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THE FUTURE OF MUSLIM FAMILY LAW IN SOUTH AFRICA

by

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AND

SOUTH AFRICAN CONSTITUTIONAL STUDIES CENTRE
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INTRODUCTION

Albie Sachs

Since its arrival in South Africa Islam has been associated with resistance to domination. In the first place, slaves torn from their homes in the East Indies clung to Islam as a means of asserting their personality and beliefs. In a later period, when racial domination became the basis of government in South Africa, Muslims were subjected to gross discrimination on the grounds of not having white skins.

A third form of domination was more subtle. South Africa was governed as a "Christian country" and Christian values became the norm. This was most noticeable in the area of family law, where judges explicitly upheld the Christian marriage as being the only one which the courts could recognise. This resulted in Muslim and Hindu unions not being regarded as lawful marriages. In legal terms, wives were regarded as concubines, and children as illegitimate offspring. The argument used by judges was that even though the unions might in practice be monogamous and comply with all the general legal requirements of a valid marriage, they were not lawful because they were potentially polygamous.

It is not surprising, therefore, that recognition of Muslim and Hindu marriages was one of the principal demands of the campaigns led by M K Ghandi at the beginning of the century.

Muslim South Africans, together with their non-Muslim brothers and sisters, have played a notable part in the struggle for non racial democracy. Some gave their lives; one recalls with pride names such as those of Imam Haroon and Ahmed Timol. The contribution of distinguished leaders like Yusuf Dadoo and Maulv Cachalia are well-known. In recent years, members of the Muslim community, including Ahmed Cassim, Dr Ram Salojee, Dr Essop Jassat, Imam Hassan Solomon, Moulana Farid Esack and many others, have been prominent in the struggle for human rights and against apartheid. They participated as individuals, as workers, as residents, as professionals, as traders, and frequently as organised members of the Muslim community.

The question now is how to harmonise the claims of Muslims to be full citizens of a free South Africa with their right to maintain a specifically Muslim personality and character. All the evidence suggests that Muslims neither wish to stand aside from, nor do they contemplate being pushed to the margins of, a new South Africa. Rather, they seek to bring Islam into the new South Africa

and proudly enter the mainstream of South African life as Muslims.

The Muslim community will themselves debate the issues and consider all the implications in relation to questions of faith. This introduction seeks merely to touch on some of the constitutional and legal questions raised, with a view to encouraging all round debate.

What, in constitutional terms, will it mean to enter the new South Africa as a Muslim (or Jew, or Christian or Hindu)?

The ANC draft Bill of Rights has attempted to deal with the question. Article 1 declares that:

1. All South Africans are born free and equal in dignity and rights.

2. No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth or other status.

3. All men and women shall have equal protection under the law.

This is the foundation of the Bill of Rights. It means that Muslim shall no longer be subjected to discrimination on the grounds c race or creed. All the legal barriers which have been erected t keep Muslims from participating fully and equally in South Africa society are removed. Furthermore, no religious group shall hav an over-privileged or an under-privileged position in relation t any other groups.

Article 5 deals with right of association, religion, language an culture. It reads as follows:

> Freedom of Association
>
> 1. There shall be freedom of associatior including the right to form and join trad unions, religious, social and cultural bodies and to form and participate in non governmental organisations.
>
> Freedom of Religion
>
> 2. There shall be freedom of worship an tolerance of all religions, and no State c official religion shall be established.
>
> 3. The institutions of religion shall be separat from the State, but nothing in thi Constitution shall prevent them from cc

operating with the State with a view to furthering the objectives of this Constitution, nor from bearing witness and commenting on the actions of the State.

4. Places associated with religious observance shall be respected, and no-one shall be barred from entering on grounds of race.

These articles give a guaranteed space to Islam as they do to other religions. No future government will be able to take away the rights of religious observance. In this sense, the state acknowledges the sovereignty of Islam in the religious sphere. The state cannot interfere in terms of religious worship, doctrine or organisation, nor can it intrude upon sacred places. The right to travel, contained in another section, guarantees the freedom of Muslims to go Mecca and to associate internationally with other Muslims.

There is no direct reference, however, to the status of Muslim family law, just as there is no reference to the status of traditional African family law systems, or to Hindu, Christian or other forms of family bonding. The following general factors might be seen as particularly relevant:

1. Differences of religion should not in any way be allowed t form the basis of differences of civil, political and lega rights. We are all South Africans and as such are entitle to equal protection under the law whatever our belief might be.

2. The right to conscience should never be questionec Beliefs must be respected, and no-one should b penalised for believing or for non-believing.

3. Religious communities form important parts of Sout African life, influencing the personality and culture of th whole society.

4. A non-denominational approach must be adopted whic does not favour any one religion over another. The qualit of a faith is not determined by the number of it adherents

5. Religious communities themselves have a fundamental bu not exclusive role to play in helping to define thei constitutional rights in a new South Africa. Each religio should have the right to speak on its own, and all religiou groups to speak collectively; non-religious persons an

bodies should co-operate with religious ones in finding agreed values and principles based on respect and tolerance for all, by all.

6. The question of religious rights and freedoms is of interest not only to religious communities but to all South Africans. It affects the nature of the society we live in, its degree of tolerance and openness. The multi-faith character of South Africa gives it richness and texture, from which all of us, believers and non-believers alike, benefit.

We are still left with the problem of relationship between state law and the sharia. In Mauritius it was recently argued that non-acceptance of the sharia as part of the state law represented discrimination on the grounds of religion against Muslims, but the Mauritian Supreme Court rejected this argument. What should the position be in South Africa?

This question has been the object of Firoz Cachalia's research. With sensitivity and objectivity he has analysed various currents of thought. Reading through his material, it appears that there are three possible options in respect of the relationship between the sharia, the state law and the constitution. (He has stated the

options in a slightly different way.)

The first option is to accept that the state law and the shari operate in separate spheres, each acknowledging that the othe exists, but neither seeking to superimpose itself on the other. Thi position has been accepted, even fought for, by Muslims in man countries, particularly where they are in a minority and thei religious rights are trampled upon or ignored by the majorit religion. It has also been argued for by Muslims in countrie where the state had adopted aggressive postures in relation t religion, allowing a certain measure of freedom of worship, bu prohibiting the religious authorities from having any say at all i dealing with family or inheritance problems.

The concept of separate sovereignties presupposes that the stat is not required to usurp or take over the functions of religion, n is religion required to secularise itself and become part of th state. It is up to the conscience of each person then to decic whether in a particular situation he or she wishes to regulate h or her affairs according to religious or state norms. Only in a sta where the sharia is the state law, or conversely where the sta outlaws the sharia, does such choice not exist; neither is likely be case in South Africa.

In practice, this approach means that when the state courts deal with parties who happen to be Muslim, religion and religious norms do not enter into the picture. The state judges, neither on their own, nor with the help of religious advisors, do not attempt to apply the principles of the sharia, but, rather, they give effect to the general law of the land. Conversely, the Muslim judicial authorities are not expected to refer to the general law of the land when applying the sharia; the religious texts are autonomous, and not subject to any gloss or overriding imprint of the state law.

The adoption of a "separate spheres" approach would facilitate overcoming the present position in terms of which Muslim marriages have virtually no status at all in South African law, being recognised neither in terms of state law nor through recognition of the sharia. Muslim judicial officers could be given capacity to act as marriage officers in terms of the general law. This would mean that persons married by them would no longer be subject to the possibility of being regarded as merely co-habiting in terms of the law of the land, nor could their children be treated as illegitimate for any purpose. At the same time, the religious ceremony would proceed according to the tenets of the sharia.

The marriage ceremony would thus have two distinct parts, th religious and the official. This is the position today with regard t Anglican, Catholic and Jewish marriages. Both the official and th religious ceremonies take place in the same building on the sam occasion. The official marriage gives rise to rights and dutie under the state law, while the religious marriage results i entitlements and obligations under the religious law. The two hav nothing to do with each other, may even have contradictor outcomes.

Accordingly, a marriage in a Catholic church by an ordaine Catholic priest who is also a recognised marriage officer, woul have two moments with two separate outcomes. First, ther would be the taking of sacramental vows, in terms of which th parties bind themselves in holy matrimony, and secondly, ther would be the signing of the register, as a consequence of whic the union would be recognised as an official marriage in the eye of the state. The religious law and the state law would hav markedly different results. In terms of the religious law, th marriage can only be dissolved by death; similarly, contraceptic and abortion are both outlawed. The law of the land, on the oth hand, would permit divorce if the marriage broke dow irretrievably, facilitate contraception as a means of fami

planning, and permit abortion in certain circumstances. It would then be up to the conscience of the parties concerned to decide whether they wished to be bound exclusively by the religious law or whether to exercise their rights in terms of the general law.

The religious law retains its sovereignty in its own sphere, the state law has sovereignty in its domain. The appointment of ministers, priests and rabbis as marriage officers is a functional convenience and a mark of tolerance; it in no way affects church or talmudic dogma. Equally, the appointment of Muslim judicial officers as official marriage officers would not oblige them to apply general law rather than the sharia when acting as religious leaders.

Taking away the marginalisation of Muslim marriages, and recognising Muslim religious authorities as marriage officers, would thus have the effect of giving full status and dignity to Muslim marriages in the eyes of the general law, without eliminating the right of Muslims to refer all their marriage problems to the religious authorities and to conduct their lives in terms of the sharia. It would be up to the conscience of each Muslim to decide whether to apply the terms of the sharia or the state law in relation to questions such as divorce, division of

property, custody of children and inheritance.

There are may steps which Muslims could take to minimise an possible discrepancy between the terms of the sharia and th principles of the general law. Thus they could have an ante nuptial contract in terms of which they agree in advance to appl sharia principles to the property regime of the marriage, and the could write wills in such a way as to give effect to the sharia a far as distribution of property after death is concerned.

The only limitations to what could be achieved by contract or las will and testament, would be those arising from constitutionall guaranteed rights. In this respect, for example, parties would nc be able to sign away their rights to gender equality, nor coul they seek to oust the jurisdiction of the courts in relation t guarding the best interests of minors.

A second option would be to attempt some kind of fusic between state law and the sharia. The state could recognise th the sharia would be a formal source of law recognised by judge in the case of family problems involving Muslims. Many variatior would be possible. All Muslims could automatically fall under th sharia, and the Muslim judicial authorities could be recognised b

the state as having exclusive jurisdiction to deal with their family and inheritance problems. Alternatively, the cases could go to the ordinary courts of the land, but experts on the sharia could be used as assessors or advisors. Another possibility would be to give a choice to the parties - either at the time of their marriage or at the moment of the dispute, as to whether the marriage should be governed by the general law or the sharia. (The rights of possible third party creditors should then be protected by some appropriate form of notice.) It might be possible to arrange for Muslim couples to submit their disputes to a form of mediation by Muslim judicial authorities, whose decisions could then be consented to by the parties and become part of the order of the ordinary court. As far as the state law is concerned, the Muslim judicial authorities would not themselves have the power to dissolve the marriage or order division of the property, but they could declare that as a result of the talaq, the marriage had irretrievably broken down, and that a property settlement in line with the principles of the sharia had been consented to by the parties.

Another possible modality would be to proceed along the lines established in Tanzania, in terms of which the ordinary state courts would apply the principles of the sharia to couples who are

Muslim, but subject to certain limitations, namely, that the general minimum age of marriage applied to Muslims, that no husband could have a second wife without the consent of his first wife, and that divorce through talaq would only take effect when it was registered in the court and made part of a court order.

The third basic option would be to confer exclusive jurisdiction on the Muslim judicial authorities to hear the family law problems of Muslims, and to give them power to pronounce and execute judgement in terms of the sharia.

The issue is open and complicated. There is clearly no simple solution that would attend to all the problems and leave everyone satisfied. One looks forward to Muslims being on the bench and having significant positions in parliament and the legal profession, and making appropriate contributions to the development of the law. The Muslim judicial authorities, for their part, have shown sensitivity and courage in fighting for broad civil rights for Muslims and for all South Africans. Whatever solution is agreed upon, choice would seem to have a major role to play.

Everyone needs to be heard, women and men, the younger generation as well as the older. Broad constitutional principles of

freedom, equality and rights of conscience are involved. This is an area of overlap between what may be referred to as the right to be the same and the right to be different. The broadest possible discussion is needed.

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THE FUTURE OF MUSLIM FAMILY LAW IN SOUTH AFRICA

Firoz Cachalia

PART I
Introduction

We are entering a period of major constitutional and political restructuring in South Africa. The legal abolition of apartheid and the establishment of a constitutional democracy is clearly on the agenda. The great majority of South Africans, regardless of their ideological orientation, ethnic origin or religious affiliation should welcome these changes. Muslim South Africans have a particular reason for rejoicing because they, together with their fellow South Africans, have been discriminated against, firstly as slaves and indentured labourers, secondly, because they are mostly not white, and thirdly because they do not adhere to the majority religion in South Africa.

The new constitution will represent the culmination of our struggles and the fulfilment of our vision. It will embody the unity of our nation, entrench equality of citizenship and guarantee rights of cultural uniqueness and religious expression.

The publication of the ANC draft Bill of Rights is an important contribution to politics of transition. It affirms the ANC's commitment to non-racism, democracy and human rights, and to an inclusive constitution-making process. While it provides a basic framework it leaves considerable room for debate on vital questions. One of these is the future of African customary and Muslim personal laws.

In 1987[1] the South African Law Commission (SALC) solicited the opinion of several Muslim organisations and individuals[2] on the question whether recognition should be accorded to Muslim personal laws as part of the law of the land. The ULEMA bodies[3] as well as the Islamic Council of South Africa (ICSA) expressed themselves in favour.[4] "Extra-Parliamentary" organisations like the Muslim Youth Movement (MYM) and the Call of Islam expressed reservations about the desirability of co-operating with a statutory body, and argued that the apparent readiness of the authorities to consider recognition was part of a political strategy aimed at ethnic co-option.[5] The SALC has not yet published its findings.

The issue now needs a fresh airing in the light of the process of negotiating a new constitution, which will hopefully extend to all

South Africans what John Rawls has called "the equal liberties of citizenship"[6] while acknowledging cultural diversity and protecting religious freedom. In determining the content of the relevant constitutional provisions, the views of the Muslim community should be of decisive importance. What follows is an attempt to situate the historic claims of the South African Muslim community within the context of the emerging democratic order. Before considering the concrete options available and their constitutional implications, it is necessary to introduce the reader to the South African Muslim community, its values and aspirations, and its system of law.

PART II
South African Muslims and Muslim Law

The first Muslims to arrive in South Africa were not, as is sometimes assumed to have been the case, among the indentured labourers who arrived in Natal from the south of India on the ship *Truro*, on 16 November 1860. The indentured labourers who had come to work on Natal's sugar cane plantations, were in fact preceded by slaves, who were imported into the Cape colony from the Malayan Archipalegos.[7] Despite

"harassment from their white Christian owners, the early Muslims clung tenaciously to their faith and to their cultural heritage. They gathered in their houses to perform *Salaat*,[8] to learn and memorise the Holy Quran, and to observe their Islamic traditions".[9] The indentured labourers were followed by Muslim and Hindu merchants from Gugerat, Surat and Porbander.[10]

Today there are approximately 500 000[11] Muslims in South Africa, many of whom are of Indian origin but the majority are classified "coloured" under the apartheid laws. There are also relatively small numbers of African and white adherents[12]. Muslims are a largely urbanised community of artisans, professionals and merchants. In most Muslim households the husband still has the primary duty of support but the number of Muslim women in wage employment and at universities is expanding and increasingly middle-class families rely on the income of both spouses. Working class women have for a long time now been forced out of the home by economic necessity.[13]

Muslims have established a dense network of autonomous organisations, mosques, educational institutions (Madressas) and judicial structures within "civil society". The ULEMA (Muslim theologians) have established provincial councils or jamiats which

regulate religious practice and ritual and issue fatawa (edicts) on the interpretation of Islamic law, including family law. Their decisions are widely respected by Muslims and are considered binding.

Legal Status of Muslims

Since the great majority of Muslims are members of the "non-white races" they suffer the same civil and political disabilities as the black majority. Muslims have never enjoyed equal rights of citizenship and have been discriminated against on the grounds of race. Under Group Areas legislation, entire Muslim jamaats (communities) were forcibly removed and had to re-establish mosques out of resources accumulated within the community.[14] Though the Muslim community exhibits a great variety of political viewpoints, the majority of Muslims have participated in the anti-apartheid struggle for *equality, democracy and national unity.*[15]

But Muslims have also been involved in a discrete struggle for the assertion of the *Muslim identity*. This is a struggle which emphasises the integrity and validity of Islamic concepts. The non-recognition of Muslim personal laws by the South African law

has long been a source of grievance. Thus two potentially, but not necessarily, conflicting strands of political thought have arisen within the Muslim community: one emphasises the struggle for the rights of all citizens, and denounces separate rights; and the other asserts the rights of the Muslim, qua Muslim.

Legal Status of Muslim Marriages

South African courts have followed the celebrated definition of a marriage enunciated by Lord Penzance in Hyde v Hyde and Woodmanse.[16] He said:

> "... that marriage, as understood in *Christendom*, may ... be defined as a *voluntary* union for life of *one man and one woman*, to the exclusion of all others."(my emphasis)

Thus, the monogamous marriage of Roman Dutch law is the only form of marriage recognised under our law. It may be contracted by all, irrespective of *race or religion*. A marriage which does not possess the element of exclusiveness is not recognised as a legal marriage under South African law. Marriages in accordance with Muslim (or Hindu) rites are denied recognition on the basis that they are "potentially polygamous"[17] unless solemnised by a

marriage officer[18] in terms of section 3 of the Marriage Act 25 of 1961, in which event a valid *civil* marriage arises. The South African law of course is not consistent in this regard because African customary marriages, even if actually polygamous, are accorded limited legislative recognition.[19]

The consequences of non-recognition are serious, particularly for the wife. Although a couple may regard themselves as married according to the tenets of their religion, the law treats them as strangers. There is therefore no legal nexus between them: there is no joint estate and any nuptial agreement is void; there are no financial obligations between the spouses inter se and no claim for loss of support accrues to the dependent spouse on the death of her "husband"; she has no claim for maintenance on divorce or against her husband's deceased estate; she is effectively disinherited if her husband dies intestate; she may be compelled to give evidence against her spouse in criminal proceedings; and the law attaches the stigma of illegitimacy to her children.[20]

Muslims, however, continue to regulate their domestic affairs in accordance with Islamic law. All Muslims are married by a representative of the Muslim clergy, who performs the niqah (marriage ceremony) usually in a mosque, and their marriages

are effectively dissolved by the talaq (repudiation) procedure. So the law of the land, and the law of the South African Muslim community exist side by side in mutual disregard. This leads to all sorts of anomalies. Muslims who regard themselves as married are regarded as unmarried by the law; Muslims who have annulled their marriage, are, in the absence of a court order, considered married.

The long struggle of Muslims for the recognition of their marriages and legal system is much more than a struggle to overcome these disabilities and anomalies; it is an expression of the assertion of the Muslim identity, of which Islamic law is an integral component.

Muslim Law, Muslim Culture and the Muslim Identity

As modern Europe emerged from feudalism, it discarded theocracy; new ideologies of state and law based on social contract and natural law doctrines accompanied the consolidation of absolute monarchies. Thus secularisation was the reverse side of the centralisation of political power independent of the church. Islamic law and civilization evolved along a different path.[21] The

Prophet of Islam, Mohamed (Peace be Upon Him) established a system of law and judicial order; no Reformation occurred in Islamic history to separate church and state, religion and law.

The Arabic term for Islamic law is fiqh and "it connotes not only a system of binding rules, but also all that is spiritually profitable and injurious to man".[22] The Holy Quran is the fundamental source of Islamic law, and in the Muslim belief system, it constitutes the ipsimissima verba of Almighty God. The Quran contains both secular and religious injunctions, and "it prescribes moral standards for a wide range of personal, social and economic and political relationships, embracing both civil and criminal law".[23] The Holy Quran, together with compilations of the practices and traditions of the Prophet Mohammed (Peace be upon Him) form a body of commandments which govern all aspects of a Muslim's life, including marriage, divorce and devolution of property on death.

Thus, Islam is a "revelational culture",[24] which does not differentiate between law and religion, positive legal rules and moral prescriptions, the religious and the profane, and the public and the private. This religious world-view guides the individual through the life-cycle of birth, life and death; and it gives meaning

to existence. Islamic culture provides the Muslim umma (community), in the words of Ali Mazrui,[25] with *criteria for evaluation, lenses of perception and cognition and a basis for identity.* It is crucial therefore, in any discussion of the possible accommodation of Muslim personal laws in a future non-racial legal order, to grasp this continuity of Muslim law, religion, culture and identity.[26]

The Muslim Law of Marriage and Succession

Islam considerably ameliorated the status of women. In pre-Islamic Arabia women were little more than chattels subject to the arbitrary power of their husbands.[27] Islam abolished the practice of female infanticide,[28] recognised women as persons[29] capable of bearing rights,[30] and accorded them special matrimonial rights and privileges.[31]

Marriage Relationship in Islam

Marriage, according to the sharia, is a civil contract. It is not in the nature of a sacrament and therefore can be dissolved if the

relationship ends in failure.[32] The marriage relationship creates reciprocal rights and obligations between the spouses, although the husband remains the party primarily responsible for supporting the family.[33]

Muslim marriages, in contrast with the common law rule, are automatically out of community of property. Marriage therefore does not create a joint estate and the wife retains full ownership of all property acquired before the marriage. She also retains full legal capacity to acquire, alienate, hypothecate or otherwise deal with any property, whether movable or immovable, corporeal or incorporeal, to conclude contracts and to litigate without the assistance of her husband.[34] The Roman Dutch concept of the marital power is completely alien to Islamic law.[35] Islamic law also differs from the South African law in that it permits a husband a plurality of spouses.

Divorce (Talaq) and Ancillary Issues

In Islamic law, the parties may proceed to dissolve their marriage, when the marriage relationship has broken down irretrievably,[36] and there is accordingly no reasonable prospect for a restoration

of a normal marriage relationship between them through mediation.

Divorce may be given orally or in writing but it must take place in the presence of witnesses. The husband must exercise his right of repudiation (talaq) on three successive occasions before the divorce becomes irrevocable. In effect, the marriage relationship continues to subsist before pronouncement of the third and final talaq.

Islam does recognise divorce at the instance of the wife (khule)[37]. The wife may stipulate this right in her marriage contract[38] and even where she has not done so, she may demand the divorce on specified grounds,[39] but she may then be required to surrender her dower to her husband as compensation.[40]

Consequences of Divorce:

Guardianship and Custody

The mother, as of right, is entitled to custody of male children up to the age of seven and in the case of female children, until they reach the age of puberty. Thereafter custody and guardianship

devolves upon the father.[41]

Maintenance (Nafqah)

After dissolution of the marriage, the husband is obliged to support his former wife for the period of her eddah, that is for three months, or if she is pregnant, until delivery of the child. He remains obliged to support his sons born of the marriage until their majority and his daughters until their marriage.[42]

Children : Legitimacy

Legitimacy is dependent on a valid marriage. Illegitimacy is a permanent condition because the sharia does not recognise the doctrine of legitimation per subsequens matrimonium.[43] An illegitimate child does not inherit from the father on intestacy.[44] In other respects illegitimate children are acknowledged as "full members of the community"[45] entitled to "grow up free from prejudice or stigmas of any kind".[46]

Adoption

The Holy Quran forbids adoption as an artificial mode of creating

family ties. It recognises only those family relationships based on consanguinity and affinity. Islam accordingly refuses to extend rights reserved for family members to outsiders.[47]

The Muslim Law of Succession (Miraaath)

The Holy Quran contains detailed provisions dealing with the devolution of the estates of deceased persons.[48] These provisions are peremptory and cannot be departed from. A testamentary disposition which purports to vary the order of succession prescribed by the Quran is invalid, unless the heirs consent.[49] Accordingly, Islamic law does not allow freedom of testation.[50]

The Muslim wife has an entrenched, "non-derrogable" right to inherit from her husband's deceased estate. If there are no children born of the marriage when the husband dies, she is entitled to receive one quarter; if there are children, she receives one eighth.

Three aspects of the Islamic law of succession could be considered prima facie not to accord with contemporary

expectations. These are, that the distribution incorporates the "extended family",[51] is always per capita,[52] and as a general rule, male heirs receive twice as much as female heirs of the same degree.[53]

Muslim Law and Sex Discrimination

It is clear that some Islamic family laws are based on a traditional, sex-based distribution of rights and obligations within the family. It would be wrong however to conclude that Islam and gender equality are necessarily in conflict.

It is true that there are passages in the Holy Quran which entrench the husband's "leadership" within the family. But this concept is *legally irrelevant* because it does not affect the distribution of rights between the spouses inter se or in relation to third parties. There is no legal hierarchy within the Muslim family. Muslim husbands are denied the marital power both by the sharia and the modern South African law. Secondly, although Islam appears to endorse patriarchy and a division of functions within the family based on sex-roles, these are features of the social structure which do not distinguish Islam as a culture or

legal system. It is arguable that these social structures are part of the *context* of Islam's revelation and are not ordained by its *normative* structure.[54] Finally the sharia, described by Ali Mazrui as "one of the glories of Islam", as well as "one of its shackles"[55] has not precluded family law reforms in Muslim countries aimed at ameliorating the status of women. From the 1950's onwards in various countries, procedural and substantive innovations have been introduced in the principles of Islamic family law relating to maintenance of a divorced wife, unilateral divorce by a husband, polygamy and the custody of children. Countries implementing these reforms include Tunisia, Morocco, Egypt, Algeria, Pakistan and Malaysia.[56]

PART III
Options

In this section of the paper, three "models" which suggest ways of dealing with the tension between the concept of a common citizenship and the right of Muslims to organise their family life in accordance with their beliefs are outlined. The first, legal unity is aimed at overcoming the consequences of the non-recognition of Muslim marriages. The second, legal integration, proposes unification of personal laws, and the third, legal pluralism

constitutionally entrenches a plurality of family laws.

Legal Unity

This "model" is based on the *single concept of marriage*, but would at the same time accord recognition to Muslim marriage rites (niqah). A marriage which complies with both the requisites of a civil marriage, (minimum age, capacity, consent and monogamy) and the essential elements of a Muslim marriage[57] would give rise to a marriage relationship with the ordinary civil consequences (e.g. be in community of property, create a reciprocal duty of support etc). The incidence of a Muslim marriage *contract* (as opposed to its *consequences*) such as the dowry, agreed to at the time of the marriage would also be enforceable in a South African court.[58] There will still be a need for a centralised system of administration. As an alternative to the present system which allows for the licensing of Muslim priests (alims) as marriage officers, the parties could be placed under legal duty to register their marriage within a specific time. Registration would be for administrative purposes only and would not be a condition precedent to the validity of the marriage.[59]

As pointed out earlier, South African courts have refused to recognise Muslim marriages on the ground that they are potentially polygamous.[60] There is no justification, as M A E Bulbulyia pointed out in his article in De Rebus in 1983[61], for continuing to withhold recognition from Muslim marriages which are in fact monogamous and which in *all other respects conform to the requirements of the civil law.*

The parties to a Muslim marriage, accorded recognition by the law of the land, will remain free to incorporate the rules of that faith, either informally, or *contractually* before and after the marriage and on divorce. The matters that could be dealt with in this way include the proprietary consequences of the marriage and maintenance,[62] division of property, custody and guardianship on divorce.[63] Where a court of general jurisdiction is seized of a matter upon which Muslim litigants have agreed, the court will in effect treat a *religious obligation* as a *private contractual duty*, and enforce the obligation as such.

This "model" provides for a degree of *private ordering* and hence, a degree of autonomy from the state legal order. Sharia rules would function as a "private legal system".[64]

Religious freedom in this "model" could be protected through *constitutionally guaranteed* rights of *conscience, association and of privacy* and thus through a separation of religious organisations and state.

This "model", first suggested as a possible option by Albie Sachs,[65] is based on a distinction between the "public" and the "private" domains and formal and informal systems of justice. Its particular strength is that it allows individuals and communities to adjust to wider processes of social change by institutionalising *choice*, *personal freedom* and *private autonomy*. The social conditions in which change occurs, as Tawa Ocran has pointed out, are usually "complex and plurally determined. Participant individuals and affected groups hold different interests, different perceptions of the problems, and hence, different ideas about resolving problems. Collective action requires a delicate balancing of interests".[66]

This "two-tier" system of marriage has been criticised on the basis that its flexibility and sensitivity to cultural and traditional practices" would "enable individuals and families to adhere to cultural practices which deny individual liberties and foster oppressive relationships",[67] and that it would "exclude men and

women from recourse to the state machinery in their struggles for a family structure free from gender oppression".[68] This critique assumes that culture and tradition are necessarily static and oppressive, is based on a mechanical understanding of the relationship of law and culture with social change, and implies a policy of legal coercion of the "traditional" family.The efficacy of law as an instrument of change in culturally sensitive areas is limited for, as Tawa Ocran reminds us, law has more impact "in areas of social life that are relatively neutral, emotionally speaking, than on expressive and evaluative areas. In other words, the family resists but the market place complies".[69]

Legal Integration[70]

This "model" seeks to *integrate* the legal principles of different legal systems. Unlike *unification*, which imposes a uniform law, integration "creates a law which brings together, without totally obliterating, laws of different origins".[71] By incorporating substantive rights recognised by a *religious* system of law into the *secular* law, their effects may be standardised and conflicts between them removed. This will mean that the principles of both the sharia laws and the civil law, as a result of legislative innovation, will apply to Muslim marriages and the devolution of

property on death. It is submitted that there are sufficient points of identity between the two legal systems to make this a feasible option.

There are of course clearly fundamental differences between the modern South African law and the sharia law. Chief among these are Islam's tolerance of polygamy, the husband's unilateral right to repudiate his wife, the sharia rules regulating the status of children and the succession rule according preference to male heirs. But, there are also important points of similarity. Marriage in both systems is contractual in nature, giving spouses some latitude to regulate their relationship by *agreement*, and the grounds for divorce coincide. Separate property, the matrimonial proprietary regime preferred by Islam, may be chosen by the parties in modern South African law, and both systems are consistent with the idea of marriage as a partnership of equals. The rules of standing and contractual capacity are also the same since the abolition of the marital power in South African law.

In addition to the measures provided for by the first "model", legal integration would establish parity between different *forms* of marriage, and provide for uniform procedures for contracting a marriage as well as for divorce.[72]

i. Parity between Different Forms of Marriage

Under the present South African law, Islamic and customary marriages are considered inferior to "Christian" monogamous marriages and therefore are not accorded equal protection under the law. This distinction is discriminatory and should end. All married women would then enjoy equal status.[73]

ii. Uniform Procedures for Contracting a Marriage

An integrated marriage law would accord recognition to a multiplicity of *marriage rites* and establish a *uniform* system of administration.[74]

iii. Uniform Procedures on Divorce

No marriage would be dissolved except by decree of a court of competent jurisdiction. Parties married under Islamic law wishing to dissolve their marriage would also require a judicial decree.

Further Recommendations

Marriage

It should be provided, either by way of a suitable amendment to the Matrimonial Property Act of 1984 or by way of special legislation applicable to Muslim marriages, that such marriages would automatically be out of community of property. The accrual system should be applicable to such marriages, unless contractually excluded.[75]

Divorce

Muslim plaintiffs seeking a divorce decree should be required to satisfy the court that the matter was referred to a Muslim Conciliation Board,[76] and that the attempt at reconciliation had failed. A certificate issued by the board, to the effect that talaq has been validly pronounced, and annexed to the pleadings, should be regarded as conclusive proof that the *marriage has irretrievably broken down.* Where conciliation has failed the board should assist the parties to reach agreement on the ancillary issues (custody, maintenance etc), to be incorporated in the court order dissolving the marriage. The Supreme Court of course will

retain its power to make custody orders, order periodic maintenance payments and redistribute property on divorce.

Succession

The Intestate Succession Act 81 of 1987 should be amended to provide that the estate of a Muslim who dies intestate will devolve according to Islamic law, unless a declaration is filed with the Master indicating a contrary intention.

A Muslim's freedom of testation should not be limited by this change in the law. The deceased estates of Muslims will continue to be administered in terms of the Administration of Estates Act 66 of 1965.

Wakf

Wakf is a foundation in perpetuity which has a sacred nature. In Islam, land and buildings dedicated to public worship (e.g. mosques), or for the benefit of humanity, acquire a sacred character.[77] There is a need for the recognition of wakf endowments under the general law of the land.[78]

This model suggests enactment of special measures to regulate Muslim marriages, as distinct from proposals to incorporate sharia law as a separate *system* in the law.

These measures will clearly *differentiate* between different *forms* of marriage but will not be *discriminatory* as all married persons will still have the same rights. All married people will effectively have the same choices regarding the proprietary consequences of their marriage, husbands and wives will have equal rights during and on the dissolution of the marriage, and on divorce the courts will have the same powers, regardless of the form of the marriage.

Legal Pluralism

A pluralism of laws, as the two previous "models" have shown, can be accommodated in a variety of ways. The concept, "legal pluralism" is used here to denote the *formal* incorporation of different systems of personal law within a single jurisdiction.

Internal Conflicts of Law

Legal pluralism in this sense inevitably leads to conflicts of law problems.[79] Before deciding the substantive issue before the court, it must be determined in limine which system of law to apply to a particular dispute between the parties. Pluralistic legal systems therefore require rules of recognition[80] which incorporate internal conflicts of law rules for selecting the applicable personal law. Personal laws are laws which attach to individuals by virtue of their affiliation to a particular group of people, rather than their attachment to a particular place.[81] Therefore, whereas private international law is concerned with conflicts between state laws, which are territorially based, internal conflicts of laws regulate conflicts of group laws within a state.[82] The recognition and enforcement of a group's legal system is a corollary of its right to foster its *identity*. Where the internal conflict of group laws reflect different economic relationships, "profound issues of socio-economic change"[83] are also involved in the selection process.

The recognition of a personal system of law depends on the extent to which a state, having regard to a wide range of policy issues and conflicting claims,[84] is prepared to give effect to

personal laws that are at variance with its own within its borders. Group laws always exist "within the matrix of the general law of the state... hence it is the general law which determines the recognition of group laws".[85] Therefore, where the group law is also a religious law, the incorporation of personal laws as part of the positive law raises the issue of religious freedom and the proper parameters of state action.

S H Haq Nadvi is a strong advocate of the view that official recognition should be extended to sharia laws.[86] This proposal, intended to guarantee religious freedom, could also have the unintended effect of curtailing group autonomy. Where a group law is recognised the state acquires authority over its doctrinal development, interpretation, application and enforcement.

The group law is made subject to an external standard and external law maker. The rules of a legal system, once chosen, are applied subject to the exclusionary rule of the forum's public policy.[87] Under colonialism, for instance, the application of African customary law was made subject to a "repugnancy clause", which effectively empowered the colonial courts to make moral judgements on the contents of customary laws. Independent African countries have abolished the repugnancy

clause, but the courts retain a discretion to exclude customary law on the grounds of public policy or equity.[88]

Even where courts are not empowered to exercise a discretion the process of adjudication (which includes the socalled choice of law problem) is not a simple, mechanical process of discovering the "true" rule. When there is no clearly applicable rule the courts make policy choices and exercise a creative law making role.[89] Ordinarily, this role rarely attracts any attention let alone controversy. But secular courts of general jurisdiction do not have the experience or legitimacy to interpret religious laws.[90] Proposals which will in effect require the ordinary courts to apply sharia rules therefore need to be thought through more carefully. Clearly, it will be necessary to improve the representivity of the judiciary by the appointment of Muslim jurists as assessors.[91] Codification will be necessary to unify different sources of Muslim family law and curtail the court's interpretive powers.

The process then of selecting the applicable rule from different legal systems in a particular case is policy-orientated. The prior process of selecting a legal system's choice of law rules (rules of recognition) also has policy implications. It will have to be decided for instance which family law issues (marriage, divorce,

maintenance, custody, guardianship, division of property on divorce, succession), will be governed by the sub-legal system, because the policy considerations may not be the same in each case. It will also have to be decided whether our choice of law rules will accord primacy to ascriptive group membership[92] or to the conscious or implied choice of the parties. Conflicts rules which involve litigants in choice of law decisions[93] empower the courts to apply rules recognised by a legal system in a flexible manner to litigants in transition from one socio-economic order to another. On the other hand, they may not be entirely appropriate where the object is to accord recognition to group cultural identities.

Conflicts of Rights

In addition to the conflicts of law problems that the courts will have in the exercise of their ordinary jurisdiction, in a future constitutionally based legal order the courts will have to resolve "conflicts of right" in the exercise of their constitutional jurisdiction. Some of these potential conflicts between gender equality and religious freedom could be resolved in the process of drafting and adopting a new constitution.

The concept of the equality of the sexes is no longer "a special characteristic of a particular society, it is a universally cherished ideal and has been recognised as a human right".[94]. The new South African constitution will also probably contain provisions guaranteeing the equality of the sexes within the family and society.[95]

The constitutional entrenchment of the equality of the sexes is likely to stimulate family law reforms to equalise the rights and duties of wives and husbands, and mothers and fathers and encourage the independent personal development of women both inside and outside the family.[96] At the same time legal rules, whether of the common or statute law, or of the sharia, which are based on traditional "gender-based" distinctions between the sexes within the family context, could be at risk in litigation challenging their constitutional validity.[97] The rule of our common law requiring the wife to follow the husband's domicile,[98] the "presumption" favouring wives in custody disputes, and the sharia rule conferring unequal rights on divorce are examples of family laws which may not survive a new constitutional litmus test of gender equality.[99]

A legal system which recognises a plurality of personal laws

therefore implies a particular kind of constitution, one which protects these laws through special savings clauses and an entrenched hierarchy of rights. Section 23(1)(a) of the Zimbabwean Constitution for instance forbids discrimination on the grounds of race, tribe, place of origin, political option, colour or creed.[100] This section is followed by a special proviso which excludes family laws from its ambit. Section 23(3) reads: "nothing contained in any law shall be held to be in contravention of sub-section 1(a) (the section prohibiting discrimination) to the extent that the law in question relates to any of the following matters: a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law...". This provision preserves the duality of the Zimbabwean legal system which protects customary laws which discriminate against women.[101] Similarly, those Arab countries which have constitutions guaranteeing equality to all citizens, have had to incorporate special provisions protecting their personal status codes.[102]

Religious Freedom and Personal Laws

In secular states, religious freedom is usually protected through the guarantee of equality, the guarantee of non discrimination[103]

and through privacy and associational rights.[104] A strict separation is maintained between, on the one hand, laws enforceable by the state, and, on the other hand, religious injunctions which do not have the force of law. The law treats believers and non-believers uniformly; it allows believers to manifest their belief in public and in private[105] but is does not oblige non-believers to believe. This conception of religious freedom is compatible with a constitutional guarantee of equality between the sexes. Both these human rights (gender equality and religious freedom) can co-exist in the same constitution without any hierarchy between them, each subject only to the limits of its own inherent nature and any express derogations provided for.

But does religious freedom necessarily include the right of Muslims to be governed by a personal system of religious law in respect of marriage, divorce and the devolution of property? It can be argued that family laws applied uniformly to all citizens, which have the effect of preventing Muslims from living in accordance with the tenets of their faith, without legal disability, are discriminatory because they impose a disproportionate burden on Muslims.[106] This argument suggests that a constitutional entrenchment of a plurality of family laws is necessary to guarantee religious freedom to Muslims.[107]

PART IV
Conclusion

The third "model" brings the potential conflicts between women's rights and religious rights into focus. While it appears to force a choice between two equally important constitutional goals - the guarantee of equality and the protection of diversity, the first and second models suggest that it is possible to reconcile equal citizenship rights with Muslim personal law. The challenge we face as we negotiate a new constitution is to guarantee equality to husbands and wives, men and women, Muslim women and other women, without forcing Muslims to choose between their religion and the constitution. Clearly, comprehensive consultations with Muslim and womens' organisations are necessary. It is better to resolve such potential conflicts now, through an inclusive process of constitution-making, than later through potentially divisive constitutional litigation.

Footnotes:

1. A questionnaire was circulated, inviting Muslim organisations to submit representations.

2. Professor Habibul Haq Nadvi, head of the Department of Arabic at the University of Durban Westville and Advocate A D Mohamed of the Durban Bar submitted well researched representations in their personal capacities. They have been prominent advocates of the view that the South African government should be encouraged to extend recognition to Muslim personal laws. Nadvi believes that the difficulties experienced by Muslims in South Africa can only be overcome through official recognition of Muslim personal law. Advocate A D Mohamed advocates the establishment of family courts, the nomination of qadis (judges) by the judicial committee of the Islamic Council of South Africa and the confirmation of their appointments as judges and magistrates by the State President.

3. The ULEMA bodies are Councils of Theologians. They include the Muslim Judicial Council (MJC) of the Cape, the Jamiat-U-Lama (Tvl), the Jamiat-U-Lama (Natal) and the Mujlisul-U-Lama of South Africa.

4. The ULEMA bodies issued a joint pamphlet which read: "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 a legal system of the Republic of South Africa."

5. The attitude of the Muslim Youth Movement is reflected in the February 1988 issue of Al Qalam, the Movement's newspaper.

6. Keith Graham, (ed) Contemporary Political Philosophy, Cambridge University Press, London 1982, page 67.

7. Islamic Council of South Africa (ICSA), "Meet the Muslims", page 14.

8. An obligation performed five times every day.

9. Islamic Council of South Africa, (ICSA), op cit, page 14.

10. Ibid, page 15.

11. Ibid, page 32.

12. Ibid, page 13.

13. Sabita Jithoo "The Dynamics of Indian Family Firms in Durban", Aspects of Family Life in the South African Indian Community, proceedings of a conference arranged by the Department of Social Work at the University of Durban-Westville, 25-26 March 1985.

14. Ibid, page 26.

15. Ibid, page 31.

16. (1886) L.R. IP. AD. 130.

17. Seedats Executors v The Master (Natal) 1917 AD 302.

18. Section 3 of the Marriage Act 25 of 1961 provides for the appointment of priests of any Indian religion as marriage officers. It would appear that very few Gors (Hindu priests) and Maulvis (Muslim priests) have registered under the Act. This means that the great majority of marriages in the Indian community, contracted in accordance with Muslim or Hindu rights, are not legally binding unions. The "wives" of such unions are hardly better off than concubines. The reasons for this reluctance are not entirely clear. When the authorities introduced a similar provision in the Indian Relief Act 22 of 1914 Ghandi advised against the appointment of marriage officers on the ground that such appointments would "lead to dishonesty in the community and expose the priest to temptations". (Indian Opinion, 8 July 1914). In their representations to the SALC, dated 29 March 1988 the Islamic Council explained their attitudes to section 3 of the Marriage Act in the following terms: "... Muslims are reluctant to accept appointments as a result of statutory impediments such as the Immorality and Mixed Marriages Acts. This reluctance will continue to exist as long as the morality of Muslim Marriages are judged according to Christian values." It may also be that the Muslim clergy consciously chose not to register as marriage officers because Muslim marriages solemnised in that capacity would have the consequences of an ordinary civil marriage and be dissoluble only by an order of court.

19. Sec 11 of Black Administration Act 1927.

20. The courts have however found ways to mitigate the inequitable consequences of non-recognition. Thus in Isaacs v Isaacs 1948 (CPD), where the parties had pooled their resources and collaborated in a joint enterprise, the court found that a tacit, universal partnership existed

between them. In S v Vengetsamy 1972 (4) SA 351 (D) the court held that as the evidence had established that the marriage of the accused and his spouse in accordance with Hindu rights had all the attributes of a Christian marriage, the common law rule that the spouse of an accused is not a compellable witness for the prosecution should be observed and that the accused was entitled to object to the evidence.

21. Smith, M G, "The Sociological Framework of Law", in Kuper H and Kuper L, African Law : Adaptation and Development, University of California Press, 1965, page 34. There is also however a secular tradition in Islam which sees the state as a social organisation "with a material base rooted in economic and political structures", rather than as a divinely ordained institution. See Omar Asghar Khan, "Political and Economic Aspects of Islamitization" in Asghar Kahn (ed) Islam Politics and the State: The Pakistan Experience, Zed Books, 1985.

22. MAE Bulbulyia, "The Ethical Foundations and Distinctive Features of Islamic Law", Comparative and International Law Journal of Southern Africa, July 1985, page 219.

23. Ibid, page 216.

24. S H Haq Nadvi "Islamic Legal Philosophy and the Quranic Origins of the Sharia Law", Journal of Juridical Science, No 1, July 1989, page 89.

25. Ali Mazrui Cultural Forces in World Politics, Heinemann, 1990, page 7.

26. It follows that it would not be correct to view legal pluralism in this context simply as a reflection of uneven economic development. Islamic law does not represent a "traditional"

order in a process of modernisation; it is constitutive of the Muslim identity (See R S Suttner "Legal Pluralism in South Africa", International and Comparative Law Quarterly, January 1970 for a discussion of the impact of social and economic processes on African customary law.)

27. Dr Shahzanan Shakarchi "The Legal Status of Women in Islam", p 81 in Human Rights In Islam, Report of Seminar held by International Commission of Jurists, Kuwait, December 1980.

28. Fazlur Rahman, "The Status of Women in Islam: A Modernist Interpretation", page 286. See also Sura 81; verses 8 and 9; Sura 16, verses 57-59; and Sura 17, verse 31.

29. Riffat Hassan, "Women in the Context of Change and Confrontation within Muslim Communities", page 108.

30. MAE Bulbulyia, "Women's Rights and Marital Status: Are we Moving Closer to Islamic Law", De Rebus, September 1983, page 430.

31. Ibid, page 431.

32. Ibid, page 430.

33. The idea that Islam sanctifies the division of labour and responsibility within the family is based on a reading of Sura 4, verse 34. In this passage men are referred to as the "protectors and maintainers of women". See Raffat Hassan, Op Cit, for an interesting "textual" analysis aimed at reconciling this passage with gender equality.

34. Bulbulyia, Op Cit, page 430.

35. H Haq Nadvi "Towards the Recognition of Islamic Personal Law", The Internal Conflict of Laws in South Africa, A J G M Sanders (ed), Butterworths, Durban, 1990, page 16.

36. Bulbulyia, Op Cit, page 432.

37. Abdur Rahman I Doi Shariah : The Islamic Law, Ta Ha Publishers, London, 1984, page 192.

38. H Haq Nadvi, Op Cit, page 432.

39. Abdur Rahman I Doi, Op Cit, page 195.

40. Ibid, page 195.

41. H Haq Nadvi, Op Cit, page 433.

42. Memorandum of Islamic Council of South Africa, "On Islamic Marriages and Related Matters" submitted to South African Law Commission, 29 March 1988.

43. Memorandum submitted to South African Law Commission by Advocate A B Mohammed and I M Bawa on the subject of the status of illegitimate children in Islam.

44. Ibid, page 27. The tendency in modern South African law is to eliminate the legal disabilities attaching to the status of illegitimacy. Section 2 of the Intestate Succession Act, 81 of 1987 provides that illegitimacy does not affect the capacity of one blood relation to inherit the estate of another blood relation.

45. Ibid, page 17.

46. Ibid, page 18.

47. Ibid, page 26. Fatima Meer and Moulana Ebrahim Moosa, in their comments on a draft version of this paper, both made the point that it is not adoption per se, but the fictional attribution of the adoptive parents' genealogy to the child which is forbidden in Islam.

48. See, M S Omar, "Islamic Personal and S.A. Law", De Rebus, October, 1981.

49. For a discussion of this debatable point see David Pearl Textbook on Moslem Personal Law, London, Croomhelm, 1987, page 142-145.

50. A Muslim testator can bequeath up to one third of the net estate to persons or causes other than the Quranic heirs.

51. Succession rules based on tribal relationships are arguably not appropriate in a modern context, as they act as a disincentive for "nuclear families" to save and accumulate.

52. The Principle of representation has been incorporated into the law of many Muslim countries. In Pakistan, for instance, the Muslim Family Laws' Ordinance of 1961 introduced the principle of representation and thereby effectively reformed the classical sunni law of inheritance to enable grandchildren to inherit in the place of their deceased parents.

53. M S Omar, Op Cit, 1981, page 486.

54. Fazlur Rahman, Op Cit. He makes this "sociological" argument in relation to polygamy at page 301: "One must completely accept our general contention that the specific legal rules of the Quran are conditioned by the socio-historical background of their enactment and what is eternal therein is the social objectives or moral principles

explicitly stated or strongly implied in that legislation", and in relation to the unequal shares of female heirs, at page 297: "...inheritance shares like other economic values and obligations assigned to the sexes... are a function of their actual roles in traditional society... there is nothing inherently unchangeable about these roles - indeed when justice so demands, change is Islamically imperative". See also Sir Mohammed Iqbal The Reconstruction of Religious Thought in Islam Lahore, 1988, page 170.

55. Ali Mazrui, op cit, page 15.

56. See Abdur Rahman Doi op cit, page 149; Tahir Mahmood, "Islamic World: Developments in the 1985-86 Period", Columbia Journal of Family Law 1987-8 vol 36, page 137; Albert Benardi "Iran: Family Law After the Islamic Revolution" Columbia Journal of Family Law, 1986-7 Vol 25, page 151; Jane Connors, "Malaysia Responding to Religious and Cultural Pluralism", Columbia Journal of Family Law, Vol 27 1988-9, page 195.

57. The essentials of a valid Muslim marriage are:
1. Consent of Guardians, Shafii and Maliki jurists consider the approval of guardians as the essential element of a valid Muslim marriage.
2. Dower (maher): A woman is entitled to receive from her prospective husband, as an essential incident of her marriage, a sum of money known as maher. The maher belongs to the wife absolutely and is not in the nature of a consideration for the wife's consent to the marriage.
3. Consent: There must be a proposal and an acceptance (ijab and qubul).
4. Two Witnesses.

58. In 1983, the Appellate Division, in the case of Ismail v Ismail 1983 (1) SA 1006 (A), refused to enforce payment of the dowry, on the basis that it was intimately connected with a potentially polygamous union not recognised by South African law.

59. This proposal is aimed at overcoming the problems associated with the present system. See Footnote 18 (supra). It is not without its difficulties however. Those who wish their marriage relationship to be governed exclusively by Islamic Law may object that if the consequences of a civil union are applied automatically to their marriage relationship they will be deprived of the freedom to make a choice between an Islamic and a civil marriage.

60. See Footnote 17 (supra).

61. September 1983, page 432.

62. It will be important to explore whether "clean break" divorce settlements would be regarded as consistent with Islamic law. The sharia rule, which allows a divorced wife maintenance for three months only, does not adequately protect long serving, non-earning spouses who do not accumulate assets during the marriage but who nevertheless contribute services which have an economic value. Of course, the "clean break" option is only available where the husband is a man of means.

63. Subject, of course, to the courts overriding discretion in respect of these matters.

64. Rodger Cotterrell, "The Sociological Concept of Law" Journal of Law and Society, Vol 10, no 2 1983, page 247.

65. Albie Sachs, Protecting Human Rights in a New South Africa, Oxford University Press, Cape Town, 1990, page 172.

66. Tawa Ocran, "Law, African Economic Development and Social Engineering : A Theoretical Nexus" Zambia Law Journal, 1972, vol 16, page 24.

67. Andrew Charman, "A Response to Albie Sachs" Agenda

68. Ibid

69. Ocran, Op Cit, page 29.

70. Over the last five years, there have been significant moves towards the judicial and legal integration of African customary laws in South Africa.
1. The Special Courts for Blacks Abolition Act 34 of 1986 abolished separate courts for blacks.
2. Law of Evidence Amendment Act 45 of 1988 conferred jurisdiction on the magistrates courts to apply African customary law.
3. The Marriage and Matrimonial Property Amendment Act 3 of 1988 gives the status of a civil marriage to a customary union, and effectively extends the provisions of the Matrimonial Property Act 88 of 1984 to civil marriages contracted by Africans.

71. A N Allott "What is to be done with African Customary Law? The Experience of Problems in Reforms in Anglo-Africa from 1950" Journal of African Law, Vol 56,68 page 56 at page 65.

72. B A Rwezaura "The Integration of Personal Laws : Tanzania's Experience", Zimbabwean Law Review, Vol 1 & 2, 1983-4, page 85.

73. Islamic law recognises polygamy. But most Muslim countries have either abolished polygamy or subjected this institution to strict controls. (See for example, the Code of Personal Status of Iraq, 1959 Section 4, The Syrian Code of Personal Status Article 17, the Tunisian Code of Personal Status 1957, The Moroccan Code of Personal Status). The juristic basis for these reforms is found in a verse in the Quran which lays down that "ye will not be able to deal equally between (your) wives however much you wish to do so" (Quran, Sura 4, verse 129).

One way to control polygamy would be to subject Islamic marriages to a standard form contract prohibiting a second marriage during the subsistence of the first one and entrenching the wife's reciprocal right of divorce.

74. See footnotes 18, 57 and 59 (supra).

75. Nadvi's view is that the accrual system is inconsistent with Islamic principles.

76. The Board should be constituted by the Ulema Bodies and the Judicial Committee of the Islamic Council of South Africa. The Board should also be staffed by suitably trained personnel.

77. M A E Bulbulyia, "Application of the Concept of Wakf in South Africa" De Rebus April 1982, page 155.

78. H Haq Nadvi, op cit, page 19.

79. If sharia family laws are accorded recognition by the state law, the conflicts problem will not be too complex because the process of classification (of causes of action) will be simple and the conflicts limited and easily definable.

80. To use H L A Hart's terminology.

81. T W Bennett Application of Personal Laws in Southern Africa, Juta, Johannesburg 1985, page 1.

82. A J G M Sanders, "The Role of Comparative Law in the Internal Conflict of Laws", The Internal Conflicts of Laws in South Africa, Butterworths, Durban, 1990, page 58.

83. T W Bennett, op cit, page 13.

84. For example, women's rights and gender discrimination.

85. A J G M Sanders, op cit, page 58.

86. H Haq Nadvi, op cit, page 13.

87. The concept "Public Policy", which controls the exercise of a judicial discretion, has a notoriously indeterminate content. The South African courts arguably have not been sufficiently sensitive to the heterogeneity of the population in determining their public policy doctrine (see Kerr "Back to the Problems of 100 or more years ago: Public Policy concerning contracts relating to marriages that are potentially or actually polygamous" SALJ, 1984, p445).

88. The Customary Law and Primary Courts Act in Zimbabwe now provides that customary law will apply in specified circumstances "unless the justice of the case otherwise requires".

89. See Robert B Seidman "Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyers Reasoning and Customary Law" Zimbabwe Law Review Vol 1&2, 1983-4.

90. The Shah Bano case in India (1985 (3) S.C.R. 844(SC 1985)) demonstrates the problems that can arise when secular courts are required to interpret religious laws. In this case the Indian Supreme Court upheld the right of a sixty-eight year old women, who had been married for forty-three years to claim maintenance in terms of section 125 of the Code of Criminal Procedure which applies to all Indian citizens regardless of religious affiliation. This decision expanded a Muslim divorcee's maintenance rights, which under Islamic law, are limited to the period of her Iddah, which is three months.

The judge held, firstly, that under Islamic law, Muslim husbands are required to provide their divorced wives with maintenance beyond the Iddah period and secondly, that even if this interpretation of the Holy Quran was not correct, the respondent's claim for maintenance had to succeed because the provisions of the code prevailed in the event of a conflict with the personal law of any religious group.

This decision provoked large demonstrations in India. Eventually the government was forced to enact legislation to undo the effect of the court's decision.

91. As recommended by Nadvi and the Islamic Council of South Africa.

92. A J G M Sanders, op cit, page 59. He suggests that the overriding connecting factor should be membership of a legal cultural group. But he goes on to suggest that group membership should be based on voluntary association rather than ascription.

93. T W Bennett, op cit, page 105. Bennett's view is that effect must be given to the expectations of the parties. But in the absence of express agreement he suggests the use of a number of "objective" connecting factors.

94. Article 1 of the Universal Declaration of Human Rights 1948 reads "all human beings are born free in dignity and rights". See S Jaffer Hussein "Inequality and Sex Discrimination in Family Law in India", page 70, Zambia Law journal Vol 7 1979.

The Convention on the Elimination of all Forms of Discrimination against women is an International Bill of Rights for Women. Article 1 defines gender discrimination as follows": For the purposes of the present convention, the term discrimination against women shall deem any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." This definition is substantially the same as the definition of racial discrimination contained in article 1 of the International Covenant on the Elimination of all forms of Racial Discrimination.

Article 16(1) of the convention bestows equal rights and responsibilities on spouses during the marriage and on its dissolution. Article 5 imposes obligations on states to modify social and *cultural* patterns with a view to achieving the elimination of customary and other *practices based on the idea* of the inferiority or superiority of the sexes.

See also, the preamble and article 1(3) of the U N Charter;

article 16 of the Universal Declaration of Rights, and articles 3, 26 and 23(4) of the International Covenant of Civil and Political Rights.

95. The ANC's draft Bill of Rights reflects a strong commitment to gender equality. Gender neutral language is used throughout the document. Article 1(3) reads: "all men and women shall have equal protection under the law". Article 28 constitutionally entrenches the concept of marriage as a partnership of equals.

96. Lynne D Wardle "The Impact of the Proposed Equal Rights Amendment upon Family Law", Journal of Family Law, Vol 23, page 477.

97. Ibid, page 478.

98. P Q R Boberg, The Law of Persons and the Family Juta, 1977, Johannesburg, page 66.

99. This will depend on the standard of judicial scrutiny adopted by the courts. Distinctions between the sexes which are based on a "reasonable" classification have been upheld in India (See Jaffer Hussein, footnote 29 (supra), page 81.

100. Sex is not specifically mentioned in this section.

101. Maboreke, "Women Under Zimbabwean Law" Zimbabwe Law Review Vol 6 1988, page 69.

102. See Nadia Hijab Women Power: The Arab Debate on Women and Work, Cambridge University Press, New York, 1988, page 14. Muslim countries which have ratified the Convention on the Elimination of all Forms of

Discrimination against Women, like Bangladesh, Egypt, Iraq, Libya and Tunisia have reserved their obligations to implement the convention where they are in conflict with Islamic law (See Rebecca J Cook, "Taking Women's Rights Seriously", Law Monthly No 26 October 1990;page 27).

103. In November 1981, the Declaration of the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief was adopted by the United Nations.

104. Waite J in Reynolds v US 98 US 145 1879 distinguished belief from the practice of religion, and held that the latter was subject to state control.

105. See J van der Vyver "Seven Lectures on Human Rights" Juta 1976 Chapter 3.

106. Anika Rahman "Religious Rights v Women's Rights in India: Test case for interpreting human rights law" Columbia Journal of Transnational Law Vol 28 no 1 1990, at page 488.

107. A recent decision of the Mauritian Supreme Court took a contrary view. In the course of his judgment in Bhewa & Anor v Government of Mauritius 1991, Judge Lallah said the following:

> "The reasoning of the plaintiffs is, in our judgment, based on an insufficient understanding of the duality of religion and state in a secular system. The secular state is not anti-religious but recognises freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former that of law-making for the public good and the latter that of religious teaching,

observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion is the state religion but also the holy book of that religion is the supreme law.