

THE RECOGNITION OF MUSLIM MARRIAGES IN SOUTH AFRICA PAST, PRESENT AND FUTURE

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1 Introductory remarks

The title of this paper might be misleading. It should read "the non-recognition of Muslim marriages in South Africa." Due to their polygamous nature Muslim marriages are not recognised as valid marriages in terms of the common law of South Africa.¹ The monogamous marriages of the Roman-Dutch law (referred to as civil marriages) that came to South Africa with the first Dutch settlers are, in general, the only marriages recognised as valid marriages. These marriages were and still are open to members of all the different population groups in South Africa.²

Today the law of marriage in South Africa is a conglomerate of Roman-Dutch law and legislation.³ Hahlo describes a marriage as

(...) the legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts.⁴

In this definition lies the first and most important reason for the non-recognition of Muslim marriages in South Africa. It is not monogamous, but either *de facto* polygamous or potentially polygamous. According to South African common law these marriages are *contra bonos mores* and therefore void.⁵ For Muslim marriages to be recognised, it has to comply with the provisions of the Marriage Act.⁶ The impediment against Muslim marriages does not only effect Muslim marriages concluded in South Africa, but also those concluded abroad. Thus a Muslim marriage concluded as a valid marriage in Pakistan between two Pakistanis will not be recognised as a valid marriage in South Africa.⁷

On 27 April 1994 South Africa had entered into a new and exciting constitutional dispensation with the commencement of the 1993 Constitution.⁸ The 1993 Constitution was repealed by the 1996 Constitution, which commenced on 4 February 1997. Section 15 of the 1996 Constitution recognises freedom of religion and makes provision for the recognition of religious and traditional marriages by means of legislation.⁹

Section 15,¹⁰ read with sections 30,¹¹ 31,¹² 181(1)¹³ and 185¹⁴ of the 1996 Constitution recognises the religious diversity of the South African population and opens the door for the future recognition of Muslim marriages. It is clear from these provisions that Muslim people have the right to enjoy their culture and to practise their religion.¹⁵ The right to have Muslim marriages¹⁶ recognised is, however, not constitutionalised in the 1996 Constitution.¹⁷

Furthermore, sections 15, 30, 31, 181(1) and 185 read with sections 9¹⁸ and 187¹⁹ of the 1996 Constitution seem fraught with potential conflict. For example, according to the Islamic law of divorce a Muslim husband may divorce his wife by uttering the words *talāq* three times. The same option is, however, not available to the Muslim wife. On the face of it, this seems to be in direct conflict with the equality clause contained in section 9. However, it may be argued by some that such discrimination is sanctioned in

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terms of sections 15, 30 and 31 that recognise religious and cultural rights so that such discrimination is consequently not unconstitutional.²⁰

This paper may broadly be divided into three sections. Firstly, a brief historical overview regarding the recognition of Muslim marriages in South Africa will be given.²¹ Thereafter, the current position regarding the recognition of Muslim marriages will be discussed.²² Finally, a few concluding remarks regarding the future of Muslim marriages in the light of the 1996 Constitution will be given.²³ In order not to bore the audience with a pure historical and theoretical discussion the author will refer quite frequently to factual situations that can be found in numerous court decisions on the subject.

2 Historical background

The majority of Muslims who first arrived in the former Cape Colony was brought from the Dutch colonies in the East Indies,²⁴ the coastal regions of Southern India and Malaysia as slaves, convicts and political exiles. Later they were also imported from India to work on the sugar plantations of the former Natal province²⁵ and some of them also came as businessmen. Although the Dutch colonials prohibited the practise of Islam in public places or the conversions of heathens or Christians to Islam, the English colonials gave them religious freedom in 1806.²⁶

Although religious freedom existed in South Africa from an early stage, it did not mean that *de facto* or potentially polygamous religious marriages were recognised as valid marriages. As a general rule these marriages were from an early stage regarded as *contra bonos mores* and thus void. The consequence was that the wife of such a union was not recognised as a "wife" in terms of South African law and the children born out of such a union were regarded as extra-marital.²⁷

Due to the large influx of Indian immigrants of whom a great portion were Muslims, some of the provinces made provision for different marriage and immigration laws regarding Indians.²⁸ However, these marriages had to be monogamous before it could receive recognition. The only province that made provision for the recognition of polygamous Indian marriages was the former province of Natal.²⁹ Such recognition was only given to an Indian marriage(s) concluded before arrival in South Africa. The marriage(s) became a valid marriage(s) upon registering thereof by the then Protector of Indian Immigrants. Indian immigrants domiciled in South Africa could not conclude valid polygamous marriages in South Africa or anywhere else after they had established their domicile in South Africa.³⁰

The Immigrants Regulation Act³¹ consolidated and amended the various immigration laws that existed in the provinces.³² The main purpose of the Act was to regulate the affairs of immigrants. Section 5 made provision for certain persons or classes of persons to be exempted as prohibited immigrants. In terms of section 5(g) the wife of a "lawful and monogamous marriage duly celebrated according to the rites of any religious faith outside the Union" between the wife and the exempted person was also exempted as a prohibited immigrant. The effect of this provision was very harsh on Indian immigrants who were married in terms of Islamic law.

In 1914 the Indian Relief Act³³ brought some respite. In terms of section 3(1) the reference to a "lawful and monogamous marriage duly celebrated according to the rites of any religious faith outside the Union" was deleted. In terms of section 3(2) "wife" was defined so as to include one wife of a polygamous marriage.³⁴ It made provision for the appointment of priests of any Indian religion as marriage officers. They were authorised to conclude Indian marriages according to the rites of any Indian religion.³⁵ Such a marriage could be transformed into a valid marriage if it was registered.³⁶ In order to be registered the marriage had to be recognised as a

marriage under the tenets of their particular religion and had to be a *de facto* monogamous marriage. However, the incidents that followed from such a marriage, were identical to the incidents that followed from a valid civil marriage.³⁷ The General Law Amendment Act³⁸ repealed the Indian Relief Act and since 1971 it is not possible anymore to conclude a valid Indian marriage in this way.

Furthermore, foreign polygamous marriages were and still are not recognised as valid marriages in South Africa. The *locus classicus* in this regard is *Seedat's Executors v The Master (Natal)*.³⁹ The facts of this case may be summarised as follows:⁴⁰ H married W1 in 1883 while domiciled in India. Three children were born in India out of this marriage. In 1902 he immigrated to South Africa and settled in the former province of Natal. In 1904, while domiciled in Natal, he went back to India and married W2. Six children were born out of his second marriage, two in India and four in Natal. H died leaving a will in which he bequeathed his estate to his two wives and all his children according to Islamic law. Under the Natal Act⁴¹ the "lineal descendants" of the testator must pay 1% estate tax and all other beneficiaries 5%. The "surviving spouse" of the testator was exempted from paying estate tax. It was therefore essential to determine whether H's wives were "surviving spouses" and his children "lineal descendants" in terms of the act. It was accepted that H's second marriage was void and his children therefore extra-marital. He was domiciled in Natal and could therefore not have concluded a valid polygamous marriage in India. However, regarding H's first marriage it was argued that such a marriage was valid in terms of the law of domicile (that was India) and should therefore also be recognised as a valid marriage in terms of South African law. The court found that it is under no obligation to recognise a marriage contracted validly in terms of foreign law if such a marriage would be "repugnant to the moral principles of its people."⁴² The court held that polygamy

(...) vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilized peoples, on grounds of *morality and religion*,⁴³ and the Courts of a country which forbids it are not justified in recognizing a polygamous union as a valid marriage.⁴⁴

The court held that W1 was not a "surviving spouse" in terms of the said Act and that she had to pay 5% estate tax. However, since the status of their children was determined in terms of domicile of religion, they were legitimate in India and therefore also in South Africa. The children of H and W1 were "lineal descendants" in terms of the said Act and only liable to pay 1% estate tax.

On 1 January 1962 the Marriage Act⁴⁵ came into operation. It is a consolidation of all existing marriage laws and some immigration laws in South Africa. "Marriage" is not defined in terms of the Act and it is generally accepted that it means a civil marriage.⁴⁶ Section 3 makes provision for the appointment of a marriage officer with authority to solemnise a marriage "according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion."⁴⁷ Section 29A further makes provision for the registration of such a marriage by the marriage officer. Muslim marriages will, therefore, be regarded as valid monogamous marriages if they were solemnised by an authorised marriage officer and if the particular marriage was registered.⁴⁸ These sections of the Marriage Act make it possible for a void *de facto* monogamous Muslim marriage to be converted into a valid civil marriage. The conversion means, however, that the South African common law applies to such a marriage and it is, therefore, unacceptable to most Muslims.

3 Muslim marriages today

Although Muslims constitute only about 2% of the total population

of South Africa,⁴⁹ they regard adherence to their religion in a very serious light. In general Muslims feel that they have the right to regulate their lives in terms of their own legal system, namely Muslim personal law.⁵⁰ Such recognition implies that recognition must also be given to Muslim marriages and the consequences flowing therefrom. However, the legislature and the courts have, since the commencement of the 1993 and 1996 Constitutions, not been sympathetic towards this plight of Muslims in South Africa. They still do not recognise Muslim marriages as valid marriages.

The courts did, in some cases, declare Muslim marriages as putative marriages.⁵¹ However, in order to be declared a putative marriage, it must be proved that one or both of the parties acted in good faith. Although the marriage is void, it has certain of the effects of a valid marriage. For example, the children of a putative marriage have the same status as the children born from a valid civil marriage.⁵²

The Court of Appeal interpreted the provisions of the Marriage Act⁵³ in *Ismail v Ismail*.⁵⁴ The facts of the case may be summarised as follows:⁵⁵ H and W were married in terms of Islamic law. Their marriage was at all material times monogamous. Approximately four years after their marriage H divorced W by means of *ṭalāq*.⁵⁶ W claimed for arrear maintenance,⁵⁷ delivery of deferred dowry, payment of certain jewellery in W's possession and maintenance for the period of *'idda*⁵⁸ in the *Moulana*.⁵⁹ The *Moulana* gave judgement in favour of W. H neglected to abide by the judgement and W instituted action in the Transvaal Provincial Division. H raised a point *in limine* against her particulars of action

inasmuch as the customs relied upon by the plaintiff [W] are *contra bonos mores*, unreasonable and in conflict with law, alternatively are in conflict with rules of law which are unalterable by agreement.⁶⁰

The exception was upheld in the court *a quo* and it was found that the marriage was polygamous and therefore void on the ground of public policy. The court argued, that to

(...) entertain the plaintiff's [W's] claims would be tantamount to recognising the illegal union entered into by the parties and that would be to fly into the face of all authority in this country (...).⁶¹

W lodged an appeal against this decision. The Appellate Division had to decide whether the court *a quo* erred in upholding the point *in limine* of H. In order to do so, the validity of the marriage between H and W had to be investigated.

W's council agreed that the marriage was not valid, because it is potentially polygamous and did not comply with the formalities of the Marriage Act.⁶² They argued that W's cause of action was based on certain Muslim customs and a marriage contract and not on the marriage between the parties. The question that had to be considered was whether the Muslim customs and a contract arising from it are *contra bonos mores* and not whether the marriage was valid or void. The court did not agree with this approach and found:

In my view the claims should not be viewed in isolation. The tenets of the Muslim faith appear to govern all aspects of the marriage relationship. (...) the Court must have regard to the very close and intimate connection between the customs and contract in question and the underlying conjugal union.⁶³

The second argument submitted by W's council was the change in the attitude of society towards polygamy. In order to illustrate this submission W's council relied on a few factors. First of all they argued that the provisions of sections 3(1) and 11 of the Marriage

Act afforded Muslim marriages some form of recognition.⁶⁴ Section 3(1) reads:

The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages *according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.*

The court was of the opinion, however, that section 3(1) did not afford any recognition to Muslim marriages. It found that the emphasised words related to the form of the marriage ceremony and not to the requirements of the marriage as such.⁶⁵ Section 3(1) enables Muslims to conclude their marriages according to Islamic rites by an *imām*. If, however, they want their marriages to be valid monogamous marriages in terms of South African law, the *imām* must be a designated marriage officer who has to comply with the formalities applicable to the solemnisation of marriages in terms of the Act.⁶⁶

Furthermore, W's council argued that section 11 gave some form of recognition to Muslim marriages, because such marriages do not "purport to effect a valid marriage" in terms of subsection 3. Section 11 reads as follows:

A marriage may be solemnized by a marriage officer only. Any marriage officer who purports to solemnize a marriage which he is not authorized under this Act to solemnize or which to his knowledge is legally prohibited, and any person not being a marriage officer who purports to solemnize a marriage, shall be

guilty of an offence and liable on conviction to a fine not exceeding four hundred rand or, in default of payment, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

Nothing in sub-section (2) contained shall apply to any marriage ceremony solemnized in accordance with the rites or formularies of any religion, if such ceremony does not purport to effect a valid marriage.

The court evaluated section 11 and found that there was nothing in the provisions of section 11 that gives some form of recognition to Muslim marriages. It held:

The mere fact that the Legislature has not prohibited polygamous unions, recognised as marriages under the tenets of the Muslim faith, does not mean it also approves of such unions or that the consequences thereof are legally enforceable.⁶⁷

In the third place W's council referred the court to English⁶⁸ and Zimbabwean⁶⁹ cases to illustrate that increased recognition was being given to polygamous marriages in England and Zimbabwe. The court held, however, that those cases referred to foreign polygamous marriages and were, therefore, distinguishable from the facts of this case.⁷⁰

Fourthly, W's council argued that the legislature, in a number of statutes, gave recognition to polygamous marriages.⁷¹ The court evaluated these statutes and came to the conclusion that the existence of such legislation was not indicative of recognition (or "tolerance" as the court called it) of Muslim marriages in general.⁷²

The court finally came to the conclusion that the marriage of W and H was *contra bonos mores* and thus void on the following

grounds.⁷³

- There was no justification to deviate from the long line of decisions in which the courts had refused to give recognition to Muslim marriages.
- The concept of polygamous marriages would undermine the monogamous status of civil marriages.
- The marriage laws of South Africa were designed for monogamous marriages and recognition of polygamous marriages would create practical problems.⁷⁴
- The recognition of Muslim marriages should be in conflict with the principle of equality between marriage partners.⁷⁵
- Muslims had the right to convert their *de facto* monogamous marriage into *de jure* monogamous marriages in terms of the provisions of the Marriage Act.
- Muslim marriages were "contrary to the accepted customs and usages that were regarded as morally binding upon all members of society." ⁷⁶

As a result of the marriage of H and W being void, all Muslim customs and the contract arising from their marriage were also *contra bonos mores* and void. The court held accordingly that the appeal regarding W's claim for arrear maintenance, deferred dowry and maintenance for the period of 'idda should fail. The claim for certain jewellery, which was the property of W, did not rely on the same grounds as the other claims and had to succeed.⁷⁷

The Marriage Act⁷⁸ is still applicable to marriages today. The consequences of non-recognition of Muslim marriages are particularly unfair to women. She has no claim for loss of support if the husband is killed;⁷⁹ she has no claim for maintenance against her husband after their divorce;⁸⁰ she is not a beneficiary after the death of her husband in terms of the Intestate Succession Act;⁸¹ she may be compelled to give evidence against her husband in criminal

proceedings,⁸² and she has no claim for financial support during their marriage.⁸³ The question may be asked whether the provisions of the 1996 Constitution altered the position regarding the recognition of Muslim marriages. A discussion of the relevant provisions of the 1996 Constitution follows hereafter.

4 Constitutional analysis

4.1 Interpretation of the Constitution

The supremacy of the 1996 Constitution is recognised in terms of section 2 of the 1996 Constitution. Section 2 lays down that any "law or conduct" that is inconsistent with the Constitution is invalid and any obligations imposed by the Constitution must be performed.⁸⁴ An express duty is placed on the State to "respect, protect, promote, and fulfil the rights in the Bill of Rights." In terms of section 8(1) the Bill of Rights, as contained in chapter 2 of the 1996 Constitution, applies to "all law and binds the legislature, the executive, the judiciary, and all organs of state".⁸⁵ It is clear from these provisions that any legislation and conduct must comply with the provisions of the Constitution.

In order to analyse the relevant constitutional provisions applicable to the recognition of Muslim marriages, it is important to determine how the 1996 Constitution is to be interpreted. Section 39 of the 1996 Constitution provides important guidelines. First of all, section 39 lays down that "a court, tribunal or forum" must promote the values that underlie an open and democratic society based on *human dignity, equality and freedom*.⁸⁶ Secondly, "a court, tribunal or forum" *must* consider international law and "may consider foreign law."⁸⁷ Thirdly, "every court, tribunal or forum *must* promote the spirit, purport and objects of the Bill of Rights" when it interprets legislation and develops the common law.⁸⁸ Fourthly, the existence of any other rights or freedoms that are

recognised or conferred by common law are recognised. These rights and freedoms must be consistent with the Bill of Rights.⁸⁹

It is clear from the wording of section 39 that the traditional approach to statutory interpretation applicable during parliamentary sovereignty before the commencement of the 1993 Constitution will not provide an adequate basis for constitutional interpretation.⁹⁰ Before the commencement of the 1993 and 1996 Constitutions the main function of interpretation was to determine the intention of the legislature. The intention of the legislature was mainly inferred from the text of the legislation, which led to a positivistic approach.⁹¹ The Constitution, however, requires from the courts to interpret the Constitution in order to fulfil its stated purpose. In order to achieve that the courts must promote the constitutional values embodied in the Constitution. In *Shabalala v Attorney-General Transvaal*⁹² justice Mahomed held:

(...) the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable." The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality". It is premised on a legal culture of accountability and transparency. *The relevant provisions of the Constitution must therefore be interpreted as to give effect to the purposes sought to be advanced by their enactment.*⁹³

It is, therefore, necessary for the judiciary⁹⁴ to identify and interpret the basic constitutional values underpinning the Constitution and then to give effect to them through a purposive approach.⁹⁵ In doing so, the judiciary must take public international law and may take

foreign case law into consideration. In *Park-Ross v Director, Office for Serious Economic Offences*⁹⁶ judge Tebbutt observed as follows with regard to foreign case law:

While it is indeed so that section 35(1) of the Constitution⁹⁷ provides that in interpreting the provisions of Chapter 3 thereof, the Court may "have regard to comparable foreign case law," *this should be done with circumspection because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being.*⁹⁸

4.2 Application of the Bill of Rights

4.2.1 General

Section 8 of the 1996 Constitution is referred to as the application-clause. The relevant subsections read as follows:

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

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

- in order to give effect to a right in the Bill,

must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

- may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

From the provisions of section 8 the following questions arise: Is the Bill of Rights applicable to non-recognised Muslim personal law? The answer to this question will depend on the meaning of "law" in section 8(1). If, for the purpose of this paper, it is accepted that non-recognised Muslim personal law is not "law" in terms of section 8(1) and therefore not subject to the provisions of the Constitution, the next question is how recognition to Muslim personal law should be given? A discussion of these questions and issues follows hereafter.

4.2.2 Application of the Bill of Rights to non-recognised Muslim personal law.

The Muslim population in South Africa follows a practice (or custom) of Muslim personal law in South Africa which is at this stage not formally recognised in terms of South African common law. It is therefore important to determine the applicability of the 1996 Constitution, and in particular the Bill of Rights⁹⁹ on non-recognised Muslim personal law.

Section 7(2) of the 1993 Constitution made provision for the application of the Bill of Rights to "all law in force". The Constitutional Court in *Du Plessis v De Klerk*¹⁰⁰ held that the phrase "all law in force" referred to both the South African common law

and statute law. Since Muslim personal law is not recognised in terms of the common law or legislation, it may be argued that Muslim personal law is not "all law in force", and that it was, therefore, not subject to the provisions of the Bill of Rights as contained in the 1993 Constitution.

Section 8(1) in the 1996 Constitution differs somewhat from section 7(2) of the 1993 Constitution. The phrase "in force" was omitted and section 8(2) of the 1996 Constitution refers only to "all law". The first question that comes to mind is whether this omission changes the applicability of the Bill of Rights to Muslim personal law. On the face of it, the answer appears to be in the negative. Writers such as Burns¹⁰¹ and Rautenbach and Malherbe¹⁰² are of the opinion that the Bill of Rights applies to legislation, common law and customary law. Such a viewpoint would exclude Muslim personal law from the scrutiny of the Bill of Rights.

I do not agree with these viewpoints. It is inconceivable that there might be certain areas of "law" that are not subject to the scrutiny of the Bill of Rights. Such a viewpoint makes a mockery of the supremacy of the Constitution as emphasised in section 2 of the 1996 Constitution. I submit that non-recognised Muslim personal law is indeed included in "all law" as contained in section 8(1) of the 1996 Constitution.

Such inference is supported, *inter alia*, by the text of the 1996 Constitution. Firstly, the use of "all law" in the 1996 Constitution in contrast to the use of "all law in force"¹⁰³ in the 1993 Constitution, indicates that the constitutional drafters (maybe?) envisaged that there could be law in South Africa that can not be classified as "law in force", but which nevertheless needed to be scrutinised in terms of the Bill of Rights. Muslim personal law should be a law system that is not in force, because it is not recognised in terms of South African law, but which needs to be scrutinised in terms of the Bill of Rights.

Secondly, section 2 of the 1996 Constitution recognises the

supremacy of the 1996 Constitution and invalidates "law or conduct" that is inconsistent with the Constitution. It may, therefore, be argued that non-recognised Muslim personal law is "conduct" that is subject to the Constitution.¹⁰⁴

Thirdly, section 15 of the 1996 Constitution refers to "systems" of "religious, personal or family law".¹⁰⁵ The use of the word "law" is a clear indication that the constitutional writers saw these systems as systems of "law" and, therefore, it may be argued that "all law" in section 8(1) of the 1996 Constitution also refers to these law systems as "all law" that is subject to the Bill of Rights.

Fourthly, sections 30 and 31¹⁰⁶ of the 1996 Constitution emphasise that religious and cultural rights must be exercised in a manner that is not inconsistent with any provision of the Bill of Rights. It does not make sense to say that Muslims have the right to enjoy their religion (which includes the *shari'a*), but that the enjoyment of such a right that may lead to inequality before the law, is not subject to the Bill of Rights because it is not included in the phrase "all law".

A further argument that may be advanced for the inclusion of Muslim personal law in the phrase "all law", can be found in the viewpoint of Van der Vyver¹⁰⁷ regarding the meaning of "law". He argues that "law" consists of both positive state law¹⁰⁸ and positive non-state law.¹⁰⁹ Positive state law includes legislation, custom and case law. On the other hand, positive non-state law includes, for example, the rules of a sports club or an organisation, or the rules of a family head laid down for the members of the family.¹¹⁰ If his argument was to be followed, it would mean that the rules of a religious group, such as Muslims, are positive non-state law that is "law" in terms of South African law.

Furthermore, numerous Acts in South Africa recognise certain aspects of Muslim marriages. For example, section 21(3) of the Insolvency Act¹¹¹ describes the word "spouse" to include also a wife or husband married "according to any law or custom". In

terms of section 31 of the Special Pensions Act¹¹² a "dependant" includes the spouse of a deceased to whom he or she was married "under any Asian religion". A similar provision appears in the Demobilisation Act.¹¹³ In terms of section 1 of the said Act a "dependant" includes any surviving spouse to whom the deceased was married "in accordance with the tenets of a religion". Section 1(2)(a) of the Births and Deaths Registration Act¹¹⁴ includes in the term "marriage" all marriages concluded according to the "tenets of any religion". Although it may be argued that this legislation recognises Muslim marriages for practical reasons, it is indicative of the plurality of the South African society. It is therefore difficult to motivate why Muslim marriages are recognised for certain purposes, but not when the parties of a Muslim marriage turn to the courts for the recognition of their union.

In spite of these arguments in favour of the inclusion of non-recognised Muslim personal law in the phrase "all law", it is not certain whether the courts would follow this argument. It is, therefore, recommended that recognition must be given to Muslim personal law, or at least Muslim marriages. There are at least two possible ways to recognise Muslim marriages. The first is to develop the common law to give recognition thereto.¹¹⁵ The second is to recognise Muslim marriages in terms of section 15 of the 1996 Constitution.¹¹⁶ These possibilities will be investigated hereafter.

4.2.3 The recognition of Muslim personal law

4.2.3.1 Development of the common law to recognise Muslim marriages

Over the years there have been attempts to develop the South African common law to give recognition to Muslim practices or customs followed in South Africa. However, until today, Muslim marriages are not recognised by the courts, as Muslim marriages are

potentially polygamous. *Ryland v Edros*¹¹⁷ and *Amod v Multilateral Motor Vehicle Accident Fund*¹¹⁸ serve as recent illustrations of these attempts and will be discussed hereafter.

In terms of section 8(3) and 39(2) of the 1996 Constitution the courts have the power to develop the common law. Such development "must promote the spirit, purport, and objects of the Bill of Rights." The indirect horizontal application of the Bill of Rights implies that the common law must be developed through the principle of the *boni mores*. Up to now the courts have held that Muslim marriages are potentially polygamous and are therefore *contra bonos mores*. Today however, various sections in the Constitution guarantee religious freedom. Since the "spirit, purport, and objects" of the Bill of Rights must be promoted when interpreting the common law, it may be argued that the non-recognition of Muslim marriages is unconstitutional in the light of our constitutional values of equality and freedom. According to Corbett¹¹⁹

(...) the policy decisions of our courts which shape and, at times, refashion the common law must also reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people.

In *Ryland v Edros*¹²⁰ the court was prepared to develop the common law to give recognition to the contractual consequences of a Muslim marriage. The facts of the case were as follows:¹²¹ H and W entered into a *de facto* monogamous Muslim marriage in 1976. Their marriage did not comply with the provisions of the Marriage Act¹²² and was therefore not a valid recognised marriage in terms of the said Act. H divorced W in 1992 by serving the *talāq* on her. Thereafter he instituted an action in court to evict her from the house that they shared as husband and wife. W defended the action and instituted a counter-claim for arrear maintenance,¹²³ a con-

solatory gift¹²⁴ and an equitable portion of the growth of H's estate.¹²⁵ She based her claim on the "contractual agreement" constituted by their Muslim marriage. During the pre-trial proceedings H and W agreed that W will vacate the house and that H will pay half of W's costs of her counter-claim. The only issue on which the court had to decide, was W's counter-claim.

In order to reach a decision regarding W's counter-claim, the court had to answer two preliminary questions.¹²⁶ The first question was whether it was appropriate for the court to pronounce upon religious matters.¹²⁷ Judge Farlam pointed out that the courts, in the past, did not involve themselves in religious matters "unless some proprietary or other legally recognised right was involved."¹²⁸ He argued that section 14 of the 1993 Constitution¹²⁹ may have changed the position and that the doctrine of entanglement might now be part of South African law. However, since the representatives of H and W agreed that the present issues did not require the interpretation of religious issues, there was no question of doctrinal entanglement. It was, therefore, not necessary for the court to deal with the question.¹³⁰

The second question was whether the *Ismail* case¹³¹ debarred H and W to rely on the marriage contract that forms the basis of their Muslim marriage. Judge Farlam held that public policy was a question of fact.¹³² Because public policy is based on facts, it can only change if there was a change in the facts on which it was based. He accepted that the 1993 Constitution brought about a change in the factual position of public policy in South African common law and it was possible to revise the *Ismail* case regarding the validity of a contract flowing from a Muslim marriage. The 1993 Constitution required a reappraisal of the basic values on which public policy was based.¹³³ If the "spirit, purport and objects" of the 1993 Constitution and the basic values underlying it were in conflict with the view regarding public policy, as expressed in the *Ismail* case, then the values underlying the 1993 Constitution had to

prevail.¹³⁴

The court then considered whether the underlying values of the 1993 Constitution were in conflict with the views regarding public policy as expressed in the *Ismail* case. Judge Farlam came to the conclusion that it could not be said that the contract arising from a Muslim marriage was "contrary to the accepted customs and usages which are regarded as morally binding upon *all* members of our society" or was "fundamentally opposed to *our* principles and institutions" as expressed in the *Ismail* case.¹³⁵ He based his decision on, *inter alia*, the fact that the viewpoints of only one group in our multi-cultural society were taken into consideration and found:

[I]t is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.¹³⁶

Secondly, judge Farlam referred to the principles of equality and of diversity and the recognition of the South African society as a multi-cultural society. These principles were among the values that underlined the 1993 Constitution. In his opinion these values "irradiate" the concept of public policy that the courts have to apply.¹³⁷ He differed from the viewpoint expressed in the *Ismail* case, namely that the contracts in issue were *contra bonos mores* and held:

In my opinion the "radiating" effect of the values underlying the new Constitution¹³⁸ is such that neither of these grounds for holding the contractual terms under consideration in this case to be unlawful can be supported.¹³⁹

Finally he came to the conclusion that the marriage, as well as the contract arising from the marriage, were not *contra bonos mores*. The result was that the *Ismail* case no longer "operates to preclude a court from enforcing claims such as those brought by" parties to an Islamic union. The court then proceeded to consider the counter-claim of W and awarded her arrear maintenance after considering the facts.¹⁴⁰ The question whether W was entitled to a consolatory gift stood over for later determination.¹⁴¹ Regarding the claim for an equitable share in H's estate, the court found that W could not prove that such a custom existed among the Muslim population and that her claim had to fail.¹⁴²

Although this case is seen as a landmark regarding the rights of Muslims in South Africa, its effect is limited in three ways. Firstly, no recognition has been given to Muslim marriages. It is only the marriage contract, which arises from a Muslim marriage, that is recognised as valid. Secondly, the court did not deal with polygamous Muslim marriages and it is uncertain whether the court would have followed the same route if the marriage was in fact polygamous. Thirdly, it was a decision of the Cape Provincial Division and the possibility exists that other provinces might follow a different route because of the rule of *stare decisis*.

This was what in fact happened in *Amod v Multilateral Motor Vehicle Accident Fund*,¹⁴³ which was a decision of the Durban High court. The facts of the case were as follows:¹⁴⁴ H and W entered into a Muslim marriage in 1989. Their marriage did not comply with the requirements of the Marriage Act¹⁴⁵ and was therefore not regarded as a valid civil marriage. H was killed in a motor accident in 1993 and W lodged a claim for compensation for loss of support by reason of H's death against the multilateral Motor Vehicle Accident Fund (MMV). The MMV denied liability on the ground of the fact that the marriage between H and W were a void Muslim marriage. W contended that H had a contractual obligation to support her.¹⁴⁶

The question before court was whether the MMV was legally liable to compensate W for her loss of support. In terms of South African common law such a liability would exist if H were, during his life, under a common law duty to support W. In terms of section 31 of the Black Laws Amendment Act¹⁴⁷ a partner in a customary marriage may also claim for loss of support as a result of the death of the breadwinner. However, due to the *Ismail* case, which held that Muslim marriages were *contra bonos mores*, such a duty did not exist if the parties were married in terms of Islamic law.¹⁴⁸

W's council argued, first of all, that there has been a change in public policy regarding the conclusion of Muslim marriages, which have changed the traditional position. Judge Meskin found, however, that the onus to prove such a change rested on W and that she could not prove that there has been a change of policy since the *Ismail* case.¹⁴⁹

Secondly W's council argued that the court should develop the common law to recognise a duty to support arising out of a Muslim marriage.¹⁵⁰ Judge Meskin held that, although the facts of the case occurred before the commencement of the 1996 Constitution, it was in the interest of justice to apply the 1996 Constitution to the facts of the case.¹⁵¹ He interpreted sections 39(2), 8(2) and 8(3) of the 1996 Constitution and came to the conclusion that section 39(2) does not give a general power to the courts to develop the common law "to promote the spirit, purport, and objects of the Bill of Rights." The court argues that, if section 39(2) is read with sections 8(2) and (3), it is clear that the development of the common law the legislature had in mind is development

(...) "in order to give effect to a right in the Bill (...) to the extent that legislation does not give effect to that right" (...). It is not intended that the Court is to have a general power of development of the common law to "promote the spirit, purport and objects of the Bill of Rights" independ-

ently of giving effect, when applying a provision of the Bill of Rights to a natural or juristic person, to "a right in the Bill (...) to the extent that legislation does not give effect to that right."¹⁵²

W's council argued that that the right to equality¹⁵³ that includes the right not to be unfairly discriminated against on the ground of marital status or religion, and the right to dignity are relevant to the facts of the case.¹⁵⁴ Taking the facts of the case into consideration, judge Meskin agreed that "a refusal to recognise the contractual duty of support upon which [W] relies as being sufficient to ground the liability which she seeks to enforce constitutes, indeed, a violation" of these rights. He agrees that such refusal results in the unequal treatment of persons before the law, that is between females lawfully married in terms of the civil law to a deceased breadwinner and those married illegally to a deceased breadwinner in terms of non-recognised Muslim law. Although such refusal results in the unequal treatment before the law, the question is, however, whether the court has the power to develop the common law by elimination of a principle that already forms part of it.¹⁵⁵ With reference to *Du Plessis v De Klerk*¹⁵⁶ judge Meskin held:

As I read section 8(3)(a), the intention is that if there is silence in the common law with regard to the giving effect to a right in the Bill, and legislation does not give effect to such right, the court must amplify the common law to eliminate such silence. This is not an intention that the court must, in order to give effect to a particular right, eliminate or alter an existing principle of the common law which affects the operation of such right, irrespective of the manner in which this occurs. *The intention is that such alteration or elimination is to remain the function of the legislature.*¹⁵⁷

The court finally came to the conclusion that it may not alter the existing law regarding a claim for loss of support to include a duty to support in terms of a contractual relationship resulting from a Muslim marriage, and W's claim was denied.¹⁵⁸

It is clear from the judgement that the court read its power to develop the common law as restrictive, i.e. not to eliminate principles that already forms a part of it. Such an attitude creates the impression that the courts, who are supposed to be the protectors of fundamental rights, are powerless to enforce or protect those rights contained in the Bill of Rights. The 1996 Constitution provides the opportunity to adapt the common law to give recognition to Muslim marriages. This developmental function of the courts should not be read as restrictive, i.e. to eliminate the common law, but to adapt it to new circumstances. The distinctive character of common law has always been its ability to change through the ages. However, if it is not kept in mind that the change will not be always acceptable to the community, it will be mere paper law. This may also be one of the reasons why the courts are reluctant to interfere with *de facto* situations and why they leave it to the legislature to effect change. The courts may however not ignore their duty as protector of an individual's fundamental rights in terms of the Constitution by leaving it to the legislature to effect change.

Another disappointing aspect of the decision is the court's approach regarding an individual's constitutional right to equality. Section 9 of the 1996 Constitution reads as follows:

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

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

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

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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

It is clear from the wording of section 9 that the right to equality is very wide. An individual is not only entitled to be treated equal before the law, but also has the right to "equal protection and benefit of the law." Furthermore, section 9(4) prohibits discrimination in the private sphere, which put the question of equality clearly outside the scope of the horizontal and vertical debate currently going on in South Africa.¹⁵⁹ Surely, the unequal treatment of married Muslim and other couples cannot be proven fair as envisaged in terms of section 9(5)?

After the decision in *Amod v Multilateral Motor Vehicle Accident Fund*¹⁶⁰ has been delivered, W applied for leave to appeal directly to the Constitutional Court.¹⁶¹ The Constitutional Court found that the crucial question in the application before the court was whether the common law should be developed to allow the applicant to claim damages for support. Since it was the viewpoint of the Constitutional Court that this question is one which falls primarily within the jurisdiction of the Supreme Court of Appeal, the application for leave to appeal was dismissed. Although it could not be said that the Constitutional Court was misdirected in its

findings, the reluctance (or caution) of the courts to apply the Bill of Rights directly to private relationships is illustrated. The reluctance of some of the courts to deal with matters such as adapting the common law to the new constitutional order and to forgo the challenge to bring about legal renewal may frustrate claimants and give rise to unnecessary costs for the individual.

4.2.3.2 Application of the Bill of Rights to the common law

In the previous paragraph, the reluctance of some of the courts to develop the common law to give recognition to Muslim marriages was illustrated. The courts are faced, however, with another problem and that is the scope of application of the Bill of Rights to the common law. The South African common law is traditionally divided into public and private law.¹⁶² The private law regulates relationships between private individuals and is therefore concerned with horizontal relationships. On the other hand, the public law regulates relationships between the State and individuals and is therefore concerned with vertical relationships.¹⁶³ It is important to determine whether the 1996 Constitution, and in particular the Bill of Rights, applies only vertically,¹⁶⁴ or vertically and horizontally.¹⁶⁵ Writers such as Van der Vyver¹⁶⁶ argue that the question of vertical and/or horizontal application of the Bill of Rights is irrelevant. However, since the Constitutional Court in *Du Plessis v De Klerk*¹⁶⁷ used the terms “horizontal” and “vertical” in its judgement, the terms are most likely here to stay.

The application of the Bill of Rights on the terrain of the private law has been the subject of an ongoing debate between legal academics and judicature.¹⁶⁸ Regarding the application of the Bill of Rights in the 1993 Constitution, the majority of the Constitutional Court in *Du Plessis v De Klerk*¹⁶⁹ held that the Bill of Rights is in general only applicable to vertical relationships, that is between individuals and organs of the state.¹⁷⁰ However, the backdoor for

indirect horizontal application in terms of section 35(3)¹⁷¹ was left open.¹⁷² Furthermore, it was argued, without giving examples, that there might be circumstances where it could be said that the Bill of Rights has direct horizontal application.¹⁷³

Although the popular viewpoint is that the Bill of Rights contained in chapter 2 of the 1996 Constitution has vertical and direct horizontal application,¹⁷⁴ the debate regarding the horizontal and/or vertical application is far from over.¹⁷⁵ For instance, in *Amod v Multilateral Motor Vehicle Accident Fund*¹⁷⁶ the late judge Meskin argued:

As I interpret the new Constitution, and more particularly sections 8(2) and 8(3) read with sections 39(2) thereof, the intention of the legislature is that the operation of section 39(2) is to be no different from that of section 35(3) of the interim Constitution as elucidated in the *Du Plessis* case (*supra*), that is as enabling the Court *indirectly to apply the Bill of Rights*,¹⁷⁷ as contained in Chapter 2, in all litigation involving an organ of the State (such as the instant case) and all litigation involving private individuals.¹⁷⁸

In spite of the arguments advanced in favour of a direct horizontal application of the Bill of Rights, section 8 of the 1996 Constitution does not necessarily support such an inference. Although the phrase “all law” in section 8(1) may imply direct application of the Bill of Rights to private relationships, sections 8(2),¹⁷⁹ 8(3) and 39(3) seem to contradict such a deduction. Section 8(2) qualifies the application of the Bill of Rights in the case of natural and juristic persons and lays down that the Bill of Rights “binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the rights and of any duty imposed by the right.” It may be argued that section 8(2) restricts the horizontal application of the

Bill of Rights to an indirect application on horizontal level. This argument may be explained as follows: According to section 8(2) the Bill of Rights is only binding on natural and juristic persons if "it is applicable" to the "extent that it" is applicable. To decide whether the Bill of Rights is applicable and to which extent, the nature of the rights and any duty imposed by the rights must be taken into account. Such a decision would, it appears, require a policy decision from the court.¹⁸⁰ There have not been any judgments on this issue so far and it is uncertain how the courts will interpret the provisions of section 8(2).

If the court comes to the conclusion that a provision of the Bill of Rights is applicable to a natural or juristic person, after taking into account the "nature of the rights and of any duty imposed by the right", section 8(3) comes into operation. Section 8(3) confines the application of the Bill of Rights and the developmental function of the courts to the common law. Viewed in this context, the application and development of the common law appear to be nothing more than an indirect horizontal application of the Bill of Rights proposed by the Constitutional court in *Du Plessis v De Klerk*.¹⁸¹

For example: The following clause appears in T's will: "I bequeath my farm to my daughter A on condition that she may not marry a person of another race. If she does, the farm must go to my brother B." One year after T's death, A wants to marry someone of another race but she also does not want to lose the farm. She approaches the court to apply for an order to declare the condition unconstitutional. In terms of section 8(1) it must be decided if the execution of a will falls within the scope of "all law". If the answer is yes the court must apply the Bill of Rights in resolving the dispute before the court. Since the relationship is horizontal of nature, the court has to decide whether the Bill of Rights is applicable in terms of section 8(2) of the Constitution by taking into consideration the nature and duty of the right in question. If the court found, after

making a policy decision concerning the applicability of the Bill of Rights to the dispute, that the Bill of Rights is applicable to the dispute, the provisions of section 8(3) comes into operation. Section 8(3) requires of the court to assess the common law position. What then is the position of T and A in terms of common law? The freedom of the testator to make any provisions regarding his estate is encompassed in the maxim *voluntas testatoris servanda est*. In this he or she is only constrained by a few statutory and common-law restrictions.¹⁸² In terms of the common law he or she may not make provisions which are illegal, vague, impossible, offensive or *contra bonos mores*. The question then arises whether it is *contra bonos mores* for a testator to restrict his beneficiaries' choice of a partner in matrimony on the ground of race. In *Aronson v Estate Hart* the court found that a clause in a will, providing that a beneficiary will forfeit a benefit if he or she does not marry a person of a certain religion (or as in the example of a certain race), is valid. Today, however, the constitutional entrenched right to equality precludes discrimination on the basis of race. Since the "spirit, purport, and objects" of the Bill of Rights must be promoted when interpreting the common law, it may be argued that the "race-clause" in dispute is unconstitutional in the light of our constitutional values of equality and non-racism. The court, therefore, has to develop the common law through the principle of *boni mores* to declare the condition in dispute unconstitutional. Whether the courts will go so far as to infringe on a testator's freedom of testation in the private sphere remains to be seen.

4.2.3.3 Recognition in terms of section 15 of the 1996 Constitution

In the previous paragraphs it was illustrated that the courts are reluctant to develop the common law to give recognition to Muslim marriages. Furthermore, the Bill of Rights scope of application to

the common law is uncertain. Therefore, it is suggested that the legislature should give recognition to Muslim personal law by means of legislation.

Section 15 of the 1996 Constitution recognises freedom of religion and provides that legislation may recognise religious marriages and religious personal law systems, which include Muslim marriages and Muslim personal law. However, section 15 does not recognise a right to have Muslim personal law or Muslim marriages recognised. Section 15 reads as follows:

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Religious observances may be conducted at state or state-aided institutions, provided that

those observances follow rules made by the appropriate public authorities;
they are conducted on an equitable basis; and
attendance at them is free and voluntary.

- (3) (a) This section does not prevent legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law; or 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.

Recognition of Muslim personal law in terms of section 15(3)(a) of the 1996 Constitution must be consistent with the Bill of Rights. The

implication is that Muslim personal law will only be recognised to the extent that it conforms to the "spirit, purport, and objects" of the Bill of Rights. The drafting of legislation that recognises Muslim personal law or at least Muslim marriages will not be an easy task. There are numerous areas of potential conflict. From a western point of view Muslim personal law often discriminates against women.¹⁸³ For example, a woman inherits only half of what her male counterpart inherits;¹⁸⁴ it is easier for a husband to divorce his wife than for a wife to divorce her husband;¹⁸⁵ the wife does not participate in the marriage ceremony, and polygamy discriminates against women.¹⁸⁶ If all "discrimination" is not eliminated, recognition of Islamic personal law by means of legislation will not be in compliance with the provisions of section 15(3)(b) or other provisions of the 1996 Constitution. On the other hand, if Islamic personal law is developed in order to eliminate all forms of discrimination, before recognition is given, it may be argued that such recognition does not afford the Muslim population equal protection before the law envisaged in terms of section 9(1) of the 1996 Constitution. To sum up: Section 9(1) of the 1996 Constitution emphasises that everybody is "equal before the law and has the right to equal protection and benefit of the law." According to section 9(2) equality includes the "full and equal enjoyment of all rights and freedoms." The right not to be unfairly discriminated against on certain grounds, such as gender, sex, marital status, religion and culture, is provided for in section 9(3). Recognition of Muslim personal law, as it is, will result in discrimination against women. Non-recognition of Muslim personal law, on the other hand, may be regarded as unfair discrimination on the ground of religion. If, however, Muslim personal law is adapted to conform with the provisions of the 1996 Constitution, the possibility exists that the change will not be acceptable to the Muslim community, which will result in the legislation becoming mere paper law.

5 Concluding remarks

Muslim marriages and Muslim personal law are not recognised in terms of South African common law. The 1996 Constitution gives courts the opportunity to adapt the common law to "promote the spirit, purport, and objects of the Bill of Rights."¹⁸⁷ The development function of the courts should not be read as restrictive, that is to eliminate the common law, but to adapt it to new circumstances. The distinctive character of the common law has always been its ability to adapt to changing circumstances.

The 1996 Constitution recognises, amongst other rights, the cultural diversity of South Africa by protecting cultural and religious rights. Such change in the public policy regarding the recognition of cultural diversity in South Africa should be reflected in the decisions of the courts. The courts may not ignore their newly found duty as protector of an individual's fundamental rights by leaving it to the legislature to effect change. Undoubtedly the courts are placed in a difficult position. If they develop the common law to recognise Muslim marriages as valid marriages, it may lead to discrimination against women. On the other hand, if they do not recognise Muslim marriages as valid marriages, they do not afford equal protection to Muslims before the law.

The 1996 Constitution makes provision for the recognition of traditional and religious marriages and traditional and religious personal law systems by means of legislation. In order to reach legal certainty regarding the validity of Muslim marriages, legislative recognition should be given to legalise Muslim marriages in South Africa. The Recognition of Customary Marriages Act¹⁸⁸ serves as example of such an Act. It recognises polygamous customary marriages as valid marriages. It must be remembered that any legislation recognising Muslim marriages or Muslim personal law will have to stand the test of constitutionality before it will be accepted. Furthermore, if the recognition is not acceptable to the

Muslim community, the result will be mere paper law.

These are but a few of the issues regarding the recognition of Muslim personal law, or at least, of Muslim marriages that will have to be addressed in the immediate future of a new South Africa.

NOTES

- 1 *Ismail v Ismail* 1983 1 SA 1006 (A). The Recognition of Customary Marriages Act 120 of 1998 gives recognition to polygamous customary marriages. Despite section 15(3) of the Constitution of the Republic of South Africa 108 of 1996 (hereinafter referred to as the 1996 Constitution) similar legislation has not been issued for the recognition of religious marriages. Although the President signed the Act on 20 November 1998, it will only come into operation on a date announced in the Gazette. To this moment, no date has been published yet. The development of South African common law, as the official legal system of South Africa, is very interesting. In short its development started with the establishment of a refreshment station by the Dutch East India Company (known as the "VOC") in 1652. As a natural result of the Dutch colonisation of the Cape the law applicable to the settlers in the Cape was the Roman-Dutch law, which was the official law in the Netherlands at that stage. The Roman-Dutch law applicable in the Cape started, however, to expand and develop in another direction as the Roman-Dutch law applied in the Netherlands. English law also influenced it after British occupation in 1806. The influence was primarily in the form of legislation and court decisions. Today the South African common law is a conglomerate of Roman-Dutch law, English law and legislation. For a further discussion of the history of South African common law, see Kleyn and Viljoen, *Beginners Guide for Law Students*, 2nd ed., Kenwyn: Juta, 1998, chapter 3; Du Plessis,

- Inleiding tot die Reg*, Kaapstad: Juta, 1990, 46 *et seq.*
- 2 Hahlo, *The South African Law of Husband and Wife*, 5th ed., Cape Town: Juta, 1985, 29.
 - 3 The legal requirements for a valid marriage according to the Roman-Dutch law are contractual capacity of the spouses, consensus between the spouses and a lawful marriage. See Cronjé, *Die Suid-Afrikaanse Persone- en Familiereg*, 3rd ed., Durban: Butterworths, 1994, 153-171. Furthermore, certain formalities as prescribed in the Marriage Act 25 of 1961 must be complied with. These formalities include, *inter alia*, solemnisation of the marriage by a competent marriage officer in terms of section 11(1), producing of identity documents and/or sworn affidavits by the parties in terms of section 12, following of certain procedures at the marriage ceremony in terms of section 29 and registration of the marriage in terms of section 29A. See Clark, "History of the Roman-Dutch law of marriage from a socio-economic perspective" in Visser (ed.), *Essays on the History of Law*, Cape Town: Juta, 1989, 159-212 for a detailed discussion on the history of marriage in South Africa.
 - 4 Hahlo, *The South African Law of Husband and Wife*, 1985, 21.
 - 5 *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A).
 - 6 25 of 1961. For example in terms of section 11 of the Act a marriage must be solemnised by an appointed marriage officer. If the *imām* is therefore not an appointed marriage officer, he would not be in a position to solemnise a valid marriage in terms of the Act. Such a person may, however, receive an appointment as a marriage officer. See Sinclair, *The Law of Marriage*, Kenwyn: Juta, 1996, 263-266.
 - 7 The non-recognition of Muslim marriages contracted abroad has various implications for Muslims who live in South Africa. Their marriages are not recognised and therefore the normal

- legal effects of such marriages are also not recognised. See § 2 and 3 for a discussion of this dilemma.
- 8 Constitution of the Republic of South Africa 200 of 1993 (hereinafter referred to as the 1993 Constitution).
 - 9 See § 4.2.3.3 for the wording of section 15. Freedom of religion was recognised in terms of section 14 of the 1993 Constitution.
 - 10 Freedom of religion, belief and opinion.
 - 11 Right to language and culture.
 - 12 Rights of cultural, religious and linguistic communities.
 - 13 Makes provision for the establishment of the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities.
 - 14 Describes the objects and functions of the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, for example, one of the main objects of the Commission is to promote respect for the rights of cultural and religious communities.
 - 15 For a discussion of these provisions see § 4.
 - 16 There has been constant pressure on the Government to recognise Muslim personal law. See Moosa, *An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with regard to the Recognition and Implementation of Muslim Personal Law (MPL)*, University of Western Cape: LLM-thesis, 1996, 41 *et seq.* (hereinafter referred to as *An analysis*). Muslim personal law includes the marriage and succession laws of Muslims. A Commission of Inquiry (COI) into Muslim Personal Law (MPL) is currently investigating Muslim personal and family laws in South Africa. The mandate of the COI is: "To explore ways and means of recognising, implementing and administering MPL in South Africa with due respect to the requirements of Shari'a herein and to call for evidence, representations, memoranda

etc. from the Muslim public, Muslim organisations herein and, if so required, information from such State instances as may be deemed in the interest and supportive to the work of the COI, and to formulate such legislation, including constitutional amendments as may be required for the full, complete and unfettered recognition, implementation and administration of the MPL." (Undated letter of the COI that has been sent to various institutions during 1997 to invite memoranda regarding the abovementioned matter - Project 59 of the *South African Law Commission*).

- 17 The position was the same under the 1993 Constitution. See De Waal, Currie and Erasmus, *The Bill of Rights Handbook*, 2nd ed., Kenwyn: Juta, 1999, 295. See also § 4.2.2.3.
- 18 Section 9(1) confirms that every individual "is equal before the law and has the right to equal protection and benefit of the law." Section 9(2) deals with measures to effect so-called "affirmative action". Section 9(3) prohibits unfair discrimination by the State on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Section 9(4) prohibits unfair discrimination on the same grounds between individuals and authorises the National legislature to enact legislation to prohibit unfair discrimination. In terms of section 9(5) discrimination in terms of subsection (3) is unfair unless it is proven that the particular discrimination is fair. The onus is thus on the person/state who alleges that the discrimination is fair.
- 19 Section 187 read with section 185(1)(d) makes provision for the establishment of a Commission for Gender Equality. One of the functions of the Commission is to promote respect for gender equality and the protection thereof.
- 20 According to Goolam, "Gender equality in Islamic family law," in: *Law in Motion*, Paper delivered at the 1st World Law

Conference, 9-12 September 1996, Brussels, 752-753, cognisance must be taken of the different value systems of the various communities before human rights issues are debated. He argues: "In order to understand the approach adopted by any particular culture or civilisation in respect of the issue of gender equality, it is necessary to understand the culture's or civilisation's total approach to human existence. In this way, a solution to a specific problem is correctly viewed in its larger and complete setting."

- 21 See § 2.
- 22 See § 3.
- 23 See § 4 and 5.
- 24 Now Indonesia.
- 25 The province was renamed KwaZulu-Natal.
- 26 Much has been written about the settlement of Muslims in South Africa. For a brief summary see Moosa, *An Analysis*, 35 *et seq.*
- 27 *Bronn v Frits Bronn's Executors* (1860) 3 Searle 313; *R v Sukina* 1912 TPD 1079; *Esop v Union Government (Minister of the Interior)* 1913 CPD 133. In the former Transvaal in *R v Fatima* 1912 TPD the court held that "wife" included the wife of an Indian immigrant who was married in terms of religious rites that was not recognised as a valid marriage in terms of the laws of Transvaal. "Wife" was, however, restricted to only one wife of an Indian immigrant. In terms of section 1 of the Births and Deaths Registration Amendment Act 40 of 1996 the children born from such an invalid marriage are no longer regarded as extra-marital. Although section 2 of the same Act defines "marriage" as to include a religious marriage, it does not give recognition to Muslim marriages.
- 28 For example in the former Cape colony section 4 of the Marriage Act 16 of 1860 (C) made provision for marriage officers to be appointed to solemnise monogamous Muslim

marriages. See *Mashia Ebrahim v Mahomed Essop* 1905 TS 59. The particular Act was repealed by the Marriage Act 25 of 1961. In terms of section 4(e) of the Immigration Act 30 of 1906 (C) provision was also made for the exemption of the wife of an exempted Indian immigrant. In *Esop v Union Government (Minister of the Interior)* 1913 CPD 133 the court held that "wife" in terms of the said Act did not include a woman married in terms of Islamic law which recognises polygamy. The particular Act was repealed by the Immigrants Regulation Act 22 of 1913. In the former Natal the marriages of Muslims were regulated in terms of Law 19 of 1881 (N). The Indian Immigration Law 25 of 1891 (N) made provision for the registration of the marriages of Indian immigrants. These two acts were both repealed by the Marriage Act 25 of 1961. No provision was made in the former Transvaal and Orange Free State for the regulation of Muslim marriages. For a detailed historical discussion of the various legislation applicable to marriages in South Africa see an earlier edition of Hahlo, *The South African Law of Husband and Wife*, 2nd ed., Cape Town: Butterworths, 1963, 16 *et seq.*, 62 fn 2, 583-585.

29 Section 68 of the Indian Immigration Law 25 of 1891 (N) as repealed by the Marriage Act 25 of 1961.

30 Section 66 of the Indian Immigration Law 25 of 1891 (N) as repealed by the Marriage Act 25 of 1961.

31 22 of 1913. It commenced on 1 August 1913. In terms of section 5 of the Admission of Persons to the Union Regulation Amendment Act 60 of 1961 the title of this Act was changed to the Admission of Persons to the Union Regulation Act 22 of 1913. The Admission of Persons to the Republic Regulation Act 59 of 1972 repealed this act, which was in turn repealed by the Aliens Control Act 96 of 1991.

32 See section 29 read with the first schedule of the Act for the laws that were repealed.

33 22 of 1914.

34 The marriage had to be recognised as a valid marriage under the tenets of an Indian religion. See section 3(2)(a)-(b) for further qualifications that existed. "Wife" included, however, only any one woman to whom the exempted male was married. Hahlo, *The South African Law of Husband and Wife*, 1963, 585.

35 Section 1.

36 Section 2.

37 Section 1(2).

38 80 of 1971.

39 1917 AD 302.

40 306-307.

41 35 of 1905.

42 307.

43 Own emphasis. 66 years later the court in *Ismail v Ismail* 1983 1 SA 1006 (A) 1026A-B concurred with this judgement. However, the court in the *Ismail* case did not say that a Muslim marriage was *contra bonos mores* in a narrow sense, that is immoral, but held that such a union is *contra bonos mores* in a wider sense, that is "contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society" or "as being fundamentally opposed to our principles and institutions." This is a clear shift in the court's attitude towards the reason for polygamous marriage's invalidity from being unchristian to it being against accepted customs and usages.

44 307-308. It is irrelevant if such a marriage is *de facto* monogamous or not.

45 25 of 1961. See the schedule to the Act for all the laws repealed.

46 *Ismail v Ismail* 1983 1 SA 1006 (A) 1021A.

47 It has been found that the clause "according to Christian,

- Jewish or Mohammedan rites or the rites of any Indian religion" does not authorise the conclusion of potentially polygamous unions in terms of Islamic law. See *Ismail v Ismail* 1983 1 SA 1006 (A) 1021A-C.
- 48 Hahlo, *The South African Law of Husband and Wife*, 1985, 31-32. The Act also prescribes other formalities for valid marriages.
- 49 In 1991 there were 389 573 Hindus, 338 142 Muslims and 67 654 Jews from a population of 30 986 920 people in South Africa. See *Central Statistical Services Report* 03/01/22(91), Population Census 1991. The numbers for the 1996 census are not available yet. There are also other statistics available that differ somewhat from the statistics of the Central Statistical Services. The difference is, however, of no great importance. See Moosa, *An Analysis* 39-40; Haron, *Muslims in South Africa: an annotated bibliography*, Cape Town: South African Library, 1997, 1.
- 50 Moosa 1995 A Fundamental Document Of Human Motivation, Relationships And Human Endeavours From An Islamic Perspective [found on internet], Hyperlink <http://www.constitution.org.za/cgi-bin/vdkw-cgi/xfee016d6-327/Search/x334384/9!#HLO> [Date of use 23 May 1995], 19-22.
- 51 See, *inter alia*, *Moola v Aulsebrook* NO 1983 1 SA 687 (N); *Ex Parte Azar* 1932 OPD 107; *Ex Parte L* 1947 3 SA 50 (C). However, in *Solomons v Abrams* 1991 4 SA 437 (W) the court refused to declare a Muslim marriage as a putative marriage. The court held that only a ceremony that has been duly solemnised in terms of the Marriage Act 25 of 1961 could be regarded as a valid marriage.
- 52 Hahlo, *The South African Law of Husband and Wife*, 1985, 111-117.
- 53 In the previous paragraph it was explained that the Marriage Act 25 of 1961 came into operation to consolidate all the

- existing marriage and immigration laws. This Act is still applicable today. It prescribes certain formalities to be complied with if parties want to conclude a valid marriage.
- 54 1983 1 SA 1006 (A).
- 55 108F-1019G.
- 56 If the *ṭalāq* is communicated three times at certain stages by the husband to the wife the marriages comes to an end.
- 57 She alleged that H did not maintain her during the last 2 years and 10 months of their marriage.
- 58 *'Idda* is a waiting period that starts after the husband has pronounced the divorce, which is more or less three months after the divorce. Moosa, "The interim and final Constitutions and Muslim Personal law: Implications for South African Muslim women," 1998, *StellLR* 198.
- 59 The *Moulana* (Ar. *mawlānā* "our lord") is an Islamic Authority in Pretoria, South Africa, whose judgement is only binding upon the conscience of Muslims in South Africa.
- 60 1019E-F.
- 61 1019F-G.
- 62 Sections 2, 3, 11 and 29(2) of the Act.
- 63 1020D-F.
- 64 1020H *et seq.*
- 65 1021B-D.
- 66 1021D-E.
- 67 1021H-1022A.
- 68 1022B.
- 69 1022G.
- 70 1022B-1023H.
- 71 1023H-1024C.
- 72 1024C-D.
- 73 1024D-1026B.
- 74 The concept of polygamous marriages is not unfamiliar to the South African law system. Discretionary recognition has been

given to polygamous customary law unions in terms of section 1(1) of the Law of Evidence Amendment Act 45 of 1988. Furthermore, the Recognition of Customary Marriages Act 120 of 1998 that gives formal recognition to polygamous customary law unions has been approved. The Act will come into operation upon a date fixed by the President.

75 For example, the Muslim wife does not participate in the marriage ceremony and the Muslim husband may terminate the marriage unilaterally, whilst the Muslim wife is not in the position to do so (1024G-H). Although this might be true, the non-recognition of the marriage *in casu* also resulted in the prejudice of the wife in that she could not claim for maintenance.

76 1026B.

77 1026-1027.

78 25 of 1961.

79 *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D).

80 *Ismail v Ismail* 1983 1 SA 1006 (A).

81 81 of 1987. In terms of the Act the "spouse" of a deceased person inherits from the deceased's intestate estate if the latter dies intestate. "Spouse" includes only a spouse to whom the deceased was married in terms of civil law, and spouses of Muslim marriages are not regarded as spouses in terms of the Act. *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Dauids v The Master* 1983 1 458 (C).

82 In terms of section 195 of the Criminal Procedure Act 51 of 1977 a wife or husband may not be compelled to testify against each other in a criminal case. A Muslim wife or husband is, however, not entitled to invoke such privilege. See *S v Johardien* 1990 1 SA 1026 (C).

83 Cachalia, *The Future of Muslim Family Law in South Africa*, Johannesburg University of the Witwatersrand: Centre for

Applied Legal Studies Occasional Paper 12, 22.

84 Section 2 of the 1996 Constitution.

85 Section 8(1) of the 1996 Constitution.

86 Section 39(1)(a). Own emphasis. These values are repeated in the preamble of the 1996 Constitution, as well as sections 1, 7(1), 36(1) and 195(1) of the 1996 Constitution.

87 Section 39(1)(b) and (c). Own emphasis. "Must" indicates an obligation and "may" indicates discretion.

88 Section 39(2). Own emphasis. See the discussion in § 4.2.3.

89 Section 39(4).

90 *Qozoleni v Minister of Law and Order* 1994 1 BCLR 75 (E) 80D *et seq.*; *S v Acheson* 1991 2 SA 805 (NMHC); Cachalia *et al.*, *Fundamental Rights in the New Constitution*, Kenwyn: Juta, 1994, 4-5.

91 Referred to as the intention theory. See Du Plessis, *The Interpretation of Statutes*, Durban: Butterworths, 1986, 35-39.

92 1995 12 BCLR 1593 (CC). Although the court interpreted the provisions of the 1993 Constitution, the arguments regarding the interpretation of a Constitution are still relevant regarding interpretation of the 1996 Constitution.

93 1605C-F. Own emphasis.

94 Especially the Constitutional court.

95 In a Canadian case *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* 1990 1 SCR 425 this approach was explained as follows: "[I]t is necessary to ascertain the values which that provision was designed to protect (...). The purposive approach best achieves this end (...). Charter methodology should not be circumvented by the mechanical application of one of the traditional rules of statutory interpretation." In *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 359-360 it was stated that "[t]he meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it

was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be (...) a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection." The purposive approach was also followed in *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (E); *Zantsi v The Chairman of the Council of State* 1994 6 BCLR 136 (Ck) 161 I; *S v Marwane* 1982 3 SA 717 (A) 748H; *Khala v Minister of Safety and Security* 1994 4 SA 218 (W); *Park-Ross v Director: Office for Serious Economic Offences* 1995 1 SACR 530 (C) 548I. See also Cachalia *et al.*, *Fundamental Rights in the New Constitution*, 9-12; Du Plessis, "The jurisprudence of interpretation and the exigencies of a new constitutional order in South Africa," *Acta Juridica* 1998, 14-16 discusses five methods of constitutional interpretation, namely grammatical, systematic, teleological, historical and comparative.

- 96 *Park-Ross v Director: Office for Serious Economic Offences* 1995 1 SACR 530 (C).
- 97 Own emphasis. The court interpreted the 1993 Constitution. Although the 1993 Constitution was repealed by the 1996 Constitution, a great deal of the principles of interpretation applicable to the 1993 Constitution is still applicable to the 1996 Constitution.
- 98 Own emphasis. This cautionary rule was approved in *Berg v Prokureur-Generaal van Gauteng* 1995 11 BCLR 1441 (T)

- 1445G *et seq.* See also *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (E) 80C; *Nortjé v Attorney-General of the Cape* 1995 2 BCLR 236 (C).
- 99 As contained in chapter 2 of the 1996 Constitution.
- 100 1996 5 BCLR 658 (CC) 682. It must, however, be borne in mind that the court did not deal with religious matters in this case.
- 101 *Administrative Law under the 1996 Constitution*, Durban: Butterworths, 1998, 15.
- 102 Rautenbach and Malherbe, *Staatsreg*, 2nd ed., Durban: Butterworths, 1996, 306.
- 103 Own emphasis.
- 104 The Bill of Rights forms part of the Constitution as a whole and therefore it can be argued that the Bill of Rights will also be applicable to conduct which is not law in terms of section 8.
- 105 Own emphasis.
- 106 These sections recognise the religious and cultural diversity of the South African population.
- 107 Van Zyl and Van der Vyver, *Inleiding tot die Regswetenskap*, 2nd ed., Durban: Butterworths, 1982, chapters 7-9.
- 108 "Staatlike positiewe reg" as he calls it.
- 109 "Nie-staatlike positiewe reg" as he calls it.
- 110 Van Zyl and Van der Vyver, *Inleiding tot die Regswetenskap*, 273.
- 111 24 of 1936.
- 112 69 of 1996.
- 113 99 of 1996.
- 114 51 of 1992.
- 115 See § 4.2.3.1.
- 116 See § 4.2.3.3.
- 117 1997 1 BCLR 77 (C).
- 118 1997 12 BCLR 1716 (D).
- 119 *The Law of Succession in South Africa*, Cape Town: Juta, 1980, 67.

- 120 1997 1 BCLR 77 (C). The case was decided when the 1993 Constitution was still in operation. However, section 14 of the 1993 Constitution is similar to section 15 of the 1996 Constitution and the decision is still of relevance for the interpretation of the 1996 Constitution.
- 121 696C-697G.
- 122 25 of 1961.
- 123 For the period of their marriage.
- 124 W alleged that the divorce was without just cause. 696G.
- 125 W alleged that she contributed labour, effort and money to H's estate and that she is therefore entitled to an equitable portion thereof. 696H.
- 126 701G-702A.
- 127 Judge Farlam refers to it as the "doctrine of entanglement."
- 128 703E. Quoted from *Allen v Gibbs* 1977 3 SA 212 (SE) 218A-B.
- 129 The wording of section 13 of the 1993 Constitution is similar to the wording of section 15 of the 1996 Constitution. See § 4.2.4.3.
- 130 703B-J. It may, however, be argued that the court did indeed interpret religious issues by choosing the evidence of one expert witness over the other on the issue of division of property between the parties (715-714).
- 131 *Ismail v Ismail* 1983 1 SA 1006 (A). For a discussion of the facts of the case see § 3.
- 132 704B. He referred to the 1993 Constitution that was the beginning of the new South African constitutional dispensation. According to Mahomed, "*Ryland v Edros* [1996] 4 All SA 557 (C)," Casenote 1997 *De Rebus* 189 it is clear that the concept of public policy is not a vague and arbitrary concept that is "open to abuse by an executive-minded judiciary. Rather it operates within definite parameters and is guided by the interpretation provision" of the 1993 Constitution.

- 133 704D.
- 134 705.
- 135 707E.
- 136 707G.
- 137 707H-709A.
- 138 The 1993 Constitution.
- 139 709C.
- 140 711D-714F. W claimed arrear maintenance from January 1977 (date of marriage) to 14 January 1993 (third month after third *ṭalāq* was served). The court pointed out that the parties concluded a contract in terms of which they agreed that their marriage should be governed by Islamic law. It was common cause that the rules of the Shāfi'ī school is relevant in this case. Under the Shāfi'ī school H is obliged to maintain his wife during their marriage and for a period of three months after *ṭalāq*. It is therefore clear that H and W agreed (in terms of their marriage contract) that H would maintain W during their marriage and for three months after *ṭalāq*, and that any unpaid maintenance would accumulate as a debt, and that prescription of such a debt would not be possible. The court held, however, that prescription is for the benefit of the general public and that an agreement to renounce prescription (as in this case) should be against public policy. Therefore, H is only liable to pay maintenance to W for the period from 25 October 1991 (i.e. three years before W's counter-claim was served on H's attorneys) to 14 January 1993 (i.e. three months after the marriage was terminated by the third *ṭalāq*).
- 141 714G-H. H and W had to lead evidence regarding H's conduct regarding the divorce before the issue can be decided.
- 142 W's council argued that W was entitled to an equitable portion of H's estate. He based his argument on legislation enacted in Malaysia, namely section 58 of the Malaysian Islamic Family Law (Federal Territory) Act 1984 that confers upon a court the

- power to order a division of assets between divorcing parties (715D-717A). The court did not accept his argument and held: "It is clear, in my view, that the Malaysian rules are based, in part at least, on Malay custom which, not being in conflict with the essential principles of Islamic law, is capable of being synthesised therewith. In view of the fact that no other Islamic country" adopts this approach, I cannot see on what basis I can regard the Malaysian rules as being part of the provisions of Islamic personal law incorporated by the parties into their contract unless a custom similar to the Malay *adat* relating to *harta sepencarian* prevails among the Islamic community, to which the parties belong, in the Western Cape." (717B-D).
- 143 1997 12 BCLR 1716 (D). For a discussion of the case see Freedman, "Islamic marriages, the duty to support and the application of the Bill of Rights: *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D)" Case note 1998 *THRHR* 532-538.
- 144 1719C-H.
- 145 25 of 1961.
- 146 In terms of the Muslim marriages, which is a contract, H is obliged to support and maintain W.
- 147 76 of 1963.
- 148 1719I.
- 149 1720C.
- 150 Section 39(2) read with sections 8(2) and (3) of the 1996 Constitution.
- 151 1722E.
- 152 Section 8(3)(a). 1722H-J.
- 153 Section 9 of the 1996 Constitution.
- 154 Section 10 of the 1996 Constitution.
- 155 1723C-D.
- 156 1996 5 BCLR 658 (CC) 691D-E: "The Lawgiver did not say that Courts should invalidate rules of common law inconsistent" or

declare them unconstitutional."

- 157 1723H-I. Own emphasis.
- 158 The court distinguished the issues of this case from the issues present in *Ryland v Edros* 1997 2 SA 690 (C) and correctly held on 1726E that the court in *Ryland v Edros* 1997 2 SA 690 (C) did not hold that a Muslim marriage is a lawful marriage or that it generated a legal duty to support a wife.
- 159 See § 4.2.3.2.
- 160 1997 12 BCLR 1716 (D).
- 161 *Amod v Multilateral Motor Vehicle Accidents Fund* 1 1998 4 SA 753 (CC).
- 162 Du Plessis, *Inleiding tot die reg*, Kaapstad: Juta, 1990, 121 *et seq.*
- 163 Hutchison, *Wille's Principles of South African Law*, 8th ed., Cape Town: Juta, 1991, 45-46; Du Plessis and Corder, *Understanding South Africa's Transitional Bill of Rights*, Cape Town: Juta, 1994, 33 and 113.
- 164 Vertical application means that the Bill of Rights protects the private individual from the power of the State in a vertical relationship. See Burns, *Administrative Law under the 1996 Constitution*, Durban: Butterworths, 1998, 15.
- 165 Horizontal application means that the Bill of Rights protects the fundamental rights of private individuals from interference from other private individuals in a horizontal relationship. See Burns, *Administrative Law under the 1996 Constitution* 17-18.
- 166 "Gelykberegting" 1998 *THRHR* 371.
- 167 1996 5 BCLR 658 (CC).
- 168 Regarding the 1993 Constitution see, *inter alia*, Visser, "Enkele beginsels en gedagtes oor die horisontale werking van die nuwe Grondwet" 1997 *THRHR* 296-303; Lourens and Frantzen, "The South African Bill of Rights - public, private or both: a viewpoint on its sphere of application" 1994 *CILSA* 344-346; Strydom, "The private domain and the Bill of Rights"

1995 *SAPL* 52-72; Burns, *Administrative Law under the 1996 Constitution*, 11; Van Aswegen, "The implications of a Bill of Rights for the law of contract and delict" 1995 *SAJHR* 51; Rautenbach and Malherbe, *Staatsreg*, 309; Van der Vyver, "The private sphere in constitutional litigation", 1994, *THRHR*, 378-395; De Waal, "A comparative analysis of the provisions of German origin in the interim Bill of Rights," 1995, *SAJHR*, 10; Kruger, "Die beregting van fundamentele regte gedurende die oorgangsbedeling," 1994, *THRHR*, 400; Du Plessis, "The genesis of the chapter on fundamental rights in South Africa's transitional Constitution," 1994, *SAPL*, 1-21; Van Wyk, "The South African Bill of Rights: An evaluation," 1994, *SAPL*, 278-286; *De Klerk v Du Plessis* 1994 6 BCLR 124 (T) 131E; *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) 638A; *Potgieter v Kilian* 1995 11 BCLR 1498 (N) 1515B; *Gardener v Whitaker* 1994 5 BCLR 19 (E) 29J; *Mandela v Falati* 1994 4 BCLR 1 (W) 6H-I; *Motala v University of Natal* 1995 3 BCLR 374 (D) 380I; *Baloro v University of Bophuthatswana* 1995 8 BCLR 19 (E) 28 A. Regarding the 1996 Constitution see, *inter alia*, Kerr, "The Bill of Rights in the new Constitution and customary law," 1997, *SALJ*, 348; Woolman and Davis, "The last laugh: *Du Plessis v De Klerk*, Classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions," 1996, *SAJHR*, 361-404; Du Toit, "Towards the autonomous state? Comparing South Africa's 1993 Constitution and the 1996 Constitution Draft Bill" and Heyns, "Human rights in the new South African Constitution," both in *Seminar Report: Aspects of the Debate on the Draft of the The New South African Constitution Dated 22 April 1996* (Papers delivered at an international conference 24-26 April 1996 Umtata), 33; Van Wyk, "'n Paar opmerkings en vrae oor die nuwe Grondwet," 1997, *THRHR*, 377-394; Cheadle and Davis, "The application of the 1996 Constitution in the private

sphere," 1997, *SAJHR*, 44-66; Van der Walt, "Perspectives on horizontal application: *Du Plessis v De Klerk* revisited," 1997, *SAPL*, 1-31; Govender, "Horizontality revisited in the light of *Du Plessis v De Klerk* and clause 8 of the Republic of South Africa Constitution Bill 1996" 1996 *HRCLJ* 20-23; Wolhuter, "Horizontality in the interim and final Constitutions," 1996, *SAPL*, 512-527; Van der Vyver 1998, *THRHR*, 367-399; *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D).

169 1996 5 BCLR 658 (CC).

170 695E.

171 Section 35 reads as follows: "(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality (...) (2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided that such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation. (3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

172 691B-692H.

173 692I.

174 See for instance Du Toit, "Towards the Autonomous State?" 33 and also Heyns, "Human Rights in the New South African Constitution" 109.

175 See for instance Van Wyk, 1997, *THRHR*, 386.

176 1997 12 BCLR 1716 (D).

177 Own emphasis.

- 178 Own emphasis.
- 179 If section 8(1) made the Bill of Rights directly applicable to private relationships, section 8(2) would have been unnecessary.
- 180 In order to make a value judgment the court must take the nature and duties of the relevant right into consideration. Furthermore, section 39 of the 1996 Constitution provides valuable guidelines that must also be taken into consideration before such value judgements can take place. It requires from the courts to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" when interpreting the Bill of Rights. Furthermore, the courts *must* consider international law and *may* consider foreign law in doing so. Also of importance is section 39(2) that requires from the courts to "promote the spirit, purport, and objects of the Bill of Rights" when they interpret legislation and when they develop the common and customary law.
- 181 So far the courts have been reluctant to develop the common law and have left it to the legislature to do so. See for example *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D) and *Mthembu v Letsela* 1998 2 SA 675 (T).
- 182 Van der Merwe and Rowland, *Die Suid-Afrikaanse Erfreg*, 6th ed., Pretoria: JP van der Walt & Son, 1990, 251-252.
- 183 Discrimination against women is by no means typical of religiously based personal law systems. The South African common law was, until recently, also guilty of discrimination against women. However, the most blatant forms of discrimination were removed by the legislature. For example, the General Law Fourth Amendment Act 132 of 1993 abolished the marital power of a husband over his wife in 1993 and the Prevention of Family Violence Act 133 of 1993 provides for the first time for the prosecution of marital rape.
- 184 Cachalia, *The Future of Muslim Family Law in South Africa*,

30.

- 185 De Waal, Currie and Erasmus, *The Bill of Rights Handbook*, 294; *Ismail v Ismail* 1983 1 SA 1006 (A) 1024 G.
- 186 *Ismail v Ismail* 1983 1 SA 1006 (A) 1024 G.
- 187 Section 39(2).
- 188 120 of 1998. The date of commencement must still be published in the Gazette.