SEPARATE BUT EQUAL? MARRIAGE LAWS IN A MULTICULTURAL CONTEXT –THE IMPACT ON WOMEN.

South Africa consists of a plurality of cultural groups. Each cultural group has its own traditional practices. The Bill of Rights section of the South African Constitution enshrines equality between all citizens. In keeping with this, the legislature has attempted to accommodate different cultures within the State and to treat all cultures equally. Unfortunately, this has had the unintended but very real effect of simultaneously reinforcing the subjugation of women in different cultures within the State. This paper will formulate an approach to multicultural accommodation by the State that recognises substantive equality for women. Through an analysis of marriage laws in South Africa, it will be argued that any State attempt to accommodate different cultures has to be context and history dependent.

Marriage laws serve as an excellent index to illustrate how South Africa has failed to ensure equality for women in a multicultural context. Each cultural group has its own marriage system. These individual systems seldom conform to notions of substantive equality entrenched in the Bill of Right. Many marriage systems are highly patriarchal. In its attempt to accommodate various cultures, the State has reinforced this patriarchy. Presently, South Africa has a dual system of marriage. Customary marriages are regulated in terms of the Recognition of Customary Marriages Act of 1998 while Civil marriages are regulated in terms of the Marriages Act of 1961. The peril of this kind of multicultural accommodation is that it creates an either/or paradigm where women have to choose to be regulated either by the traditions and customs of their culture or by the State; While this respects cultural difference, it does little to eradicate patriarchy within cultures, but reinforces such patriarchy at a national level: Such accommodation is based on the false assumption that it is easy for women to move between cultural and State accommodation and provides an illusory right of exit for women wanting to escape patriarchal practices. Further, it fails to recognise that women may autonomously choose to remain within their respective cultures while at the same time wanting State equality rights available to all citizens Therefore, a lacuna has been created in the equality jurisprudence and the danger of the equality section being unworkable for women is very real.

In Canada too, the accommodation of different cultures by the State has led to the rights of women taking a back seat in the political and legislative arenas. This paper will argue that in Canada too, accommodation laws ought to be sensitive to the rights of women. For the State to absolve certain cultural groups from constitutional scrutiny would mean that the Constitution is an unworkable and useless document. Not to be critical of tradition is to accept that if a particular society has always had authoritarian practices, it is morally defensible that it continues to have them. The arguments put forward in this paper are therefore also relevant to Canadian multicultural accommodation laws.

In tracing the shifting history of specific marriage customs in South Africa, and arguing for multicultural accommodation to be context and history driven, it will be revealed that a very particular model of accommodation is necessary -- one that recognises the jurisdictional autonomy of groups, but only in so far as their autonomy meets minimal defined standards enshrined in the Constitution. Such a system is in keeping with the joint governance model of accommodation currently adopted by the South African State. However, it goes a step further; while it adopts minimalist intervention on group traditions, certain normative values enshrined in the Constitution become available to all citizens. This will also ensure gender equality. This paper will examine why other models of accommodation will prove unworkable.

The proposition that accommodation models adopted by the State ought to be context and history dependent has far reaching consequences. For example, it also informs the debate on same sex marriages and whether they ought to be accommodated in a multicultural State. This is a topical issue in both South Africa and Canada. In light of the normative values enshrined in the South African Constitution, which inform the approach to multicultural accommodation put forward in this paper, as well as the values underlying the Canadian Charter of Rights and Freedoms, it will briefly be argued that it would be difficult to justify not accommodating them.

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