



UNDERSTANDING THE ISLAMIC LEGAL SYSTEM FOR SOUTH AFRICAN LEGAL PRACTITIONERS

by **Fatima Essop**

Muslims were brought to the Cape as slaves and political prisoners in the 17th century by the Dutch East India Company and are today one of the religious minority communities in South Africa. They have been practising their Muslim family laws of marriage, divorce and inheritance in the private sphere for over 300 years, despite the fact that the State did not recognise or legislate these laws. Muslim communities have formed *ulama* bodies, or Muslim judicial bodies, which are theological bodies that perform various functions like: (i) running shariah courts that adjudicate Islamic divorces; (ii) drafting Islamic wills and distribution certificates, and (iii) overseeing various community matters, including *halal* food certification, which is the process of determining whether meat or food in various food outlets are permissible for Muslims to eat.¹

In addition to family laws, Islamic law obliges Muslims to pay compulsory charitable taxes (*zakah*) on their wealth and highly encourages voluntary altruism (*sadaqah*). Hence, there are a proliferation of Islamic charitable organisations within South Africa, to whom Muslims contribute tax exempted donations annually. In March 2022 the South African National Zakah Fund alone recorded over R122 million in compulsory charitable taxes and over R35 million in voluntary charitable donations for 2022.²

There is furthermore a rapidly growing Islamic finance, banking and asset management sector in South Africa. According to the Banking Association of South Africa the value of Islamic financial services products reached R37 billion and advances amounted to R14.6 billion in the year ending in June 2020.³ As of December 2022, shariah unit trust assets totalled

R29.3 billion according to the Association for Savings and Investments South Africa. Any provider of Islamic financial products requires the oversight of a shariah board, which in turn applies Islamic legal principles in its decision making.

In the aforementioned examples Islamic law principles are being applied in the South African legal context and legal practitioners might, therefore, find it useful to understand how the Islamic legal system actually operates. Often time Muslims', and non-Muslims', understanding of Islamic law are reduced to notions that the legal system is a fixed, sacrosanct, and immutable system, because it derives directly from the *Quran*, which is considered the divine word of God. In this article, I illustrate that the Islamic legal system is far more dynamic and nuanced. I highlight some of the similarities and differences between the two legal systems.

South African law has been compared to the great baobab tree, where the roots indicate the foundations from which the legal system originates, namely: Roman-Dutch law, English common law, and African customary law. The trunk symbolises the sources of the law, including those structures that support the legal system namely: legislation, of which the Constitution is supreme, judicial precedents, legal presumptions etc. The branches reflect the different areas of law, including substantive laws versus adjectival laws and public laws versus private laws.⁴ Our legal system has also been described as having a deep legal pluralism approach to its multiple systems of laws, with the common and customary laws embodying 'official' legal pluralism, whilst the 'unofficial' legal systems (e.g. Hindu law, Jewish law and Muslim law) embody 'deep' legal pluralism.⁵

I have taken poetic licence and compared the Islamic legal system to an olive tree below, where the two main roots depict the primary sources of Islamic law, namely the *Quran* and the *Sunnah*. The *Quran* is considered a divinely inspired text revealed to the prophet Muhammad (Peace Be Upon Him or "PBUH") over a period of 23 years. It consists of approximately 114 chapters and approximately 6 342 verses, but only a limited number of these verses deal with substantive legal rulings. Many of the legal rulings relate to acts of worship like prayer, fasting or pilgrimage. Others pertain to human transactions and interactions, like family law, contractual law, or criminal law. The latter category only constitutes about two per cent of all *Quranic* verses.⁶ The *Quran* is not a legislative text per se.

The *Sunnah* are the words and actions (explicit and implicit) of Muhammad (PBUH). The *Sunnah* clarifies or elaborates upon whatever legal principles are contained in the *Quran*. The *Sunnah* has been recorded and transmitted through *Hadith*, which are reports that describe the words, actions or habits of Muhammad (PBUH). These reports were compiled over a century after his death and were completed over a period of more than three hundred years.⁷ There are various legal sciences dedicated to studying, interpreting and understanding both the *Quran* and the *Sunnah* and these sciences are represented by the sub-roots of the tree.

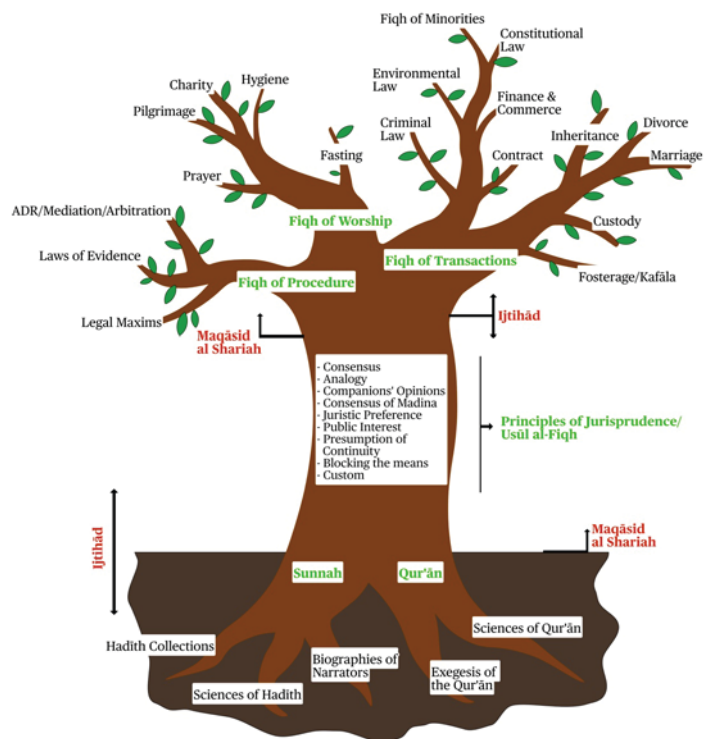
The tree trunk symbolises the secondary sources, legal tools and methodologies employed by jurists to derive substantive legal rulings from the primary sources. This legal science is referred to as *usul al-fiqh* or principles of jurisprudence. Jurists through the ages utilised the interpretive tool of *ijtihad* (legal reasoning/interpretation) to extract rulings from the primary and secondary sources. They utilised *ijtihad* to decipher the intention of the legislator (God) and make His will apparent to humans. Hallaq notes that without '[t]he entire system of legal hermeneutics developed by jurists, the revealed texts would remain empty of legal significance, for it was this hermeneutic that brought out their legal import'.⁸ As part of their hermeneutical efforts, jurists utilised various legal methodologies like, consensus, analogy, custom and considerations of public interest to derive substantive rulings from the primary sources of law.

The branches of the olive tree depict the different areas of substantive legal rulings, or positive laws, referred to as *fiqh* or Islamic jurisprudence. The term, 'jurisprudence', in this context does not have the same meaning as Western legal theory and philosophy but refers instead to the body of substantive Islamic law ruling. *Fiqh* is generally divided into the *fiqh* of worship and *fiqh* of transactions/relationships, as depicted by two of the main branches. I have included a third main branch and labelled it as the *fiqh* of procedure, which depicts laws pertaining to evidence, alternative dispute resolution and legal maxims. There are additional substantive areas of law that would fall under *fiqh* of transactions/relationships, like delict or laws of war, but I have not included all areas of substantive law owing to space constraints.

Important to note is that there is not one uniform code of law in each area of *fiqh*, which is applicable to all Muslims. *Fiqh* is the product of human interpretation and understanding of the primary sources by jurists, who developed different schools of legal thought (*madhahib*). The four main *Sunni* legal schools

Tree of Islamic Law

Fatima Essop



are the *Hanafis*, *Malikis*, *Shafi'is* and *Hanbalis*, with each school deriving its name from its founder. The majority of South African Muslims, adhere to the *Shafi'i* or *Hanafi* schools. The four legal schools differed according to their interpretations of the primary texts, which were influenced by their prevailing customs and socio-political context. Some scholars adopted literal interpretations of the primary texts, whilst others adopted a more purposive approach, taking the *maqasid al shariah* (the objectives of the law) into account. Each school developed its own sophisticated legal principles and hermeneutical methodologies when it engaged with the primary texts and derived legal rulings on different matters. The founders of each school presented their legal opinions as non-binding opinions and did not expect their opinions to be followed blindly.

Sunni Muslims accept all four schools as equally valid interpretations of the primary sources but will generally adhere to the legal rulings of one of the four legal schools according to the doctrine of *taqlid*. *Taqlid* is the process of a layperson following the opinion of a Muslim jurist or one of the Islamic schools in matters of *fiqh*. Hence, a *Hanafi* follows the opinions of the *Hanafi* school, whilst a *Shafi'i* will follow the *Shafi'i* school and so forth. It is based on the principle that the layperson places his or her full trust in the rulings of the jurists in a particular school of thought, knowing that they have utilised their skills and expertise to exercise *ijtihad* and to derive valid legal rulings from the primary and secondary sources. According to Nyazee, '[t]he doctrine of precedent and *stare decisis* are nothing more than institutionalized forms of *taqlid*. When the lower courts follow the opinions of higher courts, they are undertaking *taqlid*'.⁹ Whilst the South African common law system is based on a system of binding judicial precedent,

the Islamic law system places great emphasis on the writings of jurists and relies heavily on the four major schools of law.

One of the outstanding features of the Islamic legal system is the plurality of legal opinions that exist in different areas of substantive law. *Ikhtilaf al-fuqaha* (the disagreements of jurists) is an established Islamic law doctrine that offers multiple interpretations of the primary sources of law.¹⁰ Just as the religion of Islam is not monolithic in nature, neither is its legal system. It is this plurality of opinions, which allows for legal change and flexibility in the application of the law. This debunks the myth that Islamic law is an immutable sacrosanct system of law that is not subject to change or adaptation.

This explains why: (i) in the case of *Rylands v Edros*,¹¹ the one Islamic law expert testified that the matrimonial property regime in a Muslim marriage could be in community of property, whilst the other held that all Muslim marriages are automatically out of community of property; (ii) in *Faro v Bingham*,¹² the applicant held she was not divorced from her husband at the time of his death and was therefore entitled to inherit from his estate, whilst the relevant ulama body held she was divorced and was therefore not entitled to inherit from her deceased husband's estate; (iii) the sharia board of one Islamic investment fund might rule a share to be shariah compliant and acceptable to invest in, whilst another board might decide that it is not, and (iv) some Muslim employees take their Islamic holiday (Eid) on one day, whilst others will take it on another day, as some scholars determine the dates of the Islamic lunar calendar on the sighting of the moon, whilst others base it on astronomical calculations.

These examples are indicative of how the application of Islamic law can render very different outcomes and this should therefore be borne in mind when drafting legislation on Muslim marriages and divorce. In the recent case of *Women's Legal Centre Trust v President of the RSA*¹³ the court held that the non-recognition of Muslim marriages is a violation of the

constitutional rights of women and children in particular, and obliged the president and Parliament to pass new legislation within 24 months in order to ensure the recognition of Muslim marriages, and to regulate the consequences arising from such recognition. It is hoped, that Parliament will recognise the flexibility of the Islamic legal system as described above and will consider various interpretations, including more gender sensitive interpretations of the primary sources as well as considerations of public interest, when drafting the said legislation. **A**

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Notes

1. F Essop 'Problems of and Possibilities for Islamic Divorce in South Africa' in E Stiles and A Yakin (eds) *Islamic Divorce in the Twenty-First Century – A Global Perspective* (2022) 65
2. <https://www.sanzaf.org.za/about-us/audited-annual-financial-statement/audited-annual-financial-statement-2022/viewdocument/74.html>
3. <https://www.iol.co.za/personal-finance/my-money/banking/islamic-banking-continues-to-grow-in-south-africa>
4. Barrat et al *Introduction to the South African Law-Fresh perspectives* (2019) 2.
5. Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 42 *The Journal of Legal Pluralism and Unofficial Law* 143 at 145
6. Coulson *A History of Islamic law* (1964) 12
7. Barlas *Believing Women in Islam – Unreading Patriarchal Interpretations of the Qur'an* (2002) 42
8. Hallaq 'Muslim rage and Islamic law' (2002) 54(6) *Hastings Law Journal* 1705 at 1709
9. Nyazee *Islamic Jurisprudence (Usul al-Fiqh)* (2000) 24
10. Masud 'Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construct' in Anwar (ed) *Wanted – Equality and Justice in the Muslim Family* (2009) 65
11. 1997 (1) BCLR 77 (C)
12. [2013] ZAWCHC 159
13. [2022] ZACC 23

“ONE OF THE OUTSTANDING FEATURES OF THE ISLAMIC LEGAL SYSTEM IS THE PLURALITY OF LEGAL OPINIONS THAT EXIST IN DIFFERENT AREAS OF SUBSTANTIVE LAW.”

