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2 November 1993

Prof Lourens du Plessis  
 Technical Committee on Fundamental Rights  
 Multiparty Negotiations  
 Kempton Park

Fax no: (011) 397 2244

Dear Sir

Re: Muslim Personal Law in South Africa

On behalf of the undersigned organisations I would like to table the attached memorandum.

Although Muslim Personal Law (MPL) is not formally recognised as a customary regime of law in South Africa, it is most likely to be recognised in a future constitutional dispensation.

The concern expressed in this memorandum, which reflects the views of representative organisations in the Muslim community, is to ensure that the Multiparty negotiating process do the following:

- 1) give attention to MPL.
- 2) ensure that the provisions of the Bill of Rights regarding equality prevail over interpretations of MPL which suggest otherwise.
- 3) that your Committee on Fundamental Rights make recommendations to the future legislature charged with drafting the Muslim Personal Law code to use the above cited principles as guidelines.

Thanking You.

Yours



Moulana Ebrahim Moosa

(All inquiries regarding the above submission may be directed to the above signatory at: The Department of Religious Studies, University of Cape Town, Private Bag, Rondebosch, 7700. Tel: (021) 6961640 Fax: (021) 6503761.

The attached memorandum is endorsed by:

- 1) The Judicial Committee of the Islamic Council of South Africa.
- 2) The Muslim Youth Movement of South Africa
- 3) Majlis as-Shura al-Islami
- 4) Call of Islam
- 5) Central Islamic Trust



## MEMORANDUM ON MUSLIM PERSONAL LAW

## INTRODUCTION

1.1 Aspects of Islamic law has been practised by sections of the Muslim community for nearly 300 years, since their first arrival at the Cape in 1658. It applied to matters of personal law: dealing with marriage, divorce, inheritance and custody procedures. Two legal schools have generally been practised by the community, namely the Shafi'i and Hanafi school.

1.2 With the exception of the Statutes of India which acknowledged Muslim law, during the Dutch rule at the Cape, there is very little evidence of formal recognition of Muslim Personal Law (MPL) in South Africa to this very day. Over the years, Muslims and Muslim law increasingly became the target of discrimination - judicial, racial, cultural and religious - especially during the successive colonial regimes, as well as after the Union of South Africa and apartheid rule.

1.3 Notwithstanding the lack of formal recognition, several Muslim bodies have an informal system of administering religious law. It is known that most Muslims would prefer to follow the dictates of their religion in matters of personal law, rather than secular law.

1.4 The *status quo* is that due to the non-recognition of MPL, South African Muslims face severe hardships. Women and children are especially affected. Under the current regime of MPL, males enjoy the most rights and privileges to the disadvantage of females. For instance, in practice we find hundreds of cases where a man can summarily repudiate (*talaaq*) his wife, in an extra judicial manner, resulting in extraordinary injustice to the divorcee. Except for limited maintenance of roughly three months, she is not entitled to any additional support. In several Muslim countries this law has been reformed to accord women equal and improved rights in matters of personal law with varying degrees of success.

1.5 As we stand on the brink of a transition to a new non-racial, non-sexist and democratic society, the concerns of Muslims should not be neglected and marginalised. Muslims constitute no less than a half million people, and some say up to one million, 50% of which are believed to be women.



## STATE OF THE MUSLIM COMMUNITY

2.1 There are diverse trends in jurisprudential thinking in the contemporary Muslim world. The prerogative of interpretation should not privilege a particular class or group of Muslims. Such a tendency should be strongly resisted. Muslims in South Africa are as diverse in their viewpoints as most healthy communities are, and therefore should find solutions that meet the demands of their context.

2.2 The nature of these differences can be easily grasped if one compares say, the MPL code of Tunisia with that of Pakistan. Cultural, social, customary, economic, political and the particularity of religious expressions, play a decisive role in the formulation of personal law codes. Most experts would concede, that the MPL code of Tunisia fulfills the norms of gender equity and human rights requirements by both Islamic and secular standards, while that of Pakistan may be found to be lacking by comparison.

2.3 In South Africa similar differences exist. Muslim administrative bodies which informally implement MPL, range from conservative and precedent-oriented interpretations, to more contextual and equity-oriented interpretations.

2.4 Any attempt to implement a recognised code of MPL in South Africa, must take the above concerns of diversity into account. The emphasis should be on equity, the spirit of Islamic law, gender equality and be in line with the progressive interpretation of Islamic law as evidenced in several Arab Muslim countries.

2.5 In the formulation of the MPL code for South Africa all sectors of Muslim society and the entire range of role players should be involved. Women in particular, should be consulted and be part of the decision-making process at all levels.

## MPL IN THE CONTEXT OF CURRENT CONSTITUTIONAL CHANGES

3.5 There is little doubt that the purpose of a Bill of Rights is to provide a political and legal context in order to restore balance within the South African community, bringing those who had been excluded into the process and granting freedoms and justice to all members of community, including women.



3.6 In terms of clauses 8 and 14 of the Interim Bill of Rights; principles 10, 11, 12 of the draft Constitutional Principles; and, in terms of the resolution of the World Conference on Religion and Peace, 'Declaration on Religious Rights and Responsibilities', it is clear that the recognition of MPL would be as a result of: 1) a guarantee of religious freedom; 2) but, that its enforcement and administration will be interpreted as a customary law notion.

3.7 In the light of 3.6, the codification of MPL is imperative.

3.8 The codification of MPL should not derogate the fundamental principles enshrined in a Bill of Rights. There are tenets and principles in the prestigious legacy of Muslim law that in fact affirm and amplify those of the Bill of Rights. These principles should form the minimum guarantees of a MPL code for South Africa.

#### HUMAN RIGHTS AND MUSLIM PERSONAL LAW

4.1 Advancing MPL should proceed from a human rights perspective. It is accepted that a human rights dispensation is in full accord with Islamic law.

4.1 The formulation of a MPL code should be envisaged as a *process* not as an *event*. With the minimum guarantees (see 3.8) as a point of departure, the *process* of codification should be initiated. This could take some time since attitudes have been entrenched over the years and various Muslim constituencies have to dialogue each other's viewpoints, before a consensus could be reached on an appropriate MPL code.

4.2 In Islamic law the notion of equality and human rights are unequivocally stressed as the cornerstone of interpersonal relations, although at times Muslim practices may fail to give effect to it.

4.3 Muslims have a unique opportunity to reform some of their MPL practices and bring it in line with the spirit and teachings of the *shari'ah* (religious law) on this occasion when the overall character of South African society is undergoing significant change.