Paper for presentation purposes. Do not cite without the explicit approval of the author.

# *Personal laws and the legal recognition of religious minority claims:*

# *Opportunities and challenges*

**Waheeda Amien**

**BA LLB (Cape Town) LLM (Western Cape) Ph.D. (Ghent).**

**Senior Lecturer, Faculty of Law, University of Cape Town, South Africa**

**Presentation at Experts Group Meeting. Hosted by the United Nations Independent Expert on Minority Issues, Palais Wilson, Geneva, Switzerland**

**6 June 2013**

I would like to begin by thanking the United Nations Independent Expert on Minority Issues, Ms Rita Izsák, for inviting me to this group meeting on the Rights and Security of Religious Minorities.

I have been asked to share some ideas on the legal recognition of religious minority claims, specifically in relation to religious personal laws. In doing so, I intend to draw on the Canadian, Indian and South African experiences because Canada and India have historically and South Africa has more recently applied their minds to the implications of doing so. To note at the outset, Canada and South Africa have ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women ('Women's Convention') without reservation. India, however, has ratified it subject to it not being inconsistent with its policy of non-interference in the affairs of its minority communities.

Due to time constraints, I shall limit my focus to the personal laws of Muslim communities. I shall provide very brief sketches of rather complex situations in each of the three countries so I hope you will forgive me and not interpret my abrupt descriptions as a minimising of the complexities of the different contexts. I think that it is also important for me to note from the outset that I am approaching my

presentation with the perspective of marginalized members of religious communities in mind, particularly women and the implications of religious discrimination for them.

In South Africa, we have a freedom of religion clause that makes a legally pluralistic society possible (in the official sense). So we have a secular society that is tolerant of religion in the public sphere. But we do not have state-sanctioned religion – all religions are meant to be treated equally. The South African Constitution protects the individual and collective rights to freedom of religion. An individual has the right to have, manifest and propagate her/his religion. And individuals have the right to practise their religion in association with others and to establish, maintain and join religious associations.

We also have a provision in our freedom of religion clause that enables government to enact legislation that recognizes religious and customary marriages or religious and customary personal law systems. Realizing that official customary laws applied within indigenous communities and religious laws practised within religious minority communities have the potential to discriminate against female members of those communities, the government added a proviso to ensure that legislation recognizing customary and religious marriages or customary and religious personal law systems must not be enacted in a way that is inconsistent with other provisions of the Constitution including the right to gender equality.

To date, this provision has only been used to afford legal recognition to African customary marriages. Minority religious marriages and personal law systems have not yet been legally recognised. In the Muslim context, South African *imāms* could be designated as marriage officers so that *nikahs* that they perform could result in legally valid marriages. However, most South African *imāms* are not so designated with the result that the large majority of South African spouses do not have legally valid marriages. This means that those spouses cannot access the benefits of civil/secular marriages and this has particularly negative implications for Muslim women. Marital disputes between Muslim spouses are also adjudicated in forums within the Muslim communities, which are not legally enforceable. So rulings that discriminate against women cannot be legally challenged.

In accordance with the freedom of religion provisions, a process was initiated in 2003 to afford legal recognition to Muslim marriages. The process culminated in a Muslim

Marriages Bill ('MMB'), which recommends comprehensive regulation of the nuanced features of Muslim marriages and divorce. In drafting this legislation, the drafters consulted extensively with role-players within the Muslim communities and broader secular society. Most women's rights advocates from within the Muslim community and secular society support enactment of the MMB even though they do not regard it as being one hundred percent consistent with gender equality. However, they would rather have the MMB enacted because it promises to provide more protection for Muslim women than they currently have. Those women's rights advocates are also aware that if they launch gender challenges to the MMB after it is enacted, there is a good likelihood that the Constitutional Court will interpret the legislation in a way that will promote gender equality.

On the other hand, moderate members of the *ulamā* (who comprise the majority of the *ulamā* in South Africa) also support enactment of legislation to recognize Muslim marriages but they condition their support for the MMB on the amendment of two clauses: First, the MMB enables a secular judge to preside over the adjudication of MMB related disputes. The *ulamā* argue that adjudication of MMB related disputes by non-Muslim judges is un-Islamic. They will only agree to MMB related disputes being adjudicated by a secular court if they are presided over by Muslim judges with or without Islamic law experts as assessors. Secondly, the MMB makes provision for voluntary mediation preceding finalization of a divorce. Since the *ulamā* see the mediation arena as the area in which they could exercise influence to determine the outcome of MMB related disputes, they are insisting that mediation be compulsory.

In Canada, religious marriages are not legally recognized unless the religious leader officiating the marriage is a designated marriage officer. In the Canadian Muslim communities, most *imāms* are so designated. But while Muslim spouses can access the benefits attached to secular marriages, women still have to rely on their local leaders to exit unwanted religious marriages. Applications by women for among others, divorce and spousal maintenance are dealt with in *Sharī'a* arbitration tribunals. Male-centred interpretations of Islamic law usually inform the outcome of the decisions rendered in those tribunals, which usually militate against women. For example, tribunals seldom grant post-divorce maintenance and divorce is not easily granted to women. In 2006, the province of Ontario decided to prohibit orders emanating from religious arbitration tribunals from being legally enforceable. The

effect was that decisions rendered by those tribunals could not be held accountable to human rights standards and Muslim women have no recourse to challenge those decisions in secular courts.

In India, the government has a long history of accommodating minority religious communities' claims for the regulation of their own personal laws. So it is willing to intervene in the personal law matters of minority religious communities only if the latter request the government to do so and only to the extent requested by the communities. At times, this has provided protection for women; at other times, it has not had positive implications for them. For instance, the Muslim Personal Law (Shariat) Application Act 26 of 1937 ('Shariat Act') enables Indian Muslim communities to regulate their personal laws as they please. The positive spin off of this is that Muslim marriages are legally recognized. The negative implication is that Indian Muslim male leaders claim the right to interpret Islamic law, which usually has harmful implications for women. When practices that have negative implications for women are challenged in court, many of the lower courts have sanctioned them. Fortunately, the Supreme Court of India has been more progressive in its approach by coming to the aid of Muslim female litigants and setting precedent for the prioritization of gender equality.

The following insights can be gleaned from the above experiences:

1. Where discrimination exists within religious minority communities, including as a result of male-centred interpretations of religious laws, the state should intervene to provide protection for the marginalized members of the community who are negatively affected by the decisions.
2. From the Canadian and South African experiences, it is clear that no state intervention can lead to the privatized oppression of women.
3. Similarly, minimal regulation as in the case of India can also lead to the privatized oppression of women.
4. Regulation of religious marriages or personal law systems should therefore not be dismissed out of hand; especially if it will provide more protection for women's rights than if there is no regulation.
5. Regulation may apply to the whole of a religious personal law system or just aspects of a religious personal law system such as marriage and divorce.

6. The choice whether to regulate or not and which aspects of a religious personal law system to regulate should depend on whether it will result in more or less protection for the rights of marginalized members of the religious community. If regulation can provide more protection to women, it should be considered.
7. Where the state intervenes to regulate religious marriages, the religious freedom of a community must be balanced against the needs of marginalized women within that community to have their rights protected.
8. There must be an opt-out option for those members of the religious community who do not wish to be bound by the legislation regulating religious marriages or personal law systems.
9. There must also be an option for those members of the religious community to whom the legislation may not apply to enter into a civil marriage and access the protections and benefits of civil law. For instance, same-sex couples, inter-religious couples etc. should be able to enter into civil marriages in addition to having a *nikah*.
10. The main *challenge* of regulating religious marriages or personal laws is that you need buy-in from religious leaders otherwise the benefits of regulation will not filter down to those who need it most. So this might entail compromises having to be made. As long as those compromises are reasonable, they should also not be dismissed out of hand.
11. Regulation of religious marriages or personal laws brings those laws directly into the purview of the judiciary. This creates the *opportunity* for a secular judiciary that is committed to the advancement of human rights to assist in the interpretation of religious laws so that they develop in a human rights consistent manner (India is a good example of this).
12. In the negotiation/consultation process, it is important to take into consideration all the voices within the community; not just those who purport to be the religious leaders or who purport to speak on behalf of women's interests. One should not even assume that women's rights advocates speak for all women within the community; in the same way that one should not assume that religious clergy necessarily represent the views of everyone within a community.
13. If a choice is made not to regulate religious marriages or personal law systems through legislation, then consideration should be given to affording legal recognition to religious tribunals that women and men in the community access;

and ensure that those forums are required to implement human rights standards and be subjected to appeal mechanisms. This creates the *opportunity* to encourage religious tribunals to be more mindful of the human rights implications of their decisions. The *challenge* is that those litigants who cannot afford to appeal decisions will end up with legally enforceable decisions that may discriminate against them.

14. Whatever approach is taken, it must be context specific. I do not think that there is a one-size-fits all answer to the challenges posed by the marriages or personal laws of religious minorities.