

# MUSLIM PERSONAL LAWS AFFECTING CHILDREN: DIVERSITY, PRACTICE AND IMPLICATIONS FOR A NEW CHILDREN'S CODE FOR SOUTH AFRICA\*

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## EXPLANATION OF TERMS

The following definitions serve to facilitate the understanding of this paper.

### *Muslim Personal Law (MPL)*<sup>1</sup>

MPL is a religiously based private law which pertains to, inter alia, marriage, divorce, inheritance, polygyny, custody and guardianship, and which falls under the category of family law. It has its origin in the Qur'an,<sup>2</sup> which, along with the Sunna<sup>3</sup> of Prophet Muhammad, is the primary source of Islam. The Qur'an is not a lawbook, as only a small number, approximately eighty,<sup>4</sup> of the verses deal with legal matters. Most of them pertain to personal laws. It is in the areas explicitly referred to by these (divine) verses that one finds little or no change in various Muslim countries, which were quite prepared to follow secular codes in other areas, such as commercial and criminal law. Minor (conservative)

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<sup>1</sup> Hereinafter abbreviated to MPL.

<sup>2</sup> The Qur'an was revealed to Prophet Muhammad in the seventh century of the Christian era over a period of twenty-three years. It is a religious text considered by Muslims to be the literal word of God.

<sup>3</sup> The Sunna (tradition) of Muhammad is the received customs associated with him and embodied after his death in book form called Hadith. For twenty-three years Muhammad literally lived out the Qur'an. The Sunna is therefore explanatory of and complementary to the Qur'anic text.

<sup>4</sup> Out of some six thousand.

reforms were introduced in the twentieth century when these verses were transformed into codes of MPL.

### *Islamic law (Shari'a)*

Islamic law is the conservative interpretation and application of the primary sources by early Muslim jurists, such as Abu Hanifa and Imam Shafi'i.<sup>5</sup> The Qur'an is separated from this classical formulation of Islamic law (into schools of law) by a process of legal development lasting more than two centuries. During this period, the Qur'anic norms underwent considerable dilution to the detriment of women and children. It is common for Islamic law (interpretations of original) to be mistaken with Islam (original) itself. After the death of Muhammad, legal decisions were given by his 'successors', the first four caliphs, Abu Bakr, Umar, Uthman and Ali. These caliphs and learned jurists warned that Muslims must guard against upholding their interpretations, which should be considered wrong if the primary sources so indicate. They did not want their views to be followed blindly the way certain Ulama (religious authorities essentially responsible for the interpretation of Islamic law) seem to advocate. While these jurists considered their opinions as contextual and best suited for their own time and circumstances, today these opinions are given more weight than the original sources of Islam itself!<sup>6</sup> In South Africa, conservative Ulama, who presently regulate and administer MPL, give these interpretations precedence over the primary sources themselves.

Apart from these two primary sources of Islam and of particular interest to this paper, in so far as it might provide local Muslims with a tool to overcome conflicts in MPL, is a source called *ijtihad* (independent reasoning). Reasoned interpretation of the primary sources was allowed for four centuries after Muhammad's death. The 'door of *ijtihad*' was formally closed in the tenth century. Closure meant that there was no further need to interpret the Qur'an and Sunna, and recourse could only be had to the interpretations of the earliest scholars, whose opinions were not subject to any alterations. Notwithstanding the spirit of equality implicit in Islam, closure rendered jurisprudence ineffective and unable to provide answers to emerging and contingent issues. This ended the classical period of Islam. Closure allowed for the codification of Islamic law. This is still the position today, although there is a call for these doors to be reopened.<sup>7</sup>

<sup>5</sup> In the eighth century the four major Sunni (traditionalist) Islamic schools of law were established and named after their founders, Hanafi, Maliki, Shafi'i and Hanbali.

<sup>6</sup> Najma Moosa *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL)* (unpublished LL.D. thesis University of the Western Cape 1996) 55 (hereinafter cited as Moosa).

<sup>7</sup> Moosa op cit note 6 at 18.

## INTRODUCTION

Marriage is seen as an institution for, among various objects, the procreation of children.<sup>8</sup> Children in Islam are ideally seen as the fruits of marriage—for mothers as homemakers to love and nurture and for fathers to provide materially, presumably without any distinction between males and females. Sons, however, are specifically perceived as part of the wealth of men.<sup>9</sup> Seventh-century Qur'anic verses of this nature are not interpreted any differently today, even though the situation in society has changed. There are mothers who are unwilling or unable *merely* to fulfil the role of homemaker, as there are fathers who are unwilling or unable to be the *sole* providers for their families. Sons become men and daughters become women, and in this way the vicious cycle is perpetuated. These verses also set the scene for the rights of Muslim children and the problems that these rights hold for any legislation, including human-rights instruments, whose provisions might apply equally to children, irrespective of sex and religion. In this paper, though, it is argued that the rights of children in Islam, seen in proper perspective, can be synchronized to conform to the requirements of a new children's code in South Africa (whether in the form of a revised Child Care Act or entirely new piece of legislation) and international instruments, as indeed should be the case the world over.

Even though the Child Care Act<sup>10</sup> has recently been amended,<sup>11</sup> the Law Commission is reviewing the statute in order to refocus South African law to comply with international instruments, especially the United Nations Convention on the Rights of the Child (CRC) (1989).<sup>12</sup> The CRC was ratified by South Africa in 1995,<sup>13</sup> and this means that the government is now bound to uphold its provisions. Of particular interest is art 2 (1), which states:

'The States Parties to the . . . Convention shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or *his or her* parent's . . . *sex*, . . . *religion*, . . . *birth or other status*' (emphasis added).

The position of Islamic countries on the matter was, as to be expected, one of dissatisfaction. 'Throughout this process, dissatisfaction over the articles on religion . . . hovered in the background. The Islamic countries wanted the article on religion to be either diluted or deleted.'<sup>14</sup>

<sup>8</sup> Najma Moosa *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman* (unpublished LLM dissertation University of the Western Cape 1991) 25 (hereinafter cited as N Moosa (1991)).

<sup>9</sup> Qur'an chapter 3 verse 14. However, God declares in Q.64:15 and Q.18:46 respectively that one's wealth and children (sons) are meant as a trial. <sup>10</sup> Act 74 of 1983.

<sup>11</sup> By the Child Care Amendment Act 96 of 1996.

<sup>12</sup> Hereinafter abbreviated to CRC.

<sup>13</sup> *National Assembly Debates* col 2629 (13 June 1995); *Senate Debates* col 1719 (13 June 1995).

<sup>14</sup> Cynthia Price Cohen 'Drafting of the United Nations Convention on the Rights of the Child: Challenges and Achievements' in Eugene Verhellen (ed) *Understanding Children's Rights* (1996) 329–30.

Not to be deterred, Islamic countries did what they usually do with United Nations instruments that they find problematic. Thus even though they might have accepted (signed and/or ratified) the CRC, they did so subject to the caveat or reservation that its provisions/obligations be compatible with principles of Islamic law. Pakistan, being a typical example, ratified the CRC in 1990 subject to the reservation that 'provisions of CRC shall be interpreted in the light of Islamic laws and values'.<sup>15</sup> In South Africa, the government has made it clear that it will not be a party to any forms of inequality. For example, it ratified the CRC and the United Nations Women's Convention (CEDAW), which provides for equality between the sexes, without any reservations. In addition, the final South African Constitution of 1996<sup>16</sup> made it clear that while there is provision for the possible recognition and implementation of MPL (though not any other aspect of Islamic law), it must conform to the Bill of Rights and equality enshrined in it, once it is so recognized. The *right* to have MPL recognized is therefore not constitutionalized. MPL thus needs to be reformed before it will be officially recognized. If this is done, then there ought to be no real problems with the proposed new legislation for children. But Muslims are split on the way forward and hence the status quo prevails. MPL remains unreformed and accordingly unrecognized. Formal 'concessions' by the government in terms of which, for instance, children born of religious marriages are no longer stigmatized and registered at birth as 'illegitimate', serve to slow down the process of reform further. Notwithstanding the possibility that MPL will not be recognized in the near future, the fact remains that Muslim children are being disadvantaged and will continue to be disadvantaged if no consideration is given to any new legislation in South Africa that might improve their status. Non-recognition of MPL causes problems, which include abuses of certain 'privileges' relating to polygyny, divorce, maintenance, and custody of children in Muslim family relationships.

Paying due regard to the split between Muslims as far as the position of MPL in South Africa is concerned, this paper will focus on Muslim laws affecting children from both a traditional and contemporary human-rights perspective with the object of finding a balance that will ultimately protect and enhance the (human) rights of Muslim children. I shall first provide a general overview of the rights of children as espoused in Islam and classical Islamic law and apply it to modern concerns, with a view to how it accords with or might conflict with comparable provisions in South African private law.

<sup>15</sup> B B Pande 'The Politics of Children's Rights in Asia: Rhetoric and Reality' in Eugene Verhellen (ed) *Understanding Children's Rights* (1996) 508.

<sup>16</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

## ISLAM EMPHASIZES A BALANCE BETWEEN THE RIGHTS AND DUTIES OF PARENTS AND CHILDREN

Rights and their corresponding duties are familiar concepts in both South African and Islamic law. Parental power constitutes the sum total of rights and duties of parents with respect to their minor children, for example custody and guardianship. Islam, however, stresses that the roles of parent and child are complementary and advocates that there should be a balance between parental powers and duties and the rights and obligations of children.<sup>17</sup> Eventually there is a reversal of roles in that the child becomes a parent and the parent becomes a child with old age. In other words, age does not necessarily mean wisdom nor youth ignorance.<sup>18</sup> 'In various contexts the Qur'an<sup>19</sup> cites instances where the parents were proved wrong in their encounter with their children and also where the children misjudged the positions of their parents.'<sup>20</sup>

While parents have many important rights over children, such as the right to chastise them, they do not necessarily take precedence over the rights of children. Umar, the second caliph of Islam, went so far as to say that the rights of children can in certain instances even precede those of parents.<sup>21</sup> Religious authorities and parents and guardians of Muslim children are thus obliged to ensure that the rights of these children are not sabotaged under the guise of religion, and, too, that they not be treated differently from their peers.

## MUSLIM LAWS EMPOWERING, PROTECTING AND AFFECTING CHILDREN: SOME EXAMPLES

No concerted effort will be made in this paper to divide the rights of children into definite (narrow) categories. Instead, these rights will be dealt with broadly and will include paternity, fosterage, custody, maintenance, guardianship of the person and guardianship of property. One cannot really categorize these laws/rules into particular compartments, as

<sup>17</sup> Hammudah 'Abd al 'Ati *The Family Structure in Islam* (1977) 182,203 (hereinafter cited as 'Abd al 'Ati). See Q.6:151 and Q.46:15.

<sup>18</sup> This is illustrated in an anecdote in terms of which a man, tired of caring for his aged father, decided to abandon him. He asked his son to fetch a blanket with which to smother his grandfather. When the son came back with only half of the blanket, his father wanted an explanation. The son replied that he would keep the other half for his father when his father in turn got old. See A R Omar 'The Rights of Children in Islam' in Abdul Rashied Omar & Ebrahim Moosa (eds) *Children in Islam: Rights, Illegitimacy and Islamic Law* (1996) 7 (hereinafter cited as Omar).  
<sup>19</sup> See Q.11:42-48; 12:8; 19:43-45; 47:17.

<sup>20</sup> 'Abd al 'Ati op cit note 17 at 203-4.

<sup>21</sup> This is illustrated in a story of a father having come to the caliph Umar complaining of his son's disobedience to him and neglect of his rights. When Umar questioned the son, the son enquired of him whether he (the son) had rights over his father and, if so, what they were. Umar replied in the affirmative and named the rights. The son complained that his father did not uphold these rights. Umar then chided the father as follows: "You have come to me to complain about the disobedience of your son. *You have failed in your duty to him before he has failed in his duty to you; you have done wrong to him before he has wronged you*" (emphasis added) (Omar op cit note 18 at 6-7).

they overlap to a large extent and furthermore often act both to the benefit and detriment of children, especially female children. For example, legislation of an Islamic country might permit a girl to marry at the age of sixteen. This can be considered as both empowering and discriminatory, in that it could contribute to the high fertility/birth rate for women in some of these countries. Moreover, because the final Constitution only makes provision for the possible recognition of MPL and not any other Islamic laws, the focus will be solely on MPL and human rights (and instruments) as provided for in the Constitution.

### *The right to life*

Muslim children have an inalienable (first) right to life.<sup>22</sup> Because God grants (sanctifies) life to both parent and child, it cannot be tampered with by anyone, including a parent. Hence abortion<sup>23</sup> is a contentious issue. God has granted children to those especially entrusted to be parents and they are thus answerable to God if they commit a breach of this trust by failing to preserve and protect this life. Islam prohibited (female) infanticide, a pre-Islamic pagan practice, whereby infants were killed for fear of shame and want. It made it a crime against God and did away with one of its causes, poverty, by making compulsory almsgiving (a tax to aid those in need) one of the five pillars of Islam. It seems as if the Qur'anic verses relating to infanticide<sup>24</sup> have been misread as applying to abortion. In modern parlance this appears to have been replaced by reproductive rights, of which the right of a woman to choose an abortion forms an integral part. Islamic scholars, whose views vary from one extreme to another, have as yet not come up with a creative solution to this moral problem. What is clear, however, is that there are views for and against abortion. In some Muslim countries abortion is legal, whereas in others it is criminalized. Islamic pro-life views have failed to make an impact on policymakers in South Africa. While they often pose problems like these as ones of concern with the Qur'an and its proper interpretation, it really boils down to the extent to which Western influence on the secular and religious aspects of life should be tolerated.

While Muslim academics and theologians pay scant attention to issues such as abortion, these issues and conflicts of opinion need to be dealt with in so far as they will affect the lives of Muslim women in South

<sup>22</sup> 'Abd al 'Atj op cit note 17 at 184.

<sup>23</sup> While there are no Qur'anic verses which relate directly to the issue of abortion, the Islamic-law position regarding abortion is that it is unlawful and forbidden, irrespective of the fact that pregnancy is a result of illegitimate sex or rape or of the fact that a deformed foetus has been conceived. It is permissible, however, at any stage of pregnancy or even just before birth if the mother's life is endangered. See Moosa op cit note 6 at 68–9.

<sup>24</sup> Q.6:137; Q.6:140; Q.6:151; Q.17:31; Q.16:58–9.

Africa should MPL be exempt from the Bill of Rights and a particular interpretation of MPL prohibits abortion.<sup>25</sup>

*The right to an inheritance and an education: equitable or equal?*

Although there is a Prophetic tradition<sup>26</sup> to the effect that parents are obliged to treat children equally, they are more often than not treated unequally.<sup>27</sup> Islam made education and learning incumbent on both male and female equally.<sup>28</sup> Yet females are prevented from occupying certain 'secular' professions in some Muslim countries. Furthermore, very few female theologians have emerged within the ranks of Islam.<sup>29</sup> Parents (ultimately the father (and his relatives) as the guardian of education) are responsible for the formative (and advanced) educational, religious, moral and physical development of their children.<sup>30</sup>

To turn to religious development: There is a Prophetic tradition to the effect that all children are considered to be born as Muslim. Although the Qur'an stresses that there is no compulsion in faith, nevertheless apostasy or conversion from Islam is considered in some opinions to be a capital crime punishable by death. Apostasy by one of the spouses normally terminates an Islamic marriage and, as indicated below, an apostate would be denied any right to an inheritance.<sup>31</sup> Article 14 (1) of the CRC assures to children a choice in religion, but Islamic states disagree in the form of reservations. They maintain that the child has the right to practise but not choose or change his or her religion, which must accord with that of the father. Article 14 (2) of the CRC does offer some assistance in this regard and provides: 'States Parties shall respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her right [to freedom of religion] . . . .'<sup>32</sup>

<sup>25</sup> If the neutral stance taken in s 11 of the Constitution, which merely states that '[e]veryone has the right to life', is interpreted by the judiciary as allowing women a free choice (to have or not to have an abortion), this will not interfere with MPL. If, however, a recognized MPL were to be exempt from the Bill of Rights and a particular interpretation of MPL prohibits abortion, then Muslim women could be denied such a free choice. Although the Constitution does not expressly provide for a right to abortion on request, the Choice on Termination of Pregnancy Act 92 of 1996 provides for abortion on request until the twelfth week of pregnancy or later under certain circumstances (s 2).

<sup>26</sup> The Prophet refused to be a witness to parents favouring a son, to the exclusion of siblings, with a gift. He said: 'Do not ask me to be a witness to injustice. Your children have the right of receiving equal treatment as you have the right that they should honour you . . .' (Omar op cit note 18 at 10).

<sup>27</sup> 'Abd al 'Ati op cit note 17 at 207.

<sup>28</sup> N Moosa (1991) op cit note 8 at 14.

<sup>29</sup> Moosa op cit note 6 at 45-6.

<sup>30</sup> Omar op cit note 18 at 9-10.

<sup>31</sup> Moosa op cit note 6 at 137-41.

<sup>32</sup> See Geraldine van Bueren *The International Law on the Rights of the Child* (1995) 152, 156-9.

As far as succession is concerned, children are given a fixed share in what can be likened to 'intestate' succession.<sup>33</sup> But while *Islam* (as opposed to Islamic law) makes the female a co-sharer with the male (Q.4:7), her share is always half that of the male. This inequality can, though, be overcome by the effective use of tools such as dower, dowry and gift.<sup>34</sup> Jurists have identified apostasy and homicide as the two conditions which permit parents to exclude children from their estates.

*Status and identity of children: legitimacy, 'illegitimacy'<sup>35</sup> and adoption*

In terms of Islamic law, paternity and maternity, or establishing who the natural/biological father and mother of a child are, is a fundamental (second) right of the child which confers on him or her the status of legitimacy and is established through marriage, acknowledgement and evidence.<sup>36</sup> The adopted child also has the right to know who his or her biological parents are, and hence adoption as understood in South African law, although permitted in early Islam, was prohibited by Qur'anic injunction, and this is still considered to be the position today. According to the Qur'an, if the real parents of the child concerned are unknown, the child is to be called a 'brother in faith' or 'client' of his or her fellow Muslims (Q.33:5). The Prophet Muhammad adopted a son, but it was later made clear in the Qur'an that Muhammad was not his father and that children are to be called by the names of their fathers (Q.33:40; Q.33:5). In terms of s 25 (1)(b) of the Births and Deaths Registration Act,<sup>37</sup> a mother who has custody of a child (born in wedlock) and who has remarried may apply to have her child's surname changed to that of her new husband. This is not allowed in Islam. Instead of adoption, Islam

<sup>33</sup> In Islamic law the heirs of the deceased are determined at the time of his death. Voluntary freedom of testation by will is limited in that the deceased may only dispose freely of one third of his net assets. (It is normally disposed of in favour of a stranger or charity (non-heir). The testator may, as an exception to the general rule, leave a bequest to a compulsory (Qur'anic) heir if the other heirs consent thereto *after* the testator's death.) The rest (two thirds) is automatically devolved in accordance with the fixed shares prescribed in terms of the compulsory Qur'anic rules of 'intestate' succession. Cf N Moosa (1991) op cit note 8 at 38-52, 152-68 and note 45.

<sup>34</sup> Dower, an important ingredient of a Muslim marriage, is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. Dowry consists mainly of property items such as clothing, money and jewellery. Although a well-established custom, it does not have its origin in Islamic law. In terms of Islamic law, gift is an unlimited disposition of property during one's lifetime. Cf N Moosa (1991) op cit note 8 at 9, 29-30, 153-5, 159.

<sup>35</sup> In terms of the Child Care Amendment Act 96 of 1996, the term 'illegitimate' is replaced by the term 'out of wedlock' (s1 (c)). However, the substantive legal status of, for example, children born of marriages by religious rites remains unaffected. See Julia Sloth Nielsen & Belinda van Heerden 'Putting Humpty Dumpty Back Together Again: Towards Restructuring Families' and Children's Lives in South Africa' (1998) 115 *SALJ* 156 at 157.

<sup>36</sup> Jamal J Nasir *The Status of Women Under Islamic Law* 2 ed (1994) 115 (hereinafter cited as Nasir); Asaf A A Fyzee *Outlines of Muhammadan Law* 4 ed (1974) 189 (hereinafter cited as Fyzee) and M T El Imairi 'Rights of Children' (1978) 7 *Journal of Islamic & Comparative Law* 1 at 1 (hereinafter cited as El Imairi).

<sup>37</sup> Act 51 of 1992.



encourages fostering where the real identity of a child is known. While adoption has been expressly prohibited in Morocco and Algeria, there are some Muslim countries which, contrary to classical Islamic law, practise adoption today. Turkey and Tunisia are two such countries. The Qur'an denies adopted children, because they are not blood relations, any rights of inheritance in the property of the adoptive parents, and vice versa, although such children may inherit up to one-third of the estate by bequest.<sup>38</sup> Non-recognition of MPL in South Africa means that marriages solemnized according to Islamic law are not recognized by the state. Consequently children born of such marriages (and therefore legitimate<sup>39</sup> in terms of Islamic law<sup>40</sup>) were stigmatized as illegitimate until recently and parents of such children were stigmatized as 'natural father', 'common-law wife', and so on. Because of this status of illegitimacy, these children experienced problems regarding succession, maintenance, custody and adoption.<sup>41</sup> In terms of the Births and Deaths Registration Amendment Act 1996,<sup>42</sup> these children are now to be registered as children 'born out of wedlock' and '[f]or the purposes of this Act [the Births and Deaths Registration Act 1992] "marriage" includes a . . . marriage solemnised or concluded according to the tenets of any religion . . .'. Furthermore, in terms of the Child Care Amendment Act 1996,<sup>43</sup> 'marriage' in the principal Act of 1983 includes '. . . any marriage . . . which was concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly . . .' (emphasis added). These are but first steps, after some

<sup>38</sup> A R Naqvi 'Adoption in Muslim Law' (1980) 19 *Islamic Studies* 283 at 286-90, 298. Cf Nasir op cit note 36 at 116 and N Moosa (1991) op cit note 8 at 51.

<sup>39</sup> Legitimacy is understood as the conception of a child during the lawful wedlock of its parents.

<sup>40</sup> Apart from acknowledgement and evidence, paternity can only be established for children born in wedlock, whether under a valid marriage contract, an irregular contract, or under consummation with a semblance of the right to marital intercourse. Paternity cannot be established for children born out of wedlock. Jurists of the four Sunni schools unanimously considered the minimum term of pregnancy to be six lunar months on the basis of their interpretation of two Qur'anic verses, Q.46:15 and Q.31:14, although they differed as to from what time (consummation/contract) this period counts. In the view of all four jurists, a child born in less than/within six months from the time of marriage is deemed illegitimate (unless the father acknowledges it). Although the maximum term of pregnancy used to be a matter of controversy among jurists, ranging from two to five years, it has in practice been limited to one lunar year. All Arab states approve of the minimum period of six months and are almost, with the exception of Algeria, unanimous on a maximum of one year. Muslim countries have made reforms to the effect that the maximum period of gestation is to be one year, because these views of jurists were not based on Qur'anic text or definite rules. Cf Nasir op cit note 36 at 116-17; Fyze op cit note 36 at 190; 'Abd al 'Ati op cit note 17 at 190-1; and El Imairi op cit note 36 at 2-5.

<sup>41</sup> Cf N Moosa (1991) op cit note 8 at 65 and Moosa op cit note 6 at 42.

<sup>42</sup> Act 40 of 1996 s1 (a), inserting the definition of 'child born out of wedlock' in s 1 of the Births and Deaths Registration Act 51 of 1992, and s1 (b), inserting the following definition of 'marriage' in s 1 (2)(a) of the 1992 Act.

<sup>43</sup> Act 96 of 1996, s1 (d), inserting a definition of marriage in the Child Care Act 74 of 1983. It came into operation on 1 April 1998. Proc R28 GG 18731 of 13 March 1998.

three hundred years, towards the full recognition of a reformed MPL as provided for in the final Constitution.

A Muslim child born out of wedlock is still stigmatized as illegitimate and is therefore still expected to suffer severe legal and social discriminations because of the traditional interpretations of Islamic law. Contrary to the position in South African law, in Islamic law, as such a child was conceived in an illicit union, it cannot be legitimated even if its parents were to marry before its birth. These discriminations are encountered in both MPL (for example, rules relating to parental power,<sup>44</sup> custody and succession)<sup>45</sup> and Muslim public law.<sup>46</sup> These views are also contrary to the Qur'anic norm to the effect that no soul is to bear the burden of another.<sup>47</sup> The negative interpretations of jurists have resulted in these children having to bear unfairly the stigma of adultery committed by parents. These interpretations are questionable and have been subject to much scrutiny.<sup>48</sup>

#### *Maintenance, custody, access and guardianship*

Under normal circumstances, children, as long as they are minors incapable of taking care of themselves, have the right to be reared jointly by both parents in a caring environment. The birth of a child (irrespective of sex) should be celebrated by parents (Q.16:58). According to Prophetic tradition, a child should be named (by the seventh day of its birth) with a name which has a good meaning.<sup>49</sup> The Qur'an recommends that the child should be breast-fed for two years (Q.31:14). While jurists have varying opinions<sup>50</sup> on the matter, suckling can be done by the mother or, should she not wish to do so, a salaried wet nurse (foster mother) (as was the case with Muhammad himself) (Q.2:233). Fosterage, however, creates impediments to marriage (Q.4:23). A divorced mother who has served her Qur'anic waiting period (called *iddat* and in which reconciliation between the spouses was still possible) is entitled to be paid for suckling her child (Q.65:6).

<sup>44</sup> Islamic law, on the basis of a Prophetic tradition, recognizes no ties (of maintenance) between an illegitimate child and its putative father, but conveniently leaves this burden on the mother, as the child is considered to relate to her. Cf 'Abd al 'Atj op cit note 17 at 192.

<sup>45</sup> In terms of South African law, illegitimate children have the same rights as legitimate children to inherit *ab intestato* as well as via a will. However, as far as the Islamic law of succession is concerned, illegitimate children are the heirs of their mothers and her relatives and vice versa. The father and his relatives have nothing to do with such children's inheritance or their property. Like adopted children, they may inherit via a one-third bequest if the father so wishes, but not in terms of 'intestacy'. Cf N Moosa (1991) op cit note 8 at 50-1 and note 33.

<sup>46</sup> Ebrahim Moosa ' "The child belongs to the bed": illegitimacy and Islamic law' in Sandra Burman & Eleanor Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (1992) 171 at 174-5 (hereinafter cited as E Moosa). <sup>47</sup> Q.6:164;17:15;35:18;39:7;53:38.

<sup>48</sup> Cf Omar op cit note 18 at 8-9 and 'Abd al 'Atj op cit note 17 at 192. For an alternative Islamic perspective more in line with human rights and the true Islamic spirit of justice and equality, see E Moosa op cit note 46 at 171-84.

<sup>49</sup> Cf 'Abd al 'Atj op cit note 17 at 198-9.

<sup>50</sup> Cf Nasir op cit note 36 at 128-30.

Generally, the Muslim child is entitled to '... the right of upbringing —the right to maintenance by the father, and fosterage (suckling) and custody by the mother, if these are assigned to her. After passing the age of custody, the minor shall have the right to care and guardianship by its agnates. If it has possession of property, it shall need administration and guardianship of its property, a need shared by those who lack legal capabilities [orphans, insane and prodigals (Q.4:6)].'<sup>51</sup>

Islamic law defines custody as the caring of the infant during the early years of life. This task is usually, but not necessarily, entrusted to the mother (irrespective of her religion).<sup>52</sup> The Qur'an is not clear as to which parent gets custody of the children in the event of a divorce. However, it accepts the father's perpetual right of guardianship, and this has led jurists to assume that, after a limited period of time (custody) with their mothers, children of divorced or widowed women pass into the care of the father or nearest male agnate relative in the event of the father's death.

According to the Sunni schools of law, a mother's limited right to custody is lost if she is unable, for whatever reason, to take care of her child or if she marries a man who is not related to her child within the prohibited degrees. The latter is based on a Prophetic tradition. These rules have been relaxed in most Muslim countries, with the welfare of the child being the decisive factor.<sup>53</sup> A mother is normally only allowed custody of her child up to a certain age, according to the sex of the child. The age up to which the mother has custody of her children differs from school to school. In terms of, for example, the Hanafi school of law, she has custody over her son from birth up to seven years of age and her daughter from birth until puberty (usually nine years). Some Muslim countries have reformed their laws to make this nine and eleven years respectively for sons and daughters.<sup>54</sup>

Custody is seen as one of three forms of guardianship and is also called guardianship of the infant or person of the minor. The other two forms are guardianship of education and property, and both of these are entrusted to men (including the father).<sup>55</sup> Parental authority thus includes guardianship and custody, which appear to overlap. Although these terms are used interchangeably, it must be clear that the custody of the mother is separate from the (sole/natural/legal) guardianship of the father. Although guardianship as a rule includes custody (and access), they can be separated from each other in South African law. Guardianship refers to the rights of control and administration over the child's person and property, while custody refers to the right and duty to have personal care of the

<sup>51</sup> Nasir op cit note 36 at 115.

<sup>52</sup> The schools of law are not unanimous that apostasy (of the mother) should necessarily be a ground for disqualifying her from her right to custody. Cf Nasir op cit note 36 at 137.

<sup>53</sup> Cf Moosa op cit note 6 at 26–7.

<sup>54</sup> Cf Fyzee op cit note 36 at 198; El Imairi op cit note 36 at 12–13; and Nasir op cit note 36 at 136, 144–5.

<sup>55</sup> Cf Nasir op cit note 36 at 130–5 and Fyzee op cit note 36 at 202.

minor and to control his or her day-to-day life, for example choice of friends, education and religion.<sup>56</sup> Islamic jurisprudence recognizes the father alone as the natural guardian of his minor children and hence he has to maintain the children even if he is separated (divorced) from the mother or if the children live elsewhere or are in the custody of another person (including the mother). This has deprived a woman of the right of bringing up her children as an equal parent.<sup>57</sup> In principle, the mother is under no obligation to contribute to the maintenance of her family (Q.4:34). But if the father cannot afford to maintain the children, the mother is bound to do so in spite of the clear Qur'anic injunction to the contrary. Maintenance is defined as providing children with basic necessities, such as food, clothing and lodging.<sup>58</sup> This accords with the provisions set out in s 28(1)(c) of the final Constitution.<sup>59</sup> The four schools also agree that the child, too, has a duty to maintain his or her parents, as explained above.<sup>60</sup> In terms of Islamic law and as is in fact legislated in some Muslim countries, parents, regardless of who may have custody, may not prevent each other from seeing their children. They are bound to give each other access.<sup>61</sup>

#### *Majority and minority*

The age of 'majority' (maturity) for a Muslim child, and when he or she becomes accountable, is usually marked by puberty, which is considered by most to be reached at fifteen years but which can extend to eighteen years. All schools agree on the natural signs of puberty but differ with regard to ages.<sup>62</sup> Minors on reaching puberty may enter into a valid and binding marriage. It must be borne in mind, however, that legal capacity as it applies to marriage is not always the same as full civil legal capacity (age of majority, which can also be different in some circumstances), both of which vary from country to country and do not necessarily accord with Islamic law in this regard. The Tunisian law, for instance, stipulates that a marriage of a man under twenty years and a woman under seventeen years requires special permission by the court, while the same law stipulates that civil majority is attained at twenty years for both sexes. The best interests of the child also play a vital role in

<sup>56</sup> F J Bosman & G J Van Zyl 'Children, young persons and their parents' in J A Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 49 at 53-4.

<sup>57</sup> An analysis of various Pakistani judgments from 1947 to 1992 which investigated the attitude of the superior courts towards women as parties in custody and guardianship cases clearly reflects a shift away from rules of traditional Islamic law and an emphasis on the '*... welfare of the child which is considered of prime importance* (at times even overriding express provisions of law) *...*' (emphasis added) (Shaheen Sardar Ali & M Nadeem Azam 'Trends of the Superior Courts of Pakistan in Guardianship and Custody Cases (1947-92)—An Analysis' (unpublished paper 1993) 35). Judges have exercised *ijtihad* to this effect, especially where there was no Qur'anic guidance or where the schools of law had divergent views on the topic (op cit 2-3).

<sup>58</sup> Cf Fyze op cit note 36 at 211, 214.

<sup>59</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>60</sup> Cf El Imairi op cit note 36 at 16.

<sup>61</sup> Cf Nasir op cit note 36 at 142-3.

<sup>62</sup> Cf El Imairi op cit note 36 at 22-3.

marriage and other matters when age is a factor.<sup>63</sup> A minor is a person under the age of 15.<sup>64</sup> In South Africa, the Marriage Act<sup>65</sup> also sets its own age limits for marriage.<sup>66</sup> Furthermore, while majority is attained at 21 in terms of the Age of Majority Act,<sup>67</sup> a child is generally defined in terms of (and for the purposes of) the Child Care Act 1983, the final Constitution (s 28 (3)) and the CRC (art 1) as a person below the age of 18. Article 1 of the Convention goes further and adds 'unless, under the law applicable to the child, majority is attained earlier'. This makes it easier for Muslim countries with divergent provisions, but which have either signed or ratified this instrument, to comply with its provisions. A wide definition of the term 'child' would also solve the problem of the application of MPL to minors in the context of (and in conflict with) other legislation in South Africa. Ultimately, the best interests of the child should prevail. This would be in conformity with the provisions of the final Constitution (s 28 (2)), the CRC (art 3 (1)) and Islamic law. The duty is then on the state, the High Court as upper guardian of children, and parents to ensure that this indeed be the case. Nasir emphasizes that '*... the interests of the child [be] deemed paramount to any other consideration*' (emphasis added).<sup>68</sup>

## CONCLUSION

In the light of today's changed society, where the theoretical distinction between the role of wives as homemakers and husbands as sole providers has faded in practice, it is encouraging to note that Muslim countries now place greater emphasis on the welfare of the child in MPL matters which concern the child. South Africa, as is evident from the final Constitution and ratification of the CRC, should also be travelling on this route, as a test of this nature could go a long way in resolution of (possible) conflicts between MPL and substantive South African law. In the process the child's right to participate in decisionmaking about his or her life should not be overlooked. Both the CRC (art 12) and a Prophetic tradition support this right of the child.<sup>69</sup> A balance between these two interests would be ideal.

It becomes clear from this paper that rules of Islamic law on matters of MPL concerning children vary from school to school and country to country. The task of formulating an equitable code of MPL for South Africa which conforms with the Constitution and other human-rights instruments will therefore not be easy. None the less, the general principles applied by these schools and Muslim countries remain constant, as does the spirit of equality implicit in the teachings of Islam (Qur'an and

<sup>63</sup> Cf Nasir op cit note 36 at 7-9, 30 and 'Abd al 'Ati op cit note 17 at 77, 199.

<sup>64</sup> Cf Fyzee op cit note 36 at 197. <sup>65</sup> Act 25 of 1961.

<sup>66</sup> N Moosa (1991) op cit note 8 at 33, 53. <sup>67</sup> Act 57 of 1972.

<sup>68</sup> Nasir op cit note 36 at 115.

<sup>69</sup> A woman complained to the Prophet that her husband wished to remove her son from her. The Prophet then pointed out both parents to the child and asked him to make a choice. He chose his mother. Cf Fazlul Karim *Al-Hadis* vol 2 (1939) 728.

Sunna). Restoring intellectual and academic freedom in Islamic jurisprudence by the effective use of legal tools like *ijtihad* will also speed up this process, especially in reconsidering the status of women and children. The mother's period of guardianship over her child, for example, over which there is no limitation in the Qur'an and Sunna, has been determined as a result of the *ijtihad* of early jurists. Present-day Muslim jurists should also consider the possibility of introducing reforms within the framework of Islamic principles in, for example, the area of laws relating to maintenance.

Because of non-recognition of MPL, decisions by Ulama are only binding on the conscience of Muslims. Secular courts and Shari'a (Islamic) tribunals would obviously reach different decisions in matters relating to custody, maintenance and inheritance, to mention but a few matters. If use is not made of tools within Islam, then people are ultimately going to resort to secular courts to obtain more equitable results and protection.<sup>70</sup> Ulama acknowledge that conflicts exist between MPL and South African law and further that Muslims already resort to getting married in accordance with both Islamic and South African law in order, *inter alia*, to acquire guardianship and custody of children and to enforce the obligation of support for wives and children.<sup>71</sup>

The Cape Supreme Court in the test case of *Ryland v Edros*<sup>72</sup> gave limited recognition to the Muslim marriage contract, provided that it was a monogamous union. It remains to be seen whether such recognition would extend to other areas of MPL, such as custody and guardianship. A horizontal application of the Bill of Rights will, though, have the effect that an individual can challenge a recognized, albeit unreformed, MPL and obtain relief from the courts.<sup>73</sup>

Human rights belong to all children, irrespective of religious beliefs and cultural backgrounds. While the Qur'an advocates that change be gradual (Q.3:159), it also stresses the evolution of Muslim society (Q.14:4). There is a need to couch the message of Islam and its spirit of equality in the language of our times, which is one of human rights and equality. The Prophet ordered parents to '[b]e generous, kind and noble to [their] children, . . .'.<sup>74</sup> Muslims should therefore rather move on the side of generosity than be party to the denial of basic human rights for their children.

<sup>70</sup> Cf Moosa *op cit* note 6 at 429.

<sup>72</sup> 1996 (4) All SA 557 (C).

<sup>74</sup> Omar *op cit* note 18 at 10.

<sup>71</sup> N Moosa (1991) *op cit* note 8 at 80, 83.

<sup>73</sup> Moosa *op cit* note 6 at 392.