

# **Determining the application of a system of Muslim Personal law in South Africa**

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## **1. Introduction**

The Commission on Gender Equality (CGE) is an independent, statutory body established in terms of Section 187 of the Constitution of South Africa, Act 108 of 1996. The role of the CGE is to promote respect for gender equality and the protection, development and attainment of gender equality. In terms of Section 11(1), the CGE must inter-alia evaluate any law proposed by Parliament, affecting or likely to affect gender equality or the status of women, and make recommendations to Parliament with regards thereto. The following is an excerpt from the Submission of the Commission on Gender Equality to the SA Law Commission (SALC) in response to the Issue paper (#15) on Islamic Marriages and Related Matters.

The Commission is convinced of the need for recognition of Muslim marriages as a means of ending the hardships endured by many Muslim women and which emanates from the non-recognition of Muslim marriages. Mechanisms to enable this need not be fundamentally divergent from existing South African law and our country's constitutional and international obligations. Further, such recognition must take place within the broader context of transformation, commitment to a Constitution founded on non-racialism, non-sexism and the need to rid our country of all other forms of unfair discrimination.

## **2. South Africa as a Constitutional State**

Based on the sovereignty and democratic nature of the State, the Constitution is founded on the values of human dignity, equality, human rights, non-racialism and non-sexism. These values are affirmed in the Bill of Rights, which attempts to balance the various rights of individuals, community and state in a delicate triumvirate of reciprocal support.

The Issue Paper presents the debate as one between the Right to Equality and the Right to Freedom of Belief. A more accurate assessment would be a comparison of the divergent understandings of the concept of equality in two different systems, a modern constitutional system and a religious system. Each of these systems adopt divergent approaches to the issues of equality, human dignity and non-sexism.

The most significant determinate in the outcome of the debate lies in the actual experiences of those who utilise either of these systems. Both men and women utilise these systems. In light of the Commission's commitment to remove gender inequality, our emphasis must rest on the impact of the systems on the women who utilise it.

Religious texts and their interpretations are central and extremely valuable to any given religious community. However, for the Commission, as a democracy-supporting institution, the experiences of South African Muslims most effected by

current MPL practices, particularly women, must be our point of departure in determining a just system for regulating Muslim marriages.

### **3. Muslim Personal Law**

The SALC Issue Paper makes it clear that it is dealing with “aspects of Muslim Personal Law” (MPL). It is important to point out that MPL is merely a part of a broader body of law, covering an extensive and complex spectrum. The historical colonial domination of Muslim societies has resulted in the dissection of the broader body of Islamic law into smaller sections that were chosen for selective application. In the past, this piecemeal application of aspects of Islamic law promoted a sense of security during a time of change, and also proved valuable in maintaining a semblance of legitimacy for colonising nations.

In a not surprisingly uniform fashion across the Middle East and in other parts of the Muslim world, the single most persistent aspect of Islamic law has been the segment labelled Muslim Personal Law, focusing primarily on marriages, divorce and succession. Even in Muslim minority nations, the areas of Islamic law most diligently pursued for application are those relevant to marriage and divorce while other aspects of Islamic law such as those relating to the penal code or financial transactions were / are routinely ignored.

In societies that are deeply patriarchal it is not surprising that those aspects which are regarded as keeping women in check and which legitimise male domination should receive the most attention. This has been an international trend. It is characterised by the persistence of patriarchy, its expediency providing secular legitimacy to patriarchal religious structures.

It is interesting to note that subsequent to this many countries have found it necessary to amend various aspects of the extant MPL, in recognition of changing social circumstance. The product of this evolution raises questions as to the ‘Islamic’ nature of these laws. It also compels the recognition of the contextual nature of the law as opposed to the divine nature of the law. Even where these laws have resisted the evolutionary impact of time, it may be argued that they are inherently reflective of the cultural (Persian, Arab, Indian) context which gave rise to them.

### **4. The Commission’s assessment**

Muslims have been practising some or other form of Islamic law in South Africa since their arrival here. In light of this history of practice, it is both surprising and disappointing to note that, in proposing MPL for South African Muslims, the current law reform process has taken no steps towards an assessment of existing MPL practice nor its impact. Neither does it propose to undertake an assessment of community needs. The SALC Issue Paper deals essentially with two seemingly de-contextualised and de-linked sources, MPL and the Constitution, with little or no reference to where people, particularly women, currently find themselves. Discussions on any personal law regime in South Africa must be informed by the experience of people on the ground – particularly those who have over centuries been at the receiving end of these systems.

As a means of assessing the current MPL landscape, the Commission on Gender Equality embarked on an extensive exercise to gauge some of the various opinions on issues raised in the Paper. The process was carried out in three phases; a) meetings with ulama, b) community consultation workshops and c) women's focus groups.

#### *4.1 The Interpreters/Implementers of MPL*

While Islam has no official clergy, in South Africa there is a socially recognised class of religious leaders referred to as "ulama". They are formally represented in four major organisations: the *Jamiatul Ulama* of the Transvaal, *Jamiatul Ulama* of Natal, the Muslim Judicial Council of the Cape (MJC) and the *Sunni Jamiatul Ulama*. These bodies represent a multitude of theological backgrounds and include ordinary community religious figures with little or no formal juristic or theological credentials. The representivity/legitimacy of the groups are regularly challenged by sectors of the community, but they enjoy considerable community support.

While some 'women's only' institutions have produced women scholars, none of these scholars belong to the above-mentioned bodies. It is also noteworthy that these 'women's only' institutions operate under the guidance and control of the 'male only' religious leadership. Furthermore, it is noteworthy that while a number of Muslims, including a sizeable number of religious scholars, hail from the Black community, none of these serve in any significant capacity in the ulama bodies.

Other than the ulama, a number of reform minded individuals and organisations have increasingly intervened in the discourse of MPL in South Africa, an intervention that has been viewed by the ulama as rather unwelcome. These non-ulama voices have, in general, displayed a greater commitment to finding a gender sensitive appreciation of MPL.

#### *4.2 Meetings with the `Ulama*

The Commission met with members and/or official delegations from the following bodies: Jamiatul Ulama (KZN and Transvaal) in Johannesburg, Islamic Council of South Africa (ICSA) in Cape Town, Sunni Ulama Council, Imam Raza Academy and Sunni Jamaitul Ulama in Durban.

Only the Jamiatul Ulama and the Islamic Council of South Africa were able to comment on the Issue Paper. The Jamiatul Ulama commented in favour of the Issue Paper. It also raised concerns regarding the emergence of a hybrid MPL of South African and Islamic law, and consequently lacking legitimacy in terms of how "Islamic" it actually is. ICSA was able to provide some comment on the impact a new law would have on women.

There is little awareness among the vast majority of ulama of the current process being undertaken by the SALC, the Issue Paper or the various stages in the evolution of the new legislation. One of the largest of these bodies had up to the time of the submission of this document not reverted to us because their members "have not yet looked at the document".

A similar lack of awareness prevails in regards to the ulama's understanding of the Constitution, constitutional rights of religious communities, the tensions between these rights and that of gender equality and how the limitations clauses operate.

Apart from the Jamiatul Ulama (Transvaal & Natal), which is represented by a quarter of the project team, none of the ulama bodies consulted were able to make any substantive comments on the document, nor did they display any indication of having examined it.

Our interactions with the ulama raise the following concerns as regards our mandate to promote gender equality:

- a. There are no women in the leadership or organisational hierarchy of the ulama bodies.
- b. Women and their everyday experiences are not integral determinates of the law nor are women included in the ulama's law making processes
- c. Women are viewed as passive recipients of the law and are not active agents within the law making process.
- d. The above suggests that either a gender blind or a gender exclusive (particular to males) approach is in operation. Both are inherently inimical to achieving gender equality.

#### *4.3 Community Consultation Workshops*

The Commission hosted three workshops (Durban, Johannesburg and Cape Town) for a number of individuals and organisations in the community in an attempt to understand the community's perceptions as well as basic needs. While we do not wish to suggest that our processes have been exhaustive, the following issues emerged through this process.

##### *Community Comments on the Issue paper*

- a. Those who attended the workshops were aware of the Issue paper and most had interrogated it at some level.
- b. There was a shared sense of relief at the fact that the process of recognition of Muslim marriages had begun.
- c. There was a common call for further definition of the term MPL used in the Issue Paper.
- d. There was concern as to how local context would determine the final MPL
- e. There was strong sentiment toward community involvement in the development of any new system
- f. Concerns were expressed as to the limited knowledge of MPL amongst the lay members of the community. This gave rise to agreement on the need for education on MPL.

### *Our Observations*

- a. The community is not united in its opinion on MPL, its need or role in South Africa.
- b. There are varying levels of adherence and diverse interpretations of MPL practice across the community.
- c. There is a widespread, in our view justifiable, perception that women suffer considerable prejudice under the current system of MPL
- d. Individuals tend to apply MPL only selectively to their lives.
- e. There is a tendency to leave issues of MPL to the discretion of the ulama, who, in turn are often perceived as having applied it in a manner that disadvantages women.
- f. While at some levels we found an organic relationship between the ulama and the community, at other levels we found a nearly unbridgeable chasm with a number of ulama resenting the notion that “lay individuals” should be consulted on MPL. Given that the ulama are essentially men, this emerged as a serious gender concern.
- g. While all participants acknowledged the need for competence in the determination of draft legislation as well as application of any new legislation, some argued for the exclusive engagement of specialists (again usually male) in this process.

### *Gender Concerns*

- a. Once again the Commission noted a lack of gender representivity amongst the individuals who are engaging with the Issue Paper.
- b. That the community workshops were primarily attended by professionals and other specialists raises concerns as regards the nature of debate that will surround this issue. It is important that the outcome of this process addresses the differentiated impact of policy and legislation on men and women, taking into account their unique gendered experiences.
- c. The Commission is concerned by the lack of representivity of non-specialists, particularly women. Community women who did attend often did not participate fully. They often remained quiet and at times made no inputs to the discussions at all.
- d. Women specialists who attended were primarily lawyers or social workers. There were no women ulama present. We caution against using the interests of professional women as a yardstick of all women’s interests. Both gender and class must be considered in addressing the differentiated impact of policy.
- e. Our primary concern remains the limited awareness of women’s experiences during this process.

#### 4.4 Women's Focus Groups

Given the relative lack of women's voices in the aforementioned processes, the Commission conducted a series of four women's focus groups in Cape Town. These were conducted in informal settings and approximated a discussion format. Existing women's groups were used in order to ensure participant's familiarity with each other and in order to facilitate free participation in the discussion. Women engaged in these discussions energetically, sharing common experiences of suffering as well as joy.

##### *Women's Observations*

Some of the concerns and experiences emerging from these four focus groups were that:

- a. Women were often merely informed of their being divorced (*talaq*) by their husbands.
- b. Imams often confirmed a *talaq* without consulting the wife
- c. Women experience difficulty getting their husbands to register their marriages in court
- d. Wives have often been left destitute at the end of a marriage. This was true for those in Muslim marriages as well as those in civil marriages.
- e. Most women did not have marriage contracts and even fewer were aware that they could shape the contents of these contracts.
- f. It was difficult to negotiate a contract due to the stigma attached to being a critical and informed woman.
- g. Upon the refusal of the husband to divorce the wife, very few women applied for an annulment (*faskh*) as the process was extremely time-consuming often too difficult or too expensive – at times even humiliating. The Commission heard of one Imam charging R100 for securing a divorce (*talaq*) and R 1500 to pronounce an annulment (*faskh*).
- h. Imams regularly perform subsequent marriages to a second, third or fourth wife without gathering adequate information about the man or the circumstances of previous marriage/s and or/ financial situation.
- i. Many women find themselves financially dependant on their husbands and therefore unable to determine their own economic futures. They are consequently unable to leave unhappy or abusive marriages easily.
- j. Though women did not find it acceptable to place a total ban on polygyny, they were firm in stating the need to ensure that it is strictly regulated in terms of the Qur'anic injunction and the husband's ability to provide for his wives.
- k. There was unanimity that the existing wife/wives be informed and be required to give consent to a second marriage.

1. The current accrual property regime does not take account of women's non-financial contributions to a marriage.

#### *Our Observations*

- a. While some women were aware of the Issue Paper, few were aware of the process and only very few women had any further information on it.
- b. Women expressed deep interest in knowing the contents as well as the process of law reform.
- c. Women have suffered extreme hardship as a result of the application of MPL both in Muslim marriages as well as civil law marriages.
- d. Women are keen to know more about MPL and how it relates to their lives
- e. Women want to be involved in the law making process
- f. Women view the idea of a jointly negotiated MPL marriage contract, which reserves rights in terms of divorce and polygyny, favourably, but feel that it has not been used appropriately, nor has there been sufficient education in this area
- g. Women complained of the disparity between their rights vis-à-vis those of other South African women, who are considered as having more rights.
- h. Women made reference to additional rights currently not provided for in terms of South African law. In terms of property regimes these were in reference to including the value of their non-financial contributions to a marriage.

#### *Gender Concerns*

- a. The marginalisation of women's experiences in the MPL debate raises concerns of gender exclusivity.
- b. The extreme hardship suffered by women cannot be ignored. Such hardship is reflected in the traditional gendered divisions of labour and the further division between public and private domains. Women function within the home with limited access to finances and the law, while men function outside the home and are able to utilise the law and finances in their interests.
- c. The exclusion of women from the centres of (legislative) power in the community is further representative of this division as it extends into the public domain.
- d. The reference to rights enjoyed by other South African women may be viewed as a need to provide Muslim women with rights that lie outside the scope of current MPL practice. It further presents a solid premise for ensuring that Muslim women do not suffer any prejudice in accessing constitutionally guaranteed rights.

- e. The reference to additional rights shows that there may have to be further adjustments to existing South African law to ensure a more equitable distribution of property in marriage.

## 5. Recommendations

The varying perspectives on MPL solicited thus far reflect inherent power dynamics within the community. This proves the less than even landscape whereupon MPL functions in South Africa presently.

The Issue Paper reveals an intention toward recognition of some form of MPL, to which it makes constant reference without ever defining it or clarifying what is meant by it. In the absence of any clear understanding as to what is meant by it, we can only go by what the numerous women, whom we have engaged, have experienced of it. *The Commission is expressly opposed to the establishment of any such system. We believe it will entrench existing inequalities, perpetuate male dominance and provide legitimacy to current discriminatory practices.*

In light of the above and in the interests of equality as a founding principle of the South African nation, the Commission on Gender Equality proposes the following:

- a. That speedy amendments be made to existing South African legislation to facilitate recognition of Muslim marriages.
- b. In terms of existing marriages we propose retrospective recognition of all existing Muslim marriages – both monogamous and polygynous. We further propose that the current property regime applicable to all other civil law marriages be extended to Muslim marriages.
- c. In terms of new marriages, we propose that these be recognised by civil law (appropriately amended to recognise Muslim marriages duly performed).
- d. For all new marriages we propose that, as default, the current property regime applicable to all other civil law marriages be extended to Muslim marriages.
- e. We propose that divorce be processed through a court according to civil law (appropriately amended to recognise Muslim marriages, having been duly performed)
- f. We further recommend that both succession and custody of the children born of the union be treated according to South African civil law.
- g. We suggest that mediation in terms of divorce be encouraged.
- h. In terms of property regimes, we recommend a general review of legislation toward ensuring that the value of non-financial contributions to a marriage are also considered

## **6. Conclusion**

The CGE is aware that the concepts of gender equality and freedom of belief are contested terrains in social practice among all the communities of our country. The State and all its organs, including the SALC, have an obligation to ensure that their own prescriptions are both determined from within a Constitutional framework and more significantly, furthers the fundamental value of equality. This is our primary task. We need to avoid employing the legislative framework to circumvent this value and entrench patriarchal social and cultural practices.

We reiterate our belief in the need to ensure recognition of Muslim marriages, both as a matter of public interest and social justice. We are further convinced that the legislative framework established for both the protection and promotion of equality and the right to freedom of belief provides adequate support for recognition of Muslim marriages within a South African civil law system.

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