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SYMPOSIUM ON RABIAT AKANDE, "AN IMPERIAL HISTORY OF RACE-RELIGION IN INTERNATIONAL LAW"

RACE-RELIGIOUS DISCRIMINATION IN SOUTH AFRICA'S HINDU MARRIAGES

*Waheeda Amien**

South Africa is known historically for racial apartheid when people were classified as white, Indian, Colored, or Black/Native.[1] Indians, Coloreds, and Blacks were discriminated against and denied rights afforded to whites. One example was the right to vote, which was withheld from anyone not classified as white.[2] What is less well known is that other forms of discrimination also existed, including religion, culture, gender, and sexual orientation. These discriminations manifested in religious marriage laws. They also intersected in the domain of marriage through race and religion, resulting in what Rabiat Akande describes as "mutually imbricated religious and racial othering."[3] Akande's observation that "Euro-Christian foundations of the legal regime of religious liberty" excluded minority religions from legal protections in colonial settler situations resonates in South Africa.[4] Apartheid South Africa adopted a colonial European Christianized approach to marriage, namely, the voluntary union of one man to one woman for the duration of the marriage.[5] This definition of marriage was embedded within South Africa's common law and entrenched values of heteronormativity and monogamy, both of which are inherent in a Christian understanding of marriage. Consequently, same-sex marriages were excluded from legal protection.[6] Similarly, customary marriages and Muslim, Hindu, and Jewish marriages were not legally recognized because they were potentially polygynous, which in South Africa was deemed immoral and contrary to the colonial and apartheid era notions of public policy.[7] This essay focuses on the legal implications of Hindu marriages not being legally recognized in South Africa, and especially the disparate effect that this has on women. The essay thus adds a gendered dimension to Akande's arguments about religious discrimination.

The link between race and religious-cultural communities whose marriages were not deemed legal affected primarily Black, Indian, and Colored communities. Indians followed mainly the Hindu, Muslim, or Christian faiths.[8]

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[1] Racial classifications were legalized through the Population Registration Act 30 of 1950. *See* South Africa History Online, *Race and Ethnicity in South Africa* (Mar. 23, 2015).

[2] *Id.*

[3] *See* Rabiat Akande, *An Imperial History of Race-religion in International Law*, 118 AJIL 1, 19 (2024).

[4] *Id.* at 2.

[5] *See, e.g.*, Minister of Home Affairs v. Fourie 2006 (1) SA 524, para. 3 (S. Afr.); Ismail v. Ismail 1983 1 SA 1006, 1009 (S. Afr.).

[6] *See Minister of Home Affairs v. Fourie*, *supra* note 5.

[7] *See Ismail v. Ismail*, *supra* note 5; *see also* Women's Legal Centre Trust v. President of South Africa and Others, (2022) (5) SA 323, para. 43 (S. Afr.).

[8] South African Indians descended from "immigrant indentured Indians" and "passenger Indians." The former came to South Africa as indentured labourers during the nineteenth century to work on British-owned sugar plantations. During the nineteenth and twentieth

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There were also Muslims who were classified Colored.[9] Other Coloreds were assimilated into the Christian faith of their white masters.[10] So too were many Blacks, which is why South African Christians constitute 85.3 percent of South Africa's population.[11] Most South African Christians are thus located within Black African, Colored, and white communities.[12] In contrast, Muslims (mostly from South African Indian and Colored communities) make up 1.6 percent, and Hindus (chiefly from the South African Indian community) comprise 1.1 percent of South Africa's population.[13] South African Jews comprise 0.1 percent of the population.[14] Their history is distinct from South African faith adherents of color. South African Jews descended from Europe and were classified white.[15] They therefore did not suffer racial discrimination. Yet, their marriages were also not legal due to their potentially polygynous nature. Thus, they experienced religious-based discrimination like those who entered customary, Hindu, and Muslim marriages.[16]

Since the beginning of the twenty-first century, customary marriages were legally recognized through the Recognition of Customary Marriages Act 120 of 1998 (RCMA), same-sex unions can be legally registered through the Civil Union Act 17 of 2006 (CUA), and in 2022, the Constitutional Court recognized Muslim marriages.[17] To date, Hindu and Jewish marriages remain without legal recognition and no law has been passed to afford recognition to them.

Elsewhere, I demonstrate how non-recognition of minority religious marriages impacts unequally on Muslim and Jewish women.[18] In this essay, I extend that observation to Hindu women. I argue that failure to recognize Hindu marriages infringes against, inter alia, their rights to equality and dignity. The main issue affecting South African Hindu women is their inability to obtain religious divorce. In the absence of a Hindu divorce, I contend that a civil divorce could suffice for them to obtain closure from their existing marriages. I suggest that the unfair discrimination can be remedied by amending the common law definition of marriage to include Hindu marriages, and that either existing family law legislation must be amended to include Hindu marriages, or if new legislation is adopted, it should include Hindu marriages.

The essay commences with a discussion about the effects of non-recognition of Hindu marriages on Hindu wives, followed by an explication of the courts' approach to Hindu marriages. Thereafter, current processes for the legal recognition of religious marriages, including Hindu marriages are considered briefly.

centuries, passenger Indians came to South Africa as traders. *See* Ranji S. Nowbath, *Some Observations on the Hindus in South Africa*, 5 THEORIA: J. SOC. & POL. THEORY 70, 70–71 (1953); Suraya Dadoo, *South Africa: Many Muslims, One Islam* (Mar. 8, 2024).

[9] Referred to as "Cape Malays," who descended from slaves and political exiles who were brought to the Cape during the seventeenth century from Southeast Asia. *See* Dadoo, *supra* note 8; Ebrahim M. Mahida, *History of Muslims in South Africa: 1652–1699* (Mar. 8, 2024); South African History Online, *The Cape Malay* (Mar. 8, 2024).

[10] Christian Coloureds descended from interracial relations between white masters and Indigenous slaves. *See* Encyclopedia.com, *Cape Coloreds* (Mar. 8, 2024).

[11] South Africa's population is over 62 million. About 7.8% practices traditional African religions, 1% follows "other religions," 2.9% have no religion, and atheists and agnostics each make up 0.1%. *See* Statistics South Africa, *Census 2022* 2, 24–25 (Mar. 8, 2024).

[12] *Id.* at 25. Christians comprise 86%, Black Africans, 91.7% Coloureds, 33.6% Indians, and 90.1% whites.

[13] *Id.* at 24.

[14] *Id.*

[15] *See* Sergio DellaPergola & Allie A. Dubb, *South African Jewry: A Sociodemographic Profile*, 88 AM. JEWISH Y.B. 59 (1988). 90.1% of white South Africans are Christian. *See* Statistics South Africa, *supra* note 11, at 25.

[16] *See* Waheeda Amien & Khaleel Rajwani, *Equalizing Gendered Access to Jewish Divorce in South Africa*, 52 J. LEG. PLURALISM 330 (2020).

[17] *See Women's Legal Centre Trust v. President of South Africa and Others*, *supra* note 7, para. 86.

[18] *See* Waheeda Amien, *Overcoming the Conflict Between the Right to Religious Freedom and Women's Rights to Equality: A South African Case Study of Muslim Marriages*, 28 HUM. RTS. Q. 729 (2006). Amien & Rajwani, *supra* note 16.

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Non-recognition of Hindu Marriages in South Africa

The Marriage Act 25 of 1961 allows officiators of religious marriages to be registered as marriage officers.[19] When those officiators perform a religious marriage, they can simultaneously register a civil marriage provided the religious marriage meets civil law requirements such as monogamy. Hindu spouses would then be entitled to civil benefits including access to a civil divorce.[20]

Many South African Hindus solemnize a religious ceremony when entering marriage. While some Hindu spouses also register a civil marriage, anecdotal evidence suggests that many do not. This may be because the pandit is not a registered marriage officer or if he is, does not register a civil marriage with the religious marriage.

The South African Hindu community does not permit religious divorce,[21] an approach that follows interpretations of Hindu law that do not recognize divorce.[22] Although the South African Hindu no-divorce rule applies equally to men and women, it disparately affects Hindu wives: if parties wish to remarry, the potentially polygynous nature of the marriage allows Hindu husbands to enter Hindu marriages with other women while Hindu wives are not similarly able to marry other men through Hindu rites.

India provides precedent for the civil divorce option through Hindu law reforms enacted after 1947. Werner Menski suggests that the reforms codified customary practices of divorce that existed within Hindu communities in India.[23] In South Africa, however, the civil divorce option is only available when parties enter a civil marriage, which leaves parties in Hindu-only marriages without recourse to leave the marriage. If South African Hindus terminate their civil marriages through civil divorce, the Hindu community nevertheless accepts the dissolution of the marriage. Should the wife enter a second marriage, it is treated as valid by the Hindu community. South African Hindu women are thus not ostracized for obtaining a civil divorce even though a religious divorce is not available to them. While South African Hindu law could theoretically be reformed to recognize divorce, until that happens the civil divorce option provides an exit for Hindu women from their existing marriages.

South African Judicial and Proposed Legislative Approaches to Hindu Marriages

The case of *Singh v. Ramparsad* illustrates how a civil divorce can satisfy the need of a Hindu wife to exit an unwanted marriage, even in the absence of being able to obtain a religious divorce.[24]

In *Singh*, the parties were married by Vedic rites. They did not register a civil marriage. The wife claimed that for tax reasons, they had decided to postpone registration of a civil marriage until after the Hindu marriage was concluded. She testified that when they had decided to marry, she was scheduled to receive a lump sum payment due to her resignation as an academic and that a civil marriage would have obliged her husband to pay tax on the lump sum. The husband, however, denied that there was ever an agreement to register a civil marriage.

When the marriage broke down, the wife sought a High Court order that the Marriage Act could be interpreted to include recognition of a religious marriage. Alternatively, she sought a determination that the Marriage Act was

[19] Marriage Act 25 of 1961, § 3(1) (S. Afr.).

[20] Maintenance Act 99 of 1998 (S. Afr.); Divorce Act 70 of 1979 (S. Afr.).

[21] Singh v. Ramparsad 2007 (3) SA 445 (D), paras. 1–2 (S. Afr.).

[22] Ranganata Sitaram, Some Aspects of Hindu Personal Law 1, 34 (1989). However, other interpretations of Hindu scriptures do support recognition of divorce. *See* Tamali Mustafi, *Some Aspects of Divorce in Hindu Law and Scriptures*, 4 Int'l J. Res. Pub. & Revs. 2291 (2023).

[23] Hindu Marriage Act 25 of 1955, § 13 (India). *See* Werner Menski, *Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India*, *in* Marriage and Divorce in a Multicultural Context: Multi-tiered Marriage and the Boundaries of Civil Law and Religion (Joel A. Nichols ed., 2011); *see also* Livia Holden, Hindu Divorce: A Legal Anthropology 1 (2008).

[24] *Singh v. Ramparsad*, *supra* note 21.

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unconstitutional to the extent that it does not recognize religious marriages thereby violating her rights to, inter alia, equality and dignity.[25] The wife requested that her Hindu marriage be treated as legally valid. Alternatively, the wife pleaded that: (1) the Divorce Act 70 of 1979 can be interpreted to include religious marriages; (2) her Hindu marriage be recognized as a marriage under the Divorce Act; and (3) she was entitled to seek a divorce order against her husband. The wife wanted, in effect, for her Hindu marriage to be recognized as legally valid by amending the Marriage and Divorce Acts to include Hindu marriages so that her marriage could be dissolved through the Divorce Act.

The court did not grant any of the wife's claims based on a skewed understanding of the evidence presented and a flawed analysis of the law. Regarding the wife's testimony, the court dismissed much of it for the following reasons. First, the court appears to have been fixated on whether the parties had intended to register a civil marriage. The court decided that the wife was an unsatisfactory witness because she could not provide an exact amount of the lump sum payout, and the court deemed the tax amount so miniscule as not to be unduly burdensome for the husband to bear. Because the wife also testified that she only asked her husband once during their Hindu marriage when they would be registering a civil marriage, this was presumably an insufficient indication that she really wanted to register a civil marriage. Thus, the court rejected the wife's testimony that the parties had intended to register a civil marriage. Yet, the parties' intention to register a civil marriage was arguably irrelevant because the court was essentially asked to treat the Hindu marriage as legally valid. This was a question of law, which I address later in this essay. Second, based on the wife's sworn statement that she was abused by her husband, the court could not understand why she stayed in the relationship and "did not . . . [seek] an order compelling [her husband] to register the marriage."[26] Instead, the court considered it "[im]probable . . . that the [wife] . . . would have insisted that her marriage be registered if she was . . . abused from the outset."[27]

The court's rejection of the wife's testimony underscored a misogynistic and patriarchal understanding of gender-based abuse. Yet, that the wife was before the court asking for relief confirmed her desire to be released from an abusive marriage. Indeed, the court acknowledged that "the primary purpose in bringing this action was that [the wife wanted] closure," which the court expected she could achieve by registering a civil marriage with another man (even though the wife gave no indication that she wanted to remarry).[28] Still, this showed no appreciation for her need for closure from her existing marriage, whether she wanted to be married to someone else or not. For the wife, a civil divorce could have provided closure especially in the absence of being able to obtain a religious divorce.

What then prevented the High Court from recognizing the Hindu marriage as legally valid? In my view, nothing at all. In fact, the court's rejection of the wife's argument "that the non-recognition of a Hindu . . . marriage violates her right[s] to equality and dignity"[29] and the court's finding that "the argument that the [wife] is unfairly discriminated against because . . . the RCMA [recognizes] customary marriages . . . has no validity,"[30] was proven inconsistent with the 2022 case of *Women's Legal Centre Trust v. President of South Africa* (*WLCT*).[31] In the latter case, the Constitutional Court found that the Marriage and Divorce Acts were unconstitutional to the extent that they did not include a Muslim marriage. Like Hindu marriages, Muslim marriages are potentially polygynous. Since, as explained at the beginning of this essay, potentially polygynous marriages were not legally recognized in South

[25] Constitution of the Republic of South Africa, 1996, §§ 9(1), 9(3), 10, 15(3).

[26] *Singh v. Ramparsad*, *supra* note 21, para. 22.

[27] *Id.*, para. 27.

[28] *Id.*, paras. 45, 52.

[29] *Id.*, para. 12.

[30] *Id.*, para. 49.

[31] *Women's Legal Centre Trust v. President of South Africa*, *supra* note 7.

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Africa, the findings in the *WLCT* case are apposite to Hindu marriages. The unconstitutionality of the Marriage and Divorce Acts in the *WLCT* case related, among others, to Muslim women being unfairly discriminated against based on religion, marital status, and gender. The court acknowledged that by Muslim marriages not being recognized, the equality rights of Muslim women were violated vis-à-vis parties in customary marriages where marriages are legally recognized under the RCMA, and civil marriages entered through the Marriage Act.[32] Had the *Singh* case been challenged in the Constitutional Court, similar findings of unconstitutionality on the basis of unfair discrimination could have been made. The court also deemed the right to dignity as impaired where unfair discrimination occurs.[33] In the *Singh* matter, by not bringing the Hindu marriage into the Marriage and Divorce Acts, the High Court prevented the wife from obtaining closure from her marriage by denying her access to a civil divorce. This arguably violated her right to dignity.

The *Singh* case demonstrates that Hindu women need to have access to a civil divorce, especially in situations where they conclude a Hindu-only marriage. There are at least two options to achieve this goal. First, for a civil divorce to be made available to spouses married by Hindu-only rites, the Hindu marriage must be included within civil legislation. This requires amendments both to the common law definition of marriage and to the Marriage and Divorce Acts to bring Hindu marriages within their ambit.

Alternatively, the Constitution enables the state to enact legislation to recognize religious and traditional marriages or personal law systems.[34] This allows the state to enact new legislation to recognize religious marriages. Presently, there are two processes underway recommending the replacement of existing marriage laws with a single statute. The first process was initiated by the South African Law Reform Commission (SALRC) to draft a Single Marriage Statute.[35] The second process is led by the Department of Home Affairs (DHA) to adopt a Marriage Bill.[36] Both processes seek to recognize different forms of marriages, including religious marriages. The main difference between the two processes is that the DHA recommends recognition of marriages only while the SALRC proposes recognition for marriages and intimate partnerships. There are numerous problems with the SALRC and DHA's legislative recommendations, especially for women in Muslim marriages, which are beyond the scope of this essay. Regarding Hindu marriages, however, both the Single Marriage Statute and the Marriage Bill would enable Hindu spouses to obtain a civil divorce, providing Hindu wives access to closure in the absence of a civil marriage.

Conclusion

I have demonstrated how non-recognition of Hindu marriages impacts on access to divorce for Hindu spouses located principally in South African communities of color. The *Singh* case illustrates that access to civil divorce could provide Hindu women with closure. To have access to a civil divorce, however, the Hindu marriage must be legal. This could be realized through amendments to the common law definition of marriage and existing marriage legislation or enactment of new legislation that recognizes religious marriages and offers a civil divorce option. Until South African Hindu law is reformed to recognize religious divorce, a civil divorce may be sufficient for Hindu women to be released from undesirable marriages.

[32] *Id.*, paras. 48, 65, 86.

[33] *Id.*, para. 57.

[34] Constitution of the Republic of South Africa, 1996, *supra* note 25, § 15(3)(a).

[35] South African Law Reform Commission, Single Marriage Statute, Discussion Paper 152, Project 144 (2021).

[36] Marriage Bill, 2022 (S. Afr.).

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