

# A SOUTH AFRICAN CASE STUDY FOR THE RECOGNITION AND REGULATION OF MUSLIM FAMILY LAW IN A MINORITY MUSLIM SECULAR CONTEXT

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## ABSTRACT

South Africa implements a form of secularism that does not rely on a strict separation between religion and state. Instead, it promotes collaboration between the two. Using the example of Muslim family law, the author explores ways in which a secular state can respect the South African minority Muslim community's freedom to apply its religious family laws without impacting negatively on its female members' right to equality. Three approaches are considered along a religious diversity management spectrum namely, assimilation, accommodation, and integration. Existing and proposed family laws including the Muslim Marriages Bill are examined with reference to the aforementioned approaches. The author concludes that none of the above approaches provide sufficient protection for gender equality. Instead, she promotes a nuanced version of the integration approach, which she calls the Gender-Nuanced Integration (GNI) approach. The GNI approach is applicable to minority Muslim contexts that are governed by a supreme constitution, which protects gender equality. It promotes regulation of Muslim family law only to the extent that it does not conflict with gender equality.

## INTRODUCTION

Although the traditional understanding of secularism postulates a strict separation between religion and state,<sup>1</sup> some multicultural societies

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embody a form of secularism that promotes collaboration between religious communities and the secular state.<sup>2</sup> South Africa is an example of the latter because it enables private and public accommodation of religious beliefs and practices.<sup>3</sup> For example, the constitutional provisions relating to religious freedom afford the individual the right to have, practise and disseminate her or his religious beliefs;<sup>4</sup> create an expectation that marriages concluded under a system of religious law or religious systems of personal or family law can be recognised;<sup>5</sup> and permit state support of religious observances.<sup>6</sup>

Given the religious diversity of the South African population,<sup>7</sup> it is appropriate that the government has adopted a cooperative approach toward religious communities. However, South Africa does not accommodate religious diversity without limitation. Respect for religious diversity and promotion of religious diversity cannot infringe constitutional provisions such as women's right to equality. For example, the prospect that marriages concluded under a system of religious law or religious systems of personal or family law may be statutorily recognised is subject to the proviso that such legislation cannot be inconsistent with other constitutional rights including gender equality.<sup>8</sup>

The constitutional provision enabling the recognition of religious marriages or religious personal or family laws introduces the possibility that religious marriages or family laws could be regulated within the South African secular framework. This is significant for the minority Muslim community in South Africa,<sup>9</sup> which has been practising Muslim family law within the private sphere since the 17th century.<sup>10</sup> Despite this fact, Muslim family law has never been afforded legal recognition in South Africa due to its potentially polygynous nature.<sup>11</sup> Muslim family law encompasses *Shari'a* (Islamic law)-based monogamous and polygynous marriage, divorce, and guardianship, custody, and access of minor children.<sup>12</sup> It is often used interchangeably with the term 'Muslim personal law', which was created during British colonial rule when the latter allowed Muslim minorities to apply their own religious personal laws within their communities while expecting them to adhere to colonial criminal and commercial laws.<sup>13</sup> Yet, Muslim personal law and Muslim family law are distinguishable from each other because, while the former encompasses all the aforementioned aspects of Muslim family law, it additionally includes inheritance.<sup>14</sup> For about the past 70 years, South African Muslims have been advocating the legal recognition and enforceability of Muslim personal law by the secular state.<sup>15</sup> More recently, advocacy initiatives have focused on the recognition of two aspects of Muslim personal law namely, marriage and divorce.<sup>16</sup> Various reasons appear to motivate these advocacy efforts.

The first reason is that *Shari'a* plays a significant role in the lives of South African Muslims on individual and communal levels.<sup>17</sup> The

second reason relates to the increasing politicisation of Muslim personal law 'as an issue related to Muslim identity'.<sup>18</sup> In fact, during the post-apartheid period, minority religious communities including the Muslim community sought security in their religious identity.<sup>19</sup> This resulted in Muslim personal law becoming an 'institutional focus of identity [for] Muslims as a religious group'.<sup>20</sup> The third reason is an expectation by the '*ulama* that their Muslim family law-related decisions should have force of law.<sup>21</sup> The '*ulama* are councils of Muslim theologians, which have established *jamiats* (provincial councils) throughout South Africa to apply *Shari'a* within the Muslim community.<sup>22</sup> The *jamiats* operate as quasi-judicial bodies by issuing *fatwas* (edicts) relating to the interpretation of *Shari'a* and by presiding over Muslim-related disputes including family law.<sup>23</sup> Their decisions are legally unenforceable yet carry substantial moral weight with members of the Muslim community, many of whom willingly abide by them.<sup>24</sup> The fourth and most important reason is the adversity that Muslims suffer as a result of non-recognition of Muslim marriages.<sup>25</sup> For example, Muslim women and men are unable to access civil benefits. Secondly, children born of a Muslim marriage are stigmatised as illegitimate. Thirdly, Muslim women as vulnerable members of the Muslim community are further negatively affected because they are unable to legally enforce benefits under Muslim family law; and there is no law to protect them against gender-based discriminatory interpretations of Muslim family law that infringe their constitutional right to equality.<sup>26</sup> The Muslim family law rules and practices that discriminate against women will be mentioned later in this article.

The above reasons leave little doubt that the illegality of Muslim marriages disproportionately impacts on Muslim women. This article will explore which options are available to provide potential protection for them, beginning with the question whether or not legal recognition is necessary. This question is posed in the context of the right to not be unfairly discriminated against on the grounds of gender or sex, which is entrenched in the South African Bill of Rights.<sup>27</sup> In other words, does the Bill of Rights provide sufficient protection for Muslim women against discriminatory Muslim family law rules and practices?<sup>28</sup> It will be argued that legal recognition of Muslim marriages and Muslim family law is necessary and the ways in which recognition could be achieved will be considered. In particular, various legislative and common law options will be analysed with reference to a religious diversity management spectrum. The latter incorporates three approaches to religious diversity namely, assimilation, accommodation, and integration. It will be contended that these approaches do not provide adequate protection for women's right to equality in the context of Muslim family law. Instead, an alternative model will be offered through a Gender-Nuanced

Integration (GNI) approach, which proposes state regulation of Muslim family law in a minority Muslim secular context such as South Africa.<sup>29</sup>

#### APPLICABILITY OF THE SOUTH AFRICAN BILL OF RIGHTS TO UNRECOGNISED MUSLIM FAMILY LAW

Since the South African Bill of Rights has horizontal applicability to private disputes between individuals,<sup>30</sup> the question whether or not it applies to parties affected by Muslim family law depends on whether or not unrecognised Muslim family law constitutes 'law' that must be consistent with the Bill of Rights.<sup>31</sup> Although this issue has not yet been settled in South African law, legal academics have advanced various arguments in favour of and against the notion that Muslim family law qualifies as 'law'.

Those contending that unrecognised Muslim family law is not 'law' rely on the assertion that it does not fit into any of the constitutional categories of 'law' namely, legislation, common law, and customary law.<sup>32</sup> Furthermore, while courts have the power to develop common law and customary law, they do not appear to have similar powers regarding unofficial religious laws.<sup>33</sup> The argument that Muslim family law does constitute 'law' rests on the following reasons: Firstly, the supremacy of the Constitution renders it inconceivable that certain types of law such as unrecognised religious family law would not be subjected 'to the scrutiny of the Bill of Rights'.<sup>34</sup> Secondly, under the interim Constitution, the Bill of Rights applied to 'all law in force'.<sup>35</sup> However, the current Constitution applies to 'all law'.<sup>36</sup> Since the current Constitution does not require the Bill of Rights to be applied to law 'in force', it means that the drafters of the Constitution could have intended that unofficial laws should be subject to the Bill of Rights as well.<sup>37</sup> Thirdly, the constitutional reference to 'marriages concluded under . . . a system of religious, personal or family *law*; or systems of personal and family *law* . . . adhered to by persons professing a particular religion' indicates that the drafters of the Constitution regarded unrecognised religious family law as 'law'.<sup>38</sup> Fourthly, the South African legal system recognises custom as a potential source of law.<sup>39</sup> Therefore, religious customs could also be considered 'law'.<sup>40</sup> Furthermore, the Constitution renders invalid any 'law or conduct' that is inconsistent with it. Even if unrecognised religious family law is not considered to be 'law', it still comprises 'conduct' and would thus be subjected to the Constitution.<sup>41</sup> Moreover, the Constitution recognises the right of members of a religious community to practise their religion and to form religious associations.<sup>42</sup> To then claim that their religious rules,

principles, and practises are not subject to the Bill of Rights would make nonsense of the constitutional acknowledgement relating to South Africa's religious diversity.<sup>43</sup>

While strong arguments have been advanced to suggest that unrecognised Muslim family law could be subjected to constitutional scrutiny, the issue, as noted above, has not yet been decided. Until the judiciary adjudicates the question whether or not the Bill of Rights applies to unrecognised religious family law, it is important that Muslim family law be legally recognised for the protection of women's right to equality. The following section will explore potential modes of recognition for Muslim family law.

#### MODELS OF RECOGNITION AND REGULATION FOR MUSLIM FAMILY LAW

As mentioned previously, several approaches have been identified to deal with a religiously diverse society such as South Africa. They include assimilation, accommodation, and integration.<sup>44</sup> Assimilation involves a religious minority discarding its religious identity and assuming the identity of the dominant group.<sup>45</sup> Accommodation allows the identity of a religious minority to remain intact without having to conform to human rights standards.<sup>46</sup> For instance, particular aspects of a religious law could be afforded legal recognition without requiring them to be consistent with human rights or the state could guarantee a sovereign sphere of decision making for the minority religious community.<sup>47</sup> Integration would allow religious laws to be legally recognised only to the extent that they conform to human rights standards.<sup>48</sup> Integration would therefore involve recognition of, and respect for, religious diversity within a framework of equality.<sup>49</sup> The above three approaches can be placed on a religious diversity management spectrum, whereby assimilation and accommodation would be situated at opposite ends of the spectrum while integration would be located somewhere in the middle of the spectrum.

While most South African Muslims agree that Muslim family law should be formally recognised,<sup>50</sup> they do not all agree on the mode of recognition. Some argue that Muslim family law should be afforded recognition only through an assimilation approach or an accommodation approach and that their regulation should be left to the Muslim community. Others argue that mere recognition is not sufficient and that state regulation of Muslim family law is required through an integration approach. The following sections will focus on Muslim marriages and divorces as aspects of Muslim family law to determine which approach would best suit recognition of Muslim family law.

## 1. ASSIMILATION

The assimilation approach is reflected in the 'legal unity' model, which entails a marriage that complies with the requisites of a civil marriage and the essential elements of a Muslim marriage.<sup>51</sup> The manifestation of the 'legal unity' approach can take one of two forms. The first form of legal unity is displayed in the choice that Muslim parties have to either contract a civil marriage in addition to their religious ceremony or to have their religious ceremony and simultaneously register their Muslim marriage as a civil marriage.

Both options are available in South African law.<sup>52</sup> For example, South African Muslims can register a civil marriage under the Marriage Act<sup>53</sup> before or after they enter a Muslim marriage. Alternatively, section 3(1) enables an individual of the Muslim, Christian, Jewish, and 'Indian' faith such as Hinduism to apply to be designated as a marriage officer to solemnize legal marriages. The Marriage Amendment Bill is proposing to amend section 3(1) so that the categories of designated marriage officers can be extended to members of other religious faiths.<sup>54</sup> If enacted, the amendment will not affect the Muslim community since their members are already entitled to be designated as marriage officers. The registration of a civil marriage before or after a Muslim marriage involves two marriage ceremonies while the solemnisation of a Muslim marriage by a designated marriage officer involves only one marriage ceremony. In both instances, the marriage is only considered legal if it complies with the following formalities of the Marriage Act: both parties must be 18 years or older; the marriage must be solemnized by a registered marriage officer; the marriage must be registered under the Marriage Act; both parties must be present at the solemnisation of the marriage; both must consent to be married to each other; and the marriage must be witnessed by two competent witnesses.<sup>55</sup> The marriage would therefore be subjected to the consequences of a civil marriage including a requirement of monogamy, a reciprocal duty of support between the spouses, equal rights and equal maintenance obligations in respect of the minor children born of the marriage, a default community of property regime involving equal shares in the matrimonial assets unless specified otherwise in an ante-nuptial contract, and equal rights to divorce.<sup>56</sup> Thus, the marriage would entail a relatively equal marital relationship.<sup>57</sup>

A modified version of the first form of legal unity is also offered in the forms of universal partnership (*societas universorum bonorum*),<sup>58</sup> the Civil Union Act (CUA)<sup>59</sup> and the proposed Domestic Partnerships Bill (DPB).<sup>60</sup> These three constructs are available to cohabiting parties who are not married to each other under the Marriage Act. They are intended to address the lacuna in South African law, which does not automatically recognise family law consequences for cohabiting parties.<sup>61</sup> Universal partnership is a common law construct,<sup>62</sup> which is

located within the law of contract.<sup>63</sup> If their relationship terminates, cohabiting parties could rely on universal partnership to assert claims against each other's property.<sup>64</sup> However, they would have to prove that an express or tacit partnership had been entered into between each other and that such a partnership had been intended.<sup>65</sup> If a tacit partnership is averred, the court would consider the facts of the case to determine if an intention to form a partnership could be inferred.<sup>66</sup> The court would also determine whether it was more probable than not that a tacit agreement had been concluded.<sup>67</sup> For instance, if a woman renders services in her 'life' partner's business without receiving remuneration and her services exceed that which is normally expected of a life partner in her situation, the court will not readily infer a tacit agreement.<sup>68</sup> It appears that she would have to prove 'that she made a substantial financial contribution or regularly rendered services [in the business]'.<sup>69</sup> She would also have to prove the four requisites of a partnership namely (i) that each partner brought something into the partnership or bound themselves to bring something into it such as money, labour, or skill; (ii) that the business had been conducted for the joint benefit of both partners; (iii) that the object of the business was to make a profit; and (iv) that the partnership agreement was equivalent to a legitimate contract.<sup>70</sup> Sinclair observes that these requirements make it very difficult to prove that a universal partnership exists.<sup>71</sup> Although a spouse in a Muslim marriage could assert that the marital relationship is equivalent to a universal partnership and thus claim for her proportionate contributions to the marital assets,<sup>72</sup> it is not an option that is readily available to Muslim women (or any other cohabiting party). This is compounded by the fact that Muslim women would have to access the High Court for relief in those types of matters, which is a costly endeavour. Consequently, indigent Muslim women could be denied access to relief.<sup>73</sup>

Since universal partnership is not easily available to cohabiting parties, the government enacted the CUA in 2006. Although this legislation was intended to extend the marital benefits afforded to couples married under the Marriage Act to cohabiting same-sex couples, its ambit extends to opposite-sex cohabiting couples as well.<sup>74</sup> Therefore, opposite-sex or same-sex cohabiting parties who are 18 years or older are able to register their unions either as a marriage or as a civil partnership.<sup>75</sup> The effect of the legislation is that it extends the legal consequences that are contemplated in the Marriage Act to civil unions registered under the CUA.<sup>76</sup> Alternatively, if parties do not want a default community of property regime to apply to their unions, they might be able to register a domestic partnership under the DPB if or when it is enacted.<sup>77</sup> The DPB similarly applies to opposite-sex and same-sex couples who are 18 years or older and have not registered a marriage under the Marriage Act or the CUA or who have not registered

a civil partnership under the CUA.<sup>78</sup> Like the CUA, the DPB would subject a registered domestic partnership to the same legal consequences as parties married under civil law with the exception of the matrimonial property regime.<sup>79</sup> Unlike a civil marriage or a civil union or a civil partnership, the DPB does not afford each domestic partner equal shares in each other's assets.<sup>80</sup>

The second form of 'legal unity' can also be described as 'legal harmonisation', which would entail a synchronisation of Muslim family law with common law.<sup>81</sup> This form of legal unity could be attained through the establishment of a common code of marriage law that would be applicable to all South Africans.<sup>82</sup> This could be achieved by simply amending the Marriage Act to make provision for the legal recognition of Muslim marriages, which would be celebrated according to Muslim rites.<sup>83</sup> While legal unity may appear to have the potential to engender equality between the spouses, it is practically and normatively inappropriate. On a practical level, most South African Muslims choose not to be designated as marriage officers and therefore do not have the legal capacity to perform valid marriages.<sup>84</sup> One reason for this is perhaps because a designated Muslim marriage officer would not be able to legally perform polygynous marriages. Another reason could be that those South African Muslims who do engage in the solemnisation of Muslim marriages are simply not aware of the potential to be designated as marriage officers for the purposes of solemnising a legal marriage. Even if they were made aware of this possibility, chances are they would still choose not to be designated as marriage officers because it would preclude them from solemnising polygynous marriages. Furthermore, the culture within the South African Muslim community does not encourage the solemnisation of civil ceremonies in addition to their religious ceremonies. Bangstad observes that 'many Muslims register their disapproval of the lack of recognition of [Muslim family law] by only marrying by Islamic rites'.<sup>85</sup> Consequently, many South African Muslims choose not to have their marriages regulated by civil law.

On a normative level, if parties marry by Muslim rites and enter into a civil marriage or a domestic partnership, they would not be precluded from implementing nuanced components of a Muslim marriage and divorce that have discriminatory consequences for women. These nuances include marriage by proxy for the female while the male actively participates in the marriage ceremony; the wife's obligation to be sexually available to her husband when *mahr* (dower) is agreed upon; the wife's obligation to be obedient to her husband in exchange for his unilateral obligation to maintain her; termination of the Muslim marriage by unequal forms of divorce such as *talaq*, *tafwid al-talaq*, *faskh*, *khula*, and *mubara'a*; denial of post-*iddah* maintenance payments (*alimony*) to the wife after divorce; observance of *hilala* by the divorced

wife; and polygyny.<sup>86</sup> Under the legal unity model, these types of nuances of a Muslim marriage and divorce would not be regulated by the state. So even though an assimilation process is initiated whereby the formalities for the marriage are expected to accord with secular norms, gender-based discriminatory nuances arising from a Muslim marriage and divorce could continue to be practised in the private sphere, hidden from any type of accountability in the public sphere.

## 2. ACCOMMODATION

The accommodation approach is encompassed in the 'legal pluralism' model, which could manifest in the enactment of 'general legislation' to simply afford recognition to Muslim family law.<sup>87</sup> An example of this approach is contained in the Recognition of Religious Marriages Bill (RRMB),<sup>88</sup> which was drafted by the Commission for Gender Equality (CGE) without much consultation with the Muslim or other religious communities.<sup>89</sup> It was submitted to the Minister of Home Affairs in 2005 and has still not been tabled in Parliament.<sup>90</sup>

The RRMB purports to afford recognition to all religious marriages in South Africa including Muslim marriages but leaves the regulation of those marriages in the hands of the respective religious communities. Thus, it displays an overt sensitivity to religious diversity. Yet, it simultaneously proposes to import secular principles to guide the dissolution of religious marriages. This hotchpotch of standards is demonstrated by the following description of some of the provisions in the RRMB.

Like the Marriage Act, the RRMB stipulates that parties can contract a legal marriage if they enter into a religious marriage that is celebrated according to the tenets of their religion and is solemnized by a marriage officer designated under the RRMB.<sup>91</sup> The RRMB similarly makes provision for a minimum marriageable age of 18 years for both parties and requires that they both have to consent to be married to each other.<sup>92</sup> However, unlike the Marriage Act, the RRMB affords blanket recognition to polygyny.<sup>93</sup> In the context of Muslim family law, polygyny is discriminatory on the basis of sex/gender because the right to marry more than once at the same time is available only to men. Furthermore, wholesale recognition of polygyny will leave the administration of polygyny in the hands of the *'ulama*. Current injustices against polygynous wives could therefore continue under an application of the RRMB. For example, Muslim men could continue to enter into second, third, or fourth marriages without having to account for whether or not they would be able to treat their wives in a non-prejudicial manner.<sup>94</sup> Secondly, polygynous marriages could continue to be contracted without the existing wife's knowledge and/or consent.<sup>95</sup> Thirdly, while Muslims can include a provision for *tafwid al-talaq* in their marriage contract to enable the Muslim wife to divorce her husband if he enters

a polygynous marriage without her consent, the inclusion of such a provision is not a popular practice among South African Muslims.<sup>96</sup> Thus, polygynous wives may continue to find themselves in a situation where they may not be able to exit the marriage easily.

It is possible that the CGE did not propose outlawing polygyny because of the likelihood that the RRMB would not get sufficient buy-in from those religious communities that practise polygyny. For instance, individuals who solemnize religious marriages could simply refuse to register themselves as marriage officers under the RRMB and continue to perform illegal marriages within their communities. Yet, it is unclear why the CGE decided not to recommend recognition of polygyny in a regulated manner especially since there is precedent for the latter in the Recognition of Customary Marriages Act (RCMA).<sup>97</sup> An alternative bill namely, the Muslim Marriages Bill (MMB),<sup>98</sup> which was drafted 2 years prior to the RRMB, also provides a good example for how polygyny could be regulated to hold a man accountable for entering into a polygynous marriage. The MMB will be discussed in greater detail in the next section dealing with the integration approach. Furthermore, lessons could have been drawn from countries that strictly regulate polygyny such as Malaysia, which imposes rigorous conditions for polygyny.<sup>99</sup>

Between the RCMA, the MMB, and precedents of foreign countries, the CGE had a more than adequate model to fashion provisions for the regulation of polygyny. For example, it could very easily have included clauses that: require a man who wishes to enter into a polygynous marriage to apply to a secular court for approval of the marriage;<sup>100</sup> require the existing spouse to be notified that her husband is applying for court approval of his intended polygynous marriage and be joined in the proceedings;<sup>101</sup> require a man to demonstrate that he is financially capable of maintaining all his spouses equally;<sup>102</sup> and enable a court to make an appropriate order pertaining to the matrimonial assets to ensure that existing and future spouses are not prejudiced.<sup>103</sup> An overriding provision could have been added to make equality the most pertinent factor in the court's decision and the court could have been given the discretion to refuse the application if it is of the opinion that the polygynous marriage would negatively affect other parties involved.<sup>104</sup> Yet, the CGE inexplicably missed the opportunity to introduce safeguards for women who are subjected to polygynous marriages. If formulated strongly enough, regulation of polygyny could also act as a deterrent for future polygynous marriages.<sup>105</sup> So the CGE further passed up the opportunity to introduce disincentives for polygyny.

Continuing in the spirit of respecting religious diversity, the RRMB further provides that the matrimonial assets of the religious marriage should be 'governed by the tenets of the religion unless the spouses

enter into an ante-nuptial contract to regulate otherwise'.<sup>106</sup> For Muslims, this would mean that the current status quo would be maintained whereby Muslim spouses retain separate estates. This is a huge problem for Muslim women because in practice, most or all of the marital assets usually accrue to the husband's estate so that the wife is left financially bereft when the marriage is dissolved.<sup>107</sup> Although the RRMB recommends that through an ante-nuptial contract parties would have the right to opt out of a separate estates regime, due to religious convictions and power imbalances between Muslim men and women, not many South African Muslims enter into a written contract that deviates from the traditional rules and practices including the one relating to separate estates.<sup>108</sup> Furthermore, where Muslim parties decide to retain separate estates, the RRMB fails to incorporate the protections that are offered under civil law and in the MMB to enable a court to order an equitable distribution of the marital assets if one of the parties has contributed to the maintenance or increase of the other's estate.<sup>109</sup>

While the RRMB purports to leave the regulation of Muslim marriages within the control of the Muslim community, it attempts to subject their dissolution to a secular framework. For example, the RRMB contemplates having a religious marriage that complies with the formalities of the RRMB dissolved by a secular court on the ground of 'irretrievable breakdown of a marriage'. This ground is imported from the secular Divorce Act.<sup>110</sup> Yet, the RRMB does not provide any guidance as to what irretrievable breakdown of a marriage would mean. Presumably, the drafters of the RRMB anticipated that the courts would rely on existing judicial interpretations. Nevertheless, it leaves the issue of interpretation open. This could have the positive consequence of enabling a marriage to be dissolved simply on the basis that either of the parties no longer desires to be married without having to substantiate her or his reasons any further. Or it could have a negative consequence whereby a court leaves the interpretation of 'irretrievable breakdown' to be determined by the religious communities themselves. If the latter occurs, members of the *'ulama* could try to adopt an interpretation that would make it difficult for a woman to succeed in her divorce action. At the same time, the RRMB attempts to protect a wife who is unable to remarry as a result of her husband's refusal to release her from the religious marriage by giving a court the power to compel the recalcitrant spouse to take the 'necessary steps to have [the] marriage dissolved in accordance with the [parties'] religious tenets'.<sup>111</sup> However, the RRMB does not explain how such an order would be implemented. Thus, the current situation could be retained whereby a civil divorce is granted while the Muslim marriage remains intact, which prevents the wife from remarrying while the husband is free to engage polygynous marriages.

It is a pity that the drafters of the RRMB did not draw from the MMB, which offers a more suitable solution to address a husband's refusal to release his wife from the Muslim marriage while their civil marriage may already be dissolved. Although the MMB also precludes a court from dissolving the civil marriage without proof that the Muslim marriage has been dissolved,<sup>112</sup> if the husband refuses to grant the wife a Muslim divorce, the MMB enables her to apply for and obtain *faskh* after which the matter is dispensed with according to the Divorce Act.<sup>113</sup> These provisions will assist in preventing a husband from holding his wife hostage in the Muslim marriage even though their civil marriage has been terminated. Thus, the MMB empowers the wife by placing the power of release from the marriage in her hands. In contrast, the RRMB disempowers the wife because it leaves the power of release from the marriage in the husband's hands. The RRMB also contains a provision entitled 'equal status and capacity of spouses', which mimics a similar provision in the MMB.<sup>114</sup> The provision recognises that a wife in a religious marriage has full status and capacity to contract, litigate, and acquire and dispose of assets. As well-intentioned as the insertion of the provisions may have been in both the RRMB and the MMB, it does not give Muslim wives any more rights than they already have under secular law and *Shari'a*.<sup>115</sup> The RRMB also acknowledges that a wife in a religious marriage would retain her powers and rights under common law.<sup>116</sup> Again, this will not improve the position of Muslim women since their common law rights in respect of Muslim marriages can only be recognised on a case-by-case basis.<sup>117</sup> Each time a Muslim woman wishes to assert a Muslim family law benefit, she must approach the secular court for relief. As a result, many indigent Muslim women are further denied access to justice.<sup>118</sup>

If enacted, the RRMB would be subject to the Constitution, therefore at first blush a court should be able to strike down a discriminatory *Shari'a* rule or practice as unconstitutional.<sup>119</sup> However, Rautenbach cautions that the courts may not be able to develop Muslim family law in line with the Constitution because its ability to develop the common law and customary law may not extend to religious personal law systems or religious marriages recognised under section 15(3) of the Constitution.<sup>120</sup> This interpretation appears to be correct especially given that section 39(2) of the Constitution treats legislation differently from the common law and customary law. Section 39(2) reads: 'When *interpreting any legislation*, and *when developing the common law or customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.<sup>121</sup> Therefore, the judiciary can *develop* the common law and customary law but *interprets* legislation. Since the RRMB proposes to leave the regulation of Muslim marriages to the Muslim community, a court could *interpret* that to mean that the legislature did not intend the judiciary to interfere with the

Muslim community's regulation of their religious marriage and/or religious personal law system. This type of interpretation could lead to the unfortunate result that discriminatory *Shari'a* rules and practices could remain prevalent within the private sphere of the Muslim community.

On the one hand, it is understandable that as secular legislation, which attempts to accommodate all religious marriages within a secular framework, the RRMB cannot structurally regulate the nuances of all religious marriages and divorces. On the other hand, by neglecting to regulate those nuances, the RRMB fails to comply with the CGE's statutory imperative to protect and advance the rights of women<sup>122</sup> because it implicitly enables the discriminatory nuances that were mentioned earlier in this article to continue unabated within the private realm in the Muslim community. In fact, the RRMB specifically provides that when granting a decree for the dissolution of a religious marriage, the court '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'.<sup>123</sup> This introduces the potential for conservative interpretations relating to post-*iddah* maintenance payments to be adopted, which exclude the possibility of maintenance being awarded to the ex-wife.<sup>124</sup>

It is more than likely that the RRMB fails to provide much protection for women because the CGE did not undertake wide-spread consultations with the Muslim community and particularly with Muslim women's groups. If the CGE had done so, it would have been alerted to the negative implications of the RRMB. Instead, accommodation of Muslim marriages through the 'legal pluralism' approach, which is manifested in the RRMB, will have potentially disastrous consequences for women because it enables discriminatory Muslim family law rules and practices to remain entrenched and concealed in the private domain within the Muslim community.

### 3. INTEGRATION

The third model of recognition and regulation is through 'legal integration', which has been interpreted differently by different authors. One understanding of legal integration is that elements that are common to *Shari'a* and to South African common law could be combined into one substantive rule, which would be applied by the secular courts.<sup>125</sup> This understanding of legal pluralism is not helpful for an adequate protection of women's right to equality because rules such as *mahr* and *iddah* that are not found in the South African legal system will still not be afforded recognition and will remain unregulated in the private sphere where they will continue to negate women's right to equality.<sup>126</sup> Another understanding of 'legal

integration' is that it 'brings together laws of different origins and content, by extending equal treatment to different forms of marriage or by extending the status and jurisdiction that exists under the general law'.<sup>127</sup> The reference to 'general law' is reminiscent of a form of legal unity and is therefore as unhelpful as the legal unity model is for women's right to equality. However, the first part of the description appears to be a call for the enactment of separate legislation to afford (at the very least) legal recognition to Muslim marriages.<sup>128</sup> A variant of this understanding of legal integration is the introduction of a 'uniform Muslim code' that will be statutorily regulated within the parameters of the South African legal system and be made consistent with the Bill of Rights.<sup>129</sup> Alternatively, it could take the form of one piece of legislation comprising numerous chapters that each recognise and regulate different types of religious marriages including Muslim marriages.

The MMB is an example of the third understanding of legal integration, which involves legislation that purports to recognise and regulate Muslim marriages within a *Shari'a* framework and is expected to be consistent with the Bill of Rights.<sup>130</sup> It was drafted by a Project Committee of the South African Law Reform Commission (SALRC) and submitted to the Minister of Justice and Constitutional Development in 2003.<sup>131</sup> Like the RRMB, the MMB has also not yet been tabled in Parliament. Nevertheless, the Ministry of Justice and Constitutional Development has promised to afford it parliamentary priority in the near future.<sup>132</sup> From 1999 until 2002, the MMB was the subject of extensive consultations between the SALRC Project Committee and the Muslim community. Initially, the SALRC Project Committee had prioritised members of the *'ulama* over other community organisations in their consultation process. The *'ulama* consist only of men because they claim that the authority to interpret and decide upon *Shari'a*-related issues is the exclusive preserve of men. Consequently, Muslim women were initially excluded from the consultation process. It was only at the prompting of Muslim women's groups such as Shura Yabafazi and the Muslim Youth Movement Gender Desk that the SALRC Project Committee made a concerted effort in the latter part of the consultation process to also solicit the views of Muslim women.<sup>133</sup> Through a wide ranging and open course of consultations with conservative and progressive sections within the Muslim community, the MMB underwent numerous amendments.<sup>134</sup> Given the vastly divergent views that were expressed about the MMB during the consultation process, its most recent form (that was submitted to the Minister of Justice and Constitutional Development) can be described as a reasonable compromise between extreme positions. The SALRC Project Committee accomplished this by including many of the more progressive traditional interpretations of *Shari'a*, some of which are not practised in the South

African Muslim community. The following paragraphs provide some examples from the MMB to illustrate this:

- i) At the beginning of the consultation process, certain members of the *'ulama* had argued for a minimum marriageable age of 9 years for females. By 2002, the relevant role-players all agreed that the MMB should propose a minimum marriageable age of 18 years for females and males.<sup>135</sup>
- ii) Some *'ulama* members had argued for the recognition of unregulated polygyny, which they currently condone while some progressive Muslim women's groups advocated for the abolition of polygyny.<sup>136</sup> The MMB recommends recognition of polygyny in a regulated form.<sup>137</sup>
- iii) Although the MMB maintains the practise of marriage by proxy on behalf of the prospective bride, which is prevalent in the South African Muslim community, it also requires the consent of both spouses.<sup>138</sup> The latter prevents an application of the *Shafi'i* and *Maliki* rules that enable the guardian of a virgin female to contract her marriage without her permission.<sup>139</sup> The MMB further gives the prospective bride the choice to contract her own marriage without a proxy.
- iv) The MMB retains the traditional Muslim practice currently applied in the South African Muslim community that requires spouses to have separate matrimonial estates.<sup>140</sup> However, the negative consequences of this type of matrimonial regime, which have already been mentioned, are balanced by an inclusion of the *Shari'a* allowance that financial contributions made by one spouse to the other's estate must be considered when the court is considering an action for divorce. This *Shari'a* allowance is not currently implemented by the South African *'ulama*. As acknowledgement of this traditional *Shari'a* right, which purports to afford justice to the parties, the MMB proposes to give the court the power to make an order for the equitable division of assets where a party has assisted in the conduct of family business during the marriage, or contributed to the maintenance or increase of the other's estate.<sup>141</sup> The former provision will protect a wife who is drawn into assisting in a family business during the marriage when the business is not registered in her name. However, it is unclear whether or not the latter provision will enable a wife to be compensated for her contribution in the form of unpaid labour in the home, which is a right that is afforded by *Shari'a*. Whether or not such a right will be recognised within the parameters of the MMB will depend on judicial discretion. Therefore, the wife's right to be compensated for her unpaid labour in the home should be explicitly included in the legislation.

- v) The MMB incorporates the traditional *Shari'a* requirement that a husband must unilaterally maintain his children and his wife during the marriage and *iddah*.<sup>142</sup> The MMB recognises that part of the husband's maintenance obligation toward his wife, which the *'ulama* neglect to enforce, is to remunerate her for breastfeeding activities for a period of two years after the birth of the child.<sup>143</sup> The husband's maintenance obligation toward his children extends until they are self-supporting regardless whether or not the spouses are still married to each other. In the case of divorce, if the wife has custody of the children, the MMB includes the traditional *Shari'a* condition that the husband must provide a residence for the wife for the period of her custody if she does not already own one.<sup>144</sup> Post-*iddah* maintenance for the former wife is not provided for in the MMB, which could be interpreted to mean that it is excluded from the man's maintenance obligations. Yet, the MMB's silence on the issue may enable a court to adopt a progressive interpretation of *Shari'a* and impose a post-*iddah* maintenance obligation on the husband.
- vi) Progressive Muslim groups advocated the inclusion of irretrievable breakdown of the marriage as a ground to obtain *faskh*. However, members of the *'ulama* perceived this ground as mimicking the requirement for a civil divorce, which fuelled their argument that the MMB is anti-*Shari'a*. They were more comfortable with the insertion of *shiqaq* as a ground for *faskh*. *Shiqaq* refers to discord between the spouses so its inclusion in the MMB was not contested by progressive Muslim groups since it can be interpreted to mean an irretrievable breakdown of the marriage.<sup>145</sup> Moreover, the factors that a court may accept to prove an irretrievable breakdown of a civil marriage are similar to some of the other grounds listed in the MMB for *faskh*.<sup>146</sup>
- vii) The MMB recognises two forms of *talaq* namely *talaq-al-sunna* and *talaq al-bid'a*. *Talaq-al-sunna* allows an irrevocable *talaq* to be effected after the pronouncement of one or two *talaqs* followed by the expiration of the *iddah* period. It is recommended by the *Sunni* tradition because it allows for revocation of the *talaq* so that if the spouses reconcile before the expiration of the *iddah* period, the marriage remains intact and the wife does not have to undergo *hilala* to reunite with her husband.<sup>147</sup> *Talaq al-bid'a* is commonly referred to as the triple *talaq* because the husband pronounces '*talaq*' thrice in one sitting after which the marriage is terminated irrevocably. *Talaq al-bid'a* is not recommended by any of the *Sunni* schools of thought because the *iddah* period follows the triple *talaq* and the spouses are unable to reconcile without the wife first undergoing

*hilala*. Although frowned upon, the triple *talaq* is still regarded as permissible by the *Sunni* tradition. Its inclusion in the MMB was most likely at the insistence of the *'ulama* due to the fact that it is commonly practised in the South African Muslim community and is condoned by the South African *'ulama*.<sup>148</sup>

The *talaq* has been abused by Muslim men because women are repudiated at any time, without notice, without witnesses, and without being consulted. Apart from being informed in person, women also find themselves being divorced by their husbands telephonically and through email, text message, and letter.<sup>149</sup> In particular, *talaq* is also used in some instances to keep women in perpetual *iddah*. In practise, this means that a husband issues one *talaq* and then reconciles with his wife before the *iddah* period expires; then issues another *talaq* and reconciles before the *iddah* period expires; and repeats the pattern, which could continue *ad infinitum*. Perpetual *iddah* is abusive because women are trapped in a suspensive marriage without being able to move forward with their lives.

In an attempt to minimise the abuse of *talaq*, the MMB proposes to regulate it by making it obligatory for men to register their *talaq* in the presence of the wife and two witnesses and to institute legal proceedings so that the court can grant a decree of divorce.<sup>150</sup> Failure to comply with the MMB's provisions can result in a criminal offence and the imposition of a fine.<sup>151</sup> The MMB also empowers a court to make an order for *mut'ah al-talaq*, which is a conciliatory gift that *Shari'a* awards to women who have been unjustifiably divorced at their husbands' behest.<sup>152</sup>

viii) The MMB introduces a novel approach relating to the interpretation and application of *Shari'a*. Many members of the *'ulama* had advocated the creation of *Shari'a* courts to interpret the MMB. Instead, the MMB creatively proposes that in unopposed matters, its interpretation should be undertaken by Muslim judges who are located in the existing secular judicial infrastructure.<sup>153</sup> In the case of opposed matters, it recommends that Muslim assessors with 'specialised knowledge of Islamic law' should preside with the Muslim judge.<sup>154</sup> The requirement that Muslim judges should preside over matters arising from the MMB was presumably inserted to pacify those Muslims who believe that *Shari'a* can only be interpreted by Muslims. However, if the MMB is enacted in its current form, this requirement will be difficult to implement. The first challenge will be to try and determine whether or not a judge is Muslim. This determination may be complex because implementers of the MMB will have to decide which criteria should be used to verify that a judge is Muslim. For example, will they simply rely on the assumption that a judge with

a Muslim sounding name is Muslim? What about Muslims who do not have Muslim sounding names? Will they require a judge to be a practising Muslim to qualify as Muslim? Which criteria will they use to ascertain if a judge is a practising Muslim? Or will they simply rely on a judge's assertion that she or he is Muslim? The second challenge that implementers of the MMB will encounter is that there are few Muslim judges within the South African judiciary. This could result in a huge backlog of cases, which will prejudice those parties who are seeking redress in Muslim family law-related matters.

It may therefore be a better option to allow any secular judge to preside over matters arising from the MMB and retain the requirement that *Shari'a* or Muslim family law experts assist as assessors. The latter requirement is necessary if anything is to be learnt from the controversy that emanated from the 1985 Indian case of *Mohd. Ahmed Khan v. Shah Bano Begum and Others* ('*Shah Bano*').<sup>155</sup> This case demonstrated that *Shari'a*-related decisions that are given by non-Muslim judges will elicit an unfavourable response from the Muslim community.<sup>156</sup> Therefore, the use of assessors should allow the decisions of a secular judiciary to be more palatable to the Muslim community because they will emanate from authoritative voices in the fields of *Shari'a* or Muslim family law. It will also prevent 'legal uncertainty', which could arise when a secular judiciary attempts to pronounce on *Shari'a* related matters without having the requisite knowledge of *Shari'a*.<sup>157</sup>

At the same time, the MMB's criterion for assessors provides no insight about what would constitute 'specialised knowledge of Islamic law'. It may therefore be possible for conservative members of the *'ulama* to nominate their own representatives to act as assessors. Secular judges may end up placing greater reliance on the opinions of those assessors, which could have negative implications for women's right to equality. Fortunately, the criterion is phrased broadly enough to enable scholars in *Shari'a* or Muslim family law to be utilised as assessors. It will therefore be important for progressive thinking scholars who are engaged in research on Muslim family law and women's rights to avail themselves as assessors whenever possible so that secular judges can be exposed to progressive interpretations. Since the judiciary is obliged to uphold the Constitution and apply the Bill of Rights, it would be easier for a secular judge to apply progressive interpretations instead of conservative interpretations of Muslim family law. Therefore, the judiciary would not only be able to strike down unconstitutional Muslim family law rules and practices but also could engage in the development of and possibly also aid the reform of Muslim family law in a way that would be acceptable to the Muslim community.<sup>158</sup>

Although the MMB attempts to provide some protection for Muslim women by balancing conservative interpretations with progressive

interpretations of Muslim family law, it selectively excludes certain *Shari'a* benefits that accrue to women such as the previously mentioned right of a wife to be compensated for her unpaid labour in the home and still preserves discriminatory *Shari'a* rules and practices. For example, the MMB requires that the marriage be observed by witnesses that are considered acceptable by *Shari'a*.<sup>159</sup> A traditional understanding of this requirement is that the marriage must be observed by two witnesses who are comprised of either two men or two women and one man.<sup>160</sup> The testimony of a female witness is therefore valued less than the testimony of a male witness. A second example is that the MMB retains practices that subordinate women to men including the payment of *mahr* and the unilateral obligation of the husband to pay his wife maintenance, which require the wife to be sexually subservient and obedient to her husband.<sup>161</sup> A third example relates to the MMB incorporating unequal rights to divorce such as *talaq*, *tafwid al-talaq*, *faskh*, and *khula*.<sup>162</sup> Furthermore, the pervasive reference to *Shari'a*, *Qur'an*, and *Sunnah* as beacons of guidance for the interpretation of numerous provisions in the MMB creates the potential for those who will be interpreting the MMB to rely on conservative anti-women's rights interpretations of Muslim family law.<sup>163</sup> Yet, even though the MMB reinforces a patriarchal framework, which promotes an unequal relationship between men and women, it is expected that the secular judiciary will keep South Africa's constitutional and international law obligations foremost in their minds when interpreting provisions of the MMB so that women's right to equality can be protected.<sup>164</sup>

Another worrisome provision in the MMB that could negatively affect women's right to equality relates to the requirement for mediation and arbitration prior to obtaining a Muslim divorce.<sup>165</sup> The MMB requires that any dispute between the spouses must first be referred to mediation by an accredited Mediation Council before the marriage can be judicially dissolved.<sup>166</sup> If the parties wish, they could also refer their dispute to arbitration.<sup>167</sup> If an agreement arises from the mediation and/or arbitration, it has to be judicially confirmed unless the interests of the minor children are not sufficiently protected. In the case of mediation, the dispute can be referred for judicial adjudication if no agreement is reached. In the case of arbitration, there is no appeal for an arbitration award; at most, the proceedings can only be subjected to judicial review. The manner in which mediation is framed within the MMB appears to be notionally wrong because it negates the voluntary nature of mediation. Also, the option to additionally submit the dispute to arbitration could lead to redundant or conflicting decisions, which could have huge cost implications for the parties. Furthermore, the South African legal system presently precludes arbitration for matrimonial matters or any matter that affects the status of a person such as divorce.<sup>168</sup> It is therefore doubtful whether or not arbitration

for Muslim family law will be capable of being accommodated since the whole body of arbitration has thus far been geared toward mainly commercial matters.

More importantly, alternative dispute resolution mechanisms could be a prudent non-adversarial option for parties who are in a relationship where the power balance is relatively equal. However, they are inappropriate when the relationship is defined by an imbalance of power that tilts in favour of the husband. In such a situation, the wife would be more vulnerable and have weaker negotiating tools that could disadvantage her. Moreover, many of the *'ulama* throughout South Africa already conduct mediation and arbitration proceedings. If they succeed in obtaining accreditation for mediation and arbitration, it is likely that women may feel religiously coerced into having their marital disputes mediated and arbitrated by those bodies instead of secular groups.<sup>169</sup> Mediation agreements and arbitration awards reached as a result of alternative dispute resolution processes that are conducted by members of the *'ulama* may not necessarily favour the wife. Since the MMB only provides a judicial oversight mechanism in respect of children, women will be left unprotected.

The above exposition of the MMB illustrates that it seeks to promote freedom of religion for the South African Muslim community while attempting to afford some protection to Muslim women. The MMB attempts to achieve this by incorporating progressive provisions from within the *Sunni* tradition. This is not entirely inappropriate given that the majority of the Muslim community in South Africa follow the *Sunni* schools of thought.<sup>170</sup> It also means that the MMB operates at all times within the parameters of the *Shari'a* framework. Consequently, the MMB manages to include most of the nuances of Muslim family law, some of which are beneficial to women and others which are not, and proposes to bring those nuances into the public sphere where they can be held accountable to human rights standards. However, the MMB is not sufficiently gender nuanced, which is why women's right to equality is still potentially under threat by many of the MMB's provisions.

#### CHOICE OF MODELS FOR THE RECOGNITION AND REGULATION OF MUSLIM FAMILY LAW

The assimilation approach reflected in the Marriage Act offers to recognise Muslim marriages within a secular framework. In fact, it expects Muslim marriages to adjust to secular requirements. The result is that the nuances of Muslim marriages and divorces are ignored, which has a negative impact on women because although the parties may have a secular marriage in addition to their Muslim marriage, discriminatory Muslim family law rules and practices are still enforced

within the Muslim community. While the assimilation approach expressed through a secular marriage promises a relationship based on formal equality, lack of state regulation of the nuances of a Muslim marriage and divorce negates any possibility of substantive equality for Muslim women.

The accommodation approach manifested in the RRMB purports to be overly sensitive to religious diversity by recommending that religious communities be allowed to regulate their own marriages. The effect is that discriminatory nuances of a Muslim marriage and divorce will be kept hidden in the private sphere where they will continue to be implemented by the Muslim community. Although the accommodation and assimilation models approach Muslim marriages from different angles on the religious diversity management spectrum, they both have a negative impact on women's right to equality. By allowing discriminatory Muslim family law rules and practices to remain concealed within the private domain of the Muslim community, the two models facilitate and contribute to the privatised oppression of Muslim women.<sup>171</sup>

The third option presented in the form of the MMB adopts an integration approach by proposing to regulate Muslim marriages within a *Shari'a* framework in a way that is required to be consistent with the rights entrenched in the Bill of Rights. It therefore recommends placing the nuances of the Muslim marriage and divorce in the public domain so that they can be measured against human rights standards. However, the MMB fails to prioritise women's right to equality in some important respects. Therefore, a more gender-nuanced approach is required to ensure that women's right to equality is given satisfactory protection.

#### GNI APPROACH

The GNI approach proposes to address the gendered lacunae that are inherent in the above approaches so that women's right to equality can be afforded the protection it deserves while simultaneously respecting freedom of religion. The GNI approach could be applicable to a Muslim minority context, which is located in a secular society that is governed by a constitution protecting freedom of religion and women's right to equality. It proposes that state regulation (and not simply recognition) of Muslim marriages in this context is necessary to make the nuances of Muslim family law publicly accountable to human rights standards, particularly women's right to equality. The GNI approach therefore promotes the establishment of legal pluralism in multi-religious societies and requires the different legal systems to be consistent with women's right to equality. It insists that state regulation

of Muslim family law must ensure that freedom of religion is not promoted at the expense of women's right to equality. In other words, the GNI approach respects 'freedom of religion only to the extent that it does not infringe women's right to equality'.<sup>172</sup> Based on this understanding, the GNI approach rejects the assimilation and accommodation approaches for the minority Muslim family law context and instead promotes a gender-nuanced version of the integration approach.

To achieve its objective of ensuring sufficient protection for women's right to equality, the GNI approach recommends that the legislative and judicial bodies have a significant role to play. The legislature's role would be to recognise and regulate Muslim family law through legislation in a way that safeguards women's right to equality. Similarly, the role of the judiciary would be to interpret the legislation so that women's right to equality is protected. To ensure that judicial decisions relating to Muslim family law are accepted by the minority Muslim community, the secular judge should be assisted by Muslim family law or *Shari'a* experts. It is therefore imperative for progressive scholars and activists who are working with Muslim family law and women's rights issues to provide women-friendly interpretations of *Shari'a* that can be religiously justified. It is also important that they make themselves available as assessors so that the courts are not inundated with assessors that are traditional scholars who will promote conservative, sexist interpretations of Muslim family law.

Given that multiple interpretations of Muslim family law exist,<sup>173</sup> the inevitable questions that arise are which interpretation would a legislature and judiciary apply and what would determine their choice of interpretation? To ensure adequate protection of women's right to equality, legislation should incorporate progressive women-friendly interpretations of Muslim family law. Similarly, when the legislation is interpreted by the judiciary, the latter should allow progressive women-friendly interpretations of Muslim family law to inform its decisions. This should not be too difficult for either organ of state since they are both required to comply with South Africa's constitutional, regional, and international obligations, particularly its obligation to ensure that gender equality is protected and promoted.<sup>174</sup> In this way, the GNI approach would allow Muslim family law rules and practices to be evicted from the dungeons of the private sphere and hauled into the public domain where in order to survive they must comply with a gendered standard that promotes women's right to equality. At the same time, it is possible that state regulation of Muslim family law could result in dissidents secretly continuing to apply discriminatory rules and practices within the Muslim community. Yet, the benefits that regulation offers surely outweigh that possibility.

Women-friendly interpretations could be drawn from numerous sources. For example, progressive opinions within the traditional interpretations that exist among the different *Sunni* schools of thought; or they could be formulated from the body of Muslim feminist interpretations that is emerging in our contemporary context;<sup>175</sup> or they could be developed through the application of *ijtihad*. *Ijtihad* is a secondary source for the formulation of *Shari'a*, which involves a process of 'independent juristic reasoning'.<sup>176</sup> It is applied where solutions cannot be found in the *Qur'an* or *Sunnah*.<sup>177</sup> In about 1258 AD, Muslim jurists decided that *ijtihad* should no longer be utilised to develop *Shari'a* and deemed the 'doors of *ijtihad* to be closed forever'.<sup>178</sup> Yet, *ijtihad* is currently practised in many Muslim countries. For example, many traditional Muslim scholars view *khula'* as a form of divorce that is available to a woman, which requires her husband's consent.<sup>179</sup> However, in 2000, a Muslim scholar at Al-Azhar University in Cairo passed a *fatwa*, which effectively abolished the requirement that the husband's consent was needed for a valid *khula'* provided the wife returned her *mahr* and forfeited all financial claims against him.<sup>180</sup> That *fatwa* was codified into Egyptian divorce law.<sup>181</sup> The latter interpretation of *khula'* had been accepted as a result of lengthy campaigns by women's rights groups who had opposed the application of the conservative interpretation of *khula'* because it had resulted in grave inequities against women.<sup>182</sup> *Ijtihad* is also encouraged by a recently established global movement called Musawah, which was launched in Malaysia in February 2009. Musawah postulates the view that equality in Muslim family law is necessary for the protection of women's rights and is also possible through *inter alia* reinterpretation of the traditional sources of *Shari'a* including the application of *ijtihad*.<sup>183</sup> This view is shared by Muslim scholars such as Ali.<sup>184</sup>

Since different interest groups would be affected namely, conservative Muslim groups and women's rights groups, the possibility of compromising women's right to equality exists. The GNI approach would only tolerate compromises to the extent that they do not infringe on women's right to equality. It would therefore accept Brems' suggestion that harmful rules and practices could be replaced by symbolic rules and practices that do not cause harm to individuals.<sup>185</sup> For example, an agreement relating to *mahr* is regarded as a requirement for the validity of a Muslim marriage.<sup>186</sup> When such an agreement is reached, the wife is obliged to provide sex on demand to her husband. Hence, when the marriage terminates at the instance of the wife, she is required to return the *mahr* because she no longer has an obligation to be sexually subservient to her husband. The *mahr* is also meant to serve two other purposes. It is considered to be a form of security for the wife in the event that the marriage terminates at the behest of the husband and it is meant to act as a deterrent against the husband's arbitrary

right to *talaq*.<sup>187</sup> Some scholars even claim that the *mahr* is a symbol of respect for the wife.<sup>188</sup> This is difficult to comprehend given the sexist underpinnings of *mahr*. The GNI approach would recommend that a reasonable compromise would be to retain *mahr* as a form of security for the wife without the burdensome sexual obligation that women traditionally have to bear. *Mahr* could then become the symbol of respect that some scholars claim it is.

However, in the event that an oppressive rule or practice cannot be replaced by a symbolic one, the GNI approach would support the view that it should be eliminated.<sup>189</sup> For example, the *Qur'anic* injunction relating to how a woman should be treated when she is disobedient has been used to justify domestic violence and reinforces the stereotypical perception that women must be obedient to men.<sup>190</sup> Such an interpretation cannot be replaced with a symbolic one because a society that aims to promote equality between the sexes cannot endorse a symbol that represents power imbalances between men and women. In this way, the adoption of women-friendly interpretations of Muslim family law by a secular legislature and judiciary could have the additional benefit of aiding in the gendered reform of Muslim family law. Ideally, reform of Muslim family law should be undertaken from within the Muslim community.<sup>191</sup> However, reform may never happen in our lifetime if it is left solely in the hands of communities that are presided over by men with patriarchal ideologies. Therefore, the GNI approach recommends that where possible, a combination of external impetuses in the form of legislation and the secular judiciary should be accessed to assist with Muslim family law reform.

## CONCLUSION

The debate in South Africa has moved beyond the question whether or not Muslim marriages should be afforded legal recognition. Scholars and activists accept that legislative recognition is necessary to ameliorate the position of vulnerable Muslim parties including women. The question now is how that legislative recognition should be affected.

After discussing three options for legislative recognition of Muslim family law and/or Muslim marriages namely, assimilation, accommodation, and integration, this article has shown that none of those approaches provide adequate protection for women's right to equality. Instead, the article has proposed an alternative model namely, the GNI approach to ensure the best protection possible for the equality right of minority Muslim women who are located in a secular society.

The GNI approach considers statutory regulation of Muslim marriages in as gender sensitive a manner as possible as providing the greatest protection for women's right to equality. Statutory regulation

will allow nuances of Muslim family law to be transferred from its hidden domain in the private sphere into the open public sphere where it will be required to be consistent with human rights standards, particularly gender equality. In this way, discriminatory Muslim family law rules and practices could be potentially reformed through the adoption of feminist reinterpretations of *Shari'a* to promote women's right to equality.

Although the MMB does not fit properly into the GNI approach, it is currently the best option in relation to the RRMB and existing secular options such as the Marriage Act because it promises to provide more protection for Muslim women's right to equality. Nevertheless, the MMB can still be transformed into legislation that could correspond to the GNI approach either during the parliamentary tabling process or after its enactment through constitutional challenges. To achieve this, civil society will have to advocate vehemently for the MMB to be made more gender sensitive before it is enacted, failing which it must proactively engage with the legislation by taking precedent setting cases to the Constitutional Court and/or Supreme Court of Appeal, to challenge those provisions that result in sex-/gender-based discriminations. The judiciary will also have to be proactive and adopt wherever possible, women-friendly interpretations of Muslim family law. Finally, the judiciary must ensure that in balancing women's right to equality with religious freedom, respect for the latter does not yield negative results for women.<sup>192</sup>

#### NOTES

<sup>1</sup>Coertzen (2005): 358; Van der Schyff (2003): 515.

<sup>2</sup>Collaboration between religion and state is reflected in the 'cooperation model', which encompasses three forms of secularism that promote sensitivity to religion. The first is 'non-discriminatory neutrality' whereby the state accommodates religious symbols or practices in the public sphere without favouring one above another. The second suggests that a secular society may have an assimilation approach whereby minority communities may be coerced to adopt the religion of the majority community. For example, the dominance of the Christian religion is experienced in many secular societies where *inter alia* exclusively Christian religious holidays continue to be celebrated as public holidays. Therefore, the dominance of Christianity is maintained within the public domain even though policy making is determined by secular principles. The third is 'benevolent neutrality', which involves a multicultural understanding of freedom of religion that requires the state to respect religious diversity and to actively accommodate the religious practices and beliefs of minority religious communities. Coertzen, *ibid.*; Kymlicka (1995): 2; Meyerson (2001): 115; Van der Schyff, *ibid.*: 516–17.

<sup>3</sup>Dangor (2003): 215; Meyerson *ibid.*: 107; Van der Vyver (1999): 649–70. While the authors all agree that South Africa does not encompass a strict separation between religion and state, they do not all agree that it should be described as secular. Dangor views South Africa as a secular state because he interprets its secularity as one that involves 'active interaction between the state and religious organisations'; Van der Vyver does not view South Africa as secular because the Constitution actively promotes religion; and Heys and Brand adopt a middle position by treating South Africa as semi-secular. Heys and Brand (2000): 711, 749.

<sup>4</sup>The Constitutional Court has adopted the Canadian Supreme Court's definition of freedom of religion as 'the right to entertain such religious beliefs as a person chooses, the right to declare

religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination'. *R. v Big M Drug Mart Ltd* (1985) 18 D.L.R. (4th) 321 (S.C.C.) at para 94; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 at paras 18–19; *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 at paras 38, 110, 112.

<sup>5</sup>Van der Schyff, at n 1, 519–20; sections 15(3), 31 of the South African Constitution 1996.

Section 15(3) reads:

- (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 31 reads:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –  
to enjoy their culture, practise their religion and use their language;

...

- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>6</sup>*Ibid.*, 519–20; sections 29(3)–(4).

Section 29 reads:

- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
  - (a) do not discriminate on the basis of race;
  - (b) are registered with the state; and
  - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

<sup>7</sup>South Africa has a total population of 44,819,778. It has a diverse range of religious communities comprising several denominations of Christians, which make up 79.8% of the total population. The remainder of the population is comprised of numerous minority religious communities including Muslims (1.5%), African traditional beliefs (0.3%), Judaism (0.2%), Hinduism (1.2%) and other unidentified faiths (0.6%). Statistics South Africa (2004): 27–8.

<sup>8</sup>Amien (2006): 741; sections 15(3) (b), 31(2) of the South African Constitution. The right to equality is protected in section 9, which reads:

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

...

- (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.

<sup>9</sup>The Muslim community constitutes the largest religious minority in South Africa. See n 7.

<sup>10</sup>Moosa (2000–01): 211.

<sup>11</sup>*Bronn v Frits Bronn's Executors and Others* 1860 3 Searle 313 at 318, 320, 321; *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307–08; *Ismail v Ismail* 1983 (1) SA 1006 (AD) at 1024D-F. See also Rautenbach (2003a) 135, 148. Although the courts have increasingly been willing to recognise the Muslim marriage as a contract and to enforce proven terms and obligations of that contract, they have not recognised Muslim marriages as legal. *Ryland v Edros* 1997 1997 (2) SA 690; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Fatima Gabie Hassam v Johan Hermanus Jacobs N.O. and Others* CPD 5704; *Fatima Gabie Hassam v Johan Hermanus Jacobs N.O. and Others (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as Amicus Curiae)* CCT 83/08 [2009] ZACC 19; *Khan v Khan* 2005 (2) SA 272 (T).

<sup>12</sup> *Shari'a* is derived from the *Qur'an* (which most Muslims believe to be the written word of God), *Sunnah* (prophetic traditions of the Prophet Muhammad), *qiyas* (analogy), *ijma* (consensus), and *ijtihad* (independent reasoning). Moosa (1996): 131, 142; Moosa (1998a): 479.

<sup>13</sup> Jeenah (2004): 1.

<sup>14</sup> Moosa (1998a) at n 12, 479.

<sup>15</sup> Moosa (1996) at n 12, 135.

<sup>16</sup> Rautenbach et al (2006): 151.

<sup>17</sup> Moosa (1996) at n 12, 150.

<sup>18</sup> *Ibid.*, 146.

<sup>19</sup> *Ibid.*, 147.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, 136–8; Jeenah at n 13, 2.

<sup>22</sup> The South African *ulama* consists *inter alia* of the Muslim Judicial Council (representing the *Shafi*'s school of thought in the Western Cape), *Jamiatul 'Ulama* Transvaal (representing the *Hanafi* school of thought in Gauteng), *Jamiatul 'Ulama* Natal (representing the *Hanafi* school of thought in KwaZulu-Natal), *Majlisul 'Ulama* (representing the *Hanafi* school of thought in the Eastern Cape), *Majlis Ashura al-Islami*, Islamic Council of South Africa, *Sunni Jamiatul 'Ulama* of South Africa, *Sunni 'Ulama* Council and the United *Ulama* Council (representing the *Deobandi* and *Barelwi* schools of thought). The aforementioned schools of thought are located within the *Sunni* tradition, which also includes the *Maliki* and *Hanbali* schools of thought. The *Sunni* schools of thought were 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*. Ali (2000): 21; Bulbulia (1985): 224; Cachalia (1993) 396, 398; Dangor at n 3, 211, 218–19; Moosa, *ibid.*, 134, 142–4; Moosa (1998a) at n 12, 480.

<sup>23</sup> Cachalia *ibid.*, 398; Moosa, *ibid.*

<sup>24</sup> Moosa (1998b) 200; Cachalia, *ibid.*

<sup>25</sup> Moosa (1996) at n 12, 136–8; Jeenah at n 13, 2.

<sup>26</sup> The right to equality is protected in the South African Constitution. See n 8 above. See also correspondence by Shura Yabafazi to the Ministry of Justice and Constitutional Development, 29 April 2009 (on file with author). For a more detailed explanation of the negative effects of non-recognition of Muslim marriages on women, see Amien at n 8, 729–54.

<sup>27</sup> At n 5, section 9(3).

<sup>28</sup> Rautenbach (2003b): 18.

<sup>29</sup> Amien (2008): 383. In this paper, the author coined the approach as the 'Gendered-Nuanced Integrationist' approach. However, she prefers the current name.

<sup>30</sup> Freedman (1998): 536–7; Lehnert (2005): 247.

<sup>31</sup> At n 5, section 8(1) provides that '[t]he Bill of Rights applies to all law'.

<sup>32</sup> The Constitution treats customary law as traditions and practices that are associated with black African communities in South Africa. For example, Chapter 12 of the Constitution deals with the recognition of traditional leadership according to customary law. The Constitution also appears to draw a distinction between religion and culture since the two are mentioned separately (and not interchangeably) throughout the Bill of Rights. For instance, see section 9(3) (where culture and religion are mentioned as separate grounds for unfair discrimination), section 15 (deals only with freedom of religion), section 30 (deals only with the right to culture), and section 31 (cultural communities are distinguished from religious communities and members of each community have the right to practice her or his culture and religion respectively). See n 16, 153.

<sup>33</sup> *Ibid.*, 155.

<sup>34</sup> At n 5, section 2 reads: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. *Ibid.*, 153.

<sup>35</sup> At n 5, section 7(2). The interim Constitution governed South Africa during the transitional period leading up to after the democratic elections in 1994.

<sup>36</sup> *Ibid.*, section 8(1).

<sup>37</sup> At n 16, 153.

<sup>38</sup> At n 5, section 15(3)(a)(1)(i)-(ii) (emphasis added). See also *ibid.*, 154.

<sup>39</sup> Lehmann (2006): 22.

<sup>40</sup> At n 16, 154.

<sup>41</sup> At n 5, section 2; *ibid.*

<sup>42</sup> *Ibid.*, section 31.

<sup>43</sup> At n 16, 154–5.

- <sup>44</sup>De Witte (1999): 3; Ghosh (1994): 57; and Okin (1999): 9.
- <sup>45</sup>Okin, *ibid.*
- <sup>46</sup>Loenen (2002): 425.
- <sup>47</sup>De Witte at n 44, 3.
- <sup>48</sup>Loenen at n 46, 425.
- <sup>49</sup>Ghosh at n 44, 57.
- <sup>50</sup>Rautenbach at n 11, 130.
- <sup>51</sup>Roodt (1995): 55–6. The ‘legal unity’ model of recognition seems to accord with Ayelet Shachar’s ‘joint governance’ approach. See Shachar (2001): 5–6, 13–14, 88–92.
- <sup>52</sup>The options are also available in Canadian law. See section 20(2) of the Ontario Marriage Act R.S.O. 1990, c. M.3; Amien at n 29, 389.
- <sup>53</sup>25 of 1961.
- <sup>54</sup>Clause 4 of the Marriage Amendment Bill 2009.
- <sup>55</sup>Sections 24, 11(1), 29A, 29(4), 29(2), 30. See also Costa (1994): 914; Rautenbach at n 11, 123 footnote 5.
- <sup>56</sup>Section 30(3) of the Marriage Act at n 53; section 15 of the Maintenance Act 99 of 1998; chapters II–III of the Matrimonial Property Act 88 of 1984; Divorce Act 70 of 1979. See also Himonga and Du Bois (2007): 265, 267, 287–9; Pienaar (2006): 314; Rautenbach (2004): 26.
- <sup>57</sup>Roodt at n 51, 56.
- <sup>58</sup>Himonga and Du Bois at n 56, 365.
- <sup>59</sup>17 of 2006.
- <sup>60</sup>DPB 2008. Available at <http://www.info.gov.za/view/DownloadFileAction?id=76707> (accessed on 10 February 2010).
- <sup>61</sup>Sinclair (1996): 274.
- <sup>62</sup>Himonga and Du Bois at n 56, 365; Joubert (2006): 186, para 257.
- <sup>63</sup>At n 61, 278.
- <sup>64</sup>*Ibid.*, 274.
- <sup>65</sup>Joubert n 62, 187, para 257. See also *Ally v Dinath* 1984 (2) SA 451 (T) at 454; *Muhlmann v Muhlmann* 1984 (3) SA 102 (A) at 123; *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 956; *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 77.
- <sup>66</sup>*Isaacs*, *ibid.*
- <sup>67</sup>*Muhlmann* at n 65, at 124.
- <sup>68</sup>Joubert n 62, 187, para 257. See also *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) at 634; *ibid.*
- <sup>69</sup>*Muhlmann* (1981), *ibid.*
- <sup>70</sup>*Ibid.*; *Isaacs* at n 65; *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O) at 615.
- <sup>71</sup>Sinclair at n 61, 279.
- <sup>72</sup>*Isaacs* n 65, 961; *Ally* n 65.
- <sup>73</sup>Amien n 8, 737.
- <sup>74</sup>Memorandum on the objects of the Civil Union Bill 2006 (on file with author).
- <sup>75</sup>Section 1.
- <sup>76</sup>Section 13(1).
- <sup>77</sup>Clause 7(1).
- <sup>78</sup>Clauses 1, 4(2), 6(1).
- <sup>79</sup>For example, the DPB makes provision for a reciprocal duty of support between the partners and only permits one domestic partnership to be registered at a time. At n 60, clauses 1, 4(1), 9.
- <sup>80</sup>*Ibid.*, clause 7(1).
- <sup>81</sup>Rautenbach n 56, 24.
- <sup>82</sup>*Ibid.*, 25–6; Moosa (1996) at n 12, 152.
- <sup>83</sup>Rautenbach, *ibid.*, 26.
- <sup>84</sup>Moosa (1995a): 419.
- <sup>85</sup>Bangstad (2004): 354.
- <sup>86</sup>*Mahr*: is given to the wife by the husband as an obligation arising out of the marriage. It is anything of value that is permissible according to *Shari’a* and agreed upon between the wife and husband at the date of marriage. Once agreement is reached on the nature and amount of the *mahr*, it belongs exclusively to the wife. If it is not paid to her, it will accrue to her estate as a debt owed by the husband.
- Talaq*: entails the sole prerogative of a man to unilaterally repudiate his wife without having to provide any grounds for dissolving the marriage.
- Tafwid al-talaq*: is a form of delegated *talaq* that involves the husband delegating his right of *talaq* to his wife through an agreement, which could require her to forfeit her *mahr*. *Faskh* is a type of

Muslim divorce that can only be granted by a third party such as a *Shari'a* court judge or a member of the *'ulama*. It is available to men and women. However, it is not usually accessed by men since they are entitled to divorce at will without requiring the intervention of a third party. If a woman applies for *faskh*, she must provide grounds for her application and if she is granted the *faskh*, she is usually required to surrender her *mahr* or pay compensation to her husband.

*Khula'*: is a form of divorce that can be initiated by the wife subject to her forfeiting her *mahr*. There is disagreement among Muslim scholars about whether or not it requires the consent of the husband. Muslim countries such as Egypt, Nigeria, Bangladesh, Pakistan, and the Philippines have adopted the interpretation that does not require the husband's consent.

*Mubara'a*: is an agreement between the spouses that they will divorce without requiring compensation to be paid by either spouse. Scholars who adopt the interpretation that *khula'* does not require the husband's consent contend that those who do require his consent confuse *khula'* with *mubara'a*.

*Iddah*: is a waiting period that a woman is required to observe immediately after the dissolution of her marriage by death or divorce. During the *iddah*, the woman's movement is limited in the sense that she must remain in her home and she may neither engage in a romantic relationship or remarry. In the case of divorce, the *iddah* period is 3 months and in the case of death, the *iddah* extends to 4 months and 10 days. If she is pregnant, the *iddah* expires when the child is born.

*Hilala*: A woman is not permitted to remarry her husband from whom she is divorced until she undergoes *hilala*, ie she must first marry another man and the subsequent marriage must dissolve by death or divorce before she is allowed to remarry her former husband.

*Polygyny*: A traditional *Shari'a* understanding of polygyny allows a man to marry up to four wives simultaneously but does not afford the same right to Muslim women. The husband neither requires the existing wife's permission to enter into subsequent marriages nor needs to inform her that he is engaging in polygynous unions.

*Qur'an*, 4:3, 4:4, 4:34, 33:49, 65:4, 2:228-229, 2:234; Ahmad (1978): 221; Bilchitz et al (2006): 254-5, 262-3; 732 footnote 12, 735 footnote 25, 745, 7, 22; Carroll and Kapoor (1996): 11; Doi (1984): 158-66, 170-2, 192, 198-203; Ibn Rushd (1996): 23, 25, 36, 54, 60, 72, 79, 81, 97, 106, 115-16, 119; Moosa at n 24, 199; Women Living Under Muslim Laws (2003): 278-9.

<sup>87</sup>Rautenbach at n 56, 20; Moosa (1996) at n 12, 152.

<sup>88</sup>RRMB 2005 (on file with the author).

<sup>89</sup>Telephonic conversation with Mr Kamraj Anirudhra, Parliamentary Officer, CGE, 01 December 2008. Another example of the accommodation/'legal pluralism' approach is the Indian Muslim Personal Law (Shariat) Application Act 26 of 1937.

<sup>90</sup>Telephonic conversation with CGE Commissioner Rosieda Shabodien, 04 August 2007. The CGE is a constitutional body that is required to 'promote respect for gender equality and the protection, development and attainment of gender equality'. Section 187(1) of the South African Constitution. It drafted the RRMB and submitted it through the Department of Justice and Constitutional Development in accordance with its statutory mandate under section 11(1)(d) of the *Commission on Gender Equality Act* 39 of 1996, which reads: '[T]he [CGE] . . . may recommend to Parliament or any other legislature the adoption of new legislation which would promote gender equality and the status of women'. See also Manjoo (2005): 2, 4.

<sup>91</sup>Clauses 2(1), 3(1)(b), 5(1), 11 of the RRMB.

<sup>92</sup>Ibid., clause 3(1)(a).

<sup>93</sup>Ibid., clause 2(2), which reads: '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'.

<sup>94</sup>*Qur'an*, 4:3. The verse reads:

If ye fear that ye shall not Be able to deal justly With the orphans, Marry 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. The above verse is invoked to support polygyny in a regulated fashion. However, verse 4:129 is invoked to support the argument that polygyny can be justifiably abolished. It reads: 'Ye are never able To be fair and just As between women, Even if it is Your ardent desire'.

<sup>95</sup>Correspondence by Shura Yabafazi to the Ministry of Justice and Constitutional Development, 29 April 2009 (on file with author).

<sup>96</sup>At n 85.

<sup>97</sup> RCMA 120 of 1998.

<sup>98</sup> MMB 2003.

<sup>99</sup> Islamic Family Law (Federal Territories) Act 303 of 1984 requires five conditions to be fulfilled before a man can take a subsequent wife namely: (i) he must have the financial means; (ii) he must be able to guarantee equal treatment of the wives; (iii) he must show that no harm would be caused to the wife/wives; (iv) he must show that taking a subsequent wife is just and necessary; and (v) the proposed marriage must not decrease the standard of living of the existing wife/wives and their dependants. In 1996, condition (iv) was amended to 'just or necessary'. Hamzah and Othman (2010).

<sup>100</sup> Section 7(6) of the RCMA; clause 8(6) of the MMB.

<sup>101</sup> *Ibid.*, section 7(8), clause 8(8).

<sup>102</sup> *Ibid.*, section 7(8), clause 8(7) (a).

<sup>103</sup> *Ibid.*, section 7(6), clause 8(7) (b)–(c).

<sup>104</sup> *Ibid.*, section 7(7) (b) (iii), clause 8(7) (c).

<sup>105</sup> Roodt at n 51, 56.

<sup>106</sup> Clause 9(1)–(2).

<sup>107</sup> Amien at n 8, 734.

<sup>108</sup> Current reality indicates that Muslim women are not sufficiently empowered to exert their rights to negotiate and contract the terms of their marriage. See Amien (2002): 17; Commission on Gender Equality (2000): 9 (on file with author).

<sup>109</sup> If a secular marriage was concluded prior to 1984 and is subject to a matrimonial property regime that keeps the estates of the spouses separate, the courts have discretion to grant an order under certain circumstances for an equitable distribution of the assets. Similarly, the MMB gives a court the power to make an order for the equitable division of assets where a party has assisted in the conduct of family business during the marriage, or contributed to the maintenance or increase of the other's estate. The former should protect a wife who assists in a family business during the subsistence of the marriage while the business is not registered in her name. Section 7(3) of the Divorce Act at n 56, clause 9(7) (b) of the MMB. See also Du Bois at n 56, 267.

<sup>110</sup> Clause 10(1)–(2) of the RRMB, section 4 of the Divorce Act at n 56. Both sections empower a court to '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'.

<sup>111</sup> Clause 10(3).

<sup>112</sup> Clause 16(1).

<sup>113</sup> Clause 1(vii).

<sup>114</sup> Clause 3 of the MMB reads: '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'. Clause 8 of the RMMB reads: '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'.

<sup>115</sup> Amien at n 8, 745.

<sup>116</sup> Clause 8 of the RMMB.

<sup>117</sup> Certain Muslim family law benefits have been recognised by the secular courts as enforceable in terms of the Muslim marriage contract. See *Ryland* and *Amod* at n 11.

<sup>118</sup> Amien at n 8, 737.

<sup>119</sup> Rautenbach at n 56, 21–2. The equality clause in section 9 of the Constitution would most likely be invoked.

<sup>120</sup> *Ibid.* See also section 39(2) of the South African Constitution, which relates to the judiciary's ability to develop the common law and/or customary law.

<sup>121</sup> Emphasis added.

<sup>122</sup> Section 11(1) (d) of the Commission on Gender Equality Act at n 90, which provides that the CGE 'may recommend to Parliament or any other legislature the adoption of new legislation which would promote gender equality and the status of women'.

<sup>123</sup> Clause 10(5) (e).

<sup>124</sup> *Qur'an*, 65:6; Bilchitz at n 86, 256, 261; Cachalia at n 22, 402; Gabru (2004): 4–5; Ibn Rushd at n 86, 114; Nadvi (1990): 17–18.

<sup>125</sup> Moosa (1996) at n 12, 152.

<sup>126</sup> *Ibid.*, 152–3.

<sup>127</sup> Roodt at n 51, 56.

<sup>128</sup> Rautenbach at n 11, 144, 149.

<sup>129</sup> At n 27. Moosa (1995b): 178–9; Moosa at n 24, 201.

<sup>130</sup> Clause 2(5) of the MMB.

<sup>131</sup> SALRC (2003): i-167. See also Rautenbach et al at n 16, 163; Rautenbach at n 56, 4.

<sup>132</sup> Schroeder (2010): 5.

<sup>133</sup> Correspondence by Shura Yabafazi (Consultation of Women) to the Minister of Justice and Constitutional Development, 26 May 2009 (on file with author).

<sup>134</sup> The consultation process officially began with the publication of an Issue Paper in May 2000, which invited written submissions from the public. This led to the publication of a Discussion Paper, containing a draft Bill for the recognition and regulation of Muslim marriages. The public were again invited to tender written submissions, which resulted in an amended draft Bill. The SALRC Project Committee subsequently embarked on a road show to present the amended draft bill to those groups who had previously made written submissions. Those groups were afforded a further opportunity to tender oral submissions to the Project Committee and this resulted in further amendments, which are included in the MMB. South African Law Commission (2000): ii-34; South African Law Commission (2001): ii-73; South African Law Reform Commission 'Collation of Submissions on Discussion Paper 101: Islamic and Related Matters'. See also Rautenbach et al at n 16, 162–3; Rautenbach at n 56, 4; Rautenbach at n 11, 147–8.

<sup>135</sup> Correspondence by Shura Yabafazi at n 133. Clause 5(1)(d) of the MMB.

<sup>136</sup> In fact, many polygynous marriages are performed in secret, without the existing wife's knowledge. Correspondence by Shura Yabafazi to the Minister of Justice and Constitutional Development, 26 April 2009. See also Amien at n 108.

<sup>137</sup> Clause 8(6)–(11) proposes the following regulation for polygynous marriages: A husband must apply to court to contract a polygynous marriage and for the approval of a contract that will regulate the future matrimonial property regimes of his marriages. The court must 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'. If the existing marriage/s incorporates community of property or is out of community of property subject to the accrual system, the court may terminate the matrimonial property regime/s and order an immediate division of the property. The parties may then agree on which matrimonial property system will apply to their marriages, failing which the marriage will be deemed to be out of community of property. All interested parties, particularly existing spouses must be joined to the proceedings. A marriage officer is not permitted to register a polygynous marriage without the court order authorising the marriage. Polygynous marriages without court approval would render husbands liable of a criminal offence subject to the payment of a fine not exceeding R20,000.

<sup>138</sup> Clause 5(1)(a)–(b).

<sup>139</sup> Ibn Rushd at n 86, 4.

<sup>140</sup> Clause 8(1).

<sup>141</sup> Clause 9(7)(b).

<sup>142</sup> Clause 12(2)(a)–(c)(i).

<sup>143</sup> Clause 12(2)(c)(iii).

<sup>144</sup> Clause 12(2)(c)(ii).

<sup>145</sup> Clause 1(x)(j). This section enables a court to grant a decree of dissolution of marriage on the ground that 'discord between the spouses has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding with the result that dissolution is an option in the circumstances'. This is similar to the secular description of 'irretrievable breakdown of marriage' in section 4(1) of the Divorce Act at n 56, which allows the court to grant a secular divorce if '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'. Other grounds in clause 1(x)(a)–(i) of the MMB, which enable a woman to be granted a *faskh* include: whereabouts of husband are unknown for a substantial period of time; failure by husband to maintain his wife; imprisonment, mental illness, continued unconsciousness, and impotence of husband; cruelty by husband to wife; failure by husband to perform marital obligations for an unreasonable period of time; failure by husband to treat polygynous wife justly.

<sup>146</sup> Section 4 of the Divorce Act at n 56 reads:

(2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence –

- (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
- (b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or
- (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence, as proof of the irretrievable break-down of a marriage.

<sup>147</sup> Clause 1(xii), (xxii), (xxiii), (xxiv). See n 22 for the different Islamic schools of thought, which are located within the *Sunni* tradition.

<sup>148</sup> Bilchitz et al at n 86, 260–4; Moosa at n 24, 199; *Qur'an*, 2:232.

<sup>149</sup> Correspondence by Shura Yabafazi at n 133.

<sup>150</sup> Clause 9(3) (a), (f).

<sup>151</sup> Clause 9(3) (d).

<sup>152</sup> Clause 9(7) (g).

<sup>153</sup> Clauses 19(2), 17(1). See also *Ryland* at n 11, at 79E–80A.

<sup>154</sup> Furthermore, if an appeal is lodged to the Supreme Court of Appeal, the MMB directs that the decision of the court *a quo* must be submitted to two accredited Muslim institutions for their written comments on the *Shari'a*. However, in the case of urgent matters, the MMB gives due cognisance to the relatively few numbers of Muslim judges in South Africa and proposes that those matters could be determined by non-Muslim judges sitting without assessors. Clause 15(1) (a)-(b), 15(4).

<sup>155</sup> (1985) 2 SCC 556.

<sup>156</sup> Mahmood (1990); 298; Menski (1990): 286–7; Rahman (1990): 479.

<sup>157</sup> Rautenbach at n 56, 22.

<sup>158</sup> If enacted, the MMB will constitute legislation therefore the Bill of Rights will apply to it. Sections 8(1) and 39(2) of the South African Constitution; Amien at n 8, 753–4; Rautenbach at n 28, 18; Rautenbach et al at n 16, 153; Rautenbach at n 11, 135.

<sup>159</sup> Clause 5(1) (a); Bilchitz et al at n 86, 253.

<sup>160</sup> Nadvi at n 124, 17.

<sup>161</sup> Clause 1(iii), (vi), (xx), (xx); Amien at n 8, 745; Bennett (1995): 174.

<sup>162</sup> Clause 1(x), (xii), (xiii), (xxii), (xxiii), (xxiv). *Khula* is defined in the MMB as an agreement between the spouses to divorce upon payment of some form of compensation by the wife. As noted previously, this understanding of *khula* is at odds with the more popular interpretation among many Muslim countries. The MMB's definition also confuses *khula* with *mubara'a*. See n 86.

<sup>163</sup> Clauses 1(x), 1(xviii), 9(4), 5(1) (c), 8(7) (a), 9(8), 11(1), 11(3). Amien at n 8, 746.

<sup>164</sup> South Africa is bound to uphold its obligations under article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Adopted by the General Assembly Resolution 34/180 of 18 December 1979. Ratified by South Africa in September 1995. Conservative, anti-women interpretations of Muslim family law rules and practices could conflict with article 16 as well as women's right to equality under section 9(3) of the South African Constitution. The author argues that the South African constitutional framework makes it possible for women's right to equality to be prioritized when it conflicts with freedom of religion in the context of Muslim family law. At n 8, 753; Amien and Farlam (1998): 62.

<sup>165</sup> Clauses 13 and 14.

<sup>166</sup> Clause 13.

<sup>167</sup> Clause 14.

<sup>168</sup> Section 2 of the Arbitration Act 42 of 1965.

<sup>169</sup> A similar concern was expressed by women's groups in Canada during the controversy surrounding the *Shari'a* arbitration tribunals in Ontario. Amien at n 29, 399.

<sup>170</sup> Amien at n 8, 731; Moosa (1996) at n 12, 131.

<sup>171</sup> Amien at n 29, 404.

<sup>172</sup> *Ibid.*, 383.

<sup>173</sup> Ibn Rushd notes that varying interpretations exist within the traditional *Sunni* schools of thought, which range from very conservative to relatively progressive. Muslim feminist scholars such as Wadud have offered feminist interpretations of the primary sources of *Shari'a* thereby providing women-friendly understandings of Muslim family law. Ibn Rushd at n 86; Wadud (1999); Wadud (2006); *Women Living Under Muslim Laws* (1997).

<sup>174</sup> CEDAW at n 164; the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, which was adopted on 27 June 1981 and ratified by South Africa in June 1996; section 9(3) of the South African Constitution.

- <sup>175</sup> Ibn Rushd at n 86; Wadud and Women Living Under Muslim Laws at n 173.
- <sup>176</sup> Ali at n 22, 19–23; Moosa (1998a) at n 12, 480; Bulbulia at n 22, 223.
- <sup>177</sup> Ali, *ibid.*, 80.
- <sup>178</sup> Ali, *ibid.*, 23–4; Bulbulia at n 22, 224; Moosa at n 12, 480; Latifi (1998): 91.
- <sup>179</sup> Ahmad at n 86, 119–223; Bilchitz et al at n 86, 264; Doi at n 86, 192; Malik (1961): 99.
- <sup>180</sup> Mir-Hosseini (2003): 24–5; Women Living Under Muslim Laws (2003) at n 86, 280.
- <sup>181</sup> Personal Status (Amendment) Law 100 of 1985, amended in 2000, 278–9.
- <sup>182</sup> Women Living Under Muslim Laws, *ibid.*, 280.
- <sup>183</sup> Musawah is Arabic for equality. See online <http://www.musawah.org/> (accessed 29 May 2009); Ali at n 22, 19–23; Amien and Seedat (2009): 10–11.
- <sup>184</sup> Ali, *ibid.*, 23–4.
- <sup>185</sup> Brems (2001): 511–13.
- <sup>186</sup> At n 86.
- <sup>187</sup> Bilchitz et al at n 86, 262.
- <sup>188</sup> *Ibid.*
- <sup>189</sup> An-Na'im (1994): 178; Brems at n 185, 511–13.
- <sup>190</sup> *Qur'an* 4:34:  
 As to those women  
 On whose part ye fear  
 Disloyalty and ill-conduct,  
 Admonish them (first),  
 (Next), refuse to share their beds,  
 (And last) beat them lightly;  
 But if they return to obedience,  
 Seek not against them  
 Means (of annoyance).  
 See also Ibn Rushd at n 86, 114.
- <sup>191</sup> An-Na'im at n 189, 176–8.
- <sup>192</sup> Amien at n 8, 753.

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