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## THE MODERN-DAY IMPACT OF CULTURAL AND RELIGIOUS DIVERSITY: "MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES"\*

**C Rautenbach\*\***

### 1 Introduction

The modern-day impact of cultural and religious diversity comes to the fore in a recent publication by Hart Publishing, *viz.* "Managing Family Justice in Diverse Societies" (hereafter "*Managing Family Justice*"). The "management" of family justice in diverse cultural and religious societies remains a highly topical and vibrant theme. Formerly homogenous societies are increasingly diversifying as a result of globalisation, especially in Europe, where governments are progressively faced with the challenges migrant cultural and religious groups pose to existing legal frameworks. Contrariwise, to assume that historically diverse communities know all the answers because of their exposure to cultural and religious differences over a longer period of time is a misconception.

The failure of many governments to effectively "manage" family justice in diverse societies is testament to the fact that existing policies and legal frameworks do not necessarily work. There is no one size that fits all, and it is necessary to explore "what response the law has or should have to different family practices arising from cultural and religious beliefs" by discussing "management" strategies from a legal viewpoint in various jurisdictions.<sup>1</sup> This is indeed what the authors of *Managing Family Justice* purport to do. They discuss various scenarios of family diversity in a number of jurisdictions such as Israel, South Africa, England, Spain, Poland, France, Wales, Botswana, Iran and Bangladesh. There is no apparent link between the

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\* This note is a commentary on some of the viewpoints discussed in Maclean and Eekelaar (eds) *Managing Family Justice in Diverse Societies*. See also the book review by Rautenbach 2013(16)5 *PER* 478-487.

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<sup>1</sup> Maclean and Eekelaar *Managing Family Diversity* preface.

jurisdictions discussed besides the fact that they are all more or less confronted with the challenges family diversity brings to the fore, especially within a socio-legal context. A reader looking for solutions and strategies to "manage" family diversity will, however, be disappointed. As explained by the editors,<sup>2</sup> the contributions in the book are a collection of studies intended to contribute to academic debate, which certainly also forms part of the general democratic debate, and the discussions are relevant at least for that reason.

Having said this, it would have been helpful if the editors had conceptualised some of the terms associated with their debates, especially those appearing in the title of the book, namely "family justice", "managing" and "diverse societies", because of their fluidity and the contestation surrounding their meanings. The term "manage", for example, is usually applied in a business setting, whilst the term "regulation" is typically used to describe the operation of the law, and the term "governance" to describe what governments do. Nevertheless, the absence of a proper consideration of such words and ideas does not detract from the message the editors wish to convey, namely that the approaches to family diversity are equally diverse; thus demanding an understanding of those differences which can be obtained only through publications such as this.

This note is a commentary on the viewpoints put forward by some of the authors in *Managing Family Justice*. Wherever possible or even necessary, parallels are drawn between the contents of the relevant chapter and situations elsewhere, especially in South Africa.

## 2 Theories, ideologies and strategies

Theories and ideologies undoubtedly play an important role in one's approach to family diversity and its "management". Scholars have different ideas and views on how "management" should be performed, which illustrates that one's own

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<sup>2</sup> Maclean and Eekelaar "Introduction" 2.

upbringing and context definitely plays an important role in deciding what the best approach should be. It is therefore no surprise that authors proposes a variety of approaches.

## ***2.1 Non-involvement of state laws***

John Eekelaar<sup>3</sup> cautions against the clothing of family norms with the force of law, for a number of reasons. For one, families are groups within which power structures exist which are not and should not be regulated by state laws. In addition, laws cannot or should not cater for the nuances in personal relationships, and neither should they impose dominant ideologies upon the personal lives of individuals. He refers to three models of state regulation of family behaviour, *viz.* the "authorisation" model, the "delegation" model and the "purposive abstention" model. The model he prefers is one of "purposive abstention", which means that "moral and social obligations within families are not normally given the force of law unless their failure threatens community interests, or to achieve justice when families fall apart".<sup>4</sup> However, the law of the state would always be relevant and applicable and would nonetheless thus influence family behaviour.

At first glance, it comes as a bit of a surprise that he discusses a fourth model for regulation to which he did not refer in his introduction, *viz.* "cultural voluntarism". Upon closer inspection it appears that purposive abstention and cultural voluntarism are interlinked and dependent on each other. Cultural voluntarism allows for a certain measure of group autonomy on a voluntary basis. In this scenario the state stands back and allows individuals within groups considerable freedom to follow their own practices within the private (family) sphere. It thus seems that the purposive model and cultural voluntarism go hand in hand. The only problem with this contention is that it is based on the assumption that group activities are always voluntary and subject to the will of the individual in the group. Although this may be generally true within Western contexts, it is debatable whether it always is the

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<sup>3</sup> Eekelaar "Law and Community Practices" 15-31.

<sup>4</sup> Eekelaar "Law and Community Practices" 16-17.

situation. One of the dynamics of African societies, for example, is the role an individual plays within the social structure, which often comes to the fore in the concept *uBuntu*.<sup>5</sup> The concept in essence refers to group solidarity and the role of the individual within this group. As the survival of the group is dependent on the conduct of the individual, anti-group conduct will generally not be tolerated. Seen this way, the choices of the individual mostly have to give way to social pressure from the group within which he or she operates and "cultural voluntariness", as the author puts it, becomes questionable. A recent case in point saw the banning of women wearing trousers, and thus contravening the local customs of Swaziland, from participating in the local elections.<sup>6</sup>

I thus have to agree with the critique of Eekelaar's Eurocentric approach as voiced by Prakash Shah.<sup>7</sup> According to him, Eekelaar's preference for the "purposive abstention" *vis-à-vis* the "cultural voluntarism" model is reflective of the *status quo* in many jurisdictions. Such a viewpoint gives no recognition to the fact that cultural differences are in need of legal protection and recognition, and also blatantly ignores social realities in Europe and elsewhere.

## **2.2 Alternative Dispute Resolution**

The idea that family justice should remain within the personal sphere through the application of Alternative Dispute Resolution mechanisms, referred to as Religious Alternative Dispute Resolution (RADR), is explored by Farrah Ahmed.<sup>8</sup> By RADR she means "arbitration, mediation or reconciliation in accordance with religious norms, agreed to by the parties in a contract and recognised and (if appropriate) enforced

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<sup>5</sup> Mokgoro 1998 *PER* 16-32.

<sup>6</sup> Swazi Media Commentary 2013 <http://allafrica.com/stories/201308061076.html>. Similar incidents occurred in Malawi (News24 2012 <http://www.news24.com/Africa/News/Malawi-women-to-protest-trouser-stripping-gang-20120119> and South Africa (BBC News/Africa date unknown <http://news.bbc.co.uk/2/hi/africa/6917332.stm>). See also the concerns raised by Bano "Muslim Dispute Resolution in Britain" 82-84.

<sup>7</sup> Shah "Shadow Boxing with Community Practices" 49-60.

<sup>8</sup> Ahmed "Religious Norms in Family Law" 33-48.

by the state".<sup>9</sup> She challenges the idea that group autonomy necessarily restricts individual autonomy and argues that RADR holds the potential of enhancing individual autonomy, because it protects an individual's freedom of religion and may even provide opportunities for an individual to influence the decision of the RADR body.

In addition, she contends that the fact that RADR allows group norms and leaders to be chosen and developed by the groups means that RADR holds the potential of enhancing personal autonomy because individuals would have greater political influence over the doings of the RADR bodies. There are, however, no guarantees that the position of some marginalised groups, such as women, would be protected within RADR without state intervention. Considering that in many cases religious institutions are headed by males, that many of the religious rules are not favourable to women, that it would probably not be permissible to opt out<sup>10</sup> of RADR, and that in many jurisdictions review procedures to evaluate the decisions of the religious institutions do not exist, it is doubtful that family justice would exist for all.<sup>11</sup>

In a similar vein, Samia Bano<sup>12</sup> discusses RADR in the context of family law. She points out there are many unofficial Muslim bodies applying Muslim family law in Britain.<sup>13</sup> These bodies are neither unified nor do they represent a specific school of thought, and their orders are binding only *inter partes*.<sup>14</sup>

Her discussion of the Muslim Arbitration Tribunal established in Britain in 2007 in terms of the *Arbitration Act* of 1996 captures the concerns I have about the RADR mechanisms discussed by Ahmed above. The tribunal operates within the legal framework of England and Wales,<sup>15</sup> which means that its orders can be enforced like

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<sup>9</sup> Ahmed "Religious Norms in Family Law" 34.

<sup>10</sup> See also the comment made by Shah "Shadow Boxing with Community Practices" 55 regarding the dilemma of "one party 'wanting in' while the other objects".

<sup>11</sup> See for example the discussion of Gabru 2004 *PER* 43-56.

<sup>12</sup> Bano "Muslim Dispute Resolution in Britain" 61-86.

<sup>13</sup> Bano "Muslim Dispute Resolution in Britain" 65-69.

<sup>14</sup> A similar situation exists in South Africa. See Rautenbach 2004 *PER* 96.

<sup>15</sup> The official website of the tribunal is <http://matribunal.com/index.html>.

any other order of an arbitration tribunal in Britain. Although the procedural rules are prescribed by state laws, the parties will be able to settle their disputes in terms of Muslim law. This is thus a good example of where state law can be used to ensure the application of Muslim law in certain family disputes. Bano refers to the introduction of the Arbitration and Mediation Services (Equality) Bill which is currently being debated in the British parliament.<sup>16</sup> The purpose of the Bill is to extend equality legislation to the operation of arbitration and mediation services, and it is widely believed that its intention is to target services based on Muslim law. Bano's research reveals that the relationship between Muslim women and some of these tribunals (the unofficial ones and the Muslim Arbitration Tribunal) remains complex and she cautions against the unabridged accommodation of religious laws through these institutions within the British legal system without more research.

As far as I am aware, Muslim institutions in South Africa have not yet considered using arbitration as a mechanism for family or other Muslim-related disputes. It is also doubtful that it could be done. The *Arbitration Act*<sup>17</sup> prevents the arbitration of "any matrimonial cause or any matter incidental to any such cause"<sup>18</sup> or "any matter relating to status".<sup>19</sup> In the light of the fact that most family disputes involve either matrimonial causes or the status of a family member or a marriage, the Act would in all probability not be helpful in mediating family matters.

### **3 Interaction between religious and secular norms**

In many jurisdictions the regulation of religious and secular norms in diverse societies is often one of the most difficult things to do. In addition, societies are not divorced from one another and the interaction between religious and secular norms warrants careful consideration by state institutions.

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<sup>16</sup> Bano "Muslim Dispute Resolution in Britain" 73-76.

<sup>17</sup> *Arbitration Act* 42 of 1965.

<sup>18</sup> See s 2(a) of the *Arbitration Act* 42 of 1965.

<sup>19</sup> See s 2(b) of the *Arbitration Act* 42 of 1965.

### **3.1 Legislative responses to cultural diversity**

Pascale Fournier, Pascal McDougall and Merissa Lichtsztral describe the situation where a Jewish husband keeps his wife chained to him by refusing to grant her a religious divorce (the *get*).<sup>20</sup> In order to prevent this from happening, Israel enacted the 1995 *Rabbinical Courts Law (Enforcement of Divorce Judgments)* 5755-1995 which grants rabbinical courts the power to adjudicate Jewish divorces by issuing certain sanctions compelling the husband to issue the *get* to his wife. Sanctions would include the prevention of a husband from travelling abroad, the refusal to issue the husband with a driving licence or passport, or even the imprisonment of the husband until he issues a *get* releasing his wife.<sup>21</sup> Their research demonstrates that, although the application of this legislation has been inconsistent and fuzzy, it has given women considerably more bargaining powers in the negotiation process to obtain a divorce.<sup>22</sup>

An interesting parallel can be drawn between the legal position in Israel and that in South Africa. As a result of the occurrence of similar scenarios, where a husband refused to give his wife a *gets* after obtaining a divorce in a secular court in terms of the *Divorce Act*,<sup>23</sup> the Act was amended to include a provision that empowers the court to refuse to grant an order of divorce. Section 5A<sup>24</sup> of the *Divorce Act* allows the South African courts to prevent a Jewish husband from gaining a secular divorce

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<sup>20</sup> Fournier, McDougall and Lichtsztral "A 'Deviant' Solution" 89-105.

<sup>21</sup> Fournier, McDougall and Lichtsztral "A 'Deviant' Solution" 92-93.

<sup>22</sup> Fournier, McDougall and Lichtsztral "A 'Deviant' Solution" 91-100.

<sup>23</sup> *Divorce Act* 70 of 1979. The amendment to the *Divorce Act* followed recommendations made by the South African Law Commission (*SALC Project 76*).

<sup>24</sup> This section provides: "If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just."

without also providing a woman with a religious divorce.<sup>25</sup> This is meant to ensure that a woman will automatically be granted a *get* by her husband, if a secular divorce is granted. This, of course, can also lead to inequity if the man refuses to grant a religious divorce, as this would then prevent a secular divorce as well, and it also does not provide for the situation where the couple was married in terms of religious rites.

Waheeda Amien<sup>26</sup> argues in favour of legislative recognition for Muslim family law in South Africa. She argues convincingly that the current unrecognised status of Muslim marriages is not favourable to women because their marriages fall outside the realm of the mainstream legal systems in South Africa (the common and the customary law).

She continues to discuss two Bills in various stages of evolution that hold the potential of catering for the future recognition of Muslim marriages. The first one, namely the "Muslim Marriages Bill", was introduced into cabinet and published for comments in 2011 but does not, according to Amien, satisfy the needs of Muslims in their entirety.<sup>27</sup>

The second one is a joint effort of the Commission for Gender Equality and the State Law Advisor's Office and is referred to as the "Recognition of Religious Marriages Bill". The Bill is fairly unknown and has not yet reached the stage where public participation has been invited. Amien contends that the absence of the regulation of certain aspects of Muslim family law in the Bill opens the possibility for the Muslim community to continue regulating their own family law in a discriminatory manner. She argues in favour of the legislative regulation of Muslim family law but cautions

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<sup>25</sup> In *Amar v Amar* 1999 3 SA 604 (W), Goldstein J ordered a husband to pay a set monthly amount of maintenance until he gave his wife a *get*. See the discussion of Bilchitz "Jewish Law" 290-291. See also Blackbeard 1994 *THRHR* 641-647.

<sup>26</sup> Amien "Gendered Benefits and Costs" 107-123.

<sup>27</sup> Amien "Gendered Benefits and Costs" 117.

against a mere codification of discriminatory Muslim rules and asks that codification must be done within a human rights framework.<sup>28</sup>

Amien's discussion does not deal with the question of who is a "Muslim" in terms of the Muslim Marriages Bill. Clause 1 of the Muslim Marriages Bill defines a "Muslim" as "a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam (*Daruriyyat Al-Din*"). It does not take an expert to foresee an array of problems with this definition, especially when a court that prefers not be entangled in dogmatic questions needs to determine whether or not a person's belief is genuine. In *Prince v President, Cape Law Society*<sup>29</sup> Justice Ngcobo, who delivered the minority judgment, refers to this dilemma as follows:<sup>30</sup>

... the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, *it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.*

Nevertheless, the problem of definition is not unique to religious marriages. The fact that there are nowadays a number of statutes regulating different types of marriages in South Africa requires the application of certain conflict or choice of law rules to determine which statute is relevant to a given situation.<sup>31</sup> Although the application of the rules is not problem free, this should not hamper future

<sup>28</sup> Amien "Gendered Benefits and Costs" 122.

<sup>29</sup> *Prince v President, Cape Law Society* 2002 2 SA 794 (CC).

<sup>30</sup> *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) para 42. Emphasis added. See also Rautenbach "*Umkhosi Ukweshwama*" 63-89 for a discussion of the legal significance of the meaning of religion and culture.

<sup>31</sup> The following marriage laws are currently in operation: *Marriage Act* 25 of 1961 (monogamous civil marriage); *Recognition of Customary Marriage Act* 120 of 1998 (monogamous or polygamous customary marriage); and *Civil Union Act* 17 of 2006 (monogamous same- or opposite sex partners).

developments in South African marriage laws but must be duly regarded in the drafting of future legislation.

Another controversial issue is the constitutionality of the Muslim Marriages Bill. Some authors have argued that some of its provisions are manifestly unconstitutional, either directly or indirectly in respect of human rights violations.<sup>32</sup> Amien does not deal with the question of the constitutionality of the Muslim Marriages Bill directly, but she does discuss a few examples where the Bill does not promote women's right to equality to the full extent. She points out that the Bill continuously refers the two primary sources (*Qur'an* and *Sunnah*) as guiding principles in the interpretation of the provisions of the Bill, a fact which has the potential to disadvantage women.<sup>33</sup> She prefers that the guiding principles for the Bill's interpretation be found in South Africa's constitutional and international law obligations, and expresses the hope that a secular judiciary will take those, rather than the obligations in terms of Islamic law, into consideration when interpreting the Muslim Marriages Bill.<sup>34</sup> Her recommendation does not, however, solve the issue of the non-entanglement with dogmatic issues by a secular judiciary. Irrespective of where the judges find their guiding principles (Islamic law, constitutional law or international law) it will be required that they interpret a statute based on Islamic values and principles, which will inevitably entail the need for them to grapple with dogmatic questions.

Mavis MacLean<sup>35</sup> examines the impact of a statute aimed at the prevention of forced marriages in the United Kingdom, especially where custom or religion allows for such practices to be performed. To her surprise and the surprise of many others, the provisions of the Act have been invoked much more often than initially suspected, and have been instrumental in the protection of many young people against human rights abuses.<sup>36</sup> She also discusses future legalisation to criminalise forced marriages

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<sup>32</sup> See for example, Neels 2012 *TSAR* 486-506 and Neels 2013 *TSAR* 396-397.

<sup>33</sup> See also Moosa *Unveiling the Mind* 13-14, which discusses the inherent unequal nature of the primary sources.

<sup>34</sup> Amien "Gendered Benefits and Costs" 113-114.

<sup>35</sup> Maclean "Assessing the Impact of Legislating for Diversity" 125-136.

<sup>36</sup> Maclean "Assessing the Impact of Legislating for Diversity" 134.

and warns that such steps must be taken with caution, because they could easily backfire and negate the good effect the *Forced Marriage (Civil Protection) Act 2007* has had thus far.

### **3.2 Responses to conflicting rights and freedoms**

Time and again two opposing central forces are irreconcilably opposed within the context of human rights. These conflicting interests hold the potential of causing a tug-of-war between rights and values in human rights discourses. One conflict that comes to mind is the right to equality on the one hand and to cultural and religion-based rights on the other. These are two categories of rights which are often incompatible, especially in the case of cultural practices that violate women's rights. Teresa Picontó-Novales<sup>37</sup> discusses another well-known situation where someone's life, especially that of a minor, is threatened because in the particular scenario she discusses the religious principles of the Jehovah Witnesses prohibit a blood transfusion.<sup>38</sup> The author makes it clear that the conflict between apparent self-same values and rights such as the right of individuals to exercise their rights and freedoms as they please, the right to life and health, and children's rights, on the one hand, and cultural and religious rights and parental rights on the other, is not easily resolved.

In this particular case the boy died because of his and his parents' refusal to allow a blood transfusion to save his life. The parents were subsequently prosecuted for the offence of homicide by omission but the different opinions reached in the three judicial decisions that followed are a clear indication of the difficulties of the case. Although the constitutional court eventually found that the parents were not guilty, the author is of the opinion that the state authority's sensitive response to the religious beliefs of the family contributed to the eventual demise of the young boy,

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<sup>37</sup> Picontó-Novales "Religious Freedom" 137-151.

<sup>38</sup> Similar situations exist in South Africa. See for example, Foss 2009 <http://www.iol.co.za/news/south-africa/court-saves-jehovah-s-witness-girl-s-life-1.435180#.Ugt1gp0aIY>.

which could have been prevented if it had intervened at a much earlier stage.<sup>39</sup> The crux of the matter has been described by former Justice Sachs of the South African Constitutional Court as follows:<sup>40</sup>

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

If, however, making a choice cannot be prevented, the rights of children are paramount over other rights and freedoms, and -

... [w]hereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.<sup>41</sup>

It is also interesting to note that murder or culpable homicide are both crimes in South African law and that an omission leading to the death of someone might also be enough to lead to the conviction of the omissor.<sup>42</sup> It would be interesting to see if the so-called "cultural defence" could be raised as a defence against a conviction of murder or culpable homicide where the motivation for the crime was based on cultural or religious grounds in a criminal law context.<sup>43</sup>

Jacek Kurczewski and Małgorzata Fuszara<sup>44</sup> discuss the conflict situations where state laws prescribe a certain age for marriage and sexual intercourse whilst certain Roma traditions allow for marriage and intercourse at a much younger age. Their

<sup>39</sup> Picontó-Novales "Religious Freedom" 149-150.

<sup>40</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 35.

<sup>41</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 41.

<sup>42</sup> Under certain circumstances the omission is enough to constitute action by the commission of a crime. Kemp *et al* *Criminal Law* 44.

<sup>43</sup> See the discussion of Rautenbach and Matthee 2010 *J Legal Plur* 109-144.

<sup>44</sup> Kurczewski and Fuszara "Cultural Norms, National Laws and Human Rights" 153-168.

discussion reminds one of the 50-year-old Aboriginal man, Jackie Pascoe Jamilmira, who was initially sentenced to 13 months' imprisonment by a magistrate in Maningrida in the Northern Territory of Australia on a charge of statutory rape. The sentence was later reduced to 24 hours but again increased to 12 months after a public outcry, and the facts of the case are indicative of the issues involved where state laws and cultural practices are in direct conflict with each other.<sup>45</sup>

The authors also discuss another practice, namely "elopement", which resembles a "fake kidnapping" to escape the consequences of an arranged marriage by the parents.<sup>46</sup> The practice brings to mind a similar practice in African customary law, namely the *ukuthwala* custom. In terms of this custom a girl is "abducted" by the prospective husband, his family or his friends with the purpose of the man's marrying her. The custom has led to convictions of abduction, rape and assault in some criminal cases and remains a controversial topic in South African law. Research has shown that the practice has also been abused to force young girls to marry older men, and it is currently under investigation by the South African Law Reform Commission.<sup>47</sup>

Yasmine Debarge and Benoit Bastard<sup>48</sup> evaluate the situation in France, where historical developments have led to a total aversion against anything (culturally) different. They explain that the Child Access Services is a welfare service operating in a secular state intended to re-establish the relationship between a parent and a child. However, most of the people serviced by these services are from families with different cultural and religious backgrounds, which complicates the parent-child bonding process, especially when culture and religion are ignored.

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<sup>45</sup> See the discussion of Rautenbach and Matthee 2010 *J Legal Plur* 109-110.

<sup>46</sup> Kurczewski and Fuszara "Cultural Norms, National Laws and Human Rights" 157-160.

<sup>47</sup> For an overview of this custom, see Rautenbach and Matthee 2010 *J Legal Plur* 118-126.

<sup>48</sup> Debarge and Bastard "Child Access Services in France" 169-182.

### ***3.3 Non-state responses to cultural diversity***

In addition to or apart from governmental actions to "manage" diverse societies, other non-state mechanisms have developed to respond to such demands as diversity brings to the fore.

The first example is the development of religious tribunals assuming a quasi-judicial role within religious communities. Four authors from England and Wales<sup>49</sup> conducted empirical research into the doings of three unofficial religious tribunals (a Shariah council, a Jewish Beth Din and a Catholic tribunal) and came to the conclusion that such tribunals generally do not have a problem with being unrecognised by the states because they understand and accept the demarcation between religious and secular authority. The authors see their existence and operation outside the mainstream legal system as "no more than a passive tolerance of religious practice undertaken without expectation of state recognition".<sup>50</sup> As a result of the differences between English law and religious laws, they also do not foresee the future recognition of any of these tribunals. The argument of the authors is weakened by the fact, acknowledged by themselves, that only the views of the religious institutions were obtained and not those of the people served by them. Although on another level, their viewpoint is thus similar to that implicit in the model of "purposive abstention/cultural voluntarism" put forward by Eekelaar above. I have already indicated my criticism of such a viewpoint and also of the opinions of Shah, above. In addition, Amien<sup>51</sup> argues that proper protection can be afforded to women only if the recognition of religious rules and norms takes place within a human rights framework.

One example of a quasi-judicial tribunal tasked with the regulation of Muslim affairs in South Africa is the Muslim Judicial Council. The council was established in 1945 as a non-profit organisation that makes declarations on matters pertaining to Muslim

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<sup>49</sup> Douglas *et al* "Accommodating Religious Divorce" 185-201.

<sup>50</sup> Douglas *et al* "Accommodating Religious Divorce" 198.

<sup>51</sup> Amien "Gendered Benefits and Costs" 122.

law, including marriage and divorce.<sup>52</sup> Its pronouncements are generally accepted by the Muslim community, although it is binding only *inter partes* based on the conscience of the community. The decisions of organisations such as these often do not favour women.

The facts of a recent unreported case of the Western Cape High Court, *Faro v Bingham*,<sup>53</sup> may serve as example. The applicant in this case, Tarryn Faro, had been in a cohabitation-relationship with the late Moosa Ely (the "deceased") since 2006. The deceased had an adult son and daughter from a previous marriage. The first child of Tarryn and the deceased was born during 2007. On March 2008 they married in accordance with Muslim rites but their marriage was never legalised in terms of South African law. During 2009 the deceased became terminally ill and one day, after an argument, he obtained a *Talāq* (a letter of divorce) from the local Imam without Tarryn's knowledge. She was seven months pregnant when this happened, and their child was born on 26 October 2009 resulting in the expiration of the *Iddah*-period.<sup>54</sup> However, according to Tarryn their divorce was revoked because she and the deceased resumed intimacy after the birth of the child. After the death of the deceased, Tarryn was appointed as the executrix of his estate. Without the knowledge of Tarryn, the deceased's adult daughter obtained an annulment certificate from the Muslim Judicial Council, which she submitted to the Master of the High Court. What followed then was first a letter from the council that she was indeed the wife of the deceased, followed by another letter withdrawing the previous one and confirming that the *Talāq* was valid. In addition, Tarryn and her children were thrown out of the family home and she had to live on the streets in shelters, whilst her two minor children were taken into state care. Another meeting ensued between the deceased's daughter and the council without Tarryn's knowledge resulted in the issuing of a certificate by the council stating that there had been no reconciliation between Tarryn and the deceased, and again that the *Talāq* was valid.

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<sup>52</sup> The official website of the council is accessible at <http://www.mjc.org.za/>.

<sup>53</sup> *Faro v Bingham* (WCHC) unreported case number 4466/13 of 25 October 2013.

<sup>54</sup> Muslim law imposes a waiting period on women whose marriage has been terminated by divorce unless she is pregnant, in which case the period expires when the child is born. See Goolam, Badat and Moosa "Muslim Law of Marriage" 304.

On account of this, Tarryn was removed as executrix and the deceased's daughter was appointed in her place. Tarryn challenged the decision of the master in the Western High Court and sought relief which was to take the form, amongst others things, of a declaration that she was indeed married in terms of Muslim law and that she was a spouse in terms of the *Intestate Succession Act*<sup>55</sup> and a survivor in terms of the *Maintenance of Surviving Spouses Act*.<sup>56</sup> Based on the evidence before it, the court was satisfied that the marriage between Tarryn and the deceased was still in existence when he died and that she was to be regarded as his surviving spouse. She was accordingly reinstated as executrix and the daughter of the deceased was removed as such.<sup>57</sup> However, Tarryn's claim that their marriage be declared valid in terms of the *Marriage Act*,<sup>58</sup> alternatively, that the common law definition be extended to include Muslim marriages, was postponed for hearing at a later date.<sup>59</sup> Although the matter has not reached conclusion, three important observations can be made. First of all, the court verified that the Muslim Judicial Council "has no statutory or religious authority finally to determine questions as to whether a marriage has been validly concluded or dissolved in accordance with the tenets of Islam".<sup>60</sup> Secondly, the master is not bound by the pronouncements of the Muslim Judicial Council and must adjudicate matters such as this by looking at the factual evidence placed before her. She cannot base her decision merely on letters issued by the council.<sup>61</sup> Thirdly, the court lambasted a government department for not making any progress on the enactment of legislation recognising the validity of Muslim marriages. It ordered the Department of Justice and Constitutional Development to set out the progress it has made in respect of the enactment of the Muslim Marriages Bill of 2011 no later than 15 July 2014.<sup>62</sup>

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<sup>55</sup> *Intestate Succession Act* 81 of 1987.

<sup>56</sup> *Maintenance of Surviving Spouses Act* 27 of 1990.

<sup>57</sup> *Faro v Bingham* (WCHC) unreported case number 4466/13 of 25 October 2013 para 47.

<sup>58</sup> *Marriage Act* 25 of 1961.

<sup>59</sup> The application for the declaration of validity was postponed to 20 August 2014. *Faro v Bingham* (WCHC) unreported case number 4466/13 of 25 October 2013 para 47(c)(i).

<sup>60</sup> *Faro v Bingham* (WCHC) unreported case number 4466/13 of 25 October 2013 para 34.

<sup>61</sup> *Faro v Bingham* (WCHC) unreported case number 4466/13 of 25 October 2013 para 34-35.

<sup>62</sup> *Faro v Bingham* (WCHC) unreported case number 4466/13 of 25 October 2013 para 47(c)(ii).

Although the decision of the court is to be welcomed in the light of the protection it afforded to Tarryn, it is envisaged that the comments of the court regarding the status of the Muslim Judicial Council will not go down well with the council and the conservative members of the Muslim community who regard themselves bound by its decisions.

Also dealing with the issue of religious marriages, Jagbir Jhutti-Johal<sup>63</sup> explains how modernity has influenced the development of cultural practices within the Sikh community, especially when a marriage breaks down and issues of mediation and divorce come to the fore. Although certain religions and cultures show resilience against change, the Sikh community has realised that change is inevitable. They are therefore applying a parallel system where they try to mend the broken marriage first through family mediation and, if that does not succeed, they permit the couple to obtain a secular divorce. Private mediation initiatives for families are the norm rather than the exception.

In South Africa this role is fulfilled by unofficial religious and/or secular institutions. FAMSA (Families South Africa) is an example of a secular non-profit organisation with more than thirty offices across the country. They are engaged in family mediation and are committed to "rendering services to all persons irrespective of race, culture, gender, social-economic background, religion, education, social or political affiliation".<sup>64</sup>

Focusing on a postcolonial country, namely Botswana, Anne Griffiths<sup>65</sup> empirically investigates the "shifting norms that have brought about women having greater access to resources and property"<sup>66</sup> and illustrates how societal changes have brought about a change to the customary law of succession to include women who have previously been excluded from succession to property. Her ethnological

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<sup>63</sup> Jhutti-Johal "How Parties to Sikh Marriages Use and are Influenced by the Norms" 203-219.

<sup>64</sup> See for example the mission statement of the Potchefstroom branch at FAMSA Potchefstroom date unknown <http://www.famsapotch.org.za/about.htm>.

<sup>65</sup> Griffiths "Managing Expectations" 221-246.

<sup>66</sup> Griffiths "Managing Expectations" 222.

approach to matters of law provides us with valuable information and insight into socio-legal realities and should be followed in other pluralistic post-colonial countries where customary law exists alongside the mainstream legal system.

Recently the High Court of Botswana in *Mmusi v Ramantele*<sup>67</sup> declared the Ngwaketse customary rule of male primogeniture to be unconstitutional and invalid. The outcome of the case was hailed as a victory for women's rights under customary law but the respondent appealed the decision.<sup>68</sup> The outcome of the case is in line with the well-known decision of the South African Constitutional Court case, *Bhe v Magistrate, Khayelitsha, (Commission For Gender Equality As Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*,<sup>69</sup> which held that the customary rule of male primogeniture was unconstitutional and invalid. In order to fill the void left by the order of invalidity, the court ordered that the *Intestate Succession Act* be applied to all customary law estates, thus effectively replacing the customary law of intestate succession with the rules of the common law of intestate succession, a system of devolution alien to customary law families. The judgment was supplemented on 20 September 2010 by the *Reform of Customary Law of Succession and Regulation of Related Matters Act*,<sup>70</sup> which confirms that the *Intestate Succession Act*, with certain modifications, must be applied to all intestate estates of persons living under a system of customary law.<sup>71</sup>

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<sup>67</sup> *Mmusi v Ramantele* unreported case number MAHLB-000836-10 of 12 October 2012. In this case four women challenged the Ngwaketse customary law rule which allows for the youngest son to inherit the family home, on the basis that the rule infringed their constitutional right to equality. The court agreed and overturned the ruling of the customary court, which had found in favour of the eldest son.

<sup>68</sup> The decision of the Appeal Court is expected at the end of 2013. For more information, see Southern Africa Litigation Centre date unknown <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/mmusi-and-another-v-ramantele-and-another/>.

<sup>69</sup> *Bhe v Magistrate, Khayelitsha, (Commission For Gender Equality As Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC). For a discussion of the case, see Rautenbach 2005 *AFLA Quarterly* 30-32; Himonga 2005 *Acta Juridica* 82-107; Knoetze and Olivier 2005 *Obiter* 126-132; Rautenbach, Du Plessis and Pienaar 2006 *SAJHR* 99-118.

<sup>70</sup> *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

<sup>71</sup> The application of two acts, one based on common law principles and another on customary law principles is not without its difficulties. See for example, Rautenbach and Meyer 2012 *TSAR* 149-160.

Nazila Ghanea<sup>72</sup> discusses examples of notable changes in Iranian family law as a result of female activism. However, the few developments that have taken place over the last few years are in danger of regressing again as a result of the influence on state policy of powerful and repressive elite groups.

Farah Deeba Chowdhury<sup>73</sup> illustrates how civil society in Bangladesh is resisting secular changes imposed by the state, in favour of Muslim law. She draws the conclusion that although there are instances of gender discrimination in Bangladesh, any reforms will be accepted only if they occur within an Islamic framework. The reason for this is the composition of the Bangladeshi people; they are predominantly Muslim and will thus resist a secular approach to a large extent.<sup>74</sup>

In South Africa the introduction of a Uniform Family Code, as proposed by some female scholars in India,<sup>75</sup> is equally problematic but for reasons other than those in India. In India objections are raised against such a code because of its secular nature. In South Africa, as the Muslim Marriages Bill has proven, the problems seem to stem from the various Muslim groups which cannot reach consensus about what should be in the code and what not.<sup>76</sup>

Non-state responses to diversity in societies, especially where their actions overlap and come in conflict with those of state institutions, remain controversial and problematic. However, sitting on the fence should not be an alternative to dealing with the issues head-on; especially when the rights of vulnerable groups and individuals come into play.

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<sup>72</sup> Ghanea "Rights, Women and Human Rights Change in Iran" 247-261.

<sup>73</sup> Chowdhury "Muslim Family Law in Bangladesh" 263-269.

<sup>74</sup> Attempts in India to introduce a Uniform Civil Code for family law have failed. See for example, the discussion of Rautenbach 2006 *CILSA* 241-264.

<sup>75</sup> Chowdhury "Muslim Family Law in Bangladesh" 263.

<sup>76</sup> Amien "Gendered Benefits and Costs" 109.

#### 4 How much law is enough?

The discussion so far has revealed that legal regulation is not always the answer but needed in some cases. The question is thus how much family conduct needs to be regulated by the law? In other words, what should be kept in the family and what should be regulated by the state?

Jordi Ribot<sup>77</sup> echoes Eekelaar's sentiments when he says that the involvement of the state in family law should be limited, especially in the case of cultural and religious minorities "who are willing to settle conflicts arising in family matters according to their non-state ethnic, cultural or religious norms".<sup>78</sup> I have already voiced my concerns with such an approach, especially with regard to the position of vulnerable groups such as women and children within those minority groups. It seems that Ribot is well aware of the dangers such an approach might have for individual human rights<sup>79</sup> but he nevertheless proposes a hybrid approach involving both the law and social practices which will not "jeopardise individual self-determination or result in gender-discrimination".<sup>80</sup>

The similarity between the approach he proposes and that taken in section 31 of the South African Constitution<sup>81</sup> is noticeable. Section 31 provides as follows:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
  - (a) to enjoy their culture, practise their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Religious and cultural groups may thus continue with their social practices as long as they do not infringe anyone's rights. Additionally, the wide range of the South

<sup>77</sup> Ribot "How much Family Conduct do we Need to Regulate" 273-294.

<sup>78</sup> Ribot "How much Family Conduct do we Need to Regulate" 274.

<sup>79</sup> Ribot "How much Family Conduct do we Need to Regulate" 289.

<sup>80</sup> Ribot "How much Family Conduct do we Need to Regulate" 290.

<sup>81</sup> *Constitution of the Republic of South Africa*, 1996.

African *Constitution* makes it possible to protect individual family members against any harmful or discriminatory family conduct, because the *Constitution* is supreme law and invalidates "law and conduct" inconsistent with it.<sup>82</sup> A number of South African judgments are testament to the fact that the judiciary would not hesitate to involve themselves in unofficial family laws if they think an individual or individuals are in need of their protection.<sup>83</sup>

Marjorie Smith and Ann Phoenix<sup>84</sup> discuss the controversial issue of the corporal punishment of children by their parents and come to the conclusion that a variety of complex norms are at play for which no uniform response in law exists or should exist. The complexities of the normative issues seem to have been one of the main reasons why the South African government has not yet been able to abolish corporal punishment within the privacy of a family home.

Generally, corporal punishment is a culturally and legally acceptable form of punishment for children in South Africa. The common law defence of reasonable and moderate chastisement keeps the parents out of trouble in most cases.<sup>85</sup> Attempts made over the last few years to criminalise the corporal punishment of one's own children have been met with fierce resistance by some parents, and the drive to include a prevention clause in the *Children's Act*<sup>86</sup> was eventually abandoned to prevent the Act from following its logical course.<sup>87</sup> The position is thus that parents may still apply "moderate and reasonable" corporal punishment to their children until a court of law dictates otherwise, or the legislature steps in with alternative measures. Corporal punishment was socially accepted for many years in South African schools but was abolished in the *South African Schools Act*.<sup>88</sup> A group of

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<sup>82</sup> S 2 of the *Constitution*.

<sup>83</sup> See for example the cases discussed in Rautenbach 2010 *J Legal Plur* 143-178.

<sup>84</sup> Smith and Phoenix "Variation and Change in Normative Parental Discipline" 295-312.

<sup>85</sup> The first decision in a long line of decisions confirming this defence was *Rex v Janke and Janke* 1913 TPD 382, where the court held that it may be necessary to correct what is evil in a child by means of moderate and reasonable corporal punishment.

<sup>86</sup> *Children's Act* 38 of 2005.

<sup>87</sup> Bower *Banning Corporal Punishment* 10.

<sup>88</sup> *South African Schools Act* 84 of 1996. S 10 prevents the corporal punishment of learners at schools.

Christian parents that regarded the application of corporal punishment in Christian schools as culturally acceptable and even necessary contested the validity of the specific provision unsuccessfully in the Constitutional Court in *Christian Education South Africa v Minister of Education*<sup>89</sup> but their application failed and the court found that South Africa was internationally and constitutionally obliged not to subject children in schools to violence and degrading punishment.

## 5 Concluding remarks

The 2005 *UNESCO Universal Declaration on Cultural Diversity* regards culture "as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group ... that encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs",<sup>90</sup> and demands the following commitment from states:<sup>91</sup>

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.

This note reviews a couple of responses the law has or should have to families with different "lifestyles, ways of living together, value systems, traditions and beliefs" in a variety of legal systems. It is evident from the discussions that family diversity issues are not unique but are shared by many jurisdictions. The only difference is the way the jurisdictions deal with the issue.

The viewpoints of the authors referred to in this note contribute to a greater awareness of the challenges family diversity brings to the fore, and sets out what

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<sup>89</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

<sup>90</sup> Preamble of the *UNESCO Universal Declaration on Cultural Diversity* (2005).

<sup>91</sup> A 2 of the *UNESCO Universal Declaration on Cultural Diversity* (2005).

the book proposes to do, namely not "to propose a single definite strategy that should be adopted" to deal with family diversity, but to provide "material on which researchers, advocates and policy makers can draw in furthering their understanding of and seeking solutions to the problems raised by this significant social development".<sup>92</sup>

Any scholarly publication dealing with cultural and religious diversity contributes to our understanding of the modern-day impact of diversity and the demands such diversity makes on contemporary governments and its people.

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<sup>92</sup> See Maclean and Eekelaar *Managing Family Diversity* preface.

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## LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
FAMSA	Families South Africa
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
PER	Potchefstroom Electronic Law Journal
RADR	Religious Alternative Dispute Resolution
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
THRHR	Tydskrif vir die Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

**THE MODERN-DAY IMPACT OF CULTURAL AND RELIGIOUS DIVERSITY:  
"MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES"\***

**C Rautenbach\*\***

**SUMMARY**

This contribution deals with the modern-day impact of cultural and religious diversity and comments on some of the viewpoints to be found in *Managing Family Justice in Diverse Societies*.<sup>1</sup> The topics dealt with in this publication create a greater awareness of the challenges family diversity presents, and illustrate that an attempt to adopt a single definite strategy to manage diversity would not be the right approach; rather that each and every situation should be managed according to its unique context.

**KEYWORDS:** Legal pluralism; diverse societies; family justice; cultural diversity; religious diversity

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\* This note is a commentary on some of the viewpoints discussed in Maclean and Eekelaar (eds) *Managing Family Justice in Diverse Societies*. See also the book review by Rautenbach 2013(16)5 PER 478-487.

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<sup>1</sup> Maclean M and Eekelaar J (eds) *Managing Family Justice in Diverse Societies* (Hart Publishing Oxford and Portland Oregon 2013).