

TITLE OF DISSERTATION:

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.

by

Advocate Najma Moosa (nee Vasta). B.A., LL.B. (UWC).



Dissertation presented in fulfilment of the requirements for the degree Magister Legum in the Faculty of Law of the University of the Western Cape.

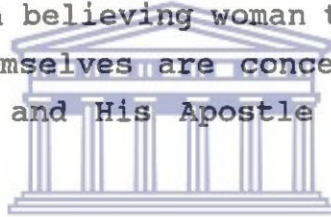
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Promoter F.A. de Villiers. B. Com., LL.B. (PU for CHE), LL.D. (Leuven). Professor in the Department of Private Law, University of the Western Cape.

Joint Promoter M.A. Sulaiman. B.A., LL.B. (UWC), LL.M. (Miami). Senior Lecturer in the Department of Private Law, University of the Western Cape.

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"Now whenever God and His Apostle have decided a matter, it is not for a believing man or a believing woman to claim freedom of choice insofar as they themselves are concerned: for he who [thus] rebels against God and His Apostle has already, most obviously, gone astray."



(The Holy Quran: Chapter 33: Verse 36).
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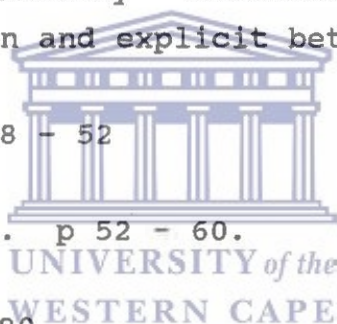
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(ii)

NOTE ON TRANSLITERATION

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



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INTRODUCTION

As a Muslim South African trained in South African Roman-Dutch law, I have been exposed to experiences/situations which indicate a conflict between the principles of South African Roman-Dutch law and Islamic law of succession. This has prompted me to do some research into the history of Islamic law, the spreading of Islamic law over large parts of the world and the question of the recognition and application of Islamic law in South Africa. The central theme of this study is the Islamic law of succession in so far as it affects women.

Chapter One of my dissertation contains a brief historical background which outlines on the one hand, the nomadic society, women and succession in pre-Islamic Arabia and on the other, their improved position upon the advent of Islam (seventh century). It ends with the historical background of Muslims in South Africa. Chapter Two is devoted to the marriage property background against which both the South African and Islamic law of succession operate. Thereafter, in Chapter Three, the South African law and Islamic law (substantive rules) of succession are compared. These include both intestate and testamentary succession, the latter being limited on the Islamic side. Chapter Four, with the backgrounds sketched in Chapters Two and Three, demonstrates the visible internal conflicts between the Islamic and South African law of marriage and succession as encountered in South African practice. After evaluating statistics and alternative solutions in this regard, and having arrived at certain conclusions, I propose that recommendations about the possible recognition and application of Muslim Personal Law in South Africa which is at present enjoying the attention of the South African Law Commission in Project 59 should see fruition and be implemented as it can only assist the society in which we live since it is a vital aspect affecting our daily lives (and deaths!). Chapter Five covers the whole aspect of the Muslim testator or testatrix's limited "freedom" of testation and reforms by certain forerunner countries in this regard which on

closer inspection are riddled with controversies. Chapter Six explores the treatment received by a Muslim widow, daughter and mother in terms of their respective fixed "intestate" shares and its implications for modern twentieth century society.

This issue, which is the major theme pervading this dissertation, concerns the fact that the Islamic law of succession is regarded as a perfect system of law. However, it is also said that this view is debatable because the "double share to the male" is an inherent and unalterable feature of this system which means that a female's share is always half of that of her male counterpart. I propose that, in the final analysis, effective use could be made of certain tools like dower, for example, to combat this inequality without in any way having to interfere with and change the divine blueprint of Islamic law as is suggested by modernist Muslim scholars and as is in fact legislated by some Muslim countries who believe that the changed family structure of modern Muslim families and the greater financial contribution of the women in a family calls for the reconsideration of women's inheritance shares.

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CHAPTER ONE

Historical Background

1. 1 A brief historical background on aspects of the social life and culture of the Nomads of Pre-Islamic Arabia

The law of family relations and inheritance, as stated by Schacht, was dominated by the ancient Arabian tribal system. (Schacht: 1964: 7). The clan formed the basis of Bedouin society. It consisted of groups of patriarchal families consisting of a father, his male children and their families, living together in a few tents. Groups of such families migrated together and owned pasturage in common. The clan was led by an elder (sheikh), who led them to war and received one quarter of the spoils of war (booty) (Jaffer: 1989: 11-12). As Coulson observed, "[t]he tribe was bound by the body of unwritten rules (customary law) which had evolved along with the historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal shayk nor any representative assembly had legislative power to interfere with this system". (Coulson: 1964: 9 - 10).

Tribal solidarity was essential for survival in the harsh desert conditions. The spirit of the clan implied boundless unconditional loyalty to fellow clansmen and corresponded in general to patriotism of the passionate, chauvinistic type. (Hitti: 1970: 27). As far as the economy of Arabia was concerned, the nomads, who lived there and who formed the majority of the Arab population, later began to include agriculture on a seasonal basis to its subsistence; thus they became semi-nomadic. Because of their increased contact with settled people, they developed a dislike for war and wilful destruction, characteristics of the earlier nomadic existence. (Jaffer: 1989: 15). Mecca was one of the main trading cities of Arabia and had no agriculture. Increasing emphasis was placed on material wealth in Mecca. The Meccans later

became financiers. Women too were involved in the commercial trade, for example, Khadija, first wife of the Prophet Muhammad (P.B.U.H)¹. (Watt: 1979: 38). The settled communities of Mecca had a customary commercial law characteristic of commercial life and those of Medina a law of land tenure, Medina being the chief town of agriculture (Amin: 1985: 308).

Arabia towards the end of the sixth century was on the threshold of change. With the development of commerce in Mecca the kinship structure changed and individualism instead of tribalism was growing (Watt: 1974: 46 - 49).

1.2 Women and pre-Islamic Arabia

Hibri's (1982: 207 - 212) article on this aspect is not entirely novel since Watt (1981: 272) had prior to this article come to a similar conclusion. She examines the socio-political conditions affecting women in the Arab peninsula before the rise of Islam. She, via her indigenous perspective and interpretation, provides preliminary data some of which is elaborated on below (based on access to certain academic sources) dispelling the view that Islam, as it is practised today, is fair and just to women and suggests that Islam as it is practised today (and not true Islam) is completely patriarchal and that this occurred through an historical process of co-optation whereby the latter became part of Islam only after the death of the Prophet Muhammad (P.B.U.H) (op. cit., 207). This is also a theme implicit in Powers' (1986) major work.

The existence of goddesses (most famous being al-Lat, al-Uzzah and Manāt; and so influential that they were mentioned in the Quran (Q. 53: 19) and again by the Prophet

¹ Salutation meaning Peace Be Upon Him.

Muhammad (P.B.U.H) in his further teachings) in the northern part of Arabia hints, in my view, at some form of strong women's rights in ancient cultures. Some tribes were matrilineal (kinship and descent between males traced through female line) and matrilocal (system of marriage where husband goes to live with wife's group). Some women possessed self-determination (a strong will to avoid subjugation) in sexual and other matters. They, for example, joined combat (and made a good job of it), recited poetry, conducted business and gave wise advice to their tribes. Practices which were exceptions to the patriarchal rule of marriage included the following: women being able to choose and divorce husbands at whim and the practice of polyandry. These facts (the right to marry and divorce) provide some proof that women had basic human rights in pre-Islamic Arabia. Although Hibri writes as if some sort of matriarchal system existed in pre-Islamic Arabia, she is not entirely correct in saying that complete "patriarchy" was practised after the death of Prophet Muhammad (P.B.U.H.) or even today for that matter. The northern Arabs practised female infanticide for two reasons: poverty or fear of shame (when captured on a raid they were treated as slaves, prior marriages became void and victors had sexual relations with them until they were freed by their own tribes). This practice subsided in due course because Arab men saw the economic advantages of selling a daughter for a large dowry as opposed to Islamic dower, a discussion whereof follows later. Their being used and later exchanged is an indicator of the socio-economic transformation here just prior to Islam. Another fact about Jahiliyyah (the Age of Ignorance existing in the pre-Islamic Arab peninsula) especially in the field of succession was that a man could marry up to 100 women implying an indefinite number of women. The effect of this is discussed in the history of succession in pre-Islamic Arabia infra. Finally, on discovering the monetary value of "live" daughters, some fathers forced them into

prostitution instead of practising female infanticide.

The next issue Hibri tackles concerns the question how women lost their limited status in the peninsula, or, more precisely, how the transition from being less patriarchal in some respects, at first, to more patriarchal, later, occurred. Trading routes influenced the cultures (many of which were agricultural). She postulates with good supporting arguments and references that these trade routes imported rudimentary technology, especially the war related kind like arrows and swords, with knowledge henceforth passing from male to male (ignoring the female). The major feature of the new patriarchal order was the development of a new tribal power structure totally based on patrilineage. Since the tribe was the highest political, economic, military and legal authority it followed that the "paternal bond" became the core and essence of the patriarchal system. (Hibri: 1982: 208 - 210; 212). As Watt (1981) concludes: "[W]hat follows is a tentative suggestion, though not without justification [that] in the recorded facts about pre-Islamic Arabia there is much evidence that the social system was on a matrilineal basis (ibid., 272) ... The view is therefore suggested here by way of hypothesis that a transition was in progress from a matrilineal system to one that was wholly or largely patrilineal, and that this transition was linked with the growth of individualism" (ibid., 387-8). This does not imply that a growth in individualism must necessarily follow.

1.3 A general history of succession prior to the advent of Islam

The flaws, which ultimately resulted in change upon the advent of Islam, in the system of succession of the Jahiliyyah people of pre-Islamic Arabia as far as women were concerned, are summarised as follows: "They failed to

realise that that which is considered logical is not necessarily equitable. They failed, too, to realise that estates are owned by God who has the power to bestow them upon those he chooses amongst his creatures. This fact was later regarded to be one of the substantial principles in Islam. Nor had they noticed that children and women were more deserving of help than men. They had also failed to apply pragmatically the strength of the relationships of the excluded women and children to the deceased. This omission marks another failure of their system since their social existence was based entirely upon this relationship." (Zaid: 1986: 10)

In a nutshell 'Abd al 'Aṭī sums up the position as follows: In pre-Islamic Arabia the right of inheritance was only granted to those who fought an enemy or took part in war. This resulted in the exclusion from inheritance of women, minors of both sexes, and invalids, as well as in the preference of the paternal to the maternal lines. ('Abd al 'Aṭī: 1977: 250).

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Owing to this strong tradition the Arabs, among whom tribal fighting was carried on all the time, only allowed those men who fought in battles to inherit. They excluded all females - daughters, widows and mothers. Women, in fact were looked upon as part of the property of the deceased and therefore their rights to property by inheritance was out of the question. (Ali: 1983: 679). Any possibility of her right of inheritance from her family, especially inheritance of fixed property such as land, which would in effect be transferring family wealth to another clan, was out of the question. (Esposito: 1982: 14). As Coulson points out, prior to the advent of Islam the unit of society was the clan, the group of blood relatives who claimed descent from a common ancestor which was patrilineal in structure exclusively through male links. Accordingly, in order to keep property within the clan,

rights of inheritance belonged solely to the "nearest" male agnate relatives (asaba) of the deceased, the order of priority being the descendants of the deceased, followed by his father, his brothers and their issue, his paternal grandfather, and finally his uncles and their descendants. By including "his brothers and their issue" Coulson implies an ordinary patrilineal and parentelic system which is slightly different to that described by Fyzee infra p.9-10. He goes on to say that there were cases where property was bequeathed to close relatives such as parents and daughters but that this was seen as an exception to the general rule. (Coulson: 1964: 9; 16). The son of a non-Arab woman did not inherit, though the son of a captive did. (Amin: 1985: 309).

The Arabs of Jahiliyyah had complete powers of dispensing of their property by will. (Ajijola: 1983: 269). Hence testamentary disposition of property was unrestricted. It was common in pre-Islamic times for kinship groups to disown original members and put aliens in their place and to adopt aliens and confer on them the lineal identity of the adopters, along with what it entailed (Abd al 'Atī: 1977: 23). Adoption was in fashion and the right to adopt was not restricted by any condition as to the age of the adopted child, or the absence of a natural-born son to the adoptive father. (Amin: 1985: 310).

In pre-Islamic Arabia we also see the notion of "marriage by inheritance". Widows were inherited like property by the heirs of their deceased husbands implying that women were equal to property. (Amin: 1985: 310). As noted, a man could marry an indefinite number of wives compared to the Quranic four. There was no limitation on the number of wives. An Arab was permitted to take as his wife his step-mother, cousin and wife's sister. His wives became part of his inheritance upon his death (and not inheriting from him is to be understood in the light of the chaos it would

cause). His son would then have the choice of marrying them (except his own mother), imprisoning them until they gave up any property they may have in exchange for freedom or marrying them off to another male and pocketing the dowry. He was also empowered to forbid her from remarriage in the hope of obtaining ransom or inherit on her death. (ʿAbd al ʿAṭī: 1977: 101). Women were not allowed to inherit. The property they accumulated from trading with chickens, eggs etcetera was subject to the husband's control. (Hibri: 1982: 209 - 10). In marriages by purchase or contract, the suitor also possibly paid another sum (sadaq), besides the dowry, to the woman herself, thereby purchasing her and making her his exclusive property. (Stowasser: 1977: 291).

Powers writes that Western scholars, in trying to trace the formation of the Islamic law of inheritance, hold the view that only the active male members of the tribe were entitled to inherit in pre-Islamic Arabia and that Quranic legislation changed this by also allowing females to inherit, and, subsequently these two heterogeneous elements - the tribal customary law of pre-Islamic Arabia and the Quranic legislation were joined together to form the "science of the shares". (Powers: 1986: 105). He however does not uphold this view and arrives at a questionable conclusion which is subject to a lot of debate which polemic will not be entered into.

Fyzee (1964: 382) sums up the principles of the pre-Islamic law of succession as follows:

- (a) nearest male agnate succeeded (indicative of a system of primogeniture);
- (b) females and cognates were excluded;
- (c) descendants preferred to ascendants and ascendants to collaterals (see supra p. 8);
- (d) where agnates were equally distant, estate was divided

per capita.

1.4 A brief background of Islamic Law

Islamic law evolved in the seventh century of the Christian era in the Arabian peninsula and in lower Mesopotamia. Islam was a religion of the city; far from being a mere "projection of the Bedouin mind", the new faith was born in and shaped by a city environment. (Stowasser: 1977: 290). The Quran (revealed Word of God) is not a law book, that is, it is not a collection of prescriptions providing a legal system since only a few verses can be said to contain legal provisions. Most of these deal with family law and inheritance. The Quran and the Sunna of the Prophet Muhammad (P.B.U.H) (received custom associated with him, embodied in hadith which is an item of information related to him containing either something he did or said; sometimes it is translated "tradition" as transmitted from reporter to reporter) (Jaffer: 1989: 79) are seen as sources of law. Not only is the example set by the Prophet Muhammad (P.B.U.H) and his instructions seen as a source of law, but it was also during his life that we see the period of Quranic revelation which took place over approximately 23 years. On the death of the Prophet legal decisions were given by the early Caliphs who now led the people, and later during the Umayyad period (661 - 750 C.E.) judges (qadis) took over this role since the judiciary as one of the functions of government became differentiated. In the eighth century, due to the dissatisfaction with Umayyad's rule and its courts, four schools (or versions) of law were founded: Hanafi, Maliki, Shafii and Hanbali. (Esposito: 1982: 2). These comprise together the Sunni school as opposed to the Shi'ites (also called Shia). The Sunnis (traditionalists) represent the orthodox Muslim population which did not align itself with any particular school. In contrast the Shi'ites or the followers of Ali (the Prophet Muhammad's cousin and son-in-law and a caliph) became a

school in Islam calling for restricting the leadership in the Islamic world to the household of Ali. (Jaffer: 1989: 87 - 8). The Sunnite and Shi'ite systems of inheritance when compared differ widely, hence my dissertation will only be based on the Sunnite system with its basically common religious dogma which has the support of the majority of Muslim followers, since it is comprised of the four major schools as opposed to the Shia's who are in the minority. Emphasis will be placed on the Hanifi school of law in certain areas, for example, the rules of dower and the general order of entitlement to inheritance. "The different Sunni and Shia interpretations of the Quranic enunciations on inheritance are explained in the following manner. Taking the Hanafis as representing the Sunnis and the Ithnā 'Asharī (a branch of Shia) the Shia or Shi'ites, the main differences between the two sects are as follows. The Hanafis allow the framework or principles of the pre-Islamic customs to stand: they develop or alter those rules in the specific manner mentioned in the Quran, and by the Prophet. The Shias deduce certain principles, which they hold to underlie the amendments (to the pre-Islamic customary law) expressed in the Quran, and fuse the principles so deduced with the principles underlying the pre-existing customary law, and thus raise up a completely altered set of principles and rules derived from them." (Nasir: 1986: 198). The general principles of the Hanafi distribution of the estate are discussed in Chapter Three, hence it suffices here to mention that "[t]he Shia interpretation of the law does away entirely with the priority of the agnates over the cognates and makes the estate devolve (subject to the rights of the husband or wife) upon the nearest blood relations, who divide it amongst themselves per stirpes, allotting to females half the share allotted to males in each grade." (ibid., 199).

The Muslims of South Africa, although adhering to the Sunni school, are not homogeneous: 50.96% of them are Shafi'i

Cape Muslims, partly of Malaysian origin, and 48.8% of them are Hanafi Indian Muslims. (Naudé: 1985: 25).

Among the Sunni's we also find differences. As Coulson (1971: 5) points out: "In substantive law generally, and certainly in the law of succession at death, the differences between these various schools are often not merely variations in detail but matters of a fundamentally different approach ... [T]he Sharī'a (Islamic law) appears, on a universal plane, as a comparative system in its own right."

Besides these two basic sources of Islamic law, that is the Quran and traditions of the Prophet (P.B.U.H) (as contained in the Hadith), which Bulbulia aptly says may be regarded as a magnifying glass which explains and elaborates upon Quranic principles (Bulbulia: 1982 b: 411), we also have, amongst others, two more major sources: the consensus of opinion of legal scholars (Ijma) based on the Quran and Sunna, and analogical deductions (Qiyas) based on the Quran, Sunna and Ijma. These are seen as the major sources besides which there are also other sources for example customs. (Nadvī: 1989: 35 - 42).

By way of interest it is apt to consider where Islamic law fits in among the major legal systems of the world. Chronologically Islamic law unfolded when Roman law had already reached the peak of its development while the Common law is a much later development which only started to take shape when Islamic law had already become a mature system. (Badr: 1978: 190 - 1). Today Islamic law is one of the major religious and legal systems of the world.

1.5 The role of women in Islamic Arabia: Islams contribution to the rights of women in general in so far as they differ from pre-Islamic Arabia

What follows is a summary of Hibri's article (1982: 212 - 215). Inter-alia,

- (a) Islam prohibited males from expelling menstruating women from their homes, and from refusing to eat from the same pot with them.
- (b) Islam limited the period of time a man can deny his wife sexual relations with him to four months. Men used to leave their wives for years without divorcing them. Under the new law they became automatically divorced after the four month period had elapsed.
- (c) Islam prohibited women from the practice of mourning their husbands for one full year.
- (d) Islam limited the number of wives to 4 (previously up to 100).
- (e) Islam stopped sons from marrying their fathers' wives after their death, or of marrying two sisters simultaneously. This prohibition was not retroactive, thus, marriages already in existence at that time were not affected. (Q. 4: 23).
- (f) Islam stopped the practice of forcing women to engage in prostitution. (Q. 24: 33).
- (g) Islam made female infanticide a crime against God. (Q. 16: 58 - 59; Q. 17: 31).
- (h) Islam prohibited Muslim men from taking Muslim women prisoners of war.
- (i) Islam made killing women a crime equal to that of killing men.

- (j) Islam made education and learning equally the duty of both male and female.
- (k) Islam declared null and void any marriage to which the woman did not consent.
- (l) Islam made the dower the property of the woman, not of her father or later her husband.

We see here that women received the attention they were denied in the Age of Ignorance. The Prophet Muhammad (P.B.U.H) designated his wife Aisha a religious authority. It is very interesting to note that very few female theologians have emerged within the ranks of Islam - none in fact to my knowledge in South Africa. He advocated women to be honoured and treated with kindness. The major reform of Islam towards the ultimate defeat of Pre-Islamic patriarchy lies in replacing "the 'paternal bond' of Jahiliyyah totally by the religious bond within which everyone ... is equal" (Hibri: *ibid.*, 213), thus weakening traditional allegiances and creating new allegiances based on moral and religious principles instead of patrilineage. The propagation of Islam in such a hostile surrounding could not therefore have survived without flexibility and adaptability according to Hibri (*ibid*) despite the fact that "the truths of God as stated in the Quran are eternal and unchanging". Hence we see adaptation to social circumstances necessitating change for the survival of Islam and if compared to present day Muslim society we can see the same pattern of events, inferring that one must change with time to survive. Even the Quran advocates this in Chapter 3, verse 159: "It is part of the mercy of God that thou (Prophet Muhammad) dost deal gently with them (followers). Wert thou severe or harsh hearted, they would have broken away from thee." And we also find certain parts of the Quran being abrogated by later ones to suit the people and transitions in society. This practice was

continued by the Ulama (religious authorities) after the death of the Prophet (P.B.U.H). This is what gives Islam its flexibility and adaptability to social and historical change.

Women participated in discourse with the Prophet (P.B.U.H) (via representation or delegation) and in the process of electing a new leader (therefore politically active). The Prophet (P.B.U.H) worked out a process of "give and take"-patriarchal forces were promised paradise as a reward for allowing women to regain their rights. However after the death of the Prophet (P.B.U.H) the "patriarchal takeover of Islam" commenced from inside its male ranks. At this stage women were unable to prevent this and the whole process of co-optation unfolded unhindered. An example of this is the Caliph Omar who not long after the death of the Prophet (P.B.U.H) spoke at a Friday prayer gathering suggesting dowries be reduced to a symbolic sum only to be confronted by an old woman who recited a verse in the Quran which gives the woman the right to set her own dower and keep it as her personal property. Omar admitted that he was wrong, although it must be pointed out that his argument for his proposal was that women were not for sale in Islam. As later attempts intensified women lost their personal rights. They were also prevented from becoming judges. (Hibri: 1982: 212 - 215). The theme of "Patriarchy" will be continued in Chapter Six infra where Quranic verses like Chapter 4 verse 34 concerning the supremacy of men over women and the role of patriarchal interpretations in inheritance problems facing Muslim women will be dealt with. Stowasser points out that verses like these must be viewed within the socio-economic context of seventh century Hijazi urban society. (Stowasser: 1987: 293) and this theme will also be continued in Chapter Six infra.

1.6 A general history of succession upon the advent of Islam

The reform introduced by Islam into the rules relating to inheritance is twofold: it makes the female a co-sharer with the male (Q. 4: 7) and divides the property of the deceased person amongst the heirs on a "democratic" basis, instead of handing it all over to the eldest son, as was done by the Roman law of primogeniture. (Ali: 1983: 679). Although one of the main purposes of Islamic law has been social improvement, its formal structure is individualistic. The changes which the Quran introduced into the agnatic system of inheritance that had existed in Arabia, aimed at giving some relations previously excluded from succession fixed shares in inheritance; however the way in which succession functions technically, where each and every heir succeeds directly to his individual share, is strictly individualistic. (Schacht: 1959: 138). I will deal with these reforms in more detail in Chapter Three and will therefore only briefly mention them by way of introduction here so as to indicate how they differ from pre-Islamic Arabia. It suffices to say that "[t]he enactments of the Quran concerning the distribution of a deceased person's estate are, on the whole, equitable, and show a great advance upon the unjust, and indeed cruel customs which obtained among the Arabs in pre-Islamic times ... The Islamic law of inheritance did not mean a complete departure from the preceding traditions, any more than it did a total dependance on them. Rather, it blended custom with (divine) revelation and joined the old to the new." (Abd al 'Aṭī: 1977: 253). As Nasir also states: "the Islamic law of inheritance has not entirely abolished the customary pre-Islamic law, but rather introduced radical changes to it." (Nasir: 1986: 196). This is also the generally accepted view implicit in most writers' works, for example, Schacht and Coulson (1971: 3) writes of tribal law being superimposed into Islamic law. There are however writers who reject this view for example Mundy, an anthropologist, points out that the key to the question of inheritance law was found to reside in the social history

and in the interplay between history and juristic rationalism. Her essay provides multifarious insights into the social conditions under which such laws emerged and operated. She indicates that studies by European scholars suggest a process of formation of the (fara'id) law quite different from that postulated by the above writers (24 - 25). (Mundy: 1988: 2; 24 - 5). Rahman says that the laws of the Quran were conditioned by the social-historical background of their enactment and what is eternal therein is the social objectives (like justice, equality, peace) or moral principles. (Rahman: 1982: 301).

In a nutshell Coulson (1971) describes the general nature of the Islamic law of succession as follows: "The supreme purpose of the Islamic system is material provision for ... the family group bound to the deceased by blood relationship ... prescribed by the law in rigid and uncompromising terms. Relatives are marshalled into a strict and comprehensive order of priorities and the amount, or quantum, of their entitlement is meticulously defined ... The power of the deceased to dispose of his property by will is recognised but is basically restricted to one-third of his net assets. Only where the legal heirs are prepared voluntarily to forgo their rights will testamentary disposition in excess of this limit be operative. Accordingly, the transmission of property by way of bequest, or in accordance with the wishes of the deceased, is of secondary importance, and the central core of the system of succession is formed by the compulsory rules of inheritance designed for the material benefit of the family group ... 'Intestacy' may be used as a term of convenience to describe the Islamic law of inheritance." (ibid., 1 - 2). This is so because the heirs of the deceased under Islamic law are determined at the time of his death.

1.7 Islam's contribution to the rights of women

specifically relating to succession: A summary

According to Hibri:

- (a) Islam gave both women and children a fixed share in the inheritance.
- (b) Islam stopped the practice of inheriting women along with property, and of imprisoning such women in exchange for their property. (Hibri: 1982: 212).

Fyzee (1964: 382) sums up the principles of the Islamic law of succession as follows:

- (a) husband or wife made an heir
- (b) females and cognates made competent to inherit
- (c) parents and ascendants obtained a right to inherit even when there were male descendants
- (d) the female was given half the share of the male.

1.8 A brief historical background of Muslims in South Africa

Nadvī in his "Dimensions of Islam through fourteen centuries", discusses this topic adequately and it is reiterated in his recent textbook (1979: 146 - 152; 1989: 326 - 9). As far as accuracy is concerned, various other people have also written on this topic and in comparison I found some variations in facts, dates and figures. What follows is a brief summary of his exposition. He gives a full list of references to sources in an appendix (ibid., 1989: 460) in which the information can be found. He poses and answers the question of how Islam reached South Africa.

1.8.1 CAPE

Muslims reached the Cape Province around 1654 when the Dutch East India Company decided to use it as a penal settlement and sent early Muslim prisoners to the Cape of Good Hope from Batavia (now Jakarta) in the Dutch

East Indies (now Indonesia). This is after Jan van Riebeeck arrived at the Cape in 1652. The first Muslims (known as Mardyekers) who arrived at the Cape were the Muslim soldiers in the army of the Dutch East India Company brought to protect the newly established Dutch colony. They were prohibited by a law issued in 1657 to practise Islam in public since the Dutch did not want Islam to be spread or propagated in their colonies. Offenders were to be punished with death. Muslim political prisoners started coming to the Cape. Slaves were sent from Batavia to the Cape in 1667. In the same year the first political exile also came to the Cape. Many of them were pious Muslim divines whose tombs are still found in the Cape. The Cape was chosen in 1681 as the official place of confinement for political prisoners of high and noble rank. In this way the first Muslim community was established in South Africa. The credit and glory of establishing and spreading Islam in the Cape goes to those slaves who were brought here from Bengal, the Malabar Coast and the mainland of India. It was in 1804 that religious freedom was allowed which provided a breathing space to the Muslim community in the Cape, after the British invasion and their recapture of the Cape in 1806. The British allowed the Muslims to build their first Mosque in 1807. After that a burial ground was granted and a school built; there seems to be a discrepancy about this date. Bulbulia states that the first mosque was built in Cape Town in 1790, (Bulbulia: 1982 a: 155) whereas Naudé says it was built in 1850. (Naudé: 1985: 23) Thus, the Muslim community was established and consolidated in the Western Cape. The classification of early Muslims as "Cape Malays" is misleading. Islamic culture of the Cape has no Malaysian origin. Islam, as already pointed out, originated in the Cape from the people of Indonesia and the East Coast of India. As Weekes

points out, the first generation Muslims were a mere heterogeneous body of people mainly from India, several Indonesian islands and Madagascar, with a few from Ceylon and other areas on the Indian Ocean. (Weekes: Vol 2: 1984: 719).

1.8.2 NATAL

Muslims came to the province of Natal as late as 1860 along with Hindus imported from India as indentured labourers for the sugar plantations. The skill and enterprise of Indian Muslims opened up other avenues of employment and business for them. They did not face the situations which were experienced by the Muslims in the Cape. Naudé writes the following about later arrivals: "However, since 1869 a new stream of Indians from North India who paid for their own passage entered South Africa, not as contract labourers but as traders or to serve in commerce." (Naudé: 1985: 23). Prior to this Mohamed gave a similar exposition (Mohamed: 1984: 24).

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1.8.3 TRANSVAAL

Islam was introduced to this province by railway employees. Small traders and skilled artisans also entered the inland from the coast and came to the Transvaal and Rhodesia (today Zimbabwe). The infiltration of Arabic and Swahili-speaking Muslims from Zanzibar and Mauritius is quite evident. The railway and mining industry attracted some Muslims to the Transvaal. (Nadvī: 1989: 326 - 9).

1.9 Muslims and Islam in South Africa today

"According to the figures for 1980 (in the 1980 census) Muslims constituted only 1.34% of the total population of South Africa, that is 328,900 Muslims ... By way of

contrast at least 56% of the total population of South Africa are Christians". (Naudé: 1985: 25). Bulbulia (1982 a: 155) puts the figure for Muslims at approximately 400,000 whilst Weekes (1984: 718) approximates it at 360,000. Presuming that these figures were also based on the 1980 census, there appears to be a discrepancy in them. However, they are approximations and will be regarded as such. They are officially classified as Indian or Coloured or Malay (Cape Muslims). The number of Black and White converts are also gaining momentum. Again we have a discrepancy in figures flowing from the initial discrepancy above. Weekes says that within the predominantly Christian Coloured population there is a Muslim subgroup of 182,000 people officially known as "Cape Malays". About three-quarters of these Muslims live in the Cape Town area. (Naudé (1985: 22) puts the figure at 163,700 in 1980). Indian Muslims, totalling 160,000, form the second major group. (Naudé (ibid., 23) puts the figure at 154,300 in 1980). Most live in and around Durban, but there is a significant number living in the Cape Town and Johannesburg areas. In addition, there are nearly 13,000 African and just over 1,000 White Muslims. (It must be remembered that these are approximations) (Weekes: 1984: 718). As already indicated, Naude points out that the Muslims in South Africa are more or less equally divided between the Hanafi and Shafi'i schools.

(p. 11-12 supra).

In South Africa we have various institutive bodies of experts (religious authorities) on Islamic law in each of the provinces, viz: the Jamiats of the Natal and Transvaal and the Muslim Judicial Council of the Cape and in addition the Madjlisul Ulama of Port Elizabeth in the Eastern Cape. The division among the first three bodies was made on geographical considerations but the latter is constituted by the fact of its members being alumni of the Djalalabad college irrespective of their place of domicile (Naudé:

1985: 28). Although their decisions are of a binding religious nature upon the conscience of the Muslims and they are competent to apply Islamic law, they lack the power to enforce Islamic law in South Africa. This is especially so due to the non-recognition of Muslim Personal Law (especially pertaining to marriage, divorce and inheritance) in South Africa which is currently enjoying the attention of the South African Law Commission. The various Ulama bodies have responded favourably to a questionnaire issued by the South African Law Commission pertaining the issues relating to the possible introduction of Muslim Personal Law as part of the legal system of South Africa (SALC Project 59 Questionnaire) (Annexures 1 and 2). Nevertheless a large part of the Muslim community have clearly expressed their objection to this proposal on the basis of politico-moral reasons (see e.g. Lubbe: 1989: 80 - 82). As academic E. Moosa advocated in his thesis: "Muslim Personal Law can become a vehicle for despotic repression at the level of both state and civil society and therefore it must take into account the socio-political realities of South Africa" (Moosa: 1988: 24). This is the position up to the present. I will now embark on the main section itself.

CHAPTER TWO

A brief outline of the Islamic Law and South African Law of marriage with particular emphasis on the marriage property (or patrimonial (financial)) consequences thereof as background to Chapter 4.

2.1 Islamic Law

Bearing in mind the historical background of Pre-Islamic Arabia as sketched in Chapter 1, we saw that pre-Islamic patriarchy ruled marriage. Women were seen as part of the "property" of the husband which gave rise to the notion of marriage by inheritance. There were no limitations on men's rights to marry or obtain a divorce. Men could marry an indefinite number of wives. A daughter was also considered an economic asset since she could be sold for a large dowry. With the advent of Islam the number of wives were limited to four. Marriage by inheritance fell away. Fathers could no longer force their daughters into unwanted marriages since Islam declared void any marriage to which women did not consent. As already indicated Islam made the dower as distinguished from dowry the property of the women, not of her father or her husband, hence it must be distinguished from a bride-price.

The Sharī'ah accorded women more rights, and thus changed marriage from an institution characterized by undisputed male superiority to one in which the woman was regarded as an interested partner. According to Khadduri (1978: 213) the Sharī'ah also changed the nature of marriage from "status" to "contract", in the words of Sir Henry Maine. "Marriage law remained essentially unchanged throughout the Islamic world until the beginning of the twentieth century ... [T]he law of personal status, of which certain parts relating to marriage and inheritance were directly derived from the Quran, remained virtually intact until modern

times". (ibid., 214).

With this in mind, what follows is a general description of Muslim Personal Law pertaining to marriage. Before giving a definition of marriage, it would be useful to define "family" as used in the Islamic context. 'Abd al 'Aṭī states that family describes a special kind of structure composed of people related to one another through blood ties and/or marital relationship and whose alliances are of such a nature as to entail "mutual expectations" that are "prescribed by religion, reinforced by law, and internalized by the individual" (Abd al 'Aṭī: 1977: 19). These expectations remain irrespective of the form the family may assume (ibid., 20). Traditional Muslim family structure is closer to the extended than to the nuclear type (ibid., 30). Although it is a moot point it appears that since married children and their families in most instances no longer live with their parents the nuclear family is a reality today and this new trend in itself makes it impossible to uphold all these expectations.

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Nasir states that marriage is a civil contract, without the biblical conception of sacrament. (Nasir: 1986: 38). He however adds that despite their civil character, marriage contracts are mostly regulated under religious jurisdiction to give their effects a character of sanctity (ibid., 39). He thus plays down the importance of the religious aspect. Similarly, "[i]n the leading case of Abdul Kadir v Salima 1886 8 AILR Mahmood J pointed out that such a contract was not in the nature of a sacrament, because Islamic law recognizes the right of parties to be divorced when the marriage ends in failure. It follows that there is no bar to remarriage." (Bulbulia: 1983: 431). In contrast, 'Abd al 'Aṭī's view does not correspond with what Nasir says above when he says "[s]ometimes, however the stress on the socio-legal and contractual elements of marriage tends to obscure the religious aspect: 'marriage is a contract but

it is also a covenant'" (Abd al'Aṭī: 1977: 59). Therefore it is a synthesis of both a civil act and a sacramental vow" (ibid., 220). T. Rahman defines marriage as a "religious legal contract that regularizes the sexual relationship between men and women, establishes the lineage of their progeny and creates civil rights and obligations between them" (T. Rahman: 1980: 2: 17). This definition gives equal weight to both the religious and legal aspects. Fyzee on the other extreme ignores the religious aspect totally when he defines marriage as "a contract for the legalization of intercourse and the procreation of children." (Fyzee: 1964: 74).

Islamically, marriage is not conditional on officiation by a priest because, strictly speaking, there is no such office. Religious benediction is also unnecessary for the validity of the marriage. (Abd al'Aṭī: 1977: 59). Thus, there is no need for it to be regarded as a sacrament. Although an Islamic marriage is often regarded as a religious function, Islamic law does not prescribe any particular form of marriage ceremony. The required marriage contract, whether oral or written in form, may however be supplemented by religious or social ceremonies. Thus an Islamic marriage can very well be regarded as a civil act, as it is in Western secular law. (Khadduri: 1978: 213). However, in South Africa it is customary (though not essential) that an Islamic marriage is concluded by a qualified Muslim minister subject to the observance of certain conditions in a mosque, private house or public hall etcetera. In England some mosques are now registered under Section 41 of the Marriage Act 1949 as registered buildings for the purposes of the solemnisation of marriages. (Pearl: 1972: 130).

The two essentials of offer and acceptance by the two parties or their proxies is essential for the conclusion of a marriage contract. (Abd al'Aṭī: 1977: 48). It thus

requires the mutual consent of the parties. The marriage proxy is seen as an agent acting on behalf of the principal in respect of concluding the marriage contract. Once the marriage contract is made his task is considered done. The women's consent is essential for the contract to be binding. The general juristic opinion is that the woman must not manage her own marriage contract, whether she is a virgin or was previously married and even when she possesses full legal capacity. Hence she requires a representative to conclude the contract on her behalf, for example her father or brother (ibid., 46). Sunni jurists all agree that the presence of witnesses is essential for validity of marriage contracts to ensure publicity which is the dividing line between lawful marriage and fornication. The witnesses must be two men or a man and two women (who must be sane and adult Muslims) (ibid; 49).

As far as marriage formalities are concerned under the provisions of Islamic law a marriage contract shall be valid, effective and binding despite either one or both parties not being adults, because minors, having reached puberty (deemed by most to be reached at fifteen years) may marry. It does not even require a marriage contract to be written in a formal or informal document, or even to be written at all. (Nasir: 1986: 64). Hence, as Mohamed points out, "an oral declaration and acceptance will suffice to bring the contract into existence." He also points out that registration is not an ingredient of or essential for the validity of a marriage but that it merely provides documentary evidence (Mohamed: 1984: 64 - 65). In practice the Muslims in South Africa have adopted a system of registration. This is the position held in all Islamic states where there is no codified legislation. However in some countries, for example, Egypt, the legislature has enforced certain rules both to prove marriage and to hear matrimonial disputes before the courts. Examples would be: that matrimony be proven by a formal marriage certificate,

that the ages of wife and husband shall not be below sixteen and eighteen years respectively, etcetera. In countries like Lebanon, Syria, Jordan, Iraq, Morocco and Tunisia we see the legislature following suit requiring some formalities for registration and proof of marriage contracts. They vary from elaborate to simple regulations. (Nasir: 1986: 64 ff). In Pakistan, a Muslim marriage must be registered in terms of provisions contained in section 5 of the Muslim Family Laws Ordinance 1961. In terms of S 5(2) licences are granted to Nikah Registrars (i.e. modern Marriage Officers). In terms of S 5(4) criminal sanctions of imprisonment or a fine may be imposed on whoever contravenes the provisions of registration. In India there are no registration requirements for Muslim marriages. (Pearl: 1972: 128 - 129).

Conditions may be incorporated into a marriage for either or both spouses which must be adhered to if they are advantageous to either party (Nasir: 1986: 51). It is susceptible to additional legitimate conditions and its terms can be varied within legal bounds. It is also dissoluble. (Abd al'Aṭī: 1977: 59).

Marriage "for life" is implicit in such a contract. As far as the duration of marriage is concerned the Sunni jurists are agreed that the form of marriage contract must not include or imply any time limit. For this reason they forbid the form of timed marriage called muta (pleasure) marriage (which is of a temporary nature and can be compared to a form of concubinage or legalised prostitution) (Nasir: 1986: 53). It is allowed among a small section of Shiah Muslims, and although it is referred to as a "temporary marriage" it can hardly be regarded as a marriage, as Fyzee points out. (Fyzee: 1964: 102).

Adherence to the Islamic religion by her husband is a condition for the marriage to be valid as no Muslim woman

may marry a non-Muslim unless of course he first accepts Islam. Muslim males may also marry "people of the Book" for example, Jewish or Christian women.

Polygamy, understood in Islamic law to mean permission for a man to take more than one wife (polygyny) but not vice versa (polyandry), and without going into any detail on its merits and demerits, is not regarded as an impediment to marriage. By way of elucidation, polygyny refers to the plurality of wives; polyandry refers to the plurality of husbands. Although polygamy, a generic expression covering both institutions, is used here, only polygyny is permissible by Muslim law. In terms of Islamic law, a Muslim can have up to four wives simultaneously, subject to certain conditions, in conformity with three of the major sources: the Quran, the Tradition of the Prophet Muhammad (P.B.U.H) and Consensus. This principle has been strictly adhered to in the laws of Syria, Jordan, Iraq, Morocco and Egypt, subject to restriction in so far as divorce is concerned. For example Egypt restricts polygyny by prohibiting the husband from unilaterally divorcing his wife. Under Tunisian law polygyny is forbidden. Therefore a man must first dissolve his previous marriage before remarrying. Turkey preceded Tunisia in this and is the only country in the Islamic world which has completely discarded Islamic law in favour of secular law. The debate over polygyny started in the early twentieth century, with Egypt and the Middle East opening to Europe. Modern religious reformers advocated prohibitions of polygyny, considering it an injustice to women. The fundamentalists reacted strongly, forcing legal reformations up to the early 1950's to be put on hold. However the direction at present appears to be in favour of restricted polygyny if not monogamy outright. In fact, the law in most countries allows the wife to stipulate in the marriage contract that the husband shall not take another wife (while the first marriage subsists) and enables the wife to sue for divorce

if such a condition is breached. (Nasir: 1986: 60 - 62).

The mutual rights and obligations between the husband and wife that flow from marriage has, in all its main characteristics, close connection to the Roman law or other European systems which are derived from that law. (Mohamed: 1984: 58). Hence no detail will be given here.

Focusing more specifically on the patrimonial consequences of marriage, we see that dower is an important ingredient of a Muslim marriage. The dower is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. It is a free gift. (Q. 4:4) It must be stressed that dower must not be understood to mean a "bride-price". It is not permissible for the guardian to receive anything for himself from the husband in consideration for the marriage of his daughter to the latter. (Nasir: 1986: 78). By way of contrast, in Roman law it was given by the bride herself, her father or relative to the groom, and belonged to the groom; only later was he deemed to be mere usufructuary of it. In African customary law the lobolo (as it is termed) goes to the bride's father and becomes his property. For the above reason Nasir says that "dower is neither an essential nor a condition for the validity, binding or effectiveness of the marriage contract, and that a marriage contract is deemed valid without any mention of dower." (ibid., 79). However, although indicative of the Sunni school, this is the Shafi'i point of view. Dower, according to Hanafis, is a condition precedent to the lawfulness of the marriage contract. Therefore, a marriage contract without dower is unlawful. (T. Rahman: 1978: 1: 223). Thus Khadduri correctly points out that the performance of the condition of paying of dowry is an essential element of the marriage contract (Khadduri: 1978: 213). Mohamed says that although this condition is implicit in the contract it is so powerful and binding in its nature that even an express

condition to the contrary cannot negate it. (Mohamed: 1984: 43). The qualification of dower as an effect or a consequence of the marriage contract (bearing in mind the Hanafi point of view) does not in any manner lessen the wife's entitlement to it. This right is inalienable because it is assumed even if it is not expressly stated in the contract. It is imprescriptible in that this right does not lapse with time alone. (Nasir: 1986: 79). A dower can also be divided into two portions, namely, prompt and deferred. (ibid., 81).

According to Islamic law, women, married or single, are allowed to own property or to dispose of it as they wish, to retain their separate estates, to remain owners of their dowries and inheritances, gifts, fruits of their own labour and investments. It is to be noted that Islam already took this positive and liberating stance fourteen centuries ago. Demombynes notes in this connection that Quranic law has given the wife "a status which is, in many respects, more advantageous than that bestowed by modern European law" (referred to in (Abd al 'Ati: 1977: 165)). Hence we see complete legal and contractual capacity more or less 1 500 years ago. Neither spouse acquires any "right" in the other's property by virtue of their marriage, according to the view of the majority of jurists (ibid., 146). A wife can thus freely alienate her property without the consent of the husband being required. Not even the marital authority of the husband can interfere with her right to alienate her property should she so wish or force her to alienate or deal with it in a way contrary to her wishes (Mohamed: 1984: 58). A non-Muslim woman validly married to a Muslim man enjoys the same rights as a Muslim wife as far as control of her property is concerned. Likewise the dower is the legal right of the wife of a Muslim whether or not she herself is Muslim. (Nasir: 1986: 76 - 77). In Islamic law the husband is allowed to use the marital authority associated with his role as husband. (Abd al

ʿAtī: 1977: 146). Islamic law places the husband under a legal duty to maintain his wife during marriage, but it does not recognize any continuing liability beyond for example three months (three monthly courses) on divorce (Q.2: 228) or until birth of a child if the wife is pregnant after an irrevocable divorce or four months and ten days on death (Quran: Chapter 2: Verse 234). In terms of Islamic law, men are the providers and protectors of women. Therefore they are solely responsible for maintaining the family and no such duty rests on the wife (Quran: Chapter 4: verse 34). Hence he is deemed the sole breadwinner appointed to this role by the Quran itself. He can be likened to the "head of the household". This theme is taken up in Chapter Six.

In conclusion, whatever a wife acquires as a dower from her husband and whatever assets she may have acquired before or after their marriage belongs to her exclusively. For this reason, there is thus no community of property in Islamic law. (Abd al ʿAtī: 1977: 56).

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2.2 South African Law

In his historical sketch of marriage, Hahlo mentions that marriage law became secularized in classical Roman-Dutch law and although the sacramental nature of marriage was denounced its origin was still regarded as being of a divine nature. (Hahlo: 1985: 11).

Although based on the consent of the parties, marriage is a special contract creating a special contractual relationship which is public in character. Marriage is thus a contract to which there are three parties: the husband, the wife and the state. (ibid., 21-22).

For a marriage to be regarded as a valid civil marriage in South Africa, it must be monogamous. With the arrival of

the first Dutch settlers the Roman-Dutch law monogamous marriage was received into the South African legal system. It still is the only type of marriage recognized in our law. It is available to all individuals of whatever nationality, population group or religion. Marriage is defined in our legal system as a "legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts". (ibid., 28 - 29). Hence although the word "marriage" is not defined in the Marriage Act 25 of 1961 it is quite clear from the context of the Act as a whole that it means a monogamous marriage under Common Law. (Ismail v Ismail 1983 (1) SA 1006 (A) 1021). Hence polygynous marriages, whether contracted in or outside South Africa, are void in South African Law, although they may have certain legal consequences as explained in Chapter Four. If the form of marriage does not preclude further simultaneous marriage(s) by the husband South African law regards it as potentially polygynous even if neither party has more than one partner and even when the parties intend their marriage to be monogamous. Thus a potentially polygynous union is equated with a de jure polygynous union. (Ismail v Ismail: ibid., 1020). (See also Seedat's Executors v the Master (Natal) 1917 AD 302 308).

Because Islamic marriages are void according to South African Law the effect is that none of the legal incidents of marriage are applicable to them. The parties do not succeed each other ab intestato. Their children are illegitimate. (Hahlo: 1985: 103). The latter can however inherit from their parents ab intestato in terms of the Intestate Succession Act 81 of 1987.

What follows is a summary of Hahlo (ibid., 75 - 83) which also contains the relevant sections of the Act (ibid., 441 ff).

It is the choice of the parties whether they wish to have their marriage solemnized in secular form by a civil marriage officer or in religious form by a minister of religion. Whichever form of marriage ceremony is to be followed (in court or church) and whichever religious denomination or sect may be involved, the basic legal formalities for getting married are the same. The place of the performance of a marriage is important and the Marriage Act 25 of 1961 lays down certain requirements in this regard. The marriage must be conducted by a person who has been authorized in terms of the above Act to perform marriages. In other words, the marriage must be solemnized by a marriage officer envisaged by sections 2, 3 and 11(1) of the Act. The particulars must be entered in the marriage register, which must be signed by both parties, two witnesses and the person authorized to register the marriage.

It is therefore solemnized in the presence of both parties as required by S 29 (2) of the Act. Hence the presence of the bride is required at the ceremony in terms of the Act. In terms of S 29 (4) a person cannot contract a valid marriage through any other person acting as his representative. Hence it is not possible for a couple to marry by proxy according to South African Law as both parties must be present and participate in the marriage ceremony.

Boys from eighteen to twenty and girls from fifteen to twenty who want to marry usually require the consent of both parents or legal guardians. Boys between fourteen and eighteen years and girls between twelve and fifteen cannot enter into a valid marriage without the consent of both parents or legal guardian and also, of the Minister of Home Affairs (a marriage between them is voidable). (ibid., 89 - 91).

In the light of the above, a marriage may be null and void from its inception for several reasons, for example, if the marriage ceremony has not been solemnized by a properly appointed marriage officer, or if all the prescribed formalities have not been complied with. A legal effect of a marriage in South African law is that the husband is regarded as the head of the family and has his powers confirmed in terms of Chapter II, S 13 of the Matrimonial Property Act 88 of 1984 and Act 3 of 1988. In terms of S 25(1) of the Matrimonial Property Act, Chapters II and III of the said Act did not apply to the marriages of blacks. However in terms of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, S 25(1) of the Matrimonial Property Act is deleted, so it appears that Act 3 of 1988 extended Chapter II, S 13 to include Blacks which was not the case in Act 88 of 1984. These powers cannot be excluded by contract. Another legal effect is a reciprocal duty of support which rests on the spouses for the duration of their marriage. "In practice however the duty rests primarily on the husband as head of the family and in most instances the main, if not sole breadwinner." (ibid., 133; 135).

Focusing more specifically on the patrimonial consequences of marriage we see that unlike the personal consequences of marriage which are invariable for example reciprocal support, in South African law the proprietary consequences are variable. (ibid., 125).

Marriages are either in community of property or out of community of property.

2.2.1 Marriages in community of property:

What follows is Sinclair's concise summary of the main provisions of the Matrimonial Property Act 88 of 1984. The Matrimonial Property Act entrenches the idea that

marriage is a partnership. A marriage entered into after the date of commencement of the Act (on 1st November 1984) without an antenuptial contract will produce universal community of property for Whites, Coloureds and Asians (Indians), as it has always done (but joint administration will operate in place of the marital power - Chapters II and III of the Act) (Sinclair: 1984: 14).

Hence the parties to such a marriage (in community of property) do not enter into a contract relating to their marriage before getting married. The effects of such a marriage are that the separate estates of the husband and wife become one joint estate in which the husband and wife each has an undivided half-share by virtue of the marriage itself (during the marriage and on its dissolution by death or divorce). There is a community of profit and loss between the spouses (assets/losses of either spouse forms part of the joint estate).



In the case of marriages entered into before November 1984, and where the marital power has not been excluded in terms of S 11 of the Matrimonial Property Act of 1984, the husband is the administrator of the joint estate and the wife is subject to his marital power where the traditional common law position is still applicable. There are exceptions to these rules. Only a brief outline of marriage in community of property has been attempted within the scope of this discussion. Thus, it must be noted that even in the case of a marriage in community of property, not all assets of the spouses form part of the joint estate. Each spouse may still have separate property. (ibid., 15 - 27).

2.2.2 Marriages out of community of property

Sinclair states that marriage after the date of commencement, with the standard-form antenuptial contract, will produce marriage out of community of property but subject to the system of deferred sharing of profits, that is, the accrual system (Chapter I of the Act). Thus, profits made during the subsistence of the marriage will be shared equally on the dissolution of the marriage by death or divorce. Only if the antenuptial contract expressly excludes the accrual system will complete separation of property ensue (Section 2 of the Act) - (the husband retaining his separate estate and the wife hers). (ibid., 14).

Thus, in order to marry out of community of property, the parties have to enter into an antenuptial contract before their marriage is solemnized. Before 1984 there was no legal provision for accrual sharing. Section 7 of the Divorce Act 70 of 1979 is aimed at preventing inequitable consequences of a marriage out of community of property in terms of an antenuptial contract excluding community of profit and loss and accrual sharing in any form, by giving the court granting a divorce a discretion to order the transfer of (some) assets of one spouse to the other. Chapter II of the Matrimonial Property Act which abolishes the marital power of the husband is also applicable to marriages out of community of property entered into during or after November 1984. (ibid., 33, 47 ff).

This is the position regarding marriages of Whites, Coloureds and Asians (Indians) and since the introduction of the Marriage and Matrimonial Property Law Amendment Act No. 3 of 1988, operating as from the 2nd of December 1988, it also governs the civil marriages of Blacks, since this Act deletes S 22 (6)

of the Black Administration Act which previously governed the consequences of a civil marriage between Blacks.



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CHAPTER THREE

A brief outline of the substantive rules of the Islamic Law and South African Law of succession as background to Chapter 4 (simultaneously accentuating correlative differences implicit in and explicit between them).

3.1 Islamic Law

"In a statement attributed to the Prophet Muhammad the laws of inheritance are said to constitute 'half the sum of ilm (knowledge)'." (Coulson: 1971: 3).

Bearing in mind the historical background and nature of the Islamic law of succession given in Chapter 1, what follows is a brief survey of sections of Islamic law of succession relevant to Chapter 4 of my dissertation and an even briefer summary of the South African law of succession. Although these systems are dealt with separately, I have simultaneously incorporated in them accentuated correlative differences implicit in and explicit between them.

Omar points out that the Quran prescribes the rules of succession to ensure an equitable distribution of the deceased's estate. He adds that this cannot be achieved if the framing of the rules of succession is left to opinion and subjective discretion. (Omar: 1988: 3). Although this is true in the sense that the Quran thereby removes the danger of human weakness into the sensitive area of family life by removing any favour or consideration to the beneficiaries, it is not entirely correct because certain sources of Islamic law (see Chapter 1) make provision for this, for example, via interpretation.

The Islamic law of succession consists of two parts: voluntary and compulsory.

3.1.1 Voluntary via will/bequest (wassiya)

According to Islamic law it is not necessary that the will be made in writing or that it must be signed or registered. A Muslim may make a will orally. As a general rule it may be proved only by the testimony of witnesses, usually the presence of two male adult Muslims. However, most Muslim countries have introduced legislation regulating the formalities, formats etcetera with which a will has to comply in order to be regarded as valid. (Coulson: 1971: 216 ff; Nasir: 1986: 238 ff). The South African Law Commission can benefit from their legislation in its implementation of Muslim Personal Law. In Islamic law "any person, major and of sound mind may make a will." (T. Rahman: 1980: 2: 237). The generally accepted view appears to be that majority is taken to mean reaching puberty which is estimated to be an age of at least fifteen years; however, this point is debatable (see e.g. T. Rahman: 1978: 1: 63).

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Firstly, a Muslim may only bequeath up to a 1/3 of his/her estate by will, normally in favour of a stranger or charity (non-heir) and in so doing he does not require the consent of his lawful heirs. This restriction is of Umayyad origin as is explicitly stated in the following tradition (Muw.iii. 245) and was projected back to the Prophet (P.B.U.H) as set out in Schacht (infra). Schacht mentions the possibility that it was connected with a fiscal interest in that the estate of a person who leaves no legal heirs goes to the state treasury, and a restriction of legacies would therefore tend to increase its share. (Schacht: 1979: 201 - 202.) Secondly, there is to be no bequests to compulsory heirs, even if it does not exceed 1/3 of the estate. However, this general rule is subject to exception in that it could take place if

heirs consent thereto after the testator's death. The basis of these two rules is not found in the Quran but in the Prophet's (P.B.U.H) tradition which as explained in Chapter 1 is a source of Islamic law. The first restriction is based on a report by the Companion of the Prophet (P.B.U.H), Saad b. Abi Waqqas (Esposito: 1982: 45) and the second restriction stems from the hadith reported by Ibn Abbas based on a sentence in the Prophet's Last Sermon on the day of his Farewell pilgrimage (Esposito: 1982: 46; Fysee: 1964: 359; Powers : 1986: 14). The significance of the consent requirement is as follows. Other heirs not included in the will will be at a financial loss because an heir or legatee has a greater portion or legacy compared to other heirs than what is fixed for him Quranically. This leads to the severing of family ties and wreaks havoc with social relations. But if consent is required potential severances of relationships can be prevented and family relations and love can remain intact. Consent once given cannot be revoked. If some heirs consent and others not, the will takes effect in respect of shares of heirs who consented and is void in respect of shares of heirs who did not consent. When the testator bequeaths more than 1/3, to be effective for the excess, consent of the legal heirs is required. Bulbulia states that the important point to note here is that effect is not given to the testator's power to defeat the law but the heirs after his death, becoming owners of the property could deal with it as they like and therefore they could ratify the act of the testator (now their ancestor) (Bulbulia: 1982 b: 412) Thus, there is no increase in testamentary freedom. It is seen as amounting to a gift from consenting heirs. This is reflective of the Maliki jurists' rigid interpretation of this prophetic tradition, since they maintained that where a bequest is made in favour of an heir, and

the other heirs consent to this bequest, then the transaction must be regarded as a gift from the consenting heirs. However, this prophetic tradition was interpreted by most jurists to mean that bequests to heirs were valid if they had the consent of other heirs. (Ajjola: 1983: 2 - 11). Hence, to sum up, where a person makes a will in favour of some of his heirs the same rule holds as in the case of bequeathing more than 1/3 to a stranger - it is valid if the other heirs give their consent to the disposition after the death of the testator (Hamilton: 1982: 670 - 704). "The policy of Islamic law is to permit a man to give away the whole of his property by gift inter-vivos (during his life time) but to prevent him, except for 1/3 of his estate, from interfering by will with the course of the devolution of property according to the law of inheritance" (Fyzee: 1964: 349). The will is given effect to before the heirs are paid out and is therefore said to create a right in rem (real right) and not merely a claim against the heirs (Schacht: 1964: 173) because it is only after payment of debts and the execution of wills, that the remaining estate is divided among Quranic heirs (T. Rahman: 1980: 2: 469). The same principle applies to legacies in South African law.

'Abd al 'Aṭī states that an alienation exceeding 1/3 of the wife's property is invalid without the husband's consent thus limiting her freedom to dispose of her own property. ('Abd al 'Aṭī: 1977: 166). He expresses his surprise at this point (ibid., fn. 31: 316) which is to be understood since in any case the consent of all her heirs are required in such a case so why specify her husband's consent as heir? Nevertheless, in Islamic law by the very nature of the 1/3 bequest, a wife needs her husband's consent as her heir if she wishes to dispose of more than 1/3 of her

estate via will. In contrast, in South African law a wife has the capacity to execute a will disposing of her assets without her husband's permission or co-operation being required (Barnard, Cronjé and Olivier: 1990: 264). A donation, sale for less than the value and other unilaterally disadvantageous transactions if made during a terminal illness are also regarded as wills despite being expressed to take effect while the sick person is alive. Should the sick person not finally die of the illness, these transactions are valid as if he had not been ill at all. (Schacht: 1964: 174).

- 3.1.2 The second part of Islamic law of succession deals with the remaining 2/3 of the deceased estate which devolves automatically and compulsorily upon the legal heirs determined at the time of death in accordance with the portions prescribed by the Quranic laws of inheritance, assuming that a will disposing of 1/3 has been made. If not, these rules apply to the whole of the testator's estate.

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Islamic law of succession is based on blood relationship (consanguinity - the nearer in degree excludes the more remote) and marriage (affinity). In Islamic law there is no succession by representation (Omar: 1988: 3 - 4) in what we would call intestate succession. In explaining this we see effect given to the principles of exclusion. Complete exclusion is where legitimate heirs are excluded completely because of the intermediacy of other relatives closer in lineal proximity to the deceased, for example the grandfather cannot inherit if the deceased's father is alive, nor the grandchild if the son is alive. Hence in the event of death of the grandfather and if there is a surviving son, then the issues of his predeceased son or daughter shall not be entitled to inherit in

the estate of the grandfather as representatives of their deceased father or mother which he/she would have received, if alive. Some countries like Pakistan and Egypt have however made this possible via legislation in terms of a 1/3 mandatory bequest (testate succession) in favour of orphaned grandchildren; Egypt indirectly and Pakistan directly deviating from Islamic law. This must be borne in mind in the ensuing order of entitlement and will be discussed in detail in Chapter 5 of this dissertation. Succession by representation is found in the law of testamentary succession subject to certain rules. In contrast, as far as children are concerned South African law allows for succession by representation. In 1952 Parliament changed the law to provide that where a child has died before the testator and that child would have been entitled to some benefit under the testator's will if he had survived him, the lawful descendants of that child will be entitled to succeed to the benefit, unless the will indicates otherwise (Joubert: 1954). In Roman-Dutch law succession by representation (*per stirpes*) is found in both the law of testamentary succession and the law of intestate succession (*ibid.*, 18 - 20; Joubert: 1958: 184 - 186). In Islamic law succession is *per capita* (per head) and not *per stirpes* (root). Where relatives are related equally in degree to the deceased, relations by fullblood exclude relations by half blood. Rahman says that a person who is himself excluded by having caused the death of the deceased (homicide being an impediment to inheritance) does not exclude others (S.A law differs (Corbett: 1980: 72)), for example his sons are not disqualified presuming that there are no other closer relatives. (T. Rahman: 1980: 2: 614). Normally his sons are automatically disqualified because succession is *per capita*.

The ensuing discussion drawn from T. Rahman (ibid., 470 ff) concerning the general order of entitlement to inheritance which consists of sharers, residuaries and distant heirs is largely based on the Hanafi school.

3.1.2.1 Sharers

They are primary heirs who are relative-heirs whose shares are fixed by the Quran itself, for example: $1/2$, $1/4$, $1/8$ etcetera. These are precise fractional shares. The sharers have precedence over all other heirs (Quran: Chapter 4: Verses 11 - 12; 176). They are comprised of a group of twelve persons mentioned below.

They are firstly, sharers by affinity, that is the husband or wife via marriage. A husband, his wife having no issue (children or agnatic grandchildren) gets $1/2$ of wife's estate. If there are issue (children of either sex or agnatic grandchildren) he gets a $1/4$ of it. Rahman mentions that the issue who together comprise the agnatic grandchildren are the grandson, son's daughter or grandson's son or daughter (of howsoever low in degree). The issue of a daughter is not included therein. (ibid., 476 - 7). For an explanation of the operation of the agnatic system see the next group called residuaries infra.

Before describing a wife's share, it must be understood that in Islam a wife means a Muslim wife. If she is a "Kitabiyyah" wife, that is, a Christian or Jewess she may only inherit via will and not as a sharer. Factors like divorce, for example, obviously also affects a wife's inheritance.

A wife, where there is no issue (children or agnatic grandchildren), gets a $1/4$ of her husband's estate. (ibid., 480). If there are issue or agnatic

grandchildren she gets an 1/8 of it. Bearing in mind that a husband may have up to four wives simultaneously, if he has more than one wife and there is no issue a 1/4 or if there are issue an 1/8 is divided amongst all of the wives as the case may be. It does not matter which of the wives has issue and which not, hence if the first wife has no issue but there are issue from the other wives of the husband then her share is the 1/8 to be shared by all of them. The Quran thus provides that all of the surviving wives shall inherit the portion of only one wife (Chapter 4: Verse 14.).

Secondly, they are sharers by lineage. These include parents, daughters (not sons) [son's daughters, full (true or germane) sister, consanguine sister (related from the father's side and not mother's) and uterine sister and brother (related to the deceased through the mother) and grandfather, true grandmother (no female intervening)].

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The primary heirs (first parentela) are the surviving spouse(s), both parents and children of the deceased. Strictly speaking the son is not included among these sharers but if there is a son he excludes all excludable heirs (in square brackets above) and shares the residue with the daughter(s). Therefore the son makes the daughter a residuary and he takes twice as much as her. What follows is a summary of the exact quantum of shares of the rest of the sharers.

By parents is understood the biological mother and father of the deceased (and not step mother and father).

The father - there are three situations in which the father inherits from his deceased son:

Firstly, as sharer he inherits $\frac{1}{6}$ if the son (or grandson) of a deceased is alive.

Secondly, as sharer as well as residuary - if the daughter or son's daughter is alive but not the son or grandson, he inherits $\frac{1}{6}$ as sharer plus any residue as the nearest agnate as explained later under the next group called residuaries infra.

Thirdly, as residuary only - if the deceased leaves no heir, for example, there is no son or daughter or son's daughter, except his father, the father is entitled to the whole estate as nearest agnate.

The mother - where the deceased leaves issue the mother gets $\frac{1}{6}$ of the estate (Q.4: 11). Where there is no issue (child or agnatic grandchild) she is entitled to $\frac{1}{3}$.

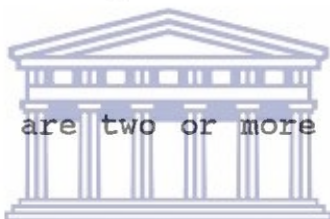
The daughter - there are three situations in which the daughter inherits from her father: If she is the only daughter, she gets $\frac{1}{2}$ of the estate. If there are two or more daughters they get $\frac{2}{3}$ of the estate to be divided equally amongst them. If her brother (son of the deceased) is also alive then she receives $\frac{1}{2}$ of his share. As I have already mentioned, the son makes the daughter a residuary and therefore she inherits with him as residuary and not as Quranic heir.

The predeceased son's daughter - there are six situations in which the son's daughter inherits from the deceased: When there is one she inherits $\frac{1}{2}$ of the estate (no son's sons). Where there are two or more, they receive $\frac{2}{3}$ to be divided equally among them provided there is no daughter of the deceased. If the deceased has a daughter she shall get $\frac{1}{2}$ (see supra) and the son's daughter $\frac{1}{6}$ to make up the $\frac{2}{3}$

share of the daughters. When there are two or more daughters the deceased's son's daughter is excluded except when a son's son (grandson) converts them into residuaries. If the son of the deceased is alive, the son's daughter (not his sister) shall not inherit, the rule that the nearer in degree excludes the more remote comes into operation here. This rule does not apply where the deceased has a daughter who competes with the son's daughter.

The full (true or germane) sister inherits in the following ways - if there is no son or father/grandfather of the deceased then:

Firstly, if there is only one sister she gets 1/2 of the estate;



Secondly, if there are two or more sisters they get 2/3;

Thirdly, in the presence of a brother she becomes a residuary and share in accordance with the rule stating that the male shall take twice that of the female;

Fourthly, in the presence of a daughter or son's daughter, after they get their shares the sister gets the residue.

The consanguine sister - the rules applicable to the full sister are very similar to those applicable here except for two differences. Where there are two or more, they get 2/3 only if full sisters do not exist; if two full sisters exist they are excluded. Where there is one full and one consanguine sister they get in proportions 1/2 and 1/6 to complete 2/3.

The uterine brother and sister - they inherit in two instances: When there is no issue of the deceased or of his son, nor father or grandfather, then one uterine brother or sister shall get $1/6$. Two or more shall get $1/3$ to be divided equally between male and female.

The biological grandfather between whom and the deceased no female intervenes, as father of the father of the deceased in his lineage upwards - Like the father he inherits in three capacities as sharer, sharer and residuary and pure residuary. Without going into detail it suffices to say that he inherits $1/6$ but is excluded if the father of the deceased is alive. The grandfather inherits as residuary in the absence of the father, issue or grandson.

The biological grandmother is that grandmother in whose relationship to the deceased no such man intervenes who stands between two women - Paternal and maternal grandmothers get $1/6$ of the estate whether one or more, provided they are all true and belong to the same degree. When there are two or more of them they share the inheritance between them. They are excluded by the mother (if alive).

"It is clear that the 'double share to the male' is fundamental to Islamic law of succession. Quranic heirs - the daughter, granddaughter, germane and consanguine sister - take an amount half as large as that of the male agnate of identical blood relation. It even applies to Quranic entitlement, so that a surviving husband takes a portion twice as large as that which a surviving wife would take under similar circumstances." (Coulson: 1978: 228).

3.1.2.2 Residuaries

The next group are called residuaries (asbat) or agnatic heirs. As indicated by T.Rahman we can distinguish between three types of residuaries. Residuaries in their own right are those male relations between whom and the deceased no female intervenes. They are males who are directly related to, or through a male, to the deceased and after defined shares are given away to the sharers, are entitled to the residue of the estate. In order of priority they consist of four classes. They include male descendants, male ascendants, second and third parentela male collaterals. A relative of a higher class eg son of the deceased excludes a relative of a lower class eg. deceased's father. Relatives in the same class nearer in degree to the deceased exclude the more remote ones. These were also the heirs of tribal customary law. There are also certain rules regulating their portions. This essentially male agnatic system is mitigated by allowing the surviving spouse and a limited number of females and non-agnates to inherit a fixed fractional portion of the estate in suitable circumstances. Residuaries in another's right are females converted into residuaries eg. daughter by a son. Residuaries together with another refer to female Quranic heirs eg. true sister (on the strength of blood ties) who becomes a residuary in the presence of other females eg. daughter. For full details see Rahman (1980: 2: 519 -526). If there are no residuaries in existence the doctrine of return (radd) comes into operation, that is, returning to sharers the residue to be divided amongst them in proportion to their respective shares. This doctrine itself is subject to certain detailed rules which will not be discussed here.

3.1.2.3 Distant heirs

Lastly, we get the "distant kindred" or uterine heirs. They are non-Quranic and non-agnatic and inherit in the absence of the two former groups. These include a maternal uncle, maternal aunt etcetera. After this group several other persons can also be entitled to inherit, for example, a person in whose favour paternity has been acknowledged by the deceased. If there is no heir of the legator or any of the above a will can be made regarding the entire property in favour of a legatee. This occurs very rarely. Hence the principle of distribution and not concentration of property is observed. Thereafter, as a last resort, any balance escheats to the state (public treasury) in the absence of any of the above. (T. Rahman: 1980: 2: 544).

There are also inheritance in special cases, two of which, relevant to my dissertation, are discussed below. However it may be mentioned in passing, that, as far as the position of the unborn child (nasciturus) and the effect of simultaneous deaths on the devolution of estates is concerned, the Islamic and South African law of succession offer the same solutions (subject to the rules of their respective laws of course). The unborn has a right to inherit if born alive. In the case of simultaneous death, where people related to each other die in the same accident and it cannot be established which of them died first, the deceased do not inherit inter se and their respective estates are devolved upon their heirs as the case may be. (For further details see Omar (1988: 93 - 94) on the Islamic position and Oosthuizen (1982: 5 - 7) on the South African position.) Under Islamic law, as far as the lineage of an illegitimate child (born out of wedlock) is concerned, they are heirs of

their mothers and her relatives and vice-versa. The father or his relatives has nothing to do with such children's inheritance or their property. They may inherit via a 1/3 will/bequest if the father so wishes but not in terms of "intestacy". As indicated infra regard must be had to the fact that in terms of S 1(2) of the Intestate Succession Act No. 81 of 1987, illegitimacy in South Africa is no longer an impediment when it comes to inheriting ab intestato. Thus illegitimate children now have the same rights as legitimate children to inherit ab intestato. It is also settled law that an illegitimate child may inherit under the wills of both his mother and his father. However, a reference to "my children" in a will includes the illegitimate children of the mother but not of the father (Barnard, Cronjé & Olivier: 1990: 78 - 9). There are reservations as to whether our courts will in future pursue this line of thought bearing in mind the Intestate Succession Act 81 of 1987 (ibid). I expect that there will soon be a Bill to remedy this. The term illegitimate as used in Islamic law must be understood in its general and universally accepted meaning and not confused with the context in which it applies to Muslims in South Africa. It is therefore clear that the Islamic and South African law differs on this issue. Omar (1988: 93 - 94) in his discussion concerning these three issues only points out the Islamic position. (Roos: 1990: 144).

Adopted children also cannot inherit in terms of the Quran since they are not considered to be blood relations but may inherit in terms of a will up to 1/3. Thus in Islamic law, an adopted son for example does not have the same rights against his adoptive parents as the real son as regards succession and vice-versa. In South Africa adoption in terms of S

17 of the Child Care Act 74 of 1983 cannot be regarded as a tool, which a Muslim father married to the mother in terms of Islamic law, may use to legitimize his own child. In conclusion, we see that "inheritance to the Muslim is very much a matter of Faith and Conscience." (Mohamed: 1984: 126).

3.2 South African Law

The content of this section has been extracted from Erasmus and De Waal (1989), Oosthuizen (1982) and (1989) and the Intestate Succession Act No. 81 of 1987.

The main historical source of the South African law of succession is Roman-Dutch law but it has also been strongly influenced by the English law and modern SA law.

Succession on death may take place in three different ways, either under a will made by the testator himself or on intestacy where he has omitted to regulate the succession or by contract where the devolution of the testator's assets is regulated by an agreement called a pactum successorium.

His beneficiaries are called heirs and shares in the residue of an estate to what is called an inheritance, and legatees who receives a specific thing or sum of money etcetera known as a legacy. This distinction is important in the sense that after debts have been paid, the legatees are paid out before the residue of the estate is handed over to the heirs and, if therefore a testator has left legacies equal to or in excess of the value of his estate, his heirs will receive nothing. Thus, if nothing is left of an estate after legacies are paid out, then heirs get nothing since there will be no residue for distribution. In contrast, generally, this cannot happen in Islamic law because bequests are restricted to 1/3 and the remaining

2/3 is the residue to be inherited by heirs. I say generally because this is also subject to exception as I have explained under the Islamic law of testate succession. An heir can benefit under a will or intestate or under a contract but a legatee can only be appointed by a will. There is therefore always an heir(s) to an estate.

As a point in common, in both South African and Islamic law there is no system of "universal succession" as in Roman Law. A will is a document executed in the manner prescribed by the law. In order to be valid it must comply with the formalities prescribed by Section 2 of the Wills Act 7 of 1953. For example, it must be in writing, signed and witnessed etcetera. The capacity to make a will is governed by the said Wills Act - generally every person of the age of sixteen years or more may make a will suffice it to say that failure to comply strictly with these requirements renders the will invalid.

A person dies intestate in respect of any property, succession to which is not regulated by a valid will or by an agreement which constitutes a valid pactum successorium. In South Africa it is settled that a person can die partly testate and partly intestate. Normally a will covers the whole of a testator's estate, in other words disposes of the whole of it. He has complete freedom of testation subject to certain limitations. One of the original limitations which was subsequently abolished in South Africa was the legitimate portion - a portion of the inheritance which was a specific proportion of the deceased's estate. After its abolition the need was felt for some form of provision for children out of the estates of their deceased parents. This right to claim maintenance was upheld by De Villiers C.J. in *Carelse v Estate de Vries*, (1906) 23 S.C. 532 and has become settled law in South Africa. This however was not the case as far as maintenance for the surviving spouse out of her deceased

spouse's estate was concerned. (Glazer v Glazer, N.O., 1963 (4) S.A. 694 (A)) Academics like Beinart (1965/6: 313) and Rowland (1967: 23) respectively cited figures and arguments in favour of forced maintenance in South Africa. These attempts have finally shown fruition in that a Bill has now been passed which has recently become an Act - Maintenance of Surviving Spouses Act 27 of 1990 -confirming this and is applicable to all population groups. However for Blacks there is an additional limitation in S 23 (1) and (2) of the Black Administration Act No. 38 of 1927 (Corbett, Hahlo, Hofmeyr and Kahn: 1980: 33 - 35).

In terms of South African law, subject to some limitations, the principle of freedom of testation is upheld in that the testator or testatrix may dispose of his/her property as he/she pleases. He/she can disinherit his/her spouse, children and other close relatives and leave everything to a "local home for cats" if it so pleases them. The spouse and children (including illegitimate ones) however have certain rights to claim maintenance against the estate of their deceased parents, as set out supra. However, although the widow previously had no such right to maintenance from the estate of her husband if she was not provided for by his will (the same applied to a widower), in contrast this can never happen in Islamic law since they can neither be disinherited nor deprived of their due proportional shares in the deceased's estate.

More important for most testators in terms of South African law is the fact that they can distribute their assets among their relatives in the proportion that they would like rather than being bound by the proportions laid down by the rules of intestate succession. The question often asked is whether such a degree of freedom is desirable. However, despite the difficulties it sometimes creates for the community, the maintaining of the principle of freedom of testation is still favoured, although some jurists are of

the opinion that it should be subject to curtailment. (Corbett, Hahlo, Hofmeyr and Kahn: 1980: 33 - 35)). Islamic testators have no such liberties except in so far as their disposition does not exceed 1/3 of their property and even this 1/3 is subject to certain conditions. Also as far as "intestate" succession in respect of the 2/3 (rest) of the property is concerned Quranic heirs' shares are defined and Muslims are bound by it, whether they exercise their limited freedom of making a will or not.

In South African law there exists an exception to the rule that a condition in a will which operates in general restraint of marriage is taken as not having been written. Thus a testator or testatrix may appoint the surviving spouse or ex-spouse as beneficiary subject to the condition that the inheritance shall forfeit if and when the spouse or ex-spouse remarries. (Hahlo: 1985: 23). By the very nature of the limited freedom of testation and fixed shares of Islamic law and also polygyny (on the side of the husband) this cannot be construed as a valid condition. The Muslim spouses possess inviolable rights to inherit ipso jure, the husband being in a better position than the wife as explained in detail in Chapter Six.

In both modern South African law and Islamic law provision is made for testate and intestate succession. Intestacy as we understand it in South African law may be used as a "term of convenience" to describe the Islamic law of inheritance.

Prior to the promulgation of the Intestate Succession Act 81 of 1987, the law relating to intestate succession in South Africa was largely based on a "hotchpotch" of Roman-Dutch Law common law provisions, for example: the New Schependomserfrecht of the Political Ordinance of 1580 and the Charter of 1661 based entirely on blood relationship and two statutory provisions namely: the Succession Act 13

of 1934 as amended, which conferred rights of succession on intestacy upon a surviving spouse, and the Child Care Act 74 of 1983, determining the rights of inheritance of an adopted child on intestacy, thereby elevating them to the status of intestate heirs. This situation has now changed and is replaced by the Intestate Succession Act 81 of 1987 which has consolidated, amended and simplified these provisions by a system of intestate succession which is as far as possible confined to close relatives of the deceased. This act came into operation on the 18th March 1988 and only applies to the intestate estates of persons who die intestate, either wholly or in part, after the commencement of the Act on 18 March 1988.

To be more specific, the order of succession on intestacy in South Africa in terms of the act is as follows:

3.2.1 The first parentela (order of succession):

The first parentela or order of succession consists of the surviving spouse, the deceased's children and their descendants by representation per stirpes, ad infinitum (S 1(1)(a), (b), (c) and S 1 (4)(a)).

Firstly, if the deceased is survived by a spouse, but not by a descendant, the spouse inherits the whole estate. (S 1 (1)(a)).

Secondly, if the deceased is survived by a descendant(s), but not by a spouse, the descendant(s) inherits the estate. (S 1 (1) (b)). For them, division of the estate takes place per stirpes and representation is allowed. (S 1(4)(a)). An adopted child is deemed to be a descendant of his adoptive parent(s), but not of his natural parent(s) except in the case of a natural parent who is also the adoptive parent of the child or was, at the time of adoption,

married to the adoptive parent of the child. (S 1 (4)(e)).

Thirdly, if the deceased is survived by a spouse and descendant then the spouse inherits a child's share (or the prescribed minimum amount which is adjustable from time to time by the Minister of Justice by notice in the Gazette - at present R125 000). Hence whatever the matrimonial regime of the parties, the surviving spouse is always entitled to a child's share or R125 000 and, of course where the parties were married in community of property or under the accrual system, the surviving spouse's share of the joint estate does not form part of the intestate estate. The descendants inherit the residue (if any) of the estate. (S 1(1)(c)) - children inheriting in equal shares.

As far as the South African law is concerned, the Act has also brought about drastic changes as regards the position of the illegitimate child. Previously, an illegitimate child could not inherit ab intestato from his father or his father's relations, but only from his mother and her relations - the relevant maxim being "een moeder maakt geen bastaard." The act has now changed this situation and provides that "illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation" (S(1)(2)). Thus illegitimate children now have the same rights as legitimate children to inherit ab intestato. In contrast the position of the adopted and illegitimate child in terms of South African law and Islamic law as far as legal consequences are concerned, vary greatly.

3.2.2 The second parentela:

If there are no relations in the first parentela (and

no surviving spouse), the estate climbs to the second parentela which consists of the deceased's parents and their descendants by representation per stirpes, ad infinitum. (S 1(1)(d), (e) and 1 (4) (a)).

Firstly, if both parents are alive they inherit the estate in equal shares (S 1(1)(d)(i)).

Secondly, if one parent only is alive, then he/she takes one half of the estate and the descendant(s) of the deceased parent (the brothers and sisters of the intestate whether of full or half blood and/or their descendants) take the other half. (S 1(1)(d)(ii)).

Thirdly, if the latter descendants do not exist, the surviving parent inherits the whole estate.

Fourthly, if both parents are dead, but there are descendant(s) of the deceased parents who are related to the deceased, whether of the full or the half blood, then half of the estate goes to the descendant(s) of the deceased father and the other half to the descendant(s) of the deceased mother (S 1(1)(e)(i)).

Fifthly, if both parents are dead, and there are no collaterals other than descendant(s) of the half blood on one side of the family only, whether paternal or maternal, then such descendant(s) inherit the whole estate. (S 1(1)(e)(ii)).

3.2.3 The third and subsequent parentelae:

If there are no relations in the first and second parentelae and no surviving spouse, the estate climbs to the third and subsequent parentelae which now consists of the deceased's grandparents, great-

grandparents, etc. and their descendants. The nearest blood-relations take per capita - the blood relation(s) of the deceased who are related to him nearest in degree inherit the estate in equal shares. They take per capita, the nearest ones excluding those more remote (S 1 (1)(f)).

If the deceased is not survived by a spouse or any blood relation whatsoever, the state is entitled to claim the intestate as bona vacantia after thirty years. The act is silent on this point, but it is submitted that the above-mentioned common law rule will apply. (Oosthuizen: 1989: 91).

Where a person dies partly testate and partly intestate the amount which the survivor takes in terms of the will is ignored in calculating the amount (intestate portion) to which he/she is entitled to in terms of the Succession Act of 1934. The same rule applies under the Intestate Succession Act of 1987.

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What has been mentioned in the first parentela about illegitimate and adopted children applies in the other parentelae as well.

In concluding this brief outline, it is clear that the order of succession may be by representation per stirpes (root) or per capita (head). The lot of the surviving spouse has also been further! improved to some extent when compared to her position in terms of the Succession Act 13 of 1934.

While the position of the wife has been further! improved in terms of the new Intestate Succession Act, in contrast under Islamic law her share remains static and unchanged by circumstances. I discuss this point in detail in Chapter Six. In summary of the above,

"[w]hat we are witnessing today, is the application of two systems of law side by side ... In view of the fact that both these systems of law differ in their sources, principles and content, problems and conflict situations must inevitably arise." (Omar: 1981: 486; 503).



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CHAPTER FOURApparent (internal) conflicts between the Islamic law and South African law of marriage and succession as encountered in South African practice4.1 Introduction

The internal conflicts in the law of succession must be seen in the light of the law of marriage itself and therefore these laws of succession and marriage must be dealt with concurrently in order for these conflicts to be exposed. Bearing in mind the background sketched in Chapters Two and Three and once these conflicts have been expounded and available statistics evaluated, I proffer possible solutions.



In South Africa, a predominantly Christian country, freedom of religion is advocated in the preamble of its Constitution, namely the Republic of South Africa Constitution Act 110 of 1983, as amended by the Constitution Amendment Act 105 of 1984, which provides "[t]o uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship ...". Hence we see that Islam as a religion can be practised freely in South Africa. As far as Islamic law is concerned it is not officially recognised here, in other words, it does not have the force of law in the South African legal system, although this situation is currently being reviewed by the South African Law Commission (Project 59).

4.2 General conflicts

Along with the monogamous marriage of the Roman-Dutch law, traditional marriages of non-white populations are also entered into. These include "marriages" according to

Islamic custom. These marriages are not regarded as lawful marriages in terms of South African law because they are potentially polygynous and are not solemnized by authorized marriage officers in compliance with the provisions of the Marriage Act 25 of 1961. (Hahlo: 1985: 31). The formalities prescribed in general by this Act and as expounded in Chapter Two, must be complied with before the marriage is regarded as valid. Without discussing any pre-Union legislation in this regard, the relevant post-Union legislation concerns the following: Under Section 2 of the Indians Relief Act 22 of 1914, it used to be possible to convert a marriage solemnized in South Africa between Indians according to Islamic custom into a legal marriage by registration, if it was recognized as a marriage under Islamic principles and was, in fact, monogamous. However with the repeal of Section 2 of Act 22 of 1914 by Section 2 of the General Law Amendment Act 80 of 1971, this is no longer possible. (ibid., 31 - 32 fn 52). The Relief Act did not give recognition to these marriages but merely provided measures for their registration. Such marriages are now governed by Section 3 (1) and 11(1) of the Marriage Act. (Mohamed: 1984: 38). In terms of it, in some parts of South Africa, Muslims marriages are solemnized by Muslim marriage officers. However, the general trend is to keep the two, that is the religious Islamic marriage and the civil South African marriage, apart.

Generally Muslim religious officers (for example Imams) are not registered as marriage officers and therefore Muslim marriages are not recognized by the State.

South African courts do not recognize marriages entered into only according to Islamic rites. They regard it as void on the grounds of public policy as was reaffirmed by the Appellate Division in the case of *Ismail v Ismail* 1983 (1) SA 1006 A. (Omar: 1988: 25).

Dlamini (1989: 408) in his article makes the point of referring to a customary union as a customary marriage because of the fact that it is a marriage albeit a marriage in terms of customary law and should be recognized as such. The same can be said for an Islamic marriage. In Hahlo's references (supra) he places the word marriage in inverted commas to highlight the fact that it is a union rather than a marriage. As pointed out in Chapter Two, polygynous marriages although void in South African law have certain legal consequences attached to them. The Legislature has therefore in several general statutes, and for specific purposes, recognized polygynous unions, obviously because it was considered expedient to do so, for example S 21 (13) of the Insolvency Act 24 of 1936 and S 1 of the Income Tax Act 58 of 1962. (Ismail v Ismail 1983 (1) SA 1024 A). Expediency, I feel, must here be seen in the light of economic advantage. Trengrove J.A goes on to say: "I also mention, in passing, that it seems unlikely that the non-recognition of polygamous unions will cause any real hardship to the members of the Muslim community, except, perhaps, in isolated instances". (ibid., 1024 - 5). As a member of the Muslim community and in the light of the revelations of the rest of the chapter, I must respectfully differ from him. Once again Dlamini hits the nail on the head when he opines that polygyny is not so much against the "notoriously vague concept" of public policy, as against state policy which is representative of White views on what is acceptable behaviour. He says that the courts have incorrectly assessed a customary marriage on the criteria of a civil marriage, thereby superimposing White values on the Black community. (Dlamini: 1989: 410). The very fact that the South African Law Commission is now willing to give effect to Muslim Personal Law is indicative of or confirms this.

In an effort to circumscribe this chapter I will not embark on any lengthy discussions concerning a putative marriage

which is not a legal marriage nor can the courts construe it as such although it has certain effects of a valid marriage. (Moola v Aulsebrook NO 1983 (1) SA 687 N) (Hahlo: 1985: 113). Suffice it to quote Omar (1981: 485): "The question whether the courts will declare an Islamic marriage putative and any children born thereof legitimate on the basis that one or both of the parties genuinely believed that the marriage was a valid one, is uncertain. This depends upon whether due solemnization in accordance with the formalities of South African law is a requirement of a putative marriage. In Ramayee v Vandiyar 1977 (3) D and CLD 77 the court held that the requirement of due solemnization does not form part of modern South African law ... It is submitted that when the matter comes up for decision before the Appellate Division, Ramayee's case would be followed in accordance with the trend of judicial development in this regard (Per Didcott J at 79)".

4.3 Legal consequences of Islamic and South African marriages and its effects on the respective succession laws.

4.3.1 Married in terms of Islamic and South African law plus will (stipulating Islamic Law of Succession)

The only way to protect the Islamic marriage in South Africa at present is to enter into a civil South African marriage as well. Furthermore, the spouse has to make an express will that his or her estate should devolve according to the Islamic law of succession. (Nadvī: 1989: 331). In this will he/she could if he/she so wishes, dispose of 1/3 of his/her property and stipulate that the rest devolve according to Islamic law or that the whole estate devolve according to Islamic law, as the case may be. If this is done South African law will respect the wishes of the testator or testatrix, and if a testator or testatrix wishes his/her deceased estate to devolve according to

Islamic law, then it will be honoured. The master of the supreme court will invoke Islamic law, if it is a requirement of the testator's will. The testator or testatrix must execute his or her will strictly in compliance with the provisions and formalities of the Wills Act of 1953 to ensure its validity. (Bulbulia: 1982 b: 412). Thus an oral (Islamic) will, will not suffice.

Thus, we see that because of its invalidity, the children born of such marriages are illegitimate. (See for example *Docrat v Bhayat* 1932 TPD 125 at 127 and *Brey v SIR* 1978 (4) SA 399 (C) at 440) Because of this status, they experience problems regarding succession, maintenance, custody and adoption. The same can be said for the stigma attached to the status attributed to the parents of such children for example: "natural father", "common law" wife etcetera. It must be stressed that although "illegitimate children" may now inherit in terms of the new Intestate Succession Act of 1987, the word "child" in a will does not include the illegitimate child of a father! To inherit such children must be expressly mentioned in the will. (See page 51 supra).

The attitude of the South African courts to Muslim marriages was greatly influenced by the decisions of the English judges in matters appearing before the English courts when a Muslim married an English woman according to his religious laws and such English woman turned to an English court for assistance. The first record of such a case in South Africa (in 1860) is that of *Bronn v Frits Bronn's Executors and Others* (3 Searle 313). It is disappointing that in this case conclusions were reached on the evidence of laymen without consulting duly qualified Muslim jurists and which conclusion had and continue to have farreaching

consequences for Muslims of South Africa. The decision of the Supreme Court has up till now remained unchanged. (Mohamed: 1984: 30; 36 and 38).

It would now be appropriate to re-examine the position in England in the light of developments as far as the recognition of foreign marriages is concerned. This is set out in Grant and Levin (1982) as follows: English courts had in the past encountered problems when dealing with the foreign polygynous marriage. Problem questions included: To what degree should such a marriage be recognised as valid by them? Polygynous marriages did not comply with the classic definition of marriage set out in Hyde v Hyde (1866) L.R.1 P. & D, that marriage is the union for life of one man and one woman, to the exclusion of all others. If they did not recognise polygynous marriages at all it would have the effect that children born from these unions would be regarded as illegitimate in England, and allow the "spouses" to marry there as though the polygynous union had not taken place. The courts did not adopt this line of thought in Bamgbose v Daniel (1955) A.C. 107 and Baidnail v Baidnail (1946) p. 122. Because of the hardship caused by the fact that the courts considered matrimonial relief to be geared to the monogamous union and did not include a merely potentially polygynous union, the Law Commission recommended that matrimonial relief should be granted to polygynously married couples and this was enacted in the Matrimonial Proceedings (Polygamous Marriages) Act of 1972, now called the Matrimonial Causes Act 1973, especially S 47 (1). (See too Forsyth: 1990: 247). The courts can now grant matrimonial relief, such as divorce, nullity, judicial separation, maintenance and orders in relation to property in cases where the petitioner is polygynously married to the respondent but also has another spouse living.

that they (i.e. SA courts) were influenced by English courts in the first place. However, it seems that the general trend in South Africa is to steer away from English case law. Thus we could say then that the legislature should intervene as happened in English law, and this option is at present being considered in South Africa via the South African Law Commission. If we look at the drastic steps taken by Turkey in 1926 where the Swiss Code replaced Islamic law even in the area of family law: In the villages marriages and divorces are still performed mainly in terms of Islamic law and by far outnumber those performed under the code. In several instances the legislature has been compelled to take cognizance of this situation by not only enacting legislation legitimizing the issue of these informal unions, but even regularizing the unions themselves on the condition that they were de facto monogamous. (Anderson: 1959: 88 - 89). If the South African Law Commission's recommendations are implemented, then Muslim Personal Law will be given its due recognition and will not be substituted by any secular code as happened in Turkey because religion will still be a personal matter between the individual and his God and this fact is merely going to be recognised by the State.

4.3.2 Married in terms of Islamic law only

In the light of the above it is clear that the legal consequences flowing from an Islamic marriage only, in terms of the South African law, have dire effects on succession because if a Muslim in South Africa has failed to make a will regarding the devolution of his property to be distributed in terms of Islamic law, then he is deemed to have died intestate in terms of South African law thus excluding the Islamic law. Added to this, his own children are now given the

status of illegitimacy, and, because his marriage is not registered in terms of the Marriage Act 25 of 1961, he is not regarded as married and this excludes his "wife" because she is now no longer his wife because of this non-compliance with the formalities of the Marriage Act and Wills Act. This is indeed a doubly inequitable situation which is reality in South African law. In other words, because the deceased married only in terms of Islamic law and has left no will, his wife is completely excluded. It is important to note that S1(2) of the Intestate Succession Act No. 81 of 1987 now also safeguards the inheritance of his "illegitimate" children by allowing them to be regarded as intestate heirs. However their shares would be distributed in terms of South African law which treats males and females equally and this would then conflict with the Islamic law where males inherit twice that of the female. His only other relatives who inherit are his ascendants and collaterals, for example his parents, brothers and sisters.

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The term illegitimacy can be qualified to have two meanings in South African law. In the first instance it refers to illegitimate children as is generally universally understood (born out of wedlock) plus it could refer to the legitimate children of customary marriages who because of the nature of their parents' union are regarded as "illegitimate" (although born in wedlock). So for a Muslim in South Africa his own children are illegitimate but could be legitimated by subsequent civil marriage in terms of South African law. However in terms of Islamic law illegitimacy incorporates the true sense of the word.

4.3.3 Married in terms of Islamic and South African law minus a will

If a married Muslim has, in addition to his Islamic marriage, also undergone a civil ceremony and subsequently dies intestate then the laws of intestate succession operate as a whole. His wife and children are now legally acknowledged as such and this means that the rules of intestate succession set out in the Intestate Succession Act 81 of 1987 as discussed in Chapter three (supra) will provide for a distribution which conflicts with the fixed shares as set out in the Quran. This is another situation which cannot be tolerated because some heirs would be excluded and others favoured etcetera, for example his wife could be sole heir if he has no children. Daughters share equally with sons and this goes against a characteristic of Islamic law that male husband/son inherits twice that of a wife/daughter.

4.3.4 Married in terms of Islamic and South African law plus a will (according to South African law)

Because South African law recognises freedom of testation, a Muslim would have the freedom to dispose of his whole estate according to a will excluding Islamic law which would also be in contravention with the Islamic laws of succession. He would thus have this freedom irrespective of him being married in terms of the civil law or Islamic law only and furthermore, even if the Islamic marriage were recognised. Assuming that recognition was given to Muslim Personal Law, the question remains whether it would be desirable that Muslims have this freedom of testation?

As far as polygyny is concerned Islamic marriages are

regarded as "potentially" polygynous even though they are de facto monogamous and on this basis our courts have refused to give it any recognition (Seedat's Executors v The Master (Natal) 1917 AD 302). However in the case of Estate Mehta v Acting Master, High Court (1958 (4) SA 252 (FC)) a new attitude was adopted in Zimbabwe and it was decided that recognition could be given to foreign polygynous marriages under certain circumstances. This decision was followed in In re Estate Koshen (1960 (2) SA 174 (SR)) and confirmed in the Appellate Division case of Kader v Kader (1972 (3) SA 203 (RAD)). It must however be noted that these cases were concerned with de facto monogamous marriages. Writers like Kahn (Hahlo: 1975: 622) criticizes the Zimbabwean approach while Forsyth (1990: 248) welcomes it. Kahn is of the opinion that the Mehta case "paved the pathway for a plethora of petty problems pertaining to polygamy" and "may have sown a crop of troubles in being influenced by the growing benevolence of the English courts towards the recognition of polygynous marriages" (Kahn: 1960: 276 - 7). However, according to Forsyth "There is much to commend this approach ... It is submitted that the South African courts too should cast off the over 70-year-old shackles of Seedat ... [I]t should not be beyond the wit of our courts to devise suitable answers to those questions. The English and Zimbabwean cases show how it may be done." (Forsyth: 1990: 248).

4.3.5 Husband has one marriage registered in terms of South African law and is also married to another wife in terms of Islamic law

This gives rise to another conflicting situation in that a man's Islamic marriage whether it precedes or follows the civil marriage is unlawful in South

African law but lawful under Islamic law and this causes problems as far as succession is concerned. Thus via his civil marriage the wife excludes the wife married in terms of Islamic law from inheriting while she is not so excluded in terms of Islamic law, although it does not exclude children born from such a marriage (cf S 1(2) of the Intestate Succession Act No. 81 of 1987).

As far as the Islamic law is concerned, polygyny is here to stay (whether it should or not is on its own another topic for a dissertation and besides in South Africa it occurs on a very limited and negligible percentage scale) and in recognizing Muslim Personal Law the South African Law Commission must take cognizance of it. However, as I pointed out in Chapter Two the parties can regulate this situation by providing for it in the marriage contract in terms of Islamic law or antenuptial contract in terms of South African law via a stipulation to the effect that the husband shall not contract a second marriage while the first one subsists and if the husband breaches or wishes to breach the condition it entitles the wife to sue for divorce. In this way monogamy is retained and, therefore, there is in my mind no reason why a marriage contract with such a valid condition should not be given the recognition it deserves.

4.4 Proprietary consequences of the above marriages and its effects on the laws of succession.

Having discussed the legal consequences of these marriages, I will now look more pertinently at the differences in the proprietary consequences of these marriages and how it can affect the Islamic law of succession.

4.4.1 Marriages in community of property.

If we look at a marriage in community of property then it becomes clear that when a Muslim couple undergo such a civil marriage it conflicts in several ways with the proprietary consequences of an Islamic marriage. Both "partners" are by virtue of the marriage itself and on its dissolution by death or divorce entitled to an undivided half share. Thus on death of either spouse the executor will first pay the surviving partner his or her half share and will only then distribute the deceased partner's share according to his or her will, or according to the rules of intestate succession, if no will has been made. It therefore appears that this entitles them to shares other than that defined in terms of Islamic law where the husband and wife's share differ and are not equal.

However the undivided half share is an automatic consequence of marriage (AND NOT of the rules of succession). It can therefore be argued that the half share which the surviving spouse receives is a consequence of the marriage being terminated and not because it is a consequence of the law of succession. Support for this argument is to be found in the fact that this (sharing of the joint estate) also takes place on dissolution of the marriage by divorce. It can therefore be concluded that there is no automatic conflict between the Islamic and South African law of succession as seems to appear from above. The argument against marriages in community of property lies in the fact that the principles of a marriage in community of property have been retained in the Matrimonial Property Act of 1984, hence it conflicts with Islamic law which allows the woman (single/married) the right of private and separate ownership and the partnership established by such a

marriage disturbs this. The abolition of the marital power in terms of S 11 of the Matrimonial Property Act 88 of 1984 merely puts the South African wife on par with her Muslim counterpart as far as legal and contractual capacity is concerned albeit this happened only as late as 1984.

4.4.2 Marriages out of community of property.

Another conflict between South African law and Islamic law is that, whereas Islamic law does not allow for a system of marriage in community of property because it contravenes its principles, as explained under 4.4.1, the marriage out of community of property is seen as a viable alternative. However the parties must execute and register an antenuptial contract expressly excluding the accrual system (sharing of profits equally on death/divorce) prior to solemnizing the civil law marriage. In South African law a marriage out of community of property retaining the accrual system is seen by most couples as probably the fairest marriage system. However, for this very reason and despite its apparent advantages, it appears that its conflict with the Islamic law of succession lies once again in the fact that shares are defined in terms of Islamic law and therefore receiving half of the profits goes contrary to these injunctions. However, the argument concerning the right of private and separate ownership advanced in 4.4.1 supra applies mutatis mutandis (and perhaps with more validity) here and it can therefore also be concluded that there is no automatic conflict between the Islamic and South African law of succession as far as this is concerned. A marriage out of community of property excluding the accrual system can be condoned by Muslims since it does not interfere with the private ownership of the spouses and since there is no "partnership" as in

cases of marriages in community of property. It allows a Muslim complete freedom of testation (as understood in Islamic law of course) to distribute his assets in terms of Islamic law. In the first part of his book Omar advises that a married couple should seriously consider changing from community of property to out of community of property excluding the accrual system in terms of a postnuptial contract. This he indicates can be done by way of a joint application to the Supreme Court in terms of section 21 of the Matrimonial Property Act 88 of 1984 (Omar: 1988: 17).

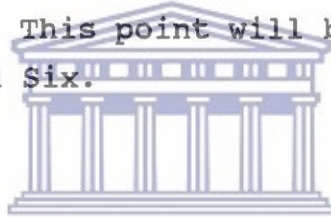
The interesting question also to be asked is whether there is also not some kind of similarity with the Islamic position where a person (prior to his death) distributes his assets? In other words, can the community of property or accrual system not be interpreted as an agreement between husband and wife to distribute the joint estate or profit respectively in a particular manner (equal shares) upon the happening of a certain event, i.e., death or divorce? (cf 4.7.1 and 6.3 ff infra).

Another fact to be taken cognizance of is that any recommendations made by the South African Law Commission will have to be applicable to all races in South Africa since Islam knows no racial distinctions and hence its laws are applicable to all.

The irony of it all is that despite so much objection to the South African Law Commission's Project 59, by the very fact that recognition is to be given to Muslim marriages per se (without any reliance on South African law systems of marriages) the effect of such recognition is actually to encourage Muslims to devolve their property in terms of Islamic law (which has prescribed rules) only. Nevertheless, as

indicated supra, because of the principle of freedom of testation being recognised in South Africa they could on the other hand dispose of it as they deem fit. It is thus a matter of conscience versus will. The Commission is thus, by doing this, discouraging people from disobeying the Quranic laws because most Muslims neglect to make a will (either because of ignorance or sheer negligence) relying on their families to distribute their estates in terms of Islamic law) or deliberately make one contrary to Islamic law. Once Muslim Personal Law is recognised there will be no need for the Muslims to use South African law to alleviate what they term "injustices" in Islamic law but to look at Islamic law itself and see what can be done from within to provide for a more equitable solution. This point will be elaborated on in Chapters Five and Six.

4.5 Other conflicts




When the provisions of South African and Islamic law of succession were compared in Chapter Three, a few other differences came to the fore namely: The application of and the restrictions applicable to the principle of testamentary freedom varies greatly. Man made (statutory) law governs the former system whereas essentially Divine law governs the latter, the former is capable of changing with time while the latter remains static for example its unique distribution of fixed shares offering the consolation of ensuring some form of benefit unlike the possibility of disinheritance implicit in the concept of freedom of testation. The former system allows for succession by representation while the latter does not. The position of adopted and illegitimate children also vary greatly. These are but to mention a few differences.

Fleming (1978) portraying a western perspective noted that

statutory changes in many Islamic nations recently had only slightly advanced the position of females, and that the example of Turkey (which discarded Islamic law and turned completely secular) seems to suggest that an almost complete cultural revolution would be needed for greater modernization. The gap in outlook and outcome between Islam and the West in this regard is therefore still very big, more so because of the accelerated pace of change in Western countries recently resulting in the de facto contraction of succession to the surviving spouse, usually the widow. This process has to date probably gone furthest in England where legislation qualifies the testator's freedom to disinherit his wife. The main concern for the widow is the importance of an independent home for her, amidst the housing shortage in Britain, and has little to do with women's liberation. (Fleming: 1978: 235 - 6).

4.6 The current position.



Seen in the above light and bearing in mind the substantive differences between the Islamic and South African law of succession as expounded implicitly and explicitly in Chapter Three, the importance of the task and contribution of the South African Law Commission must not be underestimated. As already mentioned in Chapter One, Muslim Personal Law in South Africa is currently enjoying the attention of the South African Law Commission in Project 59 and the various Ulama bodies (religious authorities) have responded favourably to a questionnaire issued by this Commission fully supporting its possible implementation as part of the South African legal system. See Annexure I for the attached questionnaire which gives a background of the South African Law Commission and its aims. The purpose of the questionnaire was to ascertain to what extent Muslims come into conflict with the rules of South African law relating to amongst others: marriage and succession. As is already apparent, for the purposes of my

dissertation I focus on these two aspects only.

As gleaned from a pamphlet issued by the Central Co-ordinating Committee for the Ulama of South Africa, members of the three Ulama bodies gathered in Durban on 14-02-1988 to discuss and formulate replies to the questionnaire. The object of this exercise was to attend to this matter in a unified manner and reply with "an unanimously agreed voice" - See Annexure 2. Thus, we see that their answers to the questions are very similar and they have in fact submitted one joint reply. I have decided, with the permission of the Muslim Judicial Council, to print some of their answers (before it was submitted in the form of a joint reply to the South African Law Commission) on questions related to statistical information on marriage and succession as it pertains to and affects the Muslim community in Cape Town only, in order to circumscribe my dissertation and also in conclusion, to proffer some alternative solutions on these issues especially in so far as it practically affects the Cape Muslims. These statistics, as I was informed, are based on information gained during practical experience in dealing with the said community and the data is established on a random basis by asking the people who consult them to answer these types of questions and are therefore not based on scientific research. This would indeed be an enormous, if not impossible task, requiring an area to area survey etcetera. Hence it suffices for the purpose of my dissertation. I have also added the results of a random survey undertaken in this regard. (see page 84-5 infra)

4.6.1 Questionnaire:

Contemporary observance and application of Islamic law in South Africa.

Q. 10: Where Islamic law in respect of any of the above-mentioned matters is in conflict with the law of

the land, does the average Muslim observe Islamic law or the law of the land?

A. Where Islamic law in respect of marriage, divorce and succession are in conflict with the law of the land, average Muslims follow Islamic law. In the event of a small minority who may give preference to the law of the land, this is generally followed by tremendous resentment and repudiation from others.

Conclusion of marriage

Q 15: Can you give an estimate of the percentage of marriages entered into by Muslims in South Africa - (a) in accordance with Islamic law only? (b) in accordance with Islamic law as well as South African law?

A: It is our experience that of all Muslim marriages approximately 95 - 98/99,9% of marriages are according to Islamic law. Our opinion is that of these, about 20 - 30% will have also married according to South African law. According to our Social Welfare Department, this seems a very fair estimate.

Q. 16: Do marriages entered into in accordance with South African law only, ever occur amongst Muslims (that is a marriage not entered into in accordance with Islamic law)?

A: Yes, they do occur but we do not believe that the numbers of such marriages are over 2 or 3% - 0.1%.

Q 17: For what reasons do Muslims find it necessary to enter into a marriage in accordance with Islamic as well as South African law?

A: Muslims do find it obligatory upon themselves that when they marry, it should be according to Islamic law because failure to do so means violation of an injunction of God and a life of sin. Furthermore failure to do so is considered repugnant by Muslim society. Marriage only according to South African law is considered tantamount to living "in sin". However certain factors make it advisable to also have the marriage solemnised according to South African law for example, legitimization of children according to law, to acquire guardianship and custody of children, to enforce the obligation of support for wives and children, to acquire eligibility for death benefits, pensions and house-subsidies; It is sometimes insisted upon by the wife and her party in order to acquire more security for herself as the rights and duties are enforceable by law.

Q. 20: Are Islamic marriages ever solemnised by Muslims appointed as marriage officers in terms of section 3 of the Marriage Act 25 of 1961? If not, why not?

A: Yes, in some parts of the country some marriages are solemnized by Muslim marriage officers. In the Cape we are not acquainted with any such officers. If such officers do exist and are able to perform the marriage in the traditional religious manner, we are not inclined to reject such officers. However, seeing that such marriages especially where they are in community of property, are sometimes against the Law of Islam, they are not acceptable to Muslims.

Q. 22: Would you (if you are a Muslim) advise a member of your family to enter into a civil marriage? Give reasons.

A: No I would not advise any member of my family to enter into a civil marriage as such a marriage brings with it certain rights and obligations which are in conflict with Islamic marriage, especially with regard to property and financial considerations. Generally it is our experience, that in the case of the ordinary man in the street, being unaware of the implications of a marriage without any contract, and failing to consult men of the legal profession, the marriage is contracted in community of property. If I have to advise anyone to have a civil marriage, in cases of necessity or expedience, I will advise that it be out of community of property.

Q. 25: Is the average Muslim aware of the fact that his Islamic marriage is not recognised in South African law? If so, how does he experience this situation?

A: Yes, the average Muslim is aware that his Islamic law marriage is not recognized. He accepts it with resentment.

Matrimonial Property

Q. 29: In the case where a Muslim enters into a marriage in accordance with Islamic as well as South African law, which matrimonial property system is usually chosen by the parties -

- a marriage in community of property? or
- division of property by antenuptial contract? or
- a marriage according to the accrual system?

A: The form of marriage which usually takes place is in community of property especially among the uninformed one. This is not the best form under the circumstances. However among the more informed

persons the system usually chosen is by antenuptial contract.

Q. 31: Is the average Muslim aware of the different choices between matrimonial property systems which exist in terms of South African law?

A: Except for the informed ones who form a small minority, the vast mass of average Muslims are not aware of the different choices between matrimonial property systems. When the need for a civil marriage does arise, no contract is agreed to beforehand, and because every marriage without such a contract is in community of property, that is what takes place.

Status of children

Q. 33: Are Muslims aware of the fact that if they do not enter into a civil marriage their children are regarded by the South African law as illegitimate? What is their attitude in this connection?

A: The Muslims in general are aware of this fact that their children are regarded as being illegitimate by the South African law. It is something tremendously resented by some and sometimes ruthlessly exploited by some. It is their intense desire to acquire legitimization of their children through recognition of Islamic law.

Succession

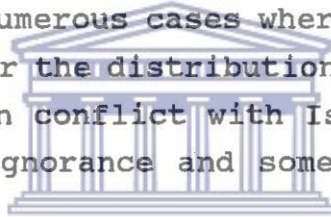
Q. 41: Is it common for Muslims to make wills according to the provisions of the South African law of succession? If not, why not?

A: Devout Muslims desire that with or without a will,

their estate should be distributed according to the stipulations of the Quran. The vast majority do not make wills. This is done mostly by those who are better off financially. In recent years under the guidance of the Ulama and the greater awareness of Islamic values, the Ulama are consulted to provide them with the proper distribution and shares according to Islamic stipulations. This tendency is on the increase.

Q. 44: Does it occur that Muslims provide in their wills for the devolution of their estate in a way which is in conflict with the rules of Islamic law? If so, what is the reason for this?

A: Yes, there are numerous cases where in their wills Muslims stipulate for the distribution of their estate in a way which is in conflict with Islamic law. The cause for this is ignorance and sometimes a lack of Islamic zeal.



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Q. 45: Whom does a Muslim in South Africa approach for advice with regard to the drawing up of a will?

A: It is our experience that Muslims generally consult their Ulama for advice on drawing up a will. They also consult Muslim lawyers. If and when they consult other lawyers, they generally present to them a proposed distribution as provided by the Ulama. Wide use is being made of the prepared will forms which had been drawn up by the Ulama in consultation with Muslim legal experts in South African law. Often the will will only stipulate a distribution according to Islamic law, whereafter after death the Ulama are contacted for the correct detailed distribution in Islamic law.

Q. 47: Are Muslims in general aware of the fact that they can provide by will that their estates must devolve according to Islamic law?

A: Yes, they are aware of this fact.

Q. 48: Does it generally occur that a re-distribution agreement is concluded by Muslim heirs to give effect to the Islamic law of succession instead of succession according to South African law?

A: Yes it does occur, but not generally, that a re-distribution agreement is concluded by Muslim heirs to give effect to Islamic law of succession rather than according to South African law. This happens more often among the deeply religious families.

Q. 50: Does it happen that heirs refuse to agree to a re-distribution of the estate in terms of Islamic law?

A: Yes it does happen occasionally although the advice of the Ulama is generally accepted.

4.6.2

Results of a random survey taken from adult attendants at an Islamic education class held at the Strand, Cape Town in March 1990.

Of a class of 44 students, 4 were unmarried. The rest (40) were all married in terms of Islamic law. Working on the basis of 40 = 100%, 15 members were also married according to the civil law (37,5%). An interesting observation in this regard was that all 15 of them were married in community of property. 26 members had made a will (65%). Of these 26 members, 24 made their wills in terms of Islamic law (60%) and

2 made their wills in terms of the South African legal principles (5%). 30 members owned property (75%).

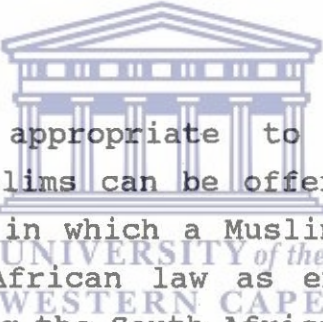
Those who made wills and who were also married according to the civil law = 57,6%

Those who owned property who also made wills = 86,6%

Those who owned property who are also married according to the civil law = 50%

This survey merely represents a limited sample of this type of research and further field research would be required to determine more accurate figures as to the exact status of provisions made by Muslims in this regard.

4.7 Alternative solutions



Finally, it would be appropriate to look at what alternative solutions Muslims can be offered. There are several alternative ways in which a Muslim can deal with the situation in South African law as expounded above, without in any way changing the South African law. Despite objection to the possible recognition of Muslim Personal Law in South Africa the reality exists that Muslims are constantly faced with practical situations where recourse to South African law, albeit in an indirect way, is inevitable and unavoidable. The following are a few examples illustrating this point. The first two examples have actually been utilised by Muslims in Cape Town, while the last one is merely reflective of a hypothetical situation.

4.7.1 Example One

As expounded above an Islamic marriage is not regarded as a valid marriage in terms of South African law for the reasons already stated. As also indicated an

Islamic marriage has very different legal consequences. No community of property exists in Islamic law and neither party has any claim on the other's property by virtue of their marriage. However, this can cause problems for example: where such a couple have worked together in the same business as if they were partners. This brings us to the concept of a universal partnership as a measure resorted to by Muslims in South Africa. A universal partnership or *societas universorum bonorum*, has been defined as one "by which the contracting parties agree to put in common all their property, both present and future. It covers all their acquisitions whether from commercial undertakings or otherwise." (Bamford: 1982: 18 - 19). The effect of a universal partnership is very similar to that of a marriage in community of property and carries many of the same benefits and disadvantages. Bamford further points out that "[i]t has been suggested that, save in the case of a lawful or a putative marriage, a universal partnership ... can be created only expressly ... It has been left open whether this ... extends to a marriage where the parties knew at the time of its conclusion that it did not accord with the laws of the land." (Bamford: 1982: 19).

In practice most such cases are resolved when parties agree to a settlement among themselves. However, on the basis of the precedent set in court decisions in this regard it can be said that "it would be contrary to well settled principles if it were to be said that a particular contract including a universal partnership cannot be created tacitly, the principle is firmly established that any contract can be brought about by conduct." (*Ally v Dinath* 1984 (2) SA 439 (T) at 452). This was also decided in previous cases for example: *Isaacs v Isaacs* 1949 (1) SA 952 (C); *V v De*

Wet NO 1953 (1) SA 612 (O); Muhlmann v Muhlmann 1981 (4) SA 632 (W) which decision was confirmed on appeal: 1984 (3) SA 102 (A). In this case the parties were married out of community of property but the court still found a universal partnership had existed tacitly, hence we do not have to rely on the marriage in order for this to be established.

Briefly the facts in the Isaacs case (supra) were as follows: The plaintiff and defendant had been "married" and "divorced" according to Islamic law. They started off with no assets. Both had engaged in commercial activities. The husband devoted all his time thereto, while the wife combined these activities with running a home and looking after children. On dissolution of the marriage she was successful in claiming a half share of certain immovable property representing the sole remaining unconsumed profits of their undertakings during the years that they had lived together.

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In Ally v Dinath (supra), the facts were briefly as follows: The plaintiff alleged that she and the defendant had lived together as man and wife for fifteen years in an Islamic relationship. They had shared a joint household and had pooled their assets, income and labour for their joint benefit. In so doing they had entered into a universal partnership. The relationship had broken down irretrievably and plaintiff sought a declaration that a universal partnership existed. She was successful in that the court held that community of property could take place tacitly and such community could be created by conduct. Thus we see the prejudiced Muslim wife can use South African law to protect herself by recourse to the concept of universal partnership. This would place her in a much better financial position than

what Islamic divorce laws would have allowed for her.

4.7.2 Example Two

Another practical example which is relevant is that Muslims can resort to the concept of a re-distribution agreement which is concluded by Muslim heirs to give effect to the Islamic law of succession instead of the South African law of succession. This alternative not only has its practical problems but the Muslim community is generally ignorant of this tool. A re-distribution agreement can only take place when all the heirs consent thereto. Often when wealth is at stake people let their greed override their sense of justice and religious conscience and it may just so happen that one or more parties can refuse to agree to this. If for example a house is at stake and one of the deceased's heirs refuse their consent, it could well happen (as in one instance to my knowledge it in fact did) that while parties are struggling to resolve this, bond repayments could lag behind and thus possibly resulting in the victims, often minor children and widows, losing their homes completely. This also results in family relationships being destroyed in the process creating additional social problems. (Haron: 1986: 117 - 119).

4.7.3 Example Three

Schutte (1986: 171 - 3) discusses the possibility of legitimation as a way in which the status of legitimacy may be acquired. The two forms of legitimation which could be of possible interest to South African Muslims as an alternative solution to the problem of illegitimacy are the legitimation per rescriptum principis (by an order of the authorities) and legitimation by Parliament (legislation).

Although the first form was applied in our Roman-Dutch law it seems to have fallen in disuse in modern South African law where its validity and application is subject to dispute. Pont (*ibid.*, 172) supports the view that this form of legitimation would allow parents who are not married to each other (compare Muslims married only in terms of Islamic law) to legitimate their children under certain circumstances. He feels that, although the judiciary rejects this method of legitimation, the Executive is still vested with the authority to legitimate a child even though it has received no such applications in the past. He implores the Executive to create the necessary facilities for it because of the societal need for such an institution. (He suggests that the Directorate of Home Affairs should, for example, be considered a competent authority to deal with such applications - cf Barnard, Cronjé and Olivier: 1990: 81.) Boberg (*Schutte; op cit.*, 173) is however of the opinion that Pont's suggestion does not accord with modern administration of justice. The second form of legitimation by Parliament (legislation) is supported by modern writers such as Spiro (*ibid.*, 173) who is of the opinion that the legislature has the capacity to change a child's status via legislation. Parliament "has however to date not exercised this prerogative and it is submitted it is unlikely ever to do so". (Lupton: 1982: 222).

It is clear from the above that it would be futile for Muslims to go to the extreme of resorting to this unclear and unsettled alternative of legitimation and the need to do so would in any event fall away if Muslim Personal Law is implemented in the South African legal system.

4.8 Conclusion

In conclusion, we see that resorting to these via media options do not always resolve problems and it would be more beneficial to all concerned if Muslim Personal Law was given due recognition instead of resisting such a step although one must not lose sight of the fact that there are inherent practical dangers implicit in taking such a step. As a foreign comparative example of such an internal conflict affecting both the laws of marriage and succession one can look at Malaysia especially in so far as it can guide us in South Africa as far as the future implementation of Muslim Personal Law is concerned by making one aware of the distinction between secular and religious law. Malaysia, a federation of 13 states, is a secular society. Its Constitution gives these states power to create laws concerning the personal law of Muslims and allows the courts, known as Sharia courts, to administer this law (p 195). Provisions in Acts concerning the division of property essentially codify Islamic law. However, one can see the influence of non-Muslim laws. Thus, for eg, the Islamic Family Law (Federal Territory) Act 1984 provides for division of property jointly acquired by husband and wife during the subsistence of the marriage, on terms that are identical to the Law Reform (Marriage and Divorce) Act 1976. (Connors: 1988/9: 195; 206). We must be wary of this happening in South Africa because it will indirectly affect the Islamic laws of succession. The growing awareness in the Muslim community in drawing up wills to regulate an Islamic distribution of their estates, is in an indirect way due to South African law itself.

Hence trying to maintain the status quo, although politically justifiable, is not practically feasible.

CHAPTER FIVEA comparative examination of reforms to the law of one-third bequest (will) and its effects on the share of the woman.5.1 Introduction:

In this Chapter I will look at measures implemented by several countries in this regard focussing more pertinently on a few Middle Eastern and North African countries. Although the term Middle East is used to refer to the area now occupied by Egypt, the Arabian Peninsula, Iraq, Syria, Lebanon, Israel, and Jordan (Jaffer: 1989:84), there is however no general agreement about the definition of the Middle East. Today, the term Middle East is used in conjunction with North Africa implying that the area of Middle East does not extend to the North African countries such as Egypt, Libya, Morocco, and Algeria. (Amin: 1985:1). Due to the nature of my dissertation, I will restrict the scope of my comparative survey to only a few countries which have played a leading role in this regard. By way of interest Mohamed (1984: 160) points out that Muslim Personal Law in some form or the other is applied in several other countries like Bangladesh, Cyprus, the Gambia, Ghana, Guyana, Kenya, Malawi, Nigeria, Sierra Leone, Singapore, Sri Lanka, Tanzania and Uganda. Nadvī (1989: 350) mentions that four non-Muslim Asian countries that recognize Muslim Personal Law are the Philippines, Singapore, Sri Lanka and Thailand. (See Nadvī (ibid., 426) for an outline of the world's legal systems.) Bearing in mind Chapters One and Three concerning the historical background and rules of succession, I will focus on three main issues, namely: abrogation, reforms to the law of one-third bequest in favour of heirs and non heirs alike by negating the consent required from the other heirs which as indicated in Chapter Three supra has its origin in the Sunna of the Prophet (P.B.U.H) which is a source of Islamic

law and lastly reforms to the law of one-third bequest in favour of grandchildren.

In conclusion I will evaluate these reforms to determine whether they are really necessary and whether it can be of any benefit to the Muslims of South Africa. I submit, in anticipation that it is not necessary for Islamic law per se to change but since societies have changed provision can be made for these changes by implementing tools provided by Islam on its inception which can be used to achieve the same results as the effects of any changes in its law. This will be dealt with in Chapter Six.

In Chapter One we have seen how Islam (considering its era of implementation) has revolutionized the pre-Islamic laws of succession. Thus Fyzee likens the Quran as an amending act rather than an exhaustive code as is reiterated by Ajiola (Fyzee: 1984: 381; Ajiola: 1983: 221). Today another shift is observed in society from the extended (traditional) to the nuclear (modern) family. In pre-Islamic Arabia there was complete freedom of testation. With the inception of Islam stress is laid on the will of God as opposed to the human will hence the theme of abrogation up until today is still a very controversial issue where traditionalists and modernists react as two opposing poles. The same goes for the one-third bequest in favour of grandchildren where the reforms of two leading countries in this regard, assuming different names and methods, that is Egypt (principle of obligatory bequest - indirect) and Pakistan (doctrine of representation - direct) have been met with criticism by both traditionalists and orientalist. The former's reason for reform was based on increasing the rights of the nuclear family while the latter's was based on social need. Egypt went one step further by introducing legislation which had the effect of augmenting a wife's or daughter's low and paltry share. Needless to say, the reaction of the Muslim

world was by no means ecstatic. Anderson writes of the Islamic law of inheritance as a whole: "And in this law too we find a sharp conflict today between the traditionalists and the reformers, although this conflict is rather more technical and legal, and of somewhat less interest to the sociologist, than that concerning questions of marriage and divorce." (Anderson: 1959: 60).

5.2 Abrogation:

As noted in my introduction the theme of abrogation is fraught with controversies where views vary from extreme conservatism to ultra modernism hence it is important to start with a sound historical background giving a more detailed account of certain aspects dealt with in Chapter Three of my dissertation. This is done by Powers (1986: 10 - 14) as follows: "By examining the detailed pronouncements on the subject of inheritance reflecting classical Islamic representation issued regularly during the (approximately) twenty-two-year period between the beginning of Muhammad's mission in 610 and his death in 632 in their reputed chronological order we can discern three distinct stages in the development of the law of inheritance. During the Meccan period (610-22), at least six verses regulating various aspects of testamentary succession (wills) were revealed to Muhammad (P.B.U.H). Then, shortly after the emigration to Medina in 622, Muhammad (P.B.U.H) received a second series of revelations establishing compulsory rules for the division of property (intestate succession). Finally, after the conquest of Mecca in 630, Muhammad (P.B.U.H) clarified the relationship between the first and second series of revelations by issuing two statements limiting the scope of testamentary dispositions (wills).

Stage One (610-622): The Bequest Verses (Six verses revealed during the Meccan period). The Quran commentators

indicate that prior to the rise of Islam and at least until the beginning of the Medinan period, it was customary for the Arabs of the Hijaz to transmit property from one generation to the next by means of a last will and testament ... Indeed, it is against a background of testamentary succession that the first series of Quranic inheritance verses is best understood. Six verses (Q.2: 180-182 [=3]), 2:240 [=4] and 5 : 105-6 [=6]) regulating various aspects of testamentary succession were revealed to Muhammad (P.B.U.H) "at the beginning of Islam" (refers to the beginning of Muhammad's (P.B.U.H) mission, in Mecca, ca A.D. 610). Q.2: 180 enjoins a person contemplating death to leave a bequest for parents and relatives: Q.2: 181 holds accountable to God anyone who alters a last will and testament; Q.2: 182 encourages the reconciliation of parties who disagree about the provisions of a will; Q.2: 240 permits a testator to stipulate that his widow is entitled to a maximum of one year's maintenance, provided that she remains in her deceased husband's house; and finally, Q.5: 105-6 establishes that a last will and testament, to be valid, must be drawn up or dictated in the presence of two trustworthy witnesses. These six verses reflect a system of inheritance that leaves the individual relatively free to determine whom his heirs will be and how much they will inherit.

Stage Two (622 - 630): The Inheritance Verses (Compulsory rules after emigration to Medina). The permissive and discretionary system characteristic of the Meccan period came to an abrupt end in A.D. 625 as a result of an incident involving a widowed lady who allegedly complained to the Prophet (P.B.U.H) that she and her two daughters had been unjustly deprived of their inheritance from her husband (who was killed and martyred in battle) by the deceased's paternal cousins (their agnate uncle). The Prophet (P.B.U.H) answered that God would decide. (For details see Nasir (1986: 196). The Divinity delivered His

response to Muhammad (P.B.U.H) in two stages, beginning with Q.4: 7, which affirms the right to women to inherit, and followed by Q.4: 11-12, which specify the exact fractional shares which women are entitled. The latter two verses, together with Q.4: 176, which awards fractional shares of the estate to consanguine and/or germane siblings (hereafter these three verses will be referred to collectively as "the inheritance verses"), form the core of what would become the "science of the shares" (ilm al-fara'id). Q.4: 11-12 and 4: 176 reflect a conception of the nature of inheritance very different from that embodied in Q.2: 180 and 2: 240 (hereafter, "the bequest verses"). In the bequest verses, the testator himself determines the type and quantity of the provisions to be made for parents, kindred and wives, making the entitlement of the legatees dependent on the will of man, not God. In the inheritance verses, on the other hand, it is God himself who determines whom the rightful heirs are and how much they will receive. God has enjoined in the Quran while instructing for the fair division of inheritance that "you know not whether your parents or your children are nearest to you in benefit (Q.4: 11). This contrasts the infallible wisdom of the Divinity with the fallible knowledge of man.

Stage Three (630-632): The Sunna (tradition) of the Prophet (P.B.U.H) (After conquest of Mecca).

Islamic tradition presents the formation of the science of the shares in terms of a progression from the voluntary system reflected in the bequest verses to the compulsory rules found in the inheritance verses. This conception, however, calls for further explanation because Q.4: 11-12 themselves award shares of the estate to the heirs "after any bequest he bequeaths", thereby indicating that the power of testation had not been eliminated entirely. The question of the extent to which testamentary dispositions remained operative is answered by the Sunna of the Prophet (P.B.U.H), which imposes two major restrictions on the

power of testation (see Chapter Three page 40 of dissertation supra) namely: "a bequest may not exceed one-third of the estate." This restriction is generally understood as an attempt to strike a balance between the compulsory (minimum 2/3 to heirs) and voluntary (maximum 1/3 via will) aspects of inheritance. The second restriction: "no bequest to an heir" had as its object the elimination of an apparent overlap between the voluntary and compulsory aspects of the law of inheritance. Q.2: 180 and 2: 240 (bequest verses) indicate that a person anticipating death should leave a bequest for parents and wives, while Q.4: 11-12 (inheritance verses) award these same persons a fractional share of the estate. It is apparently then not possible for a parent or wife to receive a bequest of up to one-third of the estate in addition to the fractional share specified in Q.4: 11-12. This is the view most favoured by Muslim scholars. Furthermore, they maintain that the fractional shares awarded to parents in Q.4: 11 and to wives in Q.4: 12 superseded or abrogated the obligation to leave bequests for those same persons, as stated in Q.2: 180 and 2: 240. Together, then, these two Prophetic dicta, "a bequest may not exceed one-third" and "no bequest to an heir", define the relationship between the voluntary and compulsory aspects of the law of inheritance. Thus, Islamic tradition teaches that at the time of his death Muhammad (P.B.U.H) had laid the foundation for the "science of the shares" (the Islamic law of inheritance) which foundation was completed over the course of the next thirty years by his Companions."

Powers in his discussion on what he calls the proto-Islamic law of inheritance (that is the original system of inheritance received by Muhammad (P.B.U.H) as opposed to the Islamic law of inheritance as is understood today which he postulates is not the same) writes that the Islamic scholars who regarded these fractional shares as compulsory

rules, saw an overlap or contradiction between the two sets of verses and in order to avoid this jurists started to teach, (ca A.D. 650), that the inheritance verses had superseded or abrogated the bequest verses. This is the position assumed by the majority of Islamic scholars throughout the centuries. He goes on to say that the apparent contradiction between the two sets of verses disappears once a distinction is made between testate succession and intestacy (as he postulates in his study existed in proto-Islamic law of testate succession that there was complete freedom of testation) and that only if no will had been made did the fractional shares mentioned in the inheritance verses, that is, the rules of intestacy, take effect. He says that although the doctrine of abrogation raises a difficult theological problem, because it questions the wisdom of God "by attributing a change of mind to the theoretically changeless and eternal divine will", it was rather the result of changed perceptions of the meaning of God's word when the distinction between testate succession and intestacy disappeared during the years immediately following the death of Muhammad (P.B.U.H) when in connection with political social and economic factors the proto-Islamic law of inheritance was transformed into the science of the shares ('ilm al-fara'id). (Powers: 1986: 51 - 2; 143). Powers also points out that the Quran does not contain any definite reference to the abrogation of the bequest verses. Of the ten verses (Q.2: 180-82, 2: 240, 4: 8, 4: 11-12, 4: 176 and 5: 105-06) that deal directly with inheritance, all but two (Q.4: 8 and 4: 176) refer to testamentary disposition. In addition, the so-called abrogating verses Q.4: 11-12, mention bequest four times without saying anything about abrogation. ("The distribution (of inheritance) in all cases is after the payment of legacies and debts") (Powers: 1986: 147). Zaid (1986: 12) says that the reason for this is because the bequest is still valid for the rest of the people who were not mentioned or given any share.

Furthermore many Hadiths confirm the lawfulness of the principle of bequest either by advising people to apply it or by quoting cases that concerned it. The hadith literature does not show Muhammad (P.B.U.H) as having ever referred to the abrogation of the bequest verses. The prophetic dictum itself "no bequest to an heir", which is traditionally regarded as indicative of abrogation, does not explicitly mention abrogation. (Powers: 1986: 147).

Zaid (1986: 10 - 12) presents the traditional view in favour of abrogation and stresses the importance of the passage of time in this connection. The Quran states that it is necessary for the deceased to bequest his estate to be distributed amongst his parents and his near relatives (Quran II: 180). This legal position prevailed at the inception of Islam and was essential then as the Muslims were very few in number and most of their relatives were still pagans and generally the people were not as yet prepared for any drastic change in the system they had inherited from their ancestors, which was based mainly on the pre-Islamic Jahiliyyah where women, for instance, had no maintenance rights under that system to demand any part of their father's, son's, or husband's estate. This system did not require the law to change suddenly but rather to make people accept change slowly. A person could use his own discretion as to how he wanted his estate to be distributed after his death. Thus he could make bequests to whomsoever he wished regardless of sex or belief. A second revelation was then revealed to Muhammad (P.B.U.H) to inform Muslims of another change in the system of inheritance (Quran 4: 7). This verse revealed that a woman and a man has equal inheritance capacities, but, in order not to upset their inherited system completely at this stage in time it did not explain clearly the women's position in comparison with men's, nor did it state their portions. God allowed them time to absorb his instructions till later when the need arose and cases came to the fore

where it was unclear whether women and children should be entitled to part of the deceased's estate, and if so, how much. This in turn led to the revelation of the inheritance verses. (Quran IV: 11). He says, that the revelation of this last verse was meant to complete the intended change as it completely abolished the Jahiliyyah system of inheritance.

As already mentioned, Zaid (1986: 10-12) presents the traditionalist argument in favour of abrogation but adds that it did not however abrogate the complete legal concept of Wasiya (will) in connection either with other distant relatives, not regarded as heirs or with non-relatives. The testator could make a bequest in their favour (of course only up to 1/3 of his estate and remembering that he may will up to 1/3 of his estate to an heir if the other heirs consent thereto). This also applied if he wanted to make a charitable bequest.

Interestingly enough, a point which is again referred to later when discussing 1/3 bequests in favour of orphaned grandchildren, a minority of jurists were of the opinion that the "Verse of Bequest" was in force. This formed the basis of modern Egyptian reforms in this regard. These jurists are of the view that this argument (that the later compulsory "Verses of Inheritance" completely abrogated the "Verse of Bequest") was only applicable to legal heirs who, under the "Verses of Inheritance", were entitled to a fixed share of inheritance. Imam Shafi'i (being one of the minority) maintained that it was commendable to make bequests to close relations who were not heirs. (Esposito: 1982: 45; 65-66; Coulson: 1971: 215). Zaid (1986: 13) writes that this minority view is regarded as "unpopular" but the modern Egyptian law favours this interpretation.

It is now apt to outline the views of the main schools of law on abrogation. Doi (1984: 463 - 4) writes that since

the inception of the obligatory bequest in favour of an heir, controversy has reigned. The Hanbali and Hanafi Schools of Islamic Jurisprudence, regard a bequest in favour of an heir as valid if other heirs consent to it. The Maliki School regards such a bequest as invalid while the two shades of opinion of the Shafi'i jurists backs both Maliki and Hanafi views. As will become apparent later it is not an "obligatory" bequest in favour of an heir but a voluntary bequest. Doi seems to confuse this with Egypt's obligatory bequest which is in favour of orphaned grandchildren. Obviously these views stem from their opinions concerning abrogation. T. Rahman (1980: 2: 463 - 466) outlines the view of the four schools on abrogation as follows. The Hanafi's support abrogation. Imam Shafi'i despite his disbelief in the abrogation of the mandate of the Quran by tradition does not deny that the probability exists. The Malikis also support abrogation. The view of the Hanbalis agrees with the rule of conduct of the three Imams, therefore a will made in favour of an heir is invalid. The Shiah's contrariwise regards a will made in favour of an heir up to one-third as valid thereby not favouring abrogation. Doi (1984: 464) writes of the modern legislative reforms in Egypt in this regard (although Egypt as I will later point out has a juristic basis for this legislation of the reform) that it is not in conformity with the above-mentioned four schools of law and departs from the traditional Shari'ah Law.

The position is summarized as follows: "the fundamental problem, that of the relationship between the two systems of voluntary and compulsory devolution of property, was unanswered by the Quran itself which led Muslim jurisprudence to find the solution in the precedents or sunna of the Prophet Muhammad which impose two principal restrictions upon testamentary power". (Coulson: 1971: 213).

In an article comparing the law of succession in the Islamic and British legal systems he states that "[p]erhaps the most salient feature of Islamic succession law is the balance it strikes between testamentary succession and inheritance. By way, essentially, of concession, the individual is given discretion to will away 1/3 of his property ... [b]ut a minimum of 2/3 of his net estate ... is subject to compulsory succession (compare Powers p 96 supra). In traditional Islamic jurisprudence, proper provision for surviving relatives and dependents is twice as important (my emphasis) as the wishes of the individual regarding the devolution of his property upon his death. This is almost the antithesis of the current situation in English law, under which the will of the deceased is paramount and only limited provision may be made, on petition to the court, for needy surviving dependants." (Coulson: 1978: 229).

The position in South African law can be compared to that of the English law. As will become apparent later in this chapter, even this limited freedom of testation is encroached upon in countries like Egypt where the minority view against abrogation prevails where the so-called 1/3 mandatory bequest to orphaned grandchildren overrides a voluntary or other bequest made by the testator.

Ajijola, a Nigerian barrister, is of the opinion that Quranic verses do not abrogate each other, but only limits its scope. He confesses however that the limitations on wills is as a result of Prophetic traditions and not the Quran. (Ajijola: 1983: 229).

Mundy examines the two broad lines of interpretation of the Quranic provisions in this regard. "The first reading (unorthodox) requires that the Quranic text be considered as a unit and without reference to the large body of later Quranic commentary, legal tradition and hadith. An early

attempt at such an interpretation was that of M.F. Boulos who ... argued that the Quranic provisions should be compared to the collections of laws found in the recensions of the Syro-Roman lawbook of the fifth century CE (whose) provisions contained a basically testamentary system with forms of intestate succession privileging agnatic kindred over cognatic and male children over female, but nevertheless providing shares in inheritance for close female relatives. Thus, in his analysis Boulos sought to reinstate the Quranic texts in a secular tradition of law and to emphasise the man-made, historical nature of later religious legal tradition ... The argument that the Quranic provisions closely resemble traditions of Roman-Byzantine law has recently been advanced in a far more careful textual analysis by D.S. Powers. Powers demonstrates close parallels between the law of the Justinian reforms and the provisions of the Quran ... For Powers (who does not cite the book of Boulos) as for Boulos the Quranic text reveal an essentially testamentary system combined with rules for intestate succession of a kind similar to imperial law of the Eastern provinces. Powers compares the Quranic verses to the law of Justinian (a noted Roman emperor); Boulos compared them to the more problematic texts known as the Syro-Roman lawbook". She goes on to discuss the significance of this line of interpretation, concerning the Quranic text which I will not pursue since it does not fall within the ambit of my dissertation. The second and more orthodox interpretation favours abrogation. A reading of this type is enshrined in Sunni fiqh. (Mundy: 1988: 24-26).

Badr (1978:190-191) states, as I have already mentioned in Chapter One page 12 of dissertation supra, that chronologically Islamic law unfolded when Roman law had already reached its highest development and that this probably accounts for why some Western scholars studying Islamic law (compare Powers supra), diffusionists in

approach, have considered the idea of Roman law influencing the development of Islamic law and have even tried to find areas of direct borrowings or of indirect influence. He feels that there has as yet been no strong evidence in support of this. The basic approach of the Islamic law of inheritance contradicts that of Roman law. He goes on to mention several differences between the two systems in support of this view. One wonders, if having read Powers, he would change his mind? (For a few of Power's arguments in this regard see Powers 1986: 56, 78 n 80, 86).

In conclusion of this section it remains to discuss a very interesting verse concerning women namely: Q.2: 240 part of which reads as follows: "Those of you who die and leave widows should bequeath for their widows a years maintenance and residence ..." (Ali: 1946: 96). Literally it is a bequest to their wives of one years maintenance without being dislodged. (Asad: 1980: 53). As noted above the bequest verse in Q.2: 180 instructs a person contemplating death to leave a bequest for parents and relatives. Jurists are of the opinion that the above verses dealing with the bequests made in favour of parents and widows, were abrogated, because these people were made inheritors and are Quranic heirs. The bequest is therefore only applicable to those who do not inherit. (Nadvī: 1989: 77). Asad seems to favour this view because he says in a commentary on this: "The question of a widow's residence in her dead husband's house arises, of course, only in the event that it has not been bequeathed to her outright under the provisions stipulated in 4: 12" (which specified her fixed Quranic portion 1/8 or 1/4 as the case may be as heir - my emphasis) (Asad: 1980: 53). Ali does not think it is abrogated. He comments as follows: "I do not think it is (abrogated). The bequest (where made) takes effect as a charge on the property, but the widow can leave the house before the year is out and presumably the maintenance then ceases". (Ali: 1946: 96).

Powers represents an illuminating perspective on the early doctrine concerning Q.2: 240. "The authorities who hold for abrogation of Q.2: 240 make a distinction between two different aspects of the verse, each of which is held to have been abrogated by a different Quranic verse. Besides referring to the testator's obligation to leave a bequest for his wife, Q.2: 240 also mentions a one-year time period. The former aspect of the verse is held to have been abrogated by the fractional share of the estate awarded to the widow in Q.4: 12, and the latter aspect is held to have been abrogated by the reference to "four months and ten (nights)" in Q.2: 234; this verse opens with the same words as Q.2: 240 ("And those of you who die leaving wives"), but then fixes the waiting period (iddat) of the widow at four months and ten nights. (See Chapter Two, p. 31 supra for an explanation). The verbal similarity between the opening lines of the two verses made it possible for the commentators to conclude that they deal with the same subject, and they accordingly argued that Q.2: 234 abrogated 2: 240 by reducing the waiting period of the widow from one year to four months and ten nights ... (In the argument) against abrogation ... [e]ven a superficial reading of the two verses, however, reveals that they treat two separate legal phenomena: the former (Q.2: 234) fixes the waiting period of widow at four months and ten nights, whereas the latter encourages testators to provide maintenance for their wives for at least one year. It is only the confusion of these two issues in such a manner that the one year period mentioned in Q.2: 240 is erroneously equated with the waiting period of the widow that makes it possible to argue that Q.2: 234 abrogated part of Q.2: 240 ... one might have expected (the abrogated verses) to have (been) omitted from the authorized version (of the Quran) yet numerous abrogated verses are found in the text of the Quran and continue to be recited although they have no legal value whatsoever and ... [n]one of these authorities (already dealt with) considers the possibility

that the two sets of verses might complement one another, the former regulating testate succession and the latter cases of intestacy." (Powers: 1986: 155-157). In Power's discussion of the classical doctrine concerning the position against the abrogation of Q.2: 240, he mentions that "Razi gives reasons why he himself prefers this unsuccessful minority position, one of which is that the abrogating verse should be revealed after the abrogated one. As for the abrogating verse being read before the abrogated one, even if this were permissible in general, still, it is considered to be a poor arrangement, and the Word of God must be free from such defects to the extent possible (my emphasis). Since this verse (Q.2: 240) is recited after that one (Q.2: 234) it is preferable that it not be considered to have been abrogated by it". (Powers: 1986: 183). This is indeed a very persuasive argument. In conclusion however the theme of abrogation remains fraught with problems.

5.3 Reforms to the law of one third bequest:

5.3.1 A) Bequests in favour of heirs and non-heirs alike by the negation of the consent requirement and its effect on the succession rights of women.

By way of introduction, the summary of Anderson is the following. Certain aspects of the Islamic law of inheritance have lately begun to evoke growing discontent. Firstly, the general rigidity of this system in its Sunni form, prohibits any supplementation to the prescribed Quranic shares. It may not even be increased by will, irrespective of the needs of the family concerned - with this is the obvious inadequacy of the share given to the wife, who only receives one-eighth of her husband's estate if he is survived by any child, while the wives of a polygynist have to share this meagre portion between

them. Next, there is the unsatisfactory phenomenon that the children of a child who predeceases his or her parent(s) are totally excluded from any share in their grandparent's(s') intestate estate by any surviving uncle (i.e., one of that grandparent's own sons - Sunni law) (or even aunt in Shi'i law), because of the strict rule that the nearer in degree must exclude the more remote in degree (the latter will be dealt with under 5.3.2 infra). (Anderson: 1965: 349 - 350).

A sect of the Shia's called the Ithna 'Asharis relaxed this rigidity of the Sunni system by allowing a testator to make bequest to heirs, as well as non-heirs, within the one-third limit irrespective of whether the other heirs give their consent or not and this means that he can, within these limits, make special provision for a blind or crippled child, for example. He could therefore assist a child who stood most in need thereof as opposed to other well-off children or could augment the pitiable share to which his widow would normally be limited to. ($1/8 / 1/4 + 1/3$). The law of this Shia sect can thus be regarded as the forerunner in this reform. (Anderson: 1965: 350 - 351). A few other countries then followed suit. In passing, it must be borne in mind that a will exceeding the one-third limitation is also valid but can only become effective once the consent of the heirs have been obtained after the death of the testator. (T. Rahman: 1980: 2: 282).

This reform, for which a precedent was set by the Shiah's sect, was first adopted in Sudan in 1945. A year later (1946) the same reform was given effect to in Egypt in Article 37 of the Law of Testamentary Dispositions and included in the Iraqi Law of Personal Status in 1959. These three countries have therefore

decreed that a testator has complete freedom of testation in respect of one third of his property and that any such bequests which he may make to a heir are no longer subject to the other heirs' consent. As far as Egypt is concerned it is maintained that this view is supported by the majority of jurists, while its implementation is based on the "Verse of Bequests" in the Quran because there is no proof that it was abrogated by the ensuing rules of inheritance and was adopted "because people stood in need of it". Anderson (op. cit., 354 - 355). In his book comprised of a series of lectures Anderson (1959: 77) sets this out as follows: "[T]he reformers urge in its support that the tradition 'No bequest to an heir' is poorly attested, is sometimes followed by the words 'except within the bequeathable third', and might in any case be construed as abrogating the command - rather than the right - to make such bequests. In addition, they point to the circumstances and requirements of modern life." This is reiterated by Coulson (1971: 256) who also makes the point that it is argued "that the Prophet's dictum might be construed as abolishing the duty, but not the right, to make bequests in favour of heirs". This is quite a major reform in Sudan and Egypt considering that they are essentially Sunni countries while in Iraq it was less remarkable because its inhabitants are almost evenly divided between Sunnis and Shi'is. It is to be noted that this reform in addition also expressly allows a testator to distribute his whole estate ($\frac{2}{3} + \frac{1}{3}$), item by item, between his heirs, subject to the proviso that this distribution does not favour some heirs at the expense of others to more than the one-third limit. In addition this reform clearly helps to alleviate the unenviable position of the widow, because it permits her husband to increase her meagre share on intestacy via a bequest not exceeding one-third of his net

estate. (Anderson: 1965: 355).

Anderson is of the opinion that "the main emphasis of these reforms has been the promotion of the interests of the 'nuclear' or basic family at the expense of the 'tribal' or agnatic heirs (extended family) (to suit popular, urban life today) ... This reform in particular makes it possible for the interests of a daughter or a wife to be enhanced at the expense of a collateral." (Anderson: 1971: 25-26).

In the light of my discussion supra it appears that these reforms were motivated by:

Firstly, the need to allow the testator more freedom where the particular circumstances warranted it (sickly child or indigent minor grandchild whose parents has predeceased the grandparent).

Secondly, to augment the fractional share of wife and daughter. This is the thrust of my dissertation and the latter half of Anderson's quotation supports this. However as regards Anderson's opinion concerning the "nuclear" family the following can be said. The extended family concept forms the basis of life in these and other Middle Eastern and Eastern (Pakistan for example) countries. There appears to be a strong resistance to and criticism of the "Western" nuclear family concept and what it entails. (This is evident even in South Africa where Muslims are in minority and more exposed to the Western concept of family and family life). That the legislatures were motivated by the desire to promote the rights of the nuclear family members appears at the least to be debatable. See reference to F. Rahman on p 112-13 infra which serves as an answer to the above arguments. Mahmood (1977: 167; 171), in discussing this reform, stresses that it

is often not easy to acquire the consent of other heirs as is required in Sunni law. He calls the invalidity of bequest in favour of an heir without the consent of other heirs an "ailment" and states that most of the disadvantages in Islamic law are not created by Islam but result from misuse and misapplication of the permissible law of Islam. This reform solves many drawbacks. It allows a husband to increase the low share of his widow in his property. A daughter's share, now one-half of the son's share, can also be increased via a will.

Esposito (1982: 65-67; 91-2) writes on modern Family Law reform in Egypt that "[e]ven more significant from the viewpoint of social and legal change is the Law of Testamentary Disposition of 1946. It's two major reforms are: the acceptance of the principle of "Obligatory Bequests" (in favour of orphaned grandchildren - Article 76 to 78) and the recognition of a Muslim's right to make bequests to whomever he wishes - Article 37." There appears to me to be an apparent contradiction in these Articles themselves because Article 78 states that all such obligatory bequests (which can be executed by the court should the grandfather fail to make such a legacy - Article 76) are to take precedence over voluntary bequests. So what in effect is supposed to be a major innovation is not so innovative after all because of this anomaly. Thus, Esposito points out that Pakistan (which incidentally, also, as I will later indicate, played a great role in the law of bequests in favour of orphaned grandchildren) has not kept pace with Egypt in that such legislation which can benefit members of the "nuclear" family and especially wives and daughters, has not been passed in Pakistan. However, he (Esposito) fails to point out as Coulson, in my opinion correctly does, that under the Pakistani

system the deceased's testamentary freedom in this regard remains intact. "[I]n the 'Middle East' the rule that the obligatory bequest takes complete precedence over any other (bequest) that has been made may occasion injustice ... (and) [j]uridically, therefore, the Pakistani Law is much sounder, in principle (although as I will later indicate Coulson, amongst others, has his reservations concerning this law) because it regulates the position of the grandchildren in a systematic fashion and at the same time preserves the balance between the criteria of right and need by leaving the deceased's testamentary freedom in tact." (Coulson: 1971: 156-7).

Be that as it may Esposito goes on to say that "[s]uch a change makes the Islamic legal system more responsive to individual circumstances. Previously, relatives who were wealthy or poor, loving or hateful had been treated alike. It remedied the problem involving the widow ... The motive behind this reform legislation was the strengthening of the rights of the nuclear family members, (my emphasis) as opposed to those of agnates in the extended tribal family. This could also alleviate the unreasonable situation in which a man with a daughter and a distant agnate relative (whom he might not know or might actually dislike) would be forced to award the agnate one-half of his estate." (therefore one third is subtracted from this half ($1/2 - 1/3$)). Once again my comments on the "nuclear" family concept on p 108 supra apply here. See also reference to F. Rahman on p 112-13 infra which serves as an answer to my arguments supra.

Mundy (1988: 20) sums up the position as follows: "Within the body of Islamic family law which had survived the colonial period largely intact, there was a movement towards a liberal reading of those clauses

of marriage and succession that particularly restricted individual freedoms. Thus in Egypt and Sudan freedom of testation was extended while measures were adopted to protect the position of orphan grandchildren, one of the anomalies of Sunni fara'id law.

Coulson (1978: 229 - 230) sums up the position on the developing Islamic law of succession in much the same vein as the other writers. "There is some movement toward greater freedom in the disposition of one's estate, as well as growing emphasis upon the succession rights of a family group which is smaller (the nuclear family) and more restricted than the traditional tribal family ... Within this smaller family group it is natural and inevitable that the female - as wife, mother and daughter - should assume greater responsibility and enjoy a more favourable status than she did under the traditional tribal grouping. The fact that the reform has not been effected in any other Muslim countries within the past three decades demonstrates how deeply-rooted the rule is within Sunni law and how drastic its breach is considered to be ... Now, in the (three countries that the traditional Sunni rule that any bequest to a legal heir is ultra vires has been abandoned, namely) Sudan, Egypt and Iraq, a testator has 'complete' freedom to dispose of 1/3 of his estate and may, for example, almost quadruple his widow's share in the estate from 3/24 to 11/24."

In concluding this section, we see that this example of reform is indicative of the law evolving to suit and accommodate the changing patterns and needs of society but that the manner in which it was done and its effect is not without criticism thus I feel it remains for society to evolve the divine blue-print of

the law for more suitable alternatives especially as far as women are concerned. In any event the same effect of this Egyptian legislation can be achieved by Islamic law where a testator may make a bequest in favour of these particular heirs if the other heirs do not object. Hence here it is Muslim attitudes that must change and if a man bequeaths 1/3 of his estate to his wife or daughter then the other heirs must respect his wishes. Hence there is no need for legislation to that effect and in this way Islamic Law can remain intact without its laws having to be changed. This is a combination of both a moral and legal issue to give effect to the intention of the testator and ultimately also giving effect to the guidelines of God.

5.3.2

Bequests in favour of "orphaned" grandchildren - the resultant effects of its manner of implementation on the Islamic laws of succession.

Much of what has been said for 5.3.1 concerning reasons for its implementation, among others, the "extended to the nuclear" family, applies mutatis mutandis to 5.3.2 since most writers treat these two aspects as a unit.

Rahman states that the only other major modern reform besides the one mentioned in 5.3.1 supra was to make orphaned grandchildren beneficiaries of the legacy of their grandfather, which right they were denied in classical Islamic law on the basis of two principles. Firstly, the principle of debarment, stating that "the nearer in kinship shall debar the remoter in kinship" thus, a surviving son or daughter would debar an orphaned grandchild from inheritance. This led to the negation of the principle of representation since an orphaned grandchild could not step into the shoes of

his or her predeceased father or mother and inherit. The medieval social structure, characterized by tribal or joint-family systems, regarded orphaned children the responsibility of paternal uncles (a responsibility also stressed by Islamic law), hence they did not fare too badly. However, with the increased breakdown today of the tribal or quasi tribal social structure, the problem has become serious and Islamic law had to take action via suitable reform. (F. Rahman: 1980: 463). Mahmood correctly in my view points out that the duty to look after such children imposed by the Shari'a on their uncles and aunts is generally shirked and because of these orphaned grandchildren's plight, Islamic countries have implemented two different solutions - the "doctrine of representation" in Pakistan and Bangladesh and the principle of "obligatory bequests" in Egypt, Syria, Tunisia, Morocco and Kuwait (my emphasis) (Mahmood: 1977: 167; 171-2). In 1946 the Egyptian inheritance law made provision for these children via a mandatory will on the part of the grandfather. This measure was, after some revision, adopted by several other Arab countries. For the reasons enunciated supra, under abrogation, as to the juristic basis of modern Egyptian Reform, and in the light of problems raised by the principle of debarment in the classical law, and also the fact that certain shares and been prescribed by the Quran and therefore could not be tampered with, Egypt could not assign a share of direct inheritance to the orphaned grandchildren and took refuge in the principle of mandatory will. The mandatory will did not find acceptance in the classical law hence an appeal was made to the Quranic passage II: 180.

The classical Sharī'ah law held that since the Quran subsequently came out with fixed shares of

inheritance, the mandatory nature of the will had been abrogated (see supra). By making the will mandatory, the Egyptian law invoked the "principle of necessity" in terms of which a permitted thing could be banned or made compulsory in the light of social necessity. Because a person is in terms of the Islamic law allowed to will only up to one-third of his property, the Egyptian law prescribed the share of the orphaned grandchildren to be equal to one-third of the grandfather's inheritable legacy or equal to their father's (or mother's) share if they had been alive, whichever is less. (F. Rahman: 1980: 463). Egypt tried to cure this lacuna of the traditional law in the Law of Testamentary Dispositions of 1946, Articles 76-78, via an "indirect method". Article 76 stated that if a grandfather failed to make a legacy (which he "MUST") to these children (which included both the children of his daughters as well as his sons) in the amount to which their predeceased parent would have been entitled by way of inheritance, the court shall execute such a bequest from the estate of the deceased grandfather provided that it does not exceed the one-third limitation. Furthermore, all such obligatory bequests are to take precedence over voluntary bequests (Article 78) (Esposito: 1982: 66). For further details on these articles see Nasir (1986: 245) who gives a full outline of Articles 76, 77 and 78 in his textbook. The laws of three Middle Eastern countries which adopted Egypt's indirect method of reform differ from each other. Tunisia (1959) follows Egypt in making this benefit available to children of daughters as well as sons of the deceased. In Egypt, but not in Tunisia, the children of an agnatic grandson or granddaughter, irrespective of degree, benefit from the same rule. In Syria (1953) and Morocco (1958) only agnatic descendants, that is the issue of the predeceased sons of the deceased, benefit

from the obligatory bequest. No provision is made for children of the deceased's predeceased daughter. (Coulson: 1978: 232). Other countries which followed suit are Jordan, Iraq and Algeria (Nasir: 1986: 246). Ajijola, a Nigerian jurist, notes under inheritance that the principle of representation is not recognized but makes mention of the Pakistani Amendment and that in the Middle East mandatory bequest had been legislated. He repeats the rationale behind mandatory bequests but does not specifically mention Nigeria's position concerning it. (Ajijola: 1983: 229-230; 283).

As a preparatory step, in Pakistan in 1955, the Commission on Marriage and Family Laws comprising of six members of the public (majority report) and one representative of the ulama (minority report), was formed. A majority report asking for reforms in marriage, divorce and inheritance was issued in 1956. However, Mowlana Ihtisham-ul-Haq wrote a strong dissenting opinion. The majority and minority reports provided the basis for a debate between modernists and traditionists. Finally, in 1961, Pakistan enacted the Muslim Family Laws Ordinance. (Donohue and Esposito: 1982: 201). The ulama of Pakistan strongly criticized Section 4 of the Pakistani Reform in this regard. For more factual detail on the happenings during the period of 1956-1961 see T. Rahman: 1980: 2: 619.

Section 4 of the Pakistani Muslim Family Law Ordinance of 1961 gave a direct share of inheritance to orphaned grandchildren from the legacy of their grandfather, a share equivalent to the share of their father or mother if they had been alive. (F. Rahman: 1980: 464). Section 4 changed the traditional law of inheritance by introducing the principle of full representation for orphaned grandchildren of the

deceased. (Esposito: 1982: 88). It included all grandchildren. A daughter's child, previously excluded now acquires his or her mother's right of inheritance. (Coulson: 1978 : 232). An obvious consequence of the law is the drastic improvement in the position of an agnatic grandchild, who now is entitled to twice as much as the deceased's own daughter. In addition, the agnatic granddaughter now excludes from succession any brother or more remote male agnate whereas this cannot be done by the deceased's own daughter. (Coulson 1971: 157).

On a closer critical inspection of these reforms, Esposito (1982: 88; 97) noted that the Pakistan reform (direct) achieved the same result as the Egyptian reform (indirect), but that their methods were different. Egyptian reformers, more juristically inclined, steered away from direct interference in the law of succession, instead they protected the rights of orphaned grandchildren through the introduction of the principle of "obligatory bequests" in the law of testamentary disposition (within which they would provide a Quranic justification). This change had some juristic basis among traditional authorities. However, Pakistan's reformers, in its response to the same social need opted to solve this problem by legislating a reform in the law of succession in spite of there being no traditional authority for this. They justified this on the grounds of "social desirability and a lack of any prohibition in the primary resources of Islamic law" (Quran and Sunnah). Anderson is critical of the Pakistani Ordinance and says that the Egyptian bequests is in comparison "a most ingenious remedy" not only having some basis in the classical texts, but it also leaves the general structure of the Islamic law of inheritance undisturbed. (Anderson: 1971: 26). Esposito (op.

cit., 100; 131) concludes that "a review of the methodology of the family law reforms in Egypt and Pakistan shows an ad hoc, fragmented approach ... (and mentions that Pakistan at that stage was busy) reviewing provisions of the Muslim Family Laws Ordinance of 1961 which rested on a weak Islamic methodology."

Anderson (1965: 356) writes of the Pakistani Ordinance that "it is praiseworthy straightforward and practical. It could probably be regarded as representative of the situation in which the deceased parent survived till one minute after the death of the respective grandparent instead of dying, perhaps, two minutes before. He confesses that in reality it is not quite so simple and the main objection to this solution is that it drastically disturbs the entire structure of the Islamic law of inheritance. For practical examples illustrating this point see those cited by Anderson

(ibid., 357). Coulson in his textbook discussion on this issue mentions that he has drawn freely from this article of his "colleague and mentor." (Coulson: 1971:135). Anderson, (1965: 358) goes on to say that the Egyptian reformers in 1946 solved this problem of orphaned grandchildren by means of the device known as "Obligatory Bequests" clearly aiming to steer away from the resultant difficulties discussed above and at the same time to keep the general structure of the Islamic law of inheritance intact. The way in which this is phrased gives the impression that Egypt after reflecting on Pakistan's mistakes tried to improve these flaws by its legislation but the Pakistani reform was introduced long after Egypt's so obviously this is not so. Coulson phrases it better. "Certainly, it is the Pakistani reform which is more extreme in this regard. And it may be that this was

due, in part at least, to the developments in the philosophy of Islamic legal reform which had taken place in the fifteen years which followed the promulgation of the Egyptian Law of Obligatory Bequests." (Coulson: 1971:153). Anderson says that the Egyptian reform does not in any way affect the structure of the Islamic law of intestate succession. This statement must be taken with a pinch of salt as Doi of Nigeria also points out since it, strictly speaking, does affect the Islamic law of intestate succession because it imposes a duty on the grandfather which Islam does not. This duty then prohibits the grandfather from leaving his whole estate to his legal heirs if he so wished and this in turn can affect their shares etcetera. He also criticises the Pakistani reform in this regard. (Doi: 1984-464). However, Anderson probably meant this statement to be seen in comparison to the Pakistani Reform and therefore we should not put too much emphasis on this statement since it would result in misinterpretation because he probably meant that the structure of the Islamic law of intestate succession was not literally affected or changed.

On obligatory bequests, Anderson (1965: 359-361)) mentions four further points indicating that the Egyptian reform is not free from defects and loopholes. Firstly, there exists a juristic justification for this reform. To mention but one example of this, the Quranic verse of bequest (Q.2: 180) commands Muslims to make provision by will for parents and close relatives not otherwise provided for. Early authorities accept that this verse may have been abrogated as far as those relatives who later received fixed shares but not as far as the close relatives are concerned. Secondly, there is an anomaly in this Egyptian law which will not be

detailed here except to say that if this reform is given effect to and where this $1/3$ has to be shared between a predeceased son's daughter and his (the predeceased son's) granddaughter, the latter takes $2/3$'s (the share her father would have taken) and this differs from the usual practice in Egypt where a daughter competes with a son's daughter. Thirdly, there is the problem of the application of this law because there are at least three alternatives. The first alternative has the effect that the obligatory bequest is not treated as a bequest at all (court system). Here the estate is divided as if the predeceased son or daughter was alive and his or her share is then given to their respective children. The second alternative operates against the clear provisions of the enactment (Mufti system). Here the obligatory bequest is taken to be a bequest to the grandchildren, of the "equivalent to the share" of a son or daughter, according to the deceased's sex and calculate this in the same way as it was done in the classical Hanafi text. The third method proposed by Abu Zahra has three clear steps and appears to be the most persuasive. These steps are first, to calculate exactly what the predeceased son or daughter would have received had he or she survived, and give this (or the bequeathable third, whichever is less) to the grandchildren. Next, to deduct this amount, as a bequest, from the whole estate. And then, finally, to divide up the remainder without considering the predeceased son or daughter, on the basis that he or she is indeed dead. This third point is succinctly summed up by Kabeer (1986: 12) as follows: "... the Egyptian experience on this score shows that such steps are fraught with practical difficulties. The formula accepted earlier in Egypt was to set apart for the grandchildren a third of the total value or the share of the link parent as if he were alive whichever

was the lesser. Later it transpired that this system - called the court system - disturbed the legitimate share of other legatees in certain cases. To correct this deficiency, another system was devised with the approval of the Grand Mufti. This system - called the Mufti system - too was not free from distortions. Thus Shaikh Abu Zahra formulated a still different method. Coulson opines that Abu Zahra's is by far the safest system from the point of view of enforcement of law. (Coulson (1971: 147-155) has analyzed the distortions of each system.)" It is the safest because this method is consistent in that it not only guarantees that the grandchildren receive their predeceased parents share within the 1/3 limit, but it also ensures that the claims of the real lawful heirs amongst themselves are not violated in so far as the remainder of the estate, after the subtraction of the bequest, is concerned. Fourthly, this Egyptian reform also has the effect of partly favouring the immediate family of the deceased as against the claims of the tribal (agnatic) heirs.

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Kabeer writing on problems and challenges concerning Muslim Personal Law in India has the following to say on the succession rights of orphaned grandchildren. India is also faced with this problem because Muslims there still observe the traditional Islamic law in this regard. The juristic basis of the Pakistani representative theory was severely criticised by religious scholars and also eminent orientalist like Coulson and Anderson. Kabeer feels that "(w)ith due allowance for minor differences in details (the Egyptian) reform can be made the model for similar reforms in Muslim Personal laws in India. (b)ut (because) the Egyptian experience on this score shows that such steps are fraught with practical difficulties, ... (f)rom these, it is also clear that

the example of Muslim countries in regard to obligatory bequests through testament cannot be followed as such. A foolproof and safe juristic basis may emerge from more pointed deliberations. But the principle of obligatory bequests has to be pursued as an attempt at reform". (Kabeer: 1986: 11-12). For a historical perspective of Muslim Personal Law in India see Nadvī (1989: 355-368). This might very well also be indicative of the direction Muslim Personal Law, within the context of the South African legal system, will follow. Thus it remains to be seen which steps, if any, will be taken as far as these type of reforms are concerned.

While Fyzee has suggested that the Pak-Bangla principle theory be enacted in India, Anderson on the other hand, recommended that India adopt the West Asian theory of obligatory bequest. (Mahmood: 1977:172).

Pakistani judge T. Rahman (1980: 2: 620) rejects section 4 of the Pakistani Reform as it goes against the injunctions of Islam. His view was relied upon by the Shari'at Bench of the Peshawar High Court in its judgement in Shari'at petition No. 3 of 1979, Mst Farishta versus Federation of Pakistan. The judgement was at the time of publication of his book under appeal before the Supreme Court. Pearl in his textbook on Muslim Personal Law outlined the verdict as follows. "The Supreme Court in Federation of Pakistan versus Farishta 1981 PLD 120 held that the Ordinance was a special statutory provision intended to be applied only to Muslims in Pakistan and the court was thus without jurisdiction to review its constitutionality" (Pearl: 1987:183). T. Rahman (op, cit., 636 - 8) criticizes that the source of current Pakistani Law as far as Section 4 is concerned

is reflective of the Roman Law, English law and the Hindu Law and is an adaptation of the repealed customary law of undivided Punjab, which in form resembled the Hindu customs and practices. He also criticizes the law of obligatory bequests in Arab countries. The court in the above case (before it was appealed upon) held Section 4 as void but offered alternatives to ease the plight of a son or daughter of a predeceased son. They suggested that a child of a predeceased son may himself or via his friend ask the District Judge within whose jurisdiction his/her grandfather's property or most of it is situated that he should intervene and advise the grandfather to make a will while still alive which guarantees the child his share as his father's heir had his father not predeceased his own father (child's grandfather). In this way the grandfather is reminded of his "duty" and relief would then be given to a son/daughter of a predeceased son in most instances. If, however, the grandfather refuses to do so and District Judge feels that due to minority or for other valid reason such a son/daughter will need maintenance, the State could arrange accordingly.

F. Rahman (1980: 464) concludes that the main objection to the 1/3 bequest is that in terms of Islamic law a will is really meant for charity. Supposing therefore that an orphaned grandchild is already wealthy and has no need for this willed property, while on the other hand a distant relative desperately needs the assistance which this will or charitable bequest could provide, he would be denied this relief in favour of the wealthy orphaned grandchild thus obviating its purpose. It was for these reasons that Pakistan decided to keep its law of 1961 rather than adopt the Egyptian solution. However, the Pakistani law has to be amended to remove

its conflict with the prescribed Quranic shares.

Coulson writes that it is not necessarily a matter of these grandchildren requiring physical provision from the deceased estate since they could already have received in inheritance from their deceased parent, or be provided for through their other surviving parent and his or her relatives, or even, if they possess the wealth, through their own resources. The fact that families are becoming more disjointed does not necessarily preclude an uncle from providing for his nephews or nieces whom he has excluded from succession to their grandfather's estate. As far as an heir is concerned, inheritance exists as of right and not need. It allows the deceased to fulfil his responsibility towards his living relations for no other reason than because they are his relations. (Coulson 1971:144).

Coulson maintains that the main objection to Egypt's "obligatory bequest" system is that such bequests have absolute priority over any other bequests that the deceased may have made. The grandchildren are entitled to the bequest as of right, regardless of whether they need it or not. The deceased is thus precluded from giving a bequest to someone in need of it other than his orphaned grandchildren. It is ironical that Egypt has allowed a testator complete freedom of testation in respect of 1/3 of his property (see 5.3.1 supra) but with this reform it encroaches on that very freedom. Coulson states his preference for the Pakistani reform in this regard despite its legal defects. (Coulson: 1978:232)

In summary we have seen several views in favour of or against these respective reforms. Due to the fact that they in one way or the other encroach upon

Islamic law, I do not align myself to either one of them. As to which of these reforms (if any) would best serve the needs of South African Muslims remains to be seen. It is my contention that a devotional act like Zakat (charity) for example which is one of the five pillars of Islam could play a role here in the sense that charity begins at home and via this form of alms-giving relatives could provide for their less fortunate relations. Why place the burden solely on the grandfather? - the Shari'ah after all imposes this obligation on the uncles and aunts of such children.

5.4 Conclusion:

Esposito states that "the call today is for modernization which is more self-consciously rooted in Islamic history, beliefs and values. This ... raises the practical question: Does Islam ... possess the resources to support and sustain reinterpretation and reform, and thus respond effectively to the demands of modernity? Is Islamic reform possible? What does this mean for women and the family? (Esposito: 1982:X). As I will prove in Chapter Six, it is not so much Islam (more specifically Islamic law of succession per se) that must reform as it is its adherents since I believe that Islam has since its inception already contained tools, the most revolutionary one being dower, of reforming the plight and position of women without in any way tampering with the basic sources of Islamic Law. In order to have a proper understanding of Islamic ideals, one must differentiate between woman's status in Islamic countries and her status in terms of Islamic laws, principles and values. It is unfair to hold Islam, as a religion and law, liable for the backwardness of its adherents. (The Muslim Family: 1986: 33).

Islamic law is more "abused, misunderstood and misrepresented" today than in the entire history of Islam. It has been projected and presented as rigid and primitive with no place in the present and the future to the disadvantage of Muslims, thereby delaying the "true revival of Islam and a genuine emergence of a contemporary Muslim intellectual tradition ... The Shariah does not need to be 'modernized' but understood on its own terms." (Sardar: 1985: 108;110).

Mahmood writes that "the ulama (of India) having rejected all the various 'remedies' recommended by modernists in order to remedy the situations arising out of application of the traditional Muslim law assert that the only remedy lies in a 'correct understanding' of the Islamic laws in their true spirit and in their proper use by the Muslims. They therefore suggest education of the masses regarding the rationale and spirit of Islamic legal principles and the 'sinfulness' of misusing these principles. On the other hand, conscious of the declining influence of religion on the society (of course, it can be argued that the opposite is true today), the modern reformers insist on action by one or the other organ of the state - legislative, executive or judiciary. However, the state has hitherto been constantly restrained by the custodians of its powers from playing this role." (Mahmood: 1977: 172-3). This can be likened to the position in South Africa except for the fact that here the tables are turned - the conservative Ulama are in favour of recommendations for the recognition and implementation of Muslim Personal Law in the future constitution of a new democratic South Africa while some professed modernists are against it for political reasons.

It thus remains the task of the Ulama and Muslims to ensure that these tools are implemented timeously so that disillusioned Muslims in South Africa are not forced to seek refuge in secular law as happened in Turkey, where Islamic law was officially abandoned even in the sphere of family law. (Anderson: 1959: 87-88). In similar vein we also have the Lebanese Druzes who are not recognised as a religious community under Muslim rule. The Druze religion originated from the Isma'iliyya branch of Shia and derived from its provisions suiting the modern nuclear family and the advancement of the status of women, for example, representation in succession and absolute freedom of testation (without any quantitative or personal restriction) all contrary to Islamic law. Layish writes that "(t)hey have a strange combination of legal systems representing opposing social philosophies - the Hanafi system in matters of intestate succession and the Druze in matters of wills (testate) and is likened to an IOU accompanied by a document cancelling it for the making of a will releases testator from application of Hanafi doctrine." (Layish: 1979:13;22;27). The latter statement is also true of other legal systems. It is the case in South Africa as well where the rules of intestate succession (the Hanafi doctrine) is neutralised by the right of free testation. However if Muslim Personal law is given the force of law, it would discourage (though not necessarily so) Muslims from the need to seek refuge in South African law in this regard.

As Kabeer (1986: 13) writes on Muslim Personal Law in India that "the Muslim Personal Law Board too has to shoulder some responsibility. Not confining itself to the negative approach of resisting the governmental and secular threats to Muslim Personal Law, it should

bear the moral obligation to put forward creative suggestions on the matter. (my emphasis). The Board should lead deliberations based on Quran and Sunnah and fiqh and crystallise views as to how they can be reformed to meet contemporary needs and solve issues in keeping with the implications of the Shariat."

Mannan, in his discussion of the Islamic law of inheritance as a whole and its economic significance writes that "(a)ccording to the Encyclopaedia of Social Sciences, Inheritance is the entry of living persons into the possession of dead persons' property and exists in some form wherever the institution of private property is recognized as the basis of the social and economic system. But the actual forms of inheritance and the laws and customs governing it differ very greatly from country to country and from time to time. Changed ways of owning and using property will always bring with them in the long run alteration in the laws and practices relating to the inheritance of wealth." The Islamic law of inheritance is however very different from this as I have already indicated and as Mannan points out is "anticapitalist in outlook" (Mannan: 1986: 133; 138). (This also makes one think of nationalisation and the redistribution of wealth and land of which much has been said in South Africa since the unbanning of the African National Congress and the Islamic standpoint on this).

An international conference entitled "Islamic Law in the Modern State" was held at the Rand Afrikaans University in July 1988 which was meant to give some perspective in academic context to an investigation of the Law Commission of South Africa into the possibility of introducing Islamic Family Law in this country. One of the contributors at this conference

was Doi ¹. (Naudé: 1988: 1-2). He adopts a sceptical attitude towards reforms in these areas of family law but is however of the opinion that the Sharīah was revealed to suit every age and time. "Its injunctions were coined in such a manner that they are not affected by the lapse of time. They do not become obsolete, nor do their general, principles and basic theories need to be changed or renovated. The generalised construction and elasticity of Shariah allows even for bringing under their jurisdiction any unprecedented new case, even though it is not possible to expect its occurrence at the beginning of revelation. Hence, the provisions of Islamic jurisprudence are not susceptible to change or substitution as are other laws and legislation." (Doi: 1988: 88).

These views appear to be reflective of those of the conservative Ulama of South Africa and as far as these type of reforms are concerned, regard must be had to the peculiar circumstances in South Africa and as to whether these circumstances really necessitate it.

¹ Professor and Director of the Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria in Nigeria.

CHAPTER SIX

The Islamic law of intestate succession and the position of the woman as wife, daughter and mother - an exploration of the treatment received by Muslim women in terms of their fixed "intestate" shares and its implications in modern society and an examination of viable alternatives to improve their economic status.

6.1 Introduction

The legislative changes in testamentary succession outlined in Chapter Five placing wives, daughters and mothers in a more favourable position as compared to the traditional law by the augmentation of their shares is not without criticism since it violates the prophetic traditions in this regard. Bearing this in mind, and also favouring the improvement of the "lot" of the woman, we now look at intestate succession and the position of the woman as wife, daughter and mother. As noted in Chapter Three there exists inequality in the inheritance shares between wife and husband, between daughter and son and between mother and father (not forgetting the inequality between sister and brother).

As demonstrated in Chapter One, e.g. (p 10, 14-15, 16), it is evident that the Quranic laws were equitable for the seventh century nomadic society of Arabia where there was a collective contribution by families to the wealth of their heads and hence the rights of the extended family to inheritance. Although it has been demonstrated that the Quran has an evolutionary ideology to its laws and that these laws can and should change as society changes, as demonstrated for example:

Firstly, during the life of the Prophet (P.B.U.H) and the period of Quranic revelation over approximately 23 years where certain laws changed from being allowed, disapproved

and disallowed. "Because he was a religious reformer who was principally interested in preaching a belief in one God - a revolutionary principle in pagan society - the Prophet Muhammad did not go so far as to seek a complete change in the social system acknowledging that it might affect the spread of his religious teachings, therefore he sought to effect gradual change in the law." (Khadduri: 1978 :217). The best example illustrating that the Quranic approach to change is gradual are the Quranic injunctions prohibiting the use of alcohol (although it must be borne in mind that these verses are subjected to different interpretations by various scholars as far as abrogation is concerned). The first revelation warned that the evils of alcohol outweigh its good effects (Q.2 : 219). The second asked the believers not to pray while under the influence of alcohol (Q.4:43). The complete ban was finally made in the third revelation (Q.5:90) (Sardar: 1985: 116).

Secondly, during the period of the Caliphate (successors of the Prophet (P.B.U.H)) the changes of accepted and "clear-cut" revelation by the Caliph according to changed societal circumstances, for example Omar's (the second Caliph of Islam) invasion of Egypt and the changes he made to the interpretation of the Quranic text concerning booty, after victory by force. For more detail see E. Moosa: (1988: 18-20); Hitti (1970:171).

Going back to the example of the alcohol quoted above, it is evident that this specific category is derived from a general rule. Most scholars of Islam view this to mean that Islamic law not only bans alcohol but all types of intoxicants and narcotics. The general rule thus prohibits society from all those things in which negative elements outweigh the positive elements. If this general rule of Islamic law is applied to nuclear energy "[i]t is indeed possible for us to prove that the bad elements of nuclear

power, its potential dangers to present and future life-forms far outweigh its good factors, its ability to provide cheap energy. It is at this level of practical policy-making that the Shariah must be used to shape the destiny of Muslim societies." (Sardar:1985:119).

Generally speaking I do not dispute that the above is not true. In fact I am in favour of change where necessary. However, 'Abd al'Aṭī (1977: 15), by stating that Islamic law is "evolutionary" in that its full growth took centuries and passed through various phases, implies that it has stopped growing. By analogy as far as, for example, the law of succession is concerned, we see that 'Abd al'Aṭī's argument does not hold much weight as the law of succession is proof that the evolutionary process is still taking place. As already indicated in the preceding chapter the changes in testamentary succession based on the motives of allowing the testator more freedom where the particular circumstances warranted it and to augment the fractional share of, for example, the wife demonstrated several inadequacies and the methods employed are not free from criticism. It still remains my contention that, as far as the law of intestate succession is concerned, that it is not the law per se that must change, since the social or moral objectives implicitly or explicitly found therein, such as justice and equality, are eternal (F. Rahman: 1982:301). But since society has changed it must accordingly adapt to its changed circumstances, hence the law must be interpreted so as to accommodate the changed society and adapt the intention of God to their changed circumstances.

As far as the law of inheritance is concerned, its only deficiency in the twentieth century, as far as women are concerned, is the fact that the women's share is no longer considered equitable due to her changed economic role in society, which will be discussed at length in this chapter.

However, I will also demonstrate that it is after all not necessary to change any of the laws of succession in this regard (albeit via a testament or inheritance) but the same effect can be achieved by offsetting conservative interpretations in this regard merely by the wife making effective use of the tool of dower (which must be distinguished from dowry) in her possession, if not at the beginning of her marriage, then during her marriage, to give effect to the eternal intention of God which was always based on equity (already at the inception of Islam).

It is a sad fact that very many woman are ignorant of the fact that the solution to their problem lies not necessarily in changing the laws of succession but in this very powerful tool which can be used even during her marriage if she did not make effective use of it at the inception of her marriage. Of course there also remains the other possibility of the husband, son and father making provision for the wife, mother and daughter via gifts inter vivos (and dowry for the daughter, which is not obligatory in Islam) which would also have the same effect, that is, improving her economic status while not interfering with any of the Quranic injunctions in this regard.

By evaluating the Quranic justification of a woman's share I will demonstrate that the diminished role as far as the responsibilities of extended families in present day societies are concerned, (where we have the increasing emergence of the nuclear family and the breakdown of the extended family) can also lead to two arguments in favour of changing the Quranic law. On the one hand it can be argued that the financial needs of the nuclear family are great and is usually only catered for by the husband and wife and possibly their children as bread-winners and that the absence of other relatives for example the husband's

brothers and sisters in contributing to the creation of nuclear family's wealth should hence be seen as an argument favouring the fact that their right to inherit should also therefore be absent. This argument is questionable because in terms of Islamic law wealth creating is basically in the hands of the husband but this does not preclude the wife from sharing in the wealth. 'Abd al 'Aṭī (1977: 19 ff), however is of the opinion that being a member of a nuclear family does not preclude one from fulfilling one's religious obligations which would include complying with the fixed shares of inheritance to compulsory heirs. On the other hand it can also be argued that because of the greater economic contribution of working wives to the present day nuclear family it should naturally result in greater rights as to their share of inheritance. Whether these arguments really have any Quranic justification is another matter altogether. Another point to remember is that if one is going to tamper with the female's share then it is inevitable that the shares of the other heirs must naturally also be affected.

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It is also an undeniable fact that the wealth of a nuclear family at the end of the life of the family is centred around a "house" and its content and with multiple heirs, including some that are not residing at home. It is almost inevitable that the biggest asset has to be sold for each heir to get their share or the other alternative is, for certain heirs to relinquish their share. "The Islamic law of inheritance leads to excessive fragmentation of real estate, which soon becomes subdivided into plots of an uneconomical size." (Anderson:1959:79). This applies to other systems as well. This is probably not so true for South Africa because an even further option is that one of the heirs can buy the other's shares from them. This was not a problem in pre-Islamic Arabia because property consisted mostly of livestock and crops etcetera which were easily divisible. As far as the extended family is

concerned "in most Muslim societies, daughters are not given their inheritance share prescribed by the sacred law in order to prevent disintegration of the joint family's patrimony" (The New Encyclopaedia Britannica: 1986: 22:36). Rahman voices it more emphatically as follows: " But even when Muslims do not like to "change any rule in the Quran", they have, in practice, made radical and even devastating changes in inheritance. Witness the usual utter deprivation of daughters of their shares in their fathers' inheritance in the interests of keeping the patrimony intact - despite not only Quranic laws but actual enacted laws of Muslim governments." (F.Rahman: 1982: 289). In an earlier article he aptly sums it up as follows: "The practical problem before most Muslim countries has actually been not so much the equality of shares as the effective allocation of any share at all to daughters from their patrimony, since in most Muslim societies where a joint (extended) family system prevails, daughters have been deprived of inheritance - despite the provisions of Islamic law - for fear of the disintegration of patrimonial estates." (my emphasis) (F. Rahman: 1980: 453). Needless to say, this point needs no further elaboration.

It is not within the ambit of this dissertation to tackle the problem as to what the "idea" was behind the relevant revelation - did it want to put proportions permanently or show that justice must prevail - that the needs of those who should be looked after are in fact looked after? I am proceeding from the basis of accepting the status quo as it is.

6.2 A comparative evaluation of the various interpretations of the relevant Quranic inheritance verses in justification of a woman's share.

I have already given a brief objective presentation as to what the actual situation for women (as far as inheritance

is concerned) in the pre-Islamic era and with the advent of Islam, has been, is, and now I will determine what it ought, by the letter of Islamic law, to be. Briefly recapping, it will be remembered that during the period immediately preceding the Quranic revelation women had no rights of inheritance. These rights belonged to men exclusively. Islam introduced changes in inheritance regulations assuring these rights to women and is still relevant today (although their portion is only one half that given to males because, men are seen as the providers of women (Q.4: 11 -12).

What follows is a summary of Rahman's two articles on this issue. In the area of general rights of spouses, the Quran states that spouses have reciprocal rights and obligations, but adds that "men are but one degree superior to women" (Q.2: 228). This qualifying clause read together with Q.4: 34 which contains the rationale for it, namely, that "men are the maintainers of women... with what they spend out of their wealth" explains the superiority of men to their being the breadwinners and economically responsible for the sustenance of their wives (within the socio-economic context of Arabian society during the Prophet's (P.B.U.H) time - seventh century Arabia) - cf Esposito (1982:108). From this, two opposite views have emerged. The conservatives (are of the opinion) that this Quranic statement is normative, that the woman, although able to possess and earn wealth, is not required to spend it on the household, which is the sole responsibility of the man and therefore, he is granted this superiority. The modernists, on the other hand, argue that this statement is descriptive and that although the conservative view does not deny that women are economically independent they do not encourage, as they the modernists do, the view that all women should make use of this ability in today's changed society to become economically independent and because of the fact that she can therefore, and in some cases in fact does,

contribute to the household the spouses should enjoy absolute equality. Rahman in discussing the economic inequality of the female's inheritance share which is half of the male's writes that some Muslim modernists like Gökalp of Turkey have suggested that the inheritance shares of male and female heirs be made equal. Other, more socially conservative modernists (for example, Iqbal) have opposed this recommendation and have argued that since the girl also gets dower from her husband, the apparent inequality of inheritance shares amounts to a real equality. This argument is not very convincing because the dower in most instances is much less than an inheritance. On the point of equality of shares of male and female however, there has been no change in any modern Muslim country with the exception of Turkey where they share equally. This therefore indicates that it will be very difficult to change. This status quo has been maintained by modern reform laws, although they have expressed it differently, implying subtle but important changes in the traditional image of the wife. For example the Tunisian and Indonesian law (my emphasis) (F. Rahman: 1980: 452-3;456). "But inheritance shares like other economic values and obligations assigned to sexes - are a function of their actual roles in traditional society... there is nothing inherently unchangeable about these roles - indeed, when justice so demands, change is Islamically imperative". (F. Rahman: 1982: 297) Rahman (ibid., 295) feels that traditional customs, usages, and attitude in Muslim societies have to change, in order for these socio-economic inequalities to change. He goes on to say that this is even more apparent in the case of a widow's share as opposed to the widower who is assigned a share of twice that much. "It is evident that in a tribal society, members in pecuniary need are supported by other members of the tribe as a whole. With social change, however, changes in shares must follow, since in a detribalized society social functions undergo radical changes". (my

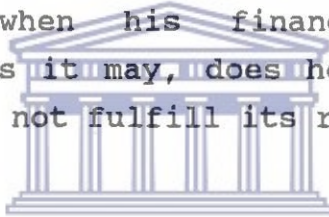
emphasis) (ibid., 297).

Iqbal's argument on dower is subject to criticism because in this case the female inherits in her capacity as daughter which concerns her succession right whereas she receives her dower as of right in her capacity as wife which flows from marriage and has nothing to do with her inheritance share. The dower argument might hold for the wife but not for the daughter. Rahman's view on Iqbal's argument makes me more convinced that dower should be substantially increased, even during the marriage (if not done before) to offset this imbalance, but it is clear that Rahman fails to see that dower is one of the answers to the problem only of the wife's share and not of the share of other female heirs. The superiority referred to by the Quran is a superiority of an economic position in a given society, not one of inherent inferiority of women. One can thus argue that if the wife earns approximately 50% of the income and if the previous statement is true, that there should then be an equal distribution of inheritance as far as she is concerned. A further complication is the case where the wife is employed in a profession where she earns in the super-income bracket and the husband is a mere layman; in other words a reversal of traditional roles. Does this not now mean that the wife should be inheriting twice as much as her husband? To my mind, the above-mentioned arguments serve as hypothetical consequences of what scholars like Rahman are advocating if the spouses are to be treated equally for he in fact states that the shares must change to achieve this equality. In other words, my argument is that fixed shares cannot be changed since it would be contrary to Quranic law and we therefore have to find alternative solutions to this problem.

6.2.1 Conservative interpretations

Mannan (1986: 140 - 141) writing on Islamic economics

and these inheritance shares says that "under the Islamic system, the obligation of maintaining the family always rests upon the husband, even when, as is often the case, the wife's personal income may be larger than the husband's. To enable the male to discharge his obligation towards the family, his share in inheritance is twice that of a female..." (my emphasis). My point is that while he is not yet in possession of that share of inheritance he is obviously more dependant on his wife if she earns more than him; therefore how can he adequately maintain her? This argument can be refuted by saying that since no obligation is placed on the wife to financially maintain the husband and the family, thus she has a right of recourse against him to recover any expenses incurred when his financial position improves. Be that as it may, does he then deserve this share if he does not fulfill its requirements in the first place?



(Abd al 'Aṭī and T. Rahman (infra) presents two interesting arguments in this regard. 'Abd al 'Aṭī (1977: 268; 270) says of this arithmetic inequality - "[T]he fact that a woman is worth half a man in certain cases of inheritance" - that "it is an interestingly verifiable proposition that the Muslim husband usually owns more than his wife and is therefore likely to leave more behind than she would, if he were to survive her. If he survives her, which is less likely from a demographic standpoint, his arithmetically larger share (of his wife's small estate) of inheritance - may in fact be equal to or even less than her arithmetically smaller share (of her husband's larger estate). The end result here would seem to be that, while the two shares are arithmetically different, they are not necessarily unequal in the final analysis (ibid., 268)... the

Muslim woman, by receiving a smaller share of the property than the man's, is not in fact being denied the fruits of any effort on her part or the produce of any of her labor. It is not that she earned something which is being withheld or taken away from her. Whatever she takes of the property of the deceased relative is in return for nothing material she has done or contributed. She inherits out of compassion or kindness so to speak, and not because she has discharged or will discharge any financial duty to any relative." (ibid., 270). He is subject to criticism in that he blatantly disregards the contribution of the woman as mother of her children and wife to her husband, let alone the fact that she usually ends up looking after his needy relatives and that these sacrifices cannot ever be equalled in money.

In presenting the opposite argument T. Rahman (1980: 2: 626 - 7), in discussing the inheritance of orphaned grandchildren, writes that in Q.4:11, "[t]his verse proves that in the indication of the heirs and their shares the economic conditions or their being needy and helpless has not been made the basis of doing so. Had it been so it would have said " for the female it is twice that of the male". It may be said that a female as against a male is in greater need of property and due to her being comparatively needy and because of femineity she should have been held to have been better entitled to property." He gives a similar argument as far as the reversal of the shares of husband and wife with and without issue are concerned.

Mohamed (1984: 132) writes that "in this matter of the difference in the size of the portions, the Law Maker has observed the principle of the heir's needs of the property" and he justifies the male's share on the

reason that the financial burdens of the family fall upon the men, not the women. He thus gives the opposite view of T. Rahman supra. Hence we see the views diverging to both ends of the spectrum which is already indicative of what will happen if the laws should be amended.

Nadvī (1989) writes in support of the conservative view that the woman has nothing to complain about because under Islamic law:

"1) she is relieved from the responsibility of earning a living. This very concept has been changed today (by the woman herself). In the name of emancipation, women have been reduced either to the status of sales girls or to office secretaries and typists, the results of which need no elaboration. They cannot eat a slice of bread without having to first be gainfully employed;

2) she has been given the right of dower from her husband;



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3) she inherits from both her father's and husband's property. (ibid., p344), ... that indeed she (the woman) is superior in regard to financial benefits as compared to the man, whose economic responsibilities are manifold while that of a woman is none (my emphasis) (ibid., p70). The truth is, that the accumulated wealth received by a female from all the sources, mentioned above, are several times more than the share received by a male member. God's Law caters for the needs of human nature and is always in keeping with the dictates of reason and wisdom. (Nadvī: 1989: 344: 70).

Ahmad (1976: 141 - 2) expresses the same view and adds to the above sources that if she is divorced, she may

get an alimony from her ex-husband. He concludes that an examination of the inheritance law within the overall framework of the Islamic Law reveals, not only justice, but also an abundance of compassion for woman.

Faruqi (1983: 135) writes that "[l]ikewise the different inheritance rate for male and females (Q.4:11) which is so often cited as an example of discrimination against women, must not be seen as an isolated prescription. It is but one part of a comprehensive system in which women carry no legal responsibility to support other members of the family, but in which men are bound by law as well as custom to provide for all their female relatives."

Hargay (1984: 16) in an interview on the position of Muslim women stated that "[t]hrough men and women have equal fundamental rights in Islam, their social roles are distinct. Wives are placed one degree below their husband in matters relating to the affairs of the family, for men are traditionally the protectors and providers... Women inherit less than men - the proportion is 2:1 - because men must provide for their families whereas the woman's inheritance becomes her personal asset. So the basis of the ratio is practicality" (my emphasis). Whether this is true today is another question. What does he maintain his family on when the inheritance share has not yet been materialized?. In other words, he does not necessarily provide for them from his inheritance share.

Haddad (1984: 157) writes that "[t]he Islamists are thus instilling traditional middle-class values, making it respectable for the woman to be confined to her domestic role and become economically dependant on

the man. This view is validated by the Quranic verse in S4:34, interpreted in such a way as to make men's leadership position contingent on their financial responsibility for women."

These traditional, conservative views represent the reasoning of the majority of people interpreting Q.4: 34 that men are ordained (one degree superior - Q.2: 228) by Quranic law protectors of women, there is therefore no choice in the matter hence they inherit twice the amount of the female (Q.4:11). Females are not forced into any economic obligations but if they wish to work, good and well, it is their choice but they must not expect the reversal of their inheritance shares.

We now look at the reasoning behind most modern interpretations.



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6.2.2 Modernist interpretations

In the socio-economic sphere some scholars of Islam also cite Quranic verses for example Q.4:34 whose traditional interpretations support what today would be an inequitable position for women. Esposito notes that this verse which is also subject to more than one interpretation must be viewed within the socio-economic context of seventh century Arabia. He says that "[t]he resolution of the dilemma caused by this verse in modern times can be found by applying the principle of the hierarchization of Quranic values. Religious obligations of men and women are not subject to change but socio-economic matters are. Increasing numbers of women in the twentieth century are no longer necessarily dependent upon their husbands for maintenance and protection. Consequently, the concept of "priority" of husband over wife in the socio-

economic sphere is subject to change." (Esposito: 1982: 107-8).

Bagvi (1984: 6) makes an interesting observation that "in the Holy Quran emphasis has been laid on the subject (of inheritance) at quite a few places out of which the rules of inheritance in a more detailed form are contained in Sura Nisa (Chapter 4)- The Chapter of the woman. The very inclusion of this subject in the chapter suggests that women-folk are the most oppressed ones in the division of inheritance. This has been proved throughout the ages." I cannot account for the basis, if any, on which Bagvi comes to this conclusion. He probably meant it to be seen as ironical in his critical analysis of chapter 4, which is dedicated to and in which specific emphasis is placed on women, yet they are not treated equally in the inheritance provisions as set out in this chapter.

Kabeer (1986: 6) in his article on Muslim Personal Law in India points out that one of the schools of thought in regard to Muslim Personal Law, "the ultra-secular Muslim modernists seeks fundamental reforms in Muslim Personal Law and among the votaries of this contention are those who plead for equality of women in the law of inheritance ..."

Puri (1985: 210) calls upon Ijtihad (personal reasoning as a source of law) to produce change bearing in mind the "1400 year long odyssey of Islam." Iqbal rejects the claim of the "Ulama" of Islam about the finality of Islamic law and pleads for Ijtihad to reinterpret it in the light of modern experience and altered conditions of modern life since men who lived in the ninth century could have no conception of the necessities of the twentieth century. On the traditional interpretation of Q.4: 34 he writes that

what would the spirit of the Quran indicate if this situation changes and woman is no more exclusively dependent on man? The situation may call for a revolutionary change in the status of women in society, as the Prophet (P.B.U.H) had introduced in Arabian society 1400 years ago. (ibid., 213)

Hibri (1982: 217 - 219) in discussing the major problem of supremacy of men over women and the role of "Patriarchy" in creating it indicates how this serious problem disappear when the clear text of the Quran is adhered to instead of its "patriarchal" interpretations as she puts it. She basically is of the opinion that the word "qawwamun - protectors and maintainers" referred to in Q.4:34 is not accurately translated and interpreted by many men and that the basic notion involved here according to her modified interpretation is one of "moral guidance and caring". She goes on to give a detailed critical analysis of the passage showing the traditional interpretation to be "unwarranted and inconsistent with other Islamic teachings." She notes that "traditional interpretations are more in accordance with man's desires than the will of God. It cannot be denied that laws change as times and places change... It was applied repeatedly in the past and should be put to good use again." She is subject to criticism because if according to her the laws are wrongly interpreted then they must be correctly interpreted and not changed because they were correct all along. As I have already mentioned supra, the working wife's income, in terms of Islamic law, is hers alone. Anything which she acquires therewith belongs to her. There is therefore no question of her husband acquiring control of her income or any assets she acquired therewith. In the light of this I feel that there is no need for a re-allocation of shares -in

other words it can be argued that the fact that women today earn an income (salary) is not automatic justification for changing the Quranic shares.

Furthermore, where the wife is also a breadwinner (contributing to the maintenance of the household) it can be argued that she has a right of recourse against her husband (or his estate) because she is not legally bound to utilize her assets for the household.

Conservatives use Q.4:34 to explain the married woman's defined social role in relation to that of the man who is her partner and the head of the family. She is the guardian of, amongst others, his household and property. The question in my mind is whether it is also not plausible to argue today that the wife as guardian of his property in the husband's "absence" should also see to it that their family is equitably provided for in his absence which could also denote death? In other words should not the husband's duty or responsibility prescribed by the Quran extend beyond his lifetime, in other words on his death his family needs his income more than ever therefore by giving an equitable "share" (for example by increasing the dower etcetera) to his wife he can ensure that she makes provision for them in his absence (death).

Kamali in an article discussing Q.2:228 ("but men have a rank above them (women)") which he divides into clauses, clause 5 being the relevant clause brings to light an interesting point after detailing traditional views on this clause (and its relationship with Q.4:34) that "Sayyid Qutb (d.1966) on the other hand, holds the view that clauses 4 and 5 are both exclusively concerned with divorce, which is the principle theme of S. 2: 228, and that neither of these clauses contains any reference to the subject of

leadership or maintenance. Qutb continues : I believe that the verse (clause 5 quoted) refers exclusively to the husband's right of revoking the talaq (divorce) which only he can incur in the first place... This is the rank which the Quran has granted the husband..." (Kamali: 1984: 91). Kamali is of the opinion that since "[r]eform activities in the present century have focused on family law, which seems to be a testing ground for the capacity of the Shari'a to accommodate social change, Islamic law must grow abreast of the needs of Muslim society and be responsive to its problems. To achieve this is far more meaningful than conformity to the traditional demand for unquestioning loyalty to the authorities of the past." (ibid., 99)

Hassan in her article gives a critical analysis of Q.4:34 comparable to that of al-Hibri supra. She says that "[t]he critical examination of this material is of crucial importance: without it no fundamental change in the position of woman can occur in any Muslim society." (1987: 101). She dissects the passage line for line and concludes: "I have analyzed sura 4, verse 34 in detail in order to show how the words of the Quran have been mistranslated in order to make men masters and women the slaves. (ibid., 104-5) Their (Muslim women) struggle and its outcome cannot in the final analysis be separated from what Islam was, what it has become, and where it is going; but their struggle may very well turn the tide of events in modern history." (ibid., 109).

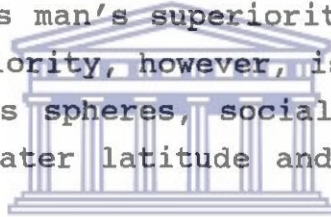
Minault writing on Ali notes that "this advocate of women's rights in Islam in the late nineteenth century disagrees with the usual male supremacist interpretation of these verses after he analyzes the original Arabic (1985: 302). His position is clearly reformist, or rather revolutionary in the context of

his times. He shows that the distinctions made between men and women that are justified on religious grounds are, in fact, the products of social custom. If these distinctions are subjected to the close scrutiny of reason, well bolstered by a knowledge of the religious sciences, the fallacy and injustice of male supremacy becomes clear." (ibid., 304).

Stowasser writes that the "same Quranic commentators who interpret the Holy Book in the light of their own contemporary reality, for instance, usually fail to consider the factors of growth and development, adaptation and change which have characterized the ideal blueprint through the ages and which are thus indicative of its flexibility." (1987: 262). She writes that despite the rights provided by the Quran for the women, amongst others, the property laws of the Quran that guarantee women the right to inherit and to bequeath property (for example, 4: 7; 4:11; 4:12), the property laws of the Quran that guarantee women the right to have full possession and control of their wealth, including the dowry, while married and after divorce, (for example, 4:4; 4:24; 4:20 and 21; 2:229) and the right of the wife to be properly fed and clothed at the husband's expense (for example, 4:34), the woman is not given full equality. Ultimately, the Quranic "blueprint" provides the male with status, control and authority over the woman (ibid., 292-3). Of 4:34 she writes that "[t]he superior status that is here given to the men over the women originates from the men's greater responsibility as protectors and providers within the socio-economic context of seventh century Hijazi urban society. As this social order may have been more flexible than appears to us now through the distance of centuries in which it became more and more rigid ... (ibid., 293). Modern, reform-minded Muslim thinkers are beginning to

work toward what Esposito calls a "hierarchization" of the Quranic values in ways reminiscent of the process by which the Quranic values were first applied to newly encountered social situations in the formative period of Islam (ibid., 294)."

Waines (1982: 646) writes that "the Middle Eastern Society... reflects a central 'metaphorical' paradox, a tension between the word of God as the normative ideal towards which man strives and the word of man represented by the forces of tribal and family custom. Each Muslim, therefore, will lead his life somewhere along the continuum between the two poles within the actual practice of his own community. Numerous apparent contradictions may illustrate this paradox. The Koran postulates man's superiority over women in Q.4:34. Male superiority, however, is clearly not an absolute; in various spheres, social forces mediate providing women greater latitude and authority than men possess."



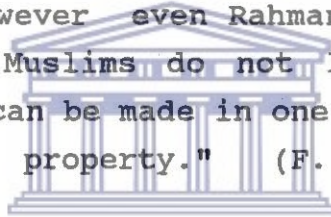
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Fernea (1986: 81) in her article places emphasis on how women's role has changed to become that of breadwinner also in addition to other roles as wife and mother in the family etcetera. She writes that "[w]ithin Middle Eastern societies themselves a rather different set of presumptions, some unspoken, exist. One is that the survival of the family unit is of primary importance, no matter who is the breadwinner."

The essence of this kind of Muslim discourse, is vividly captured in the following words: "Muslims are forever speaking about the rights of women confirmed by the Prophet of Islam and refuse to speak about the rights that they are being denied today." (R. Omar: 1988:3). Ali puts it thus: "[W]omen are granted rights in Islam that are denied to them in practice".

(as quoted in Minault: 1985:322).

Finally, we have now looked at both the traditional and modern interpretations of these verses which contains the rationale for the woman's share of inheritance and they both provide an illuminating perspective on this issue. It is also clear that the Quran as the "ipsissima verba" of God will not easily be changed as I already pointed out. F.Rahman makes mention that no modern Muslim country has changed the inheritance shares, since change would be perceived as a "bull-in-China shop" approach as far as this type of legislation involving Muslims is concerned. In fact Rahman is the only writer who openly voices that shares must be changed. Others advocate it but do not openly state it. However even Rahman adds a rider: "If, however, many Muslims do not like to change shares, arrangement can be made in one's own lifetime to dispose of one's property." (F. Rahman: 1982: 298).



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The irony is that while Muslim women were already given many rights with the introduction of Islam, "[b]y contrast, in many capitalist countries measures to improve women's position were taken only after a prolonged struggle by women and their allies to secure enfranchisement and other democratic rights." (Molyneux: 1986:173). Today we see the reverse taking place as far as the inheritance is concerned because although the position of western women only improved much later, dispelling the theory that women married in community of property acquired half the joint estate by virtue of it and were therefore not entitled to any other share, they are nevertheless in a better position when compared to women in Islam. However, sight must not be lost of the fact that in testate succession these women or any other blood

relatives for that matter may be 'disinherited'. Molyneux goes on to say that "[t]he laws enacted by socialist states have occupied a place of special importance as far as women are concerned... particularly in the area of family law... In many Third World countries where customary, tribal and religious laws defined women's position as inferior... to men... the very granting of formal legal equality between the sexes...has represented a significant break with the past...Legal reforms which are of particular significance for women...include granting equal rights within the marriage in matters concerning property and inheritance". (ibid., 181-2).

However, we must not lose sight of the fact that in testate succession these women or any blood relatives for that matter may be "disinherited."

Be that as it may, "Iran presents an interesting example of Third World development... Women, in Iran, have had their position in society radically changed since the new government took control. Under the Shah, the Sharia (traditional Islamic Law) had been significantly modified and women were given increased rights and freedoms. However, this liberal trend has been reversed by the Khomeini regime. The Islamic Republic has reintroduced traditional Islamic law ... It is interesting to note, however, that a return to traditional Sharia law regarding woman and the family need not have automatically adversely affected the position of women. Shiite Islam, unlike the Sunni sect permits the use of aql, or reasoning by judicial authorities, in interpreting Quranic law. This could allow for a great deal of flexibility in interpreting Islamic law, because it is permissible to use aql for reform appropriate to the times and circumstances and in keeping with Islamic doctrines

..." (Zolan: 1987: 183; 192 - 3). Despite other "inequalities", this is especially so as far as the law of inheritance is concerned where women in Shi'i law are far better off than in Sunni law.

"As Islam began to take stock of itself in the late nineteenth and early twentieth centuries, it became clear...that if Islam were to regain its place of moral and social leadership it must improve the lot of its women ... [A]n Iraqi woman states very poignantly the dilemma of many modern Muslims: I find to my dismay that I am full of conflict, I am pulled more strongly by the strings of tradition and Islam than I would have believed. I thought I was a modern woman, but what is that exactly? I am an Islamic woman first. ...They (Western feminists) say that the rules have been made by men for women to follow. But they do not understand that Muslim women believe these to be divine rules... By liberating them from these "man-made" regulations they are in fact liberating them from their own religion" (Smith: 1980: 523; 528; 530). This Iraqi woman expresses my sentiments exactly.

Bonderman (1968: 1171) writes that "[i]t is clear that a vast majority of the population of Near Eastern Countries is even today genuinely traditionalist in orientation...as a result, serious reforms in legal and religious practice may meet with resistance at lower levels of society." This would probably also be true of Muslims in South Africa. Nicholson (1985) aptly sums up the position as follows: "More than any man that has ever lived Muhammad shaped the destinies of his people, and though they left him far behind as they moved along the path of civilisation, they still looked back to him, at his obiter dicta (ibid., 144) for which he alleged a Divine warrant (ibid., 165) for

guidance and authority at each step (ibid., 179)."

6.3 The effective use of dower as well as dowry and gift as alternative tools to improve the inheritance shares of the wife on the one hand, and daughter and mother respectively on the other by indirectly offsetting the above interpretations of the relevant verses resulting in an equitable solution without in any way directly interfering with the laws of the "Divine blueprint".

6.3.1 Gift: (Hiba)

F. Rahman states "[i]f, however, many Muslims do not like to change shares, arrangements can be made in one's own lifetime to dispose of one's property." (F.Rahman: 1982: 297-8). Thus the law of Gift (Hiba) provides an effective alternative solution to both the shares of the wife and the mother and daughter without involving any tampering with inheritance shares. (For further details on the Law of Gift see T. Rahman (1980: 2: 1-100); see also Nasir (1986: 253-259) who discusses the general Shari'ah provisions on gifts, followed by those of the corresponding modern Arab legislations to show where they agree or differ; Ajijola (1983: 292-305) and Nadvī (1989:78).) It is my intention to merely give a brief synopsis of the Shari'ah law of Gift, although however, modern Arab legislation sets interesting and helpful precedents which could be of assistance to us in this regard.

Before going any further it must also be borne in mind as to how South African Law will treat these gifts in so far as it would have a bearing on for example the laws of insolvency and income tax. It must be remembered that the legislature has in these general statutes and for specific purposes, recognised polygynous unions for considerations of expediency.

Nevertheless, I am only proffering an option here and details as to its operation and effect can always be worked out by legal experts when necessary. Very cursorily and without going into any detail as to the numerous variations in detail of the various schools of thought which do exist, Gift can be summed up as follows: Islamic law recognizes two kinds of dispositions of property. Firstly, by a gift during one's lifetime and secondly, after death by a will. In the first instance a person can transfer his whole property while in the latter only 1/3. The first is called a disposition inter vivos while the latter is a testamentary disposition. The English term "gift", is in its restricted meaning called "Hiba", which is defined as an (immediate, unqualified and voluntary) transfer of property in something specific without an exchange or return. The motive of Hiba is to show affection towards, or to win the affection of the particular donee. It is a type of contract made by offer and acceptance which is fulfilled when possession is delivered. (Ajiola: 1983: 292 - 3). In terms of Islamic law, neither the offer nor the acceptance of a gift need be made in writing (since it is normally done orally) whether the subject of the gift is movable or immovable, although delivery of the gift is a condition of validity. (Nasir: 1986: 254). Normally legislation of some countries require registration of a gift of immovable property. Every major Muslim of sound mind may dispose of his property by gift distinguished from a will. He cannot make a gift in the "sickness of death" (while terminally ill) because he then loses ownership of the property to his heirs. (Nadvī: 1989: 78). It operates as a will and is called donatio mortis causa in Roman Law. (T. Rahman: 1980: 2: 483). A gift may be made of the whole of the donor's property; it may be made even to an heir or a stranger. (See Hamilton: 1982: 524).

The subject of a gift includes amongst others, a debt, actionable claim, corporeal or incorporeal property, negotiable instruments, property let on lease, insurance policy etcetera. (Ajijola: 1983: 294). (For more details on the essentials, conditions, death-illness, possession and revocation of gifts see references supra.)

The Law of Gift hence make it possible for the son to augment his mother's share especially where she played an influential role in the accumulation of his wealth or for benevolent reasons; for the father to augment the shares of his daughters inter vivos and can thus live with the conscience that he has treated his offspring equitably if they are of course deserving of it. Sometimes a man's son can be the black-sheep in the family and knowing that his share is pre-determined and therefore he cannot be disowned, will not make him mend his ways, but this could act as a deterrent. It also allows the husband to, in addition to stipulations as far as dower (which could be prompt or deferred) is concerned, to gift property to his wife immediately inter vivos so as not only to indirectly augment her share, but by so doing, he can simultaneously cater for the needs of their nuclear or basic family should he predecease her by ensuring for example that their main asset which is normally their house, does not have to be sold in order to be divided amongst undeserving or distant and even disliked heirs to give effect to the Islamic law of succession.

6.3.2 Dower (Mahr):

Mahr is translated into English as dower since there seems to be no other suitable word. (Bulbulia: 1983: 431). For an introductory background see Chapter Two pp 29-30 supra. T. Rahman infra defines dower (mahr) as "that financial gain which the wife is entitled to

receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage. He makes mention of dower being called "a consideration for the proprietorship of the uterus" giving it to my mind an unwarranted sexual connotation. As Ajijola points out "it is a property incumbent on the husband, either by it being named in the contract of marriage or by virtue of the contract itself as opposed to the usufruct of the wife's person (my emphasis). (Ajijola: 1983:154). However, the former is probably reflective of the Shafi'i view on the subject (see infra).

Nevertheless, every lawful object that is of value eg money, immovable property etcetera may be fixed as dower. The two kinds of dower are firstly, specified dower which is subdivided into prompt (paid at time of marriage or on demand) and deferred dower (payable on dissolution of marriage by death or divorce) and secondly unspecified, proper or customary dower which is determined in keeping with the dower settled upon other female members of the father's family and other criteria for example social position of the woman's family, wealth of the husband, the wife's personal qualifications etcetera.

Dower according to the Hanafi school of thought, is a condition precedent to the lawfulness of the marriage contract. According to them, therefore, a marriage contract without dower is not lawful. According to the Shafi'i school of thought, dower is no condition for a marriage contract and without dower a marriage contract shall be valid. The reason for this difference of opinion is that Hanafi jurists regard the marriage contract itself as the basis of the dower becoming due whereas the Shafi'i consider consummation to be the basis of it becoming due. If the marriage

is contracted with the condition that no dower is necessary, the condition is regarded as void and proper dower (unspecified) subject to the above-mentioned criteria shall now become due. (T. Rahman: 1978: 1: 223-4)

A bride is normally represented by her marriage guardian but in Hanafi law a sane, major female may negotiate her own dower. She may also set her own limits and opt for a minimal sum. The husband is held personally liable for the payment of dower except when he, as a minor, was contracted into marriage by his guardian. The liability will then rest on his guardian (usually his father). If the minor dies, his guardian must pay the dower to his widow. When he becomes a major it once again is his responsibility if he decides to uphold the marriage agreement (that is, accepts it). As far as it concerns specified dower there is no maximum on the amount which may be agreed upon but in Hanafi law there is a minimum amount. As Nasir also points out there is no ceiling set on dower but there is no such consensus on the minimal dower between the different schools. (Nasir: 1986:80).

The agreement may be made orally or in writing. During the subsistence of marriage the wife may reduce the dower or the husband may augment the fixed dower. Doi states it as follows: "The amount of dowry may be increased or decreased by the mutual consent of the husband and wife, at any time after marriage, and this is laid down in the Quran 4:24." (Doi: 1984: 166) A woman who is a major has herself the authority of realising her dower from her husband. If she is a minor her father, and in his absence her guardian, may do so. The dower debt takes precedence over all rights acquired under a will or by inheritance. The widow on the death of her husband can realise her

dower from the property of her deceased husband. The widow has the right to maintain her possession over the property of her deceased husband till her unpaid dower debt^o is paid to her. (T. Rahman: 1978: 1: 218-227; 233; 235; 242).

This is a very cursory summary of some of the rules of dower. For a more detailed outline and the position of some other countries on it see T. Rahman (ibid., 218-48). Nasir (1986) also gives a full account of the rules pertaining to dower and as pointed out in Chapter Two p 29 supra it must be noted that he confuses the Hanafi view that dower is an essential condition for the validity of marriage with that of the Shafi'i view where it is not. He gives finer details on certain aspects for example he mentions that a vague dower, for example: "a house" shall not be valid, without however invalidating the marriage contract itself, but the dower of the equal shall be due (ibid., 80). The dower becomes the right of the wife once the valid contract is concluded. The deferred dower becomes payable on the date agreed upon, otherwise it shall become payable immediately on the earlier of the 2 events: divorce or death (ibid., 81). If the specified dower is increased then such an increase becomes claimable by the wife together with the basic dower. Similarly, a wife possessing full legal capacity may alleviate the husband after marriage from the paying of all or part of her specified dower, since it is her exclusive property and thus she can dispose of it in any way she likes (ibid., 82-3). For further details see (ibid., 78-92).

Dower is seen as a precautionary measure against the husband's arbitrary power of divorce. If the marriage was not consummated, the wife is entitled to a

suitable gift, if the amount of dower had not been fixed, or one half of the agreed-upon dower (Q.2: 236-7). If the marriage was consummated, the total amount of dower is due immediately. (Esposito:1982:36). Islam makes the dower the property of the wife and the husband has no right to manipulate her to use it in any particular way. The dower is hers exclusively and is considered a form of security against the uncertainties of the future eg. divorce or separation or death of the husband (Saadawi: 1982:200). The Quran (4:19) also prohibited the husband from taking back the dower or any other gifts he had already given his wife. "A dower debt is a simple debt payable before the distribution of assets of the husband and it gives a lien over the property in favour of the widow whose dower has not been paid (widow's personal right of retention - to retain and not to obtain possession of her husband's estate) until her debt is paid. Thus, her unpaid debt does not make her the owner of this property. However, it is not a secured debt for no priority is given to the widow over the other creditors. But, it is actionable, heritable and according to some other views, it is also transferable. Thus it has priorities over legacies, and inheritance rights of heirs". (Ajijola: 1983: 158-9).

Esposito points out that the right to dower conferred on a woman because of Quranic prescriptions is meant to protect her financial position after marriage (1983: 24) and is compared to an "economic right" (ibid., 107). By way of interest, among the first usages of Qiyas (analogical deduction - a source of law), was the fixing of the minimum dower payable by the husband on marriage as ten dirhams in Kufa and three dirhams in Medina (ibid., 7). In the case of the division of dower where the proportionate amount

had not been mentioned in the contract, the allotment was determined on the basis of local custom (as a source of law). This method continued to be used in modern times (ibid., 127). Esposito brings to our attention that dower (mahr) must be distinguished from dowry (jihaz) since dower is a payment due to a wife from her husband at marriage (and never vice-versa) while dowry is the obligation of the bride's family. In Pakistan a High Court decided that intentional non-payment of dower is grounds for divorce. Dowry does not have its origin in Islamic law and is therefore not obligatory. It is however a well established custom, which custom is still practised by Muslims in South Africa. It consists mainly of property items such as clothing, money and jewellery. It created serious social problems because families tried to outdo each other in spending extravagantly resulting in the incurral of enormous debts. Thus Pakistan in 1976 enacted the Dowry and Bridal Gifts (Restriction) Act to regulate this. In its main provisions the bride was made sole owner of the dowry, bridal gifts and presents as opposed to the husband and his family, its value was also limited etcetera (ibid., 87).

As already indicated in Chapters One (p 9) and Two (p29) supra, in pre-Islamic Arabia the word sadaq represented the husband's gift to his wife, while dower (mahr) was paid to the bride's father. However, Islamic law made dower payable not to the bride's father, but only to the bride herself. Like the contract itself, this action also made the woman a party to the contract and so the marriage agreement could not be considered a sale. (Esposito: 1982:24). This is also reflective of a gradual change in the social system.

Powers, in his discussion on dower, refers to it as a

"bride-price"; however, this must be distinguished from a sale. He says that the "sources manifest sensitivity to the distinction between marriage with and without a bride-price (sadaq). On the one hand the Quran repeatedly refers to its payment as an essential condition for a valid marriage but that in the hadith literature there are numerous references to cases where marriages were arranged without it". It also seems as if he confuses sadaq (payment of a sum of money to the bride besides the dower to her father) with dower because he writes that Aisha (one of the wives of the Prophet (P.B.U.H)) scolded women who made themselves available to the Prophet (P.B.U.H) without requesting a bride-price. According to my understanding this is clearly indicative of a pre-Islamic custom where there existed marriages by purchase. He then goes on to talk about an "unendowed" wife indicating that he is actually talking about dower. It is his hypothesis that the unpaid portion (deferred) of the bride-price served as insurance against the possibility that a husband might predecease his wife without leaving a will and if the bride-price was not stipulated at time of marriage and if the husband died intestate or without providing for her in a will, then she had no claim against his estate because he is of the opinion that in proto-Islamic law (Islamic law at time of Muhammad (P.B.U.H) as opposed to today) a husband and wife did not inherit from each other upon intestacy. However, because of the position held by an earlier authority, the unendowed wife is entitled to both a share of inheritance and a bride-price. He is also of the opinion that Roman Law may have exerted an influence on the formation of Islamic law but acknowledges that there are differences too. On this point see also Mundy (1988:28; 97-9 and Powers: 1986: 76-7; 81-2; 86).

The most important Quranic verses dealing with dower are namely: Quran, 4:4 (in which the basis of the law of dower is found), 4:19, 20, 21, 24 and 25; 5:5; 2:229, 236 and 237.

It is my contention that dower must not be seen as a symbolic or minimal sum as once advocated by the Caliph Omar only to retract his opinion (cf Chapter One p 15 supra) but is to be seen and used as a powerful weapon at the disposal and defense of the wife. Hence when Nadvi (1989: 55) states that: "Rich people today give the plea of Mahr -i - Fatima (the amount of dowry paid by Hadrat Ali to Hadrat Fatima the daughter of the Holy Prophet at time of their marriage = 400 dirhams) and some fix the minimum amount of dower of ten dirhams which is an exploitation of the woman," he is perfectly correct (my emphasis). However, the important point he brings to light is, that it is allowed by the woman herself because she fixes her own dower and sadly she allows herself to be exploited because she has no other perception of dower except it being a symbolic requirement of marriage. In the light of this she cannot be blamed for its ensuing consequences, in the event of some or other unpleasant happening in the future. It is here that the marriage officer/Imam should be encouraged to inform her otherwise.

Mahmood states that the very low share of the widow in the husband's estate, which in those cases where her mahr, too, is nominal, creates great hardship (my emphasis). He writes of a case he personally knows (of district Jannpur in Uttar Pradesh (India)) where the mahr of a young widow was stipulated to be payable at Sharh Fatima (calculated to be nearly Rs 32 in that case); and in her husband's heritable property her share was about Rs 1,000 with which she had to spend

the rest of her life. (Mahmood: 1977: 166 -7).

In *Ismail v Ismail* 1983 (1) SA 1006 (A), the Appellate Division held that the polygynous union between the parties concerned should be regarded as void on the grounds of public policy and so were the customs and contract which flowed therefrom and were consequently unenforceable and that the appeal accordingly, in so far as it is related to, amongst others, the appellant's claim for delivery of the deferred dower should fail. Hence, with due recognition being given to Muslim Personal Law and its subsequent implementation, the plight of the women can also be alleviated because marriage and dower go hand in hand and if the Muslim marriage is given due recognition, rights flowing from it can also be legally enforced thus safeguarding the wife as far as her dower is concerned, and until this is done, the *Ismail* case is evidence of what can happen. By way of interest, in this case a Moulana's ruling in favour of the appellant was disregarded.

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It must be remembered in terms of South African Law that Islamic law only allows for a marriage out of community of property with the exclusion of accrual (profits made during marriage), hence even if parties abide by this, the marriage per se provides no economic relief to the wife, hence dower must be effectively used by her to overcome this situation. Dower as an ante-nuptial settlement can be effectively regulated via a pactum successorium which is a succession clause stipulating in an ante-nuptial contract how the parties wish their property to be disposed of after their respective deaths (in this case in terms of Islamic law of course). In this way provision can, for example, be made for a wife's deferred dower, to which she is entitled besides her

inheritance, and at the same time the wife can stipulate what she wishes to be done with her dower in the event of her death. In any event, this dower debt has preference over any legacies or inheritance rights of other heirs, but it would amount to killing two birds with one stone and will not disturb the Islamic shares of inheritance in any way. Thus they regulate their marriage in terms of both South African and Islamic law, hence preventing a possible future polygynous marriage (a boon for the wife) and they will regulate the disposal of their property and also comply with the Islamic law of succession.

Ali is quoted by Minault (1985: 303) as saying that "In matters of inheritance, it is true that a daughter inherits only half the amount that a son inherits. But one can argue that a daughter may take a dowry from her paternal home at the time of marriage, and in addition, she is entitled to mahr (dower) from her husband, so an unequal portion in inheritance is only just to her male siblings. However, this provision in no way implies unequal rights to property" (my emphasis). Ali thus rejects the conservative Modernists argument (p 136 supra) that since the girl also gets dower from her husband, therefore if her inheritance share equalled that of her brother, it would constitute inequality rather than equality and would be unfair to the brother.

Under the heading "marriage" Ali writes of useful ways to derive maximum benefit from dower. It is also necessary he says "to reform the giving of dower, (so instead of demanding) a huge dower at the outset (of marriage) in the hope that it will discourage divorce (which) only embitters family relationship, (m)ore beneficial, in terms of protecting the wife's interest, is the placing of stipulations in the

marriage contract. For example, the husband would agree to pay a higher amount only in the event of divorce or a second marriage, and the wife would agree not to demand payment except under such conditions ... The wife would have security without demanding a ruinous dower, and the husband would know that he would not be liable to a high payment except under certain specific conditions." (Minault: 1985: 315). Although it has its social merits, this however would defeat and undermine the economic purpose of dower and in any event the wife can stipulate in the marriage contract that she would be entitled to a divorce upon her husband remarrying whilst the first marriage still subsists. He also excludes death as being amongst such conditions. Other reforms might include "the postponement of the entire payment so that greedy parents of the bride cannot lay their hands on it and thus profit unlawfully from their daughter's marriage." (ibid., 315 - 316). This argument does not hold much weight because it is regarded as the wife's exclusive property to do with as she pleases. "In addition, other systems of payment can be devised to ease the strain on the husband. For example, a government servant, with a regular salary but no inheritance, could set aside a fixed proportion of his monthly income as dower." (ibid., 316). This is an excellent suggestion and also makes one think of a regular monthly investment which would achieve the same effect.

He goes on to suggest a reform of the custom of dowry since the wasteful expenditure on dowry has reached ridiculous proportions. He suggests that instead of giving her the whole dowry at once give her a few items upfront and the rest in form of money or securities or the right to income from land, funds which would be under the bride's control and used for

some agreed purpose. (ibid). This is also a good suggestion because dowry as a custom is basically still practised in some Muslim communities in South Africa, although it is not an Islamic obligation, and they can certainly benefit from this type of reform suggestion. This is also then another way for the father to already during his life-time, augment his daughter's share of inheritance by giving her a beneficial dowry on marriage.

Anderson has very ingeniously realised the inherent power of dower as an economic tool at the wife's disposal. He mentions that although reformers have felt unable to do anything about the inadequate treatment that the widow receives as far as her paltry inheritance share is concerned, except for the Egyptian provision of allowing bequest even to an heir, that this situation can, however, be somewhat remedied by the device of providing for a large sum as deferred dower, payable on widowhood or divorce. Thus he rightly notes that reform to the law of inheritance is not necessary. As he writes: "A somewhat similar result could, indeed, have been achieved previously by the device of contracting to give the wife a suitable sum as "deferred dower", which would then be a debt against the husband's estate. This would have the further advantage, from the wife's point of view, that it would be both irrevocable and available on divorce as well as widowhood - so the device is still of obvious value, but it might for these very reasons, sometimes be less acceptable to Muslim husbands. (my emphasis) (Anderson : 1965: 355-356 fn 12). Be that as it may, these measures do not only benefit the wife but indirectly is also of benefit to the husband because in the final analysis it offers more security to their family as a whole.

Question 60 of the questionnaire issued by the South African Law Commission read as follows: "Which court or body should, in your view, determine questions relating to Islamic law?" A number of respondents made the following proposals: "A special Division of the Supreme Court or a separate Family Court should be established for members of all groups as recommended by the Hoexter Commission with jurisdiction to hear and adjudicate upon all matrimonial and related matters ... In so far as matters concerning issues involving Islamic law, the Judge of the Special Division or of the Family Court could be assisted by two qualified Muslim Jurists... The jurisdiction will include all matters arising or flowing from the recognition of Islamic marriages such as (amongst others) dower, gifts, wills, inheritance and property rights to be determined in terms of Islamic law".

A similar but slightly different proposal was made by one respondent:

"In the first phase the (recognition of Muslim personal law)... can be implemented through the existing courts in South Africa. A supreme court judge should, in cases concerning Muslim Personal Law, be assisted by an assessor, who is qualified in Islamic law. Whilst this interim measure is in operation, preparations should be made for the second phase of the implementation through Shari'a courts manned by highly qualified and experienced Shari'a judges. In addition... an Appellate Division should be instituted sitting only when appeal cases beyond the jurisdiction of the Shari'a courts were filed and consisting of a senior South African Judge and Shari'a court judges. A Code of Law, governing these Shari'a courts, has to be formulated. The Muslim community is advised to form the Muslim Personal Law Board in South Africa consisting of the Ulama, legal experts and

Academics, as well as the representatives of all the organisations in order to supervise and safeguard the Shari'a."

Anderson is of the opinion that "this adds greater urgency to the codification of family law as a whole; for the graduates of modern law schools are well fitted by their training to interpret and apply a codified law but not to search for the dominant opinion in a multitude of medieval texts. In the sphere of family law I expect codes of future to retain a form which can be regarded as essentially Islamic, although they will include much which had little or no place in traditional law of the past (here for example I feel that one can include clauses in a contract of marriage stipulating that the wife will be entitled to a divorce should the husband take a second wife while the first marriage is still subsisting or provisions relating to an increased deferred dower etcetera). In part these codes will be based on a widespread use of eclectic device ... but I expect that its more extravagant extensions will increasingly give way to a much more rational interpretation of the ancient texts". (Anderson: 1971: 29-30).

E. Moosa (1988: 69) writes that "[f]or women as a socially disadvantaged group Muslim Personal Law could have several consequences. As stated... Muslim Personal Law as presently practised in South Africa do not account for the changed social conditions which affect the status of women". It is however my contention that this status quo can indeed be improved as indicated within the framework of, and not conflicting with, provisions and principles of the main sources of Islamic Law namely the Quran and the Sunna, but, for these improvisations to be of any

effect, we need Muslim Personal Law to be recognised in the South African legal system.



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CONCLUSION

Having researched the areas of marriage and succession relevant to my dissertation, I conclude that it is imperative that Muslim Personal Law be given its due recognition and eventually be implemented in the South African legal system as part of its statutory law. Although there has been (and still is) considerable criticism towards this step, although not unfounded, the benefits of its future implementation far outweigh its disadvantages. In so doing many dilemmas with which Muslims are faced daily in their lives (and deaths!) can easily be resolved. This condonement in no way implies that Muslims are now compromising their religion in the process.

At a conference held at the University of the Western Cape during May 1990 by a broad base of various Muslim organisations to discuss how Muslims could play a more significant role in the struggle for a free South Africa, one of the issues discussed was whether Muslim Personal Law will be recognised in a free South Africa. (Allie: 1990: 3/4: 7).



In a private sitting at this conference Maulana C.M. Sema¹ of Newcastle implored that Muslims, before the new constitution is made, must ensure that Islamic law is recognised and safeguarded in the future constitution of South Africa. Sheikh M.F. Gamiieldien¹ of Cape Town gave the assurance that the modus operandi is to be worked out by Muslims themselves and that the South African Law Commission is keen to leave its implementation at the discretion of Muslims whether via Sharīah courts, ordinary courts or other options etcetera. However, as E. Moosa² pointed out, it must be remembered that this assurance had been given at a commission level only. Once this is done, it would allow Muslim lawyers trained in South African law, to play a more

¹ Both members of the South African Law Commission.

² Guest speaker at this private sitting. See also bibliography p 195 - 6.

beneficial role in the Muslim society since Islamic law in this form would be more accessible to them. Gamieldien concluded that although the differences between the South African law and Islamic law is a contentious issue, the bottom line is that Islamic law must take precedence over the South African law wherever a dispute arose. It seems that the idea of polygynous marriages, and, I assume, its ensuing consequences, is also accepted and therefore no longer really an issue. He further pointed out that there is no denial that this could be seen as a strategy on the part of the various constituent government parties to indirectly gain Muslim support in the political arena and that it is important for Muslims to be aware of this. Whether, however, Islamic law is to be implemented via the African National Congress, National Party or Pan African Congress is not the issue but it is more important that we, as Muslims, recognise that we want our law to be applicable to us. I consider this view to be indicative of the practical situation which is a reality in South Africa today and can only be ignored at the expense of Islam itself. Would we rather have South African Law continuing to override Islamic law in these areas bearing in mind that we are a minority group? What would its implications be for the generations of Muslims to come?

There is also the fear that such a system may be dominated by views of the traditional conservative Ulama which would stifle any new thoughts and developments. However, as regards the reform of Muslim Personal Law in general and specific areas, one faces the question as to whether Islamic law should change with the vicissitudes of time. There is no denial that Islamic law is flexible and can be changed to become more compatible with the changing social and political ethos of Islamic society as use can be made of certain devices contained in the sources of law (see Chapter One p 10 - 12 supra).

I am in favour of reform where circumstances necessitate it. This however also does not mean that we have to borrow directly from forerunner countries in this regard. We have to look at

reform in the light of whether it is really necessary in its respective fields and whether alternative solutions are found in Islamic law itself having regard to the peculiar circumstances existing in South Africa. I have attempted to show that, technically speaking, Islamic law contains tools which can alleviate the specific problems encountered in this dissertation. They can be developed and be put into effect in the light of suggestions noted in Chapter Six supra.



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SOUTH AFRICAN LAW COMMISSION

ISLAMIC MARRIAGES AND RELATED MATTERS

PROJECT 59



UNIVERSITY *of the*
QUESTIONNAIRE
WESTERN CAPE

(RETURN DATE: 29 FEBRUARY 1988)

- * The completed questionnaire must please be submitted to:

The Secretary
S A Law Commission
Private Bag X668
0001 PRETORIA

BACKGROUND INFORMATION

* The South African Law Commission

The Commission is an independent statutory body established by section 2 of the South African Law Commission Act 19 of 1973. The Commission consists of seven members who are appointed by the State President and who are representative of various branches of the legal profession. The chairman of the Commission is a judge of the Supreme Court of South Africa. Where an investigation requires specialised knowledge the Act makes provision for the appointment of experts either as additional members of the Commission or as members of a committee appointed for purposes of a specific investigation.

The objects of the Commission are to do research with reference to all branches of the law of the Republic in order to make recommendations for the development, improvement, modernisation or reform thereof.

The South African Law Commission is presently engaged in an investigation into certain aspects of Islamic marriages and their legal consequences in South African law. With a view to assisting the Commission in its inquiry it would be greatly appreciated if you would be so kind as to complete the attached questionnaire and return it to the Commission at the above address by not later than 29 February 1988.

When an investigation has been completed, a report and a draft Bill (if any) are submitted by the Commission to the Minister of Justice.

* Origin of the investigation into Islamic marriages and related matters

The investigation has a history of representations and events extending over a period of about 10 years. It was first broached in representations addressed to the then Prime Minister and other Ministers by the Director of the Institute of Islamic Sharia Studies in 1975, requesting, inter alia, that ,

(i)

recognition be given to the Islamic law relating to divorce, succession and guardianship. These representations were then referred to the Commission. At the time the Commission was unwilling to include the investigation in its programme, firstly, because it was of the opinion that the recognition of the relevant aspects of Islamic law could lead to confusion in South African law and, secondly, because the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law.

During the past two years aspects of Islamic law have been raised in certain of the Commission's investigations, namely, those into the legal position of illegitimate children (Project 38) and into marriages and customary unions of Black persons (Project 51), as well as in the review of the law of evidence (Project 6) and of the law of intestate succession (Project 22). The question was posed time and again whether greater recognition should be granted in South African law to the Islamic marriage and its legal consequences.

The Commission further took cognisance of a private Bill which Mr P T Poovalingam MP (House of Delegates) wanted to introduce in Parliament last year, the aim of which was to grant some form of recognition to the Islamic law of succession. The Commission, however, concluded that the problems connected with the non-recognition of Islamic law relating to marriage and succession are so interrelated that it would serve no purpose to try to solve them separately. It was decided to tackle the problems arising from the non-recognition of the Islamic marriage in a single investigation and the above-mentioned Bill was then deferred pending the Commission's inquiry. The present investigation was included in the Commission's programme in July 1986.

* Purpose of this questionnaire

The purpose of the questionnaire which follows is to ascertain to what extent Muslims in observing the principles and instructions of Islam come into conflict with rules of the South African law relating to marriage, divorce, succession, custody, maintenance and other aspects of the law of persons and the family and to seek solutions for such conflicts.

(ii)

The above-mentioned representations and the research done thus far have already identified in theory certain aspects as possible problem areas, namely, the non-recognition of the Islamic marriage, divorce and intestate succession. However, confirmation of the fact that in practice problems do exist in these areas and information as to how it affects the Muslims in South Africa can only be obtained from the Muslims themselves. In order to afford you an opportunity to bring your problems in this regard to the Commission's attention, the questionnaire below covers all three of the above-mentioned aspects as well as related matters. It is being circulated amongst those Muslim religious leaders, Muslim organisations, South African lawyers who are Muslims and other persons who, in the Commission's opinion, can make a useful contribution.

To be of value to the Commission it is necessary that your answers, where applicable, should be detailed and that the grounds on which your answers are based should be furnished. You are welcome to submit memoranda to the Commission on any of the aspects touched upon or on other aspects which you consider to be important.

Where the questionnaire is addressed to the president or chairman of a body, it is the intention that the answers should reflect the view of the body concerned and not only the personal views of the president or chairman.



The Commission is well aware that the knowledge which it can acquire from a study of literature on Islamic law and the interpretation thereof is not sufficient to enable it to form considered opinions on the problems concerned. Therefore the Commission would not like to create the impression that it pretends to be knowledgeable in Islamic law. It would rather confirm its dependence on experts from the ranks of Muslims in this respect.

Thank you very much for your co-operation.

(iii)

QUESTIONNAIRE

* Islamic authority structures in South Africa

1. Is there any formal hierarchy amongst Muslims in South Africa?
2. Is there any institutive body amongst Muslims which can speak authoritatively for all Muslims in South Africa and whose pronouncements on Muslim matters and rules of the Islamic law are binding on all Muslims in South Africa?
3. What authority does a decision of a body like the Jamiatul Ulama Transvaal or its counterpart in Natal or the Muslim Judicial Council of the Cape or the Islamic Council have?
4. Do the said bodies have any formal contact with each other and do they take cognisance of each others pronouncements on Islamic-juridical matters relating to Islamic law?
5. (a) Which body or bodies are competent to apply and enforce Islamic law in South Africa?
(b) How is such a body or bodies constituted?
6. Which procedures does such a body follow?
7. (a) What sanctions (if any) are available to ensure the enforcement of Islamic law, if necessary?
(b) Is there any appeal against the decision of a person or body who applied or enforced Islamic law in the first instance? If so, to whom?



8. To what extent is a decision or the advice of an Ulama binding and is it observed by the Muslim community?

* Contemporary observance and application of Islamic law in South Africa

9. Are the prescriptions of the Shāria regarding marriage, divorce and succession in general observed strictly by Muslims in South Africa?

10. Where Islamic law in respect of any of the above-mentioned matters is in conflict with the law of the land, does the average Muslim observe Islamic law or the law of the land?

11. Is Islamic law as it is applied in South Africa today, in accordance with the traditional Islamic law, or has it been adapted or modernised in some respects in accordance with the Western way of life?



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12. (a) How will a member of the Muslim community set about resolving a legal problem which he has in connection with the law of marriage or succession?

(b) Will an Islamic authoritative body also advise such a person, where applicable, on the law of the land?

13. To what extent can changed circumstances and needs lead to the adaptation of Islamic law?

14. What role does the interpretation of Islamic law play in the application thereof and how are conflicting interpretations reconciled?

* Conclusion of marriage

15. Can you give an estimate of the percentage of marriages entered into by Muslims in South Africa -

(a) in accordance with Islamic law only?

(b) in accordance with Islamic law as well as South African law?

16. Do marriages entered into in accordance with South African law only, ever occur amongst Muslims (that is a marriage not entered into in accordance with Islamic law)?

17. For what reasons do Muslims find it necessary to enter into a marriage in accordance with Islamic as well as South African law?

18. Is there any Muslim body in South Africa which at present controls marriages in accordance with Islamic law or which advises persons regarding the conclusion of such marriages?



19. How is a valid Islamic marriage concluded in South Africa?

20. Are Islamic marriages ever solemnised by Muslims appointed as marriage officers in terms of section 3 of the Marriage Act 25 of 1961? If not, why not?

21. (a) Are Islamic marriages at present registered in any way?

(b) If so, is registration compulsory?

(c) If not, is there any way in which the existence of an Islamic marriage can be formally ascertained?

(d) Is it desirable that there should be some form of registration if it does not exist at present?

22. Would you (if you are a Muslim) advise a member of your family to enter into a civil marriage? Give reasons.

23. It appears as though Muslims are unwilling to enter into civil marriages. Is this true and if so, why?

24. Do Muslims who enter into a marriage in accordance with Islamic law encounter any practical problems if they do not also have their marriage solemnised in accordance with South African law? If so, what problems?

25. Is the average Muslim aware of the fact that his Islamic marriage is not recognised in South African law? If so, how does he experience this situation?

26. Is there a need for the recognition of the Islamic marriage as a marriage in the South African law? If so, why?

* Poligamy

27. To what extent do poligamous marriages still occur amongst Muslims in South Africa?

28. Would it be acceptable to Muslims if only monogamous marriages are recognised?

* Matrimonial property

29. In the case where a Muslim enters into a marriage in accordance with Islamic as well as South African law, which matrimonial property system is usually chosen by the parties -

- + a marriage in community of property? or
- + division of property by antenuptial contract? or
- + a marriage according to the accrual system?

30. What in your opinion are the reasons for the respective choices as mentioned in the previous question?



31. Is the average Muslim aware of the different choices between matrimonial property systems which exist in terms of South African law?

32. Would a marriage -

- + in community of property; or
- + according to the accrual system;

be in conflict with the principles of Islamic law?

* Status of children

13. Are Muslims aware of the fact that if they do not enter into a civil marriage their children are regarded by the South African law as illegitimate? What is their attitude in this connection?

14. What practical problems are caused by the present legal position regarding the status of children born from an Islamic marriage?

* Divorce

15. Is there any Muslim body who presently controls divorce in accordance with Islamic law in South Africa?

16. (a) Is there any need that divorces in terms of Islamic law should be registered?



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(b) If not, how is the divorce made known?

* Maintenance

17. Is a woman whose marriage was dissolved in accordance with Islamic law entitled to the payment of maintenance by her ex-husband, either by way of periodical payments or otherwise?

18. Does Islamic law recognise a right to maintenance-

(a) in respect of a child by both parents;

(b) against a child for both his parents?

39. Are any problems experienced in the application of the South African law regarding maintenance in favour of-

(a) spouses;

(b) dependent children; and

(c) other dependents?

* Guardianship

40. (a) Are any problems experienced in the application of South African Law in respect of guardianship over Muslim minors?

(b) If so, what problems?



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* Succession

41. Is it common for Muslims to make wills according to the provisions of the South African law of succession? If not, why not?

42. In cases where Muslims dispose of their property by will, is it common or exceptional that they provide in such a will that their estate should devolve according to Islamic law?

43. Does it occur in practice that a Muslim only disposes by will of that part of his estate which he is entitled to dispose of according to Islamic law?

4. Does it occur that Muslims provide in their wills for the devolution of their estate in a way which is in conflict with the rules of Islamic law? If so, what is the reason for this?

5. Whom does a Muslim in South Africa approach for advice with regard to the drawing up of a will?

(a) How does a Muslim dispose of his estate in terms of Islamic law? Does it take place formally or informally: orally or in writing?

(b) Does it also apply to that part of his estate in respect of which a Muslim has the right to dispose?

6. Are Muslims in general aware of the fact that they can provide by will that their estates must devolve according to Islamic Law?



7. Does it generally occur that a re-distribution agreement is included by Muslim heirs to give effect to the Islamic law of succession in stead of succession according to South African law?

8. Are there any practical problems attached to such a re-distribution agreement?

9. Does it happen that heirs refuse to agree to a re-distribution of estate in terms of Islamic law?

* Influence of the South African matrimonial property law

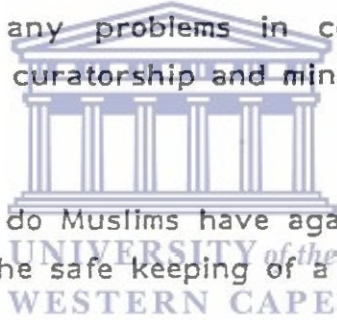
51. Does the division of a joint estate where Muslims were married in community of property create practical problems? If so, which problems?

* Minority

52. In view of the fact that the Islamic law does not recognise a specific age of majority, does the age of majority in South African law and the legal incapacities resulting therefrom cause Muslims any problems? If so, what problems?

53. Do Muslims encounter any problems in connection with South African legal provisions regarding curatorship and minority?

54. What objection, if any, do Muslims have against the provisions of the South African law regarding the safe keeping of a minor's inheritance in the Guardian's Fund?



* General

55. Which other practical problems are experienced as a result of the non-recognition of the Islamic law of succession?

56. (a) Who should, in your view, exercise control over the administration of Muslim estates?

(b) How would the controlling body or executor know that the estate should be distributed in terms of Islamic law?

* Other information

Would you like to suggest any practical solutions for the problems which might appear from the questions above?

Is Islamic law in itself capable of adapting to modern needs and to demands of the South African legal system within which it will have to operate?

Do you experience any other problems regarding family and personal law and the law relating to marriage as a result of the fact that Islamic law is not recognised in South Africa?

Which court or body should, in your view, determine questions relating to Islamic law?



How should such a court or body operate if the Islamic law is not certain or if there is a dispute between different controlling bodies?

* Particulars of respondent

(a) The respondent is-


A Muslim	
A Hindu	
Other denomination	

(b) The respondent is residing in-

The Cape Province	
Transvaal	
Natal	
Orange Free State	

(c) The particulars are given-

in my personal capacity	
on behalf of an organisation which represents Muslims	
on behalf of an organisation which DOES NOT represent Muslims	



(d) The following information would greatly assist the Commission in further consultation, if necessary, but you are not obliged to furnish it:

(i) If you completed the questionnaire in your personal capacity please furnish your name and address:

OR

(ii) If this questionnaire reflects the views of an association or body please furnish the name and address of that association or body:



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THE CENTRAL CO-ORDINATING COMMITTEE FOR
THE ULAMA OF SOUTH AFRICA

For many years since the arrival of Islam in South Africa, Muslims have been yearning for the introduction of Islamic Law in some form or another to govern their affairs. Various approaches have been made to the relevant authorities in the past but without any measure of success.

On the other hand Islamic Law in some form or another has been introduced in all Muslim countries and Muslim Personal Law has been introduced into quite a few Non-Muslim countries as well, eg India, Sri Lanka, Singapore etc.

It must now be known to many of us that a questionnaire pertaining to issues relating to the possible introduction of Muslim Personal Law as part of the legal system of South Africa, has been received by most of the Ulama, Imams, Muslim lawyers and some of our prominent professional men, all over the country. This is the very first time that Muslims have in any way been consulted with regard to any inclination towards ~~xxx~~ giving any kind of recognition for Muslim personal Law (pertaining to marriage, divorce, inheritance). We are all quite aware of the numerous problems that our brothers and sisters have had to face from time to time as a result of the non-recognition of our marriages.

Ulema from the JAMIATUL ULAMA NATAL, the JAMIATUL ULAMA (Transvaal) and the Muslim JUDICIAL COUNCIL (Cape) gathered in Durban on Sunday the 14-02-1988 under the chairmanship of MAULANA ABDUL HAQ OMARJEE of Durban to discuss the questionnaire and formulate replies to the questionnaire. The object of this exercise was to attend to this matter in a unified manner so that all the Ulema of the country, representing and speaking for the overwhelming majority of Muslims, should on this issue present a UNITED FRONT BY REPLYING WITH AN UNANIMOUSLY AGREED VOICE.

A joint reply has already been formulated and is being circulated to the various Ulema bodies. A co-ordinating committee of Ulema with members from each of the Ulema bodies have been set up to attend to this and other matters. Anyone interested and wishing to be associated with this work may contact the regional offices of the Council and Jamiats in Cape Town, Durban and Johannesburg.

We seek and hope for the cooperation of all Muslims in this endeavour and hope that it will not be long before we shall see Muslim Personal Law as part of the legal system of South Africa.

SUMMARY

Muslim South Africans are experiencing situations which indicate a conflict between the principles of South African Roman-Dutch law and Islamic law of succession. Hence the pertinent question of the recognition and application of Islamic law in South Africa is explored. The central theme of this study is the Islamic law of succession in so far as it affects women.

Chapter One of the dissertation contains a brief historical background which outlines on the one hand, the nomadic society, women and succession in pre-Islamic Arabia and on the other, their improved position upon the advent of Islam (seventh century). It ends with the historical background of Muslims in South Africa. Chapter Two is devoted to the marriage property background against which both the South African and Islamic law of succession operate. Thereafter, in Chapter Three, the South African and Islamic law (substantive rules) of succession are compared. These include both intestate and testamentary succession, the latter being limited on the Islamic side. Chapter Four, with the backgrounds sketched in Chapters Two and Three, demonstrates the visible internal conflicts between the Islamic and South African law of marriage and succession as encountered in South African practice. After evaluating statistics and alternative solutions in this regard, and having arrived at certain conclusions, it is proposed that recommendations about the possible recognition and application of Muslim Personal Law in South Africa which is at present (see date of submission of dissertation) enjoying the attention of the South African Law Commission in Project 59 should see fruition and be implemented as it can only assist the society in which Muslims live since it is a vital aspect affecting the daily lives (and deaths!) of Muslims. Chapter Five covers the whole aspect of the Muslim testator or testatrix's limited "freedom" of testation and reforms by certain forerunner countries in this regard which on closer inspection is riddled with controversies. Chapter Six explores the treatment received by a Muslim widow/daughter/mother in terms of their respective fixed

"intestate" shares and its implications for modern twentieth century society.

This issue, which is the major theme pervading this dissertation, concerns the fact that the Islamic law of succession is regarded as a perfect system of law: however, the fact that the "double share to the male" is an inherent and unalterable feature of this system which means that a female's share is always half of that of her male counterpart, makes this view debatable. It is proposed that, in the final analysis, effective use could be made of certain tools like dower, for example, to combat this inequality without in any way having to interfere with and change the divine blueprint of Islamic law as is suggested by modernist Muslim scholars and as is in fact legislated by some Muslim countries who believe that the changed family structure of modern Muslim families and the greater financial contribution of the women in a family calls for the reconsideration of women's inheritance shares.




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