

# GENDER EQUALITY AND RELIGIOUS FAMILY LAWS IN SOUTH AFRICA

CHRISTA RAUTENBACH\*

## I BACKGROUND

Perhaps the most striking feature of South Africa is the fact that we have a pluralistic society in which various communities or groups, such as Muslims, Jews, Hindus and Africans, live according to their own customs and usages. At present the law of South Africa generally does not recognize the validity of some of these customs and usages as law.<sup>1</sup> The result is that adherents to religious legal systems live under state law in the public sphere, which is the common law and, with regard to their private life, according to non-state law, which is religious customs and usages. We are all familiar with the numerous judicial decisions that refused to recognize the validity of Islamic and Hindu marriages concluded in South Africa and abroad.<sup>2</sup> The consequences of non-recognition have been particularly unfair to women in general and Muslim women in particular. Until 2000 a Muslim women had no claim for loss of support if her husband was unlawfully killed;<sup>3</sup> she has no claim for maintenance against her husband after divorce;<sup>4</sup> she is not a beneficiary after the death of her husband in terms of the *Intestate Succession Act*;<sup>5</sup> she may be compelled to give evidence against her husband in criminal

---

\* B Iur LLB LLM LLD, Associate Professor at Potchefstroom University for CHE, South Africa.

<sup>1</sup> An exception is customary law which finally received constitutional recognition in terms of s 181 of the *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter referred to as ‘the 1993 Constitution’) and s 211(3) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as ‘the 1996 Constitution’). For a discussion of the status of religious legal systems in South Africa, see Christa Rautenbach and Nazeem Goolam (eds), *Introduction to Legal Pluralism in South Africa: Religious Legal Systems* (Part II) (2002) 113 *et seq.*

<sup>2</sup> See *Seedat’s Executors v The Master (Natal)* [1917] AD 302 regarding Islamic marriages and *Logee v Minister of Interior* [1951] 2 SA 595 T regarding Hindu marriages. The courts did, in some cases, declare Muslim marriages to be putative marriages. See, inter alia, *Moola v Aulsebrook* [1983] 1 SA 687 N; *Ex Parte L* [1947] 3 SA 50 C and *Desai v Engar and Engar* [1965] 4 SA 81 W. 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.

<sup>3</sup> Fortunately the Supreme Court of Appeal developed the common law claim for loss of support to include the claim of a widow involved in a *de facto* monogamous Islamic marriage in *Amod v Multilateral Motor Vehicle Accident Fund* [1999] 4 SA 1319 SCA.

<sup>4</sup> *Ismail v Ismail* [1983] 1 SA 1006 A.

<sup>5</sup> Act 81 of 1987.

proceedings;<sup>6</sup> she has no claim in terms of the *Workmen's Compensation Act*<sup>7</sup> and she has no claim for financial support during her marriage.<sup>8</sup>

So far some courts have shown a reluctance to develop the common law to protect the rights of women living under a system of religious law.<sup>9</sup> In *Amod v Multilateral Motor Vehicle Accident Fund*<sup>10</sup> the Court held that the alteration and elimination of the common law in order to provide a Muslim wife a claim for loss of support is the function of the legislature. Although the decision of the court *a quo* was reversed by the Supreme Court of Appeal<sup>11</sup> it is a clear indication of some of the courts' reluctance to develop the common law to protect the position of women adhering to systems of religious law.

The reluctance (or caution) of the courts to deal with matters such as adapting the common law to the new constitutional order and to forgo to challenge and bring about legal renewal may frustrate claimants and give rise to unnecessary costs for the individual. In 1994 South Africa entered into a new constitutional dispensation with the commencement of the 1993 *Constitution* which was repealed by the 1996 *Constitution*. Section 15, read with ss 30, 31, 181(1)(c) and 185 of the 1996 *Constitution* recognizes the cultural and religious diversity of the South African population. Section 15(3)(a) makes provision for the recognition of religious and traditional marriages by means of legislation. It is suggested that recognition be given in terms of this provision to certain religious customs and usages practiced in South Africa. Recognition in terms of this provision is, however, subject to the provisions of the Bill of Rights and the 1996 *Constitution*. Once recognized religious legal systems will be subject to the Bill of Rights. However, until such recognition is given, the question remains whether women can rely on the provisions of the 1996 *Constitution* for protection of their rights if they adhere to a religious legal system, which is unrecognized in terms of South African law.

In this paper the following issues will be dealt with. Firstly, the question whether the Bill of Rights applies to unrecognized religious legal systems unofficially adhered to in South Africa are discussed. It is a reality that religious communities in South Africa follow religious practices, which are currently unrecognized. It is also a reality that some of these practices *prima facie* discriminate against women. It is important to determine whether the Bill of Rights applies to these practices.

Secondly, it is argued that the recognition of certain religious legal systems would guarantee constitutional protection to women adhering to these systems. It is clear from the provisions of the 1996 *Constitution* that recognition is subject to the Bill of Rights

---

<sup>6</sup> In terms of s 195 of the *Criminal Procedure Act* 51 of 1977 a wife or husband may in general not be compelled to testify against each other in a criminal case. A Muslim wife or husband whose marriage is not recognised in terms of the common law is not entitled to invoke such privilege. See *S v Johardien* [1990] 1 SA 1026 C. A different view was followed in *S v Vengetsamy* [1972] 4 SA 351 D with regard to Hindu marriages.

<sup>7</sup> Act 30 of 1941.

<sup>8</sup> F Cachalia, *The Future of Muslim Law in South Africa* (Occasional Paper 12) (1991) 22.

<sup>9</sup> Regarding Islamic marriages see *Amod v Multilateral Motor Vehicle Accident Fund* [1997] 12 BCLR 1716 D. The decision was reversed by a decision of the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accident Fund* [1999] 4 SA 1319 SCA.

<sup>10</sup> [1997] 12 BCLR 1716 D 1723H-I.

<sup>11</sup> *Amod v Multilateral Motor Vehicle Accident Fund* [1999] 4 SA 1319 SCA.

and other provisions of the 1996 *Constitution*.<sup>12</sup> It is therefore important to reflect on issues such as gender equality and cultural rights (including religion), two fundamental rights that are seemingly in conflict with each other. Considering recent proposals of the South African Law Commission<sup>13</sup> on Islamic marriages the primary focus of this paper will be on the position of Muslim women adhering to a system of Islamic law in South Africa. Although there might be various areas of gender discrimination in Islamic law the legal position of Muslim women under the law of inheritance will be used as an example.<sup>14</sup> The criteria formulated by the Constitutional Court in *President of the Republic of South Africa v Hugo*<sup>15</sup> regarding gender equality will be applied in order to determine the constitutionality of her legal position under the law of inheritance. Finally some recommendations regarding the future role of Muslim women in South Africa will be given.

## II APPLICATION OF THE BILL OF RIGHTS TO UNRECOGNISED ISLAMIC LAW

As stated earlier, it is important to determine whether the Bill of Rights applies to religious legal systems adhered to in South Africa. The answer to the question will depend on the interpretation given to the word 'law' as contained in the application-clause of the Bill of Rights. As a starting point it is necessary to determine the meaning of 'law' in terms of the 1993 *Constitution*.<sup>16</sup> Section 7 of the 1993 *Constitution* made provision for the application of the Bill of Rights to 'all law in force'. It may be argued that religious legal systems are not 'law in force', and that they were, therefore, not subject to the provisions of the 1993 *Constitution*.

The phrase 'law in force' was omitted in the 1996 *Constitution*. In terms of s 8 the Bill of Rights applies to 'all law'. 'All law' has been interpreted to include the customary law, common law and legislation.<sup>17</sup> The implication is that religious legal systems seems to be excluded from the Bill of Rights and that women (subject to these legal systems) would not be able to rely on constitutional protection.

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 1996 *Constitution* as emphasized in s 2. It is submitted that unrecognized religious legal systems (practiced in South Africa) are indeed included in the phrase 'all law' as contained in the *Constitution* for a variety of reasons.

Firstly, the text of the 1996 *Constitution* has clear indications that 'law' is wide enough to include unrecognized legal systems namely:

- The use of 'all law' in the 1996 *Constitution* in contrast to the use of 'all law *in force*' in the 1993 *Constitution*, indicates that the constitution drafters seemingly

<sup>12</sup> Section 15(3)(b).

<sup>13</sup> *Project 59 on Islamic Marriages and Related Matters: Issue Paper 15* (May 2000).

<sup>14</sup> See Najma Moosa, 'The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women' [1998] *Stellenbosch Law Review* 196-206 for a discussion of the position of Muslim women.

<sup>15</sup> [1997] 6 BCLR 708 CC. Hereinafter referred to as 'the *Hugo* case'.

<sup>16</sup> Section 7 of the 1993 *Constitution*.

<sup>17</sup> Yvonne Burns, *Administrative Law Under the 1996 Constitution* 15 (1998) and I M Rautenbach and E F J Malherbe, *Staatsreg* (2<sup>nd</sup> ed, 1996) 306.

envisaged that there could be law that cannot be classified as ‘law *in force*’, but which nevertheless needed to be scrutinized in terms of the Bill of Rights. The religious communities follow religious practices that are at this stage not formally recognized in terms of South African law. It would therefore be a legal system that is not in force, because it is not recognized in terms of South African law, but that needs to be scrutinized in terms of the Bill of Rights.

- Section 2 recognizes the supremacy of the 1996 *Constitution* and invalidates ‘law or *conduct*’ that is inconsistent with the *Constitution*. In terms of s 172(1)(a) of the same *Constitution* it is the duty of a court to declare any law or *conduct* that is inconsistent with the 1996 *Constitution* invalid ‘to the extent of its inconsistency.’ It is argued that unrecognized customs and usages are ‘conduct’ that is subject to the 1996 *Constitution*.
- Section 15 refers to ‘systems’ of ‘religious, personal or family *law*.’ The use of the word ‘law’ is a clear indication that the drafters of the 1996 *Constitution* saw these systems as systems of ‘law’, and therefore it may be argued that ‘all law’ in s 8(1) also refers to these legal systems as ‘all law’ that is subject to the Bill of Rights.
- Sections 30 and 31, recognize the religious and cultural diversity of the South African population and emphasize that religious and cultural rights must be exercised in a manner that is not inconsistent with any provisions of the Bill of Rights. It does not make sense to say that religious communities have the right to practise their religion (which includes legal rules), but that the enjoyment of such a right, which 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.’

Secondly, Van der Vyver<sup>18</sup> argues that ‘law’ consists of both positive state law and positive non-state law. 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 the rules that a family head laid down for the members of his or her family. If his argument were to be followed, it would mean that the rules of a religious group, such as Muslims, are positive non-state law, which is ‘law’ in terms of the 1996 *Constitution*.

Thirdly, numerous Acts recognize certain aspects of religious marriages, for example:

- Section 21(3) of the *Insolvency Act*<sup>19</sup> describes the word ‘spouse’ to include a wife or husband married ‘according to any law or custom’.
- Section 31 of the *Special Pensions Act*<sup>20</sup> defines ‘dependant’ to include the spouse of a deceased to whom he or she was married ‘under any Asian religion’.
- Section 1 of the *Demobilisation Act*<sup>21</sup> defines ‘dependant’ to include the surviving spouse to whom the deceased was married ‘in accordance with the tenets of a religion’.
- Section 1(2)(a) of the *Births and Registration Act*<sup>22</sup> includes in the word ‘marriage’ all marriages concluded according to the ‘tenets of any religion.’

---

<sup>18</sup> Johan Van der Vyver, *Inleiding tot die Regswetenskap* (1982) 27.

<sup>19</sup> Act 24 of 1936.

<sup>20</sup> Act 69 of 1996.

<sup>21</sup> Act 99 of 1996.

<sup>22</sup> Act 51 of 1992.

Although it may be argued that this legislation recognizes religious marriages (other than civil marriages) for practical reasons, it is indicative of the plurality of the South African society. It is therefore difficult to substantiate why Muslim or Hindu marriages are recognized for certain purposes, but not when the parties of such a marriage turn to the courts for the recognition of their union.

Fourthly, people who live in accordance with religious practices regard those practices as law. It is thus possible to create new legal principles by means of custom.<sup>23</sup>

In spite of these arguments in favour of the inclusion of unrecognized religious legal systems 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 in terms of s 15(3)(a) of the 1996 *Constitution* to religious legal systems or at least to recognize the validity of marriages concluded under a 'system of religious, personal or family law.' Such recognition would ensure that the Bill of Rights applies to customs and usages followed by religious groups and that the necessary constitutional protection is afforded to women within these groups.

Another reason why religious legal systems should be recognized concerns the developmental function of the courts. The courts have the power to develop the common and customary law.<sup>24</sup> They do not have similar powers regarding unrecognized religious legal systems. It would therefore be difficult, if not impossible, for the courts to adapt any custom and usage, which are adhered to as unofficial law in South Africa.

Section 15(3)(a) does not recognize a right to have religious legal systems or religious marriages recognized. However, other provisions in the Bill of Rights protect the cultural and religious diversity of South Africa and it may be argued that the exercising of these rights includes the right to be subject to one's own personal legal system.<sup>25</sup>

In terms of s 15(3)(b) recognition of religious legal systems or marriages must be consistent with the Bill of Rights<sup>26</sup> and other provisions of the 1996 *Constitution*. All inequalities between men and women living under one of these religious legal systems should, therefore, be dealt with before legislative recognition is given to any of these legal systems. Although various fundamental rights might be affected when determining the constitutionality of certain religious customs or usages the focus in this paper is on gender equality.

### III GENDER (AND/OR SEXUAL) EQUALITY AND RELIGIOUS FAMILY LAWS

Given South Africa's long history of oppression and discrimination against certain groups in society, it is not surprising that equality is viewed as one of the core values of

---

<sup>23</sup> Duard Kleyn and Frans Viljoen, *Beginners Guide for Law Students* (3<sup>rd</sup> ed, 2001) 94. The requirements for proving assertion of a custom were formulated in *Van Breda v Jacobs* [1921] AD 330, namely (a) the custom must have been in existence for a long period; (b) the custom must have been observed in general by the relevant community; (c) the custom must be reasonable; and (d) the content of the custom must be certain and clear.

<sup>24</sup> See ss 8(3), 39(2) and 173 of the 1996 *Constitution*.

<sup>25</sup> See, *inter alia*, ss 9, 15, 30 and 31 of the 1996 *Constitution*.

<sup>26</sup> See, s 15(3)(b). The Bill of Rights is contained in chapter 2 of the *Constitution*.

the 1993 *Constitution* and also of the 1996 *Constitution*.<sup>27</sup> As a legal concept, equality is formulated in the 1996 *Constitution* as a command for equal treatment<sup>28</sup> and as a prohibition of unfair discrimination.<sup>29</sup> When applied in practice, equality turns out to be a difficult and often illusive concept. It has been said that equality is a concept that is central in western thinking.<sup>30</sup> Although this might be true in some respects, it is notable that it is often those who blame equality as a western concept, who speak in support of equality to demand recognition of custom and usage based on religion.

In order to determine whether the right to equality has been infringed or not, the Constitutional Court in *Harksen v Lane*<sup>31</sup> developed the so-called (by now well known) multi-stage enquiry in order to determine the constitutionality of a discriminating provision.<sup>32</sup>

Although equality includes the full and equal enjoyment of all rights and freedoms, the focus is on gender equality in this paper.<sup>33</sup> Gender equality is a component of equality that is protected in terms of s 9 of the 1996 *Constitution*. South Africa's commitment to gender equality is evident from the following:

- On 29 January 1993 it ratified the United Nation's *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979 (CEDAW).

<sup>27</sup> Pierre De Vos, 'Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court' [2000] *Journal of Contemporary Roman-Dutch Law* 63.

<sup>28</sup> Sections 9(1) and 9(2).

<sup>29</sup> Sections 9(3), 9(4) and 9(5).

<sup>30</sup> 'Ubuntu' is a concept of customary law that refer to the key values of group solidarity, namely compassion, respect, human dignity and conformity to basic norms and collective unity. For a discussion of the concept 'ubuntu' see, *S v Makwanyane* [1995] 3 SA 391 CC paras 307-308 and 313. Although the concept refers to the values of a group, such values are similar to values that we normally associate with individuality. It is thus universal values that apply to people and groups.

<sup>31</sup> [1998] 1 SA 300 CC. This multi-stage enquiry was reconfirmed in *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 12 BCLR 1517 CC and *National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs* [2000] 2 SA 1 CC.

<sup>32</sup> The first step is to determine whether the impugned provision or conduct differentiates between people or categories of people. If the answer is no, there is no violation of s 9. If, however, the answer is yes, the second step is to determine whether the differentiation amounts to unfair discrimination. 'This requires a two-stage analysis. (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.' If at the end of the two-stage enquiry, the differentiation is found not to be unfair, there will be no violation of s 9. If, however, the discrimination is found to be unfair then a determination will have to be made as to whether the provisions can be justified under s 36 of the 1993 *Constitution*. *Harkson v Lane* ibid para 53.

<sup>33</sup> E Cameron, 'Our Legal System-Precious and Precarious' [2000] *South African Law Journal* 373 points out that the law is a proper instrument for giving effect to social policies. One social policy includes 'advancing inclusive attitudes to the participation in our national life of disadvantaged social groups – particularly women ...'

Article 15 of the Convention obliges state parties to ensure equality of men and women before the law and in civil matters. Article 16(1)(h) obliges state parties to take appropriate measures to ensure that spouses have the same rights of 'ownership, acquisition, management, administration, enjoyment and disposition of property.'

Section 39(1)(b) of the 1996 *Constitution* provides that international law must be considered when a court interprets the Bill of Rights. It is clear that the Convention must be taken into consideration when a dispute concerns discrimination against women. The provisions of the Convention could have a definite effect on the interpretation and application of any law relating to gender equality in South Africa.

- On 2 February 2000 the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA) was assented to.<sup>34</sup>

The purpose of the Act is two-fold, namely to promote equality and to prevent unfair discrimination. Chapter 1 of the Act contains an interpretation clause that endorses a purposive approach regarding the interpretation of the Act. Any person interpreting the Act 'may' consider (or be mindful of as the Act calls it) the following factors:<sup>35</sup>

- any relevant law or code of practice in terms of law;<sup>36</sup>
- international law; and
- comparable foreign law.

In interpreting the Act any person 'must' take into account the 'context of the dispute and the purpose' of the Act.<sup>37</sup> The Act applies to vertical and horizontal relationships and enjoys supremacy over all other Acts except the 1996 *Constitution*, amending Acts of parliament and the *Employment Equity Act*.<sup>38</sup>

Chapter 2 contains a general prohibition on unfair discrimination by the state and 'any person.' Section 8 deals with the prohibition of unfair discrimination on the ground of gender. Specific forms of unfair gender discrimination include the following:

- preventing women from inheriting family property;<sup>39</sup>
- any practice (including traditional, customary or religious practices) that impairs the dignity of women or undermines equality between men and women; and<sup>40</sup>

<sup>34</sup> Some of the objects of the Act are to further the obligations imposed in terms CEDAW (see s 2(h) of the Act) and to give effect to the 'letter and spirit' of the 1996 *Constitution* as well as to s 9(2) of the 1996 *Constitution* (see ss 2(a) and (b) of the Act). Sections 1, 2, 3, 4(2), 5, 6, 29 (with the exception of sub-s (2)), 32, 33 and 34(1) of the Act came into effect on 1 September 2000.

<sup>35</sup> Section 3(2).

<sup>36</sup> The problems regarding the meaning of law would also be of relevance here. The question that may be asked is whether unrecognised religious legal systems are 'law or code of practice in terms of law'. The answer appears to be in the negative.

<sup>37</sup> Section 3(3).

<sup>38</sup> 55 of 1998. See s 5.

<sup>39</sup> Section 8(c).

- any policy or conduct that unfairly limits access of women to land rights, finances and other resources.<sup>41</sup>

Chapter 3 of the Act deals with the burden of proof and the determination of fairness and unfairness. Chapter 4 contains provisions regarding the establishing of equality courts and the matters concerned therewith. Chapter 5 deals with the promotion of equality and places a duty on the state and ‘all persons’ to promote equality. It sets out a list of positive duties placed on the state to develop substantive equality and to address unfair discrimination and provides an illustrative list of unfair practices. Section 32 makes provision for the establishment of an Equality Review Committee consisting of seven members from various commissions. The powers, functions and term of office of the Equality Review Committee are set out in terms of s 33.

As stated, the purpose of the Act is to bind the state, when enacting legislation, to promoting equality. Section 8 of the Act deals with gender equality. In terms of this provision, ‘unfair discrimination’ on the ground of gender is prohibited. The provision goes further and provides a list of factors that are included as gender discrimination. These factors include a system of preventing women from inheriting family property<sup>42</sup> and any practice (including traditional, customary or religious) that impairs the dignity of women and undermines equality between men and women.<sup>43</sup> The fact that ‘unfair’ gender discrimination is prohibited suggests that ‘fair’ gender discrimination is sanctioned. It is envisaged that the Act will provide a potentially powerful vehicle for socially and economically disadvantaged women to assert their claims.

- In terms of s 187 of the 1996 *Constitution* a Commission for Gender Equality must be established. The duty of the Commission is to protect and promote respect for gender equality.
- Gender equality is recognized as both a value and a fundamental right in terms of the 1996 *Constitution*.<sup>44</sup>

Section 9(3) of the 1996 *Constitution* refers to both sex and gender as grounds for discrimination. Neither the *Constitution* nor the PEPUDA provide us with definitions of sex and gender. From the literature it appears that sexual discrimination is primarily based on biological differences between men and women.<sup>45</sup> It describes discrimination where the ‘sexual act is integral to the discrimination, for instance an employer insists on sexual favours as a prerequisite for advancement.’<sup>46</sup>

---

<sup>40</sup> Section 8(d). This provision appears to prohibit any practice that impairs the dignity of women. If it is found, for example, that polygyny, which permits a man to marry more than one wife (whilst a woman may not marry more than one husband), impairs the dignity of women, such a practice would be unconstitutional in terms of s 8(d).

<sup>41</sup> Section 8(e).

<sup>42</sup> Section 8(c).

<sup>43</sup> Section 8(d).

<sup>44</sup> Equality is referred to as a value in ss 1(1), 7(1), 36(1) and 39(1) and as a right in s 9.

<sup>45</sup> L Van Zyl, ‘Gender Issues and the Bill of Rights’ in C De Beer (ed), *Bill of Rights Compendium* (2000) 6.

<sup>46</sup> George Devenish, *A Commentary on the South African Bill of Rights* (2000) 56.



In contrast to sexual discrimination, gender discrimination describes ‘a situation in which a negative result flows from whether a person is male or female.’<sup>47</sup> Gender discrimination is therefore based on the stereotypical way in which society sees the perspective roles of men and women. For example, gender discrimination is based on a society’s belief that it is always the responsibility of the man to be the breadwinner and the responsibility of the woman to do domestic work.

The judgment of the Constitutional Court in the *Hugo* case<sup>48</sup> serves as an example of how the equality clause operates on the issue of gender. In this case the President<sup>49</sup> granted remission of sentence to certain mothers who had minor children under the age of 12 years. The respondent, who was a male prisoner with a minor child of 12 years, argued that the Act discriminates against him on the ground of gender and sex and that it was thus in conflict with s 8 of the 1993 *Constitution*.<sup>50</sup>

Goldstone J emphasized the importance of the prohibition against unfair discrimination within our constitutional dispensation and held:<sup>51</sup>

The prohibition on unfair discrimination ... seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. *At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.*<sup>52</sup>

The Court held that the *Presidential Act prima facie* discriminates on one of the listed grounds,<sup>53</sup> and that such discrimination is presumed to be unfair unless the contrary is proved.<sup>54</sup> Goldstone J formulated the test to determine whether the discrimination was fair or not as follows:

... it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.<sup>55</sup>

After careful consideration of the factors and circumstances the majority of the Court came to the conclusion that on the facts of the case the discrimination was fair.<sup>56</sup> The Court found that, although fathers of young children have a disadvantage, their rights or

---

<sup>47</sup> Ibid.

<sup>48</sup> [1997] 4 SA 1 CC.

<sup>49</sup> The remission was embodied in *Presidential Act 17* of 27 June 1994 and was granted in terms of s 82(1)(k) of the 1993 *Constitution*. Goldstone J held that the powers exercised by the president were executive powers that were subject to the provisions of the Bill of Rights and of review by courts of appropriate jurisdiction (para 13).

<sup>50</sup> Ibid para 32.

<sup>51</sup> Ibid para 41.

<sup>52</sup> Own emphasis. The words of Goldstone J is of particular relevance for the protection of women living under systems of law (including religious legal systems) that do not accord women and men equal dignity and respect.

<sup>53</sup> Section 8(2) of the 1993 *Constitution* that is similar to s 9(3) of the 1996 *Constitution*.

<sup>54</sup> Section 8(4) of the 1993 *Constitution* that is similar to s 9(5) of the 1996 *Constitution*.

<sup>55</sup> Ibid para 43.

<sup>56</sup> Ibid para 47.

obligations as fathers were not restricted in terms of the *Presidential Act*. The discrimination did not deny or limit their freedom. Their freedom was curtailed as a result of their conviction and not as a result of the *Presidential Act*. The latter merely deprived them from an early release to which they had no legal entitlement. Therefore, the impact of the discrimination upon the relevant fathers did not fundamentally impair 'their rights of dignity or sense of equal worth.'<sup>57</sup>

In a dissenting judgment Kriegler J<sup>58</sup> was of opinion that the notion to regard women as primary care givers of young children is a root cause of women's inequality in society. He argues that such a notion is

... both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the *Constitution* so vehemently condemns.<sup>59</sup>

According to him s 8 of the 1993 *Constitution*, and other provisions regarding gender equality, were designed to undermine and not to maintain patterns of discrimination.<sup>60</sup> As a result the benefits to a few women with young children were outweighed by the serious disadvantage to gender equality in society as a whole, and consequently the presidential decision resulted in unfair discrimination.<sup>61</sup>

In her assenting judgment O'Regan J agrees with Goldstone J and Kriegler J that the responsibility borne by mothers for the care of children is a major cause of inequality in society. It is one of the factors that renders her less competitive and less successful in the labour market resulting in the unequal division of labour between men and women, which is a primary source of women's disadvantage in society.<sup>62</sup> However, she disagrees with Kriegler J that affording advantages to mothers of young children would hamper the task of achieving constitutional equality. According to her the fact that mothers generally bear the responsibilities of child rearing is a simple fact of the matter which cannot be ignored in determining the discrimination *in casu*.<sup>63</sup>

Although Mokgoro J concurred in the order proposed by the majority of the Court, she held that the *Presidential Act* constituted unfair discrimination,<sup>64</sup> but that the discrimination was justified in terms of s 33(1) of the 1993 *Constitution*.<sup>65</sup> With regard to gender discrimination she observed as follows:<sup>66</sup>

<sup>57</sup> Ibid. According to Kriegler J the *Presidential Act* is inconsistent with the prohibition against sex or gender and that it has not been shown to be fair in terms of s 8(4) of the 1993 *Constitution* (para 64).

<sup>58</sup> [1997] 4 SA 1 CC paras 63-88.

<sup>59</sup> Ibid para 80.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid para 85.

<sup>62</sup> Ibid para 110.

<sup>63</sup> Ibid para 113. She emphasises that one of the major constitutional goals is to put an end to inequality caused by gender stereotyping.

<sup>64</sup> In her view, denying men the opportunity to be released in order to care for their children, entirely on the bases of the assumption that mothers are the primary carers, is an infringement of the equal worth of men's equality and dignity (para 92).

<sup>65</sup> In terms of this provision the rights contained in the Bill of Rights may be limited to the extent that it is reasonable and justifiable 'in an open and democratic society based on freedom and equality.'

Section 8 of our [1993] Constitution gives us the opportunity to move away from gender stereotyping. Society should no longer be bound by the notions that a woman's place is in the home (and, conversely, not in the public sphere) ... Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers.<sup>67</sup>

At the onset of this paper it was argued that all inequalities between men and women should be addressed before legislative recognition is given to marriages concluded under a system of religious law or to religious legal systems. In light of the South African Law Commission's investigation into Islamic marriages and related matters it is of the utmost importance that we start debating the relevant issues. When the principles of the *Hugo* case regarding gender equality are applied to the position of Muslim women with respect to inheritance, the following arguments may be raised.

In terms of the *Quran* a Muslim woman generally inherits only half of what her male counterpart inherits.<sup>68</sup> When applying s 9(4) of the 1996 *Constitution* to the 'half rule' it is clear that it discriminates against Muslim women on the ground of sex or gender. In terms of s 9(5) of the 1996 *Constitution* such discrimination is presumed to be unfair unless proven otherwise.

The courts have not yet had an opportunity to apply their equality jurisprudence to claims brought by disadvantaged Muslim women. To determine whether the discrimination is fair or not the test formulated by Goldstone J in the *Hugo* case can be applied, namely:

- (a) the group who has been disadvantaged;
- (b) the nature of the power in terms of which the discrimination was effected; and
- (c) the nature of the interests which have been affected by the discrimination.

The group who is affected by the 'half rule' is Muslim women living under a system of Islamic law. The reasons advanced for her unequal position are based on economic considerations and her position in the Islamic social structure, which is mostly patriarchal in nature. For example, Muslim women:

- (a) receive dower<sup>69</sup> and maintenance and are therefore not entitled to a full share as it is the male who is responsible for the dower and maintenance of women;<sup>70</sup>

---

Section 33(1) is similar to s 36(1) of the 1996 *Constitution*. In spite of her reservations on gender stereotyping she comes to the conclusion that the *Presidential Act* is justified for a number of reasons. Firstly, because fathers can apply on an individual basis for relief. Secondly, because it would be impossible to release all the fathers and mothers of young children and thirdly, because of the administrative burden that a case-by-case enquiry would entail to determine whether a father or mother is the primary carer of a child or not (ibid para 106).

<sup>66</sup> Ibid para 93.

<sup>67</sup> Ibid.

<sup>68</sup> S A Kader, *Muslim Law of Succession in India* (1998) 70.

<sup>69</sup> The dower is a sum of money or property which becomes payable by the husband to his wife as an effect of marriage. See J J Nasir, *The Islamic Law of Personal Status* (1990) 86.

<sup>70</sup> A R I Doi, *Women in Shari'a* (1989) 163.

- (b) are incapable of defending the community on an equal basis as her male counterparts;<sup>71</sup>
- (c) are free of the usual economic responsibilities that her male counterparts have;<sup>72</sup> and
- (d) are not responsible to pay expiatory fines.<sup>73</sup>

It is exactly this kind of generalization the Constitutional Court condemned in *Hugo* when it warned against gender stereotyping which may lead to inequalities in society. The economic and social role of Muslim women has changed alongside her western counterpart. She became economically independent and contributes equally to the household. In many instances she is the sole breadwinner or earns more income than her husband.<sup>74</sup> From a western perspective it may be argued that such discrimination impairs the dignity and sense of equal worth of women and that it is unconstitutional.

Saying that men are responsible for maintenance and the general well being of the family contains gender discrimination in itself. In other words, the justification for the discrimination constitutes gender discrimination in that men are seen as the sole maintainers and protectors of the Muslim family. This kind of gender stereotyping is exactly what the Court in *Hugo* cautioned against. The difference between men and women, whether perceived or real, biologically or socially based, should not be allowed to justify discrimination against women.<sup>75</sup> Therefore, the 'half rule' of Islamic law of succession is based on discriminatory justification and should be abolished.

It may be argued that the phasing out of gender inequalities in terms of religious legal systems would boil down to an infringement of other constitutional rights. There are, as it were, two opposing centric forces that may well be irreconcilable within the context of the 1996 *Constitution* as such. These conflicting interests have the potential of a constitutional tug-of-war between the selfsame constitutional values provided for in the 1996 *Constitution*, namely equality on the one hand and cultural and religious related rights on the other hand.<sup>76</sup>

However, in the case of tension between gender equality and the religious and cultural related rights, equality will outweigh culture and religion. Such an inference may be derived from the wording of ss 30 and 31 of the 1996 *Constitution*. Section 30 recognizes the right to participate in the cultural life of one's choice, but qualifies that the exercising of the right may not be inconsistent with any provision of the Bill of Rights. Section 31, dealing with the rights of cultural or religious groups to enjoy their culture and to practice their religion, contains a similar qualification.<sup>77</sup> On the other hand s 9 does not contain similar restrictions to the right to equality.

---

<sup>71</sup> A A A Fyzee, *Outlines of Muhammadan Law* (1974) 448 and David Pearl, *A Textbook on Muslim Personal Law* (1987) 2-3.

<sup>72</sup> Doi, *Women in Shari'a* 163; Fyzee, above n 71; Nasir, *The Islamic Law of Personal Status* 269.

<sup>73</sup> Fyzee, above n 71.

<sup>74</sup> Najma Moosa, 'Women and the Islamic Law of Intestate Succession' [1994] *African Law Review* 25-30.

<sup>75</sup> See Jamila Badat, *A Socio-Legal Analysis of the Position of Muslim Women in South Africa* (LLM-Dissertation University of Natal 1999) 1 *et seq.*

<sup>76</sup> See for example ss 30, 31 and 235.

<sup>77</sup> Section 31(2).

Kentridge is of the opinion that the right to equality should trump religious freedom and culture in the case of conflict. He declares that

[o]ne of the intractable problems that arises in a heterogeneous society is that of reconciling respect for cultural diversity with the commitment to uphold human rights. For example, many religions assign particular social and religious roles to men and women. The elimination of such distinctions is regarded as inimical to the religion itself. The need for sensitivity in considering such questions is acknowledged. It is nevertheless submitted that, in cases of conflict, equality trumps religious freedom and culture.<sup>78</sup>

It may be argued that women who choose to participate in cultural life, even if they are unequal to their male counterparts, cannot contest the constitutionality of any rules that are characteristic of such a culture. What this implies is that women who choose to live according to a religious legal system are subject to the laws of that system, regardless of their social position within that system. Such a viewpoint would deter the transformation of all spheres of South African society based on equality and human dignity. The state is under a constitutional duty to promote the achievement of equality.<sup>79</sup> The failure to take positive measures can, in certain circumstances, amount to unfair discrimination. Equality is a right that is available to all women, regardless of whether they are adherents of cultural and religious legal systems other than the common law of South Africa. Ackermann J in *National Coalition for Gay and Lesbian Equality v The Minister of Home Affairs*<sup>80</sup> pointed out that

[d]iscrimination does not take place in discrete areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined and its impact evaluated in isolation. Discrimination must be understood in the context of the experience of those on whom it impacts. As recognized in the *Sodomy* case – ‘[t]he experience of subordination – of personal subordination, above all – lies behind the vision of equality.’

#### IV CONCLUSION

The new dispensation brought about by the 1996 *Constitution* introduces a particular perspective with regard to the position of women in religious legal systems. At first blush there seems to be no doubt that certain rules, for example the ‘half rule’ in terms of Islamic law of succession, are substantially, if not totally, in conflict with the values enshrined in the Bill of Rights. A multicultural society like South Africa is liable to pose an enormous challenge to the implementation of a Bill of Rights. On the one hand the state has the responsibility to ensure vis-à-vis the Constitutional Court that the values enshrined in the Bill of Rights are enforced and apply to all citizens. On the other hand the seemingly discriminatory laws are based upon values which, from the adherents thereof, are not subject to censure or any ground whatsoever.

South African Muslim women striving towards a goal of gender equality should actively involve themselves in the process of refashioning Islamic law within the new constitutional dispensation. It is important that they participate in the South African

<sup>78</sup> Janet Kentridge, ‘Equality’ in Matthew Chaskalson *et al* (eds), *Constitutional Law of South Africa* (2000) 14-52.

<sup>79</sup> Section 9(2) of the 1996 *Constitution*. This is referred to as remedial equality. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 12 BCLR 1517 CC para 62.

<sup>80</sup> [2000] 2 SA 1 CC para 35.

Law Commission's investigation into Islamic marriages and related matters in order to ensure that their equality rights are in no way compromised in favour of religious and cultural freedoms and rights. In doing so they must ensure that they are actively involved in all legislation concerning religious custom and usage. Only then will they be in a position to ensure substantive equality between Muslim men and women.