

# Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages

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## ABSTRACT

This article provides an overview of the South African law reform process regarding the legal recognition of Muslim marriages in the context of South Africa's constitutional commitments. With reference to the proposed draft legislation, it explores the conflict between the right to freedom of religion and women's rights to equality that arises as a result of the proposed recognition. Despite the conflict, it is argued that legal recognition of Muslim marriages is necessary for the protection of women's rights. After considering the ways in which the conflict has been dealt with at legislative and judicial levels, suggestions are offered to overcome the conflict so that women's rights to equality are not compromised.

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## I. INTRODUCTION

Religious diversity is a key feature of South Africa's multicultural society.<sup>1</sup> This diversity derives from the colonial period that brought a host of religions from other countries through an influx of colonized servants, political prisoners, convicts, slaves, indentured labor, missionaries, farmers, and trades people. Religious communities that were not European or white were marginalized and relegated as the "other." Apartheid subsequently institutionally entrenched different forms of discrimination against those who were not classified as "white." Although the most visible form was racial, others included sex/gender-based discrimination and discrimination against non-Christian communities.

Against this background, South Africa as a constitutional democracy recognizes, protects, and seeks to promote the norms of equality, including sex/gender equality and religious freedom. In respect of the latter, a legislative process is unfolding to afford legal recognition to Muslim marriages by seeking to protect its religious features. However, this attempt to promote religious freedom inevitably entails a clash with women's rights to sex/gender equality.

After a brief description of South African Muslim communities and Muslim Personal Law (MPL) in Section II, and an examination of judicial and legislative responses to the legal status of Muslim marriages in South Africa in Sections III and IV, this article explores the conflict between the right to freedom of religion and women's rights to equality with reference to the law reform process regarding legal recognition of Muslim marriages in Section V. Finally, Sections VI and VII offer suggestions for overcoming the conflict without negating women's rights to equality.

## II. MUSLIM COMMUNITIES AND MPL IN SOUTH AFRICA

The Muslim communities in South Africa comprise 1.5 percent of the total population, thereby representing the largest religious minority in the country.<sup>2</sup> They do not exist as homogeneous entities.<sup>3</sup> In fact, MPL, which is a

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1. South Africa has a multitude of religious communities. The dominant religion is Christianity, which comprises 78 percent of the total population of 44,819,778. The Christian communities are further subdivided into about 15 denominations. Several minority religions co-exist with the majority Christian religion. They include Islam (1.5 percent); Hinduism (1.2 percent); African traditional belief systems (0.5 percent); Judaism (0.2 percent); and other faiths (0.6 percent). Those without any religious affiliation or who refuse to comment about their religious affiliation comprise 15.1 percent of the total population. Other forms of diversity relate to race, language, ethnicity/culture, and gender. Statistics South Africa, Primary Tables South Africa: Census 1996 and 2001 Compared 11–12, 27–28 (2004), available at [www.statsaa.gov.za/census01/html/RSAPrimary.pdf](http://www.statsaa.gov.za/census01/html/RSAPrimary.pdf).
  2. *Id.* at 27–28.
  3. Ebrahim Moosa notes that "the religious and political tapestry of the Muslim community in South Africa is rich, diverse and differentiated." Ebrahim Moosa, *Prospects for Muslim*

*Shari'a* (Islamic Law)<sup>4</sup> based system of family law, encompassing marriage, divorce, polygyny, custody, guardianship, and inheritance,<sup>5</sup> is practiced differently in the communities. Most of these communities follow the *Sunni* tradition<sup>6</sup> through the Hanafi and Shafi' schools of thought and to a lesser extent through the Maliki school of thought.<sup>7</sup> There are also smaller numbers who follow the *Ja'fari* school of thought, which is located within the *Shi'a* tradition.<sup>8</sup> The heterogeneity within these communities is further linked to the impact of colonialism, which brought Muslims to South Africa from places such as India, Malaysia, and Indonesia.<sup>9</sup> The way in which these communities practice Islam and MPL is a reflection of centuries of Indian, Malaysian, and Indonesian customs impacting on their religious practices. Interactions between different cultural communities in the provinces have also influenced and shaped their religious practices.

The *'ulama* (Muslim quasi-judicial bodies) preside over matters affecting the Muslim communities that range from marriage, divorce, custody, and access of children, to what foods are permissible and impermissible.<sup>10</sup> Although their decisions do not have any legal weight or enforceability, they carry substantial moral weight with members of the communities, many

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*Law in South Africa: A History and Recent Developments*, 3 Y.B. ISLAMIC & MIDDLE EASTERN L. 130, 131 (1996).

4. Primary sources of *Shari'a* comprise *Qur'an* and *Sunnah*. *Qur'an*, a religious text, is the first primary source considered by Muslims to be God's literal voice. *Sunnah* is the second primary source and refers to the alleged saying and practices of the Prophet Muhammad (p.b.u.h.) reported by generations of followers. Other sources include *ijma*, *qiyas*, and *ijtihad* as the third, fourth, and fifth secondary sources respectively. *Imja* refers to consensus among Muslim jurists regarding questions of *Shari'a*. *Qiyas* refers to analogical deduction. *Ijtihad* refers to exercising of independent juristic reasoning. SHAHEEN SARDAR ALI, GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? 19–23 (2000).
5. Najma Moosa, *Muslim Personal Law Affecting Children: Diversity, Practice and Implications for a new Children's Code for South Africa*, 115 S. Afr. L.J. 479, 479 (1998).
6. *Sunni* tradition is represented by four schools of thought, namely *Shafi'i*, *Hanafi*, *Maliki*, and *Hanbali*, named after eighth century AD Muslim jurists whose conservative, male-centred interpretations and applications of *Qur'an* and *Sunnah* inform present mainstream understandings of *Shari'a*. See *id.* at 480.
7. Moosa, *supra* note 3, at 131.
8. *Id.*
9. GOVERNMENT COMMUNICATION AND INFORMATION SYSTEM, SOUTH AFRICA YEARBOOK 2003/2004, at 1, 7 (2004). Between the mid-seventeenth and mid-nineteenth centuries, Malay Muslims may have entered the Cape as servants of their Dutch colonial masters. During that period, Southeast Asian Muslims were also brought into South Africa as political prisoners, convicts, and slaves. Thereafter, Muslims from India were brought into the country as indentured labor, and much later they came voluntarily from India. Through conversions to Islam, the Muslim communities also comprise members of indigenous African communities and the white communities. *Id.*; Soraya Dadoo, *South Africa: Many Muslims, One Islam*, 30 June 2003, available at [www.islamonline.net/English/artculture/2003/06/article08.shtml#1](http://www.islamonline.net/English/artculture/2003/06/article08.shtml#1).
10. The *'ulama* bodies include the Muslim Judicial Council (Western Cape), *Jamiatul 'Ulama* Transvaal (Gauteng), *Jamiatul 'Ulama* Natal (Kwa-Zulu Natal), *Majlisul 'Ulama* (Eastern Cape), *Majlis Ashura al-Islami*, Islamic Council of South Africa, *Sunni Jamitul 'Ulama* of South African, *Sunni 'Ulama* Council. Moosa, *supra* note 3, at 134.

of whom willingly abide by them. They are headed by conservative male clergy whose decisions reflect a traditional, male-centered understanding of *Shari'a*, which results in discriminatory treatment that negatively impacts women. For example, women are often simply informed that their husbands have issued *talaq* against them, and members of the *'ulama* tend to confirm the *talaqs* without consulting the wives.<sup>11</sup> This is reinforcement of the traditional approach to Muslim divorces that regards *talaq*<sup>12</sup> as the exclusive preserve of the husband, which does not require the wife's consent. On the contrary, a wife needs the *'ulama*'s permission to obtain a *faskh*<sup>13</sup> to release her from the marriage.<sup>14</sup> However, it appears that few women apply for *faskh* because the process can be time consuming, difficult, expensive, and sometimes humiliating.<sup>15</sup>

The heterogeneity of the Muslim communities is also evidenced by the existence of more progressive-minded Muslims, some of whom have organized themselves into nongovernmental organizations.<sup>16</sup> However, they comprise a minority, and their approaches have not been incorporated into the mainstream thinking with regard to MPL and other *Shari'a*-related issues.

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11. This observation was noted by the Commission on Gender Equality (CGE), which conducted about four focus groups with women in Cape Town during 2000. The experiences and concerns that were raised at those focus groups were included in a CGE submission to the South African Law Commission (SALC) Project Committee on its Issue Paper 15 dealing with Islamic Marriages and Related Matters. Commission on Gender Equality, *Submission on Issue Paper 15: Islamic Marriages and Related Issues* 9 (2000) [hereinafter CGE Submission on Issue 15].
  12. The traditional approach to *talaq* considers it to be the exclusive right of a man to extra-judicially and unilaterally repudiate his wife through three utterances of divorce without having to provide any grounds. IBN RUSHD, *THE DISTINGUISHED JURIST'S PRIMER: VOLUME II*, at 72, 97, 119 (Imran Ahsan Khan Nyazee, trans., 1996).
  13. *Faskh* is traditionally understood as fault-based judicial dissolution of the marriage granted at the discretion of the Islamic law judge upon the application of the wife subject to her forfeiting her *mahr* or paying some form of compensation to her husband. Grounds include: incompatibility, apostasy, cruelty, prolonged absence or imprisonment of husband, disability, and failure to maintain. ABDUR RAHMAN I. DOI, *SHARI'AH: THE ISLAMIC LAW* 170–72 (1984); *Qur'an* 2:229.
  14. A wife can also exit the marriage after obtaining her husband's and/or the *'ulama*'s permission through the granting of *khula'* or *tafwid al-talaq*. *Khula'* is traditionally understood as dissolution of the marriage obtained through mutual agreement of the parties, or granted by an Islamic law judge subject to payment by the wife to the husband of an amount that does not exceed her *mahr*. Through *tafwid al-talaq*, the husband delegates his right of *talaq* to his wife to allow her to dissolve the marriage at her instance. DOI, *supra* note 13, at 192; *Qur'an* 2:229; Women Living Under Muslim Laws, *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce* 11, 1996.
  15. CGE Submission on Issue 15, *supra* note 11, at 9.
  16. Muslim Youth Movement, Muslim Students' Association, Call of Islam, Shura Yabafazi (Consultation of Women).

### III. JUDICIAL RESPONSE TO MUSLIM MARRIAGES

#### A. Pre-Apartheid Judgments

Contemporary South Africa inherited the legacies of colonialism and Apartheid, which refused to recognize Muslim marriages as legally valid. This was based on the assumption that a relationship could only be regarded as a “civilised” marriage if it conformed to the Christian requisite of monogamy. Anything other than a strictly monogamous union was considered “anathema.”<sup>17</sup> Thus, polygynous or potentially polygynous unions such as Muslim marriages were relegated to an uncivilized status and not legally recognized. This is evident from judicial pronouncements as early as 1860 by the Cape Supreme Court:

[M]arriage is a condition Divine in its institution, . . . and it is only by the development of Christianity that the sacred and mysterious union has been clearly revealed to mankind, and has enjoined a strict observance of its requirements, and one of the first of these requirements is, amongst all Christian nations, that polygamy is unlawful, and that marriage is only good when contracted with a man who is not already married to another woman. . . . I trust that in a short time . . . the sacred institution of marriage will be brought by some well devised law within the reach of the people of this Colony who have not yet embraced the greater blessings which they would obtain by Christian marriage, by which I mean of course to one wife, which, among the heathen ought to be sanctioned and encouraged by law. It is, even amongst them, an institution of a divine character—a glimmer of the light once shining in Paradise, which is still vouchsafed to them. . . . Equally so with the Mohammedans. If what they call marriage is not what we call marriage, in its essential requirements, but what the jurisprudence of even Christian Rome under the Emperors, up to the time of Leo the Philosopher, would call a recognised concubinage—we cannot, because of the ambiguity of the expression, make that marriage which is a wholly different relation.<sup>18</sup>

The Appellate Division (A.D.) confirmed this judicial attitude in 1917 by finding that:

[p]olygamy vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilised peoples, on grounds of morality and religion, and the Courts of a country which forbids it are not justified in recognising a polygamous union as a valid marriage.<sup>19</sup>

17. *Kader v. Kader* 1972 (3) SA 203 (R.,A.D.) at 207B (S. Afr.).

18. *Bronn v. Frits Bronn's Executors and Others* 1860 3 Searle 313 at 318, 320, 321, 333 (S. Afr.).

19. *Seedat's Executors v. The Master* 1917 A.D. at 307–08 (S. Afr.).

In 1983, the A.D. reiterated its position by stating:

The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it. . . . [T]he [Muslim] customs and the [Muslim marriage] contract . . . are contrary to public policy and are, consequently, unenforceable. They may equally well be regarded as being *contra bonos mores*.<sup>20</sup>

## B. Effect of Pre-Apartheid Judgments

The effect of these judgments resulted in great hardships to South African Muslims, especially women. For example, as the marriage is not legally valid, the estates of the spouses are kept separate at marriage, during marriage, and upon dissolution of the marriage. Although the wife is free to build her estate independently of her husband's, in practice this rarely happens. Thus, she is left virtually with a nonexistent estate because most of the assets accumulated during the marriage form part of the husband's estate. She is therefore disadvantaged vis-à-vis her civil law counterpart as the latter benefits from a legislative default matrimonial property regime that awards 50 percent of the estate to each spouse upon dissolution of the civil marriage.<sup>21</sup>

Muslim spouses, most notably wives, have also been deprived of other legislative benefits directed at civil law spouses because they have been excluded from the ordinary definition of the word "spouse" on the basis of the legal invalidity of their marriages. For example, until recently they were unable to inherit from their deceased spouse's intestate estates or claim maintenance from their estates when they were disinherited.<sup>22</sup> They were also not entitled to compensation when their spouse's were killed in motor vehicle accidents.<sup>23</sup> However, these types of cases were challenged during the post-Apartheid era, and the judiciary found that notwithstanding the illegality of Muslim marriages, Muslim spouses are entitled to those legislative benefits that had been raised for adjudication.<sup>24</sup>

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20. Ismail v. Ismail 1983 (1) SA 1006 (AD) at 1024E, 1025G (S. Afr.).

21. This "in community of property" regime applies automatically in terms of the Matrimonial Property Act 88 of 1984 when parties' marriages are registered according to the Marriage Act. They share in each other's assets and liabilities accrued before, during, and at dissolution of the marriage. See Marriage Act 25 of 1961.

22. Intestate Succession Act 81 of 1987 recognized a civil law spouse as an heir to the deceased spouse's estate when the latter died without a will. Where the spouse died with a will but disinherited the surviving spouse, the Maintenance of Surviving Spouse's Act 27 of 1990 entitled the disinherited spouse to claim maintenance from the deceased spouse's estate.

23. Multilateral Motor Vehicle Accidents Funds Act 93 of 1989 awarded compensation to the surviving spouse of a civil law marriage when the deceased spouse was unlawfully and negligently killed in a motor vehicle accident by a third party.

24. Amod v. Multilateral Motor Vehicle Accidents Fund 1999 (4) SA 1319 (SCA) (S. Afr.); Daniels v. Campbell NO and Others 2004 CCT 40/03, SACLR LEXIS 17 (S. Afr.).

Muslim women are also deprived of the marriage benefits recognized by *Shari'a*. For instance, *Shari'a* affords them the right to be unilaterally maintained by their husbands during marriage and *iddah*,<sup>25</sup> and obliges husbands to pay them *mahr* (dower).<sup>26</sup> Ironically, although social norms within Muslim communities require couples to be married to each other by Muslim rites, the *'ulama* do not impose respect for *Shari'a*-based obligations that husbands are required to fulfill. In other words, they do not enforce those obligations, nor is failure to comply with those obligations penalized. For example, one method of ensuring that husbands maintain their wives could be for the *'ulama* to grant *faskhs* to wives whose husbands fail to maintain them. However, this technique is rendered useless when it is difficult for women to access *faskhs*.<sup>27</sup>

### C. Post-Apartheid Judgments

Some disadvantages experienced by Muslim women as a result of non-recognition of Muslim marriages have been vitiated by more progressive judgments, reflecting the ethos of South Africa's constitutional democracy.<sup>28</sup> These judgments reject the rationale of Apartheid-era courts that any terms and customs arising from Muslim marriage contracts are contrary to public policy. Instead, they promote the values of equality, tolerance, and accommodation of diversity; this was spelled out in the first of these judgments, in which the Cape High Court held:

[I]t is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it. . . . [T]he values of equality and tolerance of diversity and the recognition of the plural nature of our society . . . "radiate". . . the concepts of public policy and *boni mores* that our courts have to apply. . . . In the *Ismail* case, Trengove JA expressed the view that the customs and contracts

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25. Waiting period observed by a woman following dissolution of a marriage. It extends for three months after divorce, or four months and ten days after the spouse's death, or in either case if she is pregnant, until the birth of the child. During this time, her freedom of movement is limited because she is housebound and cannot marry or conduct a perceived romantic relationship. RUSHD, *supra* note 12, at 54, 106, 115–16; DOI, *supra* note 13, at 198–203; *Qur'an* 2:228, 2:234, 33:49, 65:4.
  26. Forms part of the wife's estate exclusively. It consists of anything that the parties agree to at the date of marriage, payable to the wife at the time of contracting the marriage or deferred until later as an accrued debt. RUSHD, *supra* note 12, at 23; DOI, *supra* note 13, at 158–66; *Qur'an* 2:229.
  27. CGE Submission on Issue 15, *supra* note 11, at 9.
  28. *Ryland v. Edros*, 1997 (1) BCLR 77 (C) (S. Afr.) ; Amod, *supra* note 24.

there in issue were contrary to public policy. He also said that they were *contra bonos mores*. In my opinion the “radiating” effect of the values underlying the new Constitution is such that neither of these grounds for holding the contractual terms (arising from the Muslim marriage contract) under consideration in this case to be unlawful can be supported. . . . I am satisfied that the *Ismail* decision no longer operates to preclude a court from enforcing claims (such as those arising from a Muslim marriage contract).<sup>29</sup>

This approach was confirmed by the Supreme Court of Appeal, in which the late Chief Justice Mahomed said:

The insistence that the [Islamic] duty of support [of a Muslim husband in favour of his Muslim wife] . . . is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which . . . is substantially different from the ethos which informed the determination of the *boni mores* of the community when the cases which decided that “potentially polygamous” marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law. . . . To the extent to which [the] dicta [in the *Ismail* case] are inconsistent with the approach I have articulated in this judgment, I must express my respectful disagreement with them.<sup>30</sup>

#### D. Effect of Post-Apartheid Judgments

These judgments have begun to recognize different aspects of MPL and to place Muslim spouses on a more equal footing with civil law spouses. With regard to MPL, the courts accept a Muslim marriage as a civil contract. Therefore, proven terms of that contract, such as the husband’s unilateral duty of support, his obligation to *nafaqah* (maintain) his wife during marriage and *iddah*, and payment of *mahr*, are legally enforceable.<sup>31</sup> The courts have also begun the process of including a Muslim spouse in the ordinary definition of the word “spouse” or “surviving spouse” with regard to legislation that has arisen for adjudication. In the case of a dependant’s claim arising from a deceased spouse being killed in a motor vehicle accident, and codified intestate inheritance rights and maintenance claims against a deceased spouse’s estate, Muslim spouses now enjoy the same legislative

29. Ryland, *supra* note 28, at 90G, 91I–J, 92B, 94A.

30. Amod, *supra* note 24, ¶ 20–21, 29.

31. *Id.*; Ryland, *supra* note 28.

benefits that their civil law counterparts enjoy.<sup>32</sup> In this regard, the Constitutional Court has noted:

[T]he constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word “spouse” a broad and inclusive construction, the more so when it corresponds with the ordinary meaning of the word. The issue is not whether to impose some degree of strain on the language in order to achieve a constitutionally acceptable result. It is whether to remove the strain imposed by past discriminatory interpretations in favour of its ordinary meaning.<sup>33</sup>

A further consequence is that the legislature has begun to amend other statutes to extend civil law benefits to spouses in Muslim marriages. For example, the Unemployment Insurance (UI) Act<sup>34</sup> as amended entitles a surviving spouse or a life partner to a dependant’s benefits where the beneficiary of the unemployment benefits is deceased.<sup>35</sup> Although the UI Act does not expressly include spouses of a Muslim marriage in the definition of “surviving spouse,” the term “life partner” would implicitly include them.

Notwithstanding, these judicial developments do not solve the problem of illegality because the courts have not afforded legal recognition to Muslim marriages. They have chosen to leave the intricacies of wholesale legal recognition to the legislature.<sup>36</sup> This means that each time a Muslim party wishes to enforce the terms of the Muslim marriage contract or wishes to challenge legislation that excludes her or him from its benefits, she or he has to enter the judicial process for relief. Due to cost implications and a shortage of resources by some state-funded legal aid clinics that are mandated to take on these matters, many indigent Muslim women could be denied access to this remedy. Furthermore, each case will be considered on its own merits, and the claimant will have to prove each independent claim. This could prove highly burdensome in the absence of acceptable evidence to support the claims.

An example of this deficiency was illustrated in *Ryland*.<sup>37</sup> The Court refused to accept the wife’s claim for an equitable share of her contributions to her husband’s estate during the marriage as an implied term of the Muslim marriage contract. It rejected the wife’s contention that as this rule is legislated in Malaysia, which follows the *Shafi’* school of thought, it is also applicable to the Muslim communities in the Western Cape, the majority of whom fol-

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32. See Amod, *supra* note 24; see Daniels, *supra* note 24.

33. Daniels, *supra* note 24, ¶ 21.

34. Unemployment Insurance Act 63 of 2001.

35. *Id.* § 30.

36. Amod, *supra* note 24, ¶ 28.

37. Ryland, *supra* note 28, at 100G-I.

low this school of thought as well.<sup>38</sup> Despite the Court's acknowledgment that the Malaysian rules, based in part on Malaysian custom, are "not . . . in conflict with the essential principles of Islamic law," it required the wife to tender evidence that this practice was prevalent in the Western Cape, where both she and her husband were members of the community.<sup>39</sup> In effect, the Court reinforced the patriarchal framework that informs Muslim practices in the Western Cape because the *'ulama* have adopted an understanding of *Shari'a* that favors men. As a result, the *'ulama* chose not to incorporate Islamic acceptance of equitable distribution of the spouses' estates into the practices of South African Muslim communities.

Furthermore, the judgments apply only to *de facto* monogamous Muslim marriages, and the question of *de facto* polygynous marriages was left open.<sup>40</sup> The courts have not extrapolated their reasons for doing so, but it is possible to infer that this position coincides with its hesitance to involve itself with issues of religious doctrinal entanglement.<sup>41</sup> However, by recognizing certain terms of Muslim marriage contracts and the consequences of dissolution of those contracts, and by refusing to recognize others such as a wife's claim for an equitable distribution of her contributions to the growth of her husband's estate, the courts have already become involved in this process. Even though they have not made constitutionally value-laden judgments about specific practices that negate an equal relationship between Muslim spouses, such as a husband's unilateral obligations to support his wife and to pay *mahr*, and the wife's duty to observe *iddah*, which casts her in a subservient role with fewer rights than her husband, the courts have given recognition, albeit unintentionally, to androcentric interpretations of *Shari'a* and MPL. In this way, the courts have tacitly consented to an unequal relationship between Muslim spouses.

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38. The court accepted as common cause that the *Shafi'* school of thought is predominant in Malaysia and Indonesia, as well as in the Western Cape. It noted that the importation of Malaysian and Indonesian slaves to the Cape during Dutch colonial rule resulted in the predominance of this school of thought in the Muslim community in the Western Cape. *Id.* at 81J–82A.

39. *Id.* at 100B–H.

40. *Id.* at 92C; Amod, *supra* note 24, ¶ 24; Daniels, *supra* note 24, ¶ 37.

41. The Court in Amod, *supra* note 24, ¶ 28, held:

Nor is there any danger that by upholding the appellant's claim the Court might become "entangled" in religiously controversial doctrines. The legal legitimacy of the claim can be assessed purely on the proper application of common law principles of application to the dependant's action without any reference to any religious doctrine or policy.

## IV. LEGISLATIVE RESPONSE TO MUSLIM MARRIAGES

### A. Current Options

The Marriage Act<sup>42</sup> makes provision for an officiator of Muslim marriages to be appointed as a marriage officer to solemnize legal Muslim marriages.<sup>43</sup> Therefore, parties to a Muslim marriage could contract for a valid marriage if it is solemnized by a designated Muslim marriage officer. However, most Muslims have not applied to be so designated. Parties are also able to register a civil marriage either before or after the religious ceremony, but the majority of Muslims fail to do this. Thus, communities engage only in the religious ceremony, which results in many illegal Muslim marriages.

### B. Law Reform Process

#### 1. Pre-1999 Attempts at Legal Recognition

Muslim communities have been lobbying for the legal recognition of MPL for the past sixty years.<sup>44</sup> Ebrahim Moosa notes that in 1987, the South African Law Commission (SALC) initiated an investigation into aspects of Muslim marriages and their legal consequences by circulating a questionnaire within Muslim communities to elicit comments about matters relating to MPL.<sup>45</sup> He suggests that although many of the *'ulama* supported the effort, given the political climate of the Apartheid era, the more progressive elements treated this state-based initiative with suspicion.<sup>46</sup> Moosa describes the rationale for their skepticism in the following terms:

For the anti-apartheid Muslim groups, the attempt by the SALC to offer recognition of Muslim law in the turbulent 1980s had a different meaning altogether. They viewed it as a state endeavour to dampen and defuse Muslim political anger, especially among the youth.<sup>47</sup>

As a result of the political changes during the late 1990s, nothing further came of the investigation other than an initial inquiry.<sup>48</sup> However, as South Africa entered the dawn of a new democracy, conservative and progressive Muslim organizations lobbied the multiparty Conference for a Democratic

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42. Marriage Act, *supra* note 21.

43. *Id.* § 3(1).

44. Moosa, *supra* note 3, at 135.

45. *Id.* at 134–35.

46. *Id.* at 136–37.

47. *Id.* at 138.

48. *Id.* at 139.

South Africa (CODESA), which resulted in an electoral promise to recognize MPL.<sup>49</sup> This commitment was reflected in the inclusion of a freedom of religion clause in the interim Constitution,<sup>50</sup> which enabled the enactment of legislation to recognize:

- (a) a system of personal and family law adhered to by persons professing a particular religion; *and*
- (b) the validity of marriages concluded under a system of religious law subject to specified procedures.<sup>51</sup>

To fulfill its political pledge, the newly elected government established the Muslim Personal Law Board (MPLB) in 1994 to work toward the drafting of legislation to recognize MPL.<sup>52</sup> The MPLB comprised conservative and progressive elements from the Muslim communities, but was unable to reach unanimity regarding the way in which MPL ought to be recognized.<sup>53</sup> The *'ulama* did not want MPL to be subjected to a constitutional framework based on human rights values on the basis that the latter ostensibly conflicts with *Shari'a*.<sup>54</sup> The more progressive elements argued that there is no conflict, therefore they had no problem with MPL being subjected to constitutional scrutiny.<sup>55</sup> These division caused the MPLB to disband within a year of its establishment.<sup>56</sup>

## 2. Post-1999 Attempts at Legal Recognition

The final Constitution also includes a freedom of religion clause, which reads as follows:

- (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.<sup>57</sup>

In accordance with this clause, a Project Committee (Committee) of the South African Law Reform Commission (SALRC) was appointed in March 1999 to draft legislation for the legal recognition and regulation of Muslim marriages.

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49. *Id.*

50. S. AFR. (Interim) CONST. 1993 (emphasis added).

51. *Id.* § 14(3)(a)–(b) (emphasis added).

52. Moosa, *supra* note 3, at 139.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. S. AFR. CONST. 1996, § 15(3)(a)–(b).

Abdulkader Tayob notes that this more recent attempt “appears to be enjoying greater success than the [MPLB].”<sup>58</sup> He attributes part of this success to the difference between the Committee’s proposal for legislation to afford legal recognition to Muslim marriages instead of a system of MPL.<sup>59</sup> This is in accordance with the choice offered by section 15(3)(a) in the final Constitution for the recognition of either systems of religious personal or family law *or* marriages concluded under a system of religious, personal, or family law.<sup>60</sup> In contrast, section 14(3) of the interim Constitution required that recognition be effected in respect of both systems of religious personal and family law *and* marriages concluded under a system of religious law. Accordingly, the MPLB had proposed legislation to recognize a system of MPL, which Tayob suggests “had opened up ideological differences that could not easily be settled.”<sup>61</sup> As mentioned earlier, this resulted in the eventual disintegration of the MPLB.<sup>62</sup> On the other hand, the process under the Committee appears to have remained intact because it shifted the emphasis from legal recognition of MPL as a system to legal recognition of Muslim marriages. Therefore, the Committee avoided engaging ideological and theological debates and focused attention on addressing the direct problems suffered by Muslims as a result of nonrecognition of Muslim marriages.<sup>63</sup>

A second difference between the interim and final constitutions is that the constitutional mandate encapsulated in the latter explicitly contains an inherent limitation in section 15(3)(b) requiring the relevant legislation to conform to provisions of the Constitution. Implicit in this is the obligation placed on drafters and interpreters of the legislation to ensure that recognition of religious marriages is not inconsistent with gender equality. This was most likely included because an unfettered recognition of religious marriages or systems of religious personal and family law would result in gender-based discrimination, and the general limitation clause<sup>64</sup> might not be sufficient to prevent it.

### 3. Draft Legislation for Muslim Marriages

In 2003, the SALRC submitted the Islamic Marriages and Related Matters Report,<sup>65</sup> containing draft legislation for the recognition and regulation of Muslim marriages, to the Minister of Justice and Constitutional Development

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58. Abdulkader Tayob, *The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study*, 22 RECHT VAN DE ISLAM 1, 3 (2005).

59. *Id.* at 6.

60. *Id.* at 6–7.

61. *Id.* at 6.

62. *Id.* at 3.

63. *Id.* at 6.

64. S. AFR. CONST., *supra* note 57, § 36.

65. South African Law Reform Commission, *Islamic Marriages and Related Matters: Report—Project 106* (2003) [hereinafter SALRC Report].

for consideration in the parliamentary process. The Report was a culmination of three years of deliberations with the South African Muslim communities. It officially began with the publication of an Issue Paper,<sup>66</sup> which invited written submissions from the public. This led to the publication of a Discussion Paper,<sup>67</sup> containing a draft bill for the recognition and regulation of Muslim marriages. The public was again invited to tender written submissions, which resulted in an amended draft bill. The Committee subsequently embarked on a "road show" to present the amended draft bill to those groups that had previously made written submissions. These groups were afforded a further opportunity to tender oral submissions to the Committee, and this resulted in further amendments contained in the draft legislation of the Report.

This process suggests that the Committee engaged in an open course of consultations with the communities. However, the content of the draft legislation is a testament to the fact that the exercise was heavily influenced by political expediency. The lobbying groups were broadly cast into two camps, namely the Muslim clergy and human rights and women's rights groups. Given the power dynamics with the clergy, who constantly threatened to disengage from the process and to influence Muslims not to support the draft legislation, the Committee favored their position. The Committee recognized that without the clergy's support, the benefits of the proposed legislation could be lost on the intended recipients. Furthermore, the Committee members ranged from Islamic traditionalists to Islamic apologists. Although its members were Muslim, appointed via public nominations,<sup>68</sup> the Committee consisted of a majority of men.<sup>69</sup> Even though the draft legislation can be described as a product of compromise between extreme views, the internal dynamics within the Committee regarding gender composition and political leanings, and the external pressures by the clergy most likely contributed to its contents. Thus, the legislation is more reflective of the clergy's concerns and falls short in many respects with regard to women's rights considerations. In this respect, it is clear that the Committee was selective about which interpretations of *Shari'a* to include. For example, a woman-friendly interpretation that relies on a literal and/or contextual reading of the *Qur'anic* verses relating to polygyny can lead to a religiously justified conclusion that Islam does not permit polygyny. This is derived from the following two verses read together: "If ye fear that ye shall not Be able to deal justly With the orphans, Marry

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66. South African Law Reform Commission, *Islamic Marriages and Related Matters: Issue Paper 15—Project 59* (2000).

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

68. SALRC Report, *supra* note 65, at 1–2, n.2.

69. The final composition of the Committee comprised eight members, three of whom were women. The third woman was co-opted a few months before the Report was finalized.

women of your choice, Two, or three, or four; But if ye fear that ye shall not Be able to deal justly [with them], Then only one, or [a captive] That your right hands possess. That will be more suitable, To prevent you From doing injustice.”<sup>70</sup> “Ye are never able To be fair and just As between women, Even if it is Your ardent desire.”<sup>71</sup>

The injunction to treat more than one wife “justly” is clear. Yet the *Qur’an* is explicit that the implementation of this injunction is impossible, thereby nullifying the practice of polygyny. In addition, a contextual reading indicates that the verses were revealed immediately after the Battle of Uhud, when the Muslim community was left with many orphans and widows. It therefore specifically relates to justice toward orphans. At that time it may have been a reasonable alternative to provide the necessary protection and care for orphaned women.<sup>72</sup> However, this societal purpose no longer exists in our current context, thereby negating its recognition and implementation in the twenty-first century. Notwithstanding this interpretation and despite the fact that there is precedent for the abolition of polygyny in a Muslim country such as Tunisia,<sup>73</sup> the Committee chose to recommend legalization of polygyny, albeit in a regulated form. It was perhaps also politically expedient for the Committee to do so given the fact that polygyny has been legalized in the context of African customary law.<sup>74</sup>

#### 4. Benefits of the Draft Legislation

If enacted, the draft legislation will nevertheless ameliorate the position of Muslim parties by affording them the same legal status as their civil law counterparts. This will entitle them to enjoy similar civil benefits afforded to legal spouses. It will also allow women to enjoy the beneficial aspects of a Muslim marriage.

The following are examples of *Shari’a* benefits incorporated into the draft legislation: It obliges parties to provide for *mahr*.<sup>75</sup> It recognizes the husband’s unilateral obligation to maintain his children and wife during the marriage and *iddah*.<sup>76</sup> It obliges the husband in the case of divorce to provide a separate residence for the wife when she has custody of the child(ren) if she does not own a residence and for the period of such custody only.<sup>77</sup> It entitles the wife to be separately remunerated for breast-feeding purposes for two years from the birth of the child.<sup>78</sup> It enables the court to make an order

70. ABDULLAH YUSUF ALI, THE HOLY QUR’AN: TRANSLATION AND COMMENTARY 4:3 (1946).

71. *Id.* at 4:129.

72. ABDUR RAHMAN I. DOI, WOMAN IN SHARI’AH 50–51 (1989).

73. Code of Personal Status of 1956, art. 18 (Tunis.).

74. Recognition of Customary Marriages Act 120 of 1998, § 2.

75. SALRC Report, *supra* note 65, § 1(vi).

76. *Id.* § 12(2)(a)–(c)(i).

77. *Id.* § 12(2)(c)(ii).

78. *Id.* § 12(2)(c)(iii).

for the equitable division of assets where a party has assisted in the conduct of family business during the marriage or has contributed to the maintenance or increase of the other's estate.<sup>79</sup> It exempts the wife's claim for unpaid arrears maintenance from being extinguished by prescription.<sup>80</sup> It enables a surviving spouse to lodge a claim against her deceased husband's estate for unpaid *mahr* and any tangible contribution recognized by *Shari'a* that she makes to his estate.<sup>81</sup> A less controversial provision that does not conform to the traditional approach is the minimum marriageable age of eighteen years applicable to both parties.<sup>82</sup> Other benefits include the recognition of different forms of divorce available to women such as *faskh*,<sup>83</sup> *khula'*,<sup>84</sup> and *tafwid al-talaq*.<sup>85</sup> These were probably an attempt by the Committee to balance the right to *talaq* maintained by the draft legislation as the exclusive domain of the husband.<sup>86</sup> It also recognizes polygyny in a regulated form, ostensibly as an attempt to protect women.<sup>87</sup>

### 5. Negative Aspects of the Draft Legislation

The draft legislation simultaneously militates against women. It includes the traditional Muslim approach to matrimonial property systems by incorporating a default out of the community property regime.<sup>88</sup> Current practice shows that this regime is detrimental to women, as most of the assets acquired during the Muslim marriage accumulate in the husband's estate.<sup>89</sup> Women

79. *Id.* § 9(7)(b).

80. *Id.* § 12(5). The Prescription Act 68 of 1969 places a three year prescription on civil claims.

81. *Id.* § 9(8).

82. *Id.* § 5(1)(d). The traditional *Shari'a* understanding of minimum marriageable age is puberty for both sexes. Females are therefore viable for marriage at earlier ages than males.

83. *Id.* §§ 1(x), 9(4). Defines *faskh* as stipulated in note 13.

84. *Id.* §§ 1(xiii), 9(5). Defines *khula'* as a no-fault judicial mechanism based on an agreement between spouses to dissolve the marriage at the wife's behest. It entails a transfer by the wife of property or anything permissible according to *Shari'a*. However, the requirement regarding "agreement" is not settled law because countries such as Egypt, Nigeria, Bangladesh, Pakistan, and Philippines do not require the husband's consent. WOMEN LIVING UNDER MUSLIM LAWS, KNOWING OUR RIGHTS: WOMEN, FAMILY, LAWS AND CUSTOMS IN THE MUSLIM WORLD 278–79 (2003).

85. SALRC Report, *supra* note 65, §§ 1(xxiii), 9(3). Defines *tafwid al-talaq* as conditional or unconditional delegation of *talaq* at date of marriage or subsequently by the husband to the wife or her representative.

86. *Id.* §§ 1(xii), 1(xxii), 1(xxiv), 9(3).

87. *Id.* § 8(6)–(11). The husband must apply to court to contract a polygynous marriage. The court can grant the order "if it is satisfied that the husband is able to maintain equality between his spouses as is prescribed by the Holy *Qur'an*." Polygynous marriages without court approval would render husbands liable of a criminal offence subject to the payment of a fine.

88. *Id.* § 8(1). This involves the parties' estates being kept separate at commencement of the marriage, during marriage, and at dissolution of the marriage.

89. Waheeda Amien, *Comments on the South African Law Commission's Discussion Paper No. 101: Islamic Marriages and Related Matters* 17 (2002).

are left destitute upon dissolution of the marriage. Even though parties are able to contract out of this regime, current reality indicates that women are not sufficiently empowered to exert their rights to negotiate and contract the terms of their marriage.<sup>90</sup>

Although the draft legislation provides for the “[e]qual status and capacity of spouses,”<sup>91</sup> the clause simply acknowledges that a wife and husband are equal in *human dignity*, and recognizes that they are capable of contracting, acquiring, and disposing of assets independently of each other. However, recognition of their equal capacity does not equalize their positions when they are not afforded the same rights. The clause encapsulates the paradigm within which the draft legislation is structured, which entrenches the conservative Islamic interpretation of equality that distinguishes between *Ibadaat*, which is the “ethic-religious” category in which women are accorded equality with men on a spiritual and moral level, and *Muamalaat*, which is the socioeconomic category, where women are placed in an inferior position vis-à-vis men.<sup>92</sup> Thus, the draft legislation reinforces a patriarchal framework and unequal relationship between men and women. For example, it recognizes the requirement in certain communities that a woman must be married by proxy;<sup>93</sup> it allows only the husband to take multiple spouses;<sup>94</sup> it incorporates the exclusive right of men to unilaterally repudiate the marriage (*talaq*);<sup>95</sup> it recognizes the unilateral obligations of the husband to provide *mahr* and to maintain his wife and children, which is the basis upon which obedience and sex on demand from women are justified;<sup>96</sup> it places a unilateral obligation on the wife to observe *iddah*;<sup>97</sup> and it requires that upon divorce, guardianship, custody, and access of children should be determined on the basis of the best interests of the child and “with due regard to Islamic Law.”<sup>98</sup> A conservative interpretation of the latter could award these rights to the father only.

A further fundamental flaw is that the draft legislation does not direct implementers to take cognizance of South Africa’s constitutional and international law obligations when interpreting its provisions.<sup>99</sup> On the contrary,

90. CGE Submission on Issue 15, *supra* note 11, at 9.

91. SALRC Report, *supra* note 65, § 3: “A wife and a husband in a *Muslim marriage* are equal in human dignity and both have, 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.”

92. Ali, *supra* note 4, at 37–39.

93. SALRC Report, *supra* note 65, § 5(3).

94. *Id.* § 8(6).

95. *Id.* § 1(xvii).

96. *Id.* § 1(vi), 12(2).

97. *Id.* § 1(vii).

98. *Id.* § 11(1).

99. Constitutional obligations include sections 9 (equality) and 15(3)(b) obliging government to ensure that recognition of religious marriages does not violate gender equality. Inter-

a provision is made for Islamic law, *Shari'a*, *Qur'an*, and *Sunnah*,<sup>100</sup> to act as guiding principles in the interpretation of various provisions.<sup>101</sup> Even where it provides for equality between spouses, for example in its regulation of polygyny, it does so within the auspices of the *Qur'an*.<sup>102</sup> The danger with this approach is that the interpretation of those provisions will depend on the persons who will be doing the interpreting. This is significant because the draft legislation places implementation in the hands of lay Muslim people, who will act as marriage officers; Muslim judges drawn from the judiciary and/or acting Muslim judges drawn from the advocates' and attorneys' professions; and Muslim assessors, who will be required to have specialized knowledge of *Shari'a* to preside over opposed matters.<sup>103</sup> No indication is given in the draft legislation regarding what will constitute "specialised knowledge of Islamic law." It may then be possible for the *'ulama* to nominate their own representatives to act as assessors, many of whom have not completed secondary level education. At worst, provisions that are directed to be interpreted in accordance with *Shari'a* could be open to abuse from conservative and anti-women's rights interpretations of *Shari'a*.

## V. IMPLICATIONS FOR THE RIGHT TO FREEDOM OF RELIGION AND WOMEN'S RIGHTS TO EQUALITY

By drafting legislation to recognize Muslim marriages, the Committee attempted to give effect to the constitutional guarantee for religious freedom. Despite the inherent restriction that codification of religious marriages cannot violate the right to sex/gender equality, it is clear that the drafting process for the legislation was manipulated to appease the Muslim clergy. Many of its provisions, if enacted, will stand to be constitutionally challenged on the ground of sex/gender inequality. The Constitutional Court, as the highest court of constitutional appeal, will be tasked with having to decide how to deal with the conflict between the right to freedom of religion and women's rights to equality, as indeed one will arise. It is therefore neces-

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national law obligations include those arising from the Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (entered into force 3 Sept. 1981), 1249 U.N.T.S. 13, reprinted in 19 I.L.M. 33 (1980), which South Africa ratified in 1995. The draft legislation should have explicitly noted these for interpretive purposes.

100. For an explanation of these terms, see Au, *supra* note 4.

101. SALRC Report, *supra* note 65, §§ 1(x), 9(4) (*faskh*), 1(xviii) (definition of Muslim marriage), 5(1)(c) (witnesses), 8(7)(a) (polygyny), 9(8) (claims against deceased estates), 11(1)–(3) (custody and access of children).

102. *Id.* § 8(7)(a).

103. SALRC Report, *supra* note 65, §§ 1(xv), 5, 6, 15(1)(a)–(b).

sary to examine the extent to which the norms of sex/gender equality and religious freedom have been entrenched in the Constitution and the manner in which the Constitutional Court has developed its jurisprudence in respect of both. This will give some indication regarding the position the Court may take when faced with a conflict between the two rights in the context of Muslim marriages.

## A. Gender Equality

### 1. Constitutional Provisions

The equality norm permeates throughout the Constitution, “and defines the very ethos upon which the Constitution is premised.”<sup>104</sup> This is evident in the following constitutional clauses: The Founding Provisions stipulate that “South Africa is . . . founded on the . . . values [of] . . . [h]uman dignity, the achievement of *equality* . . . and *non-sexism*.”<sup>105</sup> The Bill of Rights contains an equal protection clause, which recognizes that every person is equal before the law and that everyone has the right to equal protection and benefit of the law.<sup>106</sup> It also contains an antidiscrimination clause, which prohibits unfair discrimination on the grounds of gender and sex.<sup>107</sup> Any limitation on constitutional rights would have to be “reasonable and justifiable in an open and democratic society based on human dignity, *equality* and freedom.”<sup>108</sup> In a state of emergency, the Constitution regards the right not to be unfairly discriminated against on the ground of sex as a nonderogable right.<sup>109</sup> The Bill of Rights must be interpreted in a way that “promote[s] the values that underlie an open and democratic society based on human dignity, *equality* and freedom.”<sup>110</sup> The Constitution provides for the establishment of a Commission for Gender Equality, to strengthen constitutional democracy.<sup>111</sup> Finally, the legislature is constitutionally obliged to enact legislation to prohibit and prevent unfair discrimination,<sup>112</sup> which resulted in the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).<sup>113</sup> This Act is guided by the principles of *de jure* and *de facto* equality

104. *Fraser v. Children’s Court, Pretoria North, and Others* 1997 (2) BCLR 153, ¶ 20 (CC) (S. Afr.).

105. S. AFR. CONST., *supra* note 57, § 1(a)–(b) (emphasis added).

106. *Id.* § 9(1).

107. *Id.* § 9(3).

108. *Id.* § 36(1) (emphasis added).

109. *Id.* § 37(5)(c).

110. *Id.* § 39(1)(a).

111. *Id.* § 181(1)(d).

112. *Id.* § 9(4); ch. 2 § 23(1).

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

and equality of outcomes.<sup>114</sup> It aims to promote non-sexism and seeks to eliminate and prevent unfair discrimination on the ground of gender.<sup>115</sup>

## 2. *Jurisprudence of the Constitutional Court*

Since its establishment in 1995, the Constitutional Court has been in the process of developing equality jurisprudence on an incremental basis. It has adopted a purposive and contextual approach, which promotes substantive equality rather than formal equality.<sup>116</sup> In its first equality case, the Court noted that the equality clause needs to be understood in the context of South Africa's peculiar history, which systematically entrenched inequality on various grounds including sex/gender.<sup>117</sup> The Court held that "all such discrimination needs to be eradicated from our society is a key message of the Constitution."<sup>118</sup> At the same time, in recognition of the pluralistic nature of South African society, the Court has adopted an approach toward appreciation of difference and has noted that equality also implies a respect for difference. It has remarked:

The desire for equality is not a hope for the elimination of all differences. . . . [E]qual respect for difference, . . . lies at the heart of equality. . . . Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.<sup>119</sup>

## B. Religious Freedom

### 1. *Constitutional Provisions*

In recognition of difference, which includes religious diversity, the Constitution guarantees every person's right to freedom of religion.<sup>120</sup> The importance of this right can also be ascertained by the protection offered in other parts of the Constitution. For example, freedom of association is entrenched,<sup>121</sup>

114. *Id.* at Pmbl., § 1(ix).

115. *Id.* § 2(b)(ii)–(iv), 2(c).

116. *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC), ¶ 43 (S. Afr.).

117. *Brink v. Kitshoff* 1996 (4) SA 197 (CC) at ¶¶ 33, 40 (S. Afr.).

118. *Id.* ¶ 44.

119. *National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice and Others* 1998 (12) BCLR 1517 (CC), ¶¶ 22, 112, 132 (S.Afr.).

120. S. Afr. CONST., *supra* note 57, § 15(1).

121. *Id.* § 18.

which “includes the right of religious bodies to function freely as part of civil society.”<sup>122</sup> A provision is made for the establishment of a Pan South African Language Board to promote respect for languages used for religious purposes.<sup>123</sup> A provision is also made for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to strengthen constitutional democracy.<sup>124</sup> The Constitution permits religious observances to be conducted at state institutions, provided they are conducted on an equitable basis and there is no compulsion with regard to attendance.<sup>125</sup> This suggests a legislative intent to not give preference to one religion over others. Unfair discrimination on the basis of religion that cannot be limited justifiably is expressly prohibited,<sup>126</sup> and is incorporated into the Equality Act.<sup>127</sup> Implicit in the notion of equality is the requirement that all religions be allowed to manifest and instruct regarding their beliefs. Therefore, the commitment to equality justifies the constitutional guarantee entrenching every person’s right to freedom of religion.<sup>128</sup> The Constitution furthermore recognizes the collective right of persons belonging to a religious community to practice their religion.<sup>129</sup> It also facilitates the development of a legally pluralistic society by permitting the enactment of legislation to recognize either marriages concluded under a system of religious, personal, or family law or systems of personal and family law that are adhered to by people who profess a particular religion.<sup>130</sup>

## 2. Jurisprudence of the Constitutional Court

The Court has held that provisions enabling the enactment of legislation to recognize religious marriages or systems of religious personal and family law

underline the constitutional value of acknowledging diversity and pluralism in our society and . . . they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”. . . . These provisions collectively and separately acknowledge the rich tapestry constituted by civil

122. S v. Solberg 1997 (10) BCLR 1348 (CC) at ¶ 142 (S. Afr.).

123. S. Afr. CONST., *supra* note 57, § 6(5)(b)(ii).

124. *Id.* § 181(1)(c).

125. *Id.* § 15(2).

126. *Id.* § 9(3).

127. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, § 1(xxii)(a).

128. Nicholas Smith, *Freedom of Religion Under The Final Constitution*, 114 S. AFRICAN L.J. 217, 224–25 (1997).

129. S. Afr. CONST., *supra* note 57, § 31(1)(a).

130. *Id.* § 15(3)(a)(i)–(ii).

society, indicating in particular that . . . religion constitute[s] a strong weave in the overall pattern.<sup>131</sup>

The Court has adopted an approach that falls somewhere between an accommodation of different religions and integration of religions within an equality framework. Its tendency toward the former is evident from its suggestion that

[the freedom of religion clause] was intended at least to uphold the following principles and values: South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and *accommodatory* towards, rather than hostile to or walled-off from religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world view. The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their *accommodation* within a non-hierarchical framework of equality and non-discrimination. It follows that the State does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, requires conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.<sup>132</sup>

At the same time, a tendency toward an integrationist approach becomes apparent in the Court's acknowledgment that internal limitations requiring constitutional guarantees of religious freedom to be consistent with other provisions of the Constitution<sup>133</sup> means that those guarantees "cannot be used to shield practices which offend the Bill of Rights."<sup>134</sup> By implication, implementation of these rights cannot conflict with sex/gender equality. This is explicitly confirmed by the Equality Act, which expressly prohibits unfair discrimination on the grounds of gender that includes any religious practice "which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child."<sup>135</sup>

131. *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC) at ¶ 24 (S. Afr.).

132. Solberg, *supra* note 122, ¶ 148 (emphasis added).

133. S. AFR. CONST., *supra* note 57, § 15(3)(b), 31(2). This relates to legislation recognizing religious marriages and the collective right to practice a religion respectively.

134. *Christian Education South Africa*, *supra* note 131, ¶ 26.

135. Promotion of Equality and Prevention of Unfair Discrimination Act, *supra* note 127, § 8(d).

In a very generalized manner, the Court has indicated that freedom of religion is not an absolute right.<sup>136</sup> It has suggested that religious followers would have to accept certain binding norms, and those followers would not be automatically exempted from the law.<sup>137</sup> The Court does not consider it unreasonable or demeaning to expect religious followers to adapt to nondiscriminatory laws.<sup>138</sup>

The Court also requires that the state should “avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”<sup>139</sup> It does not want the judiciary to pronounce on whether or not a certain practice is part of a particular religion unless the dispute relates specifically to the centrality of the practice.<sup>140</sup> This seems to be an echo of the judiciary’s reluctance to not become involved in doctrinal entanglement of religious issues.<sup>141</sup> This is worrisome because the impression is created that the Court would be reluctant to enter the religious arena and pronounce discriminatory religious beliefs and practices to be unconstitutional.

Furthermore, the Court has indicated that “the balancing exercise requires a degree of *reasonable accommodation* from all concerned.”<sup>142</sup> Implicit in this is the suggestion that compromises should be expected to be made from religious and constitutional adherents. The question is what would be considered reasonable compromises and how far would the Court go to ensure that all parties are reasonably accommodated. Thus far, the Court has interpreted this to mean that specific religious conduct that violates constitutional provisions should be eliminated, without proscribing the entire religious practice. This conclusion is inferred from the Court’s statement that

when Parliament is faced with a religious practice that involves some conduct that runs counter to its objectives, the proper approach under our Constitution is not to proscribe the entire practice but to target only that conduct that runs counter to its objectives, if this can be done without undermining its objectives. This approach is consistent with the constitutional commitment to tolerance and accommodation of different religious faiths implicit in our Constitution. The requirement that less restrictive means must be used in the limitation of constitutional rights is indeed a manifestation of this commitment.<sup>143</sup>

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136. Prince v. President, Cape Law Society and Others 2000 (2) BCLR 133 (CC), ¶ 26 (S. Afr.).

137. Christian Education South Africa, *supra* note 131, ¶ 35.

138. *Id.* ¶¶ 51, 76.

139. Christian Education South Africa, *supra* note 131, ¶ 35.

140. Prince v. President, Cape Law Society and Others 2002 (2) SA 794 (CC), ¶¶ 42, 75 (S. Afr.).

141. Amod, *supra* note 24.

142. Christian Education South Africa, *supra* note 131, ¶ 76 (emphasis added).

143. *Id.* ¶ 79.

The Court's expectation that less-restrictive means should be used may lead it to be too accommodating of religious freedom, perhaps even at the expense of women's rights to equality. For example, if the Court were confronted with a constitutional challenge to polygyny, the argument for less-restrictive means could allow the Court to reject a claim that polygyny should be abolished on the ground that it violates women's rights to equality and find that the practice in a regulated form is constitutionally permissible.

Given the fact that the jurisprudence of the Court with regard to each of the conflicting rights has been developed independently of each other, it has been easier for the Court to take a fairly progressive stance in respect of each of the rights. It is therefore difficult to say precisely which road the Court will travel should it be confronted with a constitutional challenge to the draft legislation where it would have to consider both rights in tension with each other at the same time. The die will thus only be cast when the Court is in fact presented with such a case and is specifically required to pronounce on the constitutional validity of a *Shari'a*-based measure. However, depending on the facts of each case, there is sufficient constitutional justification for the Court to prioritize women's rights to equality over the right to religious freedom.

## VI. SUGGESTIONS FOR OVERCOMING THE CONFLICT

Eva Brems argues that, where possible, both rights should be protected as fully as possible. Thus, conflicts should be avoided so that both rights are left intact.<sup>144</sup> With regard to religious freedom and women's rights to equality, an attempt could therefore be made to derive an interpretation of MPL that is compatible with women's human rights and also justifiable within a *Shari'a* framework.<sup>145</sup> If this is not possible, compromises could be made for both rights so that one right is not subordinated to the other and both rights are kept at "equilibrium" with each other.<sup>146</sup> The Committee attempted this but due to political desirability, women's rights to equality were compromised far more than religious freedom. If the compromise approach is not possible, Brems then suggests that a choice would then have to be made between the two rights.<sup>147</sup>

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144. Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights and Fundamental Freedoms*, 27 HUM. RTS. Q. 294, 302–03 (2005).

145. ALI, *supra* note 4, at 40. Ali contends that an interpretation of *Shari'a* compatible with human rights norms is possible.

146. Brems, *supra* note 144. She refers to the method called "practical concordance."

147. *Id.*

In this instance, Donna J. Sullivan offers a framework for resolving conflicts between women's human rights and religious freedom that might prove useful.<sup>148</sup> She suggests a balancing process that considers the underlying principles of gender equality and religious freedom, and the impact the two rights have on each other based on the particular facts of a case.<sup>149</sup> Sullivan argues that the following factors must be considered: the relationship between the right to equality and the goal of gender equality; the importance of the religious law or practice to religious freedom; the extent to which each practice (equality and religious) infringes the other or the underlying rights and interests; whether other human rights are affected; the effect of limitations regarding equality and religious freedom on women's status and the religion respectively; and an assessment of the proportionality of limitations.<sup>150</sup> She cautions that gender and religion do not operate in isolation of inter-linking factors such as class, race, ethnicity, and socio-economic circumstances. Therefore the impact of these factors must also be taken into account.<sup>151</sup>

Furthermore, subject to the facts of a particular case, the South African constitutional framework could necessitate a finding that women's rights to equality should nevertheless take precedence over the right to religious freedom.

## VII. CONCLUSION

Legal recognition of Muslim marriages is necessary to ameliorate the disadvantages being suffered by Muslims, especially women as a result of nonrecognition. However, if enacted in its current form, the draft legislation will most likely result in a conflict between the right to freedom of religion and women's rights to equality. While a conservative reading of *Shari'a* sources validates sex and gender discrimination, there may still be room for optimism regarding the draft legislation, as it is possible that a progressive approach could allow for a woman friendly interpretation that reconciles Islam with sex/gender equality.<sup>152</sup> There is also an identified need to reinterpret and/or reformulate MPL (and *Shari'a*) for contemporaneous purposes.<sup>153</sup> Through progressive interpretations and implementation of its provisions, the draft legislation, if enacted, could provide an opportunity for reinterpretation

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148. *Id.*; Donna J. Sullivan, *Gender, Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795 (1992).

149. *Id.* at 811–13.

150. *Id.* at 821–23.

151. *Id.* at 823, 855.

152. *Id.*, *supra* note 4, at 38–40, 42–43.

153. Najma Moosa, *The Interim Constitution and Muslim Personal Law* 33 (1994), available at [www.wluml.org/english/pubs/pdf/dossier16/D16/pdf](http://www.wluml.org/english/pubs/pdf/dossier16/D16/pdf).

and/or reformulation of certain aspects of MPL and *Shari'a*.<sup>154</sup> However, this will require civil society to proactively engage with the legislation by taking cases through to the Constitutional Court and/or Supreme Court of Appeal, to challenge those provisions resulting in sex/gender based discriminations. More importantly, it will require a proactive judiciary to engage in judicial activism, to ensure a progressive interpretation of MPL, a fair balancing of the rights to sex/gender equality and religious freedom, and especially to ensure that a respect for religious freedom does not yield negative results for women. This is fortified by the argument that South Africa is constitutionally bound to ensure that religious freedom is not promoted at the expense of women's rights to equality. The challenge will thus be for the Court to seize the opportunity and choose the path less traveled to ensure that women's rights to equality are not short-changed in an effort to respect, protect, promote, and accommodate freedom of religion in South Africa.

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154. Although *Shari'a* is capable of evolving through *ijtihad* to meet the needs of communities as they develop over time, early Muslim jurists declared the "doors of *ijtihad* to be closed forever," thus stunting its dynamic nature, resulting in rigid interpretations that were not responsive to changing circumstances. Through progressive interpretations and applications of *Shari'a* and/or MPL, it may be possible for the process to be re-engaged. Ali, *supra* note 4, at 23–24.