Asad on the Secular: Implications for South Africa's Muslim Marriages Bill Debate

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Abstract

This paper examines a South African debate on legislating Muslim marriages in the light of anthropologist Talal Asad's critique developed in his *Formations of the Secular* (2003). It probes aspects of the debate under four Asadian themes: (1) the historicity of the secular, secularism, and secularization; (2) the place of power and the new articulations of discourses it creates; (3) the state as the arm of that power; and (4) the interconnections (or dislocations) among law, ethics, and the organic environment (*habitus*). I argue that Asad illumines the debate in the following ways: (1) by providing a deeper historical and philosophical appreciation of its terms of reference, given that the proposed legislation will be subject to South Africa's secular Bill of Rights and constitution; (2) by requiring us to examine and interrogate the genealogies of such particular hegemonic discourses as human rights, which some participants appear to present as ahistorical and privileged; and (3) by showing, through the concept of *habitus*, why this debate needs to go beyond its present piecemeal legal nature and develop an appreciation of the organic linkages among the Shari'ah, morality, community, and self. Yet inevitable nuances are produced when applying Asad's ideas to the South African context.

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Introduction

A set of philosophical assumptions underlies any discourse, defined here as any way of looking at and acting in the world. Whether these assumptions are true or false is not the critical question here. The question is whether we are sufficiently aware of such assumptions in the discourses within which we operate, sufficiently aware of how they communicate a specific view of the world and reality, and sufficiently aware of how this view of reality propels us to think and act in certain ways. This, I believe, is a fundamental insight of Talal Asad's *Formation of the Secular*.[1]

Since the Enlightenment, the dominant public discourses have been shaped by the secular ethic, one that, on the one hand, is fundamentally skeptical of the totalizing truth and ethical claims of religions and, on the other, is more trusting of autonomous reason as an arbiter of truth about the world and how to act in it.[2] This ethic has permeated all discourses of modernity, being manifest, among other areas, in the sphere of contemporary law. In the subsequent intersections between a totalizing religious law, such as the Shari'ah, and an autonomous human-based approach toward the law typical of liberal democracy, the conversation more often than not takes place within the terms and parameters set by the dominant discourse. This dominance is, in turn, supported by a complex configuration of power relations that perpetuate and reinforce its privileged position. Aspects of the Shari'ah, such as its personal law, may appear to enjoy acceptance within broader contemporary law, but these are still bound to the fundamental epistemological and ontological underpinnings of the liberal democratic worldview.

The conversations that even a subordinate Shari'ah has with contemporary law follow from the logic of the Shari'ah itself: It is accommodating by nature and strives for what is realistically achievable, not what is ideal.[3] However, there is a danger that while focusing on which aspects of the Shari'ah are to be incorporated into the dominant legal paradigm and how such accommodation is to be sought, we may lose sight of the two systems' radically contrasting philosophical and historical genealogies. While these genealogies are, of course, always in the background and do not necessarily feature in the conversation on the law itself, the problem arises when the implicit *assumptions* underlying the dominant paradigm shape the terms in which the conversation is constructed. While there are no actual restraints on the conversation itself, it is confined to the dominant paradigm's playing field.

The current South African debate regarding the proposed Muslim Marriages Bill (MMB) is, one might suggest, indicative of just such a scenario.

Both proponents and opponents are conducting a debate within the legal parameters of the democratic dispensation inaugurated in South Africa during the early 1990s. This dispensation is embodied in the country's constitution, a document that is often seen as enshrining the most "progressive" liberal democratic values.[4] Conducting the debate in this frame of reference cannot be helped. *Fiqh* debates operate within the constraints in which they take place. If the parameters defining this particular debate are questioned, they are done so implicitly and in passing, for the assumptions of liberal democracy are not expressly challenged.

This paper suggests that *Formations* offers a powerful template by which to engage more directly, in particular, the debate's philosophical underpinnings. It argues that Asad's insights into the historical evolution of the secular and the new scale of values it has engendered allow us to gauge how these now hegemonic values set the tone and terms of public debate. The case of the MMB is no exception in this regard. In fact, this particular case further argues that his understanding of power, as well as the historical contestation involved when new moral landscapes are defined and imposed, leads us to problematize claims by such discourses as human rights (which features prominently in the MMB debate) to be innate and privileged.

In addition, he forces us to consider the state's potentially coercive role in interpreting the provisions of the MMB, a coercion that is made "natural" by the very structure of its legal discourse. And, finally, his ideas remind us that the Shari'ah and Muslim society (viz., its social structures, practices, and spiritual resources) are interdependent and that an over-concentration on the legal aspect may obscure the debate's crucial socio-philosophical dimension. Yet applying his template to the South African context generates nuances in his template: crucially, that there are a number of *actual* convergences between the sacred and the secular without diluting the philosophical binary underlying the two.

A Background to the MMB Debate

Although calls for recognizing Muslim marriages go back more than eighty years, these were not generally recognized in the pre-democratic era because of their potentially polygynous nature.[5] In 1994, in a climate more favourable to multiculturalism, the ruling African National Congress (ANC) set up a Muslim Personal Law Board and tasked it with drafting legislation designed to recognize such marriages and associated matters. However, sharp ideological differences between the board's members led to its disbandment after only

one year.[6] A key conflict revolved around whether Muslim Personal Law should be subjected to the Bill of Rights and the Constitution. Human rights and gender activists argued that these latter should take precedence, whereas many ulama resisted what they saw as the subjugation of various Shari'ah provisions.

In 1999, the matter was revived and a project committee was designated to do the necessary drafting. In 2004, after extensive consultations, it produced the MMB, which appeared to have qualified support from both the major ulama organizations and rights activists. However, due to continued opposition from a significant number of ulama and conservative Muslims, the bill has not been tabled in Parliament and Muslims are still hotly debating its provisions.[7] The camps around the bill can be divided into three[8]: (1) rights activists who believe, that while not ideal from a human rights perspective, the MMB at least has safeguards to ensure that women's rights, as spelled out in the Constitution and the Bill of Rights, are not violated; (2) accommodators, comprised of most ulama organizations, who hold that while not ideal from a Shari'ah perspective, there is sufficient rapport between the Shari'ah's requirements and the bill's provisions to make it workable; and (3), rejecters, the more conservative ulama and their followers, who believe that there is no such rapport and that the bill should be rejected.

Asad's Themes

Asad's project, an interrogation of the secular, essentially seeks to show secularism's profound and complex historicity in an attempt to render suspect any claims that it might have to a privileged view of what is true and good. Such a critique implicates the constructed notion of human rights and, by extension, aspects of the MMB debate. His method of attack highlights, among others elements, the assumptions of the secular, the role of power, the state as its embodiment, and the secular reconfiguration of the relationship between law and morality.

The Secular, Secularism, and Secularization

Asad views the secular as an epistemic category and secularism as a political one. The major premise of his study is that the epistemic *conceptually precedes* the political. The *secular* represents a new way of thinking about myth, agency, pain, cruelty, and torture that underlies the historical construction of *secularist* conceptions of the human and human rights, minorities, nationalism,

and the place of "religion." *Secularization*, Asad appears to believe, represents the historical *movement* toward the secular and secularism. Thus secularism does not speak to any innate or foundational human values, but to historically created ones.

For example, the secular vision creates a binary between "pain" and "pleasure," with the former being seen as an unqualified blight. Hence society's efforts are to be directed toward the quantifiable reduction or elimination of pain. The *hegemony* of this view (the view itself had, of course, existed previously) is of relatively recent vintage. Religions quite often construed pain, or some measure of pain, positively as a means toward inner enrichment or passing a spiritual test. The Flagellants, Shi'ah mourners commemorating the martyrdom of the Prophet's grandson, certain Hindu rituals, the circumcision undergone by the *abakwetha* (participants in the Xhosa initiation ceremony) and, less spectacularly, pain as cleansing[9] and so on can immediately be mentioned as instances of a *more* texture-based, qualitative attitude toward pain.

The difference between religion and secularism naturally speaks to different epistemological, ontological, and (consequently) cultural presuppositions. However, in the case of secularism these have been self-consciously driven by and manufactured in historical time, as distinct from the trans-historical claims typical of religions (which self-consciously claim to locate their essence outside of history[10]). In addition, the secular (broadly speaking) was not coterminous with religion for it represented a historical rupture, a changing of the guard, a movement away from the theocentric and toward the anthropocentric. The issues here are whether this is sufficiently appreciated in *practice*, whether the genealogy of the secular has been neglected, whether the epistemological and ontological foundations of the secular are unquestionably assumed to be *de rigueur*, whether the values of secularism have unwittingly become essentialized, and whether those values have consequently become trans-culturally imposed.

I would suggest that these philosophical underpinnings have been under-appreciated in the MMB debate so far. Rights activists bandy about such concepts as fairness, justice, and equity in an un-nuanced, liberal democratic sense, seemingly assuming that others share a similar sense of these concepts. For example, gender activist Rosieda Shabodien believes that when the time comes for the MMB to be enacted, the state must ensure that the practice of one's faith, tradition, and culture does not infringe upon the "civil rights" of women or perpetuate their disempowerment. Rather, such practices must be subject to a human rights framework and other values of a (secular) constitution:

> Simply put: when the particularities of religion, culture and tradition are practiced in a way that are patriarchal, misogynist and/or discriminatory, this cannot be allowed with the state's consent. Self-regency in the arena of personal family law systems comes with a commitment to ensure it does not go against the equality principles in the Constitution and Bill of Rights.[11]

There is no interrogation by Shabodien as to how "civil rights," "disempowerment," "patriarchal," "discriminatory" and "equality" should be articulated. They are simply taken as a given, their "grammar" (as Asad would have it) set within a secularized and hegemonic discourse of human rights.

Is the language of human rights (and, more pointedly, the values contained by that language) incommensurable with Islam? Some appear to think so, for they see a radical disjuncture between the Shari'ah's provisions and the state's values. Thus Darul Uloom Abu Bakr, a Port Elizabeth-based Islamic institution opposed to the bill, urges a "careful consideration" of its implications. While it commends the bill's aims in seeking to alleviate the plight of Muslim divorcées and widows, it is concerned that assimilating Islamic laws into a secular constitution would "distort or even replace the Divine Law of Islam." The nature of the accommodation between the two systems needs to be closely probed, as dispensing with the fundamentals of the Shari'ah for a "few worldly rights" or seeking alleviation through compromised legal recourse when other means are available would violate the Qur'an and the Sunnah:

> … the big fear that overrides all these noble aims of the Bill is the resultant assimilation of Shar'ee laws into a non-Muslim Constitution that threatens to distort or even replace the Divine Law of Islam.[12]

For the Darul Uloom, the debate clearly involves broader philosophical issues. As it now stands, the MMB would involve a potential conflict between the Constitution (human law) and the Shari'ah (God's law), the latter of which necessarily implies extra-worldly considerations. In other words, the bigger picture of ultimately returning to Him and accounting for one's faithfulness to His commands cannot be sacrificed for "a few worldly rights."

Many Muslims would accept this philosophical binary: If we accept the Revelation given to the Prophet (peace be upon him), one is bound by its teachings and values and thus cannot, in principle, serve two masters – the Constitution and the Revelation – simultaneously. But whether other Muslim scholars would share this legal reasoning is another matter altogether. The

Darul Uloom simply speaks about the Shari‘ah; it does not mention the MMB debate in terms of *fiqh*, defined as the process of human reasoning based upon that law that may arrive at a variety of different, but fundamentally valid, outcomes, nuances, and opinions. But it is precisely because of *fiqh* and its generation of practical possibilities that a compromise, one that was supported by most of South Africa's major ulama associations, was reached.

Riad Saloojee reminds those who oppose the bill as *kufr* (unbelief) of several facts: (1) it is "more comprehensive and Islamic in character" than similar laws found in Bangladesh, Libya, Tunisia, Egypt, and other Muslim-majority countries; (2) the bulk of its contents simply give expression to Islamic laws of marriage and divorce or are concerned with administrative issues, and thus are not problematic in themselves; and (3) it is a means by which to realize a key goal of the Shari‘ah: the alleviation of social ills (particularly those affecting women) resulting from the current unregulated scenario. Achieving this goal may require the (perfectly valid) enforcement of certain *mubāḥ* procedures, procedures that are neither required nor forbidden in themselves but are "permitted," such as putting certain restrictions on polygyny or stipulating a minimum age for marriage. Such procedures should be seen as akin to other societal regulations that facilitate general wellbeing and should not be made the arena of ideological contention. Saloojee acerbically asks: "When is the last time one cared to 'take a bullet' for traffic lights, sanitary regulations for take-aways, or one's I.D. book?"[13]

For Saloojee, *fiqh* is eminently practical. Talk about the "Shari‘ah" versus the "Constitution" misses the point because the actual *practice* of the Shari‘ah (its *fiqh*) represented the fusing of the "secular" (as used by Saloojee, the "mundane") and the sacred. In this view, it is by dint of the Shari‘ah itself (through its *fiqh*) that an accommodation is possible between Islamic imperatives and constitutional priorities, one that does not dilute Islam's epistemological and ontological foundations. It is from *within* the Shari‘ah that a measure of commensurability with the language of rights may occur, in terms of its practical playing out, despite the philosophical antagonism.[14] Of course the articulation of such commensurability is itself subject to *fiqh* debates and the differences they generate.

All of this militates against the statist[15] understanding of the Shari‘ah as a "system" that needs to be applied. In fact, it is being applied all the time through its *fiqh*. The secular (as defined by Asad) and the Shari‘ah (when defined as God's Law) are certainly in conflict; paradoxically *fiqh*, by its practical nature, accommodates itself to secularism and the secularization process without, thereby, becoming "secular."

The Genealogy of Hegemony

A critical Asadian insight is that, ultimately, brute power determines a new moral landscape. It is this new landscape that defines and constrains the possibilities with which various players work:

> The basic question here, in my view, is not the determination of "oppressors" and "oppressed," of whether the elites or the popular masses were the agents in this reform.... It is [rather] the determination of that new landscape [when imperialism is seen as a totality of forces that converge to create a new moral landscape] and the degree to which the languages, behaviours, and institutions come to resemble those that obtain in West European nation-states.[16]

It is not that agents are unimportant: in fact, gauging motives and intentions are crucial for assigning legal and moral culpability. However, given that the new landscape is a *fait accompli*, the more interesting issue for Asad is examining the types of articulations that occur within the parameters it has now set.

The South African Bill of Rights and Constitution are, of course, the tangible outcomes of a change in power relationships. It offers an articulation of possibilities that differ from those which existed under apartheid. And Muslims have, quite understandably, seen its multicultural approach as being more amenable to the recognition of their marriages and its consequences than the strongly anti-polygamous ethos of the apartheid-era courts. But the MMB is, I suggest, neither more nor less moral than the apartheid regime in some transcendent sense. It cannot be, for it is a self-conscious historical product and hence its moral universe is prone to fluidity. Equally, some of those who supported the morality of apartheid might have believed that it had a divine origin, while to its opponents and victims it was a particular, non-binding reading of reality. Morality, then, in relation to power can only be conceived of in a subjective sense since there are inevitably victims of this power and its attached morality – even if that particular morality in itself is seen to have an objective, transcendent basis.[17]

In addition, I would contend there is a constant power struggle to impose one's moral landscape and a resistance to that imposition, pursuing its own hegemonic goals. Hegemonies continuously seek to maintain the status quo, whereas potential hegemonies seek to counter it in order to impose a new one. Resistance to power is itself an activity designed to manufacture a new set of power relations.

All of this should bring about a continuous awareness of the historicity of the Bill of Rights' provisions. They cannot be abstracted from that history and presented as natural and inalienable, for they are premised on a conception of human nature not shared by all cultures. Their genealogy, particularly in the South African context, needs, Asadian-like, to be explored and interrogated. We need to ask who are its architects, what are their backgrounds, what are their motivations?[18] The bill's particular hegemonic trajectory needs to be cognized, for its provisions, such as equality, are implicated by that trajectory. For example, we may ask "Equality? Defined by whom, for which purposes, and on what basis?" All of this does not invalidate this discourse; rather, it should bring to mind the realization that discursive assumptions are involved, that we are operating in a discourse *among* discourses. A human rights approach has no inherently privileged position in relation to other approaches, including theocratic ones.

The Intrusive State

Asad sees the state as the tool by which power is applied. More precisely, it is the tool that, in colonial Egypt, effectuated and institutionalized modernization and secularization by employing new forms of violence (viz., the law and the police force) to realize its goals.[19] More particularly, the Shari'ah was gradually confined to the realm of personal status law not because this realm was seen as too sensitive, but because in this way it could be transformed into a subdivision of legal norms maintained and controlled by the centralizing state:

> It is often assumed that colonial governments were reluctant to interfere with family law because it was at the heart of religious doctrine and practice. I argue, on the contrary, that the Shari'ah thus defined is precisely a secular formula for privatizing "religion" and preparing the ground for the self-governing subject.[20]

In other colonial contexts, the state sought to restrict the application of customary law when it was viewed as repugnant to "justice and morality." Asad quotes James Read, who writes that of

> … all the restrictions upon the application of customary laws in the colonial period, the test of repugnancy "to justice and morality" was potentially the most sweeping: for customary laws could hardly be repugnant to the traditional sense of justice or morality of the community which still accepted them, and it is therefore clear that the justice or morality of the colonial power was to provide the standard to be applied.[21]

In the contemporary era, Asad argues, the "state has the power to use human rights discourse to coerce its own citizens – just as colonial rulers had the power to use it against their own subjects."[22]

It is precisely this intrusive nature of the state that worries some MMB opponents. But this intrusion is conceived of in distinctive ways. For Ziyad Motala, the problem is that the state is not secular *enough*, for it essentially interferes in "private" religious space. Ultimately, the bill is problematic because it violates the emblematic secular separation between religion and state, a notion characteristic of modernity (as distinct from pre-modernity). He points out that that this separation evolved precisely because of medieval religious conflict. Prior to this development, the Christian clergy was subject to serious penalties if they engaged in any religious activity that was contrary to the state's specific doctrinal position. As a result there was continuous conflict between those who subscribed to that doctrine and those who did not, particularly between Catholics and Protestants, as well as between their various subsects. Theological loyalty to the state was paramount, and dissidents were subject to torture, jail, and capital punishment.

Motala charges that the state is playing a similar theological role in the current debate. While the bill technically has an "opt-out" option, its punitive provisions "push towards adherence." Motala cites the following an example: Under the bill, anyone who officiates at a Muslim marriage must give the prospective spouses the choice to be bound to its provisions or not, even if the official believes the bill to be un-Islamic. Failure to do so would make that official subject to sanctions. In other words, one is penalized for following one's conscience instead of the state's interpretation:

> Any person that prevents another from exercising rights under the Bill shall be guilty of an offence and liable to a fine or imprisonment. A mother, who dissuades her son from marrying under the Bill because she thinks it is un-Islamic, could face the prospect of one year in jail.[23]

So for Motala the MMB "takes us back to the medieval period of compulsion and coercion with the state taking sides on religious doctrine." The state has chosen particular Islamic scholarly positions on the meaning of religious terms, thereby offsetting these against the views of other scholars. Those who practice their religion according to these latter views would be at a distinct disadvantage.

But for Allie Moosagie, the bill is unwelcome not because the state is insufficiently secular, but precisely because it *is* secular and its human rights values will, in the final analysis, trump religious ones. This problem will be-

come especially apparent when cases are appealed. While its drafters have tried to restrict judicial discretion by insisting that written comment on such cases be sought from accredited Muslim institutions, he is unconvinced that Supreme Court judges will automatically be swayed to judge in accordance with the opinions received:

> Any attempt to fetter the discretionary power of the Supreme Court of Appeal will not be acceptable, for their deliberations are profoundly shaped by the secular principles of fairness, equity and justice enshrined in the Constitution. They are bound to those secular values and will not abandon them to accommodate any cultural or religious practice.[24]

Motala and Moosagie's concerns may be warranted: Waheeda Amien and Rosieda Shabodien positively welcome state intrusion into the bill's application. Amien basically supports the MMB, on the grounds that it is the best among available options to advance Muslim women's rights, but worries that some of its provisions conflict with the Bill of Rights' equality clause. She favors a gender nuanced integrationist (GNI) approach, one that requires that the freedom of religion be held accountable to human rights standards, and believes that the MMB could be transformed to correspond with this approach either through the parliamentary tabling process or constitutional challenges after its enactment. This would require "civil society" to vehemently advocate that the MMB be made more gender sensitive or, if that fails, to:

> ... proactively engage with the legislation by taking precedent setting cases to the Constitutional Court and/or Supreme Court of Appeal, to challenge those provisions that result in sex-/gender-based discriminations. The judiciary will also have to be proactive and adopt wherever possible, women-friendly interpretations of Muslim family law. Finally, the judiciary must ensure that in balancing women's right to equality with religious freedom, respect for the latter does not yield negative results for women.[25]

Similarly Shabodien, while holding that the bill will not be a cure for social ills or change the ideogical position of women in Islam, believes that it will at least provide a regulatory framework "that we can utilise, contest and amend."[26]

It does appear that rights activists are keenly aware that once the state's legal machinery takes over there is a very good chance that a rights-based constitution will more often than not rule in their favor – human rights by coercion, as Asad would have it. This may explain their attempts to fast-track its enactment.[27] (Of course, the rejecters are well aware of this fact, which explains their vehement attempts to forestall its enactment.)

At the time of this writing, the state shows little movement on the issue. In fact, it appears to have no vested interest in facilitating the MMB's passage at all. This, I believe, springs from two factors: (1) This is hardly an issue that affects South Africa's broader electorate (Muslims form 1.5 percent of the country's population) and (2) the intensive pro and con lobbying campaigns related to the bill have left the government wary of dabbling in "religious" matters. Amien recognizes these two points and, importantly, adds a third one: Since 2003, the position of Minister of Justice and Constitutional Development has been occupied by several politicians who may have had their own inclinations on the question of legislating religious marriages.[28] In addition to such idiosyncratic factors, the continuing impasse after fifteen years indicates that, in the absence of other compelling factors, political considerations that potentially challenge the state's overall authority may outweigh legal ones that promote its particular values. In other words, the state's first instinct is self-preservation.

One issue that needs careful scrutiny in this area is the much vaunted role of civil society. Amien appears to confine civil society to those organizations and groups aligned with the human rights perspective. However, the MMB debate has also seen intensive lobbying by conservative ulama and other associations (e.g., the Muslim Lawyers Association[29]) against the bill. Surely they also form part of civil society? Either way, the concept of civil society needs a more rigorous interrogation. Asad is quite cynical on whether such organizations claiming to represent civil society actually represent society at large, for he tends to view them as lobbying and special interest groups. In the case of the MMB debate, it is difficult to gauge what "real" constituencies are being represented by certain vocal parties.

Ethics, the Law, and Habitus

According to Asad, the colonial situation is defined by the power to make a strategic distinction between public law and private morality. This separation is crucial because it enables the legal work of educating subjects into a new public morality, a morality that is conducive to secular sensibilities.

But the law and morality are related to each other in "complicated ways," and legal verdicts are inevitably informed by the prevailing moral sense. If such an organic relationship is lacking, if organic conceptions of justice and underlying experiences are no longer relevant to the maintenance of the law's authority, "then that authority will depend entirely on the force of the state expressed through its codes."[30] While secular public morality in Europe might

have an organic connection to the law (it was, after all, a gradual outcome of a historical process), such a public morality had to be imposed by the state in late nineteenth-century Egypt. There, traditionally, public morality had been organically connected to the Shari'ah.

The notion of an organic relationship, *habitus*, is critical to understanding the "embodied" or living Shari'ah as opposed to statist conceptions. *Habitus*, at least in the sense that Asad uses it, has been defined as a concern with ethical formation preceded by specific pedagogical steps through which moral character is acquired. These moral virtues (fortitude) are "acquired through a coordination of outward behavior (e.g., bodily acts, social demeanor) with inward dispositions (e.g., emotional states, thoughts, intentions) through the repeated performance of acts that entail those particular virtues or vices."[31]

And so, for Asad, the Shari'ah is fundamentally not a set of sacred rules, but the ground for the development of virtues, the latter being imbibed from the Prophetic example (the Sunnah):

> *Fiqh* is critical to the process not as a set of rules to be obeyed but as the condition that enables the development of virtues ... Implied in this conception of *fiqh* is not simply a comprehensive structure of norms (*aḥkām*) but a range of traditional disciplines, combing both Sufism and the Shari'ah, on which the latter's authority depends. In other words, Abduh sees the "Islamic tradition" (the sunna) not merely as a law whose authority resides in the supernatural realm, but as a way for individuals to discipline their life together as Muslims. The role of pain-penalty is not to constitute moral obligation, but ... to develop virtue as a habitus.[32]

Asad cites the thirteenth-century polymath Ibn Taymiyyah as having had an affinity with this conception of the Shari'ah:

> In this view [Ibn Taymīyyah's], the *performance* of the Shari'ah – spiritual cultivation of the self through *'ibādāt* (acts of worship), the entire range of embodiments that define worship, together with supererogatory exercises as well as the norms of social behaviour ... – are all interdependent.[33] [my emphasis]

I believe that the notion of *habitus* brings an important dimension to the MMB debate, one that goes to its very heart. All of the involved parties (rights activists, accommodators, and rejecters) agree that the plight of women, particularly widows and divorcées in polygamous marriages, needs to be urgently addressed. They disagree on how this is to be done, and hence their differences. Legal recourse is, of course, essential to ensuring relief.

However, as per the notion of *habitus*, a vulnerable *outcome* for such a woman cannot be separated from the factors that led her *into* such a marriage in the first place; the social relationships she forges within that marriage; her relationship with her family, her community, her local imam; and the beliefs and practices that help sustain her in that marriage – in other words, the whole interrelation between family, community, texts, cultural practices, and religious authority that also form part of that marriage. An engagement with her "human rights," the state-sanctioned secular public morality, often misses the point because this is not part of her organic discourse, which is rooted in a distinctly different tradition of values that the state views as privatized morality.[34]

Again, this is not to say that the two are incommensurable. As intimated previously, there are areas in which state values and privatized values overlap, and this is where accommodation and concurrence occur. Nevertheless, the tradition's epistemological and ontological foundations remain distinct.[35] But while the overlapping may be legally "co-incidental," it speaks to an important social reality: The South African Muslim community, in its encounter with the country's broader social forces, naturally acquires new sensibilities and terms of reference. Religious leaders have to take these sensibilities into account and formulate the ideals of *habitus* in light of the new context. They may also take from the new terms and concepts on offer, but with a view to reinforcing these ideals.

As an illustration, I would like to refer to a talk by Shaykh Yusuf da Costa, head of a Cape Town Sufi order. The talk, entitled "The Abuse of Our Wives,"[36] views "abuse" very much akin to the manner in which human rights activists would employ it. He cites the following statistics: 80% of women experience emotional abuse (being humiliated, degraded, insulted, threatened, and scoffed at); 90% experience physical abuse (being punched, kicked, and scalded); 71% experience sexual abuse (including being raped or forced to watch pornography); and 58% experience economic abuse (such as being forced to hand over their wages).

Yet having accepted these definitions of abuse, da Costa locates its solution not with the law, but very much within the *habitus* of the Muslim community:

> I'm not saying you are doing this. I'm saying this to you so you can teach your children about such abuse. We must be examples in our homes, of *mawaddah* [love] and *raḥmah* [mercy]. As fathers, we must be examples in our homes not of violence, not of abuse, but of love, of tenderness, of kindness, of regard for our wives.

A Muslim's primary orientation *ought* to be toward the afterlife, for one will eventually die and be held accountable by God for one's deeds. Da Costa forcefully reminds his audience of the deep interpenetration between this life and the next by linking abuse to God's Record of Deeds:

> The worse type of abuse you get in Muslim and other homes, and I'm sorry to say this, is that husbands slap their wives, punch them, hit them, kick them, shove them, scratch them, throw things at them, and beat them up. They threaten them, attack them, lock them up in the house, throw them out when they are sick, or injured or pregnant. This is physical abuse. In so many cases these things happen. We must be extremely careful because everything that we say and everything that we do are recorded! All those slaps, all those kicks, all those shoves, all those threats, all those swear words, all those attacks are all recorded. How can we, and I'm sorry to say this, do that, and then that night we want to go sleep with that wife? How can we do that? What kind of animal behaviour is this? Do we think that the cries of our wives go unrecorded?

The problem of abuse is fundamentally addressed by reorienting attitudes toward women, particularly wives and mothers, a process that (for Muslims) is sourced in Islam and significantly impacts the *texture* of relationships:

> Surely the important thing about our relationships with our wives should be according to what Allah says. What does Allah Almighty say? How must I treat this woman? How should I care for her? What should my relationship be with her? What must I do for her? How kind should I be towards her? Most of our mothers, almost all of mothers, spend most of their day serving us free of charge. There is no compulsion in the religion for that. I want to repeat that. I hope some of the ladies upstairs are listening to me. There is no compulsion in Islam, saying that that woman must cook your food, must make your tea, must see to the breakfast, must clean the house, must feed your babies. Nothing like that! Nothing like that! But we will let our wives serve us and our children, day in and day out, day in and day out, day in and day out and show little kindness. We never say: "Thank you!" I know of one man, he has passed away, who used to sit next to his wife when they ate. When they had finished, he would put his arm around his wife and kiss her on her cheek and say: "Thank you, *bokkie*." What a man! May Allah give him a good place in the Hereafter, Amin.

This texture is undergirded by an ontological awareness of the position of women in the greater scheme of things:

> My appeal to you is that we must look at our relationships with our wives, and see in fact whether we are applying the rules of the Qur'an. And we must encourage our children to understand that part of the respect and the regard for their mothers must be because mothers are three degrees higher than fathers, and the respect for daughters is because they are two degrees higher than sons.

According to da Costa, the unacceptability of abuse (similarly defined) from both the perspective of secular human rights and the Shari'ah, is an argument for looking to the wider interconnections demanded by *habitus*: the relationship among law, orientation, texture, and ontology. But *who* is saying this is, perhaps, just as important as *what* is being said. Da Costa, an ex-professor of geography, is now a full-time deputy of the Naqshabandi order. He is speaking from within this latter capacity, and therefore from within an authoritative position *within* the *habitus*. This authority allows him to make an *organic* appeal to the constituency of the *habitus*, thereby allowing its members to move with his views, as it were. Were he solely to speak in his capacity as ex-academic, this organic connection would hardly take place.

Conclusion

Asad's insights provide new ways of thinking and critiquing the MMB debate, which has largely taken place within the legal realm, along with some sociological considerations (viz., the position of vulnerable women). But the debate's larger philosophical framework, which is implicit in all of the various positions taken, have not been subjected to adequate reflection. And it is here that Asad can make a valuable contribution, particularly in interrogating the assumptions underlying certain positions. Applying his ideas to the South African context unfolds itself in a nuanced manner. Philosophical incommensurability does not preclude convergence. Via its *fiqh*, which necessarily interacts with secularization, the Shari'ah can – and does – intersect with human rights provisions. It is an "accidental" correspondence, as it were, but a vital one nevertheless.

State and law go hand in hand, and it is important to recognize the state's coercive, intrusive power through that law. But we may also note that this potential intrusion is governed by a variety of unpredictable political and civil considerations that may thwart or delay a practical commitment to its professed human rights perspective. Coercion into that perspective is not axiomatic, for political and civil considerations appear to have played a role in the continuing impasse.

Asad's application of *habitus* enriches the debate's sociological dimension, compelling us, I think, to look beyond the legal realm for a more considered understanding of the issues in play. Law fits within a framework, and it is that framework as a whole that needs to be grasped. Yet the contextual notion of *habitus*, which constantly plays off the changing local and larger social forces it encounters, employs such encounters to vivify its ideals.

Endnotes

1. T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003). What follows is based on an interpretive reading and application of this work.
2. It is, consequently, a totalizing discourse in its own right. William Cavanaugh's description of the political project of secularism is pertinent in this regard: "The idea that religion has a peculiar tendency to promote violence is a variation on this idea that religion is an essentially private and non-rational human impulse, not amenable to conflict-solving through public reason. In the contemporary context, the idea that there is something called 'religion' with a tendency to promote violence continues to marginalize certain kinds of discourses and practices while authorizing others. Specifically, the idea that public religion causes violence authorizes the marginalization of those things called 'religion' from having a divisive influence in public life, and thereby authorizes the state's monopoly on violence and on public allegiance. Religion, then, emerges as the Other against which the secular nation-state is defined, and against which a secular social order appears as necessary. The secular is established as the sphere of rationality. The secular nation-state also appears as natural and inevitable, the answer to a universal and perennial truth about the inherent danger of non-rational religion" (p. 229) W. Cavanaugh, "The Invention of Fanaticism," *Modern Theology* 27, no. 2 (2011): 226-37.
3. On this point, see I. Taliep (2008, November 19), "Muslim Particpation in South African Liberal Democracy: An Usul al Fiqh Approach." Retrieved September 17, 2012, from International Peace College South Africa: http://www.ipsa-edu.org/2008/11/muslim-participation-in-south-african-liberal-democracy-an-usul-al-fiqh-approach. Taliep provides a sustained argument for critical and creative fiqh engagement with the South African liberal democratic context.
4. M. Gevisser (2012, March 3). "Towards a Progressive Culture." Retrieved September 17, 2012, from Mail and Guardian: http://mg.co.za/article/2012-03-16-towards-a-progressive-culture/.
5. A notable exception in this regard was the apartheid government's 1987 effort, through the South African Law Commission, to gauge Muslim opinion regarding the incorporation of Muslim personal law into the legal system. However, this

approach was roundly rejected by a number of Muslim organizations involved in the anti-apartheid struggle. See W. Amien (2010), "A Chronological Overview of Events Leading up to the Formulation of the Muslim Marriages Bill." Muslim Marriages in South Africa: From Constitution to Legislation. Papers Presented at Muslim Marriages Workshop, Saturday 22 May 2010, Capetonian Hotel. Cape Town: Centre for Contemporary Islam, UCT, 2011. Cape Town: Centre for Contemporary Islam, p. 7.

6. Ibid., 8.
7. Ibid., 11-12.
8. These categories, which are my own, are based on a broad assessment of the state of the debate as it currently stands. Each group may contain different strands arguing for its basic position, sometimes from opposite ends of the spectrum. For example, in her "Comments to the Minister of Justice and Constitutional Development on the Muslim Marriages Bill," Shabodien lists five different strands under the "rejecters" category alone, ranging from ulta-conservatives to pure secularists. See R. Shabodien and W. Amien, "Comments to the Minister of Justice and Constitutional Development on the Muslim Marriages Bill," Recognition of Muslim Marriages Forum, 9-15 May 2011. Available at http://uct.academia.edu/WaheedaAmien/Papers/638221/Comments_to_the_Minister_of_Justice_and_Constitutional_Development_on_the_Muslim_Marriages_Bill.
9. Consider, for example, the following hadith: Abu Hurairah … reports that Allah's Messenger, peace be upon him, said: "For every misfortune, illness, anxiety, grief, or hurt that afflicts a Muslim – even the hurt caused by the pricking of a thorn – Allah removes some of his sins." Sayyid Sabiq, *Fiqh us Sunnah*, "Introduction," vol. 4. Retrieved September 14, 2012, from: http://www.ymsite.com/books/fiqhussunnah/fus4_59.html.
10. And so escape the charge that they essentialize reality. This is their claim: that their reality has an essence, a foundation of being. This claim may or may not be true, but they cannot be held culpable for merely claiming to transcend linear time. In contrast, the secular grounds itself in history – as non-transcendental – so to then claim that its values are innate and transcultural would appear to be contradictory.
11. R. Shabodien (2010), "Making Haste Slowly: Legislating Muslim Marriages in South Africa." Muslim Marriages in South Africa: From Constitution to Legislation: Papers Presented At Muslim Marriages Workshop, Saturday 22 May 2010, Capetonian Hotel. Cape Town: Centre for Contemporary Islam, UCT, 2010. Cape Town: Centre for Contemporary Islam, p. 34.
12. Darul Uloom Abu Bakr (n.d.), "Proposed Muslim Marriages Bill." Retrieved March 5, 2012, from Darul Uloom Abu Bakr: http://pedarululoom.co.za/index.php?option=com_content&task=view&id=43&Itemid=28.
13. R. Saloojee (2011, April), "MMB: Setting the Record Straight." Retrieved March 5, 2012, from Muslim Views: http://www.muslimviews.co.za/index.

php?option=com_content&view=article&id=152:mmb-debate-setting-the-record-straight&catid=1:latest-news&Itemid=108.

14. Here one might refer to the remarkable project of Professor Hashim Kamali, whose series of publications (e.g., *Freedom of Expression in Islam*; *The Dignity of Man: An Islamic Perspective*; and *Rights to Education, Work, and Welfare in Islam*) seeks to bring about such commensurability predicated on a rigorous understanding of the classical Islamic tradition. See, for example, his *Freedom of Expression in Islam* (Cambridge, UK: Islamic Texts Society, 1997).
15. With reference to Egypt, Asad makes the interesting observation that both secularists and Islamists take a statist view of the Shari'ah: as sacred law that should (for secularists) be further reformed or (for Islamists) properly administered. Both positions require state intervention (Asad, *Formations*, 253). This observation finds resonance in the South African situation, where both "rights activists" and "rejecters" appear to take a similar systemic approach to the Shari'ah.
16. Ibid., 216-17.
17. To put this another way: "I am certain that this is right ['objectively' perhaps] and that's why I must do it." This "doing" will, more often than not, be contested by others with a different sense of morality, who see mine as subjective, and who will try to impose their "doing" on me. And apartheid was contested by those with this different sense, a sense which found expression in documents like the Freedom Charter. And they, in turn, were eventually able to impose this new moral landscape on others.
18. Some more insights into these questions can be found in H. Corder, "Towards a South African Constitution," *The Modern Law Review* 57, no. 4 (1994): 491-533; J. Duncan (2011, September 5), "The Problem with South Africa's Constitution." Retrieved September 17, 2012, from SACSIS.org.za (South African Civil Society Information Service: http://sacsis.org.za/s/story.php?s=631; D. McKinley (2011, October 4), "The Majority and the 'Meaning' of the Constitution." Retrieved September 17, 2012, from SACSIS.org.za (South African Civil Society Information Service): http://www.sacsis.org.za/site/article/760.1 For a more personal account of two of the main architects involved in the actual drafting of the Bill of Rights, see A. Sachs (2011, July 11). "Kader Asmal" by Albie Sachs. Retrieved September 20, 2012, from History Matters: http://historymatters.co.za/kader-asmal-by-albie-sachs/ Both Asmal and Sachs were keenly committed to the international human rights perspective.

    There has been an indirect attempt to explore the historical unfolding of the Marriages Bill in this manner. Shaykh Abdul Karriem Toffar, a leading Cape Town based mufti, is of the view that Act 200 of the interim Constitution of 1993 provided for participation in the "cultural life of one's choice" by recognizing the fundamental legality of the personal and family law associated with a specific religion. However, he believes that things changed with the adoption of the final constitution in 1996, which charged that all such systems of law be subject to the Bill of Rights. It is particularly the equality clause in this latter document, a

clause that prohibits discrimination on the grounds of gender and sexual orientation, that would be seen as potentially challenging some traditional Shari'ah provisions on issues like inheritance. See A. K. Toffar (2009), "MPL in South Africa," (Text of a presentation given at an MPL seminar, International Peace Varsity South Africa, 17 June 2009.) Retrieved September 5, 2012, from http://aljama.co.za/wp-content/uploads/2009/06/dr-toffar-mpl-in-south-africa-seminar-17june2009.pdf.

19. Asad, *Formations*, 218.
20. Ibid., 228.
21. Ibid., 109-10.
22. Ibid., 135.
23. Z. Motala (2011, April), "The Case against the Muslim Marriages Bill." Retrieved March 7, 2012, from Muslim Views: http://www.muslimviews.co.za/index.php?option=com_content&view=article&id=151:the-case-against-the-muslim-marriages-bill&catid=1:latest-news&Itemid=108.
24. A. Moosagie (2010), "Is the Muslim Marriages Bill Absolutely Essential?" Muslim Marriages in South Africa: From Constitution to Legislation: Papers Presented At Muslim Marriages Workshop, Saturday 22 May 2010, Capetonian Hotel. Cape Town: Centre for Contemporary Islam, UCT, 2011. Cape Town: Centre for the Study of Contemporary Islam, p. 22
25. W. Amien, "A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context," *International Journal of Law, Policy, and the Family* (2010): 361-96, 382.
26. Shabodien, "Making Haste Slowly," 34.
27. The Women's Legal Centre brought an application to the Constitutional Court in 2009 and, in "terms of Section 167 of the Constitution, it asked the court to compel the President and Parliament to pass legislation recognising Muslim Marriages and regulating the consequences of such marriages within eighteen (18) months." The application was unsuccessful. See H. Abrahams-Fayker (2010), "Women's Legal Centre." Muslim Marriages in South Africa: From Constitution to Legislation: Papers Presented At Muslim Marriages Workshop, Saturday 22 May 2010, Capetonian Hotel. Cape Town: Centre for Contemporary Islam, UCT, 2011. Cape Town: Centre for Contemporary Islam, p. 42.
28. W. Amien (2012), "Politics of Religious Freedom in South Africa." Retrieved September 20, 2012, from The Immanent Frame: http://blogs.ssrc.org/tif/2012/07/24/politics-of-religious-freedom-in-south-africa/.
29. Their website and their submission on the bill can be found, respectively, at http://www.mlajhb.com/ and http://www.mlajhb.com/SUBMISSIONS_ TO_ SA_LAW_COMMISSION.pdf.
30. Asad, *Formations*, 240.
31. S. Mahmood, "Ethical Formation and Politics of Individual Autonomy in Contemporary Egypt," *Social Research* 70, no. 3 (2003): 837-64, 851.

32. Asad, *Formations*, 250.
33. Ibid., 250-51.
34. The notion of *ṣabr* (patient perseverance and forbearance) may be mentioned here. This concept, which hardly enters into secular public morality, is a crucial component of the organic network mentioned. It helps define how marriages are approached and sustained. It is a quality that is seen both for its intrinsic value (the demonstration of which brings other worldly reward) as well as its possibly calming effect on the marital relationship (within reason, of course).
35. Moosa has written perceptively on this issue. See E. Moosa (2000-01), "The Dilemma of Islamic Rights Schemes," *Journal of Law and Religion* 15, 185-215.
36. Y. da Costa (2011, February 17), "Selected talks by Yusuf da Costa 24. The Abuse of our Wives." Retrieved March 2012, from Living Islam: http://www.livingislam.co.za/index.php?option=com_content&view=article&id=790:prof-yusuf-de-costa&catid=80:featured-articles&Itemid=522.