

**A GENDER EQUALITY  
PERSPECTIVE ON THE NON-  
RECOGNITION OF MUSLIM  
MARRIAGES**

**BY**

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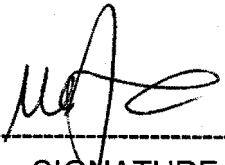
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## **SUMMARY**

Generally, traditional "marriages" according to Islamic custom are void in South African law because they are potentially polygynous and do not comply with the formalities prescribed by the Marriage Act 25 of 1961. A valid concern for those who oppose polygyny is that it may enforce and promote gender inequality in that it is practised in patriarchal Muslim societies. The Constitution of the Republic of South Africa Act 108 of 1996 contains numerous provisions aimed at combating gender inequalities, and these could be used to justify the policy of non-recognition. On the other hand, the Constitution has ushered in an era of tolerance and empathy; and the equality and religion clauses could be used to ensure that polygynous marriages are no longer ignored.

This study will examine the tensions between Muslim personal law and clauses in the Constitution which have led to calls for the reformation and codification of Muslim personal law.

### **Key Terms**

Muslim marriages; Recognition; Polygyny (Polygamy); Gender-equality; Constitution; Freedom of Religion; Muslim personal laws; Codification; Patriarchy; Recognition of religiously-based personal laws.

## INTRODUCTION

The aim of this dissertation is to investigate the position of Muslim marriages in South Africa, and to determine, particularly, in the light of the constitutional commitment to equality and religious freedom, whether that position should change.

There are two large groups of persons in South Africa who practise religions that permit polygyny, namely the Muslim and Hindu communities.<sup>1</sup> Polygyny is an anthropological term that refers to the practice of a husband having more than one wife.<sup>2</sup> In South African law a polygynous marriage is *contra bonos mores* and invalid.<sup>3</sup> A potentially polygynous marriage, one which is "celebrated under tenets which do not forbid the plurality of spouses, whether or not ... one party has in fact a plurality of spouses"<sup>4</sup>, is also invalid.

It must be noted that despite being void, polygynous marriages have certain legal consequences attached to them. For example, a Muslim marriage is recognised for the purposes of insolvency and income tax.<sup>5</sup> Interestingly, our courts have attached certain legal consequences to the marriages in the above-mentioned areas for the sake of "expediency".<sup>6</sup> If the State can profit from your marriage then it is recognised. The consequences of non-recognition can be invidious, particularly for the wife.

The bill of fundamental human rights in Chapter 2 of the Constitution of the Republic of South Africa Act<sup>7</sup> provides the perfect opportunity to re-evaluate the position of Muslim marriages.

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<sup>1</sup> Although this dissertation focuses on the Islamic faith as a system of religion which recognises polygyny, the same principles apply, *mutatis mutandis*, to the Hindu faith.  
<sup>2</sup> Kaganas and Murray 1991 *Acta Juridica* at 119.  
<sup>3</sup> *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307-309.  
<sup>4</sup> Kahn in Hahlo *The South African Law of Husband and Wife* 1975 at 601.  
<sup>5</sup> Moosa 1995 *Stellenbosch Law Review* at 419-420.  
<sup>6</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1024 B.  
<sup>7</sup> Act 108 of 1996.

Polygyny cannot be ignored when the rights granted to religious groups in this country are defined and interpreted. The relationship between Muslim women and the struggle for gender equality must also be analysed.

While there is justifiable concern for the position of Muslim women involved in polygynous unions, it is sometimes overlooked that the inequalities present in the polygynous relationship have to do with the patriarchal society in which polygyny thrives, rather than the practice of polygyny itself.<sup>8</sup>

What is more, it is not entirely clear what aspect of a potentially polygynous marriage is supposed to offend against the principle of gender equality. Many writers on Islamic jurisprudence, for instance, are of the opinion that Islam and gender equality are not necessarily in conflict.<sup>9</sup>

It would seem that actually polygynous marriages are rare and on the decline,<sup>10</sup> but this does not mean that the status quo of non-recognition should be maintained until polygyny dies out completely. Parties continue to approach the courts for relief from the harsh consequences of non-recognition.<sup>11</sup>

Reaction to the challenges posed by modern concern with human rights, particularly as it relates to the status of women, has led Muslim religious bodies and legal experts to organise themselves towards invoking their constitutional right to be governed by the personal and family laws laid down by their faith. The very fact that the South African Law Commission

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<sup>8</sup> Kaganas and Murray *op. cit.* note 2 at 127.

<sup>9</sup> Cachalia 1993 *THRHR* at 403.

<sup>10</sup> The suggested causes of the decline of polygyny are numerous and varied. (See, for example, Kaganas and Murray (*op.cit.* note 2) at 131; Simons *African Women : Their Legal Status In South Africa* 1968 at 79; Beck and Keddie (eds.) *Women In The Muslim World* 1979 at 49-50; 58).

<sup>11</sup> See *Kalla and Another v The Master and Others* 1994 (4) BCLR 79 (T) which was one of the first cases to be decided on the retrospectivity of the Constitution of the Republic of South Africa Act 200 of 1993; see also *Ryland v Edros* 1997 (2) SA 690 (C).

examined Muslim personal law with a view to its possible implementation, confirms this.



## CHAPTER 1

### POLYGyny AND MUSLIM MARRIAGES

Marriage in Muslim society is a private contract in civil law, not a sacrament.<sup>12</sup> The contract grants the man certain rights over the woman. In return she receives "a bridal gift, support according to her station and the right to respectful treatment".<sup>13</sup> The Quran permits a man to have up to four wives at a time provided that he treats his wives equally in all respects. The "Verse of polygyny" in the Quran states:

"Marry women of your choice, two, or three, or four, but if you fear that you shall not be able to deal justly (with them) then only one."<sup>14</sup>

#### 1.1 The Religious Nature Of Muslim Law

The followers of Islam believe that Allah's revelations are binding in a religious and a judicial sense. These revelations are taken from, *inter alia*, the Quran.<sup>15</sup> Unlike the period of the Reformation in Europe, no separation between state and church took place in Islamic history,<sup>16</sup> and for the Muslim there is no distinction between law and religion:

"The divine nature of Shari'a (Islamic law) denies the existence of any legislative authority on earth, conceding at most the capacity of political authorities to make administrative regulations to procure the implementation of the Shari'a."<sup>17</sup>

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<sup>12</sup> Bulbulia 1983 *De Rebus* at 430.

<sup>13</sup> Amelunxen in Veenhoven (ed) 1975 *A World Survey in Human Rights Case Studies* 1 at 87.

<sup>14</sup> Quran IV:3.

<sup>15</sup> Amelunxen *op.cit.* note 13 at 86.

<sup>16</sup> Cachalia *op.cit.* note 9 at 400.

<sup>17</sup> Hodkinson *Muslim Family Law: A Sourcebook* 1984 1-2 quoted by Bekker 1991 *Acta Juridica* at 6.

The Muslim people will therefore not accept a law which purports to unqualifiedly criticise or outlaw a practice that is provided for in the Quran.<sup>18</sup>

## 1.2 Justification For Polygyny In Traditional Muslim Society

The traditional justification for polygyny is the sexual satisfaction of the husband.<sup>19</sup> Simons<sup>20</sup> points out that a plurality of wives in Muslim society, unlike in African society, was not a source of economic gain since the man wealthy enough to afford more than one wife had his lands cultivated by slaves or hired workers; his wives simply "widened the range of legitimate sexual satisfaction" and added to the man's prestige. Other authors,<sup>21</sup> however, feel that the justification for polygyny in Muslim society are similar to those associated with African customary marriages. Poulter<sup>22</sup> states that these include the fact that polygyny is encountered primarily in Third World countries where social welfare is limited or non-existent. People are therefore dependant on their relatives for support in times of sickness, old age or famine, and the wider the family circle, the greater the support. He<sup>23</sup> points out that polygyny increases the prospects of having numerous children which adds to the prestige of the father and ensures an heir to continue his line.

## 1.3 The Position Of Women In Traditional Muslim Society

Of some 100 verses dealing with women's issues in the Quran, only a few are devoted to the Islamic status of women. Thus it is not surprising that varying interpretations of this status have developed. In addition, the fourth

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<sup>18</sup> In Muslim countries where polygyny is abolished or restricted, the justification for such measures is said to come from a stricter interpretation of the Quran and emphasis on verse 4.130: "It cannot be that you love your wives equally even if you wanted to"; Amelunxen *op. cit.* note 13 at 89.

<sup>19</sup> Vieille in Beck and Keddie (eds) 1978 *Women In The Muslim World* at 464.

<sup>20</sup> *African Women: Their Legal Status In South Africa* 1968 at 80.

<sup>21</sup> See the authorities mentioned in Poulter *English Law And Ethnic Minority Customs* 1986 at 45 note 3.

<sup>22</sup> *Op.cit.* note 21 at 44.

<sup>23</sup> *Ibid.*

chapter or sura of the Quran is devoted to women, a significant feature when viewed in the context of seventh century patriarchy and misogyny.<sup>24</sup>

The Muslim wife is greatly respected and does have some degree of familial power as a married woman and mother.<sup>25</sup>

Cachalia<sup>26</sup> points out that the Islamic faith vastly improved the position of women in Arabian society where they were "little more than chattels subject to the arbitrary power of their husbands". This is undoubtedly true: female infanticide was abolished and women were recognised as persons capable of bearing rights.<sup>27</sup> The Muslim wife has full legal and contractual capacity, and the concept of marital power is not recognised by Islamic law.<sup>28</sup>

However, as in any patriarchal society, women can only exercise rights if men afford them the opportunity to do so. Youseff<sup>29</sup> reports that in traditional society men would appropriate the property of their sisters and daughters on the grounds that it would be used to provide economic support for the women in case of divorce or widowhood. Even in countries where legislation was passed to improve the position of women "because of their customary seclusion, women were quite likely to be totally ignorant of their rights under the new legislation, and even if they should be aware of them it would take a good deal of courage to run the gauntlet of the various social pressures and sanctions that would undoubtedly face any women insisting upon these rights in a court of law".<sup>30</sup>

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<sup>24</sup> Islamic law evolved in the seventh century of the Common Era (CE) in the predominantly urban environment of the Arabian peninsula and lower Mesopotamia. The two primary sources of Islamic law, the Quran and Sunna, developed during the 23 years of Muhammed's prophethood. (See Moosa in Liebenberg (ed) 1995 *The Constitution of South Africa from a Gender Perspective* at 169-170).

<sup>25</sup> Youseff in Beck and Keddle (eds) 1978 *Women In The Muslim World* at 84.

<sup>26</sup> *Op.cit.* note 9 at 401.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Op.cit.* note 12 at 430.

<sup>29</sup> *Op.cit.* note 25 at 85.

<sup>30</sup> Coulson and Hinchcliffe in Beck and Keddle (eds) 1978 *Women In The Muslim World* at 48.

Polygyny cannot be seen in isolation from other practices affecting the Muslim wife:

- Apart from the fact that the man is permitted to marry up to four women under certain circumstances, to conclude a marriage contract the woman relies on a male representative who has some authority in shaping the agreement, although the bride's wishes are to be respected.
- With regard to divorce, the husband can unilaterally repudiate their marriage, while she may only be granted a divorce on certain grounds.<sup>31</sup>
- Muslim marriages are automatically out of community of property. The spouses do not share profit and loss, nor the accrual that each one's separate estate shows.<sup>32</sup> The wife retains full ownership of all property acquired before the marriage and has full legal capacity to deal with any property, to conclude contracts and to litigate without the assistance of her husband.<sup>33</sup> The concept of marital power<sup>34</sup> is completely alien to Islamic law.
- Apart from exclusive property rights, a wife has a right to all the basic necessities of life, which include food, clothing and shelter. It is therefore the duty of the father, husband, son or brother, as the case may be, to maintain the woman.<sup>35</sup>
- On dissolution of the marriage, the wife has to observe a three-month period of confinement, ostensibly to protect her reputation and to conclusively decide paternity in the event of an undetected pregnancy at the time of the divorce. The husband can remarry immediately.<sup>36</sup> The husband need only pay maintenance to his ex-wife during this three-month period, or if she is pregnant, until delivery of the child. In the

<sup>31</sup> "Talaq" signifies the absolute right of a man to end the marriage without assigning any causes thereto. Another way of terminating a marriage is "Khula", which is initiated by the wife, but unlike the talaq, she has to approach a theologian or a judicial body with a cause recognised as valid by the Shari'a. The wife may be required to surrender her dowry or its value to her husband as compensation.

<sup>32</sup> See Roodt 1995 *Codicillus* at 51.

<sup>33</sup> See Cachalia *op.cit.* note 9 at 401.

<sup>34</sup> As it used to be known before the General Law Fourth Amendment Act 132 of 1993 took effect.

<sup>35</sup> *Op.cit.* note 32 at 52.

<sup>36</sup> J. Badat unpublished paper delivered at Women Lawyers' Association Workshop on Women and Religion, March 1994, Durban.

instance of the divorce initiated by the wife, the husband is not obliged to pay any maintenance, not even during the period of confinement.<sup>37</sup>

- On termination of the marriage, the mother is entitled to custody of male children up to the age of seven, and female children until the age of puberty. Thereafter, custody and guardianship vest with the father.<sup>38</sup>
- With regard to succession rights, the heirs are identified and their portions are allocated by the Quran. Freedom of testation is limited to only one-third of the estate. As a general rule, the male heir receives twice as much as the female heir of the same degree. This rule extends even to a spouse's share in the deceased estate.<sup>39</sup>

Because of the rarity of polygynous marriages and possibly because the South African Muslim community is a close-knit and loyal society which has been isolated during the years of apartheid, Muslim women involved in such marriages have not voiced their opinions on polygyny and its effect on the family.

Most of the approximately 500 000 South African Muslims live in urban areas, working as artisans, professionals and merchants.<sup>40</sup> South African Muslim women have joined the working world for economic reasons, and in some instances, because of the desire to pursue a career outside the home.<sup>41</sup>

These and other factors have contributed to the creation of a society which is very different from the one for which a plurality of spouses was designed.

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<sup>37</sup> *Op.cit.* note 9 at 402.

<sup>38</sup> *Ibid.*

<sup>39</sup> See Moosa 1995 *Stellenbosch Law Review* 420ff.

<sup>40</sup> Islamic Council of South Africa "Meet the Muslims" 13-15 referred to by Cachalia (*supra* note 9 at 397).

<sup>41</sup> *Ibid.*

## 1.4 RECOGNITION OF MUSLIM MARRIAGES IN SOUTH AFRICAN LAW<sup>42</sup>

### 1.4.1 Pre-Union Statutes

#### 1.4.1.1 *Cape Province*

In terms of s4 of the Marriage Act 16 of 1860 marriage officers could be appointed to solemnise Muslim marriages. Under the Act a woman married by Muslim rites before the commencement of the Act could object to her husband's intended marriage to another woman.<sup>43</sup> The magistrate's court had to allow the objection unless it believed that the present wife's conduct would have entitled the man to a decree of divorce or separation if the union had been a valid marriage.<sup>44</sup> The fact that a second marriage could be disallowed did not validate a polygynous union.

#### 1.4.1.2 *Natal*

Section 1 of Law 19 of 1881 contained a similar provision regarding the solemnisation of Muslim marriages by Muslim marriage officers, but no allowance was made for the objection of the first wife. Various other statutes regulated the lives and marriages of Indian immigrants in Natal. For example, in terms of the Indian Immigration Law 25 of 1891:

- the religious rules of each party determined prohibited degrees of relationship;
- special rules applied regarding divorce on the ground of desertion;
- limitations were imposed on the right to remarry after divorce; and
- different grounds for annulment were provided for.<sup>45</sup>

<sup>42</sup> The information in the following discussion until the end of paragraph 1.4.2. is a brief summary of Kahn in Hahlo *South African Law of Husband And Wife* 1969 at 592-596.  
<sup>43</sup> para 4 of schedule A to Act 16 of 1860.  
<sup>44</sup> para 18 of schedule A to Act 16 of 1860.

<sup>45</sup> Other statutes which regulated the lives and marriages of Indian immigrants in Natal are the Indian Immigration Law 26 of 1891, Indian Marriages Validation Act 8 of 1944 and Indian Laws Amendment Act 68 of 1963.

#### 1.4.2 The Union of South Africa

The Indian Relief Act 22 of 1914 provided for:

- the appointment of priests to solemnise Indian marriages according to the appropriate religious rites;<sup>46</sup>
- the registration of a monogamous Indian marriage, which became valid and binding despite the fact that it was celebrated under tenets which permitted or approved of polygyny;<sup>47</sup> and
- the inclusion of the wife to a polygynous marriage under the definition of “wife” for the purposes of immigration in the Admission of Persons to the Union Regulation Act 22 of 1913.<sup>48</sup>

The Asiatics (Land And Trading) Amendment Act<sup>49</sup> was amended by the Asiatic Land Tenure Act<sup>50</sup> to extend the definition of “Asiatic” to include a woman married to an Asiatic, whether or not that marriage was of a monogamous nature. Later, the Group Areas Act<sup>51</sup> included similar provisions.

Under the Marriage Act 25 of 1961, which brought a large measure of unification, the above differential pre-Union and other statutes which had not been repealed or were not repealed by the Marriage Act of 1961 were scheduled for eventual repeal.<sup>52</sup>

#### 1.4.3 The Current Position of Muslim Marriages in Statutory Law

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<sup>46</sup>

s1.

<sup>47</sup>

s2 as amended by s2 of the Indian Laws Amendment Act 68 of 1963. But with the repeal of this section by the General Law Amendment Act 80 of 1971, this possibility no longer exists.

<sup>48</sup>

s3.

<sup>49</sup>

Act 37 of 1919.

<sup>50</sup>

Act 28 of 1946.

<sup>51</sup>

Act 41 of 1950, as amended by Act 77 of 1957 and Act 36 of 1966.

<sup>52</sup>

s39(4); (5) read with the Schedule. Note, however, that ss(5) was subsequently repealed.

Muslim parties can conclude a valid civil marriage if their (monogamous) marriage is solemnised by an authorised marriage officer in terms of the Marriage Act.<sup>53</sup> The Act<sup>54</sup> permits the appointment of ministers to solemnise marriages according to Mohammedan rites or the rites of any Indian religion. However, few Muslim priests have registered under the Act, and according to the Islamic Council, the reluctance to accept appointments will continue as long as the morality of the Muslim marriage is judged according to Christian values.<sup>55</sup> So the law of the land and the law of the South African Muslim community exist side by side in mutual disregard.

Muslim marriages do however fall within the ambit of statutes that recognise marriages in accordance with any "law or custom".<sup>56</sup> Since the adoption of the interim Constitution<sup>57</sup> the Births and Deaths Registration Amendment Act<sup>58</sup> came into operation. This Amendment Act makes provision for the recognition of customary unions concluded according to indigenous law, and marriages solemnized according to the tenets of any religion for the purposes of the principal Act only. Accordingly, a parent/s married only according to Islamic rites, for example, may apply to the Minister of Home Affairs to recognise such a marriage, so that the birth of children born of such a union may be registered as legitimate.<sup>59</sup>

Further, the Divorce Amendment Act<sup>60</sup> empowers a court of law to refuse to grant a decree of divorce if it appears to the court that the spouses are

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<sup>53</sup> Act 25 of 1961.

<sup>54</sup> s3.

<sup>55</sup> *Op.cit.* note 9 at 399.

<sup>56</sup> For instance the Insolvency Act 24 of 1936.

<sup>57</sup> Act 200 of 1993.

<sup>58</sup> Act 40 of 1996.

<sup>59</sup> While the amendment clearly does not provide a blanket recognition of religious and customary marriages, it marks a drastic change from the previous position in that it opens the way for legitimising children born of such unions. The amendment does not distinguish between monogamous and polygamous unions, so that even a child born of a polygynous marriage may on application be registered as a legitimate child.

<sup>60</sup> Act 95 of 1996.



bound by their religion to effect a divorce in accordance with the said religion.<sup>61</sup>

#### 1.4.4 Case Law

Early cases<sup>62</sup> dealing with Muslim and Hindu marriages adopted the religious argument used in the English case of *Hyde v Hyde and Woodmansee*.<sup>63</sup>

"Marriage as understood in Christendom, may ...  
be defined as a voluntary union for life of one man  
and one woman to the exclusion of all others."

In later cases the religious and moral tone gave way to the argument that such marriages should not be regarded as valid because they are inconsistent with the accepted notion of equality between spouses.<sup>64</sup> This quest for equality and Christian ideals has unfortunate implications, particularly for the female spouse:

- in law, the spouses are effectively treated as strangers with the result that there is no legal nexus between them;
- the spouses have no reciprocal maintenance obligations during or after the marriage; the provisions of the Maintenance of Surviving Spouses Act<sup>65</sup> are not applicable to a surviving spouse;
- any nuptial agreement is void;<sup>66</sup>

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<sup>61</sup> While the amendment was aimed primarily at Jewish divorces, it may have some, albeit limited, effect on Muslim divorces as well, especially where the divorce is initiated by the wife, and the husband refuses to agree to it.

<sup>62</sup> For example *Bronn v Fritz Bronn's Executors* 1860 Searle at 313; *R v Nalana* 1907 TS at 407.

<sup>63</sup> 1866 LR 1 P & D at 130, (1861-73) II ER Rep at 175.

<sup>64</sup> For example *Ismail v Ismail* 1983 (1) SA 1006 (A) and the obiter dictum in *Kalla and Another v The Master and Others* 1994 (4) BCLR 79 (T).

<sup>65</sup> Act 27 of 1990.

<sup>66</sup> Cachalia *op.cit.* note 9 at 399 also notes that no joint estate will result from the marriage, but, with respect, this should probably not be included as a consequence of non-recognition. Muslim marriages are automatically out of community of property (Cachalia at 401) and if they were to be recognised as part of the system of Muslim personal law, joint estates would still not arise.

- although both parties may inherit from each other in terms of Islamic law, neither acquires interest in the property of the other spouse by virtue of the simple fact of marriage;<sup>67</sup>
- a spouse cannot claim loss of support for the wrongful death of the breadwinner because no duty to support is recognised;<sup>68</sup>
- in the eyes of the law the wife is considered a concubine.

South African courts are not completely without sympathy for the position of Muslim spouses. Where circumstances permit, the court can find that the marriage is a putative one,<sup>69</sup> or that a tacit universal partnership<sup>70</sup> exists between the spouses. Although commendable in that these measures afford relief where it would otherwise be unavailable, they can be used only in limited cases.

For a putative marriage to exist, at least one spouse, at the time of contracting the marriage, must have been unaware of the defect that renders their marriage void and must have believed in good faith that they were lawfully married.<sup>71</sup> At common law it was further required that all the formalities had to have been complied with at the solemnization of the void marriage before it could be a putative marriage. Cachalia<sup>72</sup> notes that the majority of Muslim marriages are not solemnized by authorised marriage officers: this constitutes a defect in Muslim marriages.<sup>73</sup> There are, furthermore, conflicting views on whether a union which was not solemnized

<sup>67</sup> Moosa *op. cit.* note 5 at 420ff details the legal consequences of Islamic and South African marriages and their effects on the respective laws of succession. If a Muslim fails to make a will devolving his property in terms of Islamic law, he is deemed to have died intestate in terms of South African law, thereby excluding Islamic law. His "wife" could effectively be disinherited in terms of South African law.

<sup>68</sup> In fact she has no claim against her "husband's" deceased estate since common law and statutory references to wife, spouse, or widow are not applicable to her. (see *Dauids v The Master* 1983 (1) SA 458 (C)).

<sup>69</sup> See *Moola v Aulsebrook* 1983 (1) SA 687 (N).

<sup>70</sup> See *Isaacs v Isaacs* 1949 (1) SA 952 (C).

<sup>71</sup> Barnard et al *The South African Law of Persons and Family Law* 1994 at 178.

<sup>72</sup> 1993 *THRHR* at 399.

<sup>73</sup> This is not the only "defect". The main "defect" in the case of a Muslim marriage is that it does not require monogamy.

by a duly appointed marriage officer can qualify as a putative marriage.<sup>74</sup> Sinclair<sup>75</sup> supports the view that defects in formalities or the fact that the person officiating was not a competent marriage officer should not preclude a marriage from being a putative one.

Clearly the existence of a universal partnership will also provide relief for Muslim spouses in certain cases, but such relief will relate to patrimonial issues only. The requirements for a universal partnership were confirmed on appeal in *Muhlmann*.<sup>76</sup> They are that (i) each party should bring something into the partnership, or bind himself or herself to bring something into it; (ii) the venture should be carried on for the joint benefit of the parties; (iii) the object should be to make a profit and (iv) the partnership contract should be valid. Although the remedy is available, proving the existence of a universal partnership could be difficult, especially in the case of Muslim marriages. Since a Muslim marriage does not create a joint estate, there is no choice to make a formal agreement to share assets and the Muslim wife exercises exclusive proprietary rights over her property.<sup>77</sup> The relief granted by the court in this case does not therefore imply a willingness to recognise the Muslim marriage in the context of the system in which it originated; it is simply an attempt to prevent injustice.

More recently, in *Ryland v Edros*,<sup>78</sup> which has been considered to be the most important post-apartheid decision to be handed down by South African courts since the abolition of the death penalty,<sup>79</sup> Farlam J of the Cape Provincial Division boldly opened the door to the notion of substantive equity in Muslim marriages, customary unions and marriages across cultural boundaries. The essence of the judgement is that "contractual agreements"

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<sup>74</sup> See, for example Sinclair assisted by Heaton *The Law of Marriage* 1996 at 405-406; Cronje and Heaton *Casebook on the Law of Persons and Family Law* 1994 at 281-287.

<sup>75</sup> *Op.cit.* note 74.

<sup>76</sup> 1984 (3) SA 102 (A).

<sup>77</sup> *Op.cit.* note 32 at 52.

<sup>78</sup> 1997 (2) SA 690 (C).

<sup>79</sup> See Mahomed *De Rebus*, March 1997 at 189.

flowing from a marriage which is potentially polygynous in nature will not be rendered unenforceable, provided that the terms and obligations were not *contra bonos mores*.<sup>80</sup> In theory, the decision in *Ryland v Edros*<sup>81</sup> can perhaps be translated as reversing the consequences of non-recognition of Muslim marriages which are *factually* monogamous.<sup>82</sup> This means that our courts must recognise the nuptial agreement between parties in a monogamous marriage as a civil contract, and all the financial obligations between the spouses that go with it. Certainly, it was on the basis of cultural considerations that Farlam J recognised Muslim marriages which are *factually* monogamous. With respect to the learned Judge, he failed to deal with the single most controversial and vexing aspect of a Muslim marriage in the modern world, namely the principle of gender equality as a basis upon which such marriages are denied recognition.

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<sup>80</sup> At 571 G-H.

<sup>81</sup> *Op.cit.* note 78.

<sup>82</sup> Judge Farlam stressed, however, that what he said did not necessarily apply to contractual terms in the context of a marriage that was actually, as opposed to potentially, polygamous (573 E-F).

## CHAPTER 2

### A CRITICAL ANALYSIS OF THE NON-RECOGNITION OF MUSLIM MARRIAGES BASED UPON THE PRINCIPLE OF GENDER EQUALITY

Equality between men and women in the family is an issue that has increasingly commanded the attention of South African courts and lawmakers in recent years. In *Ismail v Ismail*<sup>83</sup> Trengove J.A. said the following:

"Furthermore, in view of the growing trend in favour of recognition of complete equality between marriage partners, the recognition of polygamous unions solemnised under tenets of the Muslim faith may even be regarded as a retrograde step; ex facie the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate their marriage unilaterally by simply issuing three 'talaaqi', without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the Moulana that her husband has been guilty of misconduct."

Judging polygyny against the standard of equality between women and men may initially seem unproblematic, as it did for Trengove J.A. in *Ismail*<sup>84</sup> where it was held that polygyny is unacceptable. Yet on closer analysis it is not easy to justify this conclusion. Recognition of the polygynous marriage does not, however, necessarily entail recognition of practices related to the marriage relationship. In considering the validity of the marriage the court could have distinguished between polygyny per se and certain institutions also connected to the Muslim faith.

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<sup>83</sup> *Op.cit.* note 6 at 1024 G-H.

<sup>84</sup> *Op.cit.* note 6.

In *Kalla and Another v the Master and Others*,<sup>85</sup> the court suggested that the principle of gender equality embodied in the Constitution may mean that polygyny is still unacceptable to the mores of South African people.

Neither court was prepared to analyse exactly what it is about polygyny that is discriminatory towards women. This is unfortunate, since such an analysis may indicate a solution to the problem of non-recognition of polygynous unions. Inequalities related solely to polygyny, and not to the environment in which polygyny is practised, could include the fact that the husband may unilaterally introduce new wives to the family.

Kaganas and Murray<sup>86</sup> set out further instances of possible discrimination, but these are related to the oppressive, patriarchal communities in which polygyny operates, and not to polygyny itself. They<sup>87</sup> remark that within African customary law, for instance, it is difficult to envisage a polygynous household in which the husband does not dominate. They consider it arguable that polygyny facilitates stereotyping and the objectification of women to a greater degree than monogamy does. The authors speculate that "symbolically polygyny may have become so closely associated with the oppression of women that it could be seen as incompatible with a social order in which the liberation of women is a recognised goal".

Notwithstanding the above, the irony of refusing to recognise polygyny because it is associated with the oppression of women, is that the decision usually operates in favour of the husband. In *Ismail*,<sup>88</sup> for instance, the claim of a Muslim woman for maintenance due to her by her husband was refused because of the potentially polygynous nature of their marriage, which was de facto monogamous. The decision has been subjected to rigorous criticism.

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<sup>85</sup> 1995 (1) SA 261 (T).

<sup>86</sup> *Op. cit.* note 2 at 127-128. See also note 31 and following text.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Op.cit.* note 6.

As Kaganas and Murray point out, "the outcome of the case suggests that one should be wary of a glib application of the notion of equality".<sup>89</sup>

Setting aside for the moment the question of whether polygyny is undesirable and therefore contrary to the principle of gender equality for Muslim women, one might begin by clarifying the concept of "equality" and thereafter assessing the meaning thereof in an Islamic framework.

## 2.1 Understanding Equality

The concept of equality implies a comparison, and an assertion that equality is denied suggests that one category of people enjoys advantages that another category does not.<sup>90</sup>

On the other hand, inherent in the notion of equal treatment or formal equality, based on the Aristotelian theory that like persons must be treated alike, is the proposition that persons in different situations must be treated differently. Feminist writers criticising formal equality point out that men and women are not the same, that women should not be made to strive to be like men in order to enjoy fair treatment, and that the quest for equal treatment has obscured the fact that the legal system is based on a male model.<sup>91</sup> The response to such criticism was to try to evolve a theory of "special treatment" for women which would accord with the so-called "real" differences between the sexes.

Sinclair<sup>92</sup> however cautions against falling into the equal/special treatment trap. She points out the dangers of justifying different treatment based on the

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<sup>89</sup> *Op.cit.* note 2 at 124. Furthermore, Trengove J's use of the principle of equality led to an outcome that is prejudicial to women and his decision added to their disadvantages. The denial of rights is all the more ironic considering that the plaintiff had no prospect of objecting to the social practice that put her at a disadvantage.

<sup>90</sup> *Op. cit.* note 2 at 127.

<sup>91</sup> Sinclair *op. cit.* note 74 at 53.

<sup>92</sup> *Op.cit.* note 74 at 59-60.

differences between men and women. Unconscious acceptance of the male norm has caused women to fail to notice that difference may be synonymous with dominance.<sup>93</sup>

Furthermore, the difficulty of presuming a "fixed reality of gender"<sup>94</sup> is that it ignores that there are fundamental differences between different groups of women. Muslim women's concerns, for instance, are very different from those of their White, Western counterparts. South African Muslim women experience similar status problems in the private and public spheres of life as experienced by their non-Muslim (Western) counterparts but, as members of a religious community, they experience another inequality. This double inequality has resulted in a dichotomy between their roles as citizens of a nation and as members of a religious community.

MacKinnon<sup>95</sup> asserts that for women to continue to affirm difference in order to justify special benefits is to affirm the characteristics of powerlessness. For her, questions of equality and of gender are questions of the distribution of power and of hierarchy rather than difference. The issue to confront is domination, not equality analysis.

I am inclined to agree with MacKinnon, especially in the light of the position of Muslim women, because it permits the inclusion of issues<sup>96</sup> into the equality debate that are kept outside it by the conventional sameness/difference approach to sex equality.

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<sup>93</sup> Sinclair *op. cit.* note 74 at 60.

<sup>94</sup> Sinclair *op. cit.* note 74 at 57.

<sup>95</sup> *Feminism Unmodified* 1987 at 38-39.

<sup>96</sup> Various Islamic religious practices and customs that privilege men over women come to mind. See, for instance the position of women in traditional Muslim society (Chapter 1) and the examples cited by Kaganas and Murray (*op. cit.* note 2) which are related to the patriarchal communities in which polygyny operates. See also 2.2 *infra*.



## 2.2 Understanding Equality in an Islamic Framework

In Western culture, sexual inequality is based on belief in women's biological inferiority. In Islam there is no such belief in female inferiority.<sup>97</sup> On the contrary, the whole system is based on the assumption that women are powerful and dangerous beings. All sexual institutions (polygamy, sexual segregation, etc.) can be perceived as a strategy for containing their power.<sup>98</sup> This belief in women's potency is likely to give the evolution of the relationship between men and women in Muslim settings a pattern entirely different from the Western one.

Most scholars will certainly agree with the Pakistani author, Fazlur Rahman, who states:

"The Quran immensely improved the status of the woman in several directions but the most basic is the fact that the woman was given a fully-fledged personality."<sup>99</sup>

For example, under pre-Islamic custom, the bride was regarded as an object to be purchased. However, under the Quran, the bride is considered a person whose consent must be obtained to validate a marriage contract. Accordingly, the dower that previously was owed to her father now is owed to the bride.<sup>100</sup> Because the woman has the right to fully dispose of her own property, the dower, in turn, provides her with some independence within the marriage and with basic social security in cases of divorce or widowhood.

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<sup>97</sup> Mernissi *Beyond the Veil: (Male-Female Dynamics in Modern Muslim Society)* 1987 at 19.

<sup>98</sup> *Ibid.*

<sup>99</sup> Rahman *Islam* 1979 at 38. Note that Islam, as a divine system of law, was revealed to the Prophet Muhammed at a time when women held a very low status in society. Women's rights in a male-dominated culture were virtually non-existent. The advent of Islam and the teachings of the Prophet did much to uplift the status of women and to dispel the prevailing idea that women were inferior and deserved to be treated differently.

<sup>100</sup> Surah 4:4.

Thus, the dower might be thought of as a symbol of the improved social and legal status of Muslim women in general.<sup>101</sup>

Furthermore, the Quran advocates that women be treated well and with kindness. Women are accorded rights and obligations equal to men in many areas. Both sexes have equal duties with regard to the observance of prayers and fasting, the payment of the poor-tax and the Haj pilgrimage.<sup>102</sup> Equality also prevails with the rights to obtaining an education, acquiring and owning property, and engaging freely in economic activity.<sup>103</sup> It is hardly surprising, therefore, that modernist Muslim scholars contend that "Islam itself, properly understood, establishes complete equality between the sexes and is not necessarily in conflict with the principle of gender equality".<sup>104</sup> Gender equality, they say, is inherent in Islamic law, but it is a *qualified* equality. It is qualified in the sense that due to the biological *differences* between the two, men and women have different roles in society. They exist as complements to each other rather than as competitors. Men and women therefore excel each other or are superior to each other in certain respects, but in the general affairs of life men are partially, but not absolutely, superior to women.<sup>105</sup> This may be attributed to the fact that special rights and duties are accorded to men and women within the framework of their special responsibilities.<sup>106</sup>

The modernists therefore contend that it is not the spirit of Islam, as revealed in its primary sources, that discriminates against women. Rather it is the practice of Islam distorted by cultural influences during the centuries of its development and its own early re-admission of patriarchy after the death of Muhammed.<sup>107</sup>

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<sup>101</sup> Bielefeldt 1995 *Human Rights Quarterly* 587 at 596.

<sup>102</sup> Badat *op. cit.* note 36.

<sup>103</sup> See para 1.3 in chapter 1.

<sup>104</sup> Moosa in Liebenberg (ed) 1995: *The Constitution of South Africa from a Gender Perspective* at 172.

<sup>105</sup> Surah II, v 228.

<sup>106</sup> Surah IV, v 34.

<sup>107</sup> *Op.cit.* note 104 at 170.

Cachalia<sup>108</sup> further submits that, although it is clear that some Islamic family laws are based on a traditional, sex-based distribution of rights and obligations within the family, it would be wrong to conclude that Islam and gender equality are necessarily in conflict. He believes that the traditional, sex-based provisions in the Quran which entrench the husband's "leadership" within the family are not *legally relevant* because they do not affect the distribution of rights between the spouses inter se or in relation to third parties. According to him there is no legal hierarchy within the Muslim family. Patriarchy, for instance, could more correctly be described as a feature of the social structure which does not distinguish Islam as a culture or legal system.

On the other hand, the idea of equal rights, regardless of gender, is unknown to the traditional Shari'a.<sup>109</sup> For instance polygyny, partly designed to provide for widows and orphans in a pre-modern society, certainly mirrors the inequality between the sexes. Further, to conclude a marriage contract the woman relies on a male representative who has some authority in shaping the agreement, although the bride's wishes are to be respected; at least she has the right to veto an unwanted husband.<sup>110</sup> With regard to divorce, the husband can repudiate his wife unilaterally. However, many Muslims disapprove of this practice and legal reforms in many Islamic countries have restricted the husband's traditional right to unilateral divorce while giving the wife more rights to demand divorce.<sup>111</sup> Nonetheless, the legal regulations in matters of divorce still reflect the unequal status of the genders, discriminating against women. Finally, the laws of inheritance entitle male heirs to twice the share to which female heirs are entitled.<sup>112</sup> Islamic law, however, accords women the absolute and inalienable right to inherit property in terms of the rules of succession promulgated in the Holy Quran.

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<sup>108</sup> *Op. cit.* note 9 at 403.

<sup>109</sup> *Op. cit.* note 101 at 596.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Op. cit.* note 101 at 597.

<sup>112</sup> See *op. cit.* note 5 at 420; *op. cit.* note 32 at 52. See, further, the examples cited under para 1.3 above reflecting the unequal status of the Muslim wife.

According to Roodt,<sup>113</sup> the rights of women in their totality (exclusive proprietary rights, right to all the basic necessities of life and the duty of males to maintain females) are supposed to balance the inequalities that they experience.<sup>114</sup>

Because the focus of the Shari'a has always been upon family matters, these Islamic family and inheritance laws continue to hold force in South Africa and in the vast majority of Islamic countries today.<sup>115</sup> Therefore, several Islamic states have entered substantial reservations to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, in particular to Article 16 which entails the claim of equal rights for men and women in matters of family law and divorce.<sup>116</sup>

As argued earlier, the main "defect" in a Muslim marriage is the fact that a husband may unilaterally introduce new wives to the family. However, it is not entirely clear what aspect of a potentially polygynous marriage is supposed to offend against the principle of gender equality. It may be argued, for example, that the husband determines the composition of the family, that women bear responsibility of the children yet have no rights over them, and that the institution allows women to be dominated, sexually stereotyped and treated as property.<sup>117</sup> As Kaganas and Murray point out<sup>118</sup> most of these examples simply point to a variety of oppressive, patriarchal features of the communities in which polygyny operates, and not to polygyny itself. Besides, monogamy is no guarantee of equality either.

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<sup>113</sup> *Op. cit.* note 32 at 52.

<sup>114</sup> For instance, in an Islamic marriage maintenance is the husband's primary obligation, regardless of his wife's private means.

<sup>115</sup> *Op. cit.* note 101 at 597.

<sup>116</sup> Apart from family law, the social position of Muslim women varies greatly from country to country. For example, in Saudi Arabia women are not even permitted to drive cars, but in the Maghreb states women frequently hold public office. (Mernissi *Beyond the Veil: (Male-Female Dynamics in Modern Muslim Society)* 1987 xxiv - xxix).

<sup>117</sup> *Op. cit.* note 32 at 57.

<sup>118</sup> *Op. cit.* note 2 at 127.

It is noteworthy, in this context also to consider the following argument based on the Quran: although the Quran permits a man to marry more than one woman, it adds the caveat that this may not be done unless the husband is able to treat all his wives with full equal justice.<sup>119</sup> In another place, however, the Quran states that this requirement can hardly ever be satisfied: "You are never able to be fair and just as between women, even if it is your ardent desire."<sup>120</sup> Many scholars, therefore, read the Quran as forbidding polygyny implicitly.<sup>121</sup> The correct interpretation seems to be that polygyny is permissible albeit only conditionally.

Although the practice of polygyny is on the decline as a result of social and economic factors, it remains a sensitive issue in Islam. The reasons advanced in defence of polygyny from an Islamic point of view have been, first, that it is endowed with Divine authority in the Quran. Secondly, it has been argued that polygyny is justified when the wife is barren or unwell because, from the husband's point of view, it will enable him to have children without discarding his wife. Thirdly, polygyny is defended because it protects widows and orphans and caters for the possibility of an excess of women over men in time of war by providing them with greater opportunities of marriage, maintenance and care than they would otherwise enjoy. Fourthly, it is argued that polygyny helps to prevent immorality.<sup>122</sup>

Indeed, polygyny provides other benefits for women.<sup>123</sup> It enables co-wives to share the burden of domestic work and, in some social contexts, this has the added advantage of freeing wives to engage in economic activities resulting in greater autonomy because they gain independence.

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<sup>119</sup> Surah 4 : 3.

<sup>120</sup> Surah 4 : 129.

<sup>121</sup> *Op. cit.* note 32 at 53; *op. cit.* note 101 at 611. Up until now, Tunisia is the only Arab state that has abolished polygamy completely by making reference to this interpretation of the Quran.

<sup>122</sup> Working paper prepared by research staff of the South African Law Commission Project 59, February 1990 at 51 - 52.

<sup>123</sup> See, generally, Kaganas and Murray *op. cit.* note 2 at 130 - 131.

CRM Dlamini<sup>124</sup> considers polygyny in modern times as a possible compromise between a happy marriage and divorce. He rejects the idea that polygyny is discriminatory against women, and states that it is calculated to protect the woman who cannot find a single man to marry and is prepared to settle for a married man.<sup>125</sup> Seen in this light, polygyny may not be intrinsically detrimental to women but may, on the contrary, actually alleviate the hardship they suffer in patriarchal societies.

However, whether or not polygyny offers benefits to women, it is accepted that formal recognition of Muslim family law, based on patriarchy, and entailing deep inequalities for women, could create inconsistencies with guarantees of equality in the Constitution.<sup>126</sup> Equality is strongly emphasised in the new Constitution of South Africa, which could provide an opportunity for the implementation of a new policy towards such marriages.

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<sup>124</sup> "The Role of Customary Law in Meeting Social Needs" in Bennett *et al African Customary Law* at 71.

<sup>125</sup> Whether such an argument will impress feminists wanting equality between the sexes remains to be seen.

<sup>126</sup> Sinclair *op. cit.* note 74 at 164.

## CHAPTER 3

### THE EFFECT OF THE CONSTITUTION ON THE POSITION OF MUSLIM MARRIAGES

The Constitution of the Republic of South Africa Act<sup>127</sup> has far-reaching implications for many branches of South African law. The Bill of Rights in the Constitution extends protection to various cultures and religions. It, *inter alia*, entrenches the following fundamental human rights: firstly, the equality clause<sup>128</sup> prohibits unfair discrimination against any person on the grounds of, among others, gender, sex, marital status, ethnic or social origin, religion, conscience and belief; secondly, section 10 accords every person the right to respect for and protection of his or her dignity; thirdly, s15(1) states that everyone has the right to freedom of conscience, religion, thought, belief and opinion; and s15(3) provides for the recognition of marriages and systems of personal and family law under any tradition or by persons professing a particular religion.

Together with its enforcement mechanisms, the Bill of Rights also concretises values: for instance, in *Ryland v Edros*<sup>129</sup> Farlam J submitted that the values of equality and tolerance of diversity, and the recognition of the plural nature of our society are among the values that underlie our Constitution. The court was undoubtedly influenced by the acceptance by our society of the values underlying the new Constitution when it held that the *Ismail* decision no longer operates to preclude a court from enforcing claims such as those brought by the defendant in that case.<sup>130</sup>

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<sup>127</sup> Act 108 of 1996 (hereinafter referred to as the final Constitution).

<sup>128</sup> s9.

<sup>129</sup> 1997 (2) SA 690(C). Note that the court in this case was not asked to recognise the Muslim marriage but merely to enforce certain terms of a contract made between the parties. The defendant, in a claim in reconvention based on "the contractual agreement" constituted by the marriage by Muslim rites, claimed arrear maintenance, a consolatory gift, and transfer (alternatively payment) of an equitable share of the growth of the plaintiff's estate.

<sup>130</sup> at 709C.

In South Africa, the constitutional protection of religious beliefs and practice has been shown to be an important aim of democratic transformation,<sup>131</sup> but because religious traditions sometimes place their imprimatur on patriarchy,<sup>132</sup> the constitutional recognition of personal legal systems may be inconsistent with the constitutional guarantee of equality between the sexes.

The gender implications of the constitution should thus be considered carefully, given the fact that Muslim personal law will probably continue to have relevance for the Muslim people.

### 3.1 Islamic Family Law And The Fundamental Rights Chapter

A universal right to freedom of religion is declared both by South Africa's interim Constitution and by the final Constitution of 1996.<sup>133</sup> The provision in the final Constitution differs, in certain respects, from that found in the interim Constitution. Both Constitutions have general freedom-of-religion provisions, which include the cognate right to freedom of conscience and the right to freedom of thought, belief and opinion.<sup>134</sup> Each also contains specific provisions which deal with statutory recognition of religious family law.

#### 3.1.1 Statutory Recognition of Religious Family Law

Section 14(3) of the interim Constitution provided:

"Nothing in this Chapter shall preclude legislation recognising

- a) a system of personal and family law adhered to by persons professing a particular religion; and
- b) the validity of marriages concluded under a system of religious law subject to specified procedures."

<sup>131</sup> See s 14(3) of the interim Constitution and s 15(3) of the final Constitution *infra*.

<sup>132</sup> Which, as has been shown, entails deep inequalities for women.

<sup>133</sup> Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) s14 (1); Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution) s15 (1).

<sup>134</sup> s14(1) of the interim Constitution and s15(1) of the final Constitution.



But s15(3) of the final Constitution stipulates:

- "a) This section does not prevent legislation recognising -
  - i) marriages concluded under any tradition, or a system of religious, personal or family law; or
  - ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

Plurality of family laws is constitutionally entrenched in as much as it permits parliament to enact laws which will recognise marriages concluded under different systems of religious law or tradition.<sup>135</sup> The guarantee of freedom of religion and prohibition against discrimination on the ground of religion<sup>136</sup> may eventually mean that religious intolerance of polygynous marriages could be relaxed by legislation and the courts.<sup>137</sup> The new s15(3), however, is slightly broader than the old s14(3). The provision of the interim Constitution dealt only with family law of religious inspiration. African customary law is now also clearly covered.<sup>138</sup>

*Kalla and Another v The Master and Others*<sup>139</sup> raised the question of whether the non-recognition of potentially polygynous marriages is unconstitutional and in conflict with s14(1) of the interim Constitution. Without deciding the issue, the court observed that the non-recognition of such marriages was "probably not unconstitutional". The court argued that the provision sanctioning the enactment of legislation recognising the validity of marriages concluded under systems of religious law would have been

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<sup>135</sup> s14(3) of the interim Constitution and s15(3) of the final Constitution.

<sup>136</sup> s9(3) of the final Constitution.

<sup>137</sup> Note that both sections (i.e. s14(3) of the interim Constitution and s15(3) of the final Constitution) refer to legislation that must still be promulgated and to date neither section has had an effect on the validity of Muslim marriages. See also Roodt *op. cit.* note 32 at 56.

<sup>138</sup> Smith 1997 *South African Law Journal* 217 at 222.

<sup>139</sup> *Op. cit.* note 85.

superfluous had the framers of the Constitution intended that s14(1) should effect a validation of such unions.

Sinclair,<sup>140</sup> commenting on s14(3) of the interim Constitution, states that if legislation is passed in terms of s14 recognising, for example the system of Muslim personal law, that law would be “immune from attack under the Constitution even if aspects of the protected system violate fundamental rights by being unfairly discriminatory on the grounds of sex”. Even if the Constitutional Court had to decide that polygyny is unfairly discriminatory towards women, the envisaged legislation would trump the equality clause. What s14(3) achieved was the elevation of one aspect of positive freedom of religion to a level where it trumped every other provision of the Bill of Rights.<sup>141</sup>

Section15(3) of the new Constitution only exempts the type of legislation under discussion from challenges in terms of s15: nothing in the general provision of s15(1) or 15(2) may be understood to prohibit religious or customary family law.<sup>142</sup> It is, however, difficult to think of an aspect of positive or negative religious freedom that could be restricted by such legislation. Statutes dealing with religious family law, for example, are more likely, under ss(3)(b), to face challenges in terms of the equality provision.<sup>143</sup> Smith<sup>144</sup> therefore argues that with the omission of the general exemption of the old s14(3), the new provision is rendered nugatory, as it does not protect this type of legislation from any constitutional provision which is likely to threaten it. From a gender perspective only, s15(3)(b) of the final Constitution thus constitutes a marked improvement.

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<sup>140</sup> *The Law of Marriage* Volume 1 (1996) at 160.

<sup>141</sup> *Op. cit.* note 138 at 222.

<sup>142</sup> *Op.cit.* note 143 at 122.

<sup>143</sup> For example, the argument that polygyny constitutes unfair discrimination, comes to mind.

<sup>144</sup> *Op.cit.* note 138 at 223.

Should the Constitutional Court have to deal with the validity of a Muslim marriage before such legislation is passed, it would certainly have to look at the right to freedom of religion guaranteed by s15. Another point that may be raised is that the current refusal of the legal system fully to recognise Muslim marriages amounts to unfair discrimination on the basis of religion, which is prohibited by s9 - the so-called equality clause.

### 3.1.2 *Application of Constitutional Principles*

Cachalia et al<sup>145</sup> set out a two-stage approach to be used in applying the principles of the Constitution: Is the right which falls within the ambit of the Chapter infringed? If so, could that infringement be justified in terms of the limitation clause?

Muslim parties could argue that the refusal to grant recognition to their marriage, which is celebrated in accordance with their religious beliefs, is an infringement of their right to freedom of religion, and their right to equality.

Every right in the Bill of Rights is, however, subject to the other provisions in the Chapter, in particular, to the limitation clause. Freedom of religion may, under the final Constitution, only be limited by a law of general application which is both "reasonable" and "justifiable" in an open and democratic society based on human dignity, equality and freedom.<sup>146</sup> Literally, the interim Constitution provided better protection. In terms of s33(1)(b)(bb), limitations on the right to freedom of religion also had to be "necessary". Whether the change will make any difference remains to be seen. Perhaps one can simply say it would be unreasonable to limit freedom of religion in an open and democratic society unless it was really necessary.<sup>147</sup>

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<sup>145</sup> *Fundamental Rights In The New Constitution* 1994 at 111.

<sup>146</sup> s36.

<sup>147</sup> *Op.cit.* note 138 at 223.

Both limitation clauses,<sup>148</sup> however, provide that the right to freedom of religion may be limited as long as the limitation is reasonable and justifiable in an open and democratic society based on freedom and *equality* [my emphasis]. Those who oppose the recognition of polygynous unions on the grounds that polygyny is discriminatory towards women may be able to rely on the emphasis placed on sex equality in the Constitution.

Apart from the reference to equality in s33 and s36,<sup>149</sup> s9(3) of the final Constitution prohibits unfair discrimination on the basis of sex. The Constitution also provides for a Commission on Gender Equality<sup>150</sup> to promote gender equality and to make recommendations regarding legislation which affects the status of women.<sup>151</sup> A reference to freedom and equality has been added in both s1(a) and s7(1) which are foundational to the final Constitution as a whole and to the Bill of Rights. Of considerable significance, however, is the inclusion in s1(b) of the final Constitution of non-sexism as a value on which the sovereign, democratic state is founded, thus elevating the status of the principle.<sup>152</sup>

But it should be noted that equality also requires that every religion be allowed to teach and manifest its own doctrines. In terms of s9(3), the state may not unfairly discriminate, directly or indirectly, on the ground of religion.

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<sup>148</sup> i.e. s33 of the interim Constitution and s36 of the final Constitution.

<sup>149</sup> *Op. cit.* note 148.

<sup>150</sup> s187 of the final Constitution (and s119(3) of the interim Constitution).

<sup>151</sup> Du Plessis and Gouws 1996 *South African Public Law* at 472. They note that no matter how "gender-friendly" the appearance of a constitutional text, it cannot compensate for a lack of appropriate action designed to harvest the benefits of gender equality. They base this statement on the fact that the Commission on Gender Equality was only appointed nearly two years after the commencement of the interim Constitution. They add that this Commission is the only state institution supporting constitutional democracy.

<sup>152</sup> Note that the preamble to the interim Constitution mentions gender equality as an important indicator of the need to create a new constitutional order. Although there is no such reference in the final Constitution, there is a reference to the improvement of the quality of life of all citizens, which could be construed as an oblique intimation of the necessity to promote gender, as well as other forms of equality. (See Du Plessis and Gouws *op. cit.* note 151 at 457).

The Constitution's commitment to equality could thus also be a justification for freedom of religion.

On the assumption that polygyny is found to be discriminatory and therefore incompatible with the notion of sex equality in a democratic South Africa, what should the Constitutional Court do? The drafters of the final Constitution have ensured that every person's right to hold the foundational beliefs which he or she has chosen are accorded equal protection by putting this right beyond the reach of any intolerant majority. The task of the courts must now be to interpret religious freedom in such a way that all faiths, in particular those of minority groups or those which are, for the moment, unpopular, have an equal opportunity to flourish. For, according to the Quranic teachings, religion is a personal affair between the individual and God, so that every one ought to be completely free in choice of faith.

## CHAPTER 4

### SUGGESTED SOLUTIONS

Despite the absence of persuasive evidence that polygyny inevitably entails the oppression of women the difficult question of whether Muslim polygynous marriages should be sanctioned by law remains to be addressed. The attitude of the legislature and judiciary towards polygyny, and various other factors<sup>153</sup> demand a re-evaluation of the policy of non-recognition of Muslim marriages. The most important factor, however, is the new constitutional era in South Africa. The Constitution<sup>154</sup> makes provision for the recognition of group laws. However, where a group law is a religious law, the incorporation of personal laws raises issues of religious freedom, equality between the sexes and the proper parameters of state action. Even if polygyny were found to be inextricably linked to social practices that are oppressive to women, there are a number of ways in which the law might respond:

- polygyny could be directly outlawed;
- polygynous marriages could be fully recognised by law;
- the present system of denying full recognition to polygynous marriages could be maintained;<sup>155</sup>
- there is a further option, which, in my view, does not warrant much consideration, and that is to allow polyandry as a way of silencing protests against polygyny on the ground that it promotes sex inequality. As Kaganas and Murray<sup>156</sup> point out “the notion of a woman acting as wife to more than one man suggests greater oppression, not liberation”.

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<sup>153</sup> The fact that Muslim personal law remains governed by religion for instance, and factors such as the position of women in Muslim marriages, practices sanctioned by the Quran, and the organisation of women's lives in accordance with their beliefs form an essential backdrop against which the policy of non-recognition of Muslim marriages must be approached.

<sup>154</sup> s 15(3)

<sup>155</sup> See Kaganas and Murray *op.cit.* note 2 at 133.

<sup>156</sup> *Op. cit.* note 2 at 127.

#### 4.1. Prohibiting Polygyny

As indicated above in Chapter 2, there is only one objection to polygyny that could possibly withstand scrutiny, and that is the concern for the subordinate position of women involved in Muslim polygynous relationships. It has however been made clear that it is difficult to determine exactly what it is about polygyny, practised in the religious context in which it originated, that undermines the position of women. It could be that it is the social environment in which polygyny is practised that is discriminatory towards women, and not polygyny *per se*. Outlawing polygyny would do nothing to improve the position of women in such an environment.

As Sinclair<sup>157</sup> correctly points out, in communities in which polygyny is still practised, the prohibition of polygyny will not have much effect except to "remove from the law's consciousness (and limited protection) those who participate (some more truly out of free choice than others) in polygyny. The law's message to women would be that they indulge in this prejudicial practice at their peril. That message may or may not serve in the future to deter them."

Kaganas and Murray<sup>158</sup> feel that it is too optimistic to assume, for example, that where polygyny is but one aspect of a system of family law based on religion, a community will alter its customs to conform with systems that are asserted to be more democratic or less oppressive of women. Accordingly, a legal prohibition of polygyny will, inevitably, leave some marriages unregulated.

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<sup>157</sup> *Op. cit.* note 74 at 168.

<sup>158</sup> *Op. cit.* note 2 at 133.

#### 4.1.1. Prospective Prohibition of Polygyny

Sinclair<sup>159</sup> suggests that if the Constitutional Court is asked to determine the constitutionality of polygyny, and decides that it is inconsistent with the Constitution and must therefore be outlawed, the court should refer the matter to Parliament in terms of s98(5) of the (interim) Constitution, to order that legislation be passed prohibiting polygyny prospectively. She suggests, however, that the existing rights of women and children should be preserved, and the way in which valid Muslim marriages can be celebrated in future, should be set out in the envisaged legislation.

An objection to this approach rests with the tension between the right to equality based on sex and that based on religion within s 9(3) of the Constitution. The insistence on monogamy as the legally recognised union for life of one man and one woman to the exclusion of all others<sup>160</sup> may infringe the religion ground of s 9 of the Constitution. In this situation the court would be faced with a conflict between protecting equality on the ground of sex (which, on the assumption that polygyny is found to be inconsistent with the Constitution, would require it to strike down polygyny) and preventing discrimination based on religion. Sinclair<sup>161</sup> submits that here the court should choose to protect sex equality at the expense of religion.

#### 4.1.2. Unitary Systems of Marriage

In suggestions about a unitary system of marriage, Albie Sachs<sup>162</sup> excludes polygyny. He offers a form of unitary system that would entail the recognition of only one form of marriage rite. The advantages of such a system would include "non-racialism, national unity and equality between spouses", but

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<sup>159</sup> *Op.cit.* note 74 at 168. Note that this suggestion was made with specific reference to the interim Constitution.

<sup>160</sup> para 1.4.4 above

<sup>161</sup> *Op. cit.* note 74 at 170.

<sup>162</sup> *Protecting Human Rights in the New South Africa* 1990 at 71. See, further, Sinclair *op. cit.* note 74 at 165.



“the state would have to denounce religious marriages as superstitious and traditional marriages as tribalistic”.<sup>163</sup>

Sachs<sup>164</sup> also refers to a more flexible solution using a single marriage law based on the essential characteristics of marriage, but allowing marriages to be celebrated in accordance with various rites. The only requirements would be that the marriage be solemnised by someone authorised to do so, and that it be registered. Sachs<sup>165</sup> excludes polygyny from this scenario by stating that the essential characteristics of marriage include a monogamous relationship. Cachalia<sup>166</sup> agrees with Sachs, but adds that the registration should be for administrative purposes only, and should not affect the validity of the marriage.

Although Sachs's proposal permits a broad degree of freedom to pursue religious practices, the difficulty with the approach is that it leaves outside the protection of family law persons who participate in the practice of polygyny.<sup>167</sup>

## 4.2. Recognising Polygynous Muslim Marriages

### 4.2.1. Deregulation of the Marriage Relationship

Labuschagne,<sup>168</sup> in dealing with cohabitation relationships, suggests that the marriage relationship should be deregulated. He believes that in the light of the current movement towards individual autonomy and freedom of intimate association, those who voluntarily enter into polygynous unions should be

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<sup>163</sup> Sachs *ibid.*

<sup>164</sup> *Op. cit.* note 162 at 72.

<sup>165</sup> *Op. cit.* note 162 at 72.

<sup>166</sup> *Op. cit.* note 9 at 404.

<sup>167</sup> Sinclair *op. cit.* note 74 at 165.

<sup>168</sup> 1989 TSAR at 371.

free to do so. This is certainly a simplistic solution which would not encourage reforms in the field of equality between the sexes. One option would be to acquire the formal written consent of the first wife before any subsequent marriage may be entered into. It is difficult to imagine how a wife could voluntarily agree to polygyny when her husband decides to take another wife. Kaganas and Murray<sup>169</sup> validly point out that “a formal requirement of consent may be worth very little and we are likely to mistrust a wife’s consent when it is exacted in a society in which men dominate”. A further problem with this requirement is that evidential proof of it might be difficult to obtain since the communities practising polygyny may be unwilling to fulfil the requirement or might simply be unaware of it. This would result in the invalidity of any subsequent marriage, thereby prejudicing the new wife and her children. It is possible, however, that the marriage could be recognised as a putative one.

#### 4.2.2. Legal Pluralism

A pluralism of laws<sup>170</sup> can be accommodated in a variety of ways.

Sachs<sup>171</sup> suggests two forms of legal pluralism. Although he may not have intended that they should include polygynous relationships, they may provide viable solutions to the issue of polygyny. The first form presupposes a family law which would be determined by the personal law of each couple. Parties would be able to organise their family lives as they choose, in accordance with their own customary or religious beliefs. Their disputes would be subject to the authority of traditional and religious leaders.

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<sup>169</sup> *Op. cit.* note 2 at 128.

<sup>170</sup> The concept of “legal pluralism” is used here to denote the *formal* incorporation of different systems of personal law within a single jurisdiction. This is also the definition which Cachalia (*op. cit.* note 9 at 408) uses.

<sup>171</sup> *Op. cit.* note 162 at 75-76.

Sachs<sup>172</sup> suggests another form of legal pluralism in terms of which a state system of justice would be responsible for administering family law, but judges would be able to apply principles and rules of various marriage systems. This approach is used in Tanzania, where there are certain minimum requirements in all cases, for example the court will recognise talaq,<sup>173</sup> but the divorce will only take effect once the judge has recognised its existence. It would of course be problematic for the court to determine exactly which system of law applies. Perhaps the application of choice of law rules could assist with this difficulty. At this stage, there are simply too many different marriage laws in this country<sup>174</sup> to expect the judiciary to acquaint itself with them. Furthermore, it is probably impossible to administer them properly and cost-effectively.

Cachalia<sup>175</sup> suggests that Muslim family law should be codified, and Muslim jurists should be appointed as assessors. Codification will be necessary to unify different sources of Muslim family law and curtail the court's interpretative powers.<sup>176</sup>

In addition to the conflicts-of-law problems that the courts will have to decide on in the exercise of their ordinary jurisdiction, the courts will, in the light of the new constitutionally-based legal order, have to resolve "conflicts of rights" in the exercise of their constitutional jurisdiction. The concept of the equality of the sexes is no longer a "special characteristic of a particular society, it is a universally cherished ideal".<sup>177</sup>

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

<sup>173</sup> Unilateral repudiation of his marriage by a Muslim man.

<sup>174</sup> *Op. cit.* note 74 at 208.

<sup>175</sup> *Op. cit.* note 9 at 410.

<sup>176</sup> *Ibid.* This proposal, intended to guarantee religious freedom, could also have the unintended effect of curtailing group autonomy. Where a group law is recognised, the state acquires authority over its doctrinal development, interpretation, application and enforcement.

<sup>177</sup> *Op. cit.* note 9 at 411. The United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) provides equally for religious and women's rights but neither addresses the issue of a potential conflict between the two kinds of rights. Other international measures dealing with women's rights include the UN Convention on the Elimination of all Forms of Discrimination Against Women

Moosa<sup>178</sup> points out that Muslims have varying interpretations of the Bill of Rights. Some are of the view that it governs all legislation and others that it protects religious provisions and that its equality clause does not cover the interpersonal relations of Muslim personal law. She<sup>179</sup> also suggests that the best option and solution to the application of Muslim personal law lies in codifying Islamic law and enacting a comprehensive bill or "uniform Muslim code" applicable to Muslims. Finally, Moosa<sup>180</sup> believes that it is too ambitious to expect the process of reform of Muslim personal law to be set in motion by a call for the reinterpretation of Islam and the Quran.<sup>181</sup>

### 4.3 Maintaining The Status Quo

As outlined in chapter 2, the present method of non-recognition of Muslim marriages has proved unsatisfactory. The tensions that manifest themselves within the various provisions of the Constitution as discussed under para 4.1 and para 4.2 above apply with equal force should the status quo be maintained. Muslim parties to a marriage would still not enjoy the protection that s 9 (right not to be unfairly discriminated against on the grounds of, among others, religion and sex) and s 15 of the Constitution promise. Women are likely to bear the burden of legal isolation and cases such as that of Mrs. Ismail<sup>182</sup> will continue to occur.

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(CEDAW) of 1980. Many modern Muslim (e.g. Egypt) and non-Muslim countries (e.g. India) are signatories to it but have placed reservations on certain of its Articles where it conflicts with Muslim personal law. South Africa has recently become a member of the United Nations and a signatory to CEDAW. Although the Bill of Rights states (s39) that a court of law must take cognisance of international law applicable to the protection of human rights when interpreting its provisions, it remains to be seen whether our Constitutional Court will interpret the Bill of Rights having regard to the CEDAW provisions.

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*Op. cit.* note 5 at 419 note 20.

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*Ibid.*

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*Op cit* note 104 at 179.

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As was suggested by some academics at a conference on "Islam and Civil Society in South Africa" held at the University of South Africa in August 1994.

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*Op. cit* note 6.

However, in considering solutions to the question of non-recognition of Muslim polygynous marriages, it is necessary to bear in mind that the entire system of Muslim personal and family law could be recognised through legislation in terms of s 15 (3)(ii) of the Constitution,<sup>183</sup> and this could mean that polygyny would be permitted. Alternatively, Muslim marriages could be recognised in terms of s 15(3)(i).

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<sup>183</sup>

Act 108 of 1996.

## CONCLUSION

Mr Justice Murphy of the United States Supreme Court made the following statement about polygyny:

“We are dealing here with ... one of the basic forms of marriage ... The fact that it is condemned by the dominant culture ... does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles.”<sup>184</sup>

While I do believe that monogamy should be encouraged, if only to reduce the extent of male domination in Muslim societies in which polygyny is practised, I cannot agree to the absolute prohibition of polygyny. It is an institution which served, and in many areas continues to serve, the religious needs of Muslim societies. Muslim polygynous relationships will remain a reality regardless of any change in the law and outright prohibition (or maintaining the status quo) will continue to cause hardship to those who, willingly or unwillingly, participate in such relationships. After all, religion is not just a matter of *belief*, it is a way of *life*. There is no genuine freedom of religion unless there is the freedom to *practise* the essential tenets of a religion.<sup>185</sup> The South African Constitution shows a sensitivity to this interpretation in recognising that commitment to the freedom of religion must not prevent legislation recognising “systems of personal and family law ... adhered to by persons professing a particular religion”.<sup>186</sup>

Islamic family law, therefore, should not be forced into a pre-conceived human rights mould,<sup>187</sup> for, as argued earlier, while it is true that Islamic law and Muslim personal law endorses inequality, Islam and gender equality are not necessarily in conflict. Polygyny does not have to be inherently offensive

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<sup>184</sup> In *United States v Cleveland* 329 U.S. 14 (1946) quoted by Glendon State Law and Family: *Family Law in Transition in the United States and Western Europe* 1977 at 39.

<sup>185</sup> And polygyny is what the essential tenets of the Muslim religion entails.

<sup>186</sup> Final Constitution s15(3)(a)(ii).

<sup>187</sup> Goolam “Islamic family law and the Bill of Rights: a proposal for the final Constitution” 1996 *Journal for Judicial Science* at 136.

to a woman's right to equality. What is more, staunch followers of Islam consider the tenets of their faith superior to the Constitution, and Islam the first theoretical and practical design of the idea of human rights.<sup>188</sup> This belief of the superior nature of religious law has been outlined under para 1.1 in chapter one.

Finally, one should take into account that many Muslims are insecure about the relationship between traditional religious norms on the one hand and modern legal standards on the other. Many Muslims assert the validity of the traditional Islamic Shari'a in principle and, at the same time, seem prepared to accommodate pragmatically some political and legal reforms.<sup>189</sup> Although such pragmatic accommodation is not sufficient to solve the general conflict between religious freedom and the right to sexual equality, accommodation does provide some intermediate solutions.

It will do well to take note of the proposals suggested by Cachalia<sup>190</sup> and Moosa<sup>191</sup> regarding codification of Islamic law. The answer to the problem of non-recognition of Muslim marriages does not lie in adopting a secular uniform civil code. Not only will it be rejected by the Muslim community, but it has failed to address the plight of women in countries where it does exist.<sup>192</sup> The process of reform needs to be addressed in line with the true Qur'anic spirit.

A certain amount of legislation may be necessary to relieve concerns about sex inequality. For example, a statute could require that the wife of an existing marriage would have to consent to the second or subsequent marriage of her husband, for the latter to be valid in terms of common law. If

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<sup>188</sup> *Op. cit.* note 32 at 57.

<sup>189</sup> See Bielefeldt *op. cit.* note 101 at 615.

<sup>190</sup> See para 4.2.2.

<sup>191</sup> *Ibid.*

<sup>192</sup> Moosa "The Interim Constitution and Muslim Personal Law: Whither South African Muslim Women?" Summary of paper presented at conference; Towards the Final Constitution: A Critique of the Present Constitution from a Gender Perspective - The Way Forward. January 1995 University of Western Cape.

the husband were to insist on marrying again without his wife's consent, which he may do in terms of Islamic law, she could approach the court for relief. The court could declare the second marriage invalid, and in doing so inform the new wife that she has no rights in the marriage in terms of the general principles of South African law. If the first wife is unhappy to accept a second marriage, which would still be valid in terms of Islamic law, her only solution would be obtain a divorce.

It seems beyond question that the Constitution cannot protect Muslim personal law if the necessary justification and legitimation for such law is lacking. It is submitted that Muslim personal law, once in force, should be subject to the final Constitution. It is a foregone conclusion that the State has undertaken to guarantee freedom of religion and belief only insofar as it does not violate other fundamental rights of its citizens. Subjecting Muslim personal law to the Bill of Rights will guarantee that whatever the final outcome of a code of Muslim personal law will be, it will provide for equality between the sexes.<sup>193</sup>

As Roodt<sup>194</sup> points out, the ideal method of gender role reform is for women to put forward their opinions. If women play an active role in formulating their rights, the scrutiny of the personal legal regimes likely to be recognised in South Africa and their provisions regarding polygyny can take place in the proper social and historical context.

In conclusion, I can find no more eloquent way to state my position than by quoting the final passage of an excellent article by Kaganas and Murray:<sup>195</sup>

"Insofar as this paper appears to accept the practice of polygyny it may be controversial, but it does not intend to take issue with those who point to the severe oppression of women in many

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<sup>193</sup>

*Op. cit.* note 192.

<sup>194</sup>

*Op. cit.* note 32 at 58.

<sup>195</sup>

1991 *Acta Juridica* at 134.



polygynous marriages. Instead, it suggests that we should re-examine the basis of our objections to polygyny and choose our responses carefully. Most importantly, perhaps, we believe that, until a great deal more attention has been paid to the real conditions of women in polygynous relationships and options for addressing them, we should be extremely cautious in identifying polygyny as the cause of oppression."

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