IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 4466/2013

In the matter between:

TARRYN FARO	Applicant
and	
MARJORIE BINGHAM N.O (*in her capacity as the Executor of the deceased estate of Moosa Ely – Estate No. 4190/2010*)	First Respondent
MUJAID ELY	Second Respondent
SHARIED ELY	Third Respondent
TASHRIEK ELY	Fourth Respondent
MUSLIM JUDICAL COUNCIL	Fifth Respondent
IMAM IB SABAN	Sixth Respondent
THE MASTER OF THE HIGH COURT	Seventh Respondent
THE MINSTER OF JUSTICE & CORRECTIONAL SERVICES	Eight Respondent

CASE NO: **22841/2014**

In the matter between:

WOMEN'S LEGAL CENTRE TRUST	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER OF HOME AFFAIRS	Third Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifth Respondent
LAJNATUN NISAA-IL MUSLIMAAT (ASSOCIATION OF MUSLIM WOMEN OF SOUTH AFRICA)	Sixth Respondent
UNITED ULAMA COUNCIL OF SOUTH AFRICA	Seventh Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Eight Respondent
COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	Ninth Respondent
THE UNITED ULAMA COUNCIL OF SOUTH AFRICA	First *Amicus Curiae*
LAW SOCIETY OF SOUTH AFRICA	Second *Amicus Curiae*
SOUTH AFRICAN LAWYERS FOR CHANGE	Third *Amicus Curiae*
MUSLIM ASSEMBLY (CAPE)	Fourth *Amicus Curiae*
ISLAMIC UNITY CONVENTION	Fifth *Amicus Curiae*
COMMISSION FOR GENDER EQUALITY	Sixth *Amicus Curiae*
JAMIATUL ULAMA KWAZULU NATAL	Seventh *Amicus Curiae*

CASE NO: 13877/2015

In the matter between:

RUWAYDA ESAU	Plaintiff

and

MOGAMAT RIETHAWAN ESAU	First Defendant
THE CABINET OF THE REPUBLIC OF SOUTH AFRICA	Second Defendant
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Defendant
GOVERNMENT EMPLOYEES PENSION FUND	Fourth Defendant
MUSLIM JUDICAL COUNCIL	Fifth Defendant
MUNEEBAH JACOBS	Sixth Defendant

JAMIATUL ULAMA KWAZULU NATAL'S AFFIDAVIT

I, the undersigned,

ABDULLAH KHAN

ID No. 67095140081

do hereby make oath and state as follows:

1. I am an adult male residing in Durban, South Africa.

2. Unless otherwise stated or implied, the facts contained herein are within my personal knowledge. I believe all submissions to be true

and correct. Where I make legal submission, I do so on the advice of my counsel, which I believe to be correct.

3. I am a Maulana (Muslim Theologian), and the Administrator of the Jamiatul Ulama KwaZulul Natal ("JAMIAT KZN"). I am also a registered Marriage Officer.[1]

4. The JAMIAT KZN, is a body with its own legal personality. I have been duly authorised to depose to this affidavit on behalf of the JAMIAT KZN.

JAMIAT KZN

5. The JAMIAT KZN is a body of Muslim Theologians, serving the Muslim Community of Kwazulu Natal. It was founded in 1955, and serves the broader community, both Muslim and non-Muslim in various fields. It is the most senior body of Muslim Theologians in Kwazulu Natal. Some of its activities are:
    a. The issuing of decrees related to Islamic Law
    b. Answering queries from the public, both nationally and internationally
    c. Mediation/arbitration of disputes

[1] See line 72 Bundle B page 1288

d. Marriage counselling
e. Publication of Islamic Literature
f. Welfare relief, nationally and internationally; and
g. Engaging with government and NGOs in matters related to Muslims.

6. It is the foremost theological body in the Province of KwaZulu Natal, whose views and rulings are highly respected amongst the Muslim Community of South Africa, and internationally as well. The majority of the Muslims priests and theologians (Imaams, Muftis and Maulanas) in KwaZulu Natal are members of the JAMIAT KZN.

7. The JAMIAT KZN has taken a keen interest since inception to the proposed process of legislating the Muslim Personal Law (MPL) initiated by the South African Law Commission and has been intensively engaged in various deliberations, workshops and even made submissions to the “SALRC” Project committee.

Overview

8. The Muslim Community of South Africa is not a monolithic society. From the very outset, when the idea of a piece of legislation incorporating certain aspects of Muslim Personal Law was mooted, a

torrent of debate has been raging in the community[2]. It has been said that the Muslim Marriages Bill ("MMB") is the most controversial piece of legislation is South African legal history.

9. The community is largely split in two on the issue. One segment proposes that the teachings of the Shari'ah should be remodelled in line with the Constitution, and thereafter enacted in order to give recognition to Muslim marriages, their dissolution and consequences thereof. A second segment is strongly opposed any enactment in the current format as this will compromise the well-established and firmly entrenched understanding of Islam, practiced upon from the very inception of Islam.

10. For the first group to allay the fears of the second, they had to resort to subterfuge, deception and deliberate downplay of issues. Details of these will be discussed below.

[2] Sinclair et al comment thus:

> What is clear from the copious and emotive comments included in the Report is that there is substantial disagreement among Muslims about regulating religious marriage through legislative modification to accommodate the requirements of the civil law and the Constitution (see, for example, the comments contained in the Report at 95–104). The cultural and religious sensitivities and the sheer complexity of the task must be acknowledged. But they pertinently raise the question whether a secular state should attempt to encapsulate the rules of a particular religion within its civil law. (June Sinclair and Else Bonthuys *LAW OF PERSONS AND FAMILY LAW* Journal of Annual Survey of South African Law 2003)

11. At the centre of the debate is the effect the Constitution will have on the implementation of the Shari'ah, albeit only certain limited aspects of the Shari'ah connected with marriage and related matters. The essential argument put forward by the first group is that the Shari'ah and the Constitution share common values, hence the two systems of law can be comfortably harmonised and reconciled.

12. As a public relations exercise, those expressing concern about the impact the Constitution will have over Islamic Law are labelled and dismissed by the first group as Alarmist, Scare Mongers and ill-informed.

13. It will be demonstrated below that incompatibility and inconsistency[3] between the Constitution and Islamic Law is real, incontrovertible, undeniable and distinctive. In the light therefore, the enactment of certain aspects of Islamic Law is itself contrary to the Constitution.

Secular Humanist Constitution

14. The South African Constitutional framework can be described as being philosophically founded on Secular Humanism.

[3] The Third Respondent acknowledges the incongruency. Paragraph 15 Bundle B Pg. 1190. Similarly the First Respondent draws attention to these incompatibilities. Paragraph 59 Bundle B. Page 1006.

15. Secular Humanists advocate that major statements of belief, including assertions that God, religion and the supernatural are at best irrelevant; that specific religious beliefs, including belief in heaven or hell or any form of life after death, the existence of a separable human "soul," and the creation of humankind by a direct act of God are dangerous and represent obstacles to human progress; that moral values are wholly relative and situational; that meaning is a function of happiness in "the here and now"; that reason and the scientific method are the best tools by which to achieve fulfilment as individuals and communities; that no form of sexual conduct short of "unbridled promiscuity" is evil; and that individuals should have the right to abortion, divorce, and birth control. This philosophy asserts that traditional theism is, at least for the purpose of identifying Human Values, an unproved and outmoded faith.

16. The South African Constitutional framework is modelled around these value systems. It is a system of law devised by humans[4] for humans, without finding its values from any religion[5].

---

[4] The Constitution is not based on the sovereignty of God, but rather on the sovereignty of the people. As Tocqueville later writes, "The people reign over the American political world as does God over the universe"
(Alexis de Tocqueville on the Natural State of Religion in the Age of Democracy Author(s): Aristide Tessitore Source: The Journal of Politics, Vol. 64, No. 4 (Nov., 2002), pp. 1137-1152 Published by: Cambridge University Press on behalf of the Southern Political Science Association)

[5] As Sachs J has highlighted:

> It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious

17. Each of the above mentioned beliefs are diametrically opposed to the Islamic belief system. Islam is based on the belief in the One Divine Being, whose name we are informed is Allah. For the guidance of mankind, Allah had appointed certain selected men as His Messengers (Peace be upon all of them), upon whom He revealed Divine Guidance and instruction for mankind. By means of such revelation, we are informed of the existence of Heaven and Hell, and that of a separate eternal life after death beyond this temporary world. As part of that Divine Guidance is a complete code of life termed the Shari'ah or Islamic Law. Muslims are duty bound to implement the Shari'ah, and to give preference to this Divine

---

> doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.

Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at paragraph 92

Another writer puts it thus:

> The authoritative sources of this Truth-be it God, the Pope, the Ayatollah, priests, or mullahs, however important they may be inside the churches or the community of believers-add nothing to its persuasive force in the arena of public reason, public deliberation, and public scrutiny. This is what all churches have to learn under conditions of a modern constitution. They all have to find their own ways to solve the "fundamentalist dilemma" (Casanova 1994, 165).

Religious Pluralism: Secularism or Priority for Democracy? Author(s): Veit Bader Source: Political Theory, Vol. 27, No. 5 (Oct., 1999), pp. 597-633 Published by: Sage Publications, Inc.

Guidance over every other ideology, religion, or "ism". Muslims believe that humans, on their own, have not be endowed with the capacity of discerning, to the full extent, what is beneficial and what is harmful for man, and that complete reliance has be place on the Divine Providence for the wellbeing and salvation of man, both in this world as well as the hereafter. For Muslims, Divine Law is Natural Law, and every other law is unnatural.

18. From this extremely brief snapshot it is clear that Secular Humanism and Islam are divergent, contradictory and dissimilar world-views. A *fortiori*, it follows that the legal systems and rules derived from each of the two philosophies are likely to have little in common[6]. This is in fact a reality that can be easily demonstrated.

19. All major world-views probably have some degree of convergence and overlap. The mere existence of certain common

[6] Goolam poses the question of which system should give way to the other, when he asks:

> [j]urists and scholars—both Muslim and non-Muslim—often differ in their interpretation of the sources of Islamic law. These interpretations range from the conservative to the liberal to the radical, the last-mentioned calling for radical changes to certain aspects of the application of the *Shari'ah*. The South African Law [Reform] Commission [has investigated] how Islamic family law could be made consistent with the constitutional Bill of Rights. In this regard, two fundamental issues should be considered. First, it is clear that our Constitution and the present-day concept of human rights is a product of Western ideas. Why, in a case of cross-cultural conflict, should Western culture and notions serve as the yardstick? And, second, why should provisions of the *Qur'an*, which is higher law, be brought in line with a secular legal system?
> ("Islamic law", Rautenbach, C and Goolam, NMI (eds) 2002)

values cannot be obfuscated for total compatibility and agreement. Many Muslim apologists deliberately downplay or turn a blind-eye away from the obvious sharp areas of conflict between the Constitution and Islamic Law. By highlighting only the common ground, they deceptively claim that Islam is completely compatible with the Constitutional ethos. This convenient self-denial, it is submitted, is delusionary. As long as the areas of stark and irreconcilable opposing positions on many aspects are not acknowledged, honest debate on how to legislatively implement certain aspects of Islamic Law within a Constitutional democracy as ours will not be possible.

20. The incompatibility between the South African legal system founded on the Constitution and Islam is not restricted to any particular draft of legislation. It is intrinsic and systemic, flowing from the philosophical underpinnings of each of the two ideologies. It will be naïve and foolish to conceive that two systems of law based on two vastly divergent world-views will not have certain areas of acute contradiction and conflict. It is this incompatibility between Islam and the Constitution which is the elephant in the room that most role-players conveniently prefer to ignore.

21. Central to the exercise of attempting to legislate Muslim Personal Law is the realisation that there is a clash of two opposing value systems, which some have framed as being a battle of two religions. Schlag has equated Constitutional values to god, when he said:

> Values are like little divinities. Like God, they serve as grounds or unquestioned origins. Like God, their invocation demands worship, reverence and selfabnegation. Like God, they provide comfort and compensation for an otherwise degraded reality. Like God, they enable the widespread belief in a hopeful, eschatological trajectory for law, politics, and human existence. In short, "values" are the secular equivalent of God – they are the continuation of theology by other means.[7]

22. One writer has acknowledged the dilemma within the Nigerian Constitution, which is not dissimilar in this regard to the South African Constitution. He writes:

> (b) The supremacy issue
> Section 1(1) of the 1999 Constitution provides that "[t]his Constitution is supreme and its provisions shall have binding force on the persons and authorities throughout the Federal Republic of Nigeria". This is reinforced by section 1 (3) which states that "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall

[7] Schlag P "Values" in *Laying down the law – mysticism, fetishism and the American legal mind* (New York University Press New York 1996) 42-59 50.

prevail and that other law shall, to the extent of the inconsistency, be void." The fundamental premise that the Constitution is supreme and that its provisions override all other laws is clearly at variance with the deeply held conviction among the Muslim faithful that the Sharia embodies the will of Allah and as such is eternally valid, immutable and not susceptible to review by any human agency. This perception of the Sharia as being divinely inspired goes a long way towards explaining the strong support which Mayer discerns among fundamentalist Muslims for the notion that not just laws but also constitutions must be drawn up or rewritten in accordance with Islamic criteria and that the Sharia is to be placed above the constitution. This creates a veritable dilemma for any advocate of the Sharia reforms who insists that these reforms are entirely compatible with the Constitution. This dilemma is clearly discernible to Al-Zakzaky who signifies that Muslims who endorse the operation of the Sharia as one of the legal systems under the Constitution must contend with two conflicts. According to him, "One conflict will be with the Constitution which will claim superiority over the Shar'iah and will therefore place the Shar'iah under its control and regulation. The other conflict will be with the Shari'ah itself which as the law of Almighty God claims superiority over all laws and therefore cannot accept the Supremacy of the Nigerian Constitution".[8]

[8] Tiptoeing through a Constitutional Minefield: The Great Sharia Controversy in Nigeria Author(s): Andrew Ubaka Iwobi Source: Journal of African Law, Vol. 48, No. 2 (2004), pp. 111-164 Published by: Cambridge University Press on behalf of the School of Oriental and African Studies

The Constitutional Framework

23. The starting point would be the Constitution, from which the various possible challenges to the MMB are most like to emanate.

The Preamble to the Constitution contains the following:

> We, the people of South Africa, Recognise the *injustices of our past*; … We therefore … adopt this Constitution as the supreme law of the Republic so *as to* -
> *Heal the divisions of the past* and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is *equally* protected by law; (emphasis added)

24. Included in the injustices of the past was gender inequality; as well as cultural and religious discrimination. The very purpose of the Constitution is to heal those divisions. Therefore the Constitution goes on to record:

> FOUNDING PROVISIONS
>
> 1. Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

25. To achieve this, the Constitution entrenches a Bill of Rights, and states:

BILL OF RIGHTS

7. Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8. Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

26. Whilst the Bill of Rights is the cornerstone of the Constitution, the Equality Clause could be said to be the heart of the Bill of Rights, and it reads:

9. Equality

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

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

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

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

of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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

27. The Constitutional Court has therefore, in litany of cases, endorsed the centrality of the Equality Clause, as it stated:

> There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.[9]

In *Bato Star*[10], Njcobo J (as he then was), said:

> The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'[11]

---

[9] *Fraser v Children's Court, Pretoria North, & others* 1997 (2) 261 (CC) at para 20; See also *Minister of Home Affairs v Fourie* 2005 (CC) at para 59; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 155 – 6; *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) at para 26 and *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 33.

[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)

[11] Id at para 73-74

28. While the Bill of Rights guarantees "freedom of conscience, religion, thought, belief and opinion"[12], any recognition of personal law has to be "consistent with this and other provisions of the Constitution"[13]. Religion and Culture "may not be exercised in a manner inconsistent with any provision of the Bill of Rights"[14]. Thus, the system of personal law to be recognised has to conform to the Equality Clause.

29. It is therefore understandable that the Promotion of Equality and Prevention of Unfair Discrimination Act[15] outlaws gender discrimination, including "traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men"[16].

30. Should a conflict arise between religion or culture on the one hand, and the Equality Clause on the other side, the latter will prevail. This was clearly demonstrated in *Bhe and Others v the Magistrate, Khayelitsha and Others*[17], where the African customary rule of male primogeniture was declared inconsistent with the

[12] S 15 of the Constitution
[13] S 15(3)b of the Constitution
[14] S 31(2) of the Constitution
[15] Act 4 of 2000
[16] S 8 of Act 4 of 2000
[17] *Bhe and Others v. Magistrate of Khayelitsha and others* 2005 (1) BCLR 1 (CC)

Constitution. The exact same stance was adopted in *Shilubana and Others v Nwamitwa*[18].

The Equality Test

31. In South African jurisprudence under the new dispensation, the *Harksen v Lane*[19] analysis enjoys the elevated position of the being the definitive test of the Equality Clause. There is no reason why, when dealing with religion, any other test should be employed. The test involves a three tier enquiry, set out as follows[20]:

> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1)[21]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
> (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is

[18] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)
[19] *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC)
[20] Id para 50
[21] The case made reference to the interim constitution. Under the final Constitution, the Equality Clause is S 9 instead of S 8, and the Limitation Clause is S 36 instead of S 33.

discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

32. Significant for our purposes is that discrimination on the basis of gender, sex, pregnancy, marital status, sexual orientation, religion, conscience, belief, culture or any combination thereof is automatically unfair as these are listed grounds.

Application to Muslim Personal Law

33. The introduction of legislation incorporating areas of Muslim Personal Law (MPL) challenges the Equality Clause on both a Macro as well as a Micro level. The former pertains to a broader treatment of Muslims differently vis-à-vis non-Muslim, or even between segments within the Muslim community; whilst the latter concept refers to substantive provisions found within such legislation. Whilst our present discussion shall concentrate on the Micro level, in passing, a few concerns around the Macro level will be noted.

34. An example of the Macro level of discrimination is that only Muslims suffer from the encumbrances imposed upon them by the MMB, whilst members of other faiths do not suffer the same. The other way around, members of other faiths could rightfully complain that they are deprived of certain privileges afforded to Muslims in the MMB. For example, their religious laws are not recognised in the manner that Muslim Personal Law is. In order to establish equality, the government will have to provide a similar dispensation to all other faiths, as numerous and divergent as they may be. Amien concludes: "Implicit in the notion of equality is the requirement that all religions be allowed to manifest and instruct regarding their beliefs."[22]

[22] Waheeda Amien *Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages* 28 Hum. Rts. Q. 729 2006

This broader based discrimination could be extended to discrimination within the Muslim community itself. The Muslim society is heterogeneous, with its members holding a host of divergent views and approaches, extending from the fundamentals on the one end to the miniscule details of the law on the other end. It is not unexpected that one encounters a debate as to such a fundamental question as: Who is a Muslim, and who is not? By the State adopting one position within these religious debates over the other, the State is discriminating against those whose views do not have the imprimatur sanction of the legislature[23]. Equality demands that all these diverse views be afforded equal accommodation and treatment.

35. Presently, we shall concentrate on instances of discrimination in the form of substantive provisions of the MMB. Amien aptly sums up the challenge, where she states:

[23] In this respect Sachs J in the case of *S v Lawrence*; *S v Negal*; *S v Solberg* commented as follows:

> "The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose beliefs, grant privilege to impose advantages on adherents of any particular beliefs, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs." (Underlining added)

S v Lawrence , S v Negal ; S v Solberg (CCT38/96, CCT39/96, CCT40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (6 October 1997) at paragraph 148

> Many of its provisions, if enacted, will stand to be constitutionally challenged on the ground of sex/gender inequality. The Constitutional Court, as the highest court of constitutional appeal, will be tasked with having to decide how to deal with the conflict between the right to freedom of religion and women's rights to equality, as indeed one will arise. It is therefore necessary to examine the extent to which the norms of sex/gender equality and religious freedom have been entrenched in the Constitution and the manner in which the Constitutional Court has developed its jurisprudence in respect of both. This will give some indication regarding the position the Court may take when faced with a conflict between the two rights in the context of Muslim marriages.[24]

36. Some examples are listed below.

a. A husband is obliged in the Shari'ah (Islamic Law) to pay his wife a dower (*mahr*), whilst no such obligation lies on the wife[25].

b. Contrary to what is stated in the Bill, only a wife need apply for a *Faskh* (judicial process of dissolution). It is absurd to suggest that a husband ever requires applying for *Faskh*. Such an application, if ever made, would be superfluous. The various grounds on which *Faskh* may be founded all relate to the

[24] Waheeda Amien *ibid*
[25] See definition of “dower” is S1 of Annexure HAF 31. Bundle B page 374

husband, for it is only the wife that relies on these grounds. Legally, the husband requires no grounds for dissolving the *Nikah* (marriage). It is a separate matter that, morally speaking, he should premise his action on some valid moral ground. In brief, if a husband gives his wife *talaaq* in the absence of any morally sound reason, the *talaaq* is legally valid. *Faskh* is designed to be only available to the wife as the husband does not require judicial intervention.[26] .

c. Upon dissolution of the *Nikah*, only the wife is obliged to observe the *Iddah* -- a mandatory waiting period. The husband has no such obligation.[27]

d. Only the husband has the right of *Talaaq*. This problematic area shall be expanded on in more detail below. Contrary to the wording adopted by the 2003 version of the Bill, the wife has no such right. This differentiation is so glaring that the drafters were compelled to resort to linguistic gymnastics in an attempt to conceal this discrimination. *Talaaq* is perhaps the strongest example of gender discrimination in the MMB.[28]

Westenberg comments thus:

[26] See definition of "Faskh" is S1 of Annexure HAF 31. Bundle B page 375
[27] See definition of "Iddah" is S1 of Annexure HAF 31. Bundle B page 375
[28] See definition of "Talaq" is S1 of Annexure HAF 31. Bundle B page 376

> From a sheer equality perspective, one may argue that the *talaq* is itself a violation. It permits the husband to unilaterally end the marriage whereas *khul'a and faksh* [sic]*,* open to the wife, require mutual agreement or court intervention respectively. In evaluating the constitutionality of this disparity, one looks to the three-tiered *Harksen* analysis.[29]

Amien adds:

> This is reinforcement of the traditional approach to Muslim divorces that regards *talaq as* the exclusive preserve of the husband, which does not require the wife's consent. On the contrary, a wife needs the *'ulama's* permission to obtain a *faskh* to release her from the marriage. However, it appears that few women apply for *faskh* because the process can be time consuming, difficult, expensive, and sometimes humiliating.[30]

e. Witnesses that are required are determined by Islamic Law. Under such law the minimum requirements are:

   i. Two male witnesses, or

   ii. One male and two female witnesses.

---

[29] Erica Westenberg *CONSTITUTIONAL ANALVSIS OF THE PROPOSED MUSLIM MARRIAGES ACT* Commission on Gender Equality - Recognition of Religious Marriages Workshop 25 October 2005

[30] Waheeda Amien *ibid*

In other words, the witnessing of two females is unacceptable, whilst that of two males is.[31].

f. Marriage is a bilateral act. If the taking of a further wife by a Muslim husband without the court's permission is a criminal act, that act is carried out by both parties to the subsequent marriage. Only the husband is saddled with a fine, whilst the subsequent wife, who is an equal partner in such crime, is not guilty of an offence.[32]

g. Only the husband is obliged to register a *Talaaq*, whilst the wife is not.[33]

h. According to Islamic Law, only the husband is obliged to maintain the wife, and not the reverse.[34]

i. Only the father is obliged to maintain the children, whilst the mother is not.[35]

[31] S 5(1)(c) of Annexure HAF 31.Bundle B page 378
[32] S 8(11) of Annexure HAF 31. Bundle B page 384
[33] S 9(3)(a) to(d) of Annexure HAF 31. Bundle B page 385
[34] Ss 12(2)(a) and 12(2)(c) of Annexure HAF 31. Bundle B page 388
[35] S 12(2)(b) of Annexure HAF 31. Bundle B page 388

j. The marriage officer mentioned in the Bill must be a Muslim. In other words a non-Muslim may not carry out this administrative task.[36]

k. The judicial officer in the High Court has to be a Muslim. This discriminates against non-Muslims.[37]

l. Assessors in the High Court have to be Muslims. This discriminates against non-Muslims.[38]

m. A distinction is drawn between a husband married in a monogamous marriage, and one in a polygynous[39] marriage.[40]

n. The *Iddah* of a menstruating woman is distinguished from the *Iddah* of a non-menstruating woman.[41]

o. The *Iddah* of a pregnant woman is distinguished from one who is not.[42]

---

[36] See definition of "marriage officer" is S1 of Annexure HAF 31. Bundle B page 376
[37] S 15(1)(a) of Annexure HAF 31. Bundle B page 391
[38] S 15(1)(a) of Annexure HAF 31. Bundle B page 391
[39] Prof TW Bennett draws a distinction between 'Polygamy' and 'Polygyny'. The learned author states as follows: " 'Polygyny' is to be preferred to the more widely used 'Polygamy'. The latter denotes more than one marriage, potentially by husband or wife, while polygyny denotes, more correctly in the context of customary law, a series of unions with more than one woman." See TW Bennet, Customary Law in South Africa, 2007 at p 243.
[40] Ss 8(4) to 8(8) and 8(11), 9(7)(c) of Annexure HAF 31. Bundle B pages 383 and 387
[41] See definition of "Iddah" is S1 of Annexure HAF 31. Bundle B page 375

p. The *Iddah* of a divorced woman is distinguished from that of a widowed woman.[43]

q. Various distinctions have been drawn between marriages concluded before the commencement of the Act and those after commencement. The ensuing inequality is arbitrary and irrational, and cannot be linked to any sound rational basis.[44] Therefore Sinclair refers to this distinction as a curious configuration[45].

37. The first nine examples *supra* (36.a to 36.i) relate to gender inequality, and these are the most significant.

38. Nos. 36.j to 36.l *supra* involve discrimination on the basis of religion.

39. Together with this 36.k and 36.l involve interference in the judiciary.

40. Section 165 of the Constitution states:

---

[42] Ibid
[43] Ibid
[44] Ss 2(1), 2(2), 2(4)(b), 5(1), 6(1), 8(1), and 8(6) of Annexure HAF 31. Bundle B page 377
[45] June Sinclair and Else Bonthuys *LAW OF PERSONS AND FAMILY LAW* Journal of Annual Survey of South African Law 2003

Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

To impose on the court that the presiding officer be a Muslim interferes with the unfettered functioning of the courts. It is also offensive to the other judges. Whilst judges administer all other legislation, why then should they be proscribed from presiding over matters dealt with in the MMB? What does the private conviction of the person have to do with interpretation and implementation of a statute? Assuming that there is some nexus between the two, what guarantee exists that the presiding officer actually has that conviction? These and other questions lead to the conclusion that the said provision is indignant to non-Muslim

members of the bench who are disqualified from trying cases involving Muslims.

To illustrate, imagine an Act that states that in every case where the litigants are white Afrikaners, the presiding officer has to be a white Afrikaner. The discrimination is glaring. It is precisely for this reason that the 2011 version of the Bill has done away with these provisions[46].

Sinclair asks:

> For a secular legal system this provision is a fundamental step. Were this legislation to be enacted, would Jewish South Africans be entitled to ask that in disputes concerning, for example, the entitlement of a woman to a get, and thus a civil divorce (see s 5A of the Divorce Act 70 of 1979), the bench be made up of (practising) Jewish judges/legal practitioners? If not, why not?[47]

41. No. 36.m involves discrimination based upon the ground of marital status.

[46] It is however important to discuss the section despite its removal from the latest version since there are calls for its reinstatement. The Second Respondent has acknowledged that the support of UUCSA and the MJC is conditional upon, amongst other amendments, that the Judge must be a Muslim. See Paragraph 85 of the Second Respondent's Affidavit, Bundle B Pg. 1073, and footnote 27 thereto. Also Bundle B pp 1227, 1270 and 1274

[47] June Sinclair and Else Bonthuys *LAW OF PERSONS AND FAMILY LAW* Journal of Annual Survey of South African Law 2003

42. The term ‘sex’ is a biological term, whereas ‘gender’ is a social term.[48] Menstruation being a biological feature, the ground of discrimination in 36.n would then be sex – a listed ground.

43. No. 36.o falls under the listed ground of pregnancy.

44. The distinction between being divorced and widowed in 36.p would fall within an analogous ground.

45. The differentiation in 36.q has no legitimate and rational government purpose.

Application of the Analysis

46. In the examples, do the relevant sections differentiate between people or categories of people? The answer in each case is in the affirmative.

47. Nos. 36.a to 36.o are on listed grounds. The outcome is that they are automatically classified as discrimination, as well as there being a presumption that the discrimination is unfair. There is no reason to

[48] *The Bill of Rights Handbook*, Currie and De Waal, p 250, 2005, Juta and Co.

suggest otherwise, and no argument can be advanced to counter the presumption.

48. In the case of 36.p, the differentiation is based on an unlisted ground. The question that then arises is "whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."[49] . It is submitted that on a proper interpretation of the Constitutional values, impairment of fundamental human dignity is established.

49. The arbitrary nature of the discrimination in 36.q has been dealt with in paragraph 45 above. These instances are thus in violation of S 9(1) of the Constitution.

50. Summing up, Amien concludes:

> Thus, the draft legislation reinforces a patriarchal framework and unequal relationship between men and women. For example, it recognizes the requirement in certain communities that a woman must be married by proxy; it allows only the husband to take multiple spouses; it incorporates the exclusive right of men to unilaterally

[49] *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC) at para 50(b)(i).

repudiate the marriage *(talaq);* it recognizes the unilateral obligations of the husband to provide *mahr* and to maintain his wife and children, which is the basis upon which obedience and sex on demand from women are justified; it places a unilateral obligation on the wife to observe *iddah;* and it requires that upon divorce, guardianship, custody, and access of children should be determined on the basis of the best interests of the child and "with due regard to Islamic Law." A conservative interpretation of the latter could award these rights to the father only.[50]

The Limitation Clause

51. The final tier of the *Harksen v Lane* test is whether the unfair discrimination can be saved by the Limitation Clause, which reads:

> 36. Limitation of rights
>
> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;

[50] Waheeda Amien *ibid*

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

52. The enquiry is whether "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". It would be absurd to suggest that a society based on equality will reasonably and justifiably permit such forms of inequality. The limitation, if allowed, would be a classical example of a contradiction in terms.

53. What the limitation clause requires is a balancing act between the infringement of the fundamental right and the benefits the law is designed to achieve[51]. A proportionality test is applied, which is explained in *Bhulwana* as:

> In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the

[51] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at para 104

> scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[52]

54. In the above examples, the infringement is drastic, hence justification needs to be of extra-ordinary strength to counter the high degree of invasion.

(a) the nature of the right

As explained above, the right to equality is being infringed, which lies at the heart of the Constitution.

(b) the importance of the purpose of the limitation

What is required is to demonstrate that the limitation serves some purpose, and further that such purpose is important. Do the inequalities mentioned above have some state purpose: No. It is not one of the purposes of the State to interpret and implement religious texts. Furthermore, in the process of legal analysis, the court may not rely on religious texts, no matter how sincere the adherents of those texts may

[52] *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 at para 18

be[53]. When the judiciary cannot even rely on religious texts as an interpretive tool, it would be far-fetched to conceive the implementation of religious texts as a state objective.

Will the Muslim community be able to demonstrate to the Constitutional Court that the above mentioned forms of discrimination serve a rational purpose? If so, can this be logically demonstrated to the satisfaction of the Court? If not, then the limitation clause will be of no assistance.

(c) the nature and extent of the limitation

The limitation is serious and complete. There is no partial or relatively minor infringement of equality. Inequality is established in totality.

(d) the relation between the limitation and its purpose

There should exist a causal connection between the limitation and it purpose. When there is no justifiable purpose in the above mentioned examples, the rational link between the limitation and its purpose does not arise.

(e) less restrictive means to achieve the purpose

[53] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at para 93

Again, when the purpose does not exist, this question does not even arise.

55. Religion cannot be used as a ground for limiting fundamental rights. Sach J summed it up as follows:

> It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. ... Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies[54].

In Brief

56. It has been sufficiently demonstrated that the MMB contains many examples of discrimination. Having applied the standard equality test, it has been proven that these forms of discrimination constitute unfair discrimination. The limitation clause is of no avail as the legal enforcement of religion is not a State objective. Therefore it

[54] *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* ibid at para 92

is inevitable that the MMB is open to various constitutional challenges.

The International Law Perspective

57. The Bill of Rights angle aside, the International Law perspective is of particular interest, and it is precisely because of this dimension that the Bill will not pass constitutional muster.

58. International Law plays a profound role within our Constitutional dispensation. Section 39(1) of the Constitution states that a court, tribunal or forum *must* consider international law when interpreting the Bill of Rights.

59. South Africa has signed (but not ratified) the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1994.

60. It has ratified the following treaties:

- International Covenant on Civil and Political Rights (ICCPR)
- Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)
- African Charter on Human and People's Rights

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol)

61. All these documents impose on the Republic a duty to promote the equality norms in a democratic society. The ICCPR especially demands commitment to the right to equality (Articles 18 and 26). CEDAW is more specific where Article 16 commands State Parties to:

> "… ensure, on a basis of equality of men and women:
> (a) The same right to enter into marriage;
> (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
> (c) The same rights and responsibilities during marriage and at its dissolution;
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
> (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
> (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

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

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

62. The preamble of the African Charter on Human and Peoples' Rights demands genuine equality and dignity for all people and dismantling of all forms of discrimination. Article 2 entitles every individual to the enjoyment of the rights and freedoms in the Charter, without distinction of any kind such as race, ethnic group, color, sex, religion etc. Article 3 states that every individual shall be equal before the law and be entitled to equal protection of the law. Article 18(3) requires states to eliminate "every discrimination against women".

63. Article 2 of the Maputo Protocol states that "… harmful cultural and traditional practices…" are those which "… are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men." Article 6 more explicitly requires states parties to "… ensure that women and men enjoy equal rights and are regarded as equal partners in marriage." Article 6(c) states that "… monogamy is encouraged as the preferred form

of marriage and that the rights of women in marriage and family, including in polygamous marital relationship, are promoted and protected." Even more clearer is Article 7 which necessitates that all marriages must be annulled or divorced by judicial order, and further demanding that "States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage."

64. These international documents and treaties are bound, in one way or another, to be in conflict with the Shari'ah.

65. As far back as 1948 the Kingdom of Saudi Arabia abstained from signing the Universal Declaration of Human Rights (UDHR) on the grounds that human rights (as understood and implemented by these instruments), in particular the freedom of religion clauses, was in conflict with the Shari'ah.[55]

Therefore, when CEDAW[56] was signed, a number of countries[57] recorded reservations[58] on the basis of Islamic Shari'ah[59]. This in-turn

[55] Ali, Shaheen Sardar, *Gender and human rights in Islam and international law : equal before Allah, unequal before man?* p. 27
[56] Convention on the Elimination of All forms of Discrimination Against Women
[57] Bahrain, Bangladesh, Brunei Darussalam, Egypt, Iraq, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Oman, Pakistan, Saudi Arabia, Syria, and United Arab Emirates
[58] According to The Vienna Convention on the Law of Treaties, 1969, Article 2 (1)(d) the term "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty

elicited objections from a host of other nations[60]. Denson says: "It is clear that the Convention must be taken into consideration when a dispute concerns discrimination against women. The provisions of the Convention could have a definite effect on the interpretation and application of any law relating to gender equality in South Africa." [61]

Egypt sought to explain[62] its reservation in the following words:

> Reservation to the text of article 16[63] concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases

---

whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that State.

[59] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm Accessed 2/01/11

[60] Austria, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom

[61] Razaana Denson 2009 *Non-Recognition of Muslim Marriages: Discrimination and Social Injustice*, Obiter 30(2) p. 281

[62] See http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm Accessed 2/01/11

[63] See Article 16 above. Interestingly, Israel recorded its reservation in relation to Article 16 "to the extent that the laws on personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article." Further, in entered its "reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel". No State ever objected to Israel's reservations.

> of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

What is abundantly clear is that some aspects of the Shari'ah relating to Family Law are definitely and irrefutably in variance with CEDAW and other International Human Rights instruments. This is precisely the reason certain Muslim states, despite the fact that they incorporate very limited aspects of the Shari'ah into their respective legislation, were compelled to record reservations to the Convention.

However, Article 28, paragraph 2, of CEDAW adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties. It states that a reservation incompatible with the object and purpose of the present Convention shall not be permitted. This puts

the legitimacy of the reservations entered into by the mentioned states into question[64].

Nonetheless, it is clear that on the international plane the very same debate, as is presently unfolding in relation to the MMB in South Africa, continues unabated. Samuel P. Huntington in his much publicised and controversial article "The Clash of Civilisations"[65] links the international debate over whether human rights are western, and thus unsuitable for non-western cultures, to a clash of civilisations: western and Islamic. He argues that differences in culture and religion create differences over policy issues such as human rights so that the promotion of human rights by the west merely provokes civilisational clashes[66].

66. The question to consider is whether the relatively small Muslim community of South Africa is prepared to open a can of worms and enter into the foray of the “Clash of Civilisations”? Are they better off dealing with aspects of Shari'ah via conscience based consultations with the Ulama (Islamic religious scholars), or are they sufficiently

[64] Banda, Fareda, *Meaningless Gestures? African Nations and the Convention on the Elimination of All Forms of Discrimination Against Women*, in Eekelaar and Nhlapo (eds) ‘The Changing Family. Family Forms and Family Law’. Oxford: Hart Publishing 1998. p. 535.
[65] S. P. Huttington, “The Clash of Civilisations” (1993) 72(3) *Foreign Affairs,* pp. 22-49
[66] Ibid at p. 29. See Rashida Manjoo, ‘Making rights real: facing the challenges of recognising Muslim marriages in South Africa’ in Julia Sloth-Nielsen (ed.) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law*. Collected Contributions from the International Miller du Toit Cloete Inc/UWC Conferences on Child and Family Law (2001-2008)

equipped to enter the battlefield of the "Clash of Civilisations" in order to achieve some limited degree of legal enforceability of the Shari'ah?

67. The State is bound by the various International instruments referred to above[67], and it is "thus an obligation that the South African government cannot ignore in its quest to recognise religious marriages."[68] The politicians' hands are tied, and it is only so much they can bend. Any further will cause the State to be in violation of its international obligations.

68. Hence the International dimension is indeed significant if not decisive, and it is precisely for this reason that the MMB is not workable[69]. This is besides the aspect of violating the Bill of Rights within its own Constitution.

Talaaq Elaborated

[67] For further details see also: Johan D van der Vyver and M Christian Green 2008 *Law, religion and human rights in Africa: Introduction*, African Human Rights Law Journal, 8(2), 337-56; and Michele Brandt & Jeffrey A. Kaplan, (1995-1996) *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 Journal of Law and Religion 105, 111-13.
[68] Rashida Manjoo, ibid p. 121
[69] The First Respondent admits that the current MMB conflict with the State's CEDAW obligations. Paragraph 77 Bundle B. page 1017

69. Whilst the issue of Talaaq was touched upon above, this issue deserves particular attention, and hence is discussed below in more detail.

The Problematic Definition

70. The 2003 version defined talaaq as

> (xxiv) "*Talāq*" means the dissolution of a *Muslim marriage*, forthwith or at a later stage, by a husband, or his wife or agent, duly authorised by him or her to do so, using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* pursuant to a *Tafwīd al-Talāq*; and

71. The right to give talaaq was broadened to include the wife. We are here referring to the original authority and not the delegated right.

The question arises as to why the drafters did so. In reality it was a *faux pas*. In an attempt to disguise the gender inequality that is inherent in the institution of talaaq, the drafters tried to create an illusion of equality. Their actual intention was to weave in the delegated right of the wife into the definition in order to build up this façade of equality. In the process they shot themselves in the foot and gave the wife the original

authority, not the delegated one. This is just one of many examples of downright poor drafting. A number of academics have commented on the deplorable state of the drafting.

The drafting team was well alive to the reality that the institution of talaaq is gender biased, which then lends itself open to a constitutional challenge. The drafters were naïve enough to believe that they would be able to conceal this reality and fool the judiciary who would be interpreting the Act. What is of concern is the *animus decipiendi* (intention to deceive). It brings into question the *modus operandi* of the project committee.

This gaffe was a real embarrassment. In response to this solecism, the United Ulama Council of South Africa (UUCSA[70]), in their subsequent draft of the Bill, suggested the following definition.

> (xxiv) **"*Talāq*"** means the dissolution of a *Muslim marriage*, forthwith or at a later stage, by a husband, or his agent, duly authorised by him to do so, using the word *Talāq* or a synonym or derivative thereof in any language, and includes the pronouncement of a *Talāq* pursuant to a *Tafwīd al-Talāq*; and further includes the pronouncement of a *Talaq* known as *Kinayah-Talaq*, through the use of broad expressions which are specifically construed as constituting

[70] First *Amicus Curiae*

Talaq by reference to the husband's intention or relevant surrounding circumstances.

However, despite their attempts to influence the Department of Justice and Constitutional Development otherwise, the gaucherie was persisted with in a draft the Department prepared in 2009. The definition presented therein was as follows[71]:

> "Talāq" means the dissolution of a Muslim marriage, ~~forthwith~~ immediately or at a later stage, by a husband, or his agent, or his wife (through *Tafwid al- Talāq*) duly authorised by him or her to do so, by using the words Talāq or a synonym or derivative thereof in any language, and includes the pronouncement of a Talāq known as *Kinayah-Talāq* pursuant to a *Tafwid al- Talāq*; and …"

The definition seemed to be oscillating from one error to the other. In the convoluted mess, the words "duly authorised by him or her to do so" could not refer to the wife, as the wife cannot duly authorise herself. Hence these words could only have been referring to the agent, leaving the wife in the position of not being authorised by the husband. In other words, we are back to square one, where the wife has an original authority, and not a delegated one.

[71] Bundle B page 699e.

Further, Kinayah-Talaaq is not issued pursuant to a Tafwid al-talaaq. In other words, delegation is not a requirement for a talaaq by inference.

72. Finally some sanity prevailed, and the 2011 version[72] has it as:

> **"*Talāq*"** means the dissolution of a Muslim marriage, immediately or at a later stage, by a husband or his agent by using the word *Talāq* or a synonym or derivative thereof in any language; and

'Talaaq by inference' has been removed, which leaves the definition incomplete and open to erroneous interpretation. Such ambiguity, anyway, is the nature of the Bill as a whole.

73. Nonetheless, having improved the wording, this is where the real difficulties only begin. Two conundrums arise, none of which have any solution in sight.

<u>Unfair Discrimination</u>

74. The first problem is, as indicated above, gender inequality. It is trite law in the Shari'ah the only the husband may issue a talaaq. The wife has no such original authority.

[72] Bundle B page 738

75. A fairly old South African Judgment records:

> This is reinforcement of the traditional approach to Muslim divorces that regards *talaq* as the exclusive preserve of the husband, which does not require the wife's consent. On the contrary, a wife needs the *'ulama's* permission to obtain a *faskh* to release her from the marriage." However, it appears that few women apply for *faskh* because the process can be time consuming, difficult, expensive, and sometimes humiliating.[73]

76. If it is argued that the husband may delegate such authority to the wife, this will not avail to counter the inequality. The husband may also decide not to or refuse to delegate this authority. This enforces the exclusive authority of the husband in this respect. Further, the husband is entitled to delegate to any other individual having legal capacity. The wife is thus in a position equal to any other person in the world, but yet not equal to her husband.

77. The issue of Faskh is also of no avail as the grounds for Faskh are limited. Faskh only comes into being through the intervention of the court, whereas talaaq does not. Legally speaking, talaaq does not require any ground for its validity. If the husband issues a talaaq

[73] Bronn v. Frits Bronn's Executors and Others 1860 3 Searle 313

for no apparent reason, it is nonetheless valid. Therefore the two institutions of Talaaq and Faskh are not on par, and the one cannot be advanced as a true counterbalance of the other.

78. Similarly, Khula' does not match up to talaaq as khula' only comes into play upon the agreement of the husband, and the wife offers payment of some property. In talaaq there is no payment, and the co-operation of the wife is not a requirement.

Sardar Ali explains:

> It is an established fact that traditional Islamic law accords the Muslim male a unilateral right to dissolve the marriage tie *(talaq)* without assigning any cause and without the interference of the court. … Although some leading judgements from the superior courts of Pakistan have tried to equate the right to pronounce *talaq* by the husband with the right of *khula* available to the woman, yet it is submitted that there are major differences between these two modes of dissolution of marriage. No matter what obstacles one places in the husband's right to give *talaq,* at the end of the day by its very definition, *talaq* may be pronounced with or without the intervention of a court of law. On the other hand, if a woman fails to convince the judge of the genuineness of her case for *khula,* she cannot unilaterally terminate the marriage contract. It is with these drawbacks in mind that the right of *khula* is being placed in the

> protective/corrective category of women's human rights rather than in the nondiscriminatory one.[74]

Hodkinson observes:

> There is no question that to the Western observer, the Muslim law of divorce, even allowing for recent developments in the subcontinent [facilitating the woman's use of faskh, and restricting the husband's use of talaq] remains in practice heavily weighted in favour of the husband.[75]

Manjoo highlights the inequality in the following passage:

> The SALRC bill provisions on *divorce* reveal a lack of clarity, disparate levels of power granted to male spouses (i.e. the entrenchment of legal inequality), and also a failure to pursue the *substantive* equality of women. For example, section 9(2) of the SALRC Bill provides that a court may terminate a Muslim marriage on any ground permitted by Islamic law. Yet, the bill fails to identify any of these grounds and thus opens the door to gender-biased interpretations of religious grounds. ... Also, the SALRC Bill, in codifying different forms of divorce and post-divorce practices, openly spells out and formalizes inequality in the law by giving the husband greater freedom to end the

[74] Shaheen Sardar Ali; *Gender and human rights in Islam and international law: equal before Allah, unequal before man?* 2000 Kluwer Law International, The Hague. p61
[75] *MUSLIM FAMILY LAW: A SOURCE BOOK*. By Keith Hodkinson. London, England: Croom, Helm Publishers, 1984; p. 246.

> marriage. This is a violation of both domestic and international laws.[76]

Westenberg comments thus:

> From a sheer equality perspective, one may argue that the *talaq* is itself a violation. It permits the husband to unilaterally end the marriage whereas *khul'a and faksh* [sic]*,* open to the wife, require mutual agreement or court intervention respectively. In evaluating the constitutionality of this disparity, one looks to the three-tiered *Harksen* analysis.[77]

Amien adds:

> This is reinforcement of the traditional approach to Muslim divorces that regards *talaq as* the exclusive preserve of the husband, which does not require the wife's consent. On the contrary, a wife needs the *'ulama's* permission to obtain a *faskh* to release her from the marriage. However, it appears that few women apply for *faskh* because the process can be time consuming, difficult, expensive, and sometimes humiliating.[78]

---

[76] Rashida Manjoo; *The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights*; Human Rights Program at Harvard Law School Working Paper July 2007

[77] Erica Westenberg *CONSTITUTIONAL ANALVSIS OF THE PROPOSED MUSLIM MARRIAGES ACT* Commission on Gender Equality - Recognition of Religious Marriages Workshop 25 October 2005

[78] Waheeda Amien *Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages* 28 Hum. Rts. Q. 729 2006

79. If one has to apply the *Harksen v Lane*[79] test of equality, the obvious conclusion would be that the institution of talaaq constitutes unfair discrimination, and has to be reformed. The court may either remove the entire institution, which is more likely from the discussion coming ahead, or it may extend this preserve to the wife. In the case of the former, the MMB will simply be unworkable, since the institution of the talaaq is a thread that runs throughout the application of the MMB. In the case of the second possibility, it would be reformation of the Shari'ah to a position that is in total violation of the Shari'ah.

Against Natural Law

80. The second problem is that the very concept of talaaq is incompatible with western law. To understand this, one needs to grasp the concept.

> Talaaq is the exclusive prerogative of the husband to, at will, repudiate the Nikah (marriage bond).

[79] *Harksen v. Lane NO* 1997 (11) BCLR 1489 (CC)

81. On a moral level, the husband should only issue a talaaq when there is a compelling ground. If he abuses this authority, he is sinful. This is what is being referred to in the Prophetic Saying :

> The most detestable of permissible acts in the sight of Allah Ta'ala is Talaaq

82. However, on a legal level (Shari'ah), the talaaq remains valid even if there are no grounds for the talaaq. Most people confuse the moral level (diyaanaat) with the legal level (qadhaa). They assume that Islamic judiciary deals with morals. That is not the case. The law concerns itself with valid and invalid, permissible and impermissible, and so forth. It does not police the morals of society. So a valid act undertaken with an ulterior motive remains valid. An invalid act carried out with the most sincere intention remains invalid. Yes, the very positive rules are themselves infused with morality.

Makdisi notes:

> Chafik Chehata noted that the manner in which an act was qualified as morally good or bad in the spiritual domain of Islamic religion was quite different from the manner in which that same act was qualified as legally valid or invalid in the temporal domain of Islamic law. Islamic law was secular, not canonical. It was concerned with civil sanctions

> for failure to do one's duty, not with moral sanctions for having a bad intention. Thus, it was a system focused on ensuring that an individual received justice, not that one be a good person.[80]

83. For a talaaq to be valid the following are NOT required:-

a. A morally sound reason

b. Witnesses present when the husband pronounces the talaaq

c. The wife being present

d. The wife being aware or having knowledge thereof.

e. Registration of the talaaq

f. A court order or decree

84. It follows that talaaq is at the absolute discretion of the husband.

85. For purposes of legal certainty, some Muslim states have introduced the process of registration of talaaq. The MMB has emulated this approached. However, what cannot be introduced is a rule that says that if the talaaq is not registered, the talaaq is invalid. This will place the legislation at variance with the true Shari'ah position. Such variance will open up a host of untold difficulties.

Thus the MMB records:

[80] Makdisi J, *The Islamic Origins of the Common Law*; North Carolina Law Review, 1999 p. 1704

> *9(4)(b)* Where an irrevocable *Talāq* has not been registered in accordance with subsection (3), it is nonetheless effective as from the time of its pronouncement.[81]

Therefore non-registration does not affect the validity of the talaaq, despite there being criminal sanctions for non-registration. It is the husband's pronouncement that brings the Nikah to an end, and not the decree of the court. This is evident from the fact that the talaaq takes effect from the time of husband's pronouncement. The husband's action is constitutive. In an Islamic context, if any of the spouses ever approaches a court in relation to talaaq, it is for a declaratory order. The Qaadhi's (Islamic judge's) decree is not constitutive, but rather the husband's action is.

86. While this is the correct Shari'ah position, the question that arises is whether this concept of talaaq is compatible with western legal systems.

It is well established in our law that only a High Court (or other court of similar stature) can pronounce on matters of status. Talaaq, being the dissolution of a marriage, affects status. In all western legal

[81] S 9(4((b) of Annexure HAF 31.

systems, a marriage may only be dissolved through judicial intervention. The very institution of talaaq gives the husband the authority to, at will, bring about a change in the status of the spouses. There is no place for extra-curial or extra-judicial dissolution of a marriage in western systems of law.

87. The foreign courts have had on occasion the opportunity to consider the effect of talaaq. Judge Gleeson explains:

> The recognition of Islamic *talaq* divorces is an issue which usually arises in the immigration context when considering whether the parties are married and a claimant can enter the UK as a spouse. Under Islamic Shari'a law, a husband is permitted to divorce a wife without recourse to court proceedings simply by declaring unequivocally his intention to repudiate the marriage in the presence of witnesses. This is a bare *talaq* and involves no proceedings at all.[82]

Elsewhere, the Tribunal added:

> "It is pronounced. Pronouncement of *talaq* three times finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities which respect classical Muslim religious tradition. Certainly by that tradition the pronouncement is a

[82] United Kingdom Asylum and Immigration Tribunal; NC (bare talaq - Indian Muslims – recognition) Pakistan [2009] UKAIT 00016; http://www.bailii.org/uk/cases/UKIAT/2009/00016.html

solemn religious act. It might doubtfully be described as a ceremony, though the absence of any formality of any kind renders the ceremony singularly unceremonious. It can fairly be described as a 'procedure' laid down by divine authority in the inspired text of the Koran. But neither respect for the divine origin of the procedure nor respect for the long enduring tradition which over the centuries had rendered the bare *talaq* effective as terminating a marriage by the law of Muslim countries necessarily or sensibly should convert the procedure into a proceeding within the intent of [the Act]. …

… The essentials of the bare *talaq* are, as I understand it, merely the private recital of a verbal formula in front of witnesses who may or may not have been specially assembled by the husband for the purpose and whose only qualification is that, presumably, they can see and hear. It may be, as it was in this case, pronounced in the temple. It may be, as it was here, reinforced by a written document containing such information, accurate or inaccurate, as the husband cares to insert in it. But what brings about the divorce is the pronouncement before witnesses and that alone. Thus in its essential elements it lacks any formality other than ritual performance; it lacks any necessary element of publicity; it lacks the invocation of the assistance or involvement of any organ of, or recognised by, the state in any capacity at all, even if merely that of registering or recording what has been done. Thus, though the public consequences are very different, the essential procedure differs very little from any other private act such as the

> execution of a will and is akin to the purely consensual type of divorce recognised in some states of the Far East.
>
> In my judgement, … such an act cannot properly be described as a 'proceeding' in any ordinary sense of the word, still less a 'proceeding' in what must, for the reasons given above, be the restrictive sense of the word as used in the Act. …
>
> But the *talaq* is still an entirely personal act. It lacks any formality other than the ritual performance. It lacks the invocation or assistance of any organ of the state. It does not even require an organ of the state to act as a registrar or recorder of what has happened.[83]

The Australian High Court commented similarly:

> A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any reason. The presence of the wife is not even necessary for pronouncing a divorce nor any notice need be given for that purpose.[84]

In a Canadian decision, Justice Fichaud stated:

> Rules of Natural Justice

[83] United Kingdom Asylum and Immigration Tribunal; [2002] UKIAT 04229; http://www.bailii.org/uk/cases/UKIAT/2002/04229.html
[84] HAQUE v. HAQUE [1962] HCA 39; (1962) 108 CLR 230

[17] I would dismiss the appeal for a second and independent reason. Castel, p. 17-8 states:

Grounds for Refusing to Recognize Foreign Divorces

Although the foreign court that granted the decree may be jurisdictionally competent in the eyes of Canadian law, recognition will be refused if the respondent did not receive notice of the proceeding, especially if fraud was present. The jurisdiction of the foreign court must not be established "through any flimsy residential means" and the petitioner must not have resorted to the foreign court for any fraudulent and improper reasons such as solely "for the purpose of obtaining a divorce". The foreign decree must not be contrary to Canadian public policy. Denial of natural justice may also be a reason for refusing recognition.

Payne, p. 112 states:

A foreign divorce may also be denied recognition where principles of natural justice have been contravened.

To the same effect: Indyka at pp. 706, 715 and 731.

[18] Mr. El Qaoud knew where Ms. Orabi resided. Yet Mr. El Qaoud did not serve Ms. Orabi with notice of the divorce proceeding . This was not a case where the respondent was difficult to locate, avoiding service, or subject to an order for substituted service. The Jordanian tribunal granted the divorce apparently without requiring

> any proof that Ms. Orabi had been served with notice. In December, 2002, Ms. Orabi received her couriered divorce decree, issued by a tribunal before which there was no role for her participation, in a country to which she had no connection, after a proceeding of which she received no notice. This divorce decree would affect her status and corollary relief. This violates the principles of natural justice. I would deny recognition of the Revocable Divorce Document on that ground[85].” [Underlining added]

88. The most significant conclusion arrived at in these foreign judgements is that the very institution of talaaq is one that goes against the principles of natural justice, from a western perspective. This was arrived at despite the misunderstanding that talaaq requires witnesses. If the true position, i.e. witnesses not being a requirement, was known to the respective judges, their conclusions would have been, *a fortiori*, more strongly applicable.

89. These foreign judgements will have strong persuasive value in our courts. That aside, our common law principles themselves lead to the conclusion that there is no scope for extra-judicial dissolution of marriages. From a western law perspective, any process that repudiates a marriage will require, at the very least, that the other party be given prior notice and the opportunity to defend such

[85] *Orabi v. Qaoud*, 2005 NSCA 28 (CanLII)

'proceedings'. On that score, the reasoning behind these judgements cannot be criticised.

The interpretation clause of the Constitution reads:

> 39. Interpretation of Bill of Rights
>
> (1) When interpreting the Bill of Rights, a court, tribunal or forum -
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) 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.

Our courts will thus consider these foreign judgements, and are most likely to be persuaded thereby.

Contrary to International Law

90. Not only is the recognition and implementation of the institution of talaaq contrary to the common law and foreign judgements, it is also in violation of International Law.

South Africa is a signatory to the 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African', also known as the 'Maputo Protocol'. Article 7 thereof reads:

> Article 7
> Separation, Divorce and Annulment of Marriage
> States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:
> separation, divorce or annulment of a marriage shall be effected by judicial order;
> women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
> in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
> in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage [Underlining added]

It is inconceivable how the institution of talaaq could be married in with the South African legal system.

A Justification Based on Contract

91. An argument presented in favour of the Muslim Marriages Act is that the opponents are overstating the constitutional concern in an alarmist fashion. The fact that we have a Bill of Rights is being overdramatised as a scare tactic to create false panic. There is nothing to fear in the Bill of Rights. Parties will be bound by the Act through their own choice. Even if certain aspects of the Act contain provisions that may be discriminatory, this would be defended by the fact that parties have voluntarily consented to such a regime.

A party to a commercial contract enters the contract by conscious will and consent. If the party thereafter finds that the provisions of the contract are unfair or discriminatory, the party cannot cry foul and invoke the Bill of Rights to have the contract cancelled or rectified. The Bill of Rights will not interfere in a private contract and will not impose the Constitution's equality clause on the contracting parties.

The Muslim Marriages Act, because it is based on choice, will not be open to a constitutional attack since the parties have voluntarily chosen

an external system of law. If it then turns out that that system of law has certain traces of discrimination, the parties will still be bound by their commitment to that system of law, notwithstanding any discrimination. Just as a private commercial contract is protected from a Bill of Rights attack, so too will the Muslim Marriages Act be defended. There are examples where the courts have refused to come to the rescue of such opportunistic contracting parties claiming the contract is unfair, and have refused to intervene in the mutual agreement.

Therefore the opponents of the MMB are, due to lack of knowledge of the law, resorting to scaremonger tactics. There is no fear that the Shari'ah will be interfered with. This is just a fiction created to stir up the emotions of the public. So the argument goes.

Dissecting the Justification

92. The argument is however, with respect, flawed on a number of fronts. We shall analyse and counter the argument below.

The Law of Contract and the Bill of Rights

93. Private contracts are not wholly immune and insulated from an attack based on the Bill of Rights. This topic requires some detail.

94. Our law recognises the principle of autonomy. This principle postulates the ideal that individuals should be allowed the greatest possible measure of self-determination and self-realisation compatible with the interests of the other individuals. The principle of freedom of contract is an expression of the principle of individual autonomy and includes the freedom of a party to decide whether he wants to contract, with whom he wants to contract and on what terms. Another aspect of the ideal of autonomy is consensuality which means that contractual liability arises from the concurrence of the intentions of the parties to an agreement to create obligation(s) for themselves. The principle of the sanctity of contracts also flows from the principle of autonomy: an individual should take responsibility for the consequences of his decision.

Our law holds the principle of autonomy in high esteem; hence specific rules of law play a limited role as the individual should be given as much freedom as possible with only the minimum of interference. The function of the judge is to determine what the parties have agreed upon and not to make contracts for them.

The principle of good faith (*bona fides*) is the counterbalance of the principle of autonomy. This principle requires that good faith should be

protected in human relationships. Society demands that individuals should act in a certain way when forming a new relationship or when acting in an existing relationship in order to protect the interests of the other party in the relationship.

Based on the above principles, our courts have in the past denied that they have a general equitable jurisdiction to refuse the enforcement of unfair contractual terms which are clear and not against public policy[86].

95. Then the Constitutional era ushered in. Under the interim Constitution, the Bill of Rights only had vertical application. However, under the 1996 Constitution, the Bill of Rights expanded to direct horizontal application, making it possible to apply the Bill of Rights to relations between private citizens and the traditional private law sphere. This effectively demanded a re-evaluation of the Law of Contract in order to create a balancing of values.

In line with the new approach that the Constitution demanded, a fresh balance had to be found. On the one hand the court does not interfere with the foolish and imprudent decision of a contracting party[87]; whilst on the other hand the court is required to intervene when public policy

[86] *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) 605-606; *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A)
[87] *Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (W) 660

and the values of the Constitution demand so. In this respect the court held[88] that:

> All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda*[89] is, therefore, subject to constitutional control.

At para 87, Ngcobo J went on to say:

> *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it.

In respect to a specific species of contract, namely arbitration agreements, the court stated[90]:

---

[88] *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 15. See also *Bredenkamp v Standard Bank* (599/09) [2010] ZASCA 75

[89] The principle that "Agreements must be kept", also referred to as the sanctity of contract.

[90] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) para 210

> However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.

In other words a new threshold was set. At some stage, when public policy demands, the Bill of Rights does have application in private contracts, and the courts do step in to apply the Bill of Rights. The important lesson for our purposes is that the Law of Contract is not completely insulated and immune from the application of the Bill of Rights.

96. Woolman[91] goes further and argues, rather vehemently, that while a waiver of contractual rights may exist, Constitutional rights may never be waived. He concludes:

> Whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated — at some point in time — by the parties before the court? If it does not, then, as we noted

[91] *Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on Barkhuizen* Stu Woolman (2008) 125 South African Law Journal 10

above, the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.

The very premise on which the argument in the question is based has now fallen away. Consent, even in the Law of Contract sphere, is not a bar to the application of the Bill of Rights.

The argument thus fails on its first leg.

Law of Contract Distinguished

97. The MMB does not fall under the field of the Law of Contract, rather under the sphere of Family Law. Therefore the analogy with the Law of Contract is grossly misplaced. The Law of Contract, in the main, deals with commercial or patrimonial rights and obligations. On the other hand, Family Law deals with interpersonal relationships that are so close to the heart that they go to the core of the concept of Human Dignity. To compare the Law of Contract with Family Law betrays sound legal reasoning. In the area of Family Law, the Bill of Rights applies from the very outset, and sets the foundational standard by which all rules are judged *ab initio*. By contrast, in the Law of Contract, minor incursions by means of the Bill of Rights

violations may be sustained or overruled by the sanctity of contract principle. It is only when the invasion is significant will the testing powers of the Bill of Rights kick-in. Absolute equality is not a standard by which contracts are judged, nor is it practical. A modest degree of power imbalance is an inevitable feature of most commercial contracts, while such an imbalance is indefensible in the area of Family Law.

To what does the Bill of Rights Apply?

98. Section 8(1) of the Constitution is clear that the "The Bill of Rights applies to all law…". This gives rise to a simple question: Are the provisions of the Muslim Marriages Act (when enacted) law? An equally simple answer is that, as a piece of legislation, it definitely is law. The rather obvious conclusion is that the Act has to conform to the Bill of Rights. Any supposed "choice" to opt-in or opt-out will not make it any lesser law. Even if hypothetically not a single individual opts to be bound by the Act, it does remain law, which, at least in theory, has to conform to the Bill of Rights.

The Bill's Scope of Operation

99. If the obligations created by the Bill applied exclusively to those who volunteered to be bound by the Bill, the Contract theory advanced in the question could possibly have some validity. However, the duties imposed by the Bill are not simply *erga partes* (binding only on the parties), but some provisions are *erga omnes* (binding on everyone).

100. For example the Bill states: "Any person who facilitates the conclusion of a Muslim marriage … must inform the prospective spouses that they have a choice whether or not to be bound by the provisions of the Act"[92], and "Any person who intentionally prevents another person from exercising any right conferred under this Act is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year"[93] (Our emphasis).

The two sections (the second in particular) extend the obligations established by the Bill to one and all, under the threat of criminal sanctions. A consensual contract is supposed to bind the parties to the contract and no one else. Under those circumstances consent could be seen as a form of waiver. However, when those who have not

[92] S 6(9)(a) of Annexure HAF 31
[93] S 8(12) of Annexure HAF 31.

volunteered to be bound by the Bill are saddled with obligations, the implicit waiver theory falls flat. There is no consent from which an import of waiver may be extracted.

Criminal Sanctions

101. The last section quoted above, as well as other sections in the Bill, impose criminal sanctions of fines and imprisonment. This clearly brings the application of the Bill under the ambit of Criminal Law. The Criminal Law application of the Bill extends to each and every right constituted by the Bill and effectively covers every provision. The relevant section states: “Any person who intentionally prevents another person from exercising any right conferred under this Act is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year” (Our emphasis). It boggles the legal mind how the consensual contract theory (with its concomitant implicit waiver) could be reconciled with the overarching Criminal Law application of the Bill. There is no “choice” in Criminal Law, and one does not consent to be bound to the Criminal provisions of any legislation.

The Problematic Choice

102. Much has been made of the supposed party's choice of being bound by the Bill's provisions. The Bill's scheme of granting "choice" is however in itself in conflict with the Constitution.

The constitutional concept of 'Freedom of Religion' manifests itself in many forms, one of which is the rule that the State may not impose any religion, or any particular interpretation of a religion, upon any person. The State is not allowed to think for the individual what that person should or should not believe or practice. This prohibition is absolute and exacting to the extent that even a temporary election by the State would be constitutionally objectionable.

The Bill seeks to include all Muslim marriages that were concluded prior to the Bill's enactment within its provisions. Parties may however opt-out within a given period. In other words the Bill makes the "choice" of including them. The initial "choice" to be included is made by the State. Notwithstanding the option, this very choice by the State is constitutionally obnoxious. The State is not allowed to think for the individual, to choose a particular interpretation of religion for the individual or to impose a State sanctioned set of religious laws on any individual. In the sphere of religion, the election to be or not to be bound

by a religion has to be made by the individual completely voluntarily. This is one of the necessary attributes of the 'Freedom of Religion' concept. In fact this extends to all other freedoms as well.

The mere fact that individuals may opt-out does not justify the initial imposition. The State may not, even provisionally, make an election of such a personal nature on behalf of the citizen. Imposition is the very antithesis of freedom.

By way of illustration, hypothetically assume that the government enacts a law to the effect that all public servants are forthwith automatically members of the ANC, but have a window period of three years to cancel their membership. The Constitution guarantees the individual's freedom to choose affiliation with a political party. The State cannot make the choice on behalf of any citizen. The mere fact that the individual has been granted the choice to opt-out does not justify the State's decision on behalf of the individual.

When the individual has not made the conscious election to be bound by the provisions of the Bill, how then could it be argued that the individual has waived his/her constitutional rights? While there has been academic debate[94] on whether a constitutional right may be waived or

[94] See Stu Woolman *Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on Barkhuizen* (2008) 125 South African Law Journal

not, however, what is obvious is that if such a concept exists, it requires a conscious and informed decision. The court held in the Mohamed[95] case:

> To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.

103. All Muslim couples presently married in terms of Islamic Law only will, upon enactment of the MMB, be ambushed into being bound by the Act, without being aware thereof, or without being fully aware of the comprehensive consequences of the Bill. How then could it be suggested that these individuals have waived their constitutional rights as enshrined in the Bill of Rights?

Such blanket imposition of a particular interpretation of Islamic upon all Muslims would be a State imposition of a particular religious viewpoint upon the subjects, which flies in the face of Freedom of Religion. Highlighting the fact that Freedom of Religion implies non-imposition, Sachs J wrote:

10; Kevin Hopkins *Constitutional rights and the question of waiver: How fundamental are fundamental rights?* (2001) 16 SA Public Law 122 and Woolman et al *Constitutional Law of South Africa* 2nd Ed. 31-122

[95] *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening*) 2001 (3) SA 893 (CC) para 62

[18] I will start with section 15 which deals with freedom of religion, belief and opinion. The meaning of a similar provision in the interim Constitution was considered by Chaskalson P in S v Lawrence; S v Negal; S v Solberg[14] where he made the following observation[15]:

"In the [R v Big M Drug Mart Ltd] case Dickson CJC said:

'The essence of the concept of freedom of religion is 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.'

I cannot offer a better definition than this of the main attributes of freedom of religion. But, as Dickson CJC went on to say, freedom of religion means more than this. In particular he stressed that freedom implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This is what the Lord's Day Act did; it compelled believers and non-believers to observe the Christian Sabbath."

[19] This broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs. Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often

involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial. This aspect is underlined by article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) which states:

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."[96]

As one academic encapsulated it:

"The "right" to freedom of religious conscience means that government may not act for the purpose of endorsing religion or religious sects."[97]

104. It has been argued that *Ignorantia juris non excusat*[98], hence when any Act is published in the Government Gazette; it is notionally assumed that every citizen is aware of that law. Therefore it will be

[96] Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) at Paragraphs 18 and 19.

[97] Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism Author(s): Richard H. Pildes Source: The Journal of Legal Studies, Vol. 27, No. 2, Social Norms, Social Meaning, and the Economic Analysis of Law (Jun., 1998), pp. 725-763 Published by: The University of Chicago Press

[98] Ignorance of the law is no excuse

notionally presumed that all affected couples have acquiesced to provisionally being bound. This argument is delusive.

Other fields of law are not dependent on consent. One does not consent to tax laws or criminal laws. Hence the presumption is made that all citizens are bound by such laws upon publication. However, religion falls under the ambit of freedoms, which imply free will. Freedoms demand non-interference from the State, a conscious decision by the individual and the discretion to change one's choice at will. The decision maker is the individual and not the State, whereas in legislation not dealing with freedoms the decision maker is the State which has a right to impose such decisions on its subjects.

It is difficult to fathom how comprehension of such basic concepts of the law has eluded the drafters of the Bill.

105. Law that is constitutionally invalid cannot be then validated by parties choosing to abide by such law. Moseneke DCJ summed it up succinctly when he said:

> [T]he constitutional validity or otherwise of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the

> Constitution itself, which in section 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid. Several other provisions of the Constitution buttress this foundational injunction in a democratic constitutional state. A few should suffice. Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of state including the judiciary. Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, section 172(1) makes plain that when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confers validity to a law that otherwise lacks a legitimate purpose, has no merit.[99]

106. Therefore the theory that the constitutionally offensive provisions of the Bill, in particular the violations of the Bill of Rights (more specifically the Equality clause), would be able to withstand constitutional muster on the basis of a waiver implicit in the so called "choice" is untenable, irrational, legally unsound and deliberately deceptive.

[99] Van der Merwe v Road Accident Fund and Another (CCT48/05) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (30 March 2006) at Para 61.

Applicant's Target Group

107. For the purposes of this Application, Muslim couples could be divided into 4 categories:

a. Category A: Those monogamous Muslim couples who, together with being married in terms of Islamic rites, have registered their marriage in terms of the Marriage Act.

b. Category B: Those Muslim couples (monogamous or polygynous) who, together with being married in terms of Islamic rites, make a conscious and informed decision not to register their marriage in terms of the Marriage Act or any other legislation (if available). An assumption is made that if they could register their polygynous marriage, they nonetheless chose not to.

c. Category C: Those monogamous Muslim couples who are married by Islamic rites, whose marriage has not been registered in terms of the Marriage Act, and the failure to do so is not a voluntary or informed decision.

d. Category D: Those polygynous Muslim couples who desire to register their marriages.

Each of the categories shall be dealt with below.

Category A: Already In

108. The Marriage Act provides ample opportunity for Muslims to register their monogamous marriages, and thereby affording them the protection of the law. The fact that thousands of Muslims do opt for registering their marriage in terms of the Marriage Act is indicative of the fact that there is no Islamic prohibition against them doing so. In brief, there is no legal or Islamic impediment for monogamous Muslim couples availing themselves of this avenue of "strong recognition[100]".

109. The requirement that couples who wish to avail themselves of legal consequences of their marriage should do so by registering in terms of the Marriage Act is a reasonable requirement as it provides legal certainty in that outsiders will be able to ascertain the legal status of the couple. The requirement fulfils a valid State objective of

[100] To borrow the term coined by the Sixth Amicus. Paragraph 16 Bundle E Vol 3 page 168.

maintaining a Population Register by means of which the status of persons can easily and readily be determined.

110. When this sector of the Muslim community have already availed themselves of the accessible form of legal protection, they must for the purpose of this Application be excluded from those deserving attention and who are waiting be to be “rescued” by the remedies sought in the Notice of Motion.

111. A consideration that arises is that the Marriage Act, although available to Muslim couples, has consequences that differ from the Islamic consequences of an Islamic Marriages. In this light one could divide the legal consequences of a marriage into two categories:

a. The Standard rights and obligations arising from the Marriage Act and other acts dealing with marriage or marriage-like relationships, and the common law.
b. The non-Standard rights and obligations that flow from a particular culture, religion or tradition, and which differ from the Standard ones.

112. The question that then arises is whether the State has a duty to provide for such non-Standard rights and obligations. If the Applicant

contends that the State has, then it has not presented any convincing proof to support such a duty. If the Applicant accepts that the State has no such duty, which we respectfully submit is the correct answer to this question, then the State has made available the mechanism for such rights and obligations to be applied to Islamic Marriages.

113. Moreover, in the context of Muslim marriages, in attempting to provide for such Islamic rights and obligations that flow from Islamic marriages, the State is at serious risk of violating its other constitutional obligations.

114. The very grounds which the Applicant uses as a foundation to contend that the State has a duty to give legal effect to such non-Standard rights and obligations, for example the Equality Clause and International Law, ironically are the very basis on which such law (eg. the MMB) will be struck down as not passing constitutional muster.

115. The Applicant has made an issue[101] of the fact that Muslim couples, when registering their marriage, are not registering the Islamic marriage but rather entering into a civil marriage. The distinction is not significant. The position is the same for all religions.

[101] See paragraph 279 Bundle B page 1494

The essential issue is that the rights and obligations that accrue form marriage can be applied by entering into a civil marriage. There is no constitutional duty upon the State to recognise each and every marriage carried out in terms of any religion and custom. Rather the State has an open door policy whereby all religions are afforded the equal opportunity to have the common law rights and obligations of marriage to apply to their particular marriages by means of entering into a civil marriage in terms of the Marriage Act.

Category B: Already Out

116. When couples make the choice not to avail themselves of registering their marriages, they opt to deny themselves the protection of the law, and hence cannot complain. In Volks NO v Robinson, it was stated[102]:

> 91. The Act does not say who may enter into a marriage relationship. The Act simply attaches certain legal consequences to people who choose marriage as their contract. There is a choice at the entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify

[102] Volks NO v Robinson and Others (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005). These statements was made in the context of "cohabitation". It is submitted that the same reasoning applies to Islamic marriages.

their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and decide what consequences should flow from their relationships.

92. The other consideration is that marriage is a matter of choice. Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage. It is more than a piece of paper. As this Court observed in the *Dawood* case:

> "The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."

93. People involved in a relationship may choose not to marry for a whole variety of reasons, including the fact that they do not wish the legal consequences of a marriage to follow from their relationship. It is also true that they may not marry because one of the parties does not want to get married. Should the law then step in and impose the legal consequences of marriage in these circumstances? To do so in my view would undermine the right freely to marry and the nature of the agreement inherent in a marriage. Indeed it would amount to the imposition of the will of one party upon the other. This is equally unacceptable.

…

154.[103] Respect for human autonomy undoubtedly implies that the law must honour the choices that people make, including the decision whether or not to marry. … By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she must bear the consequences. Just as

[103] Ibid. Although this statement is found in the minority judgment, it reflects the reasoning of the majority judgment.

> the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life. These are powerful considerations.

117. Although the last mentioned quotation was in the context of a heterosexual life partnership, the *ratio* can be applied to couples married in terms of Islamic rites who chose not to register their marriage in terms of the Marriage Act.

118. This sector of the Muslim community must also, for the purpose of this application, be excluded from consideration. Such persons cannot cry out for constitutional remedies once they have made a conscientious decision.

119. Some of the remedies sought by the Applicant, such as Prayer 9 (Reading in) and Prayer 11 (Deeming the Marriage Act, Divorce Act and Recognition Act to apply to all Muslim marriages), impermissibly impose on the members of this Category B a regime contrary to their expressed will. This cannot be legally defensible as it violates the basic premise of freedom of choice and freedom of religion.

Category C: The Vulnerable

120. This group refers to those, more particularly women, who through illiteracy, ignorance and lack of access to the law and other resources, have not registered their Islamic marriages in terms of the Marriage Act. This appears to be the target group of this Application, and not simply all Islamic marriages.

121. There is no qualitative and quantitative study before this court as to the composition of this target group. Their real intentions are not known. All we have is an assumption, that given the free voluntary and informed choice, such persons would have opted to register their marriages. Such assumption is based on an inference drawn from the cases the Applicant has dealt with.

122. Whilst that State can and should do more in the form of education, outreach and other palliative measures of the like aimed at removing remove ignorance, levelling the playing field and making registration of marriages more accessible, this is not the relief sought in this Application.

123. The Department of Home Affairs have indicated some of the measures they have adopted to bridge this gap, where they have

trained Muslim Marriage Officers, thus making registration in terms of the Marriage Act more accessible.

124. When approaching the question of the relief that such persons are entitled to, cognisance should be had to the fact that many other persons, besides Muslim women, find themselves in a similar vulnerable situation. Notwithstanding legal remedies being available to them; due to lack of education, destitution or unequal power in the relationship; they fail to access such legal remedies.

125. The question before this Honourable Court would then be, in as far as all such vulnerable persons are concerned, has the State failed a constitutional duty by not enacting legislation (or other similar steps) providing for their vulnerability. If regard be had to the *ratio* of the majority judgment in Volks NO v Robinson[104], this question must be answered in the negative.

Category D: Polygynous Muslim Marriages seeking legal recognition.

126. In terms of Islamic Law, a man may have up to 4 wives. In regards to his first marriage, the Marriage Act is available to obtain legal protection.

[104] See paragraphs 63-68.

127. When a Muslim man wants to take a subsequent wife, there is no legal provision available to him and his second wife. This appears to be a lacuna which deserves attention. However, this is not the focus of the Application before this Honourable Court. Furthermore, a lacuna on its own does not create a constitutional obligation to enact legislation.

Judicial Activism

128. This Honourable Court has not been called upon to decide on the constitutionality of specific provisions of the MMB. However it is respectfully submitted that this Honourable Court should take judicial notice of the fact that there are many aspects of Muslim Personal Law, and more particular many clauses of the MMB, regarding which there are strong, well-founded and academically-sound fears and apprehensions that these provisions will not pass constitutional muster.

129. The Executive and Legislative branches are in an invidious position. Should they enact the legislation recognising Muslim marriages in its current format, or even with slight changes, they face the prospect of such legislation being unconstitutional. On the other hand, should they significantly modify the current format in order to

align it with the Constitution; they will be distorting and re-interpreting Islamic Law in a manner that the majority of Muslims will find offensive. The Muslim Community will read such steps as interference in their religious matters, and an affront to their religious values. The State is in the proverbial "Catch 22" situation, caught between a rock and a hard place.

130. Such a dilemma is best dealt with by the Executive and Legislative branches, without any imposition. Any political repercussions of imposing their will over the Muslim Community will be felt by the Executive and Legislature. The JAMIAT KZN's core submission is that the Judiciary should not compel the Executive and Legislature to make difficult decisions, where either way they must necessarily face negative outcomes. Should the Executive and Legislative branches steamroll such legislation onto the statute books in the absence of consensus[105], such legislation will be void of practical legitimacy as the very community which the legislation is supposed to serve will be averse thereto. On the other hand, should the Executive and Legislature not make significant amendments to

[105] The Applicant harps upon the point that for legislation to be passed, unanimity is not a requirement. Similarly unanimity amongst those affected by the legislation is not a prerequisite. Whilst this is technically correct, the South African Constitution contemplates Participatory Democracy (S 57(1)(b) of the Constitution) in which the Government must be responsive (S 1(d) of the Constitution). At every stage the Executive and Legislature must be sensitive to the needs and sentiments of the populous. Our Constitution does not envisage an autocratic rule for a period of five years, wherein the views of the citizens only have a role in electing the next Government. Interaction with the community is an ongoing process and significant opposition to the MMB cannot be ignored or swept under the carpet.

the current format of the MMB, the very same judiciary who compelled them to enact such legislation would be the first to castigate them by striking such legislation down as unconstitutional. Therefore compelling Cabinet and Parliament to take action would be taking Judicial Activism to an impermissible level.

131. Attached hereto as Annexure KZN1 is an article that appeared in the daily newspaper: The Mercury. Notwithstanding the fact that the Recognition of Customary Marriages Act was promulgated in 1998, community dissatisfaction is surfacing some 17 years later when the full impact of the legislation is being felt by the community leaders. By imposing upon the Executive and Legislature to pass the MMB, the Court may inadvertently be compelling the two to force down the throats of the Muslim Community a piece of legislation which, it is already known, a large segment of the community is opposed to. It should not be that years later, history repeats itself where the Muslim community reacts as the Honourable King Goodwill Zwelithini has.

132. Whilst the Judiciary does have oversight role over the Executive and Legislative branches, formulation of legislation is the function of the two branches[106]. The Judiciary should only intervene when absolutely necessary, and to the degree of necessity.

---

53. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* [2004] ZACC 15; 2004 (7) BCLR 687 (CC) at paragraph 44 O'Regan J emphasised that:

133. Given the highly complex and multi-faceted nature of this entire debacle, the the Executive and Legislative branches are in the best position to explore various options and find innovative solutions that satisfy the various angles. This they should be left to do without a Sword of Damocles over their heads.

134. It is also reasonably possible that after deliberating over the mater the the Executive and Legislative branches may come to the conclusion that they do not have a Constitutional valid option available to them, hence they may want to take the position of shelving the entire exercise. It may even be the most prudent of stances. Therefore all options should be left open to the Executive and Legislative branches, without compelling them to act in a manner that conflicts with the Constitution. It is submitted that the concept of talaaq, by way of example, is irrefutably irreconcilable with the Constitution. Assuming that the the Executive and Legislative branches come to realise this, and cannot formulate any

---

'*... a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend on the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the court. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker.*"

form of legislation excluding the concept of talaaq, they would then have to come to the conclusion that it is not reasonably possible for them to enact such legislation. This Honourable Court should not preclude them from taking such a position.

135. The nub of the Applicant's submission is that the enactment of the MMB or similar legislation recognising Muslim marriages is mandatory. I respectfully disagree.

136. The wording of S 15(3) of the Constitution is clearly permissive and not peremptory[107].

137. Moreover, the permission contained in this subsection is qualified by the important proviso in S15(3)(b):

> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.[108]

It is submitted that legislation incorporating the Islamic Law of Marriage and dissolution thereof, must either violate the principles of the

[107] Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) at Para 108

[108] Commenting on a similarly worded section, Sachs J said:

> Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights.

Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) at Paragraph 26.

Constitution, or be drastically modified, which will then be offensive to the majority of Muslims.

Starting Point – The State's Constitutional Duty

138. At the centre of this case is the Applicant's contention that the State has an obligation to enact legislation recognising Muslim marriages. It avers that this obligation is derived from the Constitution and the State's International Law obligations.

139. In considering whether the obligation exists or not, one has to first work from the abstract, and then apply it to the concrete.

140. This case is precedent setting. If there is an obligation to enact legislation recognising Muslim marriages, based on the equality principle it follows that there would be an obligation to recognise all religious marriages[109].

141. The Applicant has submitted[110] that there should be no distinction between religion and custom. I respectfully agree. This would extend the obligation to all marriages concluded in terms of custom.

[109] Whilst the Applicant's case is not based on a comparison with other religions, as stated in Paragraphs 28 and 31 of its Replying Affidavit, the Court must necessarily consider it for the purpose of consider the broader implications of the orders sought.
[110] Paragraph 68 Bundle B Page 1422

142. At this juncture it may be contended that the Recognition of Customary Marriages Act already provides for this. I would differ. Section 1 of the Recognition of Customary Marriages Act, defines "customary law" as: "The customs and usages traditionally observed amongst the indigenous African peoples of South Africa and which form part of the culture of those peoples." Following thereupon it will imply that any community having a custom other than that of the "indigenous African peoples of South Africa" are presently not catered for in the form of legislation. Take for example a community from Nigeria or Ethiopia who have settled in South Africa. Their next generation will be South African citizens. This naturalized community will have their own custom, excluded from the definition found in the Recognition of Customary Marriages Act. Their custom will also be deserving of constitutional protection and recognition. Therefore there exist, at least theoretically, the notion of other customs whose yet unrecognised marriages deserve recognition.

143. Purely religious marriages would extend across the spectrum of all religious and denominations. It will even include purely Christian marriages. Christianity predates South African Law. It is therefore notionally conceivable that a marriage is conducted which meets the Christian definition of marriage, but has not been registered in terms of the Marriage Act.

144. This then broadens the core question before this Honourable Court.

> Does the Constitution and International Law oblige the State to enact legislation recognising purely religious marriages and marriages concluded in terms of any established custom?

145. In considering this question, the conduct of the members of the affected communities is irrelevant. It makes no difference whether that community wants such legislation or not. The obligation arises from the Constitution and International Law, which the State must nevertheless fulfil. So whether the religious leaders of the Hindu community advise[111] their members to register their marriages in terms of the Marriage Act or not is irrelevant. Similarly it is beside the point whether Rabbis insist[112] that Jewish couples register their marriages in terms of the Marriage Act. Members of the Hindu and Jewish communities are presently subject to the Dual System[113] which the Applicant decries.

146. As alluded to above, that obligation must extend to each "branch", denomination, school of thought[114], sect, sub-sect and school of

[111] See paragraph 48 Bundle B page 1414
[112] See paragraph 50 Bundle B page 1416
[113] See paragraph 84 Bundle B page 1430
[114] In paragraphs 283 and 284 Bundle B page 1496, the Applicant contends that many countries have incorporated the various schools of thought into their family law.

interpretation within such religion, since they all deserve equal constitutional treatment.

147. Religion in a nutshell is a person's personal beliefs and practices. All the major religions have various versions, denominations and schools of interpretation. The State is obliged to give equal respect to each of these interpretations or belief systems. In theory there could be as many religions as there are citizens in the country, all of which the State must give equal recognition to.

148. If that obligation is located in the Constitution, then the obligation arose in 1996 when Constitution came into being. If it is derived from a particular treaty then the obligation arose when that treaty was ratified.

149. The obligation either existed or not. Therefore in determining the question of whether the obligation existed, the following are irrelevant and deserve to be ignored:

a. How the State conducted itself. If the obligation is located in the Constitution and/or International Law, then the State's conduct does not produce the obligation. Its conduct may be considered at the later stage of a further question of whether

---

With due respect the analogy is totally misplaced. None of these countries have the challenge of a constitution similar to that of South Africa. Many of these countries have reservations in place in relation to International Human Rights instruments.

the State fulfilled that obligation or not. That is a separate question. The conduct itself is not the source of the obligation.

b. Did the State promise the passing of the MMB or not. A promise does not create a constitutional obligation. The Constitution itself creates it.

c. Whether in practice the members of some religions or customary communities have been able to realise more rights and privileges when compared with others. If the Constitution and/or International Law creates the obligation, it must be carried out, whether the community is less fortunate or more, privileged or unprivileged.

150. It is submitted that it is difficult to fathom an interpretation of the Constitution and/or International Law which obliges the State to <u>enact legislation</u> recognising marriages concluded in terms of each and every religion and custom. The main prayer in this Application implicitly calls for such an interpretation.

<u>Recognise what?</u>

151. The Marriage Act, the Recognition of Customary Marriages Act and the Civil Union Act produce consequences which could be termed as the “civil consequences of marriage”.

152. Such civil consequences are available to Muslims. There is no impediment in them registering their marriages in terms of the Marriage Act.

153. A careful reading of the Applicant's affidavits[115] will bear out that these are not the consequences that it wishes to have recognised. It actually desires to have the Islamic Law consequences recognised, which are very much different to the civil consequences.

154. The core question then further expands to ask: Does the Constitution and International Law oblige the State to <u>enact legislation</u> recognising all purely religious marriages, marriages conducted in terms of any established custom; and the religious or customary law consequences of marriage that arise therefrom?

155. It is submitted that within our constitutional framework it would absurd to answer in the affirmative.

<u>Correct Comparison</u>

156. The Applicant repeatedly compares a Muslim woman married only in terms of Islamic rites and a woman married in terms of the

[115] For example see paragraph 299 Bundle B. Page 1501. Also Paragraph 91 Bundle B page 1433 and Paragraph 279 Bundle B page 1494.

Marriage Act. It is submitted that only focussing on this difference produces an incomplete picture.

157. Kindly consider the following comparisons in respect of recognition: Full or Limited.

	Woman married in terms of Islamic Law	Man married in terms of Islamic Law
Woman married in terms of the Marriage Act (Muslim or non-Muslim)	Limited v Full	Limited v Full
Man married in terms of the Marriage Act (Muslim or non-Muslim)	Limited v Full	Limited v Full
Woman married in terms of the Recognition of Customary Marriages Act	Limited v Full	Limited v Full
Man married in terms of the Recognition of Customary Marriages Act	Limited v Full	Limited v Full
Woman married in terms of another pure religious marriage	Both limited	Both limited
Man married in terms of another pure religious marriage	Both limited	Both limited
Woman married in terms of Islamic Law	X	Both limited
Man married in terms of Islamic Law	Both limited	X

The table applies to Muslims monogamous marriages. Polygynous marriages have been discussed above[116].

[116] See Paragraph 126

158. It should be clear that the differentiation comes about due to registration in terms of available legislation. The Marriage Act is available to Muslims.

159. In Singh V Ramparsad[117], Patel J remarked as follows:

> The Marriage Act does not proscribe purely religious marriages. These marriages involve the solemnisation by a minister of religion who is not designated as a marriage officer for the purposes of the Marriage Act. These religious marriages although they lack legal validity are regarded as lawful marriages in terms of the common law (see Daniels v Campbell NO and others [2004] ZACC 14; 2004 (5) SA 331(CC))

160. The differentiation is not based on religion. State policy does not favour any particular religion over the other.

161. Very importantly, the differentiation is not based on gender. The Muslim man is in the same position as the Muslim woman. If Muslim women suffer indirect “discrimination”, so do Muslim men.

162. Gender inequality that occurs on the ground in based on societal forces, and not State policy. Its stretches over different religions and cultures, and is not peculiar to Muslims

[117] Singh v Ramparsad and Others 2007 (3) SA 445 (D) at para 37

163. Article 1 of CEDAW reads:

> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex[118] which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. (emphasis added)

164. Since the differentiation above is not based on sex, it is submitted that CEDAW does not apply to the present differentiation. However, elsewhere I have discussed its application to provisions of the MMB.

Doctrinal Entanglement

165. The State is obliged to avoid Doctrinal Entanglement. It should not give imprimatur sanction to any one interpretation. By enacting the MMB or similar legislation, it is precisely taking sides and endorsing a particular interpretation[119].

[118] The more correct term would be “gender”.
[119] See Religion and the State, the Case Against the Muslim Personal Law Bill; Prof Ziyad Motala, *Muslimality*, https://en.wordpress.com/tag/professor-ziyad-motala/ Accessed 3 Feb 2013

166. If the premise that the State is obliged to enact legislation recognising marriages and the dissolution thereof according to a particular religion is valid, then such obligation cannot be confined to any particular religion. The equality principle would demand that the State recognise, in the form of legislation, all forms of marriages of all religions. This will apply in both an internal and external perspective. So for example if legislation recognising Hindu marriages is enacted, members of Buddist faith could also make such a demand. Similarly, some members of the Hindu faith could then approach the court to say that we do not subscribe to the interpretation of Hindu faith as found in the already enacted legislation, and hence demand a separate piece of legislation recognising our interpretation of the faith. The conundrum could go on. This would be the outcome of the incorrect premise that the State is obliged to enact legislation incorporating religious laws or custom.

167. *In brevitas*, the JAMAIT KZN submits that the First to Sixth Respondents should not in any fashion be compelled to enact any form of legislation, and that they should be free to explore innovative options to a very complex and challenging situation. In accordance with the deference rule[120], the Executive and Legislature should deal

[120] In an article entitled *The doctrine of separation of powers (a South African perspective)* [Advocate, Vol. 26 No. 1 pp 37-46], Judge Mojapelo explained this rule in the following terms.

with the matter as they deem appropriate, which includes the option

---

This principle is usually applied in our jurisdiction. It influences and is reflected in the remedy that the court will be prepared to give in constitutional case. In National Coalition for Gay and Lesbian Equality v Minister of Home Affairs Ackerman J stated that: 'The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature'. In Ferreira v Levin NO Chaskalson P stated that regulation of the economy and redistribution of resources in the public interest are part and parcel of a social welfare state. It is not for a court to approve or disapprove of such policies, which are essentially political questions. The function of the courts is instead to ensure that the implementation of a political decision conforms with the Constitution. With regard to the separation of the judicial and legislative authority the learned judge stated that:

> 'In a democratic society, the role of the Legislature as a body reflecting the dominant opinion should be acknowledged. It is important that we bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate'.

The proper demarcation of the 'terrain' of the legislature and that of the court is one of the most difficult issues in constitutional law. The learned judge also stated that the court's task is to ensure that legislation conforms with the Constitution. And it is not the function of the court to interfere with issues such as the regulation of the economy and the redistribution of resources. In Soobramoney v Minister of Health (Kwazulu-Natal) the Constitutional court refused to order the state to provide expensive dialysis treatment to save the life of a critically-ill patient. In the course of his judgment Chaskalson P referred with approval to an apposite English authority where it was held that '… [d]difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage to the maximum number of patients. This is not a judgment a court can make'.

> 'The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceeding. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution'

of not proceeding with any form of legislation if they deem this to be the most appropriate stance.

Comments on Some Prayers Sought

168. In the event the Court is inclined to grant the prayer whereby the Marriage Act is deemed to apply to Muslim marriages, then by virtue thereof the Divorce Act will automatically apply to Muslim marriages. It would be superfluous to have a further deeming provision that the Divorce Act also applies to Muslim marriages.

169. The difficulty with Prayer 9 (Reading in) and Prayer 11 (Deeming the Marriage Act, Divorce Act and Recognition Act to apply to all Muslim marriages) is that they would:

a. be inimical to the objectives of the Population Register. The State will not have a traceable record of who is married[121].

b. violate the rights and freedoms of persons belonging to Category B above[122], and

c. would, without prior notice, upon the granting of such an order, instantly change the status of persons, which will produce multiply consequences. If not hundreds of thousands, then at

[121] With respect it is submitted that the Applicant failed to appreciate the significance and objective of the Population Register. See Paragraph 321 Bundle B 1507
[122] See Paragraph 116 above.

least many tens of thousands of individuals will be affected. By way of example, the Marriage Act has as its default position the 'Community of Property and Loss' marriage propriety regime. Individual property of many thousands will overnight become joint property. That would be a drastic step for a court to take, where so many persons not before the court will be adversely affected by the order granted. It is submitted that this Honourable Court should not take such a drastic step which has far-reaching consequences.

170. In paragraph 288 Bundle B page 1498, the Applicant states that the relief sort is no different to that which courts have granted incrementally. This is not correct. What is sort here is to compel the Executive and Legislature to enact new legislation. It is submitted that a court cannot compel the Executive and Legislature to enact new legislation. Only the Constitution can do so.

House Keeping

171. The Seventh Amicus (Jamiatul Ulama KwaZulu Natal) sought to be admitted earlier on in this matter. However, there was some miscommunication between its attorneys and their corresponding attorneys. The Seventh Amicus was under the mistaken impression that it was admitted as an amicus curiae. During that stage it filed an affidavit deposed to by Emraan Ismail Vawda, the then Secretary

General. When it later discovered that it was not duly admitted, it proceeded with an Application to be admitted, which was granted on the 20th of March 2017[123]. Since the previous affidavit was filed at a stage when the Seventh Amicus was not before this Honourable Court, it is requested that the previous affidavit be ignored, and any reference thereto[124] be read to refer to this affidavit.

Costs

172. The Amicus Curiae represents a significant and *bona fide* party who has an interest in the subject matter of the Application. Its involvement is not vexatious or frivolous.

173. It is submitted that since the Amicus Curiae raised important constitutional concerns, no cost order should be made against it.

_____

DEPONENT

THUS SIGNED AND SWORN AT _____ ON _____

THIS THE _____DAY OF _____ 2017, THE DEPONENT HAVING ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND THAT IT IS TRUE AND CORRECT AND THAT HE CONSIDERS THE OATH TO

[123] Bundle C page 624
[124] Example Paragraph 60 of the First Respondent's affidavit. Bundle B. Page 1010

BE BINDING ON HIS CONSCIENCE AND THAT THE REGULATIONS OF R1258 OF 21 JULY 1972 HAS BEEN COMPLIED WITH.

_____

COMMISSIONER OF OATHS
EX OFFICIO:
DATE:
ADDRESS: