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### Recommended Citation

Waheeda Amien, & Dhammameghā A. Leatt, *Legislating Religious Freedom: An Example of Muslim Marriages in South Africa*, 29 Md. J. Int'l L. 505 (2014).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol29/iss1/18>

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## Legislating Religious Freedom: An Example of Muslim Marriages in South Africa

WAHEEDA AMIEN<sup>†</sup> AND ANNIE LEATT (DHAMMAMEGHĀ)<sup>††</sup>

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### INTRODUCTION

For the past 27 years, diverse groups of Muslims have lobbied for the legalization of Muslim marriages in South Africa and for the codification of elements of Muslim Personal Law (MPL). MPL is an Islamic-based private law system comprising family law and inheritance. Perhaps surprisingly, certain *ulamā* bodies (Muslim religious bodies or clergy)<sup>1</sup> and gender activists have supported draft legislation for the recognition of Muslim marriages under the enabling provisions of the final Constitution of South Africa 1996, though for quite different reasons. Yet, despite successive proposals, widespread consultation within the Muslim community, and two draft Muslim marriage bills, Muslim marriages are still not recognized in South Africa.

This contribution presents some background to efforts to recognize Muslim marriages and provides an overview of elements of the 2010 Muslim Marriages Bill (MMB) currently under consideration. The contribution places recognition efforts in the context of an internally diverse Muslim community. It also lays out some important resources for understanding what is at stake in the

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1. *Ulamā* literally means “learned ones,” and it refers to a body of Muslim clergy. They usually include men trained in the seminaries of the Middle East, the India-Pakistan subcontinent, and locally. Ebrahim Moosa, *Shaping Muslim Law in South Africa: Future and Prospects*, in *THE OTHER LAW: NON-STATE ORDERING IN SOUTH AFRICA* 125, 125 (Wilfried Schārf & Daniel Nina eds., 2001).

recognition of Muslim marriages, and why, despite considerable effort, this has not yet been possible in South Africa.

In doing so, we seek to highlight some of the tensions involved in an effort that seeks to afford legal recognition to a religious marriage within a secular legal framework. We ask: how it is possible to develop law that adjudicates equality between religious groups in a newly secular society, and equality between different members of religious communities, particularly between Muslim men and women? We address the question of authority and choice within a religious community: how can law work with tensions between individuals and religious leaders as interpreters and active agents of religiously sanctioned marriages? What constitutes a religious community? A legal specialist? An appropriate arbiter and a spokesperson for the religious tradition? And how, in a country like South Africa with multiple and parallel marriage legislation, do legal drafters engage with tensions between religious and secular interpretations of marriage in the context of a Bill of Rights?

The draft legislation on Muslim marriages raises complex questions about representation, interpretation, and equality in attempts to enact religious freedom in law in a secular and liberal context. It shows how law-making is at once both a legal and social process. And it demonstrates that law making is not only about the recognition of religious mores and sanctions, but also about its reformulation through codification and arbitration. The contribution therefore provides background, resources, commentary, and extracts from the South African Constitution and draft legislation on Muslim marriages to study as a case for the politics of religious freedom.

#### I. A BRIEF HISTORY OF RELIGION, POLITICS, AND RULE IN SOUTH AFRICA

South Africa is the site of a long and complex history of entanglement between religion, tradition, and political rule. Until the transition of the 1990s, South Africa was not secular. Despite their many differences, successive regimes of white colonial and apartheid government made use of Christian political theologies and traditional authority to secure white rule without democratic legitimacy.

South Africa is furthermore a country with significant religious diversity and high levels of religious adherence. In addition to the religiosity of precolonial Southern Africa and the Christianity introduced by Europeans and missionaries, political prisoners, slaves,

indentured labourers, and people fleeing persecution brought a range of religions to Southern Africa.<sup>2</sup> Demographic data on religion in South Africa is thin. The best source is the 2001 Census.<sup>3</sup> According to this data, Christianity is by far the biggest religion, with approximately 78% adherence. Christian religiosity is very diverse and can be aggregated under mainline Protestant, Reformed, Roman Catholic, African Independent, and Pentecostal Charismatic Churches. Fifteen percent of the population report that they have “no religion.” In 2001, Muslims made up about 1.5% of the South African population or around 650,000 people. They therefore comprise the biggest religious minority.<sup>4</sup> There were also 550,000 Hindus and about 75,000 Jews. A catch-all category of “other faiths,” including “Buddhist Taoist, New Age, Jehovah’s Witness and Baha’i” was selected by nearly 300,000 people. Furthermore, 126,000 people identified as having “African Traditional Belief,” and 1.4% of the population refused to answer the religion question.<sup>5</sup>

During the colonial period, the policy of indirect rule was introduced for the indigenous African population who comprised the majority of South Africans living in what were first called reserves and then “homelands.”<sup>6</sup> They were permitted to live only under a self-governing system in those homelands, which made up a miniscule fraction of the land area of the country. During that process, African customary practices were codified as Customary Law by British administrators from 1878.

Other systems of law—including those adhered to by Muslims, Hindus and Jews—were left to operate in a parallel and private sphere. Where “non-Christian” systems of law appeared in public

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2. FUNSO S. AFOLAYAN, *CULTURE & CUSTOMS OF SOUTH AFRICA* 57–83 (2004) (setting out the various religious influences in South Africa). *Cf.* *CHRISTIANITY IN SOUTH AFRICA: A POLITICAL, SOCIAL, AND CULTURAL HISTORY* (Richard Elphick & Rodney Davenport eds., 1997) (charting the history of Christian influences in South Africa).

3. *See* STATISTICS S. AFR., *CENSUS 2001: PRIMARY TABLES SOUTH AFRICA: CENSUS '96 AND 2001 COMPARED* 24–28 (2001), *available at* <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf> (reporting the census results pertaining to religion). Questions about religion have since been taken out of the Census instruments.

4. All figures for the “minority religions” should be treated with caution since sampling errors are likely to be greatest where the population proportion is so low and where migrants and foreign nationals were considerably undercounted.

5. STATISTICS S. AFR., *supra* note 3, at 24–25. Calculations were done by Leatt using simple descriptive statistical techniques.

6. J.C. MEYERS, *INDIRECT RULE IN SOUTH AFRICA: TRADITION, MODERNITY AND THE COSTUMING OF POLITICAL POWER* 1–16 (2008).

debates, they became subject to a Calvinist form of moralizing around gender and polygyny. In fact, the state did not recognize Muslim marriages because, being potentially polygynous, they were not held to conform to the “Christian requisite of monogamy.”<sup>7</sup>

In many respects, religious and racial discrimination overlapped in South African history. Religious leaders took part in racial governance as well as in opposition. In 1948, the National Party (NP) came to power in a whites-only election and introduced the policy of apartheid with racial segregation and legally codified white domination.<sup>8</sup> In 1960, 69 black people in a rally protesting the infamous pass laws were reportedly shot by the police in the Sharpeville Massacre.<sup>9</sup> The white referendum that was then proposed by the NP led to a declaration of independence from Britain. Afterwards, the South African state was more able to pursue its racist policies unhindered. During that decade, the apartheid state reached the height of its powers and ambitions.<sup>10</sup> The government launched a concerted campaign against political opposition by the African National Congress (ANC), the Black Consciousness movement, and the Pan African Congress. It also took control over many of the previously mission run schools and instituted Christian National Education, which differentiated curriculum, teacher training, and school resources by race according to the apartheid classifications: Black, Coloured, Indian, and White. Some privately-funded Jewish and Muslim schools were established to provide an alternative. However, on the whole, Hindu and Muslim children were educated in a Christian context in Coloured and Indian schools. The political theology of apartheid revolved around a Christian God that differentiated between the country’s inhabitants by race and culture.

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7. In *Ismail v. Ismail*, 1983 (1) SA 1006 (A), the Supreme Court during the apartheid era confirmed that Muslim marriages were precluded from legal recognition because their potentially polygynous nature offended the public policy or *boni mores* of that time, which was informed by a Christian ethos. Waheeda Amien, *Overcoming the Conflict between the Right to Freedom of Religion and Women’s Rights to Equality: A South African Case Study of Muslim Marriages*. 28 HUM. RTS. Q. 729, 733 (2006) (quoting *Ismail v. Ismail*, 1983 (1) SA 1006 (AD) at 1024E, 1025G (S. Afr.)).

8. LEONARD M. THOMPSON, *A HISTORY OF SOUTH AFRICA* 87–90 (2000).

9. *Id.* at 210; WILLIAM BEINART, *TWENTIETH CENTURY SOUTH AFRICA* 166–67 (2001).

10. *E.g.*, Deborah Posel, *The Apartheid Project, 1948–1970*, in 2 *THE CAMBRIDGE HISTORY OF SOUTH AFRICA: 1885–1994* 319–68. (Robert Ross et al., eds., 2011).

The preamble of the 1961 Constitution quite literally asserted that God gave South Africa to whites: White responsibility to God was to stand united to safeguard “the integrity of the country,” secure “law and order,” and “further the contentment and spiritual and material welfare of all in our midst.”<sup>11</sup>

Increased repression led to increased struggle against the state. Opposition groups radicalized, established bases in exile, and some took up armed struggle. Within the country, youth protest increased. The 1976 Soweto Uprising was a response to the plan to introduce Afrikaans as the medium of instruction for black African children.<sup>12</sup> The state’s actions became increasingly extreme with bannings, arrests, and extra-judicial killings.<sup>13</sup> In the 1980s, successive states of emergency were declared in which police and security apparatuses gained almost unfettered freedom to act against opponents of the state.<sup>14</sup> As more political leaders of the opposition were banned, incarcerated, killed, or went into exile, religious leaders took up more public roles in the struggle. Archbishop Tutu and the Reverend Allan Boesak are probably the best known of these, though they were part of a broader progressive ANC-aligned interfaith movement that participated in the United Democratic Front (UDF). Muslim leaders also participated in the struggle against apartheid, notably Imam Abdullah Haron who was murdered by the apartheid state in 1969. The Muslim Youth Movement (MYM), which continues to function today as a progressive Muslim-based organization in South Africa, was also active in the struggle against apartheid.<sup>15</sup>

While military and police repression increased, the apartheid state strategically increased its divide and rule efforts among black people by introducing the Tricameral Parliament in 1983.<sup>16</sup> The Tricameral Parliament was an attempt to co-opt Coloured and Indian leaders into “power-sharing” by giving them representation in second class houses of parliament while maintaining a white majority in the main house. Black Africans were excluded from this initiative. The

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11. REPUBLIC OF S. AFR. CONST., Apr. 24, 1961, Act 32 of 1961, pmb1.

12. THOMPSON, *supra* note 8, at 212; HERMANN BUHR GILIOME & BERNARD MBENGA, NEW HISTORY OF SOUTH AFRICA 362–63 (2007).

13. THOMPSON, *supra* note 8, at 212–13.

14. *See id.* at 236 (“South Africa’s destabilizing tactics between 1980 and 1989 led to the deaths of one million people [and] made a further three million homeless.”).

15. *About Us*, MUSLIM YOUTH MOVEMENT, <http://mym.za.org/index.php/about-us.html> (last visited May 8, 2014).

16. MARINA OTTAWAY, SOUTH AFRICA: THE STRUGGLE FOR A NEW ORDER 24–25 (1993).

black majority comprising black African, Coloured, and Indian people protested against the establishment of the Tricameral Parliament and boycotted its elections. They saw the initiative for what it was: another attempt to manipulate black South Africans. Consequently, the tricameral elections inspired “only 13 and 18 percent voter turnout respectively,”<sup>17</sup> and as result, some Hindu and Muslim people were present for the first time in lower houses of parliament. Given that, the 1983 South African Constitution of the apartheid government sought to acknowledge some equivalence of religions under the authorization of the Christian God. This was incorporated into an utterly incoherent statement that speaks of responsibility towards God and man, and the necessity of pursuing national goals of upholding “Christian values and civilized norms, with recognition and protection of freedom of faith and worship” and the “self-determination of population groups and peoples.”<sup>18</sup>

In 1987, in the context of the abovementioned dual strategy of the apartheid state, the South African Law Commission (SALC) initiated an investigation into Muslim marriages. *Ulamā* bodies in South Africa had occasionally lobbied for legal recognition of MPL under apartheid. While some of the *ulamā* supported the work of the SALC, many Muslims affiliated with the anti-apartheid struggle, such as the MYM and anti-apartheid activist members of the *ulamā*, were suspicious of the initiative.<sup>19</sup> Hence, nothing further came of that attempt.

## II. CONSTITUTING SECULARISM IN POST-APARTHEID SOUTH AFRICA

South Africa is rightly famous for its negotiated transition during which apartheid and opposition forces reached agreements that encouraged the National Party (NP) to step down and the African National Congress (ANC) to assume power. The negotiations took the form of agreements on practical arrangements for government and drafting a new Constitution. The new Constitution captured the aspirations for democracy, representation, and equality, and it also safeguarded cultural and linguistic rights, private property and business, and financial stability. Although covert military and

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17. BEINART, *supra* note 9, at 255.

18. REPUBLIC OF S. AFR. CONST., Sept. 22, 1983, Act 110 of 1983, pmb1.

19. See Ebrahim Moosa, *Prospects for Muslim Law in South Africa: A History and Recent Developments*, in 3 Y.B. ISLAMIC & MIDDLE E. L. 130, 135 (1996) (noting that many within the Muslim community suspected that purchasing legitimacy was the SALC’s motivation for the initiative).

policing operations continued during this time, the transition was able to prevent the escalation of the violence of the 1980s into a full scale civil war.

Everything was up for negotiation, and the legal and political status of religion changed dramatically during the transition period. The 1996 South African Constitution is now secular in as much as it promises the right to religious freedom and religious equality and makes legal provision for the relationships between state and religion. It has destroyed the edifice of Christian political theology and the unique place Christianity had under apartheid. It also offers the promise of dignity, recognition, and the protection and exercise of religious freedom for all South Africans. What this means in practice is still being worked out in society, law, and jurisprudence.

The rights entrenched in the new Constitution are basically liberal in form; they are mainly oriented to the rights of individuals. The various conglomerations of apartheid power—the NP, those further to the right of Afrikaner politics, and some of the leaders of homelands—all sought protection for group rights under the rubric of consociationalism and group, rather than individual, political representation. As a second prize, they were willing to accept a strongly federal arrangement that retained some special race majorities in certain areas. The ANC in contrast was set on winning the basic rights of representative democracy with one person one vote. They sought a dispensation in which citizens would be recognized as having political equality in a state that could work to secure social and economic equality. To do so, they prioritized individual rights in legal drafting and negotiations, even as they furthered the rhetoric of people's power on the streets. The liberal aspirations are largely captured in the Constitution's Bill of Rights, sections of which are discussed below.

In the transition, religion was not a particularly contentious issue. Debates about the future of religion were held between the ANC, NP, and other smaller parties, and they were informed by an interfaith body through the World Conference on Religion and Peace (WCRP) that coordinated submissions and perspectives from a wide range of progressive Christian and Muslim groups. In addition, many religious individuals or groups wrote to the Constitutional Assembly or lobbied the parties to the negotiations. On the whole, there was considerable consensus within the formal negotiating process about the importance of recognizing religious diversity, the principle of freedom of religion, and the significance of religious practice to most South Africans.

There are a number of areas in which legal provisions about religion are found in the Constitution. The bedrock of these are contained *inter alia* in the equality provision (section 9), the individual right to freedom of religion (section 15), and the collective right to freedom of religion (section 31).

The equality provision states:

9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.<sup>20</sup>

Importantly, section 9(3) promises protection from discrimination on the basis of religion and belief, as well as on the basis of sex, gender, and sexuality. As in most constitutional dispensations with a Bill of Rights, potentially conflicting rights and protections are enshrined. For instance, the collective right to freedom of religion in section 31 can potentially conflict with section 9(3). As we will show, this conflict is illustrated in the Muslim Marriages Bill (MMB). Section 31 reads:

31 (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

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20. S. AFR. CONST., 1996 § 9.

(a) to enjoy their culture, practice their religion and use their language; and,

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.<sup>21</sup>

Significantly, section 31(2) will most likely provide the balance needed to prevent a discriminatory religious practice from being lawfully sanctioned. It appears to create the potential to subordinate religious rights to, for example, equality. For instance, a practice authorized by a sacred text or religious authority that discriminates unfairly on the basis of gender, sex, or sexuality, will most likely not be upheld in the event of a court challenge.

The transition founded a new political community that was, for the first time, not racially legislated. Many of the events and symbols of the nation-building that accompanied the transition were secular in form and content. They included ushering in the new Constitution, the 1994 elections, the inauguration of Nelson Mandela, and his personification of inclusive reconciliation. Where religious leaders were present at important ceremonial events to found the new nation, including Mandela's inauguration and the opening of the first democratic Parliament, great care was taken to have those events blessed by religious leaders from a wide range of faiths and denominations.

Yet, the rhetorical and performative creation of a national community also required some sort of revisiting of the past. It is in relation to this most painful and antagonistic past that Christianity, as the majority religion and as a common language of reconciliation, was brought into use in the political process. In the process of the Truth and Reconciliation Commission (TRC) and in nation-building discourse, Christian notions of reconciliation, liberation, and forgiveness were mobilized. In fact, given the largely Christian population in South Africa, themes and images from Christianity continue to infuse public and political culture.

While section 31 protects the collective right of "persons belonging to a religious community" to "practice their religion" and

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21. *Id.* § 31.

“form, join and maintain religious associations,” section 15 protects the individual right to freedom of religion. Section 15, which is titled “Freedom of Religion, Belief and Opinion,” includes three sections.<sup>22</sup> The first was introduced early in the negotiation process and was maintained in the 1996 Constitution as a general formulation of the right to religion. Section 15 (1) states, “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”<sup>23</sup>

The technical legal drafting teams in 1993 noted that all parties agreed that religion formed part of a basic set of first generation rights that were “minimal or essential rights and freedoms.”<sup>24</sup> Recognized as comprising an international rights standard, it formed common ground among the main negotiating parties.

Unlike in the United States, however, the negotiating parties in South Africa conceived a relationship of cooperation between state and religious groups. They decided against a strict wall of separation between religious and state institutions. Political and religious groups agreed that their institutions should be separated for their mutual and common good, but that separation should not be so strict as to preclude their cooperation or the presence of religious observance in state and state-aided institutions.

Very different rationales informed this consensus. Some were explicitly religious, others political. All parties agreed that South Africa is a religious country, that there is religious diversity, and that, unlike in the past, there must be a place for all religions in the new society.<sup>25</sup> They also agreed that the area of operation of religious institutions should not be less than that of Calvinist Christianity under apartheid. Religious clergy and observance should still be present in

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22. *Id.* § 15.

23. *Id.* § 15(1).

24. See TECHNICAL COMM. ON FUNDAMENTAL RIGHTS DURING THE TRANSITION, SUMMARY OF THE FIRST PROGRESS REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS IN THE TRANSITION 2–5 (May 14, 1993), available at <http://www.constitutionnet.org/files/3201.PDF> (including “Freedom of conscience, religion, thought and belief” in the category of “Minimal or essential rights and freedoms which must be accommodated”).

25. E.g. Nat’l Party, *National Party Preliminary Submission to Theme Committee Four on Freedom of Religion*, CONSTITUTIONNET, <http://www.constitutionnet.org/files/3016.PDF> (last visited June 28, 2014); Afr. Christian Democratic Party, *African Christian Democratic Party Submission to Theme Committee Four on Freedom of Religion*, CONSTITUTIONNET, <http://www.constitutionnet.org/files/3006.PDF> (last visited June 28, 2014).

schools, prisons, hospital chaplaincies, and in public broadcasting. However, the terms of their presence were altered to include the full range of religions. By consensus, institutional Christianity lost its monopoly on the state and state-aided institutions. This was formulated in the following way in the 1996 Constitution:

15 (2) Religious observances may be conducted at state or state-aided institutions, provided that –

- (a) those observances follow rules made by the appropriate public authorities;
- (b) they are conducted on an equitable basis, and;
- (c) attendance at them is free and voluntary.<sup>26</sup>

Prior to the enactment of the 1996 Constitution, there was some debate about who should have the authority to determine the rules for religious co-existence and practice in state institutions. In draft form, section 15(2)(a) referred only to “appropriate authorities.”<sup>27</sup> A Constitutional Assembly Public Hearing in May 1995 provided a chance for religious groups to elaborate on who would have such authority.<sup>28</sup> The overwhelming consensus among religious groups, endorsed by the WCRP, was that religious bodies should retain autonomy over religious observances, even when they were in state institutions. Religious bodies envisaged an interlocutory interfaith body, controlled by religious groups, which could advise government on religious matters.

Religious groups had no leverage over the decision on an appropriate authority when it was finally made. In April 1996, at the very end of the negotiations, the ANC and the NP met to negotiate deadlocked issues in bilateral conversation.<sup>29</sup> The NP wanted to make sure that, in schools particularly, the appropriate authority would be the school governing body.<sup>30</sup> They hoped to retain the Christian

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26. S. AFR. CONST., 1996 § 15(2).

27. S. AFR. (INTERIM) CONST., 1993 § 13.

28. *S. Afr. Constitutional Assembly Public Hearing on Religion* (1995) (transcript on file at S. Afr. Nat'l Archives CA F4 1/12/6).

29. See PENELOPE ANDREWS, *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW* 169–71 (2001) (describing the private, bilateral negotiating process).

30. NAT'L PARTY, *PRELIMINARY SUBMISSION ITEM 14: SOCIO ECONOMIC RIGHTS* (N.D.) (on file with S. Afr. National Archives, CA 2/4/4/1/7/13) (“With regard to the rules for religious observances referred to in section 14(2), we wish to emphasise that the ‘appropriate authority’ that may issue them should be the

character of some schools, which could be done if the majority of learners and members of the school governing bodies were Christian or even a specific denomination of Christianity. On their insistence, the phrasing of the religion clause was altered to read “the appropriate public authorities.”

The third section to the right to freedom of religion in the 1996 Constitution was included after direct lobbying by *ulamā* groups during the constitutional negotiation process. It is this provision that provides the enabling legislation for the MMB under discussion:

15(3) (a) This section does not prevent legislation recognising –

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal or family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.<sup>31</sup>

Sections 15, 31 and 9(3) emerged from the political process as the trilogy of constitutional provisions that, among others, gave a new place to religion in South Africa. In other words, constitutionally, they gave religion its place through the individual right to religion, equal recognition of religions, and non-discrimination on the grounds of religion. At the same time, like section 31, section 15(3), which affords parliament discretion to pass legislation to recognize among others religious marriages, also creates the possibility of subordinating religious practices to equality. As a result, discriminatory religious practices that are included within the legislation may not withstand constitutional scrutiny. In South Africa, we have not yet had occasion to test this theory since legislation aimed at recognizing religious marriages has not yet been enacted. However, we do have draft legislation proposing to recognize Muslim marriages in accordance with section 15(3). In the next two

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governing body of the institution in question and that, if need be, this should be stipulated in the constitution.”)

31. S. AFR. CONST., 1996 § 15(3).

sections, we discuss that legislation in more detail and provide the background that led to its formulation.

### III. THE SOUTH AFRICAN MUSLIM COMMUNITY AND THE HISTORY OF THE INTRODUCTION OF THE MUSLIM MARRIAGES BILL

A large part of the South African Muslim community is not indigenous to Africa. Their ancestors were brought to South Africa from the seventeenth century as slaves, indentured labourers, political prisoners, convicts, and traders from various parts of the world including South Asia, South-East Asia, and Africa.<sup>32</sup> The large majority of South African Muslims follow the *Sunni* tradition with a small number adhering to the *Shi'i* tradition.<sup>33</sup> As a result of their origins, most Muslims in South Africa were classified by the apartheid state as Coloured and Indian, and many are still located within those historically racially disadvantaged communities.<sup>34</sup> Anecdotal evidence suggests that there is a rising number of black Africans converting to Islam in South Africa and an increasing number of Muslims are also located in immigrant communities entering South Africa from other parts of Africa. To a much lesser extent, converts to Islam can further be found in the white South African community.

Under British colonialism, Muslims could only practise Islam and regulate their religious personal laws within the private sphere because any public display of their religion was proscribed and punishable by death, though this was not actively enforced.<sup>35</sup> It is not surprising, given how long Muslims have been in South Africa, that there are those within the community who organized themselves into *ulamā* bodies and assumed the authority to pronounce on everything related to Islam. *Ulamā* bodies have appropriated a quasi-judicial function that enables them to preside over disputes emanating from the Muslim community including those involving marriage and divorce. The biggest *ulamā* body in South Africa is the *Sunni*-based United *Ulamā* Council of South Africa (UUCSA), which was formed in 1994 and represents about 400 mosques, 200 Muslim educational

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32. Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J. L. & RELIGION 185, 211 (2001).

33. Moosa, *supra* note 19, at 131.

34. Waheeda Amien, *Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages*, 13 ACTA JURIDICA COMP. & INT'L L. J. S. AFR. 357, 359 (2013).

35. G.J. van Niekerk, *Legal Pluralism*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 8–9 (J.C. Bekker et al., eds., Durban 2006).

institutions, and 1350 Muslim theologians across the country.<sup>36</sup> It is an umbrella body that comprises seven affiliates: the *Jamiatul Ulamā* South Africa (established in 1923); the Muslim Judicial Council of South Africa (MJC) (established in 1945); the *Jamiatul Ulamā* of KwaZulu-Natal (established in 1955); the *Sunni Jamiatul Ulamā* of South Africa (established in 1978); the *Sunni Ulamā* Council of South Africa (established in 1992); the Eastern Cape Islamic Congress (established in 1996); and the Council of *Ulamā* Eastern Cape (established in 1999).<sup>37</sup>

While South African Muslims were eventually permitted to practice their faith in the public domain, their religious personal laws were never afforded legal recognition, mainly because the potentially polygynous nature of their marriages did not conform to a Christian understanding of marriage. The racial discrimination they suffered was therefore integrally linked to religious discrimination. The call by Muslims for Muslim Personal Law (MPL) to be recognized thus emanates from a desire to have their dignity restored. However, other motivating factors also drive different sections of the Muslim community to advocate for the recognition of their personal laws. For instance, many members of the *ulamā* wish to regulate MPL in a legally enforceable manner and with the sanction of the state. While their decisions carry moral weight within the Muslim community, they are currently unenforceable. Gender activists also call for the recognition of Muslim marriages but to provide protection to Muslim women who are disparately affected by the non-recognition of their marriages.<sup>38</sup>

In October 1993, just as the interim 1993 Constitution was being finalized, Muslim groups made a series of submissions to the Technical Committee responsible for drafting the Bill of Rights.<sup>39</sup> This opened up the issue of MPL and its recognition in the new Constitution. The Committee's report noted that "[a]t a late stage of

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36. *About Us*, UNITED ULAMA COUNCIL S. AFR., [http://www.uucsa.net/index.php?option=com\\_content&view=article&id=2&Itemid=3](http://www.uucsa.net/index.php?option=com_content&view=article&id=2&Itemid=3) (last visited May 8, 2014).

37. *Id.*

38. Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 INT'L J. L. POL'Y & FAM. 361, 363 (2010).

39. TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING TRANSITION, TWELFTH PROGRESS REPORT (Nov. 15, 1993), available at <http://www.constitutionnet.org/files/3212.PDF>.

the negotiation process representatives of the Muslim community made submissions . . . to the effect that the religious laws observed by certain communities . . . should also be recognized constitutionally in explicit terms.”<sup>40</sup> Weeks of intense consultation followed. There were two broad perspectives presented from the Muslim community. On the one hand, the *ulamā* who initiated these representations argued for the recognition of Islamic law and particularly its family law elements. They also wanted the establishment of state funded or administered religious courts to apply this law. They made several arguments for this: recognition would provide redress for the second class status of Islam in South Africa; it would sanction the marriages, divorces, laws of succession and custody arrangements practiced by most Muslims; and it would legitimize the work of the *ulamā* by recognizing them and giving them access to non-voluntary modes of redress for the contravention of their rulings through fines or imprisonment. In the view of these members of the *ulamā*, Islamic law is divinely sanctioned and should remain immune to the intervention of secular or civil law. According to Moosa, they “postured themselves as the sole authorities on MPL to the exclusion of other sectors of the Muslim community.”<sup>41</sup>

A second perspective came from a broad alliance of progressive Muslims who gathered in response to this proposal. This group included some *ulamā* authorities, particularly from the MJC, as well as Muslim community organizers, academics and women’s representatives. According to one member of the drafting committee, a submission by Ebrahim Moosa which was endorsed by a number of Muslim groups<sup>42</sup> tipped the balance in the decisions of the Negotiating Council. Moosa’s submission clearly summarizes the issues of this more progressive perspective.

Moosa’s submission acknowledged the widespread *de facto* practice of MPL in South Africa, which was (and still is) informally administered by various Muslim jurists. Moosa wrote that “[i]t is known that most Muslims would prefer to follow the dictates of their religion in matters of personal law, rather than secular law.”<sup>43</sup> Given

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40. *Id.*

41. Moosa, *supra* note 1, at 128.

42. Urgent Memorandum on Muslim Personal Law to Technical Committee (Nov. 2, 1993) (on file with the Univ. Cape Town Hugh Corder Collection). The memorandum was sent on Department of Religious Studies, University of Cape Town letterhead. The memorandum was endorsed by the Judicial Committee of the Islamic Council of South Africa, the Muslim Youth Movement of South Africa, *Majlis as-Shura al-Islami*, Call of Islam and the Central Islamic Trust.

43. *Id.*

the fact that MPL did in fact guide many Muslims' family relations, its non-recognition was problematic. Moosa's main concern was that MPL as administered outside the ambit of the secular court system disadvantaged women.<sup>44</sup> Practices he identified as problematic on the grounds of gender inequality include divorce by repudiation (*talāq*) and limited maintenance provisions.<sup>45</sup>

Unlike the *ulamā* submissions, progressive Muslims highlighted the diversity of schools of Islamic interpretation and Muslim cultural practices in South Africa. For this reason, it was impossible they said, to simply recognize any one self-appointed authority on Islamic law. This was a matter that required wide debate across the Muslim community, and that debate should always include women.<sup>46</sup> Moosa suggested that the outcome of those discussions should be the codification of MPL.<sup>47</sup> Such codification, which was "imperative," would provide the Muslim community with a chance to reform their practices and bring them into line with human rights norms, particularly around gender. Progressive Muslims argued that a similar codification in Tunisia had been conducted in ways that entrench gender equality that is true to Islam: "It is accepted that a human rights dispensation is in full accord with Islamic law."<sup>48</sup>

Some of the conservative *ulamā*'s demands are absent from section 15(3) of the 1996 Constitution. The submission about courts was deemed too specific for a transitional constitution and beyond the technical committee's remit.<sup>49</sup> The ANC also made it clear that the recognition of personal and family laws should only take place "within the framework of the Chapter on Fundamental Rights."<sup>50</sup> It would, in other words, only recognize such law where it guaranteed gender and other grounds for equality.

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44. *Id.*

45. *Id.*

46. This is itself a contentious proposition according to more conservative interpretations of Islamic law in which the testimony of women is treated as less reliable than that of men.

47. Urgent Memorandum on Muslim Personal Law to Technical Committee, *supra* note 42.

48. *Id.*

49. They suggested that if this issue of religious courts was to be taken up at all, it should be dealt with in the chapter on Traditional Authorities that was at the time debating customary courts. This did not happen.

50. Urgent Memorandum on Muslim Personal Law to Technical Committee, *supra* note 42.

Section 15(3)(a) is the same as its concomitant provision in section 14(3) of the 1993 Constitution with one exception. While the latter did not prevent the legislation of marriages *and* systems of personal and family law, the 1996 Constitution replaced the *and* with *or*. The reason for this can be found in debates internal to the Muslim community about who has the right to represent and interpret Islamic legal thought. Subsequent to the enactment of the 1993 Constitution, a Muslim Personal Law Board (MPLB) was established to draft legislation to recognize MPL.<sup>51</sup> Due to ideological differences between the more progressive and conservative voices on the MPLB, it disbanded within a year. Conservative members of the *ulamā* represented on the MPLB believed that as a divinely sanctioned system, MPL could not be subordinated to the Constitution. In contrast, progressive members adopted the view that progressive interpretations of MPL allowed it to be consistent with constitutional provisions, including gender equality. Thus, a progressive approach to MPL enabled the latter to be compatible with the Constitution so there would be no need for subordination by one to the other.<sup>52</sup> For some years, this situation led to a deadlock, and no further action was taken to make use of the Constitution's enabling provision.

The process to recognize MPL was revived in 1999 when the South African Law Reform Commission (SALRC) appointed a Project Committee to draft legislation in accordance with section 15(3)(a).<sup>53</sup> This time their brief was to propose recognition to Muslim *marriages* as opposed to a *system of personal or family laws*. Members of the Project Committee were nominated through a public process and comprised a majority of Muslims from among the judiciary, legal profession, academia, and representatives of UUCSA. After a period of four years of extensive consultation with the South African Muslim community, the Project Committee submitted a comprehensive report accompanied by a draft Muslim Marriages Bill to the Ministry of Justice and Constitutional Development in 2003

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51. Abdulkader Tayob, *The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study* 22 RECHT VAN DE ISLAM 1, 3 (2005) ("In 1994, the government appointed a Muslim Personal Law Board to propose a system of Islamic law . . . . The body consisted of members from both the religious leadership and representatives from the youth organizations that were active against apartheid. The Board collapsed by April 1995 when its members could not reach agreement.").

52. *Id.* at 3–6.

53. Waheeda Amien, *The Muslim Marriages Bill: Is It the Answer to the Dilemma of Non-Recognition of Muslim Marriages in South Africa?* (2009), <http://www.engender.org.za/publications/WAmienMuslimViewsArticleMMB.pdf>.

(hereafter referred to as the 2003 MMB).<sup>54</sup> Tayob suggests that the process undertaken by the SALRC Project Committee proved to be more successful than the efforts of the MPLB because of the narrower focus on the recognition of marriages rather than the broader object of codifying a whole system of personal or family laws. This enabled the Project Committee to concentrate on the direct needs of the Muslim community relating to marriage and divorce and address those in draft legislation instead of getting bogged down by the ideological differences that had plagued the MPLB.<sup>55</sup> The remarkable thing is that even though there was significant consensus on the 2003 MMB, it languished in the Ministry amidst the perhaps more urgent task of rewriting almost every piece of legislation in the newly democratic state. Still, it is unclear why the Ministry did not push for its enactment. Did it lack the political will to do so? Did it expect 100% support from the Muslim community, given the dissident voices of very conservative members of the *ulamā* who rejected any type of state regulation of MPL as well as those members of the *Shi'i* community who felt that their needs were not catered for in a largely *Sunni*-favourable MMB? Was the Ministry persuaded by gender activists within secular society that the MMB should not be enacted unless it was 100% consistent with gender equality?

Whatever the reason, no further progress was made for seven years until a women's rights NGO, the Women's Legal Centre (WLC), instituted an action in 2009, asking the Constitutional Court to order the Department of Justice and Constitutional Development to enact legislation to recognize Muslim marriages.<sup>56</sup> Although the Court decided against the WLC because they had instituted the action in the incorrect court, it did spur the Department to apply its mind to the MMB. During 2010, without any further consultation, the Department submitted an amended version of the MMB to Cabinet, which subsequently approved it (hereafter referred to as the 2010 MMB).<sup>57</sup> This meant that the MMB could formally enter the

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54. See generally SOUTH AFRICAN LAW REFORM COMMISSION ISLAMIC MARRIAGES & RELATED MATTERS REP. (2003) [hereinafter SALRC REP.] available at [http://www.justice.gov.za/salrc/reports/r\\_prj59\\_2003jul.pdf](http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf).

55. Tayob, *supra* note 51, at 6.

56. *Women's Legal Trust v. President of the Republic of South Africa, and Others* 2009 (6) SA 94 (CC) (S. Afr.).

57. Muslim Marriages Bill, 2010, available at [http://www.justice.gov.za/legislation/bills/2010\\_muslim-marriages-bill.pdf](http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf) [hereinafter 2010 MMB] (S. Afr.).

parliamentary process for consideration by the Portfolio Committee on Justice and Constitutional Development and the National Assembly. However, four years later, this has still not happened.

The majority of the Muslim community, including members of the *ulamā* and many gender activists, appeared to support the 2003 MMB even though it did not contain all their demands.<sup>58</sup> The majority of the *ulamā* were satisfied that the 2003 MMB was *Sharī'a* compliant and gender activists who pushed for its enactment believed that it would provide more protection for Muslim women than they have in the absence of legislation. In contrast, those members of the *ulamā* who supported the 2003 MMB withdrew their support for the 2010 version on the basis that amendments that were unilaterally effected by the Department had rendered the MMB non-compliant with *Sharī'a*. This has now brought the process to a halt and has effectively reversed four years of work by the SALRC. However, given the Ministry's unenthusiastic treatment of the 2003 MMB, one wonders if a retreat to the drawing board in relation to the 2010 MMB by all the relevant parties concerned would actually make a difference. There is more work to be done to understand the dynamics within the Department that have prevented the process from reaching any kind of conclusion.

Having given some background to the creation of the MMB in its two forms (2003 and 2010), we now turn to its contents and examine how the drafters and Muslim activists sought to develop a compromise position amidst the demands of the Constitution, various forms of legal interpretation of MPL, and secular or civil forms of marriage. This includes a more detailed description of the controversial provisions in the 2010 MMB that seem to have halted any possibility of its enactment. A synopsis of the gender-problematic provisions is also included.

#### IV. THE MUSLIM MARRIAGES BILL

The 2010 Muslim Marriages Bill (MMB) recommends that legal recognition be afforded to Muslim marriages and proposes a comprehensive framework that encompasses a mainly *Sunni* paradigm for the regulation of Muslim family law. According to the Preamble, the aim of the MMB is:

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58. Waheeda Amien, *Why Forsake Muslim Women?* 42 THINKER 26, 27 (2012) (“Although the [Muslim Marriages Bill 2003] did not meet all the demands of all the role players, it was certainly a document that most felt that they could live with.”).

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 recognize the status and capacity of spouses in Muslim marriages; to regulate the proprietary consequences of Muslim marriages; to regulate the termination of Muslim marriages and the consequences thereof; and to provide for matters connected therewith.<sup>59</sup>

To a large extent, the MMB purports to recognize the majority of characteristics associated with a traditional understanding of *Sunni* marriages. For instance, in clause 1, it defines a Muslim marriage as one that is “between a man and a woman contracted in accordance with Islamic law only.”<sup>60</sup>

The MMB then defines Islamic law as “the law as derived from the *Holy Qur’an*, the *Sunnah* (Prophetic model), the consensus of Muslim Jurists (*Isma*) and analogical deductions based on the primary sources (*Qiyas*).”<sup>61</sup>

The MMB further provides the following definition of a “Muslim” as “a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam.”<sup>62</sup> Here we should note that the definition of a Muslim is one that depends on individual belief and faith rather than membership of a community or culture. Through these definitions, the MMB excludes same-sex couples from concluding a Muslim marriage that could be registered under the MMB, even though South Africa legislates and recognizes same-sex unions.<sup>63</sup> It could also exclude those following the *Shi’i* tradition, and the conclusion of a *Shi’i*-type *mutah* (temporary) marriage, which would arguably not be recognized under the MMB. The drafters also make the very questionable assumption that all Muslims agree on the essentials of Islam.

The MMB further limits the sources of Islamic law to primary and secondary sources. The exclusion of subsidiary sources is

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59. 2010 MMB, *supra* note 57, at pmbl.

60. *Id.* at cl. 1.

61. *Id.*

62. *Id.*

63. *See* Civil Union Act 17 of 2006 (S. Afr.) (noting that Civil Unions between same-sex couples will be recognized under the law).

problematic because that is where the greatest potential for the reform of Islamic law lies. For example, *maslahā* (public interest), *istihsān* (the discretion to relax a rule that could result in harm), *urf* and *adat* (customs and practices followed within a community) are but a few of the subsidiary sources of Islamic law. These sources enable greater responsiveness to the lived social and economic realities of any Muslim community. Without recognition of the subsidiary sources of Islamic law, its interpretation and application will most likely entrench existing conservative and male-centered understandings and practices. The 2003 MMB did not contain a definition of Islamic law. It is unclear why the Department would see fit to include a definition in the 2010 MMB, particularly one as limiting as this. Had the Department consulted about the proposed definition, it might have realized the disastrous implications that a reductionist definition of Islamic law could have for marginalized members of the Muslim community.

Other features of a traditional *Sunni* understanding of Muslim family law are incorporated into the 2010 MMB. These include the consent of both parties (this is an especially *Hanafi* interpretation); marriage by proxy should either party prefer that option; prompt and deferred *mahr* (the dower payable by the husband to the wife); *nafaqah* (a husband's unilateral obligation to maintain his wife, wives, and children, which includes separate residence for the wife in the case of dissolution of the marriage while the children are in her custody); polygyny (a husband being permitted to have multiple wives); a wife's right to be compensated for breastfeeding; a wife's right to be compensated for services rendered in her husband's or his family's business; separate matrimonial property estates for the spouses; the right of both spouses to be compensated for direct contributions to the maintenance or growth of each other's estates; alternative dispute resolution preceding dissolution of the marriage; *iddah* (the waiting period observed by the wife following dissolution of the marriage by death or divorce); *mut'ah al-talāq* (compensation owed to the wife when the marriage is dissolved at the unjustified behest of the husband); and most of the different forms of dissolution of a Muslim marriage that are available to men and women including *talāq* (a husband's unilateral right to repudiate his wife), *tafwīd-al-talāq* (where a husband delegates his right of *talāq* to his wife), *khul'a* (the dissolution of the marriage at the instance of the wife) and *faskh* (a fault-based divorce available to men and women).<sup>64</sup> The grounds for *faskh*, which are listed in the 2010 MMB, are in fact

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64. 2010 MMB, *supra* note 57, §§ 1, 5, 8, 9, 11, 12.

similar to so-called secular or civil grounds for divorce found in many western jurisdictions:

“*Faskh*” means a decree of dissolution of a marriage granted by a court, upon the application of a husband or wife, on any ground or basis permitted by Islamic law, including, in the case of a wife, any one or more of the following grounds, namely where -

(a) the husband is missing, or his whereabouts are not known, for a substantial period of time (*Maḥqūd al-Khabar*);

(b) the husband fails to maintain his wife (*Adam al-Infāq*);

(c) the husband has been sentenced to imprisonment for a period of three years or more, provided that the wife is entitled to apply for a decree of the dissolution of the marriage within a period of one year as from the date of sentencing;

(d) the husband is mentally ill, or in a state of continued unconsciousness as provided for in section 5 of the Divorce Act, which provisions apply with the changes required by the context (*Junūn*);

(e) the husband suffers from impotence or a serious disease which renders cohabitation intolerable (*Ayb*);

(f) the husband treats his wife with cruelty in any form, which renders cohabitation intolerable (*Dharar*);

(g) the husband has failed, without valid reason, to perform his marital obligations for an unreasonable period (*Dharar*);

(h) the husband is a spouse in more than one Muslim marriage and fails to treat his wife justly in accordance with the injunctions of the *Qur'an* and *Sunnah* (*Dharar*);

(i) the husband commits harm against his wife, as recognized by Islamic law (*Dharar*); or

(j) discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that the dissolution of the marriage is an option in the circumstances (*Shiqāq*).<sup>65</sup>

Members of the majority *Sunni ulamā* do not appear to have a problem with the above formulations of the 2010 MMB. However, amendments by the Department to the issue of who would have the authority to interpret and apply the MMB and the nature of the mediation process preceding adjudication has caused most of the *ulamā* to now treat the 2010 MMB as un-Islamic.

Unlike the 2003 MMB, which proposed that a secular court comprising a Muslim judge and two Islamic law experts as assessors should adjudicate opposed matters arising from the MMB, the 2010 MMB does not make any reference to Muslim judges or Islamic law experts as assessors. As the Indian case of *Shah Bano*<sup>66</sup> teaches us, many Muslims take the issue of who is authorized to interpret and adjudicate Islamic law very seriously indeed. This is why the compromise that the *ulamā* reached with the SALRC Project Committee, which required a Muslim judge and Islamic law experts as assessors to preside over opposed matters, was palatable to the *ulamā*. Clauses 15(1) and 16(1) of the 2003 MMB titled “Courts and assessors” provided:

15(1) If any dispute is referred to a court for adjudication, the following provisions shall apply –

(a) the Judge President or other head of the court which has jurisdiction, shall appoint a Muslim judge from that court to hear such dispute, and if there is no Muslim judge, the Minister for Justice and Constitutional Development shall appoint a duly admitted practicing Muslim advocate or attorney of at least 10 years’ standing as acting presiding officer: Provided that in urgent matters and in cases of an application under Rule 43 of the High Court Rules, the matter may be determined by a non-Muslim judge sitting without assessors;

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65. *Id.* § 1.

66. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844 (India).

(b) the court shall be assisted by two Muslim assessors who shall have specialised knowledge of Islamic law.

...

16 (1) In the event of proceedings being instituted under this Act for the confirmation or grant of a decree of dissolution of a Muslim marriage or other relief, and such proceedings are not opposed, or in the event of the parties having concluded a settlement agreement, the matter shall be heard by a Muslim judge sitting without assessors.<sup>67</sup>

These provisions are creative examples of how religious plurality could be accommodated within a secular legal framework. However, the Department removed them from the 2010 MMB without consulting with the relevant stake-holders. Practical considerations such as whether or not there are a sufficient number of Muslim judges within the judiciary and how one would determine who qualifies as a Muslim judge should not be minimized or dismissed. Yet, if these issues were cause for concern for the Department, they should have been revisited with the *ulamā* and gender activists who had initially supported the 2003 MMB.

The second issue that has caused the *ulamā* considerable trepidation is the conversion of a *compulsory* mediation process recommended in the 2003 MMB, to a *voluntary* mediation process advocated in the 2010 MMB. The *ulamā* argue that Islamic law requires a process preceding the dissolution of a marriage that involves an attempt at reconciliation through the assistance of two “arbiters.”<sup>68</sup> The authority for this assertion is derived from *Qur’ān* 4: 35:

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, God will cause their

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67. SALRC REP., *supra* note 54, at 127.

68. *See id.* at 91 (noting that the United Ulama Council, and others, proposed that the SALRC consider “mandatory mediation and voluntary arbitration, before a dispute is referred to court, as an integral part of the Bill.”) This proposal was opposed by the Commission on Gender Equality and the Muslim Youth Movement. *Id.*

reconciliation: for God hath full knowledge, and is acquainted with all things.<sup>69</sup>

The change in the form of the mediation process is a serious breach of the agreement between the *ulamā* and the SALRC Project Committee, most likely as a trade off for not establishing a separate *Sharī'a* court. The mediation process is probably the forum in which the *ulamā* envisaged exercising control over the outcome of disputes. In both the 2003 and 2010 MMB's, unless the mediation agreement between the parties relates to minor children, provision is made that the court cannot overrule the mediation agreement.<sup>70</sup> In fact, the proposed change in the status of the mediation proceedings has now given some members of the *ulamā* the gap to advocate for the establishment of a parallel *Sharī'a* Arbitration Forum or *Sharī'a* Court over which they would have exclusive power and from which they could render enforceable orders. Should the Traditional Courts Bill (TCB)<sup>71</sup> be enacted, they would have a strong case to set up a parallel adjudication system that has the force of law. However, gender activists have thus far succeeded in preventing the TCB from being enacted.

A third contentious issue for the *ulamā* relates to the question of choice for those Muslims who do not wish to be bound by the provisions of the legislation. The 2010 MMB recommends that those who enter into a Muslim marriage after the MMB is enacted must register their marriage in accordance with the provisions of the MMB in order for it to regulate their marriage. In contrast, the MMB will automatically apply to those who enter into a Muslim marriage before the enactment of the MMB and they will have a prescribed period of time in which to opt-out of the provisions of the MMB. For those who choose not to have their marriages regulated by the MMB, the current legal status of non-recognition that applies to Muslim marriages will apply to Muslim marriages that are not registered after the MMB comes into operation:

2 (1) The provisions of this Act apply to Muslim marriages concluded after the commencement of this Act where the parties to the marriage elect, in the prescribed manner, to be bound by the provisions of this Act.

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69. THE HOLY QUR'AN 4:35 (Abdullah Yusuf Ali trans., 1946) [hereinafter QUR'AN].

70. SALRC REP., *supra* note 54, at 125–26; 2010 MMB, *supra* note 57, § 12.

71. Traditional Courts Bill, 2012, Bill 1-2012 *available at* <http://www.justice.gov.za/legislation/bills/2012-b01tradcourts.pdf> (S. Afr.).

(2) The provisions of this Act apply to Muslim marriages concluded before the commencement of this Act, unless the parties, within a period of 36 months or such longer period as may be prescribed, as from the date of the commencement of this Act, jointly elect, in the prescribed manner, not to be bound by the provisions of this Act, in which event the provisions of this Act do not apply to such a marriage.

(3) The law applying to a Muslim marriage in respect of which the parties have elected not to be bound by the provisions of this Act, is the law as it was before this Act came into operation.<sup>72</sup>

This is a difficult issue pertaining to the balancing of secular and religious laws in liberal systems. Individual choice is a fundamental liberal value. The *ulamā* would prefer that the opt-in option, which the MMB proposes for those entering into Muslim marriages after its enactment, should also be made available to those who are parties to Muslim marriages prior to the enactment of the MMB. In other words, the *ulamā* suggest a reversal of onus where the burden of opting-out is not placed on Muslim parties. Rather, they should have the burden of opting-in. If the *ulamā*'s suggestion is incorporated into the final legislation, it could potentially prejudice women in existing Muslim marriages whose husbands are opposed to being bound by the provisions of the MMB. So the interplay between opt-in and opt-out becomes a manifestation of the tension between an otherwise marginalized individual's right to enjoy the benefits of the proposed legislation and an individual's right to exercise her or his right to religious freedom.

The 2010 MMB also contains several provisions that are problematic for women's rights. Besides the limiting definitions of a Muslim marriage and Islamic law, the MMB includes a conservative interpretation of *khul'a*, which prevents women from enjoying an equal right to divorce:

Khula' means the dissolution of the marriage bond at the instance of the wife, in terms of an agreement for the transfer of property or other permissible

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72. 2010 MMB, *supra* note 57, § 2.

consideration between the spouses according to Islamic law.<sup>73</sup>

This definition effectively requires the husband to consent to the amount that a wife must pay to him to be released from the marriage. Traditionally, *khul'a* requires the wife to give back her *mahr* if it has been paid to her or waive receiving it if the husband has not yet paid.<sup>74</sup> A progressive interpretation of *khul'a* incorporated into the laws of Egypt<sup>75</sup> for example, does not require the husband's consent regarding the amount that a wife needs to give him to leave the marriage. This progressive interpretation effectively balances the husband's unilateral right to *talāq*, which requires him to pay any outstanding *mahr* when he exercises the *talāq*. The conservative interpretation of *khul'a* reflected in the MMB effectively enables a husband to prevent his wife from successfully exercising the *khul'a*. In addition, neither the 2003 nor 2010 MMB's make provision for *mubara'a*, which is a mutual form of divorce where the husband and wife agree to no longer be married to each other.

Women's rights activists have also taken issue with the provision incorporating the traditional Islamic law rule that spouses must maintain separate estates when entering marriage, during the marriage and upon dissolution of the marriage. The 2010 MMB reads:

8 (1) A Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by

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73. *Id.* § 1.

74. Nik Noriani Nik Badli Shah, *Legislative Provisions & Judicial Mechanisms for the Enforcement and Termination of the Islamic Marriage Contract in Malaysia*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 190–191* (Asifa Quraishi & Frank E. Vogel eds., 2008) (“In classical Islamic law [Khul'a] was a divorce by which the wife obtains her husband's consent . . . by some sort of compensation (e.g., return of the dower [mahr]”); Mona Zulficar, *The Islamic Marriage Contract in Egypt*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 234* (Asifa Quraishi & Frank E. Vogel eds., 2008) (“[in Ottoman Egypt] [i]f the wife . . . wanted a divorce without having to prove fault . . . she had the option of khul', divorce agreed by mutual consent . . . [i]n the case of disagreement, she could automatically obtain a divorce through Khul' by a court judgment, but usually at the price of her financial rights to deferred dower.”) The exact nature of Khul'a was the subject of several submissions to the SALRC. SALRC REP., *supra* note 54, at 23–24.

75. Law No. 1 of 2000 (Law on the Reorganization of Certain Terms and Procedures of Litigation in Personal Status Matters) art. 20 (Egypt).

mutual agreement of the spouses, in an ante nuptial contract which must be registered in the Deeds Registry.<sup>76</sup>

While this traditional rule was introduced in seventh century Arabia to protect the property of wives, the socio-economic reality of the twenty-first century is that many Muslim women are left without financial protection when their marriages end because the bulk of the marital assets are registered in their husbands' names. Since a Muslim marriage is treated as a contract under Islamic law, it would not be Islamically impermissible to create a default community of property regime or an out of community of property regime subject to an accrual system, while affording those Muslims who wish to have an out of community property regime excluding the accrual system the opportunity to do so through an antenuptial contract.<sup>77</sup>

The 2010 MMB further recognizes the single most defining feature of a Muslim marriage: its potentially polygynous nature. In clause 8(4)-(7), the MMB enables a husband to take multiple wives. It seeks to set out the conditions for entering into second and subsequent marriages:

(4) In the case of a husband who is a spouse in more than one Muslim marriage, all persons having a sufficient interest in the matter, and in particular the husband's existing spouses, must be joined in the proceedings.

...

(6) A husband in a Muslim marriage, to which this Act applies, who wishes to conclude a further Muslim

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76. 2010 MMB, *supra* note 57, § 8(1).

77. Clause 8(1) of the MMB is consistent with an "out of community of property regime that excludes the accrual system." *Id.* The default matrimonial property regime under South African law entails one of community of property, which enables spouses to share equally in a joint estate. The joint estate comprises their assets that they bring into the marriage and acquire during the subsistence of the marriage. Spouses can opt out of the default community of property regime by registering an antenuptial contract that records a choice to enter into an out of community of property regime that either includes or excludes the accrual system. The accrual system enables spouses to enter the marriage with separate estates, to maintain separate estates during the marriage, but to share in the accrual of their estates when the marriage ends in divorce or death. *Cf.* Matrimonial Property Act 88 of 1984.

marriage with another woman after the commencement of this Act must apply to court –

(a) for approval to conclude a further Muslim marriage in terms of subsection (7); and

(b) for approval of a written contract which will regulate the future matrimonial property system of his marriages.

(7)(a) When considering the application in terms of subsection (6), the court must grant approval if it is satisfied that the husband is able to maintain equality between his spouses as is prescribed by the Holy Qur'an.<sup>78</sup>

A strict application of the above provisions will permit a husband to take a maximum of four wives, which accords with the mainstream understanding of Islamic law.<sup>79</sup>

To the best of our knowledge, there is no statistical data on the extent of polygyny among Muslims in South Africa, itself a consequence of those marriages taking place outside the framework of state law and registration. There is, however, some research that reveals that many South African Muslim women are not in favour of polygyny.<sup>80</sup> This study is based on a sample of married Muslim women living in Cape Town. Approximately 4% of the participants of that study had husbands who had taken second wives.<sup>81</sup> Three quarters of the women participants said they would be unhappy or very unhappy if their husbands were to enter into second or subsequent marriages.<sup>82</sup> In addition, 71% said that they would

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78. 2010 MMB, *supra* note 57, § 8(4–7).

79. See QUR'AN, *supra* note 69, at 4:3 (“Marry women of your choice, two, or three, or four.”).

80. S. Shaikh et al., *South African Muslim Women: Sexuality, Marriage and Reproductive Choices, Research Report*, 31 J. ISLAMIC STUD. 96 (2001). For more empirical data on Muslim marriages in difficulty, through divorce, polygyny, and spousal abuse, see Mogamat Yoesrie Toefy, *Divorce in the Muslim Community of the Western Cape: a Demographic Study of 600 Divorce Records at the Muslim Judicial Council and National Ulama Council between 1994 and 1999* (2001) (unpublished M.A. Dissertation, University of Cape Town) (on file with author); SINDRE BANGSTAD, *GLOBAL FLOWS, LOCAL APPROPRIATIONS: FACETS OF SECULARISATION AND RE-ISLAMIZATION AMONG CONTEMPORARY CAPE MUSLIMS* (2007).

81. Shaikh et al., *supra* note 80, at 15.

82. *Id.* at 16.

separate from or divorce their husbands if they actually took a second wife.<sup>83</sup>

Although the recommended recognition of polygyny could give rise to a constitutional challenge on the basis of gender and sex since the same right to enter into polygynous marriages is not afforded to women, the Constitutional Court has indicated that it will entertain a reasonable accommodation of religious practices<sup>84</sup> The protective mechanisms recommended in the MMB to deal with polygyny may lead the Constitutional Court to conclude that the interests of Muslim women are sufficiently protected thus potentially amounting to a reasonable accommodation of the religious practice. For example, a husband would be required to apply to court for approval of the contract that will regulate his subsequent marriage; an existing wife would have to be joined in the proceedings, which would afford her the opportunity to provide a view on the proposed marriage; and the husband would have to show that he would be “able to maintain equality between his spouses.”<sup>85</sup> This is the approach that was taken in the legislation regulating polygynous African customary marriages.<sup>86</sup> The only difference is that the MMB tailors the requirement of “equality between his spouses” to the *Qur’ānic* understanding of equality in an attempt to be accommodative of Islamic nuances pertaining to polygyny. Several English translations of *Qur’ān* 4:3, which is the verse that arguably permits polygyny in Islam, suggest that a husband is only permitted to take more than one wife if he can ensure that it will not result in injustice between his wives.<sup>87</sup> The condition of equality within the context of polygyny as provided for in the MMB may therefore be interpreted within the parameters of the wives being treated justly. This may not necessarily equate to absolute equality between the wives if a measure of inequality between them still results in justice being served.

Of the many Islamic law rights and practices that the 2010 MMB incorporates, not all are proactively encouraged by all the members of the South African *ulamā* even though they would not deny their

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83. *Id.* at 109.

84. *Christian Education South Africa v. Minister of Education*, 2000 (4) SA 757 (CC) at para. 51 (S. Afr.).

85. 2010 MMB, *supra* note 57, § 8(7).

86. The Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

87. *See Verse (4:3) - English Translation*, QURANIC ARABIC CORPUS, <http://corpus.quran.com/translation.jsp?chapter=4&verse=3> (last visited May 10, 2014) (showing seven parallel translations of the Arabic text).

authenticity as Islamically recognized rights and obligations. Some of those rights that benefit women have already been mentioned. These include the wife's right to be compensated for breastfeeding; her services rendered in her husband's or his family's business; the husband's obligation to provide his ex-wife with accommodation while the children are in her custody; and a spouse's right to be compensated for her or his direct contributions to the other's estate.<sup>88</sup> At the same time, the 2010 MMB does not include all the *Sunni* rights that are available to women in marriage. For instance, a wife has an Islamic law right to be compensated for her labour in the home, which the MMB does not provide for.

When it comes to issues relating to the guardianship, custody of, or access to, a minor child born of the Muslim marriage, an attempt is made to ensure consistency with the secular principle of the best interests of the child while maintaining deference to Islamic law:

10 (1) In making an order for the custody of, or access to a minor child, or in making a decision on guardianship, the court must, with due regard to Islamic law and the report and recommendations of the Family Advocate, which must take into account Islamic norms and values, consider the welfare and best interests of the child.<sup>89</sup>

The concern is that a conservative interpretation of Islamic laws relating to guardianship, custody of, and access to, minor children could militate against women and infringe their right to gender equality. For instance, a traditional *Sunni* approach only recognizes a right of guardianship in favour of men if the child is born within wedlock. Furthermore, a mother only has limited rights of custody especially in relation to her son. The *Sunni Māliki* school allows a mother to have custody of her male child until he becomes pubescent and the *Sunni Hanafī* and *Shāfi'ī* schools only enable a mother to have custody of her male child until he is seven years old.<sup>90</sup> In the case of female children, the *Hanafī* school permits the mother to retain custody until her daughter reaches puberty while the *Shāfi'ī* and *Māliki* schools allow the mother to have custody until her

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88. 2010 MMB, *supra* note 57, § 9(8)(b).

89. *Id.* § 10(1).

90. Sherman A. Jackson, *Kramer versus Kramer in a Tenth/Sixth Century Egyptian Court: Post-Formative Jurisprudence between Exigency and Law*, 8 ISLAMIC L. & SOC'Y. 27, 33–34 n.25 (2001).

daughter is married. However, if the mother marries another man, she loses all custodial rights over her children.<sup>91</sup>

The synopsis of the MMB presented in the previous paragraphs illustrates that if either version of the MMB is enacted, it will result in the codification of a parallel religious-based family law system. On the one hand, this could enable Muslim women to access Islamic law rights through a secular framework. On the other hand, this could just as easily entrench gender-based discriminatory rules within the secular legal system.

In the absence of legislation enabling both Muslim women and men to assert their Islamic law rights arising from their Muslim marriages, all is not lost. Since the introduction of South Africa's democratic constitutional dispensation in 1994, the judiciary has provided some relief. In the next section, we consider how the post-1994 judiciary has approached the issue of Muslim marriages.

#### V. JUDICIAL ACTIVISM

The judiciary under the colonial and apartheid states refused to recognize potentially polygynous marriages on the basis that they were *contra bonos mores* or against their understanding of public policy.<sup>92</sup> However, in the groundbreaking case of *Ryland v. Edros*,<sup>93</sup> which was decided in 1997, the Cape High Court (as it then was) for the first time in the history of South Africa rejected the colonial and apartheid interpretations of public policy in the context of marriage. The Court held that public policy prior to the introduction of a constitutional democracy in South Africa had been informed by the presumed views of only one section of South African society.<sup>94</sup> The Court found that it was:

“[I]nimical to all the values of the new South Africa  
for one group to impose its values on another and that

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91. *E.g.*, JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 35 (2001).

92. *Bronn v. Frits Bronn's Executors and Others* 1860 (3) SC 313 (CSC) (S. Afr.); *Seedat's Executors v. The Master (Natal)* 1917 A.D. 302; *Estate Mehta v. Acting Master, High Court* 1958 (4) SA 252 (F.C.) (S. Afr.); *Kader v. Kader Bronn v. Frits Bronn's Executors and Others* 1860 (3) SC 313 (CSC) (S. Afr.); *Seedat's Executors v. The Master (Natal)* 1917 A.D. 302; *Estate Mehta v. Acting Master, High Court* 1958 (4) SA 252 (F.C.) (S. Afr.); *Kader v. Kader* 1972 (3) SA 203 (R., A.D.) (S. Afr.); *Ismail v. Ismail* 1983 (1) SA 1006 (A) (R., AD) (S. Afr.).

93. 1997 (2) SA 690 (CC) (S. Afr.).

94. *Id.* at 707 G.

the Courts should only brand a [marriage] contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.”<sup>95</sup>

The Court emphasized that “the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution.”<sup>96</sup> Consequently, in paying tribute to the multicultural nature of South African society that is now defined by the constitutional values promoting equality between groups and an acceptance of diversity, the Court recognized a monogamous Muslim marriage as a contract that is enforceable under South African law. In particular, the Court granted the wife’s claim for spousal maintenance and *mut’ah al-talāq*.<sup>97</sup> The Court did not grant the wife’s claim for an equitable share of her tangible and intangible contributions to the growth of her husband’s estate because no evidence had been presented to confirm that such a practice was prevalent within the Muslim community in which the parties had been members.<sup>98</sup>

Following the example set by the Court in *Ryland*, a growing trend has emerged within the judiciary to afford recognition to proven terms and customs arising from the Muslim marriage contract. In fact, subsequent to *Ryland*, the judiciary has on a case-by-case basis enforced Islamic law obligations through secular or civil legislation. For instance, in 1999, the Supreme Court of Appeal (SCA) in *Amod v. Multilateral Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)*<sup>99</sup> accepted the unilateral obligation of a husband to support his wife in a monogamous Muslim marriage as a duty that was worthy of recognition and respect under the law.<sup>100</sup> As a result, the Islamic maintenance obligation of the husband in a monogamous Muslim marriage was given expression through the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989, which enabled the Muslim wife of the deceased Muslim husband to benefit as his dependant.<sup>101</sup> Thereafter, in 2005, in the case of *Khan v. Khan*,<sup>102</sup> the Transvaal Provincial Division (as it then was) extended

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95. *Id.* at 707 F.

96. *Id.* at 708 I.

97. *Id.* at 718 I.

98. *Id.* at 717 H, 719 A.

99. 1999 (4) SA 1319 (SCA) (S. Afr.).

100. *Id.* at 1329–30 para. 23.

101. *Id.* at 1320–21.

102. 2005 (2) SA 272 (T) at (281–283) (S. Afr.).

recognition of a Muslim wife's right to spousal maintenance to instances of polygyny, and permitted the polygynous Muslim wife to enforce her maintenance claim against her husband through the Maintenance Act 99 of 1998.<sup>103</sup> More recently, the right of a Muslim wife to access rule 43 of the Uniform Rules of Court was recognized, enabling her to claim interim maintenance and custody of and access to her minor child/ren born of the Muslim marriage pending finalization of her claim to have the Divorce Act 70 of 1979 apply to the dissolution of her Muslim marriage.<sup>104</sup> In the cases dealing with the rule 43 application, the parties settled out of court so the judiciary did not have the opportunity to indicate whether or not it would have granted the wives' claims to regulate the dissolution of their Muslim marriages through the secular or civil divorce legislation.

The judiciary has also interpreted the word "spouse" in certain secular or civil legislation to include or extend to Muslim spouses so that the latter can enjoy the benefits of the legislation. For instance, in *Daniels v. Campbell NO and Others*<sup>105</sup> and *Fatima Gabie Hassam v. Johan Hermanus Jacobs NO and Others*,<sup>106</sup> the Constitutional Court permitted Muslim spouses respectively in monogamous and polygynous Muslim marriages to be treated as intestate heirs for the purpose of the Intestate Succession Act 81 of 1987 and to claim maintenance from their deceased spouses' estates under the Maintenance of Surviving Spouses Act 27 of 1990.

Despite the judiciary's willingness to recognize and enforce proven terms and customs of the Muslim marriage contract, it has not been prepared to recognize the marriage itself as valid. Instead, it has taken the view that wholesale recognition of Muslim marriages is best left to the legislature to address.<sup>107</sup> This appears to be in line with the judiciary's hesitance to involve itself in matters of religious doctrine.<sup>108</sup> Provided that no interpretation relating to religious doctrine is required, the judiciary is happy to recognize proven rights and obligations emanating from the Muslim marriage contract. Yet, this may be a somewhat artificial distinction drawn by the judiciary.

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103. See also *Cassim v. Cassim*, No. 3954/06 (S. Afr. TPD, Dec. 15, 2006).

104. *Mahomed v. Mahomed*, No. 2154/08 (S. Afr. ECP, May 29, 2009); *Hoosain v. Dangor*, No. 18141/09, (S. Afr. WCC, Nov. 18, 2009).

105. 2005 (5) SA 331 (CC) at 341–42, 349–50 (S. Afr.).

106. 2009 (5) SA 572 (CC) at 589, 593–94 (S. Afr.).

107. *Amod v. Multilateral Vehicle Accidents Fund 1999* (4) SA 1319, at 1331–32 para. 28 (SCA) (S. Afr.).

108. *Ryland v. Edros 1997* (4) LRC 70 (ICHRL) at 703 E–F (S. Afr.).

For instance, by recognizing certain aspects of the Muslim marriage contract and not recognizing others, as happened in the *Ryland* case where the Court rejected the wife's claim for an equitable distribution of her husband's estate, the judiciary ends up involving itself in religious doctrine even though it may not be engaging in direct interpretation of the religion.<sup>109</sup>

The judiciary has played a significant role in the last 17 years by affording reprieve to especially vulnerable and marginalized Muslim women. However, the limitation of judicial intervention in the area of Muslim marriages is that it can only provide ad hoc relief. So it is understandable that the failure to legislate Muslim marriages appears to be causing some frustration to the judiciary as expressed in the most recent case, namely, *Faro v. Bingham NO and Others*.<sup>110</sup> The wife in the *Faro* case asked that Muslim marriages be deemed valid under the Marriage Act 25 of 1961 or that the common law definition of marriage be extended to include Muslim marriages.<sup>111</sup> In other words, she asked that a Muslim marriage be treated as a secular or civil marriage. The Western Cape High Court postponed judgment on this claim until August 20, 2014, and has given the Minister of Justice and Constitutional Development until July 15, 2014 to report on the progress of the Muslim Marriages Bill (MMB).<sup>112</sup> Should there not be any significant development on the MMB by that date, one wonders if the judiciary will depart from its previous reluctance to afford legal recognition to Muslim marriages and allow it to be given validity through the Marriage Act? That may put the MMB to rest once and for all. But it would still not solve the problem of ensuring a religious divorce at the behest of a Muslim wife in situations where their husbands refuse to grant one. This latter problem is unfortunately a global one in countries with Muslim minorities. Thus far, no solution to that particular problem is in sight, short of enacting legislation regulating religious divorce as is the case in India.<sup>113</sup> In other words, there seems to be no escaping the need to legislate.

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109. Amien, *supra* note 7, at 738.

110. *Faro v. Bingham*, No. 4466/2013 (S. Afr. WCC 25 Oct. 2013), <http://www.saflii.org/za/cases/ZAWCHC/2013/159.html>.

111. *Id.* at 7–8 para. 19. The common law definition of marriage is “the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts.” *Ismail*, 1983 (1) SA 1006 (AD) at 1019 H (S. Afr.).

112. *Id.* at 21–23 para. 47.

113. Dissolution of Muslim Marriages Act, 1939, Act. 8, Acts of Parliament, 1939 (India).

## VI. THE POLITICS OF RELIGIOUS FREEDOM

There are a number of different types of marriages in South Africa, namely, secular or civil marriages, customary marriages, and civil partnerships. It could be useful to compare them in thinking about the role of religion and its relation to the state and legislature.

Secular or civil marriages are regulated by the Marriage Act 25 of 1961, which legislates for marriage between a man and a woman, and allows for marriage officers of different religious and humanist persuasions.<sup>114</sup> In particular, it enables a person who solemnizes or officiates *inter alia* Christian, Hindu, Muslim, and Jewish marriages to be registered as a marriage officer. This means that when an *imām* who is designated as a marriage officer, performs a Muslim marriage, he or she can simultaneously register a secular or civil marriage. Alternatively, a Muslim couple could enter into a secular or civil marriage in addition to their Muslim marriage. In these ways, they could access the benefits attaching to secular or civil marriages. However, very few Muslims enter into secular or civil marriages. Prior to 1994, the reason was mainly political in that entering into a secular or civil marriage was construed as an act of collaboration with an unjust state. After 1994, the reason centred on the religiosity of the marriage. Many *imāms* viewed secular or civil marriages as unIslamic because they did not permit polygyny and encompassed a default matrimonial regime of community of property. The latter is at odds with the mainstream Islamic law approach, which requires a complete separation of the spouses' properties. Thus, most South African *imāms* discouraged their congregations from entering into secular or civil marriages and very few allowed themselves to be registered as marriage officers.

However, as recently as May 1, 2014, the Department of Home Affairs announced that they had registered more than 100 *imāms* as marriage officers.<sup>115</sup> This appears to have been an electioneering strategy to elicit Muslim votes for the May 7, 2014 national elections. The issue of recognition of Muslim marriages tends to surface every five years during the general elections period when politicians use the Muslim Marriages Bill (MMB) to canvass for Muslim votes. This time, they employed a different strategy and got a significant number of *imāms* to be registered as marriage officers thereby conveying the

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114. Marriage Act 25 of 1961 § 3(1) (S. Afr.).

115. *Minister Welcomes Move to Legal Status*, CAPE TIMES (South Africa), May 1, 2014, available at 2014 WLNR 11666067.

message to the Muslim community that secular or civil marriages are now an Islamically permissible option for them.<sup>116</sup> It is still unclear how the Department managed to obtain buy-in from the very *imāms* who had previously denounced secular or civil marriages. If one were to hazard a calculated guess, one could surmise that the *imāms* may have been persuaded that they would not be precluded from officiating polygynous marriages provided the latter are not registered under the Marriage Act and they could opt to perform secular or civil marriages where the parties have concluded an ante-nuptial contract regulating their matrimonial regimes as out of community of property. In fact, some *imāms* have announced that they will only register secular or civil marriages in cases where couples have the aforementioned ante-nuptial contract.

The precise implications of this recent occurrence of the registration of *imāms* is yet to be determined. At this point, it raises the following questions: Will more Muslims now be motivated to enter into secular or civil marriages? How will the rights of polygynous wives in unregistered marriages weigh against the rights of wives in secular or civil marriages? Will those Muslims who enter into secular or civil marriages still be able to assert their rights emanating from their Muslim marriage? Will Muslims entering into secular or civil marriages obfuscate the need for enactment of legislation to recognize Muslim marriages? As mentioned in the previous section, if the wife wishes to dissolve the marriage through divorce, a secular or civil divorce will not guarantee a religious divorce. For this, she will still need legislation to recognize and regulate Islamic forms of divorce. Alternatively, the *ulamā* would have to accept a secular or civil divorce as sufficient to dissolve the Muslim marriage. But is the South African *ulamā* anywhere near ready for such a radical interpretation of what could qualify as a valid Muslim divorce?

In contrast to secular or civil marriages, the Recognition of Customary Marriages Act 120 of 1998 (RCMA) legislates marriages concluded under African custom and provides for polygyny in law.<sup>117</sup> The most recent legislation is the Civil Union Act 17 of 2006, which legislates civil partnerships, including same-sex couples.<sup>118</sup>

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116. *Id.* (noting that 117 imams were qualified as marriage officers).

117. Recognition of Customary Marriages Act 120 of 1998 § 2 (S. Afr.).

118. See Civil Union Act 17 of 2006 (S. Afr.). But see Henriét De Ru, *The Civil Union Act 17 of 2006: A Transformative Act or a Substandard Product of a Failed Conciliation Between Social, Legal and Political Issues?*, 73 J. CONTEMP. ROMAN-DUTCH L. 553, 567–68 (2010) (criticizing the drafting of the Act).

Unlike the MMB, attempts to legislate customary marriages were effected early in the term of the ANC government. In 1997, the South African Law Commission (SALC) proposed legislation to recognize customary marriages. The SALC argued that “in certain areas, spouses should be free to follow their cultural preferences as guaranteed in sections 30 and 31 of the 1996 Constitution,” which respectively protect the rights to language and culture and as noted previously, of cultural, religious and linguistic communities.<sup>119</sup> The SALC therefore proposed legislation that would recognize both polygynous and monogamous customary marriages, but altered the terms of the marriage contract in such a way that would strengthen women’s entitlements. For instance, it recommended that a husband who intends to enter into a polygynous customary marriage must apply to court for approval of the written contract of the subsequent marriage and that existing wives be joined in the proceedings.<sup>120</sup>

The SALC also suggested that some rules should apply to all marriages: consent of both parties; minimum legal age of consent; legal equivalence between the parties to a marriage; and some of the same terms for divorce. This explains the great degree of similarity among the provisions of the different marriage legislation. To use the RCMA as an example, with the exception of a few features particular to customary marriages such as *lobolo*, polygyny, and the recognition of customary marriage payments, the bulk of the RCMA is a reflection of the Marriage Act. This includes the default matrimonial property regime of community of property and dissolution of the customary marriage being regulated by the Divorce Act. Clearly these attempts at assimilation were to enable equality between the spouses. However, one of the criticisms leveled at the attempt to achieve consistency between the RCMA and secular or civil marriage and divorce legislation is that assimilation is normatively problematic because it sets the secular or civil marriage legislation as the standard to which customary marriages must comply.<sup>121</sup> It also introduces

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119. J. Mahomed et. al., *Harmonisation of the Common Law and the Indigenous Law 2* (S. Afr. Law Comm’n, Project 90, Issue Paper No. 3, 1996) (“Sections 30 and 31 of the Constitution entitle both individuals and groups to practise and participate in the cultural life of their choice, which would include the right to live by customary law. Thus, while some rules should apply to all marriages, in certain areas spouses should be free to follow their cultural preferences.”), available at [http://www.justice.gov.za/salrc/ipapers/ip03\\_prj90\\_1997.pdf](http://www.justice.gov.za/salrc/ipapers/ip03_prj90_1997.pdf).

120. Recognition of Customary Marriages Act, *supra* note 117, § 7.

121. Amien, *supra* note 34, at 381.

practical problems of implementation when the requirements of the Marriage Act, which have been subsumed into the RCMA, cannot be enforced because they are unfamiliar to the intended beneficiaries and do not take their lived realities into account. For example, applying to a third party to take a second or subsequent wife is not traditional practice for those who enter into customary marriages. Thus, in many instances, the applications as required by the RCMA are simply not made and husbands proceed to enter into polygynous marriages as they did prior to the enactment of the RCMA. Furthermore, a large percentage of the black African population who enter into customary marriages reside in the rural areas of South Africa.<sup>122</sup> So even in those instances where husbands do make application to court to enter into a subsequent marriage, existing wives in rural areas find it too expensive to travel to court to make their voices heard.<sup>123</sup> Thus, the envisioned protections incorporated into the legislation are lost on the intended beneficiaries.

In contrast, most of the MMB proposes to recognize and regulate specific features of Muslim family law that are not unfamiliar to the South African Muslim community. There is far less assimilation with secular or civil marriage legislation regarding the features and requirements for marriage in the MMB than is reflected in the RCMA. The MMB displays more of an effort on the part of government to be sensitive to the needs and expectations of the minority Muslim community. To the extent that consistency between the MMB and secular or civil marriage legislation is evident, it appears to be mainly for the purpose of achieving administrative expediency. For instance, the requirement that the Family Advocates Office make recommendations in respect of any minor children born of the Muslim marriage is similarly expected in the case of secular or civil marriages and African customary marriages. Even then, the requirement is tailored to conform to Islamic law by expecting the Family Advocate to “take into account Islamic norms and values.”<sup>124</sup>

There is a productive comparison to be made across the different forms of marriage and the legal, political, and popular deliberations around their recognition. One comparison reveals the consequences of differences in institutional position and legal entitlement between

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122. Debbie Budlender et al., *Marriage Patterns in South Africa: Methodological and Substantive Issues*, 9 S. AFR. J. DEMOGRAPHY 1, 17 (2004).

123. Chuma Himonga, *The Advancement Of African Women's Rights In The First Decade Of Democracy In South Africa: The Reform of the Customary Law of Marriage and Succession*, ACTA JURIDICA COMP. & INT'L L. J. S. AFR. 82, 85 (2005).

124. 2010 MMB, *supra* note 57, § 10(1).

religious and traditional bodies. Many of the issues that drafters faced in reconciling religious and traditional marriages and substantive gender equality are shared between customary and Muslim personal laws. They include polygyny, grounds for divorce, custody, inheritance, division of marital estates at divorce, consent, age of consent, and women's legal standing in marriage contracts. As observed previously, the legislation drafted for customary and Muslim marriages treat some of these issues in similar ways, with a core secular or civil law component that prioritizes equality, and others that make provision for gender differentiation according to religion and tradition. There are further similarities. Women married under customary and Muslim rites were prejudiced by the non-recognition of their marriages. Men claiming authority over their traditions—*ulamā* and traditional leaders respectively—contested the authority of the state to transform their traditions. In both cases, an alliance of progressive religionists and traditionalists contested their patriarchal authority in the name of transformation of tradition and gender equality. Both law making processes began in the early years of democracy and therefore under similar national political conditions. Yet, one concluded soon after its commencement and the other has still not been finalized.

When it came to developing customary marriage legislation, the lawmakers followed due process, took comments into account, framed a compromise, yet acted against the wishes of the vast majority of traditional leaders and gender advocates in passing the RCMA. The National and Provincial Houses of Traditional Leaders had, on the whole, been extremely critical of the Recognition of Customary Marriages Bill (RCMA Bill).<sup>125</sup> The Commission on Gender Equality (CGE), which organized a consultation process with rural African women, was also critical, particularly of the provisions on polygyny.<sup>126</sup> The question of how to deal with polygyny was central to the RCMA Bill. As Cheryl Gillwald, then Deputy Minister of Justice and Constitutional Development said at the launch of the RCMA that the polygyny was not banned because such a ban “would be almost impossible to enforce and the popularity of the practice

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125. Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

126. COMM'N ON GENDER EQUALITY, RECOGNITION OF CUSTOMARY MARRIAGES BILL SUBMISSION TO JUSTICE PORTFOLIO COMMITTEE (1998), available at <http://www.pmg.org.za/docs/1998/980929cge.htm> (The commission “rejects the practice of polygamy and regards such practice as discriminatory.”).

seems to be waning.”<sup>127</sup> Despite this, Budlender and others calculate that 7% of married African women report “that their husbands have other wives beside themselves.”<sup>128</sup> Lack of support for the RCMA Bill notwithstanding, the Department of Justice and Constitutional Development pushed it through Parliament and the RCMA was enacted in 1998.<sup>129</sup>

When it came to developing Muslim marriage legislation, the SALRC began in a similar way. They formed a consultative body that included a variety of opinions among Muslims, followed due process, took comments into account and then framed a compromise. However, they did not act against the wishes of those Muslims who were opposed to the compromise. Instead, they acknowledged the autonomy of the “Muslim community” in deciding on this matter. They gave cognisance to the idea of the sacred authority of the *Qur’ān* and were unwilling to codify elements of scripture in opposition to its claimed authoritative interpretation. But it was only by withdrawing from the legislative process that they could do this.

How then to explain the different outcomes between the processes relating to the enactment of the RCMA and the still pending enactment of the MMB, which is causing Muslim marriages to continue to operate outside the ambit of state law? The difference is a direct result of relations between the state and religious and traditional bodies respectively. In the case of customary law, it was codified by colonial administrators, legislated by apartheid administrators, and now again, codified through the RCMA. In other words, the institution of traditional leadership and customary law were part of the state and its law. As such, they are uniquely subject to legislative development, and therefore, to the equality provisions. They do not have autonomy from the state.

What then of MPL? The ideas of religious autonomy, conscience, and a separation of powers and domains have been central to the development of secularism. These ideas were defended by both the ANC and religious groups in the negotiations. The constitutional right to religion includes the right to the integrity of conscience. Religious organizations as institutions of civil society have the right to autonomous ecclesiastical and theological control

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127. Boshadi Nkomo, *South Africa: New Customary Marriages Act Sees Women as Equal Partners*, WOZA, (Nov. 16, 2000), <http://allafrica.com/stories/200011160352.html>.

128. Budlender et al., *supra* note 122, at 17.

129. Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).

over their internal rules and regulations. Religious groups sought separation from the state so that their ecclesiastical and theological control could remain autonomous. As long as a social practice or institution does not seek the authorization of the state; as long as no one takes this practice to court; and as long as an organization can claim to be a religion with a domain of autonomy through conscience or sacred authority, the state has not legislated religious practices to bring them in line with equality provisions. But the moment a practice or institution falls under the rubric of legislation, equality becomes an issue. The ordination of women in church, for example, is a matter of ecclesiastical and theological autonomy. Unless someone takes it to court, and perhaps even then, the state is unlikely to intervene. On the contrary, access of women to chieftainship, for example, has been both proactively legislated and contested in court.<sup>130</sup> It seems that the state is more inclined to intervene when the conduct or practice is cultural rather than religious in nature.

The above examples of marriage legislation also point to the different avenues open for the legislation of majoritarian and counter-majoritarian demands. Unpopular demands for equality that are in opposition to public opinion have been taken to court. This is most clear in the advancement of equal rights for gay and lesbian people who won their demands through the courts.<sup>131</sup> It put enormous pressure on the ANC at a time when it sought to defend itself against claims of immorality. It is clear that the executive branch of the ANC had to override the “popular” will represented in the views of members of parliament to support the Civil Union Act. The question of Muslim marriages on the other hand, which affects a small minority, has been dealt with in specially established forums of lawyers and specialists. The state has not yet been willing to intervene to force a resolution in favour of one or another position.

#### CONCLUSION

The South African example presenting an attempt to legislate a religious marriage regime in a secular democracy points to many

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130. See *Shilubana and Others v. Nwamitwa*, 2009 (2) SA 66 (CC) at 70 para. 3 (S. Afr.) (involving a challenge to the principle of male primogeniture in the selection of a new chief).

131. See generally *Nat'l Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999 (1) SA 6 (CC) (S. Afr.); *Nat'l Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (S. Afr.).

tensions in the place of religion under law. The South African Bill of Rights guarantees a right of religious freedom. It also limits and frames this right. Turning a right into a legislative and social reality is a far more complex and ambivalent process. As we have shown, the success of such a process depends on the levels of consensus among religious representatives, claims to religious legitimacy and authority, negotiations between public and private presence of religion, and political will in relation to religious minorities.

The tension between secular or civil recognition of Muslim marriages as contracts in the courts and the non-recognition of Muslim marriages under legislation is increasing. It will be interesting to watch developments in this area over the next few months or years. Whichever way the process goes, it is clear that there is a process of de-facto secularization of Muslim marriages recognized as a secular or civil contract. This goes some way towards removing the exceptionalism of religious systems of law. As an increasingly large body of literature shows, any legal recognition of religious law is at the same time a process of its reformulation.