demonstration of the problem.

<sup>15</sup>. South African Senate Debates, March 17, 1955, cols. 751-752.

<sup>16</sup>. Raymond S. Suttner, "Legal Pluralism in South Africa," International and Comparative Law Quarterly, vol. 19, Jan. 1970, p.140.

Changes in society have also affected the African way of life. Law in African societies is the law of the peasant, cattle-herding, agrarian society with a form of family organisation. In the Roman-Dutch law, law focuses on the individual and enhances modernization - urbanization and industrialization.<sup>17</sup> Law, morals and religion are viewed as interconnecting. Due to the economic momentum of urbanization, a class of Africans participating in an economy outside the traditional framework have emerged who cannot be suitably governed by tribal rules. Although tribal custom under chieftain rule was flexible and satisfactory it was effective within its context. While many urban Africans would like to adhere to the practice of lobolo for instance, where gifts raised by the husband's group are distributed among the bride's family at the time of marriage, it is becoming increasingly difficult to maintain that practice. Marriage in an urban setting, even among Africans, is becoming a private affair. The innovation of cash lobolo fails to establish kinship and collective ties in the way that goods and livestock did. This is because lobolo had a special significance and an organic relationship to their rural mode of living which cannot be appreciated in an urban setting. A delay in lobolo payment in the lives of many urban Africans invariably resulted in the break-up potential marital relations which not infrequently lead to unmarried mothers being left to take care of children born outside the marriage.

In the practice of ACL Africans generally find their native judicial dispensation to be inferior with poorly qualified

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17. Suttner, 1970, p. 138.

commissioners administering the system. The procedures and cases are decided in a formalistic manner. It has been observed that "these courts do not perform in a manner that is remotely comparable to the chief's court in the old society"<sup>18</sup>. They also lack the flexibility of the tribal court, a flexibility which arose from the court's position in the tribal society.<sup>19</sup> In practice the Commissioner is free to apply his own static version of customary law and will decide on his own which is 'Black law' etc. This administrative weakness lead to a general disrespect for ACL and in turn enhances the prestige of the dominant law. Ethnic and religious subjects are thus indirectly encouraged to observe the dominant legal system due to the inability of the subordinate system to respond to their needs.<sup>20</sup> The discretionary powers of the commissioner's courts until recently were very wide giving the process a semblance of uniformity but where legal efficacy is actually sacrificed.

#### Issues and Prospects of MPL

Some of the incipient problems of judicial administration can be expected in MPL as was seen to be the case in ACL. South Africa has no stock of suitably qualified persons to serve as magistrates or qadis and lawyers in the application and implementation of MPL. Nor is there any institution where such training can be offered. Those who currently deal with problems affecting Muslim personal law are Middle East

18. Suttner, 1986, p. 124.

19. Ibid.

20. In Malaysia, India and other countries where legal pluralism is to be found many Muslims have sought relief in the civil law since the Muslim law courts do not meet the requirements of efficacy according to them.

or Indo-Pak seminary-trained clergymen who have little background as to how a judiciary functions in a modern state.

In some circles there is an increasing sense of dissatisfaction over the way marriages, divorces, issues of succession etc. are being handled by the Transvaal, Natal Jamiats and the Muslim Judicial Council (MJC). Even if MPL is administered by the state or state-sponsored structures there is still no guarantee that the inherent problems related to MPL will be solved. These relate particularly to the content of the law which has to be adapted to the South African context. Some of the more important ones are the arbitrary male prerogative in the dissolution of marriages through the abuse of the talaq system, male patriarchy which promote gender inequality and matters related to polygamy, custody of children and inheritance.

Through urbanization women are increasingly becoming economically independent, but have as yet not received a commensurate status within Islamic law. Psychologically and morally women still find their legal status as minors to be inhibiting. Urgent attention ought to be given to the discrimination experienced by women as a result of the male prerogative to divorce. By a unilateral utterance of the talaq formula a man can instantaneously and permanently separate himself from his wife even if it was uttered in a moment of anger or distress. To be fair, the MJC has since ceased to recognize this type of divorce, but the practice

is still rife and accepted by the Transvaal and Natal 'ulama.

Changing social conditions have rendered many dimensions of the classical Shari`a/figh process inapplicable. Islamic law can only hope to achieve the desired results within the framework of religious morality if the Shari`a/figh process is understood as open and not close. The problems of inefficient judicial administration and the inflexible application of ACL will inevitably be repeated in MPL if far reaching reforms do not take place. It is also imperative that reforms accomodate the transitory nature of socio-political developments South Africa is undergoing.

A method increasingly being used in recent times to adapt Islamic law to new circumstances is what can be called legal eclecticism, known as talfig or takhayyur. This allows jurists and lawyers to draw from the vast reservoir of judicial statements made by the historical legal schools, especially the famous four - the Hanafi, Shafi` Maliki and Hanbali schools - as well as others besides them. This means that even though the individual may not be a follower of a particular legal school he/she could follow a ruling of another school which would satisfy his/her needs. While this method may be of practical use, some sections of orthodoxy have consistently resisted talfig. It involves preferring a more convenient viewpoint from one madhab in a context where that school of thought may not have any following at all. However, talfig is not problem-free since there is no unanimity as to its acceptance. It can also exacerbate

social tensions between progressive interpretations who prefer unrestrained talfig and more conservative ones who resist it. In my opinion, only a contemporary legal hermeneutic consistent with the theoretical assumptions outlined in the previous chapters of this thesis could pave the way for a meaningful solution to the inherent problems in the content of MPL. As an interim measure the use of takhayyur/talfig coupled with an acute sensitivity to socio-political developments can bring some measure of relief.

For women as a socially disadvantaged group MPL could have several consequences. As stated before MPL as presently practiced in South Africa do not account for the changed social conditions which affect the status of women. In order to arrive at reforms and to re-interpret the law in order to suit to new conditions a general principle needs to be stated. That is that one must accept the contention that specific rules of the Qur'an are conditioned by the socio-historical background of their enactment. What is eternal therein is the social objectives or moral objectives which are to be found implicitly or explicitly in the legislation.<sup>21</sup> Understood in this way further principles based on the ideals of the Shari`a can be developed. To be effective as a realistic reformer, it was not always possible for the Prophet Muhammad to go beyond a certain limit in his legal reforms. But the changes he brought about

21. Fazlur Rahman, "The Status of Women In Islam: A Modernist Interpretation," in Separate Worlds - Studies of Purdah in South Asia, (eds) Hanna Papanek & Gail Minault, South Asia Books, New Delhi, 1982, p. 310.

in Arabian society must be seen as fundamental moral guidelines along which it is expected society will evolve.<sup>22</sup>

In the field of general rights for spouses, the Qur'an proclaims that men and women have reciprocal rights over each other. However, it adds that "men are but one degree superior to women".<sup>23</sup> This qualifying clause read with 4:34 that "men are the maintainers of women...with what they spend out of their wealth" explains the superiority of men to they were the breadwinners and had the economic function to provide sustenance for their wives in sixth century Arabia. This ordinance has caused a divergence in the lines of argument. The conservatives hold that this statement of the Qur'an is normative. The woman, they say, can earn and possess wealth but is not required to spend on the household economy since that is the concern of the male, and therefore the male enjoys a certain superiority. A modern interpretation argues that the Qur'an is descriptive of a particular socio-political formation. With the inevitable change in society, women can and ought to become economically independent and can contribute to the household economy. The superiority referred to by the Qur'an is a superiority of an economic position in a given society, not one of inherent inferiority of women. Hence the change in the economic status of women has a bearing upon her social and political status leading to equality between the sexes.

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22. This is clearly seen with regard to legislation affecting slavery. Even though the Prophet and the Qur'an did not forbid slavery the moral tenor of ordinances affecting slaves, similar to that of laws affecting women, pointed towards the ideal that Islam anticipated a society where slavery was abolished.

23. Al-Qur'an 2:228.

The same applies to equal witness-worthiness of a male and female in court. The Qur'an states that reliable and unimpeachable evidence is required in civil court cases. In such cases, for the evidence of one male that of two females is regarded as equal. The Qur'an explicitly states the reason for this 2:1 ratio to be "for if one (female) should forget, the other might remind her".<sup>24</sup> The context of this command relates to commercial transactions where people are encouraged to document commercial deals and have them attested in the presence of witnesses. The description of the Qur'an ought to be seen against its socio-historical background which reflects a situation where men were mainly operative in the commercial field and women were less experienced and involved in this area. Here again the conservative opinion believes that the text depicts women as inherently inferior to men with respect to witness-worthiness. However, taking into consideration the liberatory objectives of Muhammad's teachings, such ordinances are not normative statements, but are descriptive of a certain practice in a given context. Hence when the social conditions change, the law must change as well. Classical Muslim lawyers have understood this to be descriptive and have made changes to this practice when conditions warranted it. Departing from the 2:1 female to male ratio, they did accept the evidence of one midwife as sufficient evidence in a case when the maternity of a child was in dispute. What these examples show is that liberatory measures can be supported from the ideal and classical

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24. Al-Qur'an 2:282.

teachings of Islam. However, conservative interpretations present the laws as inflexible and have the potential to make MPL impractical and redundant. This would in the end undermine the religious and spiritual concerns of the Muslim community.

Some more examples will show how classical lawyers used their contextual experience to interpret the law. For instance, if a husband deserted his wife or went missing, the woman could marry again. However, the waiting period before she could marry again is in dispute. The Hanafi law put this period at ninety six years, while the Maliki school put it at four years. Today the practice amongst even staunch Hanafis is to put aside the ruling of their school. Adopting the eclectic approach of talfig or takhayyur they follow the convenience offered by the Maliki law. The differences arise out of two contingent observations by Abu Hanifa and Malik. The Hanafi ruling is based on the premise that the maintenance of marriage be presumed as long as possible and that the average life expectancy is about ninety six years. The wife can only marry when the husband is presumed dead beyond any doubt. A presumption which, incidentally, assumes that the marriage took place when the husband was an infant because the law does not even take into account his age at the time he disappeared in order to subtract his spent age from the presumed ninety six years. As far as redress to the surviving wife is concerned the Hanafi law is ridiculous. Malik based his four year waiting period on an observation that the maximum gestation period is four years. Both judgements are premised on empirical

observations. This means that more accurate and precise observations can and ought to replace these rulings of the classical lawyers. The changed social conditions have rendered them inapplicable. No sound jurist will allow a deserted wife or one whose husband had gone missing to wait four years today. Taking into account modern conditions, the MPL code in Indonesia has put the waiting period at two years and in Morocco it is one year.<sup>25</sup>

Another example is the law regarding the maintenance of a divorcee who is unable to support herself. The classical law schools allocate maintenance during the period of 'idda, a stipulated period of about three months, during which the wife cannot get married to another man. The waiting period or 'idda of a pregnant woman is until childbirth.<sup>26</sup> The assumption is that responsibility for the maintenance of the divorcee reverts back to her immediate family after the 'idda period. It is clear that the social pattern underlying this legal ordinance is one of an extended family system based on relations of kinship in a specific economic formation. The reality today is that family structures have undergone radical changes and cannot easily and satisfactorily fulfill the objectives of the classical legislation. As in the famous Shah Banoo case in India, it has been proven that there are grounds for maintenance beyond the stipulated 'idda period for women who are unable or not in a position to support themselves at the time of

25. Fazlur Rahman, "Modernization of Muslim Family Law," in International Journal of Middle East Studies, vol 11, 1980, p. 460.

26. Depending on the condition of the divorcee the 'idda period would differ.

divorce. With the growth of new social patterns, a case could be made for maintenance in such cases to be a state responsibility or that the stipulated three month 'idda period be extended until the female is sufficiently rehabilitated to maintain herself economically. It would certainly be unfair to burden the ex-husband with maintenance in perpetuity if there were reasonable grounds for divorce. However, some adequate compensation is obviously called for in cases of unilateral repudiation. The issue of alimony to a wife would certainly be a fair consideration in the light of the Qur'anic teachings which describes a marriage contract as a "solemn contract"<sup>27</sup> indeed. Since marriage is a contract then in line with the spirit of the normative teachings of the Qur'an a unilateral repudiation must be considered a grave breach deserving of appropriate financial and social sanctions"<sup>28</sup> These adjustments of the law to modern circumstances is consistent with the practice of the classical jurists who were not loath apply apply contextual criteria in their evaluations.

The challenge facing Muslim scholarship and the architects of MPL in South Africa is to reform and codify it. Failing to do so, MPL runs the risk of reviving the age-old rivalries between legal schools. This could have serious consequences for the Muslim community and for the country at large. One example which may illustrate the potential for conflict will suffice. In terms of one legal school (Hanafi) a female may contract a marriage without the consent of her guardian. Another school (Shafi`) would invalidate such a

27. Al-Qur'an 4:21.

28. Fazlur Rahman, op.cit., pp.460-462.

marriage. A couple following two different legal schools may marry in terms of the more liberal Hanafi opinion in this case. Such a marriage can be contested as invalid from the Shafi' perspective. The potential for social conflict in such instances is obvious if these legal differences are not suitably resolved through proper codification.

It must be pointed out that while legal eclecticism (talfig) could pave the way towards some short-term solutions no viable legal system can be proposed without a proper examination of the society for which it is prescribed. It is submitted that the best approach to MPL is to develop a legal system which responds to the social structure and reacts to what it finds as the condition in which people find themselves living. In addition an interpretive framework ought to be developed, namely a legal theory, which is consistent with the historical legacy of Islamic law, but also suitable to the needs of modern society.

As we saw in the case ACL that women in the cities suffer serious hardships under the traditional law. The courts and legislature prefer to align themselves with the men.<sup>29</sup> Even if the legislature had the inclination to reduce gender inequality it would be considered "politically foolhardy for the government to introduce reforms which could possibly antagonize conservative Africans, the section most likely to support government policy."<sup>30</sup> It is not at all remote a possibility to expect a similar logic to be applicable to MPL. Whereas progressive interpretations of MPL would call

29. Suttner, *op.cit.*, (1970) p. 152.

30. Suttner, *IBid.*

for the eradication of gender inequality, it is hard to conceive that the orthodox and conservative traditional/ethnic elite will not resist this. Gender inequality is a product of economic inequality which is linked to women's work roles under capitalism.<sup>31</sup> The state legislature has recently made amendments to civil law in South Africa in order to reduce gender inequality in some aspects of the civil law. Even if the state legislature has the best intentions to reduce gender inequality and discrimination in MPL it is highly unlikely that it will risk alienation of its traditional/ethnic elite supporters by bringing about far-reaching and effective reforms. In the event that MPL is not reformed, it will not come as a surprise to find Muslim men and women would seek the protection of the country's civil code in matters of personal law. If this is to happen it would defeat the purpose for the application of MPL to say the least, but would nevertheless highlight the contradictions and problems which are inherent in the system.

#### Political Issues

ACL was also chiefly promoted to enable the tribal institutions to gain legitimacy which will strengthen the position of the chiefs against the more radical leaders. MPL could have similar, if not identical, objectives. Since the existing management of religious and legal issues is in the hands of the 'ulama, a continuation of this pattern would be encouraged by the state as it would reinforce conservative

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31. Mervat Hatem, "Class and Patriarchy as Competing Paradigms for the Study of Middle Eastern Women", Comparative Studies in Society and History, vol 29, 1987, p. 814.

hegemony. The record of the 'ulama, especially those in the Transvaal and Natal, during the height of South Africa's recent political crises has shown that they deliberately ignore or attempt to avoid addressing the immediate political issues affecting the majority of South Africans. At best their attitude can be described as ambiguous. Hence, they can serve as a buffer against the more "radical" leadership of the community. A similar pattern is discernable in the very embryonic Muslim-state relations as pointed out in the previous chapter with the distinction of the good and the bad 'subject'. The state discourse shows a favourable disposition towards the conservative traditional and ethnic elite. The similar knowledge-interests the 'ulama share with the pro-state actors and institutions, such as the Centre for Islamic Studies at RAU who have spearheaded the campaign to promote MPL, establishes clear links of reciprocal interests between the conservative Muslim sections and their counterparts in the broader spectrum of politics in South Africa. To preserve the loyalty of the traditional and ethnic elite, the role of MPL ought to be seen as a mechanism to promote a process of conservative hegemony in the Muslim community. In the previous chapter the willingness of the conservative forces to co-operate with the state to implement MPL has already been noted. While no overt political motive can be detected from their statements, critical analysis does however unmask the hidden discourses underlying the moralistic and religious tenor of the discourses which have already been documented.<sup>32</sup>

32. See the ff. 25 in chapter two, where the 'ulama statement prays for the speedy implementation of MPL and hails it as an achievement for Islam.

From a perspective of political ethics the attitude of the 'ulama' and their supporters with respect to the MPL proposal can be described as a characteristic ambivalence between prudence and legitimacy. Prudence is to recognize the realities of politico-military powers and an anxiety to maintain the integrity and peace of a society, no matter how nominal the good or oppressive the ruler may be. Legitimacy is to insist in theory on the correct qualifications of a ruler and the proper procedures for the management of the affairs of the community. While conceding that South Africa is not a Muslim state, the general principles of Islam are still obligatory on Muslims. If the Islamic principles of polity are conveniently set aside for purposes of expediency then many other practices can also be put aside, which would be an untenable proposition. Ibn Taymiyya has effectively stressed the need for legitimate political rule.<sup>33</sup> What is common to an otherwise diverse group of Muslim leaders and thinkers in the nineteenth and twentieth centuries ranging from Afghani, Abduh, Hassan al-Banna, Hussain Ahmad Madni, Sayed Qutb, Ali Shari'ati, Mawdudi, and Khomeini<sup>34</sup> is their

33. Taqi al-Din Ibn Taymiyya, Al-Siyasa al-Shar'iyya, Darul Kutub al-Arabi, (undated), p. 22.

34. See Sami Zubeida, "The City and its 'other' in Islamic political ideas and movements," in Economy and Society, vol. 14, No. 3, August, 1985, pp. 319-319. Jamal ul-Din al-Afghani was the leading reformer of the Middle East in the nineteenth century. Muhammad Abduh was his student and protege, while Rashid Rida was the protege of the latter. Hussain Ahmad Madni was the leader of the Jamiatul 'Ulama of India and close ally of the Indian National Congress. Hassan al-Banna was the founder of the Muslim Brotherhood Movement in Egypt and Sayed Qutb was one of the most articulate spokesmen of that Movement. Ali Shari'ati was one of the leading intellectuals of the pre-revolutionary Iran, while Ayatullah Khomeini was the chief figure in the 1979 Islamic Revolution. Abul A'la Mawdudi was the founder of the Jamat Islami on the Indian sub-continent.

emphasis on legitimacy and rejection of the philosophy of prudence. Legitimacy of rule was the basis of the anti-colonial struggle in Muslim countries in the Middle East and South East Asia. Not all leaders promoted the doctrine of legitimacy. The mercenary and sycophantic certainly stressed prudence to legitimacy.

The central charge against the 'ulama and the traditional and ethnic supporters in South Africa is their propensity towards prudence and silence about the unpopular political practices of the apartheid state. Relations between Muslims and the state are not ruled out here, provided that the doctrine of legitimacy is satisfied. In South Africa this is not satisfied and hence the conflict between the traditional/ethnic elite and the politicized elite is bound to increase.

#### Lessons from Algeria

The French colonial experience in establishing qadi-courts in Algeria bear some impressive resemblances to developments in South Africa. Although it should be borne in mind that Algeria is a majority Muslim country, while Muslims in South Africa are barely half-a-million, the value of this comparison lies in uncovering the strategic logic of the modern state. The transformation of the Muslim court system took place around the 1850's to the 1870's. This was the immediately preceding the build-up to the Algerian war of liberation, November 1, 1954-July 5, 1962. Algeria was undergoing major political crises and internal resistance in a way similar to what contemporary South Africa is

experiencing. Examining the strategies relevant to the bureaucratization of the Muslim courts Allan Christelow is of the opinion that the strategy of co-option by offering the Algerians a religiously-based legal system was a French political strategy aimed at subduing political resistance.<sup>35</sup>

While the French strategy had limited success two aspects of this struggle in the domain of legal ideology bear direct relevance to this study. They are the key roles played by the politicized and educated youth or urban elite on the one hand, and role of the patriarchal elite on the other. Among the urban elite and youth, Hamida Bin Badis, the son of the revolutionary, Al-Makki Bin Badis, played an active role. Under his leadership the youth demanded more political power and opposed several of the French laws of special taxes and laws imposed on the Muslims etc. In young Bin Badis' reasoning participation in the Muslim court system held no prospect for greater substantive autonomy for the Algerians. In an impressive description of Hamida's attitude Christelow says...

He had learned from his father that to accept the framework of colonial pluralism, while it may have offered solace to the Muslim identity, was in effect to accept and legitimize the subordinate status of the Muslim within that plural system.<sup>36</sup>

The patriarchal elite and traditional notables in turn continued to lobby attention for Islamic legal issues by

35. Allan Christelow, "Transformation of the Muslim Court System in Colonial Algeria: Reflections on the Concept of Autonomy", in Islamic Law, (ed) Al-Azmeh, 1988, pp. 215-230; see also by the same author, "The Muslim Judge and Municipal Politics in Colonial Algeria and Senegal", Comparative Studies in Society and History, vol. 24, 1982.

36. Christelow, 1988, p. 227.

approaching French officials and liberal politicians in France and launching petitions drives to win ears for their case.<sup>37</sup>

What they preserved was a strongly bureaucratized Muslim court system, completely subordinated to the French courts and limited<sup>38</sup> in its jurisdiction to personal status affairs.

As the demands made by the urban elite for a greater share of political power increased, the colonial state fell back increasingly on the power of the traditional elite. They could be relied on for support of the status quo. It was also the traditional elite who showed the strongest resistance to legal reform. One particular issue they blocked was reforms affecting women's rights. Christelow says that with such thorough-going control one would have expected the enlightened French 'legal orientalist' to have enacted reforms in areas of women's rights. But this did not happen.<sup>39</sup> Many women who took part in the war of liberation felt that they earned the right to full equality with men.<sup>40</sup> This is still a demand unfulfilled in modern Algeria.

From the Algerian experience it can be expected that the traditional elite, which includes sections of the 'ulama, would have a reciprocal relationship with the apartheid state. The evidence for this has already been provided in the previous chapter. What is of considerable interest is the consistency of class patterns of resistance and

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37. Ibid.

38. Ibid., p. 229.

39. Ibid., p. 228.

40. Mohammad Arkoun, "Algeria" in The Politics of Islamic Revivalism, (ed) S T Hunter, Indiana Univ. Press, 1988, p. 174.

collaboration in Muslim society. While a section of the urban elite and youth showed concern for national and contextual issues the traditional elite lobbied frantically for parochial issues and reinforced patriarchy at all costs. For the politicized elite issues of political legitimacy takes precedence over the desire for modernization. In South Africa there is not much of a departure from this pattern either. The ideological interpellation of a 'good subject' - the traditional elite - and a 'bad subject' - the politicized elite - finds an echo in the analysis of the Algerian experience.

It is inevitable that MPL in South Africa will be linked to other ideological state apparatuses, such as the tricameral parliament. Since the implementation of MPL would require legislation to be passed by parliament it will be actively debated by the Muslim parliamentarians. They may also seek to increase their electoral votes on this issue. Or, it may also potentially renew hostilities between them and the anti-state political activists depending on a number of variables which makes it difficult to predict.

In the case of MPL it is the religious discourse which is at the centre of the ideological conflict. As a powerful symbol in society religion, as the projections for MPL in South Africa indicate, has the potential of both a force for legitimation or one for social change.

The question of political legitimacy in Islamic political thought raises the question whether support and co-operation with an illegitimate authority would be an infringement of Islamic principles or not. In terms of the philosophy of legitimacy, participation with an illegitimate authority would be seen as an infringement of Islamic principles. It is for this reason that MPL would be resisted until such time that the state enjoys legitimacy. According to the philosophy of prudence, MPL would be in the interest of Muslims irrespective of the degree of illegitimacy of the political authority. These two strands supportive of the philosophies of legitimacy and prudence come out quite clear in the examination of the discourses of the anti- and pro-MPL lobbies respectively.<sup>41</sup>

#### CONCLUSION

Legal pluralism is a product of modernization which is indispensably tied to the nation-state model. In South Africa this momentum of modernization exists beyond any doubt. What is observed is that the nation-state accommodates non-state legal systems but couples it to a twin-discourse of autonomy and the preservation of inequality. These ideological dimensions are to be found in ACL which has been operative in South Africa for many decades.

We also noted how the modern state tries to encapsulate all social and political fields through a process of bureaucratization. It also has a logic of abolishing those fields that conflict with its own political interests.

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41. See chapter two.

As we have seen the problems faced in ACL were also to be found in MPL at both a theoretical and practical level. These include an urgent need for legal reform and the need to affect far-reaching reforms to restrain patriarchy. The brief mention of the Algerian Muslim courts and its conflict with the nineteenth century modern state only confirms the analyses already made with respect to South Africa.

In order to prevent MPL from becoming a servant of a ruling political ideology there is a need to show that Islamic law has an ability to respond to social conditions in a dynamic and practical manner. A legal system which is open and flexible has the potential to respond to socio-political issues from a living and contemporary context. If it is closed and inflexible the present will be tied to a moment in the past that will make Islamic law extremely anachronistic and socially irrelevant. In such cases it becomes an effective ideological instrument in the hands of unscrupulous political authority in order to fragment opposition for political objectives. In that case the nation-state will be able to manipulate religious authority to serve its goals. At the same time no debate will be able to take place in order to challenge given positions within the law because the debate is not located in the present but in the past. Only those who claim to have religious authority will be able to manipulate the past into self-serving policies. It is for this reason, that, in addition to the socio-political implications outlined and projected above, there is also an urgent need to develop a contemporary paradigm for the interpretation of Islamic law.

This however, is a project beyond the scope of this limited thesis.

## CONCLUSION

In the preceding chapters I have identified the socio-political implications of the implementation of MPL in South Africa. These implications were identified in three principal areas, namely, that of the Shari`a, the interface between law and ideology and in the area of legal pluralism in a modern state.

### The Shari`a

In this thesis it has been pointed out that the main features of the Shari`a is its ability to be efficacious and convenient as a source of moral values from God. A distinction between the common understanding of the Shari`a and a more refined one was introduced in the debate. This produced an understanding of the Shari`a which admits a dimension of immutability as well as a dimension of mutability. In other words, there are levels of meaning in understanding the Shari`a. It was further illustrated that it is more accurate to speak of a Shari`a/figh process which reflects both the metaphysical and profane axes of Islamic law.

Furthermore, it was pointed out that the Shari`a/figh process has always been contextual in so far as it operated in a dialectical fashion with the socio-political process. Here the practice of the early Muslim jurists was cited as evidence in support. They saw Islamic law as an open and flexible system. Another dimension of this investigation showed that law was always the site for political struggle during the Islamic imperium. With this preliminary

exposition of the relationship between law and the political process it became manifest that law was also subject to ideologisation. Even the ideal metaphysical model of the Shari`a is the utopia and an ideological fact.

#### Muslim Personal Law as a Problem in Political Discourse

In this chapter MPL is located within the general political discourse of South Africa, with specific focus on the Muslim-state discourse. It was shown that law has the capacity of reproducing individuals into conforming political subjects in conjunction with a variety of other discourses. The Muslim 'subject', used in a specialised sense is examined in the ideological process.

Two ideological discourses are identified. A pro-state discourse supported by the traditional and ethnic elite, and an alternative anti-state discourse. Concerted and sophisticated state efforts to create a legal Muslim subject are identified. In turn the traditional/ethnic elite show a propensity to regard the Shari`a as closed and inflexible and thereby creates the danger of it becoming an instrument of a ruling ideology.

#### The Modern State and Legal Pluralism

African Customary Law is used as an existing model of a servient legal system functioning within the modern nation-state. Some of the problems experienced in ACL were brought under the spotlight. It was found that the nation-state accomodates the servient legal systems for its own self-interest. This surfaces when the examination discloses that the servient legal systems operate on the basis of autonomy

but in such a manner that it preserves their inequality when compared to the dominant legal system. At some stage during the evolution of the nation-state the servient laws are discarded in favour of the dominant legal systems. It is for this reason that the nation-state constantly tries to encapsulate the servient legal system into the bureaucratization process of the nation-state.

ACL and MPL share the same problems of patriarchy, women's rights and the problems of dealing with modernity. One possible way in which servient legal systems, MPL and ACL, could resist encapsulation is to be open and flexible to change.

The traditional/ethnic elite also favour a political ethic of prudence in order to justify their co-operation with the state. The politicized elite oppose them on the grounds that it is an infringement of Islamic ethics to support a state whose legitimacy is increasingly being questioned.

Some of the key problems in MPL is briefly illustrated with some examples. These problems call for an urgent reform of MPL which require a contextual hermeneutic for the interpretation of Islamic law which is a project which awaits further research.

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ANNOUNCEMENT**MUSLIM  
PERSONAL LAW**

For many years since the arrival of Islam in South Africa, Muslims have been yearning for the introduction of Islamic Law in some form or another to govern their affairs. Various approaches have been made to the relevant authorities in the past but without any measure of success.

On the other hand Islamic Law in some form or another has been introduced in all Muslim countries and Muslim Personal Law has been introduced into quite a few non-Muslim countries as well, e.g. India, Sri Lanka, Singapore, etc.

It must now be known to many of us that a questionnaire pertaining to issues relating to the possible introduction of Muslim Personal Law as part of the legal system of South Africa, has been received by most of the Ulama, Imams, Muslim Lawyers and some of our prominent professional men all over the country. This is the very first time that Muslims have in any way been consulted with regard to any inclination towards giving any kind of recognition for Muslim Personal Law (pertaining to marriage, divorce, inheritance, etc). We are all quite aware of the numerous problems that our brothers and sisters have had to face from time to time as a result of the non-recognition of our marriages.

Ulamas from the JAMIATUL ULAMA (Natal), the JAMIATUL ULAMA (Transvaal) and the MUSLIM JUDICIAL COUNCIL (Cape) gathered in Durban on Sunday the 14th February, 1988 under the Chairmanship of Maulana Abdul Haq Omarjee of Durban to discuss the questionnaire and formulate replies to the questionnaire. The object of this exercise was to attend to this matter in a unified manner so that all the Ulama of the country, representing and speaking for the overwhelming majority of Muslims, should on this issue present a UNITED FRONT BY REPLYING WITH AN UNANIMOUSLY AGREED VOICE.

A joint reply has already been formulated and is being circulated to the various Ulama bodies. A co-ordinating committee of Ulama with members from each of the three provincial Ulama bodies have been set up to attend to this and other matters. Anyone interested and wishing to be associated with this work may contact the regional offices of the JAMIATUL ULAMA NATAL, Durban, JAMIATUL ULAMA TRANSVAAL, Johannesburg, MUSLIM JUDICIAL COUNCIL, Cape Town.

We pray and hope for the co-operation of all Muslims in this endeavour and hope that it will not be long before we shall see Muslim Personal Law as part of the legal system of the Republic of South Africa.

The Secretary,  
CENTRAL COMMITTEE  
ULAMA OF SOUTH AFRICA



Mujlisul Ulama of South Africa  
(COUNCIL OF THEOLOGIANS)  
 P.O. BOX 3393, PORT ELIZABETH 6065

ASSALAMU ALAIKUM

15th Jamadil Ula 1408  
 5th January 1988

A PAMPHLET BEING CIRCULATED BY SOME "CO-ORDINATING COMMITTEE OF JOHANNESBURG" URGES MUSLIM ORGANIZATIONS "including the Jamiatul Ulamas of the Transvaal, Natal and the Cape" TO REFRAIN FROM ANSWERING THE QUESTIONNAIRE WHICH THE South African Law Commission has presented to Muslim bodies. In regard to the resolutions of this "Co-ordinating Committee", the MUJLISUL ULAMA OF SOUTH AFRICA ADVISES THE MUSLIM COMMUNITY AS FOLLOWS:

- (1) The questionnaire poses questions on important matters affecting the Deeni life of Muslims in South Africa.
- (2) The answers to the questions concern the Shariah, hence unqualified persons with their resolutions and deliberations are rejected. Wisdom demands that the questionnaire be fully answered with avenues of distress and conflict of the law of the land with the Shariah being high-lighted.
- (3) The so-called "Co-ordinating Committee" has no status in the Shariah. It possesses no Shar'i authority and its resolutions are devoid of Islamic substance.
- (4) This misguided "Co-ordinating Committee" has displayed deplorable lack of understanding and conceit in urging the Jamiatul Ulama organizations to submit to its (this Committee's) baatil, baseless and un-Islamic resolutions.
- (5) The Jamiatul Ulama organizations are not subservient in any way to this "Committee" or to any other body.
- (6) The Jamiatul Ulama WILL answer the questionnaire in the interests of the Muslim community of South Africa.
- (7) The Jamiatul Ulama bodies act in their OWN RIGHT as representatives of the Shariah, not as agents or representatives of fictitious committees comprising of unqualified persons.
- (8) The Ulama will reject and dismiss the suggestions and attempts at steam-rolling and the dubious tactics initiated by juhhaal (ignoramuses) from any quarter whatsoever.
- (9) The Qur'aanic verses cited by the "Co-ordinating Committee" in its pamphlet provide neither basis nor sanction for the resolutions stated in the pamphlet.
- (10) Muslim organizations and individuals are under NO Islamic obligation to heed the misdirected call of this committee of no Shar'i standing.
- (11) The Ulama shall answer the questionnaire in the light of the Shariah. The "shura" (consultation) of the juhhaal is not solicited nor welcome.
- (12) Muslim organizations are hereby urged to keep in view the best interests of the Muslim community and answer the questionnaire in consultation with the Ulama. The Qur'aan Majeed commands:  
 "O People of Imaan! Obey Allah, obey the Rasool and the Ulul Amr among you." The "Ulul Amr among you" in this day are the Ulama--not some self-appointed "Co-ordinating Committee" possessing no Shar'i base.

# APPENDIX 3

## SOUTH AFRICAN LAW COMMISSION

### ISLAMIC MARRIAGES AND RELATED MATTERS

#### PROJECT 59

#### QUESTIONNAIRE

(RETURN DATE: 29 FEBRUARY 1988)

- \* The completed questionnaire must please be submitted to:

The Secretary  
S A Law Commission  
Private Bag X668  
0001 PRETORIA

## BACKGROUND INFORMATION

### \* The South African Law Commission

The Commission is an independent statutory body established by section 2 of the South African Law Commission Act 19 of 1973. The Commission consists of seven members who are appointed by the State President and who are representative of various branches of the legal profession. The chairman of the Commission is a judge of the Supreme Court of South Africa. Where an investigation requires specialised knowledge the Act makes provision for the appointment of experts either as additional members of the Commission or as members of a committee appointed for purposes of a specific investigation.

The objects of the Commission are to do research with reference to all branches of the law of the Republic in order to make recommendations for the development, improvement, modernisation or reform thereof.

The South African Law Commission is presently engaged in an investigation into certain aspects of Islamic marriages and their legal consequences in South African law. With a view to assisting the Commission in its inquiry it would be greatly appreciated if you would be so kind as to complete the attached questionnaire and return it to the Commission at the above address by not later than 29 February 1988.

When an investigation has been completed, a report and a draft Bill (if any) are submitted by the Commission to the Minister of Justice.

### \* Origin of the investigation into Islamic marriages and related matters

The investigation has a history of representations and events extending over a period of about 10 years. It was first broached in representations addressed to the then Prime Minister and other Ministers by the Director of the Institute of Islamic Sharia Studies in 1975, requesting, inter alia, that

recognition be given to the Islamic law relating to divorce, succession and guardianship. These representations were then referred to the Commission. At the time the Commission was unwilling to include the investigation in its programme, firstly, because it was of the opinion that the recognition of the relevant aspects of Islamic law could lead to confusion in South African law and, secondly, because the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law.

During the past two years aspects of Islamic law have been raised in certain of the Commission's investigations, namely, those into the legal position of illegitimate children (Project 38) and into marriages and customary unions of Black persons (Project 51), as well as in the review of the law of evidence (Project 6) and of the law of intestate succession (Project 22). The question was posed time and again whether greater recognition should be granted in South African law to the Islamic marriage and its legal consequences.

The Commission further took cognisance of a private Bill which Mr P T Poovalingam MP (House of Delegates) wanted to introduce in Parliament last year, the aim of which was to grant some form of recognition to the Islamic law of succession. The Commission, however, concluded that the problems connected with the non-recognition of Islamic law relating to marriage and succession are so interrelated that it would serve no purpose to try to solve them separately. It was decided to tackle the problems arising from the non-recognition of the Islamic marriage in a single investigation and the above-mentioned Bill was then deferred pending the Commission's inquiry. The present investigation was included in the Commission's programme in July 1986.

\* Purpose of this questionnaire

The purpose of the questionnaire which follows is to ascertain to what extent Muslims in observing the principles and instructions of Islam come into conflict with rules of the South African law relating to marriage, divorce, succession, custody, maintenance and other aspects of the law of persons and the family and to seek solutions for such conflicts.

The above-mentioned representations and the research done thus far have already identified in theory certain aspects as possible problem areas, namely, the non-recognition of the Islamic marriage, divorce and intestate succession. However, confirmation of the fact that in practice problems do exist in these areas and information as to how it affects the Muslims in South Africa can only be obtained from the Muslims themselves. In order to afford you an opportunity to bring your problems in this regard to the Commission's attention, the questionnaire below covers all three of the above-mentioned aspects as well as related matters. It is being circulated amongst those Muslim religious leaders, Muslim organisations, South African lawyers who are Muslims and other persons who, in the Commission's opinion, can make a useful contribution.

To be of value to the Commission it is necessary that your answers, where applicable, should be detailed and that the grounds on which your answers are based should be furnished. You are welcome to submit memoranda to the Commission on any of the aspects touched upon or on other aspects which you consider to be important.

Where the questionnaire is addressed to the president or chairman of a body, it is the intention that the answers should reflect the view of the body concerned and not only the personal views of the president or chairman.

The Commission is well aware that the knowledge which it can acquire from a study of literature on Islamic law and the interpretation thereof is not sufficient to enable it to form considered opinions on the problems concerned. Therefore the Commission would not like to create the impression that it pretends to be knowledgeable in Islamic law. It would rather confirm its dependence on experts from the ranks of Muslims in this respect.

Thank you very much for your co-operation.

# QUESTIONNAIRE

## \* Islamic authority structures in South Africa

1. Is there any formal hierarchy amongst Muslims in South Africa?
2. Is there any institutive body amongst Muslims which can speak authoritatively for all Muslims in South Africa and whose pronouncements on Muslim matters and rules of the Islamic law are binding on all Muslims in South Africa?
3. What authority does a decision of a body like the Jamiatul Ulama Transvaal or its counterpart in Natal or the Muslim Judicial Council of the Cape or the Islamic Council have?
4. Do the said bodies have any formal contact with each other and do they take cognisance of each others pronouncements on Islamic-juridical matters relating to Islamic law?
5. (a) Which body or bodies are competent to apply and enforce Islamic law in South Africa?  
  
(b) How is such a body or bodies constituted?
6. Which procedures does such a body follow?
7. (a) What sanctions (if any) are available to ensure the enforcement of Islamic law, if necessary?  
  
(b) Is there any appeal against the decision of a person or body who applied or enforced Islamic law in the first instance? If so, to whom?

8. To what extent is a decision or the advice of an Ulama binding and is it observed by the Muslim community?

\* **Contemporary observance and application of Islamic law in South Africa**

9. Are the prescriptions of the Sharia regarding marriage, divorce and succession in general observed strictly by Muslims in South Africa?

10. Where Islamic law in respect of any of the above-mentioned matters is in conflict with the law of the land, does the average Muslim observe Islamic law or the law of the land?

11. Is Islamic law as it is applied in South Africa today, in accordance with the traditional Islamic law, or has it been adapted or modernised in some respects in accordance with the Western way of life?

12. (a) How will a member of the Muslim community set about resolving a legal problem which he has in connection with the law of marriage or succession?

(b) Will an Islamic authoritative body also advise such a person, where applicable, on the law of the land?

13. To what extent can changed circumstances and needs lead to the adaptation of Islamic law?

14. What role does the interpretation of Islamic law play in the application thereof and how are conflicting interpretations reconciled?

\* Conclusion of marriage

15. Can you give an estimate of the percentage of marriages entered into by Muslims in South Africa -

(a) in accordance with Islamic law only?

(b) in accordance with Islamic law as well as South African law?

16. Do marriages entered into in accordance with South African law only, ever occur amongst Muslims (that is a marriage not entered into in accordance with Islamic law)?

17. For what reasons do Muslims find it necessary to enter into a marriage in accordance with Islamic as well as South African law?

18. Is there any Muslim body in South Africa which at present controls marriages in accordance with Islamic law or which advises persons regarding the conclusion of such marriages.?

19. How is a valid Islamic marriage concluded in South Africa?

20. Are Islamic marriages ever solemnised by Muslims appointed as marriage officers in terms of section 3 of the Marriage Act 25 of 1961? If not, why not?

21. (a) Are Islamic marriages at present registered in any way?

(b) If so, is registration compulsory?

(c) If not, is there any way in which the existence of an Islamic marriage can be formally ascertained?

(d) Is it desirable that there should be some form of registration if it does not exist at present?

22. Would you (if you are a Muslim) advise a member of your family to enter into a civil marriage? Give reasons.

23. It appears as though Muslims are unwilling to enter into civil marriages. Is this true and if so, why?

24. Do Muslims who enter into a marriage in accordance with Islamic law encounter any practical problems if they do not also have their marriage solemnised in accordance with South African law? If so, what problems?

25. Is the average Muslim aware of the fact that his Islamic marriage is not recognised in South African law? If so, how does he experience this situation?

26. Is there a need for the recognition of the Islamic marriage as a marriage in the South African law? If so, why?

\* Poligamy

27. To what extent do polygamous marriages still occur amongst Muslims in South Africa?

28. Would it be acceptable to Muslims if only monogamous marriages are recognised?

\* **Matrimonial property**

29. In the case where a Muslim enters into a marriage in accordance with Islamic as well as South African law, which matrimonial property system is usually chosen by the parties -

- + a marriage in community of property? or
- + division of property by antenuptial contract? or
- + a marriage according to the accrual system?

30. What in your opinion are the reasons for the respective choices as mentioned in the previous question?

31. Is the average Muslim aware of the different choices between matrimonial property systems which exist in terms of South African law?

32. Would a marriage -

- + in community of property; or
- + according to the accrual system;

be in conflict with the principles of Islamic law?

\* **Status of children**

33. Are Muslims aware of the fact that if they do not enter into a civil marriage their children are regarded by the South African law as illegitimate? What is their attitude in this connection?

34. What practical problems are caused by the present legal position regarding the status of children born from an Islamic marriage?

\* **Divorce**

35. Is there any Muslim body who presently controls divorce in accordance with Islamic law in South Africa?

36. (a) Is there any need that divorces in terms of Islamic law should be registered?

(b) If not, how is the divorce made known?

\* **Maintenance**

37. Is a woman whose marriage was dissolved in accordance with Islamic law entitled to the payment of maintenance by her ex-husband, either by way of periodical payments or otherwise?

38. Does Islamic law recognise a right to maintenance-

(a) in respect of a child by both parents;

(b) against a child for both his parents?

39. Are any problems experienced in the application of the South African law regarding maintenance in favour of-

(a) spouses;

(b) dependent children; and

(c) other dependents?

\* **Guardianship**

40. (a) Are any problems experienced in the application of South African Law in respect of guardianship over Muslim minors?

(b) If so, what problems?

\* **Succession**

41. Is it common for Muslims to make wills according to the provisions of the South African law of succession? If not, why not?

42. In cases where Muslims dispose of their property by will, is it common or exceptional that they provide in such a will that their estate should devolve according to Islamic law?

43. Does it occur in practice that a Muslim only disposes by will of that part of his estate which he is entitled to dispose of according to Islamic law?

44. Does it occur that Muslims provide in their wills for the devolution of their estate in a way which is in conflict with the rules of Islamic law? If so, what is the reason for this?
45. Whom does a Muslim in South Africa approach for advice with regard to the drawing up of a will?
46. (a) How does a Muslim dispose of his estate in terms of Islamic law? Does it take place formally or informally: orally or in writing?
- (b) Does it also apply to that part of his estate in respect of which a Muslim has the right to dispose?
47. Are Muslims in general aware of the fact that they can provide by will that their estates must devolve according to Islamic Law?
48. Does it generally occur that a re-distribution agreement is concluded by Muslim heirs to give effect to the Islamic law of succession in stead of succession according to South African law?
49. Are there any practical problems attached to such a re-distribution agreement?
50. Does it happen that heirs refuse to agree to a re-distribution of the estate in terms of Islamic law?

\* **Influence of the South African matrimonial property law**

51. Does the division of a joint estate where Muslims were married in community of property create practical problems? If so, which problems?

\* **Minority**

52. In view of the fact that the Islamic law does not recognise a specific age of majority, does the age of majority in South African law and the legal incapacities resulting therefrom cause Muslims any problems? If so, what problems?

53. Do Muslims encounter any problems in connection with South African legal provisions regarding curatorship and minority?

54. What objection, if any, do Muslims have against the provisions of the South African law regarding the safe keeping of a minor's inheritance in the Guardian's Fund?

\* **General**

55. Which other practical problems are experienced as a result of the non-recognition of the Islamic law of succession?

56. (a) Who should, in your view, exercise control over the administration of Muslim estates?

(b) How would the controlling body or executor know that the estate should be distributed in terms of Islamic law?

\* Other information

57. Would you like to suggest any practical solutions for the problems which might appear from the questions above?

58. Is Islamic law in itself capable of adapting to modern needs and to the demands of the South African legal system within which it will have to operate?

59. Do you experience any other problems regarding family and personal law and the law relating to marriage as a result of the fact that Islamic law is not recognised in South Africa?

60. Which court or body should, in your view, determine questions relating to Islamic law?

61. How should such a court or body operate if the Islamic law is not certain or if there is a dispute between different controlling bodies?

\* Particulars of respondent

(a) The respondent is-

A Muslim	
A Hindu	
Other denomination	

(b) The respondent is residing in-

The Cape Province	
Transvaal	
Natal	
Orange Free State	

(c) The particulars are given-

in my personal capacity	
on behalf of an organisation which represents Muslims	
on behalf of an organisation which DOES NOT represent Muslims	

(d) The following information would greatly assist the Commission in further consultation, if necessary, but you are not obliged to furnish it:

(i) If you completed the questionnaire in your personal capacity please furnish your name and address:

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OR

(ii) If this questionnaire reflects the views of an association or body please furnish the name and address of that association or body:

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