

THE ROLE THAT LAY MUSLIM JUDGES PLAY
IN STATE COURTS AND RELIGIOUS
TRIBUNALS IN SOUTH AFRICA:
A HISTORICAL, CONTEMPORARY AND
GENDER PERSPECTIVE

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Abstract: Taking the example of a religious adjudicative body for Muslims in the Western Cape in South Africa, this article analyses the symbiotic working relationship between state courts and non-state dispute settlement bodies, in which the lines of interference are fluid and not always predictable. Seeing the need for adapting international legal anthropological investigative methods to the particular situation of South Africa, the author highlights the inadequacies of both the state and non-state bodies in solving religious disputes between factions seeking control over the Muslim communities and in avoiding the perpetuation of Islamic rules that discriminate against women.

1. Introduction

There are no formally recognized religious courts in South Africa. Informal religious tribunals do, however, exist alongside South African civil law. For this reason the religious disputes of Muslims are normally resolved in their own unofficial religious tribunals (Department of Foreign Affairs 1968: 19). One such tribunal, namely the Muslim Judicial Council,¹ played a clear role in dispute resolution involving Muslims

¹ Hereafter abbreviated to MJC. This is the Western Cape-based Muslim religious tribunal (established in 1945) available to Muslims seeking redress or advice in essentially Muslim personal or family law matters. Details of this body will be elaborated later in this paper. See also footnotes 5 and 35.

in the Western Cape² and it has over the years forged a 'working relationship' with the Cape Provincial Division of the Supreme (now High) Court. While Muslims are subject to the state legal system they are also morally bound to a system of religious law which is as yet not recognized by the state. Muslims, within a broader South African society are therefore exposed to a plurality of legal systems. Non-recognition has meant that for more than 300 years since they first arrived in South Africa, resolution of their religious disputes³ were left in their own hands. There are several conservative *Ulama*⁴ or male religious bodies of experts on Islamic law located in the various provinces in South Africa and who dominate these bodies (Naudé 1985: 28).

Although their decisions are of a binding nature upon the conscience of the Muslims, they lack the legal power to enforce them. This is due to the non-recognition of Muslim Personal Law.⁵ Their competence to apply Islamic law is also questionable because members of these bodies do not necessarily have accredited local legal training. As will be elaborated below this does not, however, detract from the significant role that they play in dispute resolution. These religious authorities are now seeking

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- ² In terms of the final Constitution South Africa now consists of nine provinces of which the Western Cape is one (section 103). See footnote 7.
 - ³ 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 paper.
 - ⁴ "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).
 - ⁵ This is essentially a religiously-based private law which has its origins in the *Qur'an*. 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. 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. Because of its divine origin, MPL has remained relatively unchanged.

formal state recognition of MPL to be implemented in newly created *Shari'a* or Islamic courts. The viability of this option will also be elaborated in this paper.

While their disputes were usually resolved in their own unofficial tribunals, Muslims, *including* members of the religious tribunals themselves, 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. Both the interim (1993)⁶ and final (1996)⁷ South African Constitutions now makes provision for the possible recognition (section 14 (3) now section 15 (3)) and implementation of MPL and thus the establishment of such types of courts. It is now a constitutionally guaranteed right and choice to access (gender) justice. Both these Constitutions do not erect walls of separation between church and state. Section 22 of the interim Constitution (and section 34 of the final Constitution) provided 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 not be able to resolve their disputes among themselves (Du Plessis 1994: 64). While section 22 appears to give some legitimacy to existing religious tribunals, section 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. Muslim religious authorities, calling for the establishment of religious courts, wish to utilize the latter option. As indicated, they want MPL to be implemented in separate, specially created *Shari'a* or Islamic courts. In order therefore to assess the feasibility of such a recommendation, 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 section 34 of the final Constitution. This paper therefore also briefly 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 imple-

⁶ Act 200 of 1993.

⁷ Act 108 of 1996.

mentation 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). 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.

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 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.

In this paper a brief background of Islam in South Africa will firstly be sketched. 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. 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 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 on decisions of the Cape 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 mediation⁸ and negotiation, in imple-

⁸ Mediation in the context of this paper presupposes that the disputes are between people who share a common religion or culture.

menting a recognized MPL, will also be briefly 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 MJC, 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.

3. Muslims and Islam in South Africa today

Since their first arrival at the Cape more than 300 years ago, Muslims in South Africa have always practised their religion but could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently. While the new democratic dispensation now allows for a change to the *status quo*, MPL to date remains unrecognized. Muslims constitute an estimated 1.1 % (approximately ½ million) of the total South African population compared to the approximately 66.5 % Christians (Central Statistical Services 1993: 9). South African Muslims in general belong to the *Sunni*⁹ school of law and are more or less equally divided between the *Hanafi* and *Shafi'i* schools (Naudé 1985: 25). The present government of national unity in both the interim and final Constitutions now not only guarantee freedom of religion and belief (section 14 (1)) (now section 15 (1)) 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)). While there is no separation between "state" and "religion", the *right* to have MPL recognized is, however, not constitutionalized in both these Constitutions. However, once recognized, such laws must conform to the spirit of equality foundational to our final Constitution which now, unlike the interim Constitution, subjects a recognized MPL to the Bill of Rights (section 15 (3)(a)-(b)).

Various Islamic bodies, *Ulama* and relevant organisations have now, in the light of the new political dispensation in South Africa, reached consensus on the need for the recognition of MPL and its implementation although they still remain divided on the issue of subjecting MPL to the final Bill of Rights. The Muslim community in South

⁹ In the eighth century the four major Islamic schools of law were established and named after their founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* (Esposito 1982: 2). These together comprise the *Sunni* (traditionalist) schools.

Africa is therefore not united under one national MPL body because of various problems encountered in this regard.

4. Legal anthropology and dispute resolution

Legal anthropology is the study of rules, processes and values at grassroots level (Sanders 1991: 66). The insights provided by legal anthropology to academic legal studies lie in its research methods and an emphasis on 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 (Witty 1980: 1; Bennett 1991: 51). 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).

In spite of a late start anthropological studies have made much progress in the study of methods of dispute resolution. These studies give 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)¹⁰ a certain method of settling disputes, like mediation, 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).

A valid criticism that can, however, be directed at anthropological studies is that 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

¹⁰ For the contrary argument, namely that the nature of the discipline is relevant or that an "Islamic anthropology" might be better suited to make findings on Muslim societies, see for example Ahmad 1986: 7, 25.

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 the final Constitution makes 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 will be further detailed below 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: 36). In secular Turkey, on the other hand, because village women benefited more from bringing their disputes before the national courts rather than the traditional village mediators, they usually chose the former (Starr 1992: xl, 89-115).

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. 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). *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 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 choose 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 final Constitution¹¹ 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 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.

5. Alternative methods of dispute resolution

Alternative dispute resolution mechanisms to what the courts can provide will now be briefly examined with a view to recommending that they be given increased importance and priority as a (cost) effective first step or link in the chain of dispute resolution. This is done 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. The possible symbiotic relationship of these alternative mechanisms with other informal methods of dispute resolution, like the existing MJC, could also reinforce the need to retain religious tribunals. Dispute settlement by mediation¹² (one such alternative

¹¹ See for example, section 15 (freedom of religion), section 9 (equality and equal protection of the law) and section 34 (access to justice) of the final Constitution. See also section 166 (e) (establishment of new courts) of the final Constitution.

¹² See footnote 8.

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 act as both mediators and arbitrators and therefore these techniques need further elaboration. 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 later in this paper.

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). Mediation has been claimed to be "... all process and no structure" (Fuller 1971: 307). 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).¹³ Mediators attempt to reconcile disputants through compromise and parties normally choose mediation 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 are therefore many similarities between the attributes of *qadis* (Islamic judges) and mediators.

¹³ 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).

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). The jurisdiction of *qadis* has been extended to include matters pertaining to MPL. Mediation, however, does not necessarily have to be limited to personal law matters like divorce, as for example expounded in Q.4: 35,¹⁴ 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 local religious leaders and depend on them for assistance in resolving conflicts (Anderson 1957: 35).

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 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). 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 resolu-

¹⁴ This would read as *Qur'an* chapter 4 verse 35.

tion 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 of mediation [, negotiation] and adjudication into one model of dispute management" (Witty 1978: 314).

This is an excellent way of giving practical effect to section 34 of the final 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". It will also become apparent when dealing with the role of the MJC 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 therefore to succeed in this endeavour, lawyers 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 paragraph.

6. Adequacy of secular South African Courts in resolving Muslim religious disputes and the role of the MJC

In this section the role of the South African judiciary, particularly the Cape Supreme (now High) 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 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 have for a century [already] been ... in darkness as to the precepts and principles of Mohammedan law" (De Villiers Roos 1907: 177). 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.

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 apparatuses of the state to mediate conflicts they seemed unable to settle in the traditional manner, [i.e.] via the mediation of the *ulema*."

Dauids (1980: 5) sums up the types of early religious disputes with which the Cape Supreme Court had to contend: "Over twenty cases have been located between 1866 and 1900 in which the position of the Imam¹⁵ was disputed ... [including] internal conflicts [such] as the Hanafee-Shafee Dispute, the Shafee Juma-ah Question and external conflicts such as the Khalifa [Ratiep]¹⁶ Question of 1856 and the Cemetery Riots of 1886."

As far as the *Hanafi/Shafi'i* disputes were concerned, the majority of Cape Muslims adhered to the *Shafi'i* school of Islamic law.¹⁷ However, a religious guide and mediator named Abubakr Effendi¹⁸ at the time tried to instil (his own) *Hanafi* views on questions relating to the Friday congregational prayer (*Jumu'ah*). This caused conflict

¹⁵ See Davids 1980: 50 and footnote 39.

¹⁶ 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).

¹⁷ See footnote 35.

¹⁸ 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). 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 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).

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 in 1945 (Cilliers 1983: 105, 107; Davids 1980: 51-56).

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 cemetery disputes (1858-1886),¹⁹ 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.

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 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

¹⁹ 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 1984: 47-79; Bradlow 1985: 187). See footnote 32.

Ahmadiyya issue.²⁰ 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, 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 1982²¹ 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. 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 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. 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

²⁰ *Ahmadiyyas* believe in all Islamic tenets except that they deny that the Prophet Muhammad (Peace Be Upon Him) 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).

²¹ *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (CPD) 857 G.

ordered that the trial proceed (Lubbe 1989: 116-119, Annexure 13 (A-35-A-54); Rahman, Fuad 1995a: 5).²²

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)).²³ 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. It certainly condoned other decisions of the Supreme 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 proceedings". 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)).²⁴ "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

²² Supreme Court (CPD) Case number 10058/82: 24 July 1985.

²³ See also De Villiers Roos 1907: 176.

²⁴ Supreme Court (CPD) Case number 10058/82: 20 November 1985.

the ruling of the Supreme Court since 'no unbeliever can make another unbeliever a Muslim'.²⁵ In so doing the MJC merely displayed behaviour typical of the losing party in such cases because "... the losing 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 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 was 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.²⁶ As is evident from the findings of this case, freedom of religion was considered an individual and not a group right.²⁷ This accords with international trends. 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). 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 where they at least have the statutory assurance that judges will be impartial.²⁸ Both Nazim and the MJC appealed²⁹ against

²⁵ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 12. See also Haron 1991: 13-20.

²⁶ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 139.

²⁷ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 102.

²⁸ The same biases and impartialities will have to be dealt with if MPL is recognized and Islamic courts are given jurisdiction over these matters, because it is doubtful whether Muslim judges can be considered impartial in terms of section 34 of the final Constitution if they, for example, show a bias towards a particular version of Muslim law or jurisprudence.

²⁹ Case number 201/1992. *Mohamed and Another v Jassiem* 1996 (1) SA 673 (A).

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 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 *Ahmadiyya* matter. There is no clear separation between state and religion. Furthermore, provision is now made in the final Constitution for the recognition of religious law and access to justice for all.

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 resolution in 1964. The MJC decided that the mosque is *waqf* property³⁰ 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

³⁰ 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).

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 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* MJC³¹ (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 matter³² involved the South African National Zakah Fund (SANZAF). In this particular case where *the state redirected a dispute involving Muslims back to the MJC*, the latter's judicial competence played a significant role. In January 1984 the Chairman of SANZAF applied for a court order against an ex-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

³¹ See footnote 35.

³² 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 19.

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, implications of a possible horizontal application of the Bill of Rights, 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 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.³³ 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 1989: 74). The MJC was one such body which was formed to resolve legal issues. It is clear from this section that secular courts have played an instrumental role in resolving

³³ For example, cases relating to a Muslim organization called the *Qibla* Movement, the *Ahmadiyya* cases and the *Zakaat* (Charity) Fund case.

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.³⁴

7. The MJC as a mechanism of dispute resolution

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.³⁵

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*³⁶ 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

³⁴ Imbalances are 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 (incidentally all males) to the Supreme Court and Constitutional Court (Van Zyl 1995: 134). This does not imply that these judges possess any legal qualifications in Islamic law. South Africa's new chief justice and Minister of Justice are also Muslim males. The first female Muslim judge has now been appointed to the Land Claims Court and there are at least four Muslim women magistrates apparently all located in the province of Kwazulu Natal. 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.

³⁵ The MJC essentially subscribes 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).

³⁶ A *qadi* usually refers to a religious judge. It is, however, used in a different sense here as will be explained below.

Guru helped to create was the highly coveted and prestigious position of *qadi* or "chief priest" (*Imam*).³⁷ 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."³⁸

Traditionally one of the functions of an *Imam*³⁹ was to settle disputes within a community. Prior to the introduction of the MJC a local *Imam* normally provided leadership and guidance to his own congregations and an *alim*⁴⁰ 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* 1993: 1).⁴¹ 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. As indicated in the previous section its decisions have also been contested in South

³⁷ 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).

³⁸ 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.

³⁹ Literally leader, normally of congregational prayers. See Lubbe 1989: 18-19.

⁴⁰ Singular for *ulama* and literally meaning "scholar" (Lubbe 1989: 83-84).

⁴¹ For more detail as to the actual formation of the MJC see Lubbe 1989: 63-65 and Davids 1985: 16-18.

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 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.⁴² Several references are also made to the constitution of the MJC which has been amended from time to time (Lubbe 1989: 76, 78).

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 conservative schools/theological 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). 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 as discussed below, 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. However, these "secularly-trained" Muslims were sought as counsel by the MJC to defend it in, for example, the *Ahmadiyya* issue discussed above. 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.

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

⁴² In contrast, church tribunals in South Africa are in fact registered and bound by the provisions of their constitutions (Moosa, N. 1996: 330-332).

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 abattoirs. 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* 1993: 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. Divorce laws, for example, are given conservative interpretations allowing the husband the prerogative to initiate a divorce at his sole discretion. 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 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. 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."⁴³ 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, authoritatively refer to Islamic law as a source of law. Problems are, however, envisaged when 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

⁴³ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 68.

(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*.⁴⁴ 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 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. 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 thought⁴⁵ (Lubbe 1989: 72-73). This, although in a roundabout way, serves to address partially the problem with *ijtihad* (independent reasoning) which judges have faced since the tenth century when the doors of independent reasoning as a source of Islamic law were closed (Moosa, N. 1996: 18).

As indicated, although there have been many attempts to establish a national council of *Ulama*, no real success has thus far been achieved (Lubbe 1989: 80). Muslims have displayed unity on issues like the recognition of MPL and the *Ahmadiyya* issue (Lubbe 1989: 80-81). However, 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 South Africa the SANZAF case referred to above, where a religious tribunal was used as an alternative to a civil court, is considered to be an exception. In the US for

⁴⁴ See also Le Roux 1981: 30 where the distinction between a *mufti* and a *qadi* is highlighted.

⁴⁵ See footnote 9.

example, civil courts are preferred over religious courts 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 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. The final Constitution in any event only makes 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. 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. As will be further addressed when discussing the *Shari'a* court, this shows that the relationship between law and politics is recognized in Islamic law just as in other legal systems. 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, 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 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. Whether or not the recent appointment of Muslim judges⁴⁶ to the Supreme Court (and other Courts) will make it easier for a religious minority to gain access to justice as far as MPL in South Africa is concerned, remains to be seen. 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. The Bill of Rights can only be effective if judges are willing to interpret the Constitution with imagination, foresight, knowledge and due regard to the gender problems and sensi-

⁴⁶ See footnote 34.

tivities, the different religions and their intricacies, the social conditions, background and customs that are unique to the South African society at large (Sellami-Meslem 1993: 73).

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). 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.

8. *Shari'a* Courts: A viable option?

Since the implementation of MPL is necessary in order for Muslims to be able to manifest their religion, a further question which is briefly addressed in this paper 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. 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. 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.⁴⁷ There are various other sound reasons in support of

⁴⁷ See Moosa, N. 1996: 82-85, 179 *et seq.*, 204 *et seq.*, 441.

the recommendation that recognition of MPL in South Africa does not warrant enforcement in separate *Shari'a* courts.⁴⁸

Secondly, and as indicated in this paper, state courts have a proven record of dealing (albeit with mixed success) with disputes of a religious nature. 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 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 (section 34).

9. Conclusion

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 the MJC, 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 in order to redress their personal law grievances. 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 (Moosa, N. 1996: 102 *et seq.*). For example, Article 15 of CEDAW⁴⁹ (which South Africa has signed and ratified) also requires state parties to ensure that religious courts with jurisdiction over civil

⁴⁸ See Moosa, N. 1996: 420-432.

⁴⁹ UN Convention on the Elimination of All Forms of Discrimination Against Women.

matters and secular courts with jurisdiction over religious matters comply with the provisions of CEDAW.

It is clear from this paper 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 other's legitimacy 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 formally recognized (Moosa, N. 1996: 102 *et seq.*). Whether it is possible for state courts, notwithstanding section 34 of the final Constitution, to impute a legal system to parties on the basis of their religiosity or lifestyle also remains to be seen (Bennett 1991: 127). While major changes have been effected to Islamic procedural and constitutional law, 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). 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. 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). 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 section 34 of the final Constitution which can be interpreted to give Muslims a choice/option between secular and religious courts (Von Benda-Beckmann 1981: 167-168, 172). However, as indicated above, reinforcement of each other's authority and decisions could alleviate some of these problems.

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 sciences, 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 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. 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). 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 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%) 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; 1975: 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. 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 (Moosa, N. 1996: 75 *et seq.*).

Given the divisions 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 Muslims especially in terms of section 34 of the final 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. 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 (Moosa, N. 1996: 75 *et seq.*). It is expected that this function will still have 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. 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 illustrate a good working relationship between secular courts and religious tribunals. 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 section 34 of the final Constitution) without it being necessary to create a new set of *Shari'a* or religious courts (in terms of section 166 (e) of the final Constitution).⁵⁰ The arguments that co-operation with secular courts is not religiously permissible or that 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. State courts have been called upon to resolve matters of MPL⁵¹ as well as of a Muslim doctrinal nature. Instances of co-operation between state courts and the MJC give 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. The state should therefore be able to 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. Co-operation with state courts and subsequent recognition will allow for more transparency, fewer jurisdictional problems and for the decisions of these tribunals to be given the force of law instead of being merely binding on the conscience of Muslims.

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⁵⁰ For detail on the benefits of such a "minimalist option" see reference in footnote 48.

⁵¹ Recent cases include *Kalla v the Master and Others* 1995 (1) SA 261 (TPD) 262 and *Ryland v Edros* 1996 4 All SA 557 C. For more detail see Moosa, N. 1996: 392 footnotes 137 and 139.

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