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MUSLIM MARRIAGES IN SOUTH AFRICA: THE LIMITATIONS AND LEGACY OF THE INDIAN RELIEF ACT OF 1914[1]

Goolam Vahed
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Many Muslims in post-apartheid South Africa have been seeking to use the new freedoms of a democratic state and its liberal constitution to pursue distinctive rights as part of a broader project to construct new and tighter Islamic codes in public and private domains. One example is the call for *shariah*-based[2] Muslim Personal Law (MPL) in accordance with the South African Constitution which allows for the recognition of 'personal or family law' provided it is not in conflict with the Constitution. A South African Law Commission (SALC) committee headed by Supreme Court Judge Mohamed Navsa released a draft Bill on MPL in December 2001. Muslim journalist Khadija Magardie considered it "a progressive step" towards resolving the mismatch between Muslim personal law and the Bill of Rights, but warned

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that while it was "good news for some, its contents are likely to have some quarters sighing into their three fists long beards".[3] The draft bill sparked intense debate among Muslims. Some welcomed its commitment to gender equality, others were unhappy with some of its provisions but were prepared to gradually effect change, and yet others rejected the bill outright because they considered aspects of it, including restrictions on polygamy, conditions relating to the custody of children and payment of maintenance, and the age of consent for marriage, to be in conflict with Islamic law. The latter believe that *sharia* is a divine creation and that Muslims are obliged to implement all of its prescriptions in their daily lives. There could be no compromise because the law of God supersedes manmade laws.

Contestation among Muslims over MPL has delayed its implementation in post-apartheid South Africa. Such contestation among South Africa's Muslims, and between them and the state, has a long history. This paper looks at one aspect of MPL, namely the status of Muslim marriages, from a historical perspective. It traces the attitude of the Colonial State and Muslim migrants towards marriage and family from the arrival of Indians in 1860 until 1914, when the landmark Indian Relief Act was negotiated between Mahatma Gandhi and General Smuts. The laws of the Colonial State reflected the culture of the dominant group in Natal. They fundamentally affected Indians by challenging and questioning their notions of what constituted family. This provides a reassessment of the 1913 Act, which constituted "a complete and final settlement" of the Indian Question for General Smuts.[4] While the settlement brought Gandhi's South African campaign to an end, the limitations of the Act resulted in a partial settlement that left many issues unresolved, including the status of Indian marriages. This had dire consequences for Indians, especially women. Many Indians, but Muslims in particular, saw

[3] *Mail and Guardian*, 7 December 2001.

[4] B. Pachai, *The South African Indian Question 1860-1971* (Cape Town: C. Struik, 1971), 68.

the failure to get recognition for polygamous marriages as a fundamental weakness of the settlement. They protested vehemently against this shortcoming in the Act but to no avail.

Muslims in 1914 faced many of the moral, ethical, and practical dilemmas as those confronting their descendents in 2004. This paper traces how Muslims reacted to their predicament in 1914, and the lessons, if any, that we can draw for the post-apartheid period. This paper raises wider questions. This includes the place of Islamic norms in a unitary legal system, the impact of diverse social norms on the political community, how to reconcile normative diversity with political unity, the extent to which Islamic scripture can be reinterpreted ('recontextualised') to conform to local practices, and the degree to which the state may exercise authority over Muslims on issues of marriage, divorce, and gender.[5] Although this paper focuses mostly on Muslims, the recognition of Indian marriages during the period under review was of equal concern to Hindus, and this paper often refers to `Indian' rather than Muslim *per se*. The focus on Muslims is not intended to disregard the impact on Hindus but is due to the focus on MPL in post-apartheid South Africa.

Migration and the Status of the Indian Family

Indians began settling in Natal from 1860 with the arrival of indentured workers. Entrepreneurs from Gujarat on the west coast of India followed from the mid-1870s. Approximately seven to ten per cent, roughly 10,000 to 15,000, of indentured migrants were Muslim, while the majority of the approximately 4,000 passenger migrants were Muslim.[6] There were significant differences of class, language, region, and ethnicity among Indians. Indians comprised ten per cent of Natal's population of 1.1 million in 1904. Approximately ten percent of them were Muslim, 87 percent

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Hindu, and 2 percent Christian. There were obvious class differences between indentured and ordinary migrants.[7] Traders dominated Indian life politically, socially, and economically. Bound by common economic interests, they preserved caste divisions and consciousness, and maintained strong links with India. They also sought to distinguish themselves legally from indentured Indians by insisting that as British subjects they should be treated equally with Whites in terms of Queen Victoria's 1858 proclamation.[8] However, as 'Indians', traders soon discovered that race was a serious obstacle to socio-economic integration and cultural assimilation in White Natal. After Responsible Government in July 1893 a spate of legislation was introduced to force Indians to re-indenture or return to India after completing their indenture, and to legally subordinate non-indentured Indians so that Whites would feel secure against the `Asiatic Menace'.[9] This forced a collective identity of being `Indian' in relation to Whites and Africans. Muslims were not homogeneous either. There were differences of language, class, and religious practice between ethnic groups like Memon, Surti, Mia-bhai, and Koknee who contested the right to speak for Muslims and disagreed over most issues.

The status of Indian marriages was of concern to Colonial officials and employers who were seeking a stable labour force. Many single migrants formed relationships on board ships, at immigration depots, or at places of employment. While it was clear to officials and employers that these men and women understood themselves to be `married', such unions, even when solemnised by Muslim Imams and Hindu priests, were not regarded as legal in Natal. There was uncertainty among colonial

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officials, employers, and Indian migrants themselves about the status of such relationships. In an attempt to stabilise family life, Law 12 of 1872 required Indians to register existing and new marriages with the Protector. Between 1873 and 1886, 4,998 marriages were registered.[10] Law 12 did not resolve the uncertainty surrounding Indian marriages. The first problem was that it contemplated a ceremony antecedent to registration though it did not specify what that ceremony should be. Deputy Protector Manning reported in 1883 that while many Indians considered themselves married "though there was no civil marriage, no ceremony, no nuptial feast, and no registration", Law 12 prohibited him from registering their marriages.[11] He wrote to Protector Mason in January 1884:

> I am of the opinion that the fact of registration should be considered to constitute the marriage, and that the only proof of it in future will be the production of a copy of the register. From the accident of being employed at the same place, people of different castes such as Mussulmans and Hindoos become attached to each and perhaps have children. They then wish to acknowledge their union and legitimise their children but the marriage of such different castes being contrary to their traditions it would be very difficult except as a civil contract.[12]

Colonial officials paid no attention to Manning's suggestion that a ceremony should not be mandatory for Indians to register marriages until the government-appointed Wragg Commission of 1885-1887 made the same recommendation. Even though they lived as husband and wife, the law regarded many Indian couples to be unmarried until Law 25 of 1891 permitted the Protector to register Indian marriages without regard to a ceremony.

Indians probably feared that registering their marriage with a

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Christian Protector or magistrate would mean that customary laws regarding divorce, polygamy, and maintenance would no longer apply. It is also possible that Hindu and Muslim religious figures peddled such views to increase their authority among Indians. The solution, as far as many Indians were concerned, was the appointment of Muslim and Hindu religious marriage officers so that marriages would have religious and legal validity. While the registration of marriages concerned Hindus and Muslims, a marriage officer was only appointed for Muslims. Pioneer Muslim traders like Aboobaker Amod, Dawud Mahomed, and Moosa Hajee Cassim, who owned large businesses and extensive property, commanded the respect and ear of the authorities, and successfully petitioned the government to appoint a marriage officer. Act 19 of 1881 provided for the appointment of a marriage officer for the "solemnization of marriage of persons professing the Mahommedan faith". The choice of Marriage Officer exposed the deep differences among Muslims.

Aboobaker Amod, the first passenger migrant in Natal, was appointed marriage officer on 14 May 1881. However, there is no record of his having registered marriages by the time of his death in 1887. A replacement was not appointed until attorney-general William Goodricke petitioned the Colonial Secretary on 12 November 1891 on behalf of A.M. Tilly, Hoosen Meeran, Dawud Mahomed, Amod Jeewa and other Muslim traders[13] to appoint a replacement because civil marriages performed by magistrates were not valid in "Mahommedan law or that community":

> We would, with submission, point out that the Petitioners are not of the same class or caste of men who arrive in this Colony under the

[13] Other petitioners included Noordien Mohamed, Amod Shakjee, Sayed Mahomed, Mangoo Rehman, Hoosen Esop, Mohamed Esop, Syed Ally, Mamoojee Amod, Rahmatoola Sartoolla Ismail, Ebrahim Amod Mamoojee, Suliman Dawjee, M.N. Ebrahim, Sulliman Ebrahim, Dawood Hoosen, E.H. Rasool, Hoosen Rasool, Amod Saragu, Amod Akbar, Suleman Hoosen, Hoosen Lall, Amod Mohammed, Amod Mahomed Mayat, Mirza Jaffer and Dawjee Mahomed.

> Indian Immigration Law but are men totally different stamp and who are bound by the strict letter of the Mahommedan Law and religious principles. No doubt it is a fact well known to His Excellency that according to the Mahommedan Custom the females of that religion are not allowed to appear or be seen in public. Under these circumstances, and seeing that a Marriage Officer has been appointed for the Jews, we would humbly submit that His Excellency will be carrying out the intentions of the Legislature and at the same time will be granting a lasting benefit upon the Mahommedans of this Town.

The petitioners suggested the appointment of the Imam of the West Street Mosque, Kajee Ramathulla, "thus relieving Your Petitioners from the serious disabilities at present existing". Ramathulla, who had arrived in Natal in 1889, was appointed marriage officer on 20 March 1892. The congregation of the West Street mosque comprised primarily of Gujarati and Urdu-speaking Muslims. Memon Muslims from the nearby Grey Street opposed Ramathulla's appointment. They were led by Hajee Mahomed Haji Dada, a trustee of the mosque and founder-member of the Natal Indian Congress in 1893. Protector Mason, describing Dada as "one of the leading Mohammedans of Durban", suggested that two marriage officers be appointed in view of "the assertion of Haji Dada that a large number of Mahomedans have little faith in or respect for Kajee Ramathulla".[14] This dispute highlights the deep divisions among Muslims. Memons were drawn from places like Porbander, Bhanvad, Ranavav and Jodiah in Kathiawar, a peninsula of India within the Gujarat division of Bombay, and spoke Memonese, an unwritten dialect of Sindhi. Surtis, who constituted an important segment of Muslim society in Natal, were Gujarati-speaking Muslims from villages like Kathor, Tadkeshwar, Variawa, and Surat. Urdu-speaking Muslims were mainly from the village of Rander. The Grey Street mosque was built in 1881 by

[14] NAB, CSO 5197/1892, Protector Mason to the Colonial Secretary, 31 March 1892.

Memon traders Aboobaker Amod and Haji Dada. In 1885, their Surti counterparts led by A.M. Tilly and Hoosen Meeran built a separate mosque a short distance away in West Street.[15] While Memons and Surti's were 'Muslims' to outsiders, differences between them manifested at key moments.

The Colonial Secretary did not act against Ramathulla until he received a letter from Percy S. Coates, the attorney of Dada and other "prominent Muslims", on 5 November 1892. Coates informed the Colonial Secretary that Ramathulla had told his congregation that the fact of his registering their marriage did not alter the application to it of Islamic law. They could marry plural wives and register both marriages, while the Islamic Law of divorce would apply to registered marriages without intervention by the Court. According to Coates, Ramathulla's views were creating "considerable doubt and uneasiness" among Muslims, and would "affect the whole social system of the Mahommedans here. I have written to him several times for a declaration of his views, but he declines to give any satisfactory reply". Ramathulla was also accused of solemnising a marriage between a nine-year-old boy and seven-year-old girl, which would be regarded as normal in India at the time. On seeing Coates' letter, Attorney-General Gallwey advised the Colonial Secretary to "dismiss and prosecute" Ramathulla. The latter was dismissed on 16 November 1892 for allegedly advocating Islamic rather than Natal law regarding marriages and divorce.[16]

Ramathulla protested to the Government through his attorney Ralph Heathcote on 17 November 1892 that he was being "harrassed by a small faction in the congregation here" and that the majority of worshippers at West Street were fully behind him. Worshippers at West Street mosque refuted the allegations against Ramathulla in a petition to Governor-General Mitchell on 11

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[15] See G.H. Vahed, 'Mosques, Mawlana's and Muharram: Establishing Indian Islam in Colonial Natal, 1860-1910' in *Journal of Religion in Africa,* XXXI (2001): 3-29

[16] NAB, CSO 5197/1892.

January 1893. They declared their awareness that "we are subject to the laws of this Colony and the Kajee has never led us to believe otherwise", and requested that the dismissal be overturned so that "our community shall not be without that which has been so great a help and comfort to us, namely the residence here of one of our Priesthood". In a second letter to the Colonial Secretary on 28 November 1892, Ramathulla emphasised that his duties in Natal comprised "merely the celebration and registration of marriages, nothing more":

> I am now forty-seven years of age. My male ancestors have been for many generations Priests at Jellalapool. My great-grandfather to whom the Rajah Gaikwarda of Baroda made a very valuable grant of land in India was a high priest.... The seriousness of the position both as regards my private concerns and as regards my priesthood compels me to beg with all humility that His Excellency will be pleased to reconsider my dismissal and rehabilitate me from that the effects of which, if no relief be granted me, will be life-long.

Dada and his associates feared that the petition might persuade the government to reverse its decision. Coates wrote to the Colonial Secretary on 15 January 1899 that it had "come to my client's [Haji Dada] attention that an attempt is being made to obtain his (Ramathulla's) reinstatement.... The said officer has rendered himself obnoxious to a considerable section of the Mahommedan Community and his re-instatement under any circumstances would be viewed with disfavour by them". This faction prevailed on the government which upheld Ramathulla's dismissal.[17] He left Natal at the end of 1892 and was not replaced. While marriages solemnised by Imams gave the union between man and wife religious sanction they were not recognised by colonial law unless registered with the Protector or a local magistrate.

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[17] NAB, CSO 5197/1892.

Indian migrants from Mauritius who began arriving in the 1870s to work on the Natal railways faced a different problem. When Manning tried to register the marriage of Moonsamy and Mooniama, who were married "according to Brahmanical rites" on 27 July 1884, Registrar of Marriages G. Canond informed him on 20 August 1884 that Ordinance No. 17 of 1846 was only contemplated for marriages "solemnised according to Christian rites". Thus, Manning complained, the marriage could not be registered even though he had spoken to several witnesses "and found that the parents of the girl and all the friends of both sides regarded the marriage as complete and satisfactory". Manning protested to Protector Mason on 10 September 1884:

> The Law declares that certain penalties shall be inflicted if Indians neglect to register their marriages. And I have made constant efforts to teach the Indians that their marriage in this country is as binding on them as it would be in their own country and as binding on them as it is on others. And it will be strange if I have to tell these people that their marriage is not acknowledged and they are not allowed to register it.[18]

A further problem for Indians was that Law 25 of 1891 proscribed the registration of polygamous marriages contracted in India, as well the contraction of such marriages in Natal. The status of polygamous marriages was placed before the Natal Supreme Court in 1899 when Tulukanem sued for "nullification" of her marriage to Munsami on the grounds that he was also married to Thayi. She claimed that because bigamous marriages were not recognised in Natal, her marriage should not have been registered. Justice Broome agreed that although polygamous marriages were in accordance with Indian personal law, they were invalid in Natal, and granted a decree of nullity because Munsami was already married when he married Tulukanem.[19] The law in Natal was contrary to Hindu and Muslim systems of belief which permitted

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[18] NAB, II/ 18, 10 September 1884.
[19] *Natal Advertiser,* 8 March 1899.

polygamy. Muslim men are permitted to marry a maximum of four women provided they treat all equitably in matters such as food, clothing, housing, expenses, as well as the division of time. Islam sees polygamy as essential to maintain the social fabric of society. Jurists explain, for example, that polygamy makes it possible for men to take second wives without divorcing the first if she is barren; husbands with a strong sexual urge can have plural wives rather than plural illicit affairs; widows and unmarried women can become co-wives to men able to support more than one wife rather than live in deprivation, and so on.[20] While Islamic law sanctioned polygamy, colonial law, reflecting the culture and belief system of the dominant White Christian ruling class, made polygamy unlawful. This was in contrast to the attitude of White colonists to the majority African population, who were permitted to live by their customary law through the 1891 Code of Native Law to serve the utilitarian purposes of settlers. While the ideological and institutional foundations of settler society in Natal were thus not based on a single set of laws or social norms, White settlers were unwilling to accommodate the social norms and values of Indians even though they refused to grant them full citizenship nor did they expect them to assimilate into White society. The refusal to recognise polygamy in the case of Hindus and Muslims, insistence that marriages be accompanied by a ceremony, and failure to appoint Hindu and Muslim marriage officers, contributed to the uncertain status of Indian families.

Migrant Experience: Single and Male

Early pioneers saw themselves as transients rather than settlers and rarely brought their families to Natal. The status of Indian marriages therefore remained on the backburner while Indians addressed more pressing problems like immigration rights, the right to trade, and the impact of the £3 tax. The Muslim population

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[20] See Yusuf Al-Qaradawi, *The Lawful and Prohibited in Islam* (Indianapolis: American Trust Publications, 1985), 188-193.

was overwhelming male. According to the 1904 Census 9,992 (9.9 per cent) of Natal's Indian population of 100,918 was Muslim, 72 per cent being male. By 1921 there were 16,809 Muslims in Natal, 10,095 or 60 per cent being male. The experience of H.C. Coovadia, a partner in *Hoosen Cassim & Co.* with his brother M.C. Coovadia, underscores the pattern of predominantly male migration and retention of strong ties with India. Although H.C. Coovadia first came to Natal in 1881, his family only joined him in 1918, 37 years later. The following summary of H.C. Coovadia's movements between Natal and India illustrates the sustained link of migrants with their villages of origin. [21]

Arrival in Natal:	1881	Departure for India:	1885
	1886		1890
	1892		1896
	19.10.1900		1901
	1.10.1903		1908
	29.11.1917		1925
	11.12.1929	Died	1932

Coovadia was not an exception. Many pioneer traders followed this arrangement. Traders usually formed partnerships, and took turns to manage the business in Natal while fellow-partners visited India. Moosa Hajee Cassim arrived in Natal in 1880 and opened *Moosa Hajee Cassim & Co.* in partnership with his brothers Ebrahim and Umar while his wife remained in India. The brothers travelled regularly between Porbander and Durban, and had homes in both places. Moosa lived in India for ten years between July 1899 and April 1909 while Ebrahim and Umar ran the business in Natal. Moosa Hajee Cassim returned to Natal permanently with his wife Hoorbai Bagasrawalla, sons, Aboobaker (A.B.), Abdulla, and Ismail, and daughter Ayesha in 1909. Ebrahim and Umar returned

[21] NAB, MSCE 18488/1932.

to India in 1910, terminated the partnership in 1912, and never returned to Natal. Moosa remained in Natal where he died in 1921.[22]

Ebrahim Patel was born in Natal in 1897. After his father's death, the family returned to Kathor where Ebrahim married Hawa Essop Dawjee in 1918. He returned to Natal shortly after his marriage to open a business but was unsuccessful. He rejoined his wife in Kathor in 1921, opening a grocery store. A son Mohammed was born in 1921 and a daughter Fathima in 1922. After four years Ebrahim felt stifled by the lack of economic opportunity and returned to Natal without his family. Hawa and the children only joined Ebrahim in 1929 after he opened a retail store.[23] M.C. Anglia, Mahomed Ebrahim Salaybhai, and Mahomed Goolam Hoosen Patel formed a partnership on 1 August 1903. A special condition of the partnership provided for travel to India: "Any partner desiring to go to India on a holiday may do so with mutual consent of the other partners and when such absence shall not exceed a period of more than one year unless mutually agreed for a longer period". All three partners spent long periods in India; further, the partnership arrangement allowed Anglia to participate in passive resistance during which he was imprisoned for several months.[24]

G.H. Miankhan of Ahmedabad arrived in Natal around 1879, followed by his brother Adamji Miankhan in the early 1880s. They established *G.H. Miankhan and Co.* in Field Street and were joined by their brothers Chandabhay and Nanabhay. G.H. Miankhan returned to India in the early 1890s to marry Wajeeraboo Ismailjee. Like many traders, he travelled back and forth between India and Natal while his wife and daughters Munoobhai and Atheekehbhai lived in India. They, in fact, never

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[22] NAB, MSCE 6274/1919.

[23] S. Patel, 'Ebrahim Suleman Patel', (Third-Year History Project, University of Durban-Westville, 1983), 12-15.

[24] NAB, MSCE 4643/1919.

visited Natal as Miankhan died while visiting India in 1919.[25] Adamji Miankhan was a close associate of the Gandhi and secretary of the NIC for several years. He was born in Ahmedabad in 1866, married Fooljiboo in 1888 and had two children, Sakeena Bai (b. 1894) and Ally Hoosen (b. 1889). When Fooljiboo died in 1899, he married Umtoollboo Abdoolally in 1901, and had three more children, Tasaduk Husein, Gairah Bai, and Hoosen. Adamji Miabhai died in Ahmedabad in July 1907 at the age of 41. His wife and children had never visited Natal. The example of *G.H. Miankhan and Co.* further illustrates the importance of business partnerships in permitting colleagues to maintain homes in Natal and India.[26]

A 1926 *Government Report* found a large discrepancy between the numbers of married Indian men and women in South Africa because of "the custom among resident Indians of keeping their wives in India, where they are visited by their husbands at intervals. Thus a commercial or business domicile is maintained in the Union, but a domicile of home and family, that is, true domicile, in such cases is retained in India".[27] The decision to leave wives and children in the sub-continent was motivated by factors such as the short-term intention of the migrants, apprehension of commitment to settlement in the new environment, or the financial cost of supporting wives and children until one's business was profitable. Mahatma Gandhi, for example, when he was joined by his wife Kasturbai in 1896 had to assist during the birth of their children, nurse her when she fell ill, seek proper facilities for educating his sons Manilal, Harilal, and Devdas, and fit time in his heavy schedule for his family. In fact, after a visit to India, he was reluctant about Kasturbai returning to Natal, and wrote in 1903:

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[25] NAB, MSCE 4310/1919.

[26] NAB, MSCE 31/96.

[27] Special Report No. 39. The Indian Population of the Union, 1926 (Pretoria, Government Publishers, 1926), 6.

> I told her that either I should return to India at the end of the year or that she should come here by that time. I am most anxious to fulfil the promise ... how to do so is the difficulty. To return at the end of the year is out of the question. I must not think of returning for three or four years. Will she consent to remain there all that time? ... Explain that situation to your Aunt. It is highly desirable that she should decide to stay on there, as life here is rather expensive. If she remains there, savings made in this place will enable her and the children to lead a comparatively easy life in India.[28]

Kasturbai did not heed Gandhi's advice, but joined him in Natal in 1903. Gandhi had to nurse her during her illnesses. In March 1914, for example, he wrote to family members: "She lies hanging between life and death. I am by her side the whole day. ... I have done hardly anything save nursing her during the last ten days. I have been obliged to remain at home.... I always read the *Ramayana* to her and sing prayer songs".[29] Even though communication and transportation were expensive and inefficient, many migrants moved between Natal and India, and maintained homes in both places. They sustained a myriad of other transnational relationships and interests. The absence of families, gender imbalance, and youthfulness of the migrant population resulted the status of Muslim and Hindu marriages not being at the forefront of their concerns during the formative decades of Indian settlement.

There is little record of the terrible impact that long separations had on the women left behind in the villages. One can only contemplate this. Were wives and children anxious that long periods apart would lead to family disintegration? Did wives fear that husbands might create new families in Natal to ease the pain of separation? There are a few records of the consequences for wives. Suliman Mahomed Vorajee married Rassool Amod in India

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[28] F. Meer, Ed. *The South African Gandhi. An Abstract of the Speeches and Writings of M.K. Gandhi 1893-1914* (Durban: Institute of Black Research), 1075-1076.

[29] Meer, *South African Gandhi*, 1079-1080.

in 1872 when she was just four. They lived together for 16 months during 1883 and 1884 after Rassool reached puberty. Vorajee left India for Mauritius in 1884, and migrated to Natal in 1886. Rassool's brother Dawood Amod, who arrived in Natal in 1888, sued Vorajee for financial compensation. He claimed that Vorajee had left Rassool "entirely unprovided for" in India and that he, Amod, had spent £84 to maintain her. Vorajee told the court that he arranged for Rassool to live with his mother when he was leaving for Mauritius but she refused and deserted him. He also claimed that he had offered to pay her fare to Natal but she snubbed his offer. Vorajee further claimed that he did not ask Amod to pay for Rassool's maintenance and that Islamic law did not require him to provide financial support during Rassool's "desertion". Amod, in turn, told the court that when he met Vorajee in Natal, the latter told him: "I left your sister with your mother. Don't be afraid, I'll pay expenses of her feed and keep. I promised to send your mother from 150 to 200 rupees per annum". Amod produced a letter from his mother dated 14 August 1890:

> When Suliman went away he said we should not be afraid of expenses, and that he would send from about 150 rupees to 200 rupees every year, but he has not even sent a "pie" in those six years; mention this in the presence of two persons that he may be put to shame, and then he may send expenses or money.

Amod read this letter to Vorajee in the presence of S. Peerun Mohammed, Amod Jeewa, Dawjee Mahomed Mayat, and Ibrahim Vahed. They supported Amod's version that Vorajee had promised to return to India or pay for Rassol's upkeep. Justice Turnbull gave judgement in favour of Amod with costs. Justice Gallwey, however, declared that since the promise was made to Amod's mother, she had to institute the claim. Amod could not sue in his own name. Justice Wragg supported Justice Gallwey. They declined, however, to give costs to Vorajee, "whose conduct

towards his wife Rassool appears to be very reprehensible".[30]

Wives in India were anxious that husbands might create new families in Natal to ease the pain of separation. Some did not meekly accept their plight but fought to get their rights recognised and claims satisfied. One lonely wife addressed her concerns to the Governor-General of South Africa. Fathima Sakoor Latib Bagha of Mundiawar, Kutyana, wrote to the Governor-General on 22 June 1916. Though hard-pressed for money she was very conscious of maintaining her pride and dignity:

> I am a daughter of a respectable family and belong to the Memon community. About eleven years ago I was married to a Memon Abdulgani Dada at the age of eleven. A.G. Dada, my husband, is a native of Kutyana, a town of Junagadh State in India. He stayed after marriage for one month and a half with me and went for earning to South Africa. My husband at the time of departure gave me promise of returning within two years from journey and entrusted me gold and silver ornaments worth ten pounds (£10). From South Africa he sent £10 for living expenses for me and his parents a long long time ago. Since then no news or expense is received from him. Moreover I am given to understand he has married a Malay woman in your Colony and passes his time with her. Here I live as a chaste woman and a true and faithful wife to my husband. If I am required to prove the truth of it, I will be ready to do so on being informed. But now without him and the expense from him I cannot live. Therefore I, a woman, request most humbly your Excellency to be pleased enough to give me proper justice and redress my grievances. Either Your Excellency may be pleased enough to send the divorce certificate signed by my husband, together with the sum of living expenses of so long a time, which I can claim as his wife, or Your Excellency will be pleased enough to take care that he comes directly to Kutyana. If he is not willing to defray living expenses and at the same time is not willing to come but wishes to divorce me still, I will not grudge. Anyhow either must be done. Of one thing I must remind your Excellency that the divorce can be given only by my

[30] *Natal Law Reports 1893*: 238-244; 3 -10 July 1893, 1 September 1893.

> husband and not by the wife, according to our Mahomedan law. Against the will of the husband, the wife cannot be released from the marriage bond. Hoping to be honoured with the favourable reply.

As the Governor-General did not reply, Fathima wrote to him again on 15 December 1916. The Secretary of Interior investigated the matter and reported to the Prime Minister on 2 April 1917 that the husband had told the police that he would consult with a solicitor as he intended divorcing his wife. The Secretary of Interior advised the Prime Minister that it would be "best not to get involved and for government to act as go-between to facilitate divorce. It will be best to leave the matter alone in the hope that the husband will take action". The letters were sent to the government of Bombay but there is no record of the outcome.[31]

Passive Resistance, 1913-1914

Gandhi was preoccupied with the passive resistance campaign which had been launched in the Transvaal in 1906 to protest against a law requiring Indians to register. By 1909 only Gandhi and a few loyal supporters were engaged in the `movement', and between 1909 and 1913 it constituted primarily of negotiations between Gandhi and the government.[32] Seven years of passive resistance had brought few tangible results. Meanwhile, the mass of Indians laboured under the burden of the £3 tax. P.S. Aiyar, editor of *African Chronicle*, formed the Natal Indian Patriotic Union in 1908. Though short-lived because of poor organization and lack of finance, NIPU successfully highlighted the burden of the tax.[33] The Colonial Born Indian Association, formed in March 1911, helped fill the political vacuum for working class Indians in Natal. The CBIA focused mainly on restrictions against inter-provincial migration, an important issue for educated Indians as

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[31] SAB, GG902, 15/836.
[32] Swan, *Gandhi*, 197.
[33] Swan, *Gandhi*, 206.

shrinking opportunities in Natal was forcing many to seek jobs elsewhere in South Africa.[34] When Gokhale, a high-ranking Indian diplomat, visited South Africa in 1912 the tax was at the forefront of Indian grievances in Britain, India, and South Africa. He discussed the tax with the Union government and left behind the impression that it would be repealed. Smuts denied this. Gandhi therefore considered it ethically proper to pursue its repeal. The tax was one of several demands listed by Gandhi. Others included the removal of residential barriers in the Transvaal, the right to inter-provincial migration, the right to enter the Orange Free State, just licensing laws, the right to domicile after three years absence from the country, the validity of Indian marriages, and removal of restrictions on the entry of wives and children from India.[35] According to Swan, this "strategic modification of broadening the movement's goals opened up the possibility of elevating the campaign from a regional to national basis".[36]

The infamous judgement of Justice Malcolm Searle in March 1913 placed the status of Muslim marriages on the public stage. Justice Searle ruled that immigration authorities were justified in refusing entry to Hassen Essop's wife because she failed to meet the requirements of a 'legal' spouse. Searle ruled that their marriage was not in accordance with South African marriage laws and was therefore invalid. This made invalid every Indian marriage not conducted according to Christian rites or registered with a marriage officer. Gandhi argued that the legal validity of Muslim and Hindus marriages was an existing right, and that the court was being facetious in denying the legitimacy of this marriage, particularly as Hassen Esop only had one wife.[37] In an article titled "Attack on Indian Religions", Gandhi wrote in *Indian*

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[34] Swan, *Gandhi*, 207.

[35] G.H. Calpin, *Indians in South Africa* (Pietermaritzburg: Shuter and Shooter, 1949), 35.

[36] Swan, *Gandhi*, 233.

[37] F.N. Ginwala, 'Class, Consciousness and Control: Indian South Africans 1860-1946 (Ph.D, University of London, 1974), 197.

Opinion that the ruling devalued Indian religious institutions and family, created the possibility that all Hindu and Muslim wives could lose their right to live in South Africa, and would permit the government to bar any more wives from entering the country.[38] When the act was explained to Gandhi's wife Kasturbai, she became incensed and told him: "Then I am not your wife according to the laws of this country.... Let us go to India." When Gandhi told her that this was not possible until the Indian question had been resolved, Kasturbai, though ill, insisted on joining the passive resistance campaign. Gandhi reluctantly consented to her request. All the other women living in Phoenix, and many of Kasturbai's female associates, were equally incensed and followed her lead by joining the campaign.[39] The Transvaal Indian Women's Association sent a telegram to Fischer, the Minister of Interior, stressing that "the honour of Indian womanhood is affected by the judgement.... Members would offer passive resistance and in common with male members of the community suffer imprisonment rather than the indignity to which the Searle judgement subjects them".[40] The response of women was one of the triggers of the 1913 passive resistance campaign. According to Gandhi, the women "will cover themselves and the land of their birth, indeed, of their adoption, with glory.... We fully recognise what their wire means.... It is largely in their hands to end the struggle at an earlier stage. The larger the number of passive resisters, the quicker the termination of the struggle is a mathematical formula".[41]

The Searle Judgement was followed by a landmark ruling in the Natal Supreme Court in October 1913 which had far-reaching implications for Indian immigration. Mehboub Khan Jamadar, born in Nawsari, India in 1855, arrived in Natal by a strange quirk of fate. His relative Abdullah Khan migrated to Natal in 1883.

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[38] *Indian Opinion*, 22 March 1913.
[39] *Indian Opinion*, 1 October 1913.
[40] *Indian Opinion*, 10 May 1913; in Meer, *South African Gandhi*, 1018.
[41] *Indian Opinion*, 10 May 1913; in Meer, *South African Gandhi*, 1020.

Word reached his family that Abdullah had been injured during the voyage and was hospitalised. Abdullah's father arranged for Mehboub, a captain with the Gaekwar State Police, to make the journey to Natal and escort Abdullah back to India. Khan found that Abdullah had made good recovery and both remained in Natal. Khan returned to India in 1902 to marry Kulsum Bibi. Their only son, Ebrahim Ally Khan, was born in India in 1903. Khan returned to Natal where he opened a business in Isipingo while his family remained in India. Kulsum Bibi and Ebrahim joined Khan in Natal on 8 August 1913. Immigration Officer G.W. Dick refused them entry on the grounds that they were prohibited immigrants. While the marriage was solemnised by an Imam and recognised as legal and valid in India, Dick ruled that Kulsum Bibi was a "restricted" person because the marriage was solemnised under Islamic Law which permitted Mahboob Khan to take other wives during Kulsum Bibi's lifetime. Eugene Renaud, who appeared for Kulsum Bibi, argued that the marriage was monogamous because it was a union of one man and one woman. The Immigration Department argued that the marriage was polygamous because it took place under Muslim rites in a country that permitted polygamous marriages.[42]

Judge President J.P. Dove-Wilson, defining marriage "as the union of one man and one woman, to the exclusion, while it lasted, of all others", said that no union could be regarded as a marriage in South Africa if a man and woman entered into the union agreeing that other women might be assumed by the husband during her lifetime. Since Islamic law permitted Mahboob Khan to contract other marriages during Kulsum Bibi's lifetime if he desired, their union, "if indeed it can be considered by us as a marriage at all, cannot be called monogamous".[43] Dove-Wilson thus looked upon all monogamous Muslim and Hindu marriages as polygamic. This reinforced the Searle judgement and rendered the majority of

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[42] *NLR*, 1913: 437-443.
[43] *NLR* ,1913: 437-443.

Indian marriages invalid because they were performed under Hindu or Muslim rites. It also meant that all wives of Hindus and Muslims, even if they were the only wife, could be denied entry into South Africa. Kulsum Bibi and Ebrahim were forced to return to India. Khan subsequently married Rahiman in Durban. She died in July 1938. In 1949, Khan applied for an entry visa for Kulsum Bibi. This time she was allowed to join him because his wife Rahiman had died. They were thus reunited after 36 years! Kulsum Bib was seventy and Khan ninety-four. They lived together for three years before Khan's death in Isipingo in 1952 at the age of ninety-seven.[44]

Gandhi's widening of the demands of Indians, particularly the inclusion of the £3 tax and the status of Indian marriages, ensured mass support for passive resistance. As the government refused to yield on the demands, Gandhi initiated a strike by 4,000 Indian workers on 16 October 1913 at the coal mines in Northern Natal. Smuts took no action so Gandhi forced his hand by crossing illegally into the Transvaal on 23 October. The success of the strike was assured when 15,000 Indian workers on coastal sugar estates joined at the end of October.[45] The decision to strike is an indication of the depth of suffering caused by the £3 tax. About 65 per cent of indentured Indians were serving their second or subsequent term.[46] Tension was greatest on plantations because of the larger numbers, the dependency of planters on Indian labour, the year's crop had not been cut, and there were rumours that Africans were going to join the strike.[47] In Durban 7,000 free Indians joined the strike as domestic workers left their white households, waiters abandoned hotels, railway and municipal workers did not report to work, factory workers downed tools,

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[44] NAB, MSCE 1198/1952.
[45] Swan, *Gandhi*,252.
[46] J. Beall and D. North-Coombes, 'The 1913 Natal Indian Strike: The social and Economic Background to Passive Resistance,' in *Journal of Natal and Zulu History* VI (1983), 73.
[47] Swan, *Gandhi*,253.

newspaper and milk vendors joined in sympathy and hawkers withdrew from the streets.[48] Frustrated employers demanded action. The violence associated with the strike, police brutality, and use of mine compounds as prisons led to widespread negative coverage in India and England.[49]

The 1913 strike drew widespread publicity in India and England. In India, Gokhale organised meetings and collected money for passive resisters. He also sent Charles Andrews and W.W. Pearson to South Africa to address prominent Whites at public meetings and church services on the justness of the Indian cause. There was concern in London that the South African government's racist policies and heavy-handedness had put the empire at risk. Smuts responded to the negative international publicity by appointing the Solomon Commission in early December 1913 to investigate Indian grievances.

Solomon Commission, 1914

The appointment of the Commission caused a rift among Indians. Gandhi, who was in jail at the time, regarded two of the three commissioners as anti-Indian and boycotted the inquiry.[50] However, he corresponded privately with Smuts and agreed to suspend passive resistance until the Commission had published its findings. The decision to embark on *satyagraha* had split the NIC. One faction, led by joint secretaries M.C. Anglia and Dada Osman, opposed passive resistance in favour of a more moderate strategy. Matters came to a head at a meeting of 3,000 Indians in Durban in 19 October 1913 when a vote of no confidence was passed against Gandhi. Gandhi and his loyal supporters, including Muslims like Dawud Mahomed, Omar Haji Amod Jhaveri, Shaik Emamally, A.M. Paruk, G.H. Miankhan, A.G. Timol, and A.H. Moosa, left the

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[48] C.G. Henning, *The Indentured Indian in Natal*, (New Delhi: Promilla & Co., 1993), 183.

[49] M. Swan, 'The 1913 Natal Indian Strike', *Journal of Southern African Studies*, 10, (April 1984): 239-258, 257.

[50] *Indian Opinion*, 17 December 1913).

NIC and formed the Natal Indian Association (NIA).[51] Unlike Gandhi and the NIA, the NIC resolved on 28 January 1914 to cooperate with the Solomon Commission.[52] M.C. Anglia and Dada Osman appeared before the Commission, which sat in Durban from 26 January to 7 February 1914. They argued for polygamous marriages, changes to immigration laws, and just application of licence regulations. The *Natal Mercury* (8 February 1914) reported the submission by M.C. Anglia, Dada Osman and Molvie Fateh Mahomed, Imam of the Grey Street Mosque:

> Mr. M.C. Anglia: It is inconsistent with our religion that a man should be limited to only one wife, though the general practice was to have only one wife.
> Chairman: But you claim the right to have more if desired?
> Mr Anglia: Yes.

Mr Anglia, proceeding, said that at one time marriage officers were appointed, and they thought this would meet their religious opinions as regards polygamous marriages, but the Government declined to make appointments on those lines. The Chairman pointed out that a marriage before a marriage officer would be registered as a monogamous marriage. Would that meet the views of the Mohammedans? Mr Anglia said he personally would have no objection but possibly it would not meet the views of others.

> The Chairman: What you want is that polygamous marriages should be recognised as valid?
> Mr Anglia: That is the only thing we could ask.
> The chairman: Rather than a man should be limited to one wife, Mohammedans would rather not have the marriage registered.
> Mr Anglia: On account of the limit. If polygamous marriages were recognised they would be registered.

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[51] *Natal Advertiser,* 21 October 1913.
[52] *Indian Opinion,* 2 February 1914.

The deputation also outlined the ceremonies of marriage and the procedure for divorce. If a man solemnly satisfied himself that his wife's conduct was sufficient to warrant a divorce, he must warn his wife three times, and if with these repeated warnings the cause of complaint was not removed, she was separated from her husband for one month. If she still did not mend her ways she was separated for a second month. Then if matters were still the same after a third month the man would go to a priest and fill up a paper which was handed to enable her to contract a new marriage.

> Chairman: Who judges whether the woman is going wrong? The man himself?
> Mr Anglia: Yes; but in very special conditions a wife can go to the priest and complain about her husband, and afterwards the priest could force the man to divorce her.
> Chairman: You wish your laws as regards divorce and marriage to be recognized?
> Mr Anglia: If possible.

At this point the priest [Fateh Mahomed] interposed that he knew that in 1857 the Queen made a proclamation that for her people all over the Empire there should be no religious bar – that religion should be recognised everywhere. If they were to admit this (as to one wife), the millions of Mohammedans all over the world would curse them, and say: "You sold your birthright". Their religion had been established many hundreds of years ago, and not a comma had been altered. Not a word had been altered, not a word had been added, and the "beauty of the flag" under which he hoped to live and die, was that when it came to the religious aspect, there was no interference with religion.

Mr Anglia was questioned by Mr. Wylie as to what became of the children in the case of a divorce, and he was told that if very young the wife kept them, at the father's expense, but if they were older the father took them. Divorce was very rare,

for if a man divorced his wife without cause he could be called before the congregation, and made an outcast. The children of each two or more wives were recognized as legitimate, and were equally recognized as regarded the distribution of his property after his death. Mr Anglia said that under the religious law, a will which left all the property to one was bad, and a man profiting under it could be made an outcast. In India such a will would be overruled.

> Mr Wylie: If you decided to have your marriage registered as monogamous marriage would you be debarred from entering the mosque?
> Anglia: No; though some would say I had sold their rights. It would be false to our religion.

The 38-page report produced by the Solomon Commission in March 1914 addressed issues such as the man's right to repudiate his wife and take more than one wife. On the marriage question, the Commission suggested that "some provision be made for legalising *de facto* monogamous marriages under a system which recognises the right of the husband to take one or more wives", without making illegal a second marriage performed "according to the rites of their own religion, though these women could not be recognised as having any legal status as married women". The Commission was not prepared to legitimise polygamy, "so serious a departure from our principles and law that it would not be endorsed by public opinion". The values and ideas of Whites about proper conduct, and their conceptions of family and marriage, including monogamy, were imposed on Indians who could not live according to their values and practices because it would be offensive to White public opinion. The Commission also advised against the introduction of the Islamic law of divorce, which gave the husband the right to divorce his wife unilaterally by uttering the *talaq* divorce formulation:

> The husband was the judge in his own cause. If he is satisfied in

> his own mind that his wife is misconducting herself, he is entitled, after warning her three times, an interval of a month taking place between each warning, to go to the priest and write out before two witnesses what is called a `Divorce Paper' setting forth his reasons for divorcing his wife. He then utters a special word signifying `I leave her alone', and thereupon the marriage is dissolved. The paper is handed to the wife as evidence, to enable her to contract another marriage. The priest himself, it will be noted, makes no investigation into the charge and all that is necessary is that the husband himself should be satisfied of his wife's misconduct. On the other hand, the wife has no similar right to divorce her husband. All she can do is lay a complaint before the priest, who enquires into the matter and, if satisfied that the charge is true, he summons the husband before him, and if he persists in his misconduct, the priest can bring pressure upon him to divorce his wife. This is the law we are asked to recognise. It needs only to be stated how impossible it would be for us to accede to the request of the Mahommedans that we should recommend legislation recognising and legalising the Mahommedan law of marriage and divorce.[53]

According to Bowen, in many colonial settings Europeans abided by a moral ideology that assumed that law shapes moral order because individuals learn from the law what they may and may not

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[53] *Solomon Commission 1914*, 18-22. Divorce is one of the most detested acts in Islam. It is reluctantly permitted when every other course at reconciliation has failed. Islamic law contains a number of conditions pertaining to divorce. The intentions of these impediments is to make divorce difficult. Divorce, for example, is forbidden during menstruation and in the period immediately following menstruation if the husband has had sexual intercourse with his wife. If a husband has had sexual intercourse with his wife he has to wait until the next menstrual cycle to make sure that she is not pregnant as this might change his decision. When a husband announces to his wife that he intends divorcing her she must continue to live in his house for a waiting period (*iddah)* of around four months to give the couple an opportunity to reconcile. A husband has to pronounce divorce three times on three different occasions, meeting the criteria listed above, giving him an opportunity to reconsider his decision. A woman can demand divorce if she has an acceptable reason. See See Al-Qaradawi, Lawful and Prohibited in Islam, 211-219.

do. Permitting Islamic divorces and polygamy, according to this view, would lead to an increase in these practices. Not giving legal sanction to such practices was seen as a means of discouraging the regime of polygamy and helping preserve the institution of monogamous marriages.[54] However, given that White settlers were not seeking to assimilate Indians, that they were not seeking cultural unity, that the state was not a source of legitimacy for all citizens, and that Africans were allowed to live according to a separate set of laws, one would have expected Whites to give Indians a degree of latitude. But this was not the case.

Immigrants Regulation Act, 1913: What 'Relief'?

The Solomon Commission's recommendations formed the basis of the Indian Relief Bill, Act 22 of 1914, which repealed the £3 tax, permitted one wife and the minor children of an Indian marriage, even if polygamous, to join husbands resident in South Africa; permitted plural wives living in South Africa to continue to do so as long as their husbands were resident; and validated domicile certificates in Natal. However, Indians were still banned from entering the Orange Free State, only Indians born in South Africa before August 1913 were allowed to enter the Cape, restrictions against Indian immigration remained, while the Gold Law, trading restrictions, and trade licence difficulties in the Transvaal were not addressed.[55] Smuts's declaration that the Agreement was "a full and final settlement" was not shared by Indians across South Africa.[56] The Relief Bill introduced important changes regarding marriages. A crucial provision, particularly for passenger Indians keen for their families to join them in South Africa, was that it permitted the entry into South Africa of wives in "potentially polygamous marriages" as long as they were the only legally registered wives. Plural wives, however, were not recognised even though their marriages had religious sanction. While Muslims

[54] Bowen, "Sharia, State, and Social Norms", 22.
[55] F. Meer, *Portrait of Indian South Africans* (Durban: Avon House, 1968), 44.
[56] Calpin, *Indians*, 36.

loyal to Gandhi, particularly those who left with him to form the NIA, accepted the settlement as a 'Magna Carta' providing space for Indians to resolve their outstanding grievances, many others criticised the settlement. Many Muslims, in fact, questioned Gandhi's claim to represent them. H. Motan of the Hamidia Islamic Society in Johannesburg remarked:

> During the last six months the Islamic Societies have time and again repudiated the authority of Mr Gandhi to represent them in any capacity whatsoever.... The most important grievance as far as Mohammedans are concerned is the settlement of the marriage question. If we are to remain true to our religion we cannot possibly accept the so-called solution in the Bill. What does it matter to him whether the question is settled to our satisfaction or not? He is a Hindu and if he has the right to speak for anybody – he speaks for Hindus. A Hindu does not claim to have the right to more than one wife, and knows nothing about the Koran. Obviously therefore, he in no way sacrifices any religious principle by accepting this Bill.[57]

Indian Views published telegrams from the Afghanistan Community, Pathan Society, Military League, Kanamia Community, Market Merchants' Association, Hamidia Society, Cokney Community, and British Indian Association protesting against the Act. The four "most learned Indian Mussulman theologians in the Transvaal", Mawlana Abdool Gafoor, Mawlana Abdool Cader, Mawlana Mohammed, and Syed Mohammed, declared the provisions regarding Muslim marriages to be in conflict with *shariah* and "interference in our religious laws".[58] From Natal, Anglia emphasised that Muslims were demanding this right because it was in line with *shariah* and not because they wanted plural wives. He exhorted Hindus to join in the struggle to have polygamy recognised in principle:

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[57] *Pretoria News*, 9 July 1914.
[58] *Indian Views*, 24, 31 July 1914.

> We know for a fact that the Hindu religion permits polygamy in common with the Mohammedan, basing its sanction no doubt on physiological, human, social, and moral grounds exactly as in the case of the latter. The bugbear of the Government might be that such recognition would lead to an undesirable population of Indians. Such a fear however, is groundless; the Indians not being a prolific race, statisticians to the contrary notwithstanding, and the number of those among them contracting polygamous marriages being an infinitesimal part of the general population. The Mohammedan position in this question is clear to them; they have no desire to recede from it, but to tenaciously adhere to the same until their wish is given legislative expression. It should not be assumed that because Mohammedans insist on the legal recognition of the Mohammedan marriage law that they are libidinous. They are no more so than are the rest of God's human creation. To the most thoughtful among them monogamy is the approved and normal state, while polygamy is not anathema as a social privilege exceptionally granted.[59]

Statistics support Anglia's contention that polygamy was the exception rather than the rule. According to the 1921 Census, for example, 27,136 Indian men had one wife while a mere 406 (1.4 per cent) had more than one wife. Gandhi replied to criticism by suggesting that it was not incumbent upon people to register their marriages. The object of registering marriages, he said, was to protect children. It was "necessary to have a law to put a stop to the religious insults. This has been achieved and it is enough. The law is so framed that the children will be protected without registering marriages".[60] There was an immediate riposte from Anglia:

> So we have the astounding fact from Mr Gandhi that the Relief Act is a farce. Mr Gandhi knows well that no respectable Mohammedan will register his marriage and thereby give up his

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[59] *Indian Views,* 23 February 1917.
[60] *Indian Opinion,* 17 July 1914

> religion.... We now have it from Mr Gandhi that the object of the Act can be easily defeated by not registering one's marriage. This will no doubt show up the hollowness of the 'final settlement'.[61]

The chairman of the Hamidia Islamic Society, Mahomed Saloojee, and honorary secretary, H.D. Maal, wrote to the Principal Secretary of State for the Colonies on 26 March 1915 that the validity of Muslim Marriages, and thus the legitimacy of children of such marriages, "is one that cuts at the root of our Faith". The recommendations by the Solomon Commission were such that "we cannot abide by them".

> The Commission stated that they had arrived at the conclusion that the Indian community has generally accepted the principle of admitting one wife of an Immigrant as long as she is the only wife inside Africa irrespective of the number of wives the Immigrant may have in India. We feel it our duty to point out how impossible it is for us to accept such a conclusion, for, as Mahommedans, we cannot abide by any Law in that direction and at the same time adhere to the tenets of our Faith. It would be wholly contrary to the precepts of the Koran. The Law of the Union of South Africa recognises only monogamous marriages and therefore if any Mahommedan dies inside the Union of South Africa without having made a Will, the children of only one wife would be recognized as heirs to the Father's Estate, and grave injustice would be done to other children. We may be permitted to point out that there are Laws in existence in the Union of South Africa which allow succession to the Estates of polygamous natives according to their own Laws and Customs, and we humbly submit that no great harm could be done either to the religious, moral or social instincts of the European population if a similar privilege were allowed to His Majesty's Mahommedan Subjects. [62]

A further problem for Indians was the difficulty of providing

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[61] *Indian Views*, 17 July 1914.
[62] SAB, GG901, 15/770.

appropriate documentation. Lewis Harcourt, Secretary of State for the Colonies, was concerned about the evidence that had to be produced to support the claim of admission of wives and minor children of Indians resident in South Africa. In the absence of a properly certified marriage certificate, prospective migrants had to obtain the certificate of a competent officer to the effect that the woman was the wife of the applicant, and that he was personally aware that the parties concerned were married on a certain date or that he had taken sworn testimony as to the circumstances and date of the marriage. The testimony and evidence had to be attached to the certificate.[63] According to Harcourt, the Indian government considered marriages as essentially social customs of the caste or community. There was nothing analogous to Western countries where the law required marriages to be solemnised by clergymen or marriage registrars. Marriage certificates were unknown because official records were not kept of Hindu marriages, while records of Muslim marriages were "seldom perfect". Since most marriages were contracted when the parties were very young it was difficult to establish the exact date. It was also virtually impossible for magistrates to have personal knowledge of specific relationships because they exercised jurisdiction over very large and remote areas. Harcourt felt that enquiries by local junior officers, countersigned by Magistrates, should suffice. He saw little purpose in attaching the records of enquiries as these were in the vernacular.[64] The South African Government, however, left the onerous regulations in place.

Governor General Lord Buxton suggested to the Acting Minister of Interior Sir Thomas Watt on 9 November 1914 that children of polygamous marriages be recognised as legitimate for the purposes of succession to the intestate estate of their deceased father, as was the case in Mauritius where children of Muslim polygamous marriages were legitimised. Watt replied on 14

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[63] SAB, GG 901, 15/743, 1 September 1914, Harcourt to Governor General Buxton.

[64] SAB, GG 901, 15/743, 1 September 1914.

November 1914 that in the absence of "further agitation" since the Act had been passed to "finally dispose of all the grievances of the Indian community", Buxton should "discourage any attempt to reopen the matter". For Watt, the fact that Muslims had not applied for the appointment of a marriage officer since the Relief Act had come into operation on 2 July 1914, showed that they did not "value very highly the privilege of having their marriages solemnised by a Marriage Officer of their own religion appointed by the Government". [65] Watt failed to understand that most Muslims dissociated themselves from the Act because they regarded it as contrary to Islamic law. Buxton informed to Harcourt on 18 November 1914 that South African government ministers had made it clear that "one of the great inducements for the passage of the Indian Relief act was the understanding that it embodied a final settlement". In the circumstances he felt that it was futile to pursue the status of children of polygamous marriages:

> I am persuaded of the expediency of allowing the matter to drop, as there can be little or no doubt that Muhammadan Indian opinion would not really be satisfied with anything short of the full legal recognition of Muhammadan plural marriages – a concession less likely in these days to be tolerated in the Union of South Africa than in any other professedly Christian country.[66]

The India Office accepted Buxton's counsel that the matter be dropped.[67]

Legacy of the Indian Relief Act

During the first two decades of the twentieth-century, Muslim society began to mature as more and more Muslims transients became settlers, families joined male migrants, and children grew

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[65] SAB, GG901, 15/760.
[66] SAB, GG 901, 15/75.
[67] SAB, GG901, 15/760.

to adulthood. The 1913 Act had important consequences for aspects of Muslim life. The status of married and their offspring, the amount that descendents had to pay as estate duty, maintenance payable to wives, the rights of wives to seek divorce, and other issues affecting Indian migrants depended on interpretations of this Act. There are many examples to illustrate the different ways in which Indians were affected by the law, and the difficulties that many faced. Dawjee Mahomed Seedat married Aissa Bibi in India in 1883 and they had four children. He abandoned his domicile in India in 1902 and became resident in Natal. In 1904 Seedat married his second wife Rasool Bibi in India and they had six children. Seedat died in 1916 with both wives and ten children surviving him. According to his will, his property in Natal and India was to be distributed "between my said wives Rasson Bibi and Aissa Bibi, and my children born of my said wives, according to the Mahommedan Law of Succession". There was a difference over the succession duty payable by the beneficiaries. According to Act 35, 1905, duty of one percent was payable by women regarded as spouses in the sense of the Act; while five percent duty was levied if they were "strangers". Trustee M.C. Coovadia paid duty of one percent on the shares of both wives. The Master, however, demanded five percent as all the "successors were regarded as strangers in blood to the deceased". Justice Dove-Wilson gave a groundbreaking ruling:

> It is settled beyond dispute that a marriage which is Mohammedan and therefore polygamous is not one which can be recognised in South Africa no matter however much it may be recognised elsewhere. Any claim on the part of these Mahommedan wives or on the part of the children of the second wife to be regarded as otherwise than strangers in blood must be ruled out.

The Master's assessment varied. The two wives and children of the second wife were required to pay five percent duty, while duty on the share of the children of the first wife was one percent as

they were deemed "legitimate".[68] This landmark judgement set a precedent for numerous cases in subsequent years.

M.C. Coovadia was born in Ghala in 1862. He arrived in Natal in 1883 and joined his brother Hoosen's business *Hoosen Cassim & Co.* as a partner. M.C. Coovadia married Momin in India in December 1918. They had three children, Abdul Hack, Hawa, and Fatima. When M.C. Coovadia died in October 1929 the Master ruled that Momin could not be recognised as M.C. Coovadia's legal wife as the marriage was not registered in South Africa. The Master was forced to change his opinion because Coovadia's marriage was solemnised in Baroda State, the only state in India where the Civil Marriage Act of 1908 provided a statutory religious and monogamous form of marriage. The Act prohibited both parties to a marriage from having a spouse living at the date of solemnisation, while a second marriage was considered a criminal offence. Thus, Momin was considered a legal spouse in terms of South African law. When this legal conundrum emerged for the Coovadia family, elder brother H.C. Coovadia, who was a trustee of M.C. Coovadia's estate, registered his marriage to Rassool in September 1930, when he was 77 and Rassool 57 years old.[69]

In an ironic twist, the failure to resolve the marriage question came back to haunt M.C. Anglia's descendents. Anglia was born in Rander, Surat, in 1869, and arrived in Natal in 1898 with his wife Fatima and two-year old son Cassim. A daughter, Mariam, was born in Natal in 1907. When Anglia died in 1919, the Master ruled that Cassim was the sole heir because the marriage had been solemnised in India and was not registered in Natal. Cassim was considered "legitimate" because he was born in India where his parents' marriage was recognised, while Mariam was considered "illegitimate" because she was born in Natal where Islamic marriages were not recognised. Mariam and her mother Fatima

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[68] *NLR*, 1916: 535-549, 10 October 1916.
[69] NAB, MCSE 15028/1929.

could not inherit from the Estate as South African law did not regard Fatima as a "surviving spouse".[70] A.K. Seepye was born in Mauritius in 1873. He married Khadija Banu in Natal in 1896 and they had eight children. When Seepye died in 1934, the Master ruled that his marriage was invalid even though he was married under common law by the Lions River magistrate in July 1933. The Master pointed out that Section 1 of Act 2/ 1907 and Section 1 of Act 22/ 1914 spoke of marriage between Indians "according to Indian custom", while Section 1 of Act 22/ 1914 spoke of marriage between Indians in accordance with the rites and formalities of an Indian religion. Since this did not include an ordinary ceremony in a magistrate's office, Seepye's marriage was not that contemplated by law for Indians, and his failure to register the marriage under Act 22 of 1914 rendered it invalid. However, the Ministry of Justice overruled the Master on 20 August 1938:

> We have found nothing in those laws or elsewhere which provides that no Indian may validly marry except under those provisions and in the absence of such enactment we are of opinion that there is nothing to prevent two Indians being married by a magistrate or to prevent the ordinary common law consequences of such a marriage.[71]

Abdul Wahaab Kotboodeen of *M.C. Camroodeen* at 113 Grey Street married Jainab in India in 1919. They had two daughters, Ayesha and Fathima, who were born in Durban. Abdul Wahaab died in October 1930 in India while visiting his ailing father Abdul Caadir. As Abdul Wahaab's marriage was not registered and he was domiciled in South Africa, his children were declared illegitimate and his father was declared *abintestao* heir. The Master ruled on 3 June 1931 that half the estate would go to his father; three-eights to his sister Mariam Bibi; and one-eights to the children of his dead sister

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[70] NAB, MCSE 4643/1919.
[71] NAB, MSCE 21853/53.

Khairunissa. His wife Jainab and children Ayesha and Fathima did not receive a share of the estate. The situation was further complicated by the fact Abdul Caadir's parents were married in India in 1889 while he was born in Natal in 1896. As their marriage was not registered in South Africa, Abdul Caadir was deemed illegitimate and estate duty of 10% was levied.[72]

Amod Maiter married in India in 1876, migrated to Natal in 1881, and acquired a domicile in 1903. He had eight children but did not register his marriage in Natal. When he died testate in 1949, the Master ruled that in terms of Act 33 of 1944, three percent succession duty was payable where the successor was the direct descendent of the deceased and twelve percent in the case of a stranger in blood. The duty that each heir was liable to pay depended on the domicile of their mother at the time of their respective births. A child of a Muslim marriage born while the parents were domiciled in India was regarded as legitimate in the Union because the child was legitimate in Indian law. On the other hand, children born while the parents were domiciled in the Union were illegitimate even if born in India if the marriage had not been registered in Natal. In determining legitimacy, it was the domicile of origin and not the place of birth that was material. In the case of Maiter's family, since their mother acquired a domicile in Natal in 1903, children born before 1903 were liable to pay succession duty of three percent while those born after she acquired domicile had to pay twelve percent.[73]

Conclusion:

Muslim migrants to Natal challenged White settler conceptions of family and gender. They referred to a broader, transnational, set of texts and authorities whose social norms they wished to implement in Natal. Muslims failed in this endeavour as the law reified the

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[72] NAB, MSCE 16325/1931.

[73] NAB, MSCE 2339/1948.

discord between *sharia* and local values. The 1913 Act had important consequences for Indians. Marriages contracted according to Islamic Law were regarded as null and void, and, in the words of the Solomon Commission, contrary to public policy. Many issues were left unresolved: the status of spouses in Islamic marriages; the status of children born of Islamic marriages; regulating the termination of Islamic marriages; difficulties in enforcing maintenance obligations following divorce; difficulties in enforcing custody of, and access to, minor children; while the proprietary consequences arising from Islamic marriages were not recognised at law and therefore not enforceable. The non-recognition of Islamic marriage and its consequences created uncertainty among Muslims for most of the twentieth century. This particularly disadvantaged women and children because many Muslims continued to apply *sharia* on a *de facto* basis rather than reinterpret Islamic law to bring its provisions in line with local norms. For example, individual Muslims who did not register their marriages could effect a divorce, often to the detriment of the wife. Muslims distinguished between religious validity and state validity, and in most cases the former commanded greater authority.

There has been an attempt in post-apartheid South Africa to rectify this by introducing MPL in a context where the general legal structure is built along non-religious lines. While the South African constitution makes provision for special privileges for minorities, aspects of Islamic law are contrary to the constitution. Compromises in the proposed MPL bill contain provisions that many Muslims deem contrary to their belief system. This has resulted in contestation among Muslims between those who argue that there is scope for the transformation of personal law in Islam, and those who consider Islamic laws as immutable and believe that it is heretical to amend the divine provisions of the Quran. The *Tahaffuz-e-Shariat Ulema Council of Gauteng*, for example, branded the draft MPL Bill as a "New Testament", which was "un-Islamic" because it was driven by "a judge, an advocate, a

professor, one *Mawlana*, a politician doctor, and two spinsters". The Council did not regard the central issue to be the recognition or non-recognition of Muslim marriages but the "changing and altering of the divine immutable *shariah* as it has been transmitted down the centuries..."[74] For the *Tahaffuz-e-Shariat* and other like-minded individuals, Islamic law is an essential part of their religious identity. They are not willing to alter any aspect of it and reluctant to enter into a dispensation that makes the state and the Constitutional Court the ultimate guardians of *shariah*. If MPL becomes law in its present form, it is very likely that many Muslims, who rely for their interpretation of Islam on the Ulema, will not abide by its provisions. As Muslims have done for most of their stay in South Africa, they will continue to follow Islamic laws as interpreted by the Ulema and practice it on a *de facto* basis.

This article has shown that the problem of resolving the contradiction between Islamic law and the law of the state is one that Muslims have been grappling with since their arrival in South Africa. Muslims were not united then, and remain divided now because being Muslim is a contested identity. Further, Muslims were unable to resolve the contradictions between *sharia* and the laws of the secular state in the past, and it is unlikely that this incongruity will be resolved now, even though the post-apartheid ANC government is seeking to accommodate minorities. This is not a parochial matter but in line with attention worldwide on how the rights attached to persons transcend the boundaries of sovereign states, and to what extent sovereign states can accommodate transnational ideas on issues such as human rights, citizenship, marriage, and local elections. Nor is this confined to Muslims. As Bowen has pointed out,

> the issue of legal plurality is basic to the field of 'conflict of laws'; the issue of laws vis-à-vis culture recalls long debates about law and the community. Put another way, issues arising around Islam can be seen as general issues about the place of law in a modern nation-

[74] *Al-Haq*, 24, February 2004.

> state. This way of looking at them makes Islam not an exception, but the source of one of many challenges to modern legal positivism.[75]

In the South African context, the government has to accommodate the interests of many minorities, such as Indians, Afrikaners, traditional leaders, and so on, and debates about MPL constitute part of a larger discourse and tension about the constitution of the South African political community.

[75] Bowen, "Sharia, State, and Social Norms", 3.