Legally Pluralist and Rights-based Approaches to South African and English Muslim Personal Law—A Comparative Analysis

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Abstract

This article examines the right to the free exercise of religion from a comparative perspective in the context of Islamic marriage and divorce in England and South Africa. In particular, the article considers how Islamic marriage may be interpreted and recognised in a coherent manner in rights-based systems of law and how these two legal systems ensure that the rights of religious women are fully respected and acknowledged. The similarity in the growth of non-legal, quasi-judicial bodies (sharia councils in England and ulama in South Africa) is analysed, along with their effect on rulings on Islamic divorces and other matters. The article suggests that both legal systems may learn from the other and suggests ways in which this comparative method of legal analysis can be employed to achieve legal reform and the legal recognition of these marriages. In this regard, the article deals with various models, based on either the assimilation and unification of marriage laws (as proposed in South Africa) or integration and pluralism. The article examines these models not only from a pragmatic perspective, but also from a rights perspective. It suggests that the assimilation model, based on a Western, Judeo-Christian paradigm of marriage, would not only be inconsistent with the ethos of legal pluralism promoted by the South African Constitution and the English Human Rights Act, but, more importantly, would not protect the rights of Muslim women adequately. Therefore, the article concludes that, in line with recent South African High Court jurisprudence, the legislative recognition of Muslim marriage and divorce law is urgently required in both jurisdictions.

Keywords: Muslim marriages; comparative law; human rights; gender equality; matrimonial law

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Introduction

This article examines the right to the free exercise of religion from a comparative perspective in the context of Islamic marriage. In order to examine the right to the free exercise of religion, the following questions need to be responded to: How should Islamic marriage be interpreted and recognised in a coherent manner in rights-based systems of law? How do legal systems ensure that they respect the rights of religious women, namely both their right to gender equality and their right to practise their religion? In this regard, the rising prevalence of unregistered Islamic marriages in both England[1] and South Africa, and the consequences of these marriages for many vulnerable English and South African Muslim women are discussed. I allude to the provisions for divorce in such unions and the growth of non-legal, quasi-judicial bodies which give rulings on Islamic divorces and other matters. The article deals with models of recognition of marriage law, including that of one single Marriage Act, based on a principle of the assimilation and unification of marriage laws as proposed recently in South Africa. The article argues that this approach, based on a Western, Judeo-Christian paradigm of marriage, would be inconsistent with the ethos of legal pluralism promoted by the South African Constitution and the English Human Rights Act;[2] and, more significantly, such a paradigm would not protect the rights of Muslim women adequately. The article concludes that legislative recognition of Muslim marriage and divorce law is urgently required in both jurisdictions to give effect not only to this ethos of legal pluralism and the protection of gender equality, but also to the development of the organic dynamism of Muslim law in accordance with constitutional principles.

Justifications for This Use of Comparative Methodology

Islamic Religion Straddles National Boundaries

Although the comparative method has been criticised as imperialistic and anti-contextualising,[3] and even invalid as an enterprise,[4] this method of research is an inextricable part of the scholarly legal enterprise,[5] and is essential to taking lessons from both past and present developments of the law.[6] It is submitted that the comparative method is viable and resurgent, particularly in the area of Islamic marriage and divorce.[7]

1 All references to England include Wales.

2 2002.

3 Val D Rust, 'Postmodernism and Its Comparative Education Implications' (1991) 35(4) Comparative Education Review 610–626; Anne Peters and Heiner Schwenke, 'Comparative Law Beyond Post-Modernism' (2000) 49 The International and Comparative L Quarterly 800–834.

4 Peters and Schwenke (n 3).

5 Michael Stausberg, 'Comparison' in Michael Stausberg and Steven Engler (eds) *The Routledge Handbook of Research Methods in the Study of Religion* (Routledge 2014) 34–35.

6 Katharina Boele-Woelki, 'What Comparative Family Law Should Entail' (2008) 4(2) Utrecht LR 1, 14.

7 Peters and Schwenke (n 3).

In this context, individuals and families have been moving across borders in Africa and in Europe (prior to the advent of COVID-19)[8] in a manner not seen in previous eras. In our increasingly globalised society, the legal systems of various states no longer represent the traditions and values of individual cultures. Transnational influences, including human rights, regional norms, and access to international conventions, have affected the development of different legal systems. When dealing with a religion such as Islam, it is clear that the boundaries of a community no longer correspond with the modern nation state's political boundaries,[9] and Islam in different countries can be understood as part of a transnational network. There are clearly local developments which have led to major differences, but these enrich and feed into the comparative process.[10] In South Africa, as a result of the adoption of the Constitution, the courts are enjoined to consider international law when making decisions.[11] Both South Africa and England are signatories to the Convention on the Rights of the Child and to the Convention in Favour of the Elimination of Discrimination against Women (CEDAW). In both countries, anti-discrimination legislation is in place.[12] The experience of religious practice in the English jurisdiction may help with enlightening the South African system and vice versa. Comparison can aid in the critical analysis of this relationship and widen the perspective of possibilities for positive interaction or alert one to the difficulties of certain courses of action.[13]

'Bird's Eye' Secular but Dispassionate View

As I am not Muslim, this may appear to be a limitation on my credentials to examine this topic. This is a limitation that I acknowledge and of which I am constantly aware. To attempt to understand this religious practice, especially in the context of Islamic marriage, I have read widely in this area, both the literature[14] and the law,[15] to attempt

8 Jay Lindop, 'Understanding International Migration in a Rapidly Changing World' (2020) May National Statistical.

9 Ihsan Yilmaz, 'The Challenge of Post-modern Legality and Muslim Legal Pluralism in England' (2002) 28(2) Journal of Ethnic and Migration Studies 343–354, 351; Werner F Menski, 'Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Law in Britain' in Milton Israel and Narenda Wagle (eds), *Ethnicity, Identity, Migration: the South Asian Context* (University of Toronto 2013) 238, 253.

10 Yilmaz (n 9).

11 Section 39(2) of the Constitution of the Republic of South Africa, 1996.

12 South African's Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA); English law's Equality Act 2010.

13 Yilmaz (n 9).

14 For example, Mariam Khan (ed), *It's not about the Burqa* (Picador 2019); Sabrina Moufouz (ed), *The Things I would Tell You: British Muslim Women Write* (Saqi Books 2017).

15 For example Maarit Jantera-Joreborg, 'Cross-border Family Cases and Religious Diversity: What can Judges do?' in Prakash Shah with Marie-Claire Foblets and Mathias Rohe (eds) *Family, Religion and Law: Cultural Encounters in Europe* (Ashgate 2014) 143; Mohammed Fadel, 'Political Liberalism, Islamic Family Law, and Family Law Pluralism' in Joel A Nichols (ed),

to gain a more sensitive and empathetic approach to the lived reality of the operation of Muslim Personal Law (MPL). I hope that my secular (and perhaps more emotionally detached) approach may be of some value. A second criticism of my research may be made on the grounds that it relies mainly on the empirical and doctrinal findings and knowledge of others[16] rather than on my own empirical research. Despite this second limitation, as a lecturer in both jurisdictions in the area of family law and religion, I have resided in and researched the legal systems of both countries for more than 40 years and met with many Muslim academics and practitioners, and therefore feel able to reach some valid conclusions in this fraught area of the law from a comparative perspective.

Diversity and Unity in the Interpretation of Islamic Family Law

In both England and South Africa,[17] Islamic law appears to be diverse, regulating the family in a largely pluralistic way.[18] As a result, Muslims have deep disagreements on the nature of marriage and its legal and religious consequences, facts that give them reason to support legal pluralism.[19] It would appear that sharia[20] was originally a human understanding of the ethical code derived from the Qur'an. In the Sunni tradition, weight was given to the views and agreement of the scholarly elite, but in the Shia tradition, the teachings of the hereditary spiritual leaders were dominant.[21] Originally, the concept of the sharia was one of dynamism and flexibility with the power to transform.

As legal systems open up to diverse legal frameworks and social facts, a comparative approach to this area of law and religion seems a valid method of studying this discipline. An international perspective may also reveal commonly shared values and norms, and aid legislators and courts as they deal with these issues. In these diverse

Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion (Cambridge University Press 2012) 164.

16 Gillian Douglas, Norman Doe and others, 'The Role of Religious Tribunals in Regulating Marriage and Divorce' (2012) 24(2) Child and Family Quarterly 139.

17 Ursula Günther and Inga Niehaus, 'Islam, Politics and Gender during the Struggle in South Africa' in David Chidester, Abdul-Kader Tayob and Wolfram Weisse (eds), *Religion, Politics, and Identity in a Changing South Africa: Religion and Society in Transition Series, No 6* (Waxmann 2004) 103–124.

18 Fadel (n 15) 164.

19 ibid.

20 Islamic canonical law based on the teachings of the Qur'an and the traditions of the Prophet.

21 Shouket Allie, 'A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa, Eighteenth to Twentieth Century' in Shamil Jeppie, Ebrahim Moosa and Richard Roberts (eds), *Muslim Family Law in Sub-Saharan Africa Colonial Legacies and Post-Colonial Challenges* (Amsterdam University Press 2010) 16.

societies,[22] conflicting religious rules may also regulate some families[23] and constitute a way of life for them.[24] Marital and partner relationships are also increasingly becoming inter-ethnic,[25] which may lead to clashes between notions of what constitutes the right way of life.[26]

It has struck me that, in both jurisdictions, Islam appears to be based on an individual's unqualified submission to the will of God with a delineation between the public and the private areas of life. Muslim family law is associated with supernatural divine rules governing all aspects of everyday life, with a broader scope than secular law and with greater command over its followers. The primary source of Islamic Law is the Qur'an and, where the Qur'an is silent on an issue, the Sunni (tradition of the Prophet). There is a tradition of reforming and reconstructing Islamic values by the use of independent reason and interpretation, based on context and need.[27]

With the rise of nationalism and the modern state throughout the nineteenth and twentieth centuries, the notion of a formal separation of religion and state became

22 The 2011 Census has shown that the population in England and Wales has become more ethnically diverse. In 2011, 1.2 million people identified themselves as being of mixed ethnicity, up from 660 000 in 2001. The Office for National Statistics analysis provides further insight into diversity by looking at patterns and trends of people living as a couple in an inter-ethnic relationship (Office of National Statistics 2011 Census).

23 Alison Park, Caroline Bryson and John Curtice (eds), *British Social Attitudes: The 31st Report* (NatCen Social Research 2014) <www.bsa-31.natcen.ac.uk>.

24 Despite falling numbers, Christianity remained the main religion in England and Wales in 2011. In the 2011 Census, Christians were the largest religious group, with 33.2 million people (59.3 per cent of the population) (Office for National Statistics February 2014). Muslims comprise the next biggest religious group, one that has grown in the past decade. Between 2001 and 2011 there were increases in the other main religious group categories. Muslims grew the most: see Alison Park, Elizabeth Clery, John Curtice, Miranda Phillips and David Utting (eds), *British Social Attitudes Survey 28* (NatCen 2011–2012) and Park and others (n 23).

25 Inter-ethnic relationships are defined as relationships between couples who are either married, in a civil partnership or cohabiting, where each partner identifies with an ethnic group different from the other. Some 2.3 million people in the United Kingdom live in an inter-ethnic relationship (Office of National Statistics, 'Religious Ethnicity Analysis', September 2014). One in eight households now contains more than one ethnic group. It has been predicted that by 2051 the ethnic minority population will more than double due to a baby boom among people of Pakistani, Bangladeshi and African origin. Also, more than one in four Britons will be from black and minority ethnic groups (Richard Ford, 'Quarter of Britons will be from an Ethnic Minority within Decades' (*The Times* 20 April 2015) 'Mapping the Dynamics of Diversity' (Office for National Statistics, September 2014)). Nearly one in ten people living as a couple was in an inter-ethnic relationship in 2011 (part of the 2011 Census analysis, 'What does the 2011 Census tell us about Inter-ethnic Relationships?').

26 Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14(1) European J of Philosophy 1.

27 Rashida Manjoo, 'Legislative Recognition of Muslim Marriages in South Africa' (2004) 32 International J of Legal Information 271, 272–273.

prevalent in law.[28] The public sphere was increasingly perceived as the realm of reason, whereas the private sphere began to be regarded as the realm of faith.[29] In creating this division between secular public space and religious private space, secularism put religious ritual and discipline into an area without direct political or legal influence[30] as secular law became associated with an autonomy for the individual, the promotion of equal rights for women in relation to men and the prohibition of discrimination on the grounds of gender, race, ethnicity, religion, or sexual orientation.[31] In the religious sphere, societies in the twenty-first century are increasingly religiously diverse and pluralist, as individuals and minorities are afforded religious freedom against the values of the majority.[32]

South Africa and the Impact of British Colonialism

In South Africa, the heterogeneity within these communities is further linked to the impact of colonialism, which brought Muslims to South Africa from places such as India, Malaysia, and Indonesia. In 1658, the first Muslims arrived at the Cape as slaves and political exiles from the islands of Indonesia and Malaysia, Bengal, the Malabar Coast, and Madagascar. Muslims at the Cape were therefore a diverse group from many different geographical, cultural and ethnic backgrounds who managed to keep the Muslim religion alive and flourishing.[33] Then, from 1860, Indian plantation workers, independent merchants and traders arrived in the present-day KwaZulu-Natal and

28 John Witte, 'Law and Religion in the Western Legal Tradition' in Silvio Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015) 29, 38–41.

29 Ran Hirschl with Ayelet Shachar, 'Competing Orders? The Challenge of Religion to Modern Constitutionalism' (2018) 85 University of Chicago LR 425–455.

30 Charles Taylor, *A Secular Age* (Belknap 2007) 2.

31 Considerable variation exists among countries—secularism as a form of state religion (eg, France), state neutrality towards religion (eg, the United States), weak establishment (eg, Germany), and accommodation, or even celebration, of religious difference (eg, Canada and South Africa), preferential treatment of a single state-endorsed religion alongside protection for religious minorities' rights (eg, Israel, Malaysia and Sri Lanka), or strong establishment of religion (eg, Islamic constitutionalism, ranging from moderate versions in Morocco or Bangladesh to much more rigid ones in Iran or Saudi Arabia) and countries with a Muslim majority where the relationship between the religion and the state is neither purely religiously based nor secular (eg, Indonesia). In Egypt, when interpreting that country's Constitution in terms of the Islamic marriage law provisions, the Supreme Constitutional Court of Egypt has developed a creative new theory of Islamic Law. Using this theory, the court has interpreted Sharia Law in Egypt consistently with international human rights norms and with liberal policy. See B Lombardi Clark and Nathan J Brown, 'Do Constitutions Requiring Adherence to Shari'a Threaten Human rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law' (2006) 21 American Universities Intl LR 379.

32 MC Foblets, 'Family, Religion and Law in Europe: Embracing Diversity from the Perspective of "Cultural Encounters"' in Prakash Shah with Marie-Claire Foblets and Mathias Rohe (eds), *Family, Religion and Law: Cultural Encounters in Europe* (Routledge 2014) xi, xv.

33 Allie (n 21) 35.

Gauteng, the northern and eastern parts of South Africa. A third group came from the northern parts of Africa, mainly Malawi and Zanzibar. Originally, Muslims were greatly affected by the colonial history of the Cape. Three hundred years of coexistence of the Muslim communities in the Western Cape with other communities led to the creation of a unique culture with a particular cultural flexibility, these communities often speaking Afrikaans as a home language.[34] However, in contrast, the communities of Indian or Indo-Pakistani origin appear not to have fused with elements of pre-existing local cultures.

It would appear that the flexibility and adaptability of Islamic Law were increasingly rigidified by colonial intervention. At the heart of Muslim family law was the regulation of the family, and the colonial authorities were eager to maintain family stability in the colonies. Although the British had a policy of non-interference in other legal systems unless British authority was threatened,[35] a body of 'Anglo-Islamic' law emerged that had a distorting effect and reflected British preoccupations more accurately than indigenous norms. British administrators needed a speedy reference guide to Muslim family law to help with their legal administration of the colonies. A key issue, which religious thinkers across the Muslim world are still considering, is whether the laws that worked well at a particular time in history could be replaced by new rules that are more fitting in changed contexts.[36] In relation to women's equality, the development of Islamic Law has lagged behind.[37] The politicisation of Islamic family law has made legal reform particularly difficult, because vested interests may oppose reasonable changes to the Islamic family law. Particular vested interests arose in South Africa that opposed the efforts to create a constitutional democracy based on the promotion, inter alia, of gender equality. The issue of constitutional demands for gender equality pressured the production of reformist Muslim family-law proposals, but resulted in a deep schism among the Muslim religious leaders.[38] South Africa, like England, illustrates the challenges for legal pluralist democratic societies based on human rights and equality.

34 The communities in the Cape Province were also called 'Cape Malays', a term going back to an ethnical classification of the British in the early nineteenth century that underwent an extension of meaning since it corresponded in the course of the years to an exclusive identity. See Günther and Niehaus (n 17) 103–124.

35 Allie (n 21) 27.

36 Allie (n 21) 49.

37 ibid.

38 Allie (n 21) 53.

Women's Conflicting Loyalties to State and Religion

Many South African and English Muslim women may simultaneously be members of more than one community.[39] Some Muslim women have a strong connection to a religious group while at the same time possessing a citizenship connection to the state. If the two do not intersect and interact appropriately, some Muslims may feel a greater loyalty, accountability and obligation towards their religious faith in relation to their personal affairs, which may result in a loss of state authority as the 'unofficial law' (based on religious teachings) acquires a firmer hold over its members. Among some religious sectors of society, liberal answers to issues such as women's equality, homosexual rights, and abortion, which are perceived as natural human rights in most sectors of society, may even be perceived in some traditional cultures as an attack on ancient religious imperatives.[40]

A Comparative Analysis of Sharia Marriage and Divorce in English and South African Law

In both South Africa and England, Muslim marriages, known as *nikah*, neither require the involvement of any specific authority figure or clergy (such as an imam), nor need to take place in any special location (such as a mosque). The ceremony simply requires an agreement between a man and a woman, which is embodied in a contract and expressed publicly in the presence of witnesses. The validity of the *nikah* does not depend on the performance of any recorded ceremony. In both South Africa and England, the non-recognition of this form of Muslim marriage has far-reaching implications for Muslim women and children as they do not have many of the legal protections offered to women in civil marriages, customary marriages and civil partnerships. Notwithstanding this fact, both the English and the South African judiciary have assisted vulnerable parties such as women and children in these relationships.[41] However, despite the efforts of the judiciary, as a consequence of this non-recognition, Muslim women married in terms of Islamic Law do not have an automatic right to

39 Nazia Rashid, 'Shariah Councils and Religious Divorce in England and Wales' (2018) 48 Family Law 174.

40 Anti-modernist religions have grown in dominance even in previously secularist Muslim countries, such as Turkey, and these strains defy what many in the economically developed world perceive as universal human rights.

41 For example, *S v S* (GJ) (unreported case no 2014/05928, 26-9-2014). In this case, the order handed down by Andrews AJ stated, inter alia, that the 'marriage' was dissolved and a partnership agreement was upheld. This judgment seems to infer that these types of religious marriage should be recognised; and, further, that if they are so recognised, they should be subject to the same regimes that apply to all other forms of civil marriage in South Africa, including customary marriages, namely, that if one does not conclude an antenuptial contract, the marriage is automatically one of community of property by operation of the law. See Megan Harrington-Johnson, 'Muslim Marriages and Divorce' (2015) May De Rebus 40.

access the courts to assert their rights, primarily flowing out of either the death of their spouses or the dissolution of their marriages, as they would if married under civil law. The inaccessibility of the courts means that those married under Sharia Law have to obtain religious divorces from religious and cultural tribunals instead of resorting to the courts. Even if these tribunals do assist women and children, they lack enforcement powers to ensure obedience to their rulings. This state of affairs is prejudicial to Muslim women and children, who are often socially vulnerable and are victims of deep patterns of disadvantage.

With regard to divorce under Sharia Law, the term *talaq* is commonly translated as repudiation or divorce and, in classical Islamic Law, it refers to the husband's right to dissolve the marriage by announcing to his wife three times that he repudiates her.[42] The declaration must be made in clear terms; the husband must be of sound mind and not coerced.[43] According to Islamic tradition, the Prophet Muhammad (Peace be upon him) denounced the practice of triple *talaq*,[44] as has the Indian Supreme Court and legislature.[45] Pursuant to Sharia Law as practised in both England and South Africa, where a husband issues a *talaq*, he must provide financially for his wife with

42 Abed Awad and Hany Mawla, 'Divorce Legal Foundations' in Natana J DeLong-Bas (ed), *The Oxford Encyclopedia of Islam and Women* (Oxford University Press 2013). A recent Supreme Court case in India has outlawed the process as contrary to Indian Constitutional principles (<http://www.aljazeera.com/news/2017/08/india-supreme-court-suspends-muslim-divorce-law-170822052829982.html> accessed 28 August 2017; see also <http://www.familylaw.co.uk/news_and_comment/landmark-decision-handed-down-by-the-indian-supreme-court-finds-the-practice-of-triple-talaq-to-be-unconstitutional?utm_source=FILTER_JP%20Family%20Law%20eNewsletter&utm_medium=email&utm_content=http%3a%2f%2f>).

43 *Talaq* types can be classified into *talaq al-sunnah*, which is thought to be in accordance with Muhammad's teachings, and *talaq al-bid'ah*, which is viewed as deviating from it. *Talaq al-sunnah* is further subdivided into *talaq al-ahsan*, which is the least disapproved form of *talaq*, and *talaq al-hasan*. The *ahsan talaq* involves a single revocable pronouncement of divorce and sexual abstinence during the waiting period. The *hasan* divorce involves three pronouncements made during the wife's state of ritual purity with menstrual periods intervening between them, and no intercourse having taken place during that time. In contrast to *talaq al-sunnah*, *talaq al-bid'ah* does not observe the waiting period and irrevocably terminates the marriage. It may involve the declaration of *talaq* repeated three times. *Talaq al-bid'ah* reflects pre-Islamic divorce customs rather than Quranic principles, and it is considered to be a particularly disapproved, though legally valid, form of divorce in traditional Sunni jurisprudence.

44 Abd ar-Rahman I Doi, *Shari'ah: Islamic Law* (2nd edn, Ta-Ha Publishers 2008) 280.

45 In September 2018, after the Indian Supreme Court had denounced it, the Indian legislature made the Islamic practice of 'triple *talaq*' a criminal offence punishable by up to three years in prison. The move means that any Muslim man who tries to end his marriage by saying '*talaq*' ('you are divorced' in Arabic) three times in succession now faces time behind bars. The executive order issued by the Indian government on Wednesday brings an outright ban on triple *talaq* a step closer. Muslim women say they have been divorced over messaging apps such as WhatsApp or in letters, leaving them without any legal remedy.

maintenance,[46] generally considered to be that which would be reasonable in all the circumstances during the *iddat* period (the period of waiting which a divorcee or a widow observes). The *iddat* period usually covers three months or, if the wife is pregnant, the time until the delivery of the child or, as long as she is still breastfeeding, up to a maximum of two years. On the breakdown of the relationship, an 'essential' element in a Muslim marriage contract is the inclusion of a payment (akin to an Islamic dowry), known as the *mahr*, which is payable by the husband to the wife.[47] A wife is entitled to reasonable maintenance from her husband during the marriage and during the *iddat* period upon divorce,[48] and the husband must ensure payment to his wife of the *mahr* if it has not already been paid.[49] A couple may divorce by mutual agreement without attributing fault (*mubarat*), in which case a wife will not be entitled to maintenance: she will be entitled to retain only any *mahr* already paid.

Non-legal, unofficial religious fora, which seek to regulate relationship breakdowns—namely, sharia councils in England and ulama[50] in South Africa—have therefore grown in popularity in England[51] and South Africa[52] respectively. This is largely due to the lack of civil recognition of religious Muslim marriages that do not comply with the statutory formalities, and the frequent weak legal protection for financially vulnerable parties to such marriages when relationships break down. Another reason for the growth of sharia councils is their role in providing an exit for women from Islamic marriages.[53] A wife may choose to approach an Islamic authority (sharia council in England, ulama

46 Known as *nafaqa*.

47 Mahr constitutes a payment, specified in the marriage contract, to be made in the event of a divorce. Where the husband pronounces a talaq divorce, he may pay the mahr which was agreed (or, if it was paid at the time of the marriage, he forfeits it). However, where he agrees to the wife divorcing him under a khula divorce, she forfeits the mahr. See, for example, *Uddin v Choudhury* [2009] EWCA Civ 1205, discussed by John Bowen, 'How Could English Courts Recognize Shariah?' (2010) 7(3) University of St Thomas Law Journal 411. For a comparative analysis of the interaction of mahr with the civil law, see Pascale Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate Publishing 2010).

48 Sura Talaq ch 65 verse 6.

49 ibid.

50 Also referred to as *ulema*, that is, a body of Muslim scholars recognised as experts in Islamic sacred law and theology.

51 Samio Bono, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave Macmillan 2012); Douglas and others (n 16) 139.

52 In South Africa, quasi-judicial bodies are known as ulama. See Waheeda Amien, 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' 2006 28(3) Human Rights Quarterly 729, 753.

53 cf Douglas and others (n 16) 139. Some sharia councils may even pronounce on the financial entitlements of a woman on religious divorce under Sharia Law. If a husband has not made such provision for his wife, it may be 'ordered' by a sharia council. See, too, 'Review into Sharia Law' chaired by Professor Mona Siddiqui (<www.gov.uk/government/news/inependent-review-into-sharia-law-launched.ur>).

or imams in South Africa) to seek a 'judicial' dissolution of the marriage in a fault-based divorce known as *fashk*. Where this is granted, the wife is usually entitled to obtain full payment of the *mahr* and maintenance. A wife may also terminate her marriage through the use of a *khulla* divorce, based on her repudiation of the marriage contract. However, this means her loss of entitlement to the *mahr* or the return of any portion of the *mahr* already advanced. Moreover, she has no entitlement to any maintenance and may even be required to buy her way out of the marriage.

The default position in both countries remains one of exclusion and marginalisation.However, where one party has approached the courts in either jurisdiction for relief, they have been sympathetically dealt with in accordance with the rule of law and constitutional rights to equality. Issues that remain unaddressed and unresolved as a consequence of non-recognition include:

- the status of women in Muslim marriages and children born out of such marriages;
- the regulation of termination of a Muslim marriage and the proprietary consequences of this;
- the challenges in obtaining and enforcing maintenance;
- custody of minor children; and
- the position of the women on the death of their Islamic spouses.

Operation of Muslim Marriages, Divorces and the Sharia Councils in England

As in South Africa, a civil marriage in England will not receive legal recognition unless special preliminaries have occurred, and formalities as to the ceremony itself have been complied with:[54] the marriage must take place in premises registered for the purposes of marriage, and there must be a registrar of marriages or an authorised person present to officiate**.** In England, where a *nikah* marriage ceremony bears little resemblance to an ordinary marriage ceremony, the resultant 'marriage' is not to be deemed 'void' but rather 'non-existent' or a non-marriage,[55] especially if a *nikah* ceremony takes place in

54 Sections 41–44 of the Marriage Act 1949 (as amended). Four main categories of marriage ceremony enjoy legal recognition: civil marriage ceremonies; marriages contracted according to the rites of the Church of England or Wales; marriages contracted according to Quaker and Jewish traditions; and marriages conducted in other non-Anglican religious ceremonies. Muslim marriages, which are not properly registered, fall into this last category and are sometimes referred to as *nikah* marriages.

55 In *Hudson v Leigh* [2009] EWHC 1306 (Fam) the court purported to provide a framework for determining whether a non-compliant ceremony gave rise to a non-existent marriage or a void marriage by listing a number of factors which ought to be taken into account, including whether

premises that are not registered for the purposes of marriage and without a registrar of marriages or an authorised person present.[56] The court has to examine what the ceremony purported to be, its hallmarks, the intention of the parties, and the perceptions of those in attendance. If the courts hold that the ceremony was not a non-marriage, but 'void', the parties are entitled to financial relief on the breakdown of the relationship, which is a significant difference from the operation of such marriages in South African law. It also means that in English law the redistribution of the matrimonial assets may take place according to principles of English divorce law based on fairness,[57] provided

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the ceremony purported to be a lawful marriage; whether it bore enough of the hallmarks of marriage; whether the key participants, especially the person officiating, believed, intended and understood the ceremony as giving rise to the status of a lawful marriage; and the reasonable perceptions, understandings and belief of those in attendance. The court suggested that all of the factors should be considered, as the application of one factor alone may not be enough to characterise the marriage accurately.

56 In *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam) the issues were whether there had been an Islamic wedding ceremony and, if so, its legal effect, if any, in English law. The wife's case was that the intention of the parties for the purposes of the law was the all-important factor, converting a ceremony which failed to comply with the Marriage Acts into a marriage, albeit a void one. The judge found it hard to accept that the wife would have considered the ceremony, which had been conducted secretly and without any written documents, as being one which would be readily recognised. He bore in mind that the wife had lived mainly in this country for five years before the marriage and considered that she would have been aware of the required formalities. Nothing had been done by either of the parties to demonstrate an attempt to be part of a ceremony set up to or purporting to comply with the formal requirements of English law. In the circumstances this was not a void marriage but rather a 'non-marriage'.
However, in *MA v JA and the Attorney-General* [2012] EWHC 2219 (Fam), [2013] 2 FLR 68, Justice Moylan stated that, while there is a clear public interest in marriages being subject to certain formal requirements, it is questionable whether the net has been cast too widely in terms of non-marriages. See also Hon Mr Justice Moylan, 'The Approach of English Law to the Recognition of Islamic Marriages' (2016) 46 Family Law 87, 88. In *K v K (Nullity: Bigamous Marriage)* [2016] EWHC 3380 (Fam), Francis J held that, following another case—*Rampal v Rampal No 2* [2001] EWCA Civ 989; [2001] 2 FLR 1179—a bigamous marriage did not disentitle the petitioner to financial relief and, in this case, he allowed a decree of nullity. By examining what the ceremony purported to be, its hallmarks, the intention of the parties and the perceptions of those in attendance, he held that this was not a non-marriage, but rather a void one.

57 When deciding what financial orders to make, courts must have regard under s 25 of Matrimonial Causes Act 1973 to 'all the circumstances of the case' (the 's 25 factors'). The first consideration is given to the welfare, while a minor, of any child of the family, but generally the court has a wide discretion and has been directed by the House of Lords in *White v White* [2001] 1 AC 596, 608–609 to distribution based on the principle of fairness; *Charman v Charman (No 4)* [2007] EWCA Civ 503, [70]; *Miller v Miller: McFarlane v McFarlan* [2006] UKHL 24, where Lord Nicholls interpreted the fairness element as reflecting the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, homemaker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs,

the 'marriage' is deemed to be 'void' rather than a 'non-marriage', in which event the court may not distribute the matrimonial assets according to the Matrimonial Causes Act.[58]

A building or room(s) used by a religious congregation may be registered for religious worship and the solemnisation of marriage.[59] However, only a limited number of mosques are approved for such solemnisation,[60] because, despite the simplification of procedures to facilitate registration, relatively few mosques have sought to be registered.[61] A major factor in explaining this limited number of mosques registered for the solemnisation of marriage is the absence of demand for registered premises among prospective spouses.[62] Furthermore, as previously indicated, it is not necessary to hold a Muslim marriage ceremony in a mosque. Some of the Muslim community may even regard a state-sanctioned mosque with suspicion.[63] In such circumstances, the parties are required to undergo an additional civil-marriage ceremony if they wish to create a legally binding union,[64] but, increasingly, Islamic marriages are being celebrated in England without this official sanction.[65]

taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them ([2006] UKHL 24, [2006] 2 AC 61).

58 1973.

59 Places of Worship Registration Act 1855 and s 41 of the Marriage Act 1949.

60 Douglas and others (n 16) 139, 144.

61 ibid.

62 Rajnaara C Akhtar, 'Unregistered Muslim Marriages' in Joanna Miles, Perveez Mody and Rebecca Probert (eds), *Marriage Rites and Rights* (Hart Publishing 2015) 167, 183–189.

63 Douglas and others (n 16) 139; Kathryn O'Sullivan and Leyla Jackson, 'Muslim Marriage (Non)recognition: Implications and Possible Solutions' (2017) 39(1) J of Social Welfare and Family Law 22, 23.

64 Ruth Gaffney-Rhys, '*Hudson v Leigh* – the Concept of Non-marriage' (2010) 22 Child and Family L Quarterly 351–363.

65 The UK Ministry of Justice's Muslim Marriage Working Group recently noted the numbers of unregistered marriages are, in fact, 'likely to increase' (2012, 2); in the 2011 Census, 48 per cent of Muslims were aged under 25 (Office for National Statistics (ONS) 2013, 2). Islam is now the biggest minority religion in England with three million followers, representing a considerable 5 per cent of the population, and the number is likely to increase (ONS 2011 *Religion in England and Wales*, London). In South Africa, Muslims numbered approximately 1.5 per cent of the overall population in 2012. See <https://muslimsinafrica.wordpress.com/numbers-and-percentage-of-muslims-in-african-countries/> accessed 4 August 2017. Christianity accounted for more than 80 per cent of the South African population in 2010. See <https://businesstech.co.za/news/general/84315/religion-in-south-africa-and-around-the-world/> accessed 5 August 2017.

Empirical research[66] indicates that in many instances the *nikah* is not followed by a civil ceremony and remains unrecognised in terms of civil law.[67] There will be a number of Muslim women who may choose not to have a legally binding marriage.[68] For example, some Muslims might decide to have a nikah without a civil ceremony to safeguard assets in their sole name. This could be because they wish either to protect their self-made assets or to protect property that they have acquired from a previous divorce settlement or inheritance. This can equate to freely choosing to be viewed as cohabitants under state law with the intention of limiting the sharing of assets in a relationship.

Although some couples may have jointly and deliberately chosen to disregard the formalities and enter into a Muslim marriage on their own without acquiring legal marital status, a possibly substantial number of Muslim spouses (usually women) remain unaware of the lack of legal status of their marriages and may even have been misled by their spouses about the husbands' intentions in obtaining legal recognition for the marriage following the religious ceremony.[69] Those Muslims, usually women, who are not married in properly registered buildings are disadvantaged by being subject to Islamic Law only, without recourse to civil law and the courts. As a result, they lose access to the rights which they would acquire by being married according to the (secular) law in properly registered buildings. The secular legal system struggles to support such women when problems arise on separation and divorce.[70]

66 *Nikah* ceremonies may be performed at home and be conducted by an imam (religious leader); mosques are the second most popular venues for *nikah* marriage, but frequently *nikah* marriages are performed in mosques that are not a 'registered building' under the Places of Worship Registration Act 1855 and the Marriage Act 1949.

67 In 2001, the findings of a study of 287 divorce case files from the Muslim Law (Sharia) Council were reported by Shah-Kazemi. She discovered that approximately 27 per cent of the couples investigated appeared not to have entered into a recognised civil marriage in the United Kingdom, the couples having married in the jurisdiction with a *nikah* ceremony but without an accompanying civil marriage. Moreover, five of the twenty-one interviewees engaged in the study did not have a valid marriage according to English civil law. Although unable to provide exact figures, Shah-Kazemi noted the presence of women approaching the Muslim Law (Sharia) Council who 'may not have known that their Muslim marriages did not accord them the status of married women.' See Sonia N Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Sharia* (Nuffield Foundation 2001). Empirical research conducted by Douglas and others (n 16) 139 found that more than half of the hearings observed in the sharia council of the Birmingham Central Mosque involved couples with an unrecognised *nikah*-only marriage. This lack of awareness was also reflected in the Ministry of Justice's Muslim Marriage Working Group's Final Report.

68 Shah-Kazemi (n 67).

69 O'Sullivan and Jackson (n 63) 22.

70 The phenomenon of unregistered marriages was further investigated by Rajnaara, who established that the number of couples who live together without cohabiting has increased in recent years. It

Since issuing a *talaq* is a simple procedure that can be performed by the husband alone, women are frequently obliged to engage with their local sharia councils in order to obtain a religious divorce and an exit from their Islamic marriages. In England, a significant proportion of women appear to rely on sharia councils to obtain some, limited, financial provision which may be available under Sharia law for certain types of religious divorce. Where a husband seeks to dissolve a marriage by *talaq*, the sharia councils use their religious authority to terminate the marriage. The husband is then obliged to make specified financial provision for his wife. The duty is not legally enforceable, but once required by the sharia council, religious and social pressures may force a defaulting party to comply.[71]

Therefore, the work of the sharia councils relates to private, faith-related ordering in a non-legal setting.[72] They can grant religious divorces but not legal divorces.[73] It is unnecessary to grant a religious divorce to enable the parties to remarry under civil law. However, for those who are committed to their beliefs, it is essential for them to have a religious marriage and, if applicable, a religious divorce. The sharia councils advise parties to make use of the civil courts to resolve disputes, in recognition that it cannot give legally binding rulings, and the English sharia councils appear to recognise and support the ultimate authority of civil-law processes[74] when it comes to marriage and divorce and to regard a civil divorce order as evidence of the parties' desire to terminate the marriage.[75] The Muslim Law (Sharia) Councils claim that they do not represent any single school of thought, basing their rulings derived on the authority of the four main schools of Sunni brought together with other sources from the Sunni tradition, as well

is still unclear how many Muslim couples in unregistered marriages identify as either married or cohabiting. See Akhtar (n 62) 167, 183–189.

71 Leyla Jackson and Kathryn O'Sullivan, 'Putting the Cart before the Horse? The Arbitration and Media Services (Equality) Bill' (2016) 46(1) Family Law 82, 83.

72 The Arbitration and Media Services (Equality) Bill stated that it was an indictable offence for a person to falsely purport to exercise any of the powers or duties of a court to make legally binding rules without any basis under the Arbitration Act 1996 and attempted to criminalise the operation of the sharia councils in England, arguing that such councils were attempting to exercise legally binding powers. However, the sharia councils do not purport to make legally binding rules; see also Jackson and O'Sullivan (n 71). Baroness Cox's Arbitration and Media Services (Equality) Bill was given a third reading in the House of Lords in 2015 and then rejected; see also Peter Tatchwell, 'One Law for All Rally' (21 November 2009) <http://www.onelawforall.org.uk/november-21-a-successful-day-against-sharia-and-religious-laws/>.

73 Miranda Fisher, Shabana Saleem and Vishal Vora, 'Islamic Marriages: Given the Independent Review into the Application of Sharia Law in England and Wales, What is the Way Forward?' (2018) 48 Family Law 552.

74 *NA v MT* [2004] EWHC 471 (Fam).

75 Douglas and others (n 16).

as minority interpretations.[76] Each religious tribunal applies a set of norms that are binding on adherents within religious law, but the application and interpretation of these laws may differ.[77]

Following differing reports about the operation of the sharia councils, the English government launched two reviews into the sharia councils and their operation. The Home Office launched its independent review into the application of Sharia Law in England and Wales in May 2016. The intention of this review was to explore whether, and to what extent, the application of Sharia Law may be incompatible with the law in England; and to examine the ways in which Sharia Law may be being misused, or exploited, in a way that may discriminate against certain groups, undermine shared values and cause social harms.[78]

The views expressed to the independent inquiry by the Home Office included a request for banning or regulating sharia councils. Those who wanted sharia councils banned stated that society should be subject to one law only, and that is English law.[79] Further objections to sharia councils were made on the grounds that they did not treat women and men equally and operated a parallel legal system.[80] Counter-arguments favoured by the review were that the banning of sharia councils could be counter-productive,[81] as those in the Muslim community who believe that the assistance of a sharia council is required for personal matters would still look for such a service.[82] This could force those who operate sharia councils to go underground with very little exposure, subjecting women and children to further risks.[83] A Code of Practice was suggested by the members of the review[84] to set out the terms of good practice and quality standards that might be implemented and overseen by the umbrella bodies of the various groups; these groups would, in turn, monitor the practices of the individual religious and non-religious groups such as sharia councils, the Beth Din and the equivalent organisations in other

76 Ihsan Yilmaz, 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into English Law' (2001) 21 J of Muslim Minority Affairs 297.

77 With regard to the sharia councils generally, the Family Support Service originally deals with parties.

78 The Home Affairs Committee also launched an abortive inquiry in 2016 to examine the services offered by sharia councils, the reasons for their existence, the basic tenets of Sharia Law with reference to family, divorce, domestic violence and children, and how those compare to the same in English law.

79 Counter Extremism Unit, *The Independent Review into the Application of Sharia Law in England and Wales*. Presented to Parliament by the Secretary of State to the Home Department (February 2018) Cm 9560.

80 ibid 5.

81 ibid 23.

82 ibid 23.

83 ibid 5.

84 Rashid (n 39).

religious communities. The state-led regulatory body would not police or become involved in the religious teachings or practices of the organisations, but it would rather play a supervisory role over umbrella bodies.[85] However, this proposal of a Code of Practice for self-regulation was rejected by the government, partly on the ground that it would involve a recognition of sharia councils, which could lead to an official body regulating a second 'parallel' legal system.[86] In England, unlike South Africa, the arbitration tribunal may deal with Muslim matrimonial matters. The English Muslim Arbitration Tribunal **(**MAT)[87] has taken an active role in developing standards for English Muslims about what sharia might require in an English context, but it has not been active in matrimonial law,[88] operating, to some extent, under the Arbitration Act 1996. The MAT deals with all areas of civil and personal religious law, but not with divorce proceedings (other than a religious divorce), operating as it does within the framework of the secular law.[89] The Arbitration Act 1996[90] allows parties to choose that their dispute is decided in accordance with systems of religious law. Human rights instruments stress the importance of the right to a fair trial. The Arbitration Act 1996 provides that people are free to choose to have their disputes arbitrated outside the civil court system, but recognised and enforced by the civil courts.[91] However, the secular

85 It was also suggested that, for the Muslim community, the appropriate umbrella body might be the office where all religious Muslim marriages and divorces conducted in England and Wales could be registered.

86 The government stated that it would not be taking forward the review's recommendation to regulate sharia councils: see <https://www.theguardian.com/law/2018/feb/01/sharia-councils-review-islamic-marriages-uk-law>accessed 5 January 2020.

87 The MAT was established in 2007 to provide British Muslims with the opportunity to effectively resolve disputes in accordance with Islamic legal norms, see Maria Reiss, 'The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should be Non-binding' (2009) 26 Arizona J of Intl and Comp L 739, 768. Faiz-ul-Aqtab Siddiqi, a barrister and the principal of Hijaz College, and Shamim, a practising District Judge, founded the MAT to provide British Muslims with a more effective means of dispute resolution in accordance with Islamic Law; see Michael J Broyde, *Sharia Tribunals, Rabbinic Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford University Press 2017) 178.

88 See *Procedural Rules of the Muslim Arbitration Tribunal (201)* Muslim Arbitration Tribunal <http://www.matribunal.com/rules.php> accessed 14 July 2017.

89 <http://www.matribunal.com> and also a written submission on the Interfaith Legal Advisers Network (ILAN) website <http://www.law.cf.ac.uk/clr/networks/ilan4.html>.

90 Section 46. The Arbitration Act 1996 is a facilitative piece of legislation which gives the parties the choice to agree to resolve their disputes outside the courtroom. If an agreement is made to arbitrate a dispute, then any other legal proceedings may be stayed. The courts refuse to consider disputes that parties have decided to resolve by arbitration. The Arbitration Act 1996, largely used for commercial purposes, has the advantage over litigation of privacy, cost and flexibility. For a critical overview of the reaction to the Canadian controversy related to Islamic arbitration, see Natasha Bakht, 'Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy – Another Perspective' (2006) 40 Ottawa LR 67–82.

91 Section 1 provides that 'parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.' Section 1 provides that parties

courts will not enforce a decision where public policy requires the court not to.[92] Moreover, as stated above, the MAT deals only with a small proportion of family-law work and so it is difficult to make an assessment of its possible contribution of arbitration in this area of the law.

South African Procedural Reform and Significant (but Piecemeal) Reform by the Judiciary

In South Africa, as in England, many Islamic communities have not taken up the opportunity to register their mosques as registered religious buildings. However, since 2014, there has been a drive to make imams registered marriage officers.[93] As in England, many Muslims do not have a civil marriage for a variety of reasons. Some Muslim women may believe incorrectly that the Islamic marriage is the civil one, or that it stands instead of it. Some (usually Muslim men) may choose only to marry Islamically, either because they are the wealthier parties and wish to protect their assets, or perhaps because the Islamic divorce can sometimes be quicker and easier to obtain.[94] It is worth bearing in mind that it may still be in the interests of one party for the marriage to remain unrecognised and some parties may decide not to register the marriage to avoid what they perceive to be a risk of loss of rights over the marital property if there is a divorce (or, in the case of men, to allow themselves to take another wife). In these circumstances, even with increased awareness of the lack of legal status of a marriage by one or both parties, a power imbalance in the couple's relationship, combined with the advantages of non-recognition, particularly for the financially stronger spouse, may be a more determining factor than the awareness of the lack of legal recognition of a marriage.[95] Any system of family-law pluralism within a liberal state must establish institutional mechanisms to ensure that legal pluralism does not

should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

92 Section 1 of the Arbitration Act 1996.

93 In May 2014 the Department of Home Affairs initiated a project in which more than 100 Muslim clerics or imams were trained, in a pilot project, to officiate over unions that will be recognised by law. (Note that this does not grant legal recognition to Muslim marriages.) These clerics will, in effect, be marriage officers who will be authorised to issue marriage certificates in terms of South African law. This means that those Muslim spouses who wish to conclude a civil marriage at the time of their Muslim marriage may do so, but both spouses will have to consent to such civil marriage. In this case, the civil marriage takes precedence over the marriage entered into in terms of Muslim rites: see Harrington-Johnson (n 41) 40.

94 Waheeda Amien, 'Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages' (2013) 1 Acta Juridica 357–384.

95 O'Sullivan and Jackson (n 63) 22, 23.

become a tool with which to deprive individuals of their rights.[96] Perhaps this was what the then Archbishop of Canterbury, Rowan Williams, was alluding to in 2008 when he tentatively suggested that there is a need to consider the role and rule of law in a plural society with overlapping alternative identities. He talked about individuals retaining the liberty of choice of jurisdiction over certain carefully specified matters.[97] In this regard, banning sharia councils[98] will not solve the problems many Muslim women are experiencing, because these women may consider that for their religious conscience to be clear, they require a religious authority for their divorces. Although non-state-registered Muslim marriages are often considered as a poor alternative to civil marriage, problematising such marriages is based on the assumption that entering into a civil marriage is beneficial for *all* Muslim women.[99] There are those women who prefer to enter into religious-only marriages.[100] Solutions to the problems presented by unregistered *nikah*-only marriages have frequently been proposed in a way that considers unregistered marriages as completely problematic.

In the absence of legislation, the judiciary from all the various courts in South Africa have since ameliorated various aspects of Islamic family law to provide assistance to women who would otherwise have encountered considerable hardship. For the past 25 years, judicial activism has come to the assistance of many Muslim women in a lengthy series of cases that commenced in 1997 with *Ryland v Edros.*[101] In this case, Judge Farlam held that, as a Muslim marriage is a secular contract in terms of the *nikah* from which certain proprietary obligations flow, this was reason enough to impose some of the consequences of a civil marriage on a Muslim marriage, chiefly the obligation of maintenance.

Following this case, in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*,[102] the Supreme Court of Appeal (SCA) recognised a Muslim widow's claim for loss of support following the death of her husband as a result

96 Fadel (n 15) 164, argues that, for orthodox Muslims, a liberal family law represents the preferred means of recognising family-law pluralism.

97 Rowan Williams, 'Civil and Religious Law in England – a Religious Perspective' (2008) 10 Ecclesiastical LJ 262, 271 and 274. See, too, Lord Phillips of Worth Matravers, 'Equality before the Law' (2008) 161 Law and Justice 75.

98 Tatchwell (n 72).

99 Rehana Parveen, 'Legal Positionings and Muslim Women's Experiences' (2018) 6(3) Sociology of Islam 316–337.

100 Fadel (n 15) 183–189.

101 1997 (2) SA 690 (CC).

102 1999 (4) SA 1319 (SCA).

of a motor-vehicle accident.[103] In 2004, in *Daniels v Campbell NO & Others*,[104] the Constitutional Court decided that a Muslim spouse in a monogamous Muslim marriage had the right to inherit and to claim maintenance from their deceased spouse in terms of the Intestate Succession Act[105] and also in terms of the Maintenance of Surviving Spouses Act,[106] which improves the position of those married under Muslim law from heterosexual cohabiting couples.[107] *Khan v Kahn*[108] held that partners in Muslim marriages also owe each other a duty of support and have the right to claim maintenance from each other in terms of the Maintenance Act.[109] In this case, the court had to consider whether there was a legal duty on the husband[110] to maintain his wife, to whom he was married in terms of Muslim law, accepting that the marriage was a polygynous one. The court held that partners in a Muslim marriage, whether in a monogamous or a polygynous marriage, were entitled to maintenance. In *Hassam v Jacobs NO & Others*[111] the Constitutional Court held that the right to claim maintenance from a deceased spouse should also be extended to polygynous Muslim marriages. The right to claim maintenance has also been extended to include claims for interim maintenance during divorce proceedings involving Muslim marriages.[112] The Western Cape High Court has also held that the mere fact that a Muslim marriage is polygynous should not prejudice the spouses to the union.[113] In *Rose v Rose*,[114] Faiza Rose, who was married by Muslim rites to Faizel Rose for 20 years, was able to claim maintenance and a share of her former husband's pension. She had married Faizel under Islamic Law in 1988 when he was legally married to another woman. However, the court held that Muslim men often enter into more than one marriage simultaneously, that marriages can be civil, religious or customary, and that the mere fact that a Muslim marriage is polygynous should not prejudice the spouses to the union. While these decisions brought much-

103 The court held that what the dependant must show is that the deceased had a legally enforceable duty to support the dependant and it was a duty arising from a solemn marriage in accordance with the tenets of recognised and accepted faith and a duty which deserved recognition and protection for the purposes of the dependant's action.

104 CCT40/03 [2004] ZACC 14, 2004 (5) SA 331 (CC).

105 81 of 1987.

106 27 of 1990.

107 In *Volks v Robinson* 2005 5 BCLR 446 (CC) the Constitutional Court was compelled to deny the benefits of the Maintenance of Surviving Spouses Act 107 to a cohabiting couple. The Constitutional Court held that the distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. The court held further that the law cannot impose legal obligations on domestic partners who have chosen not to marry when the choice to marry is open to them.

108 2005 (2) SA 272 (T).

109 99 of 1998.

110 Section 2(1) of the Maintenance Act 99 of 1998.

111 2009 (5) SA 572 (CC).

112 Rule 43 proceedings.

113 Unreported case no 14770/11,13-8-2014 (WCC).

114 Unreported case no 14770/11,13-8-2014 (WCC).

needed relief to the lived realities of the women married in terms of Muslim rites, these decisions were not determined according to the principles and rules of Islamic Law.

Where a party to a Muslim marriage drafts a will, then, on his death, there can be detrimental repercussions for the surviving spouse. Section 2C(1) of the Wills Act[115] provides that if any descendants of a testator who are, together with the surviving spouse of the testator, entitled to a benefit in terms of a will renounce their rights to receive such benefits, these benefits vest in the surviving spouse. Even where, on their husbands' death, the testamentary heirs renounce their inheritances, section 2C(1) could be interpreted to prevent such 'women' from inheriting the renounced benefits on the basis that they are not recognised as surviving spouses for the purposes of that Act.[116] The court in *Moosa NO & Others v Harneker & Others*[117] was called on to interpret s 2C(1) of the Wills Act in the context of a polygynous marriage. In this case, the husband was married to two women under Islamic Law, one of whom he subsequently married in terms of the civil law. He agreed with both of his wives to conclude a civil marriage with the first wife, which enabled him to obtain the loan he needed to purchase the marital home, in which they lived with all of their children. The marriage to the second wife was neither registered as a civil marriage nor formalised as a civil union.[118] The husband executed a will distributing his estate between his wives and children. All his surviving children renounced the benefits due to them under the will, agreeing in writing that the shares should be inherited by their father's wives in equal amounts. The executor tried to register transfer of the deceased's one-half share of the marital home into the joint names of both wives. The Registrar of Deeds refused to register the property to the wife married only under Islamic Law on the basis that she was not a surviving spouse in terms of the law as it was applied at the time.

In this case, the second wife argued that there was unfair discrimination in that her Islamic marriage was regarded as less important than civil marriages and customary marriages.[119] In declaring s 2C(1) of the Wills Act invalid and inconsistent with the Constitution to the extent that it excluded the second wife from its ambit, Le Grange J held that the second wife was directly being discriminated against, premised upon her religion and marital status.[120] He held that this provision could be cured only by a reading-in of words that 'surviving spouse' encompasses every surviving husband or wife who was married by Muslim rites to a deceased testator.

115 7 of 1953.
116 Fareed Moosa, 'Renunciation of Benefits from a Will: Who is a "Spouse"?' (2018) Jan/Feb De Rebus 28.
117 2017 (6) SA 425 (WCC).
118 Civil Union Act 17 of 2006.
119 Recognition of Customary Marriages Act 120 of 1998.
120 At para 32.

This decision was subsequently confirmed by the Constitutional Court.[121] Cachalia AJ, in a unanimous judgment, confirmed and endorsed Le Grange J's order and reasoning.[122] He went further and emphasised the right to dignity by acknowledging that the non-recognition of the second wife's right to be treated as a surviving spouse for the purposes of this legislation, and her resultant inability to inherit from her deceased husband's will, struck at the heart of her 50-year marriage, her position in her family and her standing in her community. It informed her that her marriage was not worthy of legal protection and its effect was to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman.[123]

In conclusion, this judgment means that every person who has entered into a Muslim marriage, irrespective of whether or not such marriage has been subsequently registered in terms of the Marriage Act,[124] the Recognition of Customary Marriages Act[125] or the Civil Union Act,[126] will be regarded as a surviving spouse on the death of the other spouse insofar as the Wills Act is concerned.[127]

Finally, in *Women's Legal Centre v the President of South Africa,*[128] the Constitutional Court ordered the president and parliament to enact legislation to recognise *nikah*-only Muslim marriages as valid marriages within 24 months and to regulate the consequences of such recognition.[129] In addition, the judgment ordered[130] that if such legislation were not enacted within the 24-month period, such marriages solemnised in terms of Sharia Law may be dissolved in accordance with the Divorce Act,[131] with the effect that the matrimonial property regime of the marriage would be deemed to have been out of community of property. In terms of section 7(3) of the Divorce Act, and in the absence

121 *Moosa NO & Others v Minister of Justice and Correctional Services & Others* 2018 (5) SA 13 (CC).
122 At para 12.
123 At para 16.
124 25 of 1961.
125 120 of 1998.
126 17 of 2006.
127 Najma Moosa and Suleman Dangor (eds), *Muslim Personal Law: Evolution and Future Status* (Juta 2019).
128 [2018] 4 All SA 551 (WCC); 2018 (6) SA 598 (WCC). The case is a consolidation of three applications brought by the Women's Legal Centre. There were nine respondents in the case. The first five can be summed up as government: (1) President, (2) Minister of Justice, (3) Minister of Home Affairs, (4) Speaker of the National Assembly, (5) Chairperson of the National Council of Provinces. The other respondents were: (6) Association of Muslim Women South Africa, (7) United Ulama Council of South Africa, (8) South African Human Rights Commission and the (9) Commission for the Promotion and Protection of the Rights of Religious, Cultural and Linguistic Communities.
129 Paragraph 252.
130 Paragraph 252.
131 70 of 1979 provided that s 7(3) of this Act will apply to such unions.

of any agreement, a court will be able to make any order regarding the division of assets that the court may deem just and equitable.[132] A decree of divorce would be granted by a divorce court only once the court is satisfied that the termination of the marriage has taken place under Sharia Law, and that the marriage was in existence after the 24 months had lapsed and parliament had failed to enact legislation.[133] Lastly, the court directed that the Master should have the ability to properly investigate the existence of marriages solemnised in terms of Islamic Law before winding up.

In casu, those opposing the Women's Legal Centre's application argued, inter alia, that, for some Muslims, the Qur'an was immutable and could not be changed nor made subservient to the 'Western' values of the Constitution and that once religion became entangled with law, religion would be destroyed by the supremacy of the Constitution.[134] The president's primary counter-arguments were that South Africa's international obligations do not create enforceable domestic rights unless and until these obligations had been incorporated into domestic law by enacting legislation.[135] It was argued that the Marriage Act[136] is secular in nature and does not discriminate on the basis of religion. It was also argued that religious marriages cannot be equated to customary marriages. Furthermore, spouses in Muslim marriages are able to register a civil marriage and the imam project seeks to enable this process.[137] The state argued that it had already enacted legislation that respects, protects and promotes the rights contended to have been violated, which legislation included the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[138] Finally, the state argued that the Constitution does not impose an obligation on the state to enact legislation in respect of any particular religious group.[139]

However, the Western Cape High Court accepted the comparison made by the Women's Legal Centre between the lack of recognition and protection afforded to women in unregistered Muslim marriages and the full recognition and protection of partners in civil or customary marriages, which was acknowledged to be unfair discrimination.[140] The lack of recognition and protection of women in unregistered *nikah*-only Muslim marriages was found to amount to discrimination. The argument that Muslim marriages can be registered as a civil marriage was found not only to ignore the reality that women often lack bargaining power in marriages, but also to exclude such female spouses who

132 Paragraphs 221–229.
133 Paragraphs 229–231.
134 Paragraph 1.
135 Paragraph 73.
136 25 of 1961.
137 Paragraph 76.
138 4 of 2000.
139 Section 15(3) of the Constitution.
140 Paragraphs 119–124.

are in polygynous *nikah*-only marriages.[141] In addition, the court recognised that children born to unregistered Muslim marriages are not afforded the same protections as those who are born to civil or customary marriages, particularly upon the dissolution of these marriages.[142] Finally, the court found that, in terms of South Africa's international obligations, the legal system is bound to take reasonable and appropriate steps to eradicate discrimination against women in such marital relationships.[143] It remains to be seen how this legislation is to be drafted and what its effects will be. The need for all interested parties to be actively involved in considering the various possibilities is obvious.[144]

South African Legislative Position of Muslim Marriages and Divorces

The South African legislation legalises only certain forms of marriage and/or union. These are:

- civil marriages registered under the Marriage Act;[145]
- civil unions in terms of the Civil Union Act;[146]
- customary marriages recognised in accordance with the Recognition of Customary Marriages Act.[147]

These exclude other types of marriage, including religious marriages. This arguably constitutes unfair discrimination on the grounds of religion, culture, ethnicity, sexual orientation, gender and sex, which relates to the unfair discrimination that women in unrecognised marriages experience in relation to their counterparts in marriages that are afforded legal recognition. The type and extent of the negative effects of the non-recognition of the aforementioned types of religious marriage (Muslim, Hindu and Jewish) may differ, depending on whether or not parties in those marriages also register a civil marriage, and which features of the religious marriages are in need of state recognition and regulation. Unlike their Hindu and Jewish counterparts, *nikah*-marriages are not granted legal recognition by the law and therefore such couples are unable to access proprietary benefits such as equal division of estates when the Muslim marriage dissolves due to religious divorce or the death of one of the parties. At the same time, the non-recognition of Muslim, Hindu and Jewish marriages precludes

141 Paragraphs 129–130.
142 Paragraph 139,
143 Paragraph 173.
144 Paragraph 252.
145 25 of 1961.
146 17 of 2006.
147 120 of 1998.

spouses in those marriages from enforcing and/or accessing religious rights or benefits, notwithstanding the existence of a civil marriage. For instance, although Judaic Law and Islamic Law permit religious divorce for both spouses, women experience difficulty in obtaining a religious divorce, usually as a result of recalcitrant husbands.

South Africa, like England, illustrates the difficult challenges that legal pluralism encounters in democratic societies based on entrenched constitutional human rights. Particular tensions have arisen in South Africa following the efforts to create a constitutional democracy based on the promotion, inter alia, of gender equality, while also recognising freedom of religion. The issue of constitutional demands for gender equality forced the production of a reformist Muslim family-law proposal that caused deep division among the Muslim religious leaders.[148] An influential group of ultra-conservative religious leaders have opposed draft Bills on Muslim personal law that are in accordance with South Africa's rigorous post-1994 constitutional standards of justice and equality.[149] Some sections of Muslim society, such as the conservative ulama, remain opposed to any form of legislation that attempts to reconcile an understanding of Muslim Personal Law (MPL) and the Constitution.[150] In a similar way to the sharia councils in England, the ulama preside over matters affecting the Muslim communities, covering, inter alia, marriage, divorce, custody and access to children.[151] While some 'women-only' institutions have produced women scholars, none of these scholars belongs to the ulama and these women-only institutions operate under the guidance and control of the 'male-only' religious leaders.[152] Furthermore, although a number of Muslims are from the black community, including a number of religious scholars, none of these is present in any significant capacity in the ulama

148 Allie (n 21) 53.

149 Ebrahim Moosa, 'Muslim Family Law in South Africa: Paradoxes and Ironies' in Shamil Jeppie, Ebrahim Moosa and Richard Roberts (eds), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges* (Amsterdam University Press 2010) 331.

150 Waheeda Amien, 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28(3) Human Rights Quarterly 729, 753. Amien argues for a gender-nuanced integration approach to protect equality and regulate family law. This promotes a nuanced version of the integration approach. In this regard, civil society will have to advocate a more gender-sensitive version of the latest Muslim Marriages Bill before it is enacted.

151 The ulama bodies include the Muslim Judicial Council (Western Cape), *Jamiatul Ulama* Transvaal (Gauteng), *Jamiatul Ulama* Natal (KwaZulu-Natal), *Majlisul Ulama* (Eastern Cape) and the Islamic Council of South Africa; see also Muneer Fareed, 'Overcoming Legal Tradition: The *Ulama* and the Potential for Change' (Paper presented at Muslim Marriages Workshop – Muslim Marriages in South Africa: From Constitution to Legislation, Capetonian Hotel, 22 May 2010) 45–51.2

152 Fareed (n 151) 45–51.

bodies.[153] Reform-minded individuals and organisations have intervened, which intervention has been viewed by the ulama as unwelcome.[154] These voices have a greater commitment to finding a gender-sensitive solution.

The ulama are not subject to any arbitration since, in South Africa, arbitration has always been forbidden in any matter related to the family. Therefore the ulama operate entirely according to their own procedures: while some women report having received support from these bodies, others say that they are treated without respect.[155] In addition, women may not know that they can appeal a decision, or do not feel they are in a position to do so.[156] When a husband refuses to divorce the wife, it seems that very few women apply for an annulment (*faskh*) as the process is extremely time-consuming, often too difficult or too expensive, and at times even humiliating.[157] In the meantime, there is evidence that Muslim women are often deprived of the marriage benefits recognised by Sharia Law since some of the ulama do not, in fact, give rulings which comply with sharia-based obligations that husbands are required to fulfil and do not penalise failure to comply with those obligations.[158]

Some of the more conservative ulama have expected the government to accede to a demand that Muslim personal law incorporated in future legislation should be exempted from the provisions of the Constitution.[159] The progressive Muslim groups, however, have argued that the Constitution challenges Muslims to come up with a family-law code that includes only the best aspects of Islamic jurisprudence. Furthermore, these groups envisaged a situation of no conflict between Muslim personal law and the country's human rights law, provided that the approach to both was reasonable.[160]

153 Rosieda Shabodien, 'Making Haste Slowly: Legislating Muslim Marriages in South Africa' (Paper presented at Muslim Marriages Workshop – Muslim Marriages in South Africa: From Constitution to Legislation, Capetonian Hotel, 22 May 2010) 25.

154 Fareed (n 151).

155 Fareed (n 151).

156 Imams regularly perform subsequent marriages to second, third or fourth wives without gathering adequate information about the man or the circumstances of a previous marriage or marriages and/or the persons' financial situation: see Amien (n 96) 357–384.

157 The South African Law Commission heard of one imam charging R100 for securing a divorce (*talaq)* and R1 500 to pronounce an annulment (*faskh*): Amien (n 94).

158 Amien (n 150) 753.

159 ibid.

160 See, for example, *Mahomed v Mahomed* [2009] JOL 23733 (ECP); *Govender v Ragavayah NO & Others* 2009 (3) SA 178 (D); *Hoosein (Hoosain) v Dangor* [2009] JOL 24617 (WCC). *Solarie v Solarie* (26186/09) ZAWCHC (24 August 2010); *Arendse v Arendse* (12659/09) ZAWCHC (20 August 2012); *Faro v Bingham NO & Others* (4466/2013) ZAWCHC 159 (25 October 2013); *Isaacs v Isaacs* (2807/14) Goodwood Magistrate's Court (20 August 2014). *Moosa NO & Others v Harnaker & Others* (n 117); *Moosa NO & Others v Minister of Justice and Correctional*

Prior to the Constitution, in the 1980s, certain groups of ulama had emerged who were anti-apartheid political activists. They were increasingly opposed by conservative elements among the ulama, who perceived Muslim liberation theology as a compromise of 'pure' Islam. The Muslim religious leadership had therefore become divided about the recognition of MPL. The African National Congress (ANC) in 1994, prior to the first democratic elections, had made an electoral pledge to legislate MPL.[161] After 1994, the divisions in the Muslim community became more extreme. A minority of ultra-conservative ulama were opposed to a reformist version of MPL conducive to South Africa's human rights and international right obligations. They even objected to the participation of Muslim women in the MPL Board which had been formed in 1994.[162] It was made very clear that gender equality was incompatible with the conservative ulamas*'* interpretation of sharia.[163] Although a conservative reading of sharia sources can, at times, legitimise gender discrimination, it is possible that a progressive approach could allow for an interpretation that reconciles the right to religious freedom with gender equality.[164] In this regard, the latest Muslim Marriages Bill will need to be made more gender-sensitive before it is enacted.[165]

However, the legislative recognition of Muslim marriages is not without its risks:[166] the rules of Islamic family law are not substantively equivalent to the generally applicable rules of civil law. Moreover, the practice of MPL may vary extensively depending on the different schools of interpretation, because Islamic Law is practised differently in various South African communities.[167] The status of Muslim marriages has, since 1990, been the subject of continuing investigation by the South African Law Reform Commission (SALRC). In 2000, the SALRC's *Report on Islamic Marriages*[168] envisaged the recognition of both monogamous and polygamous Muslim marriages under certain conditions. In terms of the Issue Paper, it was proposed that existing Muslim marriages would automatically be recognised, but spouses could opt out of recognition.

Services & Others (n 121); *Singh v Ramparsad & Others* 2007 (3) SA 445 (D); *Raik v Raik* 1993 (2) SA 617 (W); *Amar v Amar* 1999 (3) SA 604 (W).

161 Moosa (n 149) 332.

162 ibid.

163 As a result, the MPLB imploded in 1995.

164 Amien (n 150) 361–396.

165 ibid.

166 *WLC v the President of South Africa* [2018] 4 All SA 551 (WCC); 2018 (6) SA 598 (WCC).

167 Moosa (n 149) 332.

168 South African Law Reform Commission (SALRC), *Report on Islamic Marriages and Related Matters Draft Muslim Marriages Bill 2000* (SALRC 2000).

In 2003, the SALRC released another report on Islamic marriages.[169] The final report included a proposed draft Bill entitled the Muslim Marriages Act. Two years later, in 2005, the South African Commission for Gender Equality (CGE) proposed an alternative draft bill entitled the Recognition of Religious Marriages Bill (RRMB) which aimed to recognise all religious marriages in accordance with constitutional and human rights obligations. For the conservative ulama, the pursuit of this proposed draft legislation was regarded as an irreligious act. They were not pleased with the regulation of male repudiation (*talaq*) powers by means of mandatory court procedures, the division of marital property and the regulation of polygamy. It was argued that the MPL Draft Bill amounted to forcing a particular form of religious behaviour on Muslim South Africans.[170]

In January 2011, another Muslim Marriages Bill was published.[171] The Bill emanated from another investigation by the SALRC on Islamic marriages and related matters and set out a draft statutory framework for the legal recognition of Muslim marriages and their consequences. This MMB gave parties the option to choose whether to be governed by such a marital regime. It also attempted to regulate polygyny and the registration of a Muslim divorce (*talaq*), all with the purpose of establishing equity between the spouses and to bringing relief to the hardships faced. In terms of this Bill, a woman could include a stipulation in the marriage contract to the effect that the husband would not take further wives. If he did marry another wife, the existing wife could divorce him.[172] The court could approve an application by a husband to take another wife, which would be granted only if the husband could satisfy the court that he would be able to treat his wives equally and that the financial consequences of all marriages have been satisfactorily arranged.[173]

This Bill was subject to intense debate in the Muslim community and was never passed.[174] No Bill has yet been passed in South Africa in respect of the recognition and regulation of Muslim marriages. It would seem that the legislature has either been suffering from inertia or avoiding to face the policy issues of whether the legal system should support polygynous Muslim unions as monogamous unions.[175] In the meantime,

169 South African Law Reform Commission (SALRC), *Project 59: Islamic Marriages and Related Matters Report* (SALRC 2003).

170 Ziyad Motala, 'The Draft Bill on the Recognition of Muslim Marriages; An Unwise, Improvident and Questionable Constitutional Exercise' (2004) 37(3) CILSA 327–339.

171 Government Gazette GN 37 (21 January 2001) GG 33946.

172 SALRC (n 169) clause 8.

173 Clause 8(7).

174 Harrington-Johnson (n 41) 40.

175 Approximately 7 184 signed petitions were received expressing objections to the Bill and a further 77 substantive comments were received from individuals who objected to the promotion of the Bill on various grounds. These objections were that the provisions of the Bill are in conflict with

Muslim couples which choose to marry according to Islamic Law can be afforded the protection of the South African legal system as it pertains to spouses only if they, in addition, register a civil marriage.

Consequences of the Lack of Recognition of Muslim Marriages

Despite judicial intervention, particularly in South Africa, the costs of bringing such applications illustrates the desperate need for legislation and clarity on many issues for twenty-first-century Islamic women.[176] Notwithstanding the judgment in *WLC v President of South Africa*,[177] the road ahead for the legal recognition of Islamic marriages in South African law remains paved with metaphorical potholes and obstacles. At present, with regard to the consequences of the lack of civil recognition for unregistered Islamic marriage, when the relationship breaks down, the parties to an unrecognised Islamic marriage are essentially confined to a status on relationship breakdown akin to that of cohabitants.[178] The financially weaker party enjoys little protection when the relationship breaks down.[179] To some extent, the judiciary in both England and South Africa have come to the assistance of parties but only after the party in the weaker financial position has had to go to court to plead her case.

The general rule in South Africa and England therefore remains that few of the invariable consequences of marriage are automatically attached to such a relationship.[180] Consequently, domestic partners must self-regulate the legal consequences of their relationship by invoking the ordinary rules and remedies of the law (such as contracts, wills or unjustified enrichment). They may also rely on a piecemeal recognition that

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Sharia Law, are un-Islamic, and that several of the provisions are unconstitutional in that they infringe on the religious freedom of Muslims and their right to equality. Some Muslim organisations indicated that any legislative intervention in Muslim personal law will lead to the transmogrification of the sharia. They further pointed out that the Bill's attempts to strike a balance between the tenets of sharia and ensuring that they conform to the Constitution have failed dismally as the Islamic Law concepts of *Talãq*, *Faskh*', *Iddah* and *Khula'*, which have been incorporated in the Bill, can be exercised only by, or apply to, either a husband or a wife, and not both, and are therefore discriminatory on the basis of gender; see *WLC v the President of South Africa* (n 166) para 20.

176 Moosa (n 149) 332.

177 *WLC v the President of South Africa* (n 166).

178 Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307). Presented to the Parliament of the United Kingdom by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty July 2007, 44–45.

179 cf ss 25–28 of Scotland Family Law (Scotland) Act 2006. If the parties separate, then either party may seek payment from the other in respect of the economic disadvantage which she has suffered as a result of the cohabitation together with the economic advantage gained by the other party as a result of the cohabitation. There is no minimum period for which the parties have to have lived together before the statutory system applies.

180 *Butters v Mncora* 2012 (4) SA 1 (SCA) para 11.

has—particularly since the advent of democracy—been conferred on such partnerships by the judiciary and the legislature.[181] In South Africa, while the democratic constitutional era has seen the coming into operation of full legal recognition of customary[182] marriages and same-sex marriages,[183] the prevailing legal position fails to acknowledge the diverse ways in which family formation takes place in a country where factors such as poverty, unemployment, labour migration, and unequal gender relations constitute major reasons for the prevalence of domestic partnerships.

Parties to a Muslim marriage might also choose to seek relief under contract law.[184] In civil law, parties to a Muslim marriage have a quasi-contractual relationship. However, the ability to take an action under contract law is beneficial only where the dowry (or *mahr*) has not been paid in full and is of a certain monetary value large enough to justify instigating litigation financially. Increasingly in England, the autonomy of the parties to make prenuptial agreements is recognised,[185] but most *mahr* contracts do not satisfy the English Supreme Court criteria for an agreement fairly entered into at the time of the marriage or at the time of a divorce.[186]

South African Suggestions for Reform

A Single Marriage Act—the 'Assimilation' Approach?

In 2013, the South African Department of Home Affairs proposed investigating the development of a single Marriage Act for South Africa to enable South Africans of different religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality as set out in the Constitution.[187] The proposal paper

181 Jacqueline Heaton, *South Africa Family Law* (3rd edn, LexisNexis 2010) 243; B Smith, 'The Dissolution of a Life or Domestic Partnership' in Jacqueline Heaton (ed), *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta 2014) 389.

182 Recognition of Customary Marriages Act 120 of 1998.

183 Civil Union Act 17 of 2006.

184 Huma Qureshi, 'How I Gave up on a Modern Muslim Marriage' (*The Guardian*, 13 October 2011) <https://www.theguardian.com/commentisfree/belief/2011/oct/13/muslim-marriage-contract> accessed 31 August 2017.

185 *Radmacher v Granatino* [2010] UKSC 42, in which the UK Supreme Court endorsed the general principles that parties to marriage may agree to a disposition of property and the courts will uphold such agreement as long as it is not seen to be unfair to one of the parties.

186 David Hodson, 'The Islamic Marriage in the Context of the Practice of English Family Law' (2016) 46(1) Family Law 90, 92. In India, the recognition of Muslim marriage contracts as purely civil contracts has proved to be extremely problematic and has led to even greater uncertainty and difficulties for the judiciary: see Dr Jean-Philippe Dequen, 'Lessons from Abroad: Muslim Marriages in India' (2016) 46(1) Family Law 99, 101.

187 Christa Rautenbach, 'Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa' (2004) 7(2) Potchefstroom Electronic LJ 96–129, 122; Christa Rautenbach, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-state Law' (2010) 60 J of Legal Pluralism 143–178, 172; cf Pieter Bakker, 'Towards the Recognition of Diversity:

identified the scope of the proposed investigation as determining the possible development of a comprehensive single marriage statute to allow persons of all religious persuasions and cultural practices in South Africa to conclude legal marriages that will accord with the doctrine of constitutional equality, the acquisition of citizenship by marriage, determining whether parties consent to marriage; what the marital age ought to be; affording recognition to all polygynous marriages; regulating marriage notice requirements; and the certification of marriage officers from all religious denominations. The SALRC pointed out that a single marriage statute may take two different forms: either a 'Single Marriage' Act, a unified set of requirements (and possibly consequences) applying to all marriages or, alternatively, an 'Omnibus Act' which contained different chapters that reflected the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim and possibly other religious marriages. It was argued that a secular marriage code that makes provision for a set of minimum requirements such as age of consent, actual consent, marriage officers and registration of marriage for all in South Africa should be considered.[188] The celebration of the marriage could then take place on the basis of equality for all South Africans before the law. It was argued that this would also acknowledge cultural and religious differences, but recognise the need for legal certainty and legislation to ensure that women are dealt with equally. Those in favour of a single Marriage Act argued that the pluralist approach places too much strain on jurists, especially judges who were not trained in all the personal-law systems of the country. This would lead to legal uncertainty.[90] A pluralist system would also need a set of rules to determine which system is applicable.[91]

Conversely, it was also argued by others that this assimilation approach of a single Marriage Act possibly bears negative implications for the rights of women and cannot guarantee that women are not still discriminated against in the religious and social laws which govern their private lives. In opposition to the proposal of a single Marriage Act, it was argued that the religious identity of the marriage could be lost in the public, state-regulated domain. Religious rules and practices, especially those that are discriminatory in nature, would not be held accountable to norms of equality and justice within a state-

Muslim Marriages in South Africa' (2009) THRHR 394–406, 405; Johann van der Vyver, 'Multi-tiered Marriages in South Africa' in Joel R Nichols, *Marriage and Divorce in a Multicultural Context: Multi-tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge University Press 2012) 200; Elsje Bonthuys, 'A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System' (2016) 6(6) Oñati Socio-legal Series 1307; Helen Kruuse, 'You Reap What You Sow: Regulating Marriages and Intimate Partnerships in a Diverse, Post-apartheid Society' (2013) International Survey of Family Law 360–361, 343; Pieter Bakker, 'Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South Africa' (2013) 16(3) Potchefstroom Electronic LJ 116–151, 139; Amien (n 94) 381; MW Prinsloo, 'Pluralism or Unification in Family Law in South Africa' (1990) 23(3) CILSA 335–336.

188 Rautenbach (n 187) 122; Rautenbach (n 187) 172.

regulated domain. It was argued that, not only from a practical perspective was the concept of a single Marriage Act unlikely to succeed, but also from a rights perspective.[189] This approach would be based on a Western, Judeo-Christian paradigm of marriage that is inconsistent with the ethos of legal pluralism and the celebration of diversity, which are promoted by the South African Constitution.[190] and the English Human Rights Act of 2002.[191] It might be possible to harmonise the basic requirements for marriage in general but still to allow for diversification regarding the cultural and religious consequences of these marriages. A further argument was based on the likelihood that a single Marriage Act would not be observed in practice. In other words, if such an Act replaced the consequences of cultural or religious marriages, it was likely to be ignored in practice and to create nothing but paper law.[192] On this basis, Muslim family law continues to be practised in South Africa regardless of non-recognition by the state.[193]

The proposed single marriage statute may meet the requirements for formal equality but will not promote substantive equality, which is the approach to equality that is consistent with South Africa's constitutional imperatives. Moreover, a single Marriage Act will not respond to the reality of all women's lived experiences of marriage in South Africa. Furthermore, the lack of regulation of the features of different types of marriage and divorce might allow the judiciary to adopt the position that they cannot interfere in religious family laws, since legislation leaves the regulation of those laws in the hands of religious communities (the common-law doctrine of religious entanglement). This doctrine could be used to shield religious rules and practice that have a negative impact on women. The proposal based on a single Marriage Act also possibly assumes that the state has no responsibility to protect marginalised members in communities against harmful practices in those communities. For example, in India since 1937, the country's Muslim Personal Law (Shariat) Application Act[194] has afforded blanket legal recognition to MPL and enabled the Indian Muslim communities to regulate MPL themselves. The outcome of this legislation has been that the Muslim family-law rules and practices that are discriminatory to Muslim women have been allowed to continue.

189 Bakker THRHR (n 187) 394; Pieter Bakker, 'Traditional Muslim Family Law and the Compatibility of the Proposed Muslim Marriage Legislation with Shari'ah' (2010) Speculum Juris 66; Bakker Potchefstroom Electronic LJ (n 187).

190 Section 15 of the Constitution.

191 Article 9 of the Human Rights Act 2002.

192 On the African continent not one African state has successfully unified their marriage laws into one statute.

193 Bakker THRHR (n 187) 394–406.

194 26 of 1937.

The Supreme Court of India has come to the protection of such women,[195] but such cases are costly and also very slow in coming to trial.

An Omnibus Statute—A Pluralist Approach?

A single marriage statute is therefore inconsistent with the ethos of legal pluralism and the celebration of diversity, which are promoted by the South African Constitution. It is submitted that with a pluralist approach those issues that cannot be resolved in draft legislation can be challenged in court once the legislation is enacted. Bringing Muslim religious marriages within the purview of the judiciary would enable the courts to interpret those features of religious marriages that the statute purports to regulate. The common-law doctrine of religious entanglement could not be invoked in these circumstances.

Legal pluralism will continue for as long as cultural and religious diversity exists and is encouraged in a society based on diversity and freedom of belief. It might be possible to codify similar marriage requirements such as marriageable age and general issues regarding consent. MPL could be recognised by a general Act specifying the areas of application. Where the principles of Muslim marriage law are opposed to the Bill of Rights, however, such principles should be developed in line with the spirit and purport of the Constitution.

Since the *WLC* case, the legal recognition and regulation of religious marriages is required of the South Africa legislature, so it would seem that the option of a single Act is off the table. It has now become necessary to ameliorate the disadvantages that women suffer as a result of the non-recognition of their religious marriages, particularly in relation to Muslim marriages.[196]

Conclusion: What has this Comparative Law Study Established?

To conclude, this study has shown that the position of Muslim women married by *nikah*-only marriages in both England and South Africa is similar.[197] However, the South African courts, particularly the Constitutional Court, have the constitutional power to order the legislature to remedy its inaction to make the law compatible with constitutional rights.[198] The South African judiciary is never excluded from the process

195 *Mohd. Ahmed Khan v Shah Bano Begum & Others* (1985) 2 SCC 556; *Danial Latifi & Another v Union of India* (2001) 7 SCC 740; *Bano & Others v Union of India & Others* (2017) 9 SCC 1.

196 South African Law Reform Commision, *Issue Paper 17, Project 118: Domestic Partnerships* (SALC 2001).

197 *James v Thomas* [2007] EWCA Civ 1212; *Geary v Rankine* [2012] EWCA Civ 555 para 19.

198 Bakker (n 189) 394–406.

of rebuilding the law,[199] as courts retain their powers of review whether or not the enacted law passes constitutional muster. However, as in England, the legislative law-making route takes priority, particularly in England, where the notion of parliamentary sovereignty is still strong, despite the inroads of the Human Rights Act[200] and international law. Therefore, this study of comparative law has established that the legal position of many women in unregistered Muslim marriages creates similar complex and apparently intractable problems in two different jurisdictions. Legislation is always a blunt instrument, seldom likely to deal adequately with the sensitivity, diversity and variety of the issues arising in this area of the interface between law and religion. However, legislative attempts should be made: the enactment of legislation in an integration approach which recognises and respects religious diversity within a framework of equality and a human rights paradigm is much more likely to protect the interests of Muslim women. An omnibus marriage statute that incorporates an integration approach should give effect to the courts' judgments, especially those in relation to Muslim marriages. An integration approach has greater potential to offer more protection for substantive gender equality than do the assimilation and accommodation approaches. The language of pluralism is that of dialogue, not on the basis that those from diverse religious backgrounds will agree with one another, but that all are committed to engaging with one another.[201]

In this regard, the South African case of *WLC v President of SA*[202] has great significance for Muslim women, both current and future, who have chosen or will choose to enter into Muslim marriages. Religious women may be challenged as to how to interpret religious law into language more conducive to the legal recognition of women's rights—for example, some orthodox Muslim women would struggle to endorse a ban on polygyny because to do so would require them to abandon their belief that the Qur'an

199 Michael Dafel, 'The Constitutional Rebuilding of the South African Private Law: A Choice between Judicial and Legislative Law-Making' *Legal Scholarship Network: Legal Studies Research Paper Series* (University of Cambridge Faculty of Law Research Paper No 1 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289103> accessed 7 January 2020.

200 Bakker (n 190) 394–406.

201 In this light it would be counter-productive for any government to impose any solution without the endorsement of the Islamic community. In England, two reviews are being carried out by the Home Office and the Home Affairs Select Committee, although they have been closed since before the election and not yet reopened.

202 *WLC v President of SA* (n 166). The case is a consolidation of three applications brought by the Women's Legal Centre. There were nine respondents in the case. The first five can be summed up as government: (1) President, (2) Minister of Justice, (3) Minister of Home Affairs, (4) Speaker of the National Assembly, (5) Chairperson of the National Council of Provinces. The other respondents were: (6) Association of Muslim Women South Africa, (7) United Ulama Council of South Africa, (8) South African Human Rights Commission and the (9) Commission for the Promotion and Protection of the Rights of Religious, Cultural and Linguistic Communities.

is the source of moral truth.[203] It is unlikely that, given the nature of *nikah*, in either England or South Africa it will be accepted as legally binding without considerable modification to its form. This is a step that many in the Muslim communities may be unwilling to take,[204] despite the fact that, when such marriages break down, many women face financial hardship.[205] Legislation on Muslim marriages will not be a total remedy of or panacea for the injustices facing women in the Muslim community because the ideology regarding the role and position of women in Islam is not going to alter magically with the enactment of this legislation. Such legislation will, however, offer a regulatory framework which could be used to challenge unfair discrimination.

Religious, cultural and traditional practices have every right of expression—but only in accordance with a human rights framework. The legislature and judiciary in South Africa and England respectively must ensure that the civil liberties of all citizens are protected, and intervene when religious and traditional practices are discriminatory and oppressive to Muslim women. It is the duty of the Muslim communities, and those in leadership roles in these communities, to ensure that the oppression of women does not continue in the name of Islam.

203 Mostapha Benhenda, 'For Muslim Minorities, It is Possible to Endorse Political Liberalism but This is not Enough' (2009) 11 J of Islamic Law and Culture 71, 87. Benhenda argues that Rawls' political liberalism and liberal citizenship is a promising concept for the inclusion of Muslim minorities into non-Muslim democracies but this possibility is too weak since the doctrine of many Muslim minorities, given their norms, cannot be challenged by political liberalism (Samuel Freeman, 'The Idea of Public Reason Revisited: Public Reasons and Political Justification' (2004) 72 Fordham LR 2021.)

204 Qureshi (n 184).

205 ibid.

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