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Equalizing gendered access to Jewish divorce in South Africa

Waheeda Amien[a] and Khaleel Rajwani[b]

[a]Department of Public Law, Faculty of Law, University of Cape Town, South Africa; [b]Department of Philosophy, McGill University, Montreal, Canada

ABSTRACT

This paper explores potential solutions to address the unequal access of Jewish women to religious divorce known as a *get* in the legal context of South Africa. We assess rabbinical and state (judicial and legislative) responses to the issue of *get* refusal in Orthodox and Conservative South African Jewish communities and show that there are significant limitations to the effectiveness of their responses. By drawing on South African case law and parallel rulings on religious entanglement in the United States of America, we illustrate the legal viability of judicial enforcement of a *ketubah* (Jewish marriage contract) in South Africa. In particular, we argue that inclusion, recognition, and enforcement of maintenance clauses in the *ketubah* by South African courts can incentivize recalcitrant husbands to issue a *get*. We further address the need for legislation to solidify the judicial enforceability of a *ketubah*, thereby ensuring timely and equitable access to religious divorce for Jewish women in South Africa.

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1. Introduction

South Africa incorporates state (weak) and non-state (deep) forms of legal pluralism (Rautenbach 2018, 6–7). At the state level, African customary law is recognized alongside common law, and both forms of law are subordinate to the South African Constitution (sections 2, 39(2)-(3) and 211 of the Constitution of the Republic of South Africa, 1996). Section 15(3) of the South African Constitution enables legislative recognition of traditional and religious personal or family law marriages or systems. However, only African customary marriages (through the Recognition of Customary Marriages Act, 1998), along with civil marriages (under the Marriage Act, 1961), and same-sex unions (in terms of the Civil Union Act, 2006) are presently afforded legislative recognition in accordance with section 15(3). Religious marriages and personal law systems that function within minority religious communities including the Muslim, Hindu, Jewish, and other religious communities in South Africa operate without state sanction.[1]

CONTACT Waheeda Amien Waheeda.Amien@uct.ac.za

Since the inception of democracy in South Africa 26 years ago, attempts were made to draft legislation to afford legal recognition to religious marriages, but no recognition has yet been granted to them. In 2003, the South African Law Reform Commission submitted a draft Muslim Marriages Bill to the Minister of Justice and Constitutional Development, which recommended the recognition- and regulation of the consequences of Muslim marriages in South Africa. The Muslim Marriages Bill was subsequently amended by the Department of Justice and Constitutional Development and adopted by the South African Cabinet in 2010. However, no further efforts were made to submit the Muslim Marriages Bill for parliamentary consideration. In 2005, the South African Commission on Gender Equality drafted a Recognition of Religious Marriages Bill, but it too was never submitted to any government body for formal consideration. The most recent initiatives are those instituted by the South African Law Reform Commission (2019) and the Department of Home Affairs (2019), which are investigating legislative recognition for all marriages in South Africa, including religious marriages. It is unclear how long those processes will take to finalize, if at all. Until then, religious marriages persist within South African communities without state recognition, regulation, or protection.

The lack of state recognition- and regulation of religious marriages has an especially disparate impact on women in religious communities. For instance, in the Muslim, Hindu and Jewish communities, women experience greater difficulty in obtaining religious divorce (Amien 2020, 85). This is significant because even when parties enter into a civil marriage (through the Marriage Act, 1961) and are able to obtain a civil divorce (through the Divorce Act, 1979), they may still feel compelled to obtain a religious divorce, particularly to pursue a religious marriage with someone else.

In this paper, we direct our attention to Jewish marriages in South Africa, and more specifically Jewish divorce, known as the *get*. Our central argument focuses on South African Jews who enter into both civil and religious marriages. In particular, we are concerned with South African Jewish women who, although they may be able to obtain civil divorces, may experience difficulty in attaining a *get* from their husbands, preventing them from remarrying within the Jewish tradition.

We proceed on the basis that the South African Constitution guarantees protection against unfair discrimination on the grounds of sex and/or gender and entrenches everyone's right to human dignity (sections 9 and 10 of the Constitution of the Republic of South Africa, 1996). Unequal access to Jewish divorce for Jewish women, specifically within Orthodox and Conservative Jewish communities, which make up more than 85% of the South African Jewish population (World Jewish Congress 2020), arguably undermines Jewish women's rights to sex and/or gender equality and dignity by afflicting them with, among others, social stigma and the indignity of being unable to move forward with their lives.

We explore whether or not judicial and/or legislative intervention is required to equalize access between women and men to Jewish divorce in South Africa. We commence in Part 2 by sketching the context of Jewish divorce in South Africa. In Part 3, we consider rabbinical and judicial interventions to assist women to obtain Jewish divorce and provide post-divorce support. In Part 4, we examine the Jewish pre-marital contract

(*ketubah*) as a potential mechanism to equalize access to Jewish divorce for women. This is followed in Part 5 by a discussion about the necessity for legislative intervention to enforce the *ketubah*. Thereafter, concluding remarks are offered in Part 6.

2. Jewish divorce in South Africa

Marriage under Jewish law (*halacha*)[2] is considered to be a private contractual agreement between two people. As such, *halacha* has historically been interpreted as permitting divorce in the form of a consensual termination of the Jewish marriage contract (*ketubah*), based on law received in the *Torah*.[3] A Jewish marriage also entails the signing of a *ketubah*, which is a prenuptial contract outlining the marital rights and obligations of the spouses in the presence of competent witnesses. The *ketubah* includes financial terms, such as the specification of a price that must be paid by the husband to the wife in case of divorce (Rautenbach 2018, 323).

The practice of Jewish divorce varies among Jewish movements. Among the Orthodox and Conservative Jewish communities, which as indicated previously comprise the majority of South African Jews, a Jewish marriage can only be dissolved in accordance with *halacha* when the husband issues a bill of divorce (*get*) to his wife and she accepts it in the presence of two witnesses (Rautenbach 2018, 330). The husband may issue a *get* for any subjective reason (Segal 1988, 99). However, among the Reform, Progressive, and Reconstructionist Jewish communities, which constitute less than 15% of the South African Jewish population (World Jewish Congress 2020), a civil divorce is sufficient to dissolve a Jewish marriage. Thus, a Jewish wife in those communities need not acquire a *get* in order to remarry (Rautenbach 2018, 331).

Segal (1988, 100) observes that even though the consent of a third party such as a rabbinical or ecclesiastical court (*beth din*)[4] is not required, it becomes a practical necessity for the *beth din* to supervise the granting of the *get* because it involves an application of complex laws, one of which is the appointment of a qualified scribe whom the husband instructs to draft the *get*. The scribe is expected to craft the *get* in handwritten form by using a particular type of calligraphy. Thereafter, the wife appears before the *beth din* where she receives the *get* in the presence of the aforementioned witnesses. Upon finalization of the divorce, the price agreed upon in the *ketubah* must be paid to the wife, unless she has committed adultery, and the parties are then free to remarry under Jewish law. The divorce also terminates the husband's duty to provide spousal maintenance, although traditionally the duty remains if the wife is considered to be in poverty (Rautenbach 2018, 330).

Within Orthodox and Conservative Jewish communities practicing *get*, even if a Jewish wife is awarded a civil divorce, she must still obtain a *get* before she is permitted to marry someone else under Jewish law (Fournier et al. 2015, 90). Although the divorce is initiated by the husband, both parties must agree to the *get* to enable a valid Jewish divorce within the Orthodox and Conservative communities (Segal 1988, 100). If either party refuses to consent to the *get*, the other party could become trapped within the Jewish marriage. However, since polygyny is not prohibited in the *Torah* (Silberberg 2020), a husband need not remain trapped in an unwanted marriage because he could enter into a subsequent marriage if his wife refuses to receive

the *get* (Rautenbach 2018, 330). The consequences of entering into a polygynous Jewish marriage are also less severe for men, particularly because children born of their subsequent marriages are considered legitimate under Jewish law (Bonthuys 2000, 8). In contrast, should a woman bear children from a subsequent relationship without obtaining a *get* to dissolve her existing Jewish marriage, the children of the subsequent marriage are deemed illegitimate (*mamzerim*), which prohibits them from marrying within the Orthodox and Conservative Jewish communities (Fournier et al. 2015, 90).

At the same time, polygyny appears to be largely unpractised within Jewish communities as a result of a thousand year-old rabbinic proclamation that prohibits polygyny (Rautenbach 2018, 330). The proclamation is widely accepted by *Ashkenazic* Jews.[5] In South Africa, the *Ashkenazi* Orthodox community informs the way in which the South African *beth din* grants Jewish divorces (*Amar v Amar* 1999 at 606A). Moreover, monogamy within Jewish communities is reinforced in countries where Jews reside as a minority community and polygyny is proscribed by law, as is the case in civil marriages in South Africa (Silberberg 2020). So, if Jewish spouses are members of a strictly non-polygynous Jewish community, *get* refusal by a wife could prevent her husband from marrying someone else. Yet, in recent years, only one such case was reported in South Africa by the South African Gett Network (2019), a grassroots organization that documents cases of *get* refusal in South Africa. Thus, we focus our attention on *get* refusal by male spouses, as in practice, it is usually men in South Africa who refuse to issue *get* to their wives (Bonthuys 2000, 8).

If a husband refuses to issue his wife a *get* in circumstances where she is legally entitled to a divorce, rabbinical authorities may attempt to compel the husband to do so under certain circumstances, such as where the husband suffers a physical ailment that cannot be endured by his wife, the husband violates his marital obligations including maintenance or sexual obligations, or there is sexual incompatibility between the spouses (Rautenbach 2018, 331). In other situations, the wife may be precluded by Jewish law from obtaining the *get*. These include situations where the husband disappears, deserts his wife, or the husband is legally incompetent to grant a divorce (ibid.). Rabbinical authorities have held that in exceptional circumstances such as times of war, a conditional *get* may be granted before going into battle (Harris 1999, 33). Jewish soldiers who were drafted into the South African Defense Force fighting in Angola in the 1970s and 1980s purportedly left powers of attorney with the *Beth Din* in Johannesburg, which enabled their wives to be given a *get* if they were missing for two years or more (ibid.).

Where a husband refuses to issue a *get* to his wife and the *beth din* is unable to compel him to do so, the wife is still considered to be married to her husband under Jewish law (Fournier et al. 2015, 91). If the wife is separated from her husband but unable to attain a divorce, she becomes a chained woman (*agunah*) and is unable to remarry with a new partner under Jewish law (Fournier et al. 2015, 90). An *agunah* bears the social burden of being unable to move on from her marriage, which undermines her dignity, autonomy, and agency as a human being. As demonstrated later in this paper, in the case of *Amar v Amar* (1999), *get* refusal can also be abused by husbands for example, to extort wives to secure greater leverage in civil divorce

negotiations. Thus, *get* refusal constitutes domestic abuse because it potentially causes emotional and psychological trauma to the *agunah* (Cobin 1986, 415). Apart from wives being impacted negatively by *get* refusal, children born of a relationship between an *agunah* and her new partner can also suffer negative consequences. As explained previously, such children are stigmatized as illegitimate.

Attempts were made by secular and rabbinical authorities in South Africa to assist Jewish women to obtain a *get* and to compel men to fulfil their Jewish post-divorce spousal support obligations. These attempts are discussed next.

3. Secular and religious interventions in Jewish divorce in South Africa

Jews outside of Israel typically marry under both local civil law and Jewish law (Harris 1999, 32). For Jews in South Africa who are married under both civil and Jewish law, the Jewish marriage is typically solemnized by a Jewish religious leader (*rabbi*) who is authorized to register a civil marriage in terms of section 3(1) of the Marriage Act (1961) (ibid., 32–33). Provided the formalities of a Jewish marriage comply with the requirements for a civil marriage,[6] the *rabbi* could simultaneously solemnize a Jewish marriage and register a civil marriage. If the *rabbi* is not designated as a marriage officer to perform civil marriages, the parties could have a civil marriage officiated before or after the Jewish marriage ceremony by a person who is empowered to register civil marriages, such as a magistrate (section 2(1) of the Marriage Act, 1961). Fishbayn (2008, 80) emphasizes that when Jewish and civil marriages take place simultaneously, two distinct legal relationships are created, both of which encapsulate different notions of the nature of marriage, and maintain different positions on the status of women within the marital contract.

Either party may institute divorce proceedings in the secular court system in terms of the Divorce Act (1979) to dissolve their civil marriage. Dissolution of the civil marriage does not require the consent of both parties. If the court is satisfied that the marriage has broken down irretrievably without any possibility of a restoration of a normal marriage relationship between them, it can grant a divorce order (sections 3-4 of the Divorce Act, 1979). As indicated earlier, within the Orthodox and Conservative Jewish communities, the civil divorce does not terminate the Jewish marriage; the parties still need to obtain a *get* to dissolve the Jewish marriage. Yet, if either party institutes- and obtains a civil divorce, the wife could be burdened as an *agunah* if her recalcitrant husband refuses to offer her a *get*. To assist women in these kinds of situations, three interventions are available in South Africa. Two of the interventions are offered through Jewish law: first, by pre-emptively incorporating the consent of both spouses to a *get* in the *ketubah* and second, holding a recalcitrant husband accountable through a Jewish excommunication order (*cherem*). The two aforementioned interventions were raised for adjudication in the cases of *Raik v Raik* (1993) and *Taylor v Kurtstag NO and Others* (2005). The third intervention can be accessed through secular legislation, namely section 5A of the Divorce Act (1979), and was implemented in the case of *Amar v Amar* (1999). These three interventions are discussed next within the context of the aforementioned cases.

3.1. Raik v Raik 1993

In the *Raik* case, the parties were married to each other by Jewish rites and had also registered a civil marriage (at 627A). The parties' *ketubah* contained a clause in which they agreed that in the event of a breakdown of their marriage, it would be dissolved according to Jewish law (at 627B-F). The case arose as a result of a civil action by the wife for an order of divorce along with, among others, an order that the husband provide the necessary assistance to enable his wife to obtain a Jewish divorce (at 624H). The latter claim was based on the husband's apparent reluctance to consent to a *get* despite the marriage having broken down irretrievably (at 620I-621B).

During the course of the civil divorce proceedings, it became clear to the Witwatersrand Local Division of the Supreme Court of South Africa (as it then was) that the husband repeatedly abused his wife throughout the marital relationship (at 621C). His unwillingness to grant a *get* clearly formed part of the pattern of abuse against his wife. In fact, the Court described the husband's conduct towards his wife as "nasty", "spiteful", "dishonest" and "vindictive", and observed that without a *get*, the wife would be unable to marry another man within the Jewish community (at 620H-621C). The Court felt compelled to come to the wife's assistance and found that public policy demands that the relevant provisions in the *ketubah* be enforced (*Raik v Raik* at 620H-621C). The Court therefore granted, among others, the wife's claim for divorce and ordered the husband to do all things reasonably necessary to ensure that a *get* is granted under the supervision of the Jewish Ecclesiastical Court or the *Beth Din* of Johannesburg (at 627G, 629B). Unfortunately, the case did not come to a practical conclusion as the husband took his own life before the *get* was given (Harris 1999, 35).

Due to legal non-recognition of Jewish marriages in South Africa, implicit in the Court's order was an acknowledgement that, while a secular court can recognize a clause within a *ketubah* involving an agreement between parties to issue a *get*, enforceability of the latter cannot fall within the purview of the state. A similar limitation was raised in the case of *Taylor* in the context of a *cherem*, which is discussed next.

3.2. Taylor v Kurtstag NO and Others 2005

In the *Taylor* case, a Jewish husband and wife concluded a settlement agreement during the course of civil divorce proceedings in which they agreed to submit their financial, maintenance, and custody disputes for arbitral determination by a South African ad hoc *beth din* (at para 4). The ad hoc *beth din* issued a written finding in which it awarded custody of the children to the wife, directed the husband to pay monthly child maintenance to the wife, and required the husband to reimburse his wife for arrears maintenance (at para 6).

In South Africa, arbitration is not permitted in respect of matrimonial disputes (section 2 of the Arbitration Act, 1965). The Witwatersrand Local Division of the High Court (as it then was) therefore noted that the arbitration award delivered by the ad hoc *beth din*, although valid under Jewish law, was not legally enforceable under South African law (at paras 32, 59). When it became clear that the husband

had no intention of adhering to the ad hoc *beth din's* maintenance awards, the ad hoc *beth din* issued a *cherem* against him. A *cherem* is an excommunication order from the Jewish community issued by the *beth din*. It serves as the strongest form of religious sanction to induce compliance with the rulings of the *beth din*, to ensure adherence to the principles of Jewish law, and to punish members of the Orthodox community for failing to comply with the *beth din's* rulings (at para 34; South African Jewish Report 2018). The *cherem* declared that the husband was not entitled to membership of Orthodox Jewish congregations and included sanctions against, among others, attending services, participating in prayer, and receiving a Jewish burial (at para 29).

The husband applied for an interdict to prevent the ad hoc *beth din* from publishing the *cherem* on the basis that it would be defamatory to him and would render him a pariah in his Jewish community (at para 57). The husband argued that the *cherem* would violate, among others, his constitutional rights to: dignity (section 10); freedom of religion (section 15(1)); freedom of association (section 18); and to practise his religion in association with other members of his religious community (section 31(1)) (at paras 17, 48).

In considering the husband's application, the Court found that the *cherem* would infringe some of the husband's personality rights by effectively depriving him of membership of an Orthodox Jewish congregation (at para 57). However, the Court regarded the infringement as reasonable and justifiable since a *cherem* enables the Jewish community "to protect the integrity of Jewish law and custom by ensuring conformity therewith" (at para 58). Moreover, the Court held that a consequence of the husband being a practising member of the Orthodox Jewish community in South Africa is that he implicitly consented to the jurisdiction of the *beth din* and its rulings, which includes the issuance of a *cherem* (at para 35).

The Court observed that members of the Jewish community also have a right through section 31 to not associate with those within the community who are seen to be flouting the accepted rules of that community (at para 58). The aforementioned right is manifested through a *cherem*, which the Court accepted is a central component of the Jewish religion (at para 56). Religious practices like the *cherem* that are protected by section 31(1) are subject to the internal limitation contained in section 31(2), which requires those practices to not be exercized in a manner that is inconsistent with other provisions of the Constitution. Bearing this in mind, the Court found that the *cherem* is not an "offensive group practice" or an "oppressive feature" of Jewish law (at para 58). Presumably, this means that the *cherem* was considered to be consistent with section 31(2). At the same time, the Court declined to pronounce on the appropriateness of the issuance of the *cherem* because it deemed that to be an entanglement with "matters of faith" (ibid.). Judicial entanglement with religious doctrine is prohibited by the common law doctrine of religious entanglement, which prevents the judiciary from engaging in religious interpretation (at para 39). Consequently, the Court dismissed the husband's application to interdict the ad hoc *beth din* from publishing the *cherem* (at para 65).

The *Taylor* case illustrates that enforcement of a religious sanction such as the *cherem* depends on the willingness of the Jewish community to voluntarily abide by

the sanction (at para 65). Although the Court did not prevent the ad hoc *beth din* from issuing its *cherem*, the enforceability within the Jewish community of the *cherem*, as with any other ruling by the *beth din* including financial awards, depends on the moral convictions of those within the community to follow the rulings. Thus, husbands willing to flout the *beth din* rulings including *cherem* would see little disincentive to stop refusing to deliver the *get* to their wives.

While the *Raik* and *Taylor* cases protected two Jewish law interventions against *get* refusal, a secular approach is offered in the form of a legislative amendment. To aid women in being released from religious marriages, the South African legislature introduced section 5A into the Divorce Act (1996),[7] which 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.

Section 5A enables a court to either refuse to grant a civil divorce if it appears that either one of the spouses is unable to remarry within their religious precepts or to make an order that it deems just. If the court makes the former order by refusing to grant a civil divorce until the religious marriage is dissolved, it can have a disparate impact on women such as those married by Jewish rites who wish to exit their religious and civil marriages but are faced with husbands who refuse to offer the *get*. Not only are those women trapped within marriages that they wish to escape and are unable to marry anyone else, they are also unable to access the patrimonial and other consequences arising from a civil divorce such as division of the marital estate. In contrast, if a Jewish husband seeks dissolution of his civil and religious marriage and the wife is unwilling to receive the *get*, as mentioned previously, he is still able to enter into a marriage with another woman under Jewish law. Alternatively, the court could apply section 5A by granting the civil divorce and incorporating an order that it deems just to act as a mechanism to persuade an uncooperative spouse to consent to a religious divorce, as it did in the case of *Amar v Amar* (1999).

3.3. Amar v Amar 1999

In the *Amar* case, the wife sought dissolution of her Jewish and civil marriages (at 605E-F). The parties entered into a settlement agreement, in which they agreed that they would first obtain a Jewish divorce from the South African *Beth Din* before proceeding to obtain a civil divorce (at 605F). Both parties were members of the Jewish Orthodox religion but followed different cultural traditions within the South African Orthodox community. The wife was a member of the *Ashkenazi* Orthodox community, which as noted earlier, underscores the manner in which Jewish divorces are granted in South Africa (at 606A). In contrast, the husband identified with the *Sephardi* Orthodox community. He subsequently backtracked on their settlement agreement by insisting that

their religious marriage be dissolved according to the *Sephardi* interpretation of Jewish law (ibid.). When the *beth din* in South Africa indicated that they would assist in obtaining a Jewish divorce according to the *Sephardi* tradition, the husband still refused to proceed with the Jewish divorce because he was unhappy with the financial terms of the settlement agreement (at 606C-D). As noted by the Witwatersrand Local Division of the Supreme Court of South Africa (as it then was), it appears that the real reason for the husband's lack of cooperation to grant a *get* was to hold his wife to ransom to ensure a financially favourable divorce settlement for himself (at 606H-607B). Having found that the marriage had broken down irretrievably, the Court granted the order of divorce but also invoked section 5A, in terms of which it made an additional order in an attempt to thwart the husband's recalcitrance (at 607D). The additional order required the husband to pay his wife a monthly maintenance until their religious marriage was dissolved according to Jewish law (at 607D-F). The rationale underlying the Court's order is reflected in its observation that

> [t]he purpose of [section 5A] is clearly to create mechanisms whereby recalcitrant spouses can be encouraged or even pressurised into granting religious divorces where these are necessary to enable a spouse to remarry (at 607I-J).

Although the *Amar* case provides precedent for South African courts to apply section 5A creatively to prevent Jewish men from abusing their power to withhold a *get*, the effectiveness of section 5A is limited by several factors. First, the application of section 5A requires parties to have registered a civil marriage and to have instituted proceedings for a civil divorce. Therefore, those who are not party to a civil marriage, or those who have already attained a civil divorce are unable to access the potential mechanism that section 5A offers. Secondly, even if parties have a civil marriage, unless they indicate in their particulars of claim that in addition to their civil marriage, they are also married according to religious rites, a court would have no basis to invoke section 5A. Women who are unable to afford legal representation or receive inadequate representation may not be aware of the benefits attached to section 5A, particularly those who are extorted by abusive husbands to secure settlement agreements that militate against their wives' interests. Thirdly, access for a woman to religious divorce requires the consensual and explicit issuance of a *get* by her husband; the *beth din* itself cannot grant the divorce (Rautenbach 2018, 331). So, even though women may be awarded a civil divorce, in circumstances where their husbands have deserted them, have disappeared, or are medically incapacitated, they would still not be able to explicitly obtain a *get* and would remain *agunah*, in some cases indefinitely.[8]

Since dissolution of a Jewish marriage through divorce primarily requires agreement between the spouses, the *ketubah* may be the most appropriate mechanism to secure the husband's consent to a *get*. In the next section, we consider the potential for legal enforceability of the *ketubah* in the South African context.

4. Equalizing access to Jewish divorce through the Jewish *ketubah*

As illustrated in the *Taylor* case, a *ketubah* can, and usually does, include a provision that authorizes the *beth din* to arbitrate disputes between the spouses in the event of

a breakdown in their marital relationship prior to the finalization of civil divorce proceedings (Beth Din of America 2019). During the course of arbitral proceedings conducted by the *beth din*, if it becomes evident that the husband is unwilling to release his wife from the marriage, to incentivize the husband to deliver the *get* to his wife, the *beth din* (like it did in the *Taylor* case) could deliver an award for maintenance payable by the husband to the wife until the husband consents to the *get*. But as evidenced in the *Taylor* case, arbitration awards in the context of family law are not legally enforceable in South Africa, which makes it easier for recalcitrant husbands to ignore those awards. Should arbitration in family law matters become legal in South Africa, it is still possible that a *beth din* may deliver an award that does not have the effect of motivating a husband to deliver a *get* to his wife.

In light of the limitations presented by family-law related arbitral outcomes highlighted above, inclusion of certain clauses in the *ketubah* may present an opportunity for both spouses to agree on mechanisms to equalize access to the *get* before the marriage is finalized. For example, the parties could include a provision in the *ketubah* that should the wife wish to be released from the marriage, the husband must pay her spousal maintenance until he delivers the *get* to her. This maintenance would be paid from the time either spouse seeks a civil divorce, or the *beth din* confirms their separation, until the time the *get* is given to the wife. Such a provision accords with the *halachic* principle that a husband is obliged to provide for his wife until their marriage ends and incentivizes delivery of a *get* in a timely manner (Beth Din of America 2019).

To date, no case has yet been presented in a South African court to test the enforceability of the *ketubah* or any provision of the *ketubah*. The only case that has thus far considered the legal validity and enforceability of a religious marriage contract is the case of *Ryland* v *Edros* (1997), where the Cape High Court (as it then was) considered the recognition of a Muslim marriage contract. Since no other provincial High Court, other than the Western Cape High Court in South Africa, has yet dealt with the legality of a religious marriage contract, the findings of the Court in *Ryland*, albeit in the context of a Muslim marriage contract, could prove helpful in determining the potential legal enforceability of a *ketubah* in South Africa.

4.1. Ryland v Edros 1997

In the *Ryland* case, the Muslim ex-wife sued her ex-husband for patrimonial compensation based on their Muslim marriage contract. The ex-wife claimed arrear spousal maintenance (*nafaqah*) for the duration of their marriage until the end of the waiting period (*iddah*) that follows a Muslim divorce, which in this case was three months; a consolatory gift (*mata'a*) due to her ex-husband's unjustifiable termination of their marriage; and an equitable share of the growth of her ex-husband's estate on the basis that she directly and indirectly contributed her "labour, effort and money" to his estate, from which she argued his estate benefited (at 696F-I). In assessing the ex-wife's claims, the Cape High Court considered two issues regarding the enforceability of the terms of a marriage contract, which emanates from a religious marriage that is not legally recognized.

First, the Court in *Ryland* reflected on the colonial and apartheid era approach to potentially polygynous marriages such as Muslim, Hindu, Jewish, and African customary marriages where the judiciary[9] regarded those marriages as contrary to public policy and consequences arising from those marriages as unenforceable (at 701I-J). Only marriages that conformed to a Christian understanding of marriage, namely heteronormative and monogamous, were deemed to be worthy of legal recognition (*Bronn v Fritz Bronn's Executors* 1860). The Court in *Ryland* found that public policy as expounded by the colonial and apartheid era judiciary is no longer applicable in a democratic South Africa because the country is now governed by a Constitution that encompasses the "values of equality … tolerance of diversity and the recognition of the plural nature of [South Africa]" (at 704D-E, 708J-709A-C). The Court also compared the Muslim marriage contract to a *de facto* monogamous Christian marriage between spouses where the parties do not register a civil marriage under the Marriage Act (1961). The Court in *Ryland* noted that in the latter instance, an agreement relating to maintenance and other financial obligations arising from the Christian marriage would most likely not be deemed to be contrary to public policy and would be enforceable. So, the Court asked, why should an agreement emanating from a Muslim marriage contract be treated any differently? (at 704D-E, 708J-709A-C). The Court accordingly found that enforcement of a Muslim marriage contract does not adversely affect the interests of South African society and held itself no longer bound by previous decisions that refused to enforce provisions of a Muslim marriage contract (at 7011B-C). Notably, the Court emphasized that its decision applies to only *de facto* monogamous Muslim marriages and does not necessarily apply to *de facto* polygynous Muslim marriages (at 7011B-C).

The Court's observation in *Ryland* regarding the change in public policy in South Africa is to be welcomed. However, it is unfortunate that the Court saw fit to include Christian marriages as the reference for part of its rationale that enforcement of a *de facto* monogamous Muslim marriage contract is consistent with South Africa's public policy. Despite the Court's attempt to respect and promote diversity, the comparison with an unregistered Christian marriage simply reinforces the Christian paradigm as the norm against which 'other' religious marriages are assessed. Had the Court not drawn on this rationale, it might have been able to justifiably extend its assessment to *de facto* polygynous Muslim marriages and could then also have included those marriages within the ambit of its findings.

Since the *Ryland* decision, along with legislative recognition of monogamous and polygynous African customary marriages through the enactment of the Recognition of Customary Marriages Act (1998), the South African judiciary afforded recognition to spouses within *de facto* monogamous and polygynous Muslim and Hindu marriages for the purpose of including them as spouses within the ambit of legislation such as the Intestate Succession Act (1987), the Maintenance of Surviving Spouses Act (1990), and the Maintenance Act (1998) (*Daniels v Campbell and Others* 2004; *Hassam v Jacobs NO and Others* 2009; *Govender v Ragavayah NO and Others* 2009; *Khan v Khan* 2005). This means that even though the legal validity of a *de facto* polygynous Muslim marriage contract has not yet been tested in the secular judicial system, if its legal validity is to be adjudicated in a South African court, it is not unreasonable to expect that it could also be afforded recognition and enforceability.

The second issue that arose in *Ryland* was whether or not the common law doctrine of religious entanglement was applicable in the case. As noted previously, the doctrine precludes the South African judiciary from interfering in matters of religious law (at 701G-H). The Cape High Court found that the particular contractual claims of the ex-wife did not invoke religious doctrinal interpretation and decided that the proven terms and customs arising from the parties' Muslim marriage contract could be enforced (at 703G-I). The Court stressed that "the position may be different in cases where issues arise which do involve matters of doctrine, even when proprietary or other legally recognized rights are involved" (ibid.).

After assessing the evidence placed before it, the Court in *Ryland* granted two of the Muslim ex-wife's pecuniary claims that she was able to prove as terms of her Muslim marriage contract, namely arrears maintenance and the consolatory gift (at 703G-I). Since the parties did not have a written contract, the Court relied on what it deemed to be the default Islamic law position as conveyed by Islamic law experts who testified on behalf of the ex-wife and the ex-husband to confirm the terms of the contract. In fact, there was no real dispute regarding the ex-wife's claims for arrear maintenance and the consolatory gift (at 703G-I). The actual dispute related to the ex-wife's claim for an equitable division of her ex-husband's estate (at 714H-I). On the one hand, the Islamic law expert for the ex-wife testified that proof for her claim for an equitable division of her ex-husband's estate could be found in Malaysian family law (section 58 of the Malaysian Islamic Family Law (Federal Territory) Act, 1984), which incorporates a Malay custom relating to jointly acquired property (at 715D-716J). On the other hand, the Islamic law expert for the ex-husband testified that within the Western Cape Muslim community where the parties resided, the estates of Muslim spouses are treated as separate. The Islamic law expert for the ex-husband confirmed that in the absence of tangible proof that the wife contributed financially to the husband's estate, upon dissolution of their marriage, there is no equitable division of the husband's estate (at 717D). Although the Court accepted that a claim such as the ex-wife's for an equitable division of her ex-husband's estate is not "in conflict with the essential principles of Islamic law, [and] is capable of being synthesized therewith" (at 717D), it found that since no such practice could be proven to exist in the Western Cape Muslim community, the ex-wife failed to prove her claim (at 717D). Consequently, the Court held that the ex-wife could not succeed in her claim for an equitable distribution of her ex-husband's estate (at 717J, 719J).

Despite the Cape High Court's insistence that it did not have to engage with religious doctrine in the *Ryland* case, the fact that it preferred one expert testimony above the other, even though both appeared to be equally plausible, suggests otherwise. In our view, *Ryland* is an example of the South African judiciary selectively engaging (or dis-engaging) with the doctrine of religious entanglement. We contend that there are several others,[10] which raises the question whether the doctrine should continue to form part of South African law. However, a consideration of that question is beyond the scope of this paper.

Ryland clarifies that issues of maintenance, property, and other civil rights within a religious marriage contract, especially those that do not require religious doctrinal entanglement may be ruled upon and enforced by a secular court. If we extend the reasoning in *Ryland* about the enforceability of a Muslim marriage contract to a

Jewish *ketubah*, and if a court were faced with a similar case involving maintenance, compensation, or other types of claims based on a Jewish *ketubah*, the court could hold such a contract to be civilly enforceable. The inclusion of the *halachic* spousal maintenance obligation, among others, into a *ketubah* could provide an enforceable and significant financial mechanism for ensuring that a *get* is given to wives in a timely fashion and in accordance with *halachic* principles.

The impetus for a South African court to recognize and enforce terms of a *ketubah* is strengthened by the fact that foreign precedent exists in other Jewish minority countries where secular judiciaries recognize and enforce contractual terms of a *ketubah* (section 39(1)(c) of the Constitution of the Republic of South Africa, 1996). For instance, the American judiciary appears to rely on similar parameters as the Cape High Court did in *Ryland* to afford legal validity and enforceability to contractual terms of a *ketubah*, namely that the contract must be consistent with public policy and not infringe the doctrine of religious entanglement. In *Avitzur v. Avitzur* (1983), a majority judgment comprising four out of seven judges was delivered by the Court of Appeals of the State of New York, which held that it is not contrary to public policy to recognize and enforce the secular terms of a *ketubah* (*Avitzur v. Avitzur* at 111). In the *Avitzur* case, the Jewish wife and husband concluded a ketubah, which arguably required the husband to appear before the *beth din* to enable the wife to obtain a religious divorce (*Avitzur v. Avitzur* at 112–113). The Court found that the husband's refusal to appear before the *beth din* constituted a breach of the *ketubah* and ordered him to do so (*Avitzur v. Avitzur* at 116). In *Light v. Light* (2012), the Jewish spouses signed a *ketubah*, in which they agreed that the husband would pay the wife $100 per day in the event of their separation until the husband granted the wife a *get* (*Light v. Light* at 1). The Superior Court of Connecticut issued an opinion, in which it found nothing in American law or public policy to prevent judicial recognition or enforcement of the contractual terms in question, which involved principles of secular contract law that did not infringe the doctrine of religious entanglement (*Light v. Light* at 6-7). Accordingly, the Court maintained that it had subject matter jurisdiction to enforce the contract, and it upheld USA legal precedent[11] where courts similarly enforced the financial terms of a *ketubah* as it related to the husband issuing a *get* (*Light v. Light* at 7).

Judicial recognition and enforcement of a *ketubah* may nevertheless rely on judicial interpretation of the provisions of a contract, which may render different results depending on which judge presides. Where one judge may find that a contractual term of a *ketubah* involves religious entanglement or is inconsistent with public policy, another may not, as happened in *Avitzur*. As noted above, the *Avitzur* case was decided by four out of seven judges, which means that one judge tipped the scales to render a favourable outcome for the Jewish wife. The case could just as easily have been decided differently. To ensure greater certainty that the financial terms of the *ketubah* can be recognized and enforced by a South African court, legislation may be required to afford legal recognition to Jewish marriages and divorce.

5. Legislative recognition of Jewish marriages, divorce, and the *ketubah*

One option to legislatively recognize the *ketubah* as a contract is to amend existing legislation such as the Marriage Act (1961), or to introduce regulations that provide

for the enforceability of the *ketubah*. The other option is to introduce new legislation to recognize and regulate Jewish marriages and divorce. The latter option is made possible through section 15(3)(a) of the South African Constitution, which was discussed at the beginning of this paper. As mentioned previously, section 15(3)(b) of the South African Constitution requires legislation enacted in terms of section 15(3)(a) to be consistent with other provisions of the Constitution including gender and/or sex equality.

As also noted in the introduction to this paper, the South African Law Reform Commission (SALRC) and the Department of Home Affairs initiated processes in accordance with section 15(3)(a) of the South African Constitution, in which they are seeking input for the drafting of legislation to afford recognition to all marriages, including religious marriages. While the Department of Home Affairs has not yet published anything concrete, the SALRC published an Issue Paper, which proposes the enactment of a 'Single Marriage Statute'. The SALRC advises that the proposed legislation could take the form of either a single marriage act or an omnibus legislation. A single marriage act would require that all marriages comply with the same requirements and follow the same consequences. An omnibus legislation could comprise several chapters, with each chapter recognizing a particular type of marriage.[12]

Based on the above description of a single marriage act contemplated by the SALRC, a single marriage act will not provide sufficient protection for women in Jewish marriages because it neither has the potential to adequately accommodate a *ketubah* nor to recognize the unique religious, cultural and legal context of Jewish divorce. In contrast, an omnibus legislation as envisaged by the SALRC could include a chapter to specifically recognize and regulate Jewish marriages and divorce. To ensure a balance between the rights to freedom of religion and gender and/or sex equality, regulation of Jewish marriages and divorce will require consultation with relevant stakeholders within the South African Jewish community including religious leaders within the *beth din*, women's rights activists in groups such as the South African Gett Network and scholars of religion and gender.

Since obtaining the *get* for women is a pressing need for many women within the South African Jewish community, a chapter recognizing Jewish marriages in an omnibus legislation should make provision for the incorporation of a *ketubah* as a legally recognized contract that specifically enables a woman to obtain her husband's consent to a *get*. A pro forma *ketubah* could be included in the legislation incorporating parameters such as those identified in the previously discussed *Raik*, *Taylor* and *Amar* cases. For instance, the pro forma *ketubah* could make provision that in the event of separation between the spouses, the husband should pay monthly spousal maintenance to his wife until the marriage is dissolved according to Jewish law. Furthermore, in the event of the irretrievable breakdown of a marriage, the husband's consent to a *get* is presumed to be given. Since the *beth din* must be satisfied that both the husband and wife consent to the *get* in order for a Jewish divorce to be granted, the pro forma *ketubah* could include a direction to the *beth din* that an irretrievable breakdown of the marriage is to be interpreted as the husband and wife providing their consent to deliver a *get* in accordance with the *ketubah*. This could empower the *beth din* to finalize the *halachic* divorce proceedings, possibly even in

the physical absence of either spouse or in the event that either spouse withholds her/his consent to the *get* when the marriage breaks down irretrievably.

If South Africa proceeds to enact an omnibus legislation containing a chapter to recognize and regulate Jewish marriages and divorce, it may be possible for a divorce order to be granted by a secular court to dissolve the Jewish marriage if provision is made for members of the *beth din* to preside as assessors in the divorce matter. If the presiding judge and the aforementioned assessors accept that the marriage has broken down irretrievably, the assessors could confirm the dissolution of the Jewish marriage according to *halachic law* and a secular divorce order could simultaneously be issued by the court to address financial, property, and other issues such as custody of the minor children born of the marriage. Alternatively, in the absence of representatives of the *beth din* as assessors in the civil divorce proceedings, the *beth din* could finalize the Jewish divorce after a civil dissolution of the marriage is obtained. Using the *Raik* case as a guideline, the *beth din* could accept the secular court's finding of irretrievable breakdown of the marriage as sufficient evidence for the fulfilment of the condition in the *ketubah* that an irretrievable breakdown of the marriage is an indication of the husband's implicit deliverance of the *get* and similarly, his wife's implicit acceptance of the *get*.

6. Conclusion

The issue of *get* refusal has a burdensome impact on the equal access of Jewish women in South Africa to a dignified religious divorce. The South African judiciary addressed the issue with piecemeal rulings to afford relief to women on a case-by-case basis. However, that kind of ad hoc relief does not guarantee equal access to religious divorce and protection for Jewish women.

A more sustainable approach is likely to be achieved through judicial recognition, regulation, and enforceability of the *ketubah*. In particular, legal recognition and regulation of the *ketubah* solidifies the possibility of enforcing clauses that oblige the husband to pay spousal maintenance until he consents to give his wife the *get,* as well as clauses indicating that irretrievable breakdown of the marriage constitutes a commitment by the husband to deliver a *get* and an acceptance by the wife to receive the *get*. Legal recognition of the *ketubah* contract respects the freedom of religion of the spouses and allows the *halachic* practice of a *get* to be accommodated, while concretely addressing the issue of gender and/or sex discrimination arising from *get* refusal. Legal recognition of the *ketubah* is an effective solution for substantively improving Jewish women's access to religious divorce.

Since judicial discretion may be an inherent limitation of judicial intervention, in that judges may rule differently on the enforceability of the *ketubah* in any particular case, legislative intervention may be necessary to recognize and regulate Jewish divorce to ensure equal access to the *get* in South Africa, especially for Jewish women and to ameliorate the position of *agunah* in South African society. It is essential that South African legislators take into account the voices of diverse stakeholders, particularly those of Jewish women who are directly affected by *get* refusal.

Finally, we believe that the recommendations offered in this paper are practically attainable and can tangibly improve the dignity and equality of Jewish women in South Africa seeking religious divorce.

Notes

1. The most recent census in South Africa records a total population of 53 million people. Of that total population, Muslims make up 2%, comprising the largest religious community in the country, followed by Hindus consisting of 1% of the total population, and Jews comprising 0.2% of the total population. See Statistics South Africa 2013, 15, 32.
2. The collective body of Jewish law is known as *halacha*, which traditionally derives from primary sources including the written Old Testament (*Torah)* and oral *Torah* (*Talmud*). The *Torah* and *Talmud* comprise codified Hebrew and Aramaic legal and theological scholarship and commentary. Other sources of Jewish legal interpretation include later Rabbinical codes and *halachic* scholarship, as well as customs and community practices (*minhag*). See Rautenbach (2018, 317–343).
3. Recognition of divorce under Jewish law is derived from the *Torah*, which provides: "If a man marries a woman who becomes displeasing to him because he finds something indecent about her, and he writes her a certificate of divorce, gives it to her and sends her from his house." Deuteronomy 24:1 (NIV).
4. In South Africa, the Jewish Ecclesiastical Court, namely *Beth Din* is seated in Johannesburg and maintains legal authority over Jewish life. The *Beth Din* rules on matters of Jewish law including family law, succession, conversion, circumcision, and approval of *kosher* food, as well as arbitrates disputes in accordance with *halacha.* See Union of Orthodox Synagogues 2020.
5. The proclamation is attributed to Rabbi Gershom. There is an additional exception in the proclamation that allows men to remarry where a woman is *halachically* incapable of consenting to a *get*, for example, due to a deteriorated mental condition. See discussion in Silberberg (2020).
6. Requirements for a civil marriage include: a) the male must be 18 years or older and the female must be 16 years or older; b) both parties must consent to the marriage and have legal capacity to consent; c) the parties must be of the opposite sexes; c) the marriage must be monogamous; and d) the marriage ceremony must be witnessed by at least two adult persons. See sections 26(1) and 30 of the Marriage Act, 1961; *Ismail* 1983 at 1019H.
7. Section 5A was incorporated into the Divorce Act (1979) by the Divorce Amendment Act (1996).
8. In one reported case in Israel, an abusive and violent husband deserted his wife and refused to grant a *get* for more than 19 years, even withholding the *get* after eventually being placed in an Israeli prison. See Sharon (2019).
9. See for example, *Ismail v Ismail* 1983 at 1021H-1022A, 1024E-G.
10. For example, see *Christian Education South Africa v Minister of Education* 2000; *Taylor v Kurtstag* 2005; *Singh v Ramparsad* 2007; *Faro v Bingham NO and Others* 2013.
11. See for instance, *Hurwitz v. Hurwitz* 1926; *Minkin v. Minkin* 1981.
12. For a detailed analysis and critique of the proposed single marriage act and omnibus legislation for religious marriages, see Amien (2020, 78–82).

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ORCID

Waheeda Amien https://orcid.org/0000-0001-5443-2384

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