



DATE DOWNLOADED: Mon Sep 5 03:52:35 2022

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Bluebook 21st ed.

Najma Moosa, The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women, 9 Stellenbosch L. REV. 196 (1998).

ALWD 7th ed.

Najma Moosa, The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women, 9 Stellenbosch L. Rev. 196 (1998).

APA 7th ed.

Moosa, N. (1998). The interim and final constitutions and muslim personal law: implications for south african muslim women. Stellenbosch Law Review, 9(2), 196-206.

Chicago 17th ed.

Najma Moosa, "The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women," Stellenbosch Law Review 9, no. 2 (1998): 196-206

McGill Guide 9th ed.

Najma Moosa, "The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women" (1998) 9:2 Stellenbosch L Rev 196.

AGLC 4th ed.

Najma Moosa, 'The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women' (1998) 9(2) Stellenbosch Law Review 196

MLA 9th ed.

Moosa, Najma. "The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women." Stellenbosch Law Review, vol. 9, no. 2, 1998, pp. 196-206. HeinOnline.

OSCOLA 4th ed.

Najma Moosa, 'The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women' (1998) 9 Stellenbosch L Rev 196

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

# THE INTERIM AND FINAL CONSTITUTIONS AND MUSLIM PERSONAL LAW: IMPLICATIONS FOR SOUTH AFRICAN MUSLIM WOMEN

Najma Moosa  
BA LL.M LL.D  
Senior Lecturer, University of the Western Cape

## 1 Introduction

All women face similar status problems in the private and public spheres of life but it is alleged that, as members of a religious community, Muslim women experience another inequality. This double inequality has resulted in a dichotomy between their public lives governed by secular laws and constitutions, and their private lives governed by religion. To date this conflict remains unresolved in various Muslim and non-Muslim countries. As will be indicated, commercial, criminal and penal codes were easily secularised but personal codes remained governed by religion. Traditional interpretations of Islam govern personal laws and as a result personal law codes conflict with the constitutions of Muslim majority and minority countries. While the constitutions of these countries guarantee equal rights to all citizens, the personal law codes privilege men over women in the areas covered by these personal laws resulting in the inequality of the sexes.<sup>1</sup> There does not, however, appear to be any Islamic justification for this state of affairs. The practice of Muslims today, as opposed to the spirit of equality in Islam as contained in its primary sources, discriminates against women.

## 2 Definitions

These definitions serve to facilitate the understanding of this paper.

### 2 1 Muslim Personal Law (MPL)

MPL is a religiously based private law. It has its origin in the *Qur'an* which was revealed during the seventh century of the Christian era and which is a religious text considered by Muslims to be the literal word of God. The *Qur'an* is a primary source of Islamic law and not a lawbook<sup>2</sup> as it contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. It is in the areas explicitly referred to by these verses that one finds little or no change in various Muslim countries. These countries were, however, quite prepared to follow secular codes in other areas such as commercial and criminal law. The term "MPL" has been coined by various Muslim countries and

<sup>1</sup> Kandiyoti "Women, Islam and the State" 1991 *Middle East Report* 9 5.

<sup>2</sup> Interestingly, it has more verses ( $\pm 100$ ) dealing with issues affecting women than with legal matters *per se*.

jurists because it pertains to, among others, marriage, divorce, inheritance, polygyny, custody and guardianship which falls under the category of family law. Minor reforms were introduced in the twentieth century when these verses were transformed into codes of MPL. These reforms have remained relatively conservative when compared with the liberal adoption of secular commercial and criminal codes. It appears then that reforming the law is not necessarily the total answer to the plight of women. Moreover, it is interesting to note that *all* laws affecting the status of Muslim women have historically been relegated to MPL (private sphere). This leads to the inference that discrimination against women is religiously based. However, reasons advanced for this discrimination include patriarchal (male interpretations of Islam in a male-dominated society), cultural and customary influences along with the influence of centuries of Islamic development and the refusal of some Muslim countries to reform. Furthermore, women's illiteracy and ignorance of the laws and hence their inability to use them has also been identified as contributing to the fact that the position of Muslim women today is less favourable compared to the status which early Islam in its true or original form (and the *Qur'an*) had conferred on them.<sup>3</sup>

## 2 2 Islamic law (*Shari'a*)

The *Qur'an* is separated from the classical formulation of Islamic law or *Shari'a* by a process of legal development lasting more than two centuries. During this period the *Qur'anic* norms underwent considerable dilution, often to the detriment of women.<sup>4</sup> It is common for Islamic law, which is the conservative interpretation and application of the primary sources (*Qur'an* or *Sunna*<sup>5</sup>) by early Muslim jurists like Hanafi and Shafi'i,<sup>6</sup> to be mistaken for Islam itself. There is therefore a difference between Islam (original) and Islamic law (interpretations of the original).

## 2 3 Two examples of MPL discriminations faced by women

As far as marriage is concerned, Islam limited the practice of polygyny<sup>7</sup> to four wives but with a strong directive towards monogamy.<sup>8</sup> The Prophet Muhammad himself serves as an example in this regard. He married his first wife at the age of 23, she being 40 years of age at the time

<sup>3</sup> Honarvar "Behind the Veil: Women's Rights in Islamic Societies" 1988 *The Journal of Law and Religion* 355 365; Shaheed "The Cultural Articulation of Patriarchy: Legal Systems, Islam and Women" 1986 *South Asia Bulletin* 38 38; Gordan *Women of Algeria. An Essay on Change* (1968) 31; Engineer *The Rights of Women in Islam* (1992) preface v-vi.

<sup>4</sup> Coulson & Hinchcliffe *Women and Law Reform in Contemporary Islam* in Beck & Keddie (ed) *Women in the Muslim World* (1978) 37 38.

<sup>5</sup> This is the received customs associated with the Prophet Muhammad embodied after his death in book form called *Hadith*.

<sup>6</sup> In the eighth century the four major Islamic schools of law were established and named after its founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* (Esposito *Women in Muslim Family Law* (1982) 2). These together comprise the *Sunni* (traditionalist) schools.

<sup>7</sup> Or the practice of having more than one wife at the same time.

<sup>8</sup> *Qur'an* chapter 4 verses 3 and 129. However, polygyny is restricted in Pakistan while Tunisia prohibits it. This reflects how *Qur'anic* interpretations can differ from country to country.

of their marriage. He remained faithful to her for 28 years until her death at which stage he was over 50 years of age.<sup>9</sup> This was contrary to the standard pre-Islamic practice of polygyny. It should be borne in mind that the Prophet only received the revelation at the age of 40. There is speculation, but no proof, that possibly a marriage contract existed between him and his wife specifying that she would be his only wife during her lifetime.<sup>10</sup> He also exhorted his son-in-law, Ali, not to take a second wife while his daughter Fatima was still alive.<sup>11</sup> The Prophet Muhammad only took several other wives after he formed the Medinan state<sup>12</sup> in an effort to consolidate ties within the newly established Islamic community for socio-political reasons. For example, he married the daughters of his two ministers, Abu Bakr and Umar respectively (both later became *caliphs*<sup>13</sup>), and in turn also gave in marriage his two daughters to the *caliphs* Uthman and Ali, to forge a blood relationship with them and in this way cementing family ties with these influential men.<sup>14</sup> The majority of his other wives hereafter were widows whose spouses were slain in battles in support of Islam. Because they were mainly Meccan immigrants, they could not return to the traditional support of their clans which they left in the first place to accompany and support Muhammad when he fled to Medina.<sup>15</sup> The *Qur'anic* verses limiting polygyny and exhorting monogamy were only revealed after Muhammad had married all his wives.<sup>16</sup>

As far as divorce is concerned, Islam introduced a waiting period, called *iddat*, the purpose of which is to effect reconciliation between the spouses and which starts after divorce has first been pronounced. This means that the divorce only becomes effective once the wife has completed three successive menstrual cycles or, if she was pregnant, with the termination of the pregnancy,<sup>17</sup> with maintenance being limited to these periods.<sup>18</sup> The divorce can thus be revoked at any time prior to completion of the waiting period and no remarriage is necessary. However, once this waiting period has been completed and the third divorce has been pronounced, the divorce becomes final and irrevocable. Divorce is not taken lightly and is discouraged through strong deterrents. The husband not only has to settle in full any unpaid portion of the wife's

<sup>9</sup> Haykal *The Life of Muhammad* (1976) 289.

<sup>10</sup> Ahmed *Women and Gender in Islam: Historical Roots of a Modern Debate* (1992) 49.

<sup>11</sup> Engineer *The Rights of Women* 159.

<sup>12</sup> Historically, the Prophet Muhammad himself established the first Muslim state in Medina in 620 CE (Kettani *Muslim Minorities in the World Today* (1986) 256-259. For more detail see Moosa *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with regard to the Recognition and Implementation of Muslim Personal Law (MPL)* Unpublished LLD dissertation (1996) 15.

<sup>13</sup> After the death of the Prophet, legal decisions were given by early *caliphs* who now led the people. The Caliphate followed the precedents set by Prophet Muhammad for a period of 30 years of Islamic history (Taji *Islamic Constitution* (1973) 25).

<sup>14</sup> Haykal *The Life of Muhammad* 290-291.

<sup>15</sup> Ahmed *Women and Gender in Islam* 52. See also n 14 *supra*.

<sup>16</sup> Haykal *The Life of Muhammad* 293.

<sup>17</sup> *Qur'an* chapter 65 verses 1;2;4.

<sup>18</sup> Incidentally, Islam reduced the one-year pre-Islamic waiting period of a widow to four months and ten days and her maintenance is thus limited to this period.

dower,<sup>19</sup> but should he after the completion of the waiting period wish to be reconciled with his former wife, she must first marry someone else, consummate this marriage and be granted a divorce from this other person. Thereafter she still has to undergo another waiting period if, and only if, she is released from this second marriage.<sup>20</sup> Divorce must be pronounced while the wife is not menstruating. She must therefore be free from any impurities. Two arbiters — one from each spouse's side — must be appointed in a bid to reconcile them. Two witnesses to the divorce are also required.<sup>21</sup>

The husband is said to have the unilateral right to initiate a divorce unless he (1) had delegated this right to the wife either as a condition of the marriage contract or at a later stage or (2) where agreement is reached between them that she can ask for a *khula* divorce as long as she, for example, returns part or all of her dower.<sup>22</sup> The last-mentioned two types of divorce form part of the five general categories of divorce spoken of by Islamic jurists. The other three involve the number of times (which ranges from one to three) the husband has to pronounce the formula of divorce for it to be effective. Without going into any detail it must be noted that one of the latter (three) categories of divorce, known as the “three-in-one” divorce, is the subject of much controversy. In terms of this type of divorce the husband pronounces the “requisite” three divorces in one sitting making the divorce unilateral, immediate and irrevocable. Bearing in mind the purpose of *iddat*, there appears to be no *Qur'anic* justification for this type of divorce since equal participation seems to be implicit in the *Qur'anic* injunctions in this regard. However, there appears to be a socio-historical reason for this. It was validated by Umar, the second *caliph* of Islam, to serve as a punitive measure imposed on Muslim men who took divorce lightly. It became an integral part of Islamic law and is still in practice today.<sup>23</sup> Today this type of divorce is still regarded as a most controversial issue among the conservative and modernist Muslims and in most Muslim countries divorce disputes are settled in court.

### 3 Position of MPL in South Africa from around 1652 up to the present

The first Muslims arrived at the Cape from Indonesia and Southern India around 1652–1658.<sup>24</sup> For approximately 300 years Muslims, have always practised their religion but despite having been granted formal freedom to practise their religion since 1804,<sup>25</sup> they could not give

<sup>19</sup> Dower is an important ingredient of a Muslim marriage. It is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage. It becomes the exclusive property of the bride.

<sup>20</sup> *Qur'an* chapter 2 verses 229–230.

<sup>21</sup> *Qur'an* Chapter 4 verse 35; Chapter 65 verse 2.

<sup>22</sup> Faruqi “Women's Rights and the Muslim Women” 1972 *Islam and the Modern Age* 76 83; Honarvar 1988 *The Journal of Law and Religion* 372–373.

<sup>23</sup> Rahman “A Survey of Modernization of Muslim Family Law” 1980 *International Journal of Middle Eastern Studies* 451 459–460; Engineer *The Rights of Women* 125–126.

<sup>24</sup> Davids *The Mosques of Bo-Kaap: A Social History of Islam at the Cape* (1980) xv.

<sup>25</sup> Davids *The Mosques of Bo-Kaap* xxi.

legal effect to their personal laws as social restrictions and political inequalities prevailed until recently.<sup>26</sup> The new democratic dispensation now allows for a change to the *status quo*. Muslims constitute an estimated 1,1%<sup>27 28</sup> of the total South African population compared to the approximately 66,5% Christians. South African Muslims in general belong to the *Sunni* school of law and are more or less equally divided between the *Hanafi* and *Shafi'i* schools.<sup>29</sup> There are several conservative *Ulama* or religious bodies of experts on Islamic law located in the various provinces in South Africa.<sup>30</sup> Although their decisions are of a binding nature upon the conscience of the Muslims, they lack the legal power to enforce them. This is due to the non-recognition of MPL. Their competence to apply Islamic law is questionable because members of these bodies do not necessarily have accredited local legal training. The previous minority government enquired into MPL through the South African Law Commission<sup>31</sup> in Project 59 on Islamic marriages and related matters, where a start was made on a comparative legal study of South African and Islamic law. The present government took this one step further. Both the interim (1993)<sup>32</sup> and final (1996)<sup>33</sup> South African Constitutions now not only guarantee freedom of religion and belief (section 14(1)), (now section 15(1)) but also makes provision within the Bill of Rights that legislation can be provided by the state for the recognition of any religious personal law (section 14(3)(a)) (now section 15(3)(a)(ii)) and for the recognition of Muslim marriages (section 14(3)(b)) (now section 15(3)(a)(i)). While there is no separation between "state" and "religion", the *right* to have MPL recognised is, however, not constitutionalised in either of these Constitutions.

<sup>26</sup> While the state gives partial legal validity to Muslim marriages for tax purposes, for example, non-recognition of MPL generally meant that marriages solemnized according to Islamic law are not recognized by the state. Consequently children born from such marriages (and therefore legitimate in terms of Islamic law) were stigmatised as illegitimate until recently. In terms of the Births and Deaths Registration Amendment Act 40 of 1996 these children are not to be registered as "children born out of wedlock" (section 1(c)) and "[f]or the purposes of this Act 'marriage' includes a . . . marriage solemnised or concluded according to the tenets of any religion . . ." (section 2 (a)). It must, however, be made clear that the substantive legal status of such children (born of marriages by religious rites) remains unaffected. See Nielsen and Van Heerden "Putting Humpty Dumpty Back Together Again: towards Restructuring Families' and Children's Lives in South Africa" 1998 *SALJ* 156 157. Further developments include the fact that in terms of the Divorce Amendment Act 95 of 1996 courts can refuse a divorce on religious grounds. The Cape High Court in the test case of *Ryland v Edros* 1996 4 All SA 557 (C) gave limited recognition to the Muslim marriage contract, provided that it was a monogamous union. For more detail on this case see Moosa *Analysis of the Human Rights and Gender Consequences of the New South African Constitution* 392.

<sup>27</sup> *Demographic Statistics* (1993) 9.

<sup>28</sup> This figure is approximated at 500 000: Cachalia *Legal Pluralism and Constitutional Change in South Africa: The Special Case of Muslim Family Laws* Unpublished paper read at a seminar *Approaches to the Study of Islam and Muslim Societies* hosted by the Department of Islamic Studies at the University of Cape Town 1991-07-17/19.

<sup>29</sup> Naudé "Islam in South Africa: A General Survey" 1985 *Journal Institute of Muslim Minority Affairs* 21 25.

<sup>30</sup> Naudé 1985 *Journal Institute of Muslim Minority Affairs* 28.

<sup>31</sup> For more detail in this regard see Moosa *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implications for the Muslim Woman* Unpublished LLM dissertation (1991) 22.

<sup>32</sup> Act 200 of 1993.

<sup>33</sup> Act 108 of 1996.

The present government has as yet not given any directive to any official body to investigate the legal recognition and formulation of MPL although it is expected that a Law Commission will be set up for this purpose.<sup>34</sup> Various Islamic bodies, *Ulama* and relevant organisations have now, in the light of the new political dispensation in South Africa, reached consensus on the need for the recognition of MPL and its implementation.<sup>35</sup> Muslims can only give practical legal effect to the religious freedom and protection of minorities as vouched for in the Constitution if due recognition is given to a reformed MPL and its implementation. Furthermore, MPL should be codified into a separate code of law which would form part of the statutory law of the South African legal system. The main reason for this (apart from the potential conflicts with the Constitution) is that definite conflicts exist between MPL and South African law.<sup>36</sup> *Ulama* are also asking for MPL to be implemented in special *Shari'a* courts.<sup>37</sup> As a consequence of such consensus being reached, a Muslim Personal Law Board was established late in 1994 to initiate the incorporation of MPL into the South African legal system.<sup>38</sup> Draft bills were prepared by this Board to provide interim relief in the areas of marriage and divorce. However, these bills were based on traditional interpretations of Islamic law and left much to be desired as far as women's rights were concerned. The Board proved problematic and was soon disbanded only to be replaced by two new controversial bodies. The Muslim community in South Africa is thus not united under one national Muslim Personal Law body.

#### 4 The constitutional position of MPL in South Africa

It appeared from the interim Constitution that the position of Muslim women in South Africa was not going to be any different, or better, than that of their international counterparts for the following reasons. The interim Bill of Rights failed to address the apparent conflict between the

<sup>34</sup> On 15 March 1997 the South African Law Commission conducted a preliminary workshop on the possible recognition of Islamic marriages and related matters.

<sup>35</sup> Whilst there is agreement that MPL should be recognised by the civil law, different opinions exist as to whether or not Muslims should be subjected to the provisions of the Bill of Rights. One view is that it governs all legislation (therefore MPL ought to be subject to it) and another is that it protects religious and customary provisions only and that its equality clause (section 8 (now section 9)), which demands equal protection and equality before the law for all men and women, does not affect or interfere with the interpersonal relations of MPL (therefore MPL ought to be exempt from it).

<sup>36</sup> It appears that the best option and solution to the application of MPL lies in codifying Islamic law and enacting a comprehensive bill or "uniform *Muslim* code" applicable to Muslims. This code should address minor variations in the four major schools of legal thought (jurisprudence) as well as considerations of desirability of reform to the present MPL with due regard to the peculiar circumstances existing in South Africa. Regard must also be had to the effective application of alternate tools to improve the status of women where reform might not be appropriate. See Moosa *Comparative Study* 152–168. The answer to the South African situation does not lie in adopting a secular uniform civil code because it will be rejected by the Muslim community and has failed to really redress the plight of women in countries where it does exist.

<sup>37</sup> The implementation of MPL is not, however, the focus of this paper.

<sup>38</sup> "Board gets established and prepares to draw up MPL bills" 1994 *al-Qalam* 4. As indicated in n 39, the possibility of dual/parallel systems of courts and the fact that it could invariably contradict the concept of equality and the serious constitutional implications this might have for Muslim women who might seek redress to constitutional inequalities originating from MPL, will not be addressed in this article.

human rights to religious freedom and equality between the sexes which were equally provided for. It was therefore possible that MPL, once recognised, could be treated as inviolable and exempt from the Bill of Rights. The government became a signatory to the Women's Convention CEDAW<sup>39</sup> in January 1993. CEDAW makes provision for states "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle".<sup>40</sup> Section 35(1) of the interim Constitution stated that a court of law must take cognisance of all international law applicable to the protection of human rights when interpreting the provisions of the Bill of Rights. However, CEDAW was at this stage not as yet ratified. These uncertainties had serious implications for Muslim women because the traditional formulation of MPL accords them a status unequal to that of men. It has to be clarified that while Islamic law and MPL endorses this inequality, Islam does not.

A call for MPL to be subject to the final Bill of Rights and other constitutional provisions, once it is recognised, has been successfully used to inform the submissions of various organizations to the Constitutional Assembly as is evident from the provisions of the final Constitution which now subjects a recognised MPL to the Bill of Rights (section 15(3)(a)-(b)).<sup>41</sup>

The fact that our Constitution specifically makes provision for recognition of religious laws and that regard be had to UN instruments when interpreting the Constitution (and further the ratification of some of these instruments like CEDAW<sup>42</sup>), shows a strong commitment on the part of the South African government to protect the rights of religious minorities. However, by subjecting MPL to the final Bill of Rights and ratifying CEDAW without any reservations, the state reinforces its commitment to ensure the birth of a transparent and equitable MPL.

As predicted and like the (broad provisions of the) interim Constitution, the final Constitution does not constitutionalise the right to have MPL recognised. However, once recognised, such laws must conform to the spirit of equality foundational to our Constitution. The challenges facing South African Muslims in this regard are enormous and unless Muslims succeed in their task, MPL will continue to function independently of the South African law.<sup>43</sup> Reform of personal (private) law must interact with and take cognisance of public law in order that

<sup>39</sup> The Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>40</sup> Part I: a 2(a) GA Res 34/180; 1979.

<sup>41</sup> See Moosa *The Interim Constitution and Muslim Personal Law: Whither South African Muslim Women?* (1995) Unpublished paper read at a conference *Towards the Final Constitution: A Critique of the Present Constitution from a Gender Perspective — the Way Forward* hosted by the Community Law Centre at the University of the Western Cape 1995-01-27.

<sup>42</sup> CEDAW was ratified by South Africa on 15 December 1995. In accordance with the procedure as set out in parts five and six of CEDAW, this document is now undergoing a process of simplification to place it in the South African context.

<sup>43</sup> This happened in Britain where special emphasis was placed on the human rights dimension of the issue: Poulter *The Claim to a Separate Islamic System of Personal Law for British Muslims* in Mallat & Connors (ed) *Islamic Family Law* (1990) 147 159.



they be able to accommodate each other. Thus, even if MPL is applicable to Muslims in South Africa, Muslims will have to face and come to terms with the constitutional and human rights implications of that MPL. Personal laws which discriminate against women cannot be given constitutional protection. At the very least, non-recognition of MPL would enable a few privileged Muslim women who are educated and informed to theoretically exercise a choice between MPL and South African law in regulating their personal affairs. However, for the vast majority of Muslim women there is no such choice. In addition, these women are divided over the question of gender and equality. The *state*, by setting such *minimum* ground rules, has taken the initiative in directing the process of MPL (independent of content). This implies that it is not going to be an agent in women's oppression as is the case in various Muslim and non-Muslim countries. It also guarantees that whatever the final shape of a code of MPL, it will provide for equality between the sexes and, moreover, allow for the achievement of this goal to be left in the hands of Muslims. Even though some *Qur'anic* references *do* allude to inequality of the sexes, it is argued in this paper that the spirit of equality implicit in Islam is compatible with the equality foundational to our Constitution and Bill of Rights and therefore with the subjection of MPL to the Bill of Rights.

Ultimately the ability of Muslims to resolve their differences will allow for a sustained recognition. Failure on the part of Muslims to comply with this condition will result in such a recognition being challenged and, if it still fails to conform, its ultimate dissolution. An unrecognised MPL will, however, force Muslims to utilise the secular law to overcome legal and practical difficulties. Conservative religious authorities would prefer a recognised MPL to be exempt from the Bill of Rights over a reformed MPL in line with secular law. It is contended that allowing such a state of affairs to continue is not at all conducive to the human rights culture we are working towards and establishing in South Africa. The avaricious behaviour of Muslim religious authorities and their failure to expedite this process of recognition because of an inability to deal effectively with the constitutional implications of a recognised MPL, could thus sabotage any hope to constitutionalise the recognition of MPL.

## 5 Can Muslim and non-Muslim countries help?

A study of the historical background of Islamic constitutions will reveal that there is no real certainty as to what constitutes Islamic constitutional law and there appears to be about five different strands of thought in this regard.<sup>44</sup> Some Muslim countries<sup>45</sup> have therefore opted

<sup>44</sup> Nolte "The Rule of Law in the Arab Middle East" 1958 *The Muslim World* 295 298; Maudoodi *The Islamic Law and Constitution* 9 ed (1986) 5; Hasan (*Guideline of an Islamic Constitution* (1978); Ishaq "State and Constitution in Islam" 1984 *Islamic and Comparative Law Quarterly* 1 5-6; Hamidullah "The First Written Constitution of the World" 1941 *The Islamic Review* 334; Taji *Islamic Constitution* 26.

<sup>45</sup> Reference to a "Muslim country" implies that the majority of its population are followers of Islam. 39 of the approximately 41 Muslim countries have adopted written constitutions. Asia has 22 Muslim countries, Africa 16 and Europe 3. See Jain "An Initial Project Report. Constitutional Law in Muslim Countries" 1985 *Islamic and Comparative Law Quarterly* 303 305.

for Western models in this regard. This uncertainty has had dire consequences for Muslim women. Although all modern Islamic governments claim to entrench equality in their constitutions they rarely uphold these ideals in reality. This applies equally to "reforms" to MPL.

Women are perceived in Muslim countries to have equality with men in public rights and duties, but not in the private sphere of the family, which is mainly or exclusively regulated by MPL. However, close examination of some of the constitutions and other pertinent legislation in some Muslim countries shows that even such professed equality in the public sphere is not always unqualified. In Egypt, for example, the conflict between MPL and the Constitution has not been resolved. The 1971 Egyptian Constitution, as amended in 1980, provides for equality between the sexes but adds the qualification that the state will ensure women's equality with men only in so far as it does not conflict with the Islamic law in this regard.<sup>46</sup> This pattern is evident in, for example, Egypt, Algeria, Nigeria, India, Pakistan and Malaysia, although countries like Indonesia and Tunisia do depart from it.

The same pattern of conflict is evident in UN human rights instruments which these countries have either become signatories to or ratified with reservations in so far as the provisions of equality in these instruments might conflict with MPL. The United Nations Charter (1945) which is purported to be legally binding on all modern Islamic states and the Universal Declaration of Human Rights (UDHR) (1948) which follows it provide equally for religious and women's rights but neither document foresees a potential conflict between these two kinds of rights. Other international measures include CEDAW (1980) of which many modern Muslim countries, like Egypt, for example, and non-Muslim states, like India, are signatories but they have placed reservations on certain of its articles where it conflicts with MPL. It appears as if the United Nations goal of equality between the sexes can never come to fruition in Muslim countries as it is inconsistent with the traditional interpretations of Islam practised today in these countries and which disadvantage women.<sup>47</sup> It appears that Muslim and non-Muslim countries and their treatment of UN instruments cannot be of much help to us. While the problem remained unresolved in the interim South African Constitution, the final Constitution certainly did not follow the trend set by these countries.

However, subjecting a code of MPL to the final Bill of Rights appears to be a real safeguard for women only if and when MPL is in fact recognised. While an effective MPL remains unrecognised, the status problems faced by Muslim women whose lives are governed by both religious and secular laws, will continue. While it might be possible to bring such private relationships within the ambit of the Bill of Rights (and some human rights instruments) in view of the greater scope for

<sup>46</sup> A 11 and 40; Hill "Comparative and Historical Study of Modern Middle Eastern Law" 1978 *The American Journal of Comparative Law* 279 296.

<sup>47</sup> Bruce "Work of the United Nations Relating to the Status of Women" 1971 *Revue des droits de l'homme* 365-366.

horizontality in the final Constitution,<sup>48</sup> Muslims (especially women) should not have to resort to alternative constitutional tools of interpretation and other mechanisms to eventually “get to” their rights. Furthermore, comparative experience highlight that legislative and judicial intervention is not enough to secure effective change. Women will have to contend and deal with the fact that there is no guarantee that legal reform, whether constitutional or via statute law, will result in the equality of the sexes. International efforts in reforming MPL proved to be only partly effective in redressing the plight of Muslim women. Even though the final Constitution promotes and protects the human rights of women through national machinery, their powers do not extend beyond the Constitution. Gradual social reform within the Muslim community, along with active participation by Muslim women, appear to be the more realistic safeguards and long term solutions for effective improvement to the status of Muslim women. Religious and customary institutions need to co-operate with each other to achieve such reform. Patriarchal, cultural and customary practices must be distinguished from purely religious practices even though they do overlap. Societal conscientisation regarding rights, effective access to justice and enforcement of decisions should be considered as important factors to achieve this goal.

## 6 Conclusion

This paper concludes that constitutions should not just be viewed as the means with which to protect individual rights but should also be regarded as the means through which social change can be achieved.<sup>49</sup> Because the lives of most Muslim women are governed by cultural and religious restraints, the effective participation of an informed Muslim society in achieving this change is of more practical value than bills of rights embodied in these constitutions. Muslim women, as an integral part of Muslim society, should not underestimate the importance of their role in the achievement of gender equality.

Finally, women, Muslim and otherwise, need “to ask afresh who we [really] are, what we [really] want, and if we are [really] willing to begin to create a new order of things”.<sup>50</sup>

## OPSOMMING

Moslem persoonlike reg word in baie lande soms tot die nadeel van Moslemvroue toegepas. Die situasie in Suid-Afrika word in oënskou geneem. Dit word deur 'n kort vergelyking van grondwette van verskeie Moslemlande gevolg. Die huidige situasie in Suid-Afrika, waar tot op hede ook geen kode van Moslem persoonlike reg erken word nie, bied 'n unieke geleentheid vir die toepassing daarvan tot voordeel van vroue. Die interim (1993) en die finale (1996) Grondwette

<sup>48</sup> See, for example, section 8 (1) (application clause), section 9 (4) (equality clause) and section 39 (2) (interpretation clause).

<sup>49</sup> Mohamed “Collective Rights, Transformation and Democracy: Some Thoughts on a New Constitutional Dispensation in South Africa” 1992 *Africa Development* 5 7; PC Report 1/1990 43 (President’s Council Report of the Committee for Constitutional Affairs on Decision-Making and Conflict Resolution Mechanisms and Techniques in Constitutional Systems.)

<sup>50</sup> Garvey & Aleinikoff *Modern Constitutional Theory: A Reader* 2 ed (1991) 409.

waarborg vryheid van godsdienst en maak ook in die Handves van Menseregte voorsiening daarvoor dat wetgewing vir die erkenning van godsdienstige persoonlike reg en Moslem huwelike deur die Staat uitgevaardig *kan* word. Voorts, die *reg* om Moslem persoonlike reg erken te kry is nie (grondwetlik) in enigeen van hierdie Grondwette vervat nie. Anders as die interim Grondwet egter, stel die finale Grondwet 'n erkende Moslem persoonlike reg onderhewig aan die Handves van Menseregte. Hierdie maatreël sal egter slegs ware beskerming aan Moslemvroue bied en vir hulle van werklike waarde wees *indien* en *wanneer* Moslem persoonlike reg inderdaad erken word. Die verhouding tussen die staatsreg en Moslem persoonlike reg moet daarom uiters versigtig oorweeg word. Daar moet nie te veel staatgemaak word op grondwette om verandering teweeg te bring nie. Die herstel van maatskaplike onregte kan slegs bereik word indien 'n ingeligte Moslem gemeenskap gewillig is om effektief aan so 'n proses deel te neem. Versuim deur Moslems om die probleme wat hulle in die gesig staar aan te spreek en op te los sal daarom die voortsetting van die *status quo* van Moslem persoonlike reg tot gevolg hê, naamlik die volgehoue onafhanklike bestaan en toepassing daarvan in die Suid-Afrikaanse reg. Dit is nie 'n lewensvatbare opsie nie aangesien die oorgrote meerderheid van Moslemvroue onderhorig is aan mans en manlik oorheerste *Ulama*-liggame wat voortgaan om Moslemvroue se lewens volgens die tradisionele uitleg van Islamitiese reg te reël. Derhalwe, al sou Moslem persoonlike reg steeds nie erken word nie, sal dit steeds toegepas word en sal die statusprobleme van Moslemvroue, wie se lewens deur religieuse sowel as sekulêre reg beheers word, voortduur.