

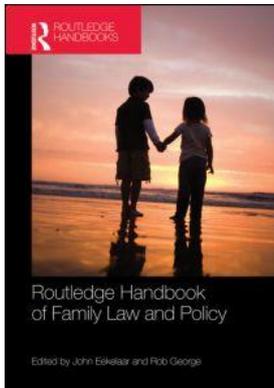
This article was downloaded by: 10.2.98.160

On: 19 Apr 2021

Access details: *subscription number*

Publisher: *Routledge*

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: 5 Howick Place, London SW1P 1WG, UK



## **Routledge Handbook of Family Law and Policy**

John Eekelaar, Rob George

### **The recognition of religious and customary marriages and non-marital domestic partnerships in South Africa**

Publication details

[https://test.routledgehandbooks.com/doi/10.4324/9780203796221.ch1\\_3](https://test.routledgehandbooks.com/doi/10.4324/9780203796221.ch1_3)

Waheeda Amien

**Published online on: 09 May 2014**

**How to cite :-** Waheeda Amien. 09 May 2014, *The recognition of religious and customary marriages and non-marital domestic partnerships in South Africa from: Routledge Handbook of Family Law and Policy* Routledge

Accessed on: 19 Apr 2021

[https://test.routledgehandbooks.com/doi/10.4324/9780203796221.ch1\\_3](https://test.routledgehandbooks.com/doi/10.4324/9780203796221.ch1_3)

**PLEASE SCROLL DOWN FOR DOCUMENT**

Full terms and conditions of use: <https://test.routledgehandbooks.com/legal-notices/terms>

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

## 1.3

# The recognition of religious and customary marriages and non-marital domestic partnerships in South Africa

Waheeda Amien

---

## Introduction

The question regarding what forms of marriage should be recognised for legal purposes is a significant one in a world of increasing cultural and religious diversity. (For further discussion see Chapter 7.4 of this book.) For some countries, this is a relatively recent phenomenon. Other countries have long been made up of a variety of religious and cultural populations, and have approached the issue in different ways. This chapter addresses the developments and challenges relating to the recognition of customary and religious marriages, and non-marital domestic partnerships in South Africa. South Africa provides a good example of development of policies in this area because, like most countries that had been colonised by Britain and Europe, it inherited a colonial legacy that was heavily influenced by a Christian understanding of marriage, which is characterised mainly by monogamy and heterosexuality. The colonial Christian underpinnings for marriage were eventually adopted by the apartheid state, where marriage was defined as ‘the union of one man and one woman to the exclusion while it lasts of all others’.<sup>1</sup> However, since the advent of democracy in South Africa in 1994, family law policy has had to recognise the vast religious and ethnic diversity of the country. This chapter considers how this has been done.

The Christian understanding of marriage was incorporated into the institution of civil marriage, which is regulated by the Marriage Act 25 of 1961.<sup>2</sup> To enjoy the patrimonial benefits of a civil marriage, including reciprocal spousal maintenance obligations, equal parental rights regarding minor children born of the marriage, and being compensated for contributions to the other’s estate, heterosexual and monogamous unions had to be registered

1 *Seedat’s Executors v The Master (Natal)* (1917) AD 302, 309; *Kader v Kader* (1972) (3) SA 203 (R., A.D.), 206H; *Ismail v Ismail* (1983) (1) SA 1006 (AD), 1019H.

2 As former British colonies, India and Canada similarly enacted legislation, which reflect the Christian ethos of monogamy and heterosexuality. E.g. see the Indian Special Marriage Act 43 of 1954. In Canada, provincial laws govern civil marriages. E.g. the Ontario Marriage Act R.S.O. 1990, c. M.3 governs civil marriages in Ontario.

under the Marriage Act. Therefore, unmarried heterosexual cohabitants who live together 'monogamously' are outside the ambit of the Marriage Act. The heterosexual and monogamous understanding of marriage also excluded potentially polygynous and same-sex marriages from being treated as lawful marriages. Under the colonial and apartheid eras, potentially polygynous marriages were specifically denied recognition as lawful marriages on the basis that they were contrary to public policy.<sup>3</sup> This meant that customary marriages and religious marriages such as Muslim marriages, Hindu marriages and Jewish marriages were not afforded full legal recognition.

Due to racial divisions imposed by the apartheid government, customary marriages were only recognised in certain parts of the former Natal province (now called KwaZulu-Natal)<sup>4</sup> and the former 'independent' homeland of Transkei (which now forms part of the Eastern Cape).<sup>5</sup> Muslim, Hindu and Jewish marriages also received partial recognition in limited circumstances, but usually in a way that did not benefit spouses of those marriages. For example, the apartheid era Insolvency Act 24 of 1936 included spouses in religious marriages in its definition of spouse.<sup>6</sup> That meant that if a spouse in a religious marriage was sequestrated, her or his spouse was divested of her or his estate, which along with the sequestrated spouse's estate, was vested in the Master of the High Court and thereafter the trustee of the estate.<sup>7</sup>

In stark contrast to the pre-1994 period, post-1994 South Africa is characterised by a constitutional democracy that heralds an undertaking for all South Africans to reject the monolithic and racist approach of the colonial and apartheid orders, and to replace it with one that is tolerant of plurality. The uniqueness of the 1996 South African Constitution lies in the fact that it not only incorporates western liberal understandings of human rights such as non-discrimination, it also recognises that a diversity of laws operate within the country that are equally deserving of recognition, including customary and religious laws. For example, section 15(3)(a) of the Constitution, which forms part of the freedom of religion clause, permits government to enact legislation that recognises religious and traditional personal or family law systems, or religious and traditional marriages. Yet, the Constitution also attempts to balance respect for diversity with protection of individual human rights. For example, section 15(3)(b) of the Constitution requires that legislation recognising religious and traditional personal or family law systems, or religious and traditional marriages, must be consistent with other provisions of the Constitution such as gender equality. The latter is protected in section 9(3) of the Constitution, which prohibits unfair discrimination on the basis of *inter alia*, sex, gender, race, marital status, religion, culture, ethnicity, belief, and sexual orientation.

In light of the above constitutional provisions, South Africa has begun to take steps to recognise the diversity of unions that exist within the country. Two key examples of personal relationships that are otherwise excluded from recognition under the Marriage Act, but have been afforded recognition under parallel legislation, are same-sex marriages and customary marriages.

In common with many western jurisdictions (see Chapter 1.4 of this book), South Africa has legislated to allow same-sex couples to enter into civil unions on an equal basis with

3 *Ismail*, op. cit., n 1, 1024D–F.

4 KwaZulu Act on the Code of Zulu Law 16 of 1985.

5 Transkei Marriage Act 21 of 1978.

6 Insolvency Act 24 of 1936, s. 21(13).

7 Insolvency Act 24 of 1936, s. 21(1). Another example of legislation recognizing religious marriages for specific purposes is the Estate Duty Act 45 of 1955, s. 1.

opposite-sex couples through the enactment of the Civil Union Act 17 of 2006 (CUA). Civil unions for same-sex spouses are regulated in the same way as civil marriages for opposite-sex spouses and bear the same consequences. Still, for legal purposes, the two unions are treated as distinct. Therefore, heterosexual spouses who choose to register a civil union under the CUA may not simultaneously register a civil marriage under the Marriage Act.<sup>8</sup>

South Africa has also legislated to recognise customary marriages through the Recognition of Customary Marriages Act 120 of 1998 (RCMA). The regulation of customary marriages presents a policy challenge for a particularly western understanding of family law, given their distinct features that are not common to the western concept of marriage. For example, customary relationships are often polygynous. Similar policy challenges are presented for the recognition of religious marriages. For example, an agreement relating to *mahr* (payment made by the husband to the wife) is required for the validity of a Muslim marriage. Certain Hindu marriages, such as those following the Vedic tradition, do not recognise divorce; and Jewish women are traditionally unable to be divorced without obtaining a *get* (Jewish divorce) from their husbands. Recognition of some features of customary and religious marriages therefore also presents a challenge to individual human rights such as gender equality, which South Africa is committed to protect and promote.

Domestic partnerships further present policy challenges albeit of a different nature to those posed by customary and religious marriages. The main challenge presented by domestic partnerships relates to the definition of marriage and the extent to which the definition is capable of including unions that do not involve the type of public ceremony that is commonly associated with marriage.

To address the policy challenges associated with the recognition of a variety of marriages, this chapter provides a brief exposition of the RCMA, followed by a consideration of the limited legal options that exist for spouses in religious marriages and unmarried cohabitants. While there appear to be moves afoot to afford full legal recognition to Muslim marriages and domestic partnerships, legislation has not yet been enacted to achieve such recognition. The legal interventions that are proposed to address the non-recognition of religious marriages and domestic partnerships are, therefore, also reflected upon, with particular emphasis on the Recognition of Religious Marriages Bill, Muslim Marriages Bill and Domestic Partnerships Bill.

## Recognition of customary marriages

Given the lack of respect that was accorded to customary marriages by the colonial and apartheid dispensations, it was a welcome intervention when the RCMA was passed in 1998. The RCMA provided full legal recognition to customary marriages and placed them on an equal footing vis-à-vis civil marriages. This does not mean that customary marriages are regarded as civil marriages. In the same way that civil unions under the CUA are treated as distinct from civil marriages under the Marriage Act, customary marriages are distinguished from civil marriages and civil unions, and spouses may not simultaneously enter into a civil marriage or civil union while having registered a customary marriage.<sup>9</sup>

At the same time, the way in which customary marriages are regulated is surprisingly similar to the way in which civil marriages are regulated. So much so that the enactment of

<sup>8</sup> CUA, s. 8(2).

<sup>9</sup> RCMA, s. 3(2); CUA, s. 8(2).

the RCMA reflects an attempt to assimilate customary marriages into the civil form of marriage.<sup>10</sup> Except for the recognition of a few features particular to customary marriages, namely, *lobolo* (transfer of property by husband or head of his family to head of wife's family) and polygyny,<sup>11</sup> and the fact that the RCMA defines a customary marriage as one that is 'concluded in accordance with customary law',<sup>12</sup> every aspect of the RCMA mimics the requirements of the Marriage Act for the conclusion of a civil marriage. This might suggest that the constitutional respect for diversity of marriages has not translated into respect for diversity within marriages.

Of significance is the fact that features of a civil marriage that are alien to customary marriages have been incorporated into the RCMA. For example, although customary marriages are traditionally entered into over an extended period of time, the RCMA requires that it be entered into immediately.<sup>13</sup> Another example relates to the notion of a matrimonial property regime, which is foreign to customary law. Under traditional customary law, property was managed for the benefit of the family. Yet, the RCMA introduced community of property as the default regime for customary marriages.<sup>14</sup> This matrimonial property system is the default regime that applies to civil marriages in the absence of an ante-nuptial contract.<sup>15</sup> Furthermore, the RCMA regulates customary divorces in the same way as civil divorces,<sup>16</sup> even though traditional customary law expects separation between spouses to be negotiated between their families.<sup>17</sup> So the RCMA effectively converts the nature of customary marriages signifying a connection between families<sup>18</sup> into one that focuses on individual spouses, which is typical of a western-type marriage.<sup>19</sup>

The legislature's intention to draw parity between civil and customary marriages may have been to ensure equality between spouses within customary marriages. To some extent, it has succeeded in achieving this aim. For example, wives in customary marriages have an equal right to divorce and are assured of equal division of property upon termination of the marriage. In other respects, failure to consider the lived realities of indigenous African

10 C. Himonga, 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession', *Acta Juridica* 2005, 82–107, 85.

11 RCMA, s. 1.

12 RCMA, s. 1. The RCMA defines 'customary law' as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.

13 E. Curran and E. Bonthuys, 'Customary law and domestic violence in rural South African communities', *South African Journal of Human Rights* 21, 2005, 607–35, 615.

14 RCMA, s. 7.

15 Community of property involves a joint estate that comprises assets and liabilities of both spouses, which they each acquire before entering marriage and during the marriage. Each spouse has a 50 per cent share in the joint estate. Matrimonial Property Act, chapter III.

16 RCMA, s. 8(2) mimics Divorce Act, s. 4(1), which reads, 'A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them'.

17 Himonga, *op. cit.*, n 10, 89.

18 *Gumede (born Shange) v President of the Republic of South Africa and Ors* (2009) (3) SA 152 (CC), para. 18; Curran and Bonthuys, *op. cit.*, n 13.

19 W. Amien, 'Reflections on the recognition of African customary marriages in South Africa: Seeking insights for the recognition of Muslim marriages', in A. Claassens and D. Smythe (eds), *Marriage, Land and Custom*, Cape Town: Juta & Co Ltd, 2014, ch. 17.

communities has caused certain safeguards that are incorporated into the RCMA to prove unworkable. For example, the RCMA requires a husband to obtain court approval for polygynous marriages and that existing wives be joined in the application, presumably to afford them an opportunity to provide their opinion on the proposed subsequent marriage.<sup>20</sup> Not only is seeking court intervention for the purposes of concluding polygynous marriages unknown to traditional customary law, it requires wives in rural areas to travel great distances to attend court. Given that the rural parts of South Africa comprise the most poverty-ridden areas in the country, wives in those areas are unable to afford the costs involved in travelling to court and legal costs that might be incurred in joining the application.<sup>21</sup> Consequently, many polygynous marriages are entered into without court intervention despite the RCMA requirement that they must.<sup>22</sup>

In contrast, draft legislation proposing recognition of Muslim marriages adopts a very different approach to that undertaken with the enactment of the RCMA. The Muslim Marriages Bill recommends the recognition and comprehensive regulation of the manifold features of Muslim marriages and divorces. This type of regulation carries with it its own set of challenges, which are discussed later in this chapter. For now, attention is given to how religious marriages and domestic partnerships are afforded limited recognition on an ad-hoc basis through legislation and as a result of case law.

### **Limited recognition of religious marriages and domestic partnerships**

Under the Marriage Act, parties married by Muslim, Hindu and Jewish rites are able to access benefits of secular legislation if they enter into civil marriages. Spouses in religious marriages are also able to benefit from specific legislation that had been enacted under apartheid but were amended post-1994, some as a result of judicial intervention and others without judicial intervention. Furthermore, other pieces of legislation were newly enacted to afford protection in specific circumstances to spouses in religious marriages and/or unmarried cohabitants.

#### *Options for civil marriage available to religious communities*

Muslims, Hindus and Jews can either enter into a separate civil marriage before or after concluding their religious marriage, or have their religious marriage solemnised by a person who is designated as a marriage officer under the Marriage Act. Section 3 of the Marriage Act enables a person who solemnises 'marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion' to be designated as a marriage officer. When the marriage officer performs the designated religious marriage, she or he could simultaneously register the marriage as a civil marriage. In this way, spouses entering into the designated religious marriage can access the patrimonial benefits attached to civil marriages.<sup>23</sup> As spouses in a civil marriage, they are also able to enjoy all the benefits accruing to civil law spouses that emanate from secular legislation. While section 3 includes the major faith religions in South Africa, it potentially excludes other faiths. The section could, therefore, be constitutionally

20 RCMA, s. 7(6).

21 Himonga, *op. cit.*, n 10, 106.

22 Himonga, *op. cit.*, n 10, 106.

23 Similar provisions exist in other jurisdictions. E.g. Marriage Act R.S.O. 1990, c. M.3, s. 20(2) (Ontario); Marriage Act 1949, ss 53–57 (England and Wales).

challenged by other faith adherents on the basis that it unfairly discriminates on the ground of religion.<sup>24</sup>

It is as yet unclear how many South African Hindu and Jewish couples currently enter into civil marriages. However, anecdotal evidence suggests that many South African Muslims do not. One of the main reasons for this is that many members of the South African *'ulamā* (Muslim clergy) discourage Muslims from entering into civil marriages by claiming that they are un-Islamic. The *'ulamā* argue that civil marriages do not enable them to solemnise valid polygynous marriages and they entail a default community of property marital regime.<sup>25</sup> The notion of community of property is at odds with the traditional Islamic expectation that spouses' estates should be kept separate upon commencement of the marriage and throughout the marriage.<sup>26</sup> Thus, many Muslim spouses are precluded by their perceived religious obligation from accessing all the secular benefits that their civil law counterparts enjoy.

For those Muslim, Hindu and Jewish spouses who enter into civil marriages and can therefore access benefits that secular legislation makes available to lawful spouses, the civil marriage still does not assist them in being able to enforce all the features of their religious marriage. For example, a Muslim wife who wishes to obtain *faskh* (fault-based Muslim divorce) and is unable to acquire it from the *'ulamā* and a Jewish wife who wants to obtain a *get* (Jewish divorce) from an unwilling husband, will not be able to seek relief in a secular court. While they might be able to obtain dissolution of their civil marriage, failure to obtain a religious divorce has a disparate effect on women who wish to exit their religious marriage. They are placed in the unfortunate position of not being able to move on with their lives and enter into a religious marriage with someone else.

To a limited extent, section 5A of the Divorce Act 70 of 1979 attempts to provide an incentive for parties to obtain a religious divorce before obtaining a civil divorce.<sup>27</sup> If a spouse applies for a divorce order to dissolve her or his civil marriage, and the other spouse is preventing a religious divorce, the court has discretion to not grant the civil divorce until the religious divorce is granted. While this would work if the party applying for the divorce were the husband, it is of no assistance to the wife if she seeks a civil and religious divorce because the court cannot compel the recalcitrant husband to grant her a religious divorce.

### *Limited recognition through legislation*

An example of apartheid era legislation that was amended during South Africa's democratic order is the Income Tax Act 58 of 1962, which now enables spouses in religious marriages and unmarried cohabitants to be exempted from paying donations tax for donations made by one spouse or unmarried cohabitant to the other.<sup>28</sup> An example of legislation that was newly enacted during the post-apartheid era is the Domestic Violence Act 116 of 1998, which extends protection to spouses in religious marriages and/or unmarried cohabitants.<sup>29</sup>

24 Constitution of South Africa 1996, s. 9(3).

25 Op cit., n 15.

26 J. Schacht, *An Introduction to Islamic Law*, Oxford: Oxford University Press, 1964, p. 167.

27 Canadian Divorce Act R.S.O., 1985, c. 3 (2nd Supp.), s. 21(1)(3) contains a similar provision; see also Divorce (Religious Marriages) Act 2002 (England and Wales).

28 Income Tax Act 58 of 1962, s.1: definition of 'spouse'.

29 Domestic Violence Act 116 of 1998, s. 1(vii)(a)–(b). Other legislation recognising spouses in religious marriages and/or unmarried cohabitants include: Compensation for Occupational Injuries and Diseases Act 130 of 1993, s. 1(xv)(c); Demobilisation Act 99 of 1996, ss 1(c) and 7; Special Pensions Act 69 of 1996, ss 2, 31(2)(a)(ii); Children's Act 38 of 2005, ss 1, 20, 231(1)(a)(ii), (c).

*Limited recognition of religious marriages through case law*

There are also apartheid era laws that were amended after 1994 as a result of case law to include spouses of religious marriages that had not been formalised under the Marriage Act within the ambit of the legislation. This followed the groundbreaking approach adopted in the case of *Ryland v Edros*.<sup>30</sup> *Ryland* was the first case in the post-apartheid constitutional dispensation to afford relief to a Muslim wife who instituted claims based on her Muslim marriage. The Cape Provincial Division (as it then was) accepted the Muslim marriage as a contract and was willing to enforce proven terms and customs arising from that contract.<sup>31</sup> The Court justified its decision on the basis that public policy in South Africa is now informed by the constitutional values of equality and tolerance of diversity.<sup>32</sup> Thus, the Court upheld the Muslim wife's claims for *nafaqah* (maintenance) until the end of her *iddah* (waiting period following divorce) as well as her claim for *mut'ah* (Islamic law compensation permitted to her when the husband unjustifiably terminates the marriage).<sup>33</sup>

The *Ryland* case laid the basis for later courts to recognise rights and obligations arising from Muslim and Hindu marriages within the ambit of specific legislation. For example, in the case of *Amod v Multilateral Motor Vehicle Accidents Fund*,<sup>34</sup> the Supreme Court of Appeal found that a Muslim husband's unilateral duty of spousal support arising from the Muslim marriage is worthy of legal recognition for the purpose of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.<sup>35</sup> The Act incorporates the common law dependant's action, which enables a surviving spouse to be compensated for loss of support in circumstances where the deceased had a legal duty of support and was unlawfully killed in a motor vehicle accident as a result of the negligent driving of a third party.<sup>36</sup> One of the overriding considerations that informed the Court's decision was its finding that the *boni mores* of South African society encapsulates the constitutional values of 'tolerance, pluralism and religious freedom'.<sup>37</sup> Thus, the Court extended the ambit of the Act to include surviving spouses in monogamous Muslim marriages.

The Constitutional Court thereafter recognised a Muslim and Hindu husband's duty of spousal support within the context of the Intestate Succession Act 81 of 1987, as well as a Muslim husband's duty of spousal support for the purpose of the Maintenance of Surviving Spouses Act 27 of 1990. In *Daniels v Campbell*<sup>38</sup> and *Hassam v Jacobs*,<sup>39</sup> the Constitutional Court found that Muslim spouses respectively in monogamous and polygynous Muslim marriages are surviving spouses for the purpose of the Intestate Succession Act. In *Daniels*, the Court further recognised surviving spouses in monogamous Muslim marriages as spouses for the purpose of the Maintenance of Surviving Spouses Act. The *Daniels* and *Hassam* cases were followed by *Govender v Ragavayah*,<sup>40</sup> where the Durban High Court extended the ambit of the

30 (1997) (2) SA 690 (C).

31 (1997) (2) SA 690 (C), 707E–H.

32 (1997) (2) SA 690 (C), 708J.

33 (1997) (2) SA 690 (C), 718I–J.

34 (1999) (4) SA 1319 (SCA).

35 (1999) (4) SA 1319 (SCA), paras 14–15, 20, 25.

36 (1999) (4) SA 1319 (SCA), paras 1, 3, 10.

37 (1999) (4) SA 1319 (SCA), para 20.

38 (2004) (5) SA 331 (CC).

39 (2009) (5) SA 572 (CC).

40 (2009) (3) SA 178 (D).

Intestate Succession Act to surviving spouses in monogamous Hindu marriages. Therefore, monogamous Muslim and Hindu wives and polygynous Muslim wives whose deceased husbands die intestate may inherit on an intestate basis, and monogamous Muslim wives may further claim maintenance from their deceased husbands' estates.

The judiciary additionally recognised Muslim and Hindu husbands' duties of spousal support arising respectively from their monogamous Muslim and Hindu marriages, for the purpose of maintenance claims and specifically in the context of the Maintenance Act 99 of 1998. In *Cassim v Cassim*<sup>41</sup> and *Laxmi Prag v Daya Prag*,<sup>42</sup> the Transvaal Provincial Division (as it then was) and the Wynberg Magistrate's Court respectively granted the Muslim wife's claim and the Hindu wife's claim for spousal maintenance under the Maintenance Act. Furthermore, the Court in *Khan v Khan*<sup>43</sup> extended the application of the Maintenance Act to Muslim wives in polygynous marriages by bringing them too within the ambit of the Maintenance Act.

In fact, Muslim wives who institute matrimonial actions against their husbands may also be awarded maintenance *pendente lite* in terms of Rule 43 of the Uniform Rules of Court. The latter enables a spouse to claim, *inter alia*, interim maintenance pending the finalisation of a matrimonial action. In the cases of *Mahomed v Mahomed*,<sup>44</sup> *Hoosain v Dangor*<sup>45</sup> and *AM v RM*,<sup>46</sup> the Muslim wives in the respective cases had instituted divorce actions against their husbands. In all three cases, the wives respectively asked the Eastern Cape and Western Cape High Courts to apply the provisions of the Divorce Act to the dissolution of their Muslim marriages and that the Courts declare their Muslim marriages valid under the Marriage Act. Prior to the finalisation of their divorce actions, they asked the Courts to grant them interim maintenance in terms of Rule 43.<sup>47</sup> In *Mahomed* and *AM*, the Eastern Cape High Court accepted that the wife's pending divorce action against her husband constituted a 'pending matrimonial action' for the purpose of Rule 43.<sup>48</sup> In *Hoosain*, the Western Cape High Court found that the word 'spouse' as it appears in Rule 43 includes a spouse in a Muslim marriage.<sup>49</sup> In the case of a dispute regarding the validity of a Muslim divorce, the Court in *AM* held further that it was not necessary to prove that the Muslim divorce is valid in order for a wife to succeed in her claim for interim maintenance.<sup>50</sup> Thus, in each of the cases, the Courts granted the wives' requests for maintenance *pendente lite*.<sup>51</sup>

Prior to the finalisation of their divorce actions, the parties reached an out-of-court settlement. So the courts were not afforded an opportunity to pronounce on the merits of the wives' claims for an order declaring the validity of their Muslim marriages and that their divorces be governed by the Divorce Act. Had the cases been pursued to their natural conclusion, it is most likely that the judiciary would have neither found the Muslim marriages to be valid under the Marriage Act nor that the Divorce Act applies to the dissolution of Muslim

41 (Part A) (TPD) (Unreported 15 December 2006, Case No: 3954/06).

42 Wynberg Magistrates' Court (2 Nov 2009).

43 (2005) (2) SA 272 (T).

44 Case No: 2154/08, judgment 29 May 2009 (ECP).

45 Case No: 18141/09, judgment 18 November 2009 (WCC).

46 (2010) (2) SA 223 (ECP).

47 *Mahomed*, n 44, para. 3; *Hoosain*, n 45, para. 2; *AM*, n 46, para. 3.

48 *Mahomed*, n 44, para. 10; *AM*, n 46, para. 10.

49 *Hoosain*, n 45, para 28.

50 *AM*, n 46, para. 10.

51 *Mahomed*, n 44, paras 13, 15; *Hoosain*, n 45, para. 31; *AM*, n 46, para. 14.

marriages. The main reason for this assertion is that the judiciary has up to now been reluctant to provide general recognition to Muslim marriages. In the *Amod* case, the Supreme Court of Appeal clearly indicated that it views such recognition to be best addressed by the legislature.<sup>52</sup>

It seems that the judiciary is more likely to grant claims arising from religious marriages if the bases of the claims are compatible with secular law. For example, the Court in *Ryland* applied the principles of South African contract law because it was satisfied that a Muslim marriage could be treated as a contract.<sup>53</sup> Similarly, the husband's duty of support arising from a Muslim or Hindu marriage could easily be accommodated in secular legislation. However, expecting a secular court to apply the provisions of the Marriage and Divorce Acts to religious marriages and divorces may not be tenable, especially when the rules of secular legislation may be incompatible with religious rules. For example, and as mentioned previously, many Muslims treat the notion of community of property as incompatible with Islamic law. If a Muslim marriage was regarded as valid under the Marriage Act, this might entail a conversion of the matrimonial property system of Muslim marriages from one that traditionally treats the estates of spouses as separate to one that is in community of property. It is, therefore, important that the process of affording legal recognition to religious marriages entails consultations with religious communities. The judiciary's recommendation that full legal recognition of religious marriages should be the responsibility of the legislature is thus a wise one since the legislature is best placed to conduct the necessary consultations with those communities.

What this all means is that religious marriages still do not have general recognition. So whenever spouses in religious marriages seek recognition, they need to convince a court to include them within the ambit of a specific piece of legislation. For example, the *Govender* case only extended the sphere of the Intestate Succession Act to spouses in monogamous Hindu marriages. Thus, spouses in polygynous Hindu marriages still need to institute a separate claim to be afforded protection under the Intestate Succession Act. This involves a cumbersome and costly process. Furthermore, if parties wish to assert claims that arise from the Muslim marriage contract such as *mahr*, they need to institute a specific claim for that. This too can prove costly and time-consuming and would most likely require legal representation.

General non-recognition of religious marriages also means that spouses in a religious marriage cannot rely on a secular court to amend religious rules that are harmful to them. This is particularly due to the judiciary's reluctance to become involved with issues relating to religious doctrine.<sup>54</sup> For example, in the case of *Singh v Ramparsad*,<sup>55</sup> the Durban High Court refused to recognise a civil divorce in favour of the wife in circumstances where the

52 *Amod*, n 34, para. 28.

53 A similar approach was adopted by the British Columbia Supreme Court of Appeal, which was willing to treat a *mahr* agreement as a valid and enforceable marriage agreement under the British Columbia Family Relations Act R.S.B.C. 1996, c. 128. In particular, the Court found that the *mahr* agreements conformed to the provisions of the Act. *Nathoo v Nathoo* [1996] B.C.J. No. 2720 (S.C.) [Q.L.]; *Amlani v Hirani* [2000] B.C.J. No.2357 (S.C.) [Q.L.]; *N.M.M. v N.S.M.* [2004] B.C.J. No. 642 (S.C.) [Q.L.].

54 This is referred to as the doctrine of religious entanglement, which was confirmed in *Taylor v Kurtstag NO and Ors* (2005) (1) SA 362 (W). In *Taylor*, the Witwatersrand Local Division of the High Court dismissed an application to restrain the *Beth Din* (Jewish Ecclesiastical Court) from issuing, publishing or disseminating a *cherem* to excommunicate the applicant from the Jewish faith (paras 39, 61, 65).

55 (2007) (3) SA 445 (D).

parties had not registered a civil marriage under the Marriage Act, and had only entered into a Hindu marriage according to the Sanathan or Vedic tradition, which does not permit divorce. The Court was not prepared to meddle in theological issues and grant a divorce in circumstances where the religion regulating the parties' marriage did not recognise divorce.<sup>56</sup>

For the above reasons, full legal recognition of religious marriages is important, which brings us to the legislative initiatives that are proposed for the legal recognition of Muslim and other religious marriages in South Africa.

## Proposed recognition of religious marriages in South Africa

In about 2005, the Commission for Gender Equality (CGE) and the Department of Justice and Constitutional Development (DoJCD) drafted a Recognition of Religious Marriages Bill (RRMB), which proposes full legal recognition of all religious marriages in South Africa.<sup>57</sup> The RRMB recommends that religious communities should regulate their religious marriages but that dissolution of religious marriage should mimic the approach espoused in the Divorce Act.<sup>58</sup> So the RRMB tries to accommodate the interests of religious communities by allowing them to manage their own marriages while assimilating the way in which those marriages are dissolved to enable conformity with civil divorces.

The approach reflected in the RRMB presents two main challenges. First, the RRMB leaves the regulation of religious marriages for the determination of religious communities. (For more general discussion of these issues, see Chapter 7.4 of this book.) It particularly does not seek to regulate practices that are potentially harmful to women, such as polygyny and denying women the right to exit unwanted religious marriages.<sup>59</sup> Religious interpretations and practices adopted by religious communities that are harmful to women could therefore potentially persist.<sup>60</sup> Second, like the RCMA, the RRMB's expectation that religious divorces should follow the same form as civil divorces is an attempt to ensure an equal right of divorce for women and men. However, this assimilation approach is subject to the same limitation faced by the RCMA, namely, it fails to take sufficient cognisance of the lived

56 (2007) (3) SA 445 (D), paras 50–51.

57 A copy of the RRMB is on file with the author and can be obtained from the CGE. For CGE contact details, see [www.cge.org.za/index.php?option=com\\_contact&view=category&catid=12&Itemid=54](http://www.cge.org.za/index.php?option=com_contact&view=category&catid=12&Itemid=54) (accessed 2 September 2013).

58 Clause 10(1)–(2); see also Divorce Act 70 of 1979, s. 3(a).

59 The Indian Muslim Personal Law (Shariat) Application Act 26 of 1937 similarly allows Indian Muslim communities to regulate Muslim personal law. Informal religious entities including male-headed *jamaats* (Muslim bodies) like the Muslim Personal Law Board and *ulam* end up interpreting and applying androcentric interpretations of Muslim family law to the detriment of Indian Muslim women. The Indian experience demonstrates the risks involved in allowing Muslim communities to regulate their own personal laws without state intervention requiring adherence to human rights norms. Women's Research and Action Group, 'Marriage and the Politics of Social Change in India's Muslim Communities', in Women Living Under Muslim Laws (ed), *Special Dossier: Shifting Boundaries in Marriage and Divorce in Muslim Communities*, France: Women Living Under Muslim Laws, 1996, pp. 168–87, 168; G. Austin, 'Religion, Personal Law, and Identity in India', in G.J. Larson (ed), *Religion and Personal Law in Secular India*, Bloomington, IN: Indiana University Press, 2001, pp. 15–23, 21.

60 See further W. Amien, 'A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context', *International Journal of Law, Policy and the Family* 24, 3, 2010, 361–96, 369.

experiences of members of religious communities where spouses will feel compelled to obtain religious divorces. While the RRMB proposes the incorporation of a clause similar to section 5A of the Divorce Act, the net effect will be the same as described in the previous section: if the unco-operative spouse is the husband and the wife is seeking a divorce, a court will not be able to force the husband to give her a religious divorce.

Notwithstanding its existence, the RRMB may never actually see the light of day in Parliament. Thus far, it does not appear to have been taken seriously by government and civil society; most likely because it was drafted without sufficient consultation with religious communities and civil society bodies. At best, the RRMB provides material for academic engagement, which is the reason for its inclusion in this chapter, and an interesting example of accommodation and assimilation approaches for teaching purposes.

In contrast, another piece of draft legislation, namely, the Muslim Marriages Bill (MMB),<sup>61</sup> was drafted by a Project Committee of the South African Law Reform Commission (SALRC) in 2003. It underwent extensive consultations with the South African Muslim community and human rights organisations and garnered substantial support among them for its enactment. The MMB recommends comprehensive regulation of the features of Muslim marriages and divorces, which includes, *inter alia*, *mahr*, marriage by proxy, the husband's unilateral duty of support toward his wife and children, polygyny, a wife's claim for compensation within marriage, and different forms of Islamic divorce.

Despite general support for the 2003 MMB, it was never passed. Instead, the ruling party used it as a political tool to solicit Muslim votes during the national elections that occur every five years. However, this tactic may not work in the 2014 elections because in 2010, the DoJCD amended the MMB without formal consultations with relevant stakeholders. Although the 2010 MMB received Cabinet approval and is now capable of formally entering the parliamentary process,<sup>62</sup> it has lost the support of those members of the South African *'ulamā* who had supported the 2003 MMB. The reason for their loss of support centres on two provisions in the 2010 MMB.<sup>63</sup> First, the 2010 MMB enables any judge from within the secular court system to adjudicate disputes arising from the MMB,<sup>64</sup> whereas the 2003 MMB required a Muslim judge to preside with Islamic law specialists as assessors.<sup>65</sup> The *'ulamā* argue that any issue of an Islamic nature that is decided upon by a non-Muslim judge would be un-Islamic. Second, the 2003 MMB required a process of compulsory mediation to precede the finalisation of the divorce.<sup>66</sup> In contrast, the 2010 MMB converts the compulsory feature of the mediation process that was recommended in the 2003 MMB into a voluntary one.<sup>67</sup> Again, the *'ulamā* take the view that mediation/arbitration of Muslim family law disputes is compulsory under Islamic law.

61 South African Law Reform Commission, *Islamic Marriages and Related Matters: Report* (Project 59, 2003), iii (SALRC Report), [www.doj.gov.za/salrc/reports/r\\_ptj59\\_2003jul.pdf](http://www.doj.gov.za/salrc/reports/r_ptj59_2003jul.pdf) (accessed 2 September 2013). A detailed analysis of the 2003 MMB is available in Amien, *op. cit.*, n 60, 370.

62 For the 2010 MMB, see [www.justice.gov.za/legislation/bills/2010\\_muslim-marriages-bill.pdf](http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf) (accessed 2 September 2013).

63 W. Amien, 'Politics of religious freedom in South Africa', *The Immanent Frame. Secularism, Religion and the Public Sphere*, SSRIC, 2012, <http://blogs.ssrc.org/tif/2012/07/24/politics-of-religious-freedom-in-south-africa/> (accessed 2 September 2012).

64 See clause 1: definition of 'court'.

65 Clause 15 (1) (a)–(b).

66 Clause 13 (1).

67 Clause 12 (1).

The provisions relating to adjudication and mediation were subject to great negotiation between the *'ulamā* and the SALRC Project Committee. So the amendment of the relevant clauses in the 2010 MMB without consulting the *'ulamā* has resulted in their distancing themselves from those clauses. They, therefore, condition their support for the 2010 MMB on the re-insertion of the 2003 MMB clauses relating to adjudication and mediation. In fact, the changes to the 2003 version of the MMB has provided the *'ulamā* with the opportunity to call for the establishment of separate *Sharī'a* courts to adjudicate matters arising from the MMB. Recently, there has also been a call to enable Muslim arbitration forums to render legally enforceable arbitration orders in respect of family law matters.<sup>68</sup> If either of these demands is met, they will most likely operate to the detriment of Muslim women because they will probably be adjudicated or arbitrated by the same members of the *'ulamā* who currently adopt interpretations and practices under the auspices of Islamic law that militate against women. Even if the decisions of *Sharī'a* courts or Muslim arbitration forums are made appealable, particularly within a human rights and constitutional law framework, the financial and emotional cost implications may cause women to not pursue appeal claims.

It is in the *'ulamā's* interest to try and retain as much authority and influence over the outcome of Muslim family law related disputes as possible. Currently, they play a quasi-judicial role within the Muslim community. Among others, they adjudicate applications by wives for *faskh*, issue certificates of confirmation for *talaqs* (unilateral repudiation of a wife by a husband), render judgments about the husband's unilateral maintenance obligation to support his wife and children, and make pronouncements about property division between spouses where, for example, one spouse claims that she or he made significant contributions to the maintenance or growth of the other spouse's estate. Since Muslim marriages are not legally recognised, any decisions rendered by the *'ulamā* are unenforceable and it is up to the moral conscience of Muslim parties to follow them. The *'ulamā* would therefore like to have the legal authority that will render their decisions legally enforceable. This is most likely the main reason that they are campaigning for the legal recognition of Muslim marriages and the reason for their insistence on a compulsory mediation process and Muslim influence on the bench.

Gender activists within the South African Muslim community and broader civil society are also advocating for the legal recognition and regulation of Muslim marriages. However, their reasons are somewhat different from those of the *'ulamā*. They recognise that non-recognition of Muslim marriages particularly impacts negatively on the more marginalised spouse within the marriage, namely, the wife.<sup>69</sup>

As mentioned earlier in this chapter, apart from being unable to access all the civil law benefits that are available to their civil law counterparts, Muslim wives have to also endure the *'ulamā's* interpretations of Muslim family law that do not always weigh in their favour. For example, it is usual for members of the *'ulamā* to not grant *faskhs* to wives even where clear Islamic law grounds exist. Instead, they often advise women to return to their marriages and

68 Currently, this is not possible within the South Africa legal framework because, unlike Canada and the UK, South Africa only permits commercial matters to be arbitrated. It would, therefore, require an overhaul of the arbitration system. Arbitration Act 42 of 1965 (South Africa) and Arbitration Act 1996 c. 23 (England and Wales). E.g. in Canada, arbitration legislation are federal-based, Arbitration Act 1991 S.O. c. 17.

69 For a description of the negative impacts of non-recognition of Muslim marriages on women, see Amien, op. cit., n 60, 363.

attempt reconciliation, including in instances where husbands are abusive. Where *faskhs* are granted, it is usually on the occasion that the husband fails to appear at the *faskh* hearing. Gender activists argue that regulation of Muslim marriages will enable Muslim women to have increased access to their Islamic law rights and benefits including divorce options that Islamic law makes available to them.<sup>70</sup> Currently, Muslim women are also unable to challenge decisions emanating from *'ulamā* bodies. Gender activists are therefore additionally pushing for Muslim family law to be adjudicated in secular courts to increase the chances of gendered reform of Muslim family law.<sup>71</sup> If the features of a Muslim marriage are regulated by legislation, the judiciary will have a basis for engaging with the doctrines of Islamic law where necessary and particularly in those instances where the legislation is vague. This will put the current judicial doctrine of religious non-entanglement to the test. To prevent the judiciary from having to engage with religious doctrine, it will be important for the legislation to provide as much certainty as possible.

Both the 2003 and 2010 versions of the MMB attempt to balance religious rights with the constitutional imperative to promote gender equality. This is why I have argued elsewhere that the MMB adopts an integration approach, as opposed to a strictly accommodation approach.<sup>72</sup> The MMB tries to do this by incorporating benefits that are traditionally afforded to women under Islamic law, even though they may not be practiced within the community. For example, it provides for a default out of community of property regime to ensure that the spouses' estates are kept separate. To balance this, it includes a wife's right to be compensated for her direct contributions during the marriage. I have also argued that the MMB does not go far enough to include the gender-friendliest interpretations of Islamic law, which is necessary for the approach that I advocate for the drafting of legislation that deals with religious family laws, namely, a Gender-Nuanced Integration approach.<sup>73</sup> For example, to appease the *'ulamā*, the MMB does not make provision for a wife to be compensated for her intangible contributions to the marriage. Nevertheless, in trying to achieve the balance between religious/customary rights and gender equality, the MMB seems to have been more successful than the RCMA and RRMB.

Apart from draft legislation proposing the recognition of Muslim marriages, the legislature has also taken steps to recommend legal recognition for domestic partnerships in South Africa. The draft legislation namely, Domestic Partnerships Bill and the judicial approach to domestic partnerships is the next subject of discussion.

## Proposed recognition of domestic partnerships in South Africa

Although the subject of unmarried cohabitants is dealt with elsewhere in this book (see Chapter 1.5), it bears some consideration in this chapter since the South African context adds a dimension to the discussion that is not found in many westernised jurisdictions. That dimension relates to one of the more pernicious effects of colonialism and apartheid that resulted in the disintegration of the extended African family and its replacement with a

70 W. Amien and R. Shabodien, *Comments to the Minister of Justice and Constitutional Development on the Muslim Marriages Bill*, compiled on behalf of the Recognition of Muslim Marriages Forum (23 May 2011).

71 Amien and Shabodien, op. cit., n 70.

72 Amien, op. cit., n 60, 373.

73 Amien, op. cit., n 60, 381.

nuclear type family.<sup>74</sup> The fragmentation of the extended African family emanated directly from the colonial and apartheid legacies of the migrant labour system and land dispossession.<sup>75</sup> In particular, the migrant labour system required black (indigenous) African men to migrate from rural areas to urban areas where they provided a cheap source of labour for white mine owners.<sup>76</sup> As mine workers, they were forced to live in the mine compounds without their families. This resulted in the formation of numerous domestic partnerships between indigenous African men and women in the urban areas while their wives remained in the rural areas and became responsible for the maintenance of the rural-based family.<sup>77</sup> These days, domestic partnerships are also entered into within other population groups, including the coloured, Indian and white communities but still to a lesser extent than those found in indigenous African communities.<sup>78</sup>

As indicated earlier in this chapter, post-1994 South Africa has witnessed the amendment of some legislation and enactment of others that have brought unmarried cohabitants within the protection of specific legislation. However, while the judiciary has been inclined to bring spouses in religious marriages within the ambit of specified legislation, it has adopted a less generous stance with unmarried cohabitants. The main reason appears to be the judiciary's understanding that, unlike religious marriages, the words 'marriage', 'spouse' and 'surviving spouse' as they appear in legislation like the Maintenance of Surviving Spouses Act, do not include domestic partnerships and unmarried cohabitants. *Volks v Robinson*<sup>79</sup> is a case in point.

In *Volks*, the respondent, Ms Robinson, had been in a 16-year domestic partnership with the deceased before he passed away.<sup>80</sup> When Ms Robinson instituted a claim for maintenance against the deceased's estate, her claim was denied on the basis that she was not considered a 'surviving spouse' for the purpose of the Maintenance of Surviving Spouses Act.<sup>81</sup> In the Act, section 1 defines 'survivor' as the 'surviving spouse in a marriage dissolved by death'.<sup>82</sup> Section 2(1) further provides:

74 *Green paper on families. Promoting family life and strengthening families in South Africa*, Government Gazette No. 34657, General Notice 756 (3 October 2011) 24–25, 6, [www.info.gov.za/view/DownloadFileAction?id=152939](http://www.info.gov.za/view/DownloadFileAction?id=152939) (accessed 26 June 2013).

75 *Green paper on families*, op. cit., n 74, 6. Land dispossession was codified in the Native Land Act 27 of 1913 and Group Areas Act 41 of 1950. The Native Land Act dispossessed indigenous Africans from 87 per cent of their arable land and allowed them to own up to only 13 per cent of arid land. This forced many indigenous Africans to move to urban areas in search of work.

76 *Green paper on families*, op. cit., n 74, 6.

77 *Green paper on families*, op. cit., n 74, 17.

78 Apartheid classifications namely, black, coloured and Indian are retained in South Africa only for the purposes of implementing affirmative action measures to protect and promote members of historically racially disadvantaged groups. Under the Employment Equity Act 55 of 1998, black Africans, coloureds and Indians are generically referred to as black. *Green paper on families*, op. cit., n 74, 17. Indigenous Africans comprise the majority of South Africa. They account for 79.2 per cent of a total population of 51,770, 560. Coloureds and whites each make up 8.9 per cent of the total population while Indians comprise 2.5 per cent of the total population. Statistics South Africa, *Census 2011. Census in brief*, 18, 21 (Statistics South Africa, 2012), [www.statssa.gov.za/Census2011/Products/Census\\_2011\\_Census\\_in\\_brief.pdf](http://www.statssa.gov.za/Census2011/Products/Census_2011_Census_in_brief.pdf) (accessed 27 June 2013).

79 [2005] ZACC 2.

80 *Volks*, n 79, para. 3.

81 *Volks*, n 79, para. 9.

82 Emphasis added.

If a *marriage* is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.<sup>83</sup>

Ms Robinson launched a constitutional challenge against section 2(1) read with section 1 on the basis that the sections unfairly discriminate against surviving unmarried cohabitants in domestic partnerships on the ground of marital status<sup>84</sup> and they offend against their right to dignity.<sup>85</sup>

Seven judges representing a majority of the Constitutional Court found, per Skweyiya J, that the word ‘marriage’ as construed in the Act ‘is one [that is] recognized either by the law or by a religion’.<sup>86</sup> The Court further found that the maintenance benefit provided for in section 2(1) is linked directly to the reciprocal spousal duty of support that arises as an invariable consequence of marriage.<sup>87</sup> The Court observed that the reciprocal spousal duty of support between married persons arises by operation of law.<sup>88</sup> In contrast, no such legal duty of support, arising through operation of law, exists between unmarried persons.<sup>89</sup> Since the Act enables the legal duty of spousal support that exists within marriage to extend beyond the death of a spouse, and since such legal duty does not exist between unmarried cohabitants, the Court concluded that a legal duty of support vis-à-vis unmarried cohabitants cannot extend beyond death.<sup>90</sup> The Court thus held that the Act is not capable of being interpreted in a way that includes unmarried cohabitants.<sup>91</sup>

Of further significance is the fact that the Court confirmed its understanding of marriage as an ‘important social institution . . . [that] has a central and special place, and forms one of the important bases for family life in . . . society’.<sup>92</sup> Consequently, the Court held that in appropriate circumstances, the law might distinguish between married and unmarried persons,<sup>93</sup> and afford protection to married persons that it does not afford to unmarried persons.<sup>94</sup> For the purpose of the Act, the Court therefore found that the distinction between married and unmarried persons neither constitutes unfair discrimination nor infringes the right of unmarried persons’ to dignity.<sup>95</sup>

In contrast, the minority judgments of Mokgoro J and O’Regan J, as well as Sachs J, departed from the majority decision by their finding that the relevant provisions of the Act unfairly discriminate against unmarried cohabitants on the basis of marital status and that the discrimination is not justifiable.<sup>96</sup> In coming to this decision, Mokgoro and O’Regan

83 Emphasis added.

84 Constitution of South Africa 1996, s. 9(3).

85 Constitution of South Africa 1996, s. 10.

86 *Volks*, n 79, para. 40. Skweyiya J wrote the majority judgment. Chaskalson CJ, Langa DCJ, Moseneke J, Ngcobo J, Van der Westhuizen J and Yacoob J concurred.

87 *Volks*, n 79, para. 56.

88 *Volks*, n 79, para. 56.

89 *Volks*, n 79, para. 56.

90 *Volks*, n 79, para. 60.

91 *Volks*, n 79, para. 45.

92 *Volks*, n 79, para. 52.

93 *Volks*, n 79, paras 54, 85.

94 *Volks*, n 79, para. 86.

95 *Volks*, n 79, paras 56, 60, 62.

96 *Volks*, n 79, paras 131–135.

recognised that long-term domestic partnerships could involve ‘patterns of dependence and vulnerability’.<sup>97</sup> Thus, in the absence of legislation protecting the interests of unmarried cohabitants, the exclusion of the latter from section 2(1) could have an adverse impact on the surviving cohabitant.<sup>98</sup> This is especially the case where unmarried cohabitants undertake reciprocal obligations of support during the subsistence of the domestic partnership, but there is no equitable distribution of the deceased cohabitant’s estate in favour of the surviving cohabitant who requires financial support.<sup>99</sup>

Following the above impact-based approach, Sachs J located the question of fairness of excluding surviving cohabitants from the ambit of the Act within a ‘situation-sensitive framework of the principles of family law’, which he suggested requires a ‘people-centred approach’.<sup>100</sup> In short, Sachs J postulated the view that the issue of fairness must be determined within the paradigm of South Africa’s constitutional democracy.<sup>101</sup> He furthermore challenged the view that parties necessarily exercise a choice when they do not marry and instead engage a domestic partnership,<sup>102</sup> particularly in relationships characterised by an imbalance of power. Within this nuanced approach to marriage and family law, Sachs J adopted a ‘functional’ as opposed to a ‘definitional’ approach to marriage.<sup>103</sup> In other words, instead of restricting legal consequences of marriage to only those relationships that comply with the formal definition of marriage, he regarded relationships that fulfill functions that are traditionally attributed to marriage as equally deserving of legal protection.<sup>104</sup>

In the context of a constitutional dispensation that promotes tolerance of diversity, the decision of the majority was surprisingly conservative. Instead, the minority judgments displayed a more attuned understanding of the lived realities of South Africans and for the need to infuse South Africa’s celebrated tolerance of diversity into the definition of marriage. In particular, Sachs J’s functional approach to marriage accords with the constitutional values of ‘diversity’, ‘tolerance of difference’ and ‘human dignity’.<sup>105</sup> Since a definitional approach to marriage such as the one adopted by the majority of the Court potentially impacts negatively on a relatively significant percentage of the population, many of whom are still affected by race-based and unequal socio-economic legacies of apartheid, legislation is required to fill the lacuna in the law relating to domestic partnerships. In fact, this lacuna is addressed in the proposed DPB and is recommended for enactment by the SALRC.<sup>106</sup>

The DPB makes provision for the legal recognition of registered domestic partnerships,<sup>107</sup> the legal status of domestic partners,<sup>108</sup> and enforcement of the legal consequences of domestic

97 *Volks*, n 79, para. 133.

98 *Volks*, n 79, paras 131, 134.

99 *Volks*, n 79, para. 131.

100 *Volks*, n 79, para. 151.

101 *Volks*, n 79, para. 151.

102 *Volks*, n 79, paras 156–57.

103 *Volks*, n 79, para. 172.

104 *Volks*, n 79, para. 173.

105 *Volks*, n 79, para. 180.

106 See [www.info.gov.za/view/DownloadFileAction?id=76707](http://www.info.gov.za/view/DownloadFileAction?id=76707) (accessed 3 September 2013). Existing remedies to protect unmarried cohabitants’ rights include drafting contracts and wills and reliance on the common law construct of universal partnership. However, these remedies offer limited protection. For further discussion, see D.S.P. Cronje and J. Heaton (eds), *South African Family Law*, 3rd edn, South Africa: LexisNexis, 2010, p. 244.

107 Preamble, clause 6.

108 Clause 2(a).

partnerships.<sup>109</sup> In addressing the challenge faced by the Constitutional Court in *Volks*, the DPB adopts the functional approach and recommends that a 'spouse' for the purpose of, *inter alia*, the Maintenance of Surviving Spouses Act, must be construed to include a registered domestic partner.<sup>110</sup> Along the same vein, the DPB recommends that registered domestic partners be brought within the definition of 'spouse' in the Intestate Succession Act.<sup>111</sup> The DPB further proposes that partners in a registered domestic partnership will have a reciprocal duty of support.<sup>112</sup> Thus, it could further potentially bring registered domestic partners within the protection of the Maintenance Act.

At the same time, the DPB also confirms the majority approach in *Volks* that a domestic partnership is not equivalent to a marriage to the extent that it does not require registration of a domestic partnership to be witnessed.<sup>113</sup> Thus, domestic partnerships would not entail the public characteristic that typifies marriage. Termination of domestic partnerships is also distinguished from civil divorces in that the DPB recommends that the latter require court intervention while the former should simply involve registration of a termination agreement.<sup>114</sup> The only time that judicial oversight of a termination agreement is proposed is when minor children are involved.<sup>115</sup> The latter requirement is to ensure that the paramount principle of the best interests of the child is upheld, which is constitutionally required and legislatively protected in the Children's Act.<sup>116</sup>

To assist in the determination of property division, the DPB makes provision for the consideration of financial and non-financial contributions that are made directly or indirectly to the maintenance or growth of the partners' joint property or each of their separate properties.<sup>117</sup> It also recognises non-financial contributions made by a homemaker or parent for the welfare of the other partner and/or child of the domestic partners.<sup>118</sup> In other words, the DPB specifically recommends giving legal recognition to the value of unpaid labour in the home in the context of a registered domestic partnership. The latter recommendation is made in view of the DPB's proposal that the default matrimonial property regime for domestic partnerships should entail separate estates, unless the registered domestic partnership agreement stipulates otherwise.<sup>119</sup> Since secular legislation does not make specific provision for unpaid labour in the home to be valued in the context of civil marriages and civil unions,<sup>120</sup> a registered domestic partnership may potentially provide more protection for non-financial contributions in the home. This might raise the question of equal treatment for spouses in civil marriages or partners in civil unions who are married out of community of property but are not as easily able to be compensated for their direct and indirect contributions within marriage.

109 Preamble.

110 Clause 19.

111 Clause 20.

112 Clause 9.

113 Preamble, clause 6.

114 Clause 13.

115 Clause 15(1).

116 Constitution of South Africa 1996, s. 28(2); Children's Act 38 of 2005, s. 9.

117 Clause 1.

118 Clause 1. This provision incorporates the Supreme Court of Appeal's finding that a domestic partnership may be inclusive of family life, therefore, non-financial contributions such as unpaid labour in the home could form part of a partnership agreement. *Butters v Mncora* (2012) (4) SA 1 (SCA), para. 23.

119 Clauses 7(1) and 7(3).

120 Marriage Act, Civil Union Act, Matrimonial Property Act.

Lastly, although the DPB mimics the civil law expectation of marriage that only one legal domestic partnership may be registered at a time,<sup>121</sup> it is simultaneously attentive to the customary law practice of polygyny among indigenous Africans. Where there may be competing claims for maintenance by an unregistered surviving domestic partner and a surviving customary spouse, the DPB recommends that the court make an order that it deems just and equitable in relation to all the parties.<sup>122</sup> It is unclear why the DPB does not make a similar recommendation in the context of Muslim spouses since polygyny is also practiced within the South African Muslim community.<sup>123</sup>

Like the MMB, the DPB was drafted several years ago without any progress being made for its enactment. The reasons for the delay are not clear. What is clear is that in both cases, and in the case of Hindu marriages, legal recognition is necessary to afford maximum access to and enjoyment of civil law benefits and religious rights.

## Conclusion

Great strides in relation to the recognition of religious marriages and domestic partnerships have been made in the past 19 years since the advent of democracy in South Africa. Tremendous efforts have been made on an ad hoc legislative basis to include spouses in religious marriages and unmarried cohabitants in domestic partnerships within the ambit of specified legislation. Although the judiciary has been disappointing in its treatment of domestic partnerships, it has provided as much relief as possible to spouses in religious marriages who were adversely affected by the non-recognition of their marriages and will most likely continue to do so on an ad hoc basis. This change in approach to religious marriages from the racist, exclusivist paradigm of the apartheid regime is a direct result of the injection of constitutional values into the public policy and *boni mores* of post-apartheid South Africa, which embraces freedom of religion, equality, human dignity, diversity, pluralities and inclusivity.

Despite the significant steps that have been taken to enable spouses in religious marriages and unmarried cohabitants in domestic partnerships to reclaim their dignity as contributing members within family structures, a great deal more is still required. Limited recognition of religious marriages and domestic partnerships that is afforded in an ad-hoc manner and in specific circumstances has proven to be insufficient. Unlike spouses in religious marriages who can rely on the judiciary to provide relief to them in the absence of legislation affording full legal recognition to religious marriages, unmarried cohabitants in domestic partnerships may not be as fortunate. This might suggest that legislative intervention to afford full legal recognition to domestic partnerships may be more urgent than in respect of religious marriages.

Nevertheless, spouses in religious marriages and unmarried cohabitants will only be able to operate on equal terms with civil, same-sex and African customary law spouses when their unions too receive legal recognition. That is not to say that the solution is as simple as enacting legislation to simply afford recognition to religious marriages or to ensure uniformity among the different types of marriages. Such an approach may further disadvantage the more

121 Clauses 1, 4(1).

122 Clause 29(3)(c).

123 The recommendation may not be pertinent for the South African Hindu community. Although polygyny is permissible in Hindu marriages, monogamy appears to be the norm among South African Hindu marriages. Cronje and Heaton, *op. cit.*, n 106, p. 237.

Waheeda Amien

marginalised members of the community. Instead, legislation recognising religious marriages must comprehensively address the full range of features that are characteristic of those unions, and be cognizant of the needs of the community it aims to serve, particularly the more marginalised members in the community, including women.

Except for the omission of Muslim polygynous spouses, the DPB should provide sufficient protection to domestic partners in all other respects if enacted in its current form. Although the MMB is not without its flaws, it will most likely provide more protection to Muslim spouses, especially Muslim wives than they currently have. The South African legislature therefore needs to continue with its business of legislating and enact legislation to confer full legal recognition to religious marriages and domestic partnerships.