Gender, Religion, and Family Law

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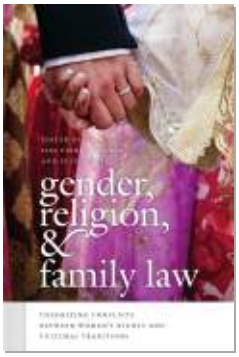

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Chapter Six Muslim Family Law in South Africa Conflating the Right to Religion with the Privileging of Religion?

Introduction

It is commonly accepted that the arena of family law is a tension-filled one; that the equality and nondiscrimination rights of women are violated through laws, policies, and practices; that despite both international and domestic obligations in regard to equality and nondiscrimination, impunity in this regard is the norm rather than the exception. The focus of this chapter will be limited to briefly highlighting issues around sex and gender equality and nondiscrimination, and religious freedom rights broadly manifested in laws, policies, and practices in South Africa, in relation to the Muslim community.

Bringing personal status laws into conformity with international and constitutional equal rights provisions is an imperative for the protection of women's equality and nondiscrimination rights. Many countries have family law systems, whether based on religion or custom, that violate the rights of individuals. Some states use the right of religious freedom to defend gender-based discrimination in the area of family law, while other states are reluctant to intervene, due to deferential attitudes in the area of religion (they avoid entanglement with religion). This is common among both states that implement religious laws and states that do not. In the struggle for equality and nondiscrimination rights, the right of freedom of religion very often overrides women's equality rights.

The incorporation of family laws can occur through multiple legal systems — for example, through a civil law system that codifies religious laws, through the reliance on uncodified laws that emanate from religious texts and

practices, or through secular laws of marriage and divorce. The institutionalization of family laws can take place through secular courts, through religious tribunals or courts, or through both forums having concurrent and, very often, hierarchical jurisdictions.

The inclusion of the right of freedom of religion in many constitutions is usually not interpreted in the broader terms of equality and nondiscrimination, that is, in terms of both nondiscrimination against the religion/religious institutions and nondiscrimination by the religion/religious institutions. Thus the equitable treatment of other religious and belief systems and also the nondiscriminatory and equal treatment of women are violated through the use of the freedom of religion right. This is usually done through the state endorsement of a particular religion, the inequitable treatment of religions, or a state claiming exemption from the equality guarantee on the basis of freedom of religion. Religious exemptions from general laws may amount to preferential treatment and may also clash with the right to equality in some circumstances.

In their defense and justification for exemptions, states sometimes argue that women's equality rights are a private matter and not the legitimate concern of the state (which focuses on the public sphere). States also refuse to acknowledge that state endorsement of a particular religion is also a threat to the free exercise of religion and thus discriminatory and coercive. Many of these issues result in a non-interventionist approach because of respect for religious autonomy and a belief that the affected individual usually has the remedy of the "right of exit." In addition to general concerns around equality and nondiscrimination, additional challenges that occur, through both the process of incorporation and institutionalization of family laws, include issues of interpretation, legitimacy, vested interests, lack of uniformity, political manipulation, and the manifestation of power and privilege.

At the international level, all states have obligations as regards the promotion and protection of human rights. The articulation of this commitment was illustrated at the March 2008 Human Rights Council meeting in Geneva, where all states reaffirmed that human rights are universal, thus confirming their obligations to ensure a domestic system founded on the belief that women's rights are human rights. The problem is that such affirmations are rendered a mockery by the actions of states that defend discriminatory religious

and cultural laws and practices as part of their free exercise of religious rights. The challenge is the translation of abstract notions of universal human rights into contextual guarantees in constitutions and laws.

The Constitution of South Africa Act 108 of 1996 (hereinafter the Constitution)[1] safeguards both the right to free exercise of religion and the right to substantive gender equality. The challenge facing South Africa is how to protect both these rights and how to address potential conflicts that may arise between these rights. As regards the current developments in respect of the recognition of Muslim marriages, the law reform efforts appear to be sponsoring one particular religion, in its attempt to accommodate religion. Furthermore, the proposed solution ignores the distinction between the state's duty to protect minority religions, rather than the privileging of any particular religion. Also the state refuses to acknowledge that there exists the real possibility that religious freedom arguments are being used as a smokescreen for gender discrimination.

This chapter identifies potential constitutional violations that may emerge in the law reform efforts that are currently taking place in South Africa. It explores, among other issues, the tensions between women's equality rights and religious rights, codification of religious personal status laws versus recognition of religious marriages, achieving equal access to justice for all women, and tensions arising between individual equality rights and group equality rights. This chapter starts with a brief discussion on legal pluralism and the accommodation of religion, a historical perspective of developments relating to the treatment of Muslim marriages, followed by an overview of legal obligations at the international, regional, and national levels. This is followed by law reform developments after 1994 and a critical overview of the proposed draft law.

Legal Pluralism and the Accommodation of Religion

The concepts of multiculturalism and legal pluralism have drawn significant scholarly attention and debate in the past and also more recently in Western societies. Such debates usually relate to legal pluralism in the family law arena. Multicultural states face a challenge in effectively and meaningfully

guaranteeing the right to equality and the right to religion and culture. In contrast to many African and Asian systems of plural family law systems, most Western countries largely maintain unified family law, and persons of all religious, cultural, and ethnic backgrounds are subject to the same family law rules and institutions. Some countries, for example, Malaysia, South Africa, and India, follow an accommodationist model within which the state retains protective but benevolent neutrality toward religion. This sometimes results in preferential or more protective acts by the state in relation to a particular religion.

Legal scholar Ayelet Shachar describes a pluralist system as one that maintains the autonomy and sovereignty of different minority cultures.[2] She points out the benefits and the risks inherent in pluralist systems and argues that pluralist systems may put at risk the equality rights of vulnerable group members, while uniform systems might do a better job at protecting citizenship rights and ensuring equal treatment. Also, pluralist systems may deny the importance of particular cultural or religious norms and discriminate against minority groups whose traditions are distinct from those embedded within the dominant culture. In Shachar's view, one solution to achieving the protection and promotion of both individual and group rights is to have a joint governance system between the state and the cultural group.[3] In response it can be argued that a joint governance system presupposes internal reforms, real respect for diversity and difference, mechanisms and structures that can be both implemented and monitored, and a willingness to have women participate in such governance systems (at both the state and religious institutional level). Both the substantive and procedural challenges are huge, especially in contexts where interpretations of religious laws and practices remain unchanged (and also often unchallengeable).

In arguing for the accommodation of religion, religious institutions make both negative demands, that is, for privacy and non-intervention, and positive demands, that is, for autonomous control of their institutions. This then opens the door to potential violations of equality rights in general and women's equality rights in particular. One question that arises in the pursuit of legal pluralism and the accommodation of religion, is whether the state should have a greater interest in promoting sex equality rights and also in ensuring that this right trumps religious freedom rights.

Untying the Historical Knot

South Africa's past from 1652 onward is characterized by conflict, injustice, oppression, and exploitation. Colonization, first by the Dutch and then the British, was followed by White minority rule from 1910 until the entrenchment of a more formal legalized apartheid regime in 1948. The Nationalist Party government came into power in 1948 and ruled from 1948 to 1993. White supremacy was the principle on which the apartheid laws and policies were based and implemented. Most of the injustices and atrocities perpetrated by the state were committed in the name of national laws or under state orders, despite many of these acts being in violation of international human rights norms and laws. Using force against its opponents and oppressing civilians were the norm, in order to maintain a system of rigid segregation of the four official race groups at all levels, including political, social, and economic. South Africa's history of colonization and apartheid included discriminatory laws, policies, and practices based on factors including race, sex, gender, culture, and religion. The goal was to create a system of legal, social, and economic separation of the people of the country.

Under apartheid, despite the limited or nonrecognition of other forms of law by the state, there had been widespread observance of both religious as well as African Customary Law. During both the colonial and the apartheid eras, there was limited state recognition and codification of African Customary Law. As regards Islamic laws and jurisprudence, there was no recognition at all by the state. Marriages conducted by Muslim rites were refused legal recognition on the grounds that they are potentially polygamous (the correct term is polygynous), and hence repugnant to good public policy, as defined by the White minority ruling class.[4]

Muslims, who constitute approximately 1.5 percent of the population (numbering about six hundred thousand), have been present in South Africa for over three hundred years.[5] Their origins, interpretation of Islam, and daily practices are diverse. They do not constitute a homogenous group, with one approach to personal status or family issues within an Islamic framework. There is no uniform system of personal status laws, either at the formal state level or at the informal community level. In some Muslim communities, the judicial and social welfare divisions of the local Ulama Councils (Muslim clergy) informally provide services in the family law area. The dispute resolu-

tion function, which is performed by these Ulama Councils in the Muslim family law arena, is based on their own subjective interpretations of religious laws and jurisprudence. Thus, matters of marriage divorce, custody, succession, and so on are sometimes resolved by these bodies. There is no empirical research on how widespread the use of such forums has been and in which geographic region of the country such usage is most prevalent.

Since 1994, post-apartheid South Africa is a country where many diverse people coexist in harmony, despite differences based on culture, race, religion, etc. The Constitution is viewed by many as an ideal model for multicultural democratic contexts, wherein the right to equality exists with the right to culture, tradition, and religion. South Africa is described as a unitary, multicultural, secular democracy that protects individual liberty and freedom through a Bill of Rights, with applicability against both the state and against individuals. The mandate of the new Constitution is transformative justice, which requires positive measures to redress historical injustices and the consequences of past discriminatory laws and policies. The foundational values of the Constitution include non-sexism, non-racism, the right to dignity, and the right to substantive equality.

The current reality, as regards Muslim marriages, is one of denial of civil law status in terms of many laws, including, among others, the Marriage Act 25 of 1961, the Divorce Act 70 of 1979, the Intestate Succession Act 81 of 1987, and the Maintenance of Surviving Spouses Act 27 of 1990. The courts have been used by some people to seek relief against discrimination and disadvantage arising from the nonrecognition of their marriages. Cases that have been brought to court include claims for spousal benefits and support, inheritance claims, and actions relating to the determination of the legitimacy of children born of marriages conducted under Muslim rites. During the apartheid era, judgments rendered by the courts clearly reflect an intolerance of diversity and the imposition of values of the White minority ruling class on all South Africans. Post-1994, the courts are bound by the spirit, ethos, and values of the Constitution, which is based on human dignity, freedom, and equality. Hence, subsequent judgments reflect these new values and illustrate a rejection of the values articulated in the apartheid era judgments. But the courts have not recognized Muslim marriages as valid marriages in the numerous cases that have been brought. Furthermore, the legislature has not addressed the issue of recognition of Muslim marriages.

The right to equality has been widely explored by South Africa's courts. The Constitutional Court set out an equality test in *Harksen v. Lane NO and Others*,[6] which mandated that any discrimination on the grounds of gender, race, ethnic origin, religion, disability, and other grounds enumerated in section 9 of the Constitution, is considered to be unconstitutional. The court recognized both past historical discrimination women faced in marriages in South Africa and current experiences of women in relation to matrimonial property and the division of labor within the household, as well as how these factors compounded and further entrenched deep inequalities between women and men. The test developed in the Harksen case gives guidelines for determining absolute breaches of equality. In *Bhe and Others v the Magistrate, Khayelitsha and Others*,[7] the Constitutional Court resolved a conflict between African Customary Law and individual rights. In examining the rule of male primogeniture, which prohibited and discriminated against women's and girls' right to inherit property, the court held that the customary law of succession, based largely on primogeniture, discriminates unfairly against women and girls, both on the grounds of race and gender. This case supports the conclusion that when a conflict of rights arises, the right to gender equality takes precedence over cultural and religious rights.

South Africa's case law post-apartheid provides important direction on the legal treatment of Muslim marriages, the right to freedom of religion, and the right to gender equality. A few cases deal with the issue of Muslim marriages specifically and the right to marry generally. The pre-democracy era cases stand in sharp contrast to subsequent jurisprudence emanating from the courts. Under colonialism and apartheid, there was a refusal on the part of both the legislature and the courts to afford legal protection to parties in a Muslim marriage. The reason largely was that these marriages were viewed as potentially polygamous (polygynous) and thus *contra bonos mores* and hence were not regarded as legally valid. The views expressed in pre-democracy era cases were based on the dominant views on what religions and practices constituted civilized religious practices, what unions were considered an anathema to the dominant Christian norms, what marriages would not be reprobated by the majority of civilized peoples on grounds of morality and religion, what marriages were contrary to public policy, etc.[8]

Ryland v. Edros[9] is a seminal example of the different approach to Muslim marriages adopted by the courts when faced with an action for claims arising

out of a marriage that was dissolved by Muslim Personal Laws. The court asserted that the Constitution's values prohibited the imposition of a dominant community's preferences and prejudices (in this case prejudice against Muslim polygynous marriages) in a plural society like South Africa.[10] The court held that the terms of an actually monogamous Muslim marriage contract were enforceable by civil courts. The *Ryland* case points toward the conclusion that the right to religious freedom emanates from the Constitution itself, and thus religious freedom cannot be pursued without due regard to other central constitutional values, such as individual and group equality rights.

Amod v. Multilateral Motor Vehicle Accident Fund[11] was a case related to compensation for the loss of support suffered as a consequence of the death of her husband in a car accident. The respondent had refused to pay compensation because Islamic marriages were not lawful at common law, since they were seen as contrary to good public policy, as they allowed for the practice of polygamy [polygyny].[12] The court, in giving recognition to the duty of support owed to the appellant, recognized the existence of a de facto monogamous Muslim marriage and granted the Muslim spouse the right to sue for survivor support.

In *Hassam v. Jacobs*[13] the court found that failure to accord inheritance rights on intestacy to a polygamous spouse violates individual and group rights to equality. In particular, the court found discrimination between civil and Muslim widows, monogamous and polygamous widows, and polygamous customary law unions versus polygamous Muslim unions. The remedy adopted was to read in "spouse or spouses" wherever the term occurs and to retroactively invalidate the impugned provision from the passage of the new Constitution.

In addition, the *Minister of Home Affairs and Another v. Fourie and Another*[14] decision on same-sex marriages asserted that the compass by which the "right to marry" cases are decided should be South Africa's modern equality jurisprudence — which has focused on the values of human dignity, equality, and freedom — rather than religious texts.[15] The court declared, "[I]t is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others."[16] The *Fourie* case lends strong support to the contention that, in the marriage context, religious norms cannot outweigh the constitutionally protected right

to equality, and hence the inability of parties to lawfully marry their same-sex partners constitutes discrimination.

The Constitutional Court has also faced another freedom of religion issue, that is, whether giving special recognition to one religious group is unfair to other religious groups that lack such special recognition. In *S v. Solberg*,[17] the majority held that state endorsement of a particular religion would not infringe on the right to freedom of religion as long as the endorsement did not have a coercive effect. However, Justice O'Regan strongly dissented and argued that any such endorsement would not be permitted in South Africa's new constitutional order.[18]

An important issue that *Solberg* raises in the Muslim marriages context is whether the SALRC draft bill creates "coercive effects." As will be outlined in the section below, one may well argue that the SALRC draft bill does this, insofar as it gives preferential treatment to some Islamic schools of interpretation over others and reinforces women's lesser socioeconomic status and autonomy, especially with regard to making religious and marital choices.

International, Regional, and National Law Obligations

From an international law perspective, there is strong support for individual and gender equality norms, and South African courts are expressly obliged to consider international law when interpreting the Bill of Rights. Section 39(1) of the Constitution states, "[W]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom . . . and must consider international law."[19] Among others, South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR) in 1998; has signed (but not ratified) the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1994; has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995; and ratified the African Charter on Human and People's Rights (African Charter) in 1996. These documents all speak of the central place of equality norms in a democratic and pluralist society. Articles 18 and 26 of the ICCPR, in particular, promote both the individual's freedom of religion and the right to equality. Also, article 16 of CEDAW infuses this generalized language with

much-appreciated specificity. It commands states parties to "ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."[20]

At a regional level, the preamble of the African Charter on Human and Peoples' Rights sets out a duty for state members to achieve genuine equality and dignity for all people and to dismantle all forms of discrimination. It honors both the universalist aspirations of the UN Charter and the Universal Declaration of Human Rights and the traditions and values of Africa, which should "inspire and characterize their reflection on the concept of human and peoples' rights." Relevant articles include the following:

(a) Article 2 entitles every individual to the enjoyment of the rights and freedoms in the charter, without distinction of any kind such as race, ethnic group, color, sex, religion, etc.

(b) Article 3 states that every individual shall be equal before the law and be entitled to equal protection of the law.

(c) Article 8 guarantees freedom of conscience, profession, and free practice of religion.

(d) Article 17(2) and (3) states that "[e]very individual may freely take part in the cultural life of his [*sic*] community. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

(e) Article 18(3) requires states to eliminate "every discrimination against women" and to protect women's rights "as stipulated in international declarations and conventions." In this way, the African Charter emphasizes women's rights by referring to pertinent international law, such as the ICCPR and CEDAW.

(f) Article 19 states that "[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

(g) Article 20 refers to the "unquestionable and inalienable right to self-determination." At first glance, the question that arises is whether the peoples referred to signify groups determined by nationality (e.g., South Africans) or race, ethnicity, culture, or religion (e.g., Muslims).

(h) Article 23, however, suggests that the former interpretation (i.e., national group) is closer to the truth when it says that "[a]ll peoples shall have the right to national and international peace and security."[21]

South Africa is one of fifteen nations that have ratified the Maputo Protocol, formally called the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Maputo Protocol, which was adopted by the African Union in July 2003 and came into force on 25 November 2005, speaks most directly to the issues at hand. It comprehensively enumerates the rights of women, imposing obligations on the ratifying states to ensure maximum protection of women's rights, prevent discrimination, and undertake measures to ensure women are given appropriate space for development, equal opportunities, and full protection of social, economic, and civil rights. The preamble proclaims the rights of women to be "inalienable, interdependent and indivisible human rights" and states its determination to enable women to "enjoy fully all their human rights." The strength of this language is significant in trying to create a hierarchy of rights. Specifically,

it compels the state to take positive action of both a legislative and a social, cultural, educational nature.

Relevant articles include the following:

Article 2 states that "harmful cultural and traditional practices" are those that "are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

The above provision is strengthened by Article 17, which states that women "shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies." While there will certainly be disagreement over what constitutes a positive cultural context, the implication is that the cultural context is not and should not be static or fixed and that tradition is not inviolate if it is deemed not to be "positive" for women. The statement guaranteeing women the right to participate in the determination of cultural policies suggests that women should be, in large part, the ones deciding on what is positive for them. This suggests that tradition is not inviolate, and such change as is necessary to promote the free development of women's personalities is encouraged.

Article 6 on marriage could scarcely be clearer in requiring states parties to "ensure that women and men enjoy equal rights and are regarded as equal partners in marriage." Article 6(c) states that "monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationship, are promoted and protected." The Maputo Protocol, while promoting monogamous marriages, recognizes the existence of polygamous marriages and the need for protection of the rights and interests of women in those marriages.

Article 7 ensures protection of women's rights by law, requiring that all marriages must be annulled or divorced by judicial order. Article 7 states that "States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage." This entails that they shall (1) have the same rights to seek separation, divorce, or annulment of a marriage; (2) have reciprocal rights and responsibilities toward their children; and (3) have the right to an equitable sharing of

the joint property deriving from the marriage. In short, these provisions are notable because they conflict with those found in both the SALRC and the CGE bills.

Article 8 requires reform of relevant discriminatory laws.[22]

Thus, these various provisions in the Maputo Protocol demonstrate — some more clearly than others — an ultimate recognition that where the individual rights of women collide with the cultural or religious rights of a group, it is the former that must be given special protection. The African Court on Human Rights, a judicial mechanism of the African Charter on Human and People's Rights, is also empowered to apply the African Charter and any other human rights treaty or convention ratified by the state parties. Thus provisions in both the Maputo Protocol and the African Charter enable both the domestic and the regional courts to draw on a broader pool of norms protecting human and, more particularly in this case, women's human rights.

At a national level, the South African Constitution mandates transformative justice, which requires positive measures to redress historical injustices and the consequences of past discriminatory laws and policies. The foundational values include non-sexism, non-racism, the right to dignity, and the right to substantive equality. The Constitution's remedial objective demands that it must be interpreted in light of its historical context and its attempt to remedy the effects of both racial and gender discrimination. This is embodied in the preamble, which states, "[T]he people of South Africa recognize the injustices of our past . . . adopt this Constitution as the supreme law of the Republic so as to: Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights [and] . . . [i]mprove the quality of life of all citizens and free the potential of each person."[23] This purpose can also be seen in the main text of the Constitution, especially the Bill of Rights. Chapter 1, section 1 sets out human dignity, equality, and non-sexism as foundational values. The constitutional guarantee of equality (section 9[1]) is the very first in the list of rights and as such enjoys a special prominence. It permeates and defines the very ethos upon which the Constitution is premised. Thus, in evaluating the proposed bill recognizing Muslim marriages, one should be keenly attuned to where they may heal some divisions and where they may instead create others. Moreover, one cannot

rightfully ignore the problems of lingering patriarchal norms that sustain and idealize gender inequality and gender discrimination, either in theory or in practice, de jure or de facto.

Section 15 of the Bill of Rights provides that "[e]veryone has the right to freedom of conscience, religion, thought, belief, and opinion," adding in section 15(3)(a) that this does not prevent legislation recognizing marriages or systems of personal or family law under any tradition or religion, so long as such recognition is consistent with this and other provisions of the Constitution (section 15[3][b]).[24] This condition is significant. First, it suggests that such legislation may conflict with other provisions of the Bill of Rights. Second, if it does, it clarifies that such legislation is subject to all other rights, including the equality right.

Section 31 creates a similar limitation. It mandates that "[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to . . . enjoy their culture, practice their religion and use their language." Despite this strong proclamation, the section goes on to state that these rights "may not be exercised in a manner inconsistent with any provision of the Bill of Rights." In contrast, the equality clauses contain no such internal limitation, or "but" clause.

The Promotion of Equality and Prevention of Unfair Discrimination Act is not simply relevant law, but also evidence of how the South African legislature interprets its own constitutional mandate. The guiding principle it stresses is the eradication of systemic racial and gender discrimination and inequality, which was injected into South African politics, economy, society, and psyche by an ill-famed triumvirate: colonialism, apartheid, and patriarchy. Chapter 2, section 8 of the act is devoted to clarifying the contours of gender discrimination. As such, it outlaws "any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men."[25]

Law Reform Efforts in Respect of Muslim Marriages

The South African Law Reform Commission (hereinafter SALRC) is a statutory body appointed by Parliament, which had in the 1980s and early 1990s considered the status of the Muslim Personal Law. In 1996 it reconsidered

this project with a particular focus on the recognition of Muslim marriages. Due to concerns raised in the past about the representivity of the SALRC project committee on this issue and also the process followed, a new project committee was recommended and subsequently appointed by Parliament in 1999, following a more transparent process of nominations. The mandate of this project committee was to investigate Islamic marriages and related matters. An issue paper identifying the issues and problems in respect of Islamic marriages was published in May 2000. A discussion paper with a draft bill was published in December 2001. After responses were collated, a new bill was released in October 2002. The final report and a substantially amended draft Muslim Marriages Bill were released in July 2003, and this has been submitted to the minister of justice, but has not been tabled in Parliament as of 2012.

The proposed draft legislation — the Muslim Marriages Act (hereinafter referred to as the SALRC Bill) — in its preamble sets out the objectives it seeks to achieve.[26] These include the following, among others: to make provision for the recognition of Muslim marriages, to specify the requirements for a valid Muslim marriage, to regulate the registration of Muslim marriages, to recognise the status and capacity of spouses in Muslim marriages, to regulate the proprietary consequences of Muslim marriages, and to regulate the termination of Muslim marriages and the consequences thereof. Thus it addresses the registration of Muslim marriages, the dissolution of such marriages, custody of and access to minor children, and the issue of maintenance (both spousal and child support). Provision is also made for the regulation of polygynous marriages. According to the SALRC, adoption of the draft bill would go a long way in creating legal certainty regarding Muslim marriages, it would give effect to Muslim values, and it would afford better protection to women in those marriages, in accordance with both Islamic and South African constitutional tenets.

The SALRC draft bill codifies elements of Muslim Personal Laws, by outlining rules for a variety of marital situations. The SALRC justified the codification approach by seeking support both from the clergy and the Constitution. Section 15 of the Constitution opens the door by allowing for legislation recognizing systems of personal and family law under any tradition or adhered to by persons professing a particular religion — although any such legislation must be consistent with the rest of the Constitution. Also, the argument asserted in the SALRC Discussion Paper 101 was that Muslims currently had difficulty

enforcing maintenance, termination of marriage, proprietary consequences, and custody rights arising from their marriages, and thus legislation must be specifically aimed at correcting these practical problems. The assertion was that women and children would be protected by specified substantive regulations. Thus, codification was asserted by the SALRC as a way to actively provide social protection in marital and family problems.

There has been widespread criticism, which included charges of preferential treatment being given to the clergy, by the SALRC. The project committee has asserted that the draft bill of 2003 is supported by the majority of the community. This assertion has been maintained despite the committee being notified that the consultation process was flawed, that many women are unaware that the bill codifies religious law (as opposed to just recognizing Muslim marriages), and that there is contestation over the schools of interpretation of Islamic law in many of the codified provisions.

As a consequence of receiving numerous concerns relating to the SALRC bill, which revolved around both constitutionality issues generally and women's right to equality in particular, the Parliamentary Office of the South African Commission for Gender Equality (CGE) drafted an alternative draft bill in October 2005. The CGE is one of the six state institutions established in chapter 9 of the Constitution, with the mandate of strengthening democracy. In terms of section 181 of the Constitution, these six state institutions are independent and subject only to the Constitution and the law. The Commission for Gender Equality Act No. 39 of 1996 is the enabling law that fleshes out the powers, functions, composition, and certain procedural aspects of the commission. These powers and functions are very wide and are set out in section 187 of the Constitution and also section 11 of the CGE Act. They include the promotion of respect for gender equality; the protection, development, and attainment of gender equality; and the power to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality.

The functioning of the CGE has focused broadly on the following: (1) monitoring and evaluating policies and practices of both private and public bodies, to establish whether they promote gender equality; (2) conducting information and education campaigns; (3) evaluating and making recommendations on existing and proposed acts of Parliament, and also proposing new laws; (4) investigating alleged violations of gender equality; (5) monitoring the implementation of international conventions; and (6) research.

One of the thematic areas of focus for the Parliamentary Office of the CGE has been the issue of recognition of Muslim marriages. The interrogation of this issue through monitoring, research, investigation, advocacy, and public education has been based on the notion of eliminating gender injustice and/or achieving gender justice. The development of a bill, called the Recognition of Religious Marriages Bill (hereinafter referred to as the CGE Bill), was produced with the assistance of the office of the state law advisor and was in fulfillment of the CGE's constitutional mandate. This is a secular bill, of general application, that provides for the recognition of all religious marriages and avoids issues of codification of specific religious tenets, so as to comply with both international and constitutional law imperatives. It also addresses the lacuna that exists with respect to the nonrecognition of other religious marriages.

The CGE Bill was discussed with the SALRC and then handed over to the relevant executive structures. The hope was that action around broad public consultations would be held by them, particularly by the Gender Directorate of the Department of Justice. But neither the Ministry of Justice nor the Ministry of Home Affairs has acceded to numerous requests for a meeting with the CGE, nor have they undertaken any public consultations on the CGE Bill. The CGE Bill will not be discussed in this article, as it does not form part of the current political and public discourse taking place as regards the recognition of Muslim marriages. This is an unfortunate development that does not bode well for a young democracy. The litigation before the Constitutional Court in July 2009, to challenge the unconstitutionality of nonrecognition of marriages conducted under Muslim laws, was dismissed, on the basis that the parties had to first seek a remedy in the lower courts.

Potential Constitutional Violations

The SALRC Bill raises many constitutional concerns, including the provisions relating to the codification of religious laws in a secular multicultural democracy; the scope of application of such a law; the potential violations of women's equality rights, both intergroup and intragroup; and issues relating to the achievement of both individual and group equality. The Constitution does not contain a provision that mandates strict separation of religion and state. As stated earlier, the Constitution guarantees freedom of religion and

belief. The SALRC Bill violates this right both in terms of the interpretations of religious law as found within the codified provisions and in the provisions relating to state enforcement of such provisions. It is apparent that the bill represents a compromise to meet constitutional guarantees, and hence it includes provisions from the different schools of Islam. This is problematic for many, as it assumes a common understanding of Muslim Personal Laws and also assumes that the Muslim community in South Africa is a homogenous one. The imposition of one version of religious law to all Muslims is viewed by many as a violation of constitutional rights, as it empowers the state to enforce and control the manner in which people choose to practice their religion and express their faith and belief. Furthermore, the bill may also be viewed as undermining the autonomy of religious institutions.

In terms of equality between citizens of a nation-state, the codification of a religious system that privileges one religious group in a secular democracy may be viewed as violating the equality rights of other groups. This is particularly relevant to the South African context, where there are other religious groups whose marriages are not recognized. Furthermore, the provisions relating to the appointment of Muslim judges and assessors to hear disputes brought by Muslim litigants could also be interpreted as privileging one sector of society and be seen as a violation of the same standard of equality for all citizens and, worse still, as a divisive factor in a context with a history of divisions. The reality in South Africa is one where all judges are bound by the dictates of the Constitution and are expected to use that in their decision making, whether the litigants are of a different race, sex, or cultural or religious group.

Further, as regards intragroup equality norms, the bill advocates different rules and procedures for people bound by the SALRC Bill. It treats the proprietary consequences of marriage, divorce rules and procedures, maintenance of spouses, and custody of and access to children differently from those that are applicable to citizens using the civil law marriage system. One example of this relates to the fact that civil law marriages are automatically in community of property, while marriages under this bill will be automatically out of community of property. The consequences of a marriage out of community of property, excluding the accrual system, is that each party retains assets that they bring into the marriage and also assets that they acquire during the subsistence of the marriage. This effectively works to the disadvantage of

the spouse who does not work outside of the home and who may also not inherit family assets because of biased gender equality rules and practices.

The provisions relating to divorce in the SALRC Bill reveal a lack of clarity, disparate levels of power granted to male spouses (i.e., the entrenchment of legal inequality), and a failure to pursue the substantive equality of women. For example, section 9(2) of the SALRC Bill provides that a court may terminate a Muslim marriage on any ground permitted by Islamic law. Yet, the bill fails to identify any of these grounds and thus opens the door to gender-biased interpretations of religious grounds. Also, in codifying different forms of divorce and post-divorce practices, the bill openly spells out and formalizes inequality in the law by giving the husband greater freedom to end the marriage. It also gives men the right to remarry immediately post-death or divorce, yet prohibits remarriage for women, for a mandatory waiting period of 130 days for a woman who is not pregnant and until the time of delivery for a woman who is pregnant (i.e., the *iddah* period). This is a violation of both domestic and international laws.

The process of dissolution of marriages under the SALRC Bill is another example of the different treatment in respect to divorce processes accorded to the Muslim community as compared to both civil law and customary law divorces. Compulsory mediation is the first step in the process of dispute resolution. This can be followed by arbitration and finally litigation if the matter is not resolved. Court proceedings will have to be presided over by a Muslim judge. Failing the existence of a Muslim judge in that court, the matter will have to be heard by a Muslim attorney (who would be designated as an acting judge). Courts would be assisted by two Muslim assessors who have specialized knowledge of Islamic laws. On appeal, the Supreme Court of Appeal would submit questions of Islamic law to two accredited Muslim institutions for guidance in its deliberations.

Numerous problems are evident in this approach. First, in court cases, the application of Islamic laws could introduce gender bias into both the procedure and substance of the case. Second, by creating a special role for Muslim judges and attorneys as judicial officers, the SALRC Bill may convey existing racial and gender judicial distributional problems into the courtroom. Third, because this bill mandates compulsory mediation, only Muslim people would be made to go through this additional procedural hoop in order to gain access to the formal justice system. This puts Muslims at a disadvantage vis-à-vis

non-Muslims with regard to their constitutionally protected right to have access to both due process and effective justice. Fourth, because arbitration is a private process, there is concern that gender bias will proceed unchecked by public scrutiny. Studies have found that private bargaining in family law tends to yield inferior results for many women.[27] Compulsory mediation and arbitration are also viewed as problematic, based both on equality arguments as well as ignoring the reality of unequal power relations in many marriages. Furthermore, compulsory mediation is a contradiction in terms, as mediation by its very nature is a voluntary process that parties agree to, with them choosing a neutral third party as a mediator.

In terms of individual rights to gender equality, there are views that the current practice of Muslim Personal Laws cannot be reconciled with the constitutional guarantee of substantive gender equality. The SALRC Bill is seen as further entrenching the existing de facto inequalities that are faced by many Muslim women, due to the implementation and practices of Islamic law. This view is borne out by the provisions on issues relating to property, spousal support, *iddah* period, divorce rules and procedures, and polygyny. For example, the proviso relating to post-divorce/death waiting periods (*iddah*) is also viewed as a violation of gender equality, as it is a mandatory obligation imposed on Muslim women only. It is also viewed as illogical, as the practical purpose behind *iddah* is to ascertain the paternity of a child that may be born to her after the death of a husband or on the dissolution of a marriage. With technology today, this can be established in a fairly short time, and hence the specific time provision in the bill does not make sense. This a-contextual approach to codification of religious laws is seen as ignoring time, place, and scientific developments in the world today. It is also seen as conservative, backward looking, and harmful to both the individual and the religion.

Another example of potential violation of individual equality rights relates to provisions in the bill that recognize and sanction the practice of polygyny, while at the same time providing some legislative protective measures. This raises two crucial issues in the context of the entrenched right to equality, both in general terms as well as with regard to sexual equality. There is no provision in the bill for a woman's right to enter into multiple marriages, and this begs the question of whether the right to religion is overriding the right to equality in this instance. The bill also ignores economic factors and unequal power relationships that force women into polygynous marriages. By legislat-

ing to regulate polygyny through the courts, the inequality/discrimination defect is not necessarily cured. Further, there is no requirement for the wife's consent prior to her husband's entering into a subsequent marriage. Debates have ensued as to whether court regulation of polygyny is practically possible, in modern social and economic conditions, and whether men will follow the prescribed court process — particularly in a context where there is a lack of acceptance of the state's right to intervene in the religious domain.

Conclusion

In an ideal world, principles and institutions of constitutionalism, human rights, and citizenship would be the norm. The ideal constitutional provisions would guarantee both the right to equality and the right to freedom of religion, but with the right to equality interpreting the right of freedom of religion; prohibitions on discrimination based on religion; and a limitation on state endorsement of a particular religion. The ideal constitution would also include provisions for the creation of monitoring bodies to ensure effective implementation of such guarantees. The promotion of sex equality through the prohibition of discrimination within religious laws and institutions would not be off-limits — as sex equality guarantees serve a sufficiently important government purpose on many levels, be it ethical, moral, legal, political, social, economic, or developmental.

South Africa is a secular country, which has also constitutionally entrenched the right to freedom of religion, belief, conscience, and opinion. The protection of minority group rights whether based on religion or culture is constitutionally guaranteed in broad terms. The question of interpretation of such constitutional guarantees and the primacy of gender equality rights is also now clear after a seminal Constitutional Court case (the *Bhe* case). Generally, the cases post-1994 have articulated the preeminent values of equality and dignity in this new society. It is clear that the protection of minority group rights does not include a right to use a legal system that is in conflict with the Constitution and its fundamental protection of the principle and practice of equality of all citizens. Also, it is clear that an obligation to enforce an unconstitutional system, which violates individual rights, will not be sanctioned by the courts.

Eisgruber and Sager argue that "[w]e need to abandon the idea that it is the unique value of religious practices that sometimes entitle them to constitutional attention. What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns. When we have replaced value with vulnerability, and the paradigm of privilege with that of protection, then it will be possible both to make sense of our constitutional past in this area and to chart an appealing constitutional future."[28]

In addition, Abdullahi Ahmed An-Na'im argues that one needs a secular state that facilitates the possibility of religious piety out of honest conviction (and not state coercion) and that the enactment and enforcement of religious laws result in the manifestation of the political will of the state and not the religious laws of Islam. Furthermore, valid concerns exist about the "ossification" that takes place when systems of laws and customs, which were fluid and accommodating, are codified and then imposed on groups who find this both alien and alienating.[29]

As stated earlier, section 15 of the Constitution opens the door by allowing for legislation recognizing systems of personal and family law under any tradition or adhered to by persons professing a particular religion — although any such legislation must be consistent with the rest of the Constitution. The codification approach utilized in the SALRC bill has put women and children at a greater disadvantage, both intergroups and intragroups. Many of these provisions are onerous in terms of a burden of proof, and they presuppose access to knowledge and an equal power of parties to negotiate mutually favorable terms. The codification of religious laws approach focuses on protecting the religious group, with the emphasis being on formalizing group norms and institutions, instead of protecting the rights of the religious individual, with the emphasis being on personal choice of forum. Because individuals, especially women, are often subjugated even within protected minority groups, and because the individual is the lowest common denominator of both individual and group rights, there is a greater imperative to protect individuals. Where foundational rights collide, the equality of women must take precedence.

The recognition of Muslim marriages on a par with all other religious marriages is not precluded. But cultural and religious rights, unlike equality rights, are subject to limitations, described above. Wayne van der Meide has argued,

"[A]lthough culture is practiced within and defined in reference to a group, in the Bill of Rights it is an individual, not a collective, right. Generally, therefore, the right to culture cannot be used to protect the interests of a group at the expense of the rights to equality, non-discrimination and inherent human dignity of individuals."[30] Hopefully, when appropriate draft legislation with regard to the recognition of Muslim marriages finally reaches the legislature, the substantive equality rights of women will trump the inclusion of archaic and discriminatory provisions that violate women's rights to sex/gender equality and religion.

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Notes

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6. Harksen v. Lane NO 1997 (11) BCLR 1489 (CC).

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8. See generally Bronn v. Fritz Bronn's Executors and others 1860 (3) Searle 313; Seedat's Executors v. The Master 1917 (A.D.); Kader v. Kader 1972 (3) SA 203 (A.D.); Ismail v. Ismail 1983 (1) SA 1006 (A.D.).

9. Ryland v. Edros 1997 (1) BCLR 77 (C).

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