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Implications for Women's Human Rights**

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PROJECT REPORT 2005-7

THE RECOGNITION OF MUSLIM PERSONAL LAWS IN SOUTH AFRICA: IMPLICATIONS FOR WOMEN'S HUMAN RIGHTS

Editor: Rashida Manjoo*

1) Introduction

Bringing personal status laws into conformity with international and constitutional equal rights provisions is an imperative for the protection of women's human rights. Multicultural secular democracies face a challenge in effectively and meaningfully guaranteeing the right to equality *and* the right to religion and culture. Currently, Muslim marriages are not legally recognized in South Africa. Nearly 1.5 million of South Africa's citizens are Muslims, yet their marriages do not enjoy legal status. Some seek out the civil law system, but the rest are without formal legislative redress when problems arise within a marriage. This creates problems for parties in Muslim marriages generally, but for women in particular, especially in the family law arena.

This report identifies potential constitutional violations that may emerge in the law reform efforts that are currently taking place in South Africa. It explores amongst other issues, the tensions between women's equality rights and religious rights, codification of religious personal status laws versus recognition of religious marriages, achieving equal access to justice for all women, and also tensions arising between individual equality rights and group equality rights.

* This report reflects research undertaken by students registered in the Clinical Advocacy Course at the Human Rights Program (HRP), Harvard Law School. HRP offers course work and fosters the participation of students in human rights activities. Amongst other activities, HRP also develops and supervises student clinical projects. One of the projects embarked on by students in 2005/6 was that of "[T]he Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights". Students involved in the project included: Mujon Baghai, Nazia Izuddin, Elodie Moser, Yvonne Osirim, Pranvera Recica and Erica Westernberg. The project was conceptualised and supervised by Rashida Manjoo (Visiting Fellow, Human Rights Program/ Research Assoc, Law Faculty- University of Cape Town, South Africa). This report is based on work undertaken over two semesters by law students and also further work undertaken by the editor. It reflects a narrow and more legalistic approach to the issue of recognition of religious marriages in South Africa, as opposed to a sociological or anthropological approach.

South Africa is in the process of considering separate legislation that will recognize Muslim marriages. In July 2003, the South African Law Reform Commission (SALRC) submitted a report to the Minister of Justice along with proposed draft legislation called the Muslim Marriages Act (hereinafter referred to as the SALRC bill) which would recognize Muslim marriages.¹ The proposed bill addresses the registration of Muslim marriages, the dissolution of such marriages, custody of and access to minor children, and the issue of maintenance (both spousal and child support). Provision is also made for the regulation of polygynous marriages. According to the SALRC, adoption of the draft bill would go a long way in creating legal certainty regarding Muslim marriages; it would give effect to Muslim values; and it would afford better protection to women in those marriages, in accordance with both Islamic and South African constitutional tenets. The SALRC draft bill codifies elements of Muslim Personal Laws, by outlining rules for a variety of marital situations. The provisions in the SALRC bill are similar to provisions on Muslim Personal Laws as codified or applied in some countries including India, Nigeria, Malaysia, Bangladesh, Uganda, Tanzania, Pakistan and Sri Lanka. Though most of these countries are multicultural, they succumb to different models of multiculturalism. Each of these models demonstrates a different approach to Muslim Personal Laws. Section three below will discuss Ayelet Shachar's models of multiculturalism and also some consequences that have arisen in a few Asian and African countries which have adopted Muslim Personal Laws.

As a consequence of receiving numerous concerns relating to the SALRC Bill, which revolved around both constitutionality issues generally and women's right to equality in particular, the Parliamentary Office of the South African Commission for Gender Equality (CGE) drafted an alternative draft bill in October 2005. This Bill, called the Recognition of Religious Marriages Bill (hereinafter referred to as the CGE bill), was produced with the assistance of the office of the State Law Advisor, and was in fulfillment of the CGE's constitutional mandate.² This is a secular bill, of general application, that provides for the recognition of *all* religious marriages and avoids issues of codification of specific religious tenets, so as to comply with both international and constitutional law imperatives. It also addresses the lacuna that exists with respect to the non-recognition of other religious marriages.

The CGE Bill was discussed with the SALRC and then handed over to the relevant executive structures. The hope was that broad public consultations would be held by them, particularly by the Gender Directorate of the Department of Justice. But neither the Ministry of Justice nor the Ministry of Home Affairs has acceded to numerous requests for a meeting with the CGE, nor have they undertaken any public consultations on the CGE Bill. The most recent development has been the discussion of potential litigation, to challenge the unconstitutionality of non-recognition of marriages conducted under Muslim laws.³

In assessing the best approach to the problem of non-recognition of religious marriages, the South African constitution must be interpreted in its historical context, i.e. by focusing on fundamentally reversing the effects of racial and gender discrimination that existed under apartheid. The constitutional mandate is *transformative* justice and hence the goal is substantive equality, not just formal equality.⁴ The centrality of equality is reflected in the fact that the Constitution sets forth human dignity, equality, and non-sexism as foundational values.⁵ South Africa's courts have stressed that this history of discrimination and the push to remedy the real-world impact of such wrongs must inform any interpretation of the Constitution, especially the provisions on equality.⁶ Taking all these factors into account, this report attempts to set out the applicable international and constitutional law obligations; the relevant domestic jurisprudence that is of persuasive value; and, finally examines a few sections of both draft Bills. The relevant sections that are examined, relate broadly to the achievement of the rights to substantive gender equality, freedom of religion and access to justice.

2) Methodology

Students registered in the Clinical Advocacy Course in the Human Rights Program, Harvard Law School in 2005/6, conducted desktop research on the constitutional validity, impact, and consequences of the abovementioned bills. Research also included a comparative analysis, seeking to identify practices and legislative models in select countries in Africa, Asia, Europe and North America. The one week field work undertaken in October 2005 included: the presentation of the research at a workshop hosted by the CGE in Cape Town; interviews with

academics, community members, and government officials; and participation in a seminar with staff of the CGE. For the purposes of the latter seminar, the students engaged in an in-depth discussion on comparisons that reflected their analysis of the differences and also the implications of both the Bills.[†] The findings and debates emanating from the desktop research and the field-work are reflected in this report. This report will be shared with the CGE and with relevant civil society organizations. It is hoped that it will be used for the purposes of advocacy at both the legislative and litigation levels, in respect of the promulgation of constitutionally sound legislation which recognizes all religious marriages, without violating women’s human rights. This report uses the term Muslim Personal Laws to refer to personal status laws emanating from the tenets of Islamic religious sources.

3) Models of multiculturalism

3.1 General

This section largely draws on the work of Ayelet Shachar, who distinguishes between two different models of multiculturalism: the religious particularist model and the secular absolutist model. The ‘religious particularist model’ is a governance model in which different religious communities are vested with legal power over their members’ personal statuses.⁷ This model addresses the problem of respecting cultural differences by granting religious communities the authority to follow their own traditions in the family law arena. Communities are vested with legal power over matters of personal status and property relations, and the state does not regulate citizens’ marriage and divorce affairs.⁸

The second model, the ‘secular absolutist model’ is a system in which the state retains authority over family law matters and all citizens are subject to a uniform secular family law. Under the secular absolutist model, the state defines legally what constitutes the family and regulates its creation and dissolution. A uniform secular state law is imposed upon all citizens in family law matters, regardless of those citizens’ group affiliation(s). Religious officials have no prescribed role in defining or celebrating marriages.⁹ In its ideal form, the

[†] The speakers and focus of each presentation at the workshop included: Elodie Moser – “Multiculturalism and Legal Systems - Models at Work”; Nazia Yusuf Izuddin – “A Comparative Analysis of Muslim Personal Law in Africa and Asia: Indicators for the South African Bill”; and Erica Westenberg – “Constitutional Analysis of Proposed Muslim Marriages Act”. Mujon Baghai and Yvonne Osirim contributed to the desk-top research which informed sections of the presentations.

secular absolutist model denies legal recognition for a marriage or divorce performed by a representative of a religious family law tradition. It also refuses to acknowledge the possible distributive aspect of religious family law traditions. In other words, the state does not allocate any legal authority to the groups over issues of status or property relations, preserving for itself the ultimate regulatory power over the citizenry in matters of marriage and divorce. In theory, the key apparent advantage of the secularist absolutist model is that it creates a legal regime in which the state has a hold over all ministers, which then avoids the claim that "... the state only supports the practices of the majority [population] in the family law arena."¹⁰ Hence, all forms of religious marriage and divorce proceedings, whether Christian, Muslim, Jewish, Hindu, etc, have no legal validity under state law. In practice, however, the allocation of legal authority set by the secular absolutist model clearly does not advance the preservation of groups through the accommodation of their diversity: rather it falls short of respecting and addressing family laws and traditions, other than those that exist in the dominant religious, social and legal systems. As Shachar suggests, "... [t]he secular absolutist model is based on the presumption that religious practices are relegated to the "private" realm."¹¹

Shachar argues that one can distinguish the '*secular absolutist model*' of civil law countries such as France, Germany, and the Netherlands, in which there is strict separation of church and state,¹² and the '*modified absolutist system*' employed in Australia, Britain, Canada, and the United States, which permits some formal recognition of religious traditions, such as by authorizing religious officials to solemnize marriages.¹³ In the latter model, the state still maintains its decisive authoritative power to regulate citizens' marriage and divorce affairs, but state family law codes have been rewritten so as to sanction greater cultural diversity. For instance, civil authorities may invest religious officials with parallel authority to formalize marriages.¹⁴ Shachar points out that "... [t]his [modified absolutist] model is important because it provides formal recognition of certain aspects of minority communities' family law traditions."¹⁵ She also shows that "... [a]t the same time, it created a legal route for secular authorities to limit the exploitative power used by religious spouses to gain excessive rights in exchange for religious divorce decrees."¹⁶ However, while this legal arrangement may well resolve some individual cases of oppression, it does not create any encouragement for religious communities to reconsider their internal norms. She states ... "[T]his model may

just incite more reactive culturalist response – even well-meaning modifications by the state still have the effect of preserving a basic imbalance.”¹⁷ Though secular countries can follow this route to control gender injustice and other forms of religious control in the secular sphere, the modified absolutist model is unlikely to prevent the violation of women’s human rights.

While the concepts of multiculturalism and legal pluralism have drawn significant scholarly attention and debate in the past decade, large scale legal pluralism in the area of family law has not taken root in western industrialized countries. In the United States we see traces of legal pluralism, where Native Americans retain powers of self-government that extends to family law. In Australia and New Zealand, Aboriginal and Maori customary law receive some recognition, but courts do not apply or enforce this customary law directly. In common law countries, some religious clergy have legal authority to formalize marriages, provided that the parties obtain a marriage license from the state. With these small exceptions, western industrialized countries largely maintain unified family law systems, and persons of all religious, cultural, and ethnic backgrounds are subject to the same family law rules and institutions. In contrast, a pluralist system can be characterized as one that maintains the autonomy and sovereignty of different minority cultures.¹⁸ Schachar points out both the benefits and the risks inherent in pluralist systems. She argues that pluralist systems may put at risk the equality rights of vulnerable group members, while uniform systems might do a better job at protecting citizenship rights and ensuring equal treatment. On the other hand, such pluralist systems may also deny the importance of particular cultural or religious norms, and discriminate against minority groups, whose traditions are distinct from those embedded within the dominant culture. In Schachar’s view, one solution to achieving the protection and promotion of both individual and group rights is to have a joint governance system between the state and the cultural group.¹⁹

3.2) Comparing Models from Asia and Africa

This section sets out a brief picture of the challenges and consequences of the adoption of Muslim Personal Laws in a few Asian and African countries. An unavoidable tension in codifying Muslim Personal Laws in different contexts is whether to adopt a monolithic or a pluralistic system. This is partly due to the reality that there is usually neither a homogenous Muslim community nor a single interpretation of religious laws in that context. Furthermore,

the issue of the public status and role of religion is also a contested one in many countries. For example, India, Nigeria, Kenya, Tanzania and Sri Lanka are secular nations to the extent that the Constitution does not recognize a state religion. All of these countries, however, have recognized Muslim citizens to be governed by their personal laws relating to marriage, divorce, maintenance (spousal and child support), custody and guardianship, and have hence codified Muslim Personal Laws. On the other hand, the main sources of law in Pakistan, Bangladesh, Malaysia and Zanzibar are Muslim Laws, with Pakistan and Bangladesh declaring Islamic Law as the state religion in their constitutions.

Despite the difference in constitutional status granted to religious law there are some parallels in the effects of application of such laws in these countries. The substance of Muslim Personal Laws and also the interpretations thereof have given rise to contestation in many countries, particularly by women's rights activists. Some questions of concern include: what constitutes a valid marriage under Muslim Laws; what are valid religious precepts; what are the rules of spousal maintenance and child support; what are the rights of spouses in a marriage etc. Though these questions involve the basic tenets of Muslim Personal Laws and give the impression of certainty as to response and broad consensus on the issues, they have also evolved into controversies concerning which religious school of interpretation prevails. The criticism is that giving legitimacy to one school of interpretation excludes the beliefs and rights of people who adhere to a different school, and this exclusion amounts to discrimination on the basis of religious belief. In the South African scenario, the SALRC bill is vulnerable to these criticisms, as it gives priority to one school of interpretation over the other. As Shafi and Hanafi schools are the dominant schools of interpretation in South Africa, the legislation tends to exclude Shia practices and certain practices that are particular to the Maliki and Hanbali schools of interpretation. In the interviews conducted, some people argued that in choosing one dominant or preferred school of interpretation, the state is mandating what religious practices should be. This argument also raised the broader questions of whether a secular state has the authority to define religious mandates, and also whether this amounts to a violation of freedom of religion.²⁰

One of the reasons articulated by India, Pakistan, Bangladesh and Kenya for the codification of Muslim Personal Laws is the protection of women from exploitation based on religious

practices. Unfortunately, women are not protected from exploitation in the above-mentioned countries or in Nigeria, Malaysia, Sri Lanka and Tanzania. Violations of women's rights are common in executing provisions on divorce, polygynous marriages, custody of children and maintenance in all these countries.²¹ In some of these countries, courts have also succumbed to traditional definitions and customary practices and have overruled constitutional law provisions found in the fundamental rights section of the constitutions. A leading example is the Shah Bano case, which was decided in India during the 1980's²². The case related to a divorce and maintenance [support] claim of an older woman who had no minor children. The Indian Supreme Court granted the woman maintenance and in its reasoning justified the decision under religious law, stating that its conclusion was in line with the Quranic²³ spirit of justice in respect of support for a person in need. Religious leaders objected to the decision and challenged the court's authority to interpret the Quran. Despite the progressive decision of the Supreme Court, the decision could not be enforced, because of extreme pressure from the religious leaders. As a consequence, a law was passed to effectively invalidate the court's decision and which "...deprived all and only Muslim women of the right of maintenance guaranteed under the Criminal Procedure Code."²⁴ One of the crucial issues that this case raises is that of the authority/power that codification processes grant to religious law implementers, even in a constitutional democracy that guarantees secularism and protection under a Bill of Rights. The lack of enforceability of a court judgment because of protests by religious leaders is an indicator of another difficulty with respect to achieving gender justice in plural legal systems.

There have also been cases in Malaysia and Nigeria that illustrate how the courts override constitutional law principles and disregard the bills of rights when interpreting religious law. Cases reveal how traditional definitions (including the definition of obedience) and interpretations of gender roles play a major role in deciding divorce, maintenance and custody issues. Some of the implications that have been common to the above mentioned countries in the process of codifying Muslim Personal Laws include: the violation of constitutional supremacy; violation of fundamental rights; affirmation of popular and customary views and beliefs on Islam such as 'polygamy is a man's right'; and challenges to the authority of the secular courts due to the existence of a parallel judicial system based on religious law. The SALRC bill replicates many provisions relating to Muslim Personal Laws that have been

codified in these countries, and this could lead to similar problems. Amongst other provisions, the sections relating to maintenance and divorce indicate how the equality provisions of the constitution are being over-ridden by religious law provisions.

4) South Africa's International Law Obligations

This section will examine the United Nations system of international human rights law and the African regional systems of human rights law. From an international law perspective, there is strong support for individual and gender equality norms, and South African courts are expressly obliged to consider international law when interpreting the Bill of Rights. Section 39(1) of the Constitution states "... when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom ... and must consider international law."²⁵ Amongst others, South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR) in 1998; has signed (but not ratified) the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1994; has ratified the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) in 1995; and ratified the African Charter on Human and People's Rights (African Charter) in 1996. These documents all speak of the central place of equality norms in a democratic and pluralist society. Articles 18 and 26 of the ICCPR, in particular, promote both the *individual's* freedom of religion and the right to equality. Also, article 16 of CEDAW infuses this generalized language with much-appreciated specificity. It commands States Parties to "... ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”²⁶

The preamble of the African Charter on Human and Peoples’ Rights sets out a duty for state members to achieve genuine equality and dignity for all people and dismantle all forms of discrimination. It honors both the universalist aspirations of the UN Charter and the Universal Declaration of Human Rights, and also the traditions and values of Africa which should “... inspire and characterize their reflection on the concept of human and peoples’ rights.”²⁷ Relevant articles include:

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

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

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

(d) Article 17(2) and (3) states that “Every individual may freely take part in the cultural life of his [sic] community. The promotion and protection of morals and traditional values recognized by the community shall be the *duty* of the State” (emphasis added).²⁸

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

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

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

(h) Article 23, however, suggests that the former interpretation (i.e. national group) is closer to the truth when it says that “All peoples shall have the right to national and international peace and security.”²⁹

South Africa is one of fifteen nations that have ratified the Maputo Protocol, formally called the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. The Maputo Protocol, which was adopted by the African Union in July 2003 and came into force on 25 November 2005, speaks most directly to the issues at hand. The Protocol comprehensively enumerates the rights of women, imposing obligations on the ratifying states to ensure maximum protection of women’s rights, prevent discrimination and undertake measures to ensure women are given appropriate space for development, equal opportunities and full protection of social, economic and civil rights. The preamble proclaims the rights of women to be “... inalienable, interdependent and indivisible human rights” and states its determination to enable women to “... enjoy fully *all* their human rights.”³⁰ The strength of this language is significant in trying to create a hierarchy of rights. Specifically, it compels the state to take positive action of both a legislative *and* a social, cultural, educational nature. Relevant articles include:

- a) Article 2 states that “... harmful cultural and traditional practices...” are those which “... are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”
- b) The above provision is strengthened by Article 17, which states that women “...shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.” While there will certainly be disagreement over what constitutes a positive cultural context, the implication is that the cultural context is not and should not be static or fixed, and also that tradition is not inviolate if it is

deemed not to be “positive” for women. The statement guaranteeing women the right to participate in the determination of cultural policies suggests that women should be, in large part, the ones deciding on what is positive for them. This suggests that tradition is not inviolate, and such change as is necessary to promote the free development of women’s personalities is encouraged.³¹

- c) Article 6 on marriage could scarcely be clearer in requiring states parties to “... ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.” Article 6(c) states that “... monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationship, are promoted and protected.” The Protocol, while promoting monogamous marriages, recognizes the existence of polygamous marriages and the need for protection of the rights and interests of women in those marriages.
- d) Article 7 ensures protection of women’s rights by law, requiring that all marriages must be annulled or divorced by judicial order. Article 7 states that “States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage.” This entails that they shall (1) have the same rights to seek separation, divorce or annulment of a marriage; (2) have reciprocal rights and responsibilities towards their children; (3) have the right to an equitable sharing of the joint property deriving from the marriage. In short, these provisions are notable because they conflict with those found in both the SALRC and the CGE bills.
- e) Article 8 requires reform of relevant discriminatory laws.

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

5) Relevant Constitutional Provisions

As stated previously, the South African Constitution should be interpreted in light of its historical context and its attempt to remedy the effects of both racial and gender discrimination. This remedial objective is embodied in its Preamble which states “...the people of South Africa recognize the injustices of our past ... adopt this Constitution as the supreme law of the Republic *so as to*: Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights [and] . . . Improve the quality of life of all citizens and free the potential of each person” (emphasis added).³² This purpose can also be seen in the main text of the Constitution, especially the Bill of Rights. Chapter 1, Section 1 sets out human dignity, equality, and non-sexism as foundational values. The constitutional guarantee of equality (s 9(1)) is the very first in the list of rights, and as such enjoys a special prominence. The Constitutional Court has often voiced this view, stating that “... the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.”³³ Thus, in evaluating the proposed bills recognizing Muslim marriages, one should be keenly attuned to where they may heal some divisions and where they may instead create others. Moreover, one cannot rightfully ignore the problems of lingering patriarchal norms which sustain and idealize gender inequality and gender discrimination, either in theory or in practice, *de jure* or *de facto*.

Section 15 of the Bill of Rights provides that “Everyone has the right to freedom of conscience, religion, thought, belief and opinion,” adding in section 15(3)(a) that this does not prevent legislation recognizing marriages or systems of personal or family law under any tradition or religion, *so long as such recognition is consistent with this and other provisions of the Constitution* (s15(3)(b)) (emphasis added). This condition is significant. First, it suggests that such legislation may conflict with other provisions of the Bill of Rights. Second, if it does, it clarifies that such legislation is subject to all other rights, including the equality right.

Section 31 creates a similar limitation. It mandates that “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to (a) enjoy their culture, practice their religion and use their language.” Despite

this strong proclamation, the section goes on to state that these rights “... may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”³⁴ In contrast, the equality clauses contain no such internal limitation, or ‘but’ clause.

The Promotion of Equality and Prevention of Unfair Discrimination Act³⁵ is not simply relevant law, but also evidence of how the South African legislature interprets its own constitutional mandate. The guiding principle it stresses is the eradication of *systemic* racial and gender discrimination and inequality, which was injected into South African politics, economy, society, and psyche by an ill-famed triumvirate: colonialism, apartheid, and patriarchy.³⁶ Chapter 2, section 8 of the Act is devoted to clarifying the contours of gender discrimination. As such, it outlaws “... any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men.”³⁷

In adopting legislation to recognize Muslim marriages, balancing the rights of women and the rights of religious groups is at the heart of staying true to the Constitution and overcoming the history of discrimination. As indicated earlier, where these foundational rights collide, the equality of women must take precedence. The recognition of Muslim marriages on a par with all other religious marriages is not precluded. But cultural and religious rights, unlike equality rights, are subject to limitations described above, as well as the general limitations clause in section 36 of the Constitution. So, in determining the scope of the right to religion and the right to equality, it is the former which may not be read so as to infringe on the equality right, especially since non-sexism is one of the foundational values of the Republic of South Africa. Finally, as Wayne van der Meide has argued, “[A]lthough culture is practiced within and defined in reference to a group, in the Bill of Rights it is an individual, not a collective, right. Generally, therefore, the right to culture cannot be used to protect the interests of a group at the expense of the rights to equality, non-discrimination and inherent human dignity of individuals.”³⁸

6) Relevant Jurisprudence

The right to equality has been widely explored by South Africa’s courts. The Constitutional Court set out an equality test in *Harksen v. Lane NO and Others*,³⁹ which mandated that any

discrimination on the grounds of gender, race, ethnic origin, religion, disability and other grounds enumerated in the s9 of the constitution, is considered to be unconstitutional. The Court recognized both, past historical discrimination women faced in marriages in South Africa and also current experiences of women in relation to matrimonial property and the division of labor within the household, and how these factors compounded and further entrenched deep inequalities between women and men. While the test developed in the Harksen case certainly gives guidelines for determining absolute breaches of equality, it does not help to determine the balancing that must be done between gender and religious equality. In *Bhe and Others v the Magistrate, Khayelitsha and Others*,⁴⁰ the Constitutional Court resolved a conflict between African customary law and individual rights. In examining the rule of male primogeniture, which prohibited and discriminated against women's right to inherit property, the Court held that the customary law of succession, based largely on primogeniture, discriminates unfairly against women, both on the grounds of race and gender. This case supports the conclusion that when a conflict of rights arises, the right to gender equality takes precedence over cultural and religious rights.

South Africa's case law post-apartheid provides important direction on the legal treatment of Muslim marriages, the right to freedom of religion, and the right to gender equality. A few cases deal with the issue of Muslim marriages specifically and the right to marry generally. The pre-democracy era cases stand in sharp contrast to subsequent jurisprudence emanating from the courts. Under colonialism and apartheid, there was a refusal on the part of both the legislature and the courts to afford legal protection to parties in a Muslim marriage. The reason largely was that these marriages were viewed as potentially polygamous [polygynous] and thus *contra bonos mores* and hence were not regarded as legally valid. The views expressed in pre-democracy era cases were based on the dominant views on what religions and practices constituted civilized religious practices; what unions were considered an anathema to the dominant Christian norms; what marriages would not be reprobated by the majority of civilized peoples on grounds of morality and religion; what marriages were contrary to public policy etc.⁴¹ As we observe in the cases below, the courts have recognized the importance that religion has in this society, but have refused to use religious doctrine to interpret the constitution.

*Ryland v. Edros*⁴² is a seminal example of the different approach to Muslim marriages adopted by the courts, when faced with an action for claims arising out of a marriage which was dissolved by Muslim Personal Laws. The Court asserted that the Constitution's values prohibited the imposition of a dominant community's preferences and prejudices (in this case prejudice against Muslim polygynous marriages) in a plural society like South Africa.⁴³ At first glance, this might seem to support the argument that liberal/secular preferences for gender equality could not be imposed on the Muslim community. However, it is important to note that the Ryland decision was based on *constitutional* values, one of which is non-sexism. Thus, the Ryland case points towards the conclusion that the right to religious freedom emanates from the Constitution itself and, thus, religious freedom cannot be pursued without due regard to other central constitutional values, such as gender equality.

*Amod v. Multilateral Motor Vehicle Accident Fund*⁴⁴ was a case related to compensation for the loss of support suffered as a consequence of the death of her husband in a car accident. The respondent had refused to pay compensation because Islamic marriages were not lawful at common law, since they were seen as contrary to good public policy, as they allowed for the practice of polygamy [polygyny].⁴⁵ The Court, in giving recognition to the duty of support owed to the appellant, recognized the existence of a de facto monogamous Muslim marriage.

In *Daniels v. Campbell NO and others*⁴⁶ the Constitutional Court held that persons married according to Muslim rites were spouses for the purposes of inheritance where the deceased died without leaving a will. The court held further that the exclusion of people married under Muslim rites from the protection of the legislation in question is clearly an unjustifiably discriminatory remnant from the apartheid era. The common factor in the abovementioned cases was that in all instances the court was prepared to provide some remedy, but at the same time the court has consistently refused to recognize the legal status of marriages which are concluded under Muslim rites.

In addition, the recent *Minister of Home Affairs and Another v. Fourie and Another*⁴⁷ decision on same-sex marriages asserted that the compass by which the 'right to marry' cases are decided should be South Africa's modern equality jurisprudence – which has focused on the values of human dignity, equality and freedom – rather than religious texts.⁴⁸ The court

declared, “[I]t is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.”⁴⁹ The *Fourie* case lends strong support to the contention that, in the marriage context, religious norms cannot outweigh the constitutionally-protected right to equality, and hence the inability of parties to lawfully marry their same sex partners constitutes discrimination. In summing up the jurisprudence, the Constitutional Court of South Africa has expanded the concept of marriage from a union of one man and one woman, to include same sex marriages; but it has also declined to recognize the legal validity of marriages conducted under the tenets of Muslim Laws.

The Constitutional Court has also faced another freedom of religion issue, i.e. whether giving special recognition to one religious group is unfair to other religious groups that lack such special recognition. In *S v. Solberg*⁵⁰, the majority held that state endorsement of a particular religion would not infringe on the right to freedom of religion, as long as the endorsement did not have a coercive effect. However, Justice O’Regan strongly dissented, and argued that any such endorsement would not be permitted in South Africa’s new constitutional order.⁵¹

An important issue that *Solberg* raises in the Muslim marriages context is whether the SALRC draft bill creates ‘coercive effects’. As will be outlined in the section below, one may well argue that the SALRC draft bill does this, insofar as it gives preferential treatment to some Islamic schools of interpretation over others and reinforces women’s lesser socio-economic status and autonomy, especially with regard to making religious and marital choices. There is additional case law on the legal treatment of the right to freedom of religion, but not specifically on the issue of Muslim marriages. Due to the constraints of space, such cases will not be discussed here.

7) Some implications of the SALRC and CGE Approaches

The SALRC draft bill (Muslim Marriages Act) and the CGE draft bill (Recognition of Religious Marriages Bill) take vastly different approaches to giving Muslim marriages legal status. Although several potential constitutional violations emerge from both proposed

statutes, they will not all be addressed in this report.⁵² The views expressed by interviewees will be utilized in the discussion of a few provisions of both bills, including the scope of application; concerns arising due to codification of religious law; and, potential violation of women's equality rights.⁵³ The report will address potential problems that focus on the provisions relating to divorce, matrimonial property regimes and maintenance.

7.1) Scope of Application

The SALRC bill applies only to Muslim marriages while the CGE bill applies to all religious marriages. The interviews reveal that some people are concerned that it is not fair to provide recognition of the tenets of one religious group and not to others. Other people argued that such recognition is patronizing to Muslims, as other religious groups are left to regulate themselves.⁵⁴ The CGE bill may be seen to remedy this criticism as it seeks to recognize all religious marriages, rather than to codify specific elements of any religious laws. It thus becomes possible to address the problem of non-recognition of religious marriages and at the same time treat all religions equally within the context of a single act. Another challenge raised is the issue of legitimization of polygynous marriages through the SALRC Bill. Such legitimization is seen as infringing women's rights and is thus in direct violation of s9(2) of the Constitution. Both bills propose recognition of polygynous marriages, with the SALRC bill also providing for the regulation of polygamous marriages. Neither bill provides for the outlawing of the practice (even at some point in the future), thus ignoring the issues of substantive equality and the realization of the inherent human dignity of women, in religious communities.⁵⁵

7.2) Some Implications of the Codification Approach

It is important to firstly explore why the SALRC took the codification approach. The SALRC looked to the Constitution for legal support of codification of Muslim personal law.⁵⁶ Section 15 of the Constitution opens the door by allowing for legislation recognizing systems of personal and family law under any tradition or adhered to by persons professing a particular religion - although any such legislation must be consistent with the rest of the Constitution. Also, the argument asserted in the SALRC Discussion Paper 101 was that Muslims currently had difficulty enforcing maintenance, termination of marriage, proprietary, and custody rights arising from their marriages and, thus, legislation must be specifically aimed at correcting

these practical problems. The assertion was that women and children would be protected by specified substantive regulations.⁵⁷ Of those interviewed, many people generally maintained that religious leaders had a strong influence over the SALRC Project Committee on the draft bill and that these leaders generally supported codification. One example cited, as common knowledge amongst many people in the Muslim community, was that the SALRC adopted the Muslim judge requirement in response to calls from religious (ulama) bodies.⁵⁸

Thus, codification was asserted by the SALRC as a way to actively provide social protection in marital and family problems. The sections below will outline how the codification approach utilized in this bill has, in fact, accomplished the exact opposite of this goal, instead putting women and children at a greater disadvantage, both inter-groups and intra-groups. Many of these provisions are onerous in terms of a burden of proof; and they also presuppose access to knowledge and an equal power of parties to negotiate mutually favorable terms. The codification of religious laws approach focuses on protecting the religious group, with the emphasis being on formalizing group norms and institutions. In contrast, the recognition of religious marriages approach focuses on protecting the rights of the religious individual, with the emphasis being on personal choice of forum. Because individuals, especially women, are often subjugated even within protected minority groups, and because the individual is the lowest common denominator of both individual and group rights there is a greater imperative to protect individuals.

The SALRC bill seeks to codify elements of Muslim Personal Laws via the legislation itself and via the jurisprudence of Muslim judges and assessors. For example, it outlines rules for several marital situations relating to divorce practices such as *talaq and khula*⁵⁹ and post-divorce practices such as *iddah*.⁶⁰ In addition, this bill also prescribes that cases be tried by Muslim judges and assessors who have special knowledge of Islamic law. Many problems arise from this approach. At one level the concerns raised over codification of religious laws reflect a broader concern that the practices of many religious laws, including Muslim Personal Laws, are biased against women. The SALRC bill gives religious leaders greater discretion and authority, especially by mandating that Muslim judges and institutions play a central role in dispute resolution. This allows for the application of a variety of interpretations of religious laws, potentially in a biased manner.

During interviews, some interviewees stated that the SALRC chose elements of Muslim Personal Laws in a piecemeal manner, picking and choosing from the four main schools of thought without regard to internal consistency or religious authenticity. Also, it was argued that by doing this, the state is attempting to legislate on the fundamentals of religious laws. This raises the broader question of whether the state has the authority to define religious mandates. Some also argued that the very act of crystallizing a specific set of religious rules in a piece of legislation goes against religious freedom and integrity, because religious tenets evolve and change over time and in different contexts.⁶¹ Many interviewees criticized the SALRC's process of consultation when drafting the bill, noting that women's voices were not adequately represented.⁶² Furthermore, the bill has raised dissent amongst Muslim scholars, with many holding that it violates freedom of religion by prescribing religious practices under coerciveness of state sanctions, and that it also infringes the autonomy of religious institutions.⁶³ It is argued that the Constitution of South Africa provides for the separation of state and religion and that this gives the government the power to provide religious groups the freedom to practice their religion. However, under the SALRC bill, the government exceeds this authority and prescribes what Islamic Law is, and, it also promotes a particular understanding of religion, thereby interpreting religious laws. As Motala holds "... the bill (SALRC) is not based on voluntarism. Instead, the state is attempting to prescribe how to worship or practice one's faith. The state should not be permitted to force or influence a person to profess a belief in a certain way." Further Motala suggests that there is a risk of alienating the Muslim communities in South Africa, because not all of them are in agreement with the prescriptions and interpretations provided for in the bill.⁶⁴

Furthermore, in some interviews people expressed the belief that the SALRC's codification approach meant that many actions brought under the Act would eventually end up in the appeals process, on grounds of unconstitutionality, resulting in a cycle of appellate courts reversing the findings of Muslim judges. This is problematic as it allows non-Muslims to determine norms of Muslim Personal Laws, which is precisely what the SALRC bill sought to avoid by providing for the appointment of Muslim judges. Also, it sets up a dynamic of conflict between the secular state and the religious community, which again undermines one of the main objectives behind the proposed law. Furthermore, by creating a special role for Muslim judges and attorneys as judicial officers, the SALRC bill may convey existing

distributional problems into the courtroom, thus contravening constitutional requirements. A history of gender discrimination likely restricts the number of female Muslim judges and attorneys. This issue is extremely relevant as recent judicial reform efforts have been focused on empowerment of women in the judiciary.⁶⁵ The CGE bill does not provide for the appointment of Muslim judges. Finally, an even deeper problem is that, by formally codifying elements of religious laws, this bill would give any such underlying bias the weight of *state sanction*. It is this state approval that would bring applied religious law out of the private sphere and under the protection of state law, and not necessarily in a gender-responsive manner. Thus, the codification approach is problematic because it opens the door for the application of Muslim Personal Laws in a manner that potentially violates many constitutional provisions.

The CGE draft bill seeks only to recognize religious marriages and avoids issues of codification of specific religious tenets. This approach is preferable for several reasons. First, recognition rectifies the central problem of Muslim marriages lacking legal status. Second, the recognition approach balances the competing rights of gender equality and culture/religion, whereas the non-recognition and codification approaches allow one right to consume the other. That is, under the recognition model, a woman can either choose to have her dispute settled in the private religious sphere by a religious individual or institution, *or* she can use the fact that her marriage has legal status to trigger the mechanisms and laws of the secular legal arena. Therefore, the recognition model does not negate or disadvantage the application of Muslim Personal Laws; it simply gives people the option of utilizing either a religious or a secular forum. This approach seems eminently practicable since many interviewees indicated that many Muslim women already currently engage in such forum shopping, in the quest to resolve marital issues.⁶⁶

It is important to note the limitations of the recognition of religious marriages approach. Because recognition leaves the private religious sphere unfettered, it leaves unfixed many of the underlying biases against women, on the part of religious leaders and institutions, just as codification goes too far in the other direction by lending state approval to these biased actors and institutions. This tension results in the conclusion that laws are not a panacea for dealing with violations of women's human rights arising out of religious practices and that other

remedies must also be pursued. Another limitation is that the CGE bill effectively forces women to choose between an exclusive religious option and a secular option, whereas the SALRC bill seems to have some moderating effect through the appeals process. Also, in theory women have a choice of forum, but in practice this is not the case, as threats/coercion/fear etc may prevent them choosing the secular realm even if they wanted to.

7.3) Potential Violations of Women's Equality Rights

The SALRC bill provisions on *divorce* reveal a lack of clarity, disparate levels of power granted to male spouses (i.e. the entrenchment of legal inequality), and also a failure to pursue the *substantive* equality of women. For example, section 9(2) of the SALRC Bill provides that a court may terminate a Muslim marriage on any ground permitted by Islamic law. Yet, the bill fails to identify any of these grounds and thus opens the door to gender-biased interpretations of religious grounds. The CGE bill, on the other hand, simplifies and equalizes rights in divorce. It states that only a court may dissolve a marriage and the civil law standard of 'irretrievable breakdown' is sufficient ground for dissolution purposes. Unfortunately, the CGE bill also makes reference to ensuring that the marriage is dissolved according to religious tenets, prior to a court process of dissolution. The implications here include: having to deal with conservative religious institutions, bargaining in the shadow of the law with recalcitrant husbands, delayed processes etc. Also, the SALRC Bill, in codifying different forms of divorce and post-divorce practices, openly spells out and formalizes inequality in the law by giving the husband greater freedom to end the marriage. This is a violation of both domestic and international laws. One example is a provision on divorce which prohibits remarriage, for a mandatory waiting period of 130 days for a woman who is not pregnant and until the time of delivery for a woman who is pregnant (i.e. the iddah period).⁶⁷

The *process of dissolution of marriages* under the SALRC Bill is another example of the different treatment in respect of divorce processes accorded to the Muslim community as compared to both civil law and customary law divorces. Under the SALRC bill, compulsory mediation is the first step in the process of dispute resolution. This can be followed by arbitration, and finally litigation if the matter is not resolved. Court proceedings will have to be presided over by a Muslim judge. Failing the existence of a Muslim judge in that Court,

the matter will have to be heard by a Muslim attorney (who would be designated as an acting-judge). Courts would be assisted by two Muslim assessors who have specialized knowledge of Islamic Laws. On appeal, the Supreme Court of Appeal would submit questions of Islamic Law to two accredited Muslim institutions.

Numerous problems are evident in this approach. First, in court cases, the application of Islamic laws could introduce gender bias into both the procedure and substance of the case. Second, as noted earlier, by creating a special role for Muslim judges and attorneys as judicial officers, the SALRC bill may convey existing distributional problems into the courtroom. Third, because this bill mandates compulsory mediation, only Muslim people would be made to go through this additional procedural ‘hoop’ in order to gain access to the formal justice system. This puts Muslims at a disadvantage vis-à-vis non-Muslims with regard to their constitutionally protected right to have access to both due process and effective justice. Fourth, because arbitration is a private process, there is concern that gender bias will proceed unchecked by public scrutiny. Studies have found that private bargaining in family law tends to yield inferior results for many women.⁶⁸ The CGE bill does not stipulate the appointment of religious judges, nor does it mandate compulsory mediation prior to adjudication processes for divorce. Hence, any underlying gender biases in the religious norms are further entrenched by the SALRC Bill, but neither are they fully confronted by the CGE Bill.

In the SALRC bill, the default position in respect of *matrimonial property regimes* for Muslim marriages is, as marriages out of community of property, excluding the accrual system. This is in contrast to the default system in both the civil law, i.e. the Marriage Act 25 of 1961 and also, the Recognition of Customary Marriages Act 120 of 1998, which provide for a default system of ‘in community of property’. The SALRC bill provides that each spouse maintains his or her own estate and any growth accrued during the marriage will not be split between the two. This can be modified by a pre-nuptial contract, prior to the marriage ceremony. These provisions could serve to disadvantage women as male spouses can often more easily acquire hard assets during a marriage, while women may contribute more intangibly to family resources. Given the backdrop of existing gender inequality in terms of socio-economic resources, women are less able to assert their interests and demand an ante-nuptial contract. Also, under this bill, an application by the husband to enter into a

subsequent marriage, may lead to the court dividing or terminating, an existing matrimonial property system. On the other hand, the CGE bill asserts that marriages will be governed by the tenets of the parties' religion. Although, this offers more room for the application of more equitable rules by the parties, by leaving the issues of proprietary consequences to the tenets of the religion, women in Muslim marriages are not protected from biased religious norms.

In terms of *maintenance*, the SALRC bill mandates that a husband supports his wife during marriage and for a limited period post-divorce (the iddah period)⁶⁹, and that he pays child support to her upon divorce, but it has no provision for the payment of alimony. In contrast, the CGE bill would invoke the provisions of laws of general application that apply to marriage, divorce and maintenance. This is especially important since realistically in South Africa, many women traditionally labor in an unpaid or informal sector of the economy i.e. largely maintaining the household and caring for children. Furthermore, because of the historical legacy of a denial of education opportunities for non-white [black/people of color] people, women often lack the education and training required to later enter the work force if necessary. Hence, the lack of an equitable matrimonial system and a provision for alimony threatens to leave many women in financial jeopardy, if not utter destitution. As a result, this omission unfairly discriminates against women, both formally and substantively, de jure and de facto. The SALRC bill serves to further entrench inequality in South African law between Muslim and non-Muslim women.

8) Conclusion

It is acknowledged that law is only one part of any solution relating the achievement of women's human rights and substantive gender equality. Law is not a panacea for underlying social inequities, both structural and systemic. It will ultimately be up to South Africans to give life and meaning to the rights entrenched in the Bill of Rights. Article 2 of the Maputo Protocol exhorts governments to seek the elimination of discrimination against women not only through legislative measures, but also through the modification "... of social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and

traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”⁷⁰

There is a spectrum of opportunities to give status to Muslim marriages. On one end is the present state of non-recognition, which is harmful *de facto* to women and so flagrantly disregarding of the constitutional right to religion and culture of Muslim South Africans. On the opposite end is the SALRC bill. Its codification of Muslim Personal laws opens a Pandora’s Box of constitutional quagmires that threatens to swallow whole the social justice mission embodied in the right to gender equality. In the middle stands the CGE bill, recognizing all religious marriages, but not codifying any religion. It partly represents the hope of a society in which the rights to equality and to culture, religion, and tradition may flourish side by side. The Constitution of South Africa is consciously an instrument committed to social justice, transformation and reconstruction. Thus any attempt to change, modify, challenge or violate the constitutional values and norms is required to be justified and must be judged in terms of the consequences and the impact it may induce. The constitutional provision under Chapter 2, article 7(2) holds a compelling obligation for the government indicating that it is required to undertake actions to ensure equal and fair implementation of rights. It gives rise to affirmative duties for the government to take proactive and affirmative steps to ensure that rights of individuals are not violated or infringed, not only by the state, but also by private parties.

Many country experiences demonstrate that codification of Muslim Personal Laws poses constitutional as well as religious law challenges. These challenges raise questions for states engaging in this process, to reconsider and revisit codification as the approach to recognition of religious laws. Such experiences also emphasize the highly delicate subject of accommodation in the family law arena, including essential problems underlying the current theoretical and legal models for dividing jurisdiction over individuals with multiple affiliations. In the South African multicultural context, the issue of recognition of Muslim marriages is of concern to its very plural fabric. Hence, its approach to multiculturalism is decisive to both its secularist and pluralist identity. The situation South Africa is faced with now demands a closer look at the different models of multiculturalism various countries have followed, and also the impact of their approaches in the recognition of Muslim Personal

Laws. The South African context requires institutional scrutiny that can appreciate the situational complexity faced by individuals who are culturally and legally tied to both the group and the state. The challenge is balancing equality rights and the right to religion. From a social science perspective – from the perspective of life as it is lived as opposed to law as it is written – a codification bill, such as the SALRC bill, will be harmful to women even when it appears neutral, such as when it allows women to enter anti-nuptial contracts to change the matrimonial regime. The reality in South Africa is that women are generally of a lower socioeconomic status than men; hence it is highly unlikely that they will be able to truly use such provisions to protect their interests. Turning a blind eye to such realities promotes and perpetuates the social inequalities the Constitution was designed to address. The problem that has been identified is that of non-recognition of religious marriages. This is a problem that is faced by the Muslim community as well as other religious communities. The legislative solution that is required is one of recognizing religious marriages, while avoiding codifying any particular religion.

ENDNOTES

¹ South African Law Reform Commission, *Islamic Marriages and Related Matters: Report- Project 106* (July 2003).

² The Commission for Gender Equality (CGE) is a statutory body established in terms of the Constitution of South Africa and the Commission on Gender Equality Act No 39 of 1996. The mandate of the CGE is to promote respect for gender equality and the protection, development and attainment of gender equality. The powers and functions of the CGE are outlined in the Commission on Gender Equality Act 39 of 1996. In terms of section 11(1) (a) of this Act, the CGE, must, inter alia: Evaluate among others, any proposed law affecting gender equality or the status of women and make recommendations; and also evaluate any of the following: Acts of Parliament, systems of personal and/or family law, custom and/or customary practices, and systems of indigenous law or any other law.

³ The Women's Legal Centre, South Africa is a public interest NGO that is planning to bring a class action application on behalf of its clients. Personal communication with Attorney J. Willams - 28 May 2007.

⁴ See generally Jagwanth S, "*The Inequality Challenge*" 15 Southern Africa Report 3 (2000); and Karl Klare, "Legal Culture & Transformative Constitutionalism," 14 South African Journal on Human Rights 146 (1998).

⁵ Preamble, The Constitution of the Republic of South Africa, Act 108 of 1996.

⁶ *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at 33, 40.

⁷ Ayelet Shachar, *Multicultural Jurisdictions – Cultural Differences and Women's Rights* (2001), Cambridge University Press. This section of the article is largely based on Pages 71-85.

⁸ *Id.*

⁹ *Id.* at 72

¹⁰ *Id.* at 73

¹¹ *Id.*

¹² *Id.* at 72

¹³ *Id.* at 77

¹⁴ *Id.*

¹⁵ *Id.* at 78

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 131

²⁰ Interviews conducted with various individuals in Oct 2005 in Cape Town, South Africa. In the interests of confidentiality, no names will be revealed. The list of interviewees is on file with the editor.

²¹ See generally Women Living Muslim Laws Network website (www.wluml.org); particularly recent cases in Nigeria, Iran and Pakistan.

²² *Mohammad Ahmad Khan v. Shah Bano Begum*, SCC 2 (1985) Sec. 556. In A.I.R.(The All India Reporter): July 1985, Vol 72 Part 859: pp.945-954. More details on the Shah Bano case can be found at <http://www.law.emory.edu/IFL/cases/India.htm>

²³ The Qur'an is regarded as the primary source of religious law and is considered by many Muslims to be the literal voice of God.

²⁴ Martha C. Nussbaum, "India: Implementing Sex Equality through Law" 2 Chicago Journal of International Law (2001) at 45. See also the Muslim Women's Protection after Divorce Act (1986).

²⁵ The Constitution of the Republic of South Africa, Act 108 of 1996

²⁶ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. Doc. A/34/46 (1980).

²⁷ African Charter on Human and Peoples' Rights adopted 27 June 1981 and came into force in 1986 OAU Doc. CAB/LEG/67/3 rev.5, 21 ILM (1982) 58. Also available: <http://www.Africa-Union.org/officialdocuments>

²⁸ It is clear that the wording embraces the individual with free choice as the ultimate societal constituent. But it also raises questions about what interpretation should be attached to "community, morality and traditional values."

²⁹ See supra note 27

³⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (informally called the 'Maputo Protocol'). Available: <http://www.Africa-Union.org/officialdocuments>

³¹ Article 2 seeks the elimination of discrimination against women not only through legislative measures, but also through the modification "of social and cultural patterns of conduct of women and men through public

education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.” This final statement makes it clear that it will be difficult to argue that inherent differences of the sexes justify their differing roles and spheres in life. Similarly, Article 3 on the right to dignity seeks to promote the free development of a woman’s personality, though ultimately it is unclear how one might give content to these statements.

³² *Supra* note 5

³³ *Fraser v Children’s Court, Pretoria North, & others* 1997 (2) 261 (CC) at para 20; *See also, Minister of Home Affairs v Fourie* 2005 (CC) at para 59 (quoting *S v Makwanyane and Another* 1995 (3) SA 391 (CC)).

³⁴ Section 31 (2) of Constitution. *Supra* note 25.

³⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁶ *Id* at Chapter 1, s4(2).

³⁷ *Id* at Chapter 2, s8.

³⁸ Wayne van der Meide, “*Gender Equality v Right to Culture*”, 116 S. African L. J. 105 1999.

³⁹ *Harksen v. Lane* NO 1997 (11) BCLR 1489 (CC).

⁴⁰ *Bhe and Others v. Magistrate of Khayelitsha and others* 2005 (1) BCLR 1 (CC).

⁴¹ *See generally* Bronn v. Fritz Bronn’s Executors and others 1860 (3) Searle 313; *Seedat’s Executors v. The Master* 1917 A.D.; *Kader v. Kader* 1972 (3) SA 203 (A.D.); *Ismail v. Ismail* 1983 (1) SA 1006 (A.D.)

⁴² *Ryland v. Edros* 1997 (1) BCLR 77 (C).

⁴³ *Id.* at 460

⁴⁴ *Amod v. Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA).

⁴⁵ Du Plessis, Lourens, “Freedom of or Freedom from Religion?” 2001 *B.Y.U. L. Rev.* 439, at 461.

⁴⁶ *Daniels v. Campbell NO and others* 2004 (7) BCLR 735 (CC).

⁴⁷ *Minister of Home Affairs and Another v. Fourie and Another* CCT 60/04.

⁴⁸ *Id* at para 48

⁴⁹ *Id.* at para 92

⁵⁰ *S v. Solberg* 1997 (10) BCLR 1348 (CC).

⁵¹ As stated in Farlam, Paul. “The Ambit of the Right to Freedom of Religion: A Commentary on *S v. Solberg*”, 1998 *S.A.J.H.R (14)* 298, at 301-302.

⁵² A fuller analysis of the provisions in both Bills will be addressed in a forthcoming journal article.

⁵³ *Supra* note 20

⁵⁴ *Id*

⁵⁵ This criticism is also applicable to marriages recognized under the Recognition of Customary Marriages Act 120 of 1998.

⁵⁶ *Supra* note 1 at s1.2

⁵⁷ South African Law Reform Commission, *Islamic Marriages and Related Matters: Discussion Paper 101-Project 59* (2001).

⁵⁸ *Supra* note 1 at s2.8.

⁵⁹ Talak, khula, faskh etc are different forms of divorce under Muslim personal laws. *See* SALRC Discussion Papers, *supra* note 58.

⁶⁰ Iddah is a mandatory ‘waiting period’ imposed on women on divorce or death of a spouse. Amongst others, the restrictions include not being able to marry and also not being able to leave the matrimonial home (with some exceptions allowed). The objective behind the ‘waiting period’ is to determine if the woman is pregnant. If so, the ‘waiting period’ extends to until she gives birth, as opposed to a waiting period of three months on divorce and just over four months on death.

⁶¹ *Supra* note 20.

⁶² *Id.*

⁶³ *See generally* Moosa E, “Prospects for Muslim Law in South Africa: A History and Recent Developments” in *Yearbook of Islamic and Middle Eastern Law, Volume 3* 1996; “What is MPL?” published by: Young Men’s Muslim Association (South Africa), undated; *Al-Haq Bulletin* No. 21, Oct 2003 (Published in Port Elizabeth, South Africa)

⁶⁴ Motala Z, “The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise” Undated. Found on website: <http://www.alinaam.org.za/misc/mplc01.htm> Accessed 6/7/2006

⁶⁵ Angela Quintal, “SA’s Judges to go back to school: racism, sexism problems for judiciary, says report.” *Weekend Post*, 22 October, 2005.

⁶⁶ *Id.*

⁶⁷ Supra note 61

⁶⁸ Bakht Natasha, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women. 1 Muslim World Journal of Human Rights 1*. 2004.

⁶⁹ Supra note 61

⁷⁰ Supra note 30.

Comparative Public Policy and Law Reform

The Protection of Minority Rights under the South African Constitution

Selected Provisions

International Covenant on Civil and Political Rights

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Constitution of the Republic of South Africa, 1996

Preamble

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Section 9 Equality

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). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 15 Freedom of religion, belief and opinion

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
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.
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 and 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.

Section 30 Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

Section 31 Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
 - a. to enjoy their culture, practise 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.

Section 235 Self-determination

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition

of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

International Law

Section 232 Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 233 Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

South African Human Rights Commission

Section 184 Functions of South African Human Rights Commission

1. The South African Human Rights Commission must
 - a. promote respect for human rights and a culture of human rights;
 - b. promote the protection, development and attainment of human rights; and
 - c. monitor and assess the observance of human rights in the Republic.
2. The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power
 - a. to investigate and to report on the observance of human rights;
 - b. to take steps to secure appropriate redress where human rights have been violated;
 - c. to carry out research; and
 - d. to educate.
3. Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
4. The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Section 185 Functions of Commission

1. The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are
 - a. to promote respect for the rights of cultural, religious and linguistic communities;
 - b. to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
 - c. to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.
2. The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.
3. The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.
4. The Commission has the additional powers and functions prescribed by national legislation.

Section 186 Composition of Commission

1. The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.
2. The composition of the Commission must-
 - a. be broadly representative of the main cultural, religious and linguistic communities in South Africa; and
 - b. broadly reflect the gender composition of South Africa.

Commission for Gender Equality

Section 187 Functions of Commission for Gender Equality

1. The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
2. The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.
3. The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

DRAFT BILL AS PROPOSED IN DISCUSSION PAPER 101

ISLAMIC MARRIAGES ACT .. OF 20..

To make provision for the recognition of Islamic marriages; to specify the requirements for a valid Islamic marriage; to regulate the registration of Islamic marriages; to recognise the status and capacity of spouses in Islamic marriages; to regulate the proprietary consequences of Islamic marriages; to regulate the dissolution of Islamic marriages and the consequences thereof; to provide for the making of regulations; and to provide for matters connected therewith.

Definitions

1. In this Act, unless the context otherwise indicates-
- (i) **“court”** means a High Court of South Africa, or a Family Court established under any law, and for purposes of section 9, a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act No. 9 of 1929). The provisions of section 2 of the Divorce Act, 1979 (Act No. 70 of 1979), shall, with the necessary changes, apply in respect of the jurisdiction of a court for the purposes of this Act;
 - (ii) **“deferred dower”** means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon dissolution of the marriage by divorce or death;
 - (iii) **“dispute,”** for the purposes of section 13, means a dispute or an alleged dispute relating to the interpretation or application of any provision of this Act or any applicable law;
 - (iv) **“dower”** means the money or property which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family, and lay the foundations for affection and companionship;
 - (v) **“existing civil marriage”** means an existing marriage contracted according to Islamic Law which has also been registered and solemnized in terms of the Marriage Act, 1961 (Act No. 25 of 1961), prior to the commencement of this Act, and in relation to which the parties may elect in the prescribed manner at any time after the date of commencement of this Act, to cause the provisions of this Act to apply to their marriage, in which event the provisions of this Act apply from the date of such

election, but without affecting vested proprietary rights (unaffected by such election) and the rights of third parties including creditors;

- (vi) **“Faskh”** means a decree of dissolution of marriage granted by a court, upon the application of the wife, on any ground or basis permitted by Islamic Law, and including any one or more of the following grounds, namely, where the -
- (a) husband is missing, or his whereabouts are not known, for a substantial period of time;
 - (b) husband fails for any reason to maintain his wife;
 - (c) 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 dissolution within a period of one year as from the date of sentencing;
 - (d) husband is mentally ill, or in a state of continued unconsciousness as contemplated by section 5 of the Divorce Act, 1979 (Act No. 70 of 1979) which provisions shall apply, with the changes required by the context;
 - (e) husband suffers from a serious disease, including impotency, which renders cohabitation intolerable;
 - (f) husband treats his wife with cruelty in any form, which renders cohabitation intolerable;
 - (g) husband has failed, without valid reason, to perform his marital obligations for a reasonable period;
 - (h) husband is a spouse in more than one Islamic marriage, he fails to treat his wife justly in accordance with the injunctions of the *Qur'an*; or
 - (i) marriage has irretrievably broken down, despite reasonable attempts at reconciliation;
- (vii) **“Iddah”** means the mandatory waiting period for the wife, arising from the dissolution of the marriage by divorce or death during which period she may not remarry. The *Iddah* of a divorced woman who -
- (a) menstruates is three such menstrual cycles;
 - (b) does not menstruate for any reason, is three months;
 - (c) is pregnant, extends until the time of delivery;
- (viii) **“irrevocable Talaq”** means -
- (a) a *Talaq* pronounced by a husband which becomes irrevocable only upon the expiry of the *Iddah*, thereby terminating the marriage upon the expiry thereof;
 - (b) according to the Hanafi School of Interpretation, a *Talaq* expressed to be irrevocable (*Bai'n*) at the time of pronouncement, thereby terminating the marriage immediately;
 - (c) the pronouncement of a third *Talaq*;

- (ix) **“Islamic marriage”** means a marriage contracted in accordance with Islamic law only, but excludes an existing civil marriage, or a civil marriage solemnized under the Marriage Act, 1961 (Act No. 25 of 1961), before or after the date of commencement of this Act;
- (x) **“Khul’a”** means the dissolution of the marriage bond, at the instance of the wife, in terms of an agreement between the spouses according to Islamic Law;
- (xi) **“marriage officer”** means any Muslim person with knowledge of Islamic Law appointed as marriage officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorisation;
- (xii) **“Minister”** means the Minister of Home Affairs;
- (xiii) **“prescribed”** means prescribed by regulation made under section 15;
- (xiv) **“prompt dower”** means the dower or part thereof which is payable at the time of conclusion of the marriage or immediately thereafter upon demand by the wife;
- (xv) **“revocable Talaq”** means a *Talaq* (“*Raj’i*”) which does not terminate the marriage before the completion of the *Iddah*, and which confers upon the husband the right to take back his wife before the expiry of the *Iddah* only;
- (xvi) **“Tafwid ul Talaq”** means the delegation by the husband of his right of *Talaq* to the wife, either at the time of conclusion of the marriage or during the subsistence of the marriage, so that the wife may terminate the marriage by pronouncing a *Talaq* strictly in accordance with the terms of such delegation;
- (xvii) **“Talaq”** means the termination of the marriage according to Islamic Law, by the husband or his agent or intermediary, through the use or pronouncement of specific words which indicate a clear intention to terminate the marriage; and includes the *Tafwid ul Talaq*;
- (xviii) **“this Act”** includes the regulations.

Application of this Act

- 2. The provisions of this Act -
 - (a) shall apply to an Islamic marriage contracted before or after the commencement of this Act;
 - (b) shall apply to an existing civil marriage insofar as the spouses thereto have elected in the prescribed manner to cause the provisions of this Act to apply to the consequences of their marriage, and otherwise to the extent specified in section 14; and
 - (c) does not apply to a civil marriage solemnised under the Marriage Act, 1961 (Act No. 25 of 1961) before or after the commencement of this Act.

Equal status and capacity of spouses

3. A wife in an Islamic marriage is equal to her husband in human dignity and has, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

Islamic marriages

4. (1) An Islamic marriage entered into before the commencement of this Act and existing at the commencement of this Act is for all purposes recognised as a valid marriage.

(2) An Islamic marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a valid marriage.

(3) If a husband is a spouse in more than one Islamic marriage, all Islamic marriages entered into by him before the commencement of this Act, are for all purposes recognised as valid marriages.

(4) If a husband is a spouse in more than one Islamic marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as valid marriages.

(5) If a husband is a spouse in an existing civil marriage, and in an Islamic marriage or marriages entered into before the commencement of this Act, such Islamic marriage or marriages are for all purposes recognised as valid marriages.

Requirements for validity of Islamic marriages

5. (1) For an Islamic marriage entered into after the commencement of this Act to be valid the prospective spouses-

- (a) must both have attained the age of 18 years, and
- (b) must both consent to be married to each other.

(2) No spouse in an Islamic marriage recognised in terms of this Act may, after the commencement of this Act, enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961) during the subsistence of such Islamic marriage.

(3) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her guardian, must consent to the marriage.

(4) If the consent of the parent or guardian as referred to in subsection (3) cannot be obtained, the provisions of section 25 of the Marriage Act, 1961, applies.

(5) Despite the prohibition in subsection (1)(a), the Minister or any person or body authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into an Islamic marriage if the Minister or the said person or body considers such marriage desirable and in the interests of the parties in question.

(6) Permission granted in terms of subsection (5) shall not relieve the parties to the proposed marriage from the obligation to comply with any other requirements prescribed by law.

(7) If a person under the age of 18 years has entered into an Islamic marriage without the written permission of the Minister or person or body authorised by him or her, the Minister or such person or body may, if he, she or it considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be, for all purposes, a valid Islamic marriage.

(8) Subject to the provisions of subsections (5) and (6), section 24A of the Marriage Act, 1961, applies to the Islamic marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(9) The prohibition of an Islamic marriage between persons on account of their relationship by blood or affinity or fosterage, or any other reason, is determined by Islamic law.

Registration of Islamic marriages

6. (1) An Islamic marriage -

- (a) entered into before the commencement of this Act, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or
- (b) entered into after the commencement of this Act, must be registered as prescribed at the time of the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(2) It shall be the duty of the parties to the marriages contemplated in paragraphs (a) and (b) of subsection (1) to cause such marriages to be registered.

(3) No marriage officer shall register any marriage unless –

- (a) each of the parties in question produces to the marriage officer his or her identity document issued under the provisions of the Identification Act, 1986 (Act No. 71 of 1986);
- (b) each of such parties furnishes to the marriage officer the prescribed affidavit; or
- (c) one of such parties produces his or her identity document referred to in paragraph (a) to the marriage officer and the other furnishes to the marriage officer the affidavit referred to in paragraph (b).

(4) The marriage officer must –

- (a) if satisfied that the spouses concluded a valid Islamic marriage, record the identity of the spouses, the date of the marriage, the Dower agreed to, whether payable immediately or deferred in full or part, and any other particulars prescribed, and must register the marriage in accordance with this Act and the regulations as prescribed;
- (b) issue to the spouses a certificate of registration, bearing the prescribed particulars; and
- (c) forthwith transmit the relevant records to a regional or district representative designated as such under section 21(1) of the Identification Act, 1986.

(5) An Islamic marriage shall be contracted in accordance with the formulae prescribed in Islamic law, including *Tazawwajtuha* and *Nakahtuha* (“I have married her”). Such a marriage shall be concluded by the parties or their proxies in the presence of a marriage officer. A marriage officer in so concluding an Islamic marriage shall, after the

commencement of this Act, cause such marriage to be registered in accordance with the provisions of subsection (4).

(6) If for any reason an Islamic marriage has not been registered, any person who satisfies a marriage officer that he or she has a sufficient interest in the matter may apply to the marriage officer in the prescribed manner to enquire into the existence of the marriage.

(7) If the marriage officer is satisfied that a valid Islamic marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(8) If the marriage officer is not satisfied that a valid Islamic marriage was entered into by the spouses, he or she must refuse to register the marriage.

(9) A court may, upon application made to that court, order -

- (a) the registration of any Islamic marriage; or
- (b) the cancellation or rectification of any registration of a Islamic marriage effected by a marriage officer.

(10) A certificate of registration of an Islamic marriage issued under this section or any other law providing for the registration of Islamic marriages constitutes *prima facie* proof of the existence of the Islamic marriage and of the particulars contained in the certificate.

(11) Failure to register an Islamic marriage does not, by itself, affect the validity of that marriage.

Proof of age of parties to proposed marriage

7. If parties appear before a marriage officer for the purpose of contracting a marriage with each other and such marriage officer reasonably suspects that either of them is of an age which debars him or her from contracting a valid marriage without the consent or permission of some other person, he may refuse to solemnize a marriage between them unless he is furnished with such consent or permission in writing or with satisfactory proof showing that the party in question is entitled to contract a marriage without such consent or permission.

Proprietary consequences of Islamic marriages and contractual capacity of spouses

8. (1) An Islamic marriage entered into before or after the commencement of this Act shall be deemed to be a marriage out of community of property, unless the proprietary consequences governing the marriage are regulated, by mutual agreement of the spouses, in an ante-nuptial contract which shall be registered in the Deeds Registry –

- (a) in the case of a marriage entered into before the commencement of this Act, within six months from the date of commencement of this Act; and
- (b) in the case of a marriage entered into after the commencement of this Act, within six months from the date of execution of the contract

or within such extended period as the court may on application allow.

(2) Notwithstanding any provision to the contrary contained in any other law, an ante-nuptial contract referred to in subsection (1) need not be attested by a notary.

(3) Spouses in an Islamic marriage entered into before or after the commencement of this Act may jointly apply to a court for leave to change the matrimonial property system, which applies to their marriage or marriages and the court may, if satisfied that -

- (a) there are sound reasons for the proposed change;
- (b) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
- (c) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

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

(5) Where the husband is a spouse in an existing civil marriage, and in an Islamic marriage, all his existing spouse or spouses must be joined in such proceedings.

(6) A husband in an Islamic marriage who wishes to enter into a further Islamic marriage with another woman after the commencement of this Act must make an application to the court for permission to do so, and to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection (6), the court may -

- (a) grant permission on the basis of Islamic law if the court is satisfied that -
 - (i) the husband has sufficient financial means;
 - (ii) there is no reason to believe, if permission is granted, that the husband shall not act equitably towards his spouses;
 - (iii) there will be no prejudice to existing spouses;
- (b) in the case of an existing marriage which is in community of property or which is subject to the accrual system -
 - (i) terminate the matrimonial property system which is applicable to that marriage; and
 - (iv) order an immediate division of the joint estate concerned in equal shares, or on such other basis as the court may deem just;
 - (v) order the immediate division of the accrual concerned in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or on such other basis as the court may deem just;
- (c) make such order in respect of the prospective estate of the spouses concerned as is mutually agreed, or, failing any agreement, the marriage shall be deemed to be out of community of property, unless the court for compelling reasons decides otherwise;
- (d) grant the order subject to any condition it may deem just, or refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsections (3) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

(10) A husband who enters into a further Islamic marriage, whilst he is already married, without the permission of the court, in contravention of subsection (6) shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.

Dissolution of Islamic marriages

9. (1) Notwithstanding the provisions of section 3(a) of the Divorce Act, 1979, (Act No. 70 of 1979), or anything to the contrary contained in any law or the common law, an Islamic marriage may be dissolved on any ground permitted by Islamic Law. The provisions of this section shall also apply, with the changes required by the context, to an existing civil marriage insofar as the parties thereto have in the prescribed manner elected to cause the provisions of this Act to apply to the consequences of their marriage.

(2) In the case of *Talaq* the following shall apply:

- (a) The husband shall be obliged to cause an irrevocable *Talaq* to be registered immediately, but in any event, by no later than seven days after its pronouncement, with a marriage officer, in the presence of the wife or her duly authorised representative and two competent witnesses.
- (b) If the presence of the wife or her duly authorised representative cannot be secured for any reason, then the marriage officer shall register the irrevocable *Talaq* only in the event that the husband satisfies the marriage officer that due notice in the prescribed form of the intended registration was served upon her by the sheriff or by substituted service.
- (c) The provisions of paragraphs (a) and (b) shall apply, with the changes required by the context, where the husband has delegated to the wife the right of pronouncing a *Talaq*, and the wife has pronounced an irrevocable *Talaq* (*Tafwid ul Talaq*).
- (d) Any spouse who knowingly and wilfully fails to register the irrevocable *Talaq* in accordance with this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding R50 000.
- (e) If a spouse disputes the validity of the irrevocable *Talaq*, according to Islamic Law, the marriage officer shall not register the same, until the dispute is resolved, if the marriage officer is of the opinion that the dispute relating to the validity of the irrevocable *Talaq* is not frivolous or vexatious and has otherwise been fairly raised.
- (f) A spouse shall, within fourteen days, as from the date of the registration of the irrevocable *Talaq* institute legal proceedings in a competent court for a decree confirming the dissolution of the marriage by way of *Talaq*. The action, so instituted,

shall be subject to the procedures prescribed from time to time by the applicable rules of court. This does not preclude a spouse from seeking the following relief -

- (i) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
 - (ii) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.
- (g) An irrevocable *Talaq* taking effect as such prior to the commencement of this Act shall not be required to be registered in terms of the provisions of this Act.

(3) A court must grant a decree of divorce in the form of a *Faskh* on any ground which is recognised as valid for the dissolution of marriages under Islamic Law, including the grounds specified in the definition of *Faskh* in section 1. The wife shall institute action for a decree of divorce in the form of *Faskh* in a competent court, and the procedure applicable thereto shall be the procedure prescribed from time to time by rules of court, including appropriate relief *pendente lite*, referred to in subsection (2)(f). The granting of a *Faskh* by a court shall have the effect of an irrevocable *Talaq*.

(4) The spouses who have effected a *Khul'a* shall personally and jointly appear before a marriage officer and cause same to be registered in the presence of two competent witnesses. The marriage officer shall register the *Khul'a* as one irrevocable *Talaq*, in which event the provisions of subsection (2)(f) will apply with the changes required by the context.

(5) In the event of a dispute between the spouses with regard to the amount of compensation in the case of *Khul'a*, the court may fix such amount as it deems just and equitable having regard to all relevant factors.

(6) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) and sections 6(1) and (2) of the Divorce Act, 1979 (Act No. 70 of 1979), relating to safeguarding the welfare of any minor or dependent child of the marriage concerned, apply to the dissolution of an Islamic marriage under this Act.

(7) A court granting or confirming a decree for the dissolution of an Islamic marriage -

- (a) has the powers contemplated in sections 7(1), 7(7) and 7(8) of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
- (b) may, if it deems just and equitable, on application by one of the parties to the marriage, and in the absence of any agreement between them regarding the division of their assets, order that such assets be divided equitably between the parties, where-
 - (i) a party has in fact assisted, or has otherwise rendered services, in the operation or conduct of the family business or businesses during the subsistence of the marriage; or
 - (ii) the parties have contributed, during the subsistence of the marriage, to the maintenance or increase of the estate of each other, or any one of them, to the extent that it is not practically feasible or otherwise possible to accurately quantify the separate contributions of each party.
- (c) must, in the case of a husband who is a spouse in more than one Islamic marriage, take into consideration all relevant factors including the sequence of the marriages, any contract, agreement or order made in terms of section 8(3) and (7).
- (d) may order that any person who in the court's opinion has a sufficient Interest in the matter be joined in the proceedings;
- (e) may make an order with regard to the custody or guardianship of, or access to, any minor child of the marriage, having regard to the factors specified in section 11; and
- (f) must, when making an order for the payment of maintenance, take into account all relevant factors.

Age of majority

10. For the purposes of this Act, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No. 57 of 1972).

Custody of and access to minor children

11. (1) In making an order for the custody of, or access to a minor child, the court shall at all times have regard to the welfare and best interests of the child as the paramount consideration.

(2) Unless the court directs otherwise having regard to the welfare and best interests of the child -

- (a) the custody of a male child until he reaches the age of nine years, and the custody of a female child until she attains puberty shall vest in the mother of that child;
- (b) the male child, when reaching the age of nine years, and the female child when attaining puberty, shall choose the parent with whom he or she wishes to be placed in custody;
- (c) the non-custodian parent shall enjoy reasonable access to the child at regular intervals, but at least once a week.

(3) Despite subsection (2), but subject to subsection (1), the court shall deprive a parent of custody, or, otherwise, shall not grant custody to that parent, if the court is at any time of the opinion that the custody of the child by that parent –

- (a) has exposed, or will expose, the child to circumstances which may seriously harm the physical, mental, moral, spiritual and religious well-being and development of the child;
- (b) has resulted, or will result, in the child being in a state of physical or mental neglect for any reason.

(4) In the absence of both parents, or, failing them, for any reason, but subject to subsection (1), the court must, in awarding or granting custody of minor children, award or grant custody to such person as the court deems appropriate, in all the circumstances.

(5) An order in regard to the custody or access to a child, made in terms of this Act, may at any time be rescinded or varied, or, in the case of access to a child, be suspended by a court if the court finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), the court shall consider the report and recommendations of the Family Advocate concerning the welfare of minor children, before making the relevant order for variation, rescission or suspension, as the case may be.

Maintenance

12. (1) The provisions of the Maintenance Act, 1998 (Act No. 99 of 1998) shall apply, with the changes required by the context, in respect of the duty of any person to maintain any other person. Without derogating from the provisions of that Act, the following provisions shall apply:

(2) Notwithstanding the provisions of section 15 of the Maintenance Act, 1998, or, the common law, the maintenance court shall, in issuing a maintenance order, or otherwise in determining the amount to be paid as maintenance, take into consideration that—

- (a) the husband is obliged to maintain his wife during the subsistence of an Islamic marriage according to his means and her reasonable needs;
- (b) the father is obliged to maintain his male child until the age of majority, or, until he is able to become self-supporting, whichever is earlier, and he is obliged to maintain his female child until she is married;
- (c) in the case of a dissolution by divorce of an Islamic marriage -
 - (i) the husband is obliged to maintain the wife for the mandatory waiting period of *Iddah*;
 - (ii) where the wife has custody in terms of section 11, the husband is obliged to maintain the wife, including the provision of separate residence, for the period of such custody only;
 - (iii) the wife shall be separately entitled to maintenance for a breastfeeding period of two years calculated from date of birth of an infant;
 - (iv) the husband's duty to support a child born of such marriage includes the provision of food, clothing, separate accommodation, medical care and education.
- (d) a major child is obliged to maintain his or her needy parents.

(3) Any amount of maintenance so determined shall be such amount as the maintenance court may consider fair and just in all the circumstances of the case.

(4) A maintenance order made in terms of this Act may at any time be rescinded or varied or suspended by a court if the court finds that there is sufficient reason therefor.

Assessors

13. (1) If any dispute is referred to a court for adjudication, the following provisions shall apply -

- (a) the court shall be assisted by two Muslim assessors who shall have specialised knowledge of Islamic Law;
- (b) the assessors shall be appointed by the Minister by proclamation in the Gazette and shall hold office for five years from the date of the relevant proclamation: Provided

that the appointment of any such assessor may at any time be terminated by the Minister for any valid reason;

- (c) any person so appointed shall be eligible for reappointment for such further period or periods as the Minister may think fit.

(2) The decision of the court on any question arising for decision before the court, shall be decided by the majority, and the court and the assessors shall give written reasons for their decision.

(3) Any decision of the court shall be subject to appeal in accordance with the applicable Rules of Court, save that the assessors shall participate in any application for leave to appeal, where such leave is necessary.

Dissolution of existing civil marriage

14. (1) In the event of a spouse to an existing civil marriage instituting a divorce action in terms of the Divorce Act, 1979 (Act No. 70 of 1979), after the commencement of this Act, the court shall not dissolve the civil marriage by the grant of a decree of divorce until the court is satisfied that the accompanying Islamic marriage has been dissolved.

(2) In the event of the husband refusing, for any reason, to pronounce an irrevocable *Talaq*, the wife to the accompanying Islamic marriage shall be entitled in the same proceedings to make an application for a decree of *Faskh* for the purposes of dissolving such Islamic marriage, in which event the provisions of this Act shall apply, with the changes required by the context.

(3) Where in addition to the existing civil marriage, the husband has concluded a further Islamic marriage or marriages registrable under this Act, the husband's existing spouse or spouses must be joined in the divorce action contemplated in subsection (1).

Regulations

15. (1) The Minister of Justice, in consultation with the Minister, may make regulations -

- (a) relating to -

- (i) the requirements to be complied with and the information to be furnished to a Marriage officer in respect of the registration and dissolution of an Islamic marriage;
 - (ii) the manner in which a Marriage officer must satisfy himself or herself as to the existence or the validity of a Islamic marriage;
 - (iii) the manner in which any person may participate in the proof of the existence or in the registration of any Islamic marriage;
 - (iv) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
 - (v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of Islamic marriages or of any document prescribed in terms of the regulations;
 - (vi) any matter that is required or permitted to be prescribed in terms of this Act; and
 - (vii) any other matter which is necessary or expedient to provide for the effective registration of Islamic marriages or the efficient administration of this Act; and
- (b) prescribing the fees payable in respect of the registration of an Islamic marriage and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Amendment of laws

16. (1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

- “(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the

matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or, is governed in terms of section 8 of the Islamic Marriages Act, 20.. .”

(2) Section 45*bis* of the Deeds Registries Act, 1937, is hereby amended -

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses;” and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

“(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 198), or under sections 8 or 9 of the Islamic Marriages Act, 20.. , as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares;”.

(3) Section 1 of the Intestate Succession Act, 1987 (Act No. 81 of 1987) is hereby amended by the addition to subsection (4) of the following paragraph:

“(g) “spouse” shall include a spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply -

- (i) for the purposes of subsection (1)(c), such surviving spouse shall inherit the intestate estate in equal shares;
- (ii) for the purposes of subsection (1)(c), such surviving spouses shall each inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section."

(4) Section 1 of the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) is hereby amended by the insertion after the definition of "survivor" of the following definition:

"Marriage" shall include an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion."

Short title and commencement

17. This Act is called the Islamic Marriages Act, 20.. , and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

REPUBLIC OF SOUTH AFRICA

RECOGNITION OF RELIGIOUS MARRIAGES BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary
of Bill published in Government Gazette No. of) (The English text is the
official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

[B - 2005]

BILL

To provide for the recognition of religious marriages; to regulate the registration of religious marriages; to provide for the equal status and capacity of spouses in religious marriages; to provide for the making of regulations; to amend certain provisions of the Deeds Registries Act, and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:—

ARRANGEMENT OF SECTIONS

1. Definitions
2. Recognition of religious marriages
3. Requirements for validity of religious marriages
4. Age of majority
5. Designation of marriage officers and appointment of registering officers
6. Registration of religious marriages
7. Determination of age of minor
8. Equal status and capacity of spouses
9. Proprietary consequences of religious marriages and contractual capacity of spouses
10. Dissolution of religious marriages
11. Change of marriage system
12. Offences and penalties
13. Regulations
14. Amendment of laws
15. Transitional provisions
16. Short title and commencement

Definitions

1. In this Act, unless the context otherwise indicates—
- "Marriage Act"** means the Marriage Act, 1961 (Act No. 25 of 1961);
- "marriage officer"** means a person designated as a marriage officer for the purposes of this Act by the Minister or an officer acting under the written authorisation of the Minister under section 5;
- "Minister"** means the Minister of Home Affairs;
- "prescribed"** means prescribed by regulation made under section 13;
- "Recognition of Customary Marriages Act"** means the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);
- "registering officer"** means a person appointed as a registering officer for purposes of this Act by the Minister or an officer acting under the written authorisation of the Minister under section 5;
- "religious marriage"** means a marriage concluded in accordance with the tenets of a religion;
- "religious tenets"** means the rites, formularies, doctrines or discipline of a religion;
- "this Act"** includes the regulations.

Recognition of religious marriages

2. (1) A religious marriage which complies with section 3 is a valid marriage and is recognised as a marriage for all purposes.
- (2) If a person is a spouse in more than one religious marriage, all such marriages entered into which comply with this Act are recognised as marriages for all purposes.

Requirements for validity of religious marriages

3. (1) For a religious marriage to be valid—
- (a) the prospective spouses—
- (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other in terms of their religion; and
- (b) the marriage must be entered into and celebrated in accordance with the spouses' religious tenets and solemnised by a marriage officer.
- (2) A spouse in a religious marriage is prevented from entering into a

marriage under the Marriage Act 1961 or the Recognition of Customary Marriages Act 1998 during the subsistence of such religious marriage, except as provided for in section 1(1).

Age of majority

4. (1) (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act 1961 applies.

(2) (a) Despite subsection (1)(a), the Minister or any officer authorised in writing by him or her, may grant written permission to a person under the age of 18 years to enter into a religious marriage if the Minister or that officer considers such marriage desirable and in the interests of the parties in question.

(b) The permission contemplated in paragraph (a) does not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a religious marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if—

- (i) he or she considers the marriage to be desirable and in the interests of the parties in question; and
- (ii) the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid religious marriage.

(3) Subject to subsection (4), section 24A of the Marriage Act, 1961 applies to the religious marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(4) The prohibition of a religious marriage between persons on account of their relationship by blood or affinity is determined by the religious tenets of the spouses' religion.

Designation of marriage officers and appointment of registering officers

5. (1) The Minister or an officer authorised by him or her in writing, may designate a religious leader or a minister of a religion as a marriage officer for the purpose of solemnising a religious marriage according to the tenets of that religion.

(2) A designation under subsection (1) may limit the authority of a religious leader or a minister of a religion to solemnise marriages—

- (a) within a specified area;
- (b) for a specified period.

(3) A designation under subsection (1) must—

- (a) be in writing;
- (b) specify the date on which it becomes effective; and
- (c) specify any limitation to which it is subject.

(4) The Minister or an officer authorised by him or her, in writing, may appoint registering officers for the purpose of this Act and may limit the authority of a registering officer to the registration of religious marriages within a specified area.

Registration of religious marriages

6. (1) Either spouse may apply to a registering officer in the prescribed form for the registration of his or her religious marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(2) Each spouse must submit a prescribed affidavit to the registering officer declaring whether or not one of the spouses is in more than one subsisting religious marriage.

(3) A registering officer must, if satisfied that the spouses concluded a valid religious marriage—

- (a) register the marriage by recording—
 - (i) the identity of the spouses;
 - (ii) the date of the marriage;
 - (iii) whether there are other subsisting religious marriages; and
 - (iv) any other prescribed particulars; and
- (b) issue to the spouses a certificate of registration, reflecting the prescribed particulars.

(4) (a) If a religious marriage is not registered, any person who satisfies a registering officer that he or she has sufficient interest in the matter may apply to the registering officer in the prescribed manner to investigate the existence of the marriage.

(b) If the registering officer is satisfied that a valid religious marriage exists between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (3).

(5) If a registering officer is not satisfied that the spouses entered into a valid religious marriage, he or she must refuse to register the marriage.

(6) A court may, upon application made to that court and upon investigation instituted by that court, order the—

- (a) registration of any religious marriage;
- (b) rectification of any registration of a religious marriage effected by a registering officer; or
- (c) cancellation of any registration of a religious marriage effected by a registering officer.

(7) A certificate of registration of a religious marriage issued under this section constitutes sufficient proof of the existence of the religious marriage and of the particulars contained in the certificate.

(8) Failure to register a religious marriage does not affect the validity of that marriage.

Determination of age of minor

7. (1) If the age of a person, who allegedly is a minor, is uncertain or is in dispute, and that person's age is relevant for purposes of this Act, the registering officer may in the prescribed manner submit the matter to a magistrate.

(2) The magistrate must determine, in the prescribed manner, the person's age and issue the prescribed certificate in regard thereto, which constitutes proof of the person's age.

Equal status and capacity of spouses

8. In addition to any rights and powers that a wife in a religious marriage has at common law, that wife has, on the basis of equality with her husband, but subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire and dispose of assets, the right to enter into contracts and to litigate.

Proprietary consequences of religious marriages and contractual capacity of spouses

9. (1) Subject to this section, the proprietary consequences of a religious marriage are governed by the tenets of that religion.

(2) Spouses in a religious marriage may specifically exclude the proprietary consequences contemplated in subsection (1) in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any religious marriage where the spouses opt for community of property as their matrimonial property system.

(4) Spouses in a religious marriage entered into before the commencement of this Act may apply jointly to a court for leave to change the matrimonial property system which applies to their marriage or marriages.

(5) The court considering an application made to it under subsection (4) may, if satisfied that—

- (i) there are sound reasons for the proposed change;
- (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice and Constitutional Development by notice in the *Gazette*; and
- (iii) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

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

} poly-marriage

Dissolution of religious marriages

10. (1) A religious marriage registered under this Act may only be dissolved by a court.

(2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if the court is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(3) If it appears to a court in divorce proceedings that either of the spouses, by reason of the tenets of their religion, is not free to remarry unless the marriage is also dissolved in accordance with such religious tenets, the court may compel the spouse preventing the religious dissolution of the marriage to take all the necessary steps to have that marriage

dissolved in accordance with the religious tenets where after it may grant a decree of divorce or the court may make any other order that it considers just.

(4) The Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), apply to the dissolution of a religious marriage.

- (5) A court granting a decree for the dissolution of a religious marriage—
- (a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);
 - (b) must, in the case of a husband who is a spouse in more than one religious marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 9(4) and (5), and must make an order that it considers just;
 - (c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;
 - (d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and
 - (e) may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with the religious tenets of the spouses.

Marriage in terms of Marriage Act

11. (1) Parties to a religious marriage may contract a marriage with each other under the Marriage Act if neither of them is a spouse in a subsisting religious marriage with any other person.

(2) If a marriage is concluded as contemplated in subsection (1) the Marriage Act applies.

(3) A spouse in a marriage entered into under the Marriage Act is, during the subsistence of such marriage, prevented from entering into any other marriage.

Offences and penalties

12. (1) Any marriage officer who purports to solemnise a marriage which he or she is not authorised under this Act to solemnise or which to his or her knowledge is prohibited is guilty of an offence and liable on conviction to a fine or to imprisonment for a period of 12 months or to both a fine and such imprisonment.

(2) Any person who purports to be a marriage officer and solemnises a marriage which he or she is not authorised under this Act to solemnise, is guilty of an offence

and liable on conviction to a fine or to imprisonment for a period of 12 months or to both a fine and such imprisonment.

(3) Subsection (1) and (2) do not apply to a marriage solemnised in accordance with the tenets of any religion, if such ceremony does not purport to effect a valid marriage.

(4) A spouse who fails to disclose the existence of subsisting marriages in the manner contemplated in section 6(2) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period of or to both a fine and such imprisonment.

(5) A person who knowingly submits false information to the registering officer is guilty of an offence and liable on conviction to a fine or to imprisonment for a period of or to both a fine and such imprisonment.

Regulations

13. (1) The Minister may, in consultation with the Minister of Justice and Constitutional Development, make regulations—

(a) relating to—

- (i) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a religious marriage;
- (ii) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a religious marriage;
- (iii) the manner in which a person with sufficient interest in the existence or registration of a religious marriage may participate in the proof thereof;
- (iv) the manner in which a registering officer may submit a matter to a magistrates' court to determine a person's age;
- (v) the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;
- (vi) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of religious marriages or of any document prescribed in terms of the regulations;
- (vii) any matter that is required or permitted to be prescribed in terms of this Act; and
- (viii) any other matter which is necessary or expedient to provide for the effective registration of religious marriages or the efficient administration of this Act; and

(b) prescribing the fees payable in respect of the registration of a religious marriage and the issuing of any certificate in respect thereof.

(2) Regulations made under subsection (1) must be submitted to Parliament

before publication in the *Gazette*.

(3) Regulations made under subsection (1) which may result in financial expenditure for the State and regulations made under subsection (1)(b) must be made in consultation with the Minister of Finance.

(4) Regulations made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.

Amendment of laws

14. (1) Section 17 of the Deeds Registries Act, 1937 (Act No. 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

"(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998 or by religious tenets of the spouses in terms of the Recognition of Religious Marriages Act, 2005."

(2) Section 45bis of the Deeds Registries Act, 1937, is hereby amended—

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorisation, under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), [or under section 7 of the Recognition of Customary Marriages Act, 1998 or under section 9 of the Recognition of Religious Marriages Act, 2005 as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,"; and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

"(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorisation under section 20 or 21(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), [or under section 7 of the Recognition of Customary Marriages Act, 1998, or under section 9 of the Recognition of Religious Marriages Act, 2005 as the case may be, in terms of which the property, lease or bond is

awarded to both spouses in undivided shares.”.

Transitional provisions

15. (1) Either spouse in a religious marriage, which is a valid marriage in terms of the tenets of their religion and existing at the time of commencement of this Act, may apply to a registering officer to register that marriage and must produce proof to the satisfaction of the registering officer of the existence of such a marriage.

(2) If the registering officer is satisfied that a valid religious marriage exists between the spouses, he or she must register the marriage and issue to the spouses a certificate of registration, bearing the prescribed particulars.

(3) Section 6(7) applies to a certificate issued under this section.

(4) The application for registration of a religious marriage contemplated in subsection (1) must be made within or such longer period as the Minister may determine.

Short title and commencement.

16. This Act is called the Recognition of Religious Marriages Act, 2005, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.