

Abstract

This paper argues that the current demand in South Africa for the legal recognition of Muslim marriages, while valid and necessary, has resulted in the part codification of one community's religious law, which constitutes a violation of the fundamental rights and values agreed to at the founding of South Africa's secular democracy.

Introduction

The previous article in this Dossier by Rashid Omar highlights the de facto existence of both religious plurality and religious pluralism in South Africa pre-democracy. The role of a religious pluralist movement, driven by civil society, in the struggle against an oppressive and discriminatory system of government in South Africa is aptly captured therein. The article also highlights the post-democracy relationship between the democratic state and the religious pluralist movement. Concerns about the possibility of "religious co-optation or legitimation" by the State, and also the rise of conservative religious leadership who are "more exclusivist in their religious outlooks and who view religious pluralism with great suspicion," are also raised in his article.

The latter point is a concern that resonates today and is visible in the demands by some religious leaders and community members, in the area of Muslim Personal Law and the codification thereof. This paper argues that the demand currently in South Africa, for the legal recognition of marriages conducted under Muslim laws, is a valid and necessary one. But it also argues that codification of aspects of religious law, in this process, is a violation of the fundamental rights and values that were agreed to at the founding of South Africa's secular democracy. This includes the pre-eminent right to equality based on sex and gender. The privileging of one religion is not only unconstitutional, it is argued, but it also has possible negative implications for the achievement of substantive gender equality, for the building of a unitary state, for national unity and also for reconciliation. The reality is that South Africa is a secular State which has also constitutionally entrenched the rights to freedom of religion, belief, conscience and opinion. The protection of minority group rights, whether based on race,

religion, culture etc, is hence guaranteed.

The nexus between gender, rights, culture, religion and law indicates clearly that, both individually and collectively, these are contested areas in terms of understandings, interpretations and challenges. There are different views both about these concepts, as well as the linkages between them. It seems apparent in South Africa that there is an absence of common acceptance that "... cultures [and religions]¹ are products of history, place, politics and people, and change over time." Also, as Jolly argues "... that individuals form and change their cultural [and religious] environments, through accepting or resisting the norms with which they live."²

Jolly's research leads her to understand culture [religion] to be: diverse and dynamic, formed by internal and external influences and structured by representations and power.³ She asserts that charges of western imposition are often made in response to gender interventions, and that this could be interpreted as being accurate, or simply a politically motivated effort to obstruct transformation of gender relations, or both.⁴ Charges of interference with the culture/religion of others and/or betrayal of one's own culture/religion, are part of the challenges facing activists who advocate for change in gender relations, and who challenge cultural and religious practices which violate substantive gender equality norms and principles.

Issues relating to contestations between group and individual rights; the consequences of colonization processes on customary and religious laws; the lack of a contextual approach to law making; the distortion of custom and religion; and also the dissonance

between official and living laws - are all areas for further discussion. A further challenge is the often-held view that Muslim laws are regarded as sacred and hence untouchable and unchanging - despite the fact that globalization and industrialization have had an impact. This effectively silences any challenges and discussions, and creates a hierarchy of untouchable custodians of religion.

Legal framework

The Constitution of South Africa is viewed by many as an ideal model for multicultural democratic contexts, wherein the right to equality exists with the right to culture, tradition and religion, amongst other differences. South Africa is described as a unitary, multicultural, secular democracy that protects individual liberty and freedom through a Bill of Rights, with applicability against both the state and against individuals. The foundational values of the Constitution include non-sexism, non-racism, the right to dignity and also the right to substantive equality. Both the Interim and the Final Constitutions guarantee freedom of conscience, religion, opinion and belief, and explicitly permits the State to enact legislation for the recognition and practice of any religious, personal law and family law system as well the recognition of marriages concluded under any system of religious law. This freedom includes both the right to hold religious belief and to express such a belief in practice; also the right to enjoy one's culture, practice one's religion, use one's language; and also to form, join and maintain cultural, religious and linguistic associations.

These rights and freedoms are all subject to other rights in the Bill of Rights, especially the right to equality, which is articulated as a core value and is formulated both as a command for equal treatment and as a

prohibition of unfair discrimination. Prohibited grounds include amongst others, gender, sex, religion, conscience and belief, race, sexual orientation. Any limitation of rights has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Interpretation of the Bill of Rights and other legislation must promote the values that underlie an open and democratic society.

International and foreign law must also be taken into account when interpreting the Constitution. South Africa has ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 16 of the Convention deals with marriage and family life and the duty on a state to take steps to end all discrimination against women in marriage and family life. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 serves a two-fold purpose, i.e. promotion of equality and the prevention of unfair discrimination. The preamble states that democracy demands the eradication of inequalities, especially those that are systemic in nature. The guiding principles include the need to take measures at all levels to eliminate discrimination and inequalities. Some measures include the forbidding of systems which prevent women from inheriting family property; forbidding customary, religious or other practices which impair the dignity of women and undermines equality between women and men and; forbidding any policy or conduct that unfairly limits access of women to land rights, finances or other resources.

Problem statement and proposed solutions

Under apartheid, there had been widespread observance of both religious as well as

customary law, despite the non-recognition of other forms of law, including Muslim laws. Marriages conducted under Muslim law systems were refused legal recognition as valid marriages on the basis that they are potentially polygamous, and hence repugnant to public policy. As a result, they have been denied civil law status/benefits in terms of the Marriage Act 25 of 1961; the Divorce Act 70 of 1979; Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. The non-recognition of Muslim marriages has caused great hardship to many Muslim women and children. South African women married in terms of Muslim laws only are currently disadvantaged both socially and economically. Children born of such marriages were considered illegitimate in terms of South African law, there is no legal nexus between a wife and husband, there is no joint estate and also no financial obligation between them etc. Currently the courts are relied on for protection of rights. The relief granted is sometimes arbitrary, often a-contextual, is of an interim nature and it could be perceived as the courts usurping the functions of the legislature in the law-making process. Hence the Court in some cases dealt with the rights and duties created due to the existence of a de facto monogamous Muslim marriage, but failed to treat such marriages on a par with civil marriages, or recognize them as valid marriages per se. The courts have not dealt with the bigger problem of the nature, impact and consequences of polygynous marriages. The administration of Muslim Personal Law (MPL), by the judicial and welfare sections of the clergy bodies, has been criticized by numerous writers. Nevertheless, there have also been persistent efforts by the clergy groups to have MPL recognized by the state. Currently, there is no commonly recognized body of Muslim judicial authority

for the engagement in a constructive manner with this contested issue. The attempt at drafting family laws that are consistent with the Constitution is crucial.

The Law Reform Commission has proposed legislation for the recognition of Muslim marriages. The preamble of the draft Muslim Marriages Bill 2003 sets out the objectives that the Bill seeks to achieve. These include: to make provision for the recognition of Muslim marriages; to specify the requirements for a valid Muslim marriage; to regulate the registration of Muslim marriages; to recognize the status and capacity of spouses in Muslim marriages; to regulate the proprietary consequences of Muslim marriages; and to regulate the termination of Muslim marriages and the consequences thereof. In this effort, certain aspects of Muslim Personal Law have been codified. Concerns have been raised by different constituencies about the consequences of codification of religious law, as well as the violation of constitutional rights. Furthermore, there is no general consensus in the Muslim community on this draft Bill.

The Commission on Gender Equality⁵ has drafted an alternative Bill which would recognize all religious marriages - without codifying any particular religion. This would then address all religious marriages - where parties are subject to the same legal equality violations as those faced by people in Muslim marriages. The primary aim of this Bill is to give effect to the Constitutional principles of equality by affording legal recognition and status to all religious marriages. This will in turn extend the protection and enjoyment of legislation afforded to spouses in civil marriages, to people in religious marriages. This becomes even more important in contexts where on the one hand, there exist deeply embedded and systemic patterns

of inequality and oppression; and where on the other hand, the Constitution is regarded as a transformative document, which seeks to take past discrimination into account, in providing redress.

This second bill provides for the recognition of religious marriages; regulates the registration of religious marriages and provides for the equal status and capacity of spouses in religious marriages. It includes the following sections: definitions, recognition of religious marriages, requirements for validity of religious marriages, age of majority, designation of marriage officers and appointment of registering officers, registration of religious marriages, equal status and capacity of spouses, proprietary consequences of religious marriages and contractual capacity of spouses, dissolution of religious marriages, change of marriage system, and offences and penalties. The constitutional protection afforded to the right to religion, allows for remedies for the amelioration of the legal disadvantages suffered by women in such marriages, and the recognition of religious marriages will hence create the necessary legal nexus for redress purposes.

Conclusion

The process of law reform efforts described above has given rise to many constitutional questions, including those relating to the separation of religion and state in a secular democracy. The larger questions of identity politics, of the loss of the tradition of religious pluralism in South Africa, and also the implications of this for nation-building and also the promotion and protection of gender equality, are not being discussed as broadly as they should be.

The lack of understanding and the a-

contextual approach adopted in the research of culture and religion have contributed to this problem. There is also a lack of recognition about the inadvertent consequences that often arise out of law reform and implementation processes, which lead to further and new problems within communities that live within such cultures and religions. There also seems to be a lack of debate on identity politics in South Africa, and hence there appears to be a conflating of culture and religion with other identity issues. This is leading to a situation where individual and group identity issues are being manifested in battles for legal recognition of culture and religion, even to the extent of introducing notions of culture and religion that are not practiced by such communities

There is a lack of acknowledgement that the battles for cultural and religious identities today is more about power and authority, and also a lack of knowledge of how the relevant formal institutions relate to modern life and their 'changing constituencies'. It is apparent in this attempt to codify Muslim Personal Law, that there is a battle to again entrench the public-private divides which we have moved away from, in light of our transformative Constitution which entrenches the right to substantive gender equality.

"We must hold the past sacred, but the future even more so"

Makuvaza, 1998:43⁹

Acknowledgements

This paper is printed with permission from the author. Please do not cite without permission of the author.

Endnotes

¹ In some contexts the term 'culture' implies an inclusion of religion. In the South African context, culture and religion are understood as two different concepts.

² Jolly S. *Gender and Cultural Change Overview Report*, Institute of Development Studies July 2002: 1

³ *Ibid*: 1

⁴ *Ibid*: 2

⁵ The Commission is a constitutional body set up to promote and protect gender equality and women's human rights.

⁶ Quoted in Jolly, *op.cit*: 2