

Muslim Personal Law in Review

Both the interim (1993) and final (1996) South African Constitutions now not only guarantee freedom of religion and belief but also makes provision within the Bill of Rights that legislation can be provided by the state for the recognition of any religious personal law (section 14 (3)(a)) (now section 15 (3)(a)(ii)) and for the recognition of Muslim marriages (section 14 (3)(b)) (now section 15 (3)(a)(i)). It is vital that S 15 (3) should be used to recognize Muslim marriages as well as MPL. 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. A state never recognizes all the rules of a personal law and almost always limits its practical application in several ways. Furthermore, the government has made it clear in the final Constitution that even though provision is made for the possible recognition and implementation of MPL (and not any other aspect of Islamic law), it must conform to the Bill of Rights and equality enshrined therein. The right to have MPL recognized is therefore not constitutionalized. MPL therefore needs to be reformed before it will be officially recognised. However, Muslims are split on the way forward and hence the status quo prevails: MPL remains unreformed and therefore unrecognised.

Mandela's meeting with prominent Muslim clergy during 1998 sparked off renewed fervour on the topic of MPL. And so, any discussion on the progress and developments in 1998 should be prefaced with the fact that the Ministry of Justice, under the leadership of Dullah Omar, was specifically requested by President Mandela to pursue the drafting and implementation of legislation recognising Muslim marriages.

It should be noted that the task of drafting and implementing such legislation does not fall strictly within the line-function of the Ministry of Justice; the Ministry of Home Affairs (ie. Mango's Ministry) is in fact charged with the responsibility of attending to the above. And so, despite the good intentions behind it, what has emerged is a Bill (The Recognition of Religious Marriages Bill) which is procedurally and substantively flawed in the following respects:

1. The Ministry of Justice sought to fast-track the Bill, overlooking key conceptual and drafting procedures. Whilst they are optional consultative documents, no green or white paper has been produced outlining governments policy on the issue of the recognition of Muslim marriages. Thus, there is no clear guide for drafting the Bill, and neither have interest groups been granted an opportunity to comment and lobby for changes in an open and transparent manner.

2. Dullah Omar made it quite clear at a meeting in 1998, that a minimalist approach would be adopted regardless of our submissions. The Bill therefore addresses some of the consequences of the non-recognition of Muslim marriages in a minimalist fashion. At the very least, it is a workable document which could be expanded and moulded through legal precedent and complimentary legislation.

3. In essence, the Bill seeks to:

- 3.1 make provision for the recognition of religious marriages;

- 3.2. specify the requirements for a valid religious marriage;

- 3.3. regulate the registration of religious marriages;

- 3.4. regulate the proprietary consequences of religious marriages and the contractual

capacity of spouses of such marriages and their competency to litigate;

3.5. regulate the dissolution of religious marriages;

3.6. provide for the making of regulations and to provide for matters connected therewith.

4. Whilst recognising Muslim marriages, the Bill does not give Muslim marriages parity of status with Civil marriages. It rather brings Muslim and other religious marriages within the domain of our Civil Law. Accordingly, MPL and South African Family Law will continue unabatedly as parallel paradigms of law.

Except for the draft bill on the Recognition of Religious Marriages Bill emerging during 1998, there has been no substantive development around MPL. The South Africa Law Commission project under the guidance of Mr Justice Mohammed Navsa has virtually collapsed in the face of the mammoth task of appeasing the spectrum of Muslim clergy in SA who have differing goals and agenda's.

Also in 1998, the case of *Amod v the Multilateral Motor Vehicle Accidents Fund* places the limited "gains" made in *Ryland v Edros* into context. The latter, which was initially perceived by public interest lawyers as a landmark precedent affecting all marriages according to Muslim rites, now amounts to nothing more than an isolated achievement of individual (as opposed to group) rights. This case is currently being taken on appeal, and we are eagerly awaiting the outcome thereof.

I am optimistic that 1999 will bring many new legal developments for Muslims in South Africa.

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