

JUDICIAL INTERVENTION IN FACILITATING LEGAL
RECOGNITION (AND REGULATION) OF MUSLIM FAMILY LAW
IN MUSLIM-MINORITY COUNTRIES:
THE CASE OF SOUTH AFRICA

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Abstract

In 2018, a groundbreaking judgment was delivered by a full bench of the Western Cape High Court in the matter of the Women's Legal Centre Trust v. President of South Africa. This case followed a long line of judgments spanning some twenty-one years in which the South African judiciary afforded limited recognition to aspects of Muslim marriages. In this decision, the Western Cape High Court ordered the South African State to prepare, initiate, enact, and implement legislation that provides for the recognition and regulation of the consequences of Muslim marriages within twelve months of the date of judgment. In this Article, the author examines the following questions: Why has the South African State not yet recognized Muslim marriages despite repeated calls to do so by South African Muslim communities? Why has it taken a court to instruct the South African State to enact legislation to recognize Muslim marriages? What, if any, are the human rights implications of the judgment? And what difference, if any, will the judgment make in the lives of Muslims? The author argues that, despite the groundbreaking nature of the judgment, it does not go far enough to ensure sufficient protection for the human rights of Muslim women and that the manner in which the Western Cape High Court's order is implemented could perpetuate the undermining of Muslim women's human rights.

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INTRODUCTION

The question of legal recognition of Muslim marriages in South Africa surfaces in the South African public domain from time to time, usually when national elections loom and the majority party wants to secure its “Muslim vote.” When that happens, promises are made in one way or another that Muslim marriages will be recognized. This has been the narrative since before the attainment of a constitutional democracy in 1994.¹ Twenty-five years later, there is still no legal recognition being afforded to Muslim marriages in South Africa, despite continuous calls for recognition of Muslim marriages by various sections of civil society and the Muslim communities in South Africa. This led to a groundbreaking judgment delivered in 2018 by a full bench of the Western Cape High Court in a consolidated application comprising three cases: the *Women’s Legal Centre Trust v. President of the Republic of South Africa* (hereinafter *WLCT*),² *Faro v. Bingham N.O.* (hereinafter *Faro*),³ and *Esau v. Esau* (hereinafter *Esau*).⁴

In the above consolidated application (hereafter also referred to as “The WLCT Matter”),⁵ the South African State was ordered to enact legislation to recognize and regulate the consequences of Muslim marriages within twenty-four months of the judgment being handed down.⁶ Enactment of such legislation would be in accordance with the constitutional right to freedom of religion, which is of an individual and collective nature. The individual right to freedom of religion is encompassed in section 15(1) of the South African Constitution, 1996, which protects “[e]veryone’s...right to freedom of conscience, religion, thought, belief and opinion.” The collective right to freedom of religion is

1 For examples, see the discussion on state initiatives relating to the recognition of Muslim marriages in Part IV of this Article.

2 Case No. 22481 (2014).

3 Case No. 4466 (2013).

4 Case No. 13877 (2015).

5 *Women’s Legal Ctr. Tr. v. President of South Africa* 2018 (6) SA 598 (WCC) [hereinafter *The WLCT Matter*].

6 Judgment was delivered on Aug. 31, 2018.

reflected in section 31 of the Constitution and recognizes the right of each person who belongs to a religious community to practice her or his religion with other members of that community and to form, join, and maintain religious associations.⁷ Through the right to freedom of religion enshrined in section 15(3) of the Constitution, the South African State may also enact legislation to recognize traditional and religious marriages or personal and family law systems.⁸ The individual and collective rights to freedom of religion are both internally limited in sections 15(3)(b) and 31(2) respectively to the extent that no one may practice her or his religion in a way that violates other constitutional rights including gender and sex equality, and legislation affording recognition to, *inter alia*, religious marriages or personal and family law systems may not be inconsistent with other rights in the Bill of Rights including gender and sex equality.⁹

In accordance with the right to freedom of religion, African customary marriages were recognized through the enactment

7 See S. AFR. CONST., 1996 § 31:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

8 See S. AFR. CONST., 1996 § 15(3):

(a) This section does not prevent legislation recognising—

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

9 See S. AFR. CONST., 1996 § 9(3) (proscribing unfair discrimination on the basis of, *inter alia*, gender and sex): “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

of the Recognition of Customary Marriages Act,¹⁰ which came into force in 2000. Same-sex couples were also afforded the opportunity to access legal rights and obligations that attach to a civil marriage¹¹ by being able to enter into civil unions registered under the Civil Union Act.¹² Why then has the South African State not also recognized Muslim marriages despite repeated calls by South African Muslim communities for recognition of Muslim marriages? Why has it taken a court to instruct the South African State to enact legislation to recognize Muslim marriages? What, if any, are the human rights implications of the judgment? And what difference, if any, will the judgment make in the lives of Muslims?

In seeking to address the above questions, particular reference is made to the WLCT judgment, which relates to the primary case in the aforementioned consolidated application. This Article commences by providing a brief historical context to the non-recognition of Muslim marriages in South Africa, followed by a short commentary on the judicial intervention provided prior to the WLCT judgment, in which the courts attempted to afford some relief to Muslim parties, especially women. A synopsis of the effects of non-recognition of Muslim marriages is also offered as well as the state initiatives undertaken thus far relating to the recognition of Muslim marriages in South Africa. Thereafter, the consolidated application with particular attention to the WLCT case and its implications for human rights is discussed. I argue that despite the groundbreaking nature of the judgment, it does not go far enough to ensure sufficient protection for the human rights of Muslim women and that the manner in which the Western Cape High Court's orders is implemented could perpetuate the undermining of Muslim women's human rights.

10 120 of 1998.

11 Entered into in terms of the Marriage Act 25 of 1961. Civil marriages registered under the Marriage Act are required to be monogamous and can only be concluded between a male and a female.

12 17 of 2006.

I. HISTORICAL CONTEXT

The WLCT matter is a culmination of more than two decades of case law, which involved claims by Muslim wives for recognition of their Muslim marriages or aspects of their Muslim marriages.¹³

The Muslim communities in South Africa originate from slaves and indentured laborers imported by colonialists from various parts of South Asia and Southeast Asia during the seventeenth and eighteenth centuries. Throughout the nineteenth century, Muslims also entered South Africa as traders from South Asia. Thereafter, they came to South Africa as immigrants from various parts of Africa.¹⁴ Presently, the Muslim communities comprise the largest religious minority in South Africa.¹⁵

Non-recognition of Muslim marriages dates back to the colonial period when the only form of marriage that was considered worthy of legal recognition and protection was one that conformed to a Christian paradigm of marriage, namely heterosexual and monogamous.¹⁶ This approach to marriage was confirmed by the apartheid-era Appellate Division per Justice Trengove in the case of *Ismail v. Ismail*.¹⁷ In particular, Justice Trengove held that any contract and custom arising from a potentially polygynous marriage

13 The main cases that were adjudicated since 1997 include the following: *Moosa v. Harnaker* 2017 (6) SA 425 (WCC); *Arendse v. Arendse* 2013 (3) SA 347 (WCC); *Hoosain (Hoosain) v. Dangor* 2010 2 All SA 55 (WCC); *Mahomed v. Mahomed* 2010 (2) SA 223 (ECP); *Hassam v. Jacobs* 2009 (5) SA 572 (CC); *Jamaloodien v. Moola* (NPD) (Unreported, Case No. 1835/06); *Cassim v. Cassim* (Part A) (TPD) (Unreported, Dec. 15, 2006, Case No. 3954/06); *Khan v. Khan* 2005 (2) SA 272 (T); *Daniels v. Campbell* 2004 (5) SA 331 (CC); *Amod v. Multilateral Motor Vehicle Accidents Fund* (Comm'n for Gender Equal. Intervening) 1999 (4) SA 1319 (SCA); *Ryland v. Edros* 1997 (2) SA 690 (C).

14 Ebrahim Moosa, *Prospects for Muslim Law in South Africa: A History and Recent Developments*, 3 Y.B. ISLAMIC & MIDDLE E. L. 131 (1996).

15 Muslims constitute 1.9% of a total population of 54.4 million South Africans. The remaining religious communities include: Christians as the majority religious community (86%); followed by traditional African religions (5.4%); Hindus (0.9%); Jews (0.2%); no religion (5.2%); and other religions (0.4%). *Table 9: Percentage Distribution of Religious Affiliation by Province, 2015, General Household Survey*, STATISTICS S. AFR. (2015), <http://www.statssa.gov.za/publications/P0318/P03182015.pdf> [<https://perma.cc/F3WP-D5W2>].

16 See, e.g., *Bronn v. Frits Bronn's Executors* (1860) 3 Searle 313.

17 1983 (1) SA 1006 (AD).

ran contrary to public policy.¹⁸ This included a potentially polygynous marriage such as a Muslim marriage. Thus, Justice Trengove deemed a Muslim marriage contract and customs arising from that contract to be *contra bonos mores* and unenforceable.¹⁹

The apartheid-era conception of public policy was subsequently rejected by the democratic-era judiciary. In the case of *Ryland v. Edros*, Judge Farlam on behalf of the Cape High Court (as it then was) found that the notion of public policy as understood by the apartheid-era judiciary could no longer hold water in a democratic and plural society such as South Africa, which is underscored by the constitutional values of equality and appreciation of diversity.²⁰ Judge Farlam held that South Africa's post-1994 public policy as defined by the parameters of its constitutional democracy permits the recognition and enforceability of a Muslim marriage contract.²¹

Following *Ryland*, a gamut of cases was adjudicated across South Africa over a period of more than twenty years, in which the South African judiciary followed the example set by Judge Farlam in respect of judicial treatment of Muslim marriages.²² South Africa consequently witnessed the unilateral Islamic law obligation of a husband to maintain his wife being considered worthy of legal recognition,²³ and Muslim wives being included in the definition of "spouse" and "surviving spouse" for the purpose of specific legislation that made provision for spouses. For instance, Muslim wives in monogamous and polygynous Muslim marriages can now claim

18 *Id.* at 1024D-F.

19 *Id.*

20 *Ryland v. Edros* 1997 (2) SA 690 (C) at 708I-J; 709A-B.

21 *Id.* at 710D-E.

22 *See id.*; Waheeda Amien, *South African Women's Legal Experiences of Muslim Personal Law*, in RELIGION AS EMPOWERMENT: GLOBAL LEGAL PERSPECTIVES 53 (Lauren Fielder & Kyriaki Topidi eds., 2016); Razaana Denson et al., *The Bastardization of Islamic Law by the South African Courts*, 39 OBITER 152 (2018); Najma Moosa, *Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa*, 115 S. AFR. L.J. 479 (1998); J.M. Pienaar, *Duty to Support and the Dependant's Claim: The Struggle of Women Married in Terms of Customary and Muslim Law*, 2 STELLENBOSCH L. REV. 314 (2006); Christa Rautenbach, *Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa*, 7 POTCHEFSTROOM ELEC. L.J. 1 (2004).

23 *Amod v. Multilateral Motor Vehicle Accidents Fund (Comm'n for Gender Equal. Intervening)* 1999 (4) SA 1319 (SCA) paras. 14–15, 20, 25.

maintenance against their husbands through the Maintenance Act.²⁴ Monogamous and polygynous Muslim spouses can inherit from their deceased spouses' intestate estates in terms of the Intestate Succession Act.²⁵ Muslim wives in monogamous Muslim marriages can claim maintenance from their deceased husband's intestate estates via the Maintenance of Surviving Spouses Act.²⁶ Muslim monogamous and polygynous surviving spouses may also benefit under the Wills Act,²⁷ which enables a surviving spouse to acquire the inheritances of their deceased spouse's descendants who are named as heirs in the deceased spouse's will but who renounce their benefits in favor of the surviving spouse of the deceased.

In the post-1994 period, the South African judiciary therefore afforded protection to both monogamous and polygynous Muslim spouses. This approach accords with the constitutional value of diversity, which in the family law context acknowledges the pluralism of family forms; that multiple forms of marriage exist; and that a spouse in those marriages is entitled to legal protection.²⁸ However, the judiciary has not provided wholesale legal recognition to Muslim marriages because it is of the view that such recognition should be undertaken by the legislature.²⁹ The judiciary has therefore only enabled limited recognition to certain aspects of a Muslim marriage such as the Muslim marriage contract, terms arising from the marriage contract such as spousal *nafaqa* (maintenance)³⁰ and recognizing Muslim wives and husbands as spouses for particular legislation.

24 99 of 1998. See *Khan v. Khan* 2005 (2) SA 272 (T).

25 81 of 1987. See *Daniels v. Campbell* 2004 (5) SA 331 (CC).

26 *Khan* 2005 (2) SA (T) para. 10.5.

27 Wills Act 7 of 1953 § 2C(1). *Moosa v. Harnaker* 2017 (6) SA 425 (WCC).

28 *Moosa* 2017 (6) SA.

29 *Faro*, Case No. 4466 para. 44; *Moosa* 2017 (6) SA (WCC) para. 16; *Daniels* 2004 (5) SA (CC) para. 108; *Amod* 1999 (4) SA 1319 (SCA) para. 28.

30 A traditional and conservative interpretation of Islamic law places a unilateral obligation on the husband to maintain his spouse(s) and children. IBN RUSHD, *THE DISTINGUISHED JURIST'S PRIMER: A TRANSLATION OF BIDAYAT AL-MUJTAHID* 63 (1996). See also Qur'an 4:34: "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard."

II. EFFECTS OF NON-RECOGNITION OF MUSLIM MARRIAGES

Failure to recognize Muslim marriages engenders negative effects for Muslims, particularly marginalized members of the Muslim communities such as women and children. Some of the negative effects include the following.

First, as noted by the WLCT in the consolidated application, the best interests of minor children born of Muslim marriages are not automatically subject to court oversight when there is a Muslim divorce.³¹ In contrast, a civil divorce or legal dissolution of an African customary marriage that involves minor children immediately activates intervention by the Family Advocate's Office followed by judicial oversight to ensure that the child's best interests are protected.³²

Secondly, Muslim spouses cannot automatically access the benefits of civil legislation as spouses in civil and African customary marriages are able to. This is because the legality of civil and African customary marriages immediately confers the status of lawful spouse on husbands and wives in those marriages, which brings them within the ambit of legislation that makes provision for spouses. In contrast, a spouse in a Muslim marriage must first approach a High Court and ask that she or he be recognized as a spouse for the purpose of particular legislation and/or to access legislative benefits that accrue to spouses. This means that Muslim parties can only be afforded *ad hoc* relief on a case-by-case basis, which requires resources that are not available to all.

Thirdly, Muslim spouses cannot automatically access benefits that are permitted under Islamic law that attach to Muslim family law.³³ For example, a Muslim marriage contract must con-

31 WLCT's argument as expressed in the judgment. *The WLCT Matter* 2018 (6) SA para. 59.

32 Divorce Act 70 of 1979 § 6; Mediation in Certain Divorce Matters Act 24 of 1987 § 4.

33 Muslim family law encompasses marriage and divorce and all the consequences pertaining to marriage and divorce such as *nafaqa* (maintenance), parental rights and responsibilities, and matrimonial property regimes, which are underscored by Islamic law principles.

tain an agreement relating to the payment of *mahr* (dower).³⁴ When the benefit such as the aforementioned *mahr* arises from the Muslim marriage contract, a Muslim wife must approach the High Court to institute a claim, which again has cost implications. Only women who have the necessary financial and emotional resources are likely to pursue such a claim.

Fourthly, Muslim wives cannot challenge gender-discriminatory Islamic law rules and practices that ascribe to Muslim family law in a civil court. For instance, traditional and conservative interpretations of Muslim divorce³⁵ confer unequal

34 *Mahr* is a payment made by the husband to the wife, which could be given promptly at the time that the Muslim marriage is concluded, or it could be deferred to a stipulated date during the course of the marriage, failing which it becomes payable when the marriage dissolves through death or divorce. ABDUR RAHMAN I. DOI, SHARIAH: THE ISLAMIC LAW 158–66 (1984); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 167 (1964). See also Qur’ān 4:4: “And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.”

35 There are four main forms of Muslim divorce, namely *ṭalāq*, *tafwīd al-ṭalāq*, *khul’*, and *faskh*. *Ṭalāq* is effected when a husband utters the word “*ṭalāq*” or its equivalent in a language other than Arabic (for example, “I repudiate you,” in English). When a marriage terminates through *ṭalāq*, a husband is required to pay any outstanding *mahr* to the wife. *Ṭalāq* is the exclusive preserve of the husband to unilaterally repudiate his wife without requiring grounds for the repudiation. The *ṭalāq* need not be given in the wife’s presence or in the presence of witnesses or with the wife’s knowledge or consent. One or two utterances of *ṭalāq* renders the marriage only tentatively terminated. This means that if the husband chooses to reconcile with his wife during the *’idda* period (three-month waiting period observed by the wife following the utterance of “*ṭalāq*”), the *ṭalāq* is revoked and the marriage remains intact. During *’idda*, the wife is expected to be house-bound, and she is not permitted to engage in a romantic relationship or enter into marriage with another man who is not her husband. The *ṭalāq* becomes irrevocable if, after the completion of the *’idda* period, the parties fail to reconcile or after the utterance of a third *ṭalāq*. After the first or second irrevocable *ṭalāq*, the parties must remarry before they can reconcile. However, after the third utterance of *ṭalāq*, the wife must first undergo *hilala* before the parties may remarry. *Hilala* refers to an intervening marriage where the wife must marry another man and consummate that marriage, and the marriage must dissolve through death or divorce before she and her previous husband may marry each other again. *Tafwīd al-ṭalāq* is a delegated form of Muslim divorce where the husband delegates the right of *ṭalāq* to his wife; thus, it is also extrajudicial. Whether or not the *tafwīd al-ṭalāq* requires fault to be shown depends on whether the husband delegates his right on a conditional or unconditional basis. *Tafwīd al-ṭalāq* may be included as a provision in a marriage contract. *Khul’* is an extrajudicial, no-fault-based Muslim divorce that is available exclusively to women. When a wife effects *khul’*, she is required to return her *mahr*. A traditional and conservative interpretation of Islamic law

rights between men and women and are adopted by most of the South African *'ulamā'*.³⁶ In South Africa, men often effect divorce through triple *ṭalāq*,³⁷ which is accepted as an Islamically permissible form of divorce by the South African *'ulamā'*. Triple *ṭalāq* is a pernicious form of *ṭalāq* that entails the utterance of the word "*ṭalāq*" (divorce) thrice in succession in one sitting, which immediately and irrevocably terminates the marriage without providing the wife with any form of defense or recourse to prevent the dissolution of the marriage. The triple *ṭalāq* therefore negates the wife's right to *audi alteram partem* (the right to be heard). Should the parties decide to reconcile, the wife must first undergo *ḥilāla*, which requires her to marry another man and for

requires the husband's consent for the *khul'*, while a progressive understanding of Islamic law sees the *khul'* as a balance against the *ṭalāq* mechanism and accordingly does not require the husband's consent. *Faskh* is available to both the husband and wife. It is a fault-based and judicial form of Muslim divorce. Since *ṭalāq* is easily obtainable by men, *faskh* is usually relied on by women who may be required to return their *mahr* in order to be released from the marriage. K.N. AHMAD, MUSLIM LAW OF DIVORCE 29, 33, 219–20 (1978); DOI, *supra* note 34, at 192; JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 41, 78, 83 (1991); JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 28–29 (2d ed. 2001); ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 144 (1949); WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 23 (2005); IBN RUSHD, *supra* note 30, at 75; VIJAY MALIK, MUSLIM LAW OF MARRIAGE, DIVORCE AND MAINTENANCE 99 (1961); DAVID PEARL, A TEXTBOOK ON MUSLIM LAW 52, 102 (1979); ABDURAGHIEM SALLIE, THE BOOK ON ṬALĀQ 177–78 (1993); SCHACHT, *supra* note 34, at 164; TALĀQ-I-TAFWID: THE MUSLIM WOMAN'S CONTRACTUAL ACCESS TO DIVORCE; AN INFORMATION KIT 11 (L. Carroll & H. Kapoor eds., 1996); WOMEN LIVING UNDER MUSLIM LAWS, KNOWING OUR RIGHTS: WOMEN, FAMILY, LAWS AND CUSTOMS IN THE MUSLIM WORLD 278–79 (2003); Amien, *supra* note 22, at 53–77; Sayyid Sabiq, *Fiqh Us-Sunnah: Doctrine of Sunnah of the Holy Prophet* 51 (undated). See also Qur'ān 2:229 ("If ye (judges) do indeed fear that they (men and women) would be unable to keep the limits ordained by God, there is no blame on either of them if she give something for her freedom."); Qur'ān 65:1 ("When ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: ... And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness."); Qur'ān 2:232 ("When ye divorce women, and they fulfil the term of their (*'Iddat*), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms.").

36 The *'ulamā'* comprises a body of male religious leaders within the South African Muslim community who provide religious guidance on matters pertaining to interpretations of Islamic law.

37 FIRASAT ALI & FURQAN AHMAD, DIVORCE IN MOHAMMEDAN LAW: THE LAW OF TRIPLE DIVORCE 22 (1983).

her subsequent marriage to be terminated before the parties are permitted to remarry.³⁸ Men are not similarly required to observe *ḥilāla*.

Although men are also not expected to obtain anyone's permission to issue *ṭalāq*, it has become customary in South Africa for them to acquire a *ṭalāq* certificate from the South African 'ulamā' as confirmation that a *ṭalāq* has taken place. In cases of dispute regarding the validity of the *ṭalāq*, the 'ulamā' usually make a pronouncement whether the *ṭalāq* is valid or not. The dispensing of the *ṭalāq* certificate and decisions relating to the validity of the *ṭalāq* are sometimes undertaken in an arbitrary manner, usually with disastrous consequences for women and children who have no recourse to appeal the decisions in a secular court due to the non-recognition of Muslim marriages in South Africa. The arbitrary nature in which the South African 'ulamā' can dispense *ṭalāq* certificates and the kind of harm that can be caused by that was illustrated in the case of *Faro v. Bingham*.³⁹ The *Faro* case was adjudicated in the Western Cape High Court in 2013 and is one of the cases in the consolidated application.⁴⁰ In the *Faro* case, the applicant, Faro, was married to the deceased by Muslim rites only.⁴¹ When the applicant tried to access the benefits of the Intestate Succession Act⁴² and the Maintenance of Surviving Spouses Act,⁴³ the Master of the High Court refused to recognize her claims because the Muslim Judicial Council (MJC),⁴⁴ which is one of the main 'ulamā' bodies in the Western Cape, confirmed that her marriage to the deceased was annulled by way of *ṭalāq*.⁴⁵ As a result, the applicant was rendered homeless, and her children were taken into state care.⁴⁶ In the context of an application to be

38 ESPOSITO, *supra* note 35, at 78, 83; HALLAQ, *supra* note 35, at 23.

39 *Faro*, Case No. 4466.

40 For a discussion of the *Faro* case, see Amien, *supra* note 22, at 68.

41 *Faro*, Case No. 4466, para. 2.

42 81 of 1987.

43 27 of 1990.

44 More information about the Muslim Judicial Council can be accessed on its website: <https://mjc.org.za> [<https://perma.cc/8ATH-U8ZX>].

45 *Faro*, Case No. 4466, paras. 3–7, 10.

46 *Id.* at para. 9.

recognized as a spouse under the Intestate Succession Act and the Maintenance of Surviving Spouses Act, the applicant disputed the validity of the *ṭalāq* on the basis that it was revoked by the deceased during her *‘idda* period.⁴⁷ On assessing the evidence placed before it, the Court found that the *ṭalāq* was indeed revoked and that the parties were still married to each at the time of the deceased’s death.⁴⁸ The Court therefore found that Faro could inherit as a surviving spouse in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.⁴⁹

In the consolidated application, Faro also argued that the Master’s decisions arising from inquiries into the validity of Muslim marriages for the purpose of assessing claims in respect of the Intestate Succession Act and the Maintenance of Surviving Spouses Act amounted to administrative action as envisaged by the Promotion of Administrative Justice Act.⁵⁰ Faro asked for an order that the Minister of Justice and Constitutional Development put into place policies and procedures to regulate inquiries by the Master of the High Court into the validity of Muslim marriages.⁵¹ The Western Cape High Court disagreed that there was any statutory obligation on the Minister of Justice and Constitutional Development to implement the requested policies and procedures and accordingly denied the order.⁵² In the absence of state regulation of Muslim marriages and divorces, the Court’s order will most likely result in the Master’s office continuing to be guided by the arbitrary manner in which the *ṭalāq* mechanism is approached within South African Muslim communities. Consequently, Muslim widows who face challenges to the validity of their marriages will suffer the brunt of a lack of administrative measures when trying to access the benefits of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

Unlike men, women in South Africa have to obtain permis-

47 *Id.* at para. 4.

48 *Id.* at paras. 29–32.

49 *Id.* at para. 32.

50 3 of 2000; *The WLCT Matter* at paras. 42–43.

51 *The WLCT Matter*, para. 42.

52 *Id.* at paras. 236, 252.

sion to divorce either by acquiring their husbands' consent to exercise *khul'* or *tafwīd al-ṭalāq* or by obtaining *faskh* from the '*ulamā'*. *Tafwīd al-ṭalāq* is usually included as a provision in a marriage contract. However, anecdotal observation suggests that most South African Muslims do not enter into written marriage contracts, either because they are unaware of their right to do so or because of power imbalances in the relationship where men refuse to sign a written contract to regulate their marriages.⁵³ The parties tend to sign only a Muslim marriage certificate that contains a stipulation relating to the payment of *mahr*. Thus, Muslim husbands in South Africa rarely delegate their right of *ṭalāq* to their wives. If a South African wife wishes to exit her Muslim marriage, she must apply to the '*ulamā'* for *faskh* to dissolve the marriage on an Islamically permissible ground. The South African '*ulamā'* establish Muslim tribunals to adjudicate *faskh* applications. In the event that the husband opposes the wife's application, the '*ulamā'* tend not to grant *faskh* even when Islamic law grounds appear to exist for the granting of *faskh*. Instead, the '*ulamā'* encourage wives to attempt reconciliation with their husbands.⁵⁴ It is therefore difficult for a wife to obtain *faskh* in South Africa. In the few instances where a Muslim tribunal decides a matter in favor of a wife, non-recognition of Muslim marriages renders the decision unenforceable in a court of law.⁵⁵ A South African Muslim wife may also effect *khul'*, but this form of Muslim divorce is not as commonly invoked as *faskh*. Also, *khul'* is only deemed valid by the South African '*ulamā'* if the husband consents to it. It is thus easier in South Africa for men to end their Muslim marriages than it is for women.

Unequal treatment between men and women that attach to a Muslim marriage in South Africa, which militates against women, also relates to, among others, consent to marriage, *mahr*, *nafaqa*, matrimonial property regimes, and '*idda*, each of which is discussed briefly below.

53 Amien, *supra* note 22, at 53–77.

54 Mariam Orrie, *Domestic Violence in Cape Town: The Role of Religious Leaders in Marital and Divorce Disputes Within the Muslim Minority Communities* 28 (2012) (unpublished MPhil dissertation, University of Capetown).

55 *The WLCT Matter* at para. 137.

A traditional and conservative understanding of Islamic law requires the consent of the adult bridegroom-to-be for a valid Muslim marriage to be entered into, while the consent of the bride-to-be is not always required.⁵⁶ For instance, the Shāfi'ī school of thought, which is predominant in the Western Cape province in South Africa, requires the consent of the *walī* (guardian) of a female who has never been married for the marriage to be considered valid, regardless of the female's age and whether or not she consents to the marriage.⁵⁷ Fortunately, the latter aspect of the consent requirement no longer appears to be practiced in South Africa. However, the bride's *walī* or whomever the *walī* designates as his *wakīl* (guardian's delegate) must still, in addition to the bride, consent to the marriage. Furthermore, the *walī* is required to be male (usually the bride-to-be's father), unless the bride-to-be has no paternal male relative.⁵⁸ In contrast, the consent of the *walī* of the bridegroom-to-be is not similarly required. The consent of the bridegroom-to-be is considered sufficient.⁵⁹

The above description of consent to marriage has evolved into a practice within the South African Muslim communities where only males attend the *nikāḥ* (marriage ceremony). In the few instances where females attend, they are not part of the ceremony and sit away from the men, usually in another part of the venue from where the *nikāḥ* is taking place. The bride-to-be's *walī* or his *wakīl* acts as her proxy and offers consent to the marriage on her behalf. The bridegroom-to-be can be involved in the *nikāḥ* if he wishes. However, he may choose to have his *walī* or his *walī*'s *wakīl* contract the *nikāḥ* on his behalf and in his presence. A simi-

56 IBN RUSHD, *supra* note 30, at 4.

57 Under traditional Islamic law, males and females are considered to be adults when they reach puberty. Thus, the consent of a male who has reached puberty is always required for marriage. In contrast, the Shāfi'ī and Mālikī *madhāhib* do not require the consent of a virgin female to marry even if she is considered an adult. *See id.* In the context of South African Muslim communities, there appears to be an (unspoken) presumption that if you have never been married, you are presumed to be a virgin.

58 Sabiq, *supra* note 35, at 105.

59 IBN RUSHD, *supra* note 30, at 4.

lar choice is not bestowed on the bride-to-be. Her *walī* or the latter's *wakīl* is expected to contract the *nikāḥ* and sign the Muslim marriage certificate on the bride-to-be's behalf. In the meantime, the bride-to-be is expected to remain out of sight, or at the very least, not be heard.

In the case of *mahr*, most of the South African 'ulamā' accept the traditional and conservative Islamic law implication attached to the payment of *mahr*, which requires a wife to be sexually subservient to her husband.⁶⁰ Furthermore, the husband's Islamic law unilateral obligation to provide *nafaqa* to his wife in turn requires the wife to be obedient to her husband.⁶¹ In the absence of a written provision regulating the matrimonial property regime of the parties, the Muslim marriage is deemed to be one where the estates of the parties are kept separate when they enter the marriage, during the marriage, and at dissolution of the marriage.⁶² In most Muslim marriages in South Africa, assets are usually acquired in the husband's name. Thus, when the marriage terminates, women are left financially destitute. Furthermore, the traditional and conservative interpretation of Islamic law that does not provide the wife with a right to post-'*idda* spousal *nafaqa* is adopted by the 'ulamā' in South Africa since the husband's duty to support his wife is considered to have ended after the expiration of the '*idda* period.⁶³ This compounds the wife's financial impoverishment when the marriage ends. Moreover, '*idda* (and as previously mentioned *ḥilāla*) are burdens that only women are expected to bear under a traditional and conservative understanding of Islamic law.

It is evident from the above that non-recognition of Muslim marriages in South Africa has effectively left the regulation of

60 Ziba Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought and Strategies for Reform*, 1 HAWWA 13 (2003).

61 Kecia Ali, *Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law*, in PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER, PLURALISM 170 (Omid Safi ed., 2003); Sabaq, *supra* note 35, at 106. See also Qur'ān 4:34.

62 S.H. Haq Nadvi, *Towards the Recognition of Islamic Personal Law*, in THE INTERNAL CONFLICT OF LAWS IN SOUTH AFRICA 16 (A.J.G.M. Sanders ed., 1990).

63 IBN RUSHD, *supra* note 30, at 114.

the body of Muslim family law to Muslim communities. Since the ‘*ulamā*’ strongly influence the way in which Muslim marriages and divorces are practiced in the South African Muslim communities, their traditional and conservative interpretations of Islamic law have resulted in rules and practices that discriminate against women, some of which are described above. Non-recognition of Muslim marriages and limited judicial recognition of aspects of Muslim marriages therefore mean that Muslim family law is either not regulated at all or is not regulated sufficiently by the South African legal system.⁶⁴ This in turn means that gender-discriminatory Islamic law rules and practices are maintained within a private domain that is not held publicly accountable, particularly to human rights standards. Muslim parties, especially women, are thus unable to access the South African legal system to regulate the consequences of their Muslim marriages and divorces in a way that would protect and promote women’s human rights.

The above are strong indicators that legal recognition and regulation of Muslim marriages in South Africa are necessary. Although, as mentioned previously, the judiciary has provided relief wherever possible to parties married by Muslim rites, it has refrained from amending existing law to afford full legal recognition to Muslim marriages. Instead, as also mentioned previously, the judiciary has adopted the position that recognition of Muslim marriages should be effected by the legislature.⁶⁵ Furthermore, there are some forms of relief that a civil court would not be able to provide without an “empowering basis,”⁶⁶ such as legislation that recognizes and regulates the features of a Muslim marriage and divorce. For example, a civil court has neither legal nor religious authority to grant a Muslim divorce. However, if legislation were to be enacted to make provision for the dissolution of a Muslim marriage by a civil court and such legislation elicited buy-in from the majority of the ‘*ulamā*’ bodies in South Africa, a civil court

64 See the founding affidavit in *The WLCT Matter*, para. 8.

65 *Amod v. Multilateral Motor Vehicle Accidents Fund* (Comm’n for Gender Equal. Intervening) 1999 (4) SA 1319 (SCA) at paras. 28, 108; *Faro*, Case No. 4466, para. 44; *Moosa v. Harnaker* 2017 (6) SA 425 (WCC) at para. 16.

66 *The WLCT Matter* at para. 141.

would be able to award a Muslim divorce that would be deemed acceptable within the Muslim communities and would be legally enforceable. An example of legislation that proposes to enable a civil court to grant Muslim divorce is the Muslim Marriages Bill,⁶⁷ which is discussed briefly in the following sections.

For the past twenty-five years since the inception of South Africa's constitutional democracy in 1994, the South African State has from time to time initiated one initiative or another purporting to lead to the recognition of Muslim marriages. As illustrated below, the timing of each initiative appears to coincide with the periods linked to South Africa's national elections, which occur every five years. It is therefore hard not to surmise, as indicated in the introduction to this Article, that the primary motivation underlying state initiatives relating to the recognition of Muslim marriages may be to solicit votes among the South African Muslim electorate.

III. STATE INITIATIVES RELATING TO THE RECOGNITION OF MUSLIM MARRIAGES

The first state initiative was the establishment of a Muslim Personal Law Board in 1994. The Muslim Personal Law Board was required to draft legislation to recognize Muslim Personal Law. Due to ideological differences relating to Islamic law and human rights, the Muslim Personal Law Board disbanded within a year of its formation.⁶⁸

Several years later, in 1999, the South African Law Reform Commission constituted a Project Committee to draft legislation to recognize and regulate Muslim marriages.⁶⁹ In 2003, the South

⁶⁷ *Islamic Marriages and Related Matters: Report [Project 59]*, SOUTH AFRICAN LAW REFORM COMMISSION 110 (2003), http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf [<https://perma.cc/5P47-MS46>]. A subsequent amended Muslim Marriages Bill, which no longer appears to be available online, is on file with the author.

⁶⁸ Ebrahim Moosa, *The Fate of Muslim Personal Law*, CENTRE FOR CONTEMPORARY ISLAM, UNIVERSITY OF CAPE TOWN (1999), http://www.cci.uct.ac.za/usr/cci/publications/aria/download_issues/1999/1998_6.pdf [<https://perma.cc/JVL4-Y26X>].

⁶⁹ Waheeda Amien, *Overcoming the Conflict Between the Right to Religious*

African Law Reform Commission Project Committee submitted a draft Muslim Marriages Bill (hereafter referred to as the “first Muslim Marriages Bill”) to the Ministry of Justice and Constitutional Development.⁷⁰ The first Muslim Marriages Bill was the negotiated result of protracted discussions between the South African Law Reform Commission Project Committee and various sections of civil society and Muslim communities in South Africa.

In about 2005, the Commission on Gender Equality attempted to offer an alternative to the Muslim Marriages Bill by drafting a Recognition of Religious Marriages Bill, which it submitted to the Ministry of Home Affairs.⁷¹ The Recognition of Religious Marriages Bill purports to afford recognition to all religious marriages by allowing religious communities to regulate their own religious marriages while requiring the dissolution of the marriages to be regulated through a civil court on terms similar to those contained in the Divorce Act.⁷² The Recognition of Religious Marriages Bill did not appear to elicit support from any of the South African religious communities and appears to have been shelved.⁷³

By 2009, when no further progress appeared to be on the horizon for the recognition of Muslim marriages, the Women’s Legal Centre Trust (WLCT) launched an application in the Constitutional Court, asking for direct access to the Court and that the Court order the South African government to enact legislation to recognize and regulate the consequences of Muslim marriages.⁷⁴ The WLCT is a non-profit trust and manages the Women’s Legal Centre (WLC), a non-profit law center that conducts public inter-

Freedom and Women’s Rights to Equality: A South African Case Study of Muslim Marriages, 28 HUM. RTS. Q. 740 (2006).

⁷⁰ *Islamic Marriages and Related Matters*, *supra* note 67, at 110.

⁷¹ A copy of the Recognition of Religious Marriages Bill is on file with the author.

⁷² 70 of 1979. Clauses 2, 10 of the Recognition of Religious Marriages Bill.

⁷³ For a discussion of the Recognition of Religious Marriages Bill, see Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 INT’L J.L. POL’Y & FAM. 369 (2010).

⁷⁴ *The WLCT Matter*.

est litigation to protect and advance the human rights of women.⁷⁵ The Constitutional Court found that the disputed issues raised in the matter involved factual as well as legal ones. The Court therefore held that it was not appropriately placed as a court of first and final instance to adjudicate the disputed issues, which may require the tendering of evidence. The Court accordingly dismissed the application for direct access.⁷⁶

Although the WLCT was not successful in the Constitutional Court, it appears that the application spurred the Department of Justice and Constitutional Development to apply its mind to the Muslim Marriages Bill. In 2009/2010, the Department of Justice and Constitutional Development unilaterally effected changes to the first Muslim Marriages Bill without eliciting input from any of the stakeholders who were consulted about the first Muslim Marriages Bill. The amended Muslim Marriages Bill (hereafter referred to as the “second Muslim Marriages Bill”) was gazetted in 2011, and the public was invited to submit comments on it.⁷⁷ Both the first and second Muslim Marriages Bills purported to comprehensively recognize and regulate the consequences of a Muslim marriage. Even though the majority of mainstream ‘*ulamā*’ bodies represented by the United Ulama Council of South Africa (UUCSA)⁷⁸ expressed support for the Muslim Marriages Bill,⁷⁹ the

75 WLCT’s founding affidavit at paras. 3, 30.

76 *The WLCT Matter* at para. 28.

77 The second Muslim Marriages Bill no longer appears to be online, but a copy is on file with the author. For further discussion on the Muslim Marriages Bill, see Waheeda Amien, *The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa*, in *MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES*, 109–17 (Mavis Maclean & John Eekelaar eds., 2013); Amien, *supra* note 73, at 371–80.

78 The United Ulama Council of South Africa (UUCSA) is an umbrella structure that represents most of the Sunnī ‘*ulamā*’ bodies in South Africa. The majority of South African Muslims follow the Sunnī tradition. Within this tradition, most South African Muslims adhere to the Ḥanafī *madhhab* (school of thought), followed by adherents of the Shāfi‘ī *madhhab* and to a lesser extent the Māliki *madhhab*. Among others, a minority of South African Muslims are located within the Shī‘ī tradition through the Ja‘farī *madhhab*. Amien, *supra* note 69, at 731; Moosa, *supra* note 14, at 131; *UUCSA Hosts a Successful Elective AGM*, MUSLIM JUDICIAL COUNCIL (SA) (Oct. 13, 2017), <http://mjc.org.za/2017/10/13/uucsa-hosts-a-successful-elective-agm> [<https://perma.cc/76A6-S5K5>].

79 *The WLCT Matter* at para. 100.

South African State has taken no further steps to process the Muslim Marriages Bill for parliamentary consideration. The reasons for the state's inaction are provided later in the Article when the state's arguments in the consolidated application are discussed.

I have elsewhere offered an analysis of the different options for recognizing Muslim marriages including the Muslim Marriages Bill and the Recognition of Religious Marriages Bill.⁸⁰ Without duplicating the analysis in this Article in great detail, I argue that the Muslim Marriages Bill offers better protection for women's rights than the Recognition of Religious Marriages Bill. This is because the Muslim Marriages Bill purports to recognize and comprehensively regulate the features of a Muslim marriage and divorce, while the Recognition of Religious Marriages Bill enables the regulation of different religious marriages and religious divorces to be undertaken by the religious communities themselves.⁸¹ Under the Muslim Marriages Bill, women will be able to enforce their Islamic law rights to Muslim divorce, among others, through a civil court. Similarly, since features of the Muslim marriage and divorce would be regulated through the Muslim Marriages Bill, gender-discriminatory rules and practices that are contained in the legislation could be challenged in a civil court and reformed in a way that could be consistent with human rights norms. In contrast, if religious communities are permitted to regulate their religious marriages and religious divorces according to their understanding of religious law requirements, as is made possible under the Recognition of Religious Marriages Bill, it could result in gender-discriminatory religious rules and practices being maintained within those communities. For instance, although the Recognition of Religious Marriages Bill proposes terms similar to those contained in the Divorce Act for a legal dissolution of a religious marriage,⁸² a pronouncement of a religiously valid divorce can only be obtained from within the religious communities themselves. Therefore, women would face the same impediments

80 Amien, *supra* note 73, at 371–80; Amien, *supra* note 77, at 109–17.

81 Recognition of Religious Marriages Bill, clause 2.

82 *Id.*, clause 10.

to accessing religious divorce within their religious communities under the Recognition of Religious Marriages Bill as they do currently. The difficulties that Muslim women in South Africa face to obtain Muslim divorce have already been raised. Women in Jewish and Hindu communities in South Africa face similar difficulties, although for different reasons. Even though Jewish and Hindu parties appear to have equal rights in relation to divorce, due to the potentially polygynous nature of Jewish and Hindu marriages, the impact of Jewish and Hindu divorce rules on men and women is unequal. For example, while Jewish husbands and wives each require the other's consent to obtain a *get* (Jewish divorce), if a wife withholds her consent, the husband may remarry according to Jewish law, but the wife may not similarly remarry if it is her husband who is withholding consent to divorce.⁸³ Under Hindu law in South Africa, neither party is permitted to divorce.⁸⁴ Yet, the Hindu husband may marry other women while the Hindu wife is precluded from marrying other men.⁸⁵ So, Muslim and Jewish women who experience difficulty in obtaining religious divorce and Hindu women who are not permitted to divorce under Hindu law in South Africa end up being trapped in unwanted marriages without the possibility of being able to move on with their lives while their husbands have the religious right to do so.

Several years later, just weeks before South Africa's fifth national elections in 2014, the Department of Home Affairs launched what is now known as the "Imām Project."⁸⁶ The Department of Home Affairs invoked section 3(1) of the Marriage Act,⁸⁷ which enables Muslim religious leaders such as *imāms* to be authorized as marriage officers so that they may register civil marriages.⁸⁸ The

83 Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *A "Deviant" Solution: The Israeli Agunah and the Religious Sanctions Law*, in *MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES* 89, 91 (Mavis Maclean & John Eckelaar eds., 2013).

84 *Singh v. Ramparsad* 2007 (3) SA 445 (D) at para. 1.

85 WERNER F. MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* 427 (2003).

86 *The WLCT Matter* at para. 23; WLCT's founding affidavit at para. 90.

87 25 of 1961.

88 Marriage Act 25 of 1961 § 3(1), provides:

The Minister and any officer in the public service authorized

Department of Home Affairs suggested that registration of *imāms* would legalize Muslim marriages.⁸⁹ This was a fallacy. Even when an *imām* performs a *nikāḥ* and simultaneously registers a civil marriage, only the latter is legal. The Muslim marriage remains unlawful, which, as mentioned previously, means that Muslim wives cannot automatically access rights attached to the Muslim marriage contract and need to approach the High Court for relief.

The most recent state initiative, during the run-up to South Africa's sixth national elections in 2019, was the establishment of a South African Law Reform Commission Advisory Committee and the publication of an Issue Paper to explore the possibility of a single marriage statute to afford recognition to all marriages in South Africa.⁹⁰ The South African Law Reform Commission suggests that it is exploring the possibility of a single marriage statute, which could take one of two forms: a) a "single or unified marriage act" that would comprise "a unified set of requirements (and possibly consequences)" for all marriages; or b) an "omnibus or umbrella marriage statute" that would contain "different chapters which reflect the current diverse set of legal requirements for and consequences of civil marriages, civil unions, customary marriages, Muslim, and possibly other religious marriages."⁹¹

The first option proposed by the South African Law Reform Commission, namely a "single or unified marriage act," appears to emanate from the desire of the current Minister of Home Affairs, Naledi Pandor, for marriages to adhere to uniform norms and to ensure that all marriages in South Africa are registered and

thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.

89 *Imams Graduate as Marriage Officers*, S. AFR. GOV'T NEWS AGENCY (May 1, 2014), <http://www.sanews.gov.za/south-africa/imams-graduate-marriage-officers> [<https://perma.cc/48WR-DX35>].

90 *Single Marriage Statute [Project 144, Issue Paper 35]*, SOUTH AFRICAN LAW REFORM COMMISSION 15, http://www.justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf [<https://perma.cc/DXC5-FA34>].

91 *Id.*

captured on the Department of Home Affairs data system.⁹² She formulates her concerns with reference to the doctrine of equality by suggesting that all marriages should meet the same requirements.⁹³ She also suggests that “the state should have no interest in who one marries, how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage.”⁹⁴

The underlying premise as conveyed by Minister Pandor for the proposed “single or unified marriage act” is problematic for four reasons. First, it is tantamount to suggesting that the Marriage Act and common law definition of marriage should be amended to make provision for the recognition of all forms of marriages in South Africa. This will not solve the current difficulties that women face within their religious communities relating to discriminatory religious rules and practices, the most pressing being access to religious divorce. Second, while the proposal may meet the requirements for formal equality (that likes be treated alike), it will not promote substantive equality, which is the approach to equality that is consistent with South Africa’s constitutional imperatives. As indicated by the South African Constitutional Court:

[A]lthough a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which

92 *Id.* at 1–2.

93 *Id.*

94 *Id.* at 2.

further the constitutional goal of equality or not.⁹⁵

The Constitutional Court also acknowledged that

The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women.⁹⁶

If the impact of equal treatment results in inequality, particularly where the inequality exacerbates disadvantage among marginalized members of society such as women in religious communities, then differential treatment is justified. Religious rules and practices, particularly of a discriminatory nature, will not be able to be regulated through a single or unified marriage act and could continue unabated within religious communities. For instance, a single or unified marriage act will not enable women in religious marriages to obtain religious divorce. In this way, a single or unified marriage act will not be responsive to the lived realities of all women in South Africa, which is an imperative of substantive equality. Third, the proposal for a single or unified marriage act promotes assimilation of the religious identity of religious marriage and religious divorce into the common law identity of a civil marriage and civil divorce, both of which are underscored by a Judeo-Christian paradigm of marriage. This is inconsistent with the ethos of legal pluralism and the celebration of diversity, which are promoted by the South African Constitution.⁹⁷ Fourth, the proposal assumes that the state has no responsibility to protect marginalized members within communities against harmful prac-

95 *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC) at para. 41.

96 *Daniels v. Campbell* 2004 (5) SA 331 (CC) at para. 22.

97 *Hassam v. Jacobs* 2009 (5) SA 572 (CC) at para. 33.

tices within those communities. In fact, it ignores the private and public nature of the consequences of marriage. The Constitutional Court notes that marriage “bring[s] the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain.”⁹⁸ Marriage is thus deemed to be constitutionally significant because of its private and public importance.⁹⁹ To not bring religious marriages into the public “state-regulated domain” where they can be held accountable to human rights standards underscored by the foundational values of the Constitution, namely dignity, equality, and freedom, would mean that discriminatory religious family law rules and practices can remain hidden in the private sphere.

The second option for a single marriage statute, namely an “omnibus or umbrella marriage statute,” proposes to accommodate the diverse forms of marriages in South Africa by incorporating chapters that each deal with a different type of marriage. In effect, this could mean incorporating existing legislation into the omnibus or umbrella marriage statute such as the Marriage Act,¹⁰⁰ Divorce Act,¹⁰¹ Civil Union Act,¹⁰² and Recognition of Customary Marriages Act,¹⁰³ which, respectively, make provision for opposite-sex marriages, same-sex unions, and African customary marriages. This could also be an opportunity for the South African Law Reform Commission to amend existing legislation that is potentially problematic, such as the Recognition of Customary Marriages Act, to make it more responsive to the lived realities of those who enter into the marriages.¹⁰⁴ Additional chapters could be included that each deal with different types of religious mar-

98 *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at para. 63.

99 *The WLCT Matter* at paras. 1–3, 124. *See also* *DE v. RH* 2015 (5) SA 83 (CC) at para. 39.

100 25 of 1961.

101 70 of 1979.

102 17 of 2006.

103 120 of 1998.

104 The Women’s Legal Centre undertook a ten-year review of the implementation of the Recognition of Customary Marriages Act 120 of 1998, which highlights gendered challenges relating to the legislation. *Recognition of Customary Marriages*, WOMEN’S LEGAL CENTRE (2011).

riages. Some religious marriages may require more or less regulation than others. To ensure that the omnibus or umbrella marriage statute is appropriately responsive to the nuances of the different types of marriages and caters to the specific needs within the relevant communities, in-depth consultation with stakeholders within the relevant communities and broader civil society is required. This could take several more years. In the meantime, the Muslim Marriages Bill is capable of ameliorating many of the difficulties experienced by Muslim women. The Muslim Marriages Bill could therefore be enacted now and incorporated later into the omnibus or umbrella marriage statute.

The WLC notes that “it is regularly approached by [Muslim] women who experience hardships and are left with no remedies.”¹⁰⁵ The suffering of women resulting from non-recognition of Muslim marriages and the delay by the South African State to afford legal recognition to Muslim marriages prompted the consolidated application in 2018 involving the *WLCT*, *Faro*, and *Esau* cases, in which the applicants asked the Western Cape High Court to order legislative intervention to recognize and regulate the consequences of Muslim marriages.¹⁰⁶ Several organizations supported the application as *amici curiae*, including the UUCSA, the Commission on Gender Equality, the Law Society of South Africa, South African Lawyers 4 Change, and the Muslim Assembly.¹⁰⁷ Salient arguments considered by the Western Cape High Court, the Court’s decision, and the reasoning underscoring the decision are provided below.

IV. THE CONSOLIDATED APPLICATION: *WOMEN’S LEGAL CENTRE TRUST V. PRESIDENT OF SOUTH AFRICA (WLCT), FARO V. BINGHAM (FARO), AND ESAU V. ESAU (ESAU)*

As the primary applicant in the consolidated application,

¹⁰⁵ The WLCT’s argument expressed in the judgment. *The WLCT Matter* at para. 138.

¹⁰⁶ WLCT’s founding affidavit at para. 32.

¹⁰⁷ *The WLCT Matter* at paras. 101, 103–05.

the WLCT argued that failure to recognize Muslim marriages as legally valid resulted in the state's abdication of its section 7(2) and 237 constitutional obligations.¹⁰⁸ Section 7(2) of the South African Constitution requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." Section 237 of the Constitution requires "[a]ll constitutional obligations...[to] be performed diligently and without delay." The WLCT contended that the constitutional rights affected by the state's failure to recognize Muslim marriages include equality (section 9), access to courts (section 34), best interests of the child (section 28(2)), dignity (section 10), and freedom of religion (section 15).¹⁰⁹ The WLCT's arguments, the South African State's responses and the Court's finding in respect of each of the aforementioned rights are discussed below.

a. Equality

The equality claim was based on the WLCT's argument that non-recognition of Muslim marriages differentiates between spouses in civil marriages on the one hand and monogamous and polygynous Muslim spouses on the other hand as well as between polygynous spouses in African customary marriages and polygynous spouses in Muslim marriages.¹¹⁰ The test for determining a violation of the equality clause, particularly section 9(1) of the Constitution, which recognizes everyone's right to equality before the law and to "equal protection and benefit of the law," and section 9(3) of the Constitution, which proscribes unfair discrimination on the grounds of, among others, religion, marital status, gender, and sex, has been established by the South African Constitutional Court in the case of *Harksen v. Lane*.¹¹¹

Guided by the aforementioned *Harksen* test, the WLCT contended the following: The differentiation between the afore-

108 *Id.* at paras. 4, 145.

109 *Id.* at para. 56.

110 *Id.* at para. 57.

111 1998 (1) SA 300 at paras. 42–53.

mentioned categories of spouses is based on grounds of religion, marital status, gender, and sex.¹¹² Since these are listed grounds for unfair discrimination contained in section 9(3), the discrimination arising from the differentiation is presumed to be unfair in terms of section 9(5) of the Constitution.¹¹³ The unfair discrimination is of a direct and indirect nature.¹¹⁴ Direct discrimination on the basis of religion and marital status arises from the fact that non-recognition of Muslim marriages negatively affects Muslim wives, husbands, and children.¹¹⁵ Indirect discrimination on the basis of gender and sex results from Muslim women being disparately affected by the non-recognition of Muslim marriages *vis-à-vis* Muslim men.¹¹⁶ For example, gender-discriminatory Islamic law rules and practices described earlier such as unequal access to divorce negatively affect Muslim wives while protecting Muslim husbands.

In response, the South African State averred that spouses in a Muslim marriage have the opportunity to enter into civil marriages.¹¹⁷ The state's defense rested on three ways in which South African Muslims could enter into a civil marriage or union while simultaneously contracting a Muslim marriage. Muslim parties can a) register a civil union in terms of the Civil Union Act; or b) register a civil marriage under the Marriage Act with an authorized marriage officer such as a magistrate before or after concluding their Muslim marriage;¹¹⁸ or c) have their *nikāh* officiated by a person who is a designated marriage officer registered under section 3(1) of the Marriage Act.

Until 2014, hardly any *imāms* were registered as marriage officers because they viewed civil marriages as un-Islamic, primarily for the following two reasons.¹¹⁹ First, the default matrimonial property regime for a civil marriage is in community of prop-

112 *The WLCT Matter* at para. 122.

113 *Id.* at para. 57.

114 *See* S. AFR. CONST., 1996 § 9(3) (proscribing direct and indirect forms of unfair discrimination).

115 *The WLCT Matter* at para. 122; WLCT's heads of arguments at para. 336.

116 *The WLCT Matter* at para. 122; WLCT's heads of arguments at para. 337.

117 *The WLCT Matter* at paras. 76, 85.

118 Marriage Act 25 of 1961 § 2(1).

119 WLCT's founding affidavit at para. 81.2.

erty, which conflicts with the traditional and conservative Islamic law rule that the estates of spouses must be kept separate at all times.¹²⁰ Second, marriage officers are not permitted to register polygynous marriages,¹²¹ which is permissible under a traditional and conservative interpretation of Islamic law,¹²² and is practiced among South African Muslim men. Yet, the Department of Home Affairs claims that more than 100 *imāms* across South Africa were trained and registered as marriage officers through the previously discussed “Imām Project.”¹²³

Through an informal investigation conducted by the WLC of the implementation of the “Imām Project,” it appears that the Department of Home Affairs may have persuaded the *imāms* that they could overcome the aforementioned anti-Islamic impediments in two ways, namely a) by requiring parties to enter into antenuptial contracts to register their marriages as out of community of property without accrual, which is tantamount to maintaining separate estates, and b) that they could continue to perform polygynous Muslim marriages but need only register one of the marriages under the Marriage Act.¹²⁴ This means that subsequent polygynous Muslim marriages would not be legally recognized and the polygynous wives who are not party to the civil marriage would be without legal protection.

The WLC’s investigation also reveals that few of the *imāms* who are authorized to register civil marriages are in fact registering civil marriages.¹²⁵ Most of the *imāms* who are marriage officers insist that the parties conclude a marriage out of community

120 SCHACHT, *supra* note 34.

121 Marriage Act 25 of 1961 § 11(2); WLCT’s founding affidavit at para. 78.1.

122 PEARL, *supra* note 35, at 70. *See also* Qur’ān 4:3:

If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.

123 *Imams Graduate as Marriage Officers*, *supra* note 89.

124 WLCT’s founding affidavit at para. 101.

125 WLCT’s founding affidavit at paras. 79, 101.

of property without accrual.¹²⁶ As noted previously, the separate estates-type matrimonial property regime has a disparate impact on Muslim women. In fact, the Muslim Judicial Council (MJC) drafted a *pro forma* marriage contract that parties are required to sign before MJC *imāms* are willing to register a civil marriage.¹²⁷ In addition to requiring the parties to register a marriage out of community of property without accrual, the *pro forma* marriage contract requires women to waive their Islamic law rights as wives and their civil rights as spouses. For instance, under Islamic law, a wife may claim compensation from her husband for labor that she performs in the home or any contributions that she makes for which he is responsible under his spousal *nafaqa* obligation.¹²⁸ The *pro forma* marriage contract contains a clause that expects a wife to relinquish her rights to claim such compensation.¹²⁹ The *pro forma* marriage contract also requires the wife to surrender her civil rights under the Intestate Succession Act¹³⁰ and Maintenance of Surviving Spouses Act¹³¹ in the event that her husband predeceases her.¹³² Thus, the WLCT argued that the MJC's *pro forma* marriage contract is prejudicial to women.¹³³ In fact, it is arguably unconstitutional on the basis that it unfairly discriminates against Muslim wives on the grounds of sex and/or gender. Accordingly, the WLCT asked the Western Cape High Court to declare the MJC's *pro forma* marriage contract contrary to public policy and unenforceable at law.¹³⁴ However, the Court dismissed the claim on the basis that it could not properly interrogate the *pro forma* marriage contract since the relevant parties involved in the

126 WLCT's founding affidavit at paras. 101–02; Matrimonial Property Act 88 of 1984 § 2.

127 WLCT's founding affidavit at para. 101.9.

128 Ali, *supra* note 61, at 170.

129 Muslim Judicial Council *pro forma* marriage contract, clause D(ii). Attached as an annexure to the WLCT's founding affidavit.

130 81 of 1987.

131 27 of 1990.

132 Muslim Judicial Council *pro forma* marriage contract, clause E. Attached as an annexure to the WLCT's founding affidavit.

133 WLCT's founding affidavit at para. 105; Matrimonial Property Act 88 of 1984 § 2.

134 *The WLCT Matter* at paras. 39, 63; WLCT's founding affidavit at para. 26.

contract were not before the court.¹³⁵ Hopefully the WLC (or another not-for-profit organization) will consider proceeding with a separate claim against the MJC to have its *pro forma* marriage contract declared contrary to public policy and unconstitutional. The horizontal application of the South African Constitution makes it possible for a constitutional claim to be instituted by one private party against another.¹³⁶

Notwithstanding the Western Cape High Court's ruling on the MJC's *pro forma* marriage contract, the Court rejected the state's defense that Muslims can choose to register a civil marriage and could derive legal protection through that avenue for the following reasons.¹³⁷ First, the Court found that the option to register a civil marriage is not available to polygynous Muslim spouses since a civil marriage only affords legal recognition to *de facto* monogamous marriages.¹³⁸ Secondly, the Court observed that not all Muslim women in South Africa are aware that their Muslim marriages are not legally protected.¹³⁹ Thirdly, the Court noted that even when Muslim women realize that they need a civil marriage to access legal protections, unequal bargaining power between spouses could result in Muslim husbands refusing to enter into civil marriages, thereby preventing women from being able to exercise a choice to register a civil marriage.¹⁴⁰ Consequently, few South African Muslims avail themselves of the opportunity to enter into civil marriages, and the majority of South African Muslims, regardless whether they are in monogamous or polygynous marriages, still enter only into Muslim marriages.¹⁴¹ The Court therefore found that the civil marriage option does not provide an adequate solution for the challenges presented by the non-recognition of Muslim marriages.¹⁴² The Court held that "the

135 *The WLCT Matter* at para. 237.

136 Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 460 (1997).

137 *The WLCT Matter* at paras. 76, 85, 129.

138 *Id.* at para. 129.

139 *Id.* at para. 131.

140 *Id.* at para. 130.

141 WLCT's founding affidavit at para. 78.2.

142 *The WLCT Matter* at para. 129.

assessment of the constitutional obligation [to equality before the law, equal protection and benefit of the law, and to not be unfairly discriminated against] cannot be negated by the women’s choice not to register their marriages.”¹⁴³ The Court accordingly found that the right to equality, particularly the right to not be unfairly discriminated against, had been infringed.¹⁴⁴

In considering the second leg of the *Harksen* test—whether or not the infringement could be justifiably limited under section 36 of the Constitution¹⁴⁵—the Western Cape High Court accepted the WLCT’s contention that the state had not advanced any legitimate governmental purpose for infringing the equality provision.¹⁴⁶ The Court held that the state had failed to justify the unfair discrimination and found that continued non-recognition of Muslim marriages violates the right to equality.¹⁴⁷

b. Access to Courts and the Best Interests of the Child

Non-recognition of Muslim marriages also has an overlapping effect on the right to access to courts as contained in section 34 of the South African Constitution and a child’s right to have her or his best interests protected as entrenched in section 28 of the Constitution. Section 34 provides, “Everyone has the right to have

143 *Id.* at para. 134.

144 *Id.* at paras. 134–35.

145 S. AFR. CONST., 1996 § 36 provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

146 *The WLCT Matter* at paras. 57, 135.

147 *Id.* at para. 57.

any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” Section 28(2) provides, “A child’s best interests are of paramount importance in every matter concerning the child.”

As argued by the WLCT, the overlapping effect on the above two rights is caused by the preclusion of spouses in Muslim marriages from accessing a civil court to resolve disputes arising from their Muslim marriage and/or Muslim divorce relating to, among others, proprietary rights, *nafaqa*, and guardianship of, custody of, and access to minor children born of the Muslim marriage.¹⁴⁸ This especially has a disparate effect on Muslim women and children. For instance, as mentioned previously, Muslim women are unable to challenge adverse decisions emanating from Muslim tribunals, and, as previously noted by the WLCT, children born of only Muslim marriages do not enjoy judicial protection to ensure that their best interests are protected during the dissolution of their parents’ Muslim marriage.¹⁴⁹ The WLCT pointed out that dissolution of Muslim marriages through Muslim divorce often results in “maltreatment, evictions and economic hardships for women and children of Muslim marriages.”¹⁵⁰ Lack of judicial intervention to regulate the dissolution of Muslim marriages thus compounds the socioeconomic difficulties experienced by women and children as a result of non-recognition of Muslim marriages in South Africa.

In light of the above, the Western Cape High Court observed:

Muslim women are not able to access the system for purposes of dissolving their marriages and regulating consequences thereof... Vulnerabilities still exist, despite the protections that have been availed by the courts by extending consequences of different statutes to spouses in Muslim marriag-

148 *Id.* at para. 137.

149 *Id.* at para. 59.

150 *Id.*

es... [And] [c]hildren in Muslim marriages are... not provided with adequate protection as those in civil and customary marriages enjoy, upon dissolution of the marriage of their parents by way of divorce.¹⁵¹

Thus, the Court found that non-recognition of Muslim marriages violates sections 34 and 28 of the Constitution.¹⁵²

c. Dignity

Dignity is a founding value in the South African Constitution along with equality and freedom.¹⁵³ It is also entrenched in section 10 of the Constitution as a stand-alone right. The WLCT argued that “[t]o treat spouses in Muslim marriages as unworthy of protection of the law devalues, stigmatises and further marginalises this vulnerable minority group.”¹⁵⁴ In other words, non-recognition of Muslim marriages conveys the message that Muslim spouses are not of equal worth in relation to spouses whose marriages are lawfully recognized. This exacerbates the marginalization of an already marginalized minority community that has suffered historical discrimination on the basis of race and religion. Moreover, Muslim women suffer additional marginalization within the South African Muslim communities as a result of traditional and conservative interpretations and application of Muslim family law rules and practices that weigh against them. South African Muslim women therefore experience multiple marginalization because non-recognition of Muslim marriages increases their marginalization as marginalized members within a marginalized religious community. The Court thus held that continued non-recognition of Muslim marriages infringes against the right to dignity.¹⁵⁵

151 *Id.* at para. 139.

152 *Id.* at para. 179.

153 S. AFR. CONST., 1996 § 1(1). *See also* Daniels v. Campbell 2004 (5) SA 331 (CC) at paras. 54–55.

154 *The WLCT Matter* at para. 58.

155 *Id.* at para. 179.

The Western Cape High Court notably observed that the violation of the rights to equality, access to courts, best interests of the child, and dignity was caused by the continued non-recognition of Muslim marriages in South Africa and is thus systemic in nature.¹⁵⁶ In the words of the Court:

As seen through the cases, the non-recognition of Muslim marriages is historic, persistent and unfulfilled since the beginning of democracy. This is not a single instance, but rather a systemic failure by the State to provide recognition and regulation, potentially effecting millions of people around the country. Marriage concerns a plethora of issues, from status to property, involving a wide range of laws, which are complex and fundamentally important.¹⁵⁷

The above observation by the Western Cape High Court is significant in the context of the historical disadvantage suffered by the Muslim communities in South Africa as a result of their Muslim marriages not being recognized since their entry into the country during the seventeenth century. The religious discrimination experienced by South African Muslims also arises from the racial discrimination perpetrated against them during apartheid since most Muslims in South Africa were not classified “white” under apartheid. As the Constitutional Court has observed, “religious marginalization coincided strongly with racial discrimination, social exclusion and political disempowerment.”¹⁵⁸

The systemic discrimination caused by the continued non-recognition of Muslim marriages is perpetuated by the South African State’s delay in affording legal recognition to Muslim marriages, which has resulted in especially Muslim women having to experience unnecessary hardships that have not been suffi-

¹⁵⁶ *Id.* at para. 143.

¹⁵⁷ *Id.* at para. 180.

¹⁵⁸ *Daniels 2004 (5) SA (CC)* at para. 20 n.26.

ciently ameliorated by *ad hoc* judicial interventions over the last two decades.¹⁵⁹ The South African State claims that the delay is especially due to lack of consensus about the Muslim Marriages Bill within the Muslim communities.¹⁶⁰ In its capacity as *amicus curiae* in the consolidated application, the Commission on Gender Equality pointed out that lack of consensus regarding the Muslim Marriages Bill is insufficient as a reason not to enact legislation to recognize Muslim marriages when non-recognition of Muslim marriages results in a violation of rights against Muslim parties.¹⁶¹ Also, non-consensus as a reason for the state's delay is disingenuous since the state has enacted other pieces of legislation that were equally, if not more, contentious. For example, the call for the recognition of same-sex unions and recognizing a woman's right to choose to terminate her pregnancy elicited huge outcries from religious communities.¹⁶² Still, the South African State enacted the Civil Union Act, which recognizes same-sex unions, and the Choice on Termination of Pregnancy Act,¹⁶³ which gives effect to a woman's right to choose to abort her fetus during the first three months of pregnancy.¹⁶⁴ Furthermore, the state's claim that South African Muslims do not support the Muslim Marriages Bill appears to be inaccurate. As mentioned previously, the United Ulama Council of South Africa (UUCSA) indicated support for the Muslim Marriages Bill in the consolidated application.¹⁶⁵ At the same time, UUCSA advises that there are aspects of the first Muslim Marriages Bill, which were removed from the second Muslim Marriages Bill, that they would want to see reinserted into legislation seeking to rec-

159 *The WLCT Matter* at paras. 55, 184.

160 *Id.* at para. 22.

161 *Id.* at para. 1.

162 *Thousands Protest Against South African Gay Marriage Bill*, 365GAY.COM (Sept. 17, 2006), <https://web.archive.org/web/20070311053712/http://www.365gay.com/Newscon06/09/091606saf.htm> [<https://perma.cc/BX9Y-ZCMN>]; Sally Guttmacher et al., *Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act*, 24 INT'L PERSP. ON SEXUAL & REPROD. HEALTH 193 (1998).

163 92 of 1996.

164 Choice on Termination of Pregnancy Act 92 of 1996 § 2(1)(a).

165 *The WLCT Matter* at para. 100.

ognize Muslim marriages.¹⁶⁶ Yet, the contentious aspects of the second Muslim Marriages Bill are not insurmountable.¹⁶⁷ For instance, UUCSA expects the provision in the first Muslim Marriages Bill that enables opposed Muslim divorces to be adjudicated by a secular court comprising Muslim judges and assessors to be included in a final version of the Muslim Marriages Bill.¹⁶⁸ If it is unrealistic to expect only judges who identify as Muslim to adjudicate opposed matters arising from the Muslim Marriages Bill, given the small number of Muslim judges available in South Africa, there are creative ways to overcome this hurdle that could render an Islamically permissible solution.¹⁶⁹ For example, if a judge regardless of religious affiliation were to be guided by Islamic law experts sitting as assessors, the judgment would be informed by and thus rendered consistent with Islamic law. Yet, the South African State has not indicated a willingness to sit down with the relevant stakeholders in the South African Muslim communities to discuss and negotiate possible solutions that could potentially satisfy the interests of the affected parties. Consequently, the WLCT argued in the consolidated application that the delay on the part of the South African State to afford legal recognition to Muslim marriages is unreasonable.¹⁷⁰

Persuaded by the applicant's arguments, the Western Cape High Court found that by failing to afford legal recognition to Muslim marriages, the South African State failed to fulfill its obligations under sections 7(2) and 237 of the Constitution.¹⁷¹ To comply with its constitutional duties, the state would have to take reasonable and effective steps to ensure that the rights to equality, access to courts, best interests of the child, and dignity are complied with.¹⁷²

166 *Id.* at para. 22.

167 Waheeda Amien & Dhammamegha Annie Leatt, *Legislating Religious Freedom: An Example of Muslim Marriages in South Africa*, 29 MD. J. INT'L L. 527–28 (2014).

168 *The WLCT Matter* at para. 22.

169 Amien & Leatt, *supra* note 167, at 527–28.

170 *The WLCT Matter* at paras. 55, 94, 109.

171 *Id.* at para. 252.

172 *Id.* at para. 152.

The WLCT argued that the most reasonable and effective way for the state to meet its constitutional obligations would be for it to enact legislation that recognizes and regulates the consequences of Muslim marriages.¹⁷³ In opposing the WLCT application, the South African State relied on, among others, the following two arguments. First, enactment of legislation that recognizes and regulates Muslim marriages would infringe against section 15(1) of the Constitution, which protects the individual right to freedom of religion.¹⁷⁴ Second, the enabling nature of section 15(3) of the Constitution does not oblige the state to enact legislation to recognize and regulate Muslim marriages or any other religious or traditional marriage or personal and family law system.¹⁷⁵ The state's arguments, the WLCT's responses, and the Western Cape High Court's findings in relation to religious freedom are discussed below.

d. Freedom of Religion

It seems that the basis for the first leg of the South African State's argument that legislation codifying Muslim family law would infringe against the right to freedom of religion is that codification would presumably preclude South African Muslims from practicing their religion in the manner that they choose.¹⁷⁶ This leg of the state's argument is self-defeating. The only way that codification of a Muslim marriage and divorce could undermine freedom of religion is if the way in which Muslim family law is currently interpreted and applied within South African Muslim communities is inconsistent with the rights in the Bill of Rights.¹⁷⁷ As pointed out at the beginning of this Article, the right to freedom of religion is not absolute. The South African Constitution does not permit anyone to practice her or his religion in community with others in a manner that violates other rights in the Constitution, including gender and sex equality. In fact, the Constitutional Court

¹⁷³ *Id.* at para. 4.

¹⁷⁴ *Id.* at para. 61.

¹⁷⁵ *Id.* at paras. 77, 86.

¹⁷⁶ *Id.* at para. 107.

¹⁷⁷ S. AFR. CONST., 1996, ch. 2.

confirmed that freedom of religion “cannot be used to shield practices which offend the Bill of Rights.”¹⁷⁸ Thus, the WLCT argued that “religious practices in respect of divorce which violate the right to equality cannot be justified on the basis of the right to freedom of religion.”¹⁷⁹

The state’s argument against codification of Muslim family law appears to be an admission that the way in which Muslim family law is presently practiced conflicts with constitutional rights. This is at odds with one of the objectives of family law, which is to afford protection to the most marginalized members of a family.¹⁸⁰ In the context of Muslim family law, state intervention is necessary to ensure that the constitutional rights of the most marginalized members of the South African Muslim communities, namely women and children, are protected. It has been noted in this Article that judicial relief for parties negatively affected by the non-recognition of Muslim marriages, while helpful, has proven to be insufficient. Furthermore, as observed by the Constitutional Court in *Bhe v. Khayelitsha*,¹⁸¹ judicial intervention on a case-by-case basis is far from ideal because any changes to improve the position of marginalized parties is extremely “slow.”¹⁸² Thus, legislative intervention is required.

At the same time, the Western Cape High Court agreed with the second leg of the state’s argument that section 15(3) of the Constitution does not place an obligation on the state to enact legislation to recognize and regulate religious marriages including Muslim marriages or religious personal and family law systems.¹⁸³ Yet, the Court noted that the Constitution does not prevent the enactment of such legislation.¹⁸⁴ Indeed, the Court found that the systemic discrimination and rights violations arising from the

178 *Christian Educ. South Africa v. Minister of Educ.* 2000 (4) SA 757 at para. 26; *The WLCT Matter* at para. 61.

179 *The WLCT Matter* at para. 61.

180 *Khan v. Khan* 2005 (2) SA 272 (T) at para. 10.5.

181 2005 (1) SA 580 (CC).

182 *The WLCT Matter* at para. 112.

183 *Id.* at paras. 183–84.

184 *Id.*

continued non-recognition of Muslim marriages require the enactment of legislation to recognize and regulate the consequences of Muslim marriages.¹⁸⁵ In particular, the Court held that “legislation is the most reasonable and effective way of protecting the rights implicated.”¹⁸⁶

The WLCT also argued that failure to legislate Muslim marriages may be inconsistent with South Africa’s international and regional law obligations.¹⁸⁷ South Africa has ratified the main international and regional human rights instruments relating to women’s rights including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁸⁸ the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women’s Protocol),¹⁸⁹ and the Southern African Development Community Protocol on Gender and Development (SADC Protocol).¹⁹⁰ The aforementioned instruments oblige States Parties to ensure that women and men enjoy equal rights in marriage, in family relations, and upon dissolution of the marriage. Moreover, the regional protocols require States Parties to enact legislation that enables all marriages including religious marriages to be registered according to national laws.¹⁹¹ The

185 *Id.* at paras. 181, 183–84.

186 *Id.* at para. 188.

187 *Id.* at para. 70.

188 G.A. Res. 34/180 (Dec. 18, 1979). Ratified by South Africa in 1995. *South Africa’s Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women & 1995 Beijing Platform for Action Reporting Requirements: Commission on Gender Equality Briefing*, PARLIAMENTARY MONITORING GROUP (July 20, 2010), <https://pmg.org.za/committee-meeting/11736/> [<https://perma.cc/CVG7-QDVE>].

189 Adopted by the African Union on July 11, 2003. Ratified by South Africa in 2003.

190 Ratified by South Africa in 2011. *Advocacy Toolkit for Women in Politics: Using the SADC Protocol on Gender and Development as an Advocacy Tool*, U.N. ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN (n.d.), <http://www.ipsnews.net/publications/usingthesadcprotocolongender.pdf> [<https://perma.cc/9B6P-YNW8>].

191 Article 16(1) of CEDAW provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

Western Cape High Court interpreted the above international and regional obligations as requiring South Africa to enact legislation to recognize Muslim marriages.¹⁹² The international and regional instruments therefore fortify South Africa's domestic obligation to legislate Muslim marriages. In order for South Africa to effectively comply with its international, regional, and constitutional obligations, it has to enact legislation that not only recognizes Muslim marriages but also regulates the features and consequences of Muslim marriages within a human rights framework.

V. THE WLCT'S CLAIMS

In light of the aforementioned arguments presented by the WLCT, the latter put forth several claims. First, the WLCT asked the Western Cape High Court to grant a declaratory order that the South African State failed to fulfill its section 7(2) and 237 consti-

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- (a) The same right to enter into marriage;
 - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibilities during marriage and at its dissolution.

Article 6 of the Women's Protocol requires:

States Parties [to] ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. [States Parties] shall enact appropriate national legislative measures to guarantee that...every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized.

Article 8 of the SADC Protocol reads:

(1) States Parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage.

....

(2)(c) Legislation on marriage shall ensure that every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws.

....

(3)(b) States Parties shall enact and adopt appropriate legislative and other measures to ensure that where spouses separate, divorce or have their marriage annulled...they shall, subject to the choice of any marriage regime or marriage contract, have equitable share of property acquired during their relationship.

¹⁹² *The WLCT Matter* at para. 183.

tutional obligations by failing to enact and bring into operation “diligently and without delay” legislation recognizing and regulating Muslim marriages.¹⁹³ Second, the WLCT requested the Court to grant an order directing that the South African State prepare, initiate, enact, and bring into operation legislation that provides for the recognition and regulation of the consequences of Muslim marriages within twelve months of the date of judgment.¹⁹⁴ In opposing the latter claim, the South African State relied on the doctrine of separation of powers. The state argued that a direction from the Court (representing the judiciary as one arm of the state) instructing the executive and/or legislature (representing the two other arms of the state) to enact legislation to recognize and regulate Muslim marriages infringes against the doctrine of separation of powers.¹⁹⁵ By way of reply, the WLCT contended that the judiciary is under a constitutional obligation to ensure that the arms of state conduct themselves in a constitutionally compliant manner, failing which the Court is obliged to declare the conduct invalid and ensure that an effective remedy is provided.¹⁹⁶ The Western Cape High Court observed that an order for a legislative remedy would not necessarily dictate to the executive and legislature which form the legislation should take.¹⁹⁷ The Court took the view that the manner of recognition and regulation would remain within the purview of the legislature and executive.¹⁹⁸ Thus, the Court did not accept that an order for the enactment of legislation to recognize and regulate Muslim marriages would undermine the doctrine of separation of powers.¹⁹⁹

The South African State also argued that the relief sought by the WLCT would result in regulating fundamental features of Islamic law, which would undermine the doctrine of religious en-

193 *Id.* at para. 33.

194 *Id.*

195 *Id.* at paras. 81, 87, 90.

196 *Id.* at para. 71.

197 *Id.* at para. 188.

198 *Id.*

199 *Id.*

tanglement.²⁰⁰ Both the WLCT and UUCSA took the view that the doctrine of religious entanglement does not arise in the application under discussion because the Court was not being asked to adjudicate on any religious precepts, and the Muslim Marriages Bill had been agreed to by the mainstream Muslims in South Africa.²⁰¹ The Western Cape High Court did not pronounce on this issue. However, one could assume that since the Court granted the WLCT's primary relief for the enactment of legislation to recognize and regulate the consequences of Muslim marriages, it most likely did not support the state's view on the matter of religious entanglement. The Court's orders are discussed later in the Article.

Until the enactment of legislation to recognize and regulate the consequences of Muslim marriages, the WLCT asked that interim relief be provided in the form of a reading-in to the Recognition of Customary Marriages Act²⁰² to include Muslim spouses within the ambit of the Recognition of Customary Marriages Act.²⁰³ This was to ensure that women and children in Muslim marriages are not left unprotected pending the enactment of legislation to recognize and regulate Muslim marriages.²⁰⁴ The WLCT's second primary claim was supported by Esau and the Commission on Gender Equality (CGE).²⁰⁵ However, the CGE offered an alternative form of interim relief pending the enactment of legislation to recognize and regulate Muslim marriages. The CGE suggested that the Divorce Act should apply to the dissolution of Muslim marriages during the interim period and that words similar to those contained in sections 8(4)(b) and (c) of the Recognition of Customary Marriages Act²⁰⁶

200 *Id.* at paras. 80, 88.

201 *Id.* at paras. 72, 102.

202 120 of 1998.

203 *The WLCT Matter* at para. 36.

204 *Id.* at para. 202.

205 *Id.* at paras. 48, 111.

206 Recognition of Customary Marriages Act 120 of 1998 § 8(4), reads:

A court granting a decree for the dissolution of a customary marriage

....

(b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of

should be read into the Divorce Act.^{207,208} The aforementioned provisions of the Recognition of Customary Marriages Act require a court to consider all relevant factors in relation to the dissolution of a polygynous marriage and to make an equitable order that it deems just. The provisions also give the court discretion to order any person who the court believes to have sufficient interest in a matter to be joined in the proceedings. The latter order could enable an existing wife in a polygynous marriage to present her views to the court about the impending marriage.

In the alternative, the WLCT sought an order that the Marriage Act,²⁰⁹ Divorce Act, and Recognition of Customary Marriages Act be declared inconsistent with the aforementioned constitutional rights to the extent that they do not provide for the recognition and regulation of Muslim marriages.²¹⁰ Overlapping relief was also sought in the *Faro* application in which Faro asked for a declaratory order to enable Muslim marriages to be brought within the ambit of the Marriage Act or the common law definition of marriage.²¹¹ At the same time, the WLCT requested that a declaration of invalidity in respect of the Marriage Act, Divorce Act, and Recognition of Customary Marriages Act be suspended for a period of twelve months to afford Parliament the opportunity to correct the constitutional defects in the impugned legislation.²¹²

section 7 (4), (5), (6) or (7) and must make any equitable order that it deems just;

(c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings...

207 70 of 1979.

208 *The WLCT Matter* at paras. 113, 212.

209 25 of 1961.

210 *The WLCT Matter* at para. 35.

211 *Id.* at para. 41. Faro's initial application was considered in the Western Cape High Court in 2013. Her claim for a declaratory order that Muslim marriages be treated as valid under the Marriage Act or that the common law definition of marriage be extended to bring Muslim marriages within its ambit was suspended by the Court to afford the South African State an opportunity to report on the progress of the Muslim Marriages Bill. The *Faro* case was thus added to the consolidated application under discussion, in which its claim for a declaratory order that Muslim marriages be deemed valid was included. See *supra* note 3.

212 *The WLCT Matter* at para. 37.

VI. THE COURT'S ORDERS

The Western Cape High Court granted the WLCT's primary claims and declared that the South African State failed to fulfill its obligations under sections 7(2) and 237 of the South African Constitution. The Court ordered the state to prepare, initiate, introduce, enact, and bring into operation, diligently and without delay, legislation to recognize and regulate the consequences of Muslim marriages within twenty-four months from the date that judgment was handed down.²¹³

I have argued elsewhere that mere legislative recognition of Muslim marriages is not sufficient to ensure protection for women's rights. Rather, comprehensive regulation of the features of a Muslim marriage and divorce is required, not only to protect freedom of religion but also to provide appropriate protection for women's rights.²¹⁴ It is therefore heartening that the Western Cape High Court found that "[c]omprehensive legislation is required because it would provide effective protection of Muslim marriages concluded in terms of the tenets of Islamic law, whilst giving expression to Muslim persons' rights to freedom of religion."²¹⁵

If Muslim family law was practiced within South African Muslim communities in a manner that was consistent with gender and sex equality, there would be no need for legislative intervention to recognize and comprehensively regulate the features of a Muslim marriage and divorce. Comprehensive regulation of the features of Muslim family law will ensure that the Muslim identity of the marriage and divorce remain intact and not be assimilated into the common law identity of a civil marriage. Comprehensive regulation will further bring the specific features of Muslim family law into the judicial domain where gender-discriminatory rules

213 *Id.* at para. 252.

214 Amien, *supra* note 73, at 381–84; Amien, *supra* note 77, at 121.

215 *The WLCT Matter* at para. 184.

and practices can be held accountable to human rights standards in the public sphere.

Notwithstanding the Court's indication that comprehensive recognition and regulation of Muslim marriages is needed, as mentioned previously, it was not inclined to dictate to the executive and legislature which form codification should take.²¹⁶ In this respect, the Court arguably guarded against infringing against the doctrine of separation of powers. However, the Court's reluctance to inform the manner of legislative intervention for the recognition and regulation of Muslim marriages means that the South African State can continue to choose not to enact the Muslim Marriages Bill. It would be a pity if the state ignored the rationale of the Court underpinning the aforementioned order that comprehensive regulation in addition to recognition of Muslim marriages is the only way to afford sufficient protection for the human rights of Muslim women. As outlined previously, any kind of legislation that does not purport to regulate the features of a Muslim marriage and divorce will create fertile ground for the violation of women's human rights.

The Court did not grant the WLCT's alternative claims or its claim for interim relief pending the enactment of legislation to recognize and regulate the consequences of Muslim marriages. Instead, guided by the CGE's claim for interim relief, the Court ordered that in the event that the state failed to meet its twenty-four-month deadline, interim relief would be afforded to enable Muslim marriages to be dissolved through the Divorce Act.²¹⁷ In other words, should the state not enact legislation within twenty-four months of the judgment being handed down, Muslim parties would be able to access the Divorce Act to have their marriages dissolved. The Court presumably granted the CGE's claim for interim relief because it considers divorce to be the main area where the judiciary has not yet provided relief to Muslim par-

²¹⁶ *Id.* at para. 185.

²¹⁷ *Id.*

ties.²¹⁸ This is not entirely accurate. Muslim women are certainly vulnerable at the point when the Muslim marriage terminates. However, their vulnerability is not confined to divorce. The fact that their Muslim marriages are not legally recognized and regulated also makes them vulnerable to discriminatory Muslim family law rules and practices that operate within marriage.

It is unclear why the Court deemed it necessary to only make the interim relief possible after the expiration of the twenty-four-month deadline. The challenges that Muslim women face in having their Muslim marriages dissolved exist presently, which is why the CGE asked that the interim relief be afforded pending the enactment of legislation to recognize and regulate Muslim marriages. The Court's order will leave Muslim women without protection for a further two years from the date of judgment, and this could be extended should the state succeed in getting the deadline extended further.

It is also unclear how the Court envisages the interim relief to be applied in the absence of having granted the WLCT's alternative claim that the Marriage Act, Divorce Act, and Recognition of Customary Marriages Act be declared unconstitutional and that Parliament be afforded an opportunity to amend the aforementioned legislation to include Muslim marriages within their ambit. In other words, for the Divorce Act to apply to the dissolution of Muslim marriages, the latter must be deemed to be lawful. In the absence of legislation that recognizes Muslim marriages, how can they be deemed to be lawful without existing marriage legislation being appropriately amended or the common law definition of marriage being extended to include Muslim marriages?

Even if Muslim marriages are deemed lawful after the expiration of the twenty-four-month deadline, dissolution of the marriage by way of the Divorce Act will still not solve the difficulties that Muslim women experience in accessing Muslim divorce. In fact, the Western Cape High Court indicated that in applying the provisions of the Divorce Act to the dissolution of a Muslim

218 *Id.* at paras. 142, 225.

marriage, the judiciary “would need to be sensitive to the requirements of Islamic law.”²¹⁹ While this may not negatively affect minor children born of the Muslim marriage because the principle of the best interests of the child will likely outweigh religious considerations that could be adverse to the interests of the child, it could very likely militate against the interests of Muslim women. For example, in accordance with a traditional and conservative interpretation of Islamic law, the marriage could be deemed to be out of community of property without accrual. Also, while a civil divorce may be granted, Muslim women could still experience difficulty in obtaining a Muslim divorce and would therefore not be able to remarry according to Islamic law. In fact, section 5A of the Divorce Act gives the court discretion to not grant a civil divorce if a religious divorce has not been obtained.²²⁰ Section 5A could thus have a disparate impact on a Muslim woman if she is seeking divorce and her husband and/or the ‘*ulamā*’ are unwilling to grant her a religious one.

CONCLUSION

The need for legal recognition of Muslim marriages in South Africa is patently evident. Without legal recognition of Muslim marriages, marginalized members within Muslim communities, namely women and children, are left without legal protection. In particular, this paper demonstrates that non-recognition

219 *Id.* at para. 229.

220 Divorce Act § 5A, reads:

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

of Muslim marriages in South Africa results in the privatization of gendered oppression of Muslim women. A constitutionally permissible solution to the challenges presented by non-recognition of Muslim marriages is provided by the South African Constitution itself, which enables legislative intervention to afford legal recognition to, among others, Muslim marriages.

Yet, legal recognition alone will not provide sufficient protection for women's human rights because gender-discriminatory Muslim family law rules and practices will continue to persist within the private sphere of the South African Muslim communities. Comprehensive regulation is therefore necessary to ensure that rules and practices related to Muslim marriages and divorces that negatively affect women are transferred into a public domain that is informed by a human rights framework.

The necessity for comprehensive regulation of the consequences of Muslim marriages in addition to legal recognition of those marriages was confirmed by the Western Cape High Court in the WLCT matter. This confirmation defines the groundbreaking nature of the judgment. While the South African judiciary in several cases that were decided prior to the WLCT matter acknowledged the need for legal recognition of Muslim marriages, none identified the need for comprehensive regulation of the features of Muslim marriages. The groundbreaking feature of the judgment is also attributed to the fact that this was the first case in the history of South Africa that has directed the South African State to enact legislation to recognize and regulate the consequences of Muslim marriages.

Unfortunately, the ground-breaking effect of the judgment is limited by the Court having left the manner of recognition open to the discretion of the South African State, which could result in the enactment of a single marriage act or omnibus or umbrella marriage act. Should the aforementioned pieces of legislation not incorporate the Muslim Marriages Bill or fail to comprehensively regulate the features of Muslim marriages and divorce, it could enable gendered discrimination arising from traditional and conservative interpretations and application of Muslim family law

rules and practices to be maintained in the South African Muslim communities. The same could be said of other religious and customary marriages. The Court's failure to implement some form of suitable interim relief pending the enactment of legislation to recognize and regulate Muslim marriages is a further limitation on the positive potential of the judgment. Until legislation is in fact enacted, Muslim women are left without any legal protection and their rights to equality, access to courts, and dignity will continue to be infringed. Similarly, children born of Muslim marriages will continue to be denied the constitutional protection that is encased in the principle of the best interests of the child.