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Najma Moosa and Suleman Dangor (Eds.) *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town: Juta, 2019. 465 pp. ISBN 978 1 485 12 716 .

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Introduction: In Context

In Muslim minority settings, the term Muslim Personal Law (MPL), which may be viewed as a sub-set of the *Shari'ah* (i.e. the comprehensive Muslim legal system), has been used as an all-embracing nomenclature that included, inter alia, marriage, divorce, custody and inheritance. This was a point that this volume's – under review - co-editor's, namely Najma Moosa and Suleman Dangor (2019: 1, fn.2), mentioned in their opening chapter; one that also served as the book's introduction. In this chapter, they charted out MPL's evolution 'from the past to the present' in South Africa (SA) (pp.1-25).

MPL, as recorded and discussed in some of the book's chapters, has been adopted as a practical legal system that functioned within secular legal structures in certain parts of the world. Some of the edited tome's contributors, in fact, made direct reference to systems in South Asia's India and Southeast Asia's Singapore. In these countries, they were implemented despite the inherent shortcomings that were encountered; and it was such a system - with modifications of course - that caused SA's Muslim minority, through its representative organizations, to fervently clamor for during the latter years of apartheid period (circa 1975-1994). Moosa & Dangor (2019: 2-4), basing themselves on Allie's 2010 essay that was reproduced in this edited text (Ch.2 pp.26-42), correctly pointed out that MPL matters had already been broached as far back as the late 17th century. While that was indeed the case historically, much of this edited tome's focus addressed the MPL process as it unfolded during the contemporary period (circa 1994-2018).

The Volume's Chapters

As one glossed over each of the book's twenty-five chapters and dipped into many of the chapters to demonstrate the volume's value as a primary legal source on SA's MPL matters, one wondered whether the book should not have been slightly retitled. Instead of addressing MPL's 'evolution and future status', it should simply have recorded: *MPL in SA: A Source Book*; the editors have basically collected and edited essays that covered the main theme. Anyone evaluating the co-editors' backgrounds will observe that they hailed from two distinct fields, namely Islamic Studies and legal studies. Since both scholars approached the MPL from their respective fields of specialization and since they worked together in realizing this project, it seems that their partnership in gathering, organizing, and editing this volume has paid off.

If one discounts the opening and closing chapters, then this edited work consists of 23 essays of varying length. From among them, 13 were previously published and the rest were solicited entries. Mention should be made of the fact that the co-editors chose the closing chapter to describe and comment on each of its chapters. The one co-editor, however, reminded one that the opening chapter was taken from her 2004 publication; for this edited publication, it was slightly reworked as a co-edited piece.

One noted that despite previous revisions, it seems that remnants of the old version were left unaltered; if one turned to page 5, for example, the reference was to the 'latest' *Report on Islamic Marriages and Related Matters* that was circulated during 2003; a similar anomaly was picked up in Navsa's chapter page 44 (fn.3). While one would like to hurriedly add that these were insignificant oversights, one cannot say the same regarding typos, spelling and grammatical mistakes that inadvertently cropped up and slipped in without them having been picked up in the copy-editing process. The reviewer intends to browse through each of the chapters to offer insights into the issues covered.

Shoukat Allie's reprinted chapter undertook 'a legal and historical excurses of MPL in the colonial Cape from the eighteenth to the twentieth century' (Ch.2 pp.26-42). Though the chapter ambitiously covered two centuries of legal developments historically, it insightfully dealt with issues that the legal fraternity was generally unaware of; much of the material was buried in unpublished and published socio-historical texts. A pertinent source that Allie should have extracted ideas from was written by J. de V Roos; this was a legal scholar to whom Allie referred to and quoted on page 33 (fn.28). The latter's 'Mohammedan Law in SA' appeared in the *South African Law Journal* 24:178-186, 1907.

As one turned to Mohamed Navsa's chapter titled 'MPL – An Update' (Ch.3 pp.43-48), one would like the co-editors to have tweaked the title a little; the reason for this is that this was a dated 2003 online essay and its update referred to developments up until that date. By the time it was reprinted in this volume, 16 years had passed and, in terms of the time-lines, it cannot be considered 'an update'. Apart from that technical point, the co-editors could have inserted 'introductory remarks' as the opening sub-heading to complement the ones that appeared later in the essay. Leaving the technical issues aside, the chapter described MPL fairly informatively.

One observed as one shifted to the next chapter that the co-editors forgot to weed out the footnote and bio-data of the chapter's co-contributors (i.e. Yousuf Dadoo & Fawzia Cassim) on page 49 since this information was correspondingly logged in on page xiii and on page xv; this was the case in other chapters too. Dadoo & Cassim's chapter concerned itself with 'The (different) debates on MPL in SA: (with the idea of) 'achieving the balance of interest' (Ch..4 pp.49-67). The authors located MPL within SA's religious freedom context and they, thereafter, examined the Muslim Marriage Bills (MMBs) of 2003 and 2010 respectively.

They principally concluded with an assessment of MPL reforms in other countries by showing how these affected variables such as polygyny and divorce. From a technical angle, one would have made adjustments to the chapter; instead of having ended off with the legal reforms that took place in other countries, they could have opened the chapter with this subsection. The change would have meant that this restructured section would have acted as a useful backdrop for what was unfolding in SA. In any case, their chapter dove-tailed with Firoz Cachalia's 1993 journal article that was reprinted; it undertook 'preliminary enquiries' about 'Citizenship, Muslim Family Law (MFL) and a Future South African Constitution' (Ch.5 pp.68-93).

Cachalia, like Dadoo & Cassim, commented on SA Muslims' legal status and marriages, before having briefly defined Muslim law, culture, and identity; each of these loaded concepts were rather simplistically covered and squeezed into one page. In addition, he weighed marriage and succession in Muslim law before he discussed them alongside sex discrimination. And Cachalia wrapped up with clarifications regarding legal unity, integration and pluralism. One was startled that Cachalia described 'Islamic law' as if it amounted to *fiqh* (page 77) only. For Cachalia's chapter, the co-editors should have inserted an 'introduction' as an extra opening sub-heading.

Waheeda Amien discoursed about ‘The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in SA’ (Ch.6 pp.94-111); this essay previously featured as a book chapter in 2013 and it examined the MMB that had gone through different drafts as was shown by Dadoo & Cassim. Like Cachalia, Amien assessed it within the context of legal pluralism. In principle, Amien supported the MMB with the proviso that marriages be regulated not only within the Muslim legal system but also within the human rights framework too. She dissected various aspects of MMB but found the role of the conservatives, a category that she did not clearly define, as problematic. While that was understandable, she did not spell out what the term actually meant and implied in the context; for her essay, she could have benefitted from Ebrahim Moosa’s article on the topic (Ch.7 p.115 fn.9).

So far, one observed that both Cachalia and Amien employed the term MFL instead of MPL in their respective chapters; the phrase seemed to have been a preferred term and one noted that Ebrahim Moosa used it in his previously published 2010 chapter too. Moosa, who titled it ‘MFL in SA: Paradoxes and Ironies’ (Ch.7 pp.112-131), switched back in using the term MPL throughout his essay. Nonetheless, Moosa spoke about the community’s attempts to have MPL recognized during the late apartheid period. He remarked about the SA Law Reform Commission (SALRC) proposals, before he critically exposed the communal politics that undermined the MPL process. Moosa, similar to two other chapters (i.e. Ch.9 and Ch. 10), addressed MPL cases that appeared in SA law courts.

In Moosa’s sub-section, he made reference to the famous *Ryland v Edros* [1996] case. Moosa, in more-or-less the same way as Dadoo & Cassim, somewhat concisely concluded by drawing lessons from the Indian *Shah Bano* [1985] case and also mentioned by Cachalia (Ch.5 p.89 fn.117). He wasn’t too optimistic about the future of MPL when he pointed out that, ‘... it would be hazardous to predict its outcome’; but he also hastily added that, ‘The future of MPL in South Africa might hold some surprises for observers’. Well, since the time Moosa’s essay was printed, the appointment of Muslim marriage officers (MMO) discussed by Fatima Asmaland, Najma Moosa & Muneer Abduroaf later in this volume was probably one of those interesting disclosures.

Abdulkader Tayob’s 2005 essay was given another life in this edited volume. Tayob and two other contributions (Ch.16 and Ch.18) stressed MPL’s rights-based context. He evaluated ‘The Struggle over MPL in a Rights-Based Constitution: A SA Case Study’ (Ch.8 pp.133-144). Unlike Moosa that devoted a part of his essay on MPL matters as they unfolded during the late apartheid era, Tayob specifically assessed MPL during the post-apartheid phase up until about 2005. Tayob examined Muslim marriages in relation to the SA Constitution; a legal document that made the necessary legal provisions for all religious traditions. He discussed that as a consequence of irreconcilable differences of interpretations and outlook, the rise and fall of the MPL Board that the co-editors also mentioned in their introduction (pp.7-9). In the final sub-section, Tayob debated the proposed MMB and, like Ebrahim Moosa, he referred to the *Ryland v Edros* [1996] case as well as the *Amod v. Multilateral Motor Vehicle Fund* [1999] case to illustrate his points. Tayob forwarded the view that the MPL debate drifted from its ideological moorings to the court where the cases illustrated the nature of the problems faced by members of the Muslim community.

Tayob’s closing point tied in with what Christa Rautenbach had argued in ‘The Contribution of the Courts in the Integration of Muslim Law into the Mixed Fabric of SA Law’ (Ch.9 pp.145-170) and what Charlene May & Seeham Samaai stated about ‘A Marriage of Laws: The Recognition of Islamic Marriages through Our Courts’ (Ch.10 pp.171-179); while the latter was a fresh contribution, the former appeared as a chapter during 2015. Though the issue of legal

integration was touched upon by Cachalia's chapter, Rautenbach and May & Samaai took the idea further in their respective contributions. Rautenbach, who sketched how SA's legal system developed, publicized the rationale for the non-recognition of Muslim marriages during the colonial and apartheid periods.

Rautenbach proved to what degree 'the change of heart' attitude adopted by the judges that presided over the (Muslim) cases in their courts contributed to redressing (Muslim) issues; this was a point made by Ebrahim Moosa (Ch.7 p.127) too. She (2019:168), in fact, One agrees with Rautenbach when she stated that, 'Until and unless legislation was enacted to recognize aspects of Muslim law, especially Muslim marriages, the courts would be the only forum to approach if aggrieved Muslim parties wanted to seek redress...'. May & Samaai, who spoke about the obligation of the court in their short chapter, argued along similar lines as Rautenbach. They, too, maintained that the secular courts acted as the appropriate legal channels that up until then provided the aggrieved parties the required relief; they (2019:176) rounded off saying that 'the courts have indeed successfully integrated the rights of women married in terms of Muslim laws and traditions with the rights contained in the Constitution'.

Fatima Seedat's chapter, which appeared in 2000 and that connected, to some extent, with Amien's chapter that dealt with the question of gender, looked at ways of 'Determining the Application System of MPL in SA' (Ch.11 pp.178-189). Apart from having shared her thoughts on SA as a Constitutional State and MPL as critical institutional structure, she zoomed in on the Commission of Gender Equality (CGE). At the time when she penned her essay, she expressed her utter disappointment that no field work was done that assessed MPL practices on the ground. In the light of this oversight, the CGE pursued such a project by interviewing a range of individuals and holding extensive consultations with focus groups and hosted workshops. At the end of this project, she catalogued a number of recommendations prior to finishing off her chapter. In Seedat's reprinted essay, she provided a summarized postscript that assessed MPL's status in response to the 2018 court judgment.

Now Najma Moosa and Muneer Abduroaf's co-authored chapter, which appeared in a 2017 anthology, aspiringly dealt with a few significant but controversial issues that have understandably been left on the sidelines throughout – as far as one could assess - the MPL process. Moosa & Abduroaf's detailed chapter titled 'Implications of the Official Designation of Muslim Clergy as Authorised Civil Marriage Officers for Muslim Polygynous, Interfaith and Same-Sex Marriages in SA' (Ch.12 pp.190-227) unpacked the appointment of MMOs. On top of that, they discussed the challenges that MMOs face when they encounter situations where the couple, in which the individuals come from two different religious backgrounds, enter into marriage or where the two individuals who desire to marry one another belong to the LGBT community; these were issues that Seedat and others alluded to in their chapters. One would like to declare that though these may have survived SA's constitutional challenges, one doubt whether the Muslim community, at large, would readily acquiesce to their approval. This may, however, only be revealed over time.

Since Zahra Macdonald's 'Religious Freedom within a Liberal Constitution: An Overview of MPL in South Africa' also addressed the status of MMOs, one would like this essay, which appeared in *Politikon: South African Journal of Political Studies* [41(2): 209-226, 2014], to have been included alongside Moosa & Abduraof's chapter. Anyhow at this point in the volume, the attention returned to MMB. Mohammed A Moosajie addressed 'The MMB: (by arguing that it is) A Legal Quagmire' (Ch.13 pp.228-244) and Suleman Dangor evaluated 'The *Majlis*' (Voice) and the MMB: (offering) A Dissection' (Ch.14 pp.245-251). The former critiqued MMB in the way it was crafted, and the latter highlighted Maulana Sadeq Desai's tirade's against the MMB. A trivial

memo regarding Dangor's examination of *The Majlis* was the fact that he should have weaved into his essay some of Ebrahim Moosa's (2019:121-122) thoughts that critiqued this Muslim tabloid too.

Hoodah Abrahams-Fayker's 'SA Engagement with MPL: The Women's Legal Centre (WLC), Cape Town and Women in Muslim Marriages' (Ch.15 pp.252-272) was a reprint of her 2011 journal article. Abrahams-Fayker, who was intimately associated with WLC, assessed its litigation strategies; in this tome, Moosa & Abduroaf (Ch.12 p.202 fn.55) and Samaai, May & Gihwala (Ch.17 pp.303-306) also cited the WLC case against the state. Similar to Rautenbach and May & Samaai, she evaluated key MPL court cases and cited, the *Daniels v. Campbell* case and the *Hassam v. Jacobs* case; ones that were either referred to or discussed by various other contributors in this volume. In fact, the *Hassam v. Jacobs* case was the sole subject of Moosa & Abduroaf's second co-authored and earlier published essay; they analyzed 'Faskh (Divorce) and Intestate Succession in Islamic and SA Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the MMB' (Ch.19 pp.329-259). One regards these authors' rendition of *faskh* in English as 'divorce' is rather misleading. However, in their chapter (p.331), they corrected this notion and offered an extensive expose on pp.343-355; and their explanation is in line with what Moosajie (Ch.13 p.232) conveyed in his chapter; he stated categorically that it meant the 'judicial annulment of a marriage'.

Abrahams-Fayker quoted Rashida Manjoo's 'The Recognition of Muslim Marriages in SA: Implications for Women's Human Rights' (Ch.16 pp.273-297) that appeared immediately after her essay. Manjoo chapter, which was a 2007 working paper, presented her ideas on 'models of multiculturalism' and she used examples from Asia and Africa; she too, like others in this tome, mentioned some of the court cases. Manjoo discussed SA's international law obligations and, thereafter, she commented on relevant constitutional provisions and jurisprudence; In addition, she mentioned about the implications of SALRC and CGE in the MPL process; these were two institutions that Ebrahim Moosa (118-120) and Fatima Seedat (185-186) dealt with in their respective chapters.

Seham Samaai, Charlene May & Harsha Gihwala conversed about 'Equal Rights and Recognition: Extending the Protection in the Wills Act to Women in Polygynous Muslim Marriages' (Ch.17 pp.298-308) and Wesahl Domingo (Ch.18 pp.309-328) debated 'MPL in SA and Women's Religious Rights and Freedoms'. While Samaai, May & Gihwala advocated for Muslim marriages' legislative recognition, they acknowledged WLC's key part in these issues and used the *Moosa NO and Others v Harnakar and Others* case – in which WLC was an *amicus curiae*- as a specific study, Domingo measured the conflict between communal rights vis-à-vis women's rights within the context of religious freedom; she argued that MPL should not be solely in the hands of either the community or the state and added that all relevant stakeholders should accommodate, reconcile, and re-engage with MMB through a purposeful representative process.

On the issue of divorce, Faizal Manjoo scrutinized the 'New trends of Legal Transplant to Triple *Talaq*: (and he specified) Lessons for SA' (Ch.20 pp.360-374). Manjoo, who revealed the contractual nature of *nikah*, addressed the triple *talaq* conundrum in European and South Asian societies. He also surveyed selected Muslim countries from which he extracted some ideas for SA. He deliberated on the 'transplant phenomenon' that involved different approaches. And on a different theme, Ziyad Motala contended that 'Arbitration and mediation as an alternative paradigm for the Recognition of Faith-Based Personal Law' (Ch.21 pp.375-392) be adopted and implemented. Besides having discussed the Constitution and its 'Freedom of Religion' clause, he pointed out the problems associated with the SALRC proposals and listed his concerns. In

response, Motala proposed the arbitration and mediation model as an alternative method to deal with spousal and familial matters; he drew from the experiences in the USA and Canada. As a matter of interest, one may refer to Dadoo & Cassim's chapter pp.60-61 fn.60 that relates to this topic.

And at this juncture, Muhamed F. Bulbulia's short essay on 'Propriety Consequences of Muslim Marriages and Contractual Capacity of Spouses' (Ch.22 pp.393-395) was inserted; it fundamentally suggested that marriage be contracted 'out of community of property with accrual'. He, however, cautioned saying that the theological bodies are the ones that should decide whether it is *Shari'ah* compliant or not. Being a Muslim legal practitioner, one would have thought that with Bulbulia's experience weighed and meant much in the circumstance and that he should have a fair sense of whether it was acquiescent. And in bringing this collection of essays to a close, the co-editors included Essa Moosa's essay on 'MMB-Mapping the Ongoing Socio-Ethico-Legal Challenges facing SA Women' (Ch.23 pp.396-400) and this was followed by Abdul Karriem Toffar ideas on the 'MMB Impasse – (that charted out) an Interim Way Forward' (Ch.24 pp.401-404). While Toffar listed 11 practical points, Essa identified the challenges. Essa strongly suggested that the differing groups needed to flesh out their ideas in order to overcome the impasse that existed; though Essa was optimistic it appears that the MPL process is still in a dilemma as Moosajie (Ch.13) described and one is not too sure whether Toffar's 11 points might help to advance it.

Towards a Wrap-Up

Before one concludes this review, one needs to point out a few anomalies and one picked up a list of spelling errors and other mistakes that were missed by the co-editors and the copy editor too. Related to Allie's chapter, the co-editors should have rectified the date of the journal entry on page 29 (fn.15). It was mistakenly recorded that Marasabessy's article was published in 1963 instead of 2003 and page 31 (fn.20) a spelling error. In Cachalia's chapter, bearing in mind that it was a 1993 written essay, the following remained: on page 73 the sentence read: "The SALC has not yet published its findings" and on page 85 (fn.97) it was noted that reference was made to 'the last five years'. Being a reprint, the editors should have either amended it or inserted an editorial footnote to clarify these sentences and phrases. Cachalia's chapter contained a few spelling errors as well and these appeared in fn.44; fn.56, fn.83 and fn.131.

Turning to Tayob's chapter, one observed in the content description that the word 'constitutional' should have been constitution (Ch.8 p.132) and in Rautenbach's chapter on p.158 (fn.71) included a sentence that is grammatically incorrect. In the respective chapters of Moosa & Abduroaf (Ch.12 p.192) and Moosajie (Ch.13 p.242), the phrase in brackets '(still current)' and the word 'first' should have been deleted. Moving on to Abrahams-Fayker's chapter and herein she (Ch.15 p.254) incorrectly indicated that the 'Call of Islam' was established in 1960; she confused this with the pamphlet that was issued with that title and the organization that was formed in 1986 using the exact same name. Further in Abrahams-Fayker's essay (p.257), a grammatical mistake appeared: 'Islamic feminist discourse and activism has grown...' While one came across a minor spelling error in Domingo's chapter (i.e. the first quote on p.312 where the word 'then' should have been typed as 'the'), one found that Bulbulia (Ch.22) had two different spellings for '*ulema* and '*ulama*'.

In all of these instances, the co-editors' editorial license was sorely needed. But while they were required in these cases, they should also have been applied in some of the chapters where the bio-data of the authors appears in their corresponding chapters. Here one can refer to the following chapters and the footnotes of each of the mentioned page numbers: Ch.4 p.49; Ch.5 p.69; Ch.8

p.132; Ch.12 p.190; Ch.18 p.309. Besides these and the final point on the co-editors' editorial engagement with the volume is that one would like the editors to have requested the contributors to 'speak to the other chapters' in the edited text; worded differently, where the authors referred to a text that was previously published and that was reprinted in this volume the authors could have made reference to both the previously published version and the reprinted essay. The only chapter where this was noted appeared in Ebrahim Moosa's chapter and it would be observed that he indicated on p.123 in fn.16 that he directed the reader to Motala's chapter in the essay. This did not appear in any other chapter nor in the coeditors' introduction; see the example on p.5 where they footnoted (fn.26) Ebrahim Moosa's chapter that was published on an earlier occasion and reprinted here.

Before this reviewer rests his case, permit him to state a few salient points as regards this tome. As one glanced through this edited work it is beyond question that these co-editors generated an invaluable resource for an array of individuals; from among this group, various legal practitioners such as judges, magistrates, advocates, and attorneys would gain from this text. Apart from them, it will also be a useful source text for social sciences and humanities scholars. The reason for arguing along these lines is that this is the first time that an entire volume was devoted to MPL matters. Even though some were re-published essays that one could have found in scattered books and journal publications, the co-editors succeeded to select and include them in one user-friendly volume. The co-editors are encouraged to consider a follow-up volume that would not only include fresh material and cover other areas that fall within the purview of MPL but they should also insert a descriptive list of all the notable cases that have been used by the legal fraternity over the many years. But even if they are not able to do that, it is hoped that this volume will stimulate younger scholars to do so.

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