The Fate of Muslim Personal Law

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The South African Law Commission is yet to announce the composition of the committee that will investigate the feasibility of recognising Muslim personal law (MPL) in South Africa. The inquiry relates to provisions in the new Constitution recognising marriages contracted according to religious or customary practices. The delay in appointing the committee, and hence in determining the fate of Muslim personal law, means that the ruling African National Congress will probably face Muslim voters in 1999 without having made good on its 1994 electoral pledge to recognise their marriages and aspects of religious law applicable to the family.

Nearly a year ago, High Court Judge Mohammed Navsa was appointed to chair the Law Commission committee on Muslim personal law. Following extensive consultations with sections of the Muslim community in different centres of the country, nominations for committee members were submitted to the Law Commission. A short list of nominees has yet to be approved by Justice Minister Dullah Omar. There has been no official explanation for the inordinate delay in setting up this committee.

Government procrastination, in this instance at least, is more than mere bureaucratic inertia. Given the fractious nature of the Muslim community and the controversy surrounding Muslim personal law, government delay comes as no surprise. From the very inception of discussions with the ANC, months before the historic April 1994 elections, various Muslim groupings have been jockeying for a position of control on this issue. Religious leaders (ϒulamaॐ🕮) zealously presented themselves as the sole representatives of the Muslim community on the topic. Their ambitions were challenged by other ϒulamaॐ🕮 groups, such as the Majlis as-Shura al-Islami, and by the Islamic Council of South Africa (ICSA), women's organisations, the Muslim Youth Movement (MYM), the Call of Islam, the Muslim Assembly and the Islamic Unity Convention (IUC). All of these groups fiercely resisted the ϒulamaॐ🕮's claim to monopoly on family law matters.

After extensive deliberations it was decided to establish an inclusive Muslim Personal Law Board (MPLB) consisting of the major stakeholders. The MPLB was duly launched in Durban in August 1994, with the keynote address given by Shaykh Rashid al-Ghannushi, exiled leader of the Tunisian Renaissance Party (al-Nahda). The composition of the MPLB was as inclusive as possible, ensuring that at least two women and a cross-section of other stakeholders were elected to the executive. For the first time a major schism among the ϒulamaॐ🕮 was seemingly overcome when both the Deobandi Jamiats (Jamiatul ϒUlamaॐ🕮 of Transvaal and Jamiatul ϒUlamaॐ🕮 of Natal), of what are now Gauteng and Kwazulu-Natal, and members of the Barelvi Jamiats decided to work together for a common cause. Historically there have been violent tensions between these two groups and the formation of the MPLB was an historic event in reconciliation.

However, there was immediate opposition to the initiative from two quarters: the Cape-based IUC and the Port Elizabeth-based Majlis al-ϒUlamaॐ🕮. The IUC felt slighted that it had not been part of the talks leading to the formation of the MPLB. Furthermore, its representative at the Durban launch failed to be elected to the MPLB executive. The Majlis reserved its ire for the Deobandi Jamiats whom it accused of having "women" and "modernists" as bedfellows on the MPLB. The Majlis successfully put pressure on the Deobandi Jamiats to have no further truck with such an "un-Islamic" formation.

Beyond such hostilities, the MPLB faced a major quandary from its inception. Some of the ϒulamaॐ🕮 groups unrealistically expected the government to accede to a demand that Muslim personal law be exempted from the provisions of the Constitution. It was clear that these ϒulamaॐ🕮 realised that their version of Muslim personal law, characterised by gender

inequality and patriarchy, would not pass constitutional muster and would therefore not be adopted as law. It was imperative, therefore, to get rid of the yoke of the Constitution.
The progressive Muslim groups, on the other hand, argued that the goal of constitutional exemption was unrealistic. More importantly, they argued that the Constitution challenges Muslims to come up with a family law code that includes the best aspects of Islamic jurisprudence. Furthermore, these groups envisaged a situation of no conflict between Muslim personal law and the country's human rights law, provided the approach to both was sensible. Unfortunately, the response of the Deobandi Jamiats was to demonise and hurl abuse at the progressive Islamic groups on the basis that they were "un-Islamic" and modernist. Obviously, whatever goodwill might have existed within the MPLB was undermined by such behaviour. Finally, after an acrimonious showdown meeting between the two groups, the ♈ulama♋🕮 unilaterally used their majority on the MPLB to close the body down in mid-1995.
They simultaneously formed the United ♈Ulama♋🕮 Council of South Africa (UUCSA) with the intention of pursuing recognition of Muslim personal law from that platform. However, this forum has produced no new proposals or initiatives to date. In the first quarter of 1998 the UUCSA met with President Mandela urging him to implement Muslim personal law. They once again reiterated their demand for MPL to be exempt from constitutional provisions.
It appears that a neutral and balanced committee spearheaded by the Law Commission may have a better chance at exploring the feasibility of Muslim personal law. However, any such committee runs the risk of encountering the deadlock experienced in the MPLB unless the parties involved understand from the very beginning that acceptance of the existing constitutional framework would be in the best interests of Muslims at large.
The expectation of some Muslims that the government will suspend the Constitution to meet the contentious needs of a sector of a minority religious community is, in a word, unrealistic. Moreover, in many Muslim majority countries, such as Tunisia, Somalia, Egypt and Pakistan, as well as in minority contexts such as the Phillipines and India, Muslims have been engaging with family law reforms in order to bring their legislation in line with human rights considerations as advocated by both the Shar❺♈a (Islamic law) and international human rights instruments.
The South African Muslim community would stand to benefit if their representatives in matters of Muslim personal law learnt from developments elsewhere in the world. At a time when leading Muslim authorities have acknowledged that gender inequality justified in the name of religion is a blemish on the reputation of Islam, it would be unwise on the part of the South African Muslim community to resist such reforms. The spirit and tenor of justice, equity and equality which constitute the primary values of the Shar❺♈a must preside in any envisaged Muslim family law dispensation.
In an historic local development, aspects of Muslim family law were recognised by the Cape High Court in 1997. In *Ryland v Edros*, the court recognised that contractual obligations entered into by parties married solely according to Islamic rites could not be ignored in terms of the new Constitution. The court saw fit to lend its power of enforcement to Muslim marriage contracts to ensure that the parties comply. Previously, South African courts regarded Muslim marriages as potentially polygamous and refused to enforce the patrimonial consequences that devolve upon the spouses on the termination of the marriage. In the Ryland case, the court argued that Mrs Edros, the repudiated spouse, was entitled to arrears of maintenance (*nafqa*) owed to her during the subsistence of her marriage and to a consolatory gift (*mata*♋🕮) if the marriage was terminated at the unjustified behest of the husband. The quantum will be decided later.