TITLE OF DISSERTATION

AN ANALYSIS OF THE HUMAN RIGHTS AND GENDER CONSEQUENCES OF THE NEW SOUTH AFRICAN CONSTITUTION AND BILL OF RIGHTS WITH REGARD TO THE RECOGNITION AND IMPLEMENTATION OF MUSLIM PERSONAL LAW (MPL)

BY

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In November 1996.

DECLARATION

I, Najma Moosa, hereby declare that the work contained in this dissertation is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Signature

N. Moosa

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Date: 18 November 1996

"All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab, or of a white over a black person, or of a male over a female. Only God - fearing people merit a preference with God"

(*Hadith*/Prophetic dictum)

"O mankind! We created You from a single (pair) Of a male and a female, And made you into Nations and tribes, that Ye may know each other (Not that ye may despise (Each other). Verily The most honoured of you In the sight of God Is (he who is) the most Righteous of you. And God has full knowledge And is well acquainted (With all things)"

(*Qur'an*:Chapter 49:Verse 13)

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

(Dictum of Mahomed AJ (as he then was) in
S v Acheson 1991 (2) SA 805 (NmHC) at 813 A-B)

SUMMARY

After three centuries of non-recognition of Muslim Personal Law (MPL) in South Africa, the new constitutional dispensation provides an opportunity to change the *status quo*. Muslim women contend with general socio-political inequalities experienced by all women in addition to discrimination based on religion and culture. They are particularly disadvantaged by the non-recognition of MPL because they have no recourse to South African law and are subject to the jurisdiction of informal religious tribunals dominated by conservative religious authorities (*Ulama*). Both the interim (1993) and final (1996) Constitutions now make provision for religious freedom and the recognition of MPL although a *right* to have MPL recognized is not constitutionalized. Because both religious freedom and equality seem to enjoy equal status in the interim Constitution, it was uncertain whether equality trumps religious rights. This uncertainty has now been resolved by the final Constitution in favour of equality.

Ulama, presently regulating and administering MPL, contend that a recognized MPL must be *exempt* from the Bill of Rights because Islamic law (*Shari'a*), which provides for unequal treatment of the sexes, will otherwise be unconstitutional. They further propose the establishment of separate *Shari'a* (religious) courts to give effect to Islamic laws. This dissertation probes the constitutional and judicial implications that such steps would have on the rights of Muslim women as citizens and as members of a religious community with a view to making recommendations on how South Africa might benefit from the recognition of MPL.

The way certain countries have dealt with religious freedom and equality in their constitutions and in the courts has been unsatisfactory. It is argued in this dissertation that Muslim marriages as well as MPL should be recognized since a distinction

between the two is unwarranted. Recognition of MPL will not necessarily lead to discrimination against Muslim women because in terms of S 15 (3)(b) of the final Constitution MPL can only be recognized *subject* to the provisions of the Constitution and its Bill of Rights (especially its equality clause (S 9)). Furthermore, subjection of MPL to the final Constitution it not unIslamic. MPL must, however, be reformed to bring it in line with the spirit of equality foundational both to the Constitution and Islam and codified to facilitate its application and implementation. The creation of *Shari'a* courts is not Islamically justifiable and will have implications for the constitutionally guaranteed right of access to justice. Nonetheless, implementational problems can be addressed by an effective integration of adjudication between existing Muslim religious tribunals (functioning in conjunction with other adopting alternative methods of dispute-resolution) and secular courts.

Muslims, as a minority in a Christian-dominated and multi-cultural South Africa, should take the necessary precautions to ensure the birth of a transparent and equitable MPL unique to South Africa so that such recognition can be sustained.

In the final analysis, however, it is submitted that subjecting a code of MPL to the final Constitution is no guarantee that social change with equality will ensue. Constitutions, laws, human rights documents and courts should be viewed as vehicles through which social change can be achieved rather than merely instruments through which human rights are protected. A fundamental evolution of Muslim society, requiring the active participation of Muslim women, is needed to bring about long-term, effective and meaningful change to their lives.

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All praise is due to the Almighty for allowing this dissertation to see fruition.

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May the Almighty bless you all.

DEDICATION

This work is dedicated to my mother, Zuleikha, for her selfless and continuing support and whose life could aptly be described by the following quote:

> "I want simply to say that, as a person belonging to what the Qur'an describes as 'a nation in the middle,' [Q.2:143]...I feel that I stand midway between my religious world which is Judaeo-Christian-Islamic (West) and my cultural world which is Hindu-Islamic (East). I have spent more than half my life in the West, which has molded my mind but where my body and soul are still ill-at-ease. All to often I feel a deep longing to return to the soil of the ancient mystic land where I was born and to the people who speak my language and share my grassroots values. To be divided - as I am - is to be in a state of perpetual exile. To be in exile is not a happy state, but it enables one to experience more than one kind of reality"
>
> (Hassan:1986:140-141).

NOTE ON TRANSLITERATION

Due to the legal nature of this dissertation and for the sake of simplicity, I have not followed any of the various systems of transliteration but I have added certain selected transliterated words and authors names where it has occured as such in the various sources.

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CHAPTER ONE

INTRODUCTION

Prior to the new constitutional dispensation in South Africa all women had identities of race and gender imposed on them. With a new dispensation in place Muslim women, however, still have to deal with identities attributed to them by religion and culture. The author of this dissertation is herself a Muslim woman who has struggled to reconcile her public life and "new found" equality with these identities. She found it difficult to believe that Islam, the self same religion which had brought seventh-century Arabian society out of its degenerating stupor, could be used to justify behaviour by conservative religious authorities (*Ulama*) in South Africa which deny women equality.[1] Earlier research[2] partly allayed her suspicions and fears but did not lay them to rest completely. The fact that South Africa was to face a human rights revolution which would ultimately affect the lives of all her citizens for the better, sparked off a desire within the author to establish whether it is not possible to reconcile the undeniable and unalterable spirit of equality within Islam with the implementation of a reformed Muslim Personal Law (MPL)[3] so that women can enjoy the best of both worlds.

It was envisioned that "[t]he [interim] Constitution of the Republic of South Africa [1993][4]...will have a revolutionary effect...particularly so in the law relating to family

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[1]See Chapter Two, 2.1.1 for an explanation of Islam. See Chapter Two, paragraph 2, 2.1.3 and Chapter Three, 3.3.1 for reference to *Qur'anic* equality.

[2]Moosa, N. 1991. A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with especial attention to the implications for the Muslim woman, unpublished LL.M thesis. Bellville:University of the Western Cape.

[3]This is a religiously-based private law. See Chapter Two, footnote 1 for an explanation.

[4]Act 200 of 1993. See Chapter Nine, footnote 3.

and personal relationships...One thing is sure and that is that traditional, stereotyped, blinkered and prejudiced thinking, which is endemic in our society, will be something of the past" (Costa:1994:914). This statement could also apply to the final South African Constitution (1996)[5] in relation to a recognized MPL. However, statements such as this must also be read with great caution because promises apparently contained in constitutions with their bills of human rights and in other human rights instruments are realized by people and tradition rather than by rules and regulations.[6] It will be shown that the interim and final South African Constitutions are no exceptions[7] and interpretations of Islam (or Islamic law) by men have been given precedence over the divine Islamic injunctions themselves.[8]

South Africa's final Constitution (1996) grew from the interim Constitution (1993) and the Bills of Rights in the two documents show remarkable similarities. The final Constitution as a democratic expression of the will of the nation also complies with the 34 Constitutional Principles laid down in its equally democratic predecessor (the interim Constitution).[9] The previous minority government[10] had given attention to matters pertaining to MPL, but the interim Constitution makes specific provision (in S 14 (3)) that legislation can be adopted to recognize MPL. This provision is repeated in the final Constitution (S 15 (3)). A *right* to have MPL recognized is, however, not constitutionalized in either of the two Constitutions.[11] Muslims will nevertheless be

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[5]The final Constitution, although already in place, is awaiting promulgation. See Chapter Nine, footnote 4.

[6]See Chapter Six, 6.3.2, Chapter Seven, 7.5 and Chapter Nine, 9.6.1.

[7]See Chapter Nine in general.

[8]See Chapter Two, paragraph 2, 2.1.1 and Chapter Three, 3.1.

[9]See Chapter Nine, 9-9.1.

[10]See reference to South African Law Commission (Project 59) in Chapter Two, 2.2.3.

[11]See Chapter Two, 2.2.3 and Chapter Nine, 9.4.1.

able to give practical legal effect to their religion should MPL thus be recognized.[12] It is not clear from the interim Constitution whether the right to equality trumps provisions dealing with religious freedom and S 14 (3) in particular.[13]

Conservative religious authorities presently regulating and administering MPL are in agreement that MPL, once recognized, will have to be *exempt* from the Bill of Rights because Islamic law, which provides for the unequal treatment of the sexes, will otherwise be unconstitutional.[14] Religious freedom must thus trump equality in order to keep Islamic law intact. They further propose the establishment of separate *Shari'a* or religious courts to give effect to Islamic laws.[15] The final Constitution has cleared up the uncertainty to some extent by explicitly subjecting any law (including MPL) recognized by virtue of S 15 (3) to the Bill of Rights[16] and by making the horizontal operation of the Bill of Rights more likely (in S 8 (2)). It will be argued in this dissertation that it should not be possible for a government to place reservations and restrictions on a constitution in relation to an issue such as MPL. Some Muslim and non-Muslim countries have placed such reservations and restrictions on their constitutions.

This dissertation probes the constitutional (including human rights) and judicial implications that a step such as exemption[17] could have on the rights of Muslim women as citizens and as members of a religious community. It furthermore asserts that a basis and validation for conflicting views on particular human rights issues can be

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[12]See Chapter Two, 2.3.

[13]See Chapter Nine, 9.6.1.

[14]See Chapter Nine, 9.6.2.

[15]See Chapter Nine, 9.8.5.

[16]See Chapter Nine, 9.6.2.

[17]See Chapter Nine.

found in the same *corpus* of Islamic (common) law which is ambiguous in many respects. It can, for example, be argued that women can/cannot be judges,[18] that abortion is/is not permitted[19] or that Muslim countries can/cannot ratify human rights instruments.[20] The same pattern is evident with matters relating to the existence-expansion/non-existence-constriction of women's rights.[21] To deal with these conflicts guidance must ultimately be sought in the spirit of equality implicit in (canonical) Islam. It is submitted that "...as women become effective participants in Muslim society, *Islam* will be better able to cope with the realities of the twent[y]-first century" (emphasis added) (Rahman:1990:498).

The dissertation is divided into ten chapters. Chapters Two to Five lay an extensive historical foundation for the treatment of religious freedom and equality in Islam and its views on constitutionalism, judicial systems and human rights. This is done for two reasons. Firstly, it has to be determined whether there really is an Islamic justification for exempting MPL from human rights instruments and bills of rights in the constitutions of the Muslim and non-Muslim countries (reviewed in Chapter Six) and for the recommendation by Muslim religious authorities (looked at in Chapter Nine) that this should also be the case in South Africa. Secondly, it will be considered whether MPL in fact has to be implemented in separate religious courts (as is the case in some of the countries reviewed in Chapter Six and as is also requested by religious authorities in South Africa referred to in Chapter Nine). It is considered useful for the South African situation to look at the United States of America as a comparative example from the West (in Chapter Seven).

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[18]See Chapter Four.

[19]See Chapter Three.

[20]See Chapter Five.

[21]See, for example, Chapters Two, Three and Six.

Alternative methods of dispute resolution and their implications for the implementation of a recognized MPL in South Africa are examined in Chapter Eight (with a view to making further recommendations in Chapter Nine).

Chapter Two systematically lays a dual historical foundation for arguments in the rest of the dissertation and ultimately for recommendations regarding MPL in South Africa. A historical sketch of Islam and the status of Muslim women is given in order to determine why, in the name of one Islam, there are so many different responses to the question of Muslim women's rights and whether there is any historical justification for the argument by religious authorities in South Africa and elsewhere in the world that Islamic law (and Islam itself) condones and indeed provides for the unequal treatment of the sexes. This examination is followed by a history of Islam and Muslims in South Africa to assess the position of MPL and Muslim women as it stood prior to a new democratic dispensation. This examination will make it easier to assess (in Chapter Nine) the direction which MPL ought to take under a new dispensation.

Chapter Three examines theological arguments used by religious Muslims to justify gender discrimination. Their feasibility and legitimacy *vis-à-vis* the injunctions of a primary and *de facto* source of Islam, namely the *Qur'an*, are assessed. In this sense it serves as a continuation and confirmation of conclusions drawn in Chapter Two. This examination is done by briefly looking at schools of Islamic law, arguments by various Muslim groups and the gender debate within Islam. Consideration is also given to possible conclusions as they affect Muslim women in South Africa (in the light of the discussion, in Chapter Nine, of gender discrimination).

Chapter Four has a dual purpose. Firstly, it seeks to determine whether it is historically feasible to refer to the notions of a supreme constitution and of constitutionality in both Islamic doctrine and Muslim countries. Secondly, a typical Islamic judicial system is examined so as to distinguish it from its secular counterparts and, more importantly, to determine whether there is an Islamic justification for such a

differentiation. The justifiability, from an Islamic point of view, for the simultaneous existence of religious courts (dealing with purely MPL matters) and secular courts (dealing with other criminal and commercial matters) is furthermore considered - also in order to assess the judicial systems of the various Muslim and non-Muslim countries discussed in Chapter Six and to contextualize the recommendations for the implementation of MPL in South Africa in Chapter Nine.

Chapter Five determines whether a human rights culture does indeed exist in Islam and, if so, its compatibility with a modern human rights culture. In order to do this, the historical position of human rights in Islam and Islamic law are examined. UN instruments are also considered in order to determine whether they have achieved their objectives of protecting human rights from being violated. The complexity of the human right to freedom of religion (in its various manifestation) is highlighted. Factors influencing the application of human rights to the detriment of women and minorities (groups) in particular are also looked at. Possible conflicts between human rights and religion and ways of resolving such conflicts are then considered. This is followed by an examination of the compatibility of Western, Islamic and Islamic law conceptions of human rights in spite of conflicts that might exist between them. If they are compatible to some extent, it must be ascertained whether it is possible to formulate an equitable Islamic law of human rights.

Chapter Five also lays a historical foundation for Chapter Six (and ultimately Chapter Nine) where it will be shown how human rights provisions in constitutions of Muslim countries and the protection afforded by UN instruments become meaningless when restrictions and reservations are placed on them because of possible conflict with Islamic law. International instruments themselves, however, also have their share of inconsistencies in spite of 40 years of UN human rights experience. South Africa will have to deal with similar problems and therefore much can be learnt from the experience of these countries.

Chapter Six has a dual purpose too. Having examined Islamic conceptions of equality, constitutions, courts and human rights in Chapters Two to Five, Chapter Six will illustrate the inability of certain Muslim and non-Muslim countries, because of a refusal to be guided by the spirit of equality in Islam, to resolve the conflicts faced by Muslim citizens in the public and private spheres of their lives. Such countries often acknowledge and deny equality between the sexes in one and the same document (constitution) by placing reservations and limitations on this human right in so far as it conflicts with religious rights. The same pattern of conflict is evident in the human rights instruments which these countries have either become signatories to or ratified with reservations in so far as the provisions of equality in these instruments might conflict with MPL. Chapter Six will also discuss examples of how women's rights are marginalized in some countries regardless of constitutional provisions that profer to protect these rights. Some countries are dealt with in more detail than others because they provide valuable lessons for reform and codification of a recognized MPL in South Africa.

Chapter Six furthermore reviews the operation of *Shari'a* courts in some of these countries (as they do not exist in all of them) to assess whether such courts can comply with modern-day constitutional and human rights challenges and therefore also whether they have a future in South Africa where access to justice is now a constitutionally guaranteed right.[22]

In Chapter Seven US democratic constitutionalism (and especially the treatment of religious freedom and equality) is examined comparatively to determine what South Africa can learn. Here the complexity of the right to religious freedom as outlined in Chapter Five is practically demonstrated. The US Bill of Rights also served as a constitutional model for some Muslim countries reviewed in Chapter Six and therefore it needs to be determined if the Muslim experience in the US is any different from the

[22]See Chapter Nine, 9.8.1, 9.8.2 and 9.8.5.

experience in countries reviewed in Chapter Six or from that in South Africa. Muslims in both the US and South Africa are in a minority and in both countries Muslims lead essentially secular lives in the public sphere. There are of course clear differences between the two systems; for example, the US Constitution, unlike its South African counterpart, clearly separates the state from religion. Whether or not Muslims in South Africa would have been better off with such a separation is also considered, especially since in both the US and South Africa Christianity is the dominant religion.

Having examined the Islamic judicial system in Chapter Four and its implementation in some Muslim and non-Muslim countries in Chapter Six, Chapter Eight examines alternative methods of dispute resolution in support of an implementation of MPL in South Africa with a view to making certain recommendations in Chapter Nine. This is done by assessing legal anthropological insights into other ways in which disputes can be resolved, the role of secular courts in resolving disputes of a religious nature, alternative methods or mechanisms to these courts and the role of religious tribunals as mechanisms for conflict resolution. Ways in which (and the viability of) linking these alternative methods of dispute resolution and religious tribunals to tie in with the role of secular courts in these types of disputes are then assessed with a view to substantiating the recommendations for the implementation of MPL to be made in Chapter Nine.

Chapter Nine opens with a brief historical overview of South African constitutional development. The state and its treatment of religion and gender and the law in South Africa are then looked at. The focus is then directed at the constitutional and judicial implications of a recognized MPL in South Africa since the coming into being of the interim Constitution in 1993. The chapter also criticizes constitutional deficiencies and progress made in the areas of religious freedom and gender equality in comparison with similar developments in the US. Notwithstanding the fact that all women face status problems, Muslim women also have to contend with an additional inequality attributed on religious grounds. This has resulted in a dichotomy between their public lives

governed by secular laws and constitutions, and their private lives governed by religion. To date this conflict remains unresolved in various Muslim and non-Muslim countries.

Having considered the position of MPL prior to the interim Constitution in Chapter Two already, Chapter Nine focuses on developments leading to the constitutional provision for its recognition and subsequently. The recognition of MPL is regarded as problematic because freedom of religion and equality carry equal weight in the interim Constitution. Taking into consideration the fact that these rights also carry equal weight in the constitutions of many countries and even international human rights instruments, certain recommendations are made. Failure to resolve this matter can mean that MPL will not be officially recognized in South Africa. The reason is that a recognized MPL must now be consistent with the final Bill of Rights and Constitution. For this reason it is important to ascertain whether our Bill of Rights operates sufficiently horizontally to include a religiously based private law like MPL within its ambit and in this way provide indirect protection for Muslims, especially women, whose lives are governed by an unofficially practised MPL. After assessing the legal status of South African Muslim women in terms of a new dispensation in comparison with their counterparts in other countries, further recommendations are made. Envisaging the *de facto* recognition of MPL, implications of implementation are assessed with a view to making recommendations for such an implementation in South Africa on the basis of the discussions in Chapters Four, Six and Eight.

Chapter Ten concludes the dissertation by noting that while one cannot challenge the fact of recognition being sought for MPL, a recognized MPL which does not comply with the Bill of Rights and other provisions of the final Constitution can be so challenged. While MPL needs to be recognized *subject* to the Bill of Rights, it is contended that recognition and subjection will be meaningless if regard is not had to social, cultural and related realities (like progress and reform) which together constitute an "Islam" unique to South Africa. For this reason provisions relating to the

recognition of MPL, as generous as they may be, appear to be of a more theoretical than practical value. The vision of how Muslim society at large, guided by religious authorities, will deal with MPL and the interpretation and application of the Constitution and Bill of Rights is of paramount importance. Going about this process the other way around, with religious authorities mandating themselves to speak for Muslim communities without their co-operation or even without consulting with them, has had disastrous consequences so far and could even result in MPL eventually not being recognized.[23] This is not only unacceptable but also undemocratic from both an Islamic and a constitutional point of view.

[23]See Chapter Nine, 9.4.2.

CHAPTER TWO

HISTORICAL ARGUMENTS: THE TWO HISTORIES

2 INTRODUCTION

The first aim of this chapter is to cast historical light on the religious foundation from which the current, generally "second-class" status of Muslim women originates. The second aim is to determine whether there is a religious justification for this dimished status of women. The third aim is to examine historically diverse responses of Islam and Muslims to the question of women's rights and to determine the direction issues regarding the status of Muslim women have taken. Finally, this chapter examines the history of Islam in South Africa to determine the status of Muslim Personal Law[1] and the position of Muslim women prior to the introduction of the interim and final Constitutions.

This Chapter thus refers to two histories. Islam and Islamic law as background to the legal status of Muslim women are first considered. This is followed by a description of the position of pre-Islamic Arabian women, the contribution of Islam to the rights of women and the implications for Muslim women of changes that occurred in subsequent periods of decline and reform. The second history referred to relates the status of women under Islamic law to the current position of Muslim women in South Africa. A brief historical background and an outline of the current position of Muslims and MPL in South Africa are given. This survey deals with the situation

[1]The term "Muslim Personal Law" has been coined by various Muslim countries and jurists because it pertains to, among other things, marriage, divorce, inheritance, polygyny, custody and guardianship which fall under the category of family law. Moreover, it is interesting to note that *all* laws affecting the status of Muslim women have historically been relegated to Muslim Personal Law (private sphere of family). Henceforth the abbreviation MPL will be used.

before the interim and final Constitutions were negotiated and introduced.[2]

An examination of the history of Islamic law illustrates that there is a difference between Islam and Islamic law. As will be explained,[3] classical Islamic law (in accordance with the different schools of jurisprudence) is, in reality, common law and not canonical since it was only codified several centuries after Islam came into existence in the seventh century (Shaheed:1986:39). Islamic law was developed about 100 to 200 years after the death of Prophet Muhammad (P.B.U.H)[4] around 632 C.E.[5] What is therefore known as the *Shari'a* or the Islamic legal system *per se* was constructed by jurist-theologians about 1 100 years ago (An-Na'im:1990a:57-58; Badr:1978:189; Liebesny:1972:41; David and Brierley:1985:455; Hammerton:1990: 6A.240.12). It is common for Islamic law, which is the interpretation and application of the primary sources of Islam by early Muslims, to be mistaken for Islam itself (An-Na'im:1988:2-3). MPL derives from the *Qur'an*,[6] hence its divine origin. Early Muslim jurists' classical interpretations of the primary sources of Islam, namely the *Qur'an* and Traditions of Muhammad, by early Muslim jurists were codified about two centuries *after* the birth of Islam. During this time *Qur'anic* norms underwent considerable dilution, often to the detriment of women (Coulson & Hinchcliffe: 1978:38). Today conservative religious authorities give these interpretations

[2]See footnote 52 where this is explained.

[3]See 2.1.1 and 3.1.

[4]Salutation meaning Peace Be Upon Him. This salutation will, for the sake of convenience, be implied but not repeated everytime his name is used in the text.

[5]See footnote 9.

[6]The *Qur'an* is a religious text considered by Muslims to be the literal word of God. It is a primary source of Islam and contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. It is in the areas explicitly referred to by these verses that one finds little or no variation in different Muslim countries. See 2.1.1 below.

precedence over the primary sources themselves. In general religious authorities, for example, frown upon the resanctioning of independent reasoning (*ijtihad*) as a source of Islamic law and prefer to uphold the centuries-old conservative juristic interpretations.[7] As will be detailed in 3.3.1 below, some *Qur'anic* references can be interpreted to allude to an inequality of sexes. In this Chapter, however, it is argued that although the effects of conservative interpretations of for example, verses dealing with socio-economic matters, provide for unequal treatment between the sexes, verses relating to ethico-religious concerns highlight that a more dominant spirit of equality pervades Islam (Esposito:1982:107).

In order to highlight the fact that the negative status of Muslim women today is predominantly due to the effects of MPL and the significant impact of conservative interpretations of MPL, it is argued that religious authorities have exercised a "pontifical monopoly" over Islamic law using MPL to make women believe that their status is religiously ordained. As will be demonstrated in Chapter Six, these inequalities have resulted in an unresolved dichotomy between their roles as citizens of a nation and as members of a religious community. This dichotomy will be highlighted in this Chapter by showing how and why Islam (divine) and Islamic law interpretations of legal scholars (man-made) differ from each other.

A detailed historical background will serve to expose the religious monopoly of religious authorities. The first period referred to above in the history of Islam indicates that in pre-Islamic Arabia a limited rights culture did exist for women. In comparison with this, Islam in the second period brought about revolutionary changes to the rights of women. In the third period a decline in these rights was experienced while in the fourth period an attempt was made to revive these rights in line with those given to women by Islam. This was not very successful because interpretations by legal scholars of the primary sources containing these rights were given precedence

[7]See 2.1.1 below.

over the primary sources themselves. For this reason international efforts to reform MPL prove that legal reforms, though partly effective, are not necessarily the total answer to the plight of women.

In South Africa conservative religious authorities presently regulate and administer MPL. They uphold the *status quo* seeing that they view Islamic law as underlying the unequal treatment of women. However, in the light of new constitutional developments it remains to be seen whether South African Muslims can adapt to the demands of a new dispensation. In Chapter Nine it will be shown that the new interim and final Constitutions lend themselves to be interpreted in ways which could respectively uphold or change this *status quo* and hence be to the detriment or benefit of Muslim women.

2.1 HISTORY OF ISLAMIC LAW AND WOMEN IN ISLAM FROM PRE-ISLAMIC ARABIA TO THE PRESENT

2.1.1 A THUMBNAIL SKETCH OF ISLAM AND ISLAMIC LAW AS BACKGROUND TO THE LEGAL STATUS OF MUSLIM WOMEN

The legal and even social status of Muslim women in South Africa must be explained with some reference to Islam and its later codification, Islamic law. A thumbnail sketch of Islam with reference to its four main sources is thus necessary as background.

Islam is regarded as the last of the revealed religions and the fulfilment of monotheism following Judaism and Christianity and starting from Adam going through Abraham and Jesus and ending with Muhammad who had to spread the message of belief in one God to a polytheistic community. Islam evolved in the seventh century of the Christian era (C.E) in the Arabian peninsula and in lower Mesopotamia in an urban or settled and not a rural or nomadic environment

(Stowasser:1987:290). Muhammad's period of prophethood started at the age of 40 and lasted for 23 years till his death at the age of 63. During this period of 23 years the two primary sources of Islam, namely the *Qur'an* and *Sunna*, developed. The *Qur'an*, the first source of Islam and the literal word of God, was revealed to him piecemeal partly in Mecca and partly in Medina. The reason for this split in revelation was that the fledgling religion met with severe opposition from the polytheistic Meccan traders, who felt threatened that the new message would affect their trade in Mecca which was the place of pilgrimage of idolaters (their clientele). Muhammad then had no option but to emigrate to Medina after he had established a small base there. This is known as the "emigration" (*hijrah*) and marks the beginning of the Islamic Era (A.H or *Anno Hegirae*)[8] - 622 in the Western calendar (The New Encyclopaedia Britannica:1986:Vol 22:3).

After Muhammad's death in 632 C.E.[9] the *Qur'an* was collected in book form round about 650 C.E. It contained injunctions ranging from what to eat to how to enter into contracts. The *Qur'an* itself contains about 6 000 verses. It is not considered a law book since there are only approximately 80 verses dealing with legal matters (Nolte:1958:300; Hammerton:1990:6A.240.13; Rahman:1979:37). These verses deal mostly with personal laws of family and inheritance. "This [paucity] of scriptural guidance has left *Shari'a* free to develop along many lines, resulting in today's diverse schools of thought" (Dudley:1982:59).[10] It is in the realm explicitly referred to by these verses that one finds little or no variation in different Muslim countries.

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[8]The beginning of the Islamic Era (and calendar) is referred to as *Anno Hegirae* (A.H.) named after the Prophet Muhammad's migration (*hijrah*) to Medina. This occurred in terms of the Western calendar in 622 C.E. See also footnote 44 below. Historically, the Prophet Muhammad himself established the first Muslim state in Medina in 620 C.E (Kettani:1986:256;259). See also 4.1.

[9]There is uncertainty as to the exact year of his death but it is estimated to be around 632 C.E.

[10]See footnotes 13 and 51 below.

These countries were quite prepared to follow secular codes in, for instance, commercial and criminal law but not in the area of MPL, which remained static because of explicit references in the *Qur'an*. In other words,[11] MPL remains static because it is based on references which can directly and visibly be traced to the *Qur'an*, a primary source of Islam and the literal word of God. This has been summed up as follows: "Experience shows that Muslim leaders make exceptions to their religious and cultural practices when political expediency and economic development require it...[y]et with women's rights, they insist traditions are unshakable" (Afkhami:1994:2). Interestingly, the *Qur'an* has more verses dealing with issues affecting women than with legal matters *per se*. Of the approximately 100 verses dealing with women's issues, only a few are consistently utilized to explain the "truly Islamic" status of women. The varying paradigms resulting from this are therefore not suprising at all (Stowasser:1987:262). The *Qur'an* dedicates the fourth chapter or *sura* to women, namely *Sura Nisaa* (lit.Women). This is a significant feature when viewed in terms of the misogynistic and patriarchal seventh century society. The *Qur'an* as the first source of Islamic law thus contains moral, religious and legal directives.

The other primary source of Islam is called the *Sunna* of Prophet Muhammad. This is received custom associated with him, embodied after his death in a body of texts compiled as books called *Hadith*. Technically *Hadith* is an item of information related to him and containing either something he did or said and it is sometimes translated "tradition" as transmitted from reporter to reporter (Jaffer:1989:79). As will be indicated below, *Sunni* scholars recognize six collections of these traditions as being authoritative (Nolte:1958:301). For 23 years Muhammad literally lived out the *Qur'an*; the *Sunna* can therefore aptly be considered his biography. It is also regarded as being a body of precedent or normative custom (Rateb:1988:3; Taperell:1985:1179). The *Sunna* was not only explanatory of the *Qur'anic* text but

[11]See footnote 6.

was also complementary to it as is evident from the *Qur'anic* verse which says of Muhammad that: "Nor does he say (aught) Of (his own) Desire. It is no less than Inspiration sent down to him" (Q.53:34).

After the death of the Prophet legal decisions were given by early *caliphs*[12] who now led the people, and later during the *Umayyad* period (661-750 C.E) judges (*qadis*) took over this role, since the judiciary became differentiated as one of the functions of government. In the eighth century, due to dissatisfaction with the *Umayyad's* rule and its courts, four[13] schools (*madhhabs* or versions) of law were established and named after their founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* (Esposito: 1982:2). These together comprise the *Sunni*[14] school as opposed to the *Shi'ites* (also called *Shia*). The *Sunnis* (traditionalists) represent the orthodox Muslim population which did not align itself with any particular school. By contrast the *Shi'ites* or the followers of Ali (the Prophet Muhammad's cousin and son-in-law and fourth *caliph*) became a school of Islam calling for restricting the leadership in the Islamic world to the household of Ali (Jaffer:1989:87-8). The many different schools of thought (jurisprudence) are indicative of the fact that Islam is not monolithic. As will be explained in Chapter Three, beside the *Sunni/Shi'i* split, there are also different doctrinal tendencies, namely traditionalist, fundamentalist and later modernist

[12]The Caliphate followed the precedents set by Prophet Muhammad for a period of 30 years of Islamic history (Taji:1973:25). It is interesting to note that "...[t]he individual had no rights against the state but merely the right to expect that the leader of the community, the *imam* or caliph, would act in conformity with the law" (Lambton:1988:3). There was then no "vertical application" of these rights, a theme which will be addressed when dealing with constitutional rights in 9.6.3.

[13]"In the course of time these four schools of law established themselves in specific parts of the Islamic world: the Maliki in North, West and Central Africa, the Hanafi in the Near and Middle East and the Indus Valley, the Shafi'i in East Africa, Malaysia and Indonesia, and the Hanbali in Saudi Arabia" (Zweigert:1992:333).

[14]We find minor variations regarding certain issues in the four law schools.

(Taperell:1985:1179; Lambton:1988:5). As indicated below,[15] the Muslims of South Africa, although adhering to the *Sunni* school, are not homogenous and are more or less equally divided between the *Hanafi* and *Shafi'i* schools (Naudé:1985:25).

Apart from these two basic (primary) sources of Islam, (the *Qur'an* and *Sunna* of the Prophet Muhammad, the latter being aptly described as a magnifying glass which explains and elaborates upon the *Qur'anic* principles) there are also two other major sources of Islam (Bulbulia:1982:411). They are *Ijma* (the consensus of opinion of either legal scholars or the community *based* on the *Qur'an* and *Sunna*) and *Qiyas* (analogical deductions *based* on the *Qur'an*, *Sunna* and *Ijma*). These are regarded as the major sources in addition to which there are also other sources, for example customs (Nadví:1989:35-42). Reasoned interpretation of these sources (*ijtihad*) was allowed for four centuries after Prophet Muhammad's death around 632 C.E after which the "door of *ijtihad*" was formally closed in the tenth century. This ended the classical period of Islam (Arzt:1990:204; Amin:1985a:20; Liebesny:1972:42). This closure allowed for the codification of Islamic law (Breiner:1992a:3 fn 3). This is still the position today although there is a call for these doors to be reopened. Interestingly also, "[t]he contemporary judge does not seek reasons for his decision in the Koran or in collections of tradition, but in the books [on *fiqh* (jurisprudence)] containing the solutions ratified by *ijma'*. Any Kadi (*i.e.* Islamic judge) who would have the temerity to interpret passages of the Koran or evaluate the authority of the hadiths on his own initiative would be acting disrespectfully towards orthodox belief..." (David and Brierley:1985:460). It, however, appears that modern legal scholars are moving away from the classical position. This is, for example, evident from Pakistani case law.[16]

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[15]See 2.2.2.

[16]See 6.3.3. See also 3.1, 4.3, 6.2.1 and 9.8.5 for more detail concerning *ijtihad* and the judiciary. There is a Prophetic tradition to the effect that when the Prophet sent a companion to Yemen he asked him how he would decide cases brought before him and the companion

According to Faruqi (1972:76-77) a discussion of Muslim women's rights involves a knowledgeable examination of the historically diverse responses of Islam and Muslims to the question of women's rights. Here one is faced with four different periods, each evoking a different response. It is on the basis of this that 2.1.2 - 2.1.5 below will be set out. These periods are firstly the period of pre-Islamic Arabia (limited rights for women), secondly the classical period or early centuries of Islam (improvement in rights of women), thirdly the period of decline in the status of women (around 1250-1900) during which a negative image of the status of women was developed, and fourthly the period of reform to the status of women which extends from the late nineteenth century to the present. These periods will be evaluated by examining categories which include customs and rules pertaining to marriage, divorce, civil-political, social and religio-cultic matters.

2.1.2 "RIGHTS" OF WOMEN IN PRE-ISLAMIC ARABIA

What follows is a brief background of the type of society that existed in the first of the four periods referred to above, namely the period of pre-Islamic Arabia. *Jahiliyyah* is another name given to pre-Islamic Arabia by the *Qur'an* and Muslims and alludes to ignorance as well as savagery and wildness (Faruqi:1972:94 fn 3). The nomads of the desert constituted the majority of the Arab population in Arabia with the clan forming the basis of this Bedouin society. The clan was made up of groups of patriarchal families consisting of a father, his male children and their families, who

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replied to the effect that he will first judge according to the *Qur'an*, failing which he will refer to the *Sunna* of the Prophet. If, however, both these sources do not provide a satisfactory answer he will resort to his own judgement (*ijtihad*) and not slacken his effort. Needless to say, the Prophet was more than satisfied with his answer (Mahmood:1985: 83; Guraya:1984:172; Al Aseer:1976:12;88; Hamidullah:1971:13; Amedroz:1910:764-765). As mentioned above, the doors of *ijtihad* has been closed since the tenth century and therefore judges cannot make effective use of this tool or source of law to interpret the main sources of Islam, namely the *Qur'an* and *Sunna* of the Prophet. This is a very serious limitation impeding the judge's administration of justice. For the position in India see 6.3.2. See also 9.8.5 at footnote 235.

lived together in a few tents. Many clans constituted a tribe. Groups of such families migrated together in search of grazing land for their livestock and although they owned pasturage in common, they possessed no fixed property and were led by an elder (*sheikh*) (Jaffer:1989:11-12;15). The tribe was bound by a body of unwritten rules or customary law with which even the *sheikh* could not interfere (Coulson:1964: 9-10). These patriotic and chauvinistic nomads later became semi-nomadic after the introduction of seasonal agriculture (Hitti:1970:27; Jaffer:1989:15). Their contact with settled people increased with the trade in caravans. Mecca was a main trading and commercial city of Arabia and had no agriculture while Medina was the chief town of agriculture. Women, for example, Khadija (the first wife of Prophet Muhammad and by whom he was employed before their marriage), were also involved in trade (Watt:1979:38; Amin:1985:308). Arabia towards the end of the sixth century was on the threshold of change. With the development of commerce in Mecca the kinship structure changed and individualism[17] instead of tribalism grew as a priority (Watt:1974:46-9).

Much has been written supporting the view that the practice of Muslims today, as opposed to the spirit[18] of Islam, discriminates against women. Reasons advanced for this discrimination include, among others, the re-emergence of pre-Islamic patriarchy after the death of the Prophet Muhammad, and the cultural and customary influences during the centuries of Islamic development (Watt:1981:272; Hibri:1982:207-212). Thus the blame is partly attributed to patriarchal (male interpretations of Islam in a male-dominated society), cultural and customary influences along with the influence of centuries of Islamic development and the refusal of some Muslim countries to reform. The inability to distinguish between Islamic and traditional cultures also

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[17]See 5.1, footnote 4 and 5.2, footnote 20 where, in discussing Islamic human rights, it is suggested that individualism is alien to Islam.

[18]Or Islam as contained in its fundamental sources, namely the *Qur'an* and *Sunna*. See footnote 35. See also 2.1.3 and 3.3.1.

explains why "[f]rom time to time one is struck by oddities in Islamic Law and in customs which seem to contradict the discriminatory pattern" (Rhoodie:1989:349). Haeri (1980:230) further identifies women's illiteracy and ignorance of the laws and hence their inability to use them as contributing to the fact that the position of Muslim women today is less favourable compared to the status which early Islam in its true or original form (and the *Qur'an*) had conferred on them (Honarvar:1988:365; Shaheed: 1986:38; Gordon:1968:31; Engineer:1992:preface v-vi).

Bearing in mind that pre-Islamic society was polytheistic, it is not suprising that both the *Qur'an* (53:19) and the Prophet Muhammad in his propagation of the teachings of Islam mention the existence of influential female goddesses. This hints at some or other form of strong women's rights in ancient cultures. Some tribes were matrilineal[19] and matrilocal.[20] There appears to be much evidence that the basis of the social system in pre-Islamic Arabia was matrilineal (Watt:1981:272). The fact that women enjoyed a "right" to self-determination and, for example, joined combat, recited poetry, conducted business[21] and served as advisers to their tribes on important matters can be construed as indicative of some limited status and proof of the fact that women had basic human rights in pre-Islamic Arabia. This contradicts the belief that they had no rights whatsoever.

Hibri (1982:210) is of the opinion that women began to lose this limited status as Arabian society became more patriarchal following exposure to the patriarchal cultures of their trading partners. There were exceptions (to patriarchy), for example as far as marriage is concerned, the practice of polyandry and of women being able to choose and divorce husbands as suited them, the latter providing some proof that

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[19]Kinship and descent between males traced through female line.

[20]System of marriage where husband goes to live with wife's group.

[21]See above footnote 24 in the text for the example of Khadija, first wife of the Prophet.

women had basic human rights in pre-Islamic Arabia.[22] Unlimited polygyny[23] and concubinage were standard practices. An Arab was allowed to marry his step-mother and cousin and could also simultaneously be married to his wife's sister. Divorce laws were lenient. All women had to do was change the position of their tents so that the entrance faced in the opposite direction to indicate to their husbands that the marriage was over (Engineer:1992:122). The Arabs also practised female infanticide for two reasons: poverty of the deprived classes and fear of shame on the part of the rich should their daughters be captured by the enemy and taken into marriage (Levy: 1957:91-2). This practice decreased when Arab fathers saw the economic advantage of selling their daughters for large sums of money and forcing them into prostitution (Hibri:1982:208-210;212; Moosa, N:1991:9).

As far as succession is concerned there was complete freedom of testation (Ajijola:1983:269). However, only males, because of their participation in tribal warfare, were allowed to inherit. Women were excluded and regarded as part of the property of the deceased - objects which could be bought and sold - and therefore could themselves be inherited (Ali:1983:679). There were, however, also exceptions to this general rule, for example, cases where property was bequeathed to close relatives such as parents and daughters (Coulson:1964:9;16). A woman could not inherit from her own family because this would mean transferring family wealth to another clan (Esposito:1982:14). Any property that she possessed was subject to her husband's control (Hibri:1982:209-10). As explained,[24] Khadija, the wealthy wife of the Prophet Muhammad, is considered to be an exception in this regard. She

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[22]For more information concerning the types of marriages that existed see Faruqi: 1972:78-9.

[23]By way of elucidation, polygyny refers to the plurality of wives while polyandry refers to the plurality of husbands. Although polygamy is a generic expression covering both institutions, only polygyny is permissible by Muslim law and hence the use of this term.

[24]See 2.1.2 and footnote 21.

conducted business in her own right and Muhammad was in her employ.

2.1.3 ISLAM'S CONTRIBUTION TO THE RIGHTS OF WOMEN

The second period of development mentioned above[25] is commonly referred to as the classical period or the early centuries of Islam. Islam in the seventh century C.E. provided the Arabian community with numerous improvements with regard to the rights of women. Islam moved away from the tribe and towards the extended family thereby also increasing the rights of women, for example, as far as inheritance was concerned. Women were no longer regarded as objects but as subjects (Faruqi:1972:82).

As far as marriage is concerned Islam limited the practice of polygyny to four wives but with a strong directive towards monogamy (Q.4:3;129). The Prophet Muhammad himself serves as an example in this regard. He married his first wife at the age of 23, she being 40 years of age at the time of their marriage. He remained faithful to her for 28 years until her death at which stage he was over 50 years of age (Haykal: 1976:289). This was contrary to the standard pre-Islamic practice of polygyny. It should be borne in mind that the Prophet only received the revelation at the age of 40. There is speculation, but no proof, that possibly a marriage contract existed between him and his wife specifying that she would be his only wife during her lifetime (Ahmed:1992:49). He also exhorted his son-in-law, Ali, not to take a second wife while his daughter Fatima was still alive (Engineer:1992:159). He only took several other wives after he formed the Medinan state in an effort to consolidate ties within the newly established Islamic community for socio-political reasons. For example, he married the daughters of his two ministers, Abu Bakr and Umar respectively (both later became *caliphs*), and in turn also gave in marriage his two daughters to the *caliphs* Uthman and Ali, to forge a blood relationship with them and

[25]See 2.1.1.

in this way cementing family ties with these influential men (Haykal:1976:290-1). The majority of his other wives hereafter were widows whose spouses were slain in battles in support of Islam. Because they were mainly Meccan immigrants, they could not return to the traditional support of their clans which they left in the first place to accompany and support Muhammad when he fled to Medina[26] (Ahmed:1992:52). The *Qur'anic* verses limiting polygyny and exhorting monogamy were only revealed after Muhammad had married all his wives (Haykal:1976:293).

Islam stopped the practice of a son marrying his stepmother or of marrying two sisters simultaneously (Q.4:23). An end was also made to concubinate relationships and temporary marriages. The wife's consent to a marriage was now essential for its validity. Dower, likened to an antenuptial settlement and an economic tool (and as distinguished from dowry in footnote 32) was introduced and made the sole property of the wife.

Islam prohibited the practice of forced prostitution (Q.24:33). It made female infanticide a crime against God and did away with one of its causes, namely poverty, by making compulsory almsgiving one of the five pillars of Islam (Q.16:58-9; Q.17: 31; Levy:1957:92).

The Prophet Muhammad delegated to his wife, Aisha, authority on religious affairs. She was often called upon by the Companions of Muhammad after his demise to give legal opinions on his tradition which was mentioned earlier as a major source of Islamic law (Rateb:1988:22; Ahmed:1992:60;73). This is a good reflection of the intellectual nature of their relationship. Aisha was also opposed to Ali (cousin and son-in-law of Muhammad) becoming a *caliph* - a controversy which would eventually result in the split between *Sunni* and *Shi'ite* Muslims. She participated in the ensuing Battle of the Camel. This battle was so named because she rode a camel in the battle.

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[26]See 2.1.1 above.

In this way, although it was not directly named after her, her participation was emphasized (Ahmed:1992:61). Women participated in discourses with the Prophet (through representation or delegation) and were politically active in the process of electing a new leader. He also advocated that women be treated with honour and kindness.

As far as divorce is concerned Islam introduced a waiting period, called *iddat*, the purpose of which is to effect reconciliation between the spouses and which starts after divorce has first been pronounced. This means that the divorce only becomes effective once the wife has completed three successive menstrual cycles or, if she was pregnant, with the termination of the pregnancy (Q.65:1;2;4), with maintenance being limited to these periods.[27] The divorce can thus be revoked at any time prior to completion of the waiting period and no remarriage is necessary. However, once this waiting period has been completed and the third divorce has been pronunced, the divorce becomes final and irrevocable. Divorce is not taken lightly and is discouraged through strong deterrents. The husband not only has to settle in full any unpaid portion of the wife's dower but should he after the completion of the waiting period wish to be reconciled with his former wife, she must first marry someone else, consummate this marriage and be granted a divorce from this other person. Thereafter she still has to undergo another waiting period if, and only if, she is released from this second marriage (Q.2:229-230). Divorce must be pronounced while the wife is not menstruating. She must therefore be free from any impurities. Two arbiters - one from each spouse's side - must be appointed in a bid to reconcile them. Two witnesses to the divorce are also required (Q.4:35;Q.65:2).[28]

The husband is said to have the unilateral right to initiate a divorce unless he (1) had

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[27]Incidentally Islam reduced the one-year pre-Islamic waiting period of a widow to four months and ten days and her maintenance is thus limited to this period.

[28]For a summary of all *Qur'anic* verses on divorce see Engineer:1992:132-4.

delegated this right to the wife either as a condition of the marriage contract or at a later stage or (2) where agreement is reached between them that she can ask for a *khula* divorce as long as she, for example, returns part or all of her dower (Faruqi: 1972:83; Honarvar:1988:372-3). The last-mentioned two types of divorce form part of the five general categories of divorce spoken of by Islamic jurists. The other three involve the number of times (which ranges from once to thrice) the husband has to pronounce the formula of divorce for it to be effective.[29] Suffice it to say that this is a controversial area especially as regards one of the three categories of divorce referred to above known as the "three-in-one" divorce whereby the husband pronounces the "requisite" three divorces in one sitting making the divorce unilateral, immediate and irrevocable. Bearing in mind the purpose of *iddat*, there appears to be no *Qur'anic* justification for this type of divorce since equal participation seems to be implicit in the *Qur'anic* injunctions in this regard. However, there appears to be a socio-historical reason for this. It was validated by Umar, the second *caliph* of Islam, to serve as a punitive measure imposed on Muslim men who took divorce lightly. It became an integral part of Islamic law and is still in practise today (Rahman:1980: 459-460; Engineer:1992:125-6). Today this type of divorce is still regarded as a most controversial issue among the conservative and modernist Muslims and in most Muslim countries divorce disputes are settled in court.[30]

The *Qur'an* is not clear as to which parent gets custody of the children in the event of a divorce. However, it accepts the father's perpetual right of guardianship and this has led jurists to assume that, after a limited period of time (custody) with their mothers, children of divorced or widowed women pass into the care of the father or nearest male agnate relative in the event of the father's death (Engineer:1992:149). The age up to which the mother has custody of her children differs from school to

[29]For finer details of the four *Sunni* schools of jurisprudence in this regard see Coulson & Hinchcliffe:1978:41-3; Kidwai:1978:116,126-7; and Rahman:1982:305-7.

[30]See Chapters Four and Six and 8.3 - 8.4.

school. According to the *Sunni* schools of law a mother's limited right to custody is lost if she is unable, for whatever reason, to take care of her children or if she marries a man who is not related to the child within the prohibited degrees. According to the *Shi'ite* schools of law the mother loses the right to custody if she remarries while her child's father is alive regardless of whether the man she marries is a close relative of the child. If, however, the child's father is deceased she retains this limited right.[31] These rules have been relaxed in most Muslim countries, with the welfare of the child being the decisive factor (Coulson & Hinchcliffe:1978:44-5; Nasir:1990:127-8).

Islamic reform of the rights of women relating to succession can be briefly outlined as follows: Islam stopped the practice of inheriting women as part of property and gave them a fixed share in what can be likened to "intestate" succession. In Islamic law the heirs of the deceased are determined at the time of his death. The woman thus became a co-sharer with the male (Q.4:7) although her share is always half that of the male. This inequality can be overcome by the effective use of alternative tools like dower, dowry and gift.[32] Voluntary freedom of testation by will is limited in that the deceased may only dispose of one third of his net assets normally in favour of a non-heir. The rest (two thirds) is automatically devolved in accordance with the fixed shares prescribed in terms of the compulsory *Qur'anic* rules of "intestate" succession.[33]

[31]See 2.1.1 for more detail on these schools of thought.

[32]Dower is an important ingredient of a Muslim marriage. It is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. It becomes the exclusive property of the bride. Dowry consists mainly of property items such as clothing, money and jewellery. It is a well-established custom and an obligation of the bride's family in some (not all) Muslim societies. It does not have its origin in Islamic law and is therefore not obligatory. In terms of Islamic law gift is a disposition of property during one's lifetime. There is no limitation on the amount of property transferred by gift (Moosa, N:1991:9,29-30,153-155,159).

[33]For more information see Moosa, N:1991:38-52,152-168.

According to Islamic law women, married or single, are allowed to own property or to dispose of it as they wish, to retain their separate estates, to remain owners of their dowries and inheritances, gifts, fruits of their own labour and investments ('Abd al 'Aṭí:1977:165). A woman is also under no obligation to contribute to the maintenance of her family (Q.4:34).

For Islam to have survived the hostile milieu in which it was born, it had to be flexible and adaptable. The *Qur'an*[34] advocates that change had to be gradual especially with regard to "replacing" the pre-Islamic paternal and tribal bond with a religious bond of brotherhood and equality. As indicated above, one must bear in mind that the *Qur'an* is separated from the classical formulation of Islamic law[35] (in accordance with the different schools of jurisprudence) by a process of legal development lasting more than two centuries. During this period the *Qur'anic* norms underwent considerable dilution, often to the detriment of women (Coulson & Hinchcliffe:1978:38). The laws of the *Qur'an* were conditioned by the socio-historical context in which they were enacted (Rahman:1982:301). This corresponds to what was said above, namely that it is important to distinguish, as the modernist Muslim scholars do, the normative verses of the *Qur'an* (which has a continual relevance and was meant for all times to come) from its contextual verses. The latter were revealed as solutions to the problems of individuals or the fledgling community as they arose during Muhammad's reign of 23 years in the seventh century. Thus it is postulated that the moral or ethical norms set out in the *Qur'an* concerning the

[34]Chapter 3 verse 159: "It is part of the Mercy Of God that thou [Prophet Muhammad] dost deal Gently with them. Wert thou severe Or harsh-hearted, They would have broken away From about thee: so pass over (Their faults), and ask For (God's) forgiveness For them; and consult Them in affairs (of moment). Then, when thou hast Taken a decision, Put thy trust in God. For God loves those Who put their trust (in Him)" (Ali:1946:164-165).

[35]See paragraph 2 above. Islamic law or *Shari'a* is the interpretation and application of the fundamental sources by early Muslims. This is stressed because of the common mistaken identification of *Shari'a* with Islam itself (An-Na'im:1988:2-3). See also footnote 18.

status of women are of equal, if not greater, importance than its specific legal rules (Coulson & Hinchcliffe:1978:37). "The moral and religious equality of the sexes before God represents the highest expression of the value of equality" (Esposito: 1982 :108). The "ethico-religious equality of women" remains uninfluenced by a change of social situation as would be the case with socio-economic matters (*ibid*). While it is contended that it was only after the death of the Prophet Muhammad that patriarchy became entrenched in Muslims' understanding of Islam,[36] it is not entirely correct to say that complete "patriarchy" was practised after his death or even today for that matter (Hibri:1982:207).

2.1.4 PERIOD OF DECLINE IN THE STATUS OF MUSLIM WOMEN AND ITS IMPLICATIONS FOR THEM

This period (1250-1900) follows the Mongol invasions and lasts until the late nineteenth century. It is during this third period of gradual political, economic and social decline that a negative image of the status of Muslim women was developed. Women gradually relinquished marriage rights granted by the *Qur'an, Sunna* and Islamic law. Instead of being a contract between the two parties involved, marriage agreements became the prerogative of parents and guardians. In spite of their legal right to accept or reject a partner, young women felt duty-bound to go along with the wishes of their family. Children were married at a tender age, although the marriage was only consummated upon their reaching puberty. Although Islamic law makes provision for nullifying such a child marriage before consummation if the parties so desire, this right was rarely utilized for fear of reprisal by relatives. Women seldom included protective stipulations against polygyny and divorce in their marriage contracts. Polygynous and concubinary practices were the order of the day.

It also became customary for men to initiate divorce. It is during this period, for

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[36]See Moosa, N:1991:14-15; 2.1.2 and 2.1.4 below.

example, that the triple divorce became the customary prerogative for men alone. *Qur'anic* injunctions in this regard were ignored. Women became physically, economically and socially more dependent on their husbands and male relatives. In comparison with the position during the early centuries of Islam, their levels of education dropped. Claiming legal rights in connection with inheritance and property, for example, became the exception rather than the norm. Ignorance about Islam and Islamic history resulted in social practices relating to concubinage, polygyny and veiling becoming associated with Islam and Islamic culture. The birth of a son was considered a blessing while the birth of a daughter was considered a misfortune. "And no wonder! For the lot of the girl was in most cases that of a second class citizen..." (Faruqi:1972:89). The mother's stronger custody rights over children provided for by Islam usually reverted to the father.

Although the spirit of equality of the sexes is implicit in Islam, developments in later centuries reversed their status in religious and other matters. For example, it became common for women to pray at home and not as part of a congregation in a mosque.

The reasons for the decline in the status of women are attributed to, among other things, the external influences enumerated below. These are, firstly, the cultural conservatism caused by historical events such as the Turkish and Mongol invasions; secondly, feudalism; thirdly, the resultant change occurring when a tribal society moves to a foreign or urban environment and finally the reassertion of old customs and traditional cultures into the Islamic culture as Islam spread to other lands. These customs and cultures eventually became norms and therefore unchanging (Faruqi: 1972:87-91; Esposito:1975:99;106). It must also be remembered that the current low status of women is often confused with the Islamic religion or culture rather than with extra-Islamic custom/Middle Eastern traditions between which there is a distinction, the latter actually being responsible for this state of affairs (Saleh:1972:35,41).[37]

[37]See 2.1.2.

European colonialism in the late nineteenth century also added to already existing inequalities in Arab society (Fleuhr-Lobban:1980:249; Ahmed:1992:127-8).

These and other factors gave rise to an urgent need for reform to the status of women by the late nineteenth century.

2.1.5 PERIOD OF REFORM AND ITS IMPLICATIONS FOR THE CURRENT STATUS OF MUSLIM WOMEN

This period extends from the late nineteenth century till the present. Fourteen hundred years of Islamic history have since passed and during this period a shift from the extended to the nuclear family occurred. Reform was in part attributable to external factors like the European and American liberalizing influences of the Enlightenment period and the Industrial Revolution requiring women in the work force. While not always achieving actual results, it revolutionized thinking about women's rights (Faruqi:1972:76-77;91). Reform was also partly attributable to internal factors as "[i]t was also due to an awakening from within the Muslim World [as] [r]eformers in various countries began advocating a new look at women's rights" (Faruqi:1972:91; see also Gordon:1968:21). While most of these reformers (notably Egyptian) viewed their reform from within an Islamic context by calling for a reinterpretation of the original sources of Islamic law, some (notably Turkish) sought their basis from non-Islamic sources. Women's organizations were formed and with the aid of individual leaders helped to bring about many changes throughout the Muslim world (Faruqi:1972:91).

Changes include reform to marriage by controlling polygyny as had been the intention of Islam in the seventh century. On the basis of *Qur'anic* injunctions, in some countries it is the exception and subject to judicial regulation while in others it has been prohibited completely. Muslim countries have abandoned child marriages and make consent to marriage a *sine qua non*. A wife is able to obtain a divorce on

reasonable grounds. Divorce without mediation and the *Qur'anic* waiting period is discouraged. Courts do play a role in divorce matters. In most Muslim countries women are now able to vote, own and manage property before and after marriage. Women have contributed substantially to the improvement of their social and political status in their own countries and have, for example, been major role players in revolutions for freedom. In the early twentieth century women reformers joined men in the quest for social upliftment. Women made their voices heard through magazines and writing and their standard of education improved. Women are now found practising all sorts of professions. With some exceptions, seclusion and veiling are no longer strictly practised in urban societies. They were in any case not an integral part of rural peasant life. With a few exceptions, Muslim women still encounter difficulties in practicing religion as part of a community and accessing religious education (Faruqi:1972:92-93).

Viewed in terms of seventh-century Arabia, Islam's changes to women's rights should be considered revolutionary when compared with their "rights" in Arabia before Islam (Faruqi:1972:94). These changes do not, however, appear to be that dramatic when viewed in twentieth-century terms if Muslim women's status is compared to that of their Western counterparts. It was for this reason that several countries influenced by, among other things, colonialism, reformed MPL *via* "paper legislation" or codes of law. It is interesting to note that all the laws affecting the status of Muslim women have conveniently been relegated to what has been termed MPL by various Islamic countries and jurists.[38]

It is evident from the multiple areas that MPL covers[39] and from the fact that these laws fall under the category of family law or civil law, that MPL forms part of the

[38]See footnote 1.

[39]See footnote 1.

private (domestic/family/home) sphere. In contrast, the Western secular laws adopted by these countries form part of the public sphere of politics and culture. The public sphere refers to educational, political and economic opportunities and activities.[40] As will be detailed in Chapter Six, even in this public sphere women's rights of "near equality" are hardly given effect to because they conflict with provisions of MPL in the private sphere. The relegation of MPL, which has its origin in the *Qur'an*, to the private sphere furthermore leads to the wrong inference that discrimination against Muslim women is based on religious considerations.[41]

It is also in this area of MPL that various Muslim countries have adopted one of three stances in their quest for reform. Their measures are either restrictive (for example, Egypt and Pakistan), less restrictive (for example, Iran and Iraq) or non-restrictive or revolutionary (for example, Turkey's secular-based reform and Tunisia's Islamic-based reform) (Keddie & Beck:1978:15; Coulson & Hinchcliffe:1978:48; Sivaramayya:1972:75; Charrad:1990:21; Austrin:1987:46). There are some Muslim countries like Saudi Arabia which have made no effort to reform or codify personal laws (White:1978:54).

As indicated above, there are various indicators by which the relative improvement in the status of women in Muslim countries can be measured. These range from one extreme to the other. They include, among others, "the establishment of a minimum legal age for marriage, the establishment of a registration requirement for marriage, the provision to enable women to request dissolution of marriage, reform in inheritance laws, regulation of polygamy, abolition of men's right of unilateral divorce, abolition of polygamy, establishment of secular inheritance law to replace

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[40]"[T]he public [sphere] is male, political, rational, valuable, remunerated and superior; the private [sphere] is female, personal, instinctual, free, taken for granted or demeaned and inferior" (Copelon:1995:194).

[41]See 2.1.2, 2.1.3 and 2.1.4 above. For more detail see Chapter Six.

religious inheritance law, and secularization of all personal law through establishment of a civil code that is not based on religion (Turkey-Swiss Civil Code 1926)" (White: 1978:53-4).

However, a study of the practical implications of most of these indicators reveals that they merely bring superficial relief to women and some are contrary to clear *Qur'anic* injunctions. So, for example, Pakistan has regulated polygyny by requiring that the husband acquire the permission of his first wife before he can marry a second one. If, however, he is in breach of this regulation, which is often the case, it does not invalidate his second marriage and he merely has to pay a small fine and/or serve a short period of imprisonment - hardly a deterrent (Shaheed:1986:42). India, on the other hand, *via* legislation, has tried to overcome the problem of limited maintenance faced by Muslim women upon divorce by literally "dumping" this responsibility onto their parents, other relatives and charities instead of their husbands because of the chaos which followed a judgement (Shah Bano) which, in its attempt to redress this problem, had violated the Islamic law of maintenance in favour of Muslim women (Chhachhi:1991:145-6,170 fn 5; Rhoodie:1989:440; Coomaraswamy:1992:106).[42]

Personal law reforms in most Muslim countries, especially those pertaining to women's rights, have been minimal and slow, as a close study of the above indicators will reveal. Adams Shilling (1980:128) aptly notes that the pace of change "makes a snail appear to be a streaker". These reforms have remained relatively conservative when compared with the liberal adoption of secular commercial and criminal codes. Even where reform has been non-restrictive or revolutionary, as for example in Turkey, where Islamic law has been replaced by secular law, they have remained merely superficial. Here they hardly have any real practical effect since only a small percentage of urban middle-class women reap any benefit, thus leaving intact the

[42]See 2.1.3 above. See the Shah Bano case referred to in 6.3.2 at footnote 87 where this violation is explained.

status quo of rural women who constitute roughly 70% of Muslim women. The latter remain blissfully ignorant and sometimes deliberately oblivious to these reforms (Afetinan:1962:51-3; Mansur Cosar:1978:124-140; Kandiyoti:1991a:11). It appears then that reforming the law is not necessarily the total answer to the plight of women.

Rahman (1982:308) puts it thus: "...modernizing legislation without an adequate basis in social change, can succeed only to a limited extent in producing that social change." Haeri (1980:230) comes to a similar conclusion concerning pre-revolution Iran.

2.2 HISTORY OF ISLAM IN SOUTH AFRICA AND THE POSITION OF MUSLIM WOMEN

2.2.1 A BRIEF HISTORICAL BACKGROUND OF MUSLIMS IN SOUTH AFRICA

This is a well researched area on which much has been published by both Muslim and non-Muslim scholars and historians. Authors of these historical sources mostly reiterate one anothers' facts and it is only in the degree of accuracy that some minor discrepancy is found regarding variations in facts, dates and figures.

2.2.1.1 CAPE[43]

Contrary to the commonly held belief, Islamic culture in the Cape does not have a Malaysian origin and the classification of early Muslims as "Cape Malays" is misleading. Islam was brought to the Cape by the Muslims of Indonesia (coming especially from the areas of Celebes and Java and later Macassar) and the East Coast of India (coming especially from the areas of Bengal, Coromandel and the Malabar Coast) (Nadví:1989:328; Weekes:Vol 2:1984:719; Davids:1980:31). Hence the term

[43]The provinces referred to in 2.2.1.1-2.2.1.3 below have now been renamed (see footnote 59).

Cape Muslims is preferable (Davids:1984:214 fn 1).

For the sake of clarity it is important, firstly, to devote attention briefly to the origin of Islam in Indonesia and India so as to put Islam in South Africa in perspective. Islam spread to Indonesia *via*, among others, Arab traders and Sufi mystics around the year 1300 of the Christian Era (C.E)[44] (Dangor:1982:1; Swart:1984:78). Davids (1980:40) says it only arrived there from the mid-1500s onwards. It was during the 1600s and 1700s that the struggle for hegemony among the Indonesian states and against the Dutch took place and Dutch colonial rule was imposed throughout the Indonesian Archipelago in the 1800s. In the twentieth century Islamic revivalism, nationalist anti-colonial movements and revolution resulting in independence in 1949 followed (Swart:1984:78).

Muslims ruled in the Indian subcontinent from approximately 711 C.E to 1858, when the British conquered India. The history of Islam in India thus lasted for about eleven centuries and ended when the Mughal Empire (founded in 1526 and which with time brought almost the whole Indian subcontinent under Muslim influence) disintegrated in the nineteenth century. India as a country thus had a long tradition of Islam well before the Dutch intervention, which took place around 1609 (Davids:1980:31; Wolpert:1989:105,122,145,239; Nadví:1989:358).

Thus slaves, convicts and political exiles (not permanent immigrants)[45] were the first Muslims to arrive at the Cape from the Dutch colonies in the East Indies (now Indonesia) and the coastal regions of Southern India from around 1652-1658[46] when the Dutch East India Company decided to use the Cape as a refreshment station and

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[44]See footnote 8.

[45]Bradlow and Cairns:1978:6.

[46]There is some discrepancy as to the exact date (Lubbe:1989:38-9; Davids:1980:xv).

penal settlement with Jan van Riebeeck, who arrived in 1652, as its representative (Davids:1980:xv; Haron:1986:1). According to Davids (1980:31), half of the aforementioned slaves, interestingly enough, came from India, thereby forming the embryo of the Cape Muslim community. Jan van Riebeeck had a few Eastern servants in his entourage but there is no evidence that they were Muslims (Shell:1974:9). It is also uncertain whether the stowaway slave, Abraham, who arrived at the Cape from Batavia in 1653, was Muslim (Naudé:1985:21). Taking the above into consideration it is generally accepted that, because their arrival was the first to be recorded and registered, the Mardyckers (free people) were the first known Muslims to arrive at the Cape from the Molucca Islands in Indonesia in 1658 (Davids:1980:xv,35). Dangor (1982) and I.D du Plessis (1972) in their respective works, are both of the opinion that, contrary to what Davids (1980:31-2) asserts, the Indonesians had played a more leading role in the establishment and development of Islam in the Cape than they had been credited with. The arrival of Jan van Riebeeck in 1652 marked the beginning of Dutch colonization of South Africa, followed by the English in 1806 (Dangor:1984:81; Haron:1986:1).

The abovementioned convicts and political exiles were stigmatised as outcasts in the eyes of their colonial captors. However, in the eyes of their fellow countrymen (notwithstanding the internal leadership power struggles among themselves and their allegiance either being with or against the Dutch) they were princes and heroes from resistance movements. Reading accounts of some of the trivial crimes they were said to have committed, the degree of their punishment was by comparison extremely harsh. Ironically enough, they provided the religious leadership Islam needed in South Africa and were directly or indirectly the pioneers in spreading Islam in the Cape (Greyling:1980:11; Dangor:1982:22 and 1984).[47] The Dutch were not ignorant of the religious threat that these people posed to the spread of Christianity even before their arrival. This is evident from the Placaat of 1642 which was reissued in 1657 in

[47]See also Shell:1974:Chapter 2.

anticipation of the Mardyckers coming to the Cape the following year (1658). It prohibited the practice of Islam in public or the conversion of heathens or Christians to Islam. Violation of these prohibitions was punishable by death. The Placaat did, however, allow Mardyckers to join Christian churches (Davids:1980:35; Haron: 1986:10-11). It was more than a century and a half later, in 1804, that Muslims overcame this hurdle when religious freedom was allowed pending the final British occupation of the Cape in 1806 (Davids:1980:xxi,46). They did, however, still require permission to erect mosques, for instance.

This then explains how the Muslim community was established and consolidated in the Western Cape after having faced adverse legal, social, political and religious environments from the beginning of Dutch colonization to the beginning of British colonization.

A brief note on Muslims in the Eastern Cape, who are linked to Cape Muslims, will conclude this summary. Muslims emerged in Port Elizabeth as free "Cape Malays" as a result of the 1806 Battle of Blaauwberg, from which they absconded rather than be conscripted into the army, and eventually landed in Uitenhage. Those who loyally took part in the wars did so to ensure religious benefits, for example to obtain plots to build mosques. This can be compared to the situation in India where Muslims displayed loyalty to the British government as a religious duty to ensure their own survival (Cilliers:1983:4). Then there was the "Malay Corps" which came to Port Elizabeth from Cape Town to fight in the Battle of the Axe. Some of them went back to the Cape when the Malay Corps was dispersed in 1846 and those who did not leave settled in the Eastern Cape (Davids:1980:141; Abrahams:1988:5-).

2.2.1.2 NATAL

Muslims came to the province of Natal as late as 1860 along with Hindus imported from India as indentured labourers for the sugar plantations. The skill and enterprise of Indian Muslims opened up other avenues of employment and business for them.

They did not face the situations experienced by the Muslims in the Cape (Nadví: 1989:328-9). Naudé writes as follows about these later arrivals: "However, since 1869 a new stream of Indians from North India who paid for their own passage entered South Africa, not as contract labourers but as traders or to serve in commerce" (Naudé:1985:23).

2.2.1.3 TRANSVAAL

Islam was introduced to this province by railway employees. Small traders and skilled artisans also entered the interior from the coast and came to the Transvaal and Rhodesia (today Zimbabwe). The infiltration of Arabic and Swahili-speaking Muslims from Zanzibar and Mauritius is quite evident. The railway and mining industry attracted some Muslims to the Transvaal (Nadví:1989:329).

2.2.2 MUSLIMS AND ISLAM IN SOUTH AFRICA TODAY

In South Africa most, if not all, racially discriminatory legislation was removed as recently as 1991 - a year of marked historical change. The purpose of one such statute, namely the Population Registration Act Repeal Act,[48] was to abolish the distinction made between persons belonging to different races or population groups. This unfortunately does not detract from the fact that racially stratified statistics have to be consulted in order to estimate the Muslim population on the basis of religion. The results of the 1991 population census were published in December 1992 (Cooper:1993:42). Because answering the section on religion was made optional, the following figures must be regarded as estimates. Data from the Central Statistical Services (CSS) (1993:9) reveal that Muslims constitute an estimated 1.1% of the total

[48]114 of 1991.

population (excluding the inhabitants of the former TBVC[49] states) compared to the approximately 66.5% Christians. This indicates a marked decrease when compared to the 1980 census figure which stood at 1.34% (Naudé:1985:25). However, Mahida (1989:107) puts the figure at 2% (474 000) but it is not certain whether his figure is based on the 1985 census or not. The 1991 figures also indicate that there are no White Muslims and also that the Asian Muslims by far exceed their Coloured counterparts. According to a CSS spokesperson the figures at 7 March 1991 of Asian and Coloured Muslims were 166 585 and 157 815 respectively. However, one has to bear in mind that 29.6% of the total population either left the section on religion unanswered or stated an objection in this regard. According to a 1992 Statistics Bulletin prepared by the Institute for Research and Economic Development (IRED) for the Central Islamic Development Foundation Trust Inc (CIDFT), Muslims constituted approximately 2% of the total population (609 894) in February 1992 and it was estimated that by the year 2010 there will be 1.5 million Muslims in South Africa, of whom approximately 1.2 million will be resident in the Cape. Presently the Cape houses almost 70% of the Muslim population (Salie:1992:3). The IRED in its list of sources refers to the South African Central Statistical Services 1990. This indicates that the figures of the 1985 census were used because the results of the 1991 census were made available only in December 1992. This is probably the reason for the wide discrepancy in these figures. Cachalia (1991a:7), on the other hand, puts the number of Muslims at 500 000 on the basis of a publication of the Islamic Council of South Africa. Nkrumah (1991:94) also puts the figure at approximately 500 000.

Because issues concerning women form a focal point of this dissertation it is also appropriate to note that the 1991 census figures for population by age and sex indicate that women constitute approximately half of the South African population (CSS:1993:5). Women also represent half of the world population and there are

[49]This refers to the former "independent" homelands of Transkei, Bophuthatswana, Venda and Ciskei.

about 300 million women in the Muslim world (composed of nine regions of the world where more than 95% of Muslims reside) whose status is determined by Islamic law (Rhoodie:1989:ix, 346-7). It is estimated that there are 850[50] million to one billion Muslims in the world, constituting 18.7% of the world population (Haddad:1991:8 fn 6; Brady *et al.*:1993b:33). South African Muslims in general belong to the *Sunni* school or versions of law and are more or less equally divided between the *Hanafi* and *Shafi'i* schools[51] (Naudé:1985:25).

2.2.3 POSITION OF MPL IN SOUTH AFRICA PRIOR TO THE INTERIM AND FINAL CONSTITUTIONS[52]

As early as 1907 already a call was made for the recognition of MPL. "All the Indians in Natal and Transvaal...regardless of [South African law], are continuing the precepts, habits and customs of Mohammedan law. The Malays, on the other hand, also would appear, according to the 'Statutes of India',[53] which were incorporated into the statute law of the Cape Colony by local plakaat, to have had the Mohammedan law of marriage, of succession and of divorce, inter alia, administered to them by the Dutch courts,...[in terms of] section (34)..." (De Villiers Roos:1907:177). De Villiers Roos concludes after an examination of court decisions concerning Muslims

[50]Zweigert (1992:330) puts the figure at 500 million or 1/6 th of the entire world population but cites no references. For this reason the figures cited above are more accurate as they are based on census studies and the World Almanac and Book of Facts 1992.

[51]See 2.1.1 above.

[52]Chapter Nine will focus specifically on MPL developments in South Africa leading up to the commencement of the interim Constitution on 27 April 1994 and beyond and will therefore encompass religious debates preceding the interim Constitution, the constitutional implications of recognition of MPL and arguments by religious authorities since the constitutional provision for recognition. Reference will also be made to the corresponding provisions of the final Constitution.

[53]This is a set of laws which ultimately came to govern the Cape as part of the Indian Empire.

and Islamic Law that "... there would seem to be room for homogeneous legislation on the subject by the Cape, the Transvaal and Natal, in view of the growing importance of the subject to those States" (De Villiers Roos:1907:186).[54] There are, however, certain problems with regard to homogeneous legislation which will be addressed and evaluated at a later stage with a view to making certain recommendations for South Africa.[55] It is also interesting to note that the Cape was (at that time already) and still is the forerunner with regard to the recognition of MPL in South Africa.[56]

To date MPL is not recognized in South Africa. Because of this non-recognition, marriages solemnized according to Islamic law are not recognized by the State. Consequently children born from such marriages are given the status of illegitimate until recently.[57] Women are particularly disadvantaged by non-recognition because they have no recourse to the law of the land and are subject to the jurisdiction of an unsympathetic informal judiciary manned by religious authorities. The South African Law Commission in Project 59 on Islamic marriages and related matters was called upon by the previous government to examine MPL (Moosa, N:1991:22). In its latest progress report, the Commission states that although a start was made on a comparative legal study of South African and Islamic law, the investigation had to be

[54]See also De Villiers Roos:1897:22 and 1906:249-50.

[55]See 9.4.2 and 9.8.5.

[56]The Islamic Forum convened at the University of Cape Town at the end of 1993 to deliberate on the question of MPL in the new South Africa. At this meeting representatives of key Muslim organizations in the Cape expressed a fear that no national consensus would be reached by Muslims but that a regional consensus in the Western Cape could lead the way (Tayob:1994:25).

[57]In terms of the Births and Deaths Registration Amendment Act 40 of 1996 these children are no longer regarded as illegitimate (S 1) and "[f]or the purposes of this Act "marriage" includes a...marriage solemnised or concluded according to the tenets of any religion..." (S 2 (a)). See 2.2.4.3.

temporarily halted but that they intend "... to give fresh attention to the investigation and its further planning during 1993" (SALC 20th Annual Report 1992:RP 32/1993: 42).[58] Assurance had been obtained from the previous minority government, albeit at commission level only, that the finer details of MPL would be determined by Muslims themselves. Hence, the South African Law Commission preferred to leave its implementation to the discretion of Muslims (Moosa, N:1991:169). The various institutive bodies of experts on Islamic law, namely *Ulama* (religious) bodies, had in the interim responded favourably to a questionnaire issued by this Commission and supported the possible implementation of MPL as part of the South African legal system. This was done amidst clear objections by a large part of the Muslim community to this proposal on politico-moral grounds (Moosa, N:1991:22;172-188). These *Ulama* bodies are located in each of the erstwhile provinces, namely the *Jamiats* of Natal and Transvaal and the Muslim Judicial Council (MJC) of the Cape and the *Madjlisul Ulama* of Port Elizabeth in the Eastern Cape.[59] The division among the first three bodies was made according to geographical considerations but the latter is constituted by the fact of its members are alumni of the *Djalalabad* college situated in India and not their place of domicile (Naudé:1985:28;Dangor: 1991:70). Although their decisions are of a binding nature upon (the conscience of) Muslims and while their competence to apply Islamic law[60] is questionable,[61] they also lack the legal

[58]Nothing has transpired since 1993 and there are indications that, in the light of constitutional developments regarding MPL, that the Law Commission is to be reconstituted.

[59]In terms of the interim and final Constitutions South Africa now consists of nine provinces, each with a legislature and an Executive Council, headed by a Premier (SS 124-125 and 144 (now SS 103-104 and 125)). The nine provinces are the Eastern Cape, Eastern Transvaal, KwaZulu/Natal, Northern Cape, Northern Transvaal, North West, Free State, Gauteng and Western Cape (S 124 (now S 103)). The role of the MJC is extensively discussed in 8.4.

[60]"In practice the interpretation of the law, ethics, morality and religious values of Islam is largely the responsibility of the '*ulama*. As such, they have the authority and power over the religious symbols" (Moosa, E:1989:73). For a more detailed description of the *Ulama* and their function see Le Roux:1981:28-43.

power to enforce them. This is due to the non-recognition of MPL. It appears that the various Islamic bodies, *Ulama* and relevant organisations have now finally, in the light of the new political dispensation in South Africa, reached consensus on the need for the recognition of MPL.[62] At the behest of representatives of the Muslim community, and after 300 years of Islam in South Africa, S 14 (3) of the interim Constitution, which is discussed in Chapter Nine, now makes provision that legislation can be provided by the State for a change to this *status quo*. It must, however, be stressed that "[a] person's *right* to have her or his system of family law recognized by the State is... *not constitutionalized*" (emphasis added) (Du Plessis: 1995:13). "Religious groups now still have to lobby the legislature to pass the constitutionally authorized legislation which recognizes their personal and family law" (Du Plessis:1996:463). This position remains unchanged in terms of S 15 (3) of the final Constitution.

2.2.4 STATUS OF MUSLIM WOMEN PRIOR TO THE INTERIM AND FINAL CONSTITUTIONS

Categories examined under this heading include religious education, civil-political and social affairs and MPL: rights and problems.

2.2.4.1 RELIGIOUS EDUCATION

In the former province of Transvaal Muslim women lost their role as community educators when the *Ulama* took control of the *madrasahs* (religious schools). The *Ulama* also restricted women's personal religious practices and rejected their gatherings. As a consequence the *Tablighi Jamaat* of India, an international

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[61]The members of these bodies do not necessarily have accredited (local) legal training.

[62]See 9.4.1.

movement which made its first contact with South Africa in 1962, committed to reviving the traditions of Prophet Muhammad[63] in the lives of Muslims, organized special classes for women (Tayob:1995:67;69-70). "In this way, women's expressions of Islam came under the influence of the *Tablighi Jamaat*, and by extension, remained under the direction of the '*ulama*" (Tayob:1995:70). The influence of the *Tablighi Jamaat* has impacted on the lives of Cape Muslim women as well.

In the Cape a Turkish mediator, Abubakr Effendi,[64] who had been sent there in 1862, started his own school for women in 1870 because of his concern for the education of Muslim women. As a consequence women even began to recite the *Qur'an*[65] in public (Tayob:1995:80; Davids:1980:184).

In the former province of Natal the first modern resurgent Islamic organization, namely the Natal Muslim Council, was founded in 1943. Its main aim was to promote modern education among both Muslim men and women. A 1945 secretarial report indicated that it was succeeding in its aim as far as women's education was concerned (Tayob:1995:92-94). The second modern resurgent Islamic organization founded in Natal in 1950, namely the Arabic Study Circle, called for the emancipation of women. Women were ardent contributors of articles to a newsletter published by it. This newsletter aimed to propogate the teachings of Islam in the light of the primary sources of Islam, namely the *Qur'an* and *Sunna* (Tayob:1995:95-96).[66]

It is to be noted that very few female theologians have emerged within the ranks of

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[63]Referred to in 2.1.1 above.

[64]See reference to him in 8.2.

[65]See 2.1.1 above.

[66]See 2.1.1 above.

Islam - none to my knowledge in South Africa. A Muslim American professor, Amina Wadud-Muhsin, recently made history in South Africa[67] (and broke a tradition in the Muslim world) by being the first Muslim woman to be invited to deliver a pre-prayer Friday sermon talk (normally delivered by a male) on 12th August 1994 to a progressive Cape mosque (Claremont Main Road Mosque)[68] congregation of mixed sexes praying on the same floor level as men (another first for South Africa). Conservative Muslims and *Ulama* voiced great objection to this event (*al-Qalam*: 1994c:1-2; *The Cape Times*:1994:2). Included in objection were a large number of women who had been brainwashed into believing that supporting this incident was tantamount to disbelief and who therefore prevented her from addressing an essentially female and separated audience at another mosque in the Cape on 14th August 1994. This then is indicative of the uphill battle awaiting Muslim women in South Africa in any endeavour to achieve "reform". This also adds substance to the fact that lay Muslims of both sexes need to be educated before any progress can be made in this regard. There is also an urgent need for women to study Islam in local and international institutions to fill the void of women scholars sensitive to gender and other issues.[69] Professor Wadud-Muhsin makes it clear that she is not a feminist[70] and neither does she espouse a feminist viewpoint. Instead she espouses a reinterpretation

[67]An Associate Professor at Virginia State University, she visited South Africa as a participant in a conference on "Islam and Civil Society in South Africa" held at the University of South Africa in August 1994. She also addressed women and brought gender issues under the spotlight during a workshop held at the University of Cape Town and organized by the Muslim Youth Movement (MYM) Gender Desk on 13th August 1994 (Roomanay:1994:1-3,7-8).

[68]Incidentally, Imam Rashid Omar of this particular mosque was elected Vice-President of the South African Chapter of the World Conference on Religion and Peace (WCRP-SA) at its annual general meeting in August 1994 (*al-Qalam*:1994d:8). See 9.4.1.

[69]For the constitutional implications of religion and education see 7.6.

[70]This term is explained in 3.3 and 3.3.1 below.

of the *Qur'anic* perception of women and can therefore be labelled a modernist[71] (Roomanay:1994:5; Wadud-Muhsin:1994:iv-vi).

2.2.4.2 CIVIL-POLITICAL AND SOCIAL AFFAIRS

Naudè (1985:22) writes of the early history of the Cape Muslim community that women were employed as milliners, seamstresses, cooks, nursemaids, laundresses and domestics while today men and women are also employed as factory workers. "Marriage to more than one woman simultaneously is rare. Women are for all practical purposes socially equal to men, following their own professions, contributing to the family income, and moving about unescorted. Religious norms dictate social behaviour. Social deviance is controlled by religious retribution and social ostracism" (Naudè:1985:23). Of the Indian Muslim community Naudè (1985:24) writes that "Indian Muslim women still commonly wear distinctive Islamic clothing consisting of trousers with a kneelength dress...but their faces are unveiled...Indian women are subjected to *purdah*, i.e. social separation...Most...Muslims attend the ritual prayer on midday Friday. The position of women is such that they keep to themselves, but they are held in high esteem. Marriage to more than one woman simultaneously is exceptional."

Today Muslim women actively participate in and have been instrumental in voting into power a new and transformed South African government. Also to be noted is the fact that 20 of the 200 African National Congress (ANC) candidates nominated for South Africa's new national assembly (10%) are Muslim, four of whom are female.[72] It must be remembered that Muslims constitute only 1.1% of the country's population (Cruywagen:1994:6). They excel in all professions and many boast a higher degree

[71]See explanation in 3.2 below.

[72]See 9.1, footnote 20.

in tertiary education.

2.2.4.3 RIGHTS UNDER ISLAM AND RELATED PROBLEMS

The situation in South Africa at present is that Muslim women, like most Muslim men, are divided over gender interests and ways to obtain equality between the sexes. There is a varying degree of awareness with regard to the existence of rights, their content and their operation. On the one hand there is a small percentage of what can in most instances be regarded as the first generation of Western-educated, mostly middle-class urban Muslim women who are aware of their Islamic rights, but this is where the road, so to speak, ends for most of this minority because in reality and in practice patriarchal perceptions of women's rights still prevail in their everyday lives. This is besides the adverse cultural and other influences that they have to contend with. On the other hand, the majority of Muslim women have an idea that rights are accorded to them by Islam, as they are often reminded by male Muslim jurist-theologians of their existence. However, their ignorance as to the content of such rights is fed by the attitude of these jurist-theologians and the monopoly exercised by the majority of them over the interpretation of the primary sources of Islamic law. As noted[73] the answer to overcoming this vulnerability lies in educating women so as to enable them to respond and come to informed conclusions and decisions in this regard.

Muslim women in South Africa suffer the same status problems as do Muslim women worldwide. Discrimination against them, however, is twofold because apart from being subject to general gender discrimination,[74] non-recognition of MPL causes additional hardship and problems. These problems include abuses of certain

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[73]See 2.1.5 above.

[74]This will be outlined in 9.2 and 9.6.1. See also 9.9.

"privileges" relating to polygyny, divorce, maintenance and custody of children in Muslim family relationships. While polygyny is seldom practised, personal laws like divorce remain contentious and needs to be reviewed in the light of the intention of the Divine Legislator.[75] Little consideration is given to deterrents in this regard, like full payment of dower to the wife on divorce and granting custody of children to the father (with their resultant maintenance) in the light of the present breakdown of the extended family. Muslim women do not take cognizance of the revolutionary and liberating effect of the Islamic regulation of leaving custody of the children to the father. They face psychological and emotional barriers and therefore cannot practically consider the implications (financial and otherwise) of allowing the father custody of the children.[76] Honarvar (1988:385) writes that Muslim men use custody (note the present tense) as a lever against women with no conscience or qualms to discourage them from divorcing their husbands. Women should view these considerations as a rebalancing of priorities and a redressing of past inequalities rather than as discrimination in reverse. While it can be argued that if women truly want to give effect to the liberal *Qur'anic* notion of complete financial independence in that they can own, earn, dispose of wealth and regulate their proprietory affairs as they deem fit, then they should not be allowed to be maintained by their husbands beyond, generally speaking, the period of approximately three months and four months and ten days after divorce and the death of their spouses respectively.[77] However, the social reality of women dictates otherwise. Welfare organizations cannot be relied on. Women are furthermore unaware that polygyny can be contractually regulated and inheritance shares effectively augmented by the use of certain tools at the disposal of

[75]See 2.1.3 above.

[76]See recommendations by Austrin:1987:153.

[77]See 2.1.3 above.

women.[78]

It has been recommended that the South African legislature reform MPL in at least five ways, namely "...proscribing talaq [divorce]; conferring autonomy on women to contract marriages without the authority of their guardians; abolishing a husband's marital control over his wife; extending the divorcee's right to maintenance beyond the iddah period of three menstrual cycles or approximately three months; and abolishing the legal disabilities attached to children born outside wedlock" (Moosa & Bosch:1993:11s). As indicated in footnote 57 above the status of illegitimate children has now been improved by legislation.

Other problems include the Muslim community's ignorance about Islamic law and its control by religious authorities; judicial insensitivity to women and their experiences; the control by exclusively male religious authorities of these informal tribunals and other bodies that regulate the affairs of Muslims and finally, the non-commital attitude of these religious authorities to the provisions of the interim South African Constitution, especially the Bill of Rights, even though it was at the behest of the legal representative of an Islamic faction that the negotiators accepted S 14 (3) (now S 15 (3)) which makes provision for the recognition of MPL and Muslim marriages.[79]

These problems indicate that for South African Muslim women much more than a mere recognition of MPL is needed to redress their plight. It is conceded that a reformed MPL is but one such step in the right direction. Granting also that women will have to contend and deal with the fact there is no guarantee that legal reform,

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[78]See Moosa, N:1991:152-168 which deals with reform in this regard. For example, a women's inheritance share which is half that of men can be augmented by making effective use of the *Qur'anic* provision of dower. See also Sachs's view, as outlined in Sinclair:1994:562, regarding the constitutionality of polygyny.

[79]See 9.4.1 and 2.2.3 above. See also Chapter Eight, especially 8.4 where the role of one such Muslim tribunal, namely the MJC, is outlined.

whether constitutional or *via* statute law, will result in the equality of the sexes, this can be achieved once the problem of reforming MPL is addressed in a way that gives effect to the true *Qur'anic* spirit of equality.

2.3 CONCLUSION

In South Africa no two Islamic communities have identical cultural systems because of the difference between traditionally Arabian and local cultures. This is one of the reasons why Muslim scholars should be reviewing the traditional *corpus* of Islamic law in line with the current transformation in South Africa (Beck:1980:32; Rhoodie: 1989:114; *al-Qalam*:1993b:4). Women should furthermore be effective participants in this process of transformation together with educating, conscientizing and reconstructing South African Muslim society as a whole (Mohamed:1992:28; Kadalie: 1989a:34; Gawanas:1991:118). No legal system can ignore the social context when framing a law and in today's context it appears that the *Qur'anic* laws are indeed normative and can therefore "...be translated into the terms of a specific social reality by each generation of interpreters" (Stowasser:1987:262; Engineer:1992:109).

The history of Islam[80] highlights the fact that the "male image" of Islam, which has for so long been unquestionably accepted as the only or proper image, is nothing more than a fiction fuelled by ignorance to give it substance. It also stresses that although some personal laws and Islamic law are in clear conflict with gender equality and while some *Qur'anic* verses can be interpreted to allude to inequality of the sexes, it is wrong to conclude that *Islam* and gender equality are necessarily in conflict (Cachalia:1991:30). The history of Islam indicates that the traditional formulation of MPL accords Muslim women a status unequal to that of men. It therefore does not go without saying that women are necessarily in a subjugated or inferior position as is purported to be the case today. On the contrary, it appears that in terms of the true *Qur'anic* spirit the status and rights granted to Muslim women in

[80]As discussed under 2.1 above.

seventh-century Arabia are not *per se* necessarily defective as is the general perception today. What must, however, be questioned is the way primary sources of Islam have been negatively influenced, construed and interpreted over the centuries to the detriment of Muslim women. As indicated,[81] modern legal scholars are using case law to move away from classical Islamic law interpretations. While international reform efforts go a long way towards improving the status of women, it highlights the fact that reforming the law is not necessarily the total answer to the plight of women. This lesson must be heeded by local Muslims in so far as it may have application to MPL reform in South Africa.

From the history of Islam in South Africa[82] it has been shown that, despite having been granted the freedom to practise their religion in 1804 already, Muslims could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently, more than three hundred years after they first arrived in South Africa. It is, however, anticipated that the rapid changes taking place in South Africa since the democratic elections of 1994 will rectify this situation. While recognition of MPL will help alleviate the practical difficulties faced by the community, the current and unreformed status of MPL, especially in so far as it pertains to Muslim women, is unsatisfactory. There must therefore be no illusions that recognition of MPL will solve these problems. The dual discrimination faced by Muslim women stems from being subject to the general gender discrimination whilst non-recognition of MPL causes additional hardship. Non-recognition also means that Muslims (especially women) have no recourse to South African law while informal Muslim religious tribunals,[83] dominated by conservative *Ulama*, implement MPL in ways which are insensitive to the needs and rights of women. However, a recognized

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[81]See 2.1.1.

[82]As discussed under 2.2 above.

[83]See 8.4, 8.6 and 9.8.5.

but unreformed MPL is not the solution to the plight of women. International experience indicates that while reform might not be the total answer, some measure of reform to MPL in the *Qur'anic* spirit of equality goes a long way towards improving their plight. Effective application of alternative tools can be used where reform might be inappropriate. Total reform, on the other hand, would obviate the need for any recognition of MPL since Muslims might as well then follow South African law and achieve the same results. Nonetheless, legal reform, constitutional or statutory, will only be effective if MPL is reformed in line with the true *Qur'anic* spirit of equality. In reality the vast majority of Muslim women are subjugated by men and male-dominated *Ulama* bodies who, by their control of MPL and its implementation, continue to regulate women's lives in terms of traditional interpretations of Islamic law. The visit by the female professor Wadud-Muhsin, a self-proclaimed "non-feminist", was marred by this domination which to a large extent was condoned and fuelled by Muslim women themselves. This is therefore also indicative of the uphill battle awaiting local Muslim women in their endeavour to change the *status quo*. Taking into consideration the lack of awareness among Muslim women of their Islamic rights[84] and their division over the question of gender and equality, it is the duty of the State to ultimately safeguard their interests. The State must therefore direct the process of MPL to ensure that whatever the final outcome of a code of MPL will be, it will be equitable for both sexes. Doing so is completely compatible with the spirit of equality implicit in Islam. In Chapter Nine it will be demonstrated that effective and democratic use of the provision for recognition of MPL in the interim and final Constitutions can provide Muslim women with a chance to change the *status quo*.

This chapter has provided us with a more accurate picture of the general position of Muslim women as well as of South African Muslim women and it is in this context that the rest of the dissertation will explore the issue of the rights of Muslim women.

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[84]As explained in 2.2.4.3.

CHAPTER THREE

THEOLOGICAL ARGUMENTS FOR RELIGIOUSLY-BASED DISCRIMINATION

3 INTRODUCTION

There are various arguments that religious Muslims use to justify discrimination against women. In this Chapter the feasibility of these arguments in relation to the *Qur'an*[1] will be considered. This will be done by briefly examining the various schools of Islamic law, arguments from various groups of Muslim people (for example modernists, conservatives, fundamentalists and women activists in addressing the status of women), the gender debate within Islam and finally the injunctions of the *Qur'an* to determine whether these arguments about women's rights are justified from an Islamic point of view. Possible conclusions for Muslim women in South Africa will also be considered in the light of the discussions on gender discrimination[2], which indicate that South Africa is still in the early stages of gender legislation and development. For this reason the emphasis is on Muslim feminist jurisprudence regarding the gender debate and its religious implications and consequences for the public and private spheres.

3.1 SCHOOLS OF ISLAMIC LAW[3]

The classical formulation and codification of Islamic law into the various schools of law by early Muslim jurists like Abu Hanifa, Imam Shafi, Imam Malik and Ibn Hanbal are not canonical but "man-made". There is a gap of about two centuries

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[1]See 2.1.1 for an explanation.

[2]See 9.2.

[3]See 2.1.1 for an explanation. See 8.4, footnote 78 for reference to *Imam* (lit.leader).

between the time of revelation of the *Qur'an* and this formulation. It was during these two centuries that the *Qur'anic* norms were diluted often to the disadvantage of women. Although these juristic formulations were merely interpretations of the two primary sources of Islam, namely the *Qur'an* and *Sunna*, they are often mistaken for Islam itself. However, the learned Muslim jurists referred to above have warned that Muslims must guard against upholding their interpretations, which should be considered wrong if the primary sources indicate otherwise. They did not want their views to be followed blindly the way certain *Ulama* seem to advocate. This is evident from the following quote: "Malik, also a practising judge, said, 'I am but a human being, I may be wrong and I may be right. So first examine what I say, if it complies with the Book [*Qur'an*] and Sunnah, then you may accept it...if...not...then you should reject it'" (Razak:1985:72; Al Aseer:1976:96). The same logic was followed by Abu Hanifa (who was not a practising judge but rather a philosopher), Shafi and Ibn Hanbal (Razak:1985:72-73; Al Aseer:1976:95-96). These jurists "...viewed their opinions as contextual, the best they could achieve for their own time and circumstances" (Davies:1988:62). Yet today these opinions are given more weight than the original sources of Islam itself! Notwithstanding the problems of translating the *Qur'an* from Arabic into other languages, as far as interpreting the *Qur'anic* text or exegesis of the *Qur'an* is concerned, it is said that: "The best *tafsír* [exegesis] is the explanation of the Qur'ān by the Qur'ān...[N]othing can match the explanation of the Qur'ān by the Qur'ān and the explanation of the Qur'ān by the Prophet [Muhammad]" (Von Denffer:1983:125,145).

The numerous and varied schools of jurisprudence highlight the fact that Islam is not monolithic.[4] Beside the *Sunni/Shi'i* split, there are also different doctrinal tendencies, namely traditionalist, fundamentalist and later modernist as explained below[5]

[4]See 2.1.1.

[5]See 3.2.

(Taperell:1985:1179; Lambton:1988:5).

Religious authorities refuse to resanction the use of *ijtihad* (independent reasoning) as a source of Islamic law to add any new interpretations or to give any direct consideration to the *Qur'an* as a primary source of law and literal word of God. They prefer to uphold the centuries-old conservative juristic interpretations. As also indicated, it is important to distinguish Islam (and its inherent spirit of equality) from Islamic law.[6] While the divine origin of Islamic law may have delayed change, it certainly did not prevent it (Liebesny:1967:34). The closing of the doors of *ijtihad* in the tenth century and the resultant restriction on the creativity of Muslim jurists virtually necessitated the adoption of codes of law based on Western models to meet the needs of reform and changing times (Badr:1987:28; Layish:1987:287; Liebesny: 1967:16). This closing of the doors of *ijtihad* may also have been the reason for the "...subsequent development of certain areas of law outside the shariah and the religious courts" (Zweigert and Kötz:1992:334). Together with contemporary Muslim jurists, even traditionalist Saudi Arabia[7] is calling for the gates of *ijtihad* to be reopened (Layish:1987:287; Majul:1978:115).

Change was allowed in certain areas for economic expediency but when it came to addressing women's rights the old argument of the divine origin of Islamic law precluded change. There are many solutions within Islam itself which are not used. Muslims have to find solutions for the problems of today, even if this means bypassing the views of these jurists. It must also be expected, and realistically so, that this whole process will take time. It must not be forgotten that while Islam is the work of God, Islamic law is the work of man. The use of *ijtihad*, as a mechanism of reform, comes to mind in spite of all the controversies surrounding its use and the

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[6]See Chapter Two, paragraph 2.

[7]See 6.2.1 below.

"closing of its doors" in the tenth century. From the tenth century onwards and up until today the interpretations of the early jurists have been accepted without question. There is much truth in the following quotation: "Paradoxically,...a living past may also have a deadening effect by dampening the fire of contemporary creativity" (Lambton:1988:1). While the spirit of equality is implicit in Islam, there are, however, *Qur'anic* verses which can be interpreted as alluding to the inequality of sexes. It is therefore postulated that on the basis of these verses and a maxim which says "there can be no *ijtihad* [in this context meaning reinterpretation of ancient texts] in any matter covered by a text", that Islamic law cannot be amended to remove *all* discrimination against women (El Naiem:1984:83).[8]

Breiner (1992a:8) could not have expressed it better when he wrote that "...Islamic law enshrines judicial principles which make it potentially more suitable than Western secular law for safeguarding genuine pluralism in society, ***provided*** that there were a far-reaching recodification, a new *ijtihād,* which removed many of discriminatory provisions of the classical formulations of the Muslim jurists...Rather than disparage the classical formulation of Islam...The principles of justice remain constant, but their application does not, cannot. God demands justice and he demands it of us, in our context, in our lifetime, in our world" (emphasis in original).

3.2 THE CONSERVATIVE, FUNDAMENTALIST AND MODERNIST PERSPECTIVES

The Islamic reaction to the Western challenge concerning the status of women has evoked three varying responses, namely a modernist, a conservative and a fundamentalist response. Authors of literature on women in Islam are divided into these groups on the basis of their ideological orientation and philosophical stance. The modernist-reformists constitute the minority and the conservatists and

[8]See 5.3.

fundamentalists (between whom there is not much ideological difference) constitute the majority (Gordon:1968:29; Stowasser:1987:260).

The modernist-reformists embrace Western ideals of emancipation. Their view is that Islam itself, properly understood, establishes complete equality between the sexes in all spheres, public and private. According to them the problem lies in confusing religious and social matters. They explain that Islam establishes complete equality between the sexes in all spheres but that scholars have confused religious and social matters (Stowasser:1987:260-261;263).

Conservatives and fundamentalists, on the other hand, between whom there is not much ideological difference, take the view that Islam restricts equality between the sexes to the sphere of religious belief (in one God) and observances such as prayers, charity, fasting and pilgrimage, in other words the five pillars of Islam. These observances essentially determine whether a person is Muslim and it is this part of Islam that remains practically static, creating a "kind of umbrella identity" which unifies Muslim people of various cultures. While what one may call the "apologetic-progressive" stance of the conservatives does allow some openness to adaptation and reform, the "scriptural activism" of the fundamentalists rules out any possibility of change. The conservatives and fundamentalists assert that social transactions like family laws (MPL), for example, can never change with time as the modernists believe they should. Modernists favour change in family laws as the social transactions of one country can never be exactly the same as those of another because of, among other things, geographical, cultural and socio-economic differences (Kidwai:1978:73; Stowasser:1987:263; Smith:1980:20).

The modernists propogate a philosophy of going "back to the *Qur'an*" but "onward to modernity", in other words, separating what is contextual from what is normative. The conservatives maintain the social and legal "scriptural inequality" of the sexes while the fundamentalists give a strict and literal interpretation of the sacred texts by

translating them directly into the present context and thereby disregarding centuries of development within Islam. They also speak of "complementarity" rather than equality of women. Nevertheless, despite their differences with regard to women's issues, all three ideologies profess to share a common base for their arguments, namely the *Qur'an* and *Hadith*, the two primary sources of Islamic law[9] (Gordon:1968:29; Stowasser:1987:261,263,269,275; Badran:1991:210).

To sum up: fundamentalists seek to derive normative prescriptions from these primary sources to the exclusion of all other ways of understanding Islam whilst modernists want to derive general principles from these sources which can be applied to the realities of contemporary life. The conservatives want to implement traditional codifications of Islamic law (Breiner:1992:12,16-17). It appears then that the "dramatically different" directions taken by these three groups can really be traced back to the same roots, that is the basic sources of Islamic law. This appears to be so notwithstanding the fact that the modernists' ideology is also perceived to be "secularly" based. An-Na'im (1995:51-52) aptly writes that "...it is conceptually misleading to speak of 'purely' religious [derived from scriptural/religious sources] or secular [premised on the supremacy of human reason and experience] discourse about the rights of women because the two interact and overlap so much in practice. People do not compartmentalize the religious and secular in their minds, motivation, and behavior as the two constantly overlap and interact in their own daily lives."

While conceding that the *Qur'an* and its language is not easy to understand and that *Qur'anic* exegesis has been used in mitigation or disapproval of various views, it would appear that while "[t]he discussion between conservatives and reformers in [certain] cases appears to be about the Koran and its correct interpretation...in reality it is the extent to which parties approve of Western ideas that [might be] under discussion" (Jansen:1980:94,55).

[9]See 2.1.1.

Thus, it seems that the above three reactions have failed to effectively address the problem of women's status and authors' criticism and intolerance of one another has done more harm than good to the cause of women. It appears to have given rise to an embryonic group of writers hovering around the peripheries of these three groups who distance themselves from these views and express their views on the matter in a tone of disillusionment.[10] It seems that the only certain result of this exercise was, and still is, to thoroughly confuse and divide Muslims. This probably explains why it is possible for individuals to hold a view which can sometimes be a combination of two or all three of these philosophies and which can then in itself rightly be regarded as unique. This is a dilemma with which many modern Muslim women are faced. How do women deal with this situation - do they ignore or do they acknowledge it? How are these women categorized - or can there be no such categorization? Muslim women continue, as a direct consequence of the threefold reaction, to be divided over gender interests and ways to obtain equality between the sexes. They also face the added disadvantage of having the discourses of their respective movements (albeit independent or state-sponsored organizations created as responses to this division) limited by the political cultures of their societies (Kandiyoti:1991a:13,18). Muslim women in South Africa display varying degrees of awareness in this regard.[11]

3.3 WOMEN ISLAMIST AND FEMINIST PERSPECTIVES

Feminism, in the sense that it is used in this chapter, is not monolithic but is broadly and generically construed. Just as there are different types or perceptions of Islam, for example Hanafi, Shafi'i, Deobandi and Barelvi,[12] there are different types of Muslim women activists. Muslim women have in their own terms, whether as

[10]See in general Austrin:1987.

[11]See 2.2.4.3 for more detail.

[12]See 2.1.1 and 9.4.1.

feminists or as Islamists, helped in the formulation of the "woman question" (Badran:1991:202;227-228). "[A]s feminists they generated their own terms of debate and as Islamists they mainly reproduced male discourses...in Egypt [for example]...only feminists, for whom the 'woman question' is central, have meaningfully attacked patriarchal interests and opposed male supremacy...[On the other hand] [w]omen Islamists, normally excluded from the Islamic establishment, have joined...fundamentalist movements. Their leaders have taken on daring social and political roles while acquiescing in an ideology that contradicts their own conduct as activists" (Badran:1991:228). The classification of women activists in Muslim countries like Egypt and Pakistan is therefore also based on their identification with the ideologies of the three groups mentioned above.[13] There are thus degrees of activism among Muslim women ranging from modernism to conservatism and fundamentalism and perceptions of inequality and the need for reform dependent on the specific ideology adhered to. While fundamentalist women label Egyptian feminism "secular", Egyptian Muslim feminists see themselves as "progressive" and the majority reject the notion that their feminism is "secular" as is the case with the feminism of those who have abandoned Islamic law in favour of a secular civil code (Turkish feminists) and those who wish to do so (Indian feminists). Instead, they argue that their feminist views are within the bounds of Islam. Their aim is to reaffirm *Qur'anic* roots through their perspective and not through male aspirations as would be the case with women Islamists. Fundamentalist (Islamist) activists, however, also claim a religious framework for their restricted views (Badran:1991:210; Shaheed & Mumtaz:1990:9-17).

Interestingly enough, there appears to be no equivalent for the term "feminism" in the Arabic language. The fact that Egyptian feminists argue for their feminism on the basis of Islamic principles as opposed to the secular feminism of, for example, Turkey puts into question the idea of a homogeneous feminism. Gardezi (1990:21),

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[13]See 3.2.

in her article on Islam and feminism in Pakistan, says that feminism is not only concerned with sexual inequality and defines feminism as "...a struggle, in particular, against women's oppression and exploitation as women...[involving] a broader critique of the entire society because gender-based oppression does not merely exist at the same time as other systems of oppression - they are interconnected." From an Islamic point of view this debate does not really have its root in religion but rather derives from the patriarchal nature of a culture which varies in its ways of expressing the Islamic religion from area to area.[14] This postulate rests on the assumption that Islamic law (based on the *Qur'an* and *Sunna* or tradition of the Prophet Muhammad) is the work of God while Islamic jurisprudence (*fiqh*) is the work of humans (Breiner:1992a:5).[15] There is thus great wisdom in the proposition that there can be no freedom *of* religion if there is no freedom *in* religion (Ackermann:1994:9).[16]

3.3.1 THE GENDER DEBATE AND MUSLIM FEMINIST JURISPRUDENCE: IMPLICATIONS FOR THE PUBLIC AND PRIVATE SPHERES

The Muslim Judicial Council (MJC) has in its demand for the recognition of MPL issued a statement in its newsletter to the effect that Islam does not differentiate between "public and private"[17] and that South African Muslims be granted the right, within the context of equal liberties and citizenship for all, to be *different* in the practice of Islam to be applied in the new South Africa (*Ad-Da'wah*:1993:1). The first statement is not true if viewed in terms of the fact that MPL has been relegated to the private sphere in almost all of the Islamic states. The practical reality of the subsequent statement would merely entrench the continuing oppression of women as

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[14]See above footnote 44 in the text.

[15]See 2, 2.1.1 and 3.1 above.

[16]See 5.1, 5.2.1, 5.3 and 7.6.

[17]See 9.6.1.

explained in both this chapter and Chapter Two.[18] With most Muslim countries relegating all laws affecting the status of women (MPL) to the realm of the private sphere of family and home, it appears that Muslim women have conveniently been subjugated under the guise of religion.[19] Due to this mistaken assumption they are under the impression that, because of the religious sanctioning of this discrimination against them and therefore its divine origin, any deviation from it would amount to nothing short of blasphemy (Rhoodie:1989:346). Many women support this discrimination because they are ignorant of the fact that religious discrimination is also based on cultural influences and not only on religion as such.

Placing men in the public world of politics and culture and women in the private world of family and home is a worldwide phenomenon. South Africa is only in the early stage of gender legislation and development.[20] The breadwinner-male and homemaker-female stereotypes are still very much relied on in both the general South African and Islamic cultures. In an attempt to investigate the extent to which the new South African Bill of Rights[21] can make these private issues public and how this in turn will affect women in terms of Islamic law, I have in this chapter selected a few topics like childbearing, childrearing and abortion for close examination from an Islamic perspective. This will highlight the potential conflicts which South African Muslim women may have to face upon a recognition of MPL exempt from the Bill of Rights.

It is apparent[22] that Muslim activists are as divided in their perspectives as American

[18]See 2.1.5, 2.2.4.3 and 2.3.

[19]See Chapter Six, paragraph 6.

[20]See 9.2 and 9.9 below. See also 9.6.1 below.

[21]This theme will be elaborated on in 9.6.1 below.

[22]See 3.3.

feminists[23] and while the American feminists can be roughly grouped into liberal (whose views are essentially "conservative" in comparison to their radical counterparts) and radical feminists, Muslim activists are roughly identified as feminists (essentially modernist) and Islamists (essentially conservatist-fundamentalist). Muslim feminists are divided into secularists and religionists with secular feminists creating "...the only discourse that insists upon radical changes in gender relations" (Badran:1991:228). The majority of Muslim feminists are fighting for liberation within the religious context. They argue that their feminism is rooted in Islam rather than deriving from any secular base. On the other hand, the ultimate goal of the few Muslim radical feminists, who have either abandoned Islamic law in favour of a secular civil code (as is the case with Turkish feminists) or wish to do so (Indian feminists), is to achieve secular equality in both the public and private spheres even if this would mean liberation from religion or living outside the pale of Islam. The status of present-day Muslim women thus oscillates between two extremes, the conservatives regarding women as childbearers and rearers while the modernists aim for equality between the sexes (Baraka:1988:46).

To highlight that both conservatives and modernists claim an Islamic justification for their opposing views, the Islamic position regarding childbearing and childrearing is summed up as follows: although it is mostly as a result of a conservative attitude that it is considered a Muslim women's "divine" duty to raise obedient and decent children, this does not detract from the fact that the attitude of the *Qur'an* and *Sunna* of the Prophet Muhammed towards a mother/motherhood is one of high esteem (Haeri:1980:212; Q.4:1; Q.31:14; Q.46:15; *Al-Hadith*). "Glorification" of motherhood has been replaced and confused with "exploitation" as is evident from the fact that the *Qur'anic* verses which glorify women have been used to exploit women to give effect to this view and thereby alleviating the father from any joint childbearing responsibilities (El Saadawi:1988:20). It appears that the different

[23]See 7.5.

treatment theory[24] is favoured by Islam because, although the *Qur'an* puts great emphasis on the equality of the sexes[25], saying that they only differ in the extent of their piety/righteousness, it qualifies this equality on the basis of biological differences giving the "edge" to men (Q.49:13; Honarvar:1988:384; Hendricks:1994:4).

The *Qur'anic* passages on this question, namely Q.2:228 and Q.4:34, are very controversial and have been subject to many interpretations. In the area of the general rights of spouses, the *Qur'an* states that spouses have reciprocal rights and duties but adds that "men are but one degree superior to women" (Q.2:228). This qualifying clause read with Q.4:34, which contains the rationale for it, namely that "men are the maintainers of women...with what they spend out of their wealth", explains the economic superiority of men over their wives. In this regard the conservatives and modernists hold opposite views.[26] These two passages are usually interpreted to justify Muslim men's superiority over Muslim women and usually signifies the end of any attempt to discuss the issue of women's equality with men in Islam. However, in the final analysis it does not mean that women cannot or should not provide for themselves but that, in view of the fact that it is women who bear children and mostly shoulder the responsibility of rearing them, they should not have the added burden of *simultaneously* providing for a family as well. This does not mean that all women can or should bear children or that a woman's sole function is to bear children. That the sameness-difference theory[27] (with emphasis on the difference) is favoured in Islam is also apparent from the following statement of a Muslim academic: "...Islam admits of both points of resemblance and of differences between the two sexes, and then makes a distribution and allotment of duties, rights

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[24]See 7.5.1 for an explanation.

[25]See footnotes 29-30.

[26]For more detail see Moosa, N:1991:135-149.

[27]See 7.5.1 for an explanation.

and privileges accordingly. This is done in view of the common and varying characteristics of both sexes; of course, there is no rule which has no exception. This is also recognised in Islam. The *Qur'an* [3:36] says: the male is not as the female..." (Akbarabadi:1985:37). Real differences between the sexes, like the ability to fall pregnant, for example, should not be seen as an obstacle in achieving (intellectual) equality (Muslim Views:1993:5).

Muslim and non-Muslim feminists share the same problems regarding the doctrine of separate spheres.[28] However, Muslim feminists, unlike non-Muslim feminists, find themselves in a situation of first having to deal with MPL and its reform before they can deal with other problems of gender inequality also encountered in the private sphere (Hendricks:1994:4-6). This is so in spite of the fact that the *Qur'an*[29] emphatically states that God not only created the sexes of like nature, manner and substance but that they are also equal in the sight of God.[30] "...[T]he Qur'an does not make a distinction between men and women in...[the process of] creation, in the purpose of the Book, or in the reward it promises" (Wadud-Muhsin:1994:15). Muslim women's inequality in the public sphere is largely the result of a *hadith* (Prophetic *dictum*) attributed to the Prophet Muhammad to the effect that those who entrust their affairs to a woman will never know prosperity. Mernissi (1991), after having examined the primary sources in this regard, refutes this claim. While non-Muslim women continue to be victims of discrimination in, for instance, the home

[28]Women Living Under Muslim Laws (WLUML) is a Muslim network lobbying for the enforcement of international instruments of gender equality like the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This charter (CEDAW) will be fully discussed in 5.2, especially 5.2.1; Chapter Six at, for example, 6.3.1 and 6.3.2 ; 9.6.1 and 9.7. The project "Women and Law in the Muslim World" aims to consolidate the efforts of women of 26 countries in Asia and Africa to work through this network (Kamal Chakravarty:1993:5).

[29]See *Qur'an* 4:1; 7:189; 16:72; 42:11. See also 2.1.3 above.

[30]See *Qur'an* 3:195; 4:32; 4:124; 16:97(8); 9:71-2. See also 2.1.3 above. For further and general detail see Ali:1978.

and family, they have made much more progress in redressing discrimination in the public sphere than Muslim activists have done. This is so even though, as indicated below, Muslim countries profess to treat women equally in the public sphere. Muslim activists are therefore still fighting for recognition and identification of individual and religious rights in both the public and private spheres before they can even consider the substantive content of or critically voice any challenge to these types of prospective rights as non-Muslim women would do. Thus, issues like abortion, childbearing and childrearing hardly ever feature as problems of MPL faced by Muslim women despite clear *Qur'anic* injunctions in this regard. In other words, the goals of Muslim and non-Muslim women activists differ in the sense that, while both are striving to achieve equality in the private sphere, non-Muslim feminists have had some success in the private sphere and can therefore focus on achieving equality in the public sphere in areas of politics, economics and the workplace to name but a few. It is thus clear that the pattern of feminism of Western countries cannot be reproduced by Muslim activists - in spite of their facing similar patriarchal prejudices - because of vast differences in the cultural articulation of these patriarchal structures (Shaheed:1986:38).

While Muslim and non-Muslim women face the same status problems in the private and public spheres of life,[31] Muslim women have to come to terms with an added burden of having to deal with the awkward dichotomy between their roles as citizens of a nation and as members of a religious community. In Muslim countries women are perceived to be equal in public rights and duties but not in the private sphere of the family, which is mainly regulated by MPL. However, a closer examination of some of the constitutions and other pertinent legislation of these countries (Egypt being a typical example) reveals that the professed equality in the public sphere is not

[31]See 2.1.5 and Chapter Six, paragraph 6.

accepted in an unqualified way.[32] Abortion is used as an example to highlight this conflict. The Islamic position regarding abortion is, according to the four schools of law, that it is unlawful and therefore forbidden irrespective of the fact that pregnancy is a result of illegitimate sex or rape or of the fact that deformed foetuses have been conceived. It is accepted by Muslim jurists that, in terms of a Prophetic tradition (*Hadith*), the foetus is ensouled at four months (120 days) and there can therefore be no question of abortion beyond this period, although it is permissible in exceptional circumstances prior to this period. It appears that abortion is only allowed at any stage (before and after four months) if a woman's life is endangered[33] on the basis that preserving the life of the mother is considered to be the lesser of two evils (Ebrahim:1988:106,116,128,131,133-134; Quasami:1989:14-15; *al-Qalam*:1995c:4-5). It must be noted that there are no *Qur'anic* verses which relate directly to the issue of abortion and it seems as if the *Qur'anic* verses relating to infanticide[34] have been misread as applying to abortion (Al-Islam:1994:8). Infanticide was a pre-Islamic practice whereby female infants were killed for fear of shame and want and, as mentioned,[35] Islam prohibited this practice and also made provision, *via* a pillar of Islam, for Muslims to pay a compulsory tax to those in need.

Reproductive policies vary from country to country. In Tunisia, for example, contraception and abortion are legal and freely accessible, while in Pakistan and Sudan contraception is allowed but abortion is criminalized[36] (Newsheet:1993:9). As

[32]See Chapter Six, paragraph 6 and 6.3.1.

[33]Generally in terms of the Islamic law abortion, whether in the first or last trimester of pregnancy, is prohibited. However, it is permissible at any stage of pregnancy or even just before birth if the mother's life is endangered (Iqbal:1988:281).

[34]Q.6:137; Q.6:140; Q.6:1551; Q.17:31.

[35]See 2.1.3.

[36]In Pakistan the punishment for the person aborting and the person causing the abortion is imprisonment of up to ten years (Iqbal:1988:288).

will be indicated,[37] the abortion issue has been hotly debated in South Africa. Submissions in this regard have also been made to the Parliamentary Ad Hoc Committee on Abortion and Sterilisation (Constitutional Assembly) by two Muslim organizations, namely the Islamic Council of South Africa's Judicial Committee (ICSA)[38] and the Muslim Judicial Council's Fatwa Committee (MJC).[39] In a very brief submission on such a contentious issue, the MJC recommended that abortion on demand be made illegal constitutionally. On the other hand ICSA gave a more detailed and informed view of the Islamic perspective on the matter and even condoned abortion on demand, not as the norm, of course, but subject to certain criteria and conditions (*al-Qalam*:1995c:4-5; Paleker:1995a:3;7). While Muslim academics and theologians pay scant attention to issues like abortion, these issues and conflicts of opinion need to be dealt with in so far as they will affect the lives of Muslim women in South Africa should MPL be exempt from the Bill of Rights and a particular interpretation of MPL prohibits abortion.

The same arguments relating to *Qur'anic* intepretation discussed above[40] apply here as well: "While reading the exegetical discussions on such topics [as religious freedom and the emancipation of women] one has to take into account that...the discussion... often only makes the pretence of being concerned with the Koran and its proper interpretation. Often the true subject of the debate is the degree to which Western influence on the secular and religious aspects of life should be tolerated" (Jansen:1980:97,94).

Muslim women worldwide are clearly divided among themselves as to how far they

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[37]See 9.6.1 below, especially footnote 95.

[38]See Moosa, E:1995:147 for more detail regarding the establishment of this body.

[39]See 2.2.3 and 9.4.2.

[40]See 3.1 and 3.2.

would go in order to achieve liberation. In South Africa some modern Muslim women (feminists) are beginning to face a similar challenge where they would readily compromise religious precepts in order to be assured of equality but at the same time would deny that doing so would place them in the same category of, for example, Turkish feminists whose feminism has a secular as opposed to an Islamic base.[41] In my opinion, however, most Muslim women in South Africa would appear to fall into the category of conservatist-Islamist Muslims. South African Muslim women are also divided and within the context of a heterogeneous South African society and in the name of religion they face a different challenge in their quest to achieve equality in comparison with the rest of South African women.

It must be remembered that there is a difference between Islamic and extra-Islamic traditional cultures and generally the current low status of Muslim women is not due to the Islamic religion or culture (Saleh:1972:35,41).[42] The solution also does not lie in merely reforming or changing laws.[43] What is required, is that the practice and interpretation and system of social and cultural values that the law upholds and reflects must change. Thus, over and above legal changes and political awareness, cultural forces must also be reckoned with, but bearing in mind that if traditional cultures which help keep society intact are totally abandoned "...a cultural vacuum [can occur] in circumstances where there are no ready substitutes" (Nhlapo:1991: 116). What must therefore also be remembered is that ultimately constitutional rights cannot be guaranteed in isolation and without the co-operation of religious authorities and with due regard to customary and cultural practices. It has been postulated from an Islamic perspective that the roots of the debate on equality between the sexes do

[41]This is explained in 3.3 above.

[42]See 2.1.4.

[43]See 2.1.5.

not lie in religion but in the patriarchal nature of culture.[44] For this reason religion, as it is presently interpreted, cannot change the condition of women.

It appears that the United Nations (UN) goal of equality between the sexes or of the elimination of discrimination against women (CEDAW)[45] in any field which requires changes in law, social custom and belief in order to be realized, is inconsistent with Islam as it is practised today (Bruce:1971:365-366). Too much emphasis must, however, not be placed on laws and constitutions as guidelines to courts, for example, as a means of achieving this goal of equality (Rhoodie:1989:114; Gwagwa:1991: 131).[46]

It is evident that while some Arab signatories report to the UN that equality between the sexes has in fact been achieved, this is not true as is evident from the personal as well as public laws and the constitutions of these countries (El Saadawi:1988:11).[47] A document which can be compared to CEDAW and from which to gauge the status of Muslim women in the future[48] is called the Universal Islamic Declaration of Human

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[44]See 3.3 above. See also 2.1 in general and especially 2.1.4.

[45]See footnote 28.

[46]As was the case with superficially granting Muslims equal status in Israel, and as also generally proven to be the case in the US, there can be no guarantee that legal reform (constitutional or statutory) will do away with sexual inequality. See 6.2.8, 7.5.1 and 7.6.

[47]See above footnote 32 in the text.

[48]In this regard, it has been recommended by the political committee of the Arab Women's Solidarity Association (AWSA - an essentially modernist Arab non-governmental association which was granted this consultative status with the Economic and Social Council of the UN in 1985), at a conference held in Egypt in 1986, that, among other things, they "...aim to search all texts in Arab legislation that discriminate against women by analysing and explaining their implications; and to work towards their cancellation, modification or change... [and that]...feminist organisations in the Arab countries...struggle for the enactment of a civil personal status code to be applied to all citizens without discrimination on the basis of sex or religious belief" (AWSA:1988:149-150).

Rights (UIDHR)[49] which was proclaimed by the Islamic Council in 1981. Its purpose, as set out in its preamble[50], was to establish an Islamic order "wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, color, sex, origin or language" (Rhoodie:1989: 353). It is to be noted that this document appears to grant equality in all spheres but it does not mention *religion* as a sphere of equality and, yet interestingly, it uses the *Qur'an*, which emphatically states that both sexes are equal in the eyes of God,[51] and *Sunna* as its only guidelines.[52] As long as religion remains a sphere of inequality as was the case in the past and still is so, then the status of Muslim women will remain essentially unchanged.

3.4 CONCLUSION

It has been shown that the reaction to the challenge posed by the modern concern with human rights, particularly as it relates to the status of women, has divided Muslims into three main camps, namely modernists, conservatives and fundamentalists. It seems, however, that these reactions have failed to effectively redress the problem of women's status. The proponents of these views and their intolerance of each other has done more harm than good to the cause of women. Muslim women activists are also aligned with one or other of these three approaches. Hence their perception of inequality and the need for reform is dependent on the particular ideology they follow. International studies have indicated that the responses of these activists range

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[49]This is the second of two documents proclaimed by the Islamic Council and is referred to as the "Declaration of Human Rights" (UIDHR:1981:1). See 5.1.1.

[50]At (g) -(i) (UIDHR:1981:4).

[51]See footnote 30.

[52]UIDHR:1981:1.

from ultra-modernist to ultra-conservative with many permutations in between.[53] Unlike their non-Muslim counterparts, whose struggles are focused on the public sphere, most Muslim feminists are concentrating their efforts on the reform of MPL, in other words, in the domestic or traditionally private realm. Muslim women in South Africa want and need a balance when it comes to the application and implementation of MPL - they are asking for freedom of religion and not freedom from religion. It seems therefore that the above responses will not be of much assistance to Muslims in South Africa.

This chapter concludes that Islam, as it is presently interpreted, cannot change the condition of women. This confirms conclusions drawn in Chapter Two, where the rights accorded to women by Islam were outlined.[54] Arguments based on classical Islamic law and used to justify discrimination against Muslim women are not justifiable from either an Islamic law or a *Qur'anic* perspective. The founders of the four main schools of Islamic law themselves unanimously give precedence to the *Qur'an* in cases of conflict. It is a fact that the varied and often contradictory interpretations of the *Qur'an* have been monopolized by men who have been responsible for defining the status of women. Differences within the different translations of the *Qur'an* by scholars like Yusuf Ali, Marmaduke Pickthall and S. Abul A'la Maududi prove that all translations are only interpretations, that interpretations can differ and finally that historical contexts are fundamental to translations (Shirkat Gah:1992:i-iii). A combination of *ijtihad* together with the most equitable views taken from the four main schools of law could well provide Muslims in South Africa with a unique starting point towards an equitable code of MPL. In this way there is a link and continuity with the past which would only add more legitimacy to any type of legal reform undertaken.

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[53]See also 7.5.

[54]See 2.1.2.

Muslims in South Africa need to look afresh at what the *Qur'an* as the word of God has to say in this regard and consider the circumstances peculiar to South Africa in order to effectively redress discrimination against Muslim women. What is of particular relevance to Muslim women in South Africa is a feminist perspective to theology.[55] Women should confidently use the scriptures in an effort to bring about change. A call has been made for a reinterpretation of the *Qur'anic* perception of women.[56] This does not necessarily mean calling for a reinterpretation of Islam and the *Qur'an*.[57]

[55]See 2.2.4.1.

[56]See 2.2.4.1.

[57]Such a reinterpretation was in fact suggested by some academics at a conference on "Islam and Civil Society in South Africa" held at the University of South Africa in August 1994 (*al-Qalam*:1994b:5). See also Chapter Ten.

CHAPTER FOUR

CONSTITUTIONS AND JUDICIAL SYSTEM(S) IN ISLAM: A HISTORICAL EXAMINATION

4 INTRODUCTION

This chapter surveys the meanings attached to the concepts "constitution" and "constitutionality" both in Islamic doctrine and in Muslim countries. The origins, development and decline of the Islamic judicial system will also be considered. The aim is to distinguish such a system from secular systems *but also* to determine whether there is any Islamic justification for a differentiation (and simultaneous existence) of religious courts (dealing with MPL matters only) and secular courts (dealing with other matters, such as criminal and commercial matters). The office of the *qadi* (and in particular women's eligibility to be appointed to this office) will also be considered.

The discussion in this chapter will help provide the context for dealing with the judicial systems of various countries in Chapter Six and for making proposals for South Africa, in particular, in Chapter Nine.[1]

4.1 A BRIEF HISTORICAL BACKGROUND TO ISLAMIC CONSTITUTIONS

There is no real certainty as to what constitutes Islamic constitutional law. "Given the nomocratic base of the Islamic state, constitutional law was barely touched upon in legal writings and remained one of the least developed areas in the science of *Shari'a*" (Mayer:1978:3). Anderson (1957:19) writes that "...the constitutional law of Islam seems to be largely an *ex post facto* rationalization of the early history of

[1]See 9.8.5.

Islam on the basis of certain Islamic norms."

There are approximately 41 Muslim countries in the world:[2] 22 in Asia, 16 in Africa and 3 in Europe (Jain:1985:305). An-Na'im (1990:xiii) places the number of Muslim countries at 35, which is lower than that arrived at by Jain in 1985. Amin (1987:93) puts the figure at 42. The constitutional law project on which Jain worked involved intensive legal research and is thus arguably more accurate. These countries are influenced by different legal systems: Iran and Saudi Arabia have Islamic legal systems; Algeria and Egypt have civil law systems and Pakistan and Nigeria common law systems. The Indonesian system is based on Roman-Dutch law. There are also mixed and socialist legal systems. Islamic law and its influence in almost all of these countries is confined to the realm of MPL (Amin:1987:93-95).

Reference to a Muslim country does not necessarily imply that Islam is the state religion of the country. What is meant is that most of that country's population are followers of Islam. Most of these countries, however, do have Islam as the state religion, the Republics of Egypt and Pakistan and the monarchy of Saudi Arabia being examples. 39 of the 41 countries do have written constitutions. The two countries that, like Britain, do not have written constitutions are Oman and Saudi Arabia. Their statutes do, however, contain some documents of a constitutional nature based essentially on Islamic principles (Jain:1985:303). Interestingly Albania, which has a mainly Muslim population, has atheism as its basic creed (Jain:1985:303,308). This means that atheism is the official religion of the country. If the state intended to state a preference for neutrality, it would probably have been more appropriate to have referred to secularism or neutrality as its legal basis.

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[2]The countries that together constitute the Middle East are the North African countries of Algeria, Libya, Mauritania, Morocco, the Sahravi Republic and Tunisia, and the West Asian countries which include the remaining Arab countries together with Iran and Afghanistan. The countries which constitute the Persian or Arabian Gulf include Bahrain, Kuwait, Qatar, Oman, Saudi Arabia and the United Arab Emirates (Jain:1985:305).

The type of government in Muslim countries varies from country to country.[3] There is also uncertainty as to what constitutes an Islamic form of government as both the primary sources of Islam, namely the *Qur'an* and the Prophet Muhammad, did not specify any particular form of government (Jain:1985:308-309). Opinions vary as to what form of government constitutes a correct and "Islamic" type of government and whether or not Islamic law makes provision for it. As far as Islamic constitutions are concerned, the same uncertainty prevails with opinions varying between extremes (Fadlallah:1977:4). There appear to be about five different strands of thought in this regard.

According to the first view there are no real guidelines for constitutions in Islamic law. Thus Nolte (1958:298) states: "Although comparatively complete in matters of worship, family law, and even commercial transactions and private affairs in general, the Shari'ah was sketchy indeed when it came to public law..." He states further that modern Islamic states of the Middle East have based their establishment of constitutions and bills of rights on Western models (Nolte:1958:307). De Feyter (1988:19), however, writes that the "[s]tate is one, as is God. Separation of powers[4] is a concept contrary to this unitrary principle...national States consecrated by written Constitutions have no legal function in traditional Islamic law." Husaini (1980:12), while acknowledging the importance of the *Qur'an* as a source of Islamic constitutions, states that "[t]he Qur'an and the Prophet [sources of Islamic law] have said only a few casual things concerning the constitution of the State and usually much more is read into those few remarks than can reasonably be expected. Thus the making of the constitution and the creation of constitutional conventions were left entirely in the hands of the rulers and their people. For this reason it 'has remained unsystematised, uncodified, and to a degree indefinite.'" He further states that the

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[3]See Jain:1985:308-309 for more details on the types of governments in Muslim countries.

[4]Kumo (1977:3) endorses this view regarding the doctrine of the separation of powers.

Arab constitution (also referred to as the Islamic or Muslim constitution) really only took shape after the advent of Islam (Husaini:1980:vii). Husaini (1980:vii) explains that an Islamic constitution is meant to refer that constitution that should govern Muslims and a Muslim constitution is meant to refer that constitution which prevailed among Muslims regardless of whether it conforms to Islamic injunctions. O'Kane (1972:142-3) points out that interestingly enough the provisions (essentially the five compulsory pillars of Islam) that regulate a Muslim's relation and duties toward God - and is essentially what makes him or her Muslim - are not regulated by any positive legislation as is the case with MPL but that in the areas of constitutional, civil and penal laws "the Qur'an is content to provide only general and universal directives; it does not descend to details and particularities except in certain rare instances."

The second view regarding Islamic constitutions is the opposite of the first view in the sense that these (constitutional) guidelines are said to be implied in the various *Qur'anic* verses even though the *Qur'an* has no specific heading or chapter directly relating to this topic. The *Qur'anic* verses often quoted in this regard and which some claim are meant to act as a yardstick for Islamic states from which Islamic principles can be deduced, include Q.24:51; Q.17:80; Q.5:44-48; Q.6:57; Q.7:58 and Q.4:58. It is on the basis of these verses that various Muslim countries and academics have decided that constitutional authority vests in God alone (Ishaque: 1984:3,11-12; *A model of an Islamic Constitution*:1983:ii,34; Maudoodi:1986:5; Kazi:1978:5-6). However, in most of these *Qur'anic* references no detaila are given to act as guidelines which actually constitute Islamic constitutional law.

The third view is very simplistic and categorically states that the *Qur'an* is (or ought to be) the constitution of all Muslims without further question (Hasan:1978;Al-Farsy: 1990:39).

Fourthly, some academics like Ishaque (1984:5-6) regard the Prophet Muhammad's

"Farewell Sermon", delivered during his last pilgrimage (Haj) to a large gathering of people at Mecca a few months before his death in 632 C.E, as "... the ultimate criterion for adjudging the validity of exercise of all public and private powers". This Sermon is likened to a bill of rights (Mahmood:1984:32).

Finally, others regard the Constitution of the City-State of Medina (the first Islamic state, which came into existence in 622 C.E[5] during the time of the Prophet Muhammad) which was drafted by Muhammad for the people of Medina, which consisted of Jews, Christians and Arabs, as the first written constitution of the (Muslim) world. This constitution is divided into two parts and contains approximately 53 clauses. It is the opinion of these people that this Medinan constitution should serve as a document outlining the constitutional precedents which all Muslim countries should follow (Taji:1973:26; Amin:1978:1; Hamidullah:1941: 334).

An-Na'im (1985:336-337), however, is of the opinion that the concept of constitutionalism itself was at that stage [referring to the first Islamic state established by the Prophet Muhammad in Medina] not yet developed. He sums this up thus: "...as long as the texts [referring to the later Medinan *Qur'anic* verses as opposed to Meccan verses][6] on which the unconstitutional aspects of traditional Shari'a remain binding, and the first Islamic era remains the basic source of legal and political concepts, there is no prospect for Islamic constitutionalism." His solution to the problem of achieving Islamic constitutionalism lies in reforming Islamic law within an Islamic framework by replacing certain later Medinan verses with former and abrogated Meccan verses. He states that "...[a]ll the verses (and related Sunna) that constituted the basis of discrimination against women and non-Muslims were of the

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[5]See also 2.1.1, footnote 8.

[6]An-Na'im (1987:15) explains the Meccan and Medinan stages of *Qur'anic* revelation in 5.2.1 above footnote 82 in the text.

Medina and not the Mecca stage" (An-Na'im:1990:54).

Generally a constitution as perceived in the Western sense can be defined as "... a set of rules or procedures which sets out a framework for government and defines the institutions and convention of all forms of political power bases: executive, legislative and judicial. Although a constitution is usually given expression in a fundamental legal document, this need not be the case. The United Kingdom has no formal written constitution of this kind, but political behaviour is governed by powerful conventions which have evolved over centuries. These together with important laws...create clearly defined and regulated roles for all institutions of government" (Godsell:1990:50). A constitution therefore prescribes the mode in which a state is organized: it is that body of principles according to which a state is governed (Sykes:1982:202). Taji (1973:26) endorses this view stating that "...a constitution is a predetermined procedure designed to secure the continued existence and progress of a state...in accordance with its system of thought." Amin (1978:1) defines an Islamic constitution as those "...rules that govern the relationship of various people of the state with one another." It is also likened to a contract between the state and the community or individual. A contradiction is evident from the above definitions given by Muslim scholars in that they talk in one breath of the people's will prevailing in constituting an Islamic government (democracy) and of God's will being supreme (theocracy) (Maudoodi:1986:185). An Islamic state (theocracy) is in fact the opposite of a secular Western democracy. It has been suggested that in a wordly state a sovereign other than God is necessary and that the Prophet Muhammad was an example of such a sovereign since obedience to God was no impediment to full sovereignty as was contended by, among others, Hobbes and Austin (Husaini:1980: 54;57). An-Na'im (1990:70-71) espouses a more liberal opinion on the definition of a constitution and is of the opinion that there is more to constitutionalism than government in accordance with any "constitution".

Husaini (1980:1) says the following about the nature and form of the Arab

constitution: "[t]he form of the constitution during the Arab Khilafat[7] travelled the full course of the Aristotelian cycle and more. The pre-Islamic form was democratic; a stern theocratic despotism can be noticed under the Prophet; an aristocracy prevailed under Abu Bakr and Umar which degenerated into an oligarchy under Uthman; it was followed once more by a despotism under the Umayyads leading to revolt and revolution under the leadership of the Abbasids."

Women definitely had a low status as far as constitutional matters were concerned. They were "...specifically and authoritatively disqualified from holding high executive and judicial office on the ground of religion and sex, respectively" (An-Na'im:1985:335-6). A woman could not be a governor (*Khalifah*) nor head any government department or become a member of *shura* (council of elders or "senate"), which was a distinctively male body. She could, however, be appointed as an arbitrator and according to the *Hanafi* school of thought[8] even a judge (she was limited to dealing with civil matters only as opposed to criminal matters) although there were no female judges during the Arab Caliphate (Husaini:1980:7,123).[9] Until very recently (5 November 1996), for example, Benazir Bhutto was a female head of an Islamic state, namely Pakistan (*Cape Argus*:1996:3,1996a:2). She has thus proved critics like Maudoodi from her own country, who regard the appointment of a woman as a head of state or leader as unIslamic, wrong (Maudoodi:1986:243;262-3). These critics can nevertheless still argue that the fact that she held office does not make it

[7]Refers to and is defined as the institution or office of a *caliph* or a state which acknowledges the sovereignty of God. The term *caliph* has *Qur'anic* and historical connotations. In the *Qur'an* it is a generic term referring to mankind being God's regency or agent on earth (Q.2:30; Q.6:165; Ali:1946:24 fn 47,339 fn 988). Historically the term *caliph* refers to the 4 elected successors of the Prophet (Saunders:1965:34,44,60,64). In other words after the death of Muhammad his duties and powers were delegated to and exercised by these persons as elected deputies of God (Faruki:1971:259). See 2.1.1 and 2.1.1, footnote 12 for more detail.

[8]See 2.1.1 for an explanation.

[9]See 4.4.

"Islamic". However, as will be indicated, even though she was "First Lady" she was a "second-class" citizen, thus reflecting the paradoxical position of Pakistani women.[10] In *A model of an Islamic Constitution* (1983:6) written on Pakistan, in a chapter that can be likened to a bill of rights, it was stated in Article 9 that "[a]ll persons of equal merit are entitled to equal opportunity, and to equal wages for equal work. No person shall be discriminated against or denied the *opportunity to work* by reason of religious belief, colour, race, origin or language" (emphasis added). Sex, however, is clearly left out as a ground of exclusion and this appears to be standard practice in Islamic constitutions as I shall illustrate.[11] Muslim women are generally disqualified from holding public office under the pretext of Islamic law if this means that they would be exercising some form of authority over Muslim men.

4.2 A BRIEF HISTORY OF ISLAMIC JUDICIAL SYSTEM(S)

In pre-Islamic Arabia there was essentially no judicial authority or organized judicial system.[12] Custom prevailed with the elder acting as judge of his tribe (Al Aseer: 1976:7-8). Gottheil (1908:385) writes that: "Among the heathen Arabs we find few traces of any recognized and standard law or order." While certain authors, like Emile Tyan and Jurji (1940:36), dispute the originality and even superiority of the Islamic judicial system, others, like Guraya (1984:9,14-15,184;1979:323) and Rahman (1966:200), have come to different conclusions which prove that the Islamic judicial system can be clearly distinguished from the pre-Islamic system which was based on arbitration and other private arrangements. The distinction between the

[10]See 6.3.3 below.

[11]See, for example, 6.3.1-6.3.3.

[12]For a detailed discussion on justice in pre-Islamic Arabia see Guraya:1984:39-71;1979: 323-349 and Al Aseer:1976:6-9.

judicial system of the two periods is apparent from the *Qur'an*.[13] While several court structures existed side by side at the same time during the early period of Islam, each fulfilling its own function in, for example, criminal, civil and personal law matters, it became standard practice to unify the judicial system. Although *Shari'a* courts were incorporated into this unified system, their jurisdiction was limited to personal law matters. The *Qur'an* was regarded as a primary source of Islamic law and justice as is evident from the numerous verses within it which refer to justice.[14] The Prophet Muhammad as the first Muslim judge and chief administrator of justice (Q.4:59) was to administer justice in accordance with the content of the *Qur'an* (Q.10:15) (Dallal: 1986:9; Al Aseer:1976:9,104; Hassan:1963:23; Gottheil:1908:385; Al-Azami:1985: 15,20; Khan:1989:77).

Morality was emphasized by the Prophet, who stressed that his authority was fallible and that if, therefore, he should err in giving a judgement and the person in whose favour judgement was wrongly handed down accepts his verdict, then the decision would not absolve this person's inevitable accountability to God (Khan:1989:77). During Muhammad's period of prophethood there was only one court for all Muslims in Medina over which he presided. He listened to appeals as well. Hence there was no "independence of the judiciary", so to speak, as the Prophet was vested with executive, judicial and legislative powers (Qadri:1980:8). For cases outside of Medina he delegated his judicial power to another person appointed for this purpose (Al Aseer:1976:10; Qadri:1980:8). If he had to leave Medina he appointed learned people, who embraced Islam, as substitutes (Qadri:1980:9; Ullah:1990:4). While theoretically there was no separation of powers, the expansion of the Muslim state led to the complete independence of the judiciary at an early stage of the development of

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[13]Chapter Four verse 65 (Q.4:65).

[14]The following verses refer to the *Qur'an* as a source of justice: Q.16:90; Q.4:58; Q.4:105; Q.4:135; Q.5:9; Q.5:44-45; Q.5:47-48; [Q.5:49-53]; Q.5:50; Q.6:152; Q.38:26; Q.42:15-17; Q.50:7-9.

Islamic jurisprudence (Fadlallah:1977:12; Kumo:1977:3;6). Non-Muslims were at liberty to decide their disputes in terms of their own personal laws (Q.5:47,50; Al Aseer:1976:26). They could, however, make use of Islamic courts and when they did, judgements were often given in their favour (Mahmud:1982:354). Non-Muslims often brought their disputes to the Prophet for settlement and he decided these disputes according to their own laws (Qadri:1980:13). This example would support the argument that, as a minority in South Africa, Muslims can make use of secular courts to adjudicate their disputes on the basis of their own personal law.[15]

Rules relating to judicial procedure concerning, for example, evidence and witnesses, are also clearly spelt out in the *Qur'an*.[16] The *Sunna* of the Prophet as a source of law also provides much guidance with regard to judicial procedure and justice (Guraya:1984:129-146; Siddiqui:1974:2). There are various Prophetic *dicta* giving guidance in this regard. On justice there is, for example, a Prophetic tradition to the effect that "'you can give an unjust law to a just judge, but you cannot give a just law to an unjust judge'" (Rosen:1990:76). The burden of proof, for example, lay with the plaintiff, while a defendant who denies the claim is required to take the oath (Abbas:1965:30-31; Dallal:1986:14). The oath played a pivotal role in decisions and today still finds application in various countries like Nigeria.[17] The issues relating to evidence, witnesses, jurisdiction and the oath which are pivotal to any hearing will not be detailed here.[18]

As will be indicated, Islamic law did not establish a doctrine of judicial precedent

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[15]See 8.2, 8.6 and 9.8.5.

[16]Q.2:282-283; Q.24:4.

[17]See also 9.3, footnote 33 for the role of the oath for Muslims in South Africa.

[18]For more information see Qadri:1973:487 and Shapiro:1981:208.

(Liebesny:1972:44; Weiss:1978:205-206; Coulson:1957:60).[19] While judicial precedent is considered to be a source of law in some Western legal systems, "[i]n contrast, judge-made law is conspicuous by its absence in the Islamic legal system. A judge is not even bound by his own previous judgement if he [later] realises that it may not have been correct. The decision may have a [decisive] effect on the parties [in] the case but the judgement does not constitute law and other judges are not bound by it" (Bulbulia:1985:225). There is also no jury and formal system of appeal in Islam (Hammerton:1990:6A.240.19,47).[20] It is clear that the Islamic judicial system had its own original and unique character which is not necessarily complied with in contemporary systems prevailing in Muslim countries. Today imitation and formalism, motivated by historical considerations, reign supreme (International Commission of Jurists:1982:77).

4.3 DEVELOPMENTS LEADING TO JUDICIAL DECLINE

At the time of his death, "[t]he Holy Prophet of Islam left a well organized judicial system. He was the Chief Justice of the Supreme Court of Madinah. He had appointed provincial and district judges in the provinces which were brought within the jurisdiction of the central government at Madinah. Abu Bakr [caliph] was elected as his successor...and acted as the Chief Justice of the Supreme Court of Madinah..." (Guraya:1984:226). In other words, after the death of Muhammad the system of courts instituted by him was continued by his successors or the first four *caliphs*, namely Abu Bakr, Umar, Uthman and Ali. Each of these *caliphs* contributed in their own unique way to the system (Al Aseer:1976:11). The administration under Abu Bakr was described as the "rule of law" (Guraya:1984:240). After Abu Bakr, the *caliph* Umar acted as the judge of Medina. While the Prophet Muhammad only

[19]See 6.2.1.

[20]See 4.4 and 4.5.

appointed judges in distant places (where he personally could not be available), Umar on the other hand appointed judges in the same area where he resided. This indicates both an overlap and separation of the office of *caliph* and judge (or separation of the executive from the judicial office). The judge became a full-time salaried worker (Guraya:1984a:97-135;1984:255,302 passim; Al Aseer:1976:12,15,18). The *caliphs* Ali and Umar were responsible for setting out the "ideal" criteria (qualities/ qualifications) with which these judges had to comply in order to qualify for appointment (Al Aseer:1976:16,110; Gottheil:1908:387; Alwani:1990:15-20; Noori and Amin:1987:44-45).

There exists some controversy about the authenticity of the documents which contain Umar's criteria but this does not detract from the historical importance of these documents (Serjeant:1984:65; Serjeant:1991:65; Margoliouth:1910:308; Hammerton: 1990:6A.240.40). From the features of the judicial office at the time of the first four *caliphs* it appears that Islamic law endorses the constitutional principles of the supremacy of the law (rule of law) and independence of the judiciary (Kumo:1978: 102-103; Dallal:1986:9; Noori and Amin:1987:72). This does not, however, necessarily mean that independence of the judiciary is present within Muslim societies (Yusuf:1982:30).

Thus after the death of Prophet Muhammad, the *caliph*, who was not necessarily competent in Islamic law, was the main judicial officer who in turn appointed *qadis* or judges as his deputies/assistants (Qadri:1973;484; Mahmood:1985:90). There are, however, differences of opinion in this regard (Azad:1987:49). The *caliph* defined their (the *quda's*) jurisdiction and could dismiss them as he pleased (Coulson:1957:57; see also footnote 29). In early Islam this theory worked in practice, and while this period formed the foundation for the system of *Shari'a* courts, the situation changed as judicial appointments were regulated and the judicial office became more established and professional basically along the same pattern as in modern judicial

systems (Mahmood:1985:85-86;Ullah:1990:17-20). Thus Islamic courts "...administered justice under public scrutiny following the adversary system after hearing both parties and considering their evidence...observed the rules of natural justice and had to record formal judgement...the rule of *res judicata* (a case already decided) was also followed..." (Mahmood:1985:88-89).[21] Having due regard to the process of juristic reasoning and well-defined general principles, the derogatory way in which the term "qadi justice" has been used by especially American and English judges to refer to the use of unlimited discretion is unfounded (Makdisi:1985:63,65; Azad:1987:114; Shapiro:1981:194; Coulson:1969:40,57; Hammerton:1990: 6A.240.36,39,46; Ghani:1983:365; Christelow:1985:7). Rosen (1990:18,59-60; 1980-1981:217-218,239-240) also emphasizes that due regard must be taken of the cultural and equity considerations and assumptions taken into account by Muslim judges. In Islamic law there is no institution like the "bar". There are also no attorneys in the sense as we understand the term today (Turabi:1987:9; Dudley: 1982:78). Instead, "...defending a party's interests before a court is, both in Muslim theory and practice, purely an application of the contract of agency...He ['attorney'] is an agent, a wakil; and the contract which binds him to his client is a ...contract of agency" (Tyan:1955 [1984]:257). "The absence of a lawyer as intermediary is linked with a law focused on the judge (*qadi*) and the courtroom" (Nader:1985:2). Dwyer (1990:4-5) highlights the fact that, compared to the US, lawyers in most Middle Eastern courts play a minor role in comparison with litigants and judges who are the primary actors. While El Fadl (1992:270) is of the opinion that this could be construed as generalizing "...from the practice of a specific locality that it is identifying an Islamic legal phenomenon", it seems to be an accurate reflection of the position in Islamic law. Concerning Morocco, Rosen (1990:64) writes that the role of lawyers has increased in recent years. Azad (1987:106-113) discusses in detail the important role of advocates in a modern court of law from an Islamic point of view as

[21]For more detail see Ullah:1990:17-20.

Ulama has not given it the attention it deserves.[22]

The periods following the first four *caliphs* are indicative of changes in the judicial system toward "modernization". Fragmentation and weakening of the judicial system were inevitable (Al Aseer:1976:18,20,23-25; Anderson and Coulson:1980:18-22,32). As indicated, the doors of *ijtihad* (independent reasoning) as a source of law were closed in the tenth century. Judges either based their decisions on schools of law or they would consult *muftis* (jurisconsults) (Al Aseer:1976:76,94; Liebesny:1972:44; Rahman:1979:81).[23] The advice of the founders of the schools was forgotten as blind imitation (*taqlid*) of a particular school became the fashion. This is still the position today because the jurisprudential allegiance of the disputing parties and even the judge to a particular school of Islamic law has proved to be a obstacle that hampers reform in precisely those areas most in need of it (El Naiem:1984:82-83).

"It is interesting to observe...that while the office of jurist was universally respected, that of *qadi* or judge was frequently deprecated" (Anderson:1957:20). Suitable candidates, however, began to refuse office in the early centuries of Islam already because "...they frequently found themselves forced to bend the law to suit the will of authority" (Juynboll:1927:606; Amedroz:1910:774; Coulson:1956:17; Coulson:1969: 58,64). The "...more pious among them...began to feel that their allegiance lay to the religious law rather than the interests of the governor" (Coulson:1956:215). This attitude, intimately connected with the moral nature of Islamic law, was attributed partly to fear that independence would not be guaranteed and partly by conservative *Ulama* interpretations attached to *Hadith* of the Prophet Muhammad in this regard

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[22]For more procedural detail on how trials traditionally took place in terms of Islamic law see Dudley:1982:78. For more historical detail on the administration of justice in Islam and the changes it underwent during the periods of early history or the Caliphate see Qadri:1980 and Ullah:1990:1-20. See also 8.3 and 8.6 for ways of improving the role of lawyers and advocates in the disputation process.

[23]See 2.1.1; 2.1.1, footnote 16; 3.1 and 6.2.1.

(Kumo:1978:102-106; Coulson:1956:212; Denny:1985:222; Kumo:1977:8).

Theoretically there is no separation of powers in Islamic legal theory and practice and therefore no notion of independence of the judiciary (Coulson:1957:57; Arzt:1990: 207; Adegbite:1977a:4). In Western societies human rights cannot be effectively safeguarded and guaranteed without an independent judiciary. Nevertheless, even an independent judiciary can sometimes fail in this regard. While it might be that the spirit of Islam is opposed to the notion of an independent judiciary as Coulson (1957:59) points out, he also notes that the *qadi* assumes "...the role of arbiter rather than judge. His duty is to settle disputes by reconciliation of the parties if possible, rather than by asserting where the right lies" (Coulson:1957:59). Qadri (1980:4) writes: "During the Caliphate periods, the duty of the judges was merely to settle disputes between the litigating parties." It was only later that their jurisdiction was extended to include personal law issues as such (Qadri:1980:4). This function of the *qadi* will become clearer when dispute settlement is discussed below.[24] While the Prophet assumed a legislative, judicial and executive role, this does not mean that judicial independence did not develop later in Islamic law.[25] The negative attitude of the judges was further fuelled by the following *Hadiths*. There is a Prophetic tradition stating that judges "...are of three types: two of whom will go to hell and the other to paradise" (Kumo:1978:106). "The two are the ignorant who accept the office and the learned who deviate from the Sharia. The third is the learned who follows the Sharia" (Kumo:1978:106 fn 22; Al Aseer:1976:103; Siddiqui:1974:2; Doi:1981:14). There is another tradition to the effect that being appointed a *qadi* is like being "slaughtered without a knife" (Doi:1981:15). The Prophet is also reported to have said that "...a camel could pass through the eye of a needle more easily than a qadi could enter heaven" (Christelow:1985:262).

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[24]See 8.3.

[25]See 4.2 and 4.3 above.

The moral attitude of the judges described above is also said to have resulted in the lack of procedural formalism in Islamic law and hence the coining of the term "*qadi* justice" (Arjomand:1989:114).[26] In early Islam bribery and corruption were prevalent among the judiciary and *qadis* often "...suffered physical maltreatment - even death - at the hands of dissatisfied political authorities" (Coulson:1956:213). "Traditions were put into currency in which the Prophet was made to utter grave warnings against accepting the position of kadi...[Even] Abu Hanifa...declined to fill the office of judge" (Juynboll:1927:607; Fyzee:1964:409-410).[27] Thus "[f]rom the outset of Islam and for some two centuries the office of Kadi was accepted with fear and reluctance. The Prophet's utterances on the matter were ominous" (Amedroz:1910:773). Kumo (1978:106) partly attributes the degeneration and corruption of the judiciary in Turkey and Egypt in the 1700s and 1800s to the negative attitude of the *Ulama* in their interpretations of the Prophetic traditions described above. Reform and secularism further restricted the competence of the *qadi* (Al Aseer:1976:35).

4.4 THE OFFICE[28] OF THE *QADI*[29] (JUDGE) TODAY

Today codes of conduct usually lay down the rules by which a judge should abide. While the *caliphs* Ali and Umar laid down several requirements in this regard, the

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[26]See 4.3 above.

[27]See reference to *Hadiths* above.

[28]Here reference is made to appointment to or the establishment of the office of *qadi* rather than to the actual constitution of a court which, incidentally, initially often took the form of a home (of the judge) or mosque and later was held in a building set aside for this purpose (Al Aseer:1976:17,108). The court (office), as such, is purported to have originated during the *Umayyad* period when the judge was the representative of the governor (Hammerton:1990:6A.240.19; Endress:1988:59).

[29]*Qadi* (plural *quda*) means religious judge (Amin:1990:128). The term *qadi* appears 62 times in the *Qur'an* where it refers mainly to God as agent and His decision-making power (Lubbe:1989:83).

appointment and qualifications of a judge are subject to intense scrutiny and ethical standards and vary from school to school. The literature with regard to the rules which a judge must follow varies between extremes and often contains preposterous recommendations and requirements. The number of conditions, for example, that need to be complied with in order to be eligible for office range from three to thirty (Azad:1987:9). The moral nature of this office is evident from statements like the following which appear in almost every source in this regard: "It [office of *qadi*] is considered to be one of the most noble acts of devotion, and is the most important duty, next only to belief in God" (Qadri:1973:481-482; Al Aseer:1976:35; Tyan:1955 [1984]:243). At the other extreme are requirements that the judge should, for example, be asked "...to constantly study the Qur'an, remain punctual in prayers, treat the parties justly, walk in dignity, speak little and gently, not to look around too much and be restrained in movements" (Qadri:1973:483). It can be understood that to be biased and partial[30] are definitely not qualities that a judge should possess but surely one's gait has nothing to do with one's ability to judge a case (Mahmood:1985: 84,89). The judge "...has to treat the parties, if they are both believers, as equals in every respect" (Juynboll:1927:606). Statements like these need to be critically analyzed and examined because in present times (taking into consideration the evolution of the role of the judge in contemporary society) a judge needs to be schooled in psychology and sociology in addition to being qualified in Islamic and secular law (Al Aseer:1976: 198). "Now-a-days a *qadi* who is well versed in the *Shari'ah* but ignorant of modern problems does not seem to prove himself competent for the post" (Azad:1987:114). The *caliph* Umar advised nobility and wealth as qualities to be looked for in appointing a judge as these would make him less suspect in that a rich person would not be easily bribed and a person belonging to a noble family would not fear the consequences of his decision. Generally he should also not

[30]In a matter between the *caliph* Umar and a Jew, the *qadi*, by merely getting up from his seat as a sign of respect to the *caliph*, was considered partial and therefore immediately dismissed (Ullah:1990:7-8).

accept gifts (Azad:1985:52;56). Over and above these ethical requirements the Muslim judge, as "culture broker" and representative of the court as mediating institution, has to contend with a number of other constraints, for example, the views of his own school of thought (law), the secular law of his country, reform legislation and his own social philosophy (Antoun:1980:455-457).[31]

According to *Shafi'i* jurists the importance of this office is reflected in the recommendation that "'a Muslim who feels himself specially capable of exercising the functions of a judge should solicit those functions..." (Qadri:1973:482). So, in spite of the negative picture painted above, the *Shafi'i* school of law actually encouraged people who felt themselves capable of exercising the functions of a judge to do so (Qadri:1980:3).[32] According to the *Hanafi* jurists, however, an ignorant person can be appointed a judge because he merely has to base his decision on the opinion of others (Qadri:1973:482; Al Aseer:1976:106; Amedroz:1910:765; Gottheil:1908:393). Such an appointment should not be solicited or coveted. While a judge may not be remunerated for his work, he is entitled to living expenses (Qadri:1973:483). Later, of course, he became a salaried officer (Habachy:1959-1960:55).

A controversial question among the different schools of law is whether a woman is competent to be appointed as a judge. In terms of the *Hanafi* school of law, because a woman qualifies as a witness, she may execute this essentially male task except in cases concerning punishment and retaliation as her evidence in these matters is not admissible. According to the *Shafi'i* and *Hanbali* school of law she may not hold this office at all. According to a third view, namely that of Al Tabari, a woman could be a judge in all matters, a view that accords more with the *Qur'anic* norm of equality between the sexes (Al Aseer:1976: 106; Qadri:1973:483; Qadri:1980:4; Farani:1980:

[31]See 8.3 below.

[32]See 4.3.

9; Rahman:1966:201; Azad:1987:10-11). There are no historical data referring to the possible appointment of women as judges (Azad:1987:13-14). Females were considered "...unfit for the difficulties of high office, and for judgements being made dependent on them" (Amedroz:1910:762).

The judge usually exercised a discretion as to the date and time of hearing cases involving women (Azad:1985:58). "Where women were involved special care was taken to select a convenient time; they were given priority...and where identification or any other examination of female participants were necessary, trusted matrons were assigned for the purpose" (Arafat:1985:21). In Iran, for example, women are not even allowed to become judges or magistrates (Mayer:1991b:131; Ahmed:1992: 232).[33] This is contrary to the *Qur'anic* injunction that women may follow any profession (Q.4:32). In Yemen women are banned from any profession related to the judiciary and law (Shaalan:1988:120). Even though in Egypt there are no explicit provisions preventing women from occupying such posts, to date no female judge has been appointed. The presence of a woman expert is, however, required in a juvenile trial court (Rateb:1988:99; Ahmed:1992:208). In Indonesia women are allowed to be judges. As far as Pakistan is concerned it was social taboos rather than regulations which prevented women from entering the judiciary (Shaheed:1986:41). In Pakistan, therefore, women had to fight for this right and only gained it after a lengthy legal battle (Azad:1987:17-19).[34] The relevant case was that of Ansar Burney v Federation of Pakistan[35] (Mayer:1991b:105-106,230). Interestingly, it has been noted that during the year 1968 the US only had three female federal judges out of a total of 422 judges (Gordon:1968:20). This shows that judicial imbalances of this nature are not only restricted to Muslim countries.

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[33]See Mayer:1990:142 and 1991b:35,85 for the status of the Iranian judiciary.

[34]See 6.3.3.

[35]PLD FSC 1983, 73. For a detailed discussion of this Federal Shariat Court decision and the arguments raised in court see Patel:1986:120-125.

The testimony of Muslim women is equated to half that of a man and the rider relating to "forgetfulness" added to the *Qur'anic* verse[36] in this regard is often used to substantiate the argument as to why women are not eligible to become judges (Muslehuddin:1988:30). This then leaves the question as to whether a strong memory instead of, for example, practical experience is the determining factor (Azad:1987: 15). So too, for example, the evidence of an expert female witness is less credible than that of an illiterate male. Other completely irrelevant criteria are used to advance the argument as to why women cannot become judges; for example, her speech and physical figure/appearance might prove to be too alluring and so forth (Azad:1987:17). It is interesting to note that in Muslim countries where women practice as lawyers, they are usually treated as being suitable for matters relating to family law as opposed to commercial or criminal law. Interestingly, the same can be said for Western women practising law in Australia. In Australia, just to mention another Western country, women are also not considered representative enough in the judiciary and a call has been made for more women judges (Australian Law Reform Commission Report No.69 Part II:1994:190,201).

While the *qadi's* jurisdiction was basically limited to personal law matters, he also undertook certain non-judicial duties; for example, he administered pious foundations (*wakfs*) and estates of orphans and drew up marriage contracts for women who did not have male relatives. A *qadi* normally administered justice alone, his decision being final except in the case of recourse to *mazalim* courts, which could function as a kind of appeal court in cases where parties were dissatisfied with the decision of a *qadi*.

There is a difference of opinion regarding the existence of hierarchical appellate structures in the Islamic legal system. Shapiro (1981:194-195,222; 1992:299,330; 1980:637) attributes the theoretical lack of appeal in Islamic law to cultural and political factors, a "peculiar combination" of dual legal systems and also to either the

[36]Q.2:282.

absence, or weak hierarchy, of Islamic political and religious organizations. According to him there is no higher level of (religious) appeal courts above the *qadis* because dissatisfied or reluctant litigants could directly approach the *caliph* as the highest political authority (Shapiro:1981:211). However, "[t]hree elements of *mazalim* [secular] jurisdiction intersect to make it an appeals jurisdiction imposed over the *kadi*. First, it is a court of complaints against government officials and the *kadi* is a government official. Second, it is a kind of equity court designated to do...justice in cases in which...the *kadi* has been incapable of doing justice...Third, the *mazalim* jurisdiction is peculiarly connected to the head of the regime [and] inheres in the caliph, sultan, or governor" (Shapiro:1981:211-212). Powers (1992:315), however, on the basis of a detailed study in this respect including a re-examination of Islamic legal theory, disagrees with Shapiro's argument as to the non-existence of appeals in classical Islamic law and concludes that "...hierarchical organization was a regular feature of Muslim polities." He further points out that as the *mazalim* court was essentially secular, it was not bound by rules of Islamic law as would be the case in a *Shari'a* or *qadi's* court (Powers:1992:316).[37] Shapiro, he writes, "...has been poorly served by Islamist scholarship on the nature and organization of the qadi's court and that quasi-appellate structures were more common in Muslim societies than he has thought" (Powers:1992:317).

At most the *qadi* could be instructed to consult qualified jurists for their religious opinions (*fatwas*). These opinions can be compared to the *responsa* given by the Roman jurists (Liebesny:1967:18-19). Later this practice was developed into a system in the Muslim West[38] (Juynboll:1927:607; Tyan:1978:373; Weiss:1987:125; Gottheil:1908:388; Anderson:1976:12-14; Zysow:1984:45; Mayer:1978:16).[39] The

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[37]See also 4.5.

[38]North Africa, Spain, Egypt and Syria.

[39]See 6.2.1.

qadi court can then be regarded as a dispute-resolution institution expounding the law since the *qadi* was not considered a lawmaker. Historically the evolution of the office of the *qadi* was to pass through four successive stages from its origin under the rule of the first Umayyad *caliphs* (661 C.E), when provincial governors of the newly established Muslim empires began to delegate this function to others (Weiss:1987: 124; Muslehuddin:1988:69 passim). In the Mamluk period (1264 C.E), for example, two new phenomena were firstly the increase in the number of chief judges/main judicial officers in the principal divisions of the realm but they remained essentially subordinate to the chief judge in the capital; and secondly, the appointment of three more chief judgeships in the capital, besides that of *Shafi'i*, for the other main *Sunni* schools of law, namely *Hanafi, Maliki* and *Hanbali* and their corresponding figures in the principal divisions of the realm (Tyan:1978:374; Escovitz:1982:529; Escovitz: 1983:147)

4.5 *SHARI'A* (ISLAMIC) COURTS AND THEIR DECLINE FROM UNIFIED TO PARALLEL JUDICIAL SYSTEMS

As indicated,[40] Muslim countries under the influence of colonialism and European codes easily secularized commercial and criminal law, while family law (MPL) has remained relatively unchanged and static because of its divine origin. "Islamic law was not abolished nor did it cease to function but it was relegated to the areas of personal and family law" (Davies:1988:75). In practice this meant that new courts would have to be created as *Shari'a* (Islamic) courts as the then main (not necessarily sole) and standard judicial organs were unable to meet the needs of the time. The judicial system also included "secular" courts to administer essentially criminal justice. These courts were presided over by police (*shurta*) for criminal trials; by the inspector of markets (*muhtasib*) for summary disposal of commercial disputes relating to, for example, fraud and nuisance; and by the court of complaints/appeals (*mazalim*)

[40]See 2.1.5. See also 6.4.

for state trials. These courts applied Islamic law principles but supplemented them with custom (Anderson and Coulson:1980:57-58; Tyan:1955 [1984]:259 passim; Jurji: 1940:47; Ziadeh:1987:20,22; Shapiro:1981:206,211; Anderson:1976:14; Ziadeh: 1959:65; Coulson:1969:66; Anderson:1957:21; Anderson:1966-1967:83-84; Liebesny:1967:19). Arafat refers to "...three institutions which were meant to guard the course of justice and fair dealing: the judge in court, the controller of civic and business affairs and the commissioner for injustices [of the court of complaints], who is an earlier equivalent of the ombudsman...whose function...it was to investigate any form of injustice...particularly when resort to the ordinary process of law had not satisfied them [community/individuals]...This Commissioner had wider jurisdiction and higher authority than a judge" (Arafat:1985:21-22). Arafat (1985:21-22) must be referring to the *mazalim* court when he refers to the "Commissioner for injustices". While the *mazalim* court could hear complaints against the *qadi*, sometimes the *qadi* held both *Shari'a* and *mazalim* jurisdiction (Shapiro:1981:207). Certain cases were also heard in these secular courts because the absence of appeal in Islamic law sometimes resulted in unscrupulous defendants avoiding civil and criminal liability (Sachedina:1987:40).[41]

In most Muslim countries this has resulted in a dichotomy or twofold administration of justice because jurisdiction is either in the secular or *Shari'a* court (Jurji:1940:38; Shapiro:1981:205).[42] Theoretically, however, a Muslim judge is supposed to decide all cases involving issues of civil and criminal law (Juynboll:1927:606; Tyan:1978: 373; Rahman:1966:199; Denny:1985:221). It is interesting to note that in all the countries referred to in Chapter Six below, with the exception of Saudi Arabia,[43] the *Shari'a* courts were solely responsible for adjudicating MPL issues while other

[41]See 4.4.

[42]See in general the judicial systems of the countries discussed in Chapter Six.

[43]See 4.6.

commercial and criminal issues were dealt with in the secular courts (Dallal:1986:17; Habachy:1959-1960:49; Anderson:1990:104; Anderson:1976:33; Majul:1978:114). This duality still exists today in all countries[44] and the unified Islamic court continues to be divided into *Shari'a* courts (dealing with personal law matters) and secular courts (for all other matters) (Al Aseer:1976:72,146). A brief historical background follows while further development in this regard will be outlined in Chapter Six.

4.6 HISTORICAL BACKGROUND TO THE DECLINE OF THE UNIFIED ISLAMIC COURT

Many reasons are cited for the decline of the Islamic court from a single court into two different courts, namely *Shari'a* and secular courts. Al Aseer (1976:119-145) outlines the main causes for the decline of the Islamic court into two tribunals as follows: 1) confusion in applying the judicial system; for example, judges from different schools of law came to different conclusions in the same case; 2) the impact of the West; and 3) defects in the system of the plurality of courts led to confusion and resulted in the weakening of both the judicial framework and faith in Islam as secular courts gained precedence over *Shari'a* courts. This happened despite the importance of family affairs for any society. The concentration of religious functions in the hands of the judge further contributed to the idea of separation of church and state and the division of the Islamic court into two tribunals.

Decline was obvious throughout the Ottoman state, that is long before the Tanzimat[45] reforms which started around 1850 in the Ottoman Empire. However, Islamic law was not the cause of this corruption and decline (Al Aseer:1976:119-120). The

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[44]With the exception of Turkey, which has completely abolished Islamic law in favour of secular law and where the two court systems have been reunified into upholding the one secular law.

[45]Tanzimat means "putting things in order" (Ziadeh:1987:23).

introduction of competing law courts also curtailed the monopoly which the *qadi* held over all things legal (Gerber:1981:132).

After the Tanzimat there followed the development of two courts: the *Shari'a* and the secular. Islam made no real distinction between the civil and religious aspects of Islamic law. Both aspects were vested in the *caliphs* during their reign. New codes introduced by the Ottomans (Turks) called for a new secular system of courts called *nizamiyyah* courts which were then instituted as part of the Tanzimat. Thus began the erosion of the *Shari'a* court whose emphasis shifted from dealing exclusively with matters between Muslims to matters involving purely personal laws. In spite of limited Ottoman influence, the system of this secular court was not enforced in Saudi Arabia and hence there is no division of the Islamic court into a *Shari'a* and secular court. Saudi Arabia is therefore unique in the sense that the one court that existed since early Islam is still in existence today. All cases are decided in accordance with Islamic law (Al Aseer:1976:67-68,73).

The introduction of the *Majallat*[46] (a compendium of "secular" judicial ordinances or a codification of Islamic law rules of procedure and civil law acceptable to both Muslims and non-Muslims), although it was derived from Islamic law, was to be administered by the secular *nizamiyyah* courts only. Another development deriving from the Tanzimat period was the creation of the mixed courts[47] (Al Aseer:1976:36-37,40-42; Anderson and Coulson:1980:37-38; Ziadeh:1987:24; Anderson:1957:24).

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[46]For more detail on the *Majallat* or the Ottoman code of civil law issued between 1869 and 1876 see Starr:1992:34-35,201; Mahmassani:1961:42-47; Liebesny:1953:131-132; Liebesny:1967:21-22. This body of independent and secular law was, incidentally, never applied in Egypt or Saudi Arabia (Al Aseer:1976:41; Jurji:1940:38). Nevertheless, the mixed courts of Egypt had the same effect of restricting Islamic law to the *Shari'a* courts and hence continuing the dichotomy between the secular and Islamic courts (Anderson and Coulson:1980:38). See 6.2.1 and 6.3.1.

[47]See 6.3.1 below.

4.7 CONCLUSION

A study of the historical background of Islamic constitutions reveals uncertainty about what constitutes Islamic constitutional law as well as a variety of approaches to the issue. It is not clear what an Islamic constitution is or should be. Because of the uncertainty, some Muslim countries have opted for Western constitutional models. That this uncertainty has had dire consequences for Muslim women will be shown in Chapter Six, where these countries are discussed.

From this Chapter it can also be concluded that there is no real *Qur'anic* impediment against Muslim women becoming judges. Non-Muslims, although free to decide their disputes in terms of their own personal laws, often resorted to Islamic courts for adjudication of their disputes. Non-Muslims are, however, bound to Islamic civil and criminal law. This makes a good argument in favour of the proposal that Muslims, because they constitute 1.1% of the total South African population, should make use of existing Muslim judicial systems and/or secular courts instead of creating separate *Shari'a* courts to adjudicate their disputes on the basis of their own personal law.[48] The function of the *qadi* to act as arbiter and mediator rather than to determine which party wins or loses a case serves to strengthen the argument in favour of the "minimalist option" advocated below[49], because existing Muslim judicial officers can continue with their current role as essentially mediators and arbitrators without the state having to create an elaborate judicial office.

MPL, because of its divine origin, has remained relatively unchanged. However, the secularization of commercial and criminal law meant that new courts had to be

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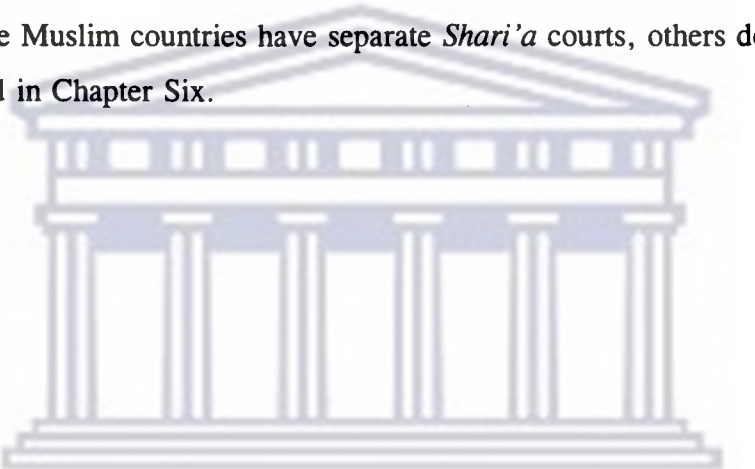
[48]See Chapter Eight and 9.8.5.

[49]See 9.8.5.

created as *Shari'a* courts, as the then main and standard judicial organs were unable to meet the needs and demands of the time. As will be demonstrated in Chapter Six, where the judicial systems of Muslim countries are discussed, in most of these countries this has resulted in a dichotomy or twofold administration of justice because jurisdiction is either in the secular or *Shari'a* court. Theoretically, however, *Shari'a* courts and their Muslim judges are supposed to decide all cases irrespective of whether they involve issues of civil (family) or criminal law. This chapter therefore lays the basis for the argument that there is no Islamic justification for the enforcement of MPL, on the one hand and, for example, commercial and criminal law on the other in separate courts. This argument is further supported by the fact that while some Muslim countries have separate *Shari'a* courts, others do not. This will be detailed in Chapter Six.



CHAPTER FIVE

ISLAM, HUMAN RIGHTS AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A HISTORICAL PERSPECTIVE

5 INTRODUCTION

The purpose of this chapter is, firstly, to point out the multi-faceted problems relating to freedom of religion (whether for a group or as a human right) and its manifestations especially in so far as South Africa, for whom these issues are imminent, can learn from 40 years of international[1] United Nations[2] human rights experience. Secondly, it will look at how factors like law, politics and religion (especially Islam) influence the measure and application of human rights (especially in so far as they relate to women and minorities) in states. Thirdly, the chapter will determine whether there are conflicts between human rights and religion and how, if possible, they can be resolved. Fourthly, Western, Islamic and Islamic law conceptions of human rights are examined to determine whether they are compatible in spite of apparent conflicts between them. If, in spite of the fact that conflicts do exist, they are compatible it is necessary to determine whether it is possible to formulate an equitable Islamic law of human rights if it does not already exist. Fifthly, this chapter lays a historical foundation for Chapter Six where the implementation of human rights instruments will be practically demonstrated. The fact that Muslim countries pay lip-service or practise double standards with regard to human rights like freedom of religion and equality by placing reservations and other restrictions on these rights and instruments in so far as they do not comply with Islamic law emphasizes that ultimately the protection offered by these instruments

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[1]This Chapter is limited to international organizations and instruments and will not include regional organizations which have addressed human rights.

[2]Hereafter abbreviated to UN. See 5.2.1 below.

becomes meaningless as they cannot compete with political expediency and cultural ramifications. Finally, it will be pointed out that even international instruments themselves have their share of inconsistencies.

This chapter therefore examines human rights in an Islamic context to highlight its theocentric rather than secular and judicial basis. Thereafter the relationship between UN human rights instruments and their theoretical effects on Islamic (human rights) principles are discussed. This serves to highlight the fact that politics and culture are the main impediments to the practical application of human rights and instruments in Muslim countries. Emphasis is placed on freedom of religion, equality and minority rights and the extent to which these rights interact, conflict and overlap with one another. A detailed examination is therefore made of the UN instruments relating to these rights.

UN instruments themselves are also problematic. This chapter points out that even though separate Islamic human rights documents have been formulated, Muslim countries have, for example, not only become signatories to international human rights instruments, but have even played an active role in the formulation of some of these instruments without acknowledging any conflict between Islamic law and these rights. This raises the question whether such participation and condonation are in line with an Islamic human rights culture? Furthermore, if there is something tantamount to human rights in Islam then it has to be ascertained which parts of the human rights are divine (Islamic) and which parts are based on man-made interpretations (Islamic law). While the most conservative of religious authorities (*Ulama*) and the most liberal modernists do not deny that such a culture exists, each perceives it from a different ideological perspective. Some conservatives even go so far as to claim that the Western notion of human rights has its origin in Islam, but they deny that Muslims can be subject to these very rights the West has "copied" from Islam. It is necessary to see how Muslim countries have dealt with freedom of religion (and related rights) either as a human or group right and how it differs (if at all) from the

West. In so doing valuable insight with regard to human rights and related issues can be gained for South Africa and its religious minorities.

5.1 ISLAMIC HUMAN RIGHTS: DO THEY EXIST?

Islamic human rights documents comparable to those of international human rights documents do exist and their existence reinforces the idea that an Islamic human rights ethic does indeed exist. Nevertheless, there are views in favour of and against the existence of such an human rights ethic.

"Questions of Islamic law are only occasionally mentioned in scholarly writing on international human rights - for the sake of comparison with the international norms or to illustrate the problems of introducing international norms in areas of the developing world" (Mayer:1991b:46). For this reason it is necessary to determine whether an equivalent human rights ethic exists in Islam and if so whether it conforms to the human rights principles espoused in international instruments.[3]

Authors on human rights in Islam, Muslim and otherwise, present ambivalent views on their existence which go from one extreme (conservative) to another (modernist) (Mayer:1991b:52-57). Some critics are of the opinion that there is no notion of individual rights in Islam (Donelly:1982:306). Arzt (1990:206) argues that the fact that an individual only has duties as opposed to rights in Islam must be viewed as reflective of the "...rejection of individualism[4] in favor of communalism."
On the other hand some Muslims advocate strongly that Islam entrenches and protects human rights as well as the rights of religious minorities (Mortimer:1983:5). Theoretically this might be the case but historically or culturally it does not appear to

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[3]See 5.2 below where the application and effects of UN documents on Islamic principles are discussed.

[4]See 5.2 for an explanation of individualism.

be so because "Muslims don't respect their own Holy Book [*Qur'an*], as they pretend, particularly in the field of human rights" (Aldeeb Abu-Sahlieh:1991:18; Farhang: 1988:64). This is especially due to patriarchal interpretations of Islamic sources (Mayer:1991b:142). A number of these Muslim scholars who maintain that human rights exist in Islam also believe that there is no fundamental inconsistency between universal human rights and Islam except in respect of some rights of equality to be accorded to women and non-Muslims (*dhimmis*) (Taperell:1985:1177,1184). The approaches used to reach this conclusion are, however, much less consistent. One view assumes that scriptural sources are found for all universal rights which, according to this view, have in any case always existed in Islam (Omar:1991:661; Omar:1991a:48). A second view is that modern secular states must be ruled by secular law including bills of rights but that religious law must be confined to family matters (Paul:1991:1067). A third and radical view maintains that historical Islamic law (a man-made construct and not Islam as such)[5] is neither sacred nor relevant to modern Muslim society. What is of more importance is the need to find ways within which Islamic polities can formulate and adapt human rights so that they can be both meaningful and useful to ordinary people and include them in this process (Paul:1991: 1068).

Non-Muslim authors are labelled "critics" by some Muslims because they question the existence of Islamic human rights concepts and believe that such concepts only developed after Western and international human rights models were already in existence and that therefore allegedly authentic Islamic human rights documents are patterned in form and substance on international instruments without even acknowledging them. These critics claim that the notion of human rights has a Western origin dating back to the seventeenth/eighteenth century. A few Muslim critics are also of this opinion and concur with the arguments of their non-Muslim

[5]See Chapter Two, paragraph 2.

counterparts (Tibi:1992:58; Tibi:1990:105,111,118; Mortimer:1983:5).[6] Other Muslims (labelled apologists), however, believe that Islam indirectly influenced early stages of international human rights law (Mayer:1991b:45,47,53-56; Paul:1991:1067-1068; Brohi:1983:169; Brohi:1982a:54; Mawdudi:1977:11-12; Khamenei:1987:18; Ministry of Justice:1974:167; Nawaz:1965:326). Some apologists go as far as to say that "[t]he time has come to refute the idea that the initiation and continued development of the concept of human rights must be attributed exclusively to Western culture" (International Commission of Jurists:1982:3). If this was/is the case then why are there obstacles in implementing internationally recognized human rights in Muslim majority countries (Nawaz:1965:325)?

The conservative and modernist views of authors on human rights can be summed up as follows: Brohi (1982:231), who reflects essentially conservative views, writes that Muslims have a dual obligation to discharge. It embraces duties like prayer (the rights of God (*Haqooqullah*)) and duties that regulate relationships between men and also between man and state (the rights of society (*Haqooq-un-Nas*)). Therefore all rights belong to God, while men have only duties. "In the Islamic conception of things...there are no human rights...only human duties...men...have rights against the believer or in relation to believers...described as 'derivative rights' since they derive from the believer's primary duty to God...rights claimed in the West for the human person involve [a] corresponding duty on the part of state-power to give effect to that right" (Brohi:1982:233,235). While Brohi (*ibid*) is of the opinion that Islam and secular Western philosophies do not have much in common, he measures Islamic views on human rights by using rights set out in the international human rights documents as the norm (Taperell:1985:1177).[7] Arzt (1990:205) says that in Islam "...'rights' are but the corollaries of duties owed to God and other individuals."

[6]See 7.2, footnote 18.

[7]See also Brohi:1982a:51,54.

Amin (1985a:30) is of the opinion that only the rights of society (*Haqooq-un-Nas*) referred to above relate to human rights as understood in modern legal systems.[8] Tibi (1992:62), who adopts a liberal approach, thinks that in order to establish human rights as individual rights in Islam would be "...tantamount to *introducing the concept of rights and to shift away from the concept of duties*. To achieve this, drastic religious-cultural reforms are required." He maintains that cultural obstacles stand in the way of establishing human rights standards in Muslim countries (Tibi:1992:64).

The Islamic and Western views on human rights are contrasted and measured by using international (Western) human rights documents as the norm (Mayer:1991b:53,196; Arzt:1990:202-203; Brohi:1983:172). This is said to lead to unfair evaluations and assumptions as far as Islamic notions of human rights are concerned because they are being judged in terms of Western standards. However, Muslims themselves use these documents as a basis of comparison or the yardstick by which to measure Islamic notions of human rights (Ministry of Justice:1974:112; Ahsan:1990:3; Khan:1989:1, 17,60). "Despite universalistic teachings of all great religions and elevation of their true followers to the highest spiritual level, man has suffered because of the dysfunctionality of religion arising from its archaic institutionalization, corporate character, and indoctrination of fanatic and obsolete beliefs and practices...Even though bills of rights in modern constitutions include qualified guarantees of freedom of conscience and religion, in practice, there are serious encroachments because of the fact that this right is intimately related to freedom of expression, freedom of assembly and association, and even freedom of irreligion for those who do not believe in the existence of God" (Dhokalia:1986:90-91). This can then be construed to mean that it would be better for a secular state not to recognize any personal laws of minorities because in this way everybody (including atheists) will be treated fairly.

In this regard the late Ayatollah Taleghani, a cleric and religious leader of Iran,

[8]See also Shad:1987:28, who makes a similar division.

argued that: "...Islam which originates from the Quran and the traditions of the Prophet, does not restrict freedom. Any group that wants to restrict...[the freedom] to criticise, protest, discuss and debate, does not comprehend Islam" (Mayer:1991b: 32). "The right to freedom of opinion and expression was recognised very early in Islam. It was the practice of... Muslims to enquire from the...Prophet [Muhammad] whether on a certain matter a divine injunction has been revealed to him. If...[not]...the Muslims freely expressed their own opinion on the matter...Freedom of opinion and expression have also been guaranteed in Islam by the institution of *Shura* or consultation with the people [Q.42:38]" (Brohi:1982:247).

In Chapter Six it will be shown how especially Muslim countries have placed restrictions on human rights despite some of them being treated as "absolute" in international instruments. The degree of toleration of as well as restrictions on freedom of religion varies from country to country as does the degree of interference in or control of ecclesiastical affairs (Dhokalia:1986:100). Many practices, including interpretations of Islamic law, social customs as well as internal and external factors or determinants influencing women's status have contributed to this state of affairs and it is women who usually suffer the most in this regard.[9] In countries where Muslims are a religious minority, developing an interest in secular constitutionalism and respect for universal human rights is often the norm. This is particularly noticeable in the younger generations of secular educated Muslims. It is interesting to note that most of the influential works in these areas are written by Muslims who are not themselves members of the *Ulama* or religious establishment.

Western and Muslim authors rely on the primary sources of Islamic law in seeking direct counterparts for or rejections of modern human rights norms (Mayer:1990: 134). This must inevitably lead to a respect for human rights within the Muslim community which in turn may pave the way for an equitable adaptation of Islamic law

[9]See especially 2.1.4 above and 5.2.1 below.

to suit the constitutional order of the pluralist state and result in the improvement in the status of Muslim women (Paul:1991:1058). The reality is that there are markedly different social groupings within the Muslim community. There are those who lead an essentially secular existence in the public sphere and those who reject these secular influences as un-Islamic. As a consequence "[w]omen are...caught up in these cross-currents of change and reaction" (Paul:1991:1062). It is interesting to note that even the most conservative Muslims are "secular" in their daily lives, professions and basic needs. While they may practice "material modernity" they reject "intellectual modernity" (Lambton:1988:6-7).[10] It is of little consequence whether or not a devout Muslim accepts human rights concepts detailed in international instruments "...as having validity as an expression of collective human idealism or as deriving legitimacy from religious teachings...provided that the concepts attract universal acceptance" (Taperell:1985:1178).

It is said that "[i]n the Islamic view human rights are universally[11] true, and yet implementation of these rights may require various forms...As law reflects the achievements of society so too the 'rightness' of human rights is determined by time, place and experience" (Traer:1991:123). Whether this would constitute a modernist viewpoint (and therefore an unacceptable viewpoint in terms of Islamic law) will be determined from the discussion below. Emphasis is placed on the dignity of the individual (Said:1979:86; Said:1978:1;1979a:63; Ministry of Justice:1974:155). There are authors, Muslim and otherwise, who are of the opinion that dignity is often confused by non-Western Islamic societies as being equivalent to human rights (Donelly:1982:303; Tibi:1992:58).

Muslims, together with Christians and Jews agree that human rights are "the gift of

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[10]See 9.7 where this is further discussed.

[11]This view is questioned in 5.1.1 below.

God" but many (though not all) Muslims confuse a reliance on the right to freedom of religion in its fullest sense to ultimately mean freedom from religion (Traer:1991: 199).[12] In other words, they believe that, if giving practical effect to freedom of religion entails deviating from Islamic principles, it would be tantamount to claiming freedom from religion (Islam) itself. In other words certain interpretations/practices are deemed to be denied within the religion itself. This could be viewed in both a negative and positive way. So, for example, if a group of Muslims were to interpret Islam in a particular (modernist) way in a conservative Muslim state, this freedom could be negatively viewed as antagonistic to Islam (and the state of course). On the other hand if freedom of religion in terms of Islamic law is deemed to preclude the right to change one's religion or belief such conversion cannot be condoned by Muslim countries and therefore from a religious perspective their restriction of this right is viewed positively. International documents have not convinced Muslims and governments otherwise and the reality is that the "...meaning of human rights will be shaped more by people than by the rules of language or logic" (Traer:1991:208). Even the US Constitution and other Western authorities regard natural rights, from which human rights ultimately developed, as God-given (Mortimer:1983:5).

5.1.1 ISLAMIC HUMAN RIGHTS INSTRUMENTS

There are many Islamic and Arabic human rights documents that can be compared to UN documents. Their development has, however, been slow and none, except for the Libyan document, has as yet been enforced. These documents are said to represent a compromise of two extremes by asserting that Islam accepts human rights as long as they conform to Islamic standards. It is mostly declarations in this area that are used for comparison with international standards. The two extremes represent, on the one hand, Muslims who claim that Islam embraces international human rights standards and declarations and argue that these standards are universal because most Muslim

[12]See 3.3, 5.2.1, 5.3 and 7.6.

governments participated in the formulation of these declarations or subsequently ratified them. On the other hand, there are those who disagree with this view. The latter claim that these standards are not universal, are alien to and lack legitimacy in major cultural traditions and are incompatible with Islam and Islamic law (Mayer: 1991b:29; An-Na'im:1992:3; Arzt:1990:210). Tibi (1992:62;1994:290) is of the opinion that, although efforts by leading Islamic authorities (like the late A. Mawdudi), institutions (like the famous al-Azhar)[13] and movements (like the London-based Islamic Council responsible for some of these documents) are regarded as the current Islamic contributors to establishing human rights schemes in Islam, "[t]he results of an analysis of these efforts are as shattering as they are disillusioning ...[they] repudiate rather than embrace the standards of international human rights law" (Tibi:1992:62). I have previously[14] made mention of the second Universal Islamic Declaration of Human Rights (UIDHR) proclaimed by the Islamic Council of Europe in Paris (and not in an Islamic city) in September 1981 (Patel & Watters:1994:163 fn 2; Tibi:1990:111; Weeramantry:1988:122). This document, which has also been published in several places, is referred to as the "Declaration of Human Rights" (UIDHR:1981:1). It purportedly grants equality in virtually all spheres but *religion* is not mentioned as a sphere of equality. It is also said to be inspired by the primary sources (divine origin) of Islamic law in contrast to the secular nature (human origin) of the UN documents (Aldeeb Abu Sahlieh:1991:25; Tibi:1990:111).

There is also a first Universal Declaration of Islamic Human Rights (UDIHR) proclaimed by the Islamic Council in London in April 1980 (Sajoo:1990:25; Aldeeb Abu-Sahlieh:1991:21-23). This first document is referred to as the "Universal Islamic Declaration" (UIDHR:1981:1). The UDIHR and UIDHR are two separate documents

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[13]See Chapter Six, footnote 62.

[14]See 3.3.1, footnote 49.

both proclaimed by the Islamic Council but referred to by slightly different names (UIDHR:1981:1). Certain authors,[15] however, create the impression that the UDIHR and the UIDHR are different names for the same document. With the UDIHR we also find that religion is not mentioned as a sphere of equality and references to the treatment and status of women are deliberately obscure. Discrimination against women is treated as being entirely natural (Mayer:1991b:120,136).

The clause on freedom of religion in the UIDHR (1981) reads as follows: "Every person has the right to freedom of conscience and worship in accordance with his religious belief" (UIDHR:1981:11).[16] The UIDHR was prepared by representatives from countries like Egypt, Pakistan and Saudi Arabia and is generally a conservative document. On the surface it appears to resemble the Universal Declaration of Human Rights[17] but a closer examination shows that this is not the case. There are also differences between its English and Arabic versions and the inconsistencies in it suggest that possibly "...its authors may not have been able to achieve a consensus among themselves about how Islamic human rights norms should be formulated" (Mayer:1991b:27,98).[18] In a Pakistani case the courts interestingly enough used the English and not Arabic version in interpreting one of the UIDHR Articles to support its decision (Mayer:1991b:105). Khan (1989:141) says that "[r]eligion must travel far beyond the Declaration both in its objectives and methods...[but] in spirit...it...and Islam are in accord...the Declaration employs language which is too general; Islam spells out the necessary safeguards." Human rights in Islam are said to be static (Khadduri:1946:79). The Universal Islamic Declaration of Human Rights (the UIDHR and not the UDIHR) is considered to be the authoritative Islamic statement on

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[15]See, for example, Tibi:1990:117 below.

[16]See also Patel and Watters:1994:167,163-4.

[17]Hereafter abbreviated to UDHR. See footnotes 21 and 40 below.

[18]See also Mayer:1990:138.

human rights which it treats in a religious and not a social context (Tibi:1990:117).

There is also the Cairo Declaration on Human Rights in Islam adopted by Member States of the Organization of Islamic Organization in Cairo in 1990 (Patel & Watters: 1994:170 fn 12). Article 19 says that all individuals are equal before the law. Article 24 limits this by stating that "[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic *Shari'ah*" (Patel & Watters:1994:174-175). Article 10 on religion stipulates that "...[i]t is prohibited to exercise any form of compulsion on man...to convert him to another religion..." (Patel & Watters:1994: 172). No mention is made of him being able to voluntarily change his religion. Some of the *Qur'anic* injunctions in this regard clearly imply that God does not need people to believe in him but it is people who are in need of God. This is evident from the following extracts: "...It is Ye that have need Of God: But God is The One Free of all wants...(Q.35:15)...Let there be no compulsion in religion...(Q.2:256)... Of those who reject faith...(Q.2:257)...Wilt thou then compel mankind, Against their will, to believe!...(Q.10:99)...But if they turn away, Thy [Muhammad's] duty is only to preach The Clear Message...(Q.16:82) ...The Truth is From your Lord: Let him who will Believe, and let him Who will, reject (it)...(Q.18:29)...If then they turn away, We have not sent thee As a guard over them. Thy duty is but to convey (The Message)... (Q.42:48)" (Ali:1946:1157-8,103-104,509-510,679,738,1320). The *Qur'anic* injunction that there be no compulsion in religion "...is consistently endorsed and substantiated in numerous other contexts in the *Qur'an*" (Kamali: 1992:80). There are, however, a large number of Muslims who are of the opinion that this verse has been abrogated by Q.9:5 or the "Sword Verse" (Breiner:1992a:5).

There is furthermore the Dhaka Declaration on Human Rights in Islam which was proposed at the 14th Islamic Conference of Foreign Ministers in 1983 in Dhaka. Except for the preamble, the text was rejected as it would have conflicted with existing laws in many of the member states. Themes and terminology contained in this Declaration closely resemble the UDHR on which it is modelled but from which

it differs in many respects. For example, in terms of this document human rights must be compatible with Islamic law. People "are equal in dignity and basic duties" but not necessarily equal in other respects. Religion is not mentioned as a sphere of equality. Women and men have different rights and duties. The right to change religion or be without one is not a human right (Hjärpe:1988:34-38; Taperell:1985: 1177).[19]

Another example of Islamic views on human rights being contrasted and measured by using international (Western) human rights documents as the norm is the Islamic charter of rights framed by more than 50 Muslim jurists and political philosophers at an international seminar convened in Kuwait in 1982 (Paul:1991:1067-1068).

In a declaration made at an international Islamic seminar sponsored by the Organisation of the Islamic Conference (OIC), it was resolved to "Call upon all governments to take effective measures to enforce human rights within their jurisdictions, provide constitutional safeguards...to ensure justice, freedom and equality for all irrespective of race, ethnic origin, religion or culture" (Islamic Council of Europe:1980:166). Note that there is no reference to sex.

Not only did Muslim countries emulate international human rights instruments under the guise of Islamic law, but in 1981 the OIC decided to found an International Islamic Court of Justice on the pattern of the International Court of Justice in the Hague. Like the latter, its decisions are not binding on nation states. The court located in Kuwait and consisting of 11 members schooled in traditional Islamic law was as at 1988 (and since) not yet in operation (Al-Ahsan:1988:28;112). The OIC is likened to an inter-governmental organisation like the UN but is based on traditional Islamic law. Members of this body are also members of the UN (Al-Ahsan:1988:53-54).

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[19]See 5.1 above.

5.2 UN DOCUMENTS ON HUMAN RIGHTS: THEIR EFFECTS ON THE BEHAVIOUR OF GOVERNMENTS OR MUSLIM SOCIETIES

Although countries are normally governed internally by their national constitutions they are externally influenced by international law. To understand the position of human rights in Islam, we have to look at and review international human rights documents and the development of international human rights concepts. Emphasis will be placed on freedom of religion, equality and minority rights. Because equality and freedom of religion overlap with each other they will be dealt with concurrently to highlight contradictions between these two rights.

These twentieth-century human rights are based on Western traditions of individualism, humanism and rationalism and on legal principles protecting individual rights. From the seventeenth to twentieth centuries a new vision of the nature of man and the relationship of each individual to others and society was established. Interestingly, modern philosophers (with a few exceptions) viewed inalienable human rights as qualities of men, not of women (Pollis and Schwab:1979a:2). Individualism is said not to be characteristic of Islam and therefore rights contained in an Islamic system cannot be equated with those as understood in international law (Mayer:1991b: 44,47,66). Said (1979a:73) hypothesizes that individual freedom is assumed to end where freedom of the community begins. "...[F]reedom in Islam implies a conscious rejection of a purely liberal and individualistic philosophy of 'doing one's own thing' as the meaning of life, or as the goal of society" (Said:1979a:74). The individual is conceived of as part of a greater whole or group (Pollis and Schwab:1979a:8).[20] International human rights instruments arose because supporters of human rights felt that these rights should not only be guaranteed in constitutions, but also by an international law binding on all nations (Mayer:1991:44).

[20]See 2.1.2; 2.1.2, footnote 17 and Khadduri:1946:77 where this notion is refuted.

It is generally difficult to define human rights. They have, however, been defined "...as those rights which are 'held equally by all human beings'...independent of the economic, social, political, cultural or religious context in which they live" (Hollenbach:1982:94). This does not mean that all rights held by human beings are human rights. Legal and contractual rights are held by human beings without necessarily being human rights (Donelly:1982:305). "Human rights are those liberties, immunities, and benefits which, by accepted contemporary values, all human beings should be able to claim 'as of right' of the society in which they live" (Encyclopedia of Public International Law:1985:268). They include moral and legal rights and are neither granted by the state nor are they the result of one's actions (Levin:1981:11; Donelly:1982:305). They are natural rights which belong to people for no other reason than that they are human and alive (McQuoid-Mason *et al.*:1991: 14; Mayer:1991b:69). They are therefore deemed to be universal, inalienable and enforceable against organized society as represented by government and its officials and not against God (Ackermann:1989:8). The universality of human rights, as contained in the UN human rights documents, is questioned by some critics in so far as it provides only one interpretation of human rights and therefore may not be relevant to societies with a non-Western cultural tradition. In addition, it is pointed out that at the time of adoption of the UDHR,[21] most third world countries were still under colonial rule (Pollis and Schwab:1979:xiii; Pollis and Schwab:1979a:1,4; Said: 1978:1; Said:1979a:63). This fact is criticized by Donelly (1982:313) and Tibi (1992:58). Tibi (1992:58) does not, however, argue that these rights must be imposed on non-Western cultures. Instead he stresses the need for establishing cross-cultural foundations of human rights. He writes that there is no universal Islam but a variety of local Islamic cultures (Tibi:1990:113). As outlined below, these rights have achieved "universal" recognition in international instruments since World War II. These instruments do not, however, consider these human rights to be absolute.

[21]See 5.2.1 below and footnote 40.

Most Muslim countries are signatories to and have even ratified certain UN documents.[22] However, it is not at all clear that these Muslim governments understand the rights contained in these documents in the same way as other countries nor that they would rank these rights in the same order of priority (Hollenbach:1982: 94). There is thus also a clear gap between states' verbal assertions of adherence to international law and their actual conduct in the area of religious freedom. There is in other words a clear discrepancy between the theory and practice of human rights. Even though human rights are legally recognized and guaranteed by states in their national constitutions, they are often limited or eliminated by legislation or treated arbitrarily in these states (Levin:1981:12).

Religion plays an important role as to how these rights are interpreted, whose rights are important and which rights are given priority.

It is interesting to note that the human rights norms set out in these international documents do not demand the separation of religion and state. There is also no reference to any theological basis for the existence of religious rights. These rights ought therefore not to be curtailed by reference to the requirements of a particular religion. These documents merely allude to the basis of human rights by stating that they are based on the "inherent dignity of the human person" (Burr:1988:242). In this sense international instruments are acceptable to most Muslim countries.[23] Nevertheless, acceptance is subject to an important caveat, namely that the enforcement of the principles contained in these documents does not conflict with principles of Islamic law (Arzt:1990:214). It is also suprising that, taking into consideration the different types of relationships that exist between states and religious communities in the world today, the states participating in the formulation of the

[22]See Chapter Six, paragraph 6.

[23]See reference to dignity in 5.1.

freedom of religion article were able to reach consensus/compromise to create a common formula (Partsch:1981:210).

The language of human rights adopted in these documents differs from that contained in the scriptures of major religions including the *Qur'an*. "The notion that religious language and human rights language can be translated into each other without distortion is highly doubtful...[the moral code advocated by these documents] prescinds from the cultural, ideological, and religious differences of the peoples of the world" (Hollenbach:1982:99).

As far as the right to freedom of religion is concerned, it has been contended that Muslims must uphold the right to freedom of belief in international instruments even if only because Islam itself began by inviting (and not coercing) people to embrace it on the merits of its rationality and truth and thereby giving them a choice in the matter (Kamali:1992:65).

While a number of Muslim scholars claim that human rights exist in Islam, they are in agreement that these rights do conflict with the rights of equality between the sexes and non-Muslims.[24] It also appears that religious rights are interpreted in a way that is very different from a Western perception especially in so far as the rights of women are concerned. As will be indicated[25], Muslim countries, as members of the UN and signatories to international human rights documents, are bound to uphold the principles of equality without discrimination on the grounds of gender or religion in their constitutions. As will also indicated[26], they have failed to do so. What has happened instead is that in practice it is the *Ulama* and not the people who decide

[24]See 5.1.

[25]See 6.1.3 below.

[26]See 6.1.3 below.

what is God's law. Family law (with its different jurisprudential interpretations as well as its inherent discrimination) is almost always exempt from constitutional scrutiny. In other words, family law and all of its related problems and discrimination are endorsed by the very same constitutions which simultaneously guarantee rights to freedom of religion *and* equality notwithstanding their conflict with each other. As will be indicated[27], different treatment for members of different religions (*dhimmis*) is also endorsed by the same constitutions that guarantee freedom of religion to all groups. "Religion" in most of the equivalent Islamic declarations[28] and constitutions[29] is either not mentioned as a sphere of equality or it is not given effect to. Women are guaranteed rights in all spheres subject to Islamic standards. Women are granted "equal protection by the law" but this does not necessarily imply that they are "equal before the law" (UIDHR:1981:7). The law and practice of most Muslim countries in these areas do not accord with international standards (Taperell:1985:1183; Ministry of Justice:1974:171). It therefore appears that the rights to freedom of religion and equality between the sexes are merely illusory and theoretical.

International human rights law does not condone the use of religious criteria to limit or deny human rights (Mayer:1988:99). A critical discussion and examination of the concerned UN documents and the impact of particular rights (freedom of religion and equality) contained therein on comparable Islamic principles will now follow to ascertain whether these principles conflict with the requirements of international law. The position of slavery in Islam will also be briefly looked at. Non-Muslims *(dhimmis)* minorities living in an Islamic state are not accorded full citizenship status in terms of Islamic law, as is the case with Muslim women (Tibi:1990:126). In order

[27]See 5.2.2 below.

[28]See 5.1.1.

[29]See in general Chapter Six.

to highlight the implications of such a status for freedom of religion the position of non-Muslim minorities will be briefly examined below[30], where minority rights will be discussed extensively.

5.2.1 FREEDOM OF RELIGION AND EQUALITY

The UN Charter (1945), which embodies the mandate and principles of the UN, is a treaty and therefore a binding legal document purportedly applicable to all Muslim countries as well (An-Na'im:1987:6).[31] Article 1 (3) refers to international co-operation in promoting human rights for all without distinction as to, amongst other things, sex or religion. Article 13 (1) (b) mentions initiating of studies and assisting in the realization of human rights without distinction as to, amongst other things, sex or religion. Article 55 (c), 56 and 76 (c) all make some form of reference to attaining human rights ideals without distinction as to, amongst other things, sex or religion (Van der Vyver:1979:20). The human rights that Muslim countries must respect and promote include those set out in the UDHR. The general consensus is that the Declaration has, on the basis of a moral obligation, become legally binding on all countries and that the Covenants referred to below are also binding because they are essentially an elaboration of the provisions contained in the Declaration and were drawn up to afford legally binding effect to these rights and freedoms (Paul: 1991:1067; Brohi:1982:237). While the UN Charter emphasizes the principle of individual rights, it does not define rights in specific terms (Said:1978:3). However, "[e]ven the *UN Charter*, in its first article, is problematic when it stipulates one of the goals of the organization to be: To achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction* as to race, *sex*, language, or *religion*. (Note the formulation: not

[30]See 5.2.2.

[31]See also 6.1.3 below.

'equally' but the much more precise 'without distinction'. Thus one's sex or religion must not be regarded as a matter of any consequence from a legal point of view)" (Hjärpe:1988:27). This is repeated in Article 2 of the UDHR (Hjärpe:1988:28). Since the drafting of this Charter, the UN has been committed, "at least as a matter of rhetoric", to equality between the sexes (Wright:1993:76). However, the division of rights in these international instruments, "...into discrete categories and definitions such as 'civil', 'political', 'economic', 'social', 'cultural' or 'peoples' rights...do not reflect the reality of women's lives" and poses a theoretical barrier to the accurate definition of women's rights as part of 'human' rights, which definition is needed to ensure the effective implementation of these rights (Wright:1993:77). This is reflective of the marginalization of women's rights in all international instruments. Their effectiveness is further hindered by weak implementation processes and the lack of enforcement mechanisms. While purportedly being binding on some states, in reality the UN Charter lacks the power to enact and enforce laws. Article 2, pp 7 states that "Nothing contained in the present Charter shall authorize the UN to intervene in any matters which are essentially within the domestic jurisdiction of any State."

The fact that a separate UN instrument, namely the Women's Convention (CEDAW) (1979),[32] had to be created to deal specifically with women is representative of the failure of general human rights law to deal adequately with women's issues (Chakaodza:1994:8). "'Women's' rights as opposed to 'human' rights are ghettoised into their 'own' convention, which nevertheless reproduces many of the assumptions found in 'human' rights generally" (Wright:1993:78). As will also indicated[33] many

[32]CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) is a UN instrument adopted in 1979 and came into force in 1981. As of March 1996 it has been signed by 97 countries and ratified by 152 countries representing peoples from all cultural and religious backgrounds in the world. See 9.7, footnote 164 and 9.6.1 for further reference to CEDAW in South Africa. See also Chapter Six.

[33]See 6.1.3 below.

Muslim countries have either ratified or become signatories to CEDAW, albeit subject to reservations. It appears, however, that more Muslim countries have also ratified earlier UN Conventions, namely the Convention on the Political Rights of Women (1952),[34] the Convention on the Nationality of Married Women (1957)[35] and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962).[36] It appears that, as early as 1948 and as recently as 1975, Saudi delegates to the UN as well as the (female) Pakistani delegate[37] opposed provisions on women's rights (Arzt:1990:218-219).[38]

Since the end of World War I it has been felt that governments by themselves could not safeguard human rights and this created the need for international guarantees (Levin:1981:13).[39] The UDHR[40] of 1948 was formulated by the UN to give expression to worldwide moral outrage at the atrocities of Hitler and the carnage of World War II but the roots of these rights go deeper than modern sources and "...are buried in the history of the relation between Christianity and the political and social institutions of Western Europe" (Hollenbach:1982:100). In 1946 the Security Council of the UN established the Commission on Human Rights to draft this Declaration. It is an informal instrument appended to the UN Charter and it is implicitly premised on

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[34]Adopted in 1952 and came into force in 1954.

[35]Adopted in 1957 and came into force in 1958.

[36]Adopted in 1962 and came into force in 1964.

[37]This happened prior to the passage of the Muslim Family Law Ordinance of 1961 mentioned in 6.3.3.

[38]See also the different attitude adopted by the Pakistani delegate below (5.2.1) as far as the right to freedom of religion was concerned.

[39]Already in 1815 and for the first time in modern history, the Congress of Vienna had shown international concern for human rights (Said:1978:2).

[40]General Assembly Resolution (GA Res) 217 A (III) of 10 December 1948.

secularism (United Nations:1992a:6; Said:1978:3; Hjärpe:1988:28). It is regarded as the UN's most fundamental statement on human rights and was approved by the General Assembly without a dissenting vote in 1948. The 48 affirmative votes included eight Muslim countries which were at that stage members of the UN. There were eight abstentions which included Saudi Arabia and South Africa[41] (Arzt:1990: 216). It is also one of the four (not three) UN documents that together comprise the International Bill of Human Rights. The other three documents are the International Covenant on Economic, Social and Cultural Rights,[42] the International Covenant on Civil and Political Rights[43] and the Optional Protocol to the International Covenant on Civil and Political Rights[44] (United Nations:1988:1-42; United Nations 1992:21-41; Sieghart:1983:24-26; Encyclopedia of Public International Law:1985:297-307). The UDHR is therefore the first part of this Bill. By 1981 it had been accepted by almost all of the 150 states of the world. All 150 states have adhered to at least one human rights instrument and more than a third of these states have adopted the above covenants (Henkin:1981:1).[45] As of late 1988 several major Muslim countries had either adopted or ratified the covenants. However, no Muslim country has adopted the Optional Protocol referred to above. As a point of interest, the International Convention on the Elimination of All Forms of Racial Discrimination[46] was the only

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[41]See 9.7.

[42]General Assembly Resolution 2200 A (XXI) of 16 December 1966 (came into force:1976).

[43]General Assembly 2200 A (XXI) of 16 December 1966 (came into force:1976). Hereafter abbreviated to ICCPR. The covenant is a legally binding treaty which came into force on 23 March 1976.

[44]General Assembly Resolution 2200 A (XXI) of 16 December 1966 (came into force:1976).

[45]See 9.7 for the status of these documents in South Africa.

[46]General Assembly Resolution 2106 A (XX) of 21 December 1965 (entry into force:1969).

UN document that received wide support in the Arab world (Arzt:1990:218).

In 1945 a UN Commission on Human Rights was established to draw up this International Bill of Human Rights. The Declaration, unlike the UN Charter but like the covenant referred to below, is not as such a legally binding document. However, it is considered to have become mandatory for at least the "signatory" states and is said to constitute evidence of the interpretation and application of the relevant provisions of the UN Charter (Pollis and Schwab:1979a:6; Encyclopedia of Public International Law:1985:307). "The declaration is only a statement of general moral principles setting forth a common standard of achievement for the states of the world" (Said:1978:4). This document was created by religious as well as secular leadership (Traer:1991:182). Its content is, however, regarded as controversial in the Muslim world. Alternative Islamic declarations confirm this (Hjärpe:1988:26; Naqavi: 1987:9).[47] The rights contained in this document can be broadly divided into two types: firstly, civil and political, and secondly, economic, social and cultural rights (Levin:1981:15). The human rights contained herein are subject to limitations which are consistent with the principle of non-discrimination (Articles 29-30) (An-Na'im: 1987:7). Article 16 (1) of the UDHR is an example of what is called civil and political rights. It provides men and women equal rights at the time of marriage, during marriage and at its dissolution. However, "[a]ttitudes in respect of marriage differ and family laws are often based on specific religious, cultural and social patterns. The rights are stated but their protection is not uniform" (Levin:1981:65). A Muslim country would, for example, construe the contents of Article 16 as conflicting with the provisions of its religiously-based MPL (Muslim family laws). Thus, irrespective of the fact that there is much *Qur'anic* legislation protecting the rights of women in the context of marriage, women can never claim equality with

[47]See 5.1.1.

their husbands.[48] This would also be the case even though the *Qur'an* also teaches that men and women are equal in the eyes of God (Hassan:1992:460-461).[49] Khan (1989:90-91) says of Article 16 that "[i]t must be construed *liberally and not literally*; for literal construction...would lead to results some of which would border on absurdity while others would be abhorrent as offending against universally accepted norms and standards of *decency*" (emphasis added). It seems, however, that one cannot construe this Article liberally without doing so literally.[50] Article 7 of the UDHR states that "All are equal before the law and are entitled without any discrimination to equal protection of the law" (United Nations:1988:3).[51] Some authors on human rights believe that the UDHR is compatible with Islamic values and principles formed by the conditions of modern society while others reject it as being incompatible with seventh-century normative Islamic prescriptions (Lambton:1988:8; Hjärpe:1988:27).[52]

Of particular interest is the right to freedom of religion which has had global relevance since the drawing up of the UDHR. Article 2 of the UDHR states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as...sex [and] religion" (United Nations:1988:2). However, when religion (including Islam) is regarded as normative for society and a system of jurisprudence is deduced from it as is the case in Islam then it is inevitable

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[48]See Q. 4:19; Q.24:33; Q.2:187; Q.9:71; Q.7:189; Q.30:21; Q.4:4.

[49]Q.3:195; Q.4:124; Q.9:71-72; Q.16:97; Q.33:35; Q.40:40; Q.49:13.

[50]See Article 16 (1) of CEDAW (Wright:1993:84). This is briefly outlined in Chapter Six, footnote 65.

[51]Compare S 8 (1) of the interim South African Constitution which is based on a similar construction. See comment above referring to Article III (a) of the UIDHR which reads as follows: "All persons are equal before the Law and are entitled to equal opportunites and protection of the Law" (UIDHR:1981:7).

[52]See 2.1.1 and 3.2.

that in order to give effect to the right to freedom of religion such right must be interpreted to include the right not to be treated equally before the law. In this way different laws apply (at least in part) to individuals according to their religious affiliation. For example, traditional interpretations of Islamic law differentiate between the status of Muslims and non-Muslims and between men and women (Hjärpe:1988:29). Article 18 of the UDHR states that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to *change* his religion or belief, and freedom, either alone or in community with others in public or in private, to manifest his religion or belief in teaching, practice, worship and observance."[53] A more elaborate version of this right is contained in Article 18 (1) of the ICCPR[54] of 1966. Article 18 (2) adds that "[n]o one shall be subject to coercion which would impair his freedom to have or to *adopt* [*change* is the verb used in the UDHR] a religion or belief of his choice" (United Nations:1988:26; Patel & Watters: 1994:28). Article 18 (3) is a limitation clause which reads as follows: "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." This is evidence that the right to freedom of religion is not an absolute right, especially the part relating to the manifestation or practice of religion (Clark:1978:214-215). States are therefore allowed to limit manifestations of religion so as to protect the rights of others including the human rights of women (Sullivan:1992:807;810). These requirements of public safety, *etc.* differ from country to country because of the different political

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[53]United Nations:1988:4; Patel & Watters:1994:14.

[54]United Nations:1988:18. There is also the International Covenant on Economic, Social and Cultural Rights (GA Res 2200 A (XXI) of 16 December 1966 which came into force on 3 January 1976. Article 13 (1) of the latter document promotes "...understanding, tolerance and friendship among all nations and all racial, ethnic or *religious groups*...". Article 13 (3) deals with the liberty of parents "...to ensure the religious and moral education of their children in conformity with their own convictions" (United Nations:1988:12-13). All anti-discrimination conventions also contain provisions concerning religious freedoms (Lerner:1991:76).

structures (democracy, theocracy, *etc.*) of states (Dhokalia:1986:124). As is evident from Article 18 (2) the right to change religion is not included.[55] Article 26 of the ICCPR added a stipulation which guaranteed equal protection of the law against any form of discrimination "on any ground such as...sex...[or] religion." (United Nations: 1988:28; Patel & Watters:1994:29-30).

Another instrument dealing with freedom of religion is the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981.[56] This Declaration was adopted by the General Assembly of the UN late in 1981 by a unanimous vote (Odio Benito:1989:2).[57] In contrast to a convention, however, it lacks the binding nature of an international agreement and is not considered a binding instrument. There are those who are against a preparation of a convention in this regard because it might lead to a weaker document than the existing Declaration. Nevertheless, a Convention on religious intolerance and discrimination is in the process of being prepared.[58] Dhokalia (1986:106) sums this up thus: "...[The Declaration's] authoritative elaboration of the right to religious freedom amounts to merely a statement of principles or ideals, *devoid of any obligatory character* yet enjoining certain moral obligations for states to follow as guidelines for guaranteeing the right to religious freedom to their citizens" (emphasis added). Because states did not share the same ethical and social values and because of the complicated nature of the subject of religious freedom, they therefore did not reach sufficient agreement on the proposed convention, it did not appear in this (convention) form. For this reason the UN General Assembly directed the Human Rights

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[55]There is no problem with the right as such "...but in the right to express thoughts, to act in accordance with one's conscience and to practise a religion" (Levin:1981:68).

[56]GA Res. 36/55 of 25 November 1981 (United Nations:1988:125).

[57]Curran:1986:143-144 and Burr:1988:249, however, state that this Declaration was adopted without a vote.

[58]For more details see Lerner:1991:89-92.

Commission in 1974 to submit a single draft Declaration (Dhokalia:1986:103). The UN had been considering instruments on religious freedom since 1962 already. It therefore took 19 years for this Declaration, which was passed in 1981, to see the light (Sullivan:1988:487-488,490; Clark:1978:220). Taking into consideration the problems and *lacunae* regarding the "universality" of human rights mentioned above,[59] it is hoped that "[i]f a convention is prepared at some time in the future, the challenge for the drafters will be to incorporate provisions that overcome these problems while retaining the positive elements of the Declaration" (Sullivan:1988:518). It is nevertheless contended that the UN "...intended that it be normative and not merely hortatory [as] is apparent from its Articles 4 and 7. Under Article 4, states are required to 'make all efforts to enact or rescind legislation' and to take other effective measures to prohibit discrimination on the basis of religion or belief. Article 7... provid[es] that '[t]he rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice'" (Sullivan:1988:488). Interestingly, because the Declaration is mainly directed towards actions taken by governments or by individuals not subscribing to a particular religion against individuals who do subscribe to that belief (a vertical and horizontal application), it appears that it does not provide enough scope to analyse interactions between members of the same religious groups (Sullivan:1988:490). This conclusion is problematic because a strong horizontal application may, as a matter of fact, be indicative of exactly the opposite. Article 6, although not exhaustive, enumerates in detail the freedoms included in the right to freedom of thought, conscience, religion or belief (United Nations:1988:128-129; Lerner:1991:82-83).

[59]See 5.1 and 5.2.

Article 1 (1) of the final version[60] of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 states that: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching" (United Nations:1988:127). Article 1 (3) has the same limitation clause as Article 18 (3) of the ICCPR and the same criticism applies here as well (Sullivan:1988:492-493).[61] Although the Declaration does not define "religion" or "belief", there is general agreement that it includes "theistic, non-theistic and atheistic beliefs" (Sullivan:1988: 491). While these terms may be mentioned in constitutions and while there are calls for a need of such definitions, they are also not defined more closely in the constitutions of many countries. In religiously plural countries like the US we find states deviating from the federal law in the manner in which they define religion. Because religion is not defined in the US Constitution, efforts have been made to augment this constitutional deficiency[62] through the development of case law and academic literature. This has resulted in definitions of religion ranging from one extreme to the other. So, for example, we find original theistic, modern "constitutional", narrow substantive and broad functional definitions of religion (Sullivan:1988:491; *Harvard Law Review*:1987:1622-1625; Collier:1982:973,977-8, 997; Choper:1982:579-580; Clements:1989:533; Greenawalt:1986:447; Hunter: 1990:58; Garvey and Schauer:1992:497-511; Abrahams:1982:225-235; Johnson:1992:

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[60]The definition of freedom of thought, conscience, religion and belief in the draft version of this convention (1967) was much more elaborate and extensive than that of the more compact draft version of this declaration (1974) which was adopted in 1981 (Dhokalia:1986:102;104).

[61]See 5.2 above where reference is made to the fact that not all rights held by people are necessarily human rights.

[62]See 7.2 where it is explained that the term religion is not defined in the US Constitution.

189-197; Hitchcock:1992:170-173; Monsma:1993:158-160; Bowser:1977:163,166; Agneshwar:1992:295-334). In the US judicial definitions of religion, formulated because it is very difficult to decide whether a system of belief constitutes a religion under the religion clauses of the First Amendment to the US Constitution, carry a great deal of weight. The reason for this is that if a set of beliefs is not considered to constitute a religion, then because of the bias towards traditional religions, its followers cannot rely on the protection provided by the religion clauses (Adams and Emmerich:1989:1663,1668; Hall:1992:16-19). "...A survey of existing definitions of religion reveals many different interpretations...most of which are one-sided and exclude polytheistic and non-theistic creeds...religion - in contra-distinction to any other form of belief - relates to faith in God as a Supreme Being, or in multiple deities, or at least in some supernatural powers or spirits capable of influencing human affairs" (Dinstein:1992:146). "Philosopher Bertrand Russell described the great historical religions as complex social phenomena that have typically entailed an institutional structure, a theological creed, and a personal moral code. Sociologist Clifford Geertz defines religion as an activity that involves an ultimate concern, a social structure and behavioral code, rites and ceremonies, symbolic or mythic language and narrative, and the belief in something metaphysical or transcendent which goes beyond what one can observe with the senses" (Gedicks and Hendrix: 1991:5).

States implementing religious law often use religion freedom in defence of their violation of international norms which guarantee women's rights and their application. In so doing these states and believers themselves contend that many of the cultural and religious practices that infringe women's human rights are *manifestations* of the right to religious freedom and therefore these practices should be protected under international law. International norms do, however, offer a framework for resolving conflicts between women's rights and freedom of religion. Even if restrictions to equality are removed from religious law, the latter is still influenced by other factors or determinants of women's status (Sullivan:1992:795-6,805,812-3). It is felt that

although Article 1 does not make mention of the rights to establish religious courts and administer religious law, they are encompassed in the right to manifest religion and therefore its protection should nevertheless apply to religious tribunals and the implementation of religious law which are manifestations of religious law. Clarity must also be given as to extent to which these tribunals must uphold human rights, like equality between the sexes (Sullivan:1988:514,518; Sullivan:1992:805).[63] Even here there are conflicts between religious and civil laws as far as procedural rules like laws of evidence are concerned. For example, in terms of Islamic law a woman's evidence carries half the weight of that of a man. In this regard Article 15 of CEDAW does not clarify the status of women before religious tribunals or secular courts applying religious laws although it guarantees equality with men before the law and identical legal capacity in civil matters. The fact that some educated women can avail themselves of secular remedies does not remove inequalities in religious personal laws which govern the lives of most women and for whom there is therefore no real choice between legal systems (Sullivan:1988:516-517). It must be taken into consideration that "[s]hould women wish to construct their lives independent of their religious communities, socioeconomic and cultural constraints often effectively deprive them of that option" (Sullivan:1992:847). It is also often those who are victims of discrimination who are unaware of any "wrong" done to them. Cultural and customary influences all play a role in this regard. Educating the youth could assist in widening the ambit of freedom in this sphere (Krishnaswami:1978:277). Furthermore, "[l]aw reform to protect the human rights of women must be accompanied by educational measures to foster social change, and economic and political initiatives to advance women's status if it is to have a significant impact on women's de facto rights" (Sullivan:1992:854).

Although Article 1 of the (religious) Declaration (1981) did not include some of the

[63]See 8.4, 8.6 and 9.8.2.

wording that referred to a right to choose, adopt, or change one's religion, Article 8[64] of the Declaration makes it clear that the General Assembly considers the earlier statements of the UDHR and ICCPR in this regard to be fully binding.[65] This is confirmed in a study of the problems of intolerance and discrimination on grounds of religion or belief which was prepared by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, who was commissioned to prepare this in 1983 and who used the Declaration as a term of reference. She drew the following conclusions. "After careful examination of...[Article 18 of UDHR and ICCPR respectively]...she came to the conclusion that although they varied slightly in wording, all meant precisely the same thing: that everyone has the right to leave one religion or belief and to adopt another...[t]his meaning...is implicit in the right to freedom...of religion and belief, regardless of how that concept is presented" (Odio Benito:1989:4;50). In his draft study on religious rights submitted to the UN Subcommission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights in 1956,[66] Special Rapporteur Krishnaswami expresses the same opinion (Krishnaswami:1978:240). The question to be raised in this regard is why this right was implicitly and not expressly encompassed in a document of this nature whose adoption and very essence was to safeguard these rights in the first place. It is after all not a binding document.[67]

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[64]"Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration on Human Rights and the International Covenants on Human Rights" (United Nations:1988:129; Patel & Watters:1994:218).

[65]Does this now mean that Muslim countries like Egypt, which has endorsed Article 8, are committed to freedom of religion as defined at least in the UDHR, if not also in the ICCPR? It seems not because this Declaration (1981) is not a binding instrument (An-Na'im:1986a: 49).

[66]UN. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), UN. Pub. No.XIV.2.

[67]It is interesting to note that the right to change one's religion or belief is specifically excluded from the scope of this right in the interim and final South African Constitutions.

Article 2 (1) of the Declaration states that "[n]o one shall be subject to discrimination by ***any State***, institution, group of persons or person on grounds of religion or other belief." Article 2 (2) further states that "[f]or the purposes of the present Declaration, the expression *'intolerance and discrimination based on religion or belief'* means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect *nullification or impairment of the recognition, enjoyment or exercise* ***of human rights and fundamental freedoms on an equal basis***" (emphasis added) (United Nations:1988:127). The conclusion of the UN Special Rapporteur referred to above was "...that it is not possible to enjoy freedom of religion or belief if full realization of other rights and freedoms is restricted or denied" (Odio Benito:1989:5). UN Special Rapporteur Krishnaswami (1978:234) asserts more strongly that "[w]here traditional religious practices come into conflict with the basic rights of [the] individual, it is the former that has to give way." Article 3 of the Declaration condemns such discrimination while Article 4 of the Declaration calls upon states to take effective measures, including enactment and rescindment of legislation, in order to prevent and remove such discrimination (United Nations:1988:127-8). However, no specific guidance concerning these measures or redress for existing discrimination is given. It is one thing to call upon the state to take steps to alleviate this problem but this would entail secular interpretations of religious law and opposition from religious leaders, which gives rise to a whole new set of conflicts. Also no mention is made of the right to equality before the law nor does the Declaration state a right to effective administrative and judicial remedies for harm suffered as a result of such discrimination (Sullivan:1988:507).[68] The UN's Special Rapporteur for Religious Intolerance, appointed in 1986 for the implementation of the Declaration, is of the opinion that "[v]ictims of intolerance and discrimination based on religion or belief should have effective remedies available to

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See 9.7.

[68]See Chapter Eight, paragraph 8, 8.2, 8.6; 9.8.2 and 9.7.

them" (Ribeiro:1991:3). His experience in this regard leads him to conclude that "... law is simply not the mechanism to suppress all intolerance" and therefore his recommendations in this regard place much emphasis on education (Davis:1991:36).

Article 2 of the Declaration therefore goes one step further by adding some new stipulations of its own which have very important implications in favour of women in so far as religious human rights conflicts with the human right to equality and the role of the State in this regard. However, because of the broad scope of Article 2, its principles have the potential to conflict with those of other human rights documents, especially in the area of women's rights, CEDAW[69] being a typical example. The broad scope of Article 2 also carries with it the danger of conflict between the principles stated in the Declaration itself (Sullivan:1988:504,515). Besides other conflicts with personal laws, another example is that, while a Muslim man may marry a non-Muslim or *kitabiyyah* woman (falling within the category of "People of the Book"), a Muslim woman may not marry a non-Muslim. While this may be an important doctrinal feature of Islam, this practice can be construed to constitute religious discrimination against the non-Muslim man and infringe the associational and privacy rights of both parties. Practical application of Article 2 would encourage, if not require of, the state to regulate interpersonal and intrareligious affairs to some extent (Sullivan:1988:504,515). The following questions are raised in this regard: "Are all the rights contained in the documents equally binding upon all peoples everywhere? Or are some rights (more than others) subject to national and cultural discretion? In short, are human rights - all, or in part - the measure of governments and cultures, or are governments and cultures the measure of human rights?" (Little *et al.*:1988:4). The qualified application of human rights instruments in the countries to be reviewed in Chapter Six highlights that some human rights - for example equality between the sexes - are subject to national, cultural and religious discretion.

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[69]See, for example, Article 5 (2) of the Declaration which conflicts with Articles 5 and 10 (c) of CEDAW (Sullivan:1988:515).

In other words, governments, culture and religion are the measure of human rights. "Are Muslims really faced with the dilemma of following Islamic law and abandoning human rights, or of espousing the 'Western' human rights ethic and abandoning religious doctrine?" (Sajoo:1990:26).

Is such a dichotomy a myth? It appears not, because Muslim women sometimes have to resort to changing from one school of Islamic law to another more lenient one and, even more drastically, converting from Islam to another religion to change personal laws applicable to them. This is done for practical and not theological reasons to avoid the application of unfavourable laws like that of divorce, for instance (Mayer:1991b:166). Non-Muslim minorities have also resorted to these tactics in a less drastic manner in that they would sometimes apply to a Muslim court to have MPL instead of their own personal laws applicable to them, where it was more favourable to their case. Such a change in personal law was especially favoured in the areas of inheritance (Goiten:1970:110).[70] In the absence of "a powerful and independent judiciary" there can be no real guarantee of human rights in Islam (Sajoo:1990:31).[71]

In examining the right to freedom of religion from an Islamic perspective two apparent conflicts appear. Islamic law appears to be in conflict not only with freedom "of" religion but also freedom "from" religion. It will be shown[72] that in most Muslim countries freedom of religion is regarded as both an inviolable and qualified human right. This theme will be expanded whilst concentrating on the fundamental right to freedom of religion itself. Freedom of belief is also included in and closely related to the right to culture and for Muslims it is Islamic law that serves to identify

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[70]See 4.2.

[71]This theme is taken up in 4.3 above 9.8.1 below.

[72]See 6.1.3 below.

Islamic culture (Majul:1978:118-119). Freedom of religion serves as a basis for all human rights. Besides the implications of a traditional interpretation of MPL, which is essentially of divine origin, on the equality clauses of most constitutions as will be expounded in Chapter Six, the right to freedom of religion includes freedom to change one's religion or belief. This is controversial because it is deemed to be against a major religious tenet of the Islamic faith and therefore Muslim countries have faced difficulties in this regard. Representatives from Muslim countries raised objections to the clause relating to the right to change one's religion during the deliberations surrounding Article 18 of the UDHR. A number of these countries (especially Saudi Arabia) tried to have this section of the Article deleted on the basis that a Muslim is not allowed to change his faith.[73] It is interesting to note a difference of opinion on this matter between Pakistan and Saudi Arabia, both Muslim countries. The representative of Pakistan supported and voted for Article 18 (without any limitations) on the basis of the *Qur'an* as primary source of Islamic law and literal word of God. What is also interesting is that the Pakistani representative who defended Article 18 on the basis of Islam was a member of the *Ahmaddiyat* movement[74] and therefore declared a heretic/apostate. This sect has since 1984 been classified by the Pakistani government as a non-Islamic sect (Ordinance XX). This reflects "...not the religious liberty intended by Article 18, but more traditional patterns of religious toleration" (Kelsay:1988:49).[75] The question of religious intolerance will not be examined in this chapter except in so far as to indicate that such intolerance is not only projected on people of a different religion or belief, but it

[73]See 5.1.1 where the validity of such a claim is refuted.

[74]See 6.3.3 for an explanation.

[75]See also Nasir:1978:266-272. Another example is that the *Baha'i* faith is not recognized by the Iranian government as an official religion but as a political movement (Odio Benito:1989:10,12; Taperell:1985:1184).

can manifest itself within the same religion.[76] The representative of theocratic Saudi Arabia abstained and rejected the UDHR on the basis of Islamic law *(Shari'a)* (not Islam), which is the interpretation and application of the primary sources by early Muslims (Kelsay:1988:37; An-Na'im:1988:2; Arzt:1990:216).[77] Incidentally, although Egypt also expressed some reservations, seven of the eight Muslim member states voted in favour of the UDHR (Sajoo:1990:24-25). Some countries again objected to the wording of the draft version of Article 18 of the ICCPR (which corresponds to Article 18 of the UDHR) to no avail. "A Saudi Arabian amendment proposing deletion of the phrase [to change one's religion] was subsequently withdrawn; a compromise amendment proposed the 'have or adopt' language of the final version, which most delegates agreed protected the freedom to change" (Clark:1978:204). "The Saudi Arabian delegate had argued that (1) the freedom to change was implicit in the guarantee of 'freedom of...religion'; (2) explicit recognition of such freedom would foster discrimination in favor of religions possessing highly organized proselytizing state religion; and (3) explicit recognition would cast doubt in the minds of the ordinary people, to whom their religion was a way of life" (Clark:1978:204 fn 22).[78] However, the objecting members did succeed to a small extent in limiting the wording of the Declaration of 1981 referring to a right to choose, adopt or change one's religion. However, as indicated above, this appears to be of very little consequence.

Islam allows any person to leave his/her religion to convert to Islam but it does not allow Muslims, whether born a Muslim or converted to Islam, to convert from Islam.

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[76]A good demonstration of religious intolerance is the clashes between the modernist, conservative and fundamentalist Muslims as indicated in 3.2 above. The unquestionable role of colonial powers in spreading this intolerance in Asia, Africa and America must also not be overlooked.

[77]See Chapter Two, paragraph 2 for an explanation of the difference between Islam and Islamic law.

[78]See also Arzt:1990:217.

This can be construed to mean that while a person might legally be affiliated to Islam, it does not necessarily imply that he believes in it (Hjärpe:1988:30). The two primary sources of Islamic law, namely the *Qur'an* and *Sunna*, do not develop the same position on the subject of apostasy. Most Muslim countries apply norms of traditional Islamic law in the area of apostasy. It is important to point out that this indirectly affects constitutional and personal laws[79] (Aldeeb Abu-Sahlieh:1986:141).[80] This is also implicit in the overlap between these laws. Apostasy in Islamic law has come to be regarded as a crime based on *Qur'anic* precepts. The *Qur'an* "[l]ike any other *constitutional* document...is replete with ambiguous and general statements subject to various interpretations" (emphasis added)[81] (Riesman: 1991:108).

To explain the *Qur'anic* position in this regard it must be pointed out that the *Qur'an* itself was revealed piecemeal and in two stages. They are the early Meccan stage between 610 and 622 and the later Medinan stage between 622 and 632 (An-Na'im: 1987:15). It is contended that, although some of the Meccan verses[82] support complete freedom of choice and prohibit any degree of coercion of non-Muslims, these verses were abrogated or superseded by later and more restrictive Medinan verses, especially those which validate holy war and fighting against disbelievers.[83] Abrogation therefore technically replaces the earlier verses making them legally "not binding". Although the topic of apostasy occurs approximately 20 times in the

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[79]For example, apostasy by one of the spouses normally brings an end to an Islamic marriage and the apostate would be unable to inherit because apostasy is said to constitute "civil death" so to speak (Doi:1981:647; Mayer:1991b:163).

[80]One critic goes as far as saying that "[i]t is crucial that any religious discrimination contained in ...practices [of criminal and civil law] be eliminated" (Clark:1978:210).

[81]See also 4.1.

[82]For example, Q.16:125 and Q.18:29.

[83]For example, Q.9:5.

Qur'an,[84] not once is the death penalty mentioned as punishment for apostasy (An-Na'im:1987:18; Kamali:1992:66,70-71,81; Yung:1991:20; An-Na'im:1986a:57). The whole subject of abrogation is itself a highly controversial and contentious issue which will not be embarked on here. An-Na'im (1986a:59) is of the opinion that the whole problem can be solved if "...some of the [Meccan] verses of the Qur'an which were not deemed to be legally binding in the past are to be legally enacted into law today." "Although the alternative models [of Islamic public law] are not entirely consistent with the Medina model, they are equally Islamic...Such a model [Meccan] would emphasize that Islam suits *all* ages and places, not just its early historical context...Islam suits all ages and places by providing a flexible framework from which the right answers may be developed according to the demands of the times" (An-Na'im:1987a:322,334).

While the crime of apostasy is based on *Qur'anic* perceptions, its punishment by death (therefore making it a capital *(hudad)*[85] crime) is based on essentially two *Hadith* of the Prophet Muhammad. The *Hadith* states that "[w]hoever changes his religion shall be killed" (Kamali:1992:71). Another *Hadith*, often quoted in support for the death sentence as punishment for apostasy, states that "[t]he life of a Muslim may be taken in three cases only...[including] one who has abandoned his religion, *while splitting him off from the community*" (emphasis added) (Kamali:1992:73). It is clear that the apostate must comply with this requirement before the death penalty can be imposed on him. Evidence to support this is found in the *Qur'an* itself - "Those who believe, Then reject faith, Then believe (again) And again reject Faith, And go on increasing in Unbelief, - God Will not forgive them Nor guide them on the Way" (Q.4:137). Kamali (1992:74) aptly sums it up thus: "The renegade could hardly enjoy the benefit of repeated belief and disbelief if capital punishment had been

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[84]Q.4:89; Q.5:60; Q.16:106; Q.47:25.

[85]*Hudud* (plural) crimes are crimes and punishments specifically defined in the *Qur'an* and *Sunna* (Merenbach:1988:244).

prescribed for the initial act of apostasy."[86] These *Hadith* were sanctioned by the consensus *(Ijma)* of his early companions. Nevertheless, it has been contended that imposing the death penalty or the use of force was not the practice of the Prophet; in his treaty (630) with the people of Mecca, he instead left matters of religion to the human conscience and allowed those who adopted Islam to renounce it. However, after the Prophet's death in 632, when some of the tribes renounced Islam, the Medinan authorities used force to create and maintain a just social order and this was a political and not religious act (Sachedina:1988:76;80-81).[87] Therefore the tradition of imposing the death penalty originated during the wars of apostasy after the Prophet's death. This was endorsed by state acts and subsequently came to be accepted as part of the law (Khadduri:1984:238). This penalty is usually deferred to give the apostate enough time to repent and return to Islam. Apparently women are given more time to repent than men (Adegbite:1977a:8-9). Women were apparently imprisoned until they changed their minds while men were executed if they did not change their minds (Mayer:1991b:163). It must be stressed that, although the *Qur'an* as *the* major source of Islamic law recommends the use of force, it does not impose the death sentence on an apostate (Adegbite:1977a:4-8; Sachedina:1988:78).[88]

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[86]See 2.1.1 for an explanation of the *Sunna* of Prophet Muhammad as a primary source of Islamic law.

[87]Political turmoil resulted early in Islam after the Prophet Muhammad's death because Arab tribes who had converted to Islam for certain reasons regarded the agreement between the Medinan government and them as cancelled with his death. They therefore demanded to be released from paying compulsory *zakah* tax, which at that time was used for military and other political purposes besides being distributed as alms to the poor and needy. The Prophet's successor Abu Bakr did not accept this argument and declared war against them. He succeeded in bringing the tribes back under the dominion of Medina and this episode set an important precedent for the law of apostasy in Islam. It was in this way that apostasy, as a religious act, came to be associated with the question of public order (Sachedina:1988:78-82).

[88]Ironically, in 1657 Muslims in the Cape were forbidden from converting the local population to Islam, the violation of which was punished by death (Chidester:1992:150). Later, however, Muslims were more successful in converting people to Islam (Bradlow:1988:195-197). See 2.2.1.1.

Secularization of criminal law in the 1800s-1900s has resulted in the death penalty becoming a rarity (Mayer:1991b:168). It seems that Muslims (or rather religious groups) are prepared to regard freedom of religion as a "full" human right in some instances and not in others; for example, if freedom of religion should conflict with traditional interpretations of Islamic law then it will be regarded as a "qualified" human right. This then give rise to a conflict between the rights of individuals to believe what they choose and the rights of religious groups to promulgate doctrine as to what they perceive to be part of religious practice and therefore what individuals should believe. The current position is aptly summed up as follows: "...[T]he subject of human rights in general and the right to freedom of religion...in particular has suffered in the West from a fashionable but unconvincing belief in relativism, and in the Islamic world from a failure to subject the *Qur'anic* foundations of Islamic faith to rigorous and sympathetic reexamination, as well as failure to acknowledge the internal complexity of the Islamic tradition in regard to those matters" (Little *et al.*:1988:9). It is suggested that in so far as Islamic law conflicts with contemporary human rights criteria, jurists should use their human intellect to interpret these principles to make them consonant with and protective of the interests of the community and perhaps comparing them with the UDHR (Amin:1989: 57-58). As Mayer (1991b:170) says, "There is diversity of opinion and ample ground for deciding that the premodern *shari'a* rules on apostasy no longer apply. Muslims can select alternative interpretations of the Islamic rules on apostasy that are more in keeping with the tenor of the Qur'an and with modern human rights norms on religious freedom."

Finally, as indicated,[89] the practice of slavery in Islam is briefly outlined to show that most Muslim countries have, when expedient, discontinued certain *Qur'anic* injunctions in practice by secular law, for example those relating to slavery. The

[89]See 5.2.

same arguments that apply to slavery also apply *mutatis mutandis* to the use of alcohol[90] and usury. It is argued that the contemporaneous value of the *Qur'anic* injunctions in this regard had been replaced by those arguments which favour greater equity (Esack:1993:184). However, this has not been the case as far as women's rights (which still remain subject to conservative interpretations) are concerned. This indicates that while Muslim countries do rely on religious criteria to place restrictions on human rights, the opposite is also true. The contentious issue of slavery, which is strictly speaking still applicable in terms of Islamic law, is now briefly highlighted to indicate that Muslim countries do in fact circumscribe religious criteria when expedient, for example, discontinuing the practice of certain *Qur'anic* injunctions and not others (Khadduri:1984:233-234).

As far as the practice of slavery is concerned the following can briefly be said. Although there are clear *Qur'anic*[91] injunctions which mandate the end to the practice of slavery and although this is substantiated by the *Sunna* of the Prophet Muhammad, slavery is strictly speaking still applicable in terms of classical Islamic law. Traditionalists, while they maintain that slavery can be abolished in practice, think that as a matter of principle slavery cannot be prohibited because the *Qur'an* contains rules as to the slave trade, slaves and their rights. They argue that non-slave status is in itself not a "human right" (Hjärpe:1988:29). It is, however, postulated "...that the rules stated in Islamic law were intended to liquidate the institution gradually" (Adegbite:1977a:6). Slavery itself was only legally abolished in the West after World War II when the UN stepped in. For example, Article 4 of the UDHR expressly prohibits slavery (Brohi:1982:246; Khadduri:1984:233-234; United Nations:1988:2; Khan:1989:65). The constitutions of most Muslim countries prohibit slavery, for example the Malaysian and Pakistani Constitutions (Nawaz:1965:330).

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[90]See Moosa, N:1991:130 for reference to the *Qur'anic* injunctions which were abolished to prohibit the use of alcohol.

[91]See Q.90:13.

5.2.2 MINORITY RIGHTS[92]

This section will start with a historical background to minority rights. The question as to whether minority rights can be regarded as individual rights will then be considered. This is followed by an outline of international instruments relating to minorities, their protection and finally a discussion of non-Muslim minorities in Muslim states and Muslim minorities in non-Muslim states.

The history of the consideration of minorities began as early as 1815.[93] It continued after the two World Wars whereafter the rights of minorities were relegated to past history and focus was now placed on equality between human beings in a given country (Thornberry:1991a:6). Although group rights and non-discrimination were already established during the period between the two World Wars, it was only after the establishment of the UN that wider international legislation developed in this area. The UN instruments and those of other international organisations are considered as part of contemporary international and human rights law (Lerner:1991:2). The UN Charter (1945) as such contains no specific provision regarding the rights of minorities and neither does the UDHR (1948). Nor does the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) contain such a provision, although Article 14 of this Convention varies from similar UN provisions in that it singles out "association with a national minority" as a ground for discrimination (Bruegel:1971:430,433; Patel and Watters:1994:115; Thornberry: 1991a:3,7). By excluding discrimination on the grounds of race, sex, language or

[92]There have been recent attempts to assert a new category of rights called third generation or collective or peoples' rights. There is, however, much controversy surrounding this and its relation to established human and earlier group rights. Some authors are of the opinion that, although these rights are given to human beings as a group/people or minority, they nevertheless retain their character as "direct" human rights but are exercized jointly rather than severally (Crawford:1992:vii; Triggs:1992:141-142; Dinstein:1976:102-103).

[93]See 5.2.1, footnote 39.

religion[94] the UN Charter, by implication, also safeguarded minorities. This principle of non-discrimination is found in three Conventions adopted between 1957 and 1965 (Capotorti:1976:3 fn 5;6-7). The UDHR also contains guarantees relating to non-discrimination (Article 2), equality (Article 7) and freedom of religion and expression (Articles 18-19) which all stand in some relationship to Article 27 of the ICCPR below (Thornberry:1991:241). Hence, much of the protection accorded to minorities is "indirect" because in many instruments, like the few mentioned above, there is no express mention of minorities (Thornberry:1991:385). The ICCPR (1966) makes provision for minorities in Article 27 as indicated below and includes the right to self-determination (Pirzada:1980:68-72; United Nations:1988:28; Thornberry:1991:242). A definition[95] of a minority has to date not been achieved.[96] It appears that it is not necessary for a group to be legally defined before it can have rights (Sigler:1983:13). Some countries even deny the existence of minorities (Ermacora:1983:291).

The spectrum of state policies towards minority groups ranges from assimilation, integration, fusion, pluralism to segregation (Thornberry:1991a:4). As indicated in Chapter Six, human rights chapters are contained in most constitutions and this attests to the fact that the state is a civilized member of the international community. Constitutions appear to be freer or more explicit than international law in relation to

[94]Articles 1, paragraphs 3, 13 and 55 c.

[95]Like Articles 22 and 27 of the UDHR, Article 27 of the ICCPR also makes mention of the right to culture. The two 1966 Covenants have also added one new right not included in the UDHR, namely the right of all peoples to self-determination (group right). Historically, the world is now in the fourth generation of human rights and during the third generation (1980), and despite not reaching consensus on the definition of a minority, an attempt was made by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to investigate a new right called the "right to be different", the essence of which was found to entail the mandate of all States to allow peoples to remain as they *are*, that is, different from each other; it applies to a group or an individual (Hassan:1982:67,69,90-91; Thornberry: 1991a:14).

[96]See the discussion on international instruments and minorities below.

the treatment of minorities and recognition of their existence (Thornberry:1991a:9). As also indicated in Chapter Six "[h]uman rights are an inspirational ideal of 20th-century philosophy, politics and law" and because some human rights like freedom of religion are subject to many restrictions, they are more often than not breached instead of observed. They do, however, hold the promise that law and the state will co-operate to heighten rather than weaken human dignity (Thornberry:1991a:13). Some universal human rights are therefore "...merely vacuous, benefiting everyone in general but no one in particular" (Thornberry:1991:387). The possibility of such breach also exists for South Africa if instruments are accepted but subjected to reservations and restrictions. "In practice, the options open to minorities for establishing rights are limited...All constitutions pay lip service to freedom, equality, and toleration, but no state has a clean record" (Dummett:1983:389).

There are many uncertainties with regard to the status of minority rights. There is, for example, no clarity as to whether these minority or third generation rights should be regarded as human (individual) rights. It is not clear whether minority rights claims are always a legitimate part of human rights (Sigler:1983:191). A typical example of where they do not co-exist is instances where human rights and group rights collide with each other in the area of affirmative action and where group rights have been favoured over human rights. There seems to be no reason why group rights and individual rights cannot co-exist in other areas (Sigler:1983:196). When two human rights conflict it is often difficult to decide which is a strong right and which a weak one. The problem, however, intensifies when minority rights are at issue because it becomes difficult to distinguish between claims of an individual and those of a group member or group itself. For example, is the right of assembly for public worship a right held by individual members of a particular faith or a right belonging to the group as such (Dummett:1983:388)? When groups as such have rights, differentiation occurs between individuals if they are members. This highlights the question as to which differentiations are now discriminatory and which ones are justifiable in the name of the rights of groups (Van Dyke:1974:725).

As to whether minority rights should be treated as human rights, there are generally two opposing views which will probably persist for a long time. There is the view that despite the collective dimension of human rights and because the subject of a human right is always an individual person, human rights should be restricted to individuals as against the state or group (Donelly:1990:39). In other words, it is not denied that group rights exist and may even rank above human rights, but they are not human rights. On the other hand, there are authors who are of the opinion that certain collective rights may be recognized as human rights and as long as these third generation rights do not compromise the implementation of other human rights, they should be regarded as human rights. Group rights can therefore either be regarded as human rights or be part of or include human rights (Baehr and VanderWal *et al.*:1990:34-35; Thornberry:1991:394; Van Dyke:1985). "This means that a member of a minority group should be able to claim that he or she, as an individual, has been denied rights available to others in the same nation. Equal treatment under the law is an individual right, although it may be claimed by a minority group member" (Sigler: 1983:195). It appears that minority rights and human rights are often complementary (Triggs:1992:145). However, minority rights and human rights can also conflict with each other. As far as the conflict between, for example, MPL and the principle of equality is concerned, the principle of equality can be construed to mean that being a member of a religion does not make individuals inherently unequal in the law of the State (Thornberry:1991:386). "...'[G]roup rights' in a philosophical or political sense can often in effect only be protected as individual rights" (Du Plessis:1989:56).[97]

[97]Interesting questions raised in this regard are: "Can we...solve the problems of group discrimination by using the language, and the law, of individual rights?...[C]an the effects of past discrimination on the groups be overcome, if only that individual who takes action on the basis of discrimination receives satisfaction and compensation as the result of his individual charge of discrimination?...[I]f the whole concept of legal rights has been developed in individual terms, how do we provide justice for the group?...[W]hy [is it] that the deprivation of individual rights on the basis of some group characteristic...[like] religion...is treated...in American law, as a problem of protecting the rights of an individual[?]" (Glazer:1978:88-89).

Others, however, feel that this view is "atomistic" and that individual rights can only be explained and justified by the rights of the community (Kiwanuka:1988:82).

It is, however, also asserted that the UN Charter and UDHR use language which is couched in individualistic terms and therefore imply that the human rights in question are not applicable to groups (Thornberry:1991a:5). While the Covenants on human rights to a certain extent do depart from such an approach, their "thrust" is individualistic. Capotorti (1976:19) is of the opinion "...that the rights referred to in Article 27 do not belong to each and every human being as such, but to persons qualified by their membership of a minority group...[T]hese rights are so to speak, half way between purely individual rights and those related to collective entities." It is further alleged that Article 27 of the ICCPR dealing in particular with minorities does not assert that these minorities *have rights* but merely that they shall not be *denied* certain *rights*. This, however, does not mean that it is only individuals who have rights. Groups, for example, have the "collective" right to self-determination (Van Dyke:1974:725-726,740; Van Dyke:1985:16; Cristescu:1981:30).[98] Thornberry (1989:867) thinks that "[s]elf-determination and the rights of minorities are two sides of the same coin." The opinion does, however, exist that self-determination is a human right and not a right of minorities (peoples) (Thornberry:1991a:5). They also have the right to physical existence under the Genocide Convention of 1948[99] (Triggs:1992:141; United Nations:1988:143-144; Capotorti:1976:11). Dinstein, for example, only finds two rights in international instruments which deal with minorities, namely the right to physical existence mentioned above and the right to a separate

[98]For a discussion of the right to self-determination see studies prepared by Espiell:1980 and Cristescu:1981 [UN Special Rapporteurs of the Sub-Commission on Prevention of Discrimination and Protection of Minorities] and Thornberry:1991:15 and 1989.

[99]See reference to rights of minorities in Article 2.

identity (Article 27) (Thornberry:1991:11).[100]

Van Dyke (1980:26) sums up the position thus: "We live in a complex world where simple-minded insistence on individualism, or on the rights of people...are all inadequate to the problems that we face. There must be flexibility in considering just claims in [both]...categories."

As far as international instruments and minorities are concerned, the life of a minority presents a problem of human rights for which the UN, as a "supra-national" body has tried to find solutions. Minorities here are taken to include both Muslim and non-Muslim minorities. "[T]he protective measures that the U.N. has accepted to ensure for the non-Muslim minorities are, in similar vein, applicable to the Muslim minorities" (Ahmad:1985:126). Some Muslim authors are of the opinion that the UN has not achieved its goal of attempting to solve the problems of especially Muslim minorities and it has been castigated by some Muslim authors as the "divided nations". Others assert that there is a dichotomy between the words and actions of the UN (Ahmad:1985:158-160,176,167-168). Yet others feel that the propaganda in this regard "...is infinitely cruder, more dishonest, and less conducive to moral and intellectual responsibility than the actual legal documents or the pronouncements and interpretations of lawyers who work with them" (Kamenka:1992:135). These views will be assessed below.

Attempts at defining a "minority" has proved vexing for international lawyers in courts and in international instruments. The lack of an authoritative definition has both theoretical and practical implications and guidelines in this regard seem to be inadequate (Sohn:1981:276-280). Ermacora (1983:289) seeks to find an adequate definition from a sociological and legal point of view. The latter (legal) point he

[100]For a comprehensive list or catalogue of group rights, including some which are controversial and not recognized as yet see Lerner:1991:34-37.

divides into a national, regional and international point of view. He maintains that the concept of minority is man-made (Ermacora:1983:287).

Article 27 of the ICCPR referred to below must be viewed in the context of other human rights instruments and UN resolutions and declarations which refer to minority problems, even those which preceded it. It should, for example, be read together with Articles 2 (1) and 26 of the ICCPR and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (also of 1966) (Ermacora:1983: 286; Capotorti:1976:4-5).[101] The Helsinki Final Act of 1975 also makes reference to minorities in its text (Thornberry:1991:248; Patel and Watters:1994:131). The African Charter on Human and Peoples' Rights of 1981 is also an example of collective peoples' rights and individual human rights. There is, however, no reference to minorities in the Charter (Patel and Watters:1994:141; Thornberry: 1991a:10). The term "people" has not been defined and is indeed very difficult to define, in any of the international instruments which uses it; for example the UN Charter was adopted in the name of "We the Peoples" and its Article 1 (2) recognizes the principle of "self-determination of peoples" and the common Article 1 of the 1966 Covenants deals with the rights of peoples to self-determination (Kiwanuka:1988:81-82; Dinstein:1976:104).

Article 27 of the ICCPR (1966) deals with minority rights not mentioned in the UDHR (1948) as follows: "In those states in which ethnic, religious or linguistic minorities exist, *persons* belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (emphasis

[101]See Thornberry:1991a:7,17-18 for a list of selected international documents (treaties, declarations, *etc.*) on minorities.

added) (United Nations:1988:28).[102] This is said to be a weak right as it only establishes the duty on states that it will not prevent individuals belonging to a minority to do what is stated in Article 27 (Eide *et al.*:1990:26). It is said to be weak in that it lacks specificity and leaves a "...wide discretion to States on the modalities of its application" (Thornberry:1991:387). By using the word "persons" it avoids giving the "group" an international personality and seems to indicate an intention to deal with individual rights only (Sohn:1981:274). However, this is not necessarily so as is indicated in the liberal interpretation given to Article 27 by some authors like Ermacora, Dinstein[103] and Capotorti (Lerner:1991:15). While both Article 27 and Article 18 (see above) guarantee freedom to manifest and practice religion, unlike Article 18, Article 27 does not permit limitations to be imposed by a state, even to the extent "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (Sohn:1981:275,285). Article 18 is given practical effect by the guarantee in Article 27 of freedom to practice religion in community with others. There is a link between the collective "human" right of religious minorities to practise their religion in community with others and the individual human right of freedom of religion (Triggs:1992:145; Dinstein:1976:120). Article 27 (as is typical of international law) only refers to "ethnic, religious[104] or linguistic minorities". It is not clear whether the elimination of "impermissible grounds for unfavourable treatment [like]...race, color, *sex*, and nationality" [can be

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[102]See also Patel and Watters:1994:30; Encyclopedia of Public International Law:1985: 385,389 and Henkin:1981:20. See further 5.2.2 where non-Muslim minorities living in Islamic states are discussed.

[103]See 5.2.2 where non-Muslim minorities living in Islamic states are discussed.

[104]A religious minority is defined as "...a group of persons who manifest (profess) religious thoughts which differ from a State religion; differs from the religion manifested by the majority of a people, which is in opposition to an atheistic behaviour of the majority of a population in particular if there is not complete freedom of religious tolerance in a given country and if the members of the religious group want to uphold their religion" (Ermacora:1983:294-295). A religious minority can of course simultaneously also be a linguistic or national or ethnic minority.

construed to] mean that national or racial groups have no rights unless they are also ethnic or linguistic minorities..." (emphasis added) (Sigler:1983:3).[105] This also has implications for women as it is uncertain whether women should be regarded as a minority.[106] Thornberry (1991a:7) thinks that the "...exiguous nature of Article 27 - the limited set of rights it enshrines - is understandable if not wholly defensible, since this Article bears much of the burden of the traditional protection of minorities in the modern system."[107]

It was recommended at a seminar on human rights in Islam held in Kuwait in 1982 that this covenant (ICCPR) be ratified by all Muslim countries as it would be of assistance to Muslim minorities in non-Muslim states (International Commission of Jurists:1982:17; Bagader:1982:70-71). It is confidently concluded that "[f]reedom of religion for individuals and for groups is now secure as part of the fundamental law of Canada"[108] (Fairweather:1986:97). Whether this is the case in other Muslim and non-Muslim countries will be assessed below.

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[105]See also Thornberry:1991a:3.

[106]See Sigler's definition of minority below.

[107]See in this regard the protection of minorities discussed below.

[108]Canada has always had a written constitution. Freedom of religion, along with several other human and group rights, became entrenched in the Canadian constitution in 1982 with the promulgation of the Charter of Rights. See Sections 15, 16 and 35. S 1 is a limitation clause. S 15 (1) entrenches the right to equality (Sedler:1988:577; Thornberry:1991a:18; Weiler:1983:317-321; Australian Law Reform Commission Report No.69 Part II:1994:58). The Constitution Act of 1982 added an "entrenched" bill of rights to the constitutional system for the first time (McWhinney:1987:73). Lessons to be learnt from the Canadian experience include the fact that "[i]t is not enough to take a stand in favor of equality and against discrimination in the abstract. One must commit oneself to a view of what these mean in the concrete, a subject upon which people can have serious and legitimate differences, even within the minority community itself" (Weiler:1983:324-325). Whether freedom of religion for groups and individuals is guaranteed as part of human rights in India and the US will be assessed in Chapters Six and Seven respectively.

The main task of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was to ensure "equality of treatment" to minorities similar to that enjoyed by majorities (Ahmad:1985:2,4). In 1967 a study was initiated by the Sub-Commission for the implementation of Article 27 of the ICCPR. "On the further recommendation of the UN Human Rights Commission, the Economic and Social Council authorized the appointment of a Special Rapporteur...Francesco Capotorti was appointed in 1971 by the Subcommission and his report was submitted in June 1977, including comments by governments. This report is a comprehensive study, historical and conceptual, of the international protection of minorities..." (Fawcett: 1979:11). In his study Capotorti "...prepared seventy six country monographs, which described highly differentiated patterns of ethnicity, language and religion in the States" (Thornberry:1991:3; Caportorti:1991:106). In this report Capotorti also proposes a new definition of a minority and, while it may be unofficial, to date it remains the leading example in this area and should be given the consideration it deserves (Sigler:1983:4). He emphasizes, however, that his definition is limited in its objective and that "[i]t is drawn up solely with the application of article 27 of the Covenant in mind. In that context...'minority' may be taken to refer to: A group numerically inferior to the rest of the population[109] of a State, in a non-dominant position, whose members - being *nationals* of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (emphasis added) (Capotorti:1991:96; Capotorti: 1976:16; Ermacora:1983:276,292; Kiwanuka:1988:92; Thornberry:1991:6; Thornberry:1989:878). There were provisional interpretations and other definitions proposed in the early debates in the UN and others by scholars, *etc.* (Capotorti:1991: 7; Capotorti:1976:14; Fawcett:1979:4;Ermacora: 1983:272; Lerner:1991:8; Heckmann:1983:9-10).

[109]For a list of "heterogeneous" population groups that fall under the heading of minorities see Heckmann:1983:9.

The following are examples of other types of definitions of minorities. "In 1985 the [UN] Sub-Commission sent to the Commission a text prepared by J.Deschênes defining 'minority' as 'a group of *citizens* of a state, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law'" (emphasis added) (Lerner:1991:9; Kiwanuka:1988:92 fn 45; Thornberry:1991:7; Thornberry:1989:878 fn 61). As emphasized in italics there is not much difference between Capotorti's and Deschêne's definitions except that one confines minorities to nationals while the other confines it to citizens. Groups such as refugees, aliens or migrant workers are not included (Thornberry:1991a:3). Capotorti is of the opinion that Article 27 should be given a restrictive interpretation (Thornberry:1991:8). A minority is "'[a]ny racial, tribal, linguistic, religious, caste or nationality group within a nation state and which is not in control of the political machinery of that state'" (Palley:1978:3). Sigler (1983:5) defines a minority as follows: "*In its simplest form we can regard as a minority any group category of people who can be identified by a siz[e]able segment of the population as objects for prejudice or discrimination or who, for reasons of deprivation, require the positive assistance of the state. A persistent nondominant position of the group in political, social, and cultural matters is the common feature of the minority.*" He goes on to determine whether this definition includes women and concludes that women are not members of a minority group because they do not comprise a group. He adds that while some women are feminists, others are not and biological similarity does not necessarily confer "groupness" upon them. He concludes that women are a social category but not a group category for the purpose of the analysis of minority rights (Sigler:1983:5).[110] Fawcett (1979:4) is of the opinion that it is more beneficial to recognize the "relativity" of the term minority in comparison with the "decisive"

[110]See the discussion of group rights in South Africa in 9.7.

character of the majority.

The Draft International Convention on the Protection of National or Ethnic Groups of Minorities which was drawn up by Professor Felix Ermacora and colleagues and presented to the UN Human Rights Commission in 1979, is considered to be an improvement on the ICCPR and the above-mentioned study by the UN Sub-Commission. If ever approved by the UN it can become binding on those states who ratify it (Palley:1978:6; Fawcett:1979:16).

Caportorti (1976:32) indicates that there is a need to go further with the task of protecting minorities because "...the problems of minorities are so vast and fraught with danger that a fresh, concerted effort must be made to settle them satisfactorily in the context of human rights."

As far as the protection of minorities is concerned the history of international protection of groups has been divided into three periods: "(1) an early period of non-systematic protection consisting mainly of the incorporation of protective clauses, particularly in favor of religious minorities, in international treaties; (2) the system established after World War I, within the framework of the League of Nations; and (3) developments following World War II, in the United Nations (UN) era" (Lerner:1991:7,23). There appears to be a transition from a system of protection of minorities to a general recognition of group rights (Lerner:1991:28). The protection of minorities is alleged to have been neglected during this third period (Bruegel:1971: 413,425).

A great deal has been written on the development of minority protection between the two World Wars.[111] What follows is a brief comment on the protection of minorities prior to the UN. De Azcárate (1946:124-125) refers to the early treaties which

[111]See Ermacora:1983 for a detailed study.

brought the First World War to an end and which set the precedent for the establishment of an international law of human rights. These peace treaties started what was then a "fairly new development" (De Nova:1965:275). One of the main aims of these treaties was to protect and ensure that minorities, religious and otherwise, would not be victims of discriminatory treatment by public authorities and to guarantee to them "...a regime of equality with respect to the majorities" (De Azcárate:1946:125). A Professor Kunz had said in 1954 that "At the end of the first World War... international protection of minorities was the great fashion: treaties in abundance, conferences, Leagues of Nations activities [Treaties of 1919-1920] and enormous literature. Recently this fashion has become nearly obsolete. Today the well-dressed international lawyer wears 'human rights'" (De Nova:1965:289-290; Thornberry:1991:6).

While the system of minority protection was clear-cut between the two World Wars, today a general rather than specific approach to human rights has influenced the status of minorities. Often the problems of minorities are approached from a political angle, for example, the motives of the league system were more political than humanitarian (Ermacora:1983:286; Haksar:1974:3;83). After the demise of the League of Nations due to the events of the Second World War, the minorities system came to a standstill (De Nova:1965:281; Dinstein:1976:116).

While formerly minority problems were dealt with on the basis of political expediency, today, although political expediency still plays a role, more emphasis is placed on the dignity and freedoms of human beings (Haksar:1974:83). There is a shift away from collective "human" rights to the advancement of individual human rights (Thornberry:1991:5). As indicated above the mandate of the special Sub-Commission of the UN, which is subordinate to the Human Rights Commission, is to deal with the dual subject of the protection of minorities and prevention of discrimination but it has concentrated on the latter (Dinstein:1976:117). As far as the work of the UN in the field of minority protection is concerned the following can be

said. Since 1955 the emphasis has been on protection against discrimination - hence the UN Declaration on the Elimination of All Forms of Racial Discrimination of 1963 and the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.[112] After 1963 emphasis was placed on new studies on the protection of minorities, hence the Capotorti and other reports referred to above (United Nations:1988:52,56,58-59; Ermacora:1983:265-266; Thornberry:1991a:7). As is evident from this chapter, the UN has dealt with problems of religious discrimination but not with problems relating to the protection of religious minorities. Ermacora (1983:280) writes that "[a] religious minority cannot exist without members of religious minorities who are prepared to manifest their religion. The protection and the guarantee of religious minorities is primarily a protection of the individual belonging to a religion in a minority position." Is minority protection the same as human rights protection? It appears that there is a conceptual difference but that "...all human rights measures...serving minorities...can be called a 'safeguard of minorities...' as an overall concept" (Ermacora:1983:345,303).

International instruments impose duties on states to protect minorities living within their territories and therefore under their jurisdiction.[113] Today there is, however, no

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[112]See reference to rights of minorities in Article 1, paragraphs 1 and 4 and Article 2 (2).

[113]In discussing the duties of public authorities in his draft study of discrimination in the matter of religious rights and practices, Krishnaswami (1978:280) stated per Rule 16 that "1. Public authorities should refrain from making any adverse distinction against, or giving preference to individuals or groups of individuals with regard to the right to freedom of thought, conscience and religion; and should prevent any individual or group of individuals from making such adverse distinctions or giving such undue preferences...4 (c) In case of a conflict between the requirements of two or more religions or beliefs, public authorities should endeavour to find a solution assuring the greatest measure of freedom to society as a whole..." The duty of the state in South Africa, in the case of conflict between members of the same faith, will be highlighted in 9.4.2, 9.5 and 9.6.2 with a view to making certain recommendations in 9.9 below. As indicated in 5.2.1 the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 does not provide sufficient scope to analyze interactions between members of the same religious groups.

international instrument specifically aiming at affording protection to minorities. Even the insertion of merely one Article relating to minorities, namely Article 27 in the ICCPR, proved a most difficult task (Haksar:1974:83,99). While protection may be a domestic[114] matter, international instruments, to the extent that they declare law, have a role to play in the protection of minorities and here the force of publicity and politics must not be underestimated (Fawcett:1979:14). "Judicial action on behalf of minorities is an important institutional safeguard of minority rights. Nowhere is the judiciary assigned the specific task of protecting minorities but this has been their role in many nations. India and the US have, for example, had active judicial intervention on behalf of minorities" (Sigler:1983:180).[115]

The position of non-Muslim minorities in a Muslim state will now be briefly outlined. Islam adopts a very liberal attitude as far as some human rights are concerned. Non-Muslim minorities are allowed to regulate their affairs according to their own personal laws. Historically, under the Ottoman (Turkish) system, communities were divided according to the *millet* (nation) system which was formed in the 1400s and lasted until the 1900s. Under this system each individual had to belong to a *millet* representing his religious group. Each *millet* established and maintained its own religious institutions and even had its own courts. Non-Muslims were thus allowed their own religious law (Sigler:1983:70; Caportorti:1991:2; Van Dyke:1985:74). Article 27 of the ICCPR reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (United Nations:1988:28; Patel & Watters:1994:30). Does the phrase "religious minority"

[114]Besides state intervention, in this respect religious groups can, for example, act as mediating institutions and the minority itself can act to serve as an instrument for its own protection although this has its own accompanying problems (Dummett:1983:396). See 8.3.

[115]See 6.3.2 and 7.4.

mean that the minority must have a religion and not merely a belief and would therefore, for example, exclude atheism as a belief? If these rights are conferred on "persons belonging to such minorities" and not on the group as such, what then is the purpose of Article 27, especially since the right "to profess and practise" one's religion is already protected under Article 18 (1) of the ICCPR? Must Article 27 not go beyond the ambit of Article 18 in order for it not to be rendered useless? These are all pertinent questions raised by Dinstein (1992:156-157) who is of the opinion that "...the purpose of Article 27 is to grant collective human rights to the members of a religious community *qua* a group." One of the areas which is pertinent to minorities but which is not covered by these international documents, but which it is felt should be considered, is the problem of whether it should regulate that "separate juridical institutions apply the minorities' own written or customary law with full effects in the law of the State" (Roth:1992:116).

Non-Muslim minorities living in a Muslim country are allowed to marry, divorce, inherit and adopt children according to their religious or cultural traditions. This is not typical of Western countries. Hence the whole concept of uniformity of laws or uniform civil code has serious implications for all minorities including Muslims living in Western countries. In Islamic law the major schools of law[116] are applied to an individual according to the community to which he belongs and not according to considerations of geography. Therefore, even within Islam, there is no uniformity, not even in law (Yung:1991:19; Breiner:1992a:2-3).[117] While Muslim countries theoretically recognize equality among their citizens regardless of religious affiliation, most of their constitutions authorize the application of Islamic law which in turn leads to discrimination on grounds of religion. This has implications for non-Muslims or

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[116]See 2.1.1 above.

[117]See the country studies in Chapter Six below where it will be explained that normally only one school of law prevails in a country while the rest may be considered where the applicable school is deficient. See also 9.8.5 below.

dhimmis. For example, "...non-Muslims are not allowed to practise any form of group worship outside embassy or consular premises in the whole of Saudi Arabia..." (Yung:1991:18). Although non-Muslims were generally subject to Islamic law they could follow their own personal laws. They were, however, bound to follow Islamic law in mixed cases involving persons of different faith and especially when the other party was a Muslim (Mayer:1991b:148). Article X (a) and (b) of the UIDHR (1981) deals with rights of non-Muslim minorities to follow their own personal laws (Patel and Watters:1994:166).[118] Pakistan[119] is a typical example of a Muslim country which purportedly safeguards the rights of minorities in its Constitution. In its preamble "...it is provided that adequate provision shall be made for minorities to profess and practise their religion and develop their cultures...Article 21 of the Constitution says that no person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation and maintenance of any religion other than its own. In Article 22 it is provided that no person attending any educational institution shall be required to receive religious instructions...if such...relates to a religion other than his own...And under Article 23 it is provided that all citizens are equal before the law and are entitled to equal protection of law. Article 26 provides that in respect of access to places of public entertainment or resort not intended for religious purposes only there shall be no discrimination against any citizen on the grounds of ...religion ...sex...Article 27 provides that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against..." (Brohi:1980:38-39). While Articles 2 and 222 are not very favourable to non-Muslim minorities, other Articles like Article 28 deal more positively with minorities and their rights (Thornberry: 1991a:12).

Whilst Muslim countries constitutionally support freedom of religion and rights of

[118]See also 5.1.1.

[119]See 6.3.3.

religious minorities, strict compliance with Islamic law (not necessarily with Islam) poses difficulties in this regard and is inconsistent with international human rights documents. In terms of Islamic law the subjects of an Islamic state are divided into three religious categories: Muslims, non-Muslims or *dhimmis* (but also adherents of monotheistic religions who believe in one of the divine revelations, for example Christians and Jews) and unbelievers. Muslim males are the only full citizens of an Islamic state. Generally *dhimmis*, who submit to Muslim sovereignty and therefore have an option of limited citizenship under contracts of *dhimma*, are not equal in a political sense and are excluded (having no choice/option in this respect) from military service in *lieu* of which they pay a special (poll) tax known as *jizya*. They are not expected to fight in holy wars on behalf of Islam. The fact that *jizya* was imposed for protective purposes and was less burdensome than the obligatory *zakah* (alms tax) paid by Muslims does not detract from the fact that it amounts to discrimination on religious grounds. Nevertheless, it seems that *jizya* has become obsolete today (Nawaz:1965:327). It was abolished in the Ottoman Empire in 1855 and in Egypt in 1856 (Vatikiotis:1988:58; Vatikiotis:1987:87). Unbelievers, on the other hand, are not entitled to this option of limited citizenship and a different set of rules applies to them (Mayer:1987:131,147; An-Na'im:1987:1,8-9,11). Apart from not being able to serve in the army, *dhimmis* cannot hold any judicial or political office nor testify in litigation involving Muslims. They cannot marry Muslim women nor build new churches or houses higher than those of Muslims and have to distinguish their garb from Muslim dress. Saudi Arabia does not allow non-Muslims to enter the holy areas of Medina and Mecca (Arzt:1990:208-209,224). Hence non-Muslims as a religious minority as well as atheists in a religious state, like their counterparts in a secular state, are also subject to discrimination implicit in the right to freedom of religion.

I shall now concentrate on the position of Muslim minorities in non-Muslim states where religion is a feature which distinguishes them and in which they have with time

become assimilated. Interestingly, it is pointed out that Islam itself began as a minority - of one person - namely, the Prophet Muhammad (Kettani:1986:3). Muslim minorities are to be found in various countries ranging from Canada, US to India (Irving:1979:29). Historically, these minorities arose in different ways such as colonial influence, conversion and emigration, *etc.* which will not be detailed here.[120] As a minority in a non-Muslim country Muslims often have to contend with multiple identities. In public they are citizens and in private they are Muslims. Many Muslims have serious difficulty with this "tidy divide" of the relegation of all expression of group identity to the private realm (Shue:1983:296-297).[121] Although a dismal picture is painted of the position of Muslims in India, authors like Kettani (1986:128) believe they are better off than their Muslim counterparts in China, for example, while others assert or believe that the position in India is the worst that could ever be experienced (Ahmad:1985:176-177).[122] Of the approximately one billion Muslims in the world today it is estimated that approximately 336-350 million or approximately one third live as minorities in non-Muslim states. It is estimated that by the year 2000 this figure would have increased to approximately half a billion (Abedin:1990:5; Abedin:1991:121; Kettani:1986:241; Azzam:1980:ix).[123] Reference is made to minorities in a primary source of Islamic law namely, the *Qur'an*.[124] A minority Muslim is defined as "...one who lives under non-Muslim jurisdiction, in a society where Islam is not the prevailing religion or culture, where there are no positive incentives to the growth... of [Islam] and where...a deliberate and persistent

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[120]See Shue:1983:293 for more detail.

[121]See 6.4 for conclusions drawn in this regard.

[122]For more details of Muslims in Europe, USSR, China, India, the rest of Asia, Africa, US and pacific regions like Australia see Kettani:1986 and Mahmoud:1991. For the position of Muslim minorities in India see 6.3.2.

[123]See 2.2.2.

[124]See for example Q.8:26.

effort has to be made to preserve Islamic identity" (Abedin:1990:5).

Islam deals with human/individual rights in the context of community (Khadduri: 1984:233; Coulson:1957:51). Muslims, no matter where they reside, are deemed to be part of a global community or *ummah* and are believed to have an obligation to assist through various ways and means their minority counterparts in preserving their religious identity (Abedin:1990:6; Kettani:1986:246-248; Abedin:1980:20). It is suggested that, historically, classical Islamic tradition has very little experience of Muslims living in a minority setup. Today most European Muslim leaders consider the Islamic concepts of *dar al-harb* (the land/territory of war or countries hostile to Islam) and *dar al-Islam* (the land/territory of Islam or territories composing the Muslim state) which divide the world in zones as outmoded and irrelevant. The other zone referred to is *dar al-muahadah* (the land/territory of treaty or countries which are friendly towards Muslim states). Others, however, feel that in modern terms this division is still valid (Nielsen:1987:19; Kettani:1986:258-259). In Europe today "[i]ndividual religion thrives while official religion declines...[and] [r]eligious freedom does not extend to the granting of legal protection to religious codes of family law" (Nielsen:1987:22). For example, while the substantive aspects of Muslim marriages might be governed by MPL, they differ from those of European countries and so do the private international law rules of these countries differ from those of Muslim countries. Hence potentially polygynous Muslim marriages, subject to private international law for example, are not accorded full recognition in English courts and neither does MPL have any legal recognition as is the position in many countries including South Africa. However, many modern governments believe in the preservation of the personal law of communities in plural societies with some even having separate personal law courts to administer these laws (Palley:1978:19).[125] Hence rights of religious groups are accorded a special status in the legal field and

[125]See Chapter Six, paragraph 6.

administration of justice (Van Dyke:1974:734). As indicated,[126] uniformity of personal or family laws is difficult to achieve, if not impossible, and therefore the "...ordering of family relations goes far beyond precise boundaries because the family is an integral part of individual and community identity. It is for this reason that it is so difficult to harmonize family law by international treaty" (Palley:1978:24,27). Nevertheless, Muslims need to go forward constructively in self-development and effect changes to concepts like constitutions which restrict them in the achievemnent of this goal (Palley:1978:38). This will enable them to live in harmony as full citizens with the "host" culture/society which they are confronted with and not merely as "guests" in it (Israeli:1980:159-160).

5.3 CONCLUSION

Although the following general conclusions relating to freedom of religion are drawn from international experience, South Africa as a member of the UN and for whom these issues are imminent, should take note of them. This chapter has shown that the concept of human rights has unmistakable political implications. These implications are used to justify the application of human rights by both Western and Muslim countries to the detriment of women and minorities. Nevertheless these types of implications do not deter from the validity of such rights. They do, however, emphasize the differences between state and individual interests (Rautenbach:1975:1-)

Human rights doctrine in Islam is theocentric rather than secular and judicial (Taperell:1985:1178; Cornelius:1978a:266). It has become apparent from this chapter that Muslims have been active in drawing up and also supporting human rights norms espoused in international instruments without seeing any conflict between Islamic law and these rights. As will be indicated in Chapter Six, acceptance of these instruments is always made subject to the caveat or reservation that their obligations be

[126]See, for example, 6.3.2, 9.4.2 and 9.8.5.

compatible with principles of Islamic law. In this sense Muslim governments and cultures have proven themselves to be the measure of human rights and not *vice versa* as should have been the case. Whether in a Muslim or non-Muslim state, this gives rise to identity problems as Muslims have to deal with the dual identity of being Muslim and citizen.[127] Repudiating international human rights norms as "an exotic Western luxury", or as a "Euro-Christian-modern-secular" yardstick which emerged from a particular human experience and to which an Islamic culture under the pretext of Islamic law therefore cannot be expected to measure up to is often a matter of expediency, based on self-interest, on the part of these governments (Mayer:1990: 136-137; Mayer:1991b:206). Today Muslim governments readily consult public international law in their international relations but not in their internal affairs. The standards proclaimed in the UN documents are not being realized in the majority of Muslim and non-Muslim states. Muslim governments should become more responsive to their aspirations of having international instruments observed in their countries where it appears that rights contained in these instruments are merely illusory and theoretical especially in so far as their application to women is concerned. Social, cultural and economic factors should not stand in the way of uniformity. It must be remembered that human rights still belong to people even though the laws of their own countries do not recognise or protect them.

Freedom of religion does not and should not be interpreted to include the right not to be equal before the law. Even non-believers are deemed to be protected by the freedom of religion clauses of international instruments. Manifestations of the right to freedom of religion which infringe upon women's rights should also not be protected by these instruments. The protection of these instruments should be extended to apply to and include religious tribunals and the implementation

[127]See 6.4 where this conflict is further discussed.

(manifestation) of religious law.[128] The Women's Charter CEDAW, for example, does not provide enough clarity on the position of especially Muslim women appearing before religious tribunals (where their evidence carries little weight) as well as before secular courts applying religious laws. While some educated and informed Muslim women can avail themselves of secular remedies and courts, the reality is that the lives of the majority continue to be governed by cultural and religious restraints. Because of the lack of educational measures to teach them, some women are even not aware of the fact that they are being discriminated against. Education, as recommended by UN Special Rapporteur Krishnaswami, should therefore play a larger role in filling this void. There is clearly also a conflict between the rights of individual Muslims to believe what they choose and the rights of religious groups to promulgate doctrine as to what they perceive to be part of religious practice and therefore what individuals should believe. It is therefore important that individual Muslims have access to effective remedies to enforce human rights. However, in spite of all these problems and conflicts it is felt that "[t]o discard the achievements of the last forty years by dismantling ...[international instruments] is to risk never being able to replace [them] with better instruments" (An-Na'im:1990b:355).

Freedom of religion, especially its manifestation (practice), is not an absolute right. It is impossible to enjoy religious freedom if other human rights are denied. A plural society can only enjoy religious freedom if equality is guaranteed to all by both law and religion. Because the practical implementation of the right to religious freedom does have certain implications, it is very difficult to maintain a balance between the holding of beliefs and the manifestation of those beliefs. The fact that each religion is defined by different practices and beliefs makes it very difficult for there to be any consensus on human rights let alone a uniform civil code. In Muslim countries freedom of religion is regarded as a "full" human right in certain instances but is

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[128]These tribunals are extensively discussed in several chapters. See in general 4.2; Chapter Six, paragraph 6; 8.4, 8.6 and 9.8.5.

restricted in other instances. In certain instances freedom of religion is said to be tantamount to freedom from religion because the latter must first ensue in order to give effect to the former. While Western and *Islamic* conceptions of human rights are not necessarily incompatible as is evident from the many correlations between the two, an examination of the rights to freedom of religion and equality has shown that there are clear conflicts between *Islamic law* and international human rights norms as far as religious freedoms and other related rights are concerned. Human rights might exist in *Islamic law* but they vary from those of international instruments and from the rights contained in the constitutions of Muslim countries, especially those relating to women and non-Muslims.[129] It is, however, doubtful that a reconciliation between the two can be accomplished in the very near future, the reason being that any attempt at reconciliation would either require a total rejection of Islamic law or a total reconstruction of it - steps that have as yet not been, and probably never will be, taken. This does not now mean that it would be better for a secular state not to recognize any personal laws of minorities because this is the only way that everybody would be treated fairly.

Freedom of religion and belief, basically an individual right, has also been translated into group terms in terms of Islamic law. There is a maxim which says "there can be no *ijtihad* [in this context meaning reinterpretation of ancient texts] in any matter covered by a text." It is postulated that on the basis of this maxim Islamic law cannot be amended to remove *all* discrimination against women and non-Muslims (El Naiem: 1984:83).[130] This does not mean that such a process of formulating an equitable Islamic law of human rights from a number of sources has not been given any consideration. Ideas put forward by academics like the Sudanese An-Na'im who advocates solutions from within Islam and who has frequently been referred to in this

[129]This will be detailed in Chapter Six. See 6.1.3.

[130]See 3.1.

and other chapters, is testimony of this (Arzt:1990:228-229; El Naiem:1984:77; An-Na'im:1987a:320).[131] "...An-Na'im is a...Muslim scholar who stresses equally his Islamic identity and his adherence to international human rights standards. [He] is aware of the European origins of the modern concept of individual human rights and acknowledges the conflict between the call for an implementation of the Islamic *shari'a* [Islamic law] and the universally accepted human rights standards...He operates on the premise that Islam is in substance compatible with Western human rights legal norms if interpreted correctly" (Tibi:1992:58-60).[132] Tibi (1994:296) is of the opinion that "[u]nless Muslims change their world view and the cultural patterns and attitudes related to it, the conflict between Islamic human rights and international human rights standards will continue to prevail..."

While there is really no such thing as Eastern and Western human rights, there is no doubt that deeply held religious or cultural beliefs and practices may violate other human rights to a large extent. Mayer (1990:146) sums up the current position thus: "...[W]hen Muslims present ideas on rights that are similar to modern, Western ones, these should not be dismissed out of hand on the theory that any similarities to Western ideas mean that the ideas are inherently 'un-Islamic' or that their proponents are necessarily alienated from their own tradition. It would be particularly hard to justify dismissing one segment of Muslim views on rights as insufficiently 'Islamic' in character in the face of the dissension among Muslims on where the Islamic tradition stands on rights issues."

Over and above these problems, international instruments are themselves also fraught with inconsistencies. It has been shown in this chapter that not much has been done to provide international procedures through which human rights can be enforced.

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[131]See, for example, An-Na'im's views on apostasy in 5.2.1 above. See also 6.1.3.

[132]See also El Naiem:1984:75.

While states have been exhorted by these instruments to take effective measures to prevent and remove discriminatory measures, they have been given very little guidance by these instruments on how to do so effectively. Women's rights, although by definition part of human rights, are marginalized in all international instruments. The conflict between women's public and private religious rights has to date not been successfully resolved by international instruments. The effectiveness of these instruments is further hindered by weak implementation processes and the lack of enforcement mechanisms. This is the case in spite of the fact that many countries have incorporated principles of international instruments into their constitutions and even though their courts have adjudicated on cases simply because human rights contained in these documents have been violated. These documents grant the right to approach courts of law for securing these rights (Cornelius:1978:37).[133] Countries need to incorporate international norms into their local laws in general and not just in their constitutions. In addition to bills of rights it is suggested that constitutional conventions and other constitutional devices are necessary to safeguard human rights. The office of ombud as an institution should be considered as a mechanism in the enforcement of human rights and change should be brought about through constitutional orders.[134] The dynamic role played by lawyers in safeguarding human rights must not go unappreciated (Kalula:1990:312-313). It also does not necessarily mean that, if members of the UN have adopted international instruments, that the General Assembly can necessarily guarantee them (Mahmud:1982:351; Mawdudi: 1977:12). This is summed up in no uncertain terms as follows: "...[I]n some countries, these rights, even though elaborately spelt out in constitutional documents, *are not worth the paper on which they are written*" (emphasis added) (Adegbite: 1977a:2). These instruments are supposed to underpin democracy itself and to serve as the basis by which the character of a modern (secular) polity is to be adjudged and

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[133]See 4.2, footnote 14 where reference is made to the following *Qur'anic* verses, namely Q.5:9,Q.5:45, on justice.

[134]See 9.8.4, footnote 202.

evaluated but it is fraught with inconsistencies as has been indicated in this chapter.

This chapter has attempted to highlight the multi-faceted dimensions of the problem of religious freedom in religious societies. It has been shown that the right to freedom of religion cannot just be perceived from a legal point of view as a justiciable (and even unalienable) human right (Hunter and Guiness:1990:129). Furthermore, despite constitutional protection and international human rights instruments "...there is hardly any country in the world which can faithfully claim to have ended all discriminations or to have created ideal conditions in which minorities can live together in harmony and complete equality" (Dhokalia:1986:126). The UN has also failed to address problems relating to the protection of religious minorities.

CHAPTER SIX

A REVIEW OF THE EFFECT OF PROVISIONS IN NATIONAL CONSTITUTIONS AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ON THE IMPLEMENTATION OF MPL IN LEGAL SYSTEMS

6 INTRODUCTION

Women are perceived in Muslim countries to have equality with men in public rights and duties, but not in the private sphere of the family, which is mainly or exclusively regulated by MPL. However, close examination of the constitutions[1] and other pertinent legislation in some Muslim countries shows that even such professed equality in the public sphere is not always unqualified. A critical investigation of specific constitutional clauses in this regard will illustrate this point and serve to expose these clauses for what they are - mere "decorations". This pattern is evident in Egypt, Algeria, Nigeria, India, Pakistan and Malaysia, although countries like Indonesia and Tunisia do depart from it. A detailed review of the constitutions of these countries indicating this pattern follows to highlight that, although modern Islamic states claim that the right to equality (without discrimination on the grounds of gender or religion) is entrenched in their constitutions, they rarely uphold this right in reality. The same dichotomy between theory and practice pertains to "reforms" of MPL enacted in these states. This chapter will show that the pattern of conflict between modern national constitutions[2] and MPL, and its resolution in favour of MPL, applies also to the position of Muslim states in relation to international human rights instruments[3] such as the UN Charter of 1945, the UDHR (1948) and others.

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[1]See 4.1 for a background to Islamic constitutions.

[2]The background to this was outlined in 4.1 above.

[3]The background to this was outlined in 5.2.1 and 5.2.2.

Yet in spite of this conflict Muslim countries were instrumental in the formulation of some of these instruments.[4] Although the UN Charter (1945) purports to be binding on all Muslim countries, Saudi Arabia, for example, abstained from voting in favour of the UDHR (1948) on the basis of its content being inconsistent with Islamic law principles. However, Pakistan saw no such inconsistencies and voted in favour of the UDHR. By 1988 several Muslim countries had either become signatories to or ratified the Covenants (1966) and CEDAW (1979), albeit with reservations. In addition to this it was shown[5] that while Islam and human rights are not necessarily incompatible, the same is not true for Islamic law and human rights. It was also shown that not only are international instruments in general themselves also fraught with inconsistencies, but women's rights are marginalized in all international instruments. Muslim women therefore have all the odds against them. For example, while both the UN Charter and the UDHR provide for both religious and women's rights, neither foresees a conflict between these two kinds of rights. In respect of more recent and explicit instruments, such as the UN Women's Convention CEDAW, it will be shown that the strategy of certain Muslim states (Egypt) and those with significant Muslim communities (India) has been to become signatories but with reservations in respect of articles that conflict with MPL. Whether the position of Muslim women in South Africa is going to be any different from that of their international counterparts will be considered in Chapter Nine.

Continuing from the brief historical background outlined above,[6] this chapter also surveys the operation, function and effectiveness of *Shar'ia*[7] (religious) courts in Muslim and non-Muslim countries (some in more detail than others) in countries

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[4]See 5.2.1 and 5.2.2.

[5]See 5.1.

[6]See 4.2.

[7]These courts are also interchangeably referred to as *Qadi* or Islamic courts.

where they do exist. It will assess whether special *Shari'a* courts, limited as they are in their scope of jurisdiction and having due regard to their present state of limited reform, can function to meet the constitutional and human rights challenges of today. Their effectiveness in these countries is examined with a view to determining whether these courts will have a future in South Africa. There are also very few detailed studies of the actual operation of Islamic courts relating to questions of procedure, evidence, court organization and court records (Antoun:1980:462; Ziadeh:1986:143; Azad:1987:64). While some Muslim countries, like Egypt, for example have adopted westernized legal and judicial systems, others like Saudi Arabia maintain Islamic courts and dispense justice with little deviation from classical Islamic law. It is the trend today for judicial practice to revert back to Islamic law principles in countries like Pakistan and Iran while countries like Egypt have experienced little change. "...The pendulum which has swung for over a century toward secularization has now started to swing toward a more extensive utilization of the shari'ah" (Ziadeh:1987: 33). In Saudi Arabia Islamic law is still the only official law and *Shari'a* courts are still the only official courts whereas in Turkey, Egypt and India these courts have been abolished and replaced by Western counterparts (Nolte:1958:299-300,304; Gani: 1988:145).

It is also interesting to note that the function of *Shari'a* courts in countries where these courts have not been abolished has been reduced to deal with issues of religious MPL only and not secular issues. In countries where these courts have been abolished, resulting in the whole of Islamic law being left "to the realm of religious ideal", Muslim clergy preferred this rather than having any changes made to MPL to bring it in line with secular law (Nolte:1958:305). Limiting the jurisdiction of the religious courts to MPL issues essentially means that a woman's access to redress pertaining to the social effect of these laws is curtailed as she cannot bring these religious personal law issues before a secular court. In most of these countries she is also not allowed to appear in court because of Islamic law restrictions placed on her right to appear and speak in public and she is therefore usually represented by either

her husband or guardian if she is not married. This has serious constitutional and personal implications because even if a Muslim woman brings constitutional inequalities to the notice of a secular court, as has happened in India, the argument is often raised that these inequalities originate from MPL which is beyond their jurisdiction and purview.[8] These issues will be addressed more fully in this chapter.

As background to the position in South Africa[9] the functions of constitutional courts or similar structures in Muslim[10] and other countries in declaring void any law in conflict with its constitutions will be briefly investigated. The non-existence of constitutional courts in some countries means that MPL cannot be interfered with. In secular India MPL is exempted from constitutional scrutiny. Taji (1973:12), writing on Pakistan, says that the *judiciary even has the power to nullify orders of government which go contrary to Islamic law*. A study of the applicable countries (some, India in particular, dealt with in more detail than others) is made to throw light on the nature of the problem elsewhere especially with a view to how South African Muslims can benefit from the experience of reform and codification of a recognized MPL in other countries. Access to justice is now a constitutionally guaranteed right in South Africa.[11] This chapter will make a detailed study of the application of the Muslim judicial system in various Muslim and non-Muslim countries with a view to its implications for South Africa.

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[8]See 9.8.5.

[9]See 9.8.3.

[10]Not all Muslim countries possess such judicial structures. For example, in Iran today there is no provision made for a Constitutional Court to declare void laws in conflict with the Constitution. This was the position even prior to the revolution in 1979 (Mehrpur:1988:66, 75-6).

[11]See 9.8.1, 9.8.2 and 9.8.5.

6.1 A BRIEF BACKGROUND

6.1.1 EFFECT AND IMPACT OF BILLS OF RIGHTS

Because European countries often exercised a considerable influence on the original constitutions of Muslim countries at the end of the era of colonies and mandates, it is interesting to reflect on the effect and impact of bills of rights adopted at independence and after decolonization in some of these "third world" commonwealth countries and the fundamental constitutional law problems faced by them. For example, the Muslim African countries which will be examined in this chapter have shown a need for and have in fact promulgated constitutions after independence despite the uncertainty surrounding the role of constitutionalism in the Islamic legal tradition[12] (Ishaq:1988:93). In the period that followed World War I the constitutions of most Muslim countries contained guarantees for the protection of human rights in the form of bills of rights modelled after the French constitution and the English human rights experience (Khadduri:1946:81). During the colonial period many Muslims studied in the West and, upon their countries achieving independence, they often assisted with the drawing up of their constitutions and also applied secular principles to their first administrations, producing modern constitutions based on European models. As will be indicated below,[13] the essentially secular nature of the Constitutions of Egypt, Pakistan, Malaysia and Indonesia confirms this (Breiner: 1992a:12-14). It is particularly interesting that these countries have adopted bills of rights, especially if one takes into consideration the fact that the British (colonizers) themselves had/have no written constitution nor any constitutional guarantees of human rights (although they have comparable documents)[14] and that in most instances

[12]See explanation in 4.1 above.

[13]See 6.2 and 6.3.

[14]See 6.3.5.

bills of rights were alien to the traditions, cultures and religious practices of these countries. Furthermore there was the possibility that the "insubstantial constitutional provisions" contained in these bills of rights might replace existing and effective common law legal protections (Read:1973:21). In spite of changes and reforms taking place in the area of human rights there was no guarantee that they could be practically enforced. India and Pakistan were the first commonwealth states to adopt bills of rights. Read (1973:29) sums this up thus: "...the...history of these...nations was scarcely an appropriate preparation for the maximum enjoyment of individual rights and freedoms. Colonial...'indirect rule', buttressing the powers of traditional rulers, the creation of special 'native courts' to administer unwritten 'customary laws'...were significant intrusions upon the rule of law which preserves English liberties." It will become clear from this constitutional study that, because of the plural nature of these societies, exceptions and restrictions to these fundamental rights were permitted in the application of personal, customary and religious law (Read:1973:21,23,28-29,40-41). This will become evident with regard to MPL in almost all of the countries discussed below .

6.1.2 STATE AND RELIGION

Islam is constitutionally established as the state religion in all but four Middle Eastern countries. The exceptions are Turkey,[15] Saudi Arabia (which has no constitution),

[15]Turkey adopts a neutral or secular policy as regards religion. Through the process of secularization, Turkey has guaranteed a system of human rights. Turkey experienced three violent upheavals in 1867, 1908 and 1922 before its system was completely westernized (Khadduri:1946:80). In comparison to other Islamic states, Turkey has the better human rights record (Said:1978:12; Said:1979a:70). As far as the status of *Shari'a* courts in Turkey is concerned, these courts were abolished in 1924 and in 1956 in Tunisia and secular courts became the norm (Al Aseer:1976:59,61). There is only one state law and one system of state courts, both of which are entirely secular (Starr:1985:124). In Iran the reverse took place when, after the Iranian revolution of 1979, its judiciary was Islamized (Arjomand:1989:114-115). For the pre-revolution position see Arjomand:1989:118. This is detailed here because these countries, although referred to occasionally, do not actually form part of the discussion

Libya and Syria (Mayer:1987:135). Unlike the US Constitution (First Amendment)[16] there is no prohibition on the "establishment" of religion in the former countries. The right protected is similar to what is called the "free exercise"clause in the US Constitution (Tan, Tiong Min and Kiat Seng:1991:689). While Saudi Arabia and Sudan (an Islamic state since 1991 and where *Shari'a* is the sole basis of law) are the only countries (besides Iran)[17] that apply Islamic law in its totality, most Islamic states have simply adopted Western concepts of human rights (Said:1978:12; Said:1979a: 70). Writing on the position in an Islamic state and political development, Said (1979a:69) states that legal theory which falls outside the ambit of Islamic law has been neglected for a long time because of the lack of adequate machinery to protect human rights from the state.

6.1.3 ISLAMIC LAW AND CONSTITUTIONALISM[18]

Constitutional law falls within the ambit of public law as opposed to private or personal law. These two fields do, however, overlap because private law matters may have constitutional law implications and these fields may for that matter even conflict with each other. Many Muslim countries have now secularized public law. Tensions are evident between international and Islamic law in this regard, especially with regard to international human rights law. An-Na'im[19] (1990:8-9) says of women in this regard: "[A]lthough much remains to be done ...the status and rights of Muslim women under secular public law are clearly superior to their status and rights

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in this chapter.

[16]See 7.2, 7.3 and 7.3, footnote 25.

[17]See footnote 15.

[18]See 4.1 where it is explained that there is uncertainty as to what constitutes Islamic constitutionalism.

[19]An-Na'im is a Sudanese Muslim jurist. See 5.3.

under Shari'a. The restoration of the public law of Shari'a would therefore have a negative effect on these women." In other words, he is of the opinion[20] that reform of Islamic law and constitutionalism go hand in hand and that therefore Islamic law must be reformed before there can be any talk of Islamic constitutionalism.

An-Na'im (1989:11) writes of the Sudanese experience as follows: "It is my conviction that Islam itself is capable of sustaining a modern constitutional state where all citizens enjoy equal rights...I am equally convinced...that the prevailing view of *Islamic...law*...is fundamentally inconsistent with modern notions of constitutionalism and the rule of law" (emphasis added). Tier (1992:219) endorses An-Na'im's view that in the area of constitutionalism "...Islamization raises the fundamental problems of democracy, secularism and the human rights of individuals." It therefore seems that both public and personal laws have to undergo change in order to accommodate each other because, even if MPL is applicable to them, Muslims will have to face the constitutional and human rights implications of that MPL. It is also interesting to compare the situation of *dhimmis* (non-Muslim communities in an Islamic state) to that of Muslims in a secular state.[21] While Muslim minorities have equality in a secular state, the reverse is not true. Islamic law allows that *dhimmis* be governed by their own personal laws but are subject to Islamic law and the jurisdiction of an Islamic state in public law matters, which includes criminal law.

The UN Charter[22] has purportedly achieved a binding force in all modern Islamic states because of the development of a body of international customary law of which it forms the basis. The purpose of the UN Charter is set out in Article 1 and includes respect for the principles of equal rights and the promotion of human rights and

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[20]See 4.1.

[21]See 5.2.2.

[22]The UN Charter was signed on 26 June 1945 and came into effect on 24 October 1945. See Chapter Five, footnote 2 and 5.2.1.

fundamental freedoms for all without distinction as to, among other things, sex or religion. Hence, as detailed in Chapter Five, discrimination on these grounds as practised in Muslim countries and based on Islamic law goes contrary to established universal human rights (An-Na'im:1990:140,177; An-Na'im:1990a:70). The UDHR[23] of 1948, which follows the UN Charter, also provides in much the same way for religious rights and women's rights but neither the Charter nor the Declaration foresees a potential conflict between these two kinds of rights (Rahman:1990:483).[24] This contradiction is apparent in most Muslim countries and is aptly summed up as follows: "On [the] one hand, there is the pull of historical religious traditions which sanction discrimination on grounds of religion and gender. On the other hand, there is the push of modernist domestic and international forces in favor of human rights and against discrimination on grounds of religion and gender. This ambivalence is reflected...in the subscription by some Muslim countries to international human rights documents which they are unable to uphold within their national jurisdictions because of the role of Shar'ia in the domestic legal systems of those countries" (An-Na'im:1990:178). Egypt[25] is a typical example of a country facing such a dichotomy. A similar situation as in Egypt is evident in a non-Muslim state like India[26], which has signed and ratified CEDAW with reservations. Inconsistencies between MPL and the

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[23]"The Declaration has no binding effect because it is a declaration and thus remains an articulation of ideals" (Rahman:1990:495). See 5.2, footnote 21, 5.2.1 and its footnote 40.

[24]See 5.2.1 where other international measures in this regard have been discussed. These international measures include the UN Women's Convention (CEDAW) of 1980, the Declaration on the Elimination of All Forms of Intolerance and Religious Discrimination of 1981, the ICCPR of 1966 (and its optional protocol) and the International Covenant on Economic, Social and Cultural Rights of 1966. The latter two laws together with the UDHR of 1948 are known as the "international bill of rights" (see 5.2.1, above footnote 41 and 9.7, footnote 148).

[25]See 6.3.1.

[26]See 6.3.2.

Indian Constitution will be discussed below.[27] As indicated above[28] Muslim women's inequality is not only based on religion but has its origin in cultural and other constructs.

6.2 POSITION IN COUNTRIES WITH *SHARI'A* COURTS

6.2.1 SAUDI ARABIA: AN EXCEPTION

Traditionalist Saudi Arabia was never under any colonial power and is the only Muslim country (besides Iran) that applies Islamic law or *Shari'a* in its totality (Solaim:1970:3 [abstract]).[29] The *Qur'an* is considered to be its "Constitution" (Al-Farsy:1990:39). The Western origins of modern constitutions have resulted in Saudi Arabia having no formal written constitution but an unwritten constitution as we understand the term today with Islamic law being its only source (Shakir:1976:1; Solaim:1970:1 [abstract],1,3 [introduction]; Seaman:1979:430; Mayer:1991:1031; Mayer:1991b:50-51).[30] In Saudi Arabia "...the *shari'a* is ambiguous...because it is uncodified in written statutes [and] is subject to the interpretation of the Council of Senior Ulama...[*S*]*hari'a* rules are consistent only in family law and in criminal matters of a non-political nature" (Abdella Doumato:1995:143-144). Influential *Ulama* (religious authorities who also act as administrators and mediators) succeeded in thwarting attempts aimed at reforming or codifying Islamic law in the late 1920s and early 1930s by the then reigning King (Layish:1987:279,291; Solaim:1970:165). Law and religion are considered inseparable in Saudi Arabia, which to date has not enacted a modern civil code (Saleh:1989:764,767; Hagel:1983:115; Sfeir:1988:752-

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[27]See 6.3.2.

[28]See 2.1.4 and 3.3.1.

[29]See 6.1.2.

[30]See 4.1 for more detail.

753; Karl:1991:1; Liebesny:1983:206).[31] Instead of a written codification of laws, a new Basic Law which emphasizes Islamic law (*Shari'a*) and reaffirms the principle sources of Islam (*Qur'an* and *Sunna*) as the constitution of Saudi Arabia, was issued in 1992 (Abdella Doumato:1995:143). "As for human rights, article 26 of the Basic Law says that 'the state shall protect human rights according to the shari'a,'...but without codifying the protections offered in the *shari'a*, the new law is at best equivocal... Nowhere...does the Basic Law specifically address women's rights" (Abdella Doumato:1995:144-145). Because all Saudis are Muslim it is alleged that "...there is no ethnic, religious or linguistic pluralism..." (Al-Farsy:1990:39-40).

Because there is no constitution with a clear statement of human rights, including equality between the sexes, there is no specific constitutional protection for human rights (Abdella Doumato:1995:145,147). Questions relating to human rights often only centre around restrictions placed on women because "...[i]n Saudi Arabia, what are viewed as inequalities as measured against United Nations standards are viewed both by policy-making agencies and public opinion as the proper Islamic balance of rights and responsibilities between men and women" (Abdella Doumato:1995:135). The Women's Convention CEDAW has to date not been signed or ratified by Saudi Arabia (Abdella Doumato:1995:158-159 fn 47).

Saudi Arabian Islamic courts administer justice "...today in the same manner it used to be administered in the classical period of Islam" (Habachy:1959-1960:50). *Shari'a* courts as the courts of general jurisdiction apply Islamic law while special commissions/courts apply secular law in, for example, commercial and labour disputes (Liebesny:1983:202; Safran:1958a:130,132,135). However, this duality of jurisdiction is unlike the duality involving state (secular) and religious courts in other countries because the *Shari'a* courts are the courts of general jurisdiction while some commissions are of an *ad hoc* nature and do not convene regularly (Ziadeh:1987:29).

[31]See 4.6, footnote 46.

Prior to 1927 several separate judicial systems existed alongside one another. In 1927 the reigning King succeeded in unifying the judicial system which today is classified into three hierarchical categories. Incidentally such a hierarchy is unknown in classical Islam (Liebesny:1983:214). Beside their role in the application and regulation of Islamic law, *Ulama* also played an influential role in the judicial system (Al Farsy:1990:36; Sfeir:1988:750; Solaim:1970:85). The reorganization and unification of the courts laid the foundation for the Judicature Act of 1975 which governs the *Shari'a* court system today (Sfeir:1988:732-733,740 -741,750; Solaim: 1971:403-404; Solaim:1970:3; Liebesny:1983:215; Schacht:1959:146; Seaman:1979: 440). As a result of the *Ulama's* persistence the *Hanbali* school of law is dominant and in 1927 all Saudi courts were ordered to use six *Hanbali* books for their decisions (Al-Farsy:1990:37; Hagel:1983:130; Saleh:1989:764; Karl:1991:4).

One of the three categories of courts referred to above is the *Shari'a* courts which has general jurisdiction over disputes, civil, criminal, commercial and MPL issues (Al-Farsy:1990:34-35; Karl:1991:6; Liebesny:1983:207; Habachy:1959-1960:56; Hammerton:1990:6A.240.19). There are three levels or a three-tiered system of *Shari'a* courts that deal with cases arising from Islamic or common law rather than from administrative/royal decrees which are adjudicated by secular organs of the state or specialized tribunals (Seaman:1979:480; Shakir:1976:10). While Islamic law is theoretically supreme, royal decrees are assuming an ever-increasing importance (Anderson:1957:25). Although this reflects a dichotomy in the legal system, it allows for change without interfering with the *Shari'a* courts (Liebesny:1983:216).

All Saudi courts, *Shari'a* and secular (civil or commercial) must, however, apply Islamic law rules of evidence and procedure (Turck:1991:3-5; Ballantyne:1990:151). In ascending order the three levels of *Shari'a* courts are firstly, the ordinary/ expeditious/ first instance courts dealing with minor domestic, personal, civil and criminal matters, which are decided upon by a *qadi* (judge); secondly, the high

(*Shari'a*) courts which deal with matters over which the ordinary courts have no jurisdiction; and thirdly, the appeal courts, which hear appeals from both the ordinary and the high courts. At the apex of this system is the Supreme/Higher Judicial Council (Commission on Judicial Supervision) which is sometimes referred to as the third level and which assists the King or Minister of Justice by providing considered legal and religious (religio-legal) opinions (*fatwas*)[32] and by so doing allowing for the adaptation of traditional law to changing circumstances (Hagel:1983:131-132; Solaim: 1970:92-94; Karl:1991:6-7; Liebesny:1983:206 -207). This Council is the closest that Saudi Arabia has come to a system of judicial review (Sfeir:1988:746).

While the names of these courts may have undergone change, their competencies have not (Sfeir:1988:741). One or more *qadis* adjudicate over these *Shari'a* courts. Rules relating to the appointment, *etc.* of judges are conservative, as is evident from emphasis placed on seniority, Islamic law education within Saudi Arabia and the fact that judges must be male Saudi nationals. Experience and education obtained outside of Saudi Arabia are regarded as inadequate for appointment and promotion purposes but studying law at foreign universities is no longer prohibited (Solaim:1970:104,170; Turck:1991:5). Apart from the fact that they must be respectable Saudi citizens, the training of *Shari'a* court judges is limited to Islamic law and they are not required to have a special technical or commercial background to understand a complex case (Karl:1991:6; Turck:1991:6). The role of judges, as far as the use of independent reasoning or *ijtihad* [33] (now a defunct source of law) is concerned, is uncertain. Prior to 1970 (when a Ministry of Justice was established) it was considered a challenge and threat to Islamic law (Solaim:1970:168-169; Karl:1991:6; Liebesny:1983:206). In 1983 the reigning King advocated a return to *ijtihad* to deal with the crisis of legal modernism (Mastura:1985:54). In classical Islam a judge was seen as the

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[32]This activity is normally performed by a *mufti*/jurisconsult who is a specialist on Islam (Mastura:1985:53; Shapiro:1981:201). See also 6.3.2.

[33]See 2.1.1.

representative of the person who appointed him (Liebesny:1983:207). This highlighted "...the open identification of executive and judicial power in one individual or institution" (Hagel:1983:133-134). Today judicial independence is favoured (Sfeir:1988:741).

Because there is no conception of judge-made law in Islam, Saudi courts do not follow a rule of *stare decisis* to bind judges to their prior decisions or to judgements of higher courts and there is hardly any case law in Saudi Arabia. While the *ratio decidendi* or reasoning behind a decision was considered to be beneficial, it is not the practice to record cases. The public therefore have to rely on oral reports if they wish to know more about past decisions (Karl:1991:8; Turck:1991:7-8,11,32; Anderson:1976:186; Ajetunmobi:1988:78; Amedroz:1910:766). This does not imply that law reporting is not permissible or did not take place in Islam. Judges also referred to earlier decisions of their predecessors (Ajetunmobi:1988:78,85 fn 8; Rashid:1986:4). This is still evident in specifically Islamic courts in India and Pakistan (Anderson:1976:78-79). However, the lack of records and binding precedents has hampered the progress of law from theory to practice (Saleh:1989:786).

6.2.2 NIGERIA

The next country to be examined is Nigeria, after it achieved independence from British occupation in 1960.[34] Islam came to Nigeria around the eleventh century and therefore preceded colonial rule which started roughly around 1860 (Doi:1988:105; Tabi'u & Rashid:1986:27,29; Butler:1987:1033). Muslims in Nigeria (estimated to be between 50 and 55% of the population) constitute the largest national minority group in Africa (Banks:1992:565; Bienen:1986:52; Voll:1992:214). The 1979 Constitution was styled on (but not copied from) the US federal/presidential system

[34]The First Nigerian Republic lasted from 1960 to 1966. The Second Nigerian Republic lasted from 1979 to 1983 (Gambari:1990:29,32,35).

(Ngwoke:1984:134; Butler:1987:1025). "...In regard to the [US] Bill of Rights not even an attempt was made to modify it..." (Tabi'u & Rashid:1986:46). The draft constitution of the "Third Republic"[35] was promulgated in 1989 and this new constitution, which was supposed to have (but did not) come into effect in October 1992, mirrors the basic law of 1979 but takes no position on the issue of the institution of Islamic law (Banks:1992:565,568; Rhoodie:1984:190; Panter-Brick: 1968:256). The Bill of Rights as contained in the Nigerian Constitution contains 13 fundamental rights of all Nigerian people, which the government must uphold. The Constitution prohibits the adoption of a state religion and makes provision for freedom of religion (S 37 (1)) (Ngwoke:1984:7; Tenney:1992:34). Accordingly discrimination on the grounds of, among other things, sex and religion is unconstitutional and prohibited (Butler:1987:1029-1031,1037).

Northern Nigeria[36] has a predominantly Muslim population following the *Sunni Maliki*[37] school of law while Southern Nigeria has a predominantly Christian population (Kenny:1989:339; Agbede:1971:119). Northern Nigerian Muslims have their civil laws of family regulated by MPL and these laws are administered in *Shari'a* courts (or *Alkali* courts as they are referred to) (Doi:1988:106 fn 5). During the Islamic period preceding colonial rule, Islamic law was not only enforced as the personal law of Muslims but was also the law governing the affairs of the State. Furthermore *alkalai* (Islamic law judges) administered Islamic law in the North in a network of courts (Yadudu:1991:23; Yusuf:1982:33). However, during the colonial

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[35]The Third Nigerian Republic was supposed to have been established in 1990 as a third attempt to restore constitutional rule based on the American model by 1992 (Gambari:1990: 29,38-39). It appears that this ideal has not yet been attained (Ibagere:1995:24).

[36]Northern Nigeria was formerly referred to as *Hausaland* and is often also referred to as the "Holy North". Islam was apparently established here by the fourteenth century (Anderson:1973:81; Hiskett:1973:57-58).

[37]See 2.1.1. Academics and judges are, however, in favour of amending and in certain instances deviating from the rigid application of *Maliki* law (Rashid:1986:2).

period it was classified as unwritten customary law in the North (Adegbite:1977:7). The English common law "...transformed the content and methodology of Islamic law, together with its judicial institutions, for the worse..." (Yadudu:1991:25,41).[38] The development of Islamic law in Nigeria is very similar to its development in British India with the exception that in Nigeria *qadis* (*alkalai*) continued to administer justice even after colonial rule (Rashid:1988:140). In Nigeria judges, especially former *alkalai*, have abused Islamic law for personal and political motives (Adegbite: 1977a:12; Yadudu:1991:36). As is the case in all other Islamic countries, Islamic law in the North was strongly tempered by local custom and that British codification and application of Islamic law aided in the organizing, regulating and spreading of Islamic law (Salamone:1983:29-30; Yadudu:1991:30-33).

During this colonial period changes took place to the effect that the application of Islamic law was restricted to MPL.[39] The jurisdiction of Islamic courts was also restricted. In 1956 the Moslem Court of Appeal (called the *Shari'a* Court of Appeal since 1960) was introduced to deal exclusively with appeals over suits involving MPL decided by the lower Native Courts (now called Area Courts) (Bush:1979:295-296).[40] Subsequent Nigerian Constitutions and laws have retained this court, though it was renamed a regional and now a state *Shari'a* Court of Appeal (Yadudu:1991:37; Yusuf:1982:109; Tabi'u and Rashid:1986:33; Mahmud:1988:35). S 240 of the 1979 Constitution makes provision for the creation of a *Shari'a* Court of Appeal for any

[38]See Yusuf:1982:94-95.

[39]Since the introduction of the Penal Code in 1960 Islamic criminal law also ceased to apply. This is still the situation today (Tabi'u & Rashid:1986:29,33-34,39-40; Butler:1987: 1034; Byang:1988:31,51; Doi:1988:120). Even though only the British criminal code was to be applied by the Nigerian courts, a compromise was reached in that a Penal Code incorporating certain Islamic law crimes was made applicable in the North in 1959 (Mahmud:1988:23-25).

[40]Area Courts (also called *Shari'a* Courts of first instance) are courts at grassroots level in all parts of the Northern states (Byang:1988:44). For more details see Yusuf:1982:116; Tabi'u and Rashid:1986:34-35; Doi:1989:37; Mahmud:1988:11; Ume:1989:82.

state that requires it.[41] Radical Islamic revivalist movements were instrumental in the establishment of these courts (Nkrumah:1989:522). In a language similar to that of the 1979 Constitution, Article 6 and Articles 259-263 of the 1989 Constitution permit a state to establish a *Shari'a* Court of Appeal (Tenney:1992:90). With this express exception the Nigerian Constitution has addressed the issue of establishment not by prohibiting government assistance to religion but by prohibiting any official state religion through Article 11 of the 1989 Constitution (Article 10 of the 1979 Constitution) (Christenson:1991:319-320). Yadudu (1985:234-235) calls for the establishment of what he calls an Islamic Family Affairs Council or Family Council as an appendage to the *Shari'a* Court of Appeal. While it would be autonomous, it could in the exercise of its functions and jurisdictions simultaneouly educate the public and regulate abuses relating to MPL.

Further appeals from this state *Shari'a* Court of Appeal, either on matters pertaining to MPL or on constitutional matters of interpretation and human rights or any other Islamic civil matter, could only be heard in the English-type courts called the High Court, the Court of Appeal and the Supreme Court. These appeals are sent to an *ad hoc* division or panel of the Federal Court of Appeal created in 1976 and subsequently to the Federal Supreme Court of Nigeria (Yusuf:1982:43-44; Tabi'u and Rashid:1986: 34,39). These channels of appeal are open to parties dissatisfied with a decision of the Islamic court (Yusuf:1982:198). The Supreme Court is the highest and final Court of Appeal of the national judiciary of Nigeria and its judges, like those of the High Court, need no knowledge or experience in the practice of MPL nor Nigerian customary law for that matter.

The appointment of judges is no longer based on stringent Islamic criteria as was the

[41]Each of the ten Northern states have their own *Shari'a* Court of Appeal (Tabi'u and Rashid:1986:37). None has as yet been established in the predominantly Christian Southern states (Byang:1988:5;49-50).

case in the past. Today such appointments are subject to the requirements and recommendations of the 1979 Constitution (Yadudu:1991:34-37). However, as is evident from S 241 (3),[42] judges of the *Shari'a* Court of Appeal (which court consists of a Grand Kadi and such number of *qadis* as may be prescribed by law) are of a higher calibre than the Area Court judges[43] (Butler:1987:1034). Even non-Muslims who comply with the provisions of this section are qualified to hold office (Byang: 1988:50). Limited jurisdiction means that the *Shari'a* Court of Appeal may only hear appeals pertaining to MPL matters from the Area Courts while other civil matters of appeal from these Courts, and in which Islamic law was applied, have to be heard in the High (English) Court where judges are not required to have any knowledge of Islamic law. Added to this is the fact that no constitutional provision was made for judges of the *Shari'a* Court of Appeal to sit with and assist the High Court judges in hearing such appeals (Tabi'u and Rashid:1986:34,38; Kumo:1986: 47). Also legal practitioners, regardless of their type of professional training, are allowed to appear before the Area Courts and the *Shari'a* Court of Appeal in terms of the 1979 Constitution (Yadudu:1991:42). Nigeria is also experiencing a sharp decline in the quality and depth of training of its Muslim judicial personnel (Yadudu:1991: 38). The English doctrine of judicial precedent has also crept into the Islamic law judicial process but the extent to which it will find favour with the *Shari'a* Court

[42]"Section 241 (3) of the 1979 Constitution provides that: A person cannot be appointed as a kadi [of the *Shari'a* Court of Appeal] unless he has obtained and held a recognised qualification in Islamic personal law for a period of not less than ten years and he either has considerable experience in the practice of Islamic personal law or he is a distinguished scholar of Islamic personal law" (Tabi'u and Rashid:1986:37-38). "...[T]he position today is that persons who ultimately wish to be appointed to [this] court will have to attend one or the other of the Nigerian universities teaching the Sharia or some other similar institution overseas" (Aguda:1989:16).

[43]Even though the bulk of civil cases heard by Area Court judges in the North is governed by Islamic law, these judges are said to be "decidedly unsuitable for judicial office" (Rashid:1986:3).

bench remains to be seen (Yadudu:1991:42;44).[44] While Islamic law is given full status within the Nigerian Federal and State judicial system, the following sums up and still is the position of Islamic law in the North:

> "The establishment of British colonial rule resulted in displacing Islamic law as the supreme legal order in Northern Nigeria...Even though now Islamic law applies in civil matters, it is subject to major restrictions in terms of the law governing its application, the courts which apply it, the quality and suitability of the personnel in these courts, and the opportunities available for its study in the system of legal education - all of which taken together show that twenty-five years after independence, the colonial policy towards its application is still haunting from its grave" (Tabi'u and Rashid:1986:49).

In 1988 Muslims were still seeking to expand the Islamic courts to the federal level and beyond the realm of personal laws. They were unsuccessful in securing constitutional provision for a Federal *Shari'a* Court of Appeal to hear Muslim cases coming from the State *Shari'a* Courts of Appeal (Bienen:1986:51). This Federal *Shari'a* Court of Appeal was envisaged to also serve as an intermediary between the state *Shari'a* courts and the federal Supreme Court of Nigeria (Ngwoke:1984:6; Gambari:1992:88-89; Doi:1989:48-52; Kumo:1977a:216-219). Political, theological and juridical reasons were advanced for the rejection of such courts, the creation of which would have resulted in a judicial partition and violation of the constitutional provision of equality of all before the law (Ngwoke:1984:418-419). Byang (1988: 101) endorses this view and this is still the *status quo* (Christenson:1991:320). It is to be noted that even today English laws applicable in parts of Nigeria are given preference when in conflict with Islamic law on the grounds of "justice, equity and good conscience" (Doi:1988:116;122).

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[44]In 1980 the publication of *Shari'a* Law Reports was initiated in Nigeria but its continuation depends on the availability of funding (Ajetunmobi:1988:78-79,84-85).

The Muslims in the South, however, do not have access to MPL nor is special provision made for redress in Islamic courts even though the Constitution[45] makes provision for the establishment of such courts (Tabi'u & Rashid:1986:42;44). Courts in the South do, however, apply Islamic law as a variant of customary law and therefore makes it subject to the English doctrine of repugnancy[46], which doctrine is not applicable to Muslims in the North because there authority for the application of Islamic law is to be found in the *Shari'a* Court of Appeal Law (Agbede:1971:126). Disputes were often decided by British judges empowered to interpret, correct and even reject personal laws of the parties in their application of this repugnancy clause (Schlesinger *et al.*:1988:317).

There is a strong Christian objection to the establishment of Islamic courts in the South. This view is endorsed by Nigerian Muslim scholars such as A.D. Ajijola who generally regard *Shari'a* courts as redundant as he is of the opinion that the English High Courts can effectively handle cases of MPL even though their judges are not trained in Islamic law. Furthermore, in consonance with the position in most Islamic countries, the operation of Islamic law should be limited to MPL and not extended to all its other civil and criminal aspects as is recommended by some scholars (Byang: 1988:31,46; Sulaiman:1977:5). While not denying that the establishment of *Shari'a* courts in the South is a legitimate constitutional right of Muslims there (and notwithstanding that these courts exist in any event in the North), it has been stated that their creation would amount to the government officially favouring one religion (financially and otherwise) to the detriment of others, which would be in clear violation of the secular constitution as explained above (Byang:1988:5-7; Bienen: 1986:51-2).

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[45]See above footnote 41 in the text.

[46]The repugnancy clause may be divided into two parts - (1) repugnancy to natural justice, equity and good conscience and (2) repugnancy to written laws (received English law) (Kumo:1986:46-7).

Some scholars like Yadudu (1985) are of the opinion that reforming MPL in the "third world" countries like Nigeria as advocated by orientalists like J.N.D. Anderson[47] is not necessarily feasible or practicable in the light of the fact that some Muslim countries are reversing their "reformist" trend in this regard. He feels that "factors" like "persuasion, education and public enlightment" can play a more effective role.

Without going into any detail, feminist and modernist trends challenging MPL have caught up in Nigeria, although there is not much literature available on the topic. The desirability of reform of MPL in Nigeria is, however, not disputed. Problem areas experienced in Nigeria with regard to reform and which are common to most Muslim countries include, among other things, ignorance of women regarding their rights under Islamic law, marriage and abuses in the practice of divorce and polygyny. Inequality between the sexes is clearly practised in Northern Nigeria. Bienen (1986:56) sums it up thus: "Religion provides a rationale for the existing social order while providing an institutional framework through which women fulfil the economic and social roles assigned to them." Women in the North were even denied the right to vote as it was deemed inconsistent with Islam (Ume:1989:330, 333).

Scholars are also of the opinion that, as in India, a uniform civil code of personal or family law is not a feasible option for Nigeria. Instead Yadudu proposes the creation of an Islamic Family Affairs Council as an extension of the constitutionally provided for *Shari'a* Court of Appeal to give effect to the "factors" referred to above (Yadudu: 1985:6,8,12,228-229,231-234; Richardson:1969:124). These proposals will be highlighted below with a view to evaluating how South African Muslims can benefit from them, especially as far as temporal laws affecting human relations are

[47]See Anderson:1973:73-83 and Anderson's classic work in this regard *Law Reform in the Muslim World* (1976).

concerned. It is clear from the above that the state *Shari'a* Court of Appeal, although a final court of appeal, is subject to a reservation due to the fact that its jurisdiction is limited to MPL and therefore further appeals involving conflicts between the Bill of Rights and interpretation of the Constitution can only be heard in a federal court of appeal and subsequently the federal Supreme Court of Nigeria (Kenny:1989:340; Yusuf:1982:43-44; Richardson:1969:119). Although the 1979 Nigerian Constitution prohibits discrimination on the grounds of sex or religion, among other things, there is no doubt that the conflicts in these areas (constitutions and MPL), and which exist in all of the countries under discussion in this chapter, exist in Nigeria as well and reforms appear to be just as cosmetic. The following has been written with regard to Nigeria: "The more common pattern...appears to be the acceptance of Islamic law in family matters, with *minimal interference* within well-defined boundaries. It is not suprising, therefore, that the Northern Nigerian government program[m]ed reform firstly by delimiting...personal law and providing a special appeal court to dispose of appeals arising on points of Islamic law in this field, and secondly, by codification of the criminal law" (emphasis added) (Richardson:1969:112). This would also be the case if, for example, the English doctrine of judicial precedent is imposed on a possible federal *Shari'a* court of appeal (Yadudu:1991:46). In addition the courts have to contend with conflicts between Islamic law and customary law and general (British-based) laws as well (Yusuf:1982:4,130).[48]

6.2.3 PHILIPPINES

I will very cursorily look at this country to see if there is any change in the pattern of conflict between constitutions and MPL which has been observed thus far. In dealing with Muslims in this secular state it is interesting to note that the Philippine law does not specifically deal with freedom of religion or religious discrimination (Rhoodie:

[48]See Agbede:1971:125-128 for a more detailed discussion on the general constitutional position of the personal application of Islamic law and conflicts in this regard.

1984:198). In terms of reform legislation in 1977 the Philippine legal system made provision for a Code of Muslim Personal Laws of Philippines of 1977 (known as Presidential Decree No.1083) to be applicable to its minority Muslim population. In the Philippines Muslims are concentrated in the southern islands. They constitute 20% of the predominantly Christian population (80%) and follow the *Shafi'i* school of thought (Majul:1978:127,132). In determining how Islamic law can be accommodated into the Philippine national legal system it was decided that this personal code cannot contain any precept which is contrary to the Philippine Constitution. Article 5 of the Code of Muslim Personal Law of 1977 provides as follows: "...No Ada which is contrary to the Constitution of the Philippines...shall be given any legal effect..." (Nadví:1989:352). Supporters of the code claim that this is more so since the Constitution contains a church-state separation clause and a establishment of the freedom of religion clause. The Philippine Constitution "...provides that no law shall be made respecting the establishment of religion or prohibiting the free exercise thereof..." (Pirzada:1980:78). However, there seems to be no change in the pattern of conflict between the Constitution and MPL, even though some sensitivity was shown to the views of educated Muslim women and the plight of Muslim wives (Mastura:n.d[1983?]:v-ix; Majul:1978:129-130). The Philippines signed (1980) and ratified (1981) CEDAW without any reservations.

A system of Shariat District and Circuit Courts was established to enforce MPL. The MPL Code was supposed to be operative in the administration and dispensation of justice and integrated into the modern state judicial system. While an Office of the Jurisconsult (*mufti*) and *Shari'a* courts were established under this Code, to date no judges have been appointed and the Code remains unenforced (Puno:1985:12-13; Diokno:1987:69; Mastura:n.d[1983?]:vii,31-38). While this state of affairs can be partly attributed to problems involving cost, the fact that Muslim lawyers in the Philippines are not trained in Islamic law but only in secular law also plays a role. The reverse is true for *Ulama* members. It has been suggested that as a temporary measure Muslim lawyers serving as judges should be assisted by a religious scholar

while they try and bridge the gap in their knowledge of Islamic law. Their religious assistants could also be encouraged to undergo secular legal studies (Majul:1978:131).

6.2.4 INDONESIA

Indonesia has the world's largest Muslim population followed by Bangladesh and India (Banks:1992:337; Madjid:1980:340). Islam came to Indonesia in the 1200s. Islam is greatly influenced by custom and culture which, as in Malaysia, sometimes play a more important role than Islam itself. While 90% of all Indonesians are Muslim, it is estimated that only 20% follow Islamic law strictly (Lev:1972:235; Ibrahim:1969:109,124; Cammack:1989:54). While Islam is also the majority religion in Indonesia, it is neither an Islamic nor a secular state and Islam is not the state religion (Johns:1987:203). Indonesia was under Dutch domination until 1942 (Windass:1969:578). The preamble to the 1945 Indonesian Constitution has a religious component and "belief in an all-embracing God" is expressed. Article 29, subsection 1 affirms this and also guarantees freedom of religion (Thoolen:1987:141). Indonesians also struggled with the question as to whether there should be a unification or diversity of laws. They eventually opted for one Marriage Law (Law No. 1 of 1974)[49], which came into effect in 1975 for all sections of the population regardless of religion. There have been changes in the national marriage laws which resulted in modifications of or reform to the Islamic law of marriage to reduce the frequency of polygyny, divorce and child marriage. These changes (in the form of legislative reforms) were met with resistance from Muslims (Cammack:1989:56; Johns:1987:218). Interestingly, "[t]he primary proponent of marriage-law reform has been a respectably powerful urban, intellectual, and upper-class women's movement..." (Lev:1972:137).

[49]Article 2, section 1 states that a marriage is legitimate if it has been performed according to the laws of the respective religions and beliefs of the parties concerned.

Islamic law is here seen as part of the codification of national civil law to give effect to the unification of Indonesia's legal system (Mahadi:1987:211-212,216,219; Thoolen:1987:60). This can be compared to Tunisia and has succeeded where India has failed. To the extent that Islamic law is part of this new marriage law, it is part of the positive law of Indonesia and the state is therefore established as an authority in the administration of such laws and as an arbiter of their legitimacy (Johns:1987:217). To this extent Indonesia is an exception to the pattern of conflict and contradiction between constitution and MPL evident in most of the countries discussed in this chapter.

The Indonesian government has, however, not shown much interest in ratifying international human rights instruments. The 1945 Constitution, which is now in force, does not contain many specific human rights provisions. As of 1 January 1985 Indonesia had only ratified nine international conventions on human rights and humanitarian law. While these nine instruments did not include the two 1966 UN Covenants, it did include the Women's Convention (CEDAW) which was signed in 1980 but ratified in 1984 with reservations (Thoolen:1987:72,81 n 102). Also "...[t]he attitude of the judiciary towards non-incorporated international human rights provisions is one of reluctance" (Thoolen:1987:75).

Islamic courts were being abolished or their jurisdiction limited elsewhere (in the other Muslim and non-Muslim countries), while they continued to flourish in Indonesia (Lev:1972:ix,229). After independence from colonial rule Islamic courts (or *Sjariah* courts as they are known) became part of the national legal system (Arifin:1985:33).[50] Judges of these courts, having an essentially *Shafi'i* outlook, were not placed under the jurisdiction of civil courts, which were under the Department of Justice, but instead were placed under the jurisdiction of the Department of Religion, which in turn was controlled by essentially conservative *Ulama* or religious

[50]For a detailed historical background see Lev:1972:63-75.

authorities. This autonomy has ironically resulted in their isolation and modernist Muslims who favour legal integration in Indonesia feel that there is no need for Islamic courts. These modernists advocate, but to no avail, the use of other *Sunni* schools besides the *Shafi'i* school and that *ijtihad* (independent legal reasoning) should be exercised to establish a school of thought unique to Indonesia (Lev:1972:110-111, 231,237-238). By placing Islamic courts under the jurisdiction of the Department of Religion Muslims controlled appointments to the judiciary and prevented any modernist tendencies from infiltrating into these courts (Cammack:1989:57; Lev: 1972:44-45,131).

As of 1985 there were 285 Islamic Courts of First Instance and 15 Islamic Courts of Appeal (Arifin:1985:38). The jurisdiction of these *Shari'a* courts were limited to regulating MPL relations (except matters relating to inheritance) between Muslims and not with issues relating to the five pillars of Islam (matters of belief). In matrimonial matters some judges often play a mediating role while others, especially in large cities, do not. Cases dealing with inheritance are handled by general courts and it is policy to codify laws. All judges are state judges and it is considered important that the judges of *Shari'a* Courts be experts in Islamic, customary and general law (Arifin: 1985:37,39,41; Lev:1972:115,125-126,232; Thoolen:1987:60).

The government has since 1974 also slowly succeeded in its attemps to co-opt Islamic courts and older traditionally educated judges are being replaced by those selected by the Supreme Court (Cammack:1989:72). "The state legal system makes provision for the administration of Islamic family law [in Islamic courts] alongside the secular courts that handle civil and criminal matters..." (Johns:1987:204). There is therefore an essentially unitary court system but religious courts exercise jurisdiction over Muslims in matters of MPL. The power and stature of these courts were substantially increased as a result of the Marriage Law of 1974, although the government had intended that exactly the opposite should happen (Schlesinger *et al.*:1988:326;

Cammack:1989:58,65). While the government was unable to effect changes through the 1974 statute, it is now trying to do so through administrative means. The Supreme Court now also has the power to hear cases of appeal from Islamic courts. Judges appointed by the Supreme Court for this purpose are selected from the civil judiciary and usually have a secular legal education. Even judges appointed to the Islamic courts now have to be law graduates and they are lured by high salaries to accept posts as Islamic judges. Lev (1972:108-109) writes on the recruitment of these judges that "[b]oth the Islamic universities and Islamic courts lack prestige...the few Islamic university graduates who are interested in becoming religious judges...do not know Arabic well enough, and sometimes barely at all." These high standards and requirements have also resulted in more women serving as Islamic court judges since 1964 as they were often better qualified than their male counterparts. Since Indonesian Islamic courts do not have jurisdiction over criminal matters, it was decided that there was therefore nothing preventing women from becoming judges, at least not from an Islamic law perspective.[51] The Supreme Court continues to play a large role in the testing and selection of these judges (Islamic court) (Cammack:1989: 65-67,69-71; Lev 1972:74,103,108-110). It seems as if Lev's (1972:264) prediction that "[c]ivil institutions...will eventually expand their authority over...religious institutions, subjugating Islamic administrations and religious law to the overriding principles of state legislation and bureaucratic integrity" is slowly beginning to materialize.

6.2.5 SINGAPORE

Singapore, a non-Muslim country, officially recognizes MPL, which is administered in terms of the Administration of the Muslim Law Act of 1966. In common with Sri Lanka and the Philippines, it has therefore also passed measures regulating MPL. Singapore was historically under the influence of Dutch rulers and hence a code

[51]See 4.4 for an explanation.

Number Eight (1770) dealing with MPL evolved which remained in operation even after the British occupation. This code was also accepted in Sri Lanka (then Ceylon) as early as 1799 and Muslim law was always subordinate to it in cases of conflict (Nadví:1989:350-352). Muslims themselves are a minority. The Constitution[52] accords the Malay minority (indigenous to Singapore) a special status and protection (Article 152 (1) - (2)). Article 153 of the Constitution specifically provides that: "The Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion." This accords with the provisions of the 1966 Act which "...constitutes a Muslim '*Ugama Islam*' to advise the President of Singapore in matters related to Muslim Law and Islam in general" (Nadví:1989:353,see also 355).

Article 15 of the Constitution guarantees freedom of religion. Article 4 of the Constitution confirms its supremacy and further states that while past laws (therefore including MPL, which was already in existence) cannot be challenged under the Constitution, new laws may be so challenged. The same argument discussed with regard to Sri Lanka[53] applies with equal validity to Singapore. While Article 12, subsection 1 provides for equality between the sexes and equal protection under the law, subsections 2 and 3 respectively qualify this as follows: "Except as expressly authorised by this Constitution, there shall be no discrimination...on the ground only of religion..." (Article 12 (2)). "This Article [12] does not invalidate or prohibit - (a) any provision regulating personal law..." (Article 12 (3)(a)). In 1995 Singapore also ratified CEDAW with reservations.

The Constitution vests the Supreme Court with judicial power (Article 93). Part 11 in S 108 (1) of the 1966 Act gives the courts freedom in deciding matters pertaining to

[52]No.28 of 1986.

[53]See 6.2.7.

the Muslim laws of succession. This Act also mentions an official list of standard Islamic textbooks which have been translated into English. In deciding cases the courts could refer to these reference books listed by the Muslim authorities (Nadví: 1989:351). However, in Singapore there are *Shari'a* courts in which Muslims can seek redress to their grievances (Capotorti:1991:71). The jurisdiction of these courts is, however, limited to deal only with cases relating to MPL (Mahmood:1985:94).

6.2.6 MALAYSIA

Malaysian society is an essentially secular society with constitutional supremacy being provided for by Article 4 (1) (Jusoh:1991:3). Just over 50% of the population are adherents of Islam (Von der Mehden:1987:177). Islam is constitutionally (Article 3 (1)) stated to be the religion of the federation of 13 states but it is not the official religion. The Federal Constitution of 1957 describes being a Muslim as part of the definition of a Malay. The ninth schedule to this Constitution makes provision for MPL and also makes provision for freedom of religion (Articles 3 (1) and 11) (Von der Mehden:1987:187; Nadví:1989:294). Fundamental human rights are also guaranteed under Articles 5-13. The Constitution furthermore empowers the states to make laws with regard to MPL. However, no uniformity has been achieved regarding MPL countrywide. Each of the 13 states continues to follow its own enactments since each state has a separate statute dealing with the administration of MPL. Most of these statutes do not effect any reform to Islamic law but merely aim to codify it. What is uniform, however, is the fact of conflict and contradiction between the Constitution and MPL.

The Malaysian Constitution is based on a Western model and concept of democracy. However, the commitment to human rights that is part of this model is subverted by constitutional recognition of MPL and provisions enabling its regulation by state governments. The conflict and contradictions between personal laws and constitutions evident in most countries discussed in this chapter apply equally to Malaysia. For

example, because MPL provides for unequal treatment of the sexes, Article 8 (1) of the Constitution which provides that "[a]ll persons are equal before the law and entitled to the equal protection of the law" does not mean a great deal in practice (Ibrahim:1992:296-298; Wahid:1990:9-10; Connors:1988-1989:195,203-204; Rhoodie:1984:184). That this right to equality is not very strong is furthermore apparent from the qualifications provided by the Constitution. For example, while Article 8 (2) provides that "[t]here shall be no discrimination against citizens on the grounds only of religion, race, descent or the place of birth in any law...", no mention is made of discrimination on the grounds of sex (Mamat:1991:45). "...[I]t is [therefore] not unconstitutional to discriminate against...women" (Mamat:1991:46). In 1995 Malaysia also ratified CEDAW with reservations.

As indicated above, provisions of Islamic law are generally confined to the areas of MPL administered in *Shari'a* courts by *kathis* while secular judges have jurisdiction over civil and criminal affairs (Jusoh:1991:xiii,49-51). "By the introduction of statutory law of Western inspiration and through a system of secular courts, Islamic law is now administered in part by special *qadi's* courts with jurisdiction based solely upon religious qualification. This has resulted in conflict in jurisdiction between this court and the secular High court" (Razak:1985:79). "...[T]he conflict between Islamic law and civil law in Malaysia today...is a constitutional matter" (Razak: 1985:81). However, an amendment to the Constitution in 1988 clearly stipulates that the High Court and inferior courts will have no jurisdiction over matters within the ambit of the *Shari'a* courts (or *Syariah* courts as they are known) (Ibrahim:1992:296-297). Each of the 13 Malaysian states has its own *Shari'a* courts. Until recently these courts were, like their Indonesian counterparts, controlled in each state by an Islamic Religious Department and judges were essentially appointed from the ranks of religious officers who lacked judicial training. These courts were also poorly organized. Changes to improve the position and status of these courts were then considered by several committees. The Federal Constitution also makes provision for most states to provide for the constitution, organization and procedure of these courts

whose jurisdiction is limited to MPL matters pertaining to Muslims (Ibrahim:1992: 307).

6.2.7 SRI LANKA

Unlike the case in India[54], where MPL already in force prior to the commencement of the Indian Constitution was considered not be be law in force at the commencement of the Constitution, in Sri Lanka (a non-Muslim country) the reverse argument applies to achieve the same effect. The 1978 Constitution (and Supreme law) now guarantees freedom of religion (Article 10), equality (Article 12) and the cultural rights of ethnic and religious minorities as fundamental rights (Article 14 (1) (e) and (f)). However, it further stipulates that while past laws (therefore including MPL which was already in existence) cannot be challenged under the Constitution, new laws may be so challenged (Article 16 (1)). This indirectly means that the *status quo* would be upheld because new laws seeking to reform existing and conservative MPL can be challenged. Thus new legislation cannot challenge the existing MPL as the latter has constitutional protection. Here too the conflict between religious rights and the right to equality, both of which are equally provided for in the Constitution, has not been resolved by the Constitution (Gunasekera:1994:11). Thus, although Sri Lanka became a signatory to CEDAW in 1980 and ratified it in 1981 without any reservations, personal laws which discriminate against women actually have constitutional protection. In some instances the Courts have played a role in overriding these laws (Shirkat Gah:1994a:6-7). The Supreme Court has held that some fundamental rights have a vertical as well as a limited horizontal application.[55]

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[54]See 6.3.2.

[55]Gunaratne v Peoples Bank 1987 CLR 383 and 396. Du Plessis (1994b:712) writes that "[i]n recent years the tendency worldwide has been to recognise the need for the horizontal application of bills of rights *but not unqualifiedly so*." See 9.6.3 *et al* for an explanation.

However, as is the case in India,[56] because MPL is exempt from constitutional scrutiny, this does not mean much for Muslims seeking redress to constitutional conflicts arising from MPL. As will be detailed,[57] South Africa has in its final Constitution heeded the fact that only if a recognized MPL is subject to the Bill of Rights will issues on horizontality and verticality of the Bill of Rights become a relevant issue for Muslims.

In Sri Lanka Muslims essentially belong to the *Sunni* sect and *Shafi'i* school of law. Under British administration MPL became (and still is) subject to the prevailing law of the land. Until 1929 MPL was applied and administered in the ordinary civil courts. In terms of the Muslim Marriage and Divorce Registration Ordinance of 1929 which established the *Shari'a* (or "Kathi" courts as they were previously known), MPL was to be the personal law of all adherents of the Islamic faith (Gunasekera: 1994:3-4,9,12). It was therefore only a few decades ago that Sri Lanka established two authentic *Shari'a* courts. Today "Kathi" courts are renamed *Quazi* courts by the Muslim Marriage and Divorce Act of 1951 which repealed the earlier Ordinance (1929). The first court, the *Quazi* Court, has exclusive jurisdiction in marriage and divorce while the second court, the Wakf Board, has exclusive jurisdiction in the area of Muslim charitable trusts. In terms of the 1951 legislation which is applicable today, the jurisdiction of the *Quazi* courts is now exclusive as the ordinary civil courts cannot hear matters that fall within the jurisdiction of the *Quazi* courts (Gunasekera: 1994:8). In all other areas of law Muslims are subject to the common law of Sri Lanka and in terms of the Constitution the Supreme Court is the highest court of appeal for both Muslims and non-Muslims (Mohideen:1985:95,110,113-114; Tiamson *et al.*:1985:155). Judges are required by legislation to be "adult *male* Muslims of suitable standing and attainments" and are appointed by a commission

[56]See 6.3.2 below at footnote 81.

[57]See 9.6.3.

which is responsible for the appointment of all the judges of the country (Mohideen: 1985:110). Lawyers are seen as ideal candidates because of their legal training and knowledge of Islamic law[58] (Mohideen:1985:110). It is interesting to note that "...local *ulama*[59] [were] not recruited into any Shari'ah Court system, and the ulama was never known to voice any opposition to any changes in the Shari'ah law or Shari'ah courts. [Instead, such opposition usually]...came from the Muslim intelligensia, consisting of teachers, lawyers, doctors, politicians, Muslim associations and congregations" (Mohideen:1985:114).

6.2.8 ISRAEL

Israel is a good comparative example of what will happen if a secular state intervenes in MPL resulting in indirect or direct influence in changing some aspects of MPL (Layish:1975:327-336). Israel has no written constitution. In 1980 Israel signed the Women's Convention CEDAW with reservations about its Article 16.[60] The reason for not ratifying the Women's Convention may include the difficulty of reconciling religious law and practice with it. The inequality of religious law and its conflict with Article 16 is also regarded as one of the main obstacles to the enactment of a bill of rights which is required for a written constitution (Shalev:1995:93). Although there is both a secular and religious legal system based on different legal norms, the *Shari'a* court system has become part of the general legal system. The Muslim judicial system serves 700 000 Muslims and *quda* are appointed by the President of the State in accordance with the civil law on the recommendation of a committee headed by the Minister of Religious Affairs (Edelman:1987:93; Layish:1971:238,255; Reiter:1995: 1). The Muslim community in Israel does not have much respect for the Muslim

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[58]All lawyers are required to study Islamic law (Tiamson *et al.*:1985:155).

[59]The concept of *Ulama* is not well developed and there are very few qualified people in this regard (Tiamson *et al.*:1985:155).

[60]See footnote 65.

judicial system as *quda* are generally not trained in Islamic law. In appointing Muslim judges emphasis is placed on secular legal education as Israel has no institutions of higher Islamic studies. The third generation of *quda* are making a concerted, although personal, effort to bridge this gap. In spite of their lack of confidence in these courts, Muslims seldom resort to secular courts in matters pertaining to MPL (Reiter:1995:3-4). This is also the case in South Africa as far as Muslims and their religious tribunals are concerned.[61]

In Israel *quda* are not assisted by *muftis* but they do make use of arbitrators in family arbitration. *Quda* have been instrumental in the adaptation of MPL in favour of or to improve the status of women to a level of "near" equality (Layish:1971:240,255; Reiter:1995:8; Layish:1975:xiii,332). Modern legal education has definitely had an impact on the practical application of Islamic law by *quda* in Israel (Reiter:1995:5, 20). Some *quda* even go so far as to appeal to colleagues to view Islamic law "...as an all-embracing, living body of law that can be interpreted and adapted to changing realities" (Reiter:1995:22). While *quda* may be "...torn between their loyalty to religious law and their recognition of the need to adapt it to changing conditions or their duty to apply state laws, which in part override religious law...[r]ather instructive is [their] favourable attitude towards secular legislation as a means to supplement, not abrogate, the *shari'a*, though this attitude is not always reflected in their judgements [but it is]...influenced by the nature of their calling [and not]...by the theoretical thought processes characteristic of...muftis, who sometimes live in ivory towers, aloof from social reality...[I]n the absence of muftis in Israel...[t]he *qadis'* conference is a forum for debating practical problems which have cropped up in the course of dispensing justice and which reveal a gap between social reality and theoretical religious law... [which they try] to bridge...by means of a traditional technique" (Layish:1971:269). Differences in social background, education and training influence the attitudes of these judges toward religious and secular law.

[61]See 8.2 and 8.4.

Those judges who have a secular legal education welcome change by the secular legislator while those who have acquired a traditional legal education from al-Azhar[62] (first generation judges) do not. If the numbers of the former should increase it could result in a reorientation of the role of Islamic law for Muslims in Israel (Layish:1971:271-272).

6.3 POSITION IN COUNTRIES WITHOUT *SHARI'A* COURTS

6.3.1 EGYPT

The position in Egypt will be examined first because the Egyptian Muslim community took the lead in efforts to Westernize reform (Voll:1992:216). After the English colonization (1882-1922) jurists in an independant Egypt in their quest for modernization strove to bring about changes, albeit restrictive, to MPL which had up to that stage remained unchanged and to bring Egyptian codes into line with other codes in the West. The creation of the Civil Code of 1947 was the culmination of their efforts and served as a model for the Arab Middle East (Riga:1991:112). In comparison to Saudi Arabia the Civil Code of Egypt (1949) is a synthesis of different sources of law, for example, Islamic law and European law. Nevertheless MPL remained outside the realm of modernization (Sfeir:1988:755-756). It is "...modern in style and organization [and] seeks to achieve a synthesis between Islamic teachings and the legal institutions of the West" (Schlesinger *et al.*:1988:325). Riga (1991:109) is of the opinion that MPL "...has need of profound reform if it is to be compatible with Western views, particularly on women".

Egypt has a regular written Constitution which was promulgated in 1971. This Constitution was amended in 1980 (De Feyter:1988:21). In Article 2 of the

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[62]The famous al-Azhar university in Cairo is considered to be the seat of Islamic learning (Liebesny:1980:205). See also 6.3.1 where reference is made to Al-Azhar.

Constitution Islam is declared the national religion and the principles of Islamic law are considered the main source of formulation of laws (De Feyter:1988:25; An-Na'im:1990:66). Conflict between MPL and the modern commitment to the notion of equality was dealt with in the 1971 Constitution (as amended), as follows. Article 40 of the Constitution guarantees the equality of all its citizens before the law and reads as follows: "All citizens are equal before the Law, as they are equal in respect to the general rights and duties; there is no discrimination between them in that regard on account of sex, origin [lineage], language, religion or belief." Article 11 guaranteed the same equality in the political, social, cultural and economic domains but added the limitation or restriction that the State will ensure women's equality with men only in so far as this does not conflict with Islamic law (Hill:1978:296). Article 46 guarantees the freedom of belief and religious practice. There is a "double standard" in Egypt where conversion from Islam is forbidden and goes contrary to the Egyptian penal code. There are a number of Egyptian penal laws that criminalize discrimination or instigation of hatred on the grounds of religion. The Copts (a Christian minority) have complained that these constitutionally guaranteed freedoms are not always upheld (MacLaren:1991:24; Arzt:1990:223). This is comparable to the situation of *Ahmadis* in Pakistan. Article 151 of the 1986 Constitution provides that international human rights treaties have the force of domestic law as soon as they are ratified and published (Arzt:1990:222). Egypt is also a signatory to international treaties and conventions which guarantee these rights (to equality and religious freedom) (Maclaren:1991:24-25). It has furthermore ratified the international women's charter CEDAW[63] but has attached reservations to certain of its articles. Egypt is a typical example of a modern Muslim country facing a dichotomy between its public and private law.[64] It indicated an awareness of this conflict when it entered reservations on certain Articles of CEDAW, Article 16 being a typical example as it

[63]See 5.2.1, footnote 32.

[64]See 6.1 above.

relates expressly to MPL. Apparently Egypt is one of the countries that has attached the most "strenuous" reservations to Article 16 (Poulter:1990:162-163; Arzt:1990: 220). "Whereas the article [16] requires complete equality between men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, Egypt's reservation states that its obligations 'must be without prejudice to the Islamic Shari'a provisions'" (An-Na'im:1990:178-9).[65] The reservation declares that "[t]his is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of the relations is an equivalency of rights and duties so as to ensure *complementarity*[66] which guarantees true equality between the spouses" (emphasis added) (Poulter:1990: 163). Egyptian women have fought for several decades for the enhancement of their political, social and economic condition and for the modernization of MPL. They requested in the planning stage of the Constitution that "...a new law of personal status be enacted, that the constitution contain (guarantees of) the freedom of the feminist movement, and that women be granted a fuller share of civil rights in keeping with their equality with men" (O'Kane:1972:139-140). However, this request was never heeded. It is ironic that also in the planning stage of the Egyptian Constitution certain members of the public demanded that the liberation and equalization of Muslim women be achieved within the ambit of Islamic law and their qualification was included in the final formulation (1971) of the clause (section 2, article 11) dealing with women (O'Kane:1972:140,148). Incidentally, in terms of Section 1, article 2 of the Egyptian Constitution, Islamic law is "a" and not "the" source of legislation (O'Kane:1972:148).

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[65]Article 16 "...obligates states parties to take affirmative steps to ensure the equality of women and men in marriage and in parental responsibilities. [It] contemplates the restructuring of the gender relations of power within the family. Precisely for that reason, it is subject to a large number of reservations by state parties" (Sullivan:1995:129).

[66]See 3.2 where the complementarity rather than equality of women is referred to.

Article 2 of CEDAW (general policy provision) includes a general condemnation of discrimination against women and seven specific measures to be undertaken in this regard. Egypt's reservation states that it will comply with Article 2 only in so far as it does not conflict with Islamic law (Arzt:1990:219). The Swedish government has made the following observations regarding reservations: "...[T]he reason why reservations incompatible with the object and purpose of a treaty [including CEDAW] are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless" (Arzt:1990:220-221). In an attempt to address this "reservation" problem the CEDAW Committee asked the UN in 1987 "to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family...and their participation in public life" (Arzt:1990:221). This request was not well received by Islamic representatives to the UN and hence no steps were taken in this regard (Artz:1990:221). It is clear that even in modernized Egypt the conflict between MPL and the Constitution has not been resolved.

The 1949 Civil Code was a compromise between Islamic and secular law and in terms of Article 1 of this Code judges were to render judgements in accordance with the "letter and spirit" of provisions of the Code, itself while Islamic law principles merely served as a backup to fill gaps found in statutory provisions and custom (Saleh:1989: 767-768; Ziadeh:1968:407; David and Brierley:1985:466). Historically Egypt did not have a unified judicial system. There were the Mixed Courts of Egypt, the Egyptian Native Courts, the Religious Courts of Personal Status (both Muslim and Christian) and the Consular Courts (Brinton:1968:157,159).

Although religious or *Shari'a* courts continued to exist alongside secular courts, their jurisdiction was limited to MPL matters and they were also regulated by a 1931 decree. In terms of this decree the *Shari'a* courts were not bound by *fatwas* (legal opinions) of any kind. These courts (which included the non-Muslim courts) were abolished in 1955 and as a consequence of the Egyptian quest for secular

modernization were absorbed into the national courts responsible for the administration of civil and criminal law in 1956 (Opolot:1981:151; Amin:1987:97). The functions and staff of these courts were transferred to the new National Courts under whose jurisdiction personal law matters were to be dealt with (Safran:1958: 20,24; Hoyle:1991:191 fn 12; Al Aseer:1976:43,63; Habachy:1959-1960:49,65,68; Anderson:1957:33). The whole Egyptian legal system thus became unified in 1956 (Hoyle:1991:192). Judges who serve in this division of the National Courts are recruited from those whose training is mainly based on conservative or traditional interpretations of Islamic law because there is as yet no single comprehensive code of MPL. This then, as indicated above, affects the way law is interpreted and applied (Anderson:1976:221). It is thought that this transfer of *quda* "...must eventually result in a deep change of character in the judges who apply Shari'a law" (Coulson:1969:99). It was thought that therefore (as a result of such a move) in some Arab countries "[f]rom now on, both the *shari'a* and modern codes will be applied in these countries, by jurists trained according to the rational and logical methods of western law" (David and Brierley:1985:478). Anderson (1957:33) also thought that "...the specialist training and background formerly required in the personnel to staff the different courts [would] no longer [be] so much needed." In the case of Egypt, however, even though she consolidated her dual secular and religious courts, by so doing she merely abolished the form and appearance of these courts while MPL was still kept alive and in force exactly as before (Al Aseer:1976:64-65). Thus, while Egypt has a unified bench and bar it does not have a unified system of law. Instead, the system is "mixed", being partly Islamic but mostly secular (Habachy:1959-1960: 50,62). New judges are now selected from Egyptian law schools, including the famous al-Azhar, where Islamic law is taught. There is, however, "...a narrowing of the gap between lawyers trained in Islamic law institutions [like al-Azhar] and those trained in modern-type law schools" (Badr:1987:34). Although Egypt does not have an all-encompassing code covering MPL, Islamic law and personal laws based on it still apply in cases pertaining to personal law. Both the Grand Mufti of Egypt and *Ulama* of al-Azhar continue to play an influential role as far as law reform is

concerned (Liebesny:1983:204-205; Al Aseer:1976:65).

6.3.2 INDIA

The position in India, a Muslim minority country, is dealt with in most detail because of the similarities it shares with the position of minority Muslims in South Africa as far as the questions of reform and codification of MPL are concerned. The history of Islam in India lasted for almost 11 centuries until the Mughal Empire disintegrated and was displaced by the British *raj* in the nineteenth century (1857) (Wolpert:1989: 104 passim; Buultjens:1986:96).

In 1986 the Muslim population was estimated to number about 85 million (Krishna: 1986:357). The Muslims on their own comprise 11% of the total population, making India the country with the second largest Muslim population in the world (Oomen: 1990:20). 90% of these Muslims are *Sunni* and generally belong to the *Hanafi* school of law (Kettani:1986:117).

Secularism pervades the provisions of the Indian Constitution (1950) and its preamble explicitly declares India to be a secular Republic (Bakshi:1994:21,23; Ul Haqq:1982: 250-251; Nadví:1989:361). India has no state religion. Buultjens (1986:101) and Abel (1965:46) maintain that Indian secularism is not negative and differs from the traditional understanding of this concept since it is not based on the denial or abolition of religion. The Indian approach is very different to that adopted by the US Constitution in, for example, the matter of there being no clear division between religion and state. In spite of their differences, the Indian Constitution has borrowed much from the US Constitution.[67] India's Constitution also differs from that of Pakistan in that the latter expressly endorses the relations between the dominant

[67]See Chapter Seven where freedom of religion in the US is examined. See also in this regard Patel:1970 and Mahmood:1986.

religion (Islam) and the state (Buultjens:1986:102). In India Articles 12-51 of the Constitution deal with human rights. These rights are divided into justiciable[68] and non-justiciable human rights[69], provided for in a separate chapter (George:1965:291).

Having established their rule in India, the British continued to follow the Muslim policy of non-interference in religious affairs of the Indians. In the early 1800s, however, they considered codifying MPL (as part of a uniform civil code) but in 1855 decided not to do so "...on account of its complexity and impracticality" (Momin: 1986:224). This decision still prevails today because attempts aimed at a unification of personal laws has been met with opposition. It was and still is felt by some Indian academics and politicians alike that a uniform civil code is necessary because the very existence of a multiplicity of religious personal laws is in direct conflict with the essential concept of a secular state (Buultjens:1986:108).

While MPL has statutory recognition in India, Islamic criminal and civil law are no longer applicable to Muslims and have been substituted by Indian secular codes. This fact then substantiates the claim that it is only in the area of MPL that hardly any changes have been made in favour of women, resulting in the status of Muslim women remaining as it is. What must be made clear, however, is that it appears that the MPL as is generally applicable in India differs materially from Islamic law and was often and until 1947 called Anglo-Muhammadan law (Rashid:1988:136,142; Gani:1988:145; Anderson:1966-1967:73). In India MPL "...was influenced by four factors which would not apply elsewhere [as in Pakistan to a certain extent] or in most other countries" (Anderson:1966-1967:142). The reasons given for this are fourfold. "...[I]t is applied today, and has been for many years, under English rules of evidence and procedure; under the English doctrine of stare decisis, or the binding

[68]Articles 12-35.

[69]Articles 36-51.

force of precedent; and, indeed, by judges, some of them British [trained in the Inns of Court in London] and many of them trained in the English system, who have sometimes misunderstood the classical texts which they thought they were applying...and [finally] the impact of statute law" (Anderson:1966-1967:73,142-3).[70] Muslims can, however, also have recourse to existing Indian legislation should they so wish and thereby exempt themselves from the jurisdiction of Islamic law (Krishna:1986:361).

MPL in India enjoys statutory recognition as a separate code and is governed by the Muslim Personal Law (Shariat) Application Act of 1937. The provisions of this pre-independence Act are said to be essentially based on traditional Islamic law. Already in 1963 government reform proposals in this regard were met with opposition from the Muslim community. Keeping in mind that until 1947, when the above-mentioned Act was introduced, MPL was called Anglo-Muhammadan law and was not based on pure Islamic law principles, then it seems ironical that it should be preserved in its present form and that reform proposals in this regard be rejected (Gani:1988:143).

In India MPL is exempt from constitutional scrutiny, although there are strong views advocating that MPL should be subject to change and where in fact the applicable MPL has already undergone much change. Although in force at the time of the commencement of the Constitution and clearly inconsistent with it, MPL was construed by the Indian courts to be "exempt" from constitutional scrutiny on the basis that it was not among "laws in force at the commencement of the constitution" (Rizvi:1987:84).[71] Interestingly, in Sri Lanka the reverse argument applies.[72] Thus,

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[70]For a critical discussion concerning the four reasons outlined above see Rashid: 1988:135-150.

[71]Incidentally the interim (S 14 (3) (a)) and final (S 15 (3) (a)) South African Constitutions make direct reference to personal laws of religious communities even though MPL is, for example, not yet in force. MPL, once in force, will be regulated and fall under the scope of the final South African Constitution in terms of the provisions of the Bill of

as indicated below, for Muslim women in India it is of little help that article 13 (1) of the Constitution stipulates that all laws inconsistent with the fundamental rights it guarantees in Part III will be void to the extent of such inconsistency (Rizvi:1987:84). Nor does the right to equality before the law and equal protection of the law afforded by article 14, or the article 15 prohibition of discrimination on grounds of among others, sex and religion, mean a great deal in practice.

This inconsistency in the Indian Constitution is highlighted in the clauses below. Bhattacharjee (1985:11-12) confirms this inconsistency in the Constitution and sums up his view as follows: "...the Personal Laws of the Muslims were obviously "Laws in Force" [immediately before the commencement of the Indian Constitution] within the meaning of that expression in Article 372 (1)[73] and Article 13 (1) of the Constitution and also State actions within the meaning of Articles 14 and 15 and, therefore, being thus subject to all the provisions of the Constitution including those relating to the Fundamental Rights, the Muslim Laws *must have* failed to the extent they were inconsistent with the provisions of the Constitution" (emphasis added). Ghouse (1972:57) endorses Bhattacharjee's view and says that it is "...difficult to see why a personal law should be supra fundamental rights when constitutional law is not...[T]herefore...'law' in article 13 includes personal laws also." Case law also supports the view that "...discrimination against women in the personal laws is beyond the purview of articles 13 and 14 as 'laws in force' do not include personal laws...[and therefore] applied only to statutory laws" (Sivaramayya:1972:70-71).

Rights. See 9.4.2 below.

[72]See 6.2.7.

[73]This article confers constitutional validity, subject to other provisions of the Constitution, on all laws in force in India at the commencement of the Constitution (Rizvi:1987:84).

India has signed (1980) and ratified (1993) CEDAW[74] with reservations. The reservation about CEDAW states that "...with regard to articles 5(a)[75] and 16(1)[76]...the Government of India declares that it shall abide by...these provisions in conformity with its policy of noninterference in the personal affairs of any Community without its initiative and consent...[t]he rationale for this...rests on India's desire to safeguard the rights of its religious and ethnic minorities" (Rahman: 1990:486). There is difficulty in reconciling religious law and practice with CEDAW because family law can follow either civil or religious codes. The Indian Constitution merely makes six direct references to women and in only one of them (Article 42) are they referred to minus any reference to men or children as is the case with the other five articles. Ironically, this single article referred to (Article 42) merely makes provision for maternity leave (Gani:1988:160).

Before British rule in India, judges appointed by Mughal emperors administered justice in standardized *Shari'a* courts according to the *Hanafi* school of law on the advice of *muftis*[77] (jurisconsults or specialists on Islamic law).[78] In 1862 the

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[74]See 6.1 above.

[75]Article 5 (a) declares that: "State Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of the sexes or on stereotyped roles for men and women."

[76]See footnote 65 above where this article is outlined.

[77]On the qualities and characteristics of a *mufti* it is stated that: "No discrimination in the competence of a *mufti* is allowed on the basis of...sex...[A] woman can also become a *mufti*" (Masud:1984:132). See reference to Aisha, wife of the Prophet Muhammad, performing this task in 2.1.3.

[78]For a detailed study of the Muslim judicial system of the Mughal Empire see Ahmad (1978). For a detailed case study of MPL as evolved and interpreted by the Indian judiciary both before and after independence see Shabbir (1988). For a detailed study of the administration of Islamic law in India both before and under British rule see Anderson:1966-

jurisdiction of these courts were restricted to personal laws and there was a decline in the role of the *quda* (Al Aseer:1976:55-56; Yaduvansh:1969:155; Anderson:1976:19-20). When Britain extended her sovereignty over India, the Muslim judicial system was abrogated. Traditional *Shari'a* courts were abolished in 1772 (David and Brierley:1985:478).[79] "There was thus one unified court system applying the laws of the various communities and there has not been in British India, nor is there today in Pakistan and India, that duality of court systems which still prevails in many other Islamic countries" (Liebesny:1967:32). Judges and magistrates took over the role of *quda*, while advocates took over the role of *muftis* (Azad:1987:53). Initially British courts in India were aided by these *muftis* in matters relating to Islamic law but this came to an end in 1864 (Dhavan:1987:219). From 1864 English was the language used in legal proceedings (Ahmad:1991a:54; Ahmad:1991:12). British courts left much to be desired as far as Muslims were concerned as judges were mostly British or Muslims trained in British law and this often, for example, resulted in looking for a solution in British law if the *Hanafi* school of law could not provide an answer instead of consulting the other schools of law which could well have been of assistance in this regard (Al Aseer:1976:57; Liebesny:1985-1986:20-21; Anderson: 1976:22; Rashid:1988:136,140; Dhavan:1987:211; Shabbir:1988:2). The judges' ignorance of the Islamic law could well be partly responsible for equity becoming "...the major structuring principle in the building of modern India's legal systems" (Bozeman:1971:134). In India there is therefore also no dichotomy between courts which deal with secular law and personal law as the same courts apply the general law to all citizens and personal law to religious communities where applicable. Interestingly and contrary to Islamic practice,[80] the common law principle of *stare*

1967:105-136.

[79]The Kazi Act of 1864 officially abolished the office of *qadi* but in 1772 already *quda* were being replaced by English judges (Rashid:1988:140,146; Ahmad:1991a:53; Ahmad: 1991:12).

[80]See 6.2.1.

decisis is still applicable in India today (Anderson:1976:25; Rashid:1988:143).

In India *ijtihad* is no longer considered to be a practically feasible option. Writing of the situation in India, Imam (1972:393) pertinently asks: "Cannot our courts go back to the text of the *Qur'an, Hadith* and *Ijma* (as the Pakistan courts are doing) ...and give effect to their underlying policies and reasons by redefining the scope of the traditional rules?" (Shabbir:1988:324). Because the judiciary in India has been denied the use of *ijtihad*, it has even been suggested that: "...If *ijtihad* is to be a purposeful source of development of Muslim personal law in India, in the constitutional and judicial set up of today, it is submitted, the role of *Mujtahids* [scholars] may have to be conceded to Parliament and our courts" (Imam:1972:391). Indian courts agree that bills of rights have vertical as well as horizontal application. Also in India, besides the control of religious endowments and educational institutions, reform of personal laws has been the third major area of constitutional litigation in India (Dhavan:1987: 241). The Supreme Court, in addressing the economic and social problems of India, also applied fundamental human rights in a horizontal manner (although not without qualification).[81] However, because MPL is exempt from constitutional scrutiny this does not mean much for Muslims seeking redress to constitutional conflicts arising from MPL.

In 1963 an attempt to once again introduce a uniform civil code to replace all existing heterogeneous personal laws, to give effect to the Directive Principle of Article 44[82] of the Constitution of 1950, was aborted (Mahmood:1972a:460). A uniform code was incidentally rejected by the majority of the conservative Muslim community although

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[81]See Shamdasani v Central Bank of India AIR 1952 SC 59; Electricity Board, Rajastan v Mohan Lal AIR 1967 SC 1857 and Sukhdos Singh v Bhagat Ram (1977) 1 SCC 421. See also De Villiers:1992:198-199 and Du Plessis:1994b:712. See also footnote 56.

[82]Article 44 is contained in the Chapter on the Directive Principles of State Policy and is found in Part IV of the Constitution. It provides that "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" (Momin:1986:231).

it had support from the minority Muslim modernists. The objection is twofold, theological and sociological. Those who believe in the maintenance of the *status quo* believe that their personal law is of divine origin and an integral part of Islam, the abandonment of which would lead to a loss of cultural identity (Anderson:1972:35; Mahmood:1972:80).

A uniform civil code is thus not the solution for Muslims in India. Shabbir (1988: 325) says that the ideal solution for Muslims would be to adopt a "uniform *Muslim* code"[83] instead of a uniform civil (secular) code since this would "...not only meet the need of changing circumstances but [would] also nullify the antigrowth trends in the area of 'Muslim Personal Law'" and it is in this context that the legislature and judiciary which gave MPL its present shape can play a more effective role.
On the other hand, while there are many Muslims who believe that such a code will work, they do realize that they are being very idealistic in expecting it to be adopted. Some scholars like Mahmood (1972a:476) believe that the introduction of a "transitory dual system of personal laws" could possibly provide a solution to this problem. What is meant by this is that, on the one hand, existing personal laws should remain but they must be reformed to ensure optimum social equality. On the other hand, a uniform civil code, "based on the cream of modern family jurisprudence", should be enacted and put to a referendum. If the latter is accepted by the majority of a particular community, it should be made compulsory; if not, the community will continue to be governed by its separate personal law with certain individuals within it obviously being able to exercise an option in favour of the uniform civil code. Only time will then tell whether such a code will be successful and even outweigh the personal law for that matter (Mahmood:1972a:476). There is also a view "...in favour of a fused family law applicable to all, whereas the hope of others is for a systematic legal choice concept retaining the option, if required, for parties to solemnise their marriage in religious form, thereby enabling a personal legal

[83]The idea of a uniform *Muslim* code will be elaborated on in 9.4.2 and 9.8.5 below.

system to govern the marital regime" (Pearl:1981:152). Pearl (1981:148) is of the opinion that "[a]n interesting stratagem, used by the Special Marriage Act (1954), is closer to the main purport of Article 44. This Act enables all persons to solemnise their marriages in accordance with a civil ceremony. In addition, section 15 of the Act enables persons whose marriages have been celebrated in religious form to register their marriages under the Special Marriage Act..." Bhattacharjee (1985:13) advocates the need for a uniform (common) civil code replacing different personal laws. It is said that this code will contain and be "...partly based on the cream extracted from all systems of personal law prevailing in the country" (Mahmood: 1972:96).

Bhattacharjee bases his proposal for a uniform code on the fact that, for example, the MPL concerning polygyny and divorce is discriminatory on the ground of sex alone and therefore void under Article 15. In addition, personal laws are applicable to communities on the sole basis of their belonging to different religions and therefore such discriminatory provisions should be prohibited under Article 15 which also prohibits discrimination on the grounds of religion. Bhattacharjee (1985:171) stresses the urgency for a uniform civil code as follows: "...[it] is *not* whether, in accordance with the mandate in Article 44, we *should have* a uniform Civil Code relating to or replacing the different personal laws operating throughout India, but whether we *cannot but have* such a Uniform Civil Code to save our different personal laws, statutory or non-statutory, from being struck down as unconstitutional." Rizvi (1987:88) makes us realise that Bhattacharjee's use of dramatic language to stress his point is ludicrous if not unnecessary in view of the fact that "[r]eading article 25 (freedom of conscience and free profession, practice and propagation of religion) and article 26 (freedom to manage religious affairs) under the protecting shadow of clause (2) of article 13..." obviates the need for this to happen. He feels that instead the Constitution should be so amended as to eliminate the conflict.

Rizvi (1987:88) makes an interesting point for Muslims in South Africa to reflect on,

namely that "...unless [the Muslim] community surrenders its right to be governed by its own religion-based personal law and permit the state to legislate in its own wisdom in that realm, as...Hindus have done...all personal laws will remain beyond the reach of the constitution." Bhattacharjee's reason (above) for a uniform code also appears to be contradictory because the mere existence of such a code implies that MPL, for example, will cease to apply to Muslims anyway, unless of course it is a national code introduced in an Islamic country as is the case in Tunisia.[84] The situation in Turkey[85], where Islamic law has been replaced by such a secular code, also serves to illustrate this point (Shahabuddin & Wright:1987:156; Saleem Khan:1971:94 -105).

When a new Adoption Bill was presented to Parliament in 1980 it expressly excluded Muslims from its scope. It was argued by a Muslim jurist that its exclusion was unconstitutional since it would deny Muslims equal protection under the laws (Krishna:1986:365).

The fact that no consensus has as yet been reached on a uniform civil code does not, however, obviate the need for some measure of reform to the already existing MPL in India (as opposed to its complete abolition) (Mahmood:1972a:467). Muslim masses in India oppose change in spite of reform to MPL in Muslim countries. Their reasons are that reform will be unacceptable if its brought about by the legislature of a predominantly non-Muslim country like India. The masses also fear that once they succumb to reform they are admitting to the government that their personal law is not immutable. This could then be construed as giving the government permission to replace it with the desired uniform civil code instead of merely reforming it

[84]See 6.3.4.

[85]See footnote 15.

(Mahmood:1972a:468). The negative attitude[86] displayed by Indian Muslims toward the reform of MPL has serious implications for the continued constitutional protection of MPL as it implies that the necessary justification and legitimation for it is lacking. In 1972 it was decided that MPL as applied in India was in urgent need of reform and that a working party should be set up, in conjunction with scholars trained in Islamic law and theology, to study ways in which to bring about these reforms effectively (Anderson:1972:36). While the Indian government has time and again given Muslims the assurance that it will not effect any changes to MPL, in 1973 the then chairman of the Law Commission warned that if Muslims do not voluntarily accept a common civil code, it will be forced on them (Sait:1980:113;115). In 1972 the Muslim community unanimously adopted a resolution to form an All-India Muslim Personal Law Board. Here Muslims categorically rejected any government interference with their personal law (Sait:1980:116).

The controversial case of Mohd.Ahmed Khan v Shah Bano Begum[87] proved that any attempt at reform to MPL will be futile and although the aim of this judgement was to improve the status of Muslim women as far as maintenance was concerned, a large proportion of women voiced strong criticism of it (Momin:1986:225). It is interesting to note the response of urban Muslim women in this regard: "While some of the Western-educated, city-based Muslim women welcomed the judgement, others were critical of it; yet others adopted a middle-of-the-road stance" (Momin:1986:229). Although this was not the first case by an Indian court (since there are no *Shari'a* courts in India) on an Islamic law topic, it was the Supreme Court's first attempt to interpret the Holy *Qur'an* and this incensed Muslims who regarded this behaviour as "an usurpation of Muslim authority", more so than the fact that the court decided that

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[86]The Muslim voice in politics is divided between the conservatives and the moderate and radical integrationists. It appears that the dominant position is that of the conservatives (Krishna:1986:359).

[87]AIR 1985 SC 945. See also 2.1.5.

secular law prevails in the case of a conflict between it and religious law (Rahman: 1990:478-9). This is summed up as follows: "The worst part of the judgement was that the judge had adversely criticised Islam for not having accorded legitimate rights to women. They interpreted the Qur'ānic verses 241-242 in Chapter 11 arbitrarily and in the light of these verses they imposed an obligation on the Muslim husband to make provision for the divorced wife" (Nadví:1989:366-367). The benefits of the Shah Bano (1985) case was undone by the subsequent passage of the Muslim Women (Protection of Rights on Divorce) Act of 1986, an Act that ironically stripped away any "protection" that women had gained with the Shah Bano case and symbolized "...a triumph of religious rights over women's rights in India" (Rahman:1990:481). This Act allowed MPL to supersede the Constitutional provisions and thereby depriving Muslim women of fundamental rights guaranteed to all citizens (Shaheed:1994:1). What Shabbir (1988:324) says of India applies equally to the situation in South Africa: "Here, in India we have constitutional safeguards for the protection of minorities' religion, culture and education. *The same document* [constitution] cannot be used to artificially justify the onslaughts on the sentiments of the minorities, while such safeguards are in dire need to be translated into action with dispassionate and honest approach specially by our judicial institutions" (emphasis added). In fact the effect of Shah Bano case demonstrates that even if a Muslim should seek redress on the basis of ordinary secular law, conservative Muslims will succeed in having judgements of such a nature set aside on the basis that they conflict with MPL. Problems like these emphasize why MPL in South Africa should be subject to the Bill of Rights, which should have a limited horizontal application as well.[88]

It has been stated with regard to reform that "...the continued application of [MPL] ...after devising effective ways and means to control its widely prevalent misuse by ignorant laymen and unscrupulous law-men, will...fulfil those various guarantees and

[88]See 9.6.3.

assurances contained in different provisions of the Constitution..." (Mahmood:1986: 107). Most Muslim countries have already made steady progress as far as reforming MPL is concerned. This was also the case in Pakistan. Gani (1988:27) raises an interesting question in this regard: "Till recently the Muslims, who are now in Pakistan and the Muslims in [the] rest of India, were governed by the same personal law. Why then have the Muslims in secular India been unable to experience even that limited degree of modernization which Muslims in theocratic Pakistan have been able to achieve?" He goes on to state that although India and Pakistan both inherited the same Muslim Personal Law Application Act of 1937, it has been amended in Pakistan by the Muslim Family Laws Ordinance of 1961 (Gani:1988:158). In Pakistan, however, an administrative body having limited judicial power is the competent authority in this regard (Gani:1988:23). In India legislative developments indicate that the right of Parliament to legislate on issues of personal law is well established. The Child Marriage Restraint Act of 1929 and the Dissolution of the Muslim Marriage Act of 1939 are indicative of these reforms in India. Gani (1988:144) says that "[t]he most recent text-books on Mohammedan Law also acknowledges this: "Numerous legislative enactments...in India deal exclusively with...Muslim Personal Law. While some of them modify substantive provisions of Muslim Law, the rest are of a regulatory nature. The courts have to apply the classical Muslim law subject to and in accordance with all this legislation. In no case can a Court hold any legislative provision to be *ultra vires* the classical Muslim Law, notwithstanding the contrary opinion of theologians. Legislation thus constitutes the Supreme source of Muslim Law in India." Oommen (1990:29) very idealistically says in this regard that "...the State in India has both legal and moral responsibility to act as a social reformer...The point is that all religious communities have their share of obscurantists, conservatives and progressives. The state need not and perhaps cannot wait till such time everybody endorses all the desirable changes."

It has been recommended by Imam (1972:385,398,416) that because MPL is interpreted to the detriment of women and notwithstanding the fact that there is no

organized forum of Muslim opinion, it is vital for the majority community to fill this gap by introducing reforms to MPL through Parliament. Parliament's power to legislate is subject to the Constitution and any laws made by Parliament must be in conformity with Part III (Bill of Rights) of the Constitution, especially Articles 25 (freedom of religion) and 29 (dealing with the protection of interests of minorities, for example, the right to preserve language and culture).

The Constitution deals extensively with the right to freedom of religion in Articles 25-39 (Burr:1988:261; Sigler:1983:144). Freedom of religion does not necessarily, however, include freedom to practice religion.[89] India has tried to unite its religiously heterogenous population by "accommodating" them (Burr:1988:268). Articles 25-30[90] of the Indian Constitution are also purported to contain "...ample safeguards for the protection of minorities" (Pirzada:1980:77). The state may not aid one religion or prefer one religion against another but it may support religious education (Sigler:1983:144). In terms of these Articles religion is protected from state interference. Ahmad (1985:56,69 and passim), Sharma (1972:271;274) and Ghouse (1972a:280), however, illustrates how Articles 25, 26 and 30 have clearly been violated in India.[91]

The Constitution is not "...overly concerned with the protection and preservation of group rights" (Sigler:1983:117-118). It recognizes the claims of individuals and communities against the state and has adopted two methods for protecting minorities. The first method involves guarantees of a negative quality protecting them from

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[89]See 7.4.

[90]"Article 27 deals with freedom as to payment of taxes for promotion of any particular religion. Article 28 deals with freedom to attend religious instruction or religious worship in certain educational institutions...Article 30 provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their own choice" (Pirzada:1980:77).

[91]See also 7.4, footnote 50.

discriminatory treatment. This is evident from Articles 14, 15, 16, 19, 25 and 26. The second method involves guarantees of a special nature evident from Articles 29 and 30 (Pathak:1972:xxvi-xxvii; Mahmood:1986:103-104; Thornberry:1991a:12).

Not only has India the severest of minority rights problems, but it and its courts have also made the most effort to address these problems in a legal fashion (Sigler:1983: 122; Pathak:1972:xxviii; Hingorani:1972:489).[92] By 1983 India's minorities had been given increasing degrees of protection by changes made to the Constitution in 42 amendments. Some of these amendments have "re-emphasized" minority rights as is evident from Articles 15 (1), 15 (4) and 29 (2). It would appear that whilst the Constitution provides both for equal treatment and special group preference, there is some conflict between them, which conflict has apparently been accommodated by Indian jurists (Sigler:1983:119-120).[93] Articles 25-28 of the Indian Constitution and their interpretation by the Indian courts form the basis of the religious freedom of religious minorities (Sharma:1972:265). "These provisions indicate that the Indian Constitution has adopted [the] 'free exercise clause' of the American Constitution without [its corresponding] 'non-establishment clause'" (Sharma:1972:266). As far as minorities are concerned Article 29 (1) refers to citizens whereas Article 30 (1) describes minorities as does Article 350 A (Thornberry:1991a:12). The term minority has, however, not been defined in the Constitution (Hingorani:1972:480). This then leaves the question as to what exactly is a minority for the purposes of freedom of religion? Freedom of religion is guaranteed to individuals as well as religious groups. Article 25 (1) refers to an individual right whilst Article 25 (2) (b) refers to a religious group. Therefore it would be incorrect to say that Article 25 deals only with the freedom of religion of individuals. Article 26 speaks about freedom of a religious denomination or section of it (Sharma:1972:263-265,276-277).

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[92]See 5.2.2.

[93]See footnotes 89 and 91.

The Indian position regarding minority rights, MPL and the status of Muslim women can be summed up as follows. As far as Muslims and the right to freedom of religion are concerned, this right is not infringed by the law which makes reforms to the MPL in force in India because the latter merely deals with regulating *social and economic relations*. Even in the observance of the rules of MPL which deal with social and economic matters, Parliament can regulate/restrict or modify them so as to provide for social welfare and reforms under Article 25 (2).

Does the right of a people to preserve their culture also encompass the right to preserve their religion? Van Dyke (1980a:11) answers in the affirmative. Van Dyke (1980:19 and 1980a:11) thinks that the violations by some Muslim countries of the human rights (equality) of women, "...are so egregious that they are scarcely to be defended by appeals to a right to preserve a culture." Article 29 (the right to conserve culture) "...is an absolute right, subject to no restrictions" (Hingorani: 1972:486). As far as Article 29 is concerned, if Indian MPL is considered to be part of Muslim and maybe even Indian culture (the two obviously do influence and overlap with each other), then Parliament's power to legislate in this regard may be restricted because of Article 29 (Imam:1972:398-399). Mahmood (1986:106-107) addresses this question as follows: "[The] [c]onnotation of the word 'culture' in this article [29] is yet to be fully examined. Article 29 itself does not define the expression 'culture'."[94] Mahmood (1986:106-107) explains further that there is also no limitation, as contained in Article 25, on this right. This means that even if regarded as "secular", matters pertaining to culture will remain within the ambit of Article 29. Indian Muslims may therefore claim that their values and traditions form part of the traditional and global Islamic law. There is also the opposite argument whereby others may claim that personal law has nothing to do with culture and that the rights contained in Articles 26 and 29 are subject to the limitations imposed on an

[94]Even the ICCPR, for example, does not define culture which is characteristic of groups and not individuals (Niec:1974:111-112).

individual's right to freedom of religion under Article 25. He concludes that as far as the first argument is concerned, personal law which relates to "intimate domestic relations and family traditions", can never be fully divorced from culture and that the second argument is based on a "...wholly unwarranted [reading]...in between the lines of the Constitution a general rule that the constitutional rights of communities are controlled by the limitations attached to the fundamental rights of communities" (Mahmood:1986:107). This is very interesting because Article 27 of the ICCPR, by guaranteeing to minorities both the right to culture and religion, does not demarcate a rigid and defined boundary between culture and religion (Capotorti:1991:57).

Although the Constitution guarantees religious and sexual equality to all its citizens and regardless of the fact that there is no state religion, it "...is at variance with the traditional value system of Indian society...for example...[it] guarantees freedom of religion in Article 25(1), but subjects it to certain limitations, relating to public order, morality and health" (Momin:1986:224).[95] Freedom of religion is thus qualified and that these limitations are emphasized in Article 25 is clear from the fact that it begins by stating these limitations: "Subject to public order, morality and health..." Article 25 is also limited by the provisions of human rights as set out in Part III of the Constitution (Patel:1970:374,378). Article 25 also states that nothing in it can prevent the state "from making any law providing for social welfare and reform" (Gani:1988:144).[96]

In the context of the present constitutional developments and law enforcement mechanisms in South Africa, the problems of MPL in India serve as a warning to be heeded by South African Muslims regarding the as yet unenforced MPL. The existence of a uniform secular uniform civil code applicable to the whole Indian

[95]See footnotes 89 and 91.

[96]See Rizvi:1987:88 referred to above.

population would in any event obviate the need to redress constitutional-MPL conflicts because such conflicts would cease to exist once MPL, with the advent of such a code, ceases to apply to Muslims. As will be explained, such a code is not a viable option for South African Muslims.[97] Such a code has yet to solve the Indian problem. It appears from a critical study of the Indian situation that MPL enjoys a large degree of immunity from state interference and regulation in India creating a "deplorable situation" for Muslim women (Gani:1988:161). This is so in spite of the fact that, as explained above, some authors are of the opinion "...that neither reform nor replacement of the Muslim law in India violates unconstitutionally the religious or cultural rights of Muslims guaranteed, respectively, in article 25 and 29 (1)" (Ghouse: 1972:50-52). Even the Constitution itself, by exempting MPL from constitutional scrutiny, allows for the pattern of conflict between the Constitution and MPL to continue. The fact that India, where MPL has been in force for so long, and its Constitution has to date been unable to solve this conflict between public and private law should encourage South Africa to address the root of the problem by subjecting MPL to the final Constitution and its Bill of Rights.

The new South African Constitution, which can obtain much guidance from the Indian Constitution as far as the treatment of personal laws is concerned, should not sanction the principles of sexual inequality as was and is the case in India. The following bleak picture reveals the Indian experience with regard to sexual equality: "There is a vigorous feminist movement in this country. There are innumerable schemes by the government for women's development. There is a separate ministry of women's welfare. What has it done for Indian Muslim women? There is a constitution which guarantees equality. What has it done for Indian Muslim women?...Why has no one done anything about the deplorable situation in which Muslim women find themselves today?" (Gani:1988:161). Gani (1988:164-5) aptly sums it up thus: "...the time has come to consider the matter beyond the Shah Bano ruling and look at the issue of

[97]See 9.8.5 below.

reform in Muslim Personal [L]aw in its totality, and to present...concrete proposals for reform which restore to women the rights to which they are entitled under the Shariat [Islamic law] but which are now being cruelly denied to them...The *status quo* cannot be defended in the name of religion." It is said of Indian women generally that "...the discriminatory personal laws which militate against the equal status of women with men continue to be in force because of narrow and doubtful judicial interpretations and neglect on the part of legislatures to enforce the concept of social justice in favour of women" (Sivaramayya:1972:70). As already indicated some scholars felt that because MPL was given its present shape by the Indian legislatures and courts, they should be instrumental in reshaping it to give effect to the fundamental right of the equality of the sexes (Sivaramayya:1972:79; Mahmood: 1972:81; Shabbir:1988:325). There is no doubt that they are trying to restore equality between the sexes but are encountering "snares and pitfalls" (Hussain:1979:71).

6.3.3 PAKISTAN

What follows (also in some detail) is the position in Pakistan, a Muslim majority country. Pakistan came into existence in 1947 after its partition from British India, whereafter it continued its inherited legal tradition of Anglo-Muhammadan law (Esposito:1980:222; Oommen:1990:19). It made its first (of several) Constitutions only in 1956 after trying to achieve some sort of consensus in differences in interpretation of the Islamic sources of law between the conservatives-fundamentalists and modernists (Ahmad:1980:262; Kennedy:1992:769,781). The 1973 Constitution declared Islam the state religion (Oommen:1990:21). Pakistan, unlike secular Turkey, has "guaranteed" a system of human rights through the liberal interpretation of original sources of Islamic law. But Pakistan has not been able to test its system of human rights because of domestic strife (Said:1978:12; Said:1979a:70).

Proponents of Islamization[98] (as opposed to secularization) assume that there is no distinction between religion and state in an Islamic system, the relationship between them being so close that the dominant religious group merely enforces its will through the government (Van Dyke:1974:736; Mayer:1987:130). For the first 30 years of its existence it was governed by essentially secular and Westernized Muslims - hence the slow process of Islamization. The next government is also said to have followed secular tendencies (Amin:1989:2,50,180).

From 1977 onwards and under new leadership, this process was speeded up with the introduction of three bills. The first two did not come to fruition and the third was short-lived. The purpose of the first bill, the Shariat Bill of 1985, was to make Islamic law the criterion for testing past and future legislation. The second bill, introduced in 1986, was called the Constitution (Ninth Amendment) Bill. It sought to amend Articles 2, 203 B and D of the Constitution and thereby bring MPL within its ambit. In 1988 another Islamic law bill called the Enforcement of Shariah Ordinance of 1988 was introduced. This bill aimed to establish Islamic law as the supreme source of law in Pakistan and to open the doors of independent reasoning (*ijtihad*) (Nadví:1989:295).

The next (and until very recently current) government continued its secular public policy trends. On 5 November 1996 the Pakistani President sacked this government and its Prime Minister Benazir Bhutto. Bhutto in turn has requested the Supreme Court to overturn her dismissal (*Cape Argus*:1996:3,1996a:2). Nevertheless, this (Bhutto) governnment was forced to introduce another version of Shariah legislation, namely the Enforcement of Shariah Act of 1991, an Act that continues to have very little impact on the process of Islamization in Pakistan (Kennedy:1992:770,772,774, 777,779; Patel:1986:211-213; Amin:1989:180; Weiss:1986:100). This Act was one

[98]The term "Islamization" is used in Pakistan (as in Iran and Sudan) for the official programme of reinstating Islamic norms and values (Mayer:1987:129; Mayer:1991b:30,34).

of four pieces of legislation passed in 1991 for the purpose of completing the Islamization of society. Women's groups and minorities have voiced their protest at this legislation in so far as these changes will directly affect their fundamental rights. Although Article 20 provides that the rights of women provided for in the 1973 Constitution will not be affected, this is problematic as the Eighth Amendment to the Constitution has already severely restricted the rights of women and minorities (WLUML:1992:1-2,6). "The Shariat Act...promised to...provide 'inexpensive and speedy justice to all manner of people through an independent Islamic system of justice'. This led to the controversial Twelfth Amendment [to the Constitution] and...two Ordinances supposedly bringing the Shariat Act's declaration of intent into practice" (WLUML:1992:1).[99] In the final analysis, it has been stated, "[i]n the absence of political leadership or societal consensus the real determinant of the content and pace of Islamic reform has been the superior courts themselves" (Kennedy:1992:780). It was decided in the Objectives Resolution[100] that the Pakistani government espouses the principles of, among other things, democracy and equality as expounded by Islam (Kennedy:1992:769,781). The Objectives Resolution also states that Muslims in Pakistan "...should be able and enabled to order their lives, individually and collectively, in accordance with the teachings and requirements of Islam as set out in the holy Quran and the Sunnah... [yet] [a]ll the constitutions[101] used the Objective Resolutions as a preamble and this is not...usually enforceable by the courts...[Only in]...1985...was [it] made an operational part of the Constitution[,] which made it justiciable..." (Amin:1989:113,171).

In Pakistan (and as ought to be the case in all countries where Muslim Personal Laws

[99]See below for details regarding changes to the judicial system.

[100]The Objectives Resolution served as a framework for the drafting of Pakistan's first Constitution. It was the result of the work of the Constituent Assembly whose job it was to define the basic directive principles of the new Pakistani state.

[101]This was the case in the 1956, 1962, interim 1972 and 1973 Constitutions.

are recognized) it is interesting to note that even in an Islamic state which has one public law for all, there is strictly speaking not one personal law for all Muslims. The reason for this is that personal laws are regulated in terms of the respective schools of thought (jurisprudence) to which a Muslim adheres (Amin:1989:151; Noori and Amin:1987:80). Freedom of religion is recognized in the preamble and in Article 20 of the Pakistani Constitution.[102] Article 20 provides that the right to freedom of religion is "[s]ubject to law, public order and morality." With due regard to these limitations this article is comparable to its equivalent in the Indian Constitution.[103] This principle has, however, not been consistently upheld in Pakistan despite the country being a signatory to the UN and international conventions which uphold this freedom. This is evident from the fact that Pakistan has banned certain *Ahmadiyya*[104] practices which are alleged to be offensive to orthodox Muslims (Berberian:1987:667-668,676,678-679,684).

Prior to the Islamization programme Pakistan had "...one of the lowest female literacy levels in the world" (Weiss:1986:98). Women's "...options have been curtailed in their access to courts, education and productivity..." (Weiss:1986:xv). Women are therefore unable to exercise any rights granted by Islam because they have to rely on their "...male relatives' personal knowledge of Islam and...on the dictates of the

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[102]This 1973 Constitution was suspended in 1977 and reinstated in 1985.

[103]See 6.3.2.

[104]*Ahmadiyyas* believe in all Islamic tenets except that they deny that the Prophet Muhammad was the last of the prophets. Instead they believe that a certain Mirza Ghulam Ahmed was the final prophet, hence their name. "There is a distinction between the two groups of Ahmad's adherents. The Qadiyanis regard him as a prophet. The Ahmadis regard him as a reformer with certain of the attributes of a prophet. Though the emphasis on his status differs, both groups accept his claims..." (Lubbe:1989:118). In 1953 traditionalist clergy were unsuccessful in their demand that the government declare *Ahmadiyyas* to be a non-Muslim minority (Faruki:1987:56-57). This demand was successfully repeated in 1974 when it was officially announced through an act of parliament "...that the *Ahmaddis* were outside the pale of Islam" (Ahmad:1980:264). For more details see Farquhar:1980:137-148 and Lubbe:1989:114-116.

individual consciences of these males for implementing that knowledge" (May:1980: 394). It is interesting to note that while women are allowed to be judges in Pakistan, members of the "bench and bar" are not trained in Islamic law except for a negligible measure of training in MPL (Patel:1986:120-125; Weiss:1986:99; Amin:1989:101).[105] The *status quo* of MPL in Pakistan has been succintly summed up as follows: "...the law of the family and succession will continue to govern the lives of Muslims in Pakistan. The law will probably remain unreformed, although there are groups to the right and groups to the left of the status quo...Even the moderate discussions concerning a uniform civil code which today are held in India do not take place in Pakistan" (Pearl:1981:158,163). As far as MPL is concerned, the Pakistani courts continued the British practice of their Indian counterparts regarding the system of binding precedents of case law. "This approach enabled the Pakistani courts to assert a creative role in the elaboration of Islamic law...beyond their traditional role which was restricted to simply applying the established law" (Esposito:1980:221).[106] As far as the group to the right is concerned the ultimate aim of Islamist activists (not modernists) is to achieve a revision of the Pakistani constitutional structure so that Islamic law is made superior to the Constitution (Kennedy:1992:771). Concerning the reforms to MPL referred to below, the Muslim clergy who form part of the composition of the "conservative-fundamentalist-activist" group is purported to be "...much more concerned about their loss of influence rather than about the changes in the traditional formulation of Muslim family laws [and this] is evident from a statement by a group of...Ulama...[who] proposed that if the government appointed competent Ulama as...religious judges and registrars of marriage, 'the problems and difficulties of jurisprudence and religion ...[could] be overcome through mutual discussions'" (Ahmad:1992:243).

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[105]This has been detailed in 4.4 above. See also the discussion of the judiciary below.

[106]See also 6.3.2.

In Pakistan, apart from the Dissolution of Muslim Marriages Act of 1939 and the Muslim Family Laws Ordinance of 1961, there has been no codification of MPL (Patel:1986:92). These two statutes set an important precedent in that the state now appropriated the right to legislate in Islamic affairs and thereby posed a great challenge to the religious establishment (Ahmad:1992:242). Nevertheless the first important piece of legislation in this regard in post-partition Pakistan was the Muslim Family Laws Ordinance of 1961 introduced by the modernist Ayub Khan government to reform the Muslim Personal Law (Shariat) Application Act of 1937, an Act that had also been applied in India. This ordinance was based on the work of a commission set up in 1955; this commission consisted of three laymen, three laywomen and one representative of the Muslim clergy. Their task was to review existing legislation and to determine whether changes should be made to restore to women their proper Islamic status. Because of a lengthy debate between modernists and traditionalists, it took five years before the recommendations of the commission were finally acted upon (Esposito:1980:224; Anderson:1966-1967:151).

Already at its inception this ordinance met with much opposition and the "...problem of mass acceptance and the possibility of repeal or modification of [this]...ordinance continue to be a serious concern for modernists" (Esposito:1980:238). Women (mostly supporters belonging to the religious right), however, steadfastly supported the validity of this ordinance and worked for its continued existence and because of this the 1973 Constitution itself exempts this ordinance from challenge in any court and was included in the First Schedule of Laws and therefore exempt from Article 8 of its Fundamental Rights, which provides that laws inconsistent with those fundamental rights will be void and that the State cannot make any law inconsistent with these Fundamental Rights. Thus, constitutional guarantees are meaningless for women in Pakistan. This has serious consequences for women because, even though the Fundamental Rights guarantee the equality of citizens and non-discrimination on the basis of sex, the status of women continue to be negatively determined by the above Ordinance. However, as indicated above, the provisions of Article 8 do not

apply to any laws mentioned in the First Schedule of the Constitution as is the case with the Muslim Family Laws Ordinance of 1961. It is interesting to note that whilst it was modernist women who opposed the ninth amendment (another version of the shariat bill) to the Constitution, which resulted in the amendment not being adopted, a major section of Pakistani women supported (and continue to support) conservative proposals in this regard as indicated above (Patel:1986:91,206,213; Weiss:1986:104).

Thus the situation in Pakistan is no different from that in any other Muslim country where there is professed equality in the public sphere but which is never really given effect to because of the conflict of the provisions with personal laws. It is also interesting to note that already in the first Pakistani Constitution of 1956, the Fundamental Rights were based on pre-existing American and other patterns and not Islamic law as such. This appears to be the case in most modern Islamic states (Haider:n.d [1984?]:65,130,333,345).[107] This Ordinance (1961) also made provision for women's rights in divorce, restriction of polygyny (in that it required that a husband obtain the written consent of his first wife before he could marry a second one), improvement of maintenance for women, registration of all marriages with government authorities in order to be recognized as valid, and finally allowing orphaned grandchildren, who had previously been excluded by their living uncles according to strict Islamic law, to inherit from their grandfather (Weiss:1986: 99; Esposito:1980:229-235; Faruki:1987:56; Ahmad:1992:242). However, as indicated above[108], these reforms are not as progressive as they purport to be because in practice they do very little to alter the daily lives of Pakistani women (Ahmad:1992: 242). There is, for example, nothing preventing the husband from marrying a second spouse without obtaining the permission of the first wife as he merely has to pay a small fine or face a short period of imprisonment should he violate this provision.

[107]See also 4.1; 6.1.1 and 6.1.3 above.

[108]See 2.1.5 and 3.3.

The next (second) piece of legislation was the West Pakistan Muslim Personal Law (Shariat) Application Act of 1962. This Act makes it compulsory for courts to apply MPL (subject to any law/statutes in force) to the personal and family affairs of Muslims. However, because MPL is excluded from the jurisdiction of the Federal Shariat Court, it excludes this Act as well and this exclusion in effect means that this court cannot question whether or not these laws are truly Islamic in the sense that they are based on Islamic sources of law. This has serious implications for women as they cannot now challenge in an Islamic court, let alone a secular court, the inequities caused by among other things, orthodox misinterpretations of Islamic law. The Federal Shariat Court has, however, decided that women are allowed to be judges (Patel:1986:91,93-4,120).[109] In the 1960s the High Court of West Pakistan (appeal court) was also instrumental in "making" law and not merely stating it by creatively interpreting personal law in favour of women. However, this was only to the benefit of "[w]omen of wealth, education, and an inclination to use the court..." (Hoebel: 1965:53). As indicated above the 1973 Constitution also purportedly prohibits discrimination on the basis of sex (Weiss:1986:99). Patel (1986:92) sums up the status of Muslim women in this regard: "[a] great deal of customary law, which is discriminatory and denies *Quranic* rights to women in Pakistan, in the sphere of Family Laws, has become a part of the Muslim Personal Law accepted publicly and applied by courts in Pakistan." In 1985 the Pakistan Women Lawyers Association approached the government to become a signatory to the women's convention CEDAW and to "support the establishment of a 'nongovernment international commission...to recommend a uniform and universal code of personal laws *under Islam* with equal representation of women and embodying these in specific provisions of law in the light of international norms and standards of justice, peace and equity'" (emphasis added to indicate how this differs in nature from the Indian secular uniform civil code proposal in this regard) (Weiss:1986:104). Although conservative Pakistani women considered CEDAW to be repugnant to Islam and although the government

[109]See 4.4.

initially intended to sign the document with reservations, CEDAW was ratified on 12 March 1996 without any reservations (*Shirkat Gah*:1994:vii; Weiss:1986:104). The problem and question facing Pakistan and indeed the contempory Muslim world remains: "...how to reconcile the Islamic ideal of equity with the ways in which women are viewed and treated in actuality" (May:1980:392).

As far as the judiciary is concerned the practice of being assisted by *muftis* was abolished and remained so after Pakistan's independence. Nevertheless, Pakistan followed a pattern of replacing judges influenced by a Westernized mode of legal training with persons trained in traditional Islamic law (Mayer:1991b:34,41). "Pakistan inherited from British India a unified legal system and a complete hierarchy of courts..." (Sardar Ali and Arif:1994:4). Pakistan therefore continued the Indian system of a court which adjudicates with both Islamic and secular law (Al Aseer: 1976:58). Since 1950 the Supreme Court has been the highest court of appeal and its decisions are binding on the lower courts. While the language of the courts remains English, there has been a call for the processes of justice to be conducted in the languages of the people, for example, in Urdu (Liebesny:1983:212-213; Haider:n.d [1984?]:13,283). In 1980 a Federal *Shari'a* Court (F.S.C), which is a parallel judicial system,[110] was created. This Court and the Shariat Appellate Bench of the Supreme Court, which consists of three Muslim judges, are among the parallel systems that are applicable to Pakistan as a whole (Sardar Ali and Arif:1994:5,8; Amin:1989:71). The decisions of the F.S.C are not final and appeals against its decisions are lodged with the Shariat Appellate Bench of the Supreme Court (Amin:1989:71,76). Since 1981 the F.S.C has consisted of a Chief Justice and seven judges, three of whom are members of the *Ulama* (Liebesny:1983:214; Liebesny: 1985-1986:30; Amin:1989:70-71; Weiss:1986a:12; Patel:1986:87-88,96-97;

[110]A parallel judicial system "...is a forum or a complete hierarchy of forums, established through a special law under which particular persons or classes of persons are tried or have their civil disputes adjudged under special laws to the exclusion of the ordinary courts of the country" (Sardar Ali and Arif:1994:2).

Esposito:1980:239; Kennedy:1992: 772). These *Ulama* are not necessarily equipped to deal with legal issues, which can have a detrimental bearing on the judgements they pass. They also favour a conservative interpretation and application of Islamic law as far as women's rights are concerned which could prove to be detrimental (Sardar Ali and Arif:1994:10; Pakistan Bar Council:n.d[1984?]:7). As indicated above another problem is that neither members of the bench nor the bar are trained in Islamic law but only in the common law, with a few exceptions (regarding MPL); conversely, *Ulama* generally lack knowledge of the common law and its practice (Amin:1989:73-74,101; Weiss:1986a:13). As will be indicated,[111] this is a problem that Muslims in South Africa will also soon be facing. It is often argued that because members of the bench and bar are Muslims they automatically qualify to work as *quda* and jurists who exercise independent reasoning (*ijtihad*). The counter-argument raised is that while superficial knowledge of Islamic law might suffice for laity, the same argument does not hold for the lawyer or judge who has to give effect to the law (Amin:1989: 101-102). The F.S.C also has to maintain a panel of jurisconsults who range from *Ulama* to Muslim academics. A party wishing to enlist the aid of such a jurisconsult can make his/her choice from the list of jurisconsults (Patel:1986:107-108). "The jurisdiction of the Court [F.S.C] to examine and declare laws as repugnant to Islamic injunctions is...limited. It does not include the Constitution [and] Muslim personal laws..." (Amin:1989:71; see Patel:1986:89,99-100,157,160). There has been a call by various religious bodies to lift these restrictions, but to no avail (Amin:1989:75). In Pakistan the emergence of these parallel judicial systems, which function parallel or alongside to ordinary courts and which have been incorporated into the Pakistani Constitution for political reasons, raises the questions of whether such a dual system of justice does not contradict the concept of equality and whether it can also be construed to have changed the Constitution itself into a "self-contradictory instrument" when one considers the question of supremacy and independence of the judiciary (Sardar Ali and Arif:1994:2,10,26; Siddiqui:1974:8). Another development worth

[111]See 9.8.5.

mentioning is that in 1983 already a final report relating to the adoption of an ordinance on *Qadi* (*Shari'a*) Courts was sent to the Pakistani government for enactment. However, nothing has thus far been done (Amin:1989:80; Patel:1986:84-86). This then raises another question about the rationale for *qadi* courts when judgements are already being delivered in Pakistan according to the precepts of Islamic law (Azad:1987:54).

As far as *ijtihad* is concerned there seems to be a movement away from the classical position.[112] This is evident from an early Pakistani judgement, Kurshid Jan v Fazal-Dad,[113] where Anwaral Haq, J held that "'the courts must be given the right to interpret for themselves the Quran and sunna; and that they may also differ from the views of earlier jurists and Imams [whose views] are entitled to the utmost respect and cannot be lightly disturbed, but the right to differ from them must not be denied to the present-day courts functioning in Pakistan...'" (Hammerton:1990:6A.240.43, 58).[114] "The court's power to exercise private reasoning (*ijtihad*) was again maintained in 1965 in *Zohra Begum v. Latif Ahmad Munawwar*...As a result of these landmark decisions, the judiciary in Pakistan has asserted its right to exercise *ijtihad* where justice and equity demand, provided that the following criteria are satisfied: (1) that the decision meets a social need, and (2) that the regulation is not prohibited by the *Qur'an* and *Sunnah* of the Prophet" (Esposito:1980:237-238).

6.3.4 ALGERIA, MOROCCO AND TUNISIA

Algeria, Morocco and Tunisia occupy a part of North Africa called the Maghreb. The Tunisian Constitution of 1959 declared Islam the state religion (Article 1). Freedom

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[112]See 2.1.1, footnote 16.

[113]1964 P.L.D. Lah 558, 612.

[114]See also Hussain:1972:185.

of religion was, however, granted to all (Article 5) (Nadví:1989:262). Referring to Article 1 as the obstacle, "...Tunisia invoked Islam, albeit indirectly, in 1985 [upon ratification] when entering its reservation to CEDAW..." (Mayer:1995:114). The Moroccon Constitution of 1962 declared Morocco a Muslim State and that Islamic provisions were beyond any constitutional revision (Section XI) (Nadví:1989:291-292). In 1993 Morocco ratified the Women's Convention CEDAW subject to major reservations in so far its provisions did not conflict with the *Shari'a* (Mayer:1995: 111). The above three countries have all been influenced by both Islamic and French law and have all adopted codes of MPL. The 1956 Tunisian Code of Personal Status has effected drastic changes and reforms to Islamic law (but has by no means renounced it) in an effort to give effect to equality between the sexes; this code was not a separate code applicable to Muslims only but a national code as it applies to all Tunisians irrespective of religion (Islamic Review:1966:17). In this respect Tunisia (like Indonesia) has achieved a uniform code, something which India has been unable to establish. After ratifying CEDAW (with reservations), "Tunisia then proceeded in 1993 to enact new reforms to some of the remaining *shari'a*-based rules in its personal status laws, not eliminating all discriminatory features, but making some additional progressive reforms" (Mayer:1995:114). Reforms in the Moroccan Code of Personal Status have in contrast been slight and traditional Islamic law is favoured. "[T]he Moroccan feminist view is that, even as modified [in 1993] the personal status law remains discriminatory and unacceptable under international standards" (Mayer: 1995:113). In Algeria two separate draft family codes have been rejected and it was only in 1984 that any success in this regard was achieved. Algeria went beyond Islamic and French law to try and find answers in socialism. This hotchpotch of legal sources made the formation of a unified legal system very difficult to achieve. As a result of this and the fact that socialism failed to provide all the answers, a reversion back to Islam was experienced. It is for this reason that I have chosen to look at Algeria (Salacuse:1975:6, 9,13,67; Entelis:1992:xi; Cheriet:1992:182).

Algeria achieved independence from French domination in 1962. However, Islam

had come to North Africa approximately a 1 000 years before French rule and hence was well established there. Muslims form the majority of the population. The first written Constitution (1963) declared Islam the state religion. The Constitution was revised in 1976 and the latter was amended in 1977, 1980 and 1989 (De Feyter:1988: 21). Interestingly the 1989 Constitution, which reiterates that Islam is the state religion (Article 2), declares that sovereignty belongs to the people and not God (Article 6) (Salacuse:1975:1,15; Flanz:1990:5). Algeria also has no Constitutional Court or Council to enforce the Constitution (Arzt:1990:227). Algeria is also a signatory to human rights documents like the UDHR (Banks:1992:12-13). According to UN statistics as at 14 March 1996, Algeria has neither signed nor ratified CEDAW.

Under early French rule Algerians were either subject to traditional law (including Islamic law) or French civil law but could not be subject to both simultaneously. Algerian Muslims were classified as French subjects and not French citizens. In order to acquire citizenship they had to give up Islamic law. Because this was considered to be too big a sacrifice, very few Muslims abandoned Islamic law. By 1944 all Algerians had become citizens and those Muslims who wished to be governed by Islamic law, continued to be so governed. The French also limited the scope of Islamic law to MPL and also effected changes to the substantive rules of Islamic law *via*, among other means, their courts (which were manned by French judges) and legislation (Salacuse:1975:73,75,77,79-80; Ageron:1991:69-70; Brett: 1973:xvi). Since independence and after two abortive attemps at producing a code of MPL, MPL in Algeria is today governed by the conservative Family Code of 1984 (Cheriet:1992:192). The problems faced by conservative traditionalists and modernist secularists in the countries discussed above continue to plague their Algerian counterparts. Feminists and feminist associations have, however, played a more vocal role in addressing the implications of tradition and modernity on MPL in Algeria than elsewhere in the world. This has been more evident since the promulgation of the 1989 Constitution. Until 1992 Muslim *Ulama* (clergy) in Algeria were being replaced

"...by academics and scholars produced by the very modern Western system they... [the clergy were] rejecting, be it in their own countries or the West" (Cheriet:1992:178).

Since 1992 Algeria has been experiencing violent political turbulence which could spell victory for the fundamentalists. However, the situation in the early 1980s concerning the negative status of both Islam and Muslim Algerian women is summed up as follows: "Despite constitutional guarantees of Islam as the state religion and of women as equal citizens,[115] Islamists were pursued and imprisoned for openly advocating an Islamic order, and feminists were detained for demonstrating against the secret promulgation of a retrograde personal status bill...ironically bringing together militant Islamists and feminists in an...unprecedented ...coalition against the regime" (Cheriet:1992:186). Many Algerian women who participated in the liberation struggle felt that they had earned the right to full equality with men and many expected that independence would bring about radical changes in these areas (Arkoun:1988:174; Melasuo:1988:186). An attempt to introduce a modern family code failed in the 1970s (as it had failed in 1905) although at this stage already it was clear that the traditionalist conservative views in this regard were gaining momentum. The 1984 Family Code (Code de la Famille) confirms this. Consisting of three volumes, all of which reflect the inequality of the sexes in the private sphere, the Family Code stands in direct "...contrast with the legal and constitutional rights of equality pledged in the public realm" (Cheriet:1992:194). Thus, as in Egypt, commitment to equality of the sexes articulated in the Constitution of 1989 is all but meaningless.[116] The 1984 Family Code replaced certain rules relating to personal laws which were enacted while the French ruled Algeria. The 1984 Code violates "...the rights provisions of the new Algerian constitution, which include a provision

[115]1976 Constitution, art. 39, 41, 42 [1989 Constitution, articles 28, 30, 31, 32].

[116]See footnote 115.

for equality before the law without discrimination on the basis of gender (article 28), a commitment to ensure equality in rights and duties among all citizens (article 30), and a guarantee of fundamental liberties and human rights (article 31)" (Mayer:1991:1034). Although it is maintained that the wife's position in marriage is improved, the fact that, for example, polygyny is retained with the first wife having the right to divorce refutes this (Melasuo:1988: 192-193). The Code was therefore conservative in nature and modernist Algerian women had once again lost the battle (Arkoun:1988:174). It must, however, be made clear that in the 1980s a large number of women supported these conservative views (Cheriet:1992:201). Mayer (1991:1034) sums up the current situation in Algeria as follows:

> "The stage has been set in Algeria for reconsidering the relationship between constitutional law and *shari'a*-based law. The questions that occur in this context are relevant...also for other Muslim countries where similar inconsistencies between constitutional guarantees of equality and *shari'a*-based personal status rules persist. Will...Algerian women...be better able to challenge the discriminatory features of the 1984 law on constitutional grounds? Or will it turn out that, despite the assurance that the Algerian constitution is the supreme law, the 1984 *shari'a*-based personal status rules will in practice be treated as inviolable?" (Mayer:1991:1034-5).

It appears as if Mayer's latter prediction has unfortunately come true. This is evident from the following statement: "Women in Algeria have been killed, forced into hiding or exiled because of their public protests against the fundamentalist Family Code imposed by the government in March 1994" (IWRAW:1994:6).

Before French rule in Algeria (as in Morocco and Tunisia) there was no unified judicial system. Unlike Morocco and Tunisia, which retained their various traditional courts during colonial rule, Algeria only managed to retain its *Shari'a* or *cadi* courts as they are known (Salacuse:1975:108-110,112). It was as a result of strong Muslim

opposition that the French authorities retained the *Shari'a* court system which was presided over by a single *qadi* (Christelow:1985:16,223,234; Christelow:1978:6876-A). The authorities did, however, succeed in slowly reducing the powers of these courts and in 1889 issued a decree limiting its jurisdiction to matters pertaining to MPL only (Salacuse:1975:77). During the 1800s these *qadi* courts were appended to the colonial judicial structure but it was only in 1947 that they came under the French Ministry of Justice. Besides the *qadi* court another, essentially French, tribunal could also deal with MPL matters. The French colonial authorities then created a Muslim Appeal Court to hear appeals from the *qadi* courts and this tribunal. This Appeal Court consisted exclusively of French judges (Salacuse:1975:112-114;117). While *Shari'a* courts were retained, French judges schooled in Islamic law not only dominated the colonial judicial system but they also reviewed decisions of the *Shari'a* courts and even took it upon themselves to apply Islamic law (Salacuse:1975:80). In this way "French judges employed a variety of techniques in shaping the Islamic law of colonial Algeria. Using such concepts as *ordre public* and equity, as well as questionable interpretations of Islamic texts, the French courts changed the very substance of certain *Shari'a* rules" (Salacuse:1975:80-81). After independence (1962) the government decided to codify MPL so as to create regularity in court judgements and create certainty on certain points of law. As explained above, after much controversy and having been rejected several times, this Code[117] finally saw fruition in 1984 (Christelow:1985:27; Mitchell:1995:1-2,5,7-8). On the evolution of the judicial system of Algeria, Morocco[118] and Tunisia,[119] the following has been written: "Upon

[117]This Code, although based on all four *Sunni* schools, does depart from the prevalent *Maliki* law in certain areas (Mitchell:1995:7-8).

[118]In modern Moroccan *Shari'a* courts, as was the position earlier, a single *qadi* decides each case. The existence of other courts within the unified legal system has, however, limited his jurisdiction to those personal law matters covered by the 1958 Code of Personal Status. In both its judgements and application of the law the court is very traditional (Rosen:1989:308-309; Rosen:1980-1981:219; Rosen:1990:62).

[119]In Tunisia Islamic courts were abolished in the mid-1950s (Lev:1972:229).

attaining independence, each...inherited a complex, pluralistic system of courts...each undertook programs of judicial reform whose...objectives were the unification, simplification, nationalization, and Arabization of the courts...[and reform] entailed the abolition of both the French and the traditional religious courts" (Salacuse:1975: 4). Shortly after independence the office of *qadi* was abolished (in Algeria in 1963). Other developments included French judges being removed from courts, supreme courts being created and Arabic being introduced into courts to make justice more accessible to the people. In all of these three states there was, however, no independence of the judiciary (Salacuse:1975:4,116-118,126).[120] On the basis of a sample of cases decided within the first two years after the passing of the 1984 Family Code, it was found that the Code failed to redress important social and legal problems pertaining particularly to women's status in marriage and society as a whole (Mitchell:1995:12-13;18).

6.3.5 BRITAIN

The British have no written constitution nor any constitutional guarantees of human rights, although they have comparable documents like the Magna Charta (1215), the Petition of Rights (1627), the Bill of Rights (1688) and also the rule of law which provides some protection for the individual. The human rights concepts as contained in these documents form part of the substantive and procedural law (Boulle:1984:4; P.C. Report 4/1982:71; Bradney:1993:3).

In Britain "[a] multiplicity of faiths exist alongside each other" (Bradney:1993:3). It is estimated that Muslims will number 2.2 million by the year 2 000 (Bradney: 1993:3-4). MPL functions independently of British law because special emphasis is placed on the human rights dimension of the issue (Poulter:1990:147,159). There is

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[120]For more details on the present Algerian judicial system and its operation see Salacuse:1975:119-125.

no official recognition of MPL as a separate system of family law as attempts made by Muslims in 1970 to recognize MPL were unsuccessful (Pearl:1985/1986:126). The reasons for this will be elaborated on below. Not all Muslims favour the idea of recognition (Nielsen:1987:32).

The United Kingdom is a signatory to international human rights conventions. It signed CEDAW in 1981 and ratified it in 1986 with reservations. Furthermore, several substantive principles and rules of MPL violate fundamental human rights and freedoms set out in these documents especially in so far as they discriminate against women and the achievement of equality between the sexes. Although Muslims stress the guarantees of freedom of religion as espoused by these treaties, the treaties themselves "...contain substantial limitation clauses which permit legal restrictions to be imposed if they are necessary to safeguard...the fundamental rights and freedoms of others" (Poulter:1990:147,159).[121]

It is interesting to note this change in policy today because (as was evident from some of the countries discussed above) the British colonialists allowed MPL to govern the lives of Muslims in their colonies where they considered it expedient to do so irrespective of its consequences of sexual inequality. "...[T]he British came to rely upon the devices of translation, textbook, and codification, to adapt indigenous arrangements to the dictates of colonial control" (Anderson:1990a:223).

Possible reasons for the British government refusing to recognize MPL were briefly given as follows: firstly, Britain follows a unified system of law in family matters; secondly, there are practical difficulties in working out a system of family law wherein variations in the four schools of law can be readily accommodated. Problems include questions relating to nationality and domicile. Thirdly, is MPL going to be justiciable in existing civil courts or in a specially created *Shari'a* court? Either way

[121]See 5.2.1.

problems are envisaged. It can be argued that secular judges are not equipped to interpret the finer details of Islamic law. Equally Muslims can disagree with legal interpretations proferred by their own judicial representatives (Poulter:1990:157-158). Poulter (1990:159) envisages that, because of these practical problems, Muslims might actually prefer to have their disputes resolved by a secular court after first having sought recourse to Muslim welfare organizations and agencies to resolve their family disputes. Often these organizations can satisfactorily resolve a dispute by counselling, conciliation and mediation.

Poulter (1990:165) suggests that as a first step towards the recognition of MPL, Muslims should "...consider joining together to compile a unified code of Muslim law, embodying the best principles of each of the schools of Islamic jurisprudence and omitting those rules which disregard international human rights law." As some sort of concession for refusing to recognize MPL, British judges and magistrates are being educated to ensure that Muslims, among others, "get a fair deal in court". This education is, however, limited to a code of conduct to assist them in becoming "culturally neutral" and does not improve their understanding of Islamic law as such (*The Argus*:1992:15). As a consequence of the refusal to recognize their personal law Muslims are making private arrangements for its application to them (Surty:1991:59).

In 1982 *Ulama* members, Muslim scholars and Islamic organizations got together and established the Islamic *Shari'ah* Council of Great Britain and Northern Ireland. This Council was representative of the major schools of law[122] and administered its affairs with a written constitution. One of the main aims of this Council was to create a court where decisions could be made on MPL matters. In 1984 a Working Group on Islam of the Churches' Committee on Migrant Workers in Europe (CCMWE) also made the same recommendation (Pearl:1985/ 1986:126). The Council has thus far been successful in adjudicating on more than 400 matrimonial cases and granting legal

[122]The majority of British Muslims follow the *Hanafi* school of law (Surty:1991:61).

opinions and verdicts to more than a thousand queries relating to aspects of Islamic law. This was supplemented in 1985 by the creation of "The Muslim Law (*Shari'ah)* Council" to meet the growing demand. It is an independent body which also makes provision for adjudication on demand. It includes 23 *Ulama* representatives of all the schools of law and obtains legal advice from three lawyers. By 1991 it had decided 106 cases and was busy with another 55 (Surty:1991:60-61). The Council's displayed flexibility in accepting opinions best suited to British Muslim society (Surty:1991:63). During the past decade various seminars and conferences on family law followed in an attempt to secure recognition of MPL and the establishment of a tribunal to deal with matters relating to personal law (Surty:1991:66-67). This is the *status quo* at present.

6.4 CONCLUSION

Muslim countries have easily secularized commercial and criminal codes for the sake of expediency and progress and have even followed Western constitutional models because of a lack of a comparable Islamic model. Countries which recognize MPL *and* implement *Western* constitutional models and human rights instruments have been unable to make significant progress in improving the status of women because of inevitable constitutional and judicial conflict. Both public and personal laws have to undergo some transformation in order to accommodate each other because, even if MPL is applicable to them, Muslims will have to face the constitutional and human rights implications of that MPL. Why is or should there be a problem with subjecting a reformed MPL to a constitution of a Muslim country when, as explained in Chapter Four, it is not clear what exactly such a constitution is and while Muslim countries submit that Islam advocates equality and justice? One of the main causes of this conflict is the fact that conservative religious authorities give Islamic law precedence over Islam itself. In was argued in Chapter Five that this is not justifiable from an Islamic human rights perspective. An examination of the operation of these courts

has proved that ultimately these religious courts are controlled by the *Ulama*, who adhere to conservative interpretations of Islam. For this reason these courts cannot do much to improve the status of Muslim women. By accepting Western constitutional models but subjecting them to MPL and not *vice versa*, Muslim states are implying that being a Muslim takes precedence over being a citizen. However, whether one is first a Muslim and then a citizen or *vice versa*, ultimately a Muslim is a believer *and* a citizen and he/she needs to reconcile these roles in order to live in harmony with him/herself and others.[123] This can be achieved if constitutions are respected as instruments which protect human rights rather than as vacuous instruments where these rights merely have decorative value. For reforms to MPL to be of any effect it must be more than merely superficial measures.

A review of how various Muslim and non-Muslim countries have dealt with human rights in their respective constitutions and courts indicates that the governments of these countries have either exempted MPL from constitutional scrutiny or placed reservations on human rights instruments so as to avoid conflict with their MPL codes. Consequently (and contrary to the position early in Islam) separate *Shari'a* courts were established separating MPL from their secular courts. While there is no Islamic justification for such an argument, some countries have separate *Shari'a* courts and others not.[124] Exempting MPL from constitutional scrutiny, placing reservations on human rights instruments and restricting MPL issues to *Shari'a* courts are all factors that favour the establishment of *Shari'a* courts. While it is true that *Shari'a* courts, in countries where they do exist, merely serve the vested interests of the *Ulama* in maintaining the *status quo* of women, it is also true that conservative interpretations of MPL dominate even in countries where *Shari'a* courts have been abolished. The effects of separate courts and exemptions placed on constitutions have

[123]See 5.2.2.

[124]See 4.7.

disadvantaged women. Reservations also defeat the very purpose of these human rights instruments. The conflict between women's public and private religious rights has as yet not been successfully resolved by international human rights legislation.[125]

The pattern of conflict between modern constitutions and MPL, and its resolution in favour of MPL, applies also to the position of Muslim states in relation to international human rights instruments. For example, it appears that the CEDAW goal of equality between the sexes is unlikely to be realized in Muslim countries, even in those that have signed the Convention, since it is a goal in direct conflict with Islam as it is practised today. This is true also in respect of those Muslim states which claim that equality between the sexes has been achieved, as is evident from a cursory inspection of both personal and public law in these countries.

The right to religious freedom is protected in constitutions at national and regional levels and its importance emphasized in non-enforceable international human rights instruments. Doing so, however, has not resulted in freedom of religion being treated as a very strong right. If constitutions protect equality of the sexes as an individual right and it is violated, then personal law should not necessarily be a relevant consideration. The regulation of personal affairs according to religious or state norms should be left up to the individual conscience and judgement and should therefore not be injurious to the equal rights of others. While Muslims demand and use freedom of religion when they are a minority in a non-Muslim state, they establish Islam as the state religion in Muslim countries and non-Muslims, although they can follow their own personal laws, are generally subject to Islamic law. Muslim governments often overlook and deny individual rights and freedoms to both Muslims and non-Muslims. As will be indicated,[126] however, the US experience has taught that it is not

[125]See 5.3 above.

[126]See Chapter Seven.

necessarily true that by keeping religion and government apart the believer and non-believer are afforded more protection. Constitutions and basic laws do not really provide a safe haven for the protection of human rights. Express guarantees and assurances in this regard are not given effect to. Vertical application of bills of rights implies that states do not protect individuals from interference of their right to freedom of religion and belief against private parties who violate it. Constitutions should, to a certain limited extent, impose obligations upon individuals towards other individuals as well as upon governments by allowing for a (limited) horizontal operation of bills of rights together with a vertical operation. However, for Muslims the question of verticality and horizontality of bills of rights is of no or little consequence if MPL is exempt from these very bills of rights and the constitution as a whole. However, with exemption a horizontal operation of the Bill of Rights will allow for its ambit (Bill of Rights) to be extended to MPL, an essentially religiously-based private law.

The following description of Egyptian women has implications that can probably be applied to all Muslim women. It refers to the awkward dichotomy and duality of women in their roles as citizens of a nation and as members of a religious community. "In a division that was never precise, the state increasingly came to influence their public roles, leaving to religion the regulation of their private or family roles. The structural contradictions and tensions this created *have to this day never been fully resolved*" (emphasis added) (Badran:1991:201). The state is perceived to be an important agent in this regard, notwithstanding the fact that Islam is the state religion in many of the Muslim countries discussed in this chapter, for example, Egypt and Pakistan.

When one thinks of enforcement mechanisms then immediately the courts come to mind. However, in order to achieve gender equity, women have to consider their votes and therefore themselves as the main or most important enforcement mechanism in this regard. It is interesting to note the link between constitutional guarantees of

equality in Muslim countries and the judiciary. This chapter concludes that too much reliance must not be placed on courts as an enforcement mechanism to resolve constitutional contradictions and conflicts, as their powers do after all not extend beyond the constitution. These guarantees are purported to apply to other areas of the law but they do not extend to MPL provisions, which have remained relatively static and conservatively interpreted, often to the detriment of women. Mayer (1977:89) concludes then that "...such [constitutional] guarantees must be taken to refer to the abolition of procedural disabilities before the courts to which non-Muslims, slaves, and women were subject in the past according to Islamic law and which are no longer to be applied in judicial proceedings."

Muslim women need to assert themselves as to how MPL is operating to their detriment and how they can contribute to reform in this regard. While some measure of reform is necessary, there should be no illusions that reform and mechanisms for reform will provide all the answers. It must also be remembered that codification of law would by implication also affect the practical implementation and application of *ijtihad* (Sami:1988:4-5). Liebesny (1967:34) writes that "[t]he enactment of modern codes and statutes is not in itself enough...The courts have the task to adjust the new enactments to practical needs. If the courts...are too literal and strict in their interpretation and allow formalism to stifle the search for truth and the equitable application of legal rules, the law is likely to remain alien and often bewildering to the people at large...Since it is neither desirable nor practical to revise periodically comprehensive codes and statutes...flexibility will have to be provided largely by the courts. Only if the legal system is responsive to new needs can rigidity, and with it the need for new large-scale reforms, be avoided." Thus, revising Islamic law, albeit in the form of codes of law, will not solve the problem for all times. "For if revision is necessary now, it will certainly again become necessary a few decades hence, when 'modern conditions' will again be changed: and so on and on, until the Law of Islam will be revised entirely out of existence" (Asad:1980a:102). South Africa must be cautioned against blind imitation of these codes, especially in so far as they have

failed to redress the plight of Muslim women. Instead circumstances peculiar to South Africa should be the main consideration. A review of the situation in a number of Muslim states supports the contention that the best option and solution to the application of MPL lies in codifying Islamic law and enacting a comprehensive bill or "uniform *Muslim* code" applicable to Muslims.[127] The idea of a secular uniform civil code is rejected mostly by conservative Muslims and, it might be added, mostly on sound religious grounds. Such a code also has serious implications for all minorities, Muslim and otherwise, who are allowed to be subject to their own personal laws and where each religion is defined by different practices and beliefs. The existence of four (and more) schools of Islamic law is also indicative of the fact that even within Islam uniformity in law is difficult to achieve.[128] Such a uniform civil code, if it focuses purely on those areas of family law which are not addressed by MPL or which fall outside its ambit, might very well turn out to be a viable option or problem-solving strategy. However, it remains very difficult to draw a clear line between the two.

[127]See 9.4.2 and 9.8.5.

[128]See 5.2.1 and 5.3.

CHAPTER SEVEN

A COMPARATIVE EXAMPLE FROM THE WEST: THE UNITED STATES

7 INTRODUCTION

While taking cognizance of the fact that the South African position is definitely not identical to that of the US, there are enough parallels to render a comparison useful. The US experience is examined in detail for the following reasons. South African constitutionalism to a certain extent resembles American democratic constitutionalism which has three structures: federalism, separation of powers and judicial review (Richards:1989:x,105). The American experience can help with the question of horizontality and verticality of our Bill of Rights especially in the light of new constitutional developments. Because of the uncertainty about what constitutes Islamic constitutional law,[1] the US Bill of Rights served as a model for some of the Muslim countries discussed in Chapter Six.[2] The American experience is said to have given Muslims living in the US "...unprecedented freedom to experiment with forms and structures for the separation of religion and state away from the watchful eyes of wary governments and the criticism of traditionalists" (Haddad:1991:5). An attempt will be made to see if the Muslim experience in America is really different from that of the countries outlined in Chapter Six or from South Africa's. Specific emphasis will be placed on the US constitutional contribution to freedom of religion and the constitutionalization of women's rights.[3] The First Amendment, freedom of religion and equal protection (Fourteenth Amendment) covers a very wide area and will be discussed with a view to comparison with the South African situation because South

[1]See 4.1.

[2]See also 7.4.

[3]See also Chapter Eight, paragraph 8, 8.2-8.4 and 8.6 for further areas of comparison with the US.

Africa is moving more towards secularism and may soon be facing the same challenges as the US with regard to the complexity of issues arising from religious freedom. Our freedom of religion clause is very similar to the "Free Exercise" clause of the US First Amendment which guarantees religious freedom. The First Amendment also contains a clause prohibiting Congress from making any law "respecting an establishment of religion". This means that the government is prohibited from establishing a state religion. This type of "dis-establishment" clause is, however, absent in our Constitution (Cachalia, Cheadle *et al.*:1994:49-50).[4] US academic literature and case law on religious freedom deal with discriminations implicit in the right to religious freedom which religious minorities in South Africa will soon have to address. Furthermore the individual and group implications of guaranteeing freedom of religion in secular US can also help our Constitutional Court address these issues and forms of discrimination (other than gender-based) flowing from this right to freedom of religion and affecting all Muslims.[5]

"...U.S. history has many parallels with that of South Africa...[and] [a]s such, the movement for equality in South Africa is simultaneously a critique of progress so far in the U.S." (Shank:1991:ii). American feminist jurisprudence will be examined to try and establish how women in South Africa, who also face status problems in the public and private spheres of life, can benefit from it.[6] The focus will be on the doctrine of separate spheres and the implications of abortion, childbearing (pregnancy) and childrearing for the public and private spheres. Because the US is so far advanced with the gender debate, an interpretation of the interim and final South African Constitutions with its Bills of Rights can benefit from American jurisprudence. Our equality clause (S 8) (now S 9) will, for example, be compared to

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[4]See 9.3 and 7.6.

[5]See 5.2.1, 5.2.2, 6.3.2, 7.3, 8.2-8.4 and 8.6.

[6]See 3.3.1.

the equal protection clause of the Fourteenth Amendment of the US Constitution on which it is based.[7]

In so far as limitations[8] to the right to gender equality are concerned, S 8 engages with gender equality jurisprudence under the US Constitution in several ways. Both Constitutions contain formal limitations on equality. Problems in cases involving pregnancy, childbirth and cases of physical differences between the sexes are experienced.[9] As far as process is concerned both Constitutions are interpreted by judicial systems influenced by gender bias against women (Czapanskiy:1995:37).

7.1 CONSTITUTIONAL DEVELOPMENTS: A BRIEF HISTORICAL OVERVIEW

English settlers came to the US because of the promise of freedom of religion, something which was lacking in their homeland (Patel:1970:372). They brought English common law to the American colonies (Friedman:1984:15). Many of the provisions of the American Bill of Rights can be traced to the Magna Carta (1215 A.D), the great British charter.[10] The English Bill of Rights (1688/1689) is likened to the "grandparent" of the US Bill of Rights, the "parents" being several state constitutions (Stivison:1991:12-13). American colonies remained under British rule until 1776, more than a 100 years after the English Bill of Rights (Cornelius:1978a: 256). After the American Revolution the former colonies became independent states (Friedman:1984:124; Khan:1978:22). After independence, "the new states endowed their people with [religious freedom], even before the adoption of the first amendment

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[7]See 9.6.1 below.

[8]See 9.6.2 below.

[9]See footnote 84.

[10]The Magna Carta basically consisted of the concessions which were extracted by Englishmen from King John (Khan:1978:20).

to the federal constitution [in 1791]. Every state that subsequently joined the Union inserted religion clauses in its constitution..." (Fritz:1989:40). The American colonists called a constitutional convention due to dissatisfaction with the first government and drafted their first constitution for a new government which was composed of the President, the Congress and the Courts. The US Constitution, as amended, is considered to be the oldest written constitution in the world (Vorster:1983:109). The Founding Fathers[11] wrote and ratified the Constitution in 1787-88, the Bill of Rights in 1789-91 and the Fourteenth Amendment (and its due process and equal protection clauses) in 1866-68 (Richards:1989:3). The US Constitution was adopted in 1789 without a bill of rights but was amended in 1791 to include provisions on human rights. It was the first country to include a Bill of Rights in its Constitution (Rautenbach:1995:6). Although there were other factors that also played a significant role, the Constitution to a large extent created the environment for development of the right to freedom of religion (Noonan:1988:720).

The Bill of Rights is made up of the first ten amendments to the federal US Constitution (Adam and Emmerich:1989:1581; Hall:1991:19). In 1791 Virginia became the necessary eleventh state to ratify the Bill of Rights, whereafter it was made effective for the whole country (Adams and Emmerich:1989:1581; Stivison: 1991:16). It was later extended to include the 13th, 14th, 15th, 19th, 24th and 26th Amendment (Levinson & Canary:1991:5; Brady *et al.*:1993b:109-110). The Fourteenth Amendment, added to the Bill of Rights in 1868, requires that state and national governments give "equal protection of the laws" to everybody. The

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[11]The term "Founding Fathers" refers to leaders who established the new nation whilst the more narrower term "Framers" (a body of 55 individuals) refers to those who drafted America's "...fundamental law and its particular guarantees" (Adams and Emmerich: 1989:1582-3; Shaman:1988:353). "[Thomas] Jefferson...was the main author of the Declaration of Independence, while [James] Madison was the leading intellect in the framing of the original U.S. Constitution and the Bill of Rights. Both were also among the most prominent activists of their time on church-state relations" (Smith:1987:11). See further Swomley:1987:23 and Kurland:1992:100.

Constitution is more than 200 years old and has been amended 26 times (Friedman: 1984:126,178; Logan:1986:274). While Article VI, section 2 of the Constitution affirms its supremacy, the courts have the power of judicial review to declare unconstitutional actions void (Cover:1983:30).[12]

While the US Bill of Rights has a vertical application, a horizontal dimension has been attributed to it as well. The US Courts[13] have recently recognized a strong need and requirement for a qualified horizontal application of bills of rights. The legislature, supported by constitutional amendments, provided protection against the private abuse of human rights especially in the sphere of racial discrimination. Most of this type of legislation has been honoured by the Supreme Court (Naude and Terblanche:1994: 611; Van der Vyver:1994:380-382).

7.2 SEPARATION OF STATE AND RELIGION IN THE US[14]

50%-95% of the population in twentieth-century pluralistic America are estimated to believe in God or a religion of some sort. American pluralism goes beyond the predominance of Protestant-Catholic-Jewish sects and includes particularly large numbers of Buddhists and Muslims (Guinness:1990:6; Harvard Law Review:1987: 1612-13; Gedicks:1990:420). It is estimated that, on the basis of the results of the largest study on religion in the US, nearly 87% of American are Christians (Neuhaus:1992: 625 fn 27). While Islam is a minority among American religions, it

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[12]See 9.8.3 below.

[13]See, for example, Edmonson v Leesville Concrete Co III S Ct 2077 (1991) and Georgia v McCallum 112 S Ct 2348 (1992). For more details and a list of earlier cases see Van der Vyver:1994:380-382 and Naude and Terblanche:1994:611.

[14]See 8.2 where the status of religious law in state legal systems and its application by US secular courts will be looked at with a view to establishing why the validity of religious law is considered to be conditional/dependent on recognition by the state. See also 8.3 for a discussion of mediation in the US.

appears that there are roughly equal numbers of Mormons, Jews and Muslims in America today (Gaffney:1990:xx; Hunter:1990:56; Stone:1991:27; Brady *et al.*: 1993a:20).[15] It must be noted that at the time of ratification of the First Amendment faiths, sects and religions such as Christian Scientists, Jehovah's Witnesses, Mormons and non-Western religions were not as yet in existence (Ivers:1991:102). It appears that the US Constitution makes the same provision for minority rights as it does for individual rights. Although the Constitution does not specifically make mention of minorities/minority rights, its First and Fourth Amendments refer to rights of "the people", whilst the Fourteenth Amendment prohibits unequal protection of "any person". The textual provisions of "assembly", "religion", "equality", *etc.* seem to have the group as their basis (Garet:1983:1002-3,1007-8).

Even though the US Constitution provides for a separation of religion and state, historically, the American Constitution was an "explicitly Christian [Protestant] document which was framed and ratified by predominantly Christian groups of men" (Jones:1991:1874-A). Even "[a]s late as 1931 the U.S. Supreme Court could declare: 'We are a Christian people...'" (Canavan:1981:25). While secularized elites in US universities and courts did not necessarily agree that it was really a "myth" that the Founding Fathers of America were anti-clerical and that they created "a wall of separation" between religion and state, others believed that separation occurred to protect religion from the state and not *vice versa* (Littell:1986:11; Neuhaus:1992:623; Carter:1994:105-6,115-116,146). Furthermore, the First Amendment was incorporated into the federal Bill of Rights in 1791 because early immigrants to the US were themselves victims of religious persecution (Dhokalia:1986:96).

The original US Constitution initially did not provide protection for blacks and women. So too a comprehensive religious equality was viewed as extending only to the various Christian denominations (Hall:1992:13). It was only in 1920, with the

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[15]See 7.4.

passing of the 19th Amendment to the Bill of Rights, that American women were granted the right to vote (Wright:1993:75). The contradiction between racial equality and legal discrimination was only eliminated by civil rights legislation in the 1960s (Mayer:1991b:94). The original Constitution did not make provision for individual rights of conscience and there was only one clause or reference, prior to the adoption of the First Amendment, that was specifically related to religion, namely Article VI, section 3.[16] This also gives an indication of the secular nature of the Constitution (Noonan:1988:717; Zimmerman:1990:132-133; Adams and Emmerich:1989:1575; Swomley:1987:19). The term "religion" was never defined in the Constitution (Bowser:1977:163).[17] However, the main components of freedom of religion found in the religion clauses of the First Amendment remedy this.[18] Of the several rights contained in the First Amendment, freedom of religion has historically been given priority in that it was named first and was therefore the first human right to be guaranteed in America (Mc Closky and Brill:1983:103). The First Amendment is itself subject to much controversy, which was further fuelled by the later Fourteenth

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[16]Article VI [Six], section 3 prescribes that "*...no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States*" (emphasis added) (McDougal, Lasswell and Chen:1976:877; Swomley:1987:19-20). Provision is made for the use of "affirmation" or solemn declaration as an alternative to a religious oath but which is equivalent to it in value and penalty if breached (Swomley:1987:20). See 4.2 and its footnote 17 and 9.3 footnote 33. This Article has rarely been interpreted by the Supreme Court and during the 200 and more years since ratification of the constitution, the High Court has heard less than one such case per decade (Garn and Oliphant:1981:49).

[17]See 5.2.1 and related footnote 62.

[18]These religion clauses are said to be "...the product of both enlightenment politics and evangelical theology" (Witte:1991:491). The European Enlightenment laid the intellectual groundwork for modern human rights theory, especially the contributions by eighteenth-century British and French thinkers, which influenced the early American rights provisions that in turn influenced subsequent rights provisions (Mayer:1991b:43; Pollis and Schwab:1979a:4). England passed a law providing for human rights in 1689. The American Congress followed suit in 1791 and France in 1789. Citizens of these respective countries made use of these laws until the UN passed the UDHR in 1948 (Mahmud:1982:351). See 5.2.1 above.

Amendment, especially its first[19] and fifth[20] sections, because the Bill of Rights is now incorporated into the Fourteenth Amendment (Zimmerman:1990:133-134,148). There is some controversy surrounding the degree or the extent of incorporation of the Bill of Rights (first ten amendments) into the Fourteenth Amendment. There are three approaches dominating twentieth-century debate in this regard (Amar:1991:1196). The restrictions of the religion clauses of the First Amendment were extended to the 50 state governments through the adoption of the Fourteenth Amendment in 1868 (Bowser:1977:163).

In the US today we have the separation of "church" (spiritual/ethereal) from the "state" (material/mundane) with religion being placed in the private sphere and away from public life and not benefiting from public policy (Gedicks:1992:678; Neuhaus: 1992:623,629; Tribe:1985:199). The First Amendment does not contain the words "church" and "state"; instead it speaks of "religion" and "congress" respectively (Berman:1990:1-; Esbeck:1986:52). There is as such no "church" in the US but rather a multiplicity of religious bodies (Smith:1987:1). The word "congress" has been interpreted by the Supreme Court as applying to states as well as the federal government (Carter:1994:108). It is contended that Americans find it difficult to deal with this separation as they value both religion and state and therefore feel that the two ought not to be entirely separated. This confusion is fuelled by the clear violations of this separation where the name of God is invoked in courts, on the nation's coins, in inscriptions of buildings like the Supreme Court, in the prayers to open meetings of Congress to name but a few (Mc Closky and Brill:1983:134;

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[19]Section 1 provides "...No State shall...deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws."

[20]Section 5 states that "...Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Garvey and Schauer:1992:437).[21] The Williamsburg Charter on Religion and Public Life,[22] created in 1988 by members of America's leading faiths to commemorate 200 years of Virginia's call for the Bill of Rights and ratification of the Constitution and thereby also the reaffirmation of the religious liberty clauses, continues to symbolize and emphasize the historical place of religion in American public life (O'Connor: 1990:1,5; Witte:1991:489-490; Guinness:1990:5). Interestingly, American Muslims have given it their stamp of approval notwithstanding the fact that their slave forebears were forced to convert to Christianity[23] both before and after the enactment of the First Amendment. This situation was only remedied by the incorporation of the Thirteenth Amendment into the Constitution (Gaffney:1990:xxiv; *The Journal of Law and Religion*:1990:322).

7.3 FREEDOM OF RELIGION AND ITS APPLICATION IN US COURTS[24]

The deteriorating situation of freedom of religion in secular US, where the majority religion has succeeded in influencing state policy to its benefit, will be examined with a view to understanding the prejudices faced by religious minorities. Forms of discrimination (other than gender-based) implicit in the right to religious freedom, for example, the right to observe religious holidays and to dress in a particular manner will then be examined (along with other such rights) with a view to making recommendations on how South Africa might benefit from this experience.

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[21]See 9.3, footnote 40.

[22]Named after the city of Williamsburg because of its significant role as far as freedom of religion was concerned (Hunter and Guinness:1990:125,127).

[23]Compare the case of early Cape Muslim slaves referred to in 2.2.1.1, who were restricted in their practice of Islam and had more to gain from converting to Christianity.

[24]The question whether the religious faith/non-faith of justices should or not affect their judicial decisions will be addressed in 9.8.1 and 9.8.2. See also Solum:1990:1083-1106.

"...[T]here are today... between 4,000 and 6,000 cases before the court involving religious liberty - far more than during the entire history of the republic from 1791 to 1980" (Littell:1986:17). The constitutional conflict between religion and state boils down to two conflicting religion clauses in the First Amendment to the US Constitution: the establishment clause and the free exercise clause. Religion was once considered so important in the US that its Constitution had to be amended with the First Amendment to protect its "free exercise". The clauses read as follows: "Congress shall make no law respecting an establishment of religion [1], or prohibiting the free exercise thereof [2]...".[25] The government is thus prohibited from establishing a state religion or interfering with religious activities and this has now come to mean that a "wall of separation" should exist between religion and state (Gustafson and Moen:1992:10). In other word, the state must remain "neutral" in religious matters. However, "[t]hese sixteen words,...so simple yet capable of so many different interpretations, have sparked intense contemporary debate" (Adams and Emmerich:1989:1560). Because the history behind the drafting of these clauses is itself unclear and because both clauses are meant to advance religious freedom, constitutionalists, academics and judges continue to grapple with their scope right into the third century of the American republic (Levy:1986; Swomley:1987; Miller:1986; Mc Closky and Brill:1983:104). For example, does the free exercise clause provide protection for religion? How does it affect the right to freedom of speech? The general approaches to the religion clauses has been threefold: strict separation,[26] strict neutrality[27] and accommodation.[28] "The establishment clause

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[25]The rest of the First Amendment reads as follows: "...or abridging the freedom of speech, or of the press, or the right of the people to assemble, and to petition the government for a redress of grievances". See 9.3 and 7.6 for the position in South Africa.

[26]This means that "[t]he clauses could be read to erect an absolute barrier to formal interdependence of religion and the state. Religious institutions could receive no aid whatever, direct or indirect, from the state. Nor could the state adjust its secular programs to alleviate burdens the programs placed on believers" (Stone, Seidman *et al.*:1991:1461).

requires (some sort of) neutrality, while the free exercise clause requires (some sort of) preference for religion and may permit other preferences" (Stone, Seidman *et al.*:1991:1545).

On the basis of 25 years of decisions, the court in 1971[29] laid down a three-pronged test of neutrality (Lemon test) which served as the main precedent on establishment clause questions. The three criteria are as follows: first, the challenged law/statute or conduct must have a secular purpose; second, its principal or primary effect must neither advance nor inhibit religion; third, it must not create an excessive entanglement of government with religion. The Supreme Court interpreted "the Establishment clause to mean that government may not aid religion unless, among other things, the purpose and 'primary effect' are secular [therefore restricts the benefits government may grant a religion/s]" (Smith:1983:83). The danger inherent in this test and recognized by both judges and scholars is that, if the courts continue to interpret it as they have, the establishment clause will not end up anti-establishment

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[27]This means that "[Religion] may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations...[t]hus states must use purely secular criteria as the basis for their actions" (Stone, Seidman *et al.*:1991:1462). An interpretation of the free exercise clause to only protect the religious against discrimination is an example of neutrality - the idea that the state should not favour religion but also not oppress it (Carter:1994:133). "Neutrality treats religious belief as a matter of individual choice, an aspect of conscience, with which the government must not interfere but which it has no obligation to respect" (Carter:1994:134).

[28]"Accommodation of religion would consist in choosing to provide exemptions from otherwise applicable laws when the laws would impose burdens on religious exercise" (Stone, Seidman *et al.*:1991:1463). "Accommodation occurs when the government seeks to promote values embodied in the Free Exercise Clause by exempting individuals with various religious beliefs from certain state laws" (La Machia:1992:119). In other words it favours religion. Although some constitutional scholars believe that accommodation violates the establishment clause because it gives the religious something which is denied others, the Supreme Court does not agree that all accommodations are unconstitutional (Carter:1994:125).

[29]Lemon v Kurtzman 403 US 602, 612-613 (1971).

but anti-religion. Those judges and scholars who support establishment clause jurisprudence conveniently ignore this test when need be as there is no other alternative to it (Carter:1994:113-114; Benson:1989:888; Swomley:1987:85; Garvey and Schauer:1992:399; US Commission on Civil Rights:1983:19).[30]

When ruling on a "free exercise" claim the courts used a two-point test. First, it determined whether a person whose beliefs were in conflict with government policy held those beliefs sincerely. Second, it determined whether those beliefs could be accommodated by less restrictive means without interfering with a compelling governmental interest (Denniston:1985:37; Benson:1989:885).[31] This test was used in the period of religious tolerance (1943-1990) (Fletcher:1993:94). It has been interpreted by the Supreme Court to mean "...that government may not hinder the exercise of religion without a strong nonreligious reason" [therefore restricts the burdens government may place on religion/s] (Smith:1983:83).[32]

Between the years 1940 and 1952 the views of judges were characterized by "social progressivism" and they thought of corporate religion as socially harmful. They thought of religion sympathetically only in so far as it was individual and pluralistic (Smith:1983:110). The first major establishment clause case[33] was only decided in 1947, more than 150 years after this clause was passed (Benson:1989:885; Miller: 1986:187). The religion clauses were initially understood to bind only the federal

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[30]See Ivers:1991:3 for a change in the three-pronged Lemon test which "...is all but set for the constitutional guillotine". See also Audi:1992:30. Scholarly debate in this regard has been profound (Carter:1994:114-115,296). See McConnell:1986:933; Laycock:1991:37; Tushnet:1988:256-57, n 31; Smith:1989:955 and Sullivan:1992a:195.

[31]Compare the position of minority rights in India at 6.3.2.

[32]For current developments and changes in this regard see Monsma:1993:21; La Macchia:1992:118 and Ivers:1991:3.

[33]Everson v United States 330 US 1 (1947).

government but this changed in the 1940s when the Supreme Court incorporated the First Amendment religion clauses into the due process clause of the Fourteenth Amendment thereby binding the state governments as well. This meant that the Supreme Court could now, for the first time, review state laws and policies on religion and the church (Witte:1991:500; Adams and Emmerich:1989:1581-2; Monsma:1993:35; Rautenbach:1995:7). Since the US Supreme Court has developed a comprehensive case law in this field over the last fourty years, state courts have followed federal precedents even when they conflicted with those of the state (Fritz:1989:55). Most of these cases arose from challenges to state law and often boiled down to controversies between minor religious groups and government agencies (Smith:1987:1;Ivers:1991:5). Nevertheless federal, state and local governments have had to deal with these religious clauses (La Macchia:1992:117).

Between 1952 and 1960 there were no major religion cases. From 1960 the courts were once again faced with a number of religion cases and some judges adopted substantially different views of religion which characterize "moderate social conservatism" and have been more favourable towards corporate religion as being socially useful (Smith:1983:88,110,113,118). From the early 1940s to the early 1980s, the Supreme Court erected a high wall of separation between organized religion and the state in accordance with the establishment clause. Fearing a violation to the establishment clause, for example, it struck down state-sponsored prayer and Bible recitation in public schools and a state requirement mandating that public officials take religious oaths[34] to assume public office. The Court, in another set of cases, broadened the scope of free exercise clause to grant constitutional protection and more tolerance to unorthodox religious conduct. For example, it upheld conscientious objection to military service based on nonsectarian and nonreligious grounds and that persons who were dismissed from work on account of religious beliefs were entitled to unemployment compensation. The metaphoric "wall of

[34]See footnote 16.

separation", however, was dismantled by the Supreme Court in the 1980s in violation of the establishment clause when the Court, for example, gave tax exemptions to parents who sent their children to parochial schools and allowed government funds to be used to support ceremonial invocation and prayer in state legislatures. The Court now also showed intolerance for the free exercise rights of minority religious observers. The Court, for example, denied the right of a Jewish soldier, who was also an ordained *rabbi*, to wear his *yarmulke* (skull cap) while on duty[35] and forced the religious practices of Native Americans to yield to the government's idea of good policy.[36] In 1990 the court upheld a Philadelphia state law on religious garb in terms of which a school district had burdened the free exercise rights of a Muslim teacher by forbidding her to wear Islamic dress to school (Ivers:1991:2-3; Carter:1994: 12,220-223,269; Neuhaus:1992:631; Guinness:1990:5). Cases during the past decade (1980-1990) not only demonstrate the continuing tension in interpreting the religion clauses but also indicate that religious conservatives have succeeded in gaining more government accommodation and support for religion at the expense of some establishment. At the same time constitutional protection of religious free exercise for minority nontraditional observers (Jews, Black Muslims and Native Americans) was drastically curtailed. There were some exceptions because in several 1985 cases the Supreme Court reaffirmed separation of church and state (Ivers:1991:vii-viii,10,99; Monsma:1993:31; Denniston:1985:35; Christenson:1991:318-9; Ivers:1993:2,172-3,184; Clark:1986:382; Swomley:1987:82; Fletcher:1993:91). While there was at one stage "too much religious sway over politics...in late-twentieth-century America...we are...tilting too far in the other direction-and the courts are assisting in the effort" (Carter:1994:10-11). "Freedom of religion...enters the 1990s relegated to the unaccustomed and unforeseen position of second-class stature in [the American] constellation of constitutional values" (Ivers:1991:92). Although the future of the free

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[35]Goldman v Weinberger 475 US 503 (1986).

[36]Employment Division of Oregon v Smith 494 US 872 (1990) and Lyng v Northwest Indian Cemetery Protective Association 485 US 439 (1988).

exercise of religion in the US is cause for concern, the Religious Freedom Restoration Act enacted in 1993[37] would at least change some of the cases which had treated religious practices as trivial enough to allow competing state interests to override them (Monsma:1993:38; Carter:1994:269). While American liberalism and secularization often overlook and are not hospitable to institutions like religious minorities, there might be more to fear from unlimited governmental power than from a strong right of religious group autonomy because the latter can serve as a check on the former (Gedicks:1989:99-100).

It is thus clear that vacillating US case law has failed to resolve the controversy surrounding the First Amendment religion clauses. "No matter where one stands on this debate, one may easily conclude that the body of law constructed by the [US] Supreme Court to measure the demands of the religion clauses is unsatisfactory" (Nichol:1986:833,835). Also unlike the case in Europe and Canada, the UN also has limited opportunity to review US law to ensure compliance with international human rights instruments and standards of religious freedom. The US has only ratified the UN Charter and the International Convention on Civil and Political Rights. Both the UN Charter and the Universal Declaration only has theoretical application. The International Covenant on Economic, Social and Cultural Rights of 1976 as well as the Racial Discrimination Convention of 1969, although in force, have not been ratified. The Draft Convention on the Elimination of All Forms of Religious Intolerance has also not been given serious consideration (Mayer:1995:121-122; Greenberg:1989:87,90,93-94).[38] Even though the US has signed the Women's Convention CEDAW in 1980 already, it has failed to ratify it (Wright:1993:75). While shifts in politics have influenced the position of the US government and some Muslim governments on CEDAW, it must be noted that the reasons attributed to the

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[37]Pub. L. No. 103-141, 107 Stat.1488 (codified at 42 U.S.C. § 2000bb *et seq.*).

[38]See 5.2.1 and 5.2.2 above for a discussion of these UN instruments.

US for non-ratification of CEDAW are not formally of a religious or cultural/ traditional nature (Mayer:1995:119-123). However, irrespective of ratification by the US "[t]he idea that the [supreme] US Constitution could be judged by international standards is not accepted in US law...The result...is that...the rights afforded to Americans in the Bill of Rights are far inferior to the extensive rights enjoyed by Russians and *South Africans* under their new constitutions" (emphasis added) (Mayer:1995:120-121).

7.4 "FREE EXERCISE" OF RELIGION AND MUSLIMS IN THE US

Muslims came to the US firstly as slaves as early as 1731 and later round the turn of the century as immigrants from the Levant[39] and Fertile Crescent.[40] Today these groups are supplemented by non-Arab and indigenous American Muslims and are reflective of all the four major *Sunni* schools of Islamic thought as well as the *Shi'ite* school (Nyang:1980:167-169,175; Ahmed:1991:11,22).[41] According to the "World Almanac and Book of Facts 1992", the current US Muslim population is estimated to be roughly 6 million, representing 2.4 % of the US population (Brady *et al.*:1993a: 20).[42]

"...[M]any Muslims do not appreciate the role of religion in American society or the role of religious values in American constitutionalism because the Constitution makes a very clear statement against the establishment of religion" (An-Na'im:1990a:69). While there is no official religion in the US and theoretically everybody enjoys

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[39]Refers to the eastern part of the Mediterranean with its islands and neighbouring countries (Sykes:1982:577).

[40]Refers to the semicircular region from E. Mediterranean to Persian Gulf (Sykes: 1982:358).

[41]See 2.1.1 above.

[42]See 7.2.

freedom of religion, Americans have not always tolerated the free exercise (practices) of religions that they were unfamiliar with nor approved of (Karst:1986:303-4).[43] Although religious beliefs will always be protected, this is not always the case as far as religious actions or practices are concerned. The Mormon practice of polygyny was, for example, not tolerated, not even by the courts (Friedman:1984:269-270). Needless to say, if Muslims were to bring similar cases to court, the results would be no different as they are not in the majority nor in the mainstream (Sigler:1983:158; US Commission on Civil Rights:1983:iii).

US Muslims, as part of the multicultural society, ought to be accorded the same rights and privileges as all Americans (Stone:1991:33). However, the constitutional protection of Islam and the rights of Muslims to the free exercise of their religion as guaranteed by the First Amendment has been questioned in court in matters brought by African-American inmates confined to prison (Moore:1991:137-139). These "prison" cases indicate that "...the courts' treatment of Islam has not been uniform and provides little guidance in determining with any certainty how Islam and Muslims will fare in asserting Muslims' civil rights" (Moore:1991:151). Matters regarding foreign law pertaining to Islamic contractual and delictual law have, however, also been heard in American courts and on the basis of difficulties encountered in this regard it was concluded that Islamic law "...will, for the most part, continue to be an entity inaccessible to American courts" (Forte:1983:33).

I will briefly focus on the rights of Muslim prisoners to practice their religion and how the courts have treated the Mormon practice of polygyny. I have particularly chosen the former because the issues they raise came to the fore in the period (1960s and 1970s) during which a significant number of blacks (African-Americans) converted to some form of Islam (Smith:1987:8). The free exercise clause permits a person to practice and observe his/her religious beliefs and encompasses the

[43]This is clearly illustrated in 7.3 above.

observance of such practices, even in a prison.[44] This has led the courts to permit an exception to the prohibition against government involvement in religion. The early 1960s litigation relating to prisoners' rights was led by black Muslim prisoners who sought the protection of the free exercise clause with regard to worship services, religious ceremonies and dietary restrictions. At first (1962-1966) the courts did not consider their movement a religion but later (1964) changed their mind[45] (US Commission on Civil Rights:1983: 65-66). In 1967 the seventh circuit court decided that black Muslims should not be denied an opportunity to attend religious services because of a possible threat to prison security. In a similar case involving Muslims which went on from 1984-1987, the Supreme Court came to an opposite conclusion (Ivers:1993:144-146 and 1991:77). A black Muslim who sought a special menu free from any pork products was denied his request on the basis of very poor logic by the fourth circuit in 1968. In 1969 the court in a similar case rectified this matter to the satisfaction of the Muslim prisoners.[46]

The question of polygyny is very briefly discussed for two reasons. The first takes into consideration that there is now more or less an equal number of Mormons and Muslims in the US.[47] Secondly, both religions permit[48] the practice of polygyny although it was the Mormons who were in the forefront of this issue in the US. In

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[44]Compare S 14 (2) (now S 15 (2)) of the interim South African Constitution.

[45]It appears that even subsequent to this in cases concerning tax exemption "...that Muslim ideology has generally been given the benefit of the doubt as regards its legitimacy as a bona fide religion" (Jones:1983:428).

[46]For more detail on cases which dealt with problems like acceptable length of hair, wearing of beards and religious vestments and preaching and proselytizing see US Commission on Civil Rights:1983:69,71-77 and Jones:1983:431.

[47]See 7.2.

[48]There are of course equally justifiable *Qur'anic* and therefore religious interpretations, which lend support to the views/laws that prohibit polygyny.

case law concerning religious exemptions under the free exercise clause, the Court had to consider clashes between the societal interest in freedom of religion *versus* the societal interest in public morality (Antieau:1985:321). In 1878, in the first of the Mormon cases, the US Supreme Court upheld a federal/congressional statute banning the practice of polygyny[49], which Mormons regarded as a religious duty. The court held that the First Amendment protected religious belief against legislation but not religious practice or action.[50] The latter "...must conform with the regulations [legislation] established by the community to protect public order, health, welfare, and morals" (Monsma:1993:18-19).

In two 1890 cases the Court upheld the validity of a Territorial and Congressional statute and held that bigamy and polygyny respectively were crimes and not the exercise of religion. "[The] Court saw no constitutional infirmities" (Abrahams: 1982:246). The US Supreme Court thus upheld both federal and state laws prohibiting the *practice* of polygyny and therefore religion (Antieau:1985:322). "The court assumed a commonly held value - the legally established nuclear family" (Hitchcock:1981:15). Today similar polygyny cases might be decided quite differently as being in the domain of Autonomous Decisions or included in the right of privacy if a large proportion of Americans believed in it and wanted to practise it (Hitchcock:1981:15; Canavan:1981:27-28).[51] These decisions verify that, besides not

[49]In terms of civil law, the first wife is the only legal wife and polgyny is still a criminal offence today (Abraham:1982:226). The constitutions of a few states have express language proscribing polygyny and other pluralistic marital practices (Antieau, Caroll and Burke:1965: 65-66). An article written in 1957 indicates that polygyny was nevertheless still practised by Mormons (Dane and Marshall:1990:I-85-86).

[50]This must not be confused with religious practices or performances of acts/rituals in pursuance of religious belief, for example, the slaughtering of an animal which is purported to be "readily" allowed in countries like India (Sieghart:1983:325). See 6.3.2.

[51]See footnote 80.

being an absolute right, there is no full freedom of religion[52] despite the fact that the First Amendment clearly refers to the free *exercise* of religion and not to the freedom of religious beliefs (Hitchcock:1992:156; Monsma:1993:38; Dane:1980:352). Thus the very early settlers who came to the US seeking religious freedom, denied it to others (Hitchcock:1981:4).

7.5 THE GENDER DEBATE AND GENDER-BASED DISCRIMINATION

It was decided in early South African case law that women were not persons and therefore not the equals of men.[53] This opinion was not peculiar to South Africa as the early American case of Goodell,[54] Ryan C.J. also construed "person" to exclude "woman".[55]

The theory of separate spheres of men and women developed in the US around the year 1850. This theory ackowledged women's legal personhood but assigned her a legal place in the private sphere, which was different and distinct from that of her husband, who was legally placed in the public sphere (Garvey & Aleinikoff:1991:394-5). It was at this stage too that feminism, as an organized social and political movement, arose. An important distinguishing factor between contemporary feminists and their early (1850 to early 1900s) counterpart, is that the latter nearly all accepted the doctrine of separate spheres or "equal but different model" (Pateman:1989:127).

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[52]McConnell (1985:1) writes that "[t]he main components of religious liberty are the autonomy of religious institutions, individual choice in matters of religion, and the freedom to put a chosen faith (if any) into *practice*."

[53]See 9.2.

[54]20 Am.Rep p 42.

[55]See Sachs & Wilson:1978:96-97 and West:1988:3.

This model was later largely replaced by several other models[56] and since 1966 feminist thought has moved dramatically "from an essentially *liberal* attack on the absence of women in the public world to a *radical* vision of the transformation of that world" (emphasis added) (Scales:1986:1384). The theory of separate spheres is a worldwide phenomenon and therefore also played a role in early gender development in South Africa. Because of the new government's strong commitment to women's issues, South Africa is making much progress in the area of gender development.[57] In order to determine the degree to which our interim and final Bills of Rights can make these private issues public, topics like abortion, childbearing and childrearing, which have been the focus of our gender debate, will be examined.

During the past century the US Supreme Court underwent an ideological and philosophical transformation with regard to the way it viewed the relationship between the sexes - from an ideology of separate spheres to one of formal equality (Gibson: 1987:1150-51). It was only since the 1970s that the separate spheres ideology has been repudiated by the Supreme Court when it dismantled the statutory structure[58] built upon the separate spheres ideology (Garvey & Aleinikoff:1991:395,401). The Court did this dismantling as follows. The Court primarily granted formal legal equality to women through cases interpreting both the constitutional equal protection clause or Fourteenth Amendment which specifically spelt out the norm of gender equality and statutory Title VII of the Civil Rights Act of 1964 (Gibson:1987:1153).

[56]See 7.5.1.

[57]See 3.3.1, 9.2 and 9.6.1.

[58]"Between the early 1960's and the late 1970's, equal rights principles...were incorporated...into federal and state legislation...and judicial doctrine, and were used successfully to challenge many forms of sex discrimination" (Freedman:1983:916). Federal legislation included anti-discrimination laws relating to equal pay, education, equal credit opportunities and housing. There were also state anti-discrimination laws, state equal rights amendments and state law reform to remove sex discrimination (Freedman:1983:916 fn 11).

From 1971[59] a stricter standard of review was applied to sex discrimination cases. By 1976 the court required that classifications based on sex have "a 'substantial' relationship to an 'important' governmental purpose"[60] (Garvey & Aleinikoff:1991: 395). In a series of cases from around 1971-1981, "...the Supreme Court insisted that women wage earners receive the same benefits for their families under military,[61] social security,[62] welfare,[63] and worker's compensation[64] programs as did [male] wage earners; that men receive the same child care allowance when their spouses died as

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[59]In Reed v Reed 404 US 71, 75 (1971). The Reed case not only represented the start of the breaking down of the separate sexual spheres barriers, but was also the first equal protection case which the Supreme Court decided a claim of sex discrimination in favour of women on the basis of the equal treatment theory (Gibson:1987:1153 fn 55,1158; Littleton: 1987:1290; Scales:1986:1374). Other successful equal protection cases dealing with sexual equality include Frontiero v Richardson 14 US 677 (1973) and Craig v Boren 429 US 190 (1976) (Garvey & Aleinikoff:1991:395; Czapanskiy:1995:39-40). There were, however, such cases which were unsuccessful, for example, Dothard v Rawlinson 433 US 321, 335 (1977) (Littleton:1987:1290 and fns 63 and 66). Littleton (1987:1304) is of the opinion that the Reed case also reflects an acceptance of the "assimilationist" model referred to below. As will also be detailed below the equal treatment theory worked well until the court had to deal with real differences (like the ability to become pregnant) between the sexes (Scales:1986:1374-5).

[60]This standard was announced in Craig v Boren 429 US 190, 197 (1976) where it was decided that gender equality claims would be subject to a less stringent test (than that used in race cases) called "heightened scrutiny review" or "intermediate standard of review", which would allow some gender-based discrimination to survive constitutional scrutiny. This test requires the court to examine whether gender discrimination is constitutional. It must be satisfied that the government wants to achieve an important governmental objective with this gender discrimination and that the measure it has chosen to do so serves this objective (Garvey & Aleinikoff:1991:395; Czapanskiy:1995:38; Gibson:1987:1153 fn 55; Littleton: 1987:1305).

[61]Frontiero v Richardson 411 US 677 (1973).

[62]Califano v Goldfarb 430 US 199 (1977).

[63]Califano v Westcott 443 US 76 (1979).

[64]Wengler v Druggists Mutual Insurance Co 446 US 142 (1980).

women did;[65] that the female children of divorce be entitled to support for the same length of time as male children, so that they too could get the education necessary for life in the public world;[66] that the duty of support through alimony not be visited exclusively on husbands;[67] that wives as well as husbands participate in the management of the community property;[68] and that wives as well as husbands be eligible to administer their deceased relatives' estates[69]" (Garvey & Aleinikoff: 1991:395). Also a state regulation permitting women to buy beer at a younger age than men was unconstitutional.[70] However, it appears that these legal and social reforms were modest leaving most women "...trapped in traditional patterns of sex segregation and sex-based hierarchy" (Freedman:1983:917).

It is common for feminist writing to distinguish between sex (a biological construct) and gender (a social, psychological, historical and cultural construct) (Albertyn & Kentridge:1994:167; Du Plessis and Corder:1994:143). "The problem, though, is... [whether] many behavioural differences between men and women are 'natural' or 'social'. This makes it difficult to draw the line between sex and gender, with the result that the terms are used interchangeably" (Albertyn & Kentridge:1994:167). As will be detailed below,[71] the confusion of the two concepts of sex and gender has also had a negative impact on court decisions, theories and debates in this regard. Although all societies use biological sex as a criterion to describe gender, gender

[65]Weinberger v Wiesenfeld 420 US 636 (1975).

[66]Stanton v Stanton 421 US 7 (1975).

[67]Orr v Orr 440 US 268 (1979).

[68]Kirschberg v Feenstra 450 US 455 (1981).

[69]Reed v Reed 404 US 71 (1971).

[70]Craig v Boren 429 US 190 (1976).

[71]See 7.5.1.

differs from culture to culture just as, for example, different cultures have different ways of expressing the basic tenets of one and the same religion. As culture evolves so does gender. The more complex a society becomes the more inadequate its culture becomes in determining gender identity; hence, gender identity is influenced by socio-political and economic factors. Legislation, religious norms and ethnicity are merely some of the determinants of the gender role of women (Brett:n.d[1990?]:2,3,4). What follows is an examination of how gender inequalities have been addressed in the US and briefly in Europe.

7.5.1 AN EVALUATION OF US FEMINIST THEORIES: THEIR PRACTICAL APPLICATION AND VIABILITY

American feminists can be divided into liberal and radical feminists, depending on which of the many "theories" of sexual equality they follow. Liberal (or cultural) feminists do not all follow one particular or common theory among themselves. They are basically proponents of either the equal treatment (sameness/ symmetrical), special treatment (difference/asymmetrical[72]) or the "equality as acceptance" (asymmetrical) theories. Radical feminists, on the other hand, reject the above theories and advocate what is coined the inequalities, dominance or empowerment approach (asymmetrical). There are also liberal feminists who critique these theories and follow what is called an assimilationist or accommodationist approach (asymmetrical) in that they contend for a middle route or combination of these theories. However, even this approach is subject to criticism (West:1988:3; Gibson:1987:1172; Littleton:1987:1295-6; Scales: 1986:1382). These theories and their implications for childbearing (pregnancy), childrearing and abortion will now briefly be discussed.

Both the equal and special treatment theories of sexual equality are judged by a male-

[72]Asymmetrical approaches include special treatment, accomodation, acceptance and the inequalities approach (Littleton:1987:1295).

standard or "double standard". In other words, if women want to be equal to men in the public sphere they have to be the same as men. Where, however, real differences occur (for example, their capacity to become pregnant or the role as traditional childrearers[73]) they are legally penalized (Littleton:1987:1279,1283 fn 22; Gibson: 1987:1157; Whitman:1988:1390; Scales:1986:1376; Finley:1986:1181-2). While the equal treatment or gender neutral (sameness) theory was successful in breaking down stereotypically created barriers, it failed to take into acount what is coined "real differences" (like the ability to fall pregnant) between the sexes that cannot fit into this male-standard (Littleton:1987:1326). To insist, as does the equal treatment theory, that pregnant women be treated like men amounts to preferential treatment.[74] This is where the special treatment or protection (difference) debate comes to women's rescue, so to speak, in the form of qualified sameness. Legally this theory makes provision for women who want equality but find themselves to be different from men (Garvey & Aleinikoff:1991:410; Sunstein:1988:830-831; Gibson:1987: 1157). Interestingly "[t]hese arguments bear a resemblance to those for special accommodations for some religious practices under the Free Exercise Clause and statutes requiring employers to seek ways to accommodate job requirements and employees' religious obligations" (Gerhardt & Rowe:1993:271).[75] The proponents of the equal treatment theory argue that the special treatment theory perpetuates the separate spheres ideology in that sex *(a biological construct)* is now a determinant of one's role in society (Gibson:1987:1171-1172).

However, the greatest criticism directed at the flaws of the special treatment theory

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[73]It has been hinted by the US Supreme court in Phillips v Martin Marietta Corp. 400 US 542, 544 (1971) that women's burden of childcare (childrearing) could be regarded as a "real" sex difference (Dowd:1986:758).

[74]By virtue of the equal treatment theory US case law now secures pregnant women of their jobs on return because after birth women revert from their pregnant (different) to their pre-pregnant (equal) state. See Albertyn:1992:24.

[75]See 7.3.

comes from the proponents of the inequalities or dominance approach, namely the radical feminists (Littleton:1987:1299). They regard this theory as inadequate for many reasons, among others, that it is premised on a norm of formal equality or sex-blindness, and does nothing about many structural inequalities, for example financial inequalities, that exist between the sexes and that the male norm is used as the yardstick by which it measures difference, resulting in inadequate law of sex discrimination (Sunstein:1988:831-832). However, the radical feminists admit that their inequalities approach itself sometimes requires different standards to be used for men and women (Scales:1986:1397). Thus it does not reject the special treatment approach in its entirety since the question is not whether (biological) differences exist but what society does with them; in other words, what are their legal and social consequences (Sunstein:1988:833; Gibson:1986:1158; Pateman:1989:125-6; Whitman: 1988:1391)? They describe gender inequality in terms of the social subordination of women partly through sexual practices and thereby include issues not normally thought to involve sex discrimination like reproductive freedom (abortion) and rape, which raise questions of inequality (Gibson:1987:1173; Sunstein:1988:828,838).[76]

A relatively novel theory called the theory of "equality as acceptance" was the brainchild of Littleton (1987:1279). She criticizes the equal and special treatment theories and argues that "acceptance" would lessen inequality not by abolishing women's sex and gender differences from men but by reassessing and revaluing the value which society attributes to traditionally "female" occupations and lifestyles so that it accords with equivalent "male" activities" (Littleton:1987:1279). In other words, male and female differences must be made costless relative to each other. If women opt for culturally or socially female behaviour or occupations such as childrearing, they should be compensated in the same way as those who opt for culturally or socially male behaviour or occupations such as legal practice (Littleton:1987:1285,1301).

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[76]See further Gibson:1987:1176; Scales:1986:1395; Whitman:1988:1401,1403.

It is apparent from these theories that each one has its merits and demerits with no one theory being ideal or adequately able to solve the problems with regard to the doctrine of separate spheres. However, while modern liberal and radical feminists are in agreement that women have real differences from men and are in agreement as to their importance, they differ as to which of these differences are most important (West:1988:13).

The practical application of these theories, some already touched on above,[77] will now be further elaborated. The inequalities approach of the radical feminists differs from most of the current US law, for example, the law of custody and divorce which is based on the special treatment or difference theory. Thus the radical feminists propose as a substitute to a proposed constitutional amendment (called the Equal Rights Amendment),[78] a women's rights amendment providing that "the subordination of women to men is hereby abolished" (Sunstein:1988:835). In 1986 the US Supreme Court[79] accepted radical feminist Catharine MacKinnon's view that sexual harassment is a form of sex discrimination (Sunstein:1988:829). Although MacKinnon also regards statutes which restrict reproductive rights like abortion as examples of sex discrimination,[80] it appears that it is inappropriate to expect the courts to carry out the

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[77]See footnote 59.

[78]This proposed constitutional amendment would officially grant women equal rights once passed but efforts to add it to the US Constitution have thus far proved unsuccessful (Gerhardt & Rowe:1993:271). The impact it would have on American family law is discussed in detail by Wardle:1984-5:477-509.

[79]Meritor Savings Bank,FSB v Vinson 477 US 57 (1986).

[80]Before 1973 abortion was a crime in many US states. However, the Court in Roe v Wade (410 US 113 (1973)) held that state prohibitions of abortion was unconstitutional on the basis of a theory of freedom of choice in private matters (Whitman:1988:1392-3). See above footnote 51 in the text. Although welcomed by most liberal feminists, some radical feminists regard the issue as one involving equality rather than privacy and hence regard this decision as a mistake (Sunstein:1988:838-9; Whitman:1988:1393). Some feminists are also of the opinion that, seen from a subjective female perspective, abortion is an act of self-

task of implementing these changes (Sunstein:1988:838). Liberal and radical feminists differ with regard to the assumption that pregnancy and all that it entails operate as the primary contributor to women's discriminatory treatment in the workplace and to the maintenance of the doctrine of separate spheres (Finley:1986:1119-20 fn 5).

American courts grapple over the definition of gender equality and in so doing they often have to determine, among other things, whether sex differences are natural (biological) or cultural (Freedman:1983:917-18; Gibson:1987:1160). There are two major judicial approaches to this issue. The one approach denies that much harm arises from sex-based laws and unevenly oppressive neutral rules and holds that "real" differences between the sexes have necessary social consequences and that cultural choices and not biology should be the criterion on which to base the equality between the sexes. The other approach is more complex and reflects, among other things, a recognition of the cultural origins of sex differentiation and the harm of sex discrimination. Because of the failure of some of the judges in the first approach to distinguish between biological and culturally constructed sex differences, court cases were wrongly decided because these judges misconstrued the application of the liberal feminist theory. That these incorrect decisions were not a result of, for example, any sexism inherent in the Fourteenth Amendment or title VII is evident from the two cases Geduldig v Aiello[81] (under the *constitutional* (Fourteenth Amendment) equal protection analysis) and General Electric Co. v Gilbert[82] (under the *statutory* Title VII analysis) (Freedman:1983:917-18,944-5; Gibson:1987:1160). In both these cases the

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defense and has nothing to do with privacy (West:1988:69). The Americans view this debate as a conflict between a woman's individual liberty or privacy and that of a non-person, namely the foetus, which is regarded neither as human nor alive. See also Vance:1988: 1405,1407-8.

[81]417 US 484 (1974).

[82]429 US 125 (1976).

Supreme Court, although it had applied the special treatment or difference theory, said that "singling out pregnancy for disadvantageous treatment was not discrimination on the basis of sex" (Littleton:1987:1305).[83] Liberal and radical feminists are, for different reasons, in agreement that these cases were wrongly decided (Gibson:1987:1155-57,1159-60,1177). Given the ambiguity in the interim South African Constitution in relation to pregnancy discrimination, the Geduldig case, because of its potentially negative implications, warned that constitutional revision might be necessary (Czapanskiy:1995:44-45).[84] In reaction to the General Electric decision, Congress passed an amendment to Title VII called the Pregnancy Discrimination Act of 1978 (PDA)[85] which amended the definitions section of Title VII (which prohibits sex discrimination) to provide that discrimination on the basis of, among other things, pregnancy and childbirth amounted to sex discrimination. The main purpose of this amendment was to remove the barriers to equal employment opportunities. In comparison to the special treatment approach followed by the courts, the PDA thus adopted an equal treatment approach to pregnancy (Gibson: 1987:1157; Garvey & Aleinikoff:1991:403-5; Dowd:1986:699;739).

Since the 1960s feminist law reform has increased mainly in the areas of rape, sexual harassment, reproductive freedom (abortion) and pregnancy rights in the workplace

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[83]Gibson:1987:1155-1156; Littleton:1987:1305 fn 147,1326,1399; Scales:1986:1375 fn 9; Dowd:1986:737; Garvey & Aleinikoff:1991:402.

[84]S 8 (2) of the interim South African Constitution does not expressly mention pregnancy and childbirth as grounds of unfair discrimination. It does, however, mention both sex and gender as grounds of prohibited discrimination. Had the final Constitution not clarified the matter, the latter grounds could have been used to develop the argument that the interim Constitution prohibits discrimination flowing from both sex and gender, for example, pregnancy discrimination (Czapanskiy:1995:45-46). However, the final Constitution (S 9 (3)) has now solved the problem by including both pregnancy and birth as grounds of unfair discrimination. See 9.6.1.

[85]Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. s 2000e(k) (1982)).

(West:1988:61). It appears that reforms in the areas of domestic violence and even reproductive rights (abortion) have been welcomed more than reforms in the areas of childbearing and childrearing, where changes have been very slow with the 50 states developing no pregnancy or child care leave policies (Gibson:1987:1145). In European countries like Sweden, for example, the position is completely different; over and above paid maternity leave, there are generous leave policies and paternity leave for fathers (Gibson:1987:1149-50). However, the Swedish experience indicates that initially more women than men made use of these leave benefits "...indicating that laws and policies do not change deeply embedded societal attitudes overnight" (Littleton:1987:1334-5 fn 281; Finley:1986:1174).

The "differences" approach adopted by the Supreme Court was not clear in theory nor consistent in application. Thus, some liberal proponents of the special treatment theory have recommended a refinement of this approach by further legal or social change on the basis of public policy (Dowd:1986:701,764-5). In contrast some neutral feminists critisize the usefulness of equality analysis (sameness/difference theories) "...as a transformative device for challenging the social and economic subordination of women" (Finley:1986:1121). These feminists have voiced a need for a legal framework to replace the doctrine of separate spheres, with legal policies that treat these public and private spheres as an overlapping continuum.

In its struggle over the meaning of equal rights theory in the context of sex discrimination cases, the Supreme Court has indicated that American courts (as is the case with the First Amendment religion clauses) "...function as a major forum in which equal rights theory is debated and articulated..." (Freedman:1983:917). Radical feminists are of the opinion that feminist jurisprudence should rid itself of its abstract approach to inequality in order to find better solutions to the problem. Thus for a successful implementation of the inequalities approach, adjudication should undergo a transformation with changes in judicial personnel to accommodate the

implementation of a feminist approach (Scales:1986:1373-4,1398).[86] "The judicial role must transcend social conditioning in such matters; in this respect, the judge must be *above* other men" (Johnston & Knapp:1989:174,176). It has been predicted that by as early as 1998 or as late as a few decades from now, the insights of the work of radical feminists and proponents of the inequalities approach will be regarded as "substantially correct in the legal culture" (Sunstein:1988:848; Scales:1986:1399).[87]

However, despite their differences, all feminists are in agreement that a good start in the direction of transformation would be to have legal discourse or language, a social creation, enlarged to include the voice of women[88] (Finley:1986:1167; Littleton:1987: 1302). In other words, the call is for women to ensure that they are included in legislative developments, as their silence inhibits the study of their subjective lives and with greater awareness and confidence will come the realization that women are the authors of their own fate (Gibson:1987:1163,1165; West:1988:55,71; Whitman: 1988:1395).

There are many state and federal laws discriminating against women and the equal rights (Fourteenth) amendment to the US Constitution has achieved mostly symbolic success in abolishing discrimination against women (Rhoodie:1984:137-138). "The major problem in the United States may be less of a constitutional one, less the correct wording of a potentially successful Equal Rights Amendment Act and *more*

[86]Recent US studies conducted on gender bias in state and federal courts indicate that judges have difficulty in understanding women's lives. However, task forces emphasizing judicial training have made much progress in overcoming this hurdle.

[87]Since 1989 the Canadian courts use a new test for discrimination which views situations from an angle of disadvantage rather that of similarity and difference (O'Neil:1993:11).

[88]"The 'different voice' strand of feminist theory...which...does not deal explicitly with language, asserts that there is a distinctly female way of approaching moral and legal dilemmas and that that way has been ignored or downplayed in legal doctrine and scholarship" (Sunstein:1988:827). See also Littleton:1987:1281.

that of the attitude of men towards women in general" (emphasis added) (Rhoodie: 1984:143). Further social evolution will allow constitutional challenges to deeply ingrained social, cultural, religious or gender-based patterns of discrimination to succeed (Mayer:1991:1035). The US experience thus confirms that constitutional and statutory guarantees alone are not enough to bring about effective change for women nor can this be expected of courts.

7.6 CONCLUSION

The US experience contains several lessons for South Africa. Freedom of religion is a complex right as the extremes of US jurisprudence highlight. "[T]he kind of public secularism that seems to have infected [US] society could lead to a demand for freedom *from* religion rather than for freedom *of* religion. The result is a dull and conforming secularism rather than religious diversity and tolerance" (Carpenter: 1995b:695). While the foundations of the US is based on religious freedom and Christian values, it has formally and strictly separated state from religion (Rountree:1990:203,215; Garvey and Schauer:1992:437). However, even though a greater role was envisaged for secularism in the new South Africa, there is no separation between state and religion.[89] The fact that the interim and final South African Constitutions specifically make provision for recognition of religious laws implies that it cannot absolve itself from the consequences flowing from such recognition. The US experience shows that even though South Africa has only chosen to subscribe to the US equivalent of the "free exercise"clause, this is no guarantee that all religions are going to be treated on the basis of complete equality and tolerance.[90] The US, like South Africa, is an example of a society where there is a "dominant" religion or religious group. In the US freedom to believe and to practice

[89]See 9.3 below.

[90]See 9.3 below.

a religion of one's own choice does not necessarily require "exactly" the same treatment for all religious groups. Separation of government and religion by article VI and the First Amendment occurred to assure Americans of various religions a large degree of equality over the last two hundred years, yet it seems that this objective has not been fulfilled because separation did not necessarily provide religious minorities with greater protection (Kurland:1986:861). This proves that such a separation is no automatic guarantee that religious freedom will ensue. This at least provides some hope for Muslims in South Africa who feel that state involvement in religion might prove to be detrimental to religious freedom.

S 14 (1) (now S 15 (1)) of the interim Constitution (modelled on Article 18 of the ICCPR) allows everyone "the right to freedom of conscience, religion, thought, belief and opinion". While our Constitution specifically provides that international human rights instruments must be taken into consideration in the interpretion of its provisions,[91] the same status is not accorded to such instruments which, for example, promote gender equality and religious freedom, in US law. Thus the South African Muslim minority has a further and "outside" safeguard to their religious rights which affords them greater security than that enjoyed by their US counterparts.

The US experience also indicates that one of the implications of the practical implementation of the right to freedom of religion and belief is that it is very difficult to achieve a balance between holding of beliefs and the manifestation/practice of those beliefs.[92] US Muslims critisize the constitutional provision of "anti-establishment" of religion and the fact that they are not always allowed the "free exercise" of their religious and practices. In contrast, the South African Constitution even goes so far as to specifically provide the Muslim minority with an opportunity to have MPL

[91]See 9.7 below.

[92]See 8.2 - 8.4 and 8.6 for further detail on the US experience.

recognized.[93] Furthermore and in conformity with international protection of minority rights, S 31 (1) of the final South African Constitution now specifically provides that religious communities may not be denied the right to practise their religion. However, like US law, South African law places limitations on the "free exercise" of certain religious practices, for example, polygyny. In South Africa there is an informal "separation" when it concerns religions other than Christianity. In this sense non-recognition of MPL means that local Muslims experience a similar freedom to their US counterparts to practice religion without the fear of government and Muslim traditionalist interference. However, having this freedom also means a lack of state protection. Thus a recognized MPL in South Africa (subject to the Bill of Rights)[94] will be subject to both state scrutiny and state protection. Such subjection will avoid disastrous repercussions on various other constitutionally guaranteed rights of Muslim women like the right to life, work, education, freedom of movement and so forth.

The disregard for UN instruments also means that the decisions of the US Supreme Court take on an added importance. Unlike the South African Constitution which defines rights and freedoms in great detail, the US Constitution couches protected rights and freedoms in wide and general terms giving the Supreme Court, as the "single, ultimate authority on constitutional law", wide scope in the determination of its meanings (Mayer:1991:1016). However, in Muslim countries[95] whose constitutions are modelled on that of the US "...the extent of jurisdiction of superior courts has remained expanded or restricted *according to the will of the majority*" (emphasis added) (Ishaq:1985:215). However, the fact that the Supreme Court has violated the metaphorical wall of separation in favour of establishment is cause for great concern for religious minorities. South Africa may have to face the same

[93]See 9.4.

[94]See 9.6.2 below.

[95]See Chapter Six.

challenges even though we do not have an establishment clause in our Constitution. During the last 50 years the interpretation of the First Amendment alone has given rise to a wealth of "free exercise" and "anti-establishment" cases in the US. However, it is still not clear whether the US Constitution has two separate religion clauses or a single clause with two facets as this uncertainty has not been resolved by the US courts (Carpenter:1995b:686,692,695). These cases also demonstrate that formal separation of state and religion did not really occur in practice. Cases have advanced both Christian values and the free exercise of the beliefs of multicultural communities. From the US case study on the religion clauses it becomes clear that courts should not be considered as the sole or most important protectors of religious freedom as its authority does not extend beyond the Constitution. Society, in its politics and rhetoric, should play a more important role along with the commitment of citizens (Carter:1994:38,145; Galanter:1966:296).[96] US case law has failed to resolve the controversy surrounding the First Amendment religion clauses. While much can be learnt from US experiences on freedom of religion and related rights, the US Constitution, its Bill of Rights and case law can at best merely serve as a guideline to South Africa. US constitutional scholars also warn "...that South Africa should not place all its faith in a Bill of Rights and an independent judiciary" (Licht and De Villiers:1994:2-3).[97] Our courts have to look for solutions unique to multicultural South Africa. The fact that the Supreme Court has recently upheld the "free exercise" right of a Muslim South African schoolgirl to wear Islamic dress in a state school indicates a move in this direction (*The Argus*:1995a:6).

The US experience also shows that it is not necessarily true that freedom of religion and belief, because it is related to an individual's inner conscience and should therefore belong to the private sphere, can best be guaranteed through a separation of

[96]See 9.8.1.

[97]See also 9.6.1 and 9.6.3.

church and state. In contrast to the US, the South African interim Constitution's S 14 (1) extends to religion an individual *and* associative dimension. S 14 (1) is circumscribed in S 14 (2) (now S 15 (2)) by a provision allowing, on certain conditions, the conduct of religious observances at state or state-aided institutions, which include educational institutions, prisons and state hospitals[98] (Du Plessis: 1994b:725; Du Plessis:1996:460). Thus freedom of religion in S 14 (1) cannot be construed to entail freedom from governmental practices which advantages one religious perspective over another as is the case with the US First Amendment establishment clause. While the exemption added to S 14 (2) helps to avoid the situation in the US where problems were experienced with having to decide what type of religious observances, if any, were allowed at public or state institutions, it does not provide much protection. It is not easy to give practical effect to this because in order to provide relief, religious observances must be conducted on an equitable basis and attendance at a religious observance must be free and voluntary (Mureinik:1994: 44-45; Steenkamp:1995:109-110). Furthermore, state endorsement of a particular religious perspective can be construed to be inequitable to those who do not subscribe to that perspective.[99]

S 14 must also be read together with other provisions in the Bill of Rights which favour the exercize of religious freedom (Du Plessis and Corder:1994:158). These include S 15 (1) (now S 16 (1)) relating to freedom of speech and expression;[100] S 17 (now S 18) (freedom of association); S 31 (now S 30) (language and culture); S 32

[98]This limitation appears to override S 33 (1) (now S 36 (1)). See 9.6.2, especially footnotes 109 and 110.

[99]See Mureinik:1994:45-46. In 9.6.3 it will be determined whether or not S 14 (1) has a horizontal or vertical application (Carpenter:1995b:686).

[100]See 5.2.1 and 2.2.4.1 above.

(c)[101] (now S 29 (3)) dealing with the right to establish independent educational (not precluding religious) institutions at their own expense and finally S 8 (2) (now S 9 (3)) which proscribes unfair discrimination on the grounds of, among other things, religion and belief. While there is no establishment clause in our Constitution, cases resembling US "establishment of religion" could be brought under our non-discrimination clause or even under freedom of expression or association (Carpenter:1995b:689).

Formal recognition of MPL must ultimately have a ripple effect on all other types of labour-related and other legislation. Failure on the part of our courts to take cognizance of the rights of religious and cultural minorities, will lead to and have various constitutional repercussions. While this has not really been a problem in a Muslim country, our Constitutional Court[102] will have to deal with cases of Muslims seeking redress to their basic rights to pray at work, dress in a particular manner, not to work on a religious/sabbath day and so forth. India and the US have, however, dealt with such issues and it can be expected of our courts to seek guidance from their experiences. However, the fact that the US, even with a separation of state and religion, has to date not resolved religious freedom problems after so many years indicates that South Africa can prepare itself for an extensive and interesting case history. Our Constitutional Court has recently confirmed that, like the US Bill of Rights, which has a vertical application, the interim Bill of Rights is predominantly

[101]While S 32 (c) (and corresponding S 29 (3)) provides that such education be anti-racist, a provision that it need be gender-sensitive is not so included. This allows for patriarchal monopoly over religion to be maintained because it is common practice for Muslim women to be excluded from religious institutions of this nature. Furthermore in contrast to the US anti-establishment clause (which nonethless has been violated in the US), S 29 (4) of the final Constitution does not preclude state financial backing to such institutions. See also 9.4.1 below.

[102]See 9.8.3 below.

vertical in operation.[103] The final Constitution, however, appears to provide more scope for a horizontal application and guidance can be sought from the US experience. The manner in which the Constitutional Court addresses the issues pertaining to religious freedom and equality will have a profound effect on the lives of many Muslims, especially women. Although there have been important decisions on the interpretation of the interim Constitution, very few have specifically dealt with gender issues or the application of feminist jurisprudence. Thus no general or accurate assessment can be made of the judiciary's role in this regard (Du Plessis and Gouws:1996:13). Nevertheless, the decisions of our judges will have to complement and accord with the new human rights culture in South Africa.

In the US a legal interest regarding gender equality developed in response to analogies between the position of racial minorities. The notion of separate spheres was originally used in a racial context, which was only done away with in 1954 in order to give effect to the constitutional equal protection clause (Littleton:1987:1287-8). Similarly, in South Africa it was only with the abolition of apartheid that real gender legislation in favour of women was contemplated.[104] US and South African women have in common that their lives and experiences need to become more visible. The "equal protection" clause contained in our equality clause is based on the American formulation adopted in the Fourteenth Amendment to the US Constitution. Judging from the extensive and contentious constitutional and jurisprudential debates in the US, the door is wide open for a similar development in our constitutional and case law. The legal concepts of equality have for many years been debated and articulated in US courts. US decisions have been successful in achieving at least formal equality between the sexes and notwithstanding instances of inconsistency in this regard, the US decisional methodology does allow for the flexibility required to achieve a degree

[103]See 9.6.3.1.

[104]See 9.2 and 9.6.1.

of substantive equality (Czapanskiy:1995:39). Current South African feminist and academic legal writing and "concrete law reform" can be located within the corresponding framework of these debates in the US (Kaganas and Murray:1994:4). Thus our courts should turn to the decisions of US courts for interpretive guidance only. Our decisions should reflect the circumstances peculiar to South Africa and the current transformation taking place here. South African women, for example, have the protection of instruments like CEDAW, which US women do not have. We can also learn much from US experiences on gender bias in courts.[105]

In South Africa both the interim and final Constitutions included sex and gender as conditions protected against discrimination.[106] Taking the cue from the US experience, the final Constitution now also includes pregnancy and birth within this scope of protected conditions. Unlike the US experience, our Constitution adopts a completely neutral stance to abortion.[107] Most of the modern US law under the constitutional equal protection clause and the statutory title VII is indicative of an understanding of the special treatment or difference theory (Sunstein:1988:830-1).[108] Because gender development in South Africa still has a long way to go it has been advocated, for both technical and structural reasons, that sex discrimination cases based on the test outlined in Craig v Boren[109], which *allows* some gender-based discrimination to survive constitutional review, "...be used as interpretive guides by constitutional decision makers in South Africa" (Czapanskiy:1995:38-39). None of

[105]See 9.8.1 and 9.8.2.

[106]See 9.6 and 9.6.1.

[107]A Bill which will legalize abortion on demand up to the 12th week of pregnancy has now been tabled in Parliament. See 9.6.1, footnote 95 (South Africa) and 3.3.1 (Islamic) for more detail.

[108]See 9.6.1 for the position of these theories in South Africa.

[109]See footnote 60.

the theories formulated by US feminists has adequately solved the problems with regard to the doctrine of separate spheres. The US Constitution has been referred to as "negative" because its lack of protection of certain rights and its negative interpretation by US courts has denied certain rights to women (Mabandla:1993:7; Copelon:1995:208-208). US constitutional and statutory experience highlight that having a Bill of Rights does not guarantee improvement to the status of women nor is there any guarantee that legislation or courts will bring about social change resulting in equality of the sexes. This is true for South Africa even though there has been a spate of gender legislation developments in South Africa.[110] The US experience has taught that "...it is not enough for [South Africa] to commit itself to gender equality at a constitutional level. Social change will not occur for women unless activists, judges, attorneys, advocates and academics ask questions about who sets the standards, who is included within those standards and who is invisible. Although this process is arduous, its holds the promise of converting a formal commitment to gender equality into a reality" (Czapanskiy:1995:47-48).

[110]See 9.2 and 9.6.1. This is also true for reforms in Islamic law. See 2.1.5.

CHAPTER EIGHT

ALTERNATIVE METHODS OF DISPUTE[1] RESOLUTION IN SUPPORT OF THE IMPLEMENTATION OF MPL IN SOUTH AFRICA

8 INTRODUCTION

In South Africa Muslims are subject to the state legal system but are also morally bound to a system of religious law which is as yet not recognized by the state. Non-recognition has meant that for 300 years resolution of their religious disputes were left in their own hands.[2] While these disputes were usually resolved in their own unofficial tribunals, Muslims have on numerous occasions resorted to state courts when these tribunals failed to meet their needs and expectations. This, however, in no way implied that secular courts were better able to deal with religious issues. While in the new dispensation constitutional provision for the possible recognition of MPL has been made, it remains to be seen *how* such recognition will in fact materialize. Freedom of religion in its various manifestations does not necessarily require the same treatment for all groups.[3] S 22 of the interim Constitution (and S 34 of the final Constitution) provides that members of religious communities "...shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum." This means that recourse can (as of right) be had to 'an outside referee' should members of a religious community

[1]While the two concepts of dispute and conflict might be linked or even used interchangeably there is a distinction between "...disputes which are a feature of normal and frequently collaborative and creative relationships, endemic in all social relationships, and an integral part of competitive systems...and...conflicts which are deeply-rooted in human needs, and which frequently require major environmental and policy restructuring for their resolution" (Burton:1990:1). The concept of dispute will form the basis of this chapter.

[2]See 2.2.3 above.

[3]See Chapter Seven.

not be able to resolve their disputes among themselves" (Du Plessis:1994c:64). While S 22 appears to give some legitimacy to existing religious tribunals, S 166 (e) of the final Constitution goes one step further by providing that "any other court established or recognized by an Act of Parliament" would be a court of the Republic.[4] Muslim religious authorities, calling for the establishment of religious courts, wish to utilize the latter option. In Chapter Nine it will be indicated that while religious authorities support the recognition of MPL, they want such laws to be implemented in separate, specially created *Shari'a* or Islamic courts.[5] In order to assess the feasibility of such a recommendation in Chapter Nine, it is necessary to determine whether existing religious tribunals and secular South African courts which have been performing this function have been doing so adequately and whether recourse can be had to other effective methods of dispute resolution in conjunction with these courts and tribunals in order to determine whether practical legal effect can be given to S 22 (now S 34) of the Constitution. This chapter therefore examines the feasibility of linking alternative methods of dispute resolution (like religious tribunals, mediation and negotiation) to tie in with the role of secular courts in order to give effect to an implementation of a recognized MPL in South Africa as this would obviate the need for separate *Shari'a* courts. It is envisaged that the implementation of MPL will follow as a consequence of its being recognized. However, because Muslims are divided on the issue of subjecting MPL to the final Bill of Rights, the possibility remains that MPL will remain unrecognized or recognized but not sustainable (and therefore unenforceable).[6] Thus it becomes important to gain more insight into how disputes are settled both in instances in which a state refuses recognition or recognizes a system of personal law.

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[4]See 9.8.2 below.

[5]See 9.8.5 below. The Islamic judicial system and its implementation in certain Muslim and non-Muslim countries were examined in Chapters Four and Six respectively.

[6]See 9.4.1 and 9.4.2 below.

There is not as much information about the relationship between the resolution of internal religious community disputes and state legal systems as there is about conflicts between religion and the state (Halperin-Kaddari:n.d[1993?]:1-2). Many theories try to explain how religious law should be treated by the state's legal system and *vice-versa*. They "...range from state suppression of religious law, through various forms of intervention, limitation, recognition, and application, to religious control over state law" (Galanter:1981:28). These theories appear to be relevant in the South African situation[7] too in the sense that there have been occasions where secular courts in South Africa restricted MPL practices, like polygyny, with reference to "public policy". There have also been instances where religious tribunals restricted the religious freedom of individual Muslims or condoned discriminatory practices as being in conformity with Islam.

Sanders (1991:68) has identified religious law (MPL) as a new area for legal anthropological research in South Africa. Assuming that we are ignorant of how all disputes among Muslims are settled in South Africa, international experience will provide useful indicators, not only about what *might* be happening here but also about how future South African policies should be developed.[8] For this reason legal anthropology (irrespective of the Western or Islamic nature of the discipline) and how it brings to our attention other ways of dispute resolution, will be briefly highlighted. The US experience is also looked at in this chapter because it was held to be the main comparative example from the West in Chapter Seven above. The role of state courts in resolving disputes of a religious nature and the circumstances that prompt individuals to select one forum over another will then be assessed with a view to determining whether secular court procedures are adequate. The main focus will be

[7]This is demonstrated in this chapter as well as in Chapters Two and Nine.

[8]For more information on the South African legal system "...an unashamedly first-world-model institution" and its courts see 9.1, 9.2 and 9.8 (Corder and Davis:1988:4).

on decisions of the Cape[9] Provincial Division of the Supreme Court because some disputes it has adjudicated have directly or indirectly involved the Cape-based Muslim religious tribunal, which will also be discussed below. The viability and role of alternative methods of dispute resolution, like mediation[10] and negotiation, in implementing a recognized MPL, will also be considered. The role of internal religious tribunals as mechanisms for the resolution of disputes will then be looked at. As indicated, the focus will be on the establishment and function of one such Muslim religious tribunal in the Western Cape, namely the Muslim Judicial Council (MJC)[11] in order to determine whether it seeks to mediate and/or adjudicate/arbitrate and whether or not parties, for example, seek arbitration over and above other dispute resolution methods like mediation and negotiation. A brief examination of the legal implications of litigation inside the Christian Church in South Africa will also follow because this can provide valuable lessons for the recognition of MPL.

As indicated, this Chapter examines alternative methods of dispute resolution in support of the implementation of MPL in South Africa with a view to substantiating further recommendations to be proferred in Chapter Nine.[12] It is divided into the following sections. Anthropological insights into different ways in which disputes can be resolved are assessed. The role of secular courts in resolving disputes of a religious nature will then be looked at in order to determine whether it is adequate. This will be followed by an examination of alternative methods of dispute resolution, for example, mediation and negotiation. The role of religious tribunals as alternative mechanisms in resolving disputes is then examined in order to establish just how well

[9]See 2.2.3, footnote 59.

[10]Mediation in the context of this chapter presupposes that the disputes are between people who share a common religion or culture.

[11]Hereafter abbreviated to MJC.

[12]See 9.8.5.

existing religious tribunals operate in South Africa. Finally, the chapter undertakes a brief examination of the experience and implications of litigation within the Christian Church in South Africa with a view to exploring how it can aid a recognized MPL.

8.1 LEGAL ANTHROPOLOGICAL INSIGHTS INTO DISPUTE RESOLUTION

Legal anthropology, also known as "ethno-jurisprudence" or ethnology of law, is the study of rules, processes and values at grassroots level (Sanders:1991:66; Allott and Woodman:1985:3; Pospisil:1978:1). The insights provided by legal anthropology to academic legal studies lie in its research methods and an emphasis on aspects of our legal system that academic lawyers fail to consider, namely the existence of various alternative methods of dispute resolution, the need to take account of the situation and perceptions of litigants and the general social context of the law (Snyder:1981:160). Legal anthropology (and the study of methods of dispute resolution in law) is a relatively new concern which really only started to gain momentum during the post-colonial period when different kinds of societies were compared with one another to ascertain (among other things) whether there were similarities and differences in their methods of dispute resolution (Roberts and Mann:1991:6; Witty:1980:1; Nader:1990: xvi; Bennett:1991:51). Most anthropological investigations referred to in this paragraph seemed to have been more preoccupied with processes rather than the analysis of institutions or the formulation of rules (Roberts:1979:199; Fuller:1971:305 -306; Allott:1985:21; Bennett:1991:53). There was therefore a movement from a preoccupation with rules to a study of courts. The case-method approach has proved particularly useful in accommodating this shift from structure to process in the cross-cultural study of law (Nader and Todd:1978:5; Moore:1978:232-233). It must, however, be noted that "[t]he disputing process is neither merely a process of solving problems nor merely a study of the manner in which problems are addressed. It is a political process whereby divisions are created or overcome, whereby ideologies are formed" (Nader:1990:7).

In spite of a late start anthropological studies have made much progress in the study of methods of dispute resolution. These studies are of a high standard and diverse in nature. Anthropologists have produced cross-cultural material on formally recognized institutions of dispute resolution as well as alternative methods of dispute resolution in which they have compared negotiation with mediation, arbitration and adjudication techniques. These studies gives us a good idea of how disputes are managed in specific societies (Nader and Todd:1978:2). The guidelines contained in these studies indicate that irrespective of the nature of the discipline (Western or Islamic)[13] a certain method of settling disputes, like mediation,[14] will be chosen in particular situations because it "performs predictable personal and social functions, regardless of the cultural setting" (Witty:1980:7). These methods can therefore be used in support of an implementation of a religiously-based MPL unique to South Africa, because as many influential writers also maintain, basic terms such as "judicial system","law" and "legal institutions" "...are clearly circumscribed and readily comparable across cultural boundaries" (Comaroff and Roberts:1981:4).[15]

A valid criticism that can, however, be directed at anthropological studies is that

[13]For the contrary argument, namely that the nature of the discipline is relevant, see Ahmad:1986:7,25; Asad:1986:1; El Fadl:1992:268,270; Mayer:1991a:92,94; Rosen:1987:2). See also Davies:1985:45 and 1988. There might be merit in the argument that an "Islamic anthropology" might be better suited to make findings on Muslim societies. It is also true that functionalist anthropology in the 1900s became more tolerant of the fact that foreign institutions like customary law ought to be judged by their own, instead of Western European, standards (Bennett:1991a:24). Furthermore, it is also a fact that there is a dearth of Western anthropological studies relating to the Middle East and other regions and whether or not these studies in general or their publications on Islam are accurate, they can provide valuable insight and guidance for similar research in South Africa because certain features and themes can have validity across cultural and other boundaries. These studies include the works of Nader:1985,1990; Witty:1978,1980; Rosen:1980-1981,1987,1989; Antoun:1990; Dwyer:1979,1990; Starr:1981,1992; Starr and Collier:1987; Gulliver:1977; Mohsen:1990; Ghani:1983; Lev:1972; Von Benda-Beckmann:1981 and Yusuf:1982.

[14]See 8.3 for an explanation.

[15]See also Roberts:1979:186,194; Bozeman:1976:ix and Bozeman:1971:78.

reporting does not necessarily (accurately) reflect the true status of Muslim women because reporters are mostly male anthropologists who have little access to or contact with Muslim women during their research as a consequence of restrictions (like seclusion) placed on these women which do not allow them to make contact with males (Ahmad:1986:58). Furthermore, anthropologists studying the legal status of women in the Middle East have been accused of placing too much emphasis on personal laws at the expense of other fields of law, for example, criminal law (Mohsen:1990:15). In South Africa Muslims can only seek redress to criminal law issues in secular courts and as will be indicated[16] both the interim and final Constitutions make provision for only one aspect of Islamic law, namely MPL (family law), to be formally recognized. Anthropological studies do, however, highlight that in the Middle East "[t]raditional legal authorities continue to enjoy considerable recognition in the interpretation of law and mediation of local dispute[s]" (Johnson and Lintner:1985:238). Furthermore, cultural systems and law influence each other to perpetuate inequalities even though classical Islamic law has not necessarily made custom a source for deciding judicial cases (Rosen:1989:302-315). The negative consequences of such conservative interpretations on the status of Muslim women have been outlined above[17] and will be further detailed below[18] when the role of the MJC in disputes of a matrimonial nature is discussed. These studies further highlight that the rights of women and their public roles are receiving more recognition both within and *outside* of the *Shari'a* courts where women are also becoming more active participants. Definite rules also define the conduct of the *qadi* (Islamic judge) with his jurisdiction basically being limited to personal and commercial law matters (Ghani:1983:353; Antoun:1990:35). In secular Turkey, on the other hand, because village women benefited more from bringing their disputes before the national courts

[16]See 9.4.1.

[17]See 2.1.4.

[18]See 8.4.

rather than the traditional village mediators, they usually chose the former (Starr: 1992:xl,89-115; Starr:1980:23; Starr:1990:91; Starr:1978:122).

The experience of developing nations has shown that modern secular judicial systems generally do not satisfy the real needs of the general population. This emphasizes the need, in both third world and modern societies, for inexpensive, simple and accessible methods of dispute resolution to exist together with formal judicial systems (Cappelletti:1979:vi). It is therefore not surprising that "[e]very society develops a range of mechanisms for resolving disputes, some of which are informal, rooted in such local institutions as religious association" (Merry:1982:18). For these reasons the experience of existing Muslim religious tribunals in South Africa must not be overlooked when considering options for the implementation of MPL. In Muslim countries, where Muslims are obliged to abide by their personal laws, informal methods of dispute resolution also co-exist with formal judicial systems. In some Muslim countries the national legal system is superimposed on the religious system and in other Muslim countries there is a separation between religious or *Shari'a* courts (dealing with personal law matters) and secular courts.[19] Disputants, nevertheless often find themselves in a position of having to exercise a choice between using the state courts of the national legal system (which either incorporates *Shari'a* courts or where they exist independently) and alternative dispute-resolving mechanisms (Ayoub:1965:11; Nader and Todd:1978:29).[20] *Shari'a* courts have become main centres of dispute resolution alongside *other* mechanisms of conflict resolution, but Muslims often resort to using the alternative mechanisms as a first step to dispute resolution. The difference in South Africa is that although MPL is as yet not formally recognized, Muslims have always practised their religion but as citizens have exercised a choice between using existing state and Muslim religious legal and

[19]See 4.2, 6.2 and 6.3 above.

[20]See 8.3.

judicial systems. However, their choice of courts was limited in the sense that secular courts did not necessarily entertain disputes of a religious doctrinal or purely MPL nature, especially when they considered these to be outside of their jurisdiction or in conflict with state policy. Muslims can nonetheless chose to use secular personal law over religious personal law and can also resort to secular courts to resolve disputes (even of a religious nature). In terms of provisions of the interim and final Constitutions[21] it further appears that Muslims as citizens can exercise this choice between secular and religious courts *even if* MPL was in fact to be recognized, religious courts were in fact to be established[22] or existing religious tribunals were to be given legal status. In view of the possible recognition of MPL, international legal anthropological studies serve to provide valuable insight into finding those dispute resolution methods best suited to the unique needs of South African Muslims so that they can balance their public and private lives without having to compromise one or the other. However, not only is legal anthropology itself a relatively new science but religious law is also a new area of anthropological research in South Africa. For these reasons too much emphasis must not be placed on international anthropological studies. The focus should instead be on its further development in a South African context.

8.2 ADEQUACY OF SECULAR COURTS IN RESOLVING RELIGIOUS DISPUTES

In this section the role of the South African judiciary, particularly the Cape[23] Supreme

[21]See for example, S 14 (now S 15) (freedom of religion), S 8 (now S 9) (equality and equal protection of the law) and S 22 (now S 34) (access to justice) of the interim and final Constitutions respectively. See also S 166 (e) (establishment of new courts) of the final Constitution.

[22]See 9.8.2.

[23]See section 8 above.

Court, is examined to ascertain its success in resolving disputes of a religious nature and also to determine what factors and circumstances influence the ways in which Cape Muslims settle their disputes. A broad spectrum of cases, not limited to any specific period, will be examined.

Individual members and groups of the Cape Muslim community have often had (and still have) recourse to secular state courts. They engage these secular courts to resolve religious disputes and to enforce either religious or secular law even against their own informal religious tribunals with whose decisions and opinions they are not satisfied. Sometimes even the religious tribunal itself (MJC) has recourse to state courts. This is so even though its members often regard themselves as a source of authority equal to that of the state judicial system. Emphasis will be placed on how religious groups have used state courts to resolve religious disputes and how they have brought these disputes within the jurisdiction of these courts. In cases where state courts did adjudicate in religious disputes it will be determined how their decisions influenced the attitudes of religious groups towards the secular state courts and ultimately the continued use of state courts.

As background to recent case law involving Cape Muslims and the role of the South African judiciary in these disputes, it needs to be determined what exactly made early Cape Muslim society obey rules[24] and how their disputes were settled, assuming that there were no Muslim judges or religious tribunals operating at that stage (Roberts:1979:12,185). Because political and social history are important forces in shaping the jurisdiction of Islamic law, their influence on Muslims in the Cape must not be underestimated (Bradlow:1985:41). With the British Occupation of the Cape in 1795 Roman-Dutch law was retained as the general "civilized" law of the colony. Any other system of law was irrelevant (Bennett:1991:111). As far as Islamic Law was concerned it was observed in 1907 that "...the superior courts of South Africa

[24]See 2.2.1.1 above.

have for a century [already] been...in darkness as to the precepts and principles of Mohammedan law" (De Villiers Roos:1907:177).[25] The extent of this ignorance is apparent from decisions of the Supreme Court which concerned similar issues but on which the court gave varying decisions. For example, in one case a Muslim marriage was accepted, in another it was considered to be a concubinate relationship, in yet another it was considered a business partnership. In another case it was boldly recognized and the dispute resolved according to the principles of MPL (De Villiers Roos:1907:186). The position is still very much the same today almost two centuries later. This type of confusion, however, reinforces the need for a code of MPL to assist courts in such matters.[26]

It needs to be determined when and why religious groups use secular (state) courts to resolve religious and intra-group disputes. It is believed that Muslims were finally induced to participate in the judicial mechanisms of the state "...from as early as 1843 on [where one] can discern a process of disintegration affecting the Islamic structure of the muslim community...By the mid-1850's there can be no disputing this. By 1856 it would seem as if the internal squabbling within the muslim community, *particularly among the ulema*, had reached such proportions that they were unable to solve the issues internally, and external mediators were appealed to" (emphasis in italics added) (Bradlow:1985:141). Bradlow (1985:128) points out that by the beginning of the 1860s Muslims "...turned to the judicial apparatusses of the state to mediate conflicts they seemed unable to settle in the traditional manner, i[.]e[.] via the mediation of the ulema."

Davids (1980:5) sums up the types of early religious disputes with which the Cape Supreme Court had to contend: "Over twenty cases has been located between 1866

[25]See also 2.2.3 and 9.8.1.

[26]See 9.8.5 and Chapter Ten.

and 1900 in which the position of the Imam[27] was disputed...[including] internal conflicts [such] as the Hanafee-Shafee Dispute, the Shafee Juma-ah Question and external conflicts such as the Khalifa [Ratiep][28] Question of 1856 and the Cemetery Riots of 1886."

As far as the *Hanafi/Shafi'i*[29] disputes were concerned, the majority of Cape Muslims adhered to the *Shafi'i*[30] school of Islamic law. However, a religious guide and mediator named Abubakr Effendi[31] at the time tried to instil (his own) *Hanafi* views on questions relating to the Friday congregational prayer (*Jumu'ah*). This caused conflict amongst Muslims and since their theologians could not resolve it, lengthy litigation and a series of Supreme Court decisions followed (Shell:1974:53). However, despite the state court's intervention, these conflicts were only finally resolved with the establishment of the MJC[32] in 1945 (Cilliers:1983:105,107; Davids: 1980:51-56).

[27]See Davids:1980:50.

[28]This is a practice which has no links with Islam. It is characterized by piercing the body with sharp objects without causing any blood to flow. This practice is accompanied with chanting and music (Davids:1980:33).

[29]See 2.1.1 for an explanation.

[30]See 2.2.2.

[31]Effendi was sent to the Cape Muslim community in 1862 by the Turkish government at the request of a Cape parliamentarian (Garabedian:1915:32; Davids:1980:53; Davids:1990: 5). See 2.2.4.1 for an initial reference to him. After he divorced his first wife, she sought recourse to the Cape Supreme Court for financial relief. This is an interesting case taking into consideration that Muslim marriages were not, as is still the case today, recognized by the state and that a Muslim woman took the initiative in suing her husband, regardless of the fact that he was considered an "official" Muslim judicial authority, in a secular court (Davids:1990:6-8).

[32]See section 8 above. See also 2.2.3 and 9.8.5.

There was also a series of mosque disputes decided by the Cape Supreme Court related to the nomination of successor *Imams* which in turn led to the establishment of more mosques in the Cape (Davids:1980:159; De Villiers Roos:1907:185). Besides these and other criminal cases there were other social issues, for example, the cemetary disputes (1858-1886),[33] property issues and so forth where Muslims also sought redress in South African courts (Bradlow and Cairns:1978:81,91,99; Davids: 1980:62-84; Bradlow:1983:15; Rochlin:1939:217 fn 1 -218; Dangor:1985:110; Von Sicard:1989:205; De Villiers Roos:1907:183-186). This is therefore evidence of both communal and individual cases and the fact that it was not necessarily issues pertaining to MPL that were disputed. This is comparable to the US position referred to below.

The underlying issues behind these cases were either doctrinal in nature, for example, disputes as to how Islam should be practised, or they related to leadership issues (Bradlow:1985 fn 3; Davids:1980:50). These cases did not really involve MPL as such. In 1873 a Supreme Court judge noted that: "'It is much to be regretted that the parties interested in this suit, instead of seeking redress in a Court of Law, did not endeavour to solve the difficulties and settle their differences amicably, and thus restore that harmony between them for which the Mahomedan community in Cape Town was at one time remarkable, but which has lately been so seriously disturbed'" (Bradlow: 1985:143). The fact that religious groups resorted to secular courts in the above instances implies that they (including Muslim women) must have had some confidence that these courts were neutral institutions mediating between the interests of different groups in society. While the remarks by the Supreme Court judge do to some extent explain why Muslims had made use of the South African judiciary in the past even when they had access to their own legal advisers/mediators (most of whom

[33]Essentially "complacent" Cape Muslims, in disputes involving the closure of their burial grounds because of a health hazard caused by a smallpox epidemic, vehemently objected to their cemeteries being closed (Davids:1984a:47-79; Bradlow:1985:187). See footnote 54.

were highly educated and imported), it still needs to be determined why they are still doing so at present.

Later case law involving Cape secular courts in essentially religious disputes will now be addressed. The focus here will be on its implications for freedom of religion under a new dispensation in South Africa. The first case involved the controversial *Ahmadiyya* issue.[34] In 1962 already the MJC condemned the *Ahmadiyya* movement as un-Islamic and its followers as apostates and in 1965 issued a *fatwa* to this effect. In so doing, the MJC had taken it upon itself to resolve and give moral judgement on the matter. Because bodies like the MJC are not necessarily bound by certain ethical rules of conduct,[35] it would have been futile for a member of the *Ahmadiyya* movement to request that the MJC reconsider its decision, to contest the impartiality of the decision or to rely on the rules of natural justice that the other side was not given a fair hearing. Thus there was no option but to resort to secular courts. In 1982[36] an *Ahmadiyya* movement, in its quest for an "Islamic" identity, made an urgent application to the Supreme Court against the spread of defamatory material and other infringements of its rights. Its members sought recourse in the South African legal system which, they believed, could give them back their identity on the basis of religious freedom. The courts, however, did not prove to be of much assistance. This appears to be in line with the US experience explained below. The MJC was cited as first respondent in the case. Van den Heever J gave judgement on 1 October 1982 to the effect that she was unable to judge, on account of the papers before her, as to whether certain teachings of Mirza Ghulam Ahmed were blasphemous or not. She set aside the application for an interdict and ordered the *Ahmadiyya* movement to

[34]Freedom of religion and the *Ahmadiyya* issue was extensively discussed in 5.2.1 and 6.3.3. See 6.3.3, footnote 104 for an explanation of this term.

[35]See 8.4.

[36]Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others 1983 (4) SA 855 (CPD) 857 G.

pay the costs of respondents (Lubbe:1989:116-119,Annexure 12 (A-21-A-34); Naudé: 1985:28). Not deterred by Van den Heever's judgement, in 1984 an *Ahmadi* individual sought an order declaring *Ahmadis* to be Muslims. The case between this individual (plaintiff) and the MJC and others (defendants) commenced before Berman AJ as he then was. Counsel for the defendants "...questioned the competence of a secular court to attempt to resolve issues of such a doctrinal nature as was involved in this case because international Islamic bodies have already declared *Ahmadis* to be non-Muslims" (Lubbe:1989:120). The view of these bodies is not necessarily reflective of the teachings of Islam.[37] However, giving judgement approximately eight months later, the court, unlike Van den Heever J, considered itself competent to deal with the issues at hand and ordered that the trial proceed (Lubbe:1989:116-119,Annexure 13 (A-35-A-54); Rahman,Fuad:1995a:5).[38]

Williamson J gives a list of past cases where the Supreme Court had been called upon to give judgement in cases where Muslim usages and customs were involved without it being considered inappropriate for a secular court to decide such matters (Lubbe:1989:124,Annexure 14 (A-63)).[39] The trial then proceeded in the Cape Supreme Court before Williamson J at which stage the defendants withdrew from the case because they "...felt that as Muslims they could not in conscience submit to the jurisdiction of this [secular] court...to decide who is a Muslim" (Lubbe:1989:121). Was it possible that the MJC could predict the outcome of this case on the basis of the willingness of the court to decide on the matter? It certainly had no qualms with the judgement by Van den Heever J in its favour. The fact that she is a female did not seem to matter either.[40] It certainly condoned other decisions of the Supreme

[37]See 5.2.1 and 6.3.3.

[38]Supreme Court (CPD) Case number 10058/82: 24 July 1985.

[39]See also De Villiers Roos:1907:176.

[40]See also 9.8.5.

Court to be detailed below. Halperin-Kaddari (n.d[1993?]:100-101) states that a court has four options when adjudicating on religious disputes: "...dismiss the suit altogether, exercise jurisdiction for the sole purpose of endorsement of the religious group's position, hear the case and employ a certain degree of review...or adjudicate the case in a regular manner ignoring the previous religious proceeedings." If a court decides that a case is not within its jurisdiction, as happened in the first *Ahmadiyya* case (1982) referred to above, then this could indirectly be construed to mean that it supports the religious group, usually the stronger party, in this case the MJC, who was being sued (Halperin-Kaddari:n.d[1993?]:101). This might also have been the reason for the MJC's willingness, despite its earlier protestations, to submit to the state courts' jurisdiction in the next *Ahmadiyya* case (1984). Nevertheless, the court in its judgement ordered, as against all three defendants, that the second plaintiff be declared a Muslim and entitled to all rights and privileges that pertain to such status. While a remark and assumption made by Williamson J before any evidence was led, namely that "in this case we see two contending groups of Muslims", was construed to amount to some prejudgement on his part, the MJC was also criticised for its late withdrawal from the trial (Lubbe:1989:124,Annexure 14 (A-55-A-99)).[41] "This judgement caused considerable consternation in the Muslim community of the Cape...the President of the MJC...was reported in various newspapers to have said that he had no intention of abiding by the judgement of Williamson J and to have urged all Muslims to ignore the ruling of the Supreme Court since 'no unbeliever can make another unbeliever a Muslim'".[42] In so doing the MJC merely displayed behaviour typical of the losing party in such cases because "...the loosing side...either chooses to go on and attack the religious outcome in a secular-civil court...or... chooses to disregard and resist it by merely refusing to act accordingly" (Halperin-Kaddari:n.d[1993?]:23-24). Even more so, "...the inconsistent behaviour of the MJC

[41]Supreme Court (CPD) Case number 10058/82:20 November 1985.

[42]Supreme Court (CPD) Case number 1438/86:23 February 1990:12. See also Haron: 1991:13-20.

by presently contesting yet another "*Ahmadi*" case before yet another non-Muslim judge, becomes rather difficult to explain and certainly strengthens the case of its critics" (Lubbe:1989:125).

In 1987 a new case was heard in the Cape Supreme Court when *Shayk* Mogamat Jassiem instituted a lawsuit against the MJC for unlawfully dismissing him. He also sued Sheikh Nazeem, the president of the MJC, for defamation because he called Jassiem an *Ahmadi* sympathizer. Both the MJC and its President defended the case. Van den Heever J, before whom this case served and who had previously considered the court incompetent to deal with doctrinal issues of this nature, then reserved judgement (Lubbe:1989:125-126). In her judgement delivered on 23 February 1990 she dismissed Jassiem's claim against the MJC for unlawful dismissal but upheld his defamation action with the amount awarded to be paid jointly and severally by the MJC and its President.[43] As is evident from the findings of this case, freedom of religion was considered an individual and not a group right.[44] This accords with international trends.[45] Van den Heever J pointed out that "...the MJC ha[d] already irrevocably prejudged the [*Ahmadiyya*] issue by accepting the ruling of 'the ulema of the world'" (at 102). In America, for example, judges are required by statute to disqualify/recuse themselves in cases where their impartiality might reasonably be questioned (Garn and Oliphant:1981:2). If a Muslim judge has already made value judgements on certain doctrinal issues such as, for example, who is considered to be a Muslim, then he is not able to give an impartial decision. If this is the case then Muslims really do not have any alternative but to seek recourse in secular courts

[43]Supreme Court (CPD) Case number 1438/86:23 February 1990:139.

[44]Supreme Court (CPD) Case number 1438/86:23 February 1990:102. See 9.7.

[45]See 5.2.1.

where they at least have the statutory assurance that judges will be impartial.[46] Both Nazim and the MJC appealed[47] against this decision and in so doing the MJC once again relied on the state courts for a judgement. The MJC was successful in that the Appellate Division of the Supreme Court, delivering judgement on 26 September 1995, upheld its appeal but dismissed Nazim's appeal, in both instances with costs (at 718-719). The Appeal Court ruled that Muslims themselves have a right to decide whether Ahmadis are Muslims and all five Appeal Court Judges (Hoexter, Smalberger, Steyn, Marais and Schutz) unanimously commented that: "One cannot deny the right of those who are legitimately charged with the protection of the Muslim faith to seek to safeguard what they consider to be the fundamental and critical tenets of their faith, and to excommunicate someone whose convictions and beliefs are in opposition to, or not in conformity with, those principles. *It would* therefore *be inappropriate for us to measure* by conventional juridical standards *the fairness or justifiability* of declaring murtad a person who persists in adopting a neutral attitude towards Ahmadis..." (emphasis added) (at 714). It was reported in a local Muslim newspaper that "new court arbitration now has favourable civil consequences for Muslims. (i) Ahmadis can now legally be debarred from mosques. (ii) Ahmadis are now legally debarred from burial in Muslim [cemeteries], (iii) Ahmadis can be denied Muslim Marriages" (Rahman, Fuad:1995a:5).

In this particular issue state courts initially did not accept jurisdiction. While it did later accept jurisdiction, it was not of much help because the court adopted a hands-off approach by declining to decide fundamental questions relating to freedom of religion. In the light of the human rights provisions of the interim Constitution this was a very unsatisfactory way of dealing with the matter.

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[46]See 9.8.1 and 9.8.2 above footnote 186 in the text for more detail on the role and partiality of Islamic courts, including the MJC.

[47]Case number 201/1992. Mohamed and Another v Jassiem 1996 (1) SA 673 (A).

The manner in which the *Ahmadiyya* matter was handled appears, however, to be in line with the US[48] approach on the basis that: "[i]t is fitting and proper for civil courts to be reluctant to adjudicate controversies of a religious nature...American law knows no theological orthodoxy, and it is beyond the competence of a court to determine the verity of any religious dogma" (Duesenberg:1959:535). Apart from many generalizations, the civil courts have on numerous occasions adopted the view that religious disputes of a purely ecclesiastical or doctrinal nature are outside of their jurisdiction (Duesenberg:1959:513). In South Africa, however, this argument would not hold as there is no clear separation between between state and religion.[49] Furthermore, provision is now made in the interim and final Constitutions for the recognition of religious law and access to justice for all. This does not, however, mean that in the US religious disputes are not heard in civil courts or that religious tribunals do not deal with civil matters as indicated below (Duesenberg:1959:513; Felstiner:1974:87). Religious disputes involving property or civil rights were considered to be within the ambit of the courts (Duesenberg:1959:513). These disputes arose within a given denomination or framework of an established congregation and included claims to church property, reinstatement of membership and burial rights.[50] Duesenberg (1959:534) writes that "...by and large American courts have handled [these disputes] very successfully and intelligently...[and] [t]hrough the decades, there has been a slow but certain trend for courts more and more to rely on the decision of the proper church judicatory." The same pattern is evident in the cases involving Muslims in South African secular courts with the only difference that doctrinal matters are in fact heard in our courts.

The tension between the religious rights of the group and those of the individual has

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[48]As evident from Chapter Seven, the US has been used as the main comparative example from the West in this dissertation.

[49]See 9.3.

[50]See also Halperin-Kaddari:n.d[1993?]:27-28 and 7.4.

by no means been resolved in the US: "Although neither pole of this dichotomy [between religious autonomy and religious community] has entirely eclipsed the other in American law, there has been significant reluctance by courts...to interfere with the internal affairs of private groups - in part out of a pluralistic desire to preserve their autonomy and diversity; in part because of the sheer *complexity* and weight of the *burden* involved in judicial forays into the *uncharted terrain* of organizational rules; and in part because of the *resentment* such *intrusion* can produce and its sharply *limited* prospects for success" (emphasis added) (Tribe:1988:1297,1155). It is, however, conceded that "[t]o make ecclesiastical decisions wholly unassailable in *civil* courts could deprive members of churches of one of the fundamental legal protections enjoyed by members of other voluntary associations" (emphasis added) (Tribe:1988: 1298).[51] The approaches of the courts in South Africa and the US clearly differ.[52]

Examples of civil law matters will be looked at next. In the Claremont Main Road Mosque case a 12-year legal battle ensued which was eventually resolved in the Appellate Division of the Supreme Court of South Africa. A dispute arose between a certain family and the Muslim community over the question of ownership of a mosque and the position of an *imam*. The matter was taken to the MJC for the resolution in 1964. The MJC decided that the mosque is *waqf* property[53] to which nobody can claim ownership and that the appointment of an *imam* vests in the mosque committee (the latter being appointed by the community). The family rejected the decision of the MJC. This shows that the judgements of a religious tribunal are not necessarily always complied with. However, the greater the likelihood that judgements will be upheld, the more suitable judgement will be as a form of dispute resolution (Eckhoff:

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[51]See 8.5.

[52]See 9.8.

[53]This is property which was permanently dedicated to a charitable cause whereafter the owner relinquishes all rights thereto or property held in perpetuity with the income devoted for religious and pious purposes (Amin:1990:165).

1967:162). This decision also indicates that where community pressure was not successful in ensuring compliance, secondary recourse to state courts was necessary. This then reduces the weight of the decisions of such tribunals. Abel (1982:3) puts it thus: "...[I]nformal institutions under capitalism must rely on state coercion rather than private threats...in order to induce the parties to consent to their jurisdiction, agree to their recommendations, and comply with them. The mere existence of coercive alternatives to informal institutions *inevitably colors the dispute process within the latter*" (emphasis added). This case therefore illustrates a link being created with state courts by referring the case to state courts in order to affirm a decision of the MJC. What happened in the interim was that an appointed board of trustees took this matter to the Supreme Court and eventually succeeded in ejecting their *imam*. Interestingly Watermeyer J based his finding that a mosque is *waqf* property on *Hanafi* evidence presented on behalf of a mainly *Shafi'i* MJC (Lubbe:1989:163,165,167-168). The judgement that the MJC had given in this regard was considered to be of decisive importance to both the court and the Muslim community (Lubbe:1989:161). It also indicates that it is possible for secular and religious tribunals to work in harmony with each other in South Africa. "In many ways...adjudication in official courts may serve to promote the application of norms that lie outside the official law by which they are guided" (Galanter:1981:25).

The next civil law matter[54] involved the South African National Zakah Fund (SANZAF). In this particular case the state redirected a dispute involving Muslims back to the MJC and where the latter's judicial competence played a significant role. In January 1984 the Chairman of SANZAF applied for a court order against an ex-

[54]Other matters, for example, include the High Level Road cemetery issue where the MJC was embroiled in allegations, which it later confirmed, that it was party to the sale of this consecrated burial land. In August 1985 it applied to the Cape Supreme Court for an interdict against both the Cape Provincial Division and Raad to stop exhumation. This application was dismissed with costs in February 1986 (Lubbe:1989:183-184,187). In stark contrast to the earlier "cemetery" cases, vocal Muslims were rather complacent when the MJC sold the above sacred burial site. See footnote 33.

employee of SANZAF to refrain from publishing defamatory statements regarding the administration of the Fund. In February 1984 King J, in what was considered to be a historical event, accepted an agreement by both parties to refer the dispute to an Islamic tribunal for arbitration. The MJC constituted this tribunal and the dispute was heard on its premises. In July 1984 judgement was passed by the President of the MJC on behalf of the tribunal. The President was apparently appointed judge with the rest of the tribunal acting in the capacity of advisers and/or assessors (Lubbe: 1989:171-174). Lubbe (1989:181-182) writes that: "In assessing the judgement given in the SANZAF case, it can be said that, with the exception of one ruling, the work of the Tribunal has impressed with its scholarly approach and sound reasoning mainly based on authoritative *Shafi'i* works...On the whole...sound judgement was given in what must be a very important milestone. It is clear that the historical significance lies in the fact that an Islamic Tribunal was appointed and that the integrity and competence of its members generated enough confidence for its findings to be made an order of court" (Lubbe:1989:182). What is especially significant is that the Muslims involved, after resorting to a secular court, agreed to resolve the matter in an Islamic tribunal. The question of impartiality comes to the fore again. If the MJC has certain and set views on matters of a doctrinal nature it is very difficult to imagine that they can give impartial rulings on these matters. It also clear that the very tribunal Muslims ought to resort to and rely on, itself sought and continues to seek the relief provided by the secular courts. This hampers the confidence that people ought to have in a judicial authority of such a nature. Compliance with the rules of natural justice,[55] implications of a possible horizontal application of the Bill of Rights,[56] protection offered by human rights instruments and other basic rules of administering justice should apply with equal validity to Islamic tribunals before there can be any successful implementation of MPL. It is, however, clear from this case

[55]See 8.5 where this is a requirement that ecclesiastical tribunals must comply with.

[56]See 9.6.3.

study that existing Muslim tribunals can successfully work with secular courts and that they can reinforce each other's decisions.

In the 1960s Muslims were not really involved with particular political groups but this changed during the 1980s. Court cases became more politically than legally orientated.[57] The more recent cases discussed above are indicative of a changing perspective on Muslim identity. It must also be noted that by this stage in their history, Muslims in South Africa have succeeded in creating for themselves "...several private religious, cultural, legal, economic and educational institutions and organisations of varying degrees to provide solutions for their problems and difficulties" (Nadví:1989a:74). The MJC was one such body which was formed to resolve legal issues. It is clear from this paragraph that secular courts have played an instrumental role in resolving disputes of a religious nature in the Western Cape, albeit with mixed success. With a new dispensation in place courts are also in the process of undergoing a transformation to rectify past imbalances and inadequacies. It is with this in mind that the current and future role of secular courts in religious disputes will be assessed in Chapter Nine.

8.3 ALTERNATIVE METHODS OF DISPUTE RESOLUTION

Because of the inadequacy on the part of South African secular courts to deal with disputes of a religious nature and because litigation is a costly business resulting in courts not always being readily accessible to ordinary people, this section basically examines alternative dispute resolution mechanisms to what the courts can provide with a view to recommending that they be given increased importance and priority as (cost) effective first step or link in the chain of dispute resolution. Their possible symbiotic relationship with other informal methods of dispute resolution, like the

[57]For example, cases relating to a Muslim organization called the *Qibla* Movement, the *Ahmadiyya* cases and the *Zakaat* (Charity) Fund case.

existing MJC, could also reinforce the need to retain religious tribunals. Dispute settlement by mediation[58] (one such alternative method) and its effectiveness as a conflict-solving tool will be looked at in order to determine its practical feasibility for the implementation of a recognized MPL in South Africa. Furthermore, Islamic judges acted as both mediators and arbitrators and therefore these techniques need further elaboration.[59] The emphasis will thus be on the features and advantages of mediation and its importance in the context of recommendations to be made for the implementation of MPL in Chapter Nine.

As a subject of study mediation has been neglected (Gulliver:1977:43-44). However, it appears to be the most promising of alternative dispute resolution mechanisms and is now beginning to be seriously considered by several courts (Cratsley:1978:14).[60] Mediation has been claimed to be "...all process and no structure" (Fuller:1971: 307).[61] It is a social process based on specific or certain defined principles (Witty:1980:10). A mediator is a third party who "...has no ability to give a judgement [but] acts in some ways as a facilitator in the process of trying to reach agreement...between two other parties who are in [the] process of negotiating to seek settlement of some dispute between them" (Gulliver:1977:15-16).[62] Mediators attempt to reconcile disputants through compromise and parties normally choose mediation

[58]See footnote 10.

[59]See Chapter Four.

[60]In Australia, for example, mediation plays an important role in the Family Court (or "Helping Court") (Australian Law Reform Commission Report No.69 Part 1:1994:104;196-197;203-205).

[61]See 8.1 above.

[62]In contrast, dispute-processing personnel in "religion-oriented cultures" are usually priests or holy men; in "secular, rule-oriented cultures" they tend to be lawyers and in "secular, consequence-oriented cultures" they tend to be scientific experts such as psychiatrists. A combination of the latter two cultures is evident in modern, typically Western legal systems (Galtung:1965:376).

because they wish to maintain their relationship with each other. Sometimes, however, mediation results in the termination of a relationship, for example, when parties are assisted in accepting the inevitability of a divorce (Fuller:1971: 308; Merry:1982:39; Starr and Yngvesson:1975:562; Witty:1980:10). Third party mediators merely mediate the dispute in informal alternatives to courts. They do not pass judgement. They act as "debate regulators". A mediator assists the parties to reach agreement by appealing to their own interests (Ayoub:1965:13; Snyder:1981: 149; Galtung:1965:360; Eckhoff:1967:158). A mediator may come from the local community but in order to ensure impartiality he (or she) is normally required to be a stranger to the disputants (Merry:1982:34; Comaroff and Roberts:1981:111; Roberts: 1979:75,164; Aubert:1967:42). "Mediators are characterized by a number of traits that are consistent cross-culturally. Mediators are respected, indigenous to the community, generous, even-handed, and not young. They are also invariably men, at least in the public aspects of the process" (Witty:1980:4). There is therefore many similarities between the attributes of *qadis* and mediators.[63]

It is also interesting, when viewed in terms of its implications for MPL, to note that disputes for mediation often stem from the area of civil (especially family) law and not criminal law (Cratsley:1978:15; Fuller:1971:330). As already indicated, the jurisdiction of *qadis* was extended to include matters pertaining to MPL.[64] Mediation, however, does not necessarily have to be limited to personal law matters like divorce, as for example expounded in Q.4:35, but could include commercial, property and other transactions. There are numerous *Qur'anic* references to mediation in family disputes which can be considered. These include: Q.2:224; Q.4:35; Q.4:59; Q.4:114 and Q.49:9-10. Muslims, including women, often do not understand or know much about Islamic law. They therefore group themselves, often quite instinctively, around

[63]See 4.4 above.

[64]See 4.3.

local religious leaders and depend on them for assistance in resolving conflicts (Anderson:1957:35).

Rothenberger (1978:163,165,168), writing about a multi-religious village in Lebanon, indicates that while there are three Middle Eastern law systems to choose from - that is, the national law with its formal court structure, customary law with its emphasis on mediation and Islamic law represented by the village *imam* (prayer leader)[65] - formal courts are seldom used and villagers are encouraged to opt for mediation. Sex and age do not appear to interfere with access to any procedure for conflict resolution (Rothenberger:1978:172). Men of the upper social class are often "remedy agents" (Rothenberger:1978:177).

Mediation and negotiation are viable alternatives to adjudication (Gulliver:1969:21). These modes are all representative of institutionalized responses to interpersonal conflict and in all three instances a third party intervenes in the dispute (Felstiner: 1974:63,69; Pospisil:1975:107; Comaroff and Roberts:1981:108). A common point in all three of these modes of dispute settlement is that both parties/disputants to the dispute participate in the process (Galtung:1965:358). The expertise required from a judge is obviously different to that required from a mediator. While a judge relies on rules and is bound by form, pattern and structure, a mediator assesses the social, cultural and religious context of the dispute - a context which he, unlike the judge, shares and is sometimes (though not necessarily) familiar with (Felstiner:1974:73-74; Gulliver:1977:21,37; Cratsley:1978:14; Bennett:1991:54). A judge (or umpire) is not interested in reconciling the parties but wants to reach a decision or pass judgement as to which of them is right (Eckhoff:1967:161; Roberts:1979:20,77).

Studies indicate that a rapid rise in the number of disputes to be heard at any one time inevitably necessitates an increase in the number of courts (and court costs) to

[65]See 8.4.

accommodate the extra work load. However, this rise in the number of disputes can be reduced if the focus is placed on the prevention or early settlement of disputes (Sander:1976:111; Nader and Singer:1976:314-315). Using alternative dispute resolution mechanisms, like mediation, is one way of addressing such a problem (Bush:1979:307). However, the "...advantages of informal alternatives to courts, in cost, access, processual variables, lay participation...are not proven" (Abel:1985). While this may or may not be true in the US, courts have been unable "to resolve minor, interpersonal disputes quickly, effectively, and in a way that satisfies the disputing parties" (Merry:1982:17). This induced the government to establish informal dispute mediation centres (Strijbosch:1985:332). However, in spite of this one finds very few references to non-government institutionalized adjudication or mediation in the US except within some organizations and minority groups. Clergy, for example, dominate dispute processing for religious minorities (Felstiner:1974:85 86; Monsma:1993:253; Bush:1979:304). Sanctions normally only relied on in traditional cultures, like respect for religious authority, are an important part of mediation (Galtung:1965:373). Co-operation between courts and communities towards establishing alternative methods of dispute resolution could well provide more appropriate answers. There is, for example, growing evidence to indicate "...that significant numbers of disputants will choose, if offered, a variety of new, court-related methods to resolve their grievances" (Cratsley:1978:69). "The focus of...drawing everyone into the operation of the national legal system...should be reevaluated. The problems of legal pluralism might be turned into [social and legal] assets [rather than liabilities] if legal pluralism were analyzed at all its different levels. [This] might well require the integration[66] of mediation [, negotiation] and adjudication into one model of dispute management" (Witty:1978:314).

[66]The possibility of legal integration will briefly be discussed in 9.8.5 below as one of three possible options regarding the relationship between state and Islamic law.

This is an excellent way of giving practical effect to S 22 (now S 34)[67] of the interim Constitution in terms of which access to justice (in secular or other independent and impartial forums) is guaranteed to all. The needs of all communities can thus be satisfied at very little expense because there is no need to create separate forums for different groups and at the same time optimum use will be made of the legal system. As indicated above, integration of mediation and adjudication is not something novel to Islamic law. The characteristics of *qadis* and mediators correspond to a large extent although in early Islam a *qadi* functioned mainly as a mediator rather than a judge because he did not necessarily decide which party was "right" and who was "wrong".[68] It will also become apparent[69] that members of the MJC already act as mediators.

While the viability and suitability of mediation and negotiation in the implementation of MPL are not doubted, there is a need for especially mediation to become a more specialized technique. International expertise and guidance must therefore be sought. In order for optimum benefit to be derived from mediation, certain stumbling blocks must be removed. Firstly, successful "[i]mplementation and maintenance of community alternatives to courts involve culturally specific adaptations to community characteristics. [Furthermore] [t]he support of lawyers and the legal profession...is necessary for the prolonged success of local mediation..." (Witty:1980:134). This will be no easy task because "[i]mplementing community mediation programs requires long-range planning. The principles of mediation must be fully understood... mediational needs must be locally self-defined" (Witty:1980:132-133). In order

[67]See paragraph 8 and 8.1.

[68]See 4.3, 4.4 and 4.7 above.

[69]See 8.4.

therefore to succeed in this endeavour, lawyers[70] need to be drawn into the process. They should be taught skills of negotiation and mediation at university level already (Nader and Singer:1976:314-315). An activist bar could also establish preventive clinics to provide advice in areas like family law (Nader and Singer:1976:317-318). These factors will be given further consideration in the concluding section below.[71]

8.4 INTERNAL RELIGIOUS TRIBUNALS AS MECHANISMS OF DISPUTE RESOLUTION

There are no formally recognized religious courts in South Africa. For this reason the religious disputes of Muslims are normally resolved in their own unofficial religious tribunals (Department of Foreign Affairs:1968:19).[72] One religious tribunal, namely the MJC,[73] played a clear role in dispute resolution involving Muslims in the Western Cape and it has over the years forged a "working relationship" with the Cape Provincial Division of the Supreme Court. This section will give a brief background to the MJC and events leading to its establishment. It will focus on the role of the MJC as a conflict-resolving mechanism with a view to assessing how well existing religious tribunals operate in South Africa.[74]

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[70]There is, however, no doubt that legal practitioners "...constitute an essential part of the conflict-solving machinery which is built up around the courts" (Aubert:1967:49). See 4.3 where lawyers/advocates appear not to have played a major role in dispute-resolution.

[71]See 8.6.

[72]See 9.8.5 below.

[73]See 8.2. See also paragraph 8 and 9.8.5.

[74]The MJC essentially subcribes to the *Shafi'i* school of thought. The legal opinions or *fatwas* issued by the MJC regarding political matters, matters of belief and worship and civil matters indicate that its opinions were not restricted to matters pertaining to MPL only (Lubbe:1989:Summary,1).

By the end of the eighteenth century there was a noticeable shift from the "...mystical experience that had characterised the practice of Islam up to that time [to]...the establishment of a period of structured, juridical practice dominated by a formal clergy, a form that has continued to dominate the practice of Islam up to the present" (Bradlow:1991:9).

Tuan Guru who arrived at the Cape in 1780 is unofficially considered to have been the first *qadi*[75] at the Cape (Lubbe:1989:45,62; Davids:1980:98; Lubbe:1986:29; Bradlow:1991:9; Bradlow:1988:153). With his assistance "...chains of religious authority [were] created within the mosques...schools were established, courts and legal proceedings initiated and a semi-formal network of charitable and health work conducted" (Bradlow:1991:9). At the pinnacle of this religious hierarchy which Tuan Guru helped to create was the highly coveted and prestigious position of *qadi* or "chief priest" (*Imam*).[76] He (*Imam*) was the spiritual head of the community and was responsible for appointing other members of the hierarchy (Bradlow:1988:150-151). Bradlow (1988:157) states that "...within the [M]uslim community alternative judicial structures existed, structures that could, and indeed, did enforce a general pattern of practice."[77]

Traditionally one of the functions of an *Imam*[78] was to settle disputes within a community. Prior to the introduction of the MJC a local *Imam* normally provided

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[75]See 4.4 where *qadi* refers to a religious judge. It is used in a different sense here as will be explained below.

[76]The positions of *qadi* and *Imam* were highly sought after (even though no remuneration was given to any member of the *Ulama* which included the *qadi*), so much so that it led to much rivalry and tension within the community (Bradlow:1988:152;170).

[77]For a detailed explanation of the institution of this hierarchy which was occupied by *Ulama* and the extent to which it was considered to challenge or pose a threat to the existing parallel colonial institutions see Bradlow:1988:153-172.

[78]Literally leader, normally of congregational prayers. See Lubbe:1989:18-19.

leadership and guidance to his own congregations and an *alim*[79] made (his own) decisions on a case to case basis (Lubbe:1989:19,62-63). Sometimes, however, this informal set-up created confusion due to a lack of order and consistency. The traditional practice of *bechara* (debate) was then resorted to but it also proved ineffective as a problem-solving forum (Lubbe:1989:63; Davids:1985:16). Realizing the need to settle internal disputes within an Islamic context, and taking into consideration that the appointment of a single *qadi* to office would not work in the Cape Muslim community with its many congregations and leaders, it was decided that the formation of a judicial body, representative of all the religious leaders (*Imams*) in the Cape, would be the better alternative. This decision gave rise to the formation of the MJC in 1945 which, as a body, assumed the functions of a "collective" *qadi* (Lubbe:1989:62-64; *Ad-Da'wah*:1993a:1).[80] However, the decisions of the MJC (whose members are essentially conservative) are merely binding on the conscience of Muslims and therefore not necessarily effective or final. Parties are therefore free to refuse the decisions offered as this tribunal (and others of a similar nature located elsewhere) generally lacks the power to enforce the execution of its decisions. The reason for this is that the State does not confer any legal authority on decisions given by non-state institutions.[81] As indicated above[82] its decisions have also been contested in South African courts. The MJC should therefore essentially be viewed "...as a council of *imâms* to whom a judicial function has been assigned rather than regarding it as a specialised judiciary" (Lubbe:1989:82).

The MJC has been described by the Supreme Court as a "voluntary association of

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[79]Singular for *ulama* and literally meaning "scholar" (Lubbe:1989:83-84).

[80]For more detail as to the actual formation of the MJC see Lubbe:1989:63-65 and Davids:1985:16-18.

[81]See 2.2.3. See also 8.2.

[82]See 8.2.

certain Sheiks" (Lubbe:1989:Annexure 14 (A-58)). Lubbe (1989:1) also refers to the MJC as a "body corporate". However, although one of the main clauses of the ten-point programme adopted in 1945 indicated an intention to "register the so-formed Judicial Council in order to ensure recognition by the Government", no subsequent registration took place (Lubbe:1989:64). The state, as such, therefore plays no role in regulating the operation of this and similar bodies elsewhere in South Africa. Several references are also made to the constitution of the MJC which has been amended from time to time (Lubbe:1989:76,78). As will be shown below,[83] non-registration distinguishes the MJC from church tribunals in South Africa who are in fact registered and bound by the provisions of their constitutions.

Religious leaders were given membership status "...regardless of the standard which they had achieved in theological training" (Lubbe:1989:65). In fact, and unlike their judicial counterparts in the formerly named provinces of Natal and Transvaal who basically trained at (Deobandi)[84] institutions in India and Pakistan, the composition of the MJC is more stratified and even includes religious leaders with no legal or theological credentials whatsoever (Lubbe:1989:66; Esack:1988:489).[85] Strangely enough the fact that some of these members/judges are not professionals does not appear to be of any significance. This fact is highlighted because of its implications for the possible creation of a *Shari'a* court in South Africa, where Muslim judges and lawyers trained in secular law and regardless of their ability might, for example, not be considered competent enough by members of this Council to serve in such a court structure.[86] However, these "secularly-trained" Muslims were sought as counsel by

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[83]See 8.5.

[84]See 9.4.1 at footnote 48.

[85]See also 2.2.2.

[86]See 9.8.5.

the MJC to defend it in, for example, the *Ahmadiyya* issue.[87] Religious leadership problems were also experienced between the MJC and the Muslim Assembly, which was established in 1967 to foster the spirit of Islam in the lives of Muslims (and which included members having some form of *secular* education). These leadership problems have to date not been resolved completely and are a typical example of the type of reaction to be expected from the MJC if a *Shari'a* court structure were to be established with some members having only a secular education.[88]

The MJC itself is composed of two main bodies, namely a General Council and a Supreme Council. All the religious leaders of the MJC belong to the General Council which in turn is sub-divided into various committees. These committees mainly deal with matters which are more of an administrative/religious than purely legal/religious nature, for example, the issuing of *halal* certificates and the inspection of abbatoirs. Included in the General Council is a committee dealing with matrimonial matters. As a result of an unprecedented increase in social problems in the 1980s, the MJC has created a full-time office and committee dealing especially with matrimonial matters (*Ad-Da'wah*:1993a:2). The MJC, however, normally resorts to a very basic form of mediation in matters of divorce, as for example expounded in Q.4:35, and therefore it needs to become more specialized.[89] Divorce laws, for example, are given conservative interpretations allowing the husband the prerogative to initiate a divorce at his sole discretion.[90] These types of laws need to be reviewed, regulated and more effectively administered and controlled so that justice can prevail for Muslim women who have to bear the consequences of such laws and decisions. Often problems faced by women in matters of this nature are minimized and services offered are not

[87]See 8.2 above.

[88]See in this regard Lubbe:1989:75-79.

[89]See 8.3.

[90]See 2.1.3.

responsive to the needs of women. The whole purpose of Islam making provision for a "waiting period" in matters of divorce was to allow for mediation and reconciliation between the spouses.[91] In India, for example, novel ideas to address this problem have been put forward. Ahmad (1972:189) has, for example, suggested that Parliament enact a "Muslim Family Disputes Settlement Act" setting out an easy procedure for the settlement of family disputes among Muslims.[92] Unlike the General Council, membership of the Supreme Council is, however, restricted to the theologically most competent *Ulama* as this Council is responsible for giving *fatwas* or legal opinions (Lubbe:1989:66-68). It is then this part of the MJC that is strictly speaking the judicial body. "It can veto decisions of the General Council. It acts as a fatwa body, a court, an appeal court. Its decisions are said to be final and binding".[93] However, while there is no real system of appeals in Islamic courts, appeal to higher courts acts as a protective mechanism for courts as the matter is moved upwards (Galtung:1965:377). The fact that the MJC considers itself to be a final court of appeal is clearly a problem.

The role of the MJC as a dispute-resolution mechanism is clear. At its inception, the main aim of the MJC was to form a structure "'to which all religious matters could be referred to for a solution...' ...[T]he MJC is thus expected...to apply the *Shari'a* as a problem[-]solving tool" (Lubbe:1989:68). In terms of Islamic principles, solutions would be provided irrespective of the class, sex and age of the litigants. The role of written Islamic law in these matters is not disputed. Even secular courts in, for example, the Claremont Main Road Mosque case discussed above,[94] authoritatively refer to Islamic law as a source of law. Problems are, however, envisaged when

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[91]See 2.1.3.

[92]For more detail see Ahmad:1972:189-191.

[93]Supreme Court (CPD) Case number 1438/86:23 February1990:68.

[94]See 8.2.

judges and litigants subscribe to different norms and values, especially as far as an egalitarian and contextual interpretation of MPL is concerned. As already indicated and as Lubbe (1989:68-69) also points out, *fatwas* are normally given by *muftis* (jurisconsults) to assist the *qadi* in his decision but here the "collective *qadi*" as the MJC refers to itself, gives the *fatwa*.[95] Since 1982 the Supreme Council has established a more structured decision making process and method of keeping of records to increase their validity as legal precedents (Lubbe:1989:69-70). This change in structure is probably more for administrative purposes because, as already indicated,[96] Islamic courts are not bound to a system of binding precedent. There is some merit and advantage in not being bound to such a system of precedent because it means that the decisions of institutionalized resolution mechanisms are not predictable (Galtung:1965:370). This is a very important factor which must be taken into consideration when considering options for the implementation of a recognized MPL because decisions of *qadis* from different schools of Islamic law may vary significantly. As far as the decision-making process is concerned, a final ruling (*fatwa*) to a request for guidance on a particular issue normally consists of three parts: "introduction of the problem or question, exposition of legal evidence and the verdict of the MJC" (Lubbe:1989:70). As already indicated, the MJC essentially follows the *Shafi'i* school of thought but there is a growing tendency to refer to works of a more comparative nature which do not support any particular school of (juristic) thought but which make reference to the primary sources of Islamic law.[97] Some of these comparative works, for example, analyse the Prophetic traditions (primary source) upon which a school of law bases its opinions instead of analysing the (man-made) opinions of scholars belonging to different schools of thought (Lubbe:1989:72-73). This, although in a roundabout way, serves to address partially the problem with

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[95]See also Le Roux:1981:30 where the distinction between a *mufti* and a *qadi* is highlighted.

[96]See 4.2.

[97]See 9.6.3.1, footnote 139.

ijtihad which judges have faced since the tenth century when the doors of independent reasoning were closed.[98]

Although there have been many attempts to establish a national council of *Ulama*, no real success has thus far been achieved (Lubbe:1989:80). However, as will be indicated below,[99] two further (but opposing) *Ulama* bodies have now been set up to deal with MPL. How long they will last and whether they will be effective remains to be seen. Muslims have displayed unity on issues like the recognition of MPL and the *Ahmadiyya* issue (Lubbe:1989:80-81). However, as has been and will be indicated,[100] controversy surrounding the actual recognition of MPL at the moment is causing more disunity than unity. These developments do not, however, detract from the viability and validity of existing religious tribunals to continue, with some modifications, their dispute-resolving role.

In the US religious courts also adjudicate on secular issues because "[t]heir...supposed advantages over civil courts are speed, less expense, less specialized procedures, privacy and adjudication by members of the same minority group as the disputants and according to its value system" (Felstiner:1974:87). However, a study of Jewish courts in Los Angeles indicates that these courts are rarely used as alternatives to civil courts but are often used to hear mainly personal law disputes or claims which the civil courts will not address. This is also evident in South Africa where the SANZAF case referred to above[101] is considered to be an exception. Civil courts are preferred in spite of the fact that these religious institutions are adjudicative and that their decisions can be enforced either through secondary recourse to government courts or

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[98]See 2.1.1 and 9.8.5.

[99]See 9.4.2.

[100]See 2.2.3 above and 9.4.2 below.

[101]See 8.2.

community pressure. It appears that mediation might be a better alternative method of dispute resolution (Felstiner:1974:87-88). The existence of religious courts therefore does not necessarily mean that they will be utilized. Disputes heard in informal religious tribunals in South Africa include those of a personal law, civil law and propriety nature.[102] The interim and final Constitutions in any event only make provision for the recognition of MPL and not Islamic law as a whole. The decisions of these informal tribunals have sometimes also been enforced through civil courts (as in the Claremont Main Road Mosque case) or community pressure as was the case with the legal opinions given by the MJC on the *Ahmadiyya* sect.[103] Ghani (1983:353-357,366), in a review of the practical implications of disputes in a *Shari'a* (Islamic) court, indicates that the state ensured that court decisions were enforced and the courts in turn consolidated and entrenched the power and authority of the state. This shows that the relationship between law and politics is recognized in Islamic law just as in other legal systems.[104] Because the legal remedies provided by the MJC are not enforceable in terms of South African law, they are ineffective and have very little value apart from being binding on the conscience of Muslims. However, even though opinions are expressed by certain progressives within the community of the inappropriate process and system operating presently within the MJC and despite the fact that it is being served by personnel recruited from the ranks of essentially conservative Muslim religious authorities,[105] the MJC as a religious tribunal still enjoys significant popular support and its decisions have a strong moral binding force on the conscience of Muslims. If the focus is placed on the relationship between law and politics, it is contended that a co-operation between the national legal system and

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[102]See also 8.5.

[103]See 8.2 above.

[104]See 9.8.5 where the political connotations of creating parallel judicial systems will be addressed.

[105]See 9.8.5 below.

these tribunals will draw religious communities into its operation and at the same time will ensure that decisions of these tribunals be given the force of law. A study on dispute settlement in the US Mormon community[106] revealed that a significant fusion of religious and secular law was evident in both church and secular courts as Mormons assumed positions in the Utah judiciary. This particular study details how a religious minority gained access to justice when the US civil courts failed to provide them any relief (Koch:1979:14). Whether or not this will happen to MPL in South Africa, especially in the light of the recent appointment of Muslim judges to the Supreme Court (and other Courts), remains to be seen.[107]

There is no doubt that the MJC currently functions as an effective alternative mechanism of dispute resolution with clear support from the community. Lubbe (1989:236) concludes his study on the MJC as follows: "The jurists of the MJC are competent scholars and are able to make important contributions to Islamic jurisprudence in South Africa. *Their [future] success will [,]however[,] be determined by* the *following factors*: ...(ii) *Preparedness to face current and new problems undauntingly* and to provide, in terms of Islamic law, guidance to the Muslim community. Matters which come to mind...[include]...*the position of women in society*...(iii) The ability of the MJC to conduct its over-all organisational activities on such a level that its judicial function is not brought into disrepute due to non-judicial incompetence" (emphasis added).[108] By implication this will apply to the ultimate success of other Muslim religious tribunals in South Africa, especially in view of a recognized MPL being made subject to the final Bill of Rights.[109]

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[106]See also 7.4.

[107]See 9.8.1.

[108]See the minimalist option referred to in 9.8.5.

[109]See 9.6.2.

8.5 LEGAL IMPLICATIONS OF LITIGATION INSIDE THE CHRISTIAN CHURCH: LESSONS FOR THE RECOGNITION OF MPL[110]

Christians constitute approximately 66.5 %[111]of the total South African population.[112] "Legally a church is a juristic person with rights and obligations of its own, and with capacities to own property, to enter into legal transactions and to sue (and be sued) in its own name. A church as voluntary association also has its own internal legal structure and can make its own rules and regulations" (Du Plessis:1995:2). From a legal point of view these rules have legal force by virtue of the fact that churches are voluntary associations and must therefore, when "adjudicating", comply with the principles of natural justice which are explained below. Actions instituted by or against a church in its external relations are processed through civil courts and in terms of South African law. Litigation falling within the ambit of internal ecclesiastical disputes are adjudicated in domestic ecclesiastical tribunals. In exceptional cases civil courts have been called upon to settle internal ecclesiatical disputes (Van der Vyver:1986:183-184). This has also been the case with the MJC except that recourse was had to secular courts on a more regular basis. As is also the case with Muslim tribunals, church tribunals face status problems. Agreement forms the basis of the jurisdiction of these tribunals. While their decisions are binding if made within the ambit of their power and in terms of prescribed procedural rules, sentences ordered by them can only be enforced by civil courts. In order, therefore, to ensure observance of their decisions secondary recourse is had to civil courts.

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[110]See also 9.3.

[111]See 2.2.2.

[112]"Christianity...has a majoritarian position in South Africa, but with great denominational diversity spread over more than 34 religious groupings and several thousand denominations. This clearly indicated religious pluralism" (Du Plessis:1996:443). See also Du Plessis:1996:442-443 for more details.

However, as indicated,[113] decisions of the MJC are not binding as of right.

Sentences of church tribunals will not be interfered with unless they are deemed, by the civil court, to be very unreasonable (Van der Vyver:1986:187). Besides being subject to procedural limitations imposed on them by their own constitutions, these tribunals are also subject to procedural limitations imposed on them by the common law and based on the principles of natural justice. In the past civil courts were cautious in intervening in cases where such a tribunal had acted in violation of its own constitution. Today the tendency is to intervene in such cases on the basis that such a tribunal derives its power from contract, the breach of which would justify such an intervention by civil courts. The courts have, however, always followed a strict approach as far as a breach of the procedural requirements of natural justice (which form part of the common law as it stands) is concerned. These rules require that a domestic tribunal observe certain fundamental common law principles of fairness which would entail applying its mind to the matter at hand, acting within its bounds of authority, maintaining good faith and acting reasonably (Van der Vyver:1986:183-184). As will be explained,[114] even though the interim Bill of Rights has a predominantly vertical application, these rules form part of the law and therefore a member of a religious community can rely on S 35 (3) (now S 39 (2)) of the interim Constitution for horizontal reinforcement of the right to the application of these rules where internal ecclesiastical disputes are to be resolved (Du Plessis:1995:10). The ecclesiastical tribunals also face problems regarding the right of recourse to civil courts. Questions include: "To what extent can a civil court review the decisions of an ecclesiastical tribunal? Must members of the church first exhaust domestic remedies before they have recourse to a civil court? Would it be possible for a religious body to exclude altogether the jurisdiction of the civil courts?" (Van der

[113]See 8.3.2.

[114]See 9.6.3.

Vyver:1986:185-186). In answer to the first question it must be noted that while there is no appeal from such a tribunal to civil courts, their decisions can be reviewed by civil courts. While the extent of this power of review has yet to be finally settled, the criteria used by the civil courts to exercise these powers of review are not conclusive nor are they always easily applicable. As far as the second question is concerned, authority has it that a church member need not exhaust domestic remedies before resorting to a secular court for relief, and finally a religious body (including Muslim tribunals) can never totally exclude the jurisdiction of civil courts. This is now reinforced by S 22 (now S 34) of the interim Constitution.[115] "A civil court maintains the capacity to interpret the religious body's constitution and to secure that the ecclesiastical tribunal discharges its functions according to the agreement that gave it life" (Van der Vyver:1986:186-187). As indicated above[116] there are many similarities between the position of Muslim religious tribunals and these ecclesiastical tribunals. However, ecclesiatical tribunals as voluntary associations and legal persons in their own right must conform to the rules of their constitutions and uphold the principles of natural justice prescribed by the common law. This at least allows for consistency, equity and impartiality which, as indicated in section 8.2 above, Muslim tribunals like the MJC, as a non-registered body, clearly lack. Registration and legal recognition of Muslim tribunals like the MJC will, however, make these bodies more transparent and accountable to both the Muslim public and the state.

8.6 CONCLUSION

Chapter Six has shown that conservative interpretations of MPL dominate to the detriment of women and religious freedom irrespective of whether there are Islamic courts in certain countries. In other words the problem lies not so much with the

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[115]See section 8 and 8.2 above.

[116]See 8.4.

existence of such courts but with interpretations of MPL which are ultimately given effect to in these courts. Non-recognition of MPL has not only meant that Muslims have no recourse to South African law, but a certain legitimacy has also been given to informal Muslim religious tribunals, administered by conservative religious authorities, to implement Islamic law and an unreformed MPL in ways which are insensitive to the needs and rights of Muslims, especially women. While conceding that by virtue of their experience alone religious tribunals have a vital role to play in the resolution of disputes, these tribunals need to be modified and transformed so that such a role can be in line with the true Islamic spirit of justice and equality. In order to ensure observance of their decisions these judicial tribunals need to be equipped with judges who have a liberal understanding of Islam and Islamic law and not only those with a conservative understanding. In this way Muslims (including women) who endorse and wish to be judged in accordance with a liberal understanding of Islam, but who have suppressed their grievances in the past because of the conservative composition of these tribunals, will be encouraged to ventilate their grievances. Protection accorded to women's rights in international human rights instruments should be extended to apply to and include these religious tribunals.[117]

It is clear from this chapter that Muslims do not consciously differentiate their religious tribunals from state courts nor do they avoid state courts. State courts in turn have had success, albeit mixed, in resolving disputes of a religious nature. Several legal systems can co-exist in the national legal system especially if they reinforce each others legitimacy[118] but contradictions are inevitable (Pospisil:1974: 107). An individual's access to effective remedies or secular courts to enforce human rights should not be compromised as a consequence of religious tribunals being

[117]See Chapter Five.

[118]See 8.3.

formally recognized.[119] Whether it is possible for state courts, notwithstanding S 22 (now S 34) of the interim Constitution,[120] to impute a legal system to parties on the basis of their religiosity or lifestyle also remains to be seen (Bennett:1991:127). As indicated major changes have been effected to Islamic procedural and constitutional law while laws of personal status or substantive law have remained relatively unchanged. The jurisdiction of religious tribunals is usually limited to personal law matters and fixed principles of Islamic law are applied to settle these disputes (Strijbosch:1985:333-334,339-341).[121] Once MPL is recognized and subject to the Bill of Rights and tribunals like the MJC given formal recognition, then it can be expected of the South African judiciary to adopt an interventionist approach in an attempt to redress problems of MPL.[122] However, unlike customary law, religious law, because of its divine origin, ought not to be excluded in certain cases in favour of the common law to effect social change on a gradual "case-by-case" basis (Bennett:1991:118).[123] Because it will be extremely difficult for secular courts to adapt an unreformed MPL to social change, it is vital that religious authorities should take the lead. Furthermore, giving formal recognition to religious tribunals does not necessarily imply or ensure observance of their decisions, especially in the light of S 22 (now S 34) of the interim Constitution which can be interpreted to give Muslims a choice/option between secular and religious courts (Von Benda-Beckmann:1981:167-168,172).[124] However, as indicated above, reinforcement of each others authority and decisions could alleviate some of these problems.

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[119]See Chapter Five.

[120]S 22 allows disputants to exercise a choice between two legal systems. See paragraph 8 and 8.2 above and 9.8.2 below.

[121]See 2.1.5 and 4.4.

[122]India is a case in point. See 6.3.2.

[123]See 9.5.

[124]See also 9.8.2 below.

In South Africa adequate field research on ways in which religious communities settle their disputes is lacking because this is a fairly recent area of anthropological research. Legal anthropology as a discipline also needs to be given more attention at local universities. Dispute settlement for South African Muslims, while it should take cognizance of international experience and other social sciencess, must be viewed in the socio-cultural context unique to South Africa where society is both culturally plural and distinct (Gulliver:1969:23; Hosten:1991:x; Sanders:1991:72; Bekker:1991: 79; Bennett:1991a:34,32). Notwithstanding the fact that religion is one of the ways in which a group can foster its cultural identity, South African Muslims do not constitute one homogeneous[125] community, either in terms of origin and culture (Bennett:1991a: 22; Lubbe:1989:1). Apartheid policies were partly to blame for fostering these cultural and customary differences. A call for a "deculturalization" of Islam in South Africa would be difficult precisely because stigmas of culture and custom are attached to religion. Because there is also no such thing as a single Muslim culture, local social and cultural realities should be the main factors influencing South African Muslim society in its choices of dispute-resolution methods.

Judges, religious and otherwise, cannot function without the initiative of people who seek the assistance of courts for various reasons (Aubert:1967:42-45). "The question ...arises why and under what circumstances individuals would choose to undergo [a] process of double translation into and out of the formal legal system. One might also ask what impact this process has on customary [and religious] laws and on local society generally" (Engel:1980:431). Legal anthropological research can prove invaluable in answering some of these questions.[126] Anthropological studies in fact also indicate a preference on the part of the "poor and powerless" to utilize their own informal courts because of linguistic, cultural and other reasons (Bennett:1991:107).

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[125]See 2.2.1 and 2.2.2.

[126]See Chapter Two.

Factors like social ostracism from the religious community can also influence the choice of litigants to prefer religious tribunals over state courts to resolve their disputes. Other factors[127] which can be considered to favour the continued existence of religious tribunals like the MJC include the following: the small size of the South African Muslim population (1.1%)[128] and the fact that apartheid policies kept them in close proximity to each other; inability of disputants to absorb the costs of expensive litigation or to afford legal counsel; the "judge's" familiarity with the character and reputation of disputants and the fact that the disputants and adjudicating party belong to the same social and religious group (Pospisil:1974:125;1978:59). In secular South Africa it would be futile to create new Islamic courts for Muslims when existing tribunals and religious authorities who administer them can continue to play this role.[129] In any event, there appears to be no Islamic justification for their creation, and this has worked well for non-Muslims in Muslim countries who, although free to decide their disputes in terms of their own personal laws, resort to Islamic courts for adjudication of their disputes.[130]

Given the divisions[131] among Muslims and their leadership and the possibility that MPL might not be formally recognized, it is vital that there should be some form of formal recourse to the law for Muslims to settle disputes of a religious nature so that some sort of order can be maintained in the Muslim community (Roberts:1979:13-14). The uncertainty surrounding the recognition and implementation of MPL could well result in secular courts being turned into major centres of dispute resolution for

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[127]For reference to other factors see Nader:1990:xx,88,90-91,92,121,138,143,161, 292,322.

[128]See 2.2.2.

[129]See 9.8.5.

[130]See Chapter Four.

[131]See 9.4.2 below.

Muslims especially in terms of S 22 (now S 34) of the interim Constitution, which provides that these courts must serve all South Africans equally and fairly.

With due regard to this uncertainty, negotiation and especially mediation should, in conjunction with adjudication, be given serious consideration by the Muslim community as a viable first step to dispute resolution because of the benefits that such an option can offer.[132] Alternative dispute resolution methods like mediation and negotiation should be the norm and not the exception in personal law and other matters. As indicated below, existing Muslim religious tribunals already possess some skills in mediating disputes. With some adaptation to religious and cultural needs, mediation has the potential of becoming a specialized, long-term and cost effective method of implementing MPL in South Africa. The public image that the law belongs in "ivory towers" and is inaccessible can be obviated if lawyers become "people friendly" and skilled in the art of negotiation and mediation. Practical training in this area should become part of the transformed legal syllabi of universities. A transformed and activist legal profession, in collaboration with other professions, should also be drawn into this process so that optimum use can be made of existing human resources in a cost effective manner. The provision of mediation through state funding should also be given serious consideration. Community volunteers, who receive special training, should also play a role (Cratsley:1978:17-18). In choosing mediators problems relating to authority and representation will be factors that need to be considered (Cratsley:1978:33). A crucial factor making mediation worth further investigation and therefore influencing its formal sanction by both Muslim religious authorities and the state in South Africa is the fact that Islamic law appears to favour mediation over adjudication although the Muslim judge (*qadi*) acted as both arbiter and mediator.[133] It is expected that this function will still have

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[132]In Indonesia, interestingly, a Muslim female "preacher" acts as a mediator in religion (Marcoes:1989-1990:19).

[133]See Chapter Four.

some validity today. Mediation, functioning as part of existing Muslim religious tribunals like the MJC, is already being used to resolve disputes, although there is no clear line of demarcation between adjudication and mediation.[134] It is contended that the MJC should continue its combined mediational and arbitrational functions as this will save the state the cost of having to create an elaborate judicial office. While the integration of the two forms of dispute resolution seems to be working well, international experience can provide guidance to a more specialized understanding of mediation and its planning in a South African context. However, even if MPL is not recognized, mediation can continue to play a pivotal role. Arbitration should therefore be viewed as a last resort.

Formal recognition of MPL would require its implementation. While there is very little data analyzing and observing cases in informal Muslim tribunals in South Africa, the Cape cases discussed above[135] illustrate a good working relationship between secular courts and religious tribunals. As will be detailed in Chapter Nine, it is imperative that such a relationship be nurtured. The symbiotic relationship between religious tribunals and alternative methods of dispute resolution (mediation and negotiation) alongside secular courts, or in conjunction with it where it might not be appropriate or adequate, should not be disregarded in considering the implementation of MPL. It is contended that existing Muslim religious tribunals in South Africa, if improved and supplemented with alternative methods of dispute resolution, can be adapted to give effect to the implementation of an officially recognized MPL (in terms of S 34 of the final Constitution) without it being necessary to create a new set of *Shari'a* or religious courts (in terms of S 166 (e) of the final Constitution). The benefits of such a "minimalist option" will be further detailed in Chapter Nine. The arguments that co-operation with secular courts is not religiously permissible or that

[134]See 8.4.

[135]See 8.2.

secular courts cannot adjudicate on religious disputes of a community are refuted by the fact that the MJC itself and Muslim individuals have utilized state courts when "expedient" for them.[136] State courts have been called upon to resolve matters of MPL[137] as well as of a Muslim doctrinal nature. Instances of co-operation between state courts and the MJC gives positive indication that state courts and religious tribunals can work together amicably and even complement each other. Unconditional "judicial deference" on the part of the state to religious tribunals like the MJC could, however, have detrimental consequences because of the potential domination of its members (who also represent religious authority) over the individual member, especially the dissident. This creates a tension between the religious rights of the group and those of the individual which might not necessarily be completely reconcilable.[138] The state should therefore be able play a role in the regulation of these structures should legal recognition be given to such existing and informal tribunals alongside South African judicial structures.[139] Co-operation with state courts and subsequent recognition will allow for more transparency, fewer jurisdictional problems and for the decisions of these tribunals (like those of church tribunals) to be given the force of law instead of being merely binding on the conscience of Muslims.

[136]See 8.2. See also 4.2 above footnote 15 in the text for a further refutation of this argument.

[137]See 8.2 and 9.6.3.1, footnotes 137 and 139 below.

[138]See 8.2 where it is demonstrated that this has been the case in the US..

[139]See 9.8.5.

CHAPTER NINE

THE IMPLICATIONS OF A RECOGNIZED MPL ON THE INTERIM AND FINAL[1] CONSTITUTIONS AND BILLS OF RIGHTS IN SOUTH AFRICA AND IMPLICATIONS FOR IMPLEMENTATION

9 INTRODUCTION

US constitutional developments and their implications for religious freedom and gender equality were examined in Chapter Seven in order to determine how South Africa can benefit from similar developments. This chapter focuses on such developments in South Africa. All women face status problems in the private and public spheres of life. Muslim women as members of a particular religious community experience an additional inequality resulting in a dichotomy between their public role as citizens of a nation and their private role as members of a religious community.[2] Bearing this in mind, this chapter focuses specifically on MPL developments preceding and following the commencement of the interim Constitution of South Africa on 27 April 1994.[3] South Africa's final Constitution[4] includes a Bill of Rights similar to that of the interim Constitution and also does not differ substantially from it because the latter entrenches 34 Constitutional Principles on

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[1]Reference to corresponding sections in the final Constitution (1996) will be incorporated into the body of the text after those (sections) of the interim Constitution (1993) to facilitate smooth reading. Differences in emphasis between the two texts, if any, will also be highlighted.

[2]See background sketched in Chapter Two, paragraph 2 and Chapter Six, paragraph 6.

[3]Constitution of the Republic of South Africa, Act 200 of 1993. Hereafter referred to as the interim Constitution. For the position of MPL prior to the interim Constitution see 2.2.3.

[4]The Constitution of the Republic of South Africa, 1996.

which the final Constitution is based.[5] The interim Constitution and Bill of Rights emphasize both religious freedom and gender equality. The interim Constitution need not be construed in such a way that religious freedom always trumps equality (Basson:1994:xxiii). However, in view of a decision of the Constitutional Court which construed the interim Constitution as having a predominantly vertical operation, MPL may be held not to be subject to the Bill of Rights. It this respect the interim Constitution may be construed as not having far-reaching repercussions for conservative MPL practices in South Africa.

MPL is religiously based private law. It is therefore important to determine to what extent the Bill of Rights operates horizontally and thus includes MPL within its ambit. The final Constitution appears to provide more latitude for horizontal application than the interim Constitution does. Because of uncertainties in this regard, estimates as to the recognition of MPL and the status of Muslim women in South Africa can be made from an examination of the interim and final Constitutions.

The legal status of Muslim women in South Africa under both the interim and final Constitutions will be assessed in comparison with that of their counterparts elsewhere in the world. The right to have MPL recognized is not constitutionalized in either the interim or final Constitutions. In order for a recognized MPL to conform to the criteria of the Bill of Rights there may be a need to reform and codify it. This can be achieved without necessarily having to compromise Islamic principles. To this end it will be argued that an effective and democratic use of the provisions for the recognition of MPL in both the interim and the final Constitutions can help resolve the conflict between the Constitution and MPL to the advantage of Muslim women. It will also be shown that, unless a code of MPL is explicitly subject to the final Bill of Rights, the conflict between women's public and private religious rights will continue.

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[5]See Constitutional Principle II in Schedule 4 to the interim Constitution.

Once MPL has been recognized, its implementation will be guaranteed on the basis of the constitutionally entrenched right of access to justice for all (S 22) (now S 34). The review in Chapter Six indicated that some (not all) Muslim countries have separate courts for the implementation of MPL. Chapter Eight examined alternative methods of dispute resolution in support of an implementation of MPL in South Africa. In view of these recommendations, the feasibility of having separate *Shari'a* or religious courts especially created for purposes of such implementation will be further examined in this chapter. The judiciary and religious courts cannot, however, be the sole or most important protectors of religious freedom and equality. Muslims as members of religious and cultural communities and as citizens forming part of society[6] at large also have a role to play. Their religious rights can be accorded a special status in the legal field and the administration of justice only if they are committed to constructive change. Apart from a radical reformulation of MPL or a reinterpretation of the *Qur'an*, the subordination of MPL to the Bill of Rights appears to be the only real safeguard for women. It will therefore be stressed in this chapter that any reform project has to be initiated and overseen by Muslims asking themselves afresh "who we are, what we want, and if we are willing to begin to create a new order of things" (Garvey & Aleinikoff:1991:409).

This chapter begins with a thumbnail sketch of the history of constitutional developments in South Africa. A synopsis of gender legislation developments prior to the interim Constitution will then be given. This is followed by an examination of the relationship between state and religion, religious debates preceding the interim Constitution, arguments by Muslim religious authorities since constitutional provision for the recognition of MPL, the relationship between MPL and customary law and an extensive examination of possible constitutional implications of the recognition of MPL. The possible effect of international law in interpreting the Bill of Rights is then assessed. Finally, the possible implications of implementing MPL will be

[6]See 5.2.2.

considered.

9.1 CONSTITUTIONAL DEVELOPMENTS: A BRIEF HISTORICAL OVERVIEW

British colonial influence was felt in South Africa as early as 1795[7] when the British first occupied the Cape. (Dutch influence in the Cape was felt as early as 1652[8] already). In 1910 the four colonies (Cape, Natal, Orange Free State and Transvaal) joined to form the Union of South Africa. In 1931 South Africa became an independent state within the British Commonwealth of nations and a full-fledged Republic in 1961. In 1948 the National Party came to power on the platform of apartheid. It remained in power until 1994, when it was replaced by the first ever non-racial Government of National Unity. The interim Constitution is the fourth and first fully democratic Constitution of South Africa. The three predecessors to this (1993) Constitution were the (Union of) South Africa Act 1909, the Republic of South Africa Constitution Act 32 of 1961 and the Republic of South Africa Constitution Act 110 of 1983. The latter Constitution was purportedly based on the "separate but equal" policy of the National Party.[9] A new Constitution has now (1996) been drafted by the Constitutional Assembly[10] responsible for the drafting of a fifth and final Constitution for South Africa. The final Constitution had to be completed and adopted within two years of the date of the first sitting of the National Assembly

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[7]The British occupied the Cape from 1795 to 1803. The second British occupation lasted from 1806 to 1910 (Marais:1985:1).

[8]The Dutch East India Company occupied the Cape from 1652 to 1795. The Batavian period lasted from 1803 to 1806 (Marais:1985:1).

[9]In terms of the 1983 Constitution, Parliament was composed of three houses, one each for Whites, Coloureds and Indians. Blacks of course were completely excluded (Carpenter:1995:955).

[10]This is the Constitution-making Body composed of the National Assembly and Senate which sat jointly for the purpose of the adoption of the final Constitution (S 68 of the interim Constitution).

(Parliament) under the interim Constitution (S 73 (1)). This deadline (10 May 1996) was binding and could not be changed unless Parliament amended the interim Constitution. A first draft of the final Constitution was subsequently approved by the Constitutional Assembly on 22 November 1995.[11] This was followed by the adoption of the final Constitution on 8 May 1996, two days before the due date. The final Constitution was then scrutinized by the Constitutional Court to ensure that it accords with the 34 Constitutional Principles set out in Schedule 4 of the interim Constitution (S 71 (2)). On 6 September 1996 the Constitutional Court refused to certify the new Constitution as complying with some of these principles (none of which directly affects this dissertation). Revisions have now been made by the Constitutional Assembly to ensure a better finished product and acceptable draft. The revised text was adopted by the Constitutional Assembly on 11 October 1996. It has now been sent back to the Constitutional Court, which in turn will hold hearings before approval and certification. Should the Court approve of the revised text, most of the provisions of the final Constitution will come into effect between January and July 1997.

The South African legal system is made up of common law[12] (which is a conglomerate of Roman-Dutch and English law), legislation and, to a certain extent, customary law[13] (Bindman:1988:4-7; Marais:1985:25,33,60). Our courts[14] and legal

[11]The draft final Constitution was merely a working draft or discussion document towards the finalization of the permanent Constitution in May 1996. The draft included a detailed Bill of Rights but it also included blank pages and contradictory options reflecting unresolved differences between the ANC and the National Party.

[12]The common law has mainly been developed through case law (Du Plessis and Du Plessis:1992:16-18).

[13]Both the interim and final Constitutions recognize the role of customary law as a component of the South African legal order. See Bennett:1994:122 and 1995:22. Although implicit in S 7 (2), customary law is explicitly referred to in Sections 35 (3), 33 (2) and 33 (3) of the interim Constitution. See S 8 (1), S 36 (2) (implicit) and S 39 (2) -(3) (explicit) of the final Constitution for reference to customary law. See also 9.5.

profession are in the process of undergoing a transformation.[15]

In 1961 and 1983 the National Party refused to include Bills of Rights[16] in the respective constitutions "...because of the humanist emphasis it placed on individual rights vis-a-vis the authority of the state" (Dugard:1992:124; see also P.C.Report 4/1982:70-71; Cowling:1991:62). Attitudes changed and attention was focused on the need for a bill of rights when two contrasting[17] documents in this regard were published by the ANC[18] and the South African Law Commission[19] instructed by the government. The ANC took the lead in publishing Constitutional Guidelines in this regard in 1988 which were followed by the South African Law Commission's

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[14]See 9.8 for detail.

[15]Resembling American democratic constitutionalism, South Africa now has a separation of powers and the interim Constitution boasts a combination of both presidential and parliamentary (unitary) features (Carpenter:1995:977; Elazar:1994:29-36; Watts:1994:86). For the US position see Chapter Seven, section 7.

[16]A bill of rights is defined as "...a charter which seeks to define and protect fundamental rights and liberties which may be incorporated into or associated with a country's constitution. As a basic document, a Bill of Rights normally enjoys constitutional status. The power of review by an independent judiciary provides the best means of enforcing a Bill of Rights against the state" (Godsell:1990:49). The African National Congress's (ANC) "Freedom Charter" adopted at Kliptown in 1955 was partly a political manifesto and partly an embryonic constitution (Carpenter:1995:973). This Charter is also seen as the precursor to a bill of rights for South Africa. In 1962 the Progressive Party, on the recommendation of the Molteno Commission, gave its blessings to a bill of rights (Dugard:1988:248-9). For a more detailed historical overview of the bill of rights debate in South Africa see Dugard:1988a:28-32.

[17]This contrast is outlined in the following sources:Dugard:1990:441-466; Robertson: 1991:227-245 and Currin:1989:1-18.

[18]Despite certain obstacles, the ANC (one of South Africa's liberation movements) laid stress on the need for such a document as early as 1943 already (Asmal:1992:1; Shank:1991: xvi).

[19]Hereafter referred to as "the Olivier Commission". See footnote 195.

"Working Paper on Group and Human Rights" in 1989 (Dugard:1992:125; Van der Vyver:1991:756-757,785; Adelman:1989:132;Sachs:1991:5). "In May 1993, a multi-party negotiating council appointed various technical committees, including a constitutional committee and a committee on fundamental rights during the transition. After the negotiating council had reached agreement on a new constitutional text, parliament adopted the new constitution in December 1993...The...Constitutional Assembly...[had then to] prepare and adopt a final constitution within two years...[which had to] include an entrenched and justiciable bill of rights" (Rautenbach:1995:2,58).[20] The Bill of Rights[21] was the result of intense negotiations between the parties concerned, although the previous government did in 1993 attempt to pre-empt the whole process by proposing to enact a bill of rights before the impending 1994 elections (Keller:1993:3; BBC Summary of World Broadcasts:1993: 1609). "The final product [bill of rights] emerged after six months of intense negotiations between the political parties participating in the Multi-Party Negotiating Process (MPNP) at the World Trade Centre in Kempton Park" (Du Plessis and Corder:1994:22). The interim Constitution will remain binding and applicable until the finalization of the 1996 Constitution.

The provisions of the interim Constitution will be reviewed and compared to those of the final Constitution in order to determine whether South Africa is going in the right

[20]A similar chapter on Fundamental Rights has been included in the final Constitution. While women constituted at least 33% of the ANC's 200 candidates nominated for South Africa's new national assembly, they merely constituted a small percentage of the "players" in this regard (Johnson & Waugh:1994:1,3; Black Sash:1993b:3; Gouws:1992:7).

[21]The Bill of Rights as contained in Chapter 3 of the interim Constitution makes provision for 25 fundamental or human rights (SS 7-35)(Cachalia, Cheadle and Davis *et al.*:1994:5). Although the interim Constitution was already implemented in April 1994, parts of it are to be implemented in 1995 while full implementation is only expected to take place in 1999. The Bill of Rights is now contained in Chapter 2 (SS 7-39) of the final Constitution.

direction as far as MPL is concerned. While the anxiety, guessing and waiting is now a thing of the past, it will have to be ascertained whether the new government has upheld its commitment of enhancing the status of women, who formed more than half of the electorate.

9.2 GENDER AND THE LAW: A BRIEF HISTORICAL OVERVIEW

Until 27 April 1994 matters relating to religion and gender were regulated either by legislation or by the common law.[22] Even though the principle of equality was recognized by both Roman-Dutch law[23] and English common law, the previous minority government in South Africa made serious legislative inroads into the common law (Van Vuuren and Du Pisanie:1991:207; Dugard:1979:263). While the common law recognized a wide range of human rights, parliamentary supremacy under the 1909, 1961 and 1983 Constitutions meant that these rights could be suspended or curtailed by legislation (Carpenter:1995:960-961).[24] Gender discriminatory laws and practices existed in a racially discriminatory environment. It was the opinion of the Appellate Division (then the highest court of the land) that women were not persons and could therefore not be regarded as the equals of men.[25] Judicial views have, however, with time undergone many changes (Pillay:1992:16, 19,21).

South African women have been subject to various civil, customary and religious laws, including different personal (and family) laws, depending on the racial, ethnic

[22]See 9.1.

[23]See *contra* Zaal:1995:34.

[24]See 9.1.

[25]Incorporated Law Society v Wookey 1912 AD 623 *per* Solomon JA at 638. See also Murray and Kaganas:1994:37 and 7.5 where a similar position was adopted in US case law.

or religious group under which they are classified (Pillay:1992:17). While they have in common the fact that all laws dealing with the status of women and their rights are applicable to the private sphere of the family, they also experience division within this sphere by being subject to different personal laws. While radical changes for South Africa's constitutional and administrative structures have been anticipated, reform to family law was regarded as unimportant (Kaganas & Murray:1991:116). Under the aegis of the previous government, "National Women's Day, 9 August 1993 marked a change in the direction for women's politics in South Africa. The parliamentary Joint Standing Committee on Justice met to consider legislation aimed at the promotion of equality between women and men and the prevention of family violence" (Kadalie: 1995:64). These legislative developments will briefly be outlined below.

A striving for equality by South African women culminated in a Women's Charter adopted in 1954 (Makhosikazi:1954:238-240). This Charter was the first to express the need for change in the personal laws of the various peoples of South Africa in order to improve the status of women (Makhosikazi:1954:238; Albertyn:1994:43). The Gender Advisory Committee, a working group in the Convention of a Democratic South Africa (CODESA), also expressed the desire for the adoption of such a document by a future Constitution-Making Body (Codesa:n.d[1992?]:5). In 1992 the Women's National Coalition (WNC)[26] was founded specifically to launch a campaign for a women's charter or comparable document (Biehl:1993 b:1; Albertyn: 1994:50-51). The WNC was in fact "...formed primarily to ensure that women's demands were put on to the national constitutional agenda" (Kadalie:1995:75). However, "[i]n so far as the interim Constitution was concerned...political negotiations...moved more quickly than the collection of women's demands and the writing of the Charter. As a result neither the Charter nor the research was available

[26]The WNC represents approximately 92 different organizations including major political parties and religious groups (Kadalie:1995:65). See 9.6.1. There has been a call for the formation of a body similar to the WNC, namely a national Muslim women's coalition, as a means of empowering Muslim women (*al-Qalam*:1993c:3).

for the interim Constitution" (Albertyn:1994:53). As a consolation, women delegates at the constitutional negotiations did seek assistance from the WNC (Albertyn:1994: 53). Not giving up hope for the possible inclusion of a charter in the final Constitution, the WNC adopted a (second) working draft of the Women's Charter For Effective Equality in early 1994. The final draft was the culmination of two years of groundwork and was handed over to the Constitutional Assembly on 9 August (National Women's Day) 1994. Thus 40 years after the first adoption of a Women's Charter in 1954, the WNC adopted its own Charter (Kadalie:1995:65). "...[T]he charter...consists of 12 articles covering every aspect of women's lives...[It] [s]eek[s] equity for women in all spheres of life [public and private]..." (Kadalie:1995:65). Article 9 of this Charter, for example, calls for "[c]ustom, culture and religion [to] be subject to the equality clause in the [final] Bill of Rights". This provision represents a distillation of the CEDAW requirement of state signatories as outlined below.[27] The Charter also seeks more explicit recognition for the Women's Convention CEDAW in the final Constitution (Kadalie:1995:65). However, this Women's Charter is not an official interpretative aid to the Bill of Rights for it enjoys no constitutional status and does not have the force of law (Mabandla, Tshabalala *et al.*:1990:46-47; Mabandla: 1990:8). While the Bill of Rights now guarantees women's rights and not a Women's Charter as had been proposed by the WNC, this does not mean that the Charter is worthless. The latter can serve as an unofficial guideline for the interpretation of the broadly phrased provisions of the Bill of Rights which entrench gender-related rights, especially the equality clause.

South Africa is only in a very early stage of gender development with instrumental and long-overdue statutory and constitutional reforms really only taking place during 1993 and 1994. Legislation on the protection and promotion of women's rights was introduced by the former government after it had become a signatory to the international Women's Convention (CEDAW) in January 1993 (Biehl:1993c:12;

[27]See 9.7.

Hansard:1993:1187). The then government's legislative proposals had mixed success. They were "unique" in the sense that even though their aim was to remove gender discrimination from the statute book, women did not participate in their formulation (Du Plessis & Gouws:1993:260; *Hansard*:1993:1182; *Voëlvry*:1993:5; Biehl:1993c: 12).

Two of the three bills then proposed became legislation after having been assented to on 6 October 1993, namely the General Law Fourth Amendment Act No.132 of 1993[28] in terms of which the marital power of the husband was finally abolished (S 29) and the Prevention of Family Violence Act No.133 of 1993[29] in terms of which rape within marriage was criminalized (S 5) and provision was made for wives to obtain interdicts against husbands who threaten to and in fact assault and abuse them (S 2). The promulgation of these Acts signified a shift towards the formal legal recognition of gender equality which eventually found fuller expression in both the interim and final Constitutions.

It will be indicated below[30] that, while the interim Constitution may emphasize

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[28]Formerly the Abolition of Discrimination Against Women Draft Bill. This Act aims to repeal or to amend provisions which differentiate between men and women but does not extend to customary or religious law issues. There are a number of issues, cultural and otherwise, which cannot be addressed merely by legislation to achieve gender equality and this may well be the reason why this Act makes no reference to these issues. While this Act no doubt removed many legally discriminatory measures to achieve equality for the sexes, many legal and other (political, economic and social) discriminatory measures still remain.

[29]Formerly the Prevention of Domestic Violence Draft Bill. Incidentally, the application of this Act extends to parties who are or were married to each other according to any law or custom and therefore Muslim women can have recourse to this Act as well. However, social pressures within the Muslim community and the provisions of an unreformed MPL will probably deter Muslim women from using the provisions of this Act to their benefit. The provision relating to rape also appears to go contrary to *Qur'anic* injunctions regarding sexual relationships wherein the wife's consent appears to be irrelevant or taken for granted (*Qur'an*: Chapter 2: Verse 223).

[30]See 9.6.1.

equality, to be effective formal legal equality must be understood to include a broader and more substantive equality. The Promotion of Equal Opportunities Draft Bill apparently proved to be fraught with structural deficiencies resulting in it being probably permanently shelved. It purportedly aimed to prohibit discrimination on the grounds of sex, marital status and pregnancy and to promote equality and equal opportunities between the sexes (paragraph 4). However, clause 24 (3), for example, stated that laws which encourage sexist stereotyping would not be interfered with. Clause 4 only protected women already in a pregnant state from discrimination and did not make provision for women discriminated against on the basis that they might become pregnant. The bill also condoned religious discrimination (Biehl:1993a:15; *Voëlvry*:1993:5; Biehl:1993d:1-4; Du Plessis & Gouws:1993:246-252,257-258).

The dichotomy between the roles of Muslim women as citizens (public) of a country and as members of a religious community (private) extends to gender legislation which also has certain implications for the public and private spheres.[31] The legislation referred to in this paragraph (9.2) "...is premised on a distinction between the enforcement of the rights in the public and private spheres" and therefore does very little to promote "real" equality for women (*Women's Bulletin*:1993:14). The interim Bill of Rights appears also to have endorsed this distinction thus departing from current human rights developments which reflect the more encompassing vision expressed in feminist jurisprudence (Mabandla:1993:26). Women's rights must become part of the public debate if gender equality is to be taken seriously (Gouws:1992:6).[32]

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[31]See 2.1.5 (especially footnote 40), 3.3.1, 3.4 and 7.5 above for a brief outline and explanation of this distinction between the private sphere (of family, nature (reproduction) and the home) and the public sphere (of politics, culture and economics).

[32]For a summary of the current South African position concerning women in the private and public sphere and legislation in this regard see Biehl:1993c:12; Burman:1991:105; Black Sash:1993b:11; Budlender:1991:37-41; Black Sash:1993b:10; Loubser:1994:8-9; Kadalie: 1995:72-74; Mabandla,Tshabalala *et al.*:1990:26.

9.3 STATE AND RELIGION IN SOUTH AFRICA

Three issues will be dealt with under this heading as follows: is there a bias for a certain religion in South Africa? Is there a preference for a particular religious institution? What is the relationship between the state and religion in South Africa?

The answer to the first question is that both South African statutory and common law show a bias and orientation towards Christianity[33] in spite of South Africa being a multi-cultural and multi-faith society. The constitutionality of such laws is, however, suspect and many of these provisions will probably not survive constitutional review (Du Plessis:1996:465). This bias was also reflected in S 2[34] of the former 1909, 1961 and 1983[35] Constitutions. The preamble to the interim Constitution opens with a broad and denominationally neutral phrase: "In humble submission to Almighty God".

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[33]Examples of such Christian-orientated laws are detailed in Van der Vyver:1986:197-200 and Du Plessis:1996:444. For example, before 1977 witnesses in both criminal and civil proceedings were permitted to take an oath in the form which they considered binding upon their conscience. Since 1977, however, S 162 (1) of the Criminal Procedure Act (51 of 1977) only provides for the Christian form of oath. Witnesses objecting to this may, in terms of S 163, make an affirmation instead of the oath. Interestingly, in the 1800s the oath still played an important role in litigation involving Muslims in South Africa. A Muslim even served as interpreter and administrator of oaths to Muslim witnesses (Elphick and Shell:1989:216). "Although the practice has died out, local Imams are emphatic in stating that it would be to the benefit of both the Courts and Malay witnesses if it were re-introduced" (Du Plessis: 1953:64). See also 4.2 and 7.2, footnote 16 above.

[34]S 2 read as follows: "The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God." Van der Vyver (1986:193) writes that this reference to "Almighty God" "...was intended to denote a kind of 'pot-pourri god' that can be interpreted by all and sundry to suit their own personal conception of the deity."

[35]In a predominantly Christian South Africa the preamble of Act 110 of 1983 advocated freedom of religion by providing "[t]o uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship..." Hence, notwithstanding that Islamic law was not officially recognized in South Africa, Islam as a religion could be freely practised. See 2.2.2 above for demographic statistics and 9.1 above for reference to the 1983 Constitution.

This phrase is not followed by any further references alluding to religion. The closing paragraphs of the preamble to the final Constitution have a narrower construction in comparison with their counterpart in the interim Constitution and read as follows: "May God protect our people...God bless South Africa". It must be stressed that the preamble, although it is of (constitutional) interpretational value to courts, is not "law" as it is not an operative provision of the Constitution. These statements therefore do not detract from the guarantees of religious freedom and equality provided for in the Constitution (Du Plessis:1996b:3).

In answer to the question whether there is a preference for a particular religious institution in South Africa, we see that between 1858 and 1902 the answer was that there was a preference in favour of two major and successive Dutch churches ("Nederduitsch Hervormde Kerk" and "Nederduitse Gereformeerde Kerk" in the Zuid-Afrikaansche Republiek). However, since 1902 no established church has enjoyed preferential treatment (Van der Vyver:1986:179).[36]

As far as the third issue is concerned, four types of relationships between the state and religious communities can be distinguished in the world today, namely "states where the civic community and the religious community are identical and law is based on and reflects religious beliefs; states where the state and the religious community are formally separated but where one creed dominates the public philosophy; states where the population belongs to more than one religion or confession (and some to none at all), and religious freedom is fully recognized with the separation of state and religion a reality [and] states where atheism is the official policy but religion is more or less tolerated" (Partsch:1981:210).

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[36]For more detail see Van der Vyver:1986:182-189; Du Plessis:1996:445-446 and 8.5 where legal competencies of religious bodies and litigation inside the church in South Africa are discussed.

South Africa with its constitutionally entrenched freedom of religion (S 14 (now S 15))[37] belongs more or less in the third category, though both the interim and final Constitutions and the Bills of Rights do not erect walls of separation between church and state (Du Plessis and Corder:1994:155).[38] Sections 14-17 of the interim Constitution (now Sections 15-18 of the final Constitution), which entrench the fundamental freedoms of religion, belief, opinion, expression, assembly and association are similar to their counterparts in the Canadian Charter of Rights and Freedoms and the US First Amendment in that they are broadly phrased and open-ended. S 14 (now S 15) (as is the case with the Canadian Charter) does not have the equivalent of the US First Amendment's disestablishment clause (Sedler:1988:579; Bekker and Carpenter:1994:91-92).[39]

During 1995, at a Constitutional Assembly hearing for religious groups in Kempton Park in which Muslims also actively participated, it was generally accepted that South Africa would be a secular state. However, the need was expressed for a working relationship between the state and religious communities. Reference to God in the preamble to the interim Constitution was also discussed at this hearing, where delegates felt that Bhuddists and atheists cannot subscribe to this phrase. The phrase raised much debate a few days after the hearing when a group of Christians marched to Parliament to demonstrate their rejection of the proposal to make South Africa a secular state (Rautenbach:1995:147;*al-Qalam*:1995b:1;*The Argus*:1995c:4). The then Archbishop Desmond Tutu, along with most Christian organizations, supported the

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[37]SS 14 and 15 of the interim and final Constitutions respectively are extensively discussed in 9.4, 9.6.2, 9.6.3.1 and 9.7.

[38]Du Plessis (1996:457,461) sums this up as follows: "The epicenter of the debate on the cluster of rights entrenched in section 14(1) [now S 15 (1)] has...been religious rights...Section 14(2) [now S 15 (2)] attests to the negotiators' *unwillingness* to erect walls of separation between church and state. It allows for the conduct of religious observances at *all state or state-aided institutions...*" See 9.6.

[39]See 7; 7.3 and 7.6.

idea of a secular state in which the ideals of freedom of religion would be respected without necessarily any reference to God in the Constitution (Mgxashe:1995:11; Malan:1995:4).[40] As indicated, however, the preamble to the final Constitution does make explicit reference to God.

9.4 MUSLIM PERSONAL LAW (MPL) AND THE CONSTITUTION

9.4.1 DEVELOPMENTS LEADING TO THE RECOGNITION OF MPL

Various Islamic bodies, *Ulama* and relevant organizations[41] have now finally, in the light of political developments in South Africa, reached consensus on the need for the recognition of MPL as part of the South African legal system.[42] As indicated before,[43] only indigenous law and South African common law are presently recognized as official legal systems in South Africa (Van Niekerk:1990:34 fn 1). The interim and final Bills of Rights do not only guarantee freedom of religion and belief (S 14 (1) (now S 15 (1))) but also allow for the introduction of legislation recognizing religious personal law (S 14 (3)(a) (now S 15 (3)(a)(ii))) and religious marriages (S 14

[40]At present a special room has been set aside within the South African Parliament for prayers and parliamentary meetings are often opened with due regard to and respect for times of prayer and meditation for those of different faiths and traditions (*The Argus*:1995d:9). See 7.2 and above its footnote 21 in the text.

[41]One such organization being the Muslim Youth Movement (MYM) which for the first time since its inception in Durban in 1970 has a modernist female leader in the Transvaal region (Nkrumah:1991:95; Haffajee:1993:35; Chothia:1993:9-10). The MYM recognized that Muslim women were marginalized and reached out to recruit them as members and allows them to worship and participate in lectures at mosques (Tayob:1995:115,117,124, 139). See 2.2.4.1.

[42]See 2.2.3 where it was also indicated that it must be borne in mind that it was not too long ago that Muslims preferred MPL not be recognized as part of state law (Sachs:1992a: 174).

[43]See 9.1 and 9.5.

(3)(b) (now S 15 (3)(a)(i))). This does not mean that a right to such recognition is constitutionalized.[44] S 14 (3) (now S 15 (3)) merely authorizes the legislature *to pass legislation* recognizing this right (Du Plessis and Corder:1994:157). Muslims will therefore still have to lobby the legislature to pass such legislation. Thus, except for one very important qualification relating to the subjection of MPL and which will be detailed below,[45] the position remains unchanged in the final Constitution. Du Plessis (1996:462) explains that "[t]he provisional nature of section 14 (3) is due to the fact that the issues for which it caters were raised during the very last phases of the negotiating process." This resembled the acutely controversial customary law issue.[46]

S 14 (3), a constitutional milestone for Muslims, was to a large extent agreed on as a result of the efforts of a National Inter-Faith Conference convened in Pretoria in November 1992 under the auspices of the South African Chapter of the World Conference on Religion and Peace (WCRP-SA). At this conference a Declaration on Religious Rights and Responsibilities was agreed to (Tayob:1995:183). This document was the culmination of two years' discussion and consultation among religious groups and was presented to all religious communities and individuals for endorsement and revision where required. On the basis of this Declaration, the National Inter-Faith Conference also drafted a proposed clause on religious freedom[47], which was then presented to the writers of the interim Constitution for their

[44]See 2.2.3.

[45]See 9.6.2.

[46]This issue will be explained in 9.5.

[47]The clause on religious freedom reads as follows: "1 All persons are entitled: 1.1 to freedom of conscience, 1.2 to profess, practise, and propagate any religion or no religion, 1.3 to change their religious allegiance; 2 Every religious community and/or member thereof shall enjoy the right: 2.1 to establish, maintain and manage religious institutions; 2.2 to have their particular system of family law recognised by the state; 2.3 to criticise and challenge all social and political structures and policies in terms of the teachings of their religion" (WCRP-SA:1993:7). See 9.7.

consideration and possible inclusion in a Bill of Rights (WCRP-SA:1993:1,3,7). "The declaration ha[d] no force of law. At best it serve[d] as a recommendation to a body writing a new constitution and Bill of Rights. That body may choose not to look at the declaration, or it may look at other contributions. Given the support the declaration has received and will generate, it is difficult to imagine it could be ignored" (Moosa, E:1992:4). As predicted, both the declaration and the proposed clause on religious freedom assisted in drafting the provisions on religious rights in the interim Constitution (Du Plessis:1996:448).

Muslims were urged to "...co-operate with other faiths to produce such a document to clarify the rights of religious people in a new state" (*al-Qalam*:1992b:4). It was realized that only the active involvement of religious groups would secure their rights. Among the Muslim delegates were *Ulama*, academics and leaders of various organizations. Notwithstanding divisions in the Muslim community, it was considered ironic that an inter-faith conference was able to unite the diverse Muslim groups while a National Muslim Conference, held in 1990 and where this idea originated, was unable to bring these groups together (*al-Qalam*:1992a:3). "'There was a common purpose in the Muslim delegation. [They] were there to level the playing field as far as religion was concerned in this country...For this common objective Muslim traditionalists and modernists, Deobandi[48] and Barelvi,[49] Shafi'i and Hanafi, collaborated. Whether it was on the issue of Muslim personal law, apostasy, or education [they] generally spoke with one voice...'" (*al-Qalam*:1992a:3). The

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[48]Most of the Transvaal *Ulama*, for example, were trained at the conservative Deobandi schools/theological centres in India and Pakistan (Tayob:1995:66; *The New Encyclopaedia Britannica*:1986:18-19; Moosa, E:1995:145). In comparison with their Transvaal and Natal counterparts, membership of the Cape *Ulama*, more specifically, that of the Muslim Judicial Council (MJC), is more varied with jurist-theolgians coming from different backgrounds and training (Lubbe:1989:66). See also 8.4.

[49]Barelvis are a sub-sect of the *Hanafi* school of thought (*The Encyclopaedia of Islam*:1979:1043). See also Moosa, E:1995:146.

Muslim community made ample use of the opportunity to debate openly and freely, criticize and vent their feelings about the declaration. There were, of course, Muslim opponents to this document (*al-Qalam*:1992:8,10,19; *al-Qalam*:1992b:4).

The Declaration, "[t]hough it is not an official document in the sense that it comes from the State... reflects the understanding of an interest group, composed of citizens and rooted in civil society, of a right vital to the exercise of that in which they have a common interest, namely their religion" (Du Plessis:1995:4). The Declaration and other charters of this nature "...can go a long way towards giving content and 'teeth' to the generally formulated religious rights in the Bill of Rights and it could be of considerable assistance to courts of law [particularly the Constitutional Court][50] interpreting the constitutional provisions entrenching religious (and related) rights" (my addition in square brackets) (Du Plessis:1995:16).

The call for recognition was heeded and as a result of lobbying for their respective positions during the closing weeks of constitutional negotiation at Kempton Park in Johannesburg, some representatives of the Muslim community finally succeeded in securing the inclusion of S 14 (3), which allows for legislation recognizing, among other things, MPL and the validity of Islamic marriages.[51]

9.4.2 DEVELOPMENTS SINCE THE CONSTITUTIONAL PROVISION FOR RECOGNITION OF MPL

Legal issues that would arise from the recognition of MPL, options in this regard and

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[50]See 9.8.3.

[51]"It is important to note that the inclusion of religious rights in Chapter 3 was not controversial...The ease with which the negotiators accepted section 14 (3) is...remarkable. They did it at the behest of the legal representative of a fundamentalist Islamic faction who lobbied them during the very final stages of the negotiating process" (Du Plessis:1996: 452,463).

lack of consensus on these issues among Muslims themselves will next be highlighted. The previous minority government had assured Muslims that the finer details of MPL and its implementation would be articulated and determined by Muslims themselves (Moosa, N:1991:169).[52] Apart from the initiatives taken by the Ministry of Justice referred to below, the present government of national unity has as yet not instructed any official body to further the examination of MPL initiated by the previous government (Toffar:1994:1-2).[53]

As a result of Muslims having reached consensus on the recognition of MPL and securing the constitutional inclusion of S 14 (3), a Muslim Personal Law Board was established in August 1994 in Durban, South Africa.[54] This Board was founded to initiate the incorporation of MPL into the South African judicial system and to decide on the scope, content, functioning, implementation and administration of MPL (*al-Qalam:*1994a:4). The main functions of this board are essentially twofold (*al-Qalam*: 1994f:3): "Firstly the application; who will be responsible for the application of Muslim Personal Law, ordinary courts or special family courts presided over by Muslim judges?[55] And secondly, [formulation and] interpretation. Can the Board achieve consensus among its founder members on the formulation of a uniform code of family laws for inclusion in the new constitution and ensure acceptability by its constituencies with their diverse tendencies in respect of the interpretation of family laws?" (Dangor: 1994:12).

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[52]See 2.2.3.

[53]Sheikh A.K Toffar (1994:4-8) lays down possible guidelines for the functioning of MPL in South Africa on behalf of the Islamic Unity Convention (IUC), a coalition of mainly Western Cape-based Muslim organizations. These guidelines will be discussed in 9.8.5.

[54]The establishment of the Board was accompanied by various problems. Because very few women served on this Board it was difficult to believe that tradition-oriented *Ulama* bodies would be able to formulate and codify MPL so that both sexes will be treated equally (*al-Qalam*:1995:2).

[55]See 9.8.2 and 9.8.5.

Commenting on the second function of the Board, one has to be very wary of using terms like "uniform civil code", especially when considering the implications this had for Muslims in India, who eventually rejected the idea. This term implies that there will only be one (secular) code applicable to all South Africans - Muslims and non-Muslims alike. It appears, however, that this is exactly what Dangor had in mind, because he goes on to write that "[t]heir (the Muslim Personal Law Board's) support for a uniform civil code makes it impossible for them to favour any legal measure which is at variance with the South African legal system" (Dangor:1994:12). As indicated in previous chapters, differences in cultures, customs, traditions and religions, especially as far as MPL, which is of divine origin is concerned, make this ideal (of a secular uniform civil code) difficult to achieve. The divine origin of MPL is also the main reason why Muslims are not in favour of a single system of family law irrespective of the fact that judges and assessors would, for example, be Muslim (Sachs:1990:100-102). Hence this option is problematic.[56]

The newly established Board also had several recommendations regarding this issue but even within its executive there seemed to be disagreement among organizations on the way forward (*al-Qalam*:1994e:3).[57] Toffar (1994a:7), on behalf of the IUC,[58] states that if MPL is recognized, and all laws related to it - for example, the Islamic laws of contract and procedure - will also have to be "overhauled". He fails to take into consideration the fact that most Muslim countries have adopted secular codes in, for example, civil and criminal law.[59] He also addresses the question of the implementation and administration of MPL in South Africa and is of the opinion that

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[56]These problems and the possibility of such an option for South Africa will be highlighted in 9.8.5 and Chapter Ten. See also 2.2.3.

[57]This will be detailed in 9.8.5.

[58]See footnote 53.

[59]See 2.1.5. There are, however, some Muslim countries, for example Pakistan, that are officially reverting back to *Shari'a* -based criminal law (Amin:1985a:21).

"[r]eligion and the functioning of religious laws must be permanently removed from the political ambit and sphere of influence" (Toffar:1994a:7). He makes it clear that MPL must function independently of comparable secular law; thus he does not confuse the issue with that of a "uniform" code as Dangor had apparently done. In this regard there are many variants of legal pluralist solutions available (Sachs: 1991:75).[60] S 14 (3) of the Constitution which makes provision for legislation recognizing MPL was but one step in the right direction. Options like the "minimalist option" as a possible solution for Muslims who merely constitute 1.1 % of the South African population will also be considered.[61]

Draft bills, namely the Recognition of Muslim Marriages *Act* of 1995 and the Muslim Succession *Act* of 1995, based on traditional interpretations of Islamic law and which leave much to be desired as far as women's rights are concerned, were prepared by the Board so as to provide interim relief in the areas of marriage, divorce and succession (*al-Qalam*:1995:1; Bosch:1995:1). The proposals were then submitted to the Constitutional Assembly on 1 February 1995 with the specific request that MPL be exempt from the final Bill of Rights, especially its equality clause (Bosch:1995:4). The IUC also supports the idea of exemption because its members believe that MPL cannot function properly and fully under the interim Constitution (Pearce:1995:6; Toffar:1994:4). In 1994 the IUC established a Commission of Enquiry into MPL and has since submitted its own draft on MPL to the Law Commission and Minister of Justice (Supreme Court Reporter:1995:7; *IUC News*:1995:1). The Department of Justice is also in the process of drafting "interim legislation which will address the most pressing concerns of Muslims pending consensus on the final legislation" (Pearce:1995:6).

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[60]See 9.8.5 where such variants (by Sachs and Cachalia) are discussed.

[61]See 9.8.5 for an explanation and discussion.

In light of the circumstances above, it appeared as if the credibility of the Board was waning; it has now been dissolved, which seems to confirm this (Paleker:1995:5). Since and as a result of the disbanding of this Board, two further *Ulama* bodies dealing with MPL were established in opposition to each other (*Athlone News*:1995:7; *Az-Zamaan*:1995:2; *The Argus*:1995:22; Rahman, Fu'ad:1995:5). This merely confirms the extent of disunity among and confusion created by Muslim religious authorities on the matter of MPL and also highlights the fact that there is little involvement on the part of the Muslim community itself in the process. Thus, despite the fact that Muslim participation was instrumental in both the success of the WCRP-SA Declaration and the constitutional inclusion of S 14 (3) as discussed above,[62] the Board and subsequent bodies have failed to carry the process further. As representatives of the Muslim community, these bodies have also not adequately informed the community of the practical implications of implementing a recognized MPL as part of the South African legal system. While certain religious groups and individuals have been successful in lobbying the legislature to give attention to their MPL demands, the validity of these demands must be questioned if they do not advance the cause or do not have the blessing of the religious community as a whole.

9.5 MPL AND THE CONSTITUTIONAL DEBATE ON CUSTOMARY LAW

It was indicated[63] that MPL, although influenced by custom, is essentially religious in nature.[64] As explained below, members of the Muslim community have, however, erroneously equated MPL with customary or indigenous law (*al-Qalam*:1993a:9).[65] The interim and final Constitutions highlight this distinction by making separate

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[62]See 9.4.1.

[63]See 2.1.1, 2.1.2 and 2.1.4.

[64]See also 9.6.3.1 above footnote 132 in the text, 8.1, 8.4 and 8.6.

[65]See 9.1 and 9.4.1.

provision for religious law and customary law. While S 14 (3) (a) and (b) of the interim Constitution (now S 15 (3)(a)(ii) and (i)) allows for the introduction of legislation recognizing religious personal law and religious marriages respectively, it also recognizes customary law as a component of South African law by directly referring to it in both Chapters 3 and 11 (now 2 and 12). Sections 35 (3), 33 (2) and 33 (3) of Chapter 3 (now S 39 (2) - (3) of Chapter 2), for example, all refer explicitly to customary law. An implied reference is also made to customary law in S 7 (2) which makes Chapter 3 applicable "to all law in force". This is also implied in S 8 (2) and S 36 (2) of the final Constitution. However, S 15 (3) of the final Constitution, because it also pertains to marriages "concluded under any tradition", causes some confusion in so far as it can be construed as referring to African customary law. While it can be argued that both systems seem to discriminate against women, the mechanisms and structures of these two systems also differ from each other. The customary law issue has furthermore been a separate issue in the constitutional debates. Brief reference is made to this debate and what eventually happened to it as a lesson for the recognition of MPL and the question of equality in South Africa. The final Constitution, instead of emphasizing respect for religion, underlines the principle of equality as it did with customary law.

At the initial phases of the drafting of the interim Constitution and the Bill of Rights customary law did not receive immediate attention.[66] It did, however, become an issue as traditional leaders pressed strongly for specific references to it. An initial attempt to completely exempt customary law from the Bill of Rights (especially its equality clause (S 8)) was unsuccessful. A proposal was then made for exemption for a limited period. The Technical Committee on Fundamental Rights during the Transition[67] refused to recommend this and instead proposed a compromise clause

[66]The Act currently dealing with the recognition of customary law is the Law of Evidence Amendment Act 45 of 1988. For more detail see Church and Edwards:1995:1249 and 9.8.5.

[67]See Du Plessis:1994a:89.

(which would have been S 32) after consultation with traditional leaders. This compromise clause[68] made the application of customary law a constitutional right but still subjected it to the provisions of the Bill of Rights. This proposal was met with mixed reaction by both traditional leaders and female negotiators.[69] Sufficient consensus for inclusion could therefore not be reached. Although traditional leaders did not succeed in having recourse to customary law constitutionalized as an individual right, they ultimately achieved some success. S 181, dealing with and securing the authority of traditional leaders to act in terms of customary law, was included in Chapter 11 of the interim Constitution (Nhlapo:1993:11s; Albertyn:1994: 59-60; Du Plessis:1994a:98-99; Bennett:1995:20-22). These provisions endorse the existing powers of traditional leaders under customary law (Bennett:1995:22). This is bad news for women lobbyists who objected to the unequal treatment of women under customary law. "The entitlement to have customary law applied in terms of the previously proposed s 32 (which would have been part of the bill of rights) would...have had greater potential to inhibit the operation of customary law than the agreed-on s 181(1). [S] 32 also made the application of customary law dependent on individual choice and not on the decisions of traditional authorities" (Du Plessis: 1994a:99). S 181 (1) does not, however, preclude customary law from being subject to the Bill of Rights and in this sense it still conforms with the excised S 32 (Du Plessis:1994a:99).

Bennett (1994:123) summed up the interim constitutional position thus: "By *implicitly* recognizing customary law, and at the same time prohibiting gender discrimination, the Constitution has brought about a head-on confrontation between two opposed

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[68]S 32 recognized the rights of communities to have their interpersonal relations governed by customary laws.

[69]Traditional leaders "...feared that certain aspects of customary law would not survive constitutional review because a 'Western court' may regard them as discriminatory against women..." (Du Plessis:1996:463).

cultures...Because African culture is pervaded by the principle of patriarchy...the gender equality clause now threatens a thoroughgoing purge of customary law" (emphasis added). However, an interpretation of S 33 (1)[70] of the interim Constitution could be construed to mean that customary law will not necessarily undergo much change. It has been suggested that in cases of such a conflict, equality should trump other individual rights in the Constitution. Heeding this, the final Constitution improves the interim constitutional position in that it recognizes traditional leadership according to customary law "*subject to the Constitution*" (S 211 (1) in Chapter 12) and furthermore instructs that courts *must* apply customary law "*subject to the Constitution*" (S 211 (3)) (emphasis added).

Some Muslims have confused MPL with customary law. This is evident from reports in a Muslim newspaper. In one article Muslim marriages were alluded to as customary marriages (*al-Qalam*:1993a:9). Part of the heading of another article dealing specifically with the proposal by traditional leaders that customary law be exempt from the Bill of Rights reads as follows: "Proposal that Bill of Rights should not guarantee equality for *Muslim*, African women..." (emphasis added) (*al-Qalam*:1993:1;3). A view was further expressed that "...should customary law be excluded from the Bill of Rights, women who fall under...Islamic law...will not be conceded full human rights...as customary law will enjoy a higher status to the Bill of Rights" (*al-Qalam*:1993:1). The excision of the proposed S 32 was thus construed as a recognition of the full human rights of both Muslim women and women under customary law, including the power to enforce these rights. The conclusion followed because customary law (and by implication Islamic religious law) would no longer have been exempted from the operation of the Bill of Rights.[71] The implications of

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[70]See 9.6.2 for a discussion of S 33 (1).

[71]See Chapter 3 - S 35 (3) of the interim Constitution (now Chapter 2 -S 39 (2)) regarding the interpretation of such common and customary law and 9.6.2 where these implications are critically discussed.

such an interpretation would be that MPL will have to be reformed before it can be recognized, let alone codified, in order to bring it into line with the Constitution. Such an interpretation would have been some consolation to Muslim women had it been possible to equate MPL with customary law. While this is not possible, Muslims can nevertheless learn from this experience. It appears that not all Muslims (especially the *Ulama*) are aware of what these implications might mean for the future of MPL in South Africa or even that they will heed the consequences of the avaricious behaviour of the traditional leaders (Moosa & Bosch:1993:11s).[72] The worst that could happen is to leave MPL as it is - unrecognized and therefore uncomplicated.

As indicated, the recognition of customary law as existing law in both the interim and final Constitutions does not exempt it from especially the provisions of the Bill of Rights. S 14 (3) likewise does not constitutionalize a right for Muslims to have their personal law recognized and made applicable to them.[73] Does this mean that MPL, once recognized, will be subject to the Bill of Rights? The final Constitution provides that MPL, even if recognized, will still be subject to the provisions of the Bill of Rights (S 15 (3)). As will be indicated below[74] attempts by avaricious and conservative religious authorities were not successful in exempting MPL from constitutional scrutiny nor has their failure to reach any compromise resulted in the total exclusion of MPL from the final Constitution.

9.6 CONSTITUTIONAL PROVISIONS AND MPL

Can safeguarded fundamental rights coexist with the recognition of MPL and will

[72]See 9.6.2.

[73]As will be indicated in 9.4.1, this position remains unchanged in the final Constitution (S 15 (3)).

[74]See 9.6.2 below.

Muslim women in South Africa reap the benefits of the Bill of Rights, given the failure of similar instruments elsewhere in the world to afford protection to Muslim women? And will the right to equality take precedence over the right to religious freedom?[75] In order to answer these questions the interim and final Bill of Rights will be analysed. The equality clause (S 8) (now S 9) prohibits discrimination on the grounds of both sex *and* gender (S 8 (2) (now S 9 (2))). This distinction is highlighted because the form of religious and cultural discrimination which Muslim women are subjected to is based on gender and not so much on sex discrimination.

There are differences of opinion over how and to what extent the interim (and now final) Bill of Rights will impact on MPL once it is recognized.[76] Much will also depend on the extent to which the interim and final Bill of Rights will be understood to apply horizontally. As will be detailed in 9.6.3 below, a horizontal application of the Bill of Rights will have far-reaching implications for Muslim women who are accorded a status inferior to men by MPL although, significantly, not by Islam itself.[77] In any event, this apparent conflict between the right to freedom of religion (S 14) and the right to equality (S 8) was one of the issues that writers of the final Constitution had to address.[78]

There is, of course, no guarantee that constitutional or statutory measures will result in real equality between the sexes. As indicated[79] the achievement of real equality for

[75]This needs to be determined because "...there are instances in which the demands of equality may limit absolute individual liberty, and cases where the requirements of freedom may check the pursuit of equality" (Albertyn and Kentridge:1994:150).

[76]See 9.5 and 9.6.2.

[77]See Chapter Two, section 2.

[78]See 9.7.

[79]See 2.1.5 and 2.3.

women lies beyond the reformation of MPL in line with the true *Qur'anic* spirit. The worst that could happen for Muslim women in South Africa is that MPL remains unrecognized and therefore unproblematized.[80]

In the following sections some of the operational features of the interim and final Bill of Rights will be considered in order to determine what implications they have with regard to the issues outlined above.

9.6.1 MUSLIM WOMEN, EQUALITY AND THE BILL OF RIGHTS

As is evident from India and the US above,[81] the international record of equality litigation serves to remind us to be wary of promises embodied in bills of rights (Albertyn:1992:23). In fact "[t]he text of the [interim] Constitution...itself...is strewn with clues which are cryptic and equivocal" (Albertyn & Kentridge:1994:151). A purposive, non-literal and contextual interpretation of especially S 8 (equality clause) and S 14 (1) and (3) (freedom of religion clauses) of the Constitution was seen as a way of remedying this uncertainty (Albertyn & Kentridge:1994:150-151; Du Plessis and Corder:1994:139; Bonthuys and Du Plessis:1995:205).[82] Such an interpretation would furthermore afford substantive equality to women. As long as equality is seen as the focal point, tensions between equality and freedom could be resolved (Albertyn and Kentridge:1994:150-151). It was also argued that S 8 (as a whole as well as each of its subsections) should be understood to require equality in a legal sense as well as the promotion of economic and social equality (Albertyn and Kentridge: 1994:152-153,155). Have these issues been resolved by the final Constitution? The following warning should suffice as an answer to this question: "The gender

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[80]See 9.5.

[81]See 6.3.2 and 7.5 respectively.

[82]See 9.7.

implications of the final constitution should...be considered with healthy scepticism given the experience that women's rights are often canvassed more actively in rhetoric than in practice" (Du Plessis & Gouws:1996:1).

The importance of equality as a value "foundational" to the interim Constitution appears from the Preamble,[83] Afterword and Constitutional Principles I, II and V in Schedule 4 to the interim Constitution, all of which constitute a value-basis for the interpretion of the Constitution.[84] This is also evident from S 1 (a) (founding provision), S 7 (1), S 36 (1) and S 39 (1)(a) of the final Constitution. Equality is also listed as the first substantive right in both the interim and final Bills of Rights to stress its significance (Du Plessis and Corder:1994:139; Cachalia, Cheadle *et al.*:1994:25). S 35 (1) of the interim Constitution enjoins courts interpreting the Bill of Rights as a whole to promote, among other things, freedom and the value of *equality*. Moreover, in terms of S 33 (1) (*a*)(ii) and S 26 (2), legal measures limiting any right in the Bill of Rights must be "justifiable in an open and democratic society based on freedom *and equality*" (emphasis added).[85] This formulation followed as a compromise between libertarian negotiators favouring a bill of rights centred on individual freedom rather than on equality and liberationist egalitarians favouring equality (Du Plessis and Corder:1994:53; Du Plessis:1994c:57). This theme also recurs in S 35 (1) and the dialectic of freedom and equality has remained in the comparable provisions of the final Constitution (S 39 (1) (a) and 36 (1)). Over and above the interim Constitution, the final Constitution reinforces the notion of substantive equality by connecting equality with human dignity which has now been

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[83]Unlike the preamble of the interim Constitution, the preamble to the final Constitution does not mention gender equality.

[84]S 232 (4) states that the Schedules "form part of the substance of [the] Constitution".

[85]The implications of S 33 for S 8, which like any other right in the interim Bill of Rights is capable of limitation by law provided that the limits fulfil the requirements of S 33 (1), will be discussed in 9.6.2.

added and placed before equality and freedom as a guiding value to Sections 1 (a), 7, 36 (1) and 39 (1) (a) (Du Plessis & Gouws:1996:2-3).

The relevant parts of S 8 read as follows: "(1) Every person shall have the right to equality before the law and to equal protection of the law.[86] (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, *gender*, *sex*, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, culture or language" (emphasis added).[87]

According to Albertyn and Kentridge (1994:156-158), S 8 (1) (now S 9 (1)) expresses the right to *substantive* (and not just formal) equality. In their view such an interpretation of S 8 (1) with regard to the relationship between it (equality), anti-discrimination (S 8 (2)) (now S 9 (3)-(4)) and affirmative action (S 8 (3))[88] (now S 9 (2)) implies that while non-discrimination and affirmative action are merely aspects or methods of achieving equality, the concept of equality is wider than either of them. S 8 (1) is concerned with inequality in all its manifestations while S 8 (2) (the anti-

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[86]S 9 (1) of the final Constitution guarantees "equal...benefit of the law" in addition to equal protection. While these provisions are to the advantage of women, should they be found to be prejudicial to men and therefore unconstitutional, they could have disasterous consequences for women who are currently advantaged by certain types of legislation.

[87]S 8 (3) (*a*) reads as follows:"This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms." S 8 (4) reads as follows: "*Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

[88]S 8 (3) (a) permitting measures designed to achieve affirmative action proved to be a real bone of contention among negotiating parties. For more detail see Du Plessis and Corder:1994:53. Affirmative action, while it remained a bone of contention under the draft final Constitution, is now regulated by S 9 (2) of the final Constitution. For more detail on S 8 (4) (proving discrimination) see Albertyn and Kentridge:1994:174-175.

discrimination provision) is specifically concerned with inequality resulting from unfair[89] discrimination. The latter supplements rather than qualifies the former and, while they overlap, they are nevertheless not synonymous. In this respect the structure of the equality clause differs from the Fourteenth Amendment to the US Constitution which guarantees "equal protection of the laws" without, however, explicitly prohibiting discrimination and is also not subject to a general limitation clause such as our S 33 (Cachalia, Cheadle *et al.*:1994:27). According to Du Plessis & Gouws (1996:5), S 9 (2) of the final Constitution "proclaims affirmative action to be an eventuality of equality [and that]...[t]his is an affirmation of substantive equality". Their view therefore concurs with that of Albertyn & Kentridge above.

Albertyn and Kentridge (1994:158) caution against drawing too heavily on foreign equality jurisprudence in developing our own because of differences in history, context and language.[90] Focus must instead be placed on "a/the new South African feminism" (Kemp, Madlala *et al.*:1995:133,141-143). Furthermore, equal protection of the law not only includes the substance and content of law but also requires the

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[89]The word "unfair" and its implications for S 8 is subject to different interpretations. According to Cachalia and Cheadle *et al.*(1994:28-29) only "malign" as opposed to "perjorative" differentiation is outlawed. This view is criticised by Albertyn and Kentridge (1994:161-163). Because S 9 (3) and (5) of the final Constitution are linked they reflect a particular perception of unfair discrimination which is also subject to criticism. For more detail see Du Plessis & Gouws:1996:6.

[90]As far as the feminist theories extensively outlined in 7.5.1 are concerned, Albertyn (1992:24), for example, rejects both the equal and special treatment feminist theories as inappropriate "...for the achievement of equality through the courts in South Africa...[as they] do not recognise that the difference between men and women is in fact about inequality and hierarchy...[which] is institutionalised in the letter, practice, interpretation and application of the law". She suggests that new interpretations of equality have to be found for South Africa (Albertyn:1992a:15). Sachs (1989:43), on the other hand, feels that "[i]t might well be that the solution lies in harmonising the right to be the same with the right to be different." See 7.5.1 and 3.3.1. These feminist theories are also discussed by Sinclair:1994:515-518 and Murray and Kaganas:1994:2 passim.

state to "foster equality by protecting vulnerable persons and groups from domination by more powerful individuals and groups, whether within the *public or the private domain*. [This imports an expansive view of the reach of the equality clause] (emphasis added)" (Albertyn and Kentridge:1994:160 and fn 55). This will require a fairly far-reaching horizontal application of the equality clause to bind private citizens, institutions and companies (Albertyn and Kentridge:1994:160 fn 55).[91] While S 9 (3) of the final Constitution (equality clause) has a vertical operation,[92] S 9 (4) is *explicitly* horizontal[93] and will in its horizontal form also make discrimination by private citizens unconstitutional. So, for example, a Muslim woman who fits a job description but who might have been refused employment because she chose to veil herself would now have a constitutional cause of action against a private company which entertained such discriminatory hiring practices. While the state-funded Human Rights Commission[94] might pay her legal fees, the company has no such privilege and has furthermore to prove that the discrimination is fair (S 9 (5)). Discrimination alludes to differential treatment (Du Plessis & Gouws:1996:6). In dealing with the question of direct and indirect discrimination referred to in S 8 (2) (now S 9 (3)-(4)), Albertyn and Kentridge (1994:166-167) welcome the explicit prohibition of both types of discrimination because it allows our courts to adopt an inclusive approach to what exactly constitutes discrimination and it furthermore provides comprehensive protection against unfair discrimination. Direct discrimination occurs as a result of someone being disadvantaged simply on the basis of, among other things, sex, gender and religion. An example of direct sex discrimination is discrimination on the

[91]See also 9.6.3, especially 9.6.3.2 below.

[92]"The *state* may not unfairly discriminate...against anyone..." (emphasis added).

[93]"*No person* may unfairly discriminate...against *anyone*..." (emphasis added).

[94]See 9.8.4.

grounds of pregnancy[95] (Albertyn and Kentridge:1994:164-165; Du Plessis and Corder:1994:143). S 1 (b) of the final Constitution also includes non-sexism as a value on which democratic South Africa was founded.

A conservative interpretation of MPL clearly conflicts with the provisions of S 8 which demand equal protection and equality before the law for all men and women. In addition, constitutional guidelines require that legislators must aim to and in fact improve the conditions of the disadvantaged on grounds of, among other things, gender, sex, religion and belief. Gender discrimination is particularly relevant to Muslim women. As indicated above,[96] gender and sex are mentioned separately as

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[95]Until 1993 women in South Africa were not protected from dismissal on account of pregnancy. The interim Bill of Rights allowed for a change to the *status quo* although it did not expressly enumerate in S 8 (2) that unfair discrimination based on pregnancy and childbirth would be unconstitutional (Czapanskiy:1995:45; Black Sash:1993b:10; Biehl:1993c:12; Du Plessis and Corder:1994:143). While the Women's Convention CEDAW was envisaged to promote women's rights in this regard, S 9 (3) of the final Constitution now expressly enumerates both pregnancy and birth as well as marital status as grounds of unfair discrimination. Much was thus learnt from the US experience. See 9.7. It seems that most South African academics supporting women's rights, favour the different/special treatment approach to equality of the liberal feminists comparable to that expounded in the US (see 7.5.1). This approach, which accords with Article 12 of CEDAW, affords women the reproductive right to choose an abortion, without which right there can be no question of equality between the sexes (Gouws:1992:7; Rhoodie:1989:471). In 3.3.1 and 7.5.1 the Islamic and US position on abortion respectively was outlined with a view to comparing it with the position in South Africa. Abortion is not particularly relevant to the recognition of MPL but is raised here to highlight that, if the neutral stance taken in S 9 (now S 11) of the Bill of Rights, which merely states that: "Every person shall have the right to life", is interpreted by the judiciary (especially the Constitutional Court) as allowing women a free choice (to have or not to have an abortion), this will not interfere with MPL. If, however, a recognized MPL were to be exempt from the Bill of Rights and a particular interpretation of MPL prohibits abortion, then Muslim women could be denied such a free choice. Although the Constitution does not expressly provide for a right to abortion on request, the Termination of Pregnancy Bill 1996 has now been tabled in Parliament. It provides for abortion on demand until the 12th week of pregnancy or later under certain circumstances (Clause 2).

[96]See 9.6.

protected conditions under S 8 (2) (now S 9 (3)) of the interim Constitution. This was not done at the insistence of female negotiators but was proposed by the Technical Committee acting on "private" submissions it had received (Du Plessis and Corder:1994:143,38).[97] The listed grounds, although extensive, are not exhaustive (Cachalia, Cheadle *et al.*:1994:30). This is clear from the phrase "without derogating from the generality of the provision" in S 8 (2).[98] This is also the case with S 9 (3) of the final Constitution which simply refers to "...one or more grounds, including..."

A distinction must also be made between sex and gender on the one hand and patriarchy on the other. Patriarchy has been defined as an ideology of male supremacy resulting from the social construction of gender (Mabandla, Tshabalala *et al.*:1990:21). Its embodiment in some of the customs, practices and religions in South African society provides justification for upholding distinctions between the sexes in the public and private spheres (Mabandla, Tshabalala *et al.*:1990:21).[99] The confusion between the concepts of sex and gender is also reflected in South African society which, for example, regards women's childbearing capacity as sufficient justification for their childcaring responsibility. This confusion also had a negative impact on court decisions, theories and debates in this regard in the US.[100]

In addition to sex and gender, S 8 (2) (now S 9 (3)) also specifies religion as a ground on which discrimination is prohibited. An applicant need not prove discrimination solely on one of the grounds listed but could also rely on a

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[97]See also 9.8.4. The distinction between sex and gender has been discussed in detail in 7.5 and elsewhere.

[98]See Albertyn and Kentridge:1994:168-170 for a critical discussion relating to the extent of this listing.

[99]See 2.1.2 and 2.1.3 above footnote 36 in the text. See also 9.9 below where certain conclusions regarding patriarchy are drawn.

[100]These have been discussed in detail in 7.5.1 and elsewhere.

combination of these grounds, for example, sex and religion (Du Plessis and Corder:1994:143). S 9 (3) furthermore adds marital status to the list. This is a significant development because unequal treatment on the basis of gender is often aggravated by discrimination based on marital status. Muslim women would also be included under the ambit of this provision once Muslim marriages are legally recognized. While S 37 (5) (c) of the final Constitution categorically lists S 9 (equality) rights with respect to race and sex (not gender) as non-derogable (non-suspendable) rights, S 15 (religious) rights are not thus included. They were, however, included under S 34 (5)(c) of the interim Constitution. Their exclusion emphasizes the precedence of equality over religion.

In addressing the issue of constitutionalization of women's rights, several areas have been identified where MPL not only conflicts with South African law in general[101] but also conflicts with the equality clause (S 8) in the interim Bill of Rights in particular. Because it was uncertain as to what extent the interim Bill of Rights would impact on MPL once the latter was recognized, it could simply not be assumed that in instances of such conflict the Bill of Rights would prevail over MPL. This uncertainty had serious implications for Muslim women. As indicated,[102] the traditional formulation of MPL accords them an unequal status to that of men. Islamic law and MPL endorse this inequality, but Islam, the interim and final Constitutions do not. The explicit subjection of MPL to the provisions of the final Bill of Rights is therefore not contrary to Islam.

Although freedom of religion and equality between the sexes are both rights guaranteed by the Constitution, the interim Bill of Rights has failed to address possible conflicts between these two rights. Currently, for example, an unofficial and

[101]See 2.2.4.3.

[102]See Chapter Two, section 2.

conservatively interpreted MPL operates to discriminate against Muslim women. While official state recognition of an unreformed MPL exempt from the provisions of the Bill of Rights would at the very least have afforded Muslim women and children legal status, MPL would have continued to discriminate against them (Moosa, N: 1991). MPL therefore has to be reformed before it can be recognized and subject to the final Bill of Rights. While "...preference for either equality or recognition [of MPL] is bound to offend some or other human right [it could even mean that] [u]nqualified equal treatment for...Muslim women will limit or even undermine the Muslim community's rights to live according to deeply held [albeit prejudicial] religious convictions and values ([S] 14 (1)) and a culture of its choice ([S] 31)" (Bonthuys and Du Plessis:1995:206). An argument which could be construed to favour religion over equality is that, while the notion of equality as understood in a Western context does not necessarily preclude its use to evaluate religious and cultural practices, such evaluation "...has to be done in the knowledge that equality itself is the product of religion and culture and that the values associated with it therefore do not inevitably trump religious or cultural values" (Bonthuys and Du Plessis:1995: 207). In order to achieve social change, traditions or culture of a society do not necessarily have to be tampered with. What is needed instead is clarification of traditional and cultural *attitudes* to gender (Brett:n.d[1990?]:5). While the broad equality clause serves as a yardstick in terms of which the validity of all past and future legislation can be measured, a pertinent question which needs to be addressed is what is going to be done about new laws in favour of women which cover the areas of oppression within the family but which fall outside the ambit of MPL.

9.6.2 IS MPL SUBJECT TO OR EXEMPT FROM THE PROVISIONS OF THE FINAL BILL OF RIGHTS?

The US[103] experience indicates that it is not always easy to transform constitutionally

[103]See 7.2.

guaranteed rights into real improvements in the lives of women. The Islamic[104] experience elsewhere indicates that Muslim women would face potential conflicts if MPL was recognized but not subjected to the Bill of Rights. In this section it will be pointed out that a failure to settle possible conflicts between the interim Bill of Rights and MPL will, in spite of the constitutional emphasis on equality,[105] result in Muslim women's continued subordination.

Major Muslim organizations all agree that MPL should be recognized by the state and placed on the same level as civil law. There are different opinions, however, as to whether MPL should be subjected to the provisions of the final Bill of Rights. This is especially due to the controversial position of Muslim women under the as yet unreformed MPL. Muslims differ as to whether the interim Bill of Rights, by protecting religion and culture, exempts the interpersonal relations of MPL from the equality clause.[106] Cachalia, Cheadle *et al.* (1994:52) argue as follows: "...[I]t would appear that the equality provision may not have sufficient constitutional reach to render religious observances or practices which might be gender discriminatory unconstitutional".

A literal reading of S 14 (3)[107] of the interim Constitution ("Nothing in this Chapter

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[104]See 3.3.1 and 6.1.3 above.

[105]Through, for example, the equality clause, the Commission on Gender Equality and Constitutional Principle V.

[106]See 9.5.

[107]S 14 (1), (2), (3) (a) and (b), dealing with freedom of religion, read as follows: "14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning. (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary. (3) Nothing in this Chapter shall preclude legislation recognising- (a) a system of personal and family law adhered to by persons

shall preclude legislation...") can prompt the conclusion that MPL will not be subject to the Bill of Rights. A more purposive reading of S 14 (3), namely that while nothing can *prevent* the legislative recognition of MPL, it will still be subject to the Bill of Rights is, however, to be preferred (Bonthuys and Du Plessis:1995:205). It can be inferred from the emphasis placed on the Bill of Rights in the opening sentence to S 14 (3) that S 14 (3) (a) and (b) are not only related to the rest of S 14 but also to the Bill of Rights as a whole (Bonthuys and Du Plessis:1995:205). S 14 (3)(a) makes provision for the recognition of religious personal law while S 14 (3)(b) makes provision for the recognition of religious marriages. In so far as MPL is concerned, S 14 (3), by distinguishing between religious law and religious marriages, creates an impression that either MPL as a whole or merely Muslim marriages could be recognized. The reason for highlighting this distinction is that even though marriage is considered to be a part of or one aspect of MPL it really encompasses the whole of MPL or family law. Marriage and its dissolution have consequences for and effects on other aspects of MPL, like inheritance, custody, guardianship and maintenance. Such a distinction between religious personal law and religious marriages is thus irrelevant. Recognizing Muslim marriages only and not the whole personal law is also not going to solve nor diminish the problem of possible exemption from the Bill of Rights.

Exempting MPL from the Bill of Rights will have serious implications for Muslim women because, as explained, traditional interpretations of Islamic law provide for unequal treatment of the sexes.[108] Further evidence in the interim Constitution to support a claim that MPL will be exempt from the Bill of Rights is the following: No fundamental right is absolute, thus although S 7 (1) prohibits legislative organs at all levels of government from enacting laws inconsistent with the Bill of Rights, it

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professing a particular religion; and (b) the validity of marriages concluded under a system of religious law subject to specified procedures."

[108]See 9.6.1.

may do so in accordance with the limitation or circumscription clause (S 33) in the Bill of Rights (De Ville:1994:289; Rautenbach:1995:56). In terms of S 33[109] any right in the Bill of Rights is capable of limitation by law provided that the limits fulfil the requirements of S 33 (1) (the general[110] limitation clause). S 33 (1) (now S 36 (1))[111] "...permits any 'law of general application' (which would include customary law [and by implication MPL once it is recognized]) to limit the fundamental rights, provided that the limitation is 'reasonable' and 'justifiable' [in an open and democratic society based on freedom and equality...]" and (b) [provided that the limitation] shall not negate the essential content of the right in question..." (S 33 (1) (a) and (b)) (Bennett:1994:123-4). S 33 (1) (b) furthermore singles out freedom of religion (S 14 (1)) as a right of which the limitation has (in addition to being reasonable and justifiable) to be *necessary* (Rautenbach:1995:92). This is not the case in the final Constitution. Freedom of religion is therefore not an "absolute" right as Devenish (1995:131) suggests it is. A country also cannot limit provisions of a Bill of Rights in order to exempt a conservative MPL from its provisions and at the same time fulfil its obligations under human rights instruments, which in essence exist because of a commitment to uphold these very provisions. It must be clarified that while the religious freedom to hold a belief cannot be limited, the freedom to manifest religion must and can be limited. Permissible limitations of religious rights therefore appear

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[109]S 33 or the limitation clause provides the courts with the test to be used in determining whether government infringements of the Bill of Rights are justifiable and therefore constitutional (Woolman:1994:60). The US was one of the countries that had a primary influence on the construction of S 33 (Woolman:1994:62; Cachalia, Cheadle *et al.*:1994: 109). For a discussion of the test(s) for the limitation of rights see Du Plessis:1994b:719-723; Du Plessis and Corder:1994:124-128; Devenish:1995:133-139 and Cachalia, Cheadle *et al.*:1994:107-116.

[110]See Rautenbach:1995:105-110 and Du Plessis:1996b:6 fn19 for reference to specific limitation clauses in the interim and final Constitutions respectively.

[111]The corresponding S 36 (1) in the final Constitution reads as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including..."

to pertain more to the freedom to manifest them rather than the freedom to hold them (Du Plessis and Corder:1994:158). These limitations on freedom of religion must be weighed up against competing human rights as well as the rights and interests of the community as a whole (Carpenter:1995b:695).

S 33 (1) also provides the state with an opportunity to justify a limitation of equality under S 8 (1). As explained previously,[112] equality is a value foundational to the Constitution yet the Bill of Rights in terms of S 33 (1) allows for a limitation to firstly be "reasonable" before it needs to be justifiable on the basis of equality. "The omission of the equality clause from the highest level of protection in the limitations clause is a hangover from a preoccupation with the American jurisprudence" (Albertyn and Kentridge:1994:176).[113]

S 14 (3) has become S 15 (3)(a) in the final Bill of Rights and has been modified to read as follows: "This section [Bill of Rights] does not prevent legislation recognising - (i) marriages concluded under any tradition or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion. (b) Recognition in terms of paragraph (a) *must be consistent with this section* [Bill of Rights] *and the other provisions of the Constitution*" (emphasis added). Consistency with the Bill of Rights is reinforced by the fact that the interpretation clause of the final Constitution (S 39 (3))[114] also includes the words "*to the extent that they are consistent with the Bill.*" This of course now means that MPL, in so far as it discriminates against Muslim women,

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[112]See 9.6.1 for a discussion of S 8.

[113]See footnote 109.

[114]S 39 (3) reads as follows:"The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law [by implication including MPL, once it is recognized] or legislation, to the extent that they are consistent with the Bill."

must first be reformed to conform to the principles of the Bill of Rights before it can be recognized (let alone codified) by the state. This conclusion is further supported by the addition to S 9 (3) of marital status to the list of grounds on which discrimination is prohibited. This argument is also reinforced by the fact that allowance is now made for the enjoyment of culture, the practice of religion and the use of language (S 31 (1)) as long as these rights are exercized in conformity with the final Bill of Rights (S 31 (2)). These developments add a whole new dimension to the controversy surrounding the recognition of MPL and could mean that conservative religious authorities would rather opt for the *status quo*, that is continue with an unrecognized, unreformed and uncodified MPL, because this would allow them to continue their "total" control over the religious affairs of Muslims. The provisions of S 15 (3)(b) of the final Constitution is explicit and ought not to be restricted by its limitation clause (S 36 (1)).

Evidence in the interim Constitution supporting a claim that a recognized MPL will have to be subject to Bill of Rights includes S 4 (1) (now S 2), S 35 (1)-(3) (now S 39 (1)-(3)). S 4 (1) deals with supremacy of the constitution and reads as follows: "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, *unless otherwise provided expressly or by necessary implication in this Constitution*, be of no force and effect to the extent of the inconsistency." The corresponding S 2 of the final Constitution contains no such qualification (as emphasized in italics above) and reads as follows: "This Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed." S 35 (1) of the interim Constitution which lays down guidelines for the interpretation of the provisions of Chapter 3 (fundamental rights) reads as follows: "In interpreting the provisions of this Chapter *a court* of law *shall* promote the values which underlie an open and democratic society based on freedom and equality and *shall*, where applicable, have regard to public

international law[115] applicable to the protection of the rights entrenched in this Chapter, and *may* have regard to comparable foreign case law."[116] The corresponding S 39 (1)(a)[117] states that "a court...*must* promote...values... based on human dignity, equality and freedom" and (b) "*must* consider international law". The use of the words "a court" can be construed to mean that if existing Muslim judicial structures are recognized to give effect to MPL, then they too would fall within the ambit of this section.

S 35 (2) of the interim Constitution provides that "[n]o law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation." This implies that a modernist interpretation of MPL can have precedence over a conservative interpretation.

S 35 (3) of the interim Constitution which also deals with the interpretation of the provisions of the Bill of Rights reads as follows: "In the interpretation of any law and the application and development of the common law and customary law, *a court shall* have due regard to the spirit, purport and objects of this Chapter."[118] The corresponding S 39 (2) of the final Constitution reads as follows: "When interpreting

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[115]Emphasis added noting the mandatory language.

[116]Emphasis added noting that the court has a discretion.

[117]See 9.7 where S 35 (1) and its corresponding S 39 (1) is further detailed. For interpretive guidelines see Du Plessis:1996b:6-8.

[118]Emphasis notes the mandatory/obligatory language.

any legislation, and when developing the common law or customary law,[119] *every court, tribunal or forum must* promote the spirit, purport, and objects of the Bill of Rights" (emphasis added).[120] The use of the words "every court, tribunal or forum" can also be construed to include existing Muslim judicial structures once they have been officially recognized.

9.6.3 MPL AND THE BILL OF RIGHTS: VERTICAL[121] AND/OR HORIZONTAL[122] APPLICATION?

As was pointed out in the previous section, the question whether the interim Bill of Rights has application to MPL is very much a matter of interpretation. It is, however, also a matter closely related to the operation of the Bill of Rights provided for in S 7 (1) and (2). The interim Bill of Rights operates mainly vertically. The types of relationships regulated by MPL and resulting from marriages are, however, not vertical but horizontal relations. The question whether the Bill of Rights applies to relationships of this nature will therefore also have to be examined briefly in this section.

There are many areas where the rights listed in the Bill of Rights might be relevant in legal relations between private persons. Early drafts of S 7 (the application clause) of the interim Constitution had provided for a limited horizontal application of the Bill of

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[119]By implication including MPL, once it is recognized.

[120]Emphasis added noting the forceful mandatory language.

[121]"This means that it [Bill of Rights] operates against the state but not against private individuals or institutions" (Du Plessis and Corder:1994:33,113).

[122]This means that private individuals and institutions are also bound by the Bill of Rights when they are involved in purely private relations (Rautenbach:1995:68). By "institutions" is meant those institutions without state power or not forming part of the governmental apparatus of the State (Du Plessis:1995:6).

Rights, but the version of S 7 (1) as eventually passed is more "vertical" than the one initially proposed. S 35 (3) does, however, provide some seepage effect of the provisions of the Bill of Rights to horizontal relationships. S 7 (1) therefore does make for a predominantly vertical operation of the Bill of Rights but not purely vertical. The draft final Constitution (1995), although it sheds new light on the matter, also does not resolve the question decisively. South African law has shown a preference for upholding the public-private divide. Legal academic opinion on the issue is divided. Some members of the legal fraternity see the Bill of Rights as a "public instrument" having an essentially vertical or narrow application. This perception leaves the private sphere outside of the scope of the Bill of Rights and therefore the jurisdiction of the courts when human rights norms are applied. As a result of this perception, it is felt that private law is and should remain responsible for dealing with the horizontal relationships of individuals (Strydom:1995:52). Although this issue has received the attention of the South African courts, a case study reveals that decisions are also divided on the question of verticality and horizontality of the interim Bill of Rights.[123] A "final" settlement of the matter by the Constitutional Court has now been produced (Flynn:1995:418-419).

[123]Froneman J in the Gardener case (*infra*) concludes that there is no simple answer to the question of verticality and horizontality (at 31 A-B). Basson (1994:15) points out that it is not clear from the provisions of the interim Constitution whether or not the Bill of Rights operates horizontally as well as vertically. This matter will have to be addressed by the Constitutional and Supreme Courts. He points out that, even though there are provisions which point very far towards horizontality, if such a role was envisaged, it should have been spelt out in no uncertain terms (Basson:1994:16). This is also the opinion of Van Dijkhorst J in the De Klerk case (at 45 E). McLaren J in a decision just prior to that of the Constitutional Court, namely the Potgieter case (*infra*) agrees with this view and maintains that if the framers intended a horizontal application they would have indicated this clearly and not have left it up to the courts to decide (see editor's summary at 1500 E-G).

9.6.3.1 THE INTERIM CONSTITUTION, ACADEMIC AND JUDICIAL OPINION[124]

Personal laws regulate horizontal relationships between private individuals.[125] MPL itself can only be applied horizontally since it regulates interpersonal relationships. MPL is therefore not directly subject to a predominantly "vertically" operating Bill of Rights. A vertical dimension will only enter into the picture when the State, for example, recognizes MPL or Muslim marriages in terms of S 14 (3)(a) and (b) of the interim Constitution. Such recognition will constitute a vertical relationship between state and individual and will be subject to the Bill of Rights because it is a function of government which, in terms of S 7 (1) and (2), is subject to constitutional review (Bonthuys and Du Plessis:1995:203). The same would be true for the corresponding provisions in the final Constitution, namely S 15 (3)(a)(ii) and (i) and S 8 (1) respectively.

As indicated,[126] there is no clear distinction between Muslim marriages and MPL (the former forms an integral part of the latter). Therefore even if Muslim marriages alone (S 14 (3)(b)) and not MPL as a whole (S 14 (3)(a)) are recognized by the state, the consequences of such marriages are directly linked to MPL. Hypothetically, therefore, even if the Bill of Rights operates vertically with regard to recognized Muslim marriages, it is still important to determine whether or not the Bill of Rights will apply horizontally to either a recognized or an unrecognized but effective MPL. The question of whether the Bill of Rights applies horizontally to MPL is especially important for Muslim women because their access to redress pertaining to the social effects of religious personal law in secular courts is normally curtailed.[127] This has

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[124]The corresponding clauses of the final Constitution are discussed in 9.6.3.2.

[125]See also 8.5.

[126]See 9.6.2.

[127]See 9.8, especially 9.8.3.

serious constitutional and personal implications because even if a Muslim woman brings constitutional inequalities to the notice of a secular court, as happened in India,[128] the argument is often raised that these inequalities originate from MPL which is beyond the courts' jurisdiction and purview. A horizontal application of the Bill of Rights would make it easier for Muslim women to challenge an "unreformed" MPL in a secular court.

It will be in the interests of Muslim women if the Bill of Rights has horizontal application as well (Du Plessis and Corder:1994:38). The provisions of the interim Constitution pertaining to horizontality (and corresponding clauses in the final Constitution), academic opinion and recent case law will next be examined.

In determining whether the interim Bill of Rights has a horizontal application the relevant constitutional provisions that must be interpreted include the following: Chapter 1, S 4 (1) - S 4 (2) (supremacy clause), Schedule 4 Constitutional Principle IV and Chapter 3, S 7 (1)-S 7 (2) (application clause), S 33 (2), S 33 (3), S 33 (4) (limitation clause), S 35 (2) and S 35 (3) (interpretation clause).[129] [130] In terms of

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[128]See 6.3.2.

[129]S 4 (1) and S 35 (2)-(3) are outlined in 9.6.2 above. S 4 (2): "This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government." Schedule 4 Constitutional Principle IV: "The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government." Chapter 3, S 7 (1): "This Chapter shall bind all legislative and executive organs of state at all levels of government" [which, according to S 232 (the definition clause) includes all statutory bodies and functionaries, for example local authorities and universities]. S 7 (2): "This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution." S 33 (2): "Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter." S 33 (3): "The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter." S 33 (4): "This Chapter shall not preclude measures designed to prohibit unfair

Sections 71 and 74 (1) the principles contained in Sections 4 (2) and 7 (1) may not be repealed or amended by Parliament and must be included in the final Constitution by the Constitutional Assembly (Rautenbach:1995:49).

Parties participating in the multi-party negotiating process differed on the question of whether the provisions of the Bill of Rights should have vertical operation only or horizontal application as well. The more traditional or conventional view is that a bill of rights operates predominantly vertically in order to protect individuals against abuse of *state power*. Because of complicated power relationships in modern-day societies and because *private* individuals are very often not in fact equals, bills of rights have begun to have a modest and qualified horizontal operation in order to "...curb the exertion of superior social power outside the traditional domain of 'state

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discrimination by bodies and persons other than those bound in terms of section 7 (1)."

[130]According to Naude and Terblanche (1994:609,613) the mere wording of these sections does not "put the lid on the debate" nor does it succeed in encompassing all the "nuances" of the problem. They argue that the social and political background in South Africa must be taken account of (Naude and Terblanche:1994:613). In their view the South African context presents four possibilities, the third of which (echoing Canadian constitutional jurisprudence), on the basis of the wording of the interim Constitution, is best suited to accord with the application of the Bill of Rights, namely that it "...applies to litigation where the state is a party (whether the law involved is statutory or common law) *and where both parties are private individuals*, but in the latter case only if the relevant legal rules are of a statutory nature" (emphasis added) (Naude and Terblanche:1994:609,613). Strydom (1995:61) is also of the opinion that while the construction of the Constitution's terminology is instructive in determining the question of the horizontality of the Bill of Rights, it should not be regarded as conclusive and that furthermore public and private categories and their respective interests preceded the constitutional provisions of the Bill of Rights. Hence "[w]here private litigation is based on a private law issue in Chapter 3, it stands to reason that the relevant constitutional provision finds direct application, the sole reason being the fact that the relevant constitutional provision embodies private law" (Strydom:1995:61-62).

authority'" (Du Plessis and Corder:1994:113).[131]

According to Du Plessis and Corder the interim Bill of Rights only has a "modest" horizontal effect in that S 35 (3) provides for a "seepage" to horizontal relationships. No direct or explicit reference to the possible horizontal operation of the Bill of Rights, however, appears in its opening statement in S 7 (Du Plessis:1994b:711-712). To offset fears that the predominantly vertical operation of the Bill of Rights (S 7 (1)) might be construed to licence "privatized apartheid", S 33 (4) was also added to the limitation clause permitting measures by the state designed to prohibit unfair discrimination by private bodies and persons not explicitly bound by the Bill of Rights in terms of S 7 (1) (Du Plessis:1994a:93-94; Currin and Kruger:1994:132-133).

S 35 (3) refers to "any law", "common law" and "customary law". It is clear that if MPL is recognized, it would probably come within the ambit of S 35 (3) because it would be construed as belonging to one of these categories. The question can, however, also be asked whether MPL, in its unrecognized form, does not constitute a form of "customary law". The matter is open to interpretation but it must be borne in

[131]Rautenbach and Malherbe (1994:246) indicate that while bills of rights may either generally or expressly contain provisions providing for a horizontal application of bills of rights, it is important to ascertain whether they also apply in other ways to private law relationships (Rautenbach and Malherbe:1994:246). They profer several guidelines for consideration and indicate that while bills of rights should be construed to influence unequal private relationships, this does not now mean that our private law will have to be rewritten as it will remain the main source for resolution of private disputes between equals (Rautenbach and Malherbe:1994:247-248). Friedman, JP in the Baloro case (*infra*), although favouring a horizontal application of the Bill of Rights, does also caution against a blanket extension towards horizontality which would harm the principles of privacy and freedom of choice (at 1022 G). However, Van Dijkhorst J in the De Klerk case (*infra*) in his response to Van Schalkwyk's approach in the Mandela case (*infra*) feels that a horizontal application would have an unsettling effect on the whole of our private law and that in any case, if need be, Parliament and not courts should alter existing law (at 49 G-H). In the Motala case (*infra*), Hurt J criticises this view of Van Dijkhorst J because he feels that courts should play a role in this regard (at 382 F-H). Does this include a religious private law? The Indian experience seem to indicate not (see 6.3.2).

mind that religious law is essentially different from customary law.[132]

S 7 (2) provides for the application of the Bill of Rights to "all law in force". That could mean that once MPL is recognized, it will become part of a "law in force". It is is unlikely that MPL will be recognized during the period of the operation of the interim Constitution, but it should be pointed out that in India a phrase similar to "law in force" had little meaning for MPL. An existing and recognized MPL was held not to be law in force at the commencement of the Indian Constitution.[133]

There are different opinions as to what exactly is meant by "all law in force". According to Du Plessis and Corder (1994:79-80) if S 7 (2) is read with S 7 (1) then it implies that only common and customary law applicable in the context of the "vertical" relationships envisaged in S 7 (1) is directly subject to the Bill of Rights (Chapter 3). Du Plessis and Corder (1994:79-80) explain that while the drafters of the interim Constitution did not consistently address the question as to whether or not the Constitution should trump all common and customary law, "[S] 7(1) will become superfluous if s 7(2) is understood to provide for the full horizontality of Chapter 3. Why have a verticality provision in the first place and then, in the next subsection, completely thwart it? If s 7(2) is understood to authorize the full horizontality of Chapter 3, the exclusion of any reference to the judiciary in s 7(1)[134] will be ridiculous...There would also be no need for s 35(3) because such a 'seepage'

[132]See 9.5.

[133]See 6.3.2.

[134]The exclusion of any reference to the judiciary from S 7 (1) occurred to placate anti-horizontalists who "...feared that any express reference to the fact that Chapter 3 binds the judiciary could prompt the conclusion that in the application of *all law*, including private law, the provisions on fundamental rights would have to be invoked" (Du Plessis and Corder:1994:112). Rautenbach (1995:50,65) regards the omission of the judiciary from S 7 (1), although deliberate as "ill-considered". He emphatically states that "...*courts are state organs and their action is state action*" (Rautenbach:1995:65).

provision would be unnecessary if there was in any event provision for full horizontality" (Du Plessis and Corder:1994:16).[135] Contrarily it is argued that because S 7 (2) makes Chapter 3 applicable to "all law in force" (including common and customary law), private law is included, resulting in the completely horizontal application of Chapter 3 (Cachalia, Cheadle *et al.*:1994:20-21). In this way ordinary citizens, being discriminated against by others, could enforce the right to equality against such persons (Cachalia, Cheadle *et al.*:1994:20).[136] According to Bonthuys

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[135]In De Klerk and Another v Du Plessis and Others 1995 (2) SA 40 T (1994 (6) BCLR 124 (T)), Van Dijkhorst J also held that S 33 (4) would be redundant if Chapter 3 had horizontal effect (at 49 C). S 7 (1) referred to the State only and S 7 (2) took up this theme; hence reference to "all law" in S 7 (2) referred to all public law applicable to the State and its organs and did not refer to all common and customary law (at 51 C). De Waal (1995:9-10) is of the opinion that the Bill of Rights has an indirect horizontal application. He supports the view of Du Plessis and Corder above "...that the omission of the judiciary from s 7(1) was intended to prevent an over-extension of the Bill of Rights on the horizontal level" (De Waal:1995:10,see also fn 27). "He argues that such an omission would be necessary, since as long as the judiciary is bound by the Bill of Rights, the door to a complete horizontal application of the Bill of Rights remains open, which could result in an eradication of the whole system of private law" (De Wet:1995:610). De Wet (1995:610-611) criticises De Waal's arguments as being flawed. Visser (1995:750), however, suggests that the final Constitution and Bill of Rights should restrict the powers of courts to change common law in general and private law in particular and should furthermore provide better guidelines on the horizontality of the Bill of Rights so as to restrict judicial initiative wreaking havoc in private law.

[136]Van der Vyver (1995:584) explains that the inclusion of S 14 (3) indicates that "all law" includes rules of public as well as private law and that even if the Bill of Rights has "vertical operation" only, it would in any event not stand in the way of contradictory personal laws. Nevertheless, the "private sphere" will be subject to constitutional influence and "...legislation enacted pursuant to section 33(4) may compel persons and institutions within the 'private sphere' to toe the human rights line" (Van der Vyver:1994:395). As far as the constitutionality of *law* is concerned the distinction between public and private law is of no significance (Van der Vyver:1994:379). Flynn (1995:438-439), relying on S 33 (3), also favours a horizontal application of the Bill of Rights. He explains that the final Constitution should in no uncertain terms allow for such direct horizontal effect and also offers a few interim doctrinal measures until this change is brought about. For more detail on the horizontal application of the Bill of Rights see Bennett:1994:125-6; Du Plessis:1994:13,19;

and Du Plessis (1995:203) "...recognition of marriages by the state is a function of government...subject to constitutional review...The same applies to 'law in force'...regarding the recognition of marriages by the state - even though much of this law is judge-made *and* the judiciary making the law is not referred to in [S] 7(1) as an organ of state bound by chapter 3. This judge-made law regulates the vertical relationship between the state, lending official recognition to a marriage, and the subjects whose marriages are recognised...The state and the courts deciding on the *recognition* of marriages are therefore bound by chapter 3 [Bill of Rights]".

Unfortunately the *obiter* intimations of Van Dijkhorst J in the 1995 case of Kalla and

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and Rautenbach:1995:75-80. In Baloro and Others v University of Bophuthatswana and Others (1995 (8) BCLR 1018 (B)), Friedman, JP held that S 7 (4) (now S 38) of the Bill of Rights, entitling a person to appropriate relief when a fundamental right is infringed or threatened, can be construed to mean that its provisions operate horizontally as well as vertically and that therefore any infringement of a fundamental right is justiciable. He therefore disagrees with Professor du Plessis's view of limited horizontality (at 1052 D). Friedman, JP bases his decision for horizontality on the following sections found in the Bill of Rights itself, namely S 7, S 7 (4) (a), S 35 (1) and (3) and S 33 (4). The decision in the Baloro case concurred with the following recent decisions. They were Mandela v Falati (1995 (1) SA 251 (W)), Jurgens v The Editor, *Sunday Times* Newspaper (1995 (1) BCLR 97 (W)), Gardener v Whitaker (1994 (5) BCLR 19 (E)) and Motala v University of Natal (1995 (3) BCLR 734 (D)). The court was of the opinion that De Klerk and Another v Du Plessis and Others (1995 (2) SA 40 T (1994 (6) BCLR 124 (T) at 51 D), where the opposite view was adopted by Van Dijkhorst J, namely that the Bill of Rights does not have horizontal but only a vertical application, was incorrectly decided. Van der Vyver (1995:572-573) is also of the opinion that the De Klerk case was incorrectly decided on the basis of "extraconstitutional considerations and numerous misdirections". This (De Klerk) decision then went on appeal to the Constitutional Court. During this time, in another decision on the question of verticality and horizontality of the Bill of Rights, namely Potgieter en 'n Ander v Kilian (1995 (11) BCLR 1498 (N)), McLaren J held that the Bill of Rights has a vertical application only (see editor's summary at 1501 C). In Du Plessis and Others v De Klerk and Another 1996 (5) BCLR 658 (CC) "...the majority of the [Constitutional] Court found that the provisions of Chapter 3 [of the interim Constitution] are not in general capable of [and were not intended to be of direct] application to any relationship other than that between persons and legislative or executive organs of government at all levels of government" (at 660 E). In other words the (1993) Bill of Rights has an essentially vertical operation. This case is discussed in 9.6.3.2 below.

Another v the Master and Others,[137] regarding the status of Muslim marriages, are not very encouraging. In holding that "...reliance upon s 14 (1) in [Chapter 3] of the Constitution to validate retrospectively a marriage which was legally invalid (namely a marriage by Muslim rites which was potentially polygamous)...was misplaced" the court is continuing the legacy of the past.[138] The Cape Supreme Court in a more recent (1996) test case[139] gave limited recognition to the Muslim marriage contract, provided that it was a monogamous union. It remains, however, to be seen whether such recognition would extend to other areas of MPL such as custody and guardianship. A horizontal application of the Bill of Rights will, however, have the effect that an individual can challenge a recognized albeit unreformed MPL and obtain relief from the courts. Judicial decisions in this regard are open to criticism in that they reflect a literal approach to constitutional interpretation instead of a liberal approach which emphasizes the spirit as well as the letter of the law (Read:1979:167).

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[137]1995 (1) SA 261 (TPD) 262. The court also left open the question whether the interim Constitution has horizontal application (at 270 E). See also 9.7 and footnote 162.

[138]See also 9.7 and 9.6.1.

[139]Ryland v Edros Supreme Court (CPD) Case number 16993/92:13 August 1996. This landmark ruling in favour of a Muslim wife now means that Muslim women and men can have recourse to civil courts for the enforcement of Islamic law rights during and upon the dissolution of their marriages. Expert witnesses for both parties (both of whom hold degrees in Islamic theology) agreed that a Muslim marriage constituted a "contractual agreement"and not a sacrament. Incidentally, the rules of the *Shafi'i* school of law were applied in this particular case. Whilst Farlam J questioned whether it was appropriate for the court to deal with matters of religious law, both parties agreed that for a decision in this case, the judge would not be required to interpret any religious doctrines. It was argued that the 1982 Appeal Court decision, Ismail v Ismail (and its view as to public policy as expressed and applied in that case) no longer applied as it was in conflict with the interim Constitution. Farlam J said the values (particularly, equality and the principle of tolerance and accommodation) underlying the Constitution must prevail. These values allow for (an indirect) "horizontal seepage" in that they "irradiate...the concepts of public policy and *boni mores* that our courts have to apply" (at p 25). For further reference to the question of horizontality in the Ryland case see pp 16-25 (unreported).

9.6.3.2 THE FINAL (1996) CONSTITUTION

Part of the corresponding application clause in the final Constitution, namely S 8, reads as follows: " (1) The Bill of Rights applies to *all* law and binds the legislature, the executive, the *judiciary*, and all organs of state. (2) A provision of the Bill of Rights, binds natural and juristic persons *if*, and *to the extent that*, it is *applicable*, taking into account the nature of the right and of any duty imposed by the right..." (emphasis added). It appears to be a considerable improvement on S 7 (1) and (2) in at least two ways. Firstly, it clearly states that the judiciary is bound by the Bill of Rights. Secondly, the extension of S 8 (2) to "natural and juristic persons if... applicable" alludes to and in fact appears to open the door towards a more direct and stronger horizontal application of the Bill of Rights bringing it more into conformity with international sentiment approving of such extended protection. However, this horizontality appears to be qualified by the formulation "if applicable". Thus instead of resolving the interpretational problem flowing from S 7 (1) and (2) it appears to have perpetuated it.[140] If "*all* law" is literally construed to include private law (which regulates "horizontal" relationships) it means that this private law will be directly subject to the Bill of Rights. However, such an interpretation would also then defeat the purpose of or render superfluous an additional (interpretation) clause S 39 (2) also relating to horizontal application and which requires that, in the interpretation of any legislation and the development of the common or customary law, "*every* court, tribunal or forum *must* promote the spirit, purport, and objects of the Bill of Rights" (emphasis added to highlight the mandatory language used).[141] Furthermore the qualifying formulation "if applicable" can also be construed to allude to a limited horizontality and hence S 8 (2) does not differ much from its counterpart in the

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[140]Authors like Van der Vyver (1995:572) claim to have solved a similar problem under S 7 (1)-(2). See 9.6.3.1. For a detailed discussion of (the application) clause in the draft final Constitution (1995) see Du Plessis:1996a:9-11.

[141]See 9.6.2 and 9.6.3.1 for the provision (S 35 (3)) in the interim Constitution.

interim Constitution. Without such a qualification the interim and final Constitutions could well have reflected opposite interpretations. Nevertheless the mere possibility that non-state organs can be bound by the Bill of Rights "if applicable" will have vast consequences for the horizontality-verticality issue. S 39 (3)[142] also indicates that, while the Bill of Rights is made applicable to common and customary law, this is only so "to the extent that they are consistent" with the Bill of Rights. The implications that this might have for a horizontal application of the Bill of Rights have already been discussed above.[143] Unlike S 7 (1) which excluded the "judiciary" from the application of the interim Bill of Rights, and was therefore construed to have a vertical application, the judiciary is now expressly mentioned in S 8 (1) as an organ of state. This accords with the view of Rautenbach above.[144] This inclusion of the judiciary in the application clause can now be construed to favour the horizontalist approach that the provisions of the Bill of Rights can be invoked in the application of *all law*, including private law. As indicated above[145] the interpretation clause S 35 (3) is construed to give the interim Bill of Rights a limited horizontal application. S 35 (3) regards courts as state organs which must apply the Bill of Rights to private common law disputes. The essence of S 35 (3) is retained in the corresponding provision in the final Constitution, namely S 39 (2)[146], which appears to be superfluous unless it reinforces the view of a stronger horizontal operation of the final Bill of Rights.

It is apparent from this discussion that the scope of application of the Bill of Rights cannot be deduced with certainty from either the interim and final Constitutions or

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[142]See footnote 114.

[143]See 9.6.3.1.

[144]See footnote 134. See also 9.6.3.1 for a discussion of the implications of S 7 (1).

[145]See 9.6.3.1 and 9.6.2.

[146]See 9.6.2.

academic and judicial opinion. Academic opinion indicates that there are at least three views of the ambit of application of the Bill of Rights. There are authors who favour a narrow interpretation which supports a strictly vertical application, namely that the Bill of Rights regulates state (legislative or executive) action and not the relations between private individuals governed by common law. There are authors who favour a wider interpretation of the relevant sections which support a horizontal application. These authors do not accept the public/private distinction because ultimately all legal regulation, whether deriving from statute or common law, gets its eventual legitimacy from possible executive enforcement. Thirdly, there are many permutations in between these two views supporting a compromise. The views of the writers do, however, incline towards favouring a generally horizontal application of the Bill of Rights over a strictly vertical application only. It becomes evident from case law in this regard that the question of verticality and horizontality of the Bill of Rights remains unresolved. Cases are more or less equally divided in favour of a horizontal or a vertical application of the Bill of Rights.

As indicated in footnote 136, the decision of the majority of the Constitutional Court in Du Plessis v De Klerk (1996) in favour of a predominantly vertical operation of the Bill of Rights was based on the provisions of the interim and not the final Constitution. The majority, *per* Kentridge AJ, were of the opinion that the question of horizontality must be determined with reference to the sources of law and the persons that are bound to the Bill of Rights (at 681 G - 682 A). It held that the term "all law" in S 7 (2) incorporates statute and common law that pertain to both public and private law disputes (at 682 B -H). It held further that the express inclusion of the legislature and the executive within the ambit of S 7 (1), together with the reference to "all law" in S 7 (2) means that the Bill of Rights applies directly to private law disputes which contain an element of state involvement (at 684 G - 685 A). However, the majority were of the opinion that the exclusion of the judiciary (and private persons) from the ambit of S 7 (1), together with the provisions of S 33 (4) and S 35 (3), clearly precludes an inference of direct horizontality (682 I - 684

D). Kentridge AJ did, however, concede that "...it may be open to a litigant in another case to argue that some particular provision of Chapter 3 must by necessary implication have direct horizontal application" (at 692 H). The majority expressly held that S 35 (3) "introduces the *indirect* application of the fundamental rights provisions to private law" (at 691 C - D). In private law disputes which do not contain an element of state involvement, the ordinary courts, including the Appellate Division, have to ensure that their decisions comply with the values underlying the Bill of Rights. The Constitutional Court was held to have jurisdiction, in terms of S 98 (2), to ensure that the provisions of S 35 (3) are complied with (at 693 C - F).

A strong dissenting judgement in favour of a direct horizontal operation of the Bill of Rights was delivered by Kriegler J. He was of the opinion that if the provisions of S 4 are read with those of S 7 (2), then reference to "all law" in S 7 (2) includes both statute and common law (at 718 C - 719 A). Furthermore the inclusion of the judiciary within the ambit of S 4, together with the reference to "all law" in S 7 (2), gives the Bill of Rights a direct horizontal operation (at 718 I - J). (Madala J reaches the same conclusion in his dissenting judgement (at 730 E - 731 C).) Kriegler J thus bases his conclusion of direct horizontality on the wide construction of the term "all law" in S 7 (2) rather than upon the categories of persons to whom the Bill of Rights applies. He is of the opinion that while the Bill of Rights "...has nothing to do with the ordinary relationships between private persons or associations,...it does govern...all law, including that applicable to private relationships" (at 720 D). While Kriegler J agreed with the majority that S 35 (3) encompasses indirect horizontality, he is of the opinion that since the Bill of Rights is directly applicable to private disputes, S 35 (3) be "...used in all cases before any court in which there is no direct challenge based on one or more of the rights and freedoms protected in [the Bill of Rights]" (at 722 H - I). This view would facilitate the interpretation of S 39 (2) of the final Constitution which retains the provision for indirect horizontality.

Since the inequalities caused by a conservative interpretation of MPL has become an

integral part of the lives of Muslim women in South Africa, it is not sufficient to provide for their redress only against the state. It is important that the liability of private parties also be brought within the ambit of the Bill of Rights in order to facilitate the reprioritization of the rights of women as provided for by Islam. In the final analysis it would appear that while the vertical application of a Bill of Rights is not unimportant, a more directly horizontal application is called for as well. This would bring law which regulates horizontal relationships including MPL within the ambit of the Bill of Rights. This does not mean that the existing "public-private" distinction will disappear. Such an approach will, however, accord with international experience to a greater extent and also with the intention of the drafters of the interim Constitution with regard to the application clause. Finally, such an approach appears to be consonant with the objects of the final Constitution too, especially with S 15 (3), which explicitly states that MPL can only be recognized if it conforms with the provisions of the Bill of Rights.

Notwithstanding S 98 (2) (now S 167 (3) and (7)) which gives the Constitutional Court final jurisdiction over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution, its decision in the De Klerk case in favour of a predominantly vertical operation of the Bill of Rights does not mean that the matter has been finally resolved, since the judgement was based on the text of the interim and not the final Constitution. However, while the provisions of the final Constitution appears to go further than this decision, they do not detract entirely from its worth. In the final analysis, it appears from the final Bill of Rights that any of the rights contained in it can, in terms of the application clause (S 8 (2)), be enforced horizontally to bind private citizens, institutions and companies "if" found to be "applicable". Furthermore, and as indicated,[147] the equality clause (S 9 (4)) operates explicitly horizontally.

[147]See 9.6.1. See also 9.7 for further support of a horizontal application.

9.7 EFFECT OF INTERNATIONAL LAW IN INTERPRETING THE BILL OF RIGHTS

A former South African prime minister, J.C Smuts, was the author of the preamble to the UN Charter (1945) (Van der Vyver:1979:15). South Africa was a member of the UN since its foundation. South Africa became a party to this Charter in 1945 and although she signed and ratified it, its provisions have not been incorporated into municipal law by statute (Dugard:1994:208-209). In 1948 the Union of South Africa, and interestingly Saudi Arabia as well, abstained from voting in favour of the adoption of the Universal Declaration of Human Rights[148] (*Encyclopedia of Public International Law*:1985:305; Ackermann:1991:1). South Africa refused to subscribe to any of the UN Conventions proscribing apartheid and as a result the international community subjected her to sanctions. Even though customary international law forms part of South African common law, courts were (prior to the interim Constitution)[149] unable to apply it as it conflicted with the apartheid legislative order. South Africa has only very recently become a fully active member of the UN.

South Africa signed the Women's Convention CEDAW and the Convention on the Rights of the Child in 1993. They were subsequently ratified only in 1995. Although the Convention against Torture, the ICCPR and the Covenant on Economic, Social and Cultural Rights have been signed, these instruments have yet to be ratified. South Africa will in all probability also become a party to the International

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[148]The UDHR includes traditional civil and political rights as well as economic, social and cultural rights (Keightley:1992:173). See also 6.1.3, footnotes 22-24 and 5.2.1, footnote 37. This international instrument and several others are fully discussed in Chapter Five. See especially 5.2 and 5.2.1.

[149]While S 231 (4) of the interim Constitution (now S 232) serves to confirm this common law position, its inclusion in both the interim and final Constitutions serves to elevate the status of customary international law. That the role of international agreements in the new legal order is not so certain is explained by Dugard:1994:210-211. See S 231 (1)-(3) and corresponding S 231 (1)-(5) and 233 of the interim and final Constitutions respectively.

Convention on the Elimination of All Forms of Racial Discrimination. These instruments as well as the African Charter of Human and Peoples' Rights of the Organisation of African Unity (of which South Africa has been a member since 1994), had as yet not been incorporated statutorily into South African law (*Encyclopedia of Public International Law*:1985:38-39; Patel & Watters:1994:v-vii; Dugard:1994:208-209,214; Devine:1995:2; Liebenberg:1995:359; Keightley:1995: 381; Sloth-Nielsen:1995:401,403).

Thus prior to the interim Constitution South African courts placed little reliance on international law in advancing human rights (Dugard:1994:208; Keightley:1992:171). The interim Bill of Rights was "inspired" by and draws heavily on the language and structure of the UDHR (1948), the two 1966 Covenants (International Covenant on Economic, Social and Cultural Rights and ICCPR), the Women's Convention CEDAW and various other instruments (Du Plessis and Corder:1994:47; Rautenbach: 1995:3,7). "In these circumstances there can be little doubt that had there been no reference to international law in the Bill of Rights, South African courts would have been obliged to turn to international human rights for guidance" (Dugard:1994:211). For much the same reasons it can be argued that national legislation, for example a recognized MPL, has to be consistent with the provisions of these instruments. Wittingly or unwittingly several controversial and conflicting provisions contained in these instruments (which remain unresolved and subject to various reservations) were also carried into the interim Bill of Rights. Most noteworthy are the provisions on freedom of religion (S 14) and equality (S 8). This is further complicated by the fact that because the interim Constitution and its Bill of Rights do not expressly provide for a hierarchy or categorization of rights, it is unclear whether all rights are treated equally or whether some are more "fundamental" than others (Devenish:1995:143; Carpenter:1995a:27,29). It could well be argued that in the South African context equality can be construed to be the most important value in the Constitution. Sections 33 and 34 of the interim Constitution, providing for the limitation and suspension of fundamental rights respectively, are the only two sections that hint at some

differentiation (Carpenter:1995a:29).[150] This uncertainty thus means that courts will have to resolve conflicts in this regard (Devenish:1995:143). The interim Bill of Rights also entrenches religious rights and freedoms (and related rights) in broad terms.[151] While religious communities are expected to determine what these rights are supposed to entail in practice, our courts can, with the help of international instruments, ensure that the content given to these broad rights is equitable.

Both the interim and final Constitution provide in no uncertain terms that international law, particularly human rights law, is to play a more significant role in the new legal order. According to S 35 (1) (now S 39 (1)) international law is to guide the interpretation of the provisions of the Bill of Rights.[152] In comparison with its counterpart in the final Constitution "S 35(1) does not compel [but merely mandates] courts to apply international norms...These norms will be elevated to a higher statutory status if - when? - South Africa becomes a party to the various international human rights conventions" (Dugard:1994:214). S 39 (1) also refers to foreign law in general. In terms of S 116 (2) if the Human Rights Commission (provided for in S 115), "...is of the opinion that any proposed legislation might be contrary to Chapter 3 or to the norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature." S 184 (2) of the final Constitution provides more expansively that "[t]he Human Rights Commission has the...power - (a) to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to

[150]See 9.6.2.

[151]See footnote 107, 9.4 and 9.6.2-9.6.3. See also Chapter Five.

[152]See 9.6.2. While Dugard (1994:214) does not make the distinction very clearly, Du Plessis (1994b:718) highlights that although S 35 (1) incorporates *public* international law into the Bill of Rights for interpretation purposes, S 231 (4), on the other hand, specifically provides for the substantive rules of *public* international law as such as to become part of South African law.

educate."

While the international instruments discussed above[153] indicate that there is no clear-cut answer to the question as to whether or not freedom to believe includes freedom not to believe, it appears that "S 14 (2) does to a certain extent acknowledge the right not to believe or at any rate not to be coerced into professing any form of religious belief" (Carpenter:1995b:685).[154] The narrow construction of S 15 (1) in the final Constitution does not include the freedom to change one's religion or belief. Similar recommendations made by the WCRP-SA in their freedom of religion clause[155] was not heeded by the drafters of the interim and final Constitutions. While such an inclusion would have signified conformity to international UN human rights instruments and Western constitutional models, it is really not as simple as that as a detailed examination of these instruments has revealed.[156] The right to change one's religion conflicts with constitutions of Muslim countries because interpretations of Islamic law do not allow a Muslim such freedom and apostasy is punishable by death. The narrow construction of S 14 (1) (now S 15 (1)) can also be compared to analogous constructions in human rights instruments which normally include the right to practise religion alone or in community, in private or public. If MPL had been exempt from the final Bill of Rights such a wider construction would have allowed a Muslim the freedom to practise religion alone, which freedom could then be extended to include freedom to practise religion according to a particular (modernist, conservative, feminist) interpretation of it. On the other hand, however, mere recognition of MPL automatically extends to it a public and perforce communal character and would thereby defeat the right to practise religion alone and in private.

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[153]See 5.2.1.

[154]See also Du Plessis and Corder:1994:156.

[155]See footnote 47 for the content of this clause. See also 9.4.1.

[156]See 5.2.1.

If legal effect is given to the practice of religion, a wider construction of S 14 (1) (now S 15 (1)) has the implication that, even if MPL is exempt from or subject to the Bill of Rights, a Muslim could exercise his or her freedom of choice to practise religion alone or in community and as a citizen opt for the provisions of secular law to govern both his or her public and private affairs.

Constitutionally, this approach accords with the right to culture provided for in S 31, namely that all individuals are free to participate in whatever culture they choose.[157] While it may ultimately be a matter of conscience, no person or organization can force a Muslim to regulate his or her personal affairs according to religious law. Conservative interpretations of Islamic law would, however, deny a Muslim such a choice. A good demonstration of religious intolerance is the clashes between the modernist, conservative and fundamentalist Muslims as indicated in Chapter Three.[158] Islam in South Africa survived colonial intolerance of religion only to be faced with new forms of intolerance.[159] The above approach also appears to be in line with S 31 (1) which is a new addition to the final Bill of Rights.[160] As outlined[161] above, Article

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[157]S 31 deals with language and culture and reads as follows: "Every *person* shall have the right to use the language and to participate in the cultural life of his or her choice" (emphasis added). Note the use of the word "person" and the implications/meanings attached to it in international instruments and constitutions. See 5.2.2. The corresponding S 30 of the final Constitution uses the word "everyone" instead of "every person" and adds the following qualification: "...but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[158]See also 5.2.1.

[159]See 2.2.1, especially 2.2.1.1.

[160]S 31 (1) recognizes (but does not expressly guarantee) the right of persons belonging to a cultural, religious or linguistic community, with other members of the community, to -"(a) enjoy their culture, practise their religion and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society." However, S 31 (2) makes it clear that the S 31 (1) right "may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

1 (1) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 states that freedom of religion includes the freedom to manifest one's religion. Furthermore, while the Declaration does not directly refer to the issue of marriage, Article 5 recognizes the right to organize one's family life in accordance with one's religion or belief (United Nations:1988:127-128). The freedom of religion clause (S 14 (1)) is construed by Muslims to include the right to have religiously based MPL and its marriages recognized (S 14 (3)(a) and (b)) in order to give effect to a manifestation of such religion. "A non-literalist, purposive reading of section 14(1) and (3)" supports this view (Bonthuys and Du Plessis:1995:209).[162] Hence S 8 "...must be interpreted flexibly and accommodatingly so as to give due effect to the difference between formal and substantive equality...This...will result in judicial recognition for Muslim marriages, subject to limitations" (Bonthuys and Du Plessis:1995:209). An equitable interpretation of Islam indicates that recognizing religious and cultural rights (S 31 now S 30) does not necessarily mean that women's rights should be so sacrificed. If MPL and/or Muslim marriages were not made subject to the final Bill of Rights, official recognition by the state of MPL as a whole or of marriages would have been construed to amount to "official" discrimination against women. Besides not being a binding instrument, the Declaration has as yet not been recognized in South Africa and therefore probably does not constitute public international law in terms of S 35 (1). It can, however, provide guidance in this regard.

The final Bill of Rights, especially its equality clause (S 9), guarantees that the status of Muslim women in South Africa can be different, or better, than that of their counterparts elsewhere in the world. As indicated[163] a purposive, contextual approach

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[161]See 5.2.1.

[162]See *contra* the *obiter* intimations in the Kalla case referred to in 9.6.3.1 and footnote 137.

[163]See 9.6.1.

to the interpretation of S 8 by the courts will allow for substantive equality to be accorded to women and will also satisfy the requirements of CEDAW (Albertyn and Kentridge:1994:151-152; Kathree:1995:435). It has, however, been shown in Chapter Six that provisions in international instruments have not been of much help in this regard. CEDAW[164] is a UN document that embodies women's rights and makes provision for states "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle" (Part 1:Article 2 (a)). "It consolidates in 'a single and comprehensive instrument the various international conventions already in existence which define the sphere of women's rights and brings into the legislative ambit many of the recommendations which have been adopted over the years by the [UN Commission on the Status of Women] since its inception in 1946'" (Kathree:1995: 421).

As indicated below, while acceptance of CEDAW by South Africa certainly marks an enormous step forward, it also has the limitations of all similar international instruments in so far as there is little power to demand its implementation. Within the UN itself it is not regarded as an instrument with strong "teeth" since countries often do not comply with its provisions. It is also often treated as an instrument dealing with women's rights and not human rights as such (Bunch:1993:975). South Africa has been a signatory since 1993. Its inclusion in the Bill of Rights was also provided for in terms of S 35 (1) of the interim Constitution. Even our Constitutional Court[165] has indicated a willingness to interpret the Bill of Rights with due regard to CEDAW. However, for technical and other reasons ratification did not, as predicted,

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[164](GA Res. 34/180; 1979). For an extensive discussion of the history of this instrument see Kathree:1995:421-437. See also 9.6.1.

[165]See 9.8.3. This is clear from the opinion of Chaskalson P in S v Makwanyane and Mchunu CCT/3/94, 1995 (3) SA 391 (CC) at paragraph 35.

take place before the Beijing UN women's conference held in September 1995. Upon the incorporation of CEDAW into municipal law in terms of S 231 (3) our courts will be bound to apply it as if it were an ordinary statute (Dugard:1994:214). Although the present government ratified CEDAW only on 15 December 1995, it has done so without any reservations, contrary to strong indications that the government might follow other governments which have ratified CEDAW with reservations. As indicated in Chapter Six, "[t]he most contentious reservations by far, are those, which indicate that the obligations of major articles of the Convention are accepted only to the extent that they are compatible with the Islamic Sharia or with traditional customs and practices" (Kathree:1995:432). In accordance with the procedure as set out in Parts Five and Six of CEDAW, this document is undergoing a process of simplification to adapt it to the South African context.[166] The simplified South African version contains provisions similar to certain CEDAW provisions, for example, Articles 4, 5, 9 and 12.[167] South Africa must also submit regular reports to the UN on the steps it has taken to put CEDAW into effect.

As indicated,[168] whilst it may be encouraging that the Bill of Rights may have a horizontal application and in this way include MPL within its ambit, this does not provide enough protection for women who are subjected to discrimination in both the public and private spheres. Since South Africa has ratified CEDAW without any reservations its requirements for example, Article 2 which includes a general

[166]On 16 January 1996 several ministries announced the measures that they would be undertaking to further the implementation of CEDAW. It was made clear that while a review of all laws is to be undertaken to eliminate gender discrimination, the struggle for gender equality would continue beyond bureaucracy. The government has also set up an Office on the Status of Women. This is a central co-ordinating structure of the National Machinery for the advancement of women, which in principle is currently located in the Deputy President's office in Pretoria. See 9.8.4.

[167]Article 15 of CEDAW is discussed in 9.8.5.

[168]See 9.6.3.

condemnation of discrimination against women, and Article 16, which directs states to take steps in eliminating discrimination against women in the sphere of personal law, can also provide additional protection and furthermore affirms its commitment to its obligation under the Convention.

A horizontal operation of international instruments also means that the state as well as private bodies and individuals can be held accountable for international human rights violations and infringements. In this way wrongs in the private sphere can be brought within the ambit of human rights protection without abolishing the distinction between public and private (Clapham:1993:91-94,134). Both the 1966 Covenants, for example, contain a [fifth] preambular paragraph that reads as follows: "*Realizing* that the individual, [*having duties to other individuals and to the Community*] to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" (emphasis added in brackets) (United Nations:1988:7-8,19). Ratification of these instruments, which helped shaped our Bill of Rights, could therefore provide weight in favour of a horizontal operation of the Bill of Rights.

International law also relates to the protection of minorities. "Minorities" would include a minority religious group and therefore the effect of international law minority protection on the situation in South Africa must be briefly considered.

In the South African political context the term "minority" refers to an ethnic minority (Dlamini:1991:213; Cachalia and Haysom:1992:7).[169] In their 1992 submissions to the Convention for a Democratic South Africa (CODESA), the Transvaal and Natal Indian Congress were of the opinion that a clause modelled on Article 27 of the ICCPR should be incorporated into a new constitution (Transvaal Indian Congress and

[169]For more detail on the constitutional background in this regard see ANC:1992:7-9,12-14.

Natal Indian Congress:1992:5). However, Article 27 of the ICCPR (1966) is strewn with controversial provisions and lacks an authoritative definition of "minority".[170] Statistically women are definitely not a minority in South Africa. Within a religious minority group, however, they can be considered a minority within a minority, so to speak, prejudiced by, for example, religious laws.

Mohamed (1992:34-35) is of the opinion that as with culture, women's constitutional rights in South Africa should be regarded as collective or minority rights and not individual rights so as to enable a woman to enlist the assistance of any woman or public interest body in legal action. He argues that "...historical experience has taught...that individual protection is an inadequate means of redressing the situation" (Mohamed:1992:35). It has, however, also been concluded that "[t]he maintenance of group values, such as language, culture and religion, in a bill of rights does not in itself provide sufficient protection of group rights either" (P.C.Report 1:1990:97). There are yet others like Macdonald (1988:19-20), who believe that the recognition of individual rights protects the rights of minorities and that individual rights can also be minority rights; for example, individual rights of freedom of conscience can also be seen as the rights of religious minorities to worship in accordance with their belief. He maintains that "[o]ne does not need group rights *in addition* to individual rights to appreciate the importance of groups" (Macdonald:1988:22).[171] It was shown that equal treatment under the law, although an individual right, could be claimed by a member of a minority group.[172] Such an approach could have interesting consequences for a recognized MPL in South Africa. Interestingly, one of the recommendations of the South African Law Commission on group and human rights was that cultural and religious values should be protected in a bill of rights as

[170]See 5.2.2.

[171]See also 5.2.2 for a discussion of minority rights *versus* individual rights.

[172]See 5.2.2.

individual and not group rights (Dlamini:1991:223). The ANC, in a 1992 submission to CODESA, was also in favour of this view (ANC:1992:8,13). As detailed above, S 31 of the final Constitution seems to provide adequate protection for minority rights and in this sense conforms with the provisions in international instruments. This is furthermore reinforced by the provision in the final Constitution for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (S 185-186).

9.8 CONSTITUTIONAL ACCESS TO (GENDER) JUSTICE, THE CONSTITUTIONAL COURT, SPECIAL COMMISSIONS AND THE IMPLEMENTATION OF A RECOGNIZED MPL

The interim Bill of Rights not only makes provision that legislation can be provided for the recognition of MPL but also provides for access to justice as a guaranteed right (S 22). The practical implications of such provisions raise questions such as the following. Which bodies are going to be in charge of controlling the application and administration of MPL? How is practical effect going to be given to S 22 (now S 34) in a plural society (Bennett:1991:60)? What are its implications for Muslim women? It is clear from this chapter thus far that merely having a Bill of Rights is not necessarily going to solve all problems (Corbett:1979:9). Individual Muslims should also be able to have access to effective remedies and be able to enforce substantive rights (Mohamed:1992:28).[173] The legislature needs to work together with the judiciary in this regard otherwise the Bill of Rights will be ineffective and amount to nothing more than "empty political rhetoric" (Cowling:1987:183; Read:1979:171).

The Bill of Rights does not only guarantee everyone's right of access to court but the Constitution also makes provision for a Constitutional Court. This section examines the implications which a guaranteed access to court could have for a recognized MPL.

[173]See 6.1.1.

Secondly, it also deals with the possible special roles of especially the Human Rights and Gender Commissions in securing Muslim women's rights. The possible role of special *Shari'a* courts,[174] in addition to these mechanisms, will also be considered. In order to deal with these issues the ability of the judiciary to help promote gender equality in South Africa will first be assessed.

9.8.1 THE JUDICIARY AND GENDER EQUALITY

With a new constitutional order in South Africa, attempts are also being made to transform the judiciary into a truly non-racial, non-sexist and independent institution. "While many legal scholars have focused on the drafting of a constitution with a justiciable bill of rights, few have discussed reform of the system of judges and magistrates who will apply its mandates" (Huebner:1993:961). "As the courts will be the interpreters and enforcers of the new substantive legal regime and the...bill of rights, it is particularly critical that they be equipped to do so fairly and well. The consensus of most observers is that as currently structured, they are not" (Huebner: 1993:989).

The ideals of a bill of rights can only be realized if its provisions are enforced by an independent and pluralistic judiciary. A question which must be addressed is whether gender equality can be enforced and protected by a reformed judiciary as the watchdog for the enforcement of the Bill of Rights in the new Constitution? It must be noted that the power and authority of the judiciary do not extend beyond the Constitution and hence it cannot be considered as the only or most important protector of equality, religious or otherwise. The role of the newly established Constitutional

[174] *Shari'a* courts have already been extensively examined in Chapter Four and their practical implementation in several countries was further outlined in Chapter Six. This will therefore not be detailed here.

Court will be examined below.[175]

In the US "there are high expectations of the judiciary to adjudicate cases in more and more areas...[but without] a corresponding readiness to protect judicial position and to allocate adequate resources to the courts" (Shetreet:1988:482). In the American parallel judicial system (state and federal) the federal system therefore acts as a "second line of defence". In countries like South Africa with a unitary judicial system provision must, however, be made for adequate resources and secure conditions for the courts and judicial office respectively. In so doing, men and women of high calibre can operate the judicial system effectively and give effect to the Constitution (Shetreet:1988:482). Judges in the new South Africa are the guardians of the Constitution and the Bill of Rights (Mthombeni:1988:19). As in the past South African judges today are mostly men professedly "[d]rawn from the cream of South Africa's legal men..." (Department of Foreign Affairs:1968:20).[176] The Bill of Rights can only be effective if judges are willing to intepret the Constitution with imagination, foresight, knowledge and due regard to the gender problems and sensitivities, the different religions and its intricacies, the social conditions, background and customs that are unique to the South African society at large (Sellami-Meslem:1993:73).[177]

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[175]See 9.8.3.

[176]The Constitution has changed the way judges are now appointed. Today, the Constitution makes provision for an independent Judicial Service Commission which is responsible for all appointments to the judiciary (S 104-105) (now S 177-178).

[177]As far as educating judges of secular courts on gender bias and related issues, much can be learnt from the US experience and their reform strategies in this regard, notwithstanding the fact that even the US has only partially succeeded in redressing this problem. See 7.5.1, especially footnote 86. However, as far as Muslim religious courts are concerned, if Muslim countries have not succeeded in adapting the training of their judges so as to ensure the protection of Muslim women's rights, it will be interesting to see if Muslim judges will be able to effectively subordinate religious commitments to constitutional commitments should such type of courts be given official recognition in South Africa (Solum:1990:1083,1106; Vogel:1990:1108; International Commission of Jurists:1982:19).

Previous studies of the South African judiciary indicate that courts are alienated and their officials socially segregated from the communities they serve. Other systems of law are foreign to them (Bennett:1991:137; P.C.Report:1982:118-119; The ANC Constitutional Committee:1990:44-45).[178] There is no interaction between the judiciary and the society it judges (Lubowski:1989:17). "Very often, suprisingly little may be known by the judges...about the law's potential or actual social effects. Perhaps even more suprisingly, rarely is any systematic attempt made by them to find out" (Cotterell:1984:1).

Here, one just has to look at the courts' lack of sensitivity to the heterogeneity of the population in their determination of what was and still is meant by public policy. Numerous cases involving Muslims and personal law issues - of which women usually bear the consequences - bear testimony to this state of affairs.[179] Imbalances are only now beginning to be redressed to accommodate the political, cultural and religious mosaic of traditions in South Africa. This is evident from the recent appointments of, for example, Muslim judges[180] (incidentally all males) to the Supreme Court (some as acting judges) and Constitutional Court (Van Zyl:1995:134). South Africa's new chief justice is also a Muslim. However, while new appointments are welcomed and long overdue, it is not enough to prepare or educate court personnel for the challenges facing them. There should also be more significant changes in the judicial personnel and gender imbalances in the composition of the bench should be rectified. As recently as 1993 South Africa had only two female judges. The second one was appointed late in 1993 (Friedman:1993: 15). Women have now also been appointed

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See also 8.1; 8.4 and 9.8.2.

[178]See, for example, 8.2 and 8.4 above.

[179]See footnote 137. See also Bennett:1991a:33; 8.2 and 2.2.3.

[180]This does not imply that these judges possess any legal qualifications in Islamic law. See 9.8.5.

to the newly established Constitutional Court (Van Zyl:1995:134).[181] There is of course no guarantee that female judges will, as a matter of course, be more gender sensitive than men. Women lawyers must therefore also become more involved in gender issues. It is interesting to note the explicit references to women in certain sections of the final Constitution dealing with the eligibility to hold office. For example, in terms of S 174 (1) "[a]ny appropriately qualified *woman* or man who is a fit and proper person may be appointed as a judicial officer" (emphasis added). In terms of S 174 (2) "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed." In terms of S 175 (1) "[t]he President may appoint a *woman* or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent..." (emphasis added).

9.8.2 THE BILL OF RIGHTS AND ACCESS TO JUSTICE

"Access to justice refers to the ability to make effective use of the legal system. It includes access to information about legal rights, to legal advice and ancillary services and to courts and tribunals to enforce legal rights and remedies" (Australian Law Reform Commission Report No.67 Interim:1994:11). S 22[182] of the interim Constitution provides that: "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum" (Bekker and Carpenter:1994:92). S 166 (e) of the final Constitution makes "[a]ny other court established or recognised by an Act of Parliament..." a court of the Republic.[183] International human rights instruments like the ICCPR also

[181]See 9.8.3.

[182]The corresponding S 34 of the final Constitution reads as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum."

[183]See 9.8.5 below.

recognize the right to be equal before courts and tribunals (Article 14) and to be equal before the law and entitled to equal protection of the law (Article 26) (United Nations:1988:24,28).[184]

Bush (1979:262) writes that "...it is necessary to develop a pluralistic understanding of access to justice...[A]n attempt should be made to explore the range of needs that exists among citizens seeking justice, and the range of action and institutions capable of meeting those needs, from direct government agents to publicly sanctioned, voluntary non-governmental arrangements." Women, however, often face many difficulties and frustations in obtaining access to justice. Factors like legal costs play an important role and often deter financially dependent women from seeking legal recourse. Legal aid is either limited or it is unavailable. Even Small Claim Courts are too few in number and this results in long delays.

Courts are often physically inaccessible or unsuitable for women and this may hamper their access to justice. Most courts, for example, have no child-care facilities and are not user friendly. South African women of a non-English background are hardly provided with adequate translation or interpreting services that would give them equal access to justice. While Muslim religious authorities use Arabic to manipulate the Islamic legal system to their advantage, little or no information about the Islamic legal system is available in community languages. The sources that are available are based on traditional interpretations of Islamic law. Another common problem is that most women, especially and including Muslim women who follow an essentially religious law about which they have scant knowledge, have no idea as to what the law is all about, let alone their rights in terms of it. There is a difference between MPL, Islamic Law and Islam.[185] However, very few Muslim women are aware that there is

[184]See 9.7.

[185]See Chapter Two, section 2. See also 8.2.

such a difference. While general public ignorance of the law is great, the ignorance of women is greater. A lack of awareness of the law logically then precludes its effective use to protect rights.

If MPL is recognized and Islamic courts are given jurisdiction over these matters, it is doubtful whether Muslim judges can be considered impartial in terms of S 22 (now S 34) if they, for example, show a bias towards a particular version of Muslim law or jurisprudence.[186] The same biases and impartialities are evident in cases involving predetermined solutions to doctrinal issues such as, for example, who is to be considered a Muslim. As has been illustrated in the cases falling within the ambit of the Muslim Judicial Council (MJC) (Cape),[187] failure of the MJC to resolve these matters has resulted in a resort to secular courts. S 22 and S 34 of the interim and final Constitutions appear to offer Muslims a choice between courts. If so, an unwillingness or even an inability on the part of secular courts to deal with matters pertaining to MPL can effectively be construed to be a violation of this right. It does not, however, necessarily mean that if one appears before a particular court that one has chosen to do so (Aubert:1967:41). This can result in an infringement of one's right to be heard in a particular court of law. The fact that Muslims chose civil law over religious law does not mean that they are forever precluded from using a religious court and *vice versa*. It has been shown that having a parallel or dual religious legal system could invariably also contradict the concept of equality.[188] This has serious constitutional implications for Muslim women who might seek redress to constitutional inequalities which originate in MPL. For example, should an ordinary court be unable or refuse to address such a matter or genuinely doubts the constitutional validity of a law, this matter could well be referred to the Constitutional

[186]See 8.2 and 8.4 for examples. See also footnote 177.

[187]See 8.4 and 8.2.

[188]See Chapter Six, section 6, 6.4 and 9.8.5.

Court.[189] It remains to be seen, however, what approach this Court will follow in reviewing such matters and whether it can nullify Islamic law principles which run contrary to the Bill of Rights. Litigation initiated in such a court is a very expensive exercise and could for this reason also be inaccessible to Muslims, especially women. Here the Human Rights and Gender Commissions referred to below[190] could be of some assistance, financially and otherwise. These are all the matters that need serious consideration in so far as they pertain to and affect constitutionally guaranteed rights.[191]

9.8.3 THE CONSTITUTIONAL COURT AS A DISPUTE RESOLVING INSTITUTION

S 4 (now S 2) of the interim Constitution makes provision for the supremacy of the Constitution.[192] Bearing this in mind, the power of the newly established Constitutional Court which interprets and applies the supreme Constitution must not be underestimated.[193] The main function of a Constitutional Court is to oversee and apply the Bill of Rights (Cowling:1987:195). This function is exercised by ordinary (Supreme) courts as well.[194] This is also the case in some countries like the US and Canada (Van der Vyver:1991:801; Wiechers:1991:291; P.C.Report 1:1990:51; Corbett:1979:4; Bekker and Carpenter:1994:122,124; Rautenbach:1995:133,138). Many reasons, political, academic and otherwise, were mentioned for and against a

[189]See 9.8.3.

[190]See 9.8.4.

[191]See 8.2 and 8.4 above and 9.8.5 below.

[192]See 9.6.3.1.

[193]S 98 (now S 167) deals with the Constitutional Court and its jurisdiction and authority to review laws (Bekker and Carpenter:1994:89,119-120).

[194]S 102 of the interim Constitution and S 172 (1)-(2) of the final Constitution.

specialized constitutional court for South Africa (Wiechers:1991:290; Dugard:1983: 330-331; Forsyth:1991:16). The US Supreme Court, which is in effect a constitutional court, was not instituted by a separate statute. In South Africa, however, as is the case in Germany, a specially constituted Constitutional Court has the power of constitutional review so as to enforce the Bill of Rights (Rautenbach: 1995:112,114; Brown *et al.*:1971:913). In 1989 the South African Law Commission[195] favoured the idea that the ordinary courts (Appellate Division) should exercise this function (Sachs:1989:51; Wiechers:1991:291; Forsyth:1991:3). This was reiterated in its Interim Report of August 1991 and in its draft Final Report on Constitutional Models (Rights:1992:19; Du Plessis and Corder:1994:192). In support of its disapproval of a Constitutional Court, the Law Commission argued that of the 125 constitutions it had studied, only 24 made provision for the establishment of a separate constitutional court. The Commission, however, failed to examine the importance and success of such courts in the 24 countries where they do exist (Wiechers:1991:292). The preference of the Law Commission was also supported by certain academics and members of the judiciary itself (Van der Vyver:1991:802; Berat:1991:495; Didcott:1988:53). However, other writers like Maduna (1989:83) and Hund (1989:34) advocated that a study should rather be made of the operation and functions of constitutional courts. Wiechers (1991:299) and Nicolson (1992:66) also favoured the institution of such a separate court. Dugard (1983:331,333) agreed on the basis that in the past the judiciary failed to make full use of its then limited powers of review.[196] The ANC, in its Bill of Rights for a New South Africa, also favoured the introduction of a specialized Constitutional Court separate from the Appellate Division (Van der Vyver:1991:803; Marcus and Davis:1991:93; Du Plessis and Corder:1994:193). The ANC further proposed that this Court be "...the final

[195]See Working Paper 25 of Project 58 on Group and Human Rights. See footnote 19.

[196]In sharp contrast to the powers of the Constitutional Court see S 34 (3) of the Republic of South Africa Constitution Act No.110 of 1983 for these limitations (Kentridge:1981:228; *Rule of Fear*:1989:7-8; Bjornlund:1990:397; Klug:1988:195).

arbiter on all constitutional matters and on the question of interpretation and enforcement of the bill of rights" (Ramaphosa:1991:34).

In 1990 the President Council's Committee for Constitutional Affairs released its report on constitution-making in a future South Africa and proposed the establishment of a Constitutional Court as a "conflict-resolving mechanism" (Asmal:1991:338-339). The above recommendations were not in vain because, as indicated, the interim and final Constitutions make provision for the establishment of this Constitutional Court, which replaces the Appellate Division as the court of final instance on constitutional matters (McQuoid-Mason *et al.*:1991:22).[197]

The Constitutional Court has thus far given opinions on certain controversial constitutional issues such as the death penalty and has also indicated a willingness to review the controversy surrounding abortion in the very near future. In this way it is also functioning as a "conflict-averting" mechanism (P.C.Report 1:1990:53).

9.8.4 SPECIAL CONSTITUTIONAL COMMISSIONS

Apart from the Constitutional Court,[198] the interim Constitution makes provision for the establishment of two specialized commissions to protect human rights, namely the Human Rights Commission (S 115) (now S 181 (1) (b)) and the Commission on

[197]See S 98 (1); S 98 (2) and S 98 (5) of the interim Constitution and S 166 (a); S 167 (3)(a)-(c) - (4) and S 172 (1) of the final Constitution. Factors relating to composition, term of office, duties and jurisdiction of the Constitutional Court are set out in Sections 98-100 (now S 167; S 174-176) of the interim Constitution (Bekker and Carpenter:1994:119-121; Dlamini:1995:121). The interim and final Constitutions make extensive provision for the structure and jurisdiction of courts in S 96-109 and S 165-180 respectively.

[198]See 9.8.3.

Gender Equality (S 119) (now S 181 (1) (d)[199] to promote gender equality (Rautenbach:1995:145-146). These Commissions act as mechanisms for the enforcement and implementation of the human rights entrenched in the Constitution. Inclusion of the Commission on Gender Equality at the eleventh hour resulted in little attention being given to consultation and details (Albertyn:1995:10).[200] In accordance with S 120 of the interim Constitution the composition, powers, functions and functioning of the Commission are now finally regulated by the Commission on Gender Equality Act.[201] This Act gives the Commission the power to refer matters of concern to the Human Rights Commission or Public Protector[202] (S 11 (1)(e)(ii)(aa)-

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[199]The functions of this Commission are set out in the corresponding S 187 (1) - (3) of the final Constitution.

[200]"The[se] provisions...were included...during the closing days of the Multi-Party Negotiating Process in 1993. They appeared to be part of an attempt to find a compromise between the demand of traditional leaders that customary law be excluded from the bill of rights and opposition to this from women" (Albertyn:1995:21 fn 10). See also 9.5. In June 1995 a Commission on Gender Equality draft bill was published. "Legislation on the CGE was finally referred to an *ad hoc* committee of parliament which tabled a bill in August 1995, some 15 months after the first sitting of the new democratic parliament" (Albertyn: 1995:10).

[201]No. 39 of 1996.

[202]SS 110-114 (now S 181 (1)(a);S 182-183)) of the interim Constitution provides for the establishment of the office of Public Protector. The Public Protector Act 23 of 1994 repeals the Ombudsman Act of 1979 (as amended in 1991) which previously regulated this office. The new Act now provides for matters incidental to this office as contemplated in the interim Constitution. In terms of S 112 (now S 182) of the interim Constitution, the traditional view that such an office should concern itself with maladministration and not human rights issues has survived (Du Plessis and Corder:1994: 204). For its role in access to information and administrative justice see S 23 (now S 32) and S 24 (now S 33). Moosa, E (1991:36) has recommended the appointment of a Muslim ombudsperson qualified in both secular and Islamic law and working in conjunction with the South African Law Commission and Justice Department, to maintain and supervise controls and standards for the various Muslim institutions in South Africa with minimal state interference. He maintains that this would be cost effective in that it would obviate the need for a separate and elaborate system of Islamic courts (Moosa, E:1991:37). See 4.5. Complaints relating to the abuse of religious rights, especially by public officials, can be lodged with the Public Protector. See S 112 (now S 182) of the interim Constitution.

(bb)).[203] Of particular significance to Muslim women, S 11 (1)(c) of this Act empowers the Commission to evaluate any existing or proposed legislation, amongst others, " (ii) any system of personal and family law or custom...affecting or likely to effect gender equality or the status of women and make recommendations to Parliament...with regard thereto." In terms of S 11 (1)(h) the Commission is also empowered to monitor the compliance with international instruments acceded to or ratified by South Africa which relate to the objects of the Commission.

The Human Rights Commission was instituted to create public awareness and control of the contents of the Bill of Rights and of its enforcement (S 116 (1)-(3)).[204] It is now regulated by the Human Rights Commission Act.[205] The Human Rights Commission is therefore an important mechanism which can be used to ensure that a recognized MPL conforms to the provisions of the Bill of Rights.

A national machinery consisting of structures and mechanisms within and outside government in the new South Africa will help further equality for women.[206] Some women felt that women's issues should be included in the responsibilities of the Human Rights Commission and not separately be designated to the Commission for Gender Equality. In this way women's right would be included in the mainstream of human rights (*The [Weekend] Argus*:1995b:20). Others, however, argued that a separate Commission for Gender Equality with the power to enforce women's rights

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[203]S 187 (2) of the final Constitution includes "the power to monitor, investigate, research, lobby, advise and report on issues concerning gender equality".

[204]See 9.7. The functions of the Human Rights Commission are set out in S 184 (1)-(4) of the final Constitution. There appears to be no clear line of demarcation between the functions of this Commission and the Commission for Gender Equality as is evident from S 187 (2) and S 184 (2) respectively.

[205]No. 54 of 1994.

[206]See 9.7, footnote 166.

was necessary to address the specific needs of women (Albertyn:1995:17-18). The uncertainty surrounding its inclusion has been resolved by providing for it in the final Constitution as a Commission in its own right.[207]

9.8.5 *SHARI'A* COURTS: A VIABLE OPTION?

As there are no ecclesiastical courts in South Africa, religious denominations arrange their own religious affairs (Department of Foreign Affairs:1968:19).[208] Muslims, within a broader South African society are therefore exposed to a plurality of legal systems.[209] Alongside South African civil law there are informal religious tribunals. Religious authorities dominating these bodies are, however, now seeking formal state recognition of MPL to be implemented in newly created *Shari'a* or Islamic courts. This paragraph will consider the practical implementation of S 22 (now S 34)[210] of the interim Constitution with reference to the possibility of having such special *Shari'a* courts.

While there are many ways in which religious issues can get into court,[211] there are essential differences in the methods which religious and state courts use in their application of religious law. State courts are at present not equipped to deal with

[207]For a critical discussion relating to the Commissions on Gender Equality and Human Rights and the implications of the distinction between gender and sex see Sinclair:1994:571-572; Albertyn:1995:9-22 and 9.6.1 above. See footnote 166 for reference to the Office on the Status of Women.

[208]See 8.4 above.

[209]See 2.2.3; 8.2, 8.4 and 8.6 above. See Pospisil:1978:53 for an explanation of how this idea of legal pluralism or a "multiplicity of legal systems" within one society was first introduced into anthropology. See also Moore:1978:80 and David and Brierley:1985:17-18.

[210]See 9.8.2 and Chapter Eight, section 8, 8.2 and 8.4.

[211]See 8.2 and 8.4 above.

MPL issues nor are Muslim theologians equipped to deal with South African law. While MPL has been successfully implemented in many countries where it also enjoys statutory recognition, it has, however, been shown that governments and courts of both Muslim and non-Muslim countries have failed to give full implementational effect to the principle of equality.[212] In some cases, however, judicial reform has succeeded where attempts by the legislature to reform MPL had failed.

"In practice the application of personal law depends on the availability of specialized courts that are competent to apply it" (Bennett:1991:110). If MPL is recognized, in which courts is it going to be applied - state or religious courts? Whether a *separate* system of Islamic (*Shari'a*) courts for the enforcement of MPL is a feasible option for South Africa will now be addressed. Since 1988 all South African courts have been allowed to take judicial notice of African Customary Law (Bennett:1991:119; Bennett: 1991a:20; Van Niekerk:1990:42).[213] However, the judicial officers applying this law "...almost invariably have little or no knowledge of indigenous law" (Van Niekerk: 1990:42). If the jurisdiction of MPL is transferred to national courts there will be this danger and the added disadvantage that South African male-dominated courts (notwithstanding S 174 (2) of the final Constitution) could, as happened in India, implement traditional interpretations of MPL to the detriment of Muslim women. Conflict in jurisdiction between the *Shari'a* and the secular national court must also not be overlooked.

In many Muslim countries women are not allowed to become judges or magistrates or even to practise law at all.[214] Is their position going to be any different with the establishment of *Shari'a* courts in South Africa? It also appears that a *qadi* (Muslim

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[212]See in general Chapter Six for examples of these countries.

[213]See footnote 66.

[214]See 4.4.

judge) must not only be male, but he must also be Muslim. In other words, a non-Muslim may not adjudicate over matters involving Muslims. In India, however, disputes involving Muslims have been and are being adjudicated by non-Muslim judges and denying this would be tantamount to infringing the equal rights of citizens (Azad:1987:24). What are the implications for Muslims in South Africa (a non-Muslim country) in this regard? Many Muslim women are not aware of the fact that they have a choice between the legal systems (at law). This was evident from the reply of the Muslim Judicial Council given to the South African Law Commission's (Project 59) questionnaire.[215] Therefore the option of a *Shari'a* (Islamic) court structure in a new South Africa needs to be thoroughly investigated with a view to determining whether Muslims want or need it and the success rate of its operation in various Muslim majority/minority countries must be assessed.[216] In an Islamic state non-Muslim minorities are governed by their own civil laws.[217] The feasibility of a dual court structure where two systems of law can exist side by side as an alternative option will also be considered. Recommendations by South African Muslim scholars in this regard are briefly examined with a view to drawing certain conclusions.

Research by Cachalia in this regard indicates three possible options regarding the relationship between Islamic law, state law and the Constitution. Whether or not they can resolve the tensions that arise from simultaneously being subject to different legal systems, as citizen on the one hand and as member of a religious community on the other, remains to be seen. The first option, legal unity, is directed at overcoming the consequences of non-recognition of Muslim marriages (MPL) and calls for a single concept of marriage. It distinguishes between the public and private spheres and formal and informal systems of justice and further provides that Islamic law, as a

[215]See 2.2.3, 8.2 - 8.4.

[216]See 8.2 and 8.4.

[217]See 5.2.2 above.

private legal system, would to a certain extent be excluded from the constitutional state legal order. This implies that it would be excluded from a Bill of Rights and a possible horizontal application thereof. A second option, a partial legal integration, proposes a fusion of state and those personal laws compatible with modern South African law. Allowance is made for many variations including the possibility of mediation.[218] The third option, legal pluralism, constitutionally entrenches a plurality of personal laws. While the first and second models suggest that it is possible to reconcile rights of citizens with MPL, the third highlights the potential conflict between two equally important constitutionally protected rights, namely women's rights and religious rights (Sachs:1992:86-89; Cachalia:1993:404-413).

S 14 (3) (a) and (b) (now S 15 (3) (ii) and (i)) of the interim Constitution, which makes provision for the recognition of MPL and religious marriages, allow for effect to be given to the first option but are subject to various interpretations which could prove detrimental to other constitutional rights of Muslim women (Sinclair:1994:559). The first option accords more or less with the *status quo* of MPL as it exists presently and, as indicated below, only a few privileged Muslims who are informed and educated can exercise options in this regard. The reality, however, is that for most women who are prejudiced by conservative interpretations of Islamic law, there is no such choice. The second option of legal integration/partial unification[219] is also fraught with problems. There are too many variations and it can be construed to conflict with constitutional provisions such as access to justice for all. However, this option has in fact been suggested by some Muslims as a viable interim measure while the problems pertaining to MPL are being addressed (Cachalia:1991 and 1991a;

[218]See 8.3.

[219]Prinsloo (1990:333) points out that it is much easier to obtain unification of indigenous law than religious law. See Yusuf:1982:200-207 for a discussion of integration (unification) as a possible practical alternative to the problem of legal pluralism in the northern states of Nigeria and obstacles that may be encountered as a result of such unification.

Moosa, E:1991:34-35). Others have rejected such an option (Toffar:1994:5). The general opinion, however, is that the administration of MPL should be left in the hands of Muslims themselves with minimal interference from the State (Moosa, E:1991:35; Toffar:1994:1; *al-Qalam*:1994e:3). In the light of what has already been written on the male-dominated *Ulama* bodies and their decision-making processes,[220] and in view of the possible horizontal application of the Bill of Rights, the third option also leaves much to be desired. It does not only lead to conflict of law problems but also to conflict of rights problems where, for example, freedom of religion could be construed to trump equality by its possible exclusion from the ambit of the Constitution.

In an attempt to address the problems which accompany recognition, various organizations have made interim recommendations regarding MPL and its judicial operation. For example, the Islamic Unity Convention (IUC) made proposals to the Minister of Justice to the effect that a register of duly qualified Muslim *Shari'a* jurists stating their sphere of operation be compiled. These jurists have to comply with strict Islamic law academic qualifications before they can be considered eligible for these posts. Knowledge of the Arabic language is, for example, deemed essential and this would also put to the test the "real" qualifications of existing *Ulama* (IUC News:1995a, 1995b:6). It seems, in view of these requirements, that most Muslim jurists trained in South African law are not eligible for these posts as they lack training in Islamic law. However, it can also be argued that *Ulama,* unschooled in South African law, cannot be appointed if they are ignorant of South African law. In comparison with the IUC proposals, it has been recommended that current deficiencies in *process* evident in a variety of informal Muslim judiciaries need to be addressed, for example, the inclusion of women and the upgrading of skills of existing personnel (Shaikh:1993:1-2; *al-Qalam:*1993c:3). Nadví (1990:23) recommends that as an interim measure MPL should be implemented through the

[220]See 8.4.

existing courts where judges are assisted by assessors trained in Islamic law. The now disbanded Muslim Personal Law Board[221] recommended to the Justice Department that the implementation of MPL had to be practical and "...within the framework of the political situation and financial constraints...[and] suggested two options for the future of MPL in South Africa: the total implementation of MPL, and a partial introduction of MPL into the current law. The first option would imply the establishment of *shari'ah* courts run by [*quda*] (Islamic judges), while the second would not involve much cost or change...the minister [of Justice] was inclined towards a phased partial approach, and...suggested that the community...determine and regulate its affairs with minimal interference from the State. Organizations in the executive, however, seem[ed] to be split on the way forward" (*al-Qalam:*1994e:3).

It is therefore apparent that while all laws affecting the status of women have historically been relegated to personal law and therefore the private sphere, the fact that personal law disputes can only be redressed in a *Shari'a* court appears to give rise to a further inequality.[222] It could mean that a Muslim woman's access to redress pertaining to the social effect of these personal laws is curtailed as she cannot bring these personal law issues before a secular court. As indicated above[223] women, in most of the countries discussed, are not allowed to appear in court because of Islamic law restrictions. This has serious constitutional and personal implications.

Article 15 of CEDAW[224] (which South Africa has signed and ratified) also requires state parties to ensure that religious courts with jurisdiction over civil matters and secular courts with jurisdiction over religious matters comply with the provisions of

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[221]See 9.4.2.

[222]See 5.1.1 where reference is made to an International Islamic Court of Justice.

[223]See Chapter Six, section 6.

[224]See 9.6.1 and 9.7 for a discussion of CEDAW.

CEDAW. "This article guarantees equality before the law and legal capacity identical to that of men in civil matters. It does not, however, address women's status before religious tribunals adjudicating civil matters where women have access to secular courts with concurrent jurisdiction over those matters" (Sullivan:1992:845). This is a problem that has to be addressed in South Africa because recognition of MPL does not imply that parties cannot choose to seek redress in a secular as opposed to a religious court or tribunal.[225] If a woman got married in terms of religious law but later decides to get divorced in a secular court to avoid being subject to gender discriminatory measures but is refused, this refusal would amount to a violation of Article 15 (Sullivan:1992:845). So where does one draw the line? The fact that secular courts and remedies are available to those women who wish to make use of them[226] does not mean that Islamic law does not have to be reformed for those women who chose to be subject to it or who often have no option but to be subject to it. As is often the case, "[s]hould women wish to construct lives independent of their religious communities, socioeconomic and cultural constraints often effectively deprive them of that option" (Sullivan:1992:847).

Options like the "minimalist option" for South African Muslims envisages that because Muslims merely constitute approximately 1.1 % of the population, it would not be cost effective for the government to establish and provide the personnel for a new set of *Shari'a* courts at a great expense. The *Ulama* (religious authorities) predominating in *existing* religious tribunals can continue this function as usual except that now the government should give these bodies statutory recognition and allow for the registration of Muslim marriages and the regulation of MPL issues. This is where government involvement should stop. Whether the status of *Ulama* should be elevated to those of *quda* (Muslim judges) should be seriously reconsidered in the

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[225]See 9.8.2.

[226]If a Muslim woman, for example, wants to avoid a polygynous marriage and all of its consequences she merely has to enter into a civil marriage.

light of deficiencies expounded above. A few exceptions notwithstanding, problems are also envisaged because *Ulama* are trained only in Islamic law while Muslim lawyers are trained only in South African law.

How are we in South Africa going to bridge the gap between the religious and modern streams to create an integrated system of adjudication?[227] That this is possible is clearly illustrated in Chapter Eight, where it has been shown that existing religious tribunals can, with some modification, continue to function as an alternative method of dispute resolution in conjunction with other adopting alternative methods (like mediation and negotiation) alongside secular courts or in conjunction with them where they might not be adequate or appropriate. If secular courts are to play any role in the administration of MPL, as suggested, then the knowledge and training of their personnel also need to be seriously supplemented. As far as the whole question of appeals is concerned, it has been suggested by some Muslim academics that any appeal from Muslim judicial authorities should be heard by the Supreme Court where the judge will be assisted by two Muslim assessors. E. Moosa (1991:39) maintains that, should the administration of MPL be left in the hands of Muslim religious authorities, then their decisions should be subject to challenge in the South African Supreme Courts, including its Appellate Division, where judges may seek the assistance of qualified Muslim assessors and where constitutional requirements are taken into consideration. These decisions will then be referred back to the Muslim statutory body that referred the matter to the Supreme Court in the first place for final verification or approval of the verdict. This seems by far the most sensible option and it is hoped that it will be given serious consideration.[228]

However, if these existing structures are to be part of the judicial system, how would

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[227]See 6.3.3 for the Pakistani experience in this regard and 8.6.

[228]There appears to be no such establishment (system of appeals) in Islamic law. See 4.4. See also reference to the SANZAF case in 8.2.

they operate (Cratsley:1978:1)? Where are these courts going to be located? Are they going to be accessible to the community especially taking into consideration the restructuring of boundaries and the fact that South Africa now consists of nine provinces?[229] Convenience and costs are important factors to be taken into consideration. Does mediation as an alternative dispute resolution method tie in with secular and/or religious tribunals?[230] The positive contribution of factors like the informal procedures, low running costs and familiarity of members of the existing Muslim religious judicial structures should, for example, not be dismissed in determining this whole question. The composition of these courts should include women who need to contribute to decisions affecting themselves and their communities. I recommend that dually qualified legal practitioners be a serious consideration and that barriers be overcome by implementing, for example, comparative South African and MPL courses at universities to engender an awareness in all students of the diverse laws that exist side by side with South African law. Law degrees should accommodate and reflect the transformation taking place here. Practical law courses should, for example, seriously consider providing training skills in mediation and negotiation.[231] The recent introduction of gender studies in law faculties can also play a role in highlighting gender inequality. Lawyers could also take degree or diploma courses offering a full legal curriculum at various Islamic colleges mushrooming all over South Africa and established ones overseas.

In South Africa MPL has as yet not been codified. Codification of MPL into a uniform Muslim code applicable to Muslims (as opposed to a secular/civil code

[229]See Chapter Two at footnote 59.

[230]See 8.3 and 8.6.

[231]See Van Niekerk:1990:42. See also 8.6.

applicable to all citizens)[232] should be given serious consideration for several reasons. It will address minor variations in the four major schools of thought (jurisprudence) in terms of circumstances peculiar to South Africa and possibly achieve a synthesis of the views best suited to South African Muslims. It will address considerations of desirability of reform to the present MPL. Such a code can also make the respective reform tasks of courts and jurists so much easier as far as matters of implementation and interpretation are concerned.[233] De Villiers Roos (1907:177) displayed an enlightened and informed insight into this sensitive area at the turn of this century already.[234] However, Muslims need to be educated about Muslim personal laws, their implications and the options provided by the various schools before they can be expected to exercise informed choices and even be subjected to such laws. Success in the creation of such a code will require full co-operation from both the religious authorities and the communities they serve, with the government keeping a watchful eye to ensure that the principles of a Bill of Rights which makes provision for MPL in the first place are not violated to the detriment of women. Restoring intellectual and academic freedom in Islamic jurisprudence by the effective use of legal tools and judicial safeguards like *ijtihad* (independent reasoning)[235] and *qiyas* (reasoning by

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[232]Such a code has been rejected by Muslims in India and has failed to redress the plight of Muslims in Turkey, where it does exist, and it would inevitably necessitate the dilution and even abandonment of Islamic law.

[233]See 9.4.2.

[234]See 2.2.3.

[235]Personal law issues like the mother's period of guardianship over her child, for example, over which there is no limitation in the *Qur'an* and *Sunna*, has been determined as a result of the *ijtihad* of jurists (Al Aseer:1976:194). Secular and *Shari'a* courts would obviously reach different decisions in matters relating to custody, maintenance and inheritance to name but a few examples (Pearl:1985-1986:126). If use is not made of tools within Islam then people are ultimately going to resort to secular courts to obtain more equitable results and protection. Systems of law might differ, but ultimately expectations of justice and equality remain the same. While the judiciary in Pakistan exercises *ijtihad*, we are still only considering the use of *ijtihad*. On the other extreme, some scholars no longer consider it to be a practically feasible option in a country like India where the judiciary has

analogy) need to be seriously reconsidered in the light of South African circumstances. *Ijtihad* can be used in reconsidering the status of women and the inability of non-Muslims to testify in a *Shari'a* court (Breiner:1992a:5-6). Other tools, like *taqlid* (blind imitation), should be treated with caution because even the famous jurists of the four main schools of law did not want their views to be blindly followed the way certain *Ulama* make it appear.[236] It is therefore not just a matter of Muslims being represented on the bench, in parliament and in the legal profession. Decisions of judges are also influenced by their personality and individual background (Barak:1989:121). Obviously the conservative or modernist orientation of Muslim judges would also affect the outcome of their decisions, which could have serious implications for Muslim women. To aid Muslims the Constitution promises ample provision of assistance on the part of the State.

As far as implementation of MPL is concerned, Muslims not only constitute 1.1% of the total population, but are also geographically widely dispersed. This highlights the possibility that it may not be cost effective to provide separate *Shari'a* courts when existing Muslim and South African judicial structures together with alternative methods of dispute resolution can, with some modification, perform the same tasks. The subjection of a recognized MPL to constitutional scrutiny furthermore means that secular courts cannot (as happened in India)[237] deny women access to justice by refusing to address constitutional inequalities which stem from MPL because they regard them as matters falling outside their jurisdiction. The "minimalist option" would help exclude problems of such a nature. Having a parallel legal system for one religious community (in a religiously plural South Africa) could also be construed as giving preference to one religion over another, which is tantamount to official

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always been denied this option. See 2.1.1 and its footnote 16 for more detail.

[236]See 3.1.

[237]See Chapter Six.

patronage of one religious group to the detriment of other groups. In so far as these parallel systems have conflicting legal values, tensions may rise and it would be very difficult to develop the national identity which South Africa is now striving for (Gunasekera:1994:11; Shaheed:1994:3). It is, however, true that by making provision for the recognition of personal laws, the Constitution itself allows for conflicting ideologies in one country.

Legal pluralism also places high demands on lawyers and the judiciary (Prinsloo: 1990:328). Technically, factors such as control and cost can prove to be serious stumbling blocks in the way of *Shari'a* courts (Bennett:1991a:33-34). The "minimalist option" would help in overcoming these and other infrastructural complexities. The role that the "secular" state ought to play in ensuring the successful execution of the decisions of existing religious tribunals also needs serious consideration. Whether or not MPL is going to fall under the jurisdiction of religious or secular courts remains to be seen.

In conclusion, and on the basis of the historical backgrounds outlined above,[238] it is clear that there is no Islamic[239] justification for relegating matters relating to an essentially unreformed MPL to the sole jurisdiction of the *Shari'a* court, while other equally Islamic affairs relating to criminal and commercial law, for example, are easily secularized and relegated to the sole jurisdiction of secular courts (Al Aseer: 1976:158). That this is Islamic, however, is an impression created and nurtured at

[238]See 4.2.

[239]See, for example, the reference to accepting Islam as a whole: "...Then is it only a part of the Book That ye believe in, And do you reject the rest?..." (Q.2:85). "There are still two courts in Muslim countries instead of the unified Islamic court; and legal reform in the personal laws is still limited..." (Al Aseer:1976:195). Nevertheless, Anderson (1976:170-171,220) points out that: "In the Muslim world as a whole...the tendency today is for every part of the law to be codified...and for the distinct and separate jurisdiction of Shari'a courts to give way to that of unified, national courts of comprehensive competence."

the expense of Muslim women, who continue to be subjugated by the decisions of these courts because of their monopoly over MPL. Bearing in mind the advantages of the "minimalist option" and constitutional guarantees and with due regard to the traditional interpretation of and minor reforms to MPL,[240] the creation of separate *Shari'a* courts is not a viable option for South African Muslims, especially not for Muslim women. There must, however, be no great expectations because the "...advance of women towards full equality with men can be expected to be enmeshed in legal controversies for some time to come, for loyalty to the *Shari'a* continues [with]...law reform...aimed at modest improvements in women's legal status" (Mayer:1977:89). Coulson (1969:97) puts it thus: "The status of women has been immeasurably improved...[b]ut the advancement of Muslim women toward the goal of equality between the sexes, desirable an end though it may be in itself, is merely part of a much more fundamental evolution of Muslim society." While the Muslim Judicial Council (MJC),[241] for example, lacks credibility as representative of a judicial structure, it is often the only measure the majority of Muslims know and can resort to to redress their personal law grievances. Hence, the "minimalist option" should be given serious consideration because it allows or makes provision for the application of MPL within existing Muslim religious and South African judicial structures without having to incur the expense of creating *Shari'a* courts for 1.1 % of the population. This accords more with the realities of the South African situation. As far as I am concerned, the transition from theoretical acceptance of MPL to its practical application is now imminent.

9.9 CONCLUSION

With a democratic constitutional order now in place, important predictions regarding

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[240]See Chapter Two, section 2 and 2.1.5.

[241]The Western Cape-based Muslim religious tribunal available to Muslims seeking redress or advice in MPL matters. See Chapter Eight, paragraph 8 and 8.4.

the fundamental rights to equality and religious freedom have been made on the basis of the provisions of the interim and final Constitutions. The South African history or the treatment of religion shows a bias towards Christianity and a very unsatisfactory treatment of other religious groups. There is also no clear separation between state and religion. Gender legislation developments and the treatment of women's issues have a very unsatisfactory history ending with the previous government hastily trying to bring about certain minor changes virtually on the brink of its demise. South African women should not place all their hope on legislation to bring about change.[242] They do not constitute a homogeneous group[243] and will have to come to terms with differences[244] and divisions amongst themselves before they can address the gender discrimination that is common to all of them and make optimum use of reforms in the public sphere (Bertelsmann-Kadalie:1989:50-51; Kaganas & Murray:1991:118-119; Austrin:1987:152). Social reconstruction in the workplace and family, in political organizations and in education play a more important role in creating an awareness in women of their rights (Du Plessis & Gouws:1993:243,260). South African society at large, male and female, will have to be gender sensitized and educated making gender development an almost joint effort as legislation alone is unable to bring about sudden improvements (Budlender:1991:46). As also indicated[245] patriarchy knows no racial, religious, social, cultural and legal boundaries (Sachs:1991: 53). Thus it "...should be fought by means of education and not through the law...[as] [i]t is not the constitution which will give women their rights" (Sachs:1991:56;63). "...[B]ecause

[242]This argument is reinforced by the Islamic (2.1.5) and US (7.5) experience in this regard.

[243]Although modern feminists take cognizance of cultural specificity and differences between women they aim "to eliminate 'patterns of disadvantage and dominance' wherever they are found" (Kaganas & Murray:1991:118-119). See also 2.2.1, 2.2.2 and 8.6 above footnote 125 in the text.

[244]These differences (not forgetting individual differences) vary according to, among other things, race, culture, class and religion.

[245]See 2.1.5.

'culture' and 'tradition' sometimes place their *imprimatur* on patriarchy, the constitutional recognition of cultural norms and personal legal systems could be inconsistent with the constitutional guarantee of equality between the sexes" (Cachalia:1991a:5). The new constitutional dispensation is, however, expected to help remedy this imbalance. The following conclusions can be drawn in this regard.

While constitutional provision was made not only for religious freedom but also for the recognition of MPL at the insistence of Muslims, the right to these laws has, however, not been constitutionalized. While it can become part of mainstream South African law, all religious or secular law will have to conform with the criteria of the Bill of Rights once it is recognized to avoid any reinforcement of women's subjugation. To this extent, MPL can be successfully integrated into a reformed South African law. In Muslim countries constitutional safeguards of equality have failed to bring any real change in the lives of women, especially in the private sphere of the family where they continue to be subjected to interpretations of religious personal laws which continues their position of inequality.[246]

A conservative interpretation of MPL conflicts with the provisions of the Bill of Rights in several ways, especially its equality clause. However, the conflicts between the fundamental rights of religious freedom and equality remain problematic (and sometimes unresolved) in both our interim and final Bills of Rights and indeed the international human rights instruments which helped shape them. While the spirit of equality pervades both the interim and final Constitutions, there is no clear indication that equality will trump religious rights which conflict with it. Opinions indicate that substantive equality can, to a certain extent, be achieved by a purposive, non-literal and contextual interpretation of both the religion and equality clauses. This conflict is exacerbated by the call of conservative Muslim religious authorities to have MPL exempt from the Bill of Rights and thereby continue the public-private distinction.

[246]See 6.4 above.

While the interim Constitution lends itself to be interpreted as allowing a recognized MPL to be exempt from the provisions of Bill of Rights, especially its equality clause, the final Constitution clearly does not.

A horizontal operation of the Bill of Rights (albeit limited) would provide a means of extending its ambit to the private relationships of Muslims and will allow for its provisions to be used by especially Muslim women against conservative religious authorities, even if an effective MPL remains unrecognized. While the wording of the interim Constitution was subject to different academic and judicial interpretations, this was recently resolved by a decision of the Constitutional Court in favour of a vertical operation of the interim Bill of Rights. However, the final Constitution (adopted subsequent to this decision) clearly leans towards a horizontal operation. This, together with the fact that S 15 clearly states that a recognized MPL must be subject to the final Bill of Rights, must be construed as a dual victory for Muslim women. As also indicated[247], subjecting MPL to the Bill of Rights will not be contrary to Islam.

The elevated status of international instruments in both our interim and final Constitutions is to be commended, although there are still some instruments that await ratification. Some of these instruments have been interpreted as having a horizontal operation and hence ratification could add more weight to a horizontal operation of our Bill of Rights. The conflict between women's rights and religious rights has also not been resolved by these instruments and international experience indicates that the effect of ratification is minimized by reservations placed on these instruments. Because equality trumps religious rights in the final Constitution, South Africa is now not compelled to follow suit. This is reinforced by the powers and function of the Commission on Gender Equality. While international law can provide useful guidelines, South Africa needs to draw on her own past experiences and peculiar

[247]See Chapters Two and Six.

circumstances to determine the way forward.

Finally, while recognition of MPL goes hand in hand with its implemetation, this does not mean that a *new* set of religious or *Shari'a* courts need to be created. In view of other constitutional guarantees and safeguards like the creation of a Constitutional Court and the Human Rights and Gender Commissions, it is submitted that access to justice as a constitutionally guaranteed right need not be compromised (especially not for Muslim women) as a result. The reason is that *existing* Muslim judicial structures together with other alternative methods of dispute resolution have, alongside or in conjunction with state courts, in the past performed this function and can therefore, with some modification and correction of gender imbalances and biases, continue to perform this task (minimalist option). A codification of a reformed MPL (providing uniformity) will also aid its implemetation.

CHAPTER TEN

CONCLUSION

It is fallacious to argue that freedom of religion is best guaranteed through a separation of state and religion and, furthermore, that manifestation of religious freedom requires the same treatment for all groups.[1] Bearing this in mind, the inclusion of S 14 (3) in the interim Constitution (1993), which provides that legislation can be provided by the State for the recognition of religious personal law and hence Muslim Personal Law (MPL)[2], was an unexpected bonus for Muslims. S 14 (3)(a) makes provision for the recognition of religious personal and family law while S 14 (3)(b) makes provision for the recognition of religious marriages. These provisions are repeated in S 15 (3) and S 15 (3)(a)(i)-(ii) respectively of the final Constitution (1996). It is argued in this dissertation that it is vital that S 15 (3) should be used to recognize Muslim marriages *as well as* MPL as a distinction between the two is unwarranted.[3] Muslim marriages should not be recognized in isolation because they form an integral part of MPL. The consequences of Muslim marriages, for example their dissolution, are directly linked to other aspects of MPL, like inheritance, custody and maintenance. Here the warning, namely that a state never recognizes all the rules of a personal law and almost always limits its practical application in several ways, must be heeded (Vitta:1970:191-192).

It is further argued that the recognition of MPL will not necessarily lead to discrimination against Muslim women because the final Constitution (in contrast to the interim Constitution) contains two very important safeguards against possible discrimination. Firstly, in terms of S 15 (3)(b) of the final Constitution MPL can only

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[1]See Chapters Five and Seven.

[2]See Chapter One, footnote 3 for an explanation.

[3]See Chapter Two, footnote 1 and 2.1.5 and Chapter Nine, 9.6.2-9.6.3.

be recognized *subject* to the provisions of the Constitution and its Bill of Rights. Secondly, the final Constitution will also have a more direct horizontal application. This means that MPL can quite readily be brought within the ambit of the Bill of Rights and especially its equality clause (S 9). These two safeguards can be construed as a double victory for Muslim women, who have to contend with a "double" discrimination namely, general gender discrimination and the additional hardship caused by non-recognition of MPL in South Africa. These constitutional safeguards have dispelled any lingering confusion or impressions that may have been created by the interim Constitution with regard to the possible exemption of MPL from the Bill of Rights. The argument that recognition of MPL will not lead to discrimination against women is further reinforced by the fact that the enjoyment of culture, the practice of religion and the use of language (S 31 (1)) are permitted as long as these rights are exercised in conformity with the final Bill of Rights (S 31 (2)). The South African government has thus chosen to deal with the conflict between the two fundamental rights of equality and religious freedom by resolving it to the advantage of all Muslims at final constitutional level rather than having to deal with it later through possibly divisive constitutional litigation (Cachalia:1991:48). This reinforces its commitment to ensure the birth of a transparent and equitable MPL and implies that it is not going to be an agent in women's subjugation as is the case in various Muslim and non-Muslim countries.[4] Local Muslim women ought therefore not to face status problems between private and public law encountered by Muslim women worldwide[5] as individual interests have trumped state and group interests. This, however, might not necessarily be the case, because many issues remain which need to be addressed and resolved.

A further and very important question which is addressed in this dissertation is whether the subjection of MPL to the Constitution, and its Bill of Rights in particular, is not

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[4]See Chapter Six, 6.4.

[5]See Chapter Nine, 9.6.2 and Chapter Six, paragraph 6.

unIslamic. It is argued that this is not the case because conservative interpretations of MPL prejudicial to women and prevailing in South Africa are in reality aberrations of the original, true Islam. Even though some *Qur'anic*[6] references *do* allude to inequality of the sexes, the spirit of equality implicit in Islam is compatible with the equality foundational to our Constitution and Bill of Rights and therefore with the subjection of MPL to the Bill of Rights. It is submitted that a recognition of MPL subject to the Bill of Rights could thus in reality be seen as a revival of the true spirit of the original Islam and in conformity with an *Islamic* conception of human rights.[7] Furthermore, and as a consequence of the lack of guidance as to what constitutes Islamic constitutional law and different approaches to the matter, there is no Islamic justification for an argument that Muslims in South Africa cannot be bound to the South African Constitution.[8]

The MPL challenge facing South African Muslims and their religious leadership is enormous.[9] The gulf between Muslim leadership together with regional and ideological differences are stumbling blocks that need to be overcome (Jaffer:1992:35). Ultimately the ability of Muslims to resolve their differences will allow for the sustained recognition of MPL. In order to address this problem MPL, as it is currently practised in the context of an evolving South Africa must be reformed to bring it in line with the true spirit of equality within Islam[10] and codified to facilitate its application and implementation. However, the divine origin of MPL makes it ambitious to expect a

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[6]See Chapter Two, footnote 6.

[7]See Chapters Two and Five.

[8]See Chapters Four and Six.

[9]See in general Chapter Six where it is illustrated that Muslim and non-Muslim countries have, to a certain degree, been successful in addressing this challenge. See also Chapter Nine, 9.4.2 and 9.9.

[10]See Chapter Two, 2.2.4.1 and Chapter Three, 3.4.

radical reformulation of MPL. There are, however, a number of ways in which MPL can be reformed "...'from inside', neither rejecting *Shari'a* outright nor maintaining it in fact...[and in doing so, beginning] the process of formulating a modern *Shari'a* of human rights from a number of sources..." (Arzt:1990:228).[11]

It has been recommended that "[i]n areas where reform would require comprehensive inquiry and debate or where change is controversial, the legislature should take the initiative" (Bennett:1994:124). However, it is envisaged that if reform of MPL is left entirely in the hands of the legislature, this would not be tolerated by religious authorities. Instead co-operation between the two is needed. The content of MPL needs to be deliberated by a Law Commission established for this purpose[12] by the government and whose framework must be gender sensitive and representative of a broad spectrum of views. As elsewhere, the social and economic contexts and realities of South African Muslim women differ and must therefore also be taken into consideration. An interim special code of MPL[13], applicable to Muslims only, is a realistic starting point as the broader Muslim community needs time to internalize these measures. This code should maintain links with the past by, for example, taking cognizance of useful interpretational tools[14] and equitable views from the schools of Islamic law.[15] The unique way Islam is practised in South Africa, within various cultural and other social contexts, must invariably determine the type of code best suited to the South African Muslim society.[16]

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[11]See reference to J.N.D Anderson in Chapter Six, footnote 47. See also Chapter Nine.

[12]See Chapter Two, 2.2.3.

[13]See Chapter Nine, 9.4.2 and 9.8.5.

[14]See Chapter Two, 2.1.1 and Chapter Six, 6.4.

[15]See Chapters Two, Three and Five.

[16]See Chapter Two, 2.3 and Chapter Six, 6.4.

Since the implementation of MPL is necessary in order for Muslims to be able to manifest their religion, a further question which is addressed in this dissertation is whether there should be separate judicial institutions catering for the application of MPL once it is recognized. Because legal pluralism is a reality in South Africa, the answer is a mixed one. Firstly, it is advocated that use be made of *existing* religious tribunals as an alternative dispute-resolution mechanism functioning in symbiosis with other alternative methods like mediation and negotiation.[17] In this way Muslims would continue to have access to experienced Muslim religious tribunals whose members also have some mediational skills. Islamic law supports this view. This would obviate the need to "recreate", at great cost, an elaborate judicial office for Muslims who constitute 1.1 % of the total population.[18] Historically the recognition of MPL, exempt from constitutional provisions and human rights instruments, has necessitated the creation of separate *Shari'a* (religious) courts. The fact that some countries have separate *Shari'a* courts for the enforcement of MPL, but others do not, is further proof that there is no Islamic justification for its existence.[19] There are various other sound reasons in support of the recommendation that recognition of MPL in South Africa does not warrant enforcement in separate *Shari'a* courts.[20]

Secondly, state courts have a proven record of dealing (albeit with mixed success) with disputes of a religious nature.[21] It is advocated that the integrated and working relationship between religious tribunals and secular courts should, subject to both systems of adjudication undergoing some transformation and modification to alleviate gender imbalances and biases, continue to be nurtured. This will allow for the

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[17]See Chapters Eight and Nine.

[18]See reference to the "minimalist option" in Chapter Nine, 9.8.5.

[19]See Chapter Six, 6.2 and 6.3 respectively.

[20]See Chapter Nine, 9.8.5.

[21]See Chapter Eight, 8.2.

enforcement of the decisions of existing religious tribunals without compromising the legitimacy of the secular courts or violating the constitutionally guaranteed right and choice to access (gender) justice (S 22) (now S34).[22]

The problem and conflict between women's rights and religious rights has to date not been resolved in many constitutions worldwide nor has it been resolved by international human rights instruments. International efforts in reforming MPL proved to be only partly effective in redressing the plight of Muslim women.[23] Reforming the law is thus not necessarily the complete answer as "[i]nequality exists not only in the letter of the law, but also in the practice and interpretation and in the system of social and cultural values that the law upholds and reflects" (Albertyn:1992:24).[24] South Africa must be cautioned against blind imitation of the codes of MPL of other countries, especially in so far as they have failed to redress the plight of Muslim women. No country (not even secular Turkey) has adequately or comprehensively addressed the status problems faced by women.[25] Hassan (1990:305) quotes a well-known Muslim scholar as saying: "...The creative process in each generation is not to remake the [Divine] Law but to reform men and human society to conform to the Law." What is therefore needed is a more fundamental evolution of Muslim society.

While conceding that the subjection of MPL to the final Bill of Rights is no automatic guarantee that social change with equality will ensue, it does, however, offer Muslims an opportunity to safeguard a recognized MPL in line with the spirit of equality foundational both to the Constitution and Islam. For reform of MPL to be effective, close co-operation between religious authorities and the legal profession and judiciary

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[22]See Chapter Nine, 9.8 - 9.8.5.

[23]See Chapters Two and Six.

[24]See also Chapter Two, 2.1.5.

[25]See Chapter Six, 6.1.2 and 6.3.2 for the Indian and Turkish experiences.

in South Africa is needed.[26] Furthermore, a recognized, reformed and systematically codified[27] MPL, as a legal system in its own right, would assist both existing Muslim tribunals and the secular judicial system[28] by providing legal certainty.

Comparative experience show that constitutions (and by implication laws and courts) should not just be viewed as the means with which to protect individual rights but should also be regarded as the means through which effective social change can be achieved (Mohamed:1992:7; P.C.Report 1:1990:43). Some responsibility must, of necessity, also be shouldered by Muslim society, especially its women, who form an integral part of society and whose lives are governed by cultural, customary and religious restraints.[29] Their role as active participants in the achievement of social change and gender equality is of more practical value than theoretical rights embodied in constitutions and human rights instruments. Furthermore, this role can be enhanced if Muslim women can overcome divisions among themselves over the question of gender and equality.[30] Gradual social reform within the Muslim community appears to be the more realistic safeguard and offers a long-term solution for effective improvement to the status of Muslim women. Societal conscientization regarding rights, effective access to justice and enforcement of decisions should be considered as important factors to achieve this goal.[31]

The following poignant judicial rumination by the famous American Justice, Learned Hand, seems appropriate as a conclusion:

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[26]See Chapters Eight and Nine.

[27]See Chapter Two, 2.2.3 and Chapter Nine, 9.4.2.

[28]See Chapter Eight.

[29]See Chapter Two.

[30]See Chapters Three and Five.

[31]See Chapter Nine.

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it" (Van der Vyver:1991:772).

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