

I am optimistic that reform is possible and that, if it is carried out sensibly and with sensitivity, it will take root. If uncertainty is to be avoided, it is important that legislatures make express provision for the extension of relevant new or amended legislation to customary law. For example, it is imperative that the Age of Majority Act be amended to make it expressly applicable to the area of African traditional law. This should be accompanied by the repeal of section 11(3)(b) of the Black Administration Act which institutionalises the perpetual minority of African women.

A pioneering role can also be played by the judiciary. It is worth noting that fundamental changes in customary family law have been ushered in by the courts over the years, such as the requirement of spousal consent for marriage, the modernisation of maintenance rules and the importation of the "best interests of the child" standard into matters of custody and guardianship.

The courts now have the opportunity to apply constitutional principles and rights in the development of a fairer legal system. When the Bench becomes representative of the population of South Africa as a whole, this important role will be easier to fulfil than many pessimists think.

Endnotes

1. Constitution of the Republic of South Africa Act 200 of 1993, hereafter referred to as the interim Constitution.
2. The Constitution of the Republic of South Africa Amendment Act 2 of 1994, which inserted customary law into the matters within the legislative competence of provinces listed in Schedule 6.
3. Inserted by the Constitution of the Republic of South Africa Amendment Act 2 of 1994.
4. Section 229 reads:
Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority.
5. Act 21 of 1978.
6. Act 38 of 1927.
7. Section 25(3) states:
Every accused person shall have the right to a fair trial, which shall include the right –
(a) to a public trial before an ordinary court of law within a reasonable time after having been charged.

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13

The interim Constitution and Muslim personal law¹

NAJMA MOOSA

Introduction

Muslim women face the same status problems in the private and public spheres of life as their non-Muslim counterparts but it is alleged that, as members of a particular religious community, they experience another inequality. To assess this assertion, it is necessary to consider how gender issues are dealt with not only in terms of Islamic law, but also in the light of the authentic spirit of the Koran.² With an eye to how South Africa's final constitution might address the status of Muslim personal law and the related question of the position of Muslim women, this chapter examines the issue of Muslim personal law in South Africa and the constitutional provisions relating to the rights of women in a number of Muslim countries. It argues for the need to reform and codify Muslim personal law and for its recognition by and subordination to the constitution. However, it also stresses the importance of the reform project being in Muslim hands and the need for those involved "to ask afresh who we are, what we want, and if we are willing to begin to create a new order of things".³

Islam in South Africa

The first Muslims arrived at the Cape from the Dutch colonies in the East Indies (now Indonesia) and the coastal regions of southern India between 1652 and 1658.⁴ Although they were granted freedom to practise their religion in 1804,⁵ the social and political inequalities prevailing in South Africa until recently prevented this from having full legal effect. However, it is anticipated that the rapid changes taking place in South Africa since the democratic elections of 1994

will rectify this situation.

Central Statistical Services data⁶ reveal that Muslims constitute an estimated 1,1 per cent of the South African population (excluding inhabitants of the former "independent" homelands of Transkei, Bophuthatswana, Venda and Ciskei),⁷ while Christians make up 66,5 per cent. South African Muslims in general belong to the Sunni⁸ school of Islamic law.⁹

While the South African Law Commission has been engaged on a comparative study of South African and Islamic law,¹⁰ its latest progress report records a temporary halt to the project.¹¹ The reasons are twofold. In the first place, the previous minority government gave assurances, albeit at commission level only, that the *modus operandi* of Muslim personal law would be determined by Muslims themselves. Hence, the South African Law Commission had to leave room for this kind of discretion.¹² Secondly, the present government of national unity has not instructed the commission or any other body to investigate the possible recognition of Muslim personal law.¹³

In the interim, however, the *ulama* or Muslim religious bodies composed of experts on Islamic law have responded to a questionnaire issued by the commission, supporting the incorporation of Muslim personal law into the South African legal system.¹⁴ These *ulama*, established in some of the erstwhile provinces of South Africa, consist of the *jamiats* of Natal and Transvaal, the Muslim Judicial Council of the Western Cape and the *Maajlisul Ulama* of Port Elizabeth in the Eastern Cape.¹⁵

Although the decisions of these bodies are theoretically binding upon the consciences of Muslims, their competence to apply Islamic law is often questionable, since their members frequently lack accredited legal training. In any event, the long-standing non-recognition of Muslim personal law by the South African state has meant that the *ulama* have lacked the legal power to enforce their decisions.

This situation is almost certain to change, given the fact that the interim Constitution of the Republic of South Africa,¹⁶ which is scheduled for finalisation by April 1999,¹⁷ not only guarantees freedom of religion and belief (section 14(1)) but also provides for the enactment of legislation recognising religious personal law (section 14(3)(a)) and Muslim marriages (section 14(3)(b)). It may be that the establishment of the new political order underwritten by

the Constitution is what persuaded the *ulama* and other local Islamic bodies to finally reach consensus on the need for state recognition of Muslim personal law.

In any event, the result was that a Muslim Personal Law Board was inaugurated in Durban on 14 August 1994 and charged with working for the incorporation of Muslim personal law into the South African judicial system.¹⁸ Although the board is preparing draft bills aimed at providing interim relief in the areas of marriage and divorce,¹⁹ its main task is conceived as hammering out how Muslim personal law might be applied, by "ordinary courts or special family courts presided over by Muslim judges", and interpreted.²⁰

However, some controversy surrounds the establishment and composition of the board. Although participation by the range of Muslim organisations is emphasised in the working of the board, critics point to a need for greater transparency and inclusivity, emphasising the principle that women's experiences should inform the drafting of any proposals that affect them.²¹ In addition, there are differences of opinion over whether the recognition of Muslim personal law would mean that Muslims were exempted from the provisions of Chapter 3 of the Constitution, notably the equality clause (section 8), where they conflict with Muslim personal law. In other words, the question is whether the Constitution will be supreme (section 4) or whether Muslim personal law will take precedence in respect of Muslims. The latter scenario has serious implications for Muslim women since they are accorded a status inferior to men by Muslim personal law, although, significantly, not by Islam itself. In any event, this apparent conflict between the right to freedom of religion and the right to equality is one of the issues that writers of the final constitution will have to address.

Women under Islamic law

Explanation of the legal and social status of Muslim women requires some reference to the Islamic law which evolved in the seventh century of the Common Era (CE) in the predominantly urban environment of the Arabian peninsula and lower Mesopotamia.²² The two primary sources of Islamic law, the Koran and Sunna, developed during the 23 years of Muhammad's prophethood. The Koran, regarded by Muslims as the literal word of God revealed piecemeal

to Muhammad over this period, emerged as a book after his death in 632 CE. It is not considered a book of law, although it contains approximately 80 verses dealing with legal matters, mostly to do with the family and inheritance. The Sunna are the received customs associated with Muhammad, also compiled after his death into a book called *Hadith*. To some extent this can be considered a biography of Muhammad.²³

Of some 100 verses dealing with women's issues in the Koran, only a few are devoted to the Islamic status of women. Thus it is not surprising that varying interpretations of this status have developed.²⁴ In addition, the fourth chapter or *sura* of the Koran is devoted to women, a significant feature when viewed in the context of seventh century patriarchy and misogyny. Indeed, Islam afforded numerous improvements to the lives and rights of women in the Arabian community. However, a flexible and gradual approach was essential if Islam was to survive in the hostile milieu into which it was born, and if the religious bond of comradeship and equality was to replace pre-Islamic paternal and tribal ties.

Modernist Muslim scholars make an important distinction between verses in the Koran that are normative or of enduring relevance, and those whose relevance is confined to the context of Muhammad's fledgling community.²⁵ Their argument is that the moral or ethical norms relating to the status of women contained in the Koran are at least as important as its specific legal rules.²⁶ In other words, their contention is that it is not the spirit of Islam, as revealed in its primary sources, that discriminates against women. Rather it is the practice of an Islam distorted by cultural influences during the centuries of its development and its own early readmission of patriarchy after the death of Muhammad.²⁷

The crucial point is that the Koran is separated from the classical formulation of Islamic law²⁸ by processes of legal development lasting more than two centuries. During this period the Koranic norms underwent considerable dilution, often to the detriment of women.²⁹ In other words, classical Islamic law is not canonical. Rather, it is common law, codified several centuries after Islam came into existence.³⁰ Not only has the Muslim approach to the issue of women's rights been historically diverse³¹ but, more significantly, the changes introduced by Islam in relation to women's rights were revolutionary in the context of seventh century Arabia.

It is irrelevant to an exploration of the original spirit of Islam that these changes do not appear dramatic against the backdrop of modernity, or that the status of Muslim women today compares unfavourably with that of their Western counterparts.

However, it is precisely modern and Western influences that have led to the enactment of legal reform in a range of Muslim countries. Such reform has been restrictive in some cases, for example in Egypt and Pakistan, less restrictive in Iran and Iraq, and non-restrictive in countries such as Turkey and Tunisia.³² In some Islamic countries, Saudi Arabia, for example, there has been no attempt to reform Muslim personal law.³³

Various indicators, such as the regulation or abolition of polygyny and the secularisation of inheritance law, have been used to assess whether the status of women in Muslim countries has improved as a result of such reforms. However, close examination reveals that personal law reform in most Muslim countries, especially as it pertains to women's rights, has been minimal and slow, bringing only superficial relief to women, contrary to the clear Koranic injunctions in this regard. Even where reform has been non-restrictive, as in Turkey, it has not delivered substantial improvement to women's lives.³⁴ This conservatism in the realm of personal law stands in sharp contrast to the liberal adoption of secular commercial and criminal codes.

Thus it is the case that in many respects the position of Muslim women is less favourable today than it was in the early days of Islam. However, this is not to support the contention that discrimination against Muslim women is religiously based. To the contrary. It is, in fact, deviation from the original spirit of Islam, as a result of patriarchal interpretations, cultural or customary influences, illiteracy and ignorance, that is responsible for the oppressed position of Muslim women.³⁵

That this oppression may appear most dramatic in the domestic sphere is the result of the tendency in Islamic states towards secularisation in the public sphere, while at the same time leaving the private realm to regulation by Islamic law. Under the influence of the modern trend towards recognition and protection of human rights, constitutions guaranteeing equal rights to all citizens exist in many countries with Muslim communities and even in some Islamic states. Obviously this sets up contradictions and tensions since such

constitutional provisions conflict with the Muslim personal law codes that privilege men over women.³⁶ The following comment in respect of the awkward dichotomy experienced by Egyptian women, in their roles as citizens of modern states and members of a religious community, could apply to all Muslim women:

In a division that was never precise, the state increasingly came to influence their public roles, leaving to religion the regulation of their private or family roles. The structural contradictions and tensions this created have to this day never been fully resolved.³⁷

Reaction to the challenge posed by modern concern with human rights, particularly as it relates to the status of women, has divided Muslims into three main camps: modernists, conservatives and fundamentalists.³⁸ The modernist minority is reformist, embracing Western ideals of emancipation. Their view is that Islam itself, properly understood, establishes complete equality between the sexes in all spheres, public and private. Conservatives and fundamentalists, between whom there is not much ideological difference, take the view that Islam restricts equality between the sexes to the sphere of religious belief and observances such as prayers, fasting, charity and pilgrimage. Such observances are essentially what determines whether a person is Muslim, and it is this part of Islam that remains practically static, creating a kind of umbrella identity which unifies Muslim people of various cultures. While what one may call the "apologetic-progressive" stance of the conservatives does allow some openness to adaptation and reform, the scriptural activism of the fundamentalists rules out any possibility of change.³⁹

Strange as it may seem, Muslim feminists are also aligned with one or other of these three approaches. Hence, their perception of inequality and the need for reform is dependent on the particular ideology they follow. While a minority have either abandoned Islamic law in favour of a secular civil code or wish to do so, most argue that their feminism resides within Islam, rather than deriving from any secular base.⁴⁰ While the goal of the radical few is the achievement of equality in both the public and private spheres, even if this would mean living outside of Islam, most Muslim feminists are fighting for liberation within the religious context. Thus, unlike their Western counterparts, whose struggles are focused in the

public sphere, Muslim feminists are concentrating their efforts on the reform of Muslim personal law, in other words, in the domestic or traditionally private realm.⁴¹

Constitutional conundrums

A study of the historical background of Islamic constitutions reveals uncertainty about what constitutes Islamic constitutional law and a variety of approaches to the issue.⁴² Some Muslim countries⁴³ have therefore opted for a Western model. However, while all modern Islamic states claim that the right to equality is entrenched in their constitutions, they rarely uphold this right in reality. The same dichotomy between theory and practice pertains to "reforms" of Muslim personal law enacted in these states.

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 Muslim personal law. However, close examination of the constitutions and other pertinent legislation in Muslim countries shows that even such professed equality in the public sphere is not unqualified. This pattern is evident in Egypt, Algeria, Nigeria, India, Pakistan and Malaysia, although countries like Indonesia do deviate from it.

In Egypt, the Civil Code of 1947 was the culmination of efforts towards modernisation, including changes, albeit restrictive, to Muslim personal law. Conflict between Muslim personal law and modern commitment to the notion of equality was dealt with in the 1971 Egyptian Constitution, as amended in 1980, by providing that the state would ensure women's equality with men only in so far as it did not conflict with Islamic law.⁴⁴

In Algeria, Muslim personal law is governed by the conservative Family Code of 1984. Comprised of three volumes, all of which reflect the inequality of the sexes in the private sphere, the Family Code stands in direct "contrast with the legal and constitutional rights of equality pledged in the public realm".⁴⁵ Thus, as in Egypt, commitment to equality of the sexes articulated in the Algerian Constitution of 1989⁴⁶ is all but meaningless.

Mayer⁴⁷ sums up the current situation in Algeria as follows:

The stage has been set in Algeria for reconsidering the relationship between constitutional law and shariah-based law. The questions

that occur in this context are relevant ... for other Muslim countries where similar inconsistencies between constitutional guarantees of equality and shariah-based personal status rules persist. Will ... Algerian women ... be better able to challenge the discriminatory features of the 1984 law on constitutional grounds? Or will it turn out that, despite the assurance that the Algerian Constitution is the supreme law, the 1984 shariah-based personal status rules will in practice be treated as inviolable?

A similar situation exists in the predominantly Muslim north of Nigeria. Although the 1979 Nigerian Constitution prohibits discrimination on grounds of sex or religion, among others, the "more common pattern ... appears to be acceptance of Islamic law in family matters, with minimal interference within well-defined boundaries".⁴⁸

In India, where Muslims constitute a minority, Muslim personal law is governed by the Muslim Personal Law (Shariat) Application Act of 1937 and enjoys statutory recognition as a separate code. Although in force at the time of the commencement of the Indian Constitution and clearly inconsistent with it, Muslim personal law was construed by the Indian courts to be exempt from constitutional scrutiny on the basis that it was not among "laws in force".

Thus, for Muslim women in India it is of little help that article 13(1) of the Constitution stipulates that all laws inconsistent with the fundamental rights it guarantees in Part III will be void to the extent of such inconsistency. Nor does the right to equality before the law and equal protection of the law afforded by article 14, or the article 15 prohibition of discrimination on grounds of sex and religion, among others, mean a great deal in practice.⁴⁹ Muslim personal law enjoys a large degree of immunity to state interference and regulation in India, creating a "deplorable situation" for Muslim women.⁵⁰

In Pakistan, apart from the Dissolution of Muslim Marriages Act of 1939 and the Muslim Family Laws Ordinance of 1961, there has been no codification of Muslim personal law.⁵¹ However, unlike their counterparts in secular India, Muslims in theocratic Pakistan have made slow but steady progress in reforming Muslim personal law.⁵² Nevertheless, the same pattern of constitutional subordination to Muslim personal law is evident. The 1973 Constitution of Pakistan itself exempts the Muslim Family Laws Ordinance of 1961

from challenge in any court and from article 8 of its Fundamental Rights, which provides that laws inconsistent with those fundamental rights will be void. Thus, constitutional guarantees of the equality of citizens and freedom from discrimination on the basis of sex, are meaningless for women in Pakistan.

In Malaysia, a federation of 13 states with a 50 per cent Muslim population, the federal Constitution is based on a Western model and concept of democracy. However, the commitment to human rights that is part of this model is subverted by constitutional recognition of Muslim personal law and provisions enabling its regulation by state governments. As a result, there is little uniformity, except in so far as most states have opted to codify rather than reform Muslim personal law. What is uniform, however, is the fact of conflict and contradiction between constitution and Muslim personal law.⁵³

Indonesia, with a 90 per cent Muslim population, is an exception to this pattern, at least in respect of national marriage laws which were unified in 1975 for all sections of the population, regardless of religion. Although there was resistance from Muslims, these marriage law changes resulted in modifications to Islamic law. To the extent that Islamic law is part of the new marriage laws, it is part of the positive law of Indonesia and the state is therefore established as an authority in the administration of such law and as an arbiter of its legitimacy.⁵⁴

International instruments

The pattern of conflict between modern constitutions and Muslim personal law outlined above, and its resolution in favour of Muslim personal law, applies also to the position of Muslim states in relation to international human rights instruments such as the United Nations Charter of 1945 and the Universal Declaration of Human Rights (1948). While both documents provide for both religious and women's rights, neither foresees a conflict between these two kinds of rights. In respect of more recent and explicit instruments, such as the 1980 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Cedaw), the strategy of Muslim states and those with significant Muslim communities has been to become signatories but with reservations in respect of articles that conflict with Muslim personal law.

The Egyptian stance on article 16 of Cedaw provides an example. The article requires complete equality between men and women in all matters relating to marriage and family relations during a marriage and upon its dissolution. While Egypt has become a signatory to Cedaw, it is with the explicit reservation that its obligations in terms of article 16 should not prejudice Islamic shariah provisions.⁵⁵ Similarly, India has placed a reservation on its signature of Cedaw in respect of both article 16 and article 5, which requires states party to the convention to work towards eliminating prejudicial customary practices that maintain inequality between the sexes. The reservation subordinates Indian compliance with the convention to its "policy of non-interference in the personal affairs of any community without its initiative and consent", rationalised on the basis of "India's desire to safeguard the rights of its religious and ethnic minorities".⁵⁶ Pakistan has not yet become a signatory of Cedaw but the government has indicated that it intends to sign the document with similar reservations.⁵⁷

In summary then, it appears that the Cedaw goal of equality between the sexes is unlikely to be realised in Muslim countries, even in those that have signed the convention, since it is a goal in direct conflict with Islam as it is practised today.⁵⁸ This is true also in respect of those Muslim states which claim that equality between the sexes has been achieved, as is evident from a cursory inspection of both personal and public law in these countries.⁵⁹

Muslim women in South Africa

The interim Constitution of South Africa includes a Bill of Rights which, among other things, outlaws discrimination on grounds of sex (section 8). The question is how such safeguards of fundamental rights might coexist with recognition of Muslim personal law. Put differently, one might ask what the chances are for Muslim women in South Africa to reap the benefits of the Bill of Rights, given the failure of similar instruments to afford protection to Muslim women elsewhere. Finally, the question could be formulated in terms of conflicting rights: will the right to equality take precedence over the right to religious freedom?

There is, of course, another fact for women to contend with: there is no guarantee that legal reform, whether constitutional or statutory, will deliver real equality between the sexes. For Muslim

women, the achievement of real equality lies on the other side of reformation of Muslim personal law in line with the true Koranic spirit. The worst that could happen for Muslim women in South Africa is that Muslim personal law remains unrecognised and therefore unproblematised.

Section 35(1) of the Constitution provides that, in interpreting the provisions of the Bill of Rights, a court of law "shall ... have regard to public international law" of relevance to the protection of human rights. Clearly, Cedaw would qualify as relevant in relation to the rights of women and it could be argued that this is so irrespective of ratification of the convention by the South African government.⁶⁰ However, the Women's Charter adopted by some 100 women's organisations participating in the National Women's Coalition and handed over to the Constitutional Assembly on National Women's Day in 1994, seeks more explicit recognition for Cedaw in the final constitution.

Submitted in the hope that it will be attached as a supplement or interpretive guideline to the final bill of rights, the charter provides in article 9 that "Custom, culture and religion shall be subject to the equality clause in the Bill of Rights". Representing a distillation of the Cedaw requirement of state signatories "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation ... and to ensure, through law and other appropriate means, the practical realisation of this principle",⁶¹ such a provision, if adopted, would settle the questions posed in the first paragraph of this section.

However, even if the Women's Charter does acquire constitutional status, a word of caution would be in order, since "the record of equality litigation in countries as diverse as ... India and the USA, reminds us that a bill of rights is a double-edged sword whose high-sounding language of equality and rights is not always translated into justice".⁶² And, in the absence of an explicit settlement of the conflict between the Bill of Rights and Muslim personal law, it may be that, despite the equality clause, the Commission for Gender Equality provided for in the interim Constitution, and Constitutional Principle V,⁶³ Muslim women will continue to suffer subordination. Indeed, this has been the case not only in Muslim countries but also in secular India, notwithstanding election promises made to women.

There are, in fact, pointers to the possibility of such an outcome in the interim Constitution itself. Section 4(1), while making the Constitution "the supreme law of the Republic", also allows for the possibility that laws or acts inconsistent with the Constitution may be permitted if so "provided expressly". It could also be argued that section 33(1) opens the way for subordination of the equality clause to Muslim personal law by providing for limitation of the rights entrenched in Chapter 3 by "law of general application", which would include customary law⁶⁴ and, by implication, Muslim personal law once it is recognised.⁶⁵ However, the provisos attached to such limitation would appear to make this argument untenable.⁶⁶

More difficult to dismiss is the argument that Muslim women will be among the victims of the fact that the Bill of Rights appears to operate only vertically, that is, is enforceable only against the state.⁶⁷ If this is true of the final constitution, then it is difficult to see how challenges to an unreformed Muslim personal law might enjoy constitutional support.

In the light of the fact that neither international human rights instruments nor egalitarian provisions incorporated into the constitutions of Muslim states have been effective in providing relief for Muslim women, it is clear that legal reform is not necessarily the total answer. It may be that gradual social reform within the Muslim community is the only hope for Muslim women. In this regard it is necessary to emphasise again that the supposed androcentric nature of Islam is nothing more than a fiction sustained by ignorance. Therefore, although some Muslim personal laws are in clear conflict with the principle of gender equality, it would be wrong to conclude that Islam itself is antipathetical to equality between the sexes. Indeed, "as women become effective participants in Muslim society, Islam will be better able to cope with the realities of the twenty-first century".⁶⁸

Conclusion

The best option for the recognition and application of Muslim personal law in South Africa lies in the codification of Islamic law and enactment of a comprehensive bill or "uniform Muslim code" applicable to Muslims. Such a code should address variations in the four major schools of Muslim legal thought as well as the desirability of reform to existing Muslim personal law. A secular civil code,

intended to apply uniformly to all citizens, would be rejected by the Muslim community. Moreover such codes, where they do exist, have failed to offer significant redress to Muslim women.

It is too ambitious to expect the process of reform of Muslim personal law to be set in motion by a call for the reinterpretation of Islam and the Koran, as suggested by some academics at a conference on "Islam and Civil Society in South Africa" held at the University of South Africa in August 1994.⁶⁹ Instead, reform must be addressed in line with the true Koranic spirit and in the context of an evolving South Africa.

The relationship between constitutional law and Muslim personal law must be very carefully considered. The constitution cannot protect Muslim personal law if the necessary justification and legitimation for it is lacking. Arguments to the contrary notwithstanding, it is all but certain that freedom of religion will be guaranteed only in so far as it does not violate other fundamental rights.

Although there are opposing voices, the general hope in the Muslim community of South Africa seems to be for Muslim personal law to be included in the ambit of the final constitution and in accord with the provisions of its bill of rights. The challenges facing the Muslim Personal Law Board of South Africa in this regard are enormous. Unless it succeeds in its task, the result will be continuation of the status quo, namely the functioning of Muslim personal law independently of the South African law.⁷⁰

At the very least, the board should enable Muslim women to exercise a choice. In reality, however, the vast majority of Muslim women are subject to men and male-dominated religious bodies who continue to regulate their lives in accord with the traditional interpretations of Islamic law. Subordinating Muslim personal law to the bill of rights will ensure that, whatever the final shape of a code of Muslim personal law, it will provide for equality between the sexes and, moreover, in Muslim terms.

It is in this regard that the following poignant judicial rumination seems appropriate as a conclusion:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court

can save it; no constitution, no law, no court can even do much to help it.⁷¹

Endnotes

1. The Koran is a religious text considered by Muslims to be the literal word of God. It is a primary source of Islamic law and 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 difference between various Muslim countries. The term "Muslim personal law" has been coined by various Muslim countries and jurists because it pertains to the personal sphere of marriage, divorce, inheritance, polygyny, custody and guardianship. All laws affecting the status of Muslim women have historically been relegated to Muslim personal law. For more detail see N. Moosa, "Comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman", unpublished master's thesis, University of the Western Cape (1991).
2. The Koran is separated from the classical formulation of Islamic law or shariah by a process of legal development lasting more than two centuries. It is common for Islamic law, which is the interpretation and application of the primary sources by early Muslims, to be mistaken with Islam itself.
3. J. H. Garvey & T. A. Aleinikoff, *Modern Constitutional Theory: A Reader* (Minnesota, West Publishing Company, 1991) 409.
4. A. Davids, *The Mosques of Bo-Kaap: A social history of Islam at the Cape* (Cape Town, South African Institute of Arabic and Islamic Research, 1980) xv.
5. Davids, *Mosques*, note 4 at xxi.
6. Demographic Statistics (1993) 9.
7. This figure is approximated at 500 000; see F. Cachalia, "Legal Pluralism and Constitutional Change in South Africa: The Special Case of Muslim Family Laws", paper presented at seminar on "Approaches to the Study of Islam and Muslim Societies", University of Cape Town, 17-19 July 1991.
8. The four major Islamic schools of law were established in the eighth century and named after their founders, namely Hanafi, Maliki, Shafi'i and Hanbali; see J. L. Esposito, *Women in Muslim Family Law* (New York, Syracuse University Press, 1982) 2. These together comprise the Sunni (traditionalist) school.
9. They are more or less equally divided between the Hanafi and Shafi'i schools. See J. A. Naudé, "Islam in South Africa: A General Survey", *Journal Institute of Muslim Minority Affairs* (1985) 25.
10. Project 59, on Islamic marriages and related matters.
11. South African Law Commission, *Twentieth Annual Report 1992* (1993) 42.
12. Moosa, *Comparative Study*, note 1 at 169.
13. A. K. Toffar, "Muslim Personal Law in a Non-Muslim State", paper presented at workshop on "Islamic Personal Law in South Africa: Its Future Position", Islamic Unity Convention, Cape Town, 16 October 1994.
14. Moosa, *Comparative Study*, note 1 at 172-88.
15. Naudé, "Islam in South Africa", note 9.
16. Act 200 of 1993, hereinafter referred to as the Constitution. See J. C. Bekker & G. Carpenter (eds), *Butterworths Selection of Statutes and Constitutional Law* (Durban, Butterworths, 1994); D. Basson, *South Africa's Interim Constitution: Text and Notes* (Cape Town, Juta, 1994).
17. Basson, *Interim Constitution*, note 16 at xxiii.
18. "Board gets established and prepares to draw up MPL bills", *al-Qalam* (1994) 4.
19. These draft bills are based on traditional interpretations of Islamic law and leave much to be desired as far as women's rights are concerned. Viewed from a gender perspective, it is essential that the board should have at least 50% female representation. It is highly unlikely that traditionally oriented *ulama* will be able to formulate and codify Muslim personal law so that both sexes will be treated equitably.
20. S. Dangor, "Muslim Personal Law: Interpretation and Application", *Muslim Views* (1994) 12.
21. G. Paleker, "MPL Board Under Attack", *Muslim Views* (1994) 4.
22. B. F. Stowasser, "Religious Ideology, Women, and the Family: The Islamic Paradigm", in B. F. Stowasser (ed), *Islamic Impulse* (London, Croon Holm, 1987) 290.
23. M. F. Rateb, *Civil rights in the light of Islamic legislation* (Cairo, Aalam Al-Kotob, 1988) 3.
24. Stowasser, "Religious Ideology", note 22 at 262.
25. F. Rahman, "The Status of Women in Islam: A Modernist Interpretation", in H. Papanek & G. Minault (eds), *Separate World: Studies of Purdah in South Asia* (New Delhi, South Asia Books, 1982) 301.
26. N. Coulson & D. Hinchcliffe, "Women and Law Reform in Contemporary Islam", in L. Beck & N. Keddie (eds), *Women in the Muslim World* (Cambridge, Harvard University Press, 1978) 37.
27. W. M. Watt, *Muhammad at Medina* (Karachi, Oxford University Press, 1981) 272; A. Hibri, "A Study of Islamic Herstory: Or how did we ever get into this mess?", *Women's Studies International Forum* (1982) 207-12.
28. Islamic law or shariah is the interpretation and application of the primary sources by early Muslims. It is common for shariah to be mistaken for Islam itself.
29. Coulson & Hinchcliffe, "Women and Law Reform", note 26 at 38.
30. F. Shaheed, "The Cultural Articulation of Patriarchy: Legal Systems, Islam and Women", *South Asia Bulletin* (1986) 39.
31. Faruqi describes four periods: the period of pre-Islamic Arabia or "Age of Ignorance"; the classical period or early centuries of Islam; the

- period of decline (around 1250-1900) during which a negative picture of the status of women was etched; and the period of reform, which extends from the late nineteenth century to the present; L. L. Faruqi, "Women's Rights and the Muslim Women", *Islam and the Modern Age* 76 (1972).
32. Beck & Keddie (eds), *Muslim World*, note 26 at 15; Coulson & Hinchcliffe, note 26 at 48; B. Sivaramayya, "Equality of Sexes as a Human and Constitutional Right and the Muslim Law", in T. Mahmood (ed), *Islamic Law in Modern India* (New Delhi, Indian Law Institute, 1972) 75; M. Charrad, "State and Gender in the Maghrib", *Middle East Report* (1990) 21; N. J. Austrin, "Modernization, Legal Reforms and the Place of Women in Muslim Developing Countries", unpublished doctoral thesis, Southern Illinois University (1987) 46.
 33. E. H. White, "Legal Reform as an Indicator of Women's Status in Muslim Nations", in Beck & Keddie (eds), *Muslim World*, note 26 at 54.
 34. A. Afetinan, *The Emancipation of the Turkish Woman* (Paris, Unesco, 1962) 51-3; F. Mansur Cosar, "Women in Turkish Society", in Beck & Keddie (eds), *Muslim World*, note 26 at 124-40; D. Kandiyoti, "Women, Islam and the State", *Middle East Report* 9 (1991) 11.
 35. N. Honarvar, "Behind the veil: Women's rights in Islamic societies" *The Journal of Law and Religion* (1988) 365; F. Shaheed, "Cultural Articulation", note 30 at 38; D. C. Gordan, *Women of Algeria: An Essay on Change* (Cambridge, Harvard University Press, 1968) 31; A. A. Engineer, *The Rights of Women in Islam* (London, C. Hurst and Company, 1992) v-vi.
 36. Kandiyoti, "Women, Islam", note 34 at 5.
 37. M. Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century Egypt* (London, Macmillan, 1991) 201.
 38. Gordan, *Women of Algeria*, note 35 at 29; Stowasser, "Religious Ideology", note 22 at 260.
 39. M. H. Kidwai, *Woman under different social and religious laws (Buddhism, Judaism, Christianity, Islam)* (New Delhi, Light & Life Publishers, 1978) 73; Stowasser, "Religious Ideology", note 22 at 263; J. I. Smith, "Introduction", in J. I. Smith (ed), *Women in Contemporary Muslim Societies* (Lewisburg, Bucknell University Press, 1980) 20.
 40. Badran, *Competing Agenda*, note 37 at 210; F. Shaheed & K. Mumtaz, "The Rise of the Religious Right and its Impact on Women", *South Asia Bulletin* (1990) 9-17.
 41. F. Hendricks, "Traditional men stand between Muslim women and their rights", *Muslim Today* (1994) 4-6.
 42. See, for example, R. H. Nolte, "The Rule of Law in the Arab Middle East", *The Muslim World* (1958) 278; K. M. Ishaque, "State and Constitution in Islam", *Islamic and Comparative Law Quarterly* (1984) 5-6; and M. Hamidullah, "The First Written Constitution of the World", *The Islamic Review* (1941) 334.
 43. Reference to a "Muslim country" implies that the majority of its

- population are followers of Islam. Thirty-nine of the approximately 41 Muslim countries have adopted written constitutions. Asia has 22 Muslim countries, Africa 16 and Europe three; see K. B. Jain, "An Initial Project Report: Constitutional Law in Muslim Countries", *Islamic and Comparative Law Quarterly* (1985) 305.
44. Articles 11 and 40; see E. Hill, "Comparative and Historical Study of Modern Middle Eastern Law", *The American Journal of Comparative Law* (1978) 296.
 45. B. Cheriet, "Islamism and Feminism: Algeria's 'Rites of Passage' to Democracy", in J. P. Entelis & P. C. Naylor (eds), *State and Society in Algeria* (Boulder, Westview Press, 1992) 194.
 46. Articles 28, 30, 31 and 32.
 47. A. E. Mayer, "Islam and the State", *Cardozo Law Review* (1991) 1034-35.
 48. S. S. Richardson, "Social Legal Reform", in J. Kritzeck & W. H. Lewis (eds), *Islam in Africa* (New York, Van Nostrand-Reinhold Company, 1969) 112.
 49. S. A. H. Rizvi, "Book Review: Muslim Law and the Constitution by A. M. Bhattacharjee", *Islamic and Comparative Law Quarterly* (1987) 84.
 50. H. A. Gani, *Reform of Muslim Personal Law: The Shah Bano Controversy and the Muslim Women (Protection of Rights on Divorce) Act 1986* (New Delhi, Deep and Deep Publications, 1988) 161.
 51. R. Patel, *Islamisation of Laws in Pakistan?* (Karachi, Faiza Publishers, 1986) 92.
 52. Gani, *Reform*, note 50 at 27 and 158.
 53. Z. A. Wahid, "The Muslims in Malaysia: A Political and Constitutional Analysis", *Ethnic Studies Report* (1990) 9-10; J. Connors, "Malaysia: Responding to Religious and Cultural Pluralism", *Journal of Family Law* (1988-1989) 203-4.
 54. A. H. Johns, "Indonesia: Islam and Cultural Pluralism", in J. L. Esposito (ed), *Islam in Asia: Religion, Politics and Society* (New York, Oxford University Press, 1987) 217-18; M. Cammack, "Islamic Law in Indonesia's New Order", *International and Comparative Law Quarterly* (1989) 56.
 55. A. A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York, Syracuse University Press, 1990) 178-9.
 56. A. Rahman, "Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law", *Columbia Journal of Transnational Law* 28, 1 (1990) 473-98.
 57. *Women & Law, National Report, Pakistan* (Lahore, Shirkat Gah, 1994) vii.
 58. M. K. Bruce, "Work of the United Nations Relating to the Status of Women", *Revue des droits de l'homme* (1971) 365-6.
 59. N. El Saadawi, "The Political Challenges Facing Arab Women at the End of the 20th Century", in N. Toubia (ed), *Women of the Arab World: The Coming Challenge. Papers of the Arab Women's Solidarity Association Conference* (London, Zed Books, 1988) 11.

60. Cedaw was signed by the previous South African government in January 1993. The convention has not been ratified by the new democratic government but there have been calls for such ratification to be given soon and without reservation.
61. Part 1, article 2(a), GA Res. 34/180, 1979.
62. C. Albertyn, "The Limits of Equality: Women's Issues in a Bill of Rights", *Rights* (1992) 23.
63. This principle reads:
The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
64. T. W. Bennett, "The Equality Clause and Customary Law", *South African Journal on Human Rights* (1994) 123-4.
65. It appears that customary or indigenous law is erroneously equated with Muslim personal law which, although influenced by custom, is essentially religious in nature; see "Muslim marriages will be 'legal' in new SA", *al-Qalam* (1993) 9.
66. Limitation of the rights enshrined in Chapter 3 is permissible, provided that such limitation "shall not negate the essential content of the right in question", and only to the extent that it is "reasonable and justifiable in an open and democratic society based on freedom and equality".
67. See Bennett, "Equality Clause", note 64 at 125-6 and L. M. du Plessis, "The genesis of the chapter on fundamental rights in South Africa's transitional constitution", *South African Public Law* (1994) 13 and 19, for discussion on the horizontal application of human rights.
68. Rahman, "Religious Rights", note 56 at 498.
69. "Conference calls for 'rethinking' Islam", *al-Qalam* (1994) 5.
70. This happened in Britain where special emphasis was placed on the human rights dimension of the issue; see S. Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims", in C. Mallat & J. Connors (eds), *Islamic Family Law* (London, Graham & Trotman, 1990) 147, 159.
71. J. D. van der Vyver, "Constitutional Options for Post-Apartheid South Africa", *Emory Law Journal* (1991) 772.

Recognition of religiously based personal law: The south Asian experience

SALMA SOBHAN

I am honoured to have been invited to share in the process of evaluating the new South Africa's interim Constitution. It is a sad fact of history that people once united by the struggle against oppression often separate at the moment of victory. Discussions and evaluations are taking place all over the country at all levels to guard against this happening here, and to ensure that the final constitution does embody the dreams and aspirations of the people. Therefore this appraisal of the interim Constitution is critical.

Many Muslims in South Africa feel that liberation from the apartheid order should be marked, *inter alia*, by elevating the status of Muslim personal law through codification and constitutional recognition. My comments have been invited on this issue and it seems to me that this could be most appropriately done by sharing the south Asian experience with you.

Background

In India, Pakistan, Bangladesh and Sri Lanka, laws relating to personal status derive from religious sources. The laws themselves are not religious but this does not prevent certain sections of society from according them a general religious coloration. Sri Lanka has had a different colonial experience from the subcontinent, which now comprises India, Pakistan and Bangladesh. It has many sources of secular law, for example, Roman-Dutch law and English common law, in addition to the religiously derived personal laws. Although the Sri Lankan experience of religious personal laws has been negative, in common with the subcontinent, I shall confine my examples to the subcontinent.