

MUSLIM PERSONAL LAW AND THE MEANING OF "LAW" IN THE SOUTH AFRICAN AND INDIAN CONSTITUTIONS

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Summary

The Muslim population of South Africa follows a practice which may be referred to as Muslim personal law. Although section 15 of the Constitution of the Republic of South Africa 108 of 1996 recognises religious freedom and makes provision for the future recognition of other personal law systems, Muslim personal law is, at this stage, not formally recognised in terms of South African law. Since Muslim personal law receives no constitutional recognition the question may be asked whether the 1996 Constitution, and in particular the Bill of Rights as contained in chapter 2 of the 1996 Constitution, is applicable to "non-recognised" Muslim personal law. The answer to this question depends to a large extent on the meaning of "law" as contained in the 1996 Constitution.

When the viewpoint of academic writers and the courts are evaluated it seems as if the meaning of law in South Africa is restricted to the common law, customary law and legislation. If such a viewpoint is to be followed, Muslim personal law is excluded from the scrutiny of the Bill of Rights. It is, however, inconceivable that there might be certain areas of "law" that are not subject to the scrutiny of the Bill of Rights. In this note it will be argued that Muslim personal law should be regarded as law in terms of the 1996 Constitution, or in the alternative, that Muslim personal law (or at least Muslim marriages) should be recognised in terms of section 15 of the 1996 Constitution.

Due to the historical resemblance between South Africa and India the meaning of "law" as contained in the 1996 Constitution will be compared with the meaning of "law" as contained in the Constitution of India. Although the Constitution of India indirectly gives recognition to various personal laws in India, these personal laws are not subject to the provisions of the Constitution of India. Therefore, it would be argued that one should approach the Constitution of India with caution when its provisions are compared to those of the 1996 Constitution of South Africa.