A COMPARATIVE EXPOSITION OF ISLAMIC LAW RELATING TO THE LAW OF HUSBAND AND WIFE

by

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DECLARATION

I,

RAZAANA DENSON

do hereby declare that

A COMPARATIVE EXPOSITION OF ISLAMIC LAW

RELATING TO THE LAW OF HUSBAND AND WIFE

is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

Signed on this the 1st day of November 2017 at Port Elizabeth.

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RAZAANA DENSON

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GLOSSARY

Ahl al-kitab:	"People of the book". The *Quranic* term for people such as Christians and Jews who followed an earlier holy scripture.
Ahliyyah:	Legal capacity.
Allah:	God.
Al-Azhaad (The Confederates):	Chapter in the Quran.
Al-Hadaanah:	Custody.
Al-Maa'idah (The Table Spread):	A chapter in the Quran.
Al-Talaaq (The Divorce):	A chapter in the Quran.
An-Nisa (The Women):	A chapter in the Quran.
An-Noor (The Light):	A chapter in the Quran.
Aqd-un-nikah:	Marriage contract.
Aqeedah:	Islamic creed.
Arkan:	Pillars of Islam.
As-salat:	Ritual prayers proceeding in a fixed and detailed order of words and movements.
Barakah:	Blessing.
Ba'in:	Irrevocable.
Baytul mal:	Public treasury.
Dhil-Hijja:	Last month of the Islamic lunar calendar.
Elaa:	When the husband swears that he will not have sexual intercourse with his wife, either for an unrestricted period or for more than four months.
Faasiqoon:	Rebellious or disobedient.
Faskh:	Formal judicial rescission of a Muslim Marriage.
Fiqh:	Islamic jurisprudence.
Hadd:	Punishment.
Hadeeth:	The traditions of the Prophet (PBUH) represented in his sayings and deeds as well as his tacit approval.
Hanafi:	School of Islamic jurisprudence.
Haraam:	Unlawful.
Hilalah:	Intervening marriage.
Ibadah:	Worship.
Iddah:	Period of waiting which a widow or divorcee observes.

Ijab:	Proposal or declaration.
Ijma:	Consensus or agreement. The third most important source of Islamic law, where it denotes the unanimity of the practice and belief of all, part of, and the total community of the believers.
Imam:	An Imam is a religious scholar who teaches the faithful about the *Quran*, and leads them through their prayers in a mosque.
Islam:	Submit to the will of God.
Kaafiroon:	Non-believer.
Kitabiyyah:	A non-Muslim woman who believes in a revealed religion.
Kinaayah:	Ambiguous terms used in a divorce.
Khutbah:	Sermon delivered by an Imam.
Khula:	Termination of the marriage by the husband where he accepts compensation from his wife for freeing her from the marriage.
Khitba:	Betrothal.
Li'an:	Dissolution of a marriage whereby one spouse testifies under oath that the other has committed adultery and the latter in turn, and also under oath, testifies to the contrary.
Mahr:	Dower.
Mahr-mithl:	Dowry according to the social position of the wife's family
Mahr mua'jjal:	Prompt dowry.
Mahr muwajjal:	Deferred dowry.
Mithaaq:	Solemn covenant or agreement between the husband and wife.
Mirath:	Inheritance.
Mubara'ah:	Form of divorce by mutual agreement of the spouses.
Mufti:	Expert on Islamic law.
Mukallaf or bulugh:	Attainment of puberty.
Muslim:	A person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad (PBUH) as the final prophet and who has faith in all the essentials of the religion of Islam.
Mushrik:	Idolator.
Mustahab:	Commendable acts.

Mustahaadhah:	Refers to a woman who experiences menstruation which continues for longer than the normal period of menstruation, or to a person who experiences irregular cycles of menstruation**.**
Mut'ah:	Indemnity payable in certain cases of repudiation; conciliatory gift.
Nafaqah:	Maintenance.
Nasab:	Relationship by consanguinity.
Nikah:	Joining of a man and woman in marriage.
Qabul:	Acceptance or consent.
Qadi:	Judge who administers the *Shari'a*.
Qiyas:	Literally to compare, analogical deductions or logical reasoning based on the primary sources and ijma.
Quran:	Holy book of Islam, which Muslims consider to be the literal word of God.
Raj'i:	Revocable.
Ramadan:	Ninth month of the Islamic lunar calendar; holy month of fasting.
Sahih:	Sound, authentic, genuine.
Sahih al Bukhari:	It is the title of the book of Hadith that has been authorised by Imam Muhammad Al-Bukhari.
Shafi'i:	School of Islamic jurisprudence.
Shaitaan:	Satan.
Sareeh:	Explicit terms used in a divorce.
Shari'ah:	Islamic Law.
Shiqaq:	Dispute.
Sunnah:	All the traditions and practices of the Prophet (PBUH) that have become a model to be followed by Muslims. Pre-Islamic customary law or tradition.
Surah:	The Qur'an is divided into a hundred and fourteen chapters. Every chapter is referred to as a surah.
Ta'azir:	Disgracing an offender who was found guilty of a shameful criminal act.
Tafriq:	Divorce by judicial intervention.
Tahlil:	This was where the husband issued an irrevocable divorce and wanted to remarry his wife. He entered into an agreement with a third party to the effect that he would marry the woman

	and divorce her after having had sexual intercourse with her.
Talaq:	"To set free", dissolution of marriage, divorce.
Talaq al-bid'a:	Innovated divorce not according to the rules laid down by Prophetic tradition; commonly known as the "three-in-one", "triple" or instant divorce.
Talaq al-ba'in:	Irrevocable divorce.
Talaq al–raji:	Revocable divorce.
Talaq al-Sunna:	Divorce according to the rules laid down in the traditions of Prophet Muhammad.
Talaq al-tafwid:	Delegated right of divorce initiated by the wife.
Taqliq:	Prenuptial agreement.
Taqwa:	Piety and righteousness**.**
Ulama:	Learned male religious scholars (theologians).
Wakil:	Representative.
Wali:	In marriage a wali is a legal guardian who is specified in terms of Shari'ah to marry off a certain woman.
Walima:	The marriage feast.
Zaalimoon:	Polytheists and wrongdoers.
Zina:	Signifies either adultery or fornication.

ACRONYMS

Commission on Gender Equality (CGE)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

European Convention on Human Rights and Fundamental Freedoms (ECHR)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Multilateral Motor Vehicle Accident Fund (MMF)

Muslim Arbitration Tribunal (MAT)

Muslim Judicial Council (MJC)

Muslim Marriages Bill (MMB)

Muslim Personal law (MPL)

Peace Be Upon Him (PBUH)

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

Prophet Muhammad Peace Be Upon Him (PBUH)

Recognition of Religious Marriages Bill (RRMB)

South African Law Commission (SALC)

South African Law Reform Commission (SALRC)

Supreme Court of Appeal (SCA)

United *Ulama* Council of South Africa (UCSA)

United *Ulama* Council of South Africa (UUCSA)

Women's Legal Centre (WLC)

CONTENTS

SUMMARY

Notwithstanding the enactment of the Constitution of the Republic of South Africa, 1996 the recognition of systems of religious, personal or family law for certain cultural and religious groups has either been limited or is virtually non-existent. To this extent, marriages concluded in terms of Islamic rites do not enjoy the same legal recognition that is accorded to civil and customary marriages. Non-recognition of Muslim marriages means there is no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage, or any orders that are made by the *Ulama*, thereby creating a perilous situation that has dire consequences for spouses to a Muslim marriage.

Despite South Africa's commitment to the right of equality and freedom of religion, the courts have acknowledged that the failure to grant recognition to Muslim marriages on the ground of gender equality, has worsened the plight of women in these marriages, in that they were left without effective legal protection, should the union be dissolved either by death or divorce. Whilst the *ad hoc* recognition of certain consequences of Muslim marriages by the judiciary has gone a some way to redress the plight of Muslim women, and provided relief to the lived realities of Muslim women, these decisions are in fact contrary to the teachings and principles of Islam and therefore problematic for Muslims. These court decisions, that are in conflict with Muslim Personal Law (MPL), will ultimately lead to the emergence of a distorted set of laws relating to Muslim family law. This is a real cause for concern.

This thesis is written from an Islamic legal theory perspective, which is contrary to western legal theory, as the latter adopts a human rights perspective. The basis of modern western democratic societies is a constitution that is premised on human rights and equality and which advocates the notion that the rights contained in the constitution reign supreme in all matters, religion included. Therefore, where a conflict arises in respect of the freedom of religion and the right to equality, western ideologies and philosophies dictate that the latter trump the former. This would inevitably mean that religious law would have to be adapted and ultimately amended so that it is in compliance with the constitution. From an Islamic religious perspective,

this is not feasible and practicing Muslims will find this untenable. This may be legally uncomfortable in South Africa as a constitutional democracy but it is the reality for the adherents of the Muslim faith.

A draft Muslim Marriages Bill (MMB) was released in 2003, and an amended MMB was tabled in Parliament in 2010. Both MMBs propose the legal recognition and regulation of Muslim marriages in South Africa. However, the two major issues delaying the enactment of the MMB into legislation are, firstly, whether or not the MMB would pass constitutional muster and secondly, the lack of agreement in the Muslim community on whether the MMB is *Shari'ah* compliant. Despite the largely consultative process that the MMBs underwent the legislative attempts to enact the MMB into legislation has not been successful. This thesis seeks to provide a possible solution whereby legislation regulating MPL law can be implemented in South Africa, notwithstanding the apparent conflict existing between MPL and the rights contained in the Bill of Rights. Notwithstanding the preference shown by the legislature to enact the MMB into legislation which will grant recognition to Muslim marriages, it is submitted there is a need for the legislature to rethink the approach that has to date been adopted. To this extent, it is submitted that the legislature should reconsider granting recognition to Muslim marriages by enacting legislation that takes the form of general legislation where state recognition is granted to all religious marriages, whether it be Muslim, Hindu or Jewish marriages. General legislation would mean that the state would require the marriage to be registered. However, the prescribed requirements, formalities and the consequences of the marriage would be determined by the chosen religious system of the spouses.

On a national level a comparative analysis between Islamic law and the South African legal system, relating to the law of marriage is conducted. For the comparative analysis on an international level the law of marriage in England and Wales has been chosen. South Africa and England and Wales share a commitment to human rights and have adopted various approaches in respect of accommodating the application of Islamic law. Furthermore, an internal pluralism exists within the Muslim communities in South Africa, England and Wales as the majority of Muslims in these countries have to varying degrees developed diverse strategies to ensure compliance with Islamic law, and as well as South African and English law.

The manner in which MPL is granted recognition needs to be given careful consideration as the implementation of this legislation will only be successful if it is compatible with the rulings and teachings of Islamic law. Caution should therefore be exercised to ensure that the fundamental aspects of MPL are not compromised as this will result in the legislation not being *Shari'ah* compliant and there will be no buy-in from the Muslim community, with the consequence that this legislation will be mere paper law.

CHAPTER 1
INTRODUCTION

1 1 BACKGROUND

As a result of the enactment of the Constitution,[1] South Africa entered into a new era of constitutional development whereby it committed itself to an open and democratic society based on freedom and equality.[2] As a result all South Africans are guaranteed basic human rights and freedoms.[3] For the first time in the history of South Africa, there is a Constitution that contains a Bill of Rights where equality and freedom underpin its very foundation. Section 7(1) describes the Bill of Rights as the cornerstone of democracy that affirms the democratic values of human dignity, equality and freedom.[4] The achievement of the ideals set out in the Constitution essentially involves the eradication of all forms of inequality, whether it be based on, for example race, gender, marital status, religion or sexual orientation.[5]

The State is therefore placed under an obligation to respect, protect and fulfil all the rights contained in the Bill of Rights. The theme of an open and democratic society, based on freedom and equality, is advocated throughout the Bill of Rights.

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1 Constitution of the Republic of South Africa, 1996.

2 S 1 of the Constitution. See also Sinclair assisted by Heaton *The Law of Marriage* (1996) Vol 1 4.

3 S 7 of the Constitution. See also Albertyn & Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 *SAJHR* 149.

4 Woolman & Bishop *Constitutional Law of South Africa* (loose-leaf) (2014) 35-1.

5 S 9 of the Constitution states:

> "(1) Everyone is equal before the law and has the right to protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) 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.
>
> (4) No persons may unfairly discriminate or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Given South Africa's long history of institutionalized discrimination, oppression and subjugation of certain groups in society, it is hardly surprising that equality occupies a prominent place in the South African Constitution. In reaction to this long history of prejudice, exclusion and discrimination, the Constitution contains an elaborate equality clause in section 9.[6] In order to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken. Apart from the equality clause in section 9, courts and tribunals are also encouraged to "promote the values that underlie an open and democratic society based on human dignity, freedom and equality" elsewhere in the Bill of Rights.[7]

The enactment of the Constitution with its Bill of Rights has impacted significantly on South African family law, since the Constitution makes provision for *inter alia*, the right to freedom of religion, conscience, thought, belief and opinion;[8] the right to culture;[9] the right to equality;[10] and the right to dignity.[11] Of particular relevance for the purposes of this thesis is section 15 of the Constitution that grants "everyone the right to freedom of conscience, religion, thought, belief and opinion." Included in the right to religious freedom is "the right to hold religious beliefs, to propagate religious doctrine and to manifest religious belief in worship and practice".[12] Section 15(1) appears to grant to those who wish to be married in terms of their religion the freedom to do so because it

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7 Ss 36(1) and 39(1)(a).

8 S 15.

9 S 30.

10 S 9.

11 S 10.

12 Smith "Freedom of Religion under the Final Constitution" 1997 *SALJ* 217 219.

involves a decision based on conscience, thought, belief, opinion and religion.[13] This thesis is focussed on this group.

In terms of section 15(3)(a) of the Constitution, provision is made for legislation recognizing marriages or systems of religious, personal and family law that would include legislation pertaining to Muslim Personal Law (MPL). Although section 15 would allow parties to enter into marriages in accordance with Muslim rites, these marriages and the consequences flowing therefrom do not enjoy the same protection that is accorded to civil and customary marriages.[14] This seems to be contrary to the provisions of section 15 as the State is required to act fairly and equitably in its dealings with the various religions in South Africa.[15] Although the Constitution allows the State to support religious observances, it is not permitted to act inequitably.[16] The Constitution does not allow the explicit endorsement of one religion over others, as this would amount to a threat to the free exercise of religion, and when governmental prestige, power and financial support are placed behind a particular religious system, the result is that religious minorities are indirectly forced to conform to the religion officially approved by the Government.[17] The Constitution requires the legislature to refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of the right to freedom of religion.[18]

In this respect Sachs J,[19] in the case of *S v Lawrence; S v Negal; S v Solberg* commented as follows:

> "The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose beliefs, grant privilege to impose advantages on adherents of any particular beliefs, require conformity in matters

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13 See also Currie & De Waal *Bill of Rights Handbook* (2005) and Rautenbach *Rautenbach-Malherbe Constitutional Law* (2012) for a discussion on s 15 of the Constitution.

14 See para 4 3 of this thesis.

15 See para 4 6 1 of this thesis.

16 *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) at 1217A.

17 *S v Lawrence; S v Negal; S v Solberg supra* 1216G-H.

18 *S v Lawrence; S v Negal; S v Solberg supra* 1218B-C.

19 *S v Lawrence; S v Negal; S v Solberg supra* 1226B-C.

simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs."

Notwithstanding the fact that South Africa is a country rich in cultural diversity, and despite section 15 of the Constitution, the recognition of systems of religious, personal or family law for certain cultural and religious groups has either been limited or is virtually non-existent. Recognition has, however, been granted to customary marriages in terms of the Recognition of Customary Marriages Act[20] despite the fact that customary law can similarly be shown to be in conflict with section 9 in terms of its patriarchal structure[21] and due to the fact that customary marriages are potentially polygynous. The South African Law Commission (SALC) in its report on customary marriages[22] stated that the principles of equality and non-discrimination are of particular relevance as traditionally the issue of the constitutionality of the recognition of customary marriages boiled down to a conflict between the constitutional values of culture and gender equality. An argument advanced for the recognition of customary marriages was that sections 9(3) and (4) of the Constitution enshrined the right against unfair discrimination on the basis of culture. Furthermore, section 30 of the Constitution affords everyone the right to participate in the cultural life of his or her choice, and section 31(1) furthermore provides that persons belonging to a cultural community may not be denied the right to enjoy their culture.[23]

The recognition of customary law does not only constitute a legal issue, but clearly also involves cultural issues. To this extent, it has been argued that customary marriages should be recognized as it forms part of the culture of the indigenous population of South Africa.[24] The problem faced by the SALC was that certain elements of the culture of indigenous law seemingly discriminated against women. The fundamental question facing the SALC was, whether in a constitutional dispensation that upholds equality and non-discrimination, it would be appropriate to grant legal recognition to a

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20 120 of 1998.

21 Traditionally, it is far more difficult for a woman to obtain a divorce, men represent the family in dealings with the outside world and women are deemed to have no rights over their children. This position has been changed by the Recognition of Customary Marriages, Act 120 of 1998.

22 *Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* Project 90 (August 1998).

23 These two rights may, however, not be exercised in a manner inconsistent with any provision of the Bill of Rights.

24 Cronje and Heaton *South African Family Law* (1999) 238.

marriage that allows polygyny.[25] The fact that only men were allowed to practice polygyny,[26] whereas females could not practice polyandry, was regarded as being incompatible with the equality clause as contained in section 9 of the Constitution.[27] The result is that there is no formal equality insofar as polygamy is concerned.[28] Dlamini[29] argues that the mere fact that polygyny permits the man to have more than one wife, does not necessarily mean that women would want to have more than one husband, or that it would necessarily be in the interests of women to have more than one husband, as this would impose an impossible burden on a woman. Dlamini furthermore submits that it should not be assumed that polygyny holds no benefits for women, as it provides a valuable social function.[30] He further argues that polygyny is aimed at protecting women in the sense that all women are regarded as the man's wife and therefore they have a certain legal status, whereas a mistress has no right or status emanating from the relationship.[31]

Dlamini then proceeds to list the various examples of benefits that polygamy might offer as, namely, sharing of domestic and farm work, companionship, the reduction of sexual demands on each wife, promotion of independence through freeing wives to engage in economic activities and to join self-help groups, reduction of the divorce rate, women who might otherwise remain unmarried are legally absorbed into a domestic unit and a man who might be tempted to commit adultery and thereby risk the breakdown of his marriage, may instead contract another valid union.[32]

In deciding whether the recognition of a customary marriage is inconsistent with the Constitution, the SALC stated that to determine whether a legal rule or institution

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25 SALC *Report on Customary Marriages* at 84.

26 Polygyny refers to the practice of a husband having more than one wife. Polyandry refers to the practice of a wife having more than one husband. Polygamy simply means a plurality of husbands or wives. Polyandry is allowed in certain African tribes who practice customary law. For example, Queen Modjadji or as she is popularly known the "Rain Queen" is allowed to marry numerous women. See Mokotong & Monnye "A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill: Distortion of Traditional Customary Marriage" 2013 (2) *Speculum Juris* 78 90.

27 SALC *Report on Customary* Marriages at 86.

28 *Ibid*.

29 Dlamini "The Ultimate Recognition of the Customary Marriage in South Africa" 1999 *Obiter* 14 20.

30 *Ibid*.

31 Dlamini 1999 *Obiter* 21.

32 *Ibid*.

constitutes an infringement of the constitutional right to equality, often leads to a balancing of interests, that necessarily entails a consideration of broader social, political and economic issues.[33] In this regard, the argument that polygyny prejudices women had to be weighed against the claim that it performed valuable social functions. [34] The SALC submitted that while the Constitution upholds non-discrimination, it also provides for the recognition of cultural rights, and that the customary marriage forms part of the African culture, to which black people have a right. The SALC also submitted that, if recognition of customary law is to be something more than an empty gesture towards the African cultural tradition, the Bill of Rights has to be construed in a manner that a set of western values does not become dominant.[35] Despite the fact that the present constitutional dispensation is largely based on western values, the SALC submitted that this did not mean that African values should be completely discarded.[36] The Constitution should be regarded as an honest attempt to merge both western and African values. The SALC also submitted that judging from the emerging constitutional jurisprudence[37] on issues of culture, customary law and religion, the courts are not prepared to strike down a customary practice merely because it is controversial or is under attack from various interests groups.[38]

Based on its findings, the SALC made the recommendation that customary marriages should be granted legal recognition, and that customary marriages should continue to be potentially polygynous, as it would be difficult to enforce a prohibition against polygyny. The recommendations of the SALC culminated in the enactment of the Recognition of Customary Marriages Act, 120 of 1998. Section 2 of the Act grants full legal recognition to monogamous and polygynous customary marriages regardless of when they were concluded. Before the Recognition of Customary Marriage Act, customary marriages were also regarded as being invalid because they permitted polygyny. As in Muslim marriages, this rule applied irrespective of whether or not the husband had in fact taken more than one wife or envisaged taking more than one wife.

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33 SALC *Report on Customary Marriages* at 87.

34 *Ibid*.

35 SALC *Report on Customary Marriages* at 24. For example, in the former Transvaal, polygyny and *lobolo* were deemed to be "uncivilized". As a result, the courts bastardized almost the entire native population, depriving practically every native father of guardianship or other rights to his children.

36 SALC *Report on Customary Marriages* at 24.

37 For example, *Mthembu v Letsela & Another* 2000 (3) SA 867 (SCA).

38 SALC *Report on Customary Marriages* at 91.

Although customary marriages are based on custom, and in addition there are more customary marriages than Muslim marriages, granting recognition to customary marriages and not to Muslim marriages, is tantamount to discrimination. There is no reason for accepting the arguments for customary marriages but not Islamic marriages. It is submitted that Muslim marriages should be granted legal recognition in accordance with the principles of *Shari'ah* notwithstanding the fact that this is not in line with the mainstream view that regards Islamic marriage law as being in conflict with gender equality.

Historically, the reasons for non-recognition of Muslim marriages were twofold: firstly, Muslim marriages are potentially polygynous and are therefore regarded as being contrary to public policy; and secondly, Muslim marriages lack validity due to the fact that they are not solemnized by a designated marriage officer as required in terms of the Marriage Act 25 of 1961.[39] Furthermore, in the light of the enactment of section 9 of the Constitution, Heaton & Kruger[40] as well as Roodt[41] argue that Muslim marriages in their present form should not be granted legal recognition, because certain elements of Muslim marriages discriminate unfairly against women on the basis of sex and gender equality, as well as their right to dignity.[42] For example, the fact that the man only is allowed to practice polygyny, whereas the wife is not afforded the liberty of taking more than one husband at a time, is seen to violate a Muslim woman's right to sex and gender equality.[43] Another example is that Islamic law (*Shari'ah*) relating to marriage is patriarchal in nature. In other words, the husband is the head of the household and the wife is expected to obey him.[44] In the light of the discussion of customary marriages, these arguments seem tenuous.

Apart from polygyny and the patriarchal nature of Islamic law, there are also differences between men and women. These differences are highlighted in chapters two and three. Examples of these differences can be listed as namely, the husband has the sole

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39 Heaton & Kruger *South African Family Law* (2015) 241.

40 Heaton & Kruger *South African Family Law* 247.

41 Roodt "Marriages under Islamic Law and Patrimonial Consequences and Financial Relief" 1995 *Codicillus* 50 57.

42 Heaton & Kruger *South African Family Law* 247.

43 See para 4 6 4 4 of this thesis.

44 See para 2 6 1 1 2 of this thesis.

responsibility to provide maintenance to his wife during the subsistence of the marriage, the husband has the unilateral right to divorce his wife and only the woman is required to observe the period of *iddah* where the marriage is terminated either through divorce or death. Notwithstanding these differences and whilst acknowledging that these differences may offend gender equality if viewed in terms of western ideology, the question is ultimately whether changes to Islamic law can be effected to bring it in line with the Constitution without changing the substance of Islamic law and whether these changes are necessary before recognition is granted to MPL. These issues are addressed in chapter four and six of the thesis.

Notwithstanding the arguments submitted above, cognizance must be given to the fact that the non-recognition of Muslim marriages effectively means that despite the fact that the parties to a Muslim marriage may regard themselves as married, there is no legal connection between them.[45] Originally, a further consequence of non-recognition of Muslim marriages was that children born of the marriage were regarded as children born of unmarried parents.[46] Therefore, the father did not automatically exercise parental rights and responsibilities over the children born where the marriage was concluded in terms of Islamic rites. This was in direct conflict with the position in Islamic law in terms of which the father enjoys parental rights and responsibilities over his children. The enactment of the Children's Act[47] has remedied this situation as in terms of the definition of marriage, a religious marriage is included.

Non-recognition of Muslim marriages has dire consequences for the parties to the marriage, more so for women who are parties to Muslim marriages, as in most cases they are left without adequate legal protection, where the marriage is dissolved either by death or divorce. This should change as provision is made in terms of section 15 of the Constitution for freedom of religion. It is, therefore, submitted that when the question is posed as to what should weigh heavier, the right to equality or freedom or religion, the latter should take preference where parties voluntarily and with informed consent submit to adhering to the tenets of Islam.

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45 The consequences of non-recognition of Muslim marriages are discussed in para 4 3 of this thesis.

46 For the purposes of this thesis, a discussion of the law relating to parent and child is excluded.

47 This situation has been remedied by s 21(1) of the Children's Act 38 0f 2005 as read with s 1 of the Children's Act.

1 2 PROBLEM STATEMENT

In recent years, the meaning of public policy as it was understood prior to the enactment of the Constitution has been redefined.[48] Public policy is a question of fact and it does change from time to time.[49] It is, therefore, submitted that the fact that Muslim marriages are not granted legal recognition, will, in the light of public-policy considerations fall foul of the rights contained in the Bill of Rights.

From post-constitutional judicial decisions it is apparent that *ad hoc* recognition has been granted to certain consequences of Muslim marriage.[50] For example, recognition has been granted to the dependant's action for loss of support,[51] the right to intestate succession arising from a *de facto* monogamous marriage,[52] as well as *de facto* polygynous marriage.[53] Furthermore, in *Khan v Khan*,[54] the court held that the spouses in a *de facto* monogamous as well as a *de facto* polygynous Muslim marriage can use the Maintenance Act 99 of 1998 to enforce the duty of support that arises from the Islamic marriage.[55] In *AM v RM*[56] and *Hoosein v Dangor*[57] applications for maintenance *pendente lite* (pending divorce litigation) in terms of rule 43 of the Uniform Rules of Court succeeded, despite the fact that the spouses had never concluded civil marriages. In *AM v RM* the order was made, notwithstanding the fact that the husband had already divorced his wife in terms of Islamic law, resulting in an effectual maintenance order post-divorce, in contradiction to the Islamic principles. Chapter four of the thesis will show that all these changes, while constitutionally sound, are not always *Shari'ah* compliant and are therefore problematic for Muslims.

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48 The notion of public policy is discussed in para 4 2 of this thesis.

49 *Ryland v Edros* 1997 (2) SA 690 (C). See also Civil Union Act 17 of 2006.

50 Post-constitutional case law is discussed in para 4 4 2 of the thesis.

51 *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (4) SA 753 (CC), *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

52 *Daniels v Campbell* 2003 (9) BCLR 969 (C), *Daniels v Campbell* 2004 (7) BCLR 735 (CC).

53 *Hassam v Jacobs* 2009 (5) SA 572 (CC).

54 2005 (2) SA 272 (T).

55 Carnelley "Enforcement of the Maintenance Rights of a Spouse, Married in Terms of Islamic Law, in the South African Courts" 2007 *Obiter* 340.

56 2010 (2) SA 223 (ECP).

57 [2010] 2 All SA 55 (WCC), 2010 (4) BCLR 362 (WCC).

In addition to the above judicial decisions, limited legal recognition has been granted to religious marriages by means of various pieces of legislation. For example, the provisions of the Births and Deaths Registration Act 51 of 1992, the Domestic Violence Act 116 of 1998 and the Children's Act 38 of 2005 apply to religious marriages. Examples of legislative provisions that apply to religious marriages are section 10A of the Civil Proceedings Evidence Act 25 of 1965, section 195(2) of the Criminal Procedure Act 51 of 1977, section 1 of the Estate Duty Act 45 of 1955 and section 21(13) of the Insolvency Act 24 of 1936.[58]

South Africa has committed itself to gender equality, in the form of *inter alia* the ratification[59] of the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[60] and the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, (PEPUDA).[61] Despite this commitment, the courts have acknowledged that the failure to grant recognition to potentially polygynous marriages on the ground of gender equality, worsened the plight of women in these marriages, in that they were left without effective legal protection, should such a union be dissolved either by death or divorce.[62] Owing to the judiciary's lack of uniformity in dealing with Muslim marriages and divorces, and as a result of the need for laws to be exacted to deal with the heterogeneity of South African society, the SALC was entrusted with the task of investigating the possible recognition of Muslim marriages in South Africa.

In May 2002, the SALC published its findings in Project 59 on Islamic Marriages and Related Matters. The SALC correctly suggested that any proposed legislation stipulating the grounds on which the conclusion of a polygynous marriage would be permissible, had to be narrowly circumscribed in recognition of the limitations set out by the *Quran* itself.[63] Based on the recommendations proposed by the SALC, a draft

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58 See para 4 5 of this thesis.

59 Ratified on 29 January 1993.

60 Adopted by the General Assembly Resolution 34/180 of 18 December 1979; entered into force on the 3 September 1981.

61 See para 4 6 4 4 of this thesis.

62 In *Ismail v Ismail* 1983 (1) SA 1006 AD the court compounded the inequalities that it had identified.

63 Doi *Shari'ah: The Islamic Law* (1984) 147. It must be appreciated that polygamy is only permissible in extraordinary circumstances. There must be inexorable reasons for polygamy and the wives must be treated with absolute impartiality.

Bill proposing the recognition and regulation of Muslim marriages was released on 22 July 2003 in the SALC *Islamic Marriages and Related Matters Report*.[64] For the following seven years there was no visible movement, and the draft Bill was not enacted as legislation. The reasons for this delay could not be ascribed to the historical reasons given for the non-recognition of Muslim marriages.[65] Rather it is due to the fact that the major religious bodies representing the Muslim communities in South Africa could not reach consensus as to whether or not the draft Bill was compliant with the principles expounded in terms of Islamic law. As long as there are provisions in the Bill that are not *Shari'ah* compliant, the Bill will not be accepted by religious scholars in the Muslim community.[66]

This remained the state of affairs until 14 December, 2010 when the draft Muslim Marriages Bill (MMB), providing for the recognition of Muslim marriages, was approved by Cabinet. The Minister of Justice and Constitutional Development officially released the draft MMB for public comment on 18 January 2011.[67] To date the draft Bill has not yet been enacted as legislation and is currently awaiting approval.

The release of the draft MMB has once again generated vigorous debate among the various sectors and groups of the Muslim community throughout South Africa. To this extent six of the seven members of the United *Ulama* Council of South Africa (UUCSA), that is the umbrella body representing the major *Ulama* (religious) bodies in South Africa, have elected to engage with the Ministry of Constitutional Development. The *Jamiatul Ulama* KwaZulu Natal has opted for the total rejection of the Bill.[68] Despite the fact that the majority of the members of the UUCSA are willing to engage with the Minister of Justice and Constitutional Development with regard to the enactment of legislation regulating Muslim marriages, the sentiments amongst religious scholars are that the draft Bill in its current form does not comply with the principles of Islamic law

64 The 2003 draft MMB is discussed in para 4 7 of this thesis.

65 See para 4 2 of this thesis.

66 The rulings given and the opinions expressed by religious scholars exert a great amount of influence over the members of the Muslim community. As a result, there will be no "buy-in" from members of the Muslim community if the MMB is met with disapproval from the religious scholars.

67 The Closing date for public comment was initially 30 April 2011, but this date was extended to 31 May 2011.

68 http://radioislamlive.com/newsletter.

and is therefore unacceptable to the Muslim community.[69] In addition, gender activists have also expressed concern in respect of the draft MMB in its current form as they submit it falls foul of the right to equality as it is discriminatory towards women.[70]

As South Africa is a constitutional democracy, any legislation enacted in South Africa is subject to the rights contained in the Bill of Rights. Section 15(3) of the Constitution provides that, while recognition of religious legal systems or polygamous marriages concluded according to religious rites should be granted, this recognition must be consistent with the Bill of Rights and other provisions of the Constitution.[71] The provision that section 15(3)(a) must be consistent with the other provisions of the Constitution, is bound to create conflict. It is in the weighing up of these conflicting rights within a broader context that the solution has to be found bearing in mind that customary law which similarly conflicts with gender equality was granted legal recognition.

When viewed in terms of western constitutional principles and philosophies, religion-based marriages, giving effect to personal and family law, are often regarded as discriminating against women's right to equality. It is, however, important to acknowledge that despite the apparent conflict between the rights contained in the Bill of Rights and Islamic law, if Muslim marriages are not granted legal recognition, this will merely compound the inequalities presently experienced by the parties to these marriages. The recognition and regulation of Muslim marriages would ensure adherence to rights that are available in Islam and to which Muslims ascribe. At present, as a result of the non-recognition of Muslim marriages, there are no legal mechanisms available to enforce the rulings made by religious scholars where, for example, they have issued a divorce.

On the other hand, the enactment of any legislation in South Africa that seeks to regulate MPL will be successful in its implementation only if the legislation is compatible with the rulings and teachings of Islamic law. This is the crux of this thesis.

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69 Those aspects of the MMB that certain religious scholars regard as *Shari'ah* non-compliant is discussed in para 4 7 of this thesis.

70 *Ibid*.

71 Currie & De Waal *The Bill of Rights Handbook* 294.

It is, therefore, imperative that the Bill of Rights be construed in a manner whereby a set of western values does not become dominant. The mere fact that Islamic law is fundamentally different from western ideology does not mean that it can be dismissed as being wrong or uncivilized.[72] As Muslims adhering to Islamic law, the applicable Islamic law principles and rules cannot be chosen or disregarded merely because of secular provisions. This may be legally uncomfortable in South Africa as a constitutional democracy but it is the reality for the adherents of the Muslim faith.

The fact that Muslims continue to regulate their domestic affairs according to Islamic law, despite the lack of recognition of Muslim marriages in South Africa should be acknowledged. To this extent marriages continue to be solemnized in terms of Islamic rites and matters relating to divorce, inheritance and child-related disputes continue to be resolved by Muslim clergymen. However, the absence of any legislation or otherwise regulating the enforcement of Islamic law, is wholly unsatisfactory where a dispute arises with regard to marital matters, divorce or maintenance issues. For example, if the parties who are married under Islamic rights and civil law, wish to divorce and a dispute arises concerning the division of the spouses' assets,[73] the parties will have a choice as to whether to seek a remedy in the secular courts or under Islamic law.[74] Should the parties choose to approach the secular courts, this would necessarily involve a High Court application that is costly and time-consuming. The enactment of legislation that recognizes and regulates Muslim marriages will go a long way to facilitate the enforcement of Islamic law in a more structured way. This, will in turn, lead to a fair and non-discriminatory dispensation in all Muslim marriages and divorces, and will not be limited to those instances where the spouses have the financial means to embark on litigation.

1 3 ISLAMIC LEGAL THEORY VERSUS WESTERN HUMAN RIGHTS PERSPECTIVES

It is important to state from the outset that this thesis is written from an Islamic legal theory perspective, that is contrary to western legal theory, as the latter adopts a

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72 See para 4 6 4 4 of this thesis.

73 The same would apply to a dispute regarding spousal maintenance or a dispute relating to the care and contact of a child born to parents married in terms of Muslim rites.

74 Where the parties are married both in terms of Islamic rites and civil law, the latter marriage takes precedence over the former.

human rights perspective. Insofar as Islamic law is concerned, the general sources on which all its beliefs, principles and rulings are based are the *Quran*[75] and *Sunnah*.[76] As Muslims believe that the *Quran* is the literal word of God, Islam is regarded as a divinely revealed religion. Therefore, the pillars on which Islam rests are infallible texts that were sent down from heaven and are represented in the verses of the Holy *Quran* and the texts of the Prophetic *Sunnah*. From these two sources the scholars derived other principles on which rulings may be based. These are, namely, *ijma* (scholarly consensus) and *qiyas* (analogy)[77].

The fact that all Muslims, no matter where they find themselves, are commanded to adhere to the rulings and principles of Islam, can be seen in the following verse of the *Quran*:

> "And so judge between them by what Allah has revealed ... and follow not their vain desires ..."[78]

The *Quran*, furthermore, issues a warning against compromising on any detail of *Shari'ah,* no matter how small it is with the following verse:

> "... but beware of them lest they turn you far away from some of that which Allah has sent down to you ..."[79]

In addition, the *Quran* spells out the repercussions for Muslims who do indeed compromise on Islamic law principles with the revelation of the following verses:

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75 The literal meaning of *Quran* in Arabic means "the book to read". The *Quran* is accepted by adherents of the Islamic faith to be the literal word of God as conveyed directly to the Prophet Muhammad (PBUH).

76 *Sunnah* refers to the traditions of the Prophet Muhammad (PBUH) which includes his sayings, actions and approval or disapproval of the actions of others. The tradition of the Prophet Muhammad (PBUH) is an important source of Islam as it demonstrates the manner in which a certain injunction mentioned in the *Quran* has to be performed. The *Sunnah* constitutes the guiding principles to which all Muslims should strive to adhere.

77 The secondary sources of *Shari'ah* are *ijma*, *qiyas* and *ijihad*. *Ijma* refers to the consensus amongst Muslim jurists in respect of questions of *Shari'ah* that are not allowed to be in conflict with the *Quran* or *Sunnah; qiyas* refers to analogical deduction, that enables a Muslim jurist, after engaging a process of study and reasoning, to transfer an existing rule by analogy to a similar situation; *ijihad* refers to the exercising of independent juristic reasoning or the formation of individual opinions or creative reinterpretations of the law. It is submitted that *ijihad* ended with the formation of the four schools of Islamic jurisprudence, namely, *Shafi'i*, *Hanafi*, *Maliki* and *Hanbali*.

78 Chap 5; verse 49.

79 *Ibid*.

> "And whoever does not judge by what Allah has revealed, such are the *kaafiroon* (non-believer)."[80]
>
> "… And whoever does not judge by that which Allah has revealed, such are the *zaalimoon* (polytheists and wrongdoers)."[81]
>
> "… And whoever does not judge by what Allah has revealed (then) such (people) are the *faasiqoon* (rebellious or disobedient)."[82]

The above verses clearly illustrate that Muslims are required to adhere to the teachings of the *Quran* regarding what it permits and what it forbids. Muslims have to obey its commands, avoid that which it prohibits, pay heed to its lessons and not overstep its limits. This remains the same whether Muslims find themselves in South Africa, England or Wales or any other place.

Islam is a religion that guides Muslims in all aspects of human life. The value system of a Muslim originates primarily from the Holy *Quran* and the progress of a Muslim is forever dependent on its application. In Islam no distinction is drawn between law and religion. For Muslims, Islam is more than a mere religion and for them it constitutes a way of life. In reality, Islam dictates every aspect of a practicing Muslim's life, whether it be aspects relating to the observance of prayer, charity, fasting, pilgrimage marriage, divorce or other everyday aspects of one's life.[83]

Closely linked to this is the concept of *taqwa* (piety and righteousness), that states that every believer should be mindful of God's omnipresence,[84] that no act goes unrecorded and no one escapes the accountability of his or her doings. *Taqwa* is what guides practicing Muslims in their desire to conform to the teachings and principles of *Shari'ah.* A case in point is the decision of the Indian Supreme Court in *Mohd Ahmed Khan v Shah Banu Begum & Ors* where the court made a decision with regard to spousal maintenance that was contrary to the principles of Islamic law.[85] Therefore, if

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80 Chap 5; verse 44.

81 Chap 5; verse 45.

82 Chap 5; verse 47

83 Alkhuli *The Light of Islam* (1981) 26.

84 Muslims believe in the constant presence of Allah (God).

85 [1985] INSC 99 (23 April 1985). In this case, the court granted the plaintiff, a 70 year old Muslim woman who was divorced by her husband, maintenance until her remarriage. The court's decision was based on the (secular) law. The court overruled the husband's objection that in terms of

a secular court makes a decision that is not *Shari'ah* compliant, the parties themselves will not feel bound by it.

In contrast, the basis of modern western democratic societies is a constitution that is premised on human rights and equality and that advocates the notion that the rights contained in the constitution reigns supreme in all matters, religion included. Therefore, where a conflict arises in respect of the freedom of religion and the right to equality, western ideologies and philosophies dictate that the latter trump the former.[86] This would inevitably mean that religious law would have to be adapted and ultimately amended so that it is in compliance with the constitution. From an Islamic perspective, this is not feasible.

This is the current dilemma facing Muslims in South Africa with regard to the recognition of Islamic law, where the Constitution dictates that *Shari'ah* be amended to bring it in line with the Bill of Rights. Based on what is expounded above in respect of Islamic legal theories, practicing Muslims will find this incomprehensible. It is, therefore, submitted that one of the primary reasons why Muslim marriages have not been granted legal recognition, is because of the irreconcilable conflict between the right to freedom of religion and the right to equality. Whilst it is acknowledged that the premise on which this thesis is based is contrary to western ideologies and principles, the crux thereof is that Islam, as a divinely revealed religion, should not have to bow down to the Constitution, which is man-made. The following quotation encapsulates the argument of this thesis:

> "The reason for this is that the Bill of Rights is individual-centred, based on Western ideas while Islamic law, like African law, has as its underlying principle the idea of communitarianism. The fundamental question which needs to be answered, therefore is: Why should Western ideas and philosophy serve as the yardstick, particularly in South Africa, an African country? A further crucial question is: Why

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Islamic law she is not entitled to maintenance. Islamic leaders rejected the decision as an unlawful interference with Muslim Personal law and argued that the secular courts took it on themselves to interpret the *Quran* and thus disturbed the understanding of India's society that was based on privacy and the autonomy of the chosen personal law. Shah Banu herself eventually wrote a public letter declaring that as a true believer she now understood that her actions were wrong and that as a good Muslim she was rejecting the decision of the Supreme Court. She thanked the religious leaders for saving her.

86 See para 4 6 4 4 of this thesis.

should a legal system such as Islam, based as it is on divine revelation, play second fiddle to a secular, human legal system?"[87]

As mentioned above, constitutional principles were interpreted in such a way to grant recognition to customary marriages, notwithstanding the fact that equality concerns remained. The same should also apply to Muslim marriages.

1 4 AIMS AND OBJECTIVES OF THE THESIS[88]

The focus of this thesis is, firstly, to discuss the various sets of rules relating to marriage and the dissolution of a marriage in terms of Islamic law, South African and English family law, as well as the amended Islamic law as adopted into both South African law and English law. The amended Islamic law applied in both these countries complies with western legal principles but is not *Shari'ah* compliant. These various sets of rules demonstrate the dilemma faced by Muslims, especially women, living in a western society. It is difficult to ascertain whether the applicable set of principles are those of the national law, the amended Islamic law for that jurisdiction or pure Islamic law. The discussion of the Islamic law, South African law and English law in chapters two and three of the thesis is important to show the context of each set of rules in the three jurisdictions. In order for a comparison to be made between the legal systems, these sets of rules have to be clearly explained. Furthermore, a discussion will also facilitate a demonstration of the attempts that have been made by South African law and English law to accommodate Islamic law. Chapters four and five of the thesis evaluate these attempts to accommodate Islamic law. These chapters furthermore demonstrate that this accommodation has to a certain extent "bastardized" Islamic law and has created legal situations that are not always *Shari'ah* compliant. Chapter four and five show that western legal interference does not necessarily rectify injustices and that the non-*Shari'ah* compliant court decisions are unacceptable to the Muslim community and have in fact created further problems for Muslims.

Secondly, the thesis examines on the one hand the conflict that arises between religious freedom that would mean the recognition and implementation of MPL in South Africa and, on the other hand, the State's duty to ensure that the supremacy of the

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87 Goolam in Rautenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems* (2002) 120.

88 See para 1 8 of this thesis for a detailed breakdown of what is discussed in each chapter.

Constitution is upheld. In other words, the thesis addresses the question whether or not this conflict can be resolved with the enactment of legislation and in the event of this not being possible, what measures can be adopted to mitigate the consequences experienced as a result of the non-recognition of Muslim marriages in South Africa.

The fact that Islamic religious laws and principles are regarded as sacred and immune to censure is an extremely complicating factor in reconciling constitutional values with religious freedom as it applies to the recognition and implementation of MPL.[89] The focus is therefore on the question of whether or not it is possible to grant expression to religious freedom as far as Islamic law is concerned in South Africa, which is a constitutional democracy. An in-depth study of the philosophy underlying the principles of family law in terms of Islamic law seeks to provide a possible solution whereby legislation regulating MPL law can be implemented in South Africa. This is, notwithstanding the apparent conflict existing between MPL and the rights contained in the Bill of Rights.

Furthermore, the legal principles of MPL, South African law and the law of England and Wales[90] as it relates to the law of husband and wife are discussed. This necessitates a study of the following: the betrothal or engagement, the requirements for the conclusion of a marriage, the personal and proprietary consequences of marriage, the dissolution of marriage, and lastly, the consequences of the dissolution of a marriage. The purpose of the comparative analysis between Islamic law and South African law is to highlight the differences and similarities and to establish common ground between the two systems of law with the view of recognizing and implementing MPL in South Africa, without compromising the principles of the latter and still give effect as far as possible to the rights contained in the Bill of Rights.

The law of marriage in England and Wales has been chosen for the purposes of a comparative analysis. Geographically and politically England and Wales together form

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89 Rautenbach "'Work in Progress': Some Comments on the Status of Religious Legal Systems in Relation to the Bill of Rights" 2003 9 *Fundamina* 134 149.

90 The law of marriage in England and Wales is referred to as English law in this thesis. Although the thesis concentrates mostly on the law of marriage as it relates to England and Wales, in some instances the development of MPL is discussed in Britain as a whole. This is particularly the case in chap 5 of this thesis.

the greater part of Great Britain.[91] Historically, from the sixteenth century to the end of the twentieth century, England and Wales existed as a single legal jurisdiction.[92] Family law in England and Wales has been regulated by the following sources, namely, international instruments,[93] legislation[94] and case law. Furthermore, South Africa and England and Wales share a common law heritage and a commitment to human rights and have adopted various approaches in respect of accommodating the application of Islamic law. In addition the majority of Muslims in South Africa and England and Wales have, to varying degrees, developed diverse strategies to ensure compliance with Islamic law and as well as national laws. In the first instance, the research investigates the extent to which England and Wales have recognized and accommodated Islamic law as it pertains to the law of husband and wife. Secondly, a comparative analysis is undertaken of the law of England and Wales to establish the extent to which Islamic law is recognized and implemented in these jurisdictions and to consider if it can inform possible change in South African law. To this extent, an analysis of the approach of the judiciary and the legislature in accommodating the application of MPL in South Africa and England and Wales is also undertaken. Lastly, the research considers the provisions of the 2003 and 2010 Muslim Marriages Bills in South Africa to establish whether or not the proposed Bills are in conformity with the general principles of Islamic

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91 Probert *Family and Succession Law in England and Wales* (2013) 19. England covers an area of 130,281 square kilometres with a population density of 395 persons per square kilometre, and Wales covers an area of 20,732 square kilometres with a population density of 144 persons per square kilometre. The other constituent parts of Great Britain, namely, Scotland and Northern Ireland, have their own distinct legal systems.

92 Probert *Family and Succession Law in England and Wales* 19. However, since 1998 Wales has its own elected law-making body, the National Assembly for Wales. Initially the National Assembly for Wales did not have authority to enact primary legislation. In terms of s 93 of the Government of Wales Act 2006, the National Assembly of Wales now possesses the power to enact legislation on a wide range of issues, such as housing, health and education.

93 The three types of international instruments that can be identified are those that are directly effective without the need for legislation, those that have been incorporated into the laws of England and Wales by legislative action and lastly, those that do not form part of domestic law, but are nonetheless of persuasive authority. An example of legislation that is directly effective without the need for legislation is Council Regulation (EC) No. 2201/2003 of 27 November 2003, concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental responsibility. The European Convention for the Protection of Human Rights and Fundamental Freedoms is an example of an international instrument that has been incorporated into domestic law by the Human Rights Act 1998. The United Nations Convention on the Rights of the Child is an example of an international instrument that has persuasive authority.

94 The regulation of family law is dealt with in numerous statues. It must be noted that much legislation in respect of family law is discretionary in nature as it sets out general principles of factors that guide a judge in making a decision rather than prescribing a result in a particular situation.

law. The thesis is concluded with recommendations for the recognition and regulation of Muslim marriages in South Africa.

1 5 LITERATURE REVIEW

A vast array of literature has been consulted in writing this thesis. In particular reference is made to two doctoral theses by Moosa and Amien respectively, on the non-recognition of Muslim marriages to highlight the different approach followed in this thesis. In her thesis of 1996 Moosa submits that it is Muslim women in particular who have been disadvantaged by the non-recognition of MPL.[95] She further argues that the Constitution provides an opportunity to change the *status quo* as it makes provision for religious freedom and the right to have MPL recognized. Her thesis investigates the constitutional and judicial implications that the recognition of MPL will have on the rights of Muslim women in South Africa. It also seeks to establish whether the recognition of MPL will indeed benefit Muslim women, bearing in mind that *Ulama*[96] who are presently regulating and administering MPL argues that any legislation recognizing MPL should be exempt from the Bill of Rights. Subsequent to this thesis, the South African courts have passed judgments that have changed fundamental principles of Islamic law. Whilst acknowledging that these decisions have to a certain extent alleviated the plight of the parties in the matter, they have not been *Shari'ah* compliant and are therefore problematic.[97]

The research conducted in this thesis and that by Moosa is similar in that an investigation is undertaken as to how legislation granting recognition to MPL can be successfully implemented in South Africa. The difference between the two theses lies in the fact that firstly, a comparative analysis of Islamic law, South African law and English law relating to the law of husband and wife between is undertaken in this thesis while Moosa's thesis focuses on the recognition and implementation of MPL in South Africa. The comparison is undertaken in order to ascertain the differences and

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95 The title of the doctorate is: "An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights With Regard to the Recognition and Implementation of Muslim Personal Law" (1996) UWC.

96 The word "*Ulama*" is used to describe learned male religious scholars or theologians.

97 It is important to understand that for Muslims their abode on earth is only temporary and their final and ultimate abode is with Allah. This can only be achieved by adherence to the principles and rules of Islam.

similarities between the two legal systems so that the enactment of legislation, granting recognition to MPL, can be successfully implemented without compromising the principles of Islamic law, and yet still giving effect as far as possible to the rights contained in the Bill of Rights. Secondly, a comparative analysis is undertaken with regard to the law of England and Wales. This comparison is undertaken to establish to what the extent Islamic law is recognized and implemented in these jurisdictions, and furthermore to consider whether it can inform possible change in South African law.

The central issue that Amien[98] addresses in her thesis is the application of Muslim family law in minority Muslim communities located in constitutional jurisdictions that recognizes both women's right to equality and the right of freedom of religion. She poses the following questions in her research:[99]

(i) whether or not the application of MPL inevitably results in a conflict between women's right to equality and the right to freedom of religion;
(ii) if a conflict does occur, whether the right to freedom of religion can be protected without women's right to equality being compromised.

In addressing these pertinent issues, Amien focuses on Muslim minorities in Canada, India and South Africa and investigates the three approaches to religious diversity, namely, assimilation, accommodation and integration. She argues that these three approaches to religious diversity do not offer adequate protection in addressing the rights of women to equality, and submits that the a new approach, namely, the Gender-Nuanced Integration approach affords greater protection for women's right to equality.[100]

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98 The title of the doctorate is: "A Consideration of the Conflict between Women's Right to Equality and Freedom of Religion when Muslim Family Law is Assimilated. Accommodated or Integrated into Multicultural Constitutional Jurisdictions" (2011) University of Ghent.

99 Amien "A Consideration of the Conflict between Women's Right to Equality and Freedom of Religion when Muslim Family Law is Assimilated. Accommodated or Integrated into Multicultural Constitutional Jurisdictions" (2011) 2.

100 Amien "A Consideration of the Conflict between Women's Right to Equality and Freedom of Religion when Muslim Family Law is Assimilated, Accommodated or Integrated into Multicultural Constitutional Jurisdictions" (2011) 79.

The similarity between the research conducted for the purposes of this thesis and that by Amien is that both theses focus on the specific features of Muslim family law, in particular, the requirements for a valid Muslim marriage, the personal and proprietary consequences flowing from Muslim marriages and the different forms of dissolving a Muslim marriage. In similar vein, Amien also draws on verses of the *Quran* as well as religious scholars to discuss Muslim family law. In her thesis, Amien also addresses the issue of non-recognition of Muslim family in South Africa. Despite these similarities, the main difference between this thesis and that of Amien is that her central point of focus is the exploration of multicultural theories and legal frameworks that could offer protection for women's right to equality whereas this thesis focuses on the recognition and implementation of MPL in South Africa without compromising the principles of MPL as it relates to Muslim marriages. This thesis views the issues from an Islamic perspective and is based on Islamic legal theories. It is submitted that religious tenets cannot be "interpreted" to align western women's rights to *Shari'ah*. Freedom of religion inevitably implies freedom to adherence of all the tenets of a religion, whether constitutionally aligned or not.

1 6 RESEARCH METHODOLOGY AND SOURCES

This is an applied research study within the constitutional framework of the subjective rights of private-law rules found in Islamic law as it relates to the law of husband and wife. The research includes a comparative analysis on a national and international level of the various legal systems for the purpose of juxtaposing the different legal systems in order to establish similarities and differences. The research is therefore comparing not only the legal systems of different countries, but also comparing Islamic law with State law. In short, this thesis compares the traditional Islamic law of husband and wife with the traditional South African and English laws as these laws relate to the law of husband and wife. It then proceeds to demonstrate the manner in which Islamic law rules and principles have been amended to fit in with the national legal framework – to the detriment of Islamic law principles. It is submitted that any successful solution granting legal recognition to Muslim marriages must be *Shari'ah* compliant. It is acknowledged that whilst all the constitutional challenges cannot be met, Islamic law should, in the light of religious freedom, be accommodated and recognition should be granted to Muslim marriages.

The research is not empirical in nature, but involves a literature study. In this regard, the thesis is based on and researched from a variety of sources, that include both primary and secondary sources. The primary sources comprise of provisions of international and national legislation, proposed legislation and important case law dealing with Islamic law, and the various legal systems are researched for the purposes of a comparative analysis so as to identify the respective legal systems' similarities and differences. For this purpose various pieces of legislation that are relevant to this research project are accessed and studied. They include Conventions, Charters, Constitutions, Acts, Bills and case law, among others. The cases that are of importance in the researching of this topic include both national and foreign cases. The primary sources of Islamic law that are consulted are the *Quran* and the *Sunnah*. In addition to these primary sources, reference is also made to the secondary sources of *ijma* and *qiyas*.

The secondary sources include, but are not limited to, books, articles, reports, papers and internet sources. The books utilized in the researching of the proposed research topic, consist of a number of legal textbooks, theses and dissertations by various academics and legal experts in the field of Islamic law, relating to the law of husband and wife. The articles that are be used as resource materials include articles from various national and international legal journals, as well as newspapers. Papers presented at conferences are also be used where applicable. The internet is also be used as a research medium.

The aforementioned sources are examined and discussed for the purpose of analysing and establishing similarities and differences between various legal systems. Key concepts, issues and problems relating to the conflict between the rules and principles of Islamic law, relating to husband and wife, and the fundamental rights entrenched in the Bill of Rights, for example, is identified and analysed. Possible solutions in order to address the above conflict are discussed and evaluated based on Islamic legal theory.

1 7 LIMITATIONS OF THE RESEARCH

As already highlighted, this study is not based on empirical research; it places reliance rather on existing work done on the subject-matter. Information is, therefore, obtained

from existing qualitative and other research studies carried out by various researchers and research institutions.

The aspects covered in this thesis relating to the law of husband and wife in terms of Islamic law is discussed in the light of the Holy *Quran*[101] and the *Sunnah*[102] of the Prophet Muhammad (PBUH), as these are the primary sources of *Shari'ah*.

For the purposes of this thesis only the position as expounded by the *Shafi'i* and *Hanafi* school of thought (*madhhab*) with regard to Islamic law relating to the law of husband and wife is discussed.[103] These two schools of jurisprudence are predominantly practised by Muslim communities in the constitutional jurisdictions where research was undertaken.[104]

1 8 ORGANIZATION OF THE THESIS

Chapter two compares the law of marriage in terms of Islamic law, South African law and English law insofar as it pertains to the general principles regulating the betrothal, marriage as well as the personal and proprietary consequences of marriage. A comparative analysis between Islamic law, South African law and the English law relating to these topics are undertaken. This highlights the legal dilemma suffered by women married in terms of Muslim rites. The purpose of this analysis is to seek similarities and highlight differences between the three legal systems to establish whether and how MPL, Muslim marriages in particular, can be granted legal recognition in South Africa.

Chapter three explores the law relating to the dissolution of a marriage and the consequences thereof, whether by death or divorce, in terms of Islamic law, South African law and English law. A comparative analysis between these three legal systems is undertaken for the same reasons as stated in chapter two.

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101 Alkhuli *The Light of Islam* 23.

102 Alkhuli *The Light of Islam* 27.

103 Examples of the other schools of jurisprudence found in Islam are *Maliki* and *Hanbali*.

104 There is no evidence to suggest that the other two schools of jurisprudence, namely, the *Maliki* and *Hanbali*, have a considerable following in South Africa or in England and Wales. These two schools of jurisprudence are excluded for the purposes of this research.

Chapter four focuses on the adoption of MPL in South Africa in a constitutional context, in light of the two MMB's that are not *Shari'ah* compliant. To this end, the development and application of MPL by the legislature and judiciary in South Africa is considered. The effect of the enactment of the Constitution on MPL, and the extent to which the legislature and judiciary has granted *ad hoc* recognition to certain consequences flowing from a Muslim marriage, is investigated. In addition, the solution proposed by the South African Law Reform Commission (SALRC)[105] for the recognition and regulation of Muslim marriages in South Africa, namely, the 2003 and 2010 Muslim Marriages Bills is discussed in view of its shortcomings, strengths and the viability of the implementation of such legislation.

In chapter five an investigation of English law is undertaken to determine the extent to which English law recognize, implements and accommodates Islamic law. This includes an investigation into whether or not English law has successfully implemented both State and Islamic law. The aim of this investigation is to determine whether the solutions adopted and accepted in England and Wales can be applied in the South African context in order to implement Islamic law.

In chapter six the conflict between Islamic law and the Constitution, in particular, the right to religious freedom *vis-a-vis* the right to equality is addressed. Furthermore, in this chapter certain recommendations are made in respect of the proposed Muslim Marriages Bill, as well as possible ways of implementation of the proposed bill and/or other solutions.

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105 The name of the South African Law Commission was changed to the South African Law Reform Commission in 2003.

CHAPTER 2
THE LAW OF MARRIAGE IN TERMS OF ISLAMIC LAW, SOUTH AFRICAN LAW AND ENGLISH LAW

2 1 INTRODUCTION

Chapter one explained the primary concern of this thesis, namely, how MPL in general, and family law in particular, can be recognized and implemented in South Africa, a constitutional democracy, without compromising the principles of Islamic law, whilst at the same time upholding the rights contained in the Bill of Rights. More specifically, the question that this thesis addresses is whether or not the conflict between the constitutional rights of equality and the right of freedom of religion can be resolved in respect of the recognition and implementation of a *Shari'ah* compliant Muslim family law in South Africa. In other words, is there a remedy for dealing with the conflict between these two rights? Furthermore, should these rights prove to be irreconcilable, should Muslim family law nonetheless be granted recognition and implemented in South Africa in order to mitigate the harsh consequences of non-recognition?

To answer these questions and to provide a background of options to Muslims citizens in a country, a comparative analysis is undertaken with regard to the law of marriage in terms of Islamic law, South African and English law. The similarities and differences between these legal systems are highlighted. As mentioned previously both the South African and English legal systems recognize the rights of equality and religious freedom and have, to varying degrees, accommodated the practice of MPL. These accommodations are discussed in chapters four and five of the thesis. This chapter discusses the law of marriage, which includes a discussion of the betrothal (engagement), the legal requirements for a marriage, as well as the personal and proprietary consequences of a marriage as applicable in Islamic law, South African law and English law. Chapter three similarly discusses the dissolution of marriage and the consequences thereof in the three jurisdictions. Chapter two should, therefore, be read in conjunction with chapter three. This comparative analysis between the three jurisdictions is important, as it sets the context for chapters four and five wherein the adoption of an amended Islamic law in the two national jurisdictions is discussed.

Having stated the above, cognizance must be taken of the fact that in terms of the religion of Islam the only intimate relationship allowed between a man and a woman is the marriage relationship.[106] Much importance is attached to the institution of marriage, as Islam regards marriage not only as the lawful means for sexual enjoyment, but also as being essential for the establishment of the family which is regarded as the first unit of society.[107] The family is viewed as the nucleus of Islamic society. As the institution of marriage is the only lawful Islamic means by which a family comes into existence, it is strongly encouraged.[108] It is also a *Sunnah* of the Prophet Muhammad Peace Be Upon Him (PBUH).[109] Islam prohibits the notion of free love and intimate relationships between a man and a woman who have not entered into a marriage.[110] Islamic law has developed a comprehensive set of rules and principles to regulate the institution of marriage as well as the betrothal.

Similarly, in so far as the institution of marriage is concerned, South African law views marriage as a social institution that is of vital importance and is entitled to legal protection.[111]

Historically, the position in South Africa was that the traditional Roman-Dutch common-law marriage was regarded as being superior to other kinds of marriages existing in South Africa.[112] After the enactment of the Constitution, attempts were made to give legal support and protection to other forms of relationships that did not fall squarely into the common-law definition of marriage. The Constitution in terms of sections 10,[113]

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106 Alkhuli *The Light of Islam* (1981) 65.

107 *Ibid*.

108 Siddiqi *The Family Laws of Islam* (1984) 28.

109 It is narrated in a *hadeeth* that the Prophet Muhammad (PBUH) said: "Marriage is my *Sunnah*. Whoever keeps away from it is not from me."

110 Alkhuli *The Light of Islam* 66.

111 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 30. See also *RH v DE* (594/2013) [2014] ZASCA 133 (25 September 2014) where the court held that a delictual claim for damages based on adultery against a third party no longer forms part of South African law.

112 In *Seedat's Executors v The Master* 1917 AD 302 a Muslim marriage was viewed as being repugnant to the moral principles of the citizens of South Africa and therefore not worthy of any legal protection that was afforded to civil marriages.

113 The right to human dignity.

15[114] and 28(1)[115] provides constitutional protection for the family and family life.[116] As a result, the Constitution and the Constitutional Court in particular, require South African family law to accommodate and protect diversity as the Constitution affirms the right to be different, and also celebrates the diversity of South African society.[117] For example, the enactment of the Recognition of Customary Marriages Act[118] gave full legal recognition to all existing customary law marriages and, furthermore, provided that customary marriages were equal in status to civil marriages. A further development for providing legal protection to alternate family forms is evidenced by the enactment of the Civil Union Act[119] which legalizes marriages between same-sex partners and provides that same-sex marriages are equal in status to opposite-sex civil marriages. The Recognition of Customary Marriages Act and the Civil Union Act have also ensured that the legal consequences of customary marriages and marriages entered into in terms of the Civil Union Act are more or less the same as those of civil marriages.[120] At present, however, Muslim and Hindu marriages do not enjoy full legal recognition in South Africa, but the judiciary has on occasion extended some of the protective legal consequences attached to civil marriages to marriages entered into in terms of religious law.[121]

In the present-day constitutional era, South African family law thus embodies a far wider range of family forms, and the definition of a family now includes single-parent

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114 The right to religion, belief and opinion.

115 S 28 deals with the rights of children.

116 *Chairperson of the Constitutional Assembly, Ex parte: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

117 *Minister of Home Affairs v Fourie (Doctors for Life International & Others, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs)* 2006 (1) SA 524 (CC) at para 60.

118 120 of 1998.

119 17 of 2006.

120 In the case of customary marriages there are still certain differences which persist, for example, the polygamous nature of a customary marriage.

121 *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1994 (4) SA 604 (W); *Ryland v Edros* 1997 (2) SA 690 (C); *Daniels v Campbell NO* 2004 (5) SA 331 (CC); *Hassam v Jacobs* 2009 (5) SA 572 (CC).

families,[122] extended,[123] polygynous,[124] unmarried[125] and same-sex[126] families. Unlike Islamic law, South African family law recognizes families units other than the traditional family.

In a similar vein, English law also attaches much importance to the institution of marriage as the State has always endorsed the institution of marriage by encouraging parties to enter into a marriage.[127] English family law also recognizes other family units, such as, same-sex couples, for example and has therefore accommodated these diverse family forms with the enactment of legislation in the form of the Civil Partnership Act 2004 and the Marriages (Same Sex Couples) Act 2013.[128]

2 2 THE BETROTHAL OR ENGAGEMENT

2 2 1 ISLAMIC LAW

A betrothal (*khitba*), which precedes a marriage contract, is essentially composed of approaches made by the man (or his family) to the woman (or her family), asking for her hand in marriage, provided the proposed union is legally possible.[129] However, nothing precludes a woman from making a proposal to a man.[130] Terms and conditions are negotiated at this stage, which may end in mutual promises of marriage.[131] Although highly recommended the "*khitba*" is not a prerequisite for the conclusion of a valid marriage. The word "betrothal" is used, rather than "engagement", as it denotes a more conventional arrangement and, unlike the latter, does not *per se* entail a claim

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122 Statistics published by Hall and Wright in 2011 indicate that only 23% of South African children live with both their biological parents, while 41% live with their mothers and 3% live with their fathers. Hall & Wright *In Brief: A Profile of Children Living in South African Using the National Income Dynamics Study* (2011) 2.

123 23% of children live in a household where neither of the biological parents is present. Hall & Wright *In Brief: A Profile of Children Living in South Africa* 2.

124 The Recognition of Customary Marriages Act 120 of 1998 gave full recognition to existing and future polygamous customary marriages.

125 A large percentage of couples in South Africa choose not to enter into a marriage. According to Census 2001, there were more than 2.4 million South African who reported living with intimate partners to whom they were not married.

126 The Civil Union Act 17 of 2006 legalizes marriage between partners of the same sex.

127 See para 2 4 3 of this thesis.

128 See para 2 3 3 of this thesis.

129 Bainham *The International Survey of Family Law* (1994) 3. In terms of *Shari'ah,* the parties do not have to be a specific age to enter into an engagement. See para 2 5 of this thesis.

130 Nasseef *Muhammad: Encyclopaedia of Seerah* (1982) Vol 2 25. The Prophet Muhammad's (PBUH) first wife, Khadija, proposed to him. She was forty years old at the time while the Prophet Muhammad (PBUH) was twenty-five years old.

131 Siddiqi *The Family Laws of Islam* 67.

for damages on the breach thereof as the betrothal is not regarded as a binding contract.[132] The termination of an engagement without a *Shari'ah*-approved justification is considered as breaking a promise, but Islamic law does not make provision for a claim for damages. Instead the erring party is entrusted to Allah, who, if he so wishes, can either forgive the erring party or punish him.[133] Furthermore, the Permanent Committee for Islamic Rulings and Verdicts[134] have stated that the betrothal between a man and a woman is not equivalent to a contract, and that either party may terminate the betrothal if they wish to do so, whether or not the other party agrees to termination of the betrothal.[135]

Both parties should be made aware of the circumstances of the other and should know the other's character and behaviour in order for betrothal to be valid.[136] A betrothal is not permissible where an impediment exists which prohibits a marriage from being concluded immediately.[137] For example, where a woman is in a period of *iddah* (mourning) at the dissolution of the marriage either by death or divorce,[138] an engagement between this woman and a third party would not be valid.[139] It is stated in the *Quran*:

> "There is no blame on you if you make an offer of betrothal or hold it in your heart. Allah knows what you cherish in your heart: But do not marry until the term prescribed is fulfilled. And know that Allah knows what is in your heart and take head of Him. But do not a make a secret contract with them except in honourable terms, nor resolve on the tie of marriage till the term prescribed is fulfilled."[140]

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132 Jamal *The Status of Women Under Islamic Law and Modern Islamic Legislation* (2009) 54.

133 *Ibid*.

134 This committee was established by royal decree on 29 August 1971 by King Faisal ibn Abd al-Aziz of Saudi Arabia. Since its inception, this committee has issued responses to Muslims not only in Saudi Arabia but in countries all over the world on a variety of questions including *hadiths*, *ibadah* (acts of worship) and *aqeedah* (Islamic creed).

135 Daweesh *Fataawa al-Lajnah al-Daa'imah* (2003) Vol 18 69.

136 Nasir *The Status of Women Under Islamic Law and Modern Islamic Legislation* (2009) 53.

137 Ba'-kathah *Tuh-fatul Ikhwaan* (1987) 143.

138 This is the position whether the divorce is revocable or irrevocable.

139 Ba'-kathah *Tuh-fatul Ikhwaan* 143; Sabiq *Fiqh Us-Sunnah: Doctrine of Sunnah of the Holy Prophet* (1989) Vol 2 382.

140 Chap 2; verse 235.

Furthermore, an engagement between a woman and a third party is not permitted where the woman is already engaged to someone else.[141] However, if the proposal has not yet been accepted or rejected, a third party can propose to the same person.[142]

In the selection of a marriage partner, the man or woman is allowed to select their marriage partner upon meeting and viewing this person.[143] The parties are allowed to meet in the presence of a chaperone for a short period of time to become acquainted with each other's character, opinions and mannerisms.[144] No courtship is allowed.[145] This position is based on authentic traditions of the Prophet Muhammad (PBUH), where the latter stated the following:

> "When one of you seeks a woman in marriage, and then if he is able to have a look at whom he wishes to marry then let him do so."[146]

According to the traditions of the Prophet Muhammad (PBUH), the man was encouraged to view the face and the hands of the prospective bride before he made the proposal of marriage.[147] This is in conformity with the Islamic view that marriage is regarded as a contract and that the contracting parties must firstly view the subject matter of the contract.[148] Alternatively, a woman within the community can be appointed by the man to view and interview the prospective bride so as to gauge the character of the latter.[149] A woman is also not precluded from viewing the prospective husband.[150] After the parties are satisfied with regard to their selection of a marriage partner, a proposal of marriage is made.[151]

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141 Alkhuli *The light of Islam* 70.

142 Nawawi *Minhaj Et Taliban: A Manual of Muhammadan Law* (2000) 282; Ba'-kathah *Tuh-fatul Ikhwaan* 143.

143 Ayoup *Fiqh of Muslim Family* (no date of publication) 10.

144 Doi Shari'ah: *The Islamic Law* (1984) 122.

145 Doi *Shari'ah: The Islamic Law* 122. The parties are allowed to view each other but must be chaperoned at all times.

146 Siddiqi *The Family Laws of Islam* 66.

147 Al-Misri & Keller *Reliance of a Traveller: A Classic Manual of Islamic Sacred Law* (2008) 511; Ba'-kathah *Tuh-Fatul Ikhwaan* 142.

148 Siddiqi *The Family Laws of Islam* 67.

149 Doi *Shari'ah: The Islamic Law* 121.

150 Sabiq *Fiqh Us-Sunnah* 386.

151 *Ibid*.

If the woman or those representing her accept the man's offer of marriage, the betrothal takes place and it constitutes a reciprocated promise by the two parties to marry at some time in the future.[152] After the conclusion of the betrothal, and once it becomes known that the woman has already been betrothed, other men are precluded from proposing to the same woman.[153] To this extent the Prophet Muhammad (PBUH) stated the following:

> "None amongst you should outbid another in transaction, nor should he make proposal of marriage upon the proposal made by someone else."[154]

It is often customary for the prospective bride and bridegroom to exchange gifts and donations once the betrothal is formalized so as to strengthen the new relationship.[155] The general rule with regard to the exchange of gifts is that it is *haraam* (unlawful) to demand the return of gifts and presents. To this extent it is narrated that the Prophet (PBUH) stated:

> "It is not lawful for a man to make a donation or give a gift and then take it back, except a father regarding what he gives his child."[156]

The exception to the general rule arises where gifts are exchanged with a view to marriage.[157] Where the marriage is not concluded, the gifts exchanged between the prospective groom and bridegroom must be returned if one of the parties requests the return of the gifts exchanged.[158] The *rationale* for the exception is that the gifts exchanged between the parties were made with the view to a marriage being concluded and were therefore not made gratuitously.[159] Imam Al-Zarkashi states the following in this respect:

> "If he proposes marriage to a woman and she accepts, and he brings them a gift then she does not marry him, then he may take back what he gave to her, because

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152 Nawawi *Minhaj et Talibain: A Manual of Muhammadan Law* 283.

153 Al-Misri *et al Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* 516.

154 Al-Qushayri *Sahih Muslim: Book of Marriage Hadeeth Number 286* (1998) Vol 8.

155 Sabiq *Fiqh Us-Sunnah* 388.

156 *Ibid*.

157 Al-Mardaawi *Al-Insaaf* (1998) Vol 8 296.

158 *Ibid*.

159 Al-Zarkashi *Al-Manthoor fil-Qawaa'id al-Fiqhiyyah* (1985) Vol 3 269.

> he only gave it on the basis that they were going to give her to him in marriage, and that did not happen."[160]

Therefore, where a marriage is not concluded, *Shari'ah* makes it permissible for the donor to demand the return of the gifts.[161] Furthermore, where the gift has been damaged or where it has been depleted it must be replaced.[162] To this extent Imam Al-San'aani states:

> "That which was given before the marriage contract is permissible and he may take it back if it is still present; this applies to items that are usually given to be used up. But with regard to items that are not usually used up, he may ask for their value if they are damaged, unless they refuse to go ahead with the marriage, in which case he has the right to ask for its value in both scenarios."[163]

To summarize, the betrothal therefore merely constitutes a mutual promise of marriage between the parties and does not constitute a marriage contract. Both parties are at liberty to withdraw from the betrothal at any stage before the conclusion of the marriage.[164] The betrothal is also not legally binding between the parties in that it does not give rise to an action for breach of promise to marry.[165] In so far as the return of engagement gifts are concerned, the donor can claim the return of all gifts where the marriage is subsequently not concluded and this ruling applies irrespective whether or not the gifts have been consumed or depleted.

2 2 2 SOUTH AFRICAN LAW

According to common law an engagement is defined as follows:

> "[A] legally binding agreement, in the nature of a reciprocal promise or contract between a man and a woman (who are competent to marry) to marry each other

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160 *Ibid*.

161 Ibn Taymiyah *Al-Fataawa al-Kubra* (2010) Vol 5 472.

162 Al-Jamal *Sharh Manhaj al-Tullaab* (1938) Vol 4 129.

163 Al-San'aani *Subul al-Salaam* (2006) Vol 2 220.

164 Sabiq *Fiqh Us-Sunnah* 388.

165 Rautenbach & Bekker *Introduction to Legal Pluralism* 4th ed (2014) 365. (However, in Egypt, the Egyptian Court of Cassation (Cassation Hearing of 14 December 1939) ruled that breach of promise does give rise to a lawful suit for damages, on the ground that it constitutes breach of promise as well as a tort that requires redress. This ruling is based on the *Quranic* injunction (Chap 5; verse 1): "O you who believe, fulfil your obligations."

on a specific date, or on some undetermined future date, but within a reasonable period."[166]

Since the enactment of the Civil Union Act,[167] same-sex partners are also allowed to enter into an engagement. An engagement has, therefore, in modern South African law, assumed the characteristic of being gender neutral.

From the above definition it can be deduced that an engagement, like any other contract, is concluded by means of offer and acceptance between the two parties concerned.[168] Whilst an engagement precedes a marriage, it is not a prerequisite for the parties to enter into a valid civil marriage.[169] As there are no special formalities required for the conclusion of an engagement, the engagement can be concluded orally, in writing or by mail or even tacitly.[170] Because an engagement is regarded as a contract, it must comply with four validity requirements laid down for valid contracts, in order to be regarded as legally binding, namely, consensus,[171] capacity to act,[172] lawfulness[173] and possibility of performance.[174]

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166 Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman & Singh *Law of Persons and the Family* (2017) 227; Heaton & Kruger *South African Family Law* 5; Sinclair *The Law of Marriage* (1996) 313, citing Brouwer 1.2.1; Voet 23.1.1.

167 17 of 2006.

168 Heaton & Kruger *South African Family Law* 5. Although traditionally, the man may ask the woman's father for her hand in marriage, this is not a legal requirement and the engagement is essentially an agreement between the two prospective spouses.

169 Heaton & Kruger *South African Family Law* 5.

170 Skelton & Carnelley (eds) Human, Robinson, Smith *Family Law in South Africa* (2010) 20.

171 Both parties must consent to the engagement. Misrepresentation, undue influence and duress will, therefore, render an engagement voidable. *Schnaar v Jansen* 1924 NPD 218; *Thelemann v Von Geyso* 1957 (3) SA 39 (W).

172 For example, a minor must obtain the consent of his or her parents for the engagement to be valid. In addition to parental consent, a boy under the age of eighteen years and a girl under the age of fifteen years require the consent of the Minister of Home Affairs to become engaged. S 26(1) of the Marriage Act 25 of 1961.

173 For a valid engagement to be concluded, both parties must be unmarried. A marriage proposal by a married person is void. This position prevails even where the married person promises marriage to a third party after he divorces his wife or at the demise of his wife. *Friedman v Harris* 1928 CPD 43; *Pietzsch v Thompson* 1972 (4) SA 122 (R). Furthermore, as an engagement is a contract of the utmost good faith, an engaged person cannot propose marriage to a third party without first terminating the engagement. See *Davel v Swanepoel* 1954 (1) SA 383 (A); *Smit v Jacobs* 1918 OPD 30.

174 For example, the parties will not be deemed to have the necessary capacity to enter into an engagement if they are under the age of puberty or if they are related within the prohibited degrees of relationship. S 26(1) of the Marriage Act; s 18(3)(c)(i) read with ss 19 and 20 of the Children's Act 38 of 2005.

The primary purpose of an engagement is for the parties to establish whether or not they are compatible so as to enjoy a happy and successful marriage, under the official protection of the law and within a socially acceptable environment.[175] To this extent, the engaged parties will enter into a courtship, that will culminate in a marriage provided they find that they are suited to each other. Whether they are not compatible, the engagement will be terminated.

Initially in terms of Roman law, an engagement contract was deemed to be a social agreement to which the law attached no legal consequences.[176] However, in Roman-Dutch law as well as in South African law, an engagement was regarded as a legally binding contract, to the extent that up until the nineteenth century the court could order that the innocent party was entitled to specific performance, where the other party was in breach of contract.[177] The right to claim specific performance was abolished by statute in the Cape in 1838[178] and in later years in the other provinces.[179]

In modern day South African law, the fact that an engagement is a mutual undertaking by the two parties to marry each other at a specific or determinable date, creates a reciprocal duty to marry on that date or on a date to be determined in the future.[180] Should one of the parties to the engagement renege on the promise to marry[181] the party will be in breach of the contract of engagement.[182] One is only allowed to withdraw from the contract of engagement without potentially becoming liable for damages if a *iusta causa* exists.[183] In the absence of a *iusta causa* the innocent party can sue the offending party for breach of promise to marry for contractual as well as

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175 *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) para 8.

176 Church and Bosman "Family Law" in Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* (1995) 580.

177 *Richer v Wagenaar* (1829) 1 Menz 262.

178 Cape Marriage Order in Council of 1838, s 19.

179 Natal Ordinance 17 of 1846, s19; Transvaal Law 3 of 1871, s 17; Orange Free State Law 26 of 1899. S 20.

180 Barratt *et al Law of Persons and the Family* 228; Sinclair *The Law of Marriage* (1996) 316.

181 For example, the party shows through his actions or words that he has no intention to marry or he subsequently enters into a marriage with someone else.

182 Barratt *et al Law of Persons and the Family* 229.

183 The fact that the one party to the engagement no longer loves the other party, or where the one party gets cold feet, does not constitute an *iusta causa* in terms of South African law. In *Van Jaarsveld v Bridges* 2010 (4) SCA 558 at para 3 the court voiced its dissatisfaction that the examples cited do not constitute *iusta causa* for the termination of an engagement.

delictual damages.[184] With regard to the claim for contractual damages, only actual proved damages, namely, patrimonial loss, can be claimed.[185] Previously actual patrimonial loss as well as proved prospective loss of the pecuniary benefits of the marriage could be claimed.[186] In *Van Jaarsveld v Bridges* it was held *obiter* that "courts should not involve themselves with speculation on such a grand scale by permitting claims for prospective losses."[187] The court furthermore held that it was easier to justify a claim for actual losses sustained by the innocent party where the breach of promise to marry occurred.[188] From the decision in Van *Jaarsveld v Bridges* the it can be deduced that the court expressed dissatisfaction with regard to the rules as it applied to the termination of an engagement, and was of the opinion that the traditional views in respect of engagements were outdated as it did not take the *mores* of modern South African society into account.[189] The court was of the opinion that public-policy considerations deem it necessary for the courts to reassess the law as it relates to claims for damages where breach of promise has occurred.[190] This position was changed by the decision in *Cloete v Maritz*.[191] In this case the High Court of the Western Cape followed the views expressed by Harms DP, in *Van Jaarsveld v Bridges* and held that the claims for damages for prospective loss where breach of promise to marry had occurred, were no longer a valid cause of action and was therefore something of the past.[192] The court stated that the position as set out in *Bull v Taylor* in respect of when a party can claim for prospective losses on the basis of breach of contract, no longer forms part of South African law.[193] The court was cognizant of the fact that this decision deviates from earlier decisions by the Supreme Court of Appeal,[194] but nonetheless held that a High Court was permitted to deviate from pre-constitutional court decisions of a higher court, where the earlier court decisions no

184 Barratt *et al Law of Persons and the Family* 229.

185 *Van Jaarsveld v Bridges supra* at paras 2-7.

186 *Guggenheim v Rosenbaum* 1961 (4) SA 21.

187 *Van Jaarsveld v Bridges supra* at para 10.

188 *Van Jaarsveld v Bridges supra* at para 11. The court cited losses related to wedding preparations and the costs of the wedding dress as examples of actual losses which can be claimed by the innocent party.

189 *Van Jaarsveld v Bridges supra* at para 3.

190 *Ibid*.

191 2013 (5) SA 448 (WCC).

192 *Cloete v Maritz supra* at 454.

193 *Ibid*.

194 The decision contradicts the principle of judicial precedent.

longer reflect the *boni mores* of public interest.[195] After giving due consideration to the values of the Constitution, the court furthermore held that the current approach to breach of promise of engagements does not reflect the current *boni mores* or policy considerations of modern South African society.[196] Accordingly, a claim for prospective loss was not upheld. The decision in *Cloete v Maritz* therefore changed the common law with regard to claims for prospective loss.[197]

In addition to contractual damages, the innocent party can also bring a claim for damages for non-patrimonial loss under the *actio iniuriarum* for the infringement of personality rights.[198] In order to succeed under the *actio iniuriarium*, the plaintiff is required to prove that his personal rights have been infringed and that the infringement was done intentionally.[199] In *Guggenheim v Rosenbaum* the plaintiff was successful with her claim for satisfaction as the defendant's denial that an engagement had indeed been concluded between him and the plaintiff, was viewed as an *iniuria*.[200] In *Van Jaarsveld v Bridges* the court held that the plaintiff could succeed only in instituting a claim for satisfaction under the *actio iniuriarium* if the engagement had been terminated in a manner that was objectively insulting and humiliating, as assessed by examining the prevailing norms of society.[201] The question posed by the court was whether or not the reasonable person would regard the manner in which the engagement was terminated to be insulting and offensive, and calculated to cause injury to the person's dignity and self-esteem.[202] In the *Van Jaarsveld* case it was held that the manner in

195 *Cloete v Maritz supra* at 456-457.

196 *Cloete v Maritz supra* 459.

197 The decision in *Cloete v Maritz* is a decision of the Western Cape High Court and is therefore only binding on courts in the Western Cape. However, it has persuasive value in other courts in South Africa. If Cloete chooses to appeal the decision to the SCA, and the SCA upholds the decision, only then will the decision become binding on the rest of South Africa. This means that, should a claim for breach of promise come before any court outside of the Western Cape, the plaintiff is still entitled to claim for prospective loss together with a claim for actual loss. It is submitted that the persuasiveness of the *obiter dictum* from *Van Jaarsveld* case and the decision in *Cloete* will result in a denial of a claim for prospective loss.

198 *Guggenheim Rosenbaum supra* at 41.

199 Barratt *et al Law of Persons and the Family* 233.

200 *Guggenheim v Rosenbaum supra* at 41.

201 *Van Jaarsveld v Bridges supra* at para 19.

202 *Ibid*.

which the engagement was terminated was neither objectively insulting nor offensive, and therefore, did not give rise to a claim for satisfaction under the *actio iuriarium*.[203]

During the course of the engagement it is customary for the engaged parties to exchange various types of gifts. Engagement gifts are classified into three categories, namely, s*ponsolatia largitas* which consist of gifts made with a view to the marriage,[204] *arrhae sponsolatiae* which is a gift given to show the seriousness of the promise,[205] and lastly other inconsequential gifts or tokens of affection.[206] Where the engaged parties mutually decide to terminate the engagement, the *sponsolatia largitas* and the *arrhae sponsolitiae* must be returned.[207] Where breach of promise has occurred the innocent party is entitled to the *arrhae sposolatiae* and *sponsolatia largitas* he or she received or alternatively, recover these gifts that were given to the guilty party.[208] In the event of the innocent party instituting a claim for damages, the value of the gifts retained by the innocent party must be set off against the value of the damages claimed.[209] Inconsequential gifts and tokens of affection need not be returned, irrespective of whether the engagement is terminated by mutual consent or whether breach of promise to marry occurs.[210]

2 2 3 THE LAW OF ENGLAND AND WALES

Before the conclusion of a marriage, it is common for couples to enter into an engagement in terms of which the parties agree to marry each other, either on a specified date or on some undetermined future date.[211] In order for a valid

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203 *Van Jaarsveld v Bridges supra* at para 12. The defendant in the *Van Jaarsveld* case sent the applicant a sms expressing his apologies for not being able to go ahead with the marriage and that he had hurt her feelings. The claim for patrimonial damages remain and the aggrieved party can institute a claim for actual damages sustained in terms of the *actio legis Aquiliae*.

204 Examples of *sponsolatia largitas* include appliances and furniture purchased for use in the future home.

205 The engagement ring is an example of *arrhae sponsilitiae*.

206 Flowers, chocolates, books are regarded as inconsequential gifts.

207 Voet 23.1.19. Sinclair *The Law of Marriage* 330-331*;* Heaton & Kruger *South African Family Law* 10; Barratt *et al Law of Persons and the Family* 234*.*

208 Heaton & Kruger *South African Family Law* 10.

209 *Ibid*.

210 Cronje *Marriage* in Harms & Faris (eds) *The Law of South Africa (LAWSA)* (1998) para 11; Joubert in Clark (ed) *Family Law Service* para A15; Sinclair assisted by Heaton *The Law of Marriage* 331; Van der Vyver & Joubert *Persone- en Familiereg* (1991) 479-480; Heaton & Kruger *South African Family Law* 10; Barratt *et al Law of Persons and the Family* 234.

211 Herring *Family Law* (2011) 89.

engagement to be concluded, both parties must consent to the engagement,[212] they must have legal capacity,[213] the engagement must be lawful[214] and the parties must be in a position to conclude a valid marriage with each other.[215]

The purpose of the engagement is to establish whether or not they are compatible to enter into a marriage that will be a lasting and happy one.[216]

Common law regarded the engagement as an enforceable contract. If one of the parties terminated the engagement without *iusta causa*, the other party could institute an action damages for breach of promise to marry.[217] This position prevailed until 1970, when the action for breach of promise was abolished by section 1 of the Law Reform (Miscellaneous Matters) Act 1970, which states that no agreement to marry is enforceable as a contract.[218] The abolition was justified on the ground that it is contrary to public policy for the parties to the engagement to feel obligated to proceed with the marriage through fear of being sued for breach of promise to marry. An ex-fiancé(e) does, however, have an action to recover any gift that was made on the express or implied condition that it would be returned should the marriage not occur.[219] Furthermore, the presumption that the gift of the engagement ring is absolute can be rebutted by the giver producing evidence that it was in fact conditional.[220]

2 2 4 COMPARISON

From the discussion above it is clear that, while similarities exist between the Islamic betrothal and the South African law and English law engagement, there are many

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212 See s 12(c) of the Matrimonial Causes Act 1973. All the requirements applicable to a valid marriage are equally applicable to an engagement.

213 See s 1(1) of the Family Law Reform Act 1969, s 2 of the Marriage Act 1949 and s 11(a)(ii) of the Matrimonial Causes Act 1973.

214 Both parties must be unmarried for a valid engagement to be concluded. S 11(b) of the Matrimonial Causes Act 1973.

215 For example, the prospective spouses must not be related to each other with the prohibited degrees of relationship in respect of consanguinity and affinity. See s 6(2) of the Marriage (Prohibited Degrees of Relationship) Act 1986. Furthermore, parties of the same sex are prohibited from entering into an engagement. See *J v C and E* [2006] EWCA Civ 551.

216 The purpose of an engagement concluded into in terms of English law is the same as that concluded into in terms of South African law.

217 Herring *Family Law* (2011) 89.

218 *Ibid*.

219 S 3(1) of the Law Reform (Miscellaneous Matters) Act 1970.

220 S 3(2) of the Law Reform (Miscellaneous Matters) Act 1970.

distinct differences, especially in respect of the requirements necessary for a valid betrothal or engagement. This is problematic for South African and English Muslim women as they are confronted with two marriage systems that are at odds with one another, namely a religious and a secular legal system.

The similarities between a betrothal and an engagement relate to lawfulness, consent and capacity to act. In Islamic, South African and English law an engagement is concluded by an offer (proposal) to marry and acceptance of the offer to marry. Secondly, the conclusion of a betrothal or an engagement is not a prerequisite for the conclusion of a valid marriage in any of the three legal systems under discussion. Thirdly, the parties cannot enter into a betrothal or engagement if they are related within the prohibited degrees of relationship.[221] Fourthly, the consent of the prospective spouses is required in order for a valid betrothal or engagement in all three legal systems. Fifthly, both parties are also required to possess capacity to conclude a valid betrothal or engagement as the parties cannot enter into engagement if one or both or both of them are under the age of puberty and both the prospective spouses must be immediately eligible to enter into a marriage. Lastly, as soon as the betrothal or engagement is concluded, the parties are expected to remain faithful to each other and not to become intimately involved with third parties. In other words, both parties are expected to conduct themselves in a manner that will enhance and ensure a happy future marriage.

The notable differences are, firstly, the fact that an engagement in terms of both South African law and English law is very much a matter of individual concern, taking place between the prospective spouses, rather than a family affair. As mentioned above, tradition dictates that a man will approach the prospective bride's father or guardian for her hand in marriage, but he is under no legal obligation to do so. In contrast, the Islamic betrothal involves the families of the prospective bride and groom, with the groom's family approaching the prospective bride and her family with the proposal.

Secondly, notwithstanding the fact that the prospective spouses are both required to consent to the engagement in all three legal systems, Islamic law dictates that in

221 See para 2 5 of this thesis.

addition to the consent of the parties, the consent of the prospective bride's guardian is required. This position prevails irrespective whether or not the prospective bride is a major. In contrast, in both South African and English law, unless the prospective bride or groom is a minor, no parental or guardian consent is required for the conclusion of the engagement.

The third difference relates to the fact that, as Islam allows polygamy,[222] a married man is allowed to propose marriage to a single woman. In South African and English law both parties must be unmarried for the engagement to be valid.

The fourth difference pertains to the fact that in terms of both South African and English law, the law relating to engagements is gender neutral as the definition of an engagement can be extended to include an engagement concluded between same-sex couples. Islamic law only recognizes the betrothal between a man and a woman. Islamic law also differentiates between a man and woman in respect of the guardian's consent as the latter's consent is only required in respect of a male where the male is a minor. As stated above, the guardian's consent is required for a woman irrespective whether she is a minor or major.

Fifthly, Islamic law prohibits a betrothal between a man and a woman who is in a period of *iddah*. In terms of South African and English law a married spouse can enter into an engagement with a third person as soon as the marriage is dissolved by death or divorce. There are no legal impediments preventing a party from proposing marriage to a third party once his or her marriage has been terminated.

The sixth difference between the three legal systems is that in both South African and English law, the purpose of the engagement is to enable the couple to determine whether or not they are suited or compatible with each other with the view to a happy and successful marriage. In terms of Islamic law, the parties are allowed to meet and view each other at the time the proposal is made but no courtship between the parties is allowed.

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222 In terms of Islamic law, the practice of polygyny is allowed and the man is permitted to conclude a marriage with up to four wives without obtaining the consent of his existing wife or wives to enter into a subsequent marriage.

The seventh difference relates to the fact that, unlike the betrothal in terms of Islamic law, which is not regarded as a legally binding agreement and consequently does not give rise to an action for breach of promise to marry, an engagement in terms of South African law is a legally binding contract with legal consequences when breach of promise occurs. In terms of South African law, breach of promise to marry gives rise to both a delictual and a contractual claim. Despite being regarded as a contract in terms of English law, an engagement does not, however, give rise to an action for damages where the engagement is terminated without *iusta causa*.

Lastly, in respect of gifts exchanged at the conclusion and during the subsistence of the betrothal and engagement, both Islamic law and South African law make provision for the return of these gifts where the betrothal or engagement is terminated. However, there is a difference in that Islamic law allows for the return of gifts made with a view to the marriage, irrespective of which party is responsible for the marriage not being concluded. Furthermore, Islamic law allows the parties to claim the return of gifts or the value thereof where the gifts have been depleted or consumed. In terms of South African law, the fate of the engagement gifts is determined by whether the engagement was terminated by mutual consent or whether breach of promise to marry occurred. South African law does not require the parties to return gifts or their value that have already been consumed. In respect of English law, a gift can only be recovered if it was given on the express or implied condition that it would be returned should the engagement be terminate.

2 3 DEFINITION OF MARRIAGE

In this section, the definition of the term “marriage” in the three jurisdictions are compared *vis-à-vis* the potential spouses, the impact of adultery and same-sex partners.

2 3 1 ISLAMIC LAW

According to Siddiqi marriage is defined as

> "…a relation between a man and a woman which is recognized by custom or law and involves certain rights and obligations, both in the case of the parties entering into the union, and in the case of the children born of it."[223] and

> "Marriage is also defined as "a contract between two partners of the opposite sex, bringing about certain rights and responsibilities, whereby among other things, sexual relations is made permissible."[224]

The Arabic word for marriage is "*nikah*" which means joining. In other words, a "*nikah*" is the joining together of a man and a woman in marriage so as to make sexual relations lawful between them.[225] The *Quran* refers to marriage as a *mithaaq*, that is, a solemn covenant or agreement between the husband and wife.[226] *Shari'ah* also views marriage as a contract between the husband and wife.[227]

The institution of marriage therefore has a three-fold function as it regulates relations between a man and a woman, and it is the mechanism that regulates the relations between a child, his parents and the community. It is also the institution that legalizes sexual relations between a man and woman.[228] Islam therefore declares fornication (*zina*) unlawful.[229] *Zina* is defined as sexual intercourse between a man and a woman who are not married to each other.[230] Islam requires both men and women to confine intimate sexual relations to the institution of marriage so that morality and society is protected from obscenity and corruption.[231] *Zina* is a punishable crime irrespective of whether or not one or both of the parties are married and whether the fornication occurs with the consent of the parties involved. From this it can be inferred that the word "*zina*" refers to both adultery where one or both parties are married to a person or persons other than the person involved in the illicit sexual intercourse as well as

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223 Siddiqi *The Family Laws of Islam* (1984) 1.
224 Ba'-kathah *Tuh-Fatul Ikhwaan* (1987) 142.
225 Ayoup *Fiqh of Muslim Family* 1.
226 Chap 4; verse 21.
227 Sabiq *Fiqh Us-Sunnah: Doctrine of the Sunnah of the Holy Prophet* 363.
228 *Ibid*.
229 Siddiqi *The Family Laws of Islam* 30.
230 Doi *Shariah: The Islamic Law* 236.
231 Siddiqi *The Family Laws of Islam* 30.

fornication which refers to sexual intercourse between parties who are both unmarried.[232] Islam regards *zina* not only as a sin, but also as an act that opens the gate for other shameful acts which ultimately lead to the destruction of the very basis of the family and the community at large.[233] As mentioned at the beginning of this chapter, the institution of marriage is worthy of legal protection and must be protected from all threats and dangers, adultery being one of these.[234] The *Quran* therefore instructs people to avoid committing adulterous acts at all costs in the following verse:

> "Do not come nearer to adultery for it is shameful (deed) and an evil, opening the road (to other evils)."[235]

The act of *zina* itself is an offence, and if committed with force, that is, rape, this will amount to additional crimes with additional punishments.[236] The *Quran* metes out the following punishment (*hadd*) for those found guilty of fornication:

> "The fornicators shall each be given a hundred lashes, and let not compassion for these keep you from carrying out the sentence of Divine Law, if you truly believe in Allah and the Last Day. And let a group of Muslims witness their punishment."[237]

The Prophet (PBUH) clarified the above injunction of the *Quran* with the following statement:

> "Take from me, accept from me, undoubtedly Allah has now shown the path for them (adulterers). For unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stoning to death."[238]

Islam ascribes the severity of the punishment for the act of adultery, and the fact that the stoning to death must be carried out in a public place is that it serves as a deterrent for other persons in society to refrain from committing such an act.[239] It must be borne in mind, however, that this punishment can only be meted out where it is proven

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232 Doi *Shari'ah: The Islamic Law* 236. See also Doi *Women in Shar'ah* 117.

233 *Ibid*.

234 Alkhuli *The Light of Islam* 105.

235 Chap 17; verse 32.

236 Nasseef *Muhammad: Encyclopaedia of Seerah* 101.

237 Chap 24; verse 2.

238 At-Tirmidhi *Jami' at-Tirmidhi Hadeeth No 1434* (2007).

239 Nasseef *Muhammad: Encyclopaedia of Seerah* 102.

beyond a reasonable doubt through the testimony of four pious and reliable witnesses, that they saw the person actually committing the act of adultery, or alternatively, where the person voluntarily confesses under oath four times that he committed the act of adultery.[240] Whilst the severity of the punishment for adultery is acknowledged, it is submitted that the harsh punishment was prescribed at the advent of Islam where there was a need to extinguish the absolute unregulated freedom of sexual license that existed at the time, and the need for the creation of a new social order where sexual activity was regulated and controlled. The fact that the severe punishment was indeed a deterrent, is evident as during the lifetime of the Prophet (PBUH) not a single case of adultery was proven by the evidence of four pious and reliable witnesses.[241] At a conference on *Muslim Doctrine and Human Rights in Islam* religious scholars affirmed that fourteen centuries had passed since the enactment of the severe punishment for adultery, and furthermore affirmed that during this time period only fourteen cases of stoning for the act of adultery occurred.[242] The deduction that can be drawn from this is that, whilst the punishment for adultery is in principle very severe, the implementation thereof is extremely rare in practice.

Islam furthermore only makes provision for a marriage to be solemnized between parties of the opposite sex. Homosexuality and sexual relationships between same-sex parties are regarded as serious sins and contrary to Islamic principles and teachings.[243] The *Quran* refers to homosexuality in the following verse:

> "We also sent Lut. He said to his people: Do you commit adultery as no people in creation (ever) committed before you? For you practise your lusts on men in preference to women. You are indeed a people transgressing beyond limits."[244]

The Prophet Muhammad (PBUH) is reported to have stated the following in respect to same-sex relationships:

> "Four types of people get up in the morning while they are under the wrath of Allah and they sleep at night while they are under the displeasure of Allah. He was

240 Doi *Shari'ah: The Islamic Law* 239.

241 Doi *Shari'ah: The Islamic Law* 245.

242 The conference was held between the religious scholars of Saudi Arabia and European jurists on 23 March 1972 in Riyadh, Saudi Arabia.

243 Doi *Shari'ah: The Islamic Law* 241.

244 Chap 7; verse 84.

> asked: Who are they? The Prophet (PBUH) replied: Those men who try to resemble women and those women who try to resemble men (through dress and behavior) and those who commit sex with animals and those men who commit sex with men."[245]

Islamic law, therefore, does not make any allowances for a marriage between same-sex partners.

2 3 2 SOUTH AFRICAN LAW

Although legislation appears to provide no definition for the term "marriage", South African legal academics have attempted to formulate a definition of marriage. According to *Wille's Principles of South African Law*, marriage is defined in the following way:[246]

> "[M]arriage may be defined as a legal relationship, established by means of a state ceremony, between two competent and consenting persons of different sexes, obliging them, *inter alia*, to live together for life (or more realistically, for as long as the marriage lasts), to afford each other the conjugal privileges exclusively, and to support each other."

Hahlo[247] and Sinclair[248] define marriage as:

> "…the legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts."

Lee and Honore ascribe the traditional meaning of marriage as:

> "The legally recognized voluntary union for life of one man and one woman to the exclusion of all others."[249]

Besides definitions submitted by legal academics, the judiciary has also adopted the traditional definition of marriage.[250]

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245 At-Tabarani *Al-Mu'jam al-Awsat* (1985) Vol 7 439.

246 Hutchison *et al Wille's Principles of South African Law* 94.

247 Hahlo *The South African Law of Husband and Wife* (1985) 21.

248 Sinclair *The Law of Marriage* 305.

249 Erasmus, Van der Merwe & Van Wyk (eds) *Family, Things and Succession* (1983) para 21.

250 *Nalana v R supra*; *Estate Canham v The Master supra*; *R v Mboko supra*; *R v Fatima supra*; *Seedat's Executors v The Master (Natal) supra*; *Ex parte Soobiah and Others: in re Estate Pillay supra*; *Hamid v Minister of Interior supra* and *Ismail v Ismail supra*.

From the above definitions it becomes apparent that the definition of marriage in South African law is the Judeo-Christian concept of marriage that regards marriage as an opposite-sex, monogamous and life-long institution. These definitions of marriage, however, no longer hold true for modern South African society as is evident from the high divorce rate, the tolerance of adultery,[251] the fact that the Civil Union Act has granted legal recognition to marriages concluded by parties of the same sex[252] and the enactment of the Recognition of Customary Marriages Act which legalizes and recognizes polygamous marriages.[253]

The decision in *RH v DE*[254] is testament to the increased tolerance of adultery as a result of the changes in the *mores* of society. Prior to the decision in *RH v DE* the common law allowed both husbands and wives to institute a delictual claim against a third party who commits adultery with their spouses.[255] However, with the enactment of the Divorce Act[256] in 1979, adultery as a ground for divorce was abolished as there was a shift to no-fault divorce. The continued existence of the action for adultery was therefore questioned.[257] Church, for example, submitted that, as adultery was no longer a ground for divorce, and because there was no longer a delictual action by the innocent spouse against the adulterous spouse, it was absurd to award a delictual action against third parties who committed adultery with one of the spouses.[258] The enactment of the Constitution provided the opportunity to challenge the action for adultery on the basis that it violates the constitutional right to freedom of association, privacy and freedom of conscience and religion of third parties as well as the other

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251 Heaton & Kruger *South African Law of Marriage* 13.

252 S 1 of the Civil Union Act 17 of 2006.

253 S 2 of the Recognition of Customary Marriages Act 120 of 1998.

254 2014 (6) SA 436 (SCA).

255 Where a third party infringed a spouse's *consortium omnis vitae* by committing adultery with his or her spouse, the innocent spouse could sue the third party in terms of the *actio iniuriarum* for damages for wounded feelings and for the infringement of their honour. See *Viviers v Kilian* 1927 AD 449 which explicitly recognized for the first time the delictual action for adultery. Recognition of the delictual action for adultery was subsequently confirmed on several occasions in court decisions, for example, *Foulds v Smith* 1950 (1) SA 1 (A) and *Bruwer v Joubert* 1966 (3) SA 334 (A) at 337. See also Neetling, Potgieter, and Visser *Neetling's Law of Personality* (2005) 207 – 212.

256 70 of 1979.

257 *Rosenbaum v Margolis* 1944 WLD 147 at 158 and *Wassenaar v Jameson* 1969 (2) SA 349 (W).

258 Church "Consortium Omnis Vitae" 1979 *THRHR* 42 379 383-384.

spouse.[259] Notwithstanding these arguments, the decision in *Wiese v Moolman* confirmed adultery as a ground for delictual liability in post-constitutional South Africa on the basis that when spouses enter into a marriage, they voluntarily limit their rights to freedom of association and freedom to use their bodies, and that the failure to provide an adequate remedy against third parties who commit adultery with their spouses, may well constitute inadequate protection of the aggrieved spouse's right to human dignity.[260] The court held that marriage was a legitimate limitation on the rights of third parties, and any interference with the marital *consortium* was a dignity violation.[261]

The Supreme Court of Appeal (SCA) decision in *RH v DE* changed the law relating to the delictual action against a third party who commits adultery with one of the spouses in a marriage. This matter arose from an appeal from the North Gauteng High Court, where the applicant (respondent) instituted an action for damages against the defendant (appellant) who had committed adultery with his wife.[262] After in-depth consideration as to whether or not the delictual action for adultery should be maintained, the court held that in the light of the changed *mores* of South African society, the delictual claim for adultery has become out-dated, and that the time has come for the action to be abolished.[263] It was held that the action derived from the *actio iniuriarum* based on adultery against third parties no longer forms part of South African law.

As stated above, the enactment of the Civil Union Act[264] legalizes civil unions between same-sex couples.[265] A more acceptable definition of a civil marriage in modern South African society would therefore be "the legally recognized voluntary union of two

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259 *Wiese v Moolman* 2009 (3) SA 122 (T).

260 *Wiese v Moolman supra* 125-126. See also *Erasmus v Heine* case no 39407/2010 ZAGPPHC 11 (28 January 2013), where court concurs with the decision in *Wiese v Moolman* and states in para 3 that the marital rights of sexual intercourse and affection and devotion of married spouses are still held in high regard in South African law and furthermore, that the rights of action of either spouse to protect these rights and, in the event of the violation of these rights by third parties, to claim damages due to the infringement, are still part of the law and therefore enforceable.

261 *Wiese v Moolman supra* 126.

262 *RH v DE supra* para 1.

263 *RH v DE supra* para 41.

264 17 of 2006.

265 S 1.

people to the exclusion of others while it lasts".[266] Mention must be made of the fact that the Civil Union Act extends to both heterosexual and same-sex couples.[267]

As mentioned previously,[268] the Recognition of Customary Marriages Act gives full recognition to all existing and future customary polygynous marriages, and allows a man to enter into multiple customary marriages provided he meets all the requirements set out in section 3(1) and section 7(6) of the Act. Section 7(6) regulates the position where a man wishes to conclude a further customary marriage with another woman. In terms of this section if a husband to a customary marriage wishes to conclude a further customary marriage with another woman, he is required to make an application to the court for the approval of a written contract regulating the matrimonial property system applicable to his existing and future marriages. In terms of section 7(8), all interested parties must be joined in this application, particularly the husband's existing wife or wives and the prospective wife.

In practice parties have not adhered to the section 7(6) of the Act and the result is that law exists on paper only.

Furthermore, section 7(1) provides that the proprietary consequences of a customary marriage concluded before the commencement of the Act is subject to customary law. Section 7(1) is, however, currently only applicable to polygynous customary marriages[269] and as customary marriage is neither in nor out of community of property, a husband who is a party to a polygynous marriage, must establish separate houses each with their separate property for each of his wives. In terms of section 7(2) of the Recognition of Customary Marriages Act, a monogamous customary marriage concluded after the commencement of the Act is deemed to be in community of property and of profit and loss unless the parties have concluded an ante-nuptial contract to specifically exclude these proprietary consequences. As in the case of section 7(6), the provisions of section 7(1) and (2) has not been adhered to as the

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266 Heaton & Kruger *South African Law of Marriage* 13.

267 The gender or sexual orientation of the parties is irrelevant if they wish to conclude a marriage in terms of the Civil Union Act.

268 Chap 1 of this thesis.

269 S 7(1) was declared unconstitutional as far as it relates to monogamous customary marriages in *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC).

matrimonial property regime in community of property is foreign to customary law and represents a drastic departure from the laws relating to property in customary law, the result being mere paper law once again.

The reality in South Africa at present is that many South African families are polygynous in practice, even though the man concerned has one legal wife.[270] This situation is particularly prevalent where men have migrated from the rural to urban areas in search of employment, leaving their wives and children behind and then subsequently establishing long-term relationships with urban women with whom they also have children.[271] Research has shown that the rural and urban women are usually aware of each other's existence, but lack the social and economic power to prevent the man from having two families.[272]

2 3 3 THE LAW OF ENGLAND AND WALES

In *Hyde v Hyde and Woodmansee*[273] the concept of marriage was defined as follows:

> "Marriage is the legally recognized voluntary union of a man and a woman for life to the exclusions of all others."

Although the definition of marriage, expounded by Lord Penzance in *Hyde v Hyde and Woodmansee,* continues to be used by modern judges, it does not provide any criteria for distinguishing the institution of marriage from cohabitation. In *Bellinger v Bellinger*[274] Thorpe LJ, in a dissenting judgment, expressed the view that marriage should be defined as "a contract for which the parties elect but which is regulated by the State, both in its formation and in its termination by divorce, because it affects status upon which depend a variety entitlements, benefits and obligations".[275] The definition distinguishes marriage from cohabitation as, unlike the latter, the law regulates a marriage from its inception until its termination. In addition it creates a legal

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270 Clark & Goldblatt *Gender and Family Law* (2007) 197 in Bonthuys & Albertyn (eds) *Gender, Law and Justice*. See also *Mrapukana v Master of the High Court* [2008] JOL 22875 (C) at para 2.

271 Clark & Goldblatt *Gender and Family Law* 197.

272 *Ibid*.

273 1866 LR 1 P & D 130.

274 [2001] 2 F.L.R. 1048.

275 *Bellinger v Bellinger supra* at para 128.

relationship with mutual rights and responsibilities.[276] It is for this reason that Baroness Hale stated the following:

> "Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered into both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and the state."[277]

The common-law definition of a marriage precludes same-sex parties from entering into a valid marriage. This was made explicit by legislation in 1970.[278] The marriage of same-sex partners who concluded a marriage overseas was, therefore, not granted legal recognition in England and Wales, and the status of the union was that of a civil partnership[279] which was regulated by the Civil Partnership Act 2004.[280] In 2013, Parliament passed the Marriage (Same Sex Couples) Act 2013, hereby legalizing same-sex marriages in England and Wales.[281] The enactment of the Marriage (Same Sex Couples) Act 2013 also automatically legalized the marriages of same-sex couples that were concluded outside England and Wales before the Act came into operation.[282] Furthermore, it allows same-sex couples who entered into a civil partnership the choice whether or not to convert their relationships into a marriage.[283] At present, the law of England and Wales legally recognize marriage in the forms of both civil and religious unions and marriages concluded in terms of the Marriages (Same Sex Couples) Act 2013.[284]

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276 Burton *Family Law* (2003) 14.

277 *Radmacher v Granatino* [2010] UKSC 42 at para 132.

278 S 11(c) of the Matrimonial Causes Act 1973. See also *J v C and E* [2006] EWCA Civ 551.

279 S 215 of the Civil Partnership Act 2004. *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).

280 Civil partnerships were made available to same-sex couples in the United Kingdom in 2004, granting same-sex couples rights and responsibilities virtually identical to marriages concluded in terms of civil law. In other words, same-sex couples and couples of whom one spouse had changed their gender were allowed to live in legally recognized intimate partnerships similar to marriage, but without permitting them to marry, or describe themselves as married. It also compelled couples to end their marriage if one or both spouses underwent gender change surgery, or if the couple were not recognized in law as having male and female gender.

281 S 1 of the Marriages (Same Sex Couples) Act 2013. The provisions of the Act only became operative on 13 March 2014. The first same-sex marriages were registered in London on the 29 March 2014.

282 S 10 and Schedule 12 of the Marriages (Same Sex Couples) Act 2013.

283 S 9 of the Marriages (Same Sex Couples) Act 2013.

284 Same-sex couples can only marry in a religious ceremony if the religious organization has agreed to perform the marriage and the premises where the marriage is to be concluded has been registered for the marriage of same-sex couples. S 1 provides that the common law which places

The definition of the term “marriage” in English law excludes polygamous marriages and a polygamous marriage between partners where one or both of them are domiciled in England and Wales is invalid.[285]

As far as adultery is concerned, it is as a reason for divorce, alongside unreasonable behaviour is one of the most widely used reasons for divorce in England and Wales.[286]

2 3 4 COMPARISON

All three legal systems view marriage as a contract that regulates the relationship between the husband and wife, their children and society at large. South African and English law also regulate the relationship between the married spouses and the state as a valid civil marriage or customary union can only take place with state endorsement and approval. This is not the position in terms of Islamic law. The *Ulama,* while professing to have moral authority over the Muslim community, can merely draw on the moral conscience of Muslim spouses to adhere to *Shari'ah,* but cannot compel compliance as their orders lack the force of law.[287] The non-recognition and lack of regulation of Muslim marriages impacts severely on the parties to these marriages, particularly on women and children who, as vulnerable groups, are currently disadvantaged both on a social and economic level. The need for the enactment of legislation granting legal recognition to Muslim marriages is crucial. Having stated this, it is also imperative any legislation enacted recognizing and regulating Muslim marriages must be *Shari'ah* compliant.

Another significant difference between the three legal systems relates to one of the purposes or aims of a marriage concluded in terms of Islamic rites, namely, the legitimization of sexual relations between the spouses. As mentioned previously, Islam prohibits any courtship or sexual relations before marriage. The institution of marriage is the only recognized institution in Islam that legitimates sexual relations between a

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a duty on religious organizations or individuals to solemnize a marriage does not extend to same-sex marriages. Same-sex couples cannot, however, marry in the Church of England or the Church of Wales as the latter does not recognize same-sex marriages.

285 See para 2 5 3 of this thesis.

286 See para 3 3 3 of this thesis.

287 See para 4 3 of this thesis.

man and a woman. Adultery is strictly prohibited and Islam has adopted a zero-tolerance policy in respect thereof. Besides regarding the committing of adultery as sinful, Islamic law has also criminalized it. In contrast South African law has, as a result of the changing *mores* of society, become more tolerant of adultery. To this extent, adultery has been abolished as one of the grounds for divorce and furthermore, as a result of changing societal attitudes in respect of adultery, one can no longer bring a delictual claim against a third party who commits adultery with one of the spouses in a marriage. Adultery is still relevant as a factor in determining spousal maintenance and the division of matrimonial property, particularly, in respect of forfeiture and redistribution orders. Insofar as English law is concerned, the presence of adultery is one of the facts that can be proven to establish that the marriage has indeed broken down.[288]

As far as same-sex marriages are concerned, these are not recognized in Islam. Islam only grants recognition to a marriage between a man and a woman, as homosexuality[289] is totally prohibited in terms of the *Quran*.[290] In both the South African and English legal systems, same-sex marriages have been legalized. If legislation is enacted to recognize Muslim marriages, that legislation would not allow same-sex marriages.

Unlike South African law[291] and English law, Islam caters for polygamy, as provision is made for the man to have up to four wives at any given time. Legislation enacted to recognize Muslim marriages should include a provision regulating polygynous marriages. Although a man who wishes to enter into a polygynous marriage is not required to seek the consent of his wife or anyone for that matter in terms of Islamic law, the aspect of poygynous unions must be regulated to ensure fairness between all the wives and to ensure that the man is in a financial position to provide maintenance for all his wives as he bears the sole responsibility of maintenance during the subsistence if the marriage.

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288 See para 3 3 3 of this thesis.

289 Homosexuality includes gays, lesbianism, bisexuality and transgendered persons.

290 Al-Misri *et al Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* 664-665; Doi *Shariah: The Islamic Law* 242-243.

291 The exception to this being the Recognition of Customary Marriage Act which allows the man to practice polygyny.

Notwithstanding these differences, all three legal systems view marriage, when it is regarded as lawful, as an institution that is of vital importance, and therefore affords greater legal protection and respect to marriage than it has to other informal intimate domestic relationships.

2 4 IMPORTANCE OF MARRIAGE

From the discussion above in respect of the definitions of marriage in Islamic, South African and English law, it is apparent that the institution of marriage plays an important role in modern society in all three the jurisdictions.

2 4 1 ISLAMIC LAW

The *Quran* and the *Sunnah* of the Prophet Muhammad (PBUH) state the following with regard to the importance and significance of marriage as a necessary social institution:

> "It is Who created you from a single person, and made his mate of like nature, in order that he might dwell with her (in love) …."[292]

> "And among His signs is this that, that He created for you mates from among yourselves, that you may dwell (live) in tranquility with them, and He has put love and mercy between your hearts. Undoubtedly in there are signs for those who reflect."[293]

It is clear from the *Quranic* verses cited above that the purpose of the institution of marriage is for men and women to provide companionship to each other, love each other, conceive children and ultimately live in peace and tranquility with each other.[294] The following verses of the *Quran* furthermore provide evidence as to the importance of the institution of marriage:

> "Then marry women of your liking, two, three, four…"[295]

> "And marry those among you who are single and the virtuous ones among your slaves, male or female."[296]

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292 *Quran* Chap 7; verse 89.

293 *Quran* Chap 4; verse 34.

294 Doi *Shari'ah: The Islamic Law* 114.

295 *An-Nisa*; verse 3.

296 *An-Noor*; verse 32.

Apart from the various verses of the *Quran,* the Prophet Muhammad (PBUH) also encouraged Muslims to enter into marriage. To this effect the Prophet Muhammad (PBUH) stated the following:

> "O young men, those among you who can support a wife, should marry for it restrains eyes from casting (evil glances) and preserves one from immorality. But those who cannot should devote themselves to fasting for it is a means of controlling sexual desire."[297]

> "When a man gets married he has perfected half of his religion. Then let him fear Allah for the remaining half."[298]

In Islam marriage is regarded as a sacred and virtuous institution and is strongly encouraged and protected.[299] To this extent it is incumbent on every male and female to get married, unless they are prevented from entering into marriage due to a valid physical or economic impediment that prevents them from fulfilling duties arising from a marriage.[300]

When a marriage takes place, the woman is entrusted to the husband in order that together they can work towards making family life and society more meaningful.[301] The spouses are therefore united as husband and wife. To this effect, the *Quran* says the following:

> "He it is Who has created you from a single soul, and of the same did He make his spouse, that he might find comfort in her."[302]

An interpretation of the above verse indicates that the wife is not regarded as being inferior to the husband, but rather that they are both from the progeny of the Prophet Adam (PBUH), and can be regarded as having the same souls.[303] The purpose of marriage according this verse is the union of two souls, which brings the parties together physically, mentally and emotionally.

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297 Al-Qushayri *Sahih Muslim:* The Book of Marriage Hadeeth 3231 (1998).

298 Al-Bayhaqi *Shu'ab-al-Iman & Al-Tirmidhi Al-Jami' Hadeeth Number 3096* (1998).

299 Doi *Women in Shari'ah (Islamic Law)* 31.

300 Siddiqi *The Family Laws of Islam* 28.

301 Siddiqi *The Family Laws of Islam* 26.

302 Chap 7; verse 189.

303 Siddiqi *The Family Laws of Islam* 54.

The marital relationship between a husband and wife is also a spiritual one, which sustains and generates love, kindness, loyalty, mercy, compassion, mutual confidence, solace and tolerance.[304] Continuous loyalty towards each other is regarded as a general rule once a marriage is concluded.[305] The marital relationship between husband and wife seeks to provide contentment, happiness and peace within the marital relationship, which in turn is vital for well-adjusted members of society.[306] The *Quran* states the following:

> "They (your wives) are as a garment to you, and you as a garment to them."[307]

According to the above verse, the husband and wife are under an obligation to offer each other mutual support and comfort. The metaphor in the *Quranic* verse above is used to emphasize that in essence the marital relationship should literally be like the human body and the dress it wears.[308] A garment protects the body from the environment. In the same manner the hearts and souls of marriage partners should be approximate to each other, and they should protect each other from those elements that could endanger their honour and morality.[309] The marriage relationship, therefore, serves to protect the chastity of the spouses in the same manner that a garment hides nakedness and provides comfort. In the same way, spouses find comfort in each other's company.[310]

It is clear from various verses of the *Quran* that the institution of marriage is regarded as the cornerstone of every Muslim society, and is the basis for the establishment of the family. The family unit is, furthermore, regarded as providing the most congenial climate for the development and fulfillment of the human personality, as the family constitutes the most fundamental unit of human civilization.[311] The view advocated by Islam is, therefore, that there can be no family without a marriage being concluded.

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304 Ahmad *Family Life in Islam.*

305 Alkhuli *The Light of Islam* 66.

306 *Ibid.*

307 Chap 2; verse 187.

308 Siddiqi *The Family Laws of Islam* 55; Rautenbach & Bekker *Introduction to Legal Pluralism* 366.

309 Siddiqi *The Family Laws of Islam* 4.

310 Doi *Women in Shari'ah (Islamic Law)* 6.

311 Siddiqi *The Family Laws of Islam* 31.

2 4 2 SOUTH AFRICAN LAW

Besides the definitions submitted by academics and the judiciary above, marriage is, for many people within South African society, an institution with strong religious connotations, and religious-interest groups therefore contend that the marital relationship is the foundation of the family,[312] and that marriage was established for the purpose of companionship and partnership with a view to procreation and for fulfilling a stewardly responsibility for the earth.[313] Proponents of the belief that marriage is a sacred, biblical institution, also regard marriage as the only way to create a stable environment for the raising of children.[314] Therefore, based on the premise that marriage enhances healthy family structures, marriage plays a pivotal role in providing social stability and good order, making it the cornerstone of society.[315]

The notion of religious approval goes hand in hand with the desire for societal approval, as many couples believe their relationship will acquire societal approval only if they get married.[316] In fact, in some cultures being married makes the difference between accepted in the community or suffering stigma.[317]

Furthermore, the importance of the role of marriage in society was acknowledged by the Constitutional Court in *Satchwell v President of the Republic of South Africa and Another:*[318]

> "[I]n terms of our common law, marriage creates a physical, moral and spiritual community of life which imposes reciprocal duties of cohabitation and support. The formation of such relationships is of profound importance to the parties, and indeed to their families and is of great social value and significance."

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312 Genesis 2:18 which reads:

> "Then the Lord God said, 'It is not good for man to live alone. I will mode a suitable companion to help him'."

Matthew 19:5 which reads:

> "And God said, 'For this reason a man will leave his father and mother and unite with his wife and the two will become one'."

313 South African Law Reform Commission Discussion Paper 104 Project 118 *Domestic Partnerships* (August 2003) 160.

314 Lind 1995 *SALJ* 482.

315 *Ibid*.

316 Mosikatsana 1996 *SALJ* 557.

317 *Ibid*.

318 *Supra* para 22.

Intrinsically linked to the institution of marriage is the concept of "family". Debates about the concept of "family" have to a large extent arisen as a result of the difficulty as to how one should define family.[319] Various attempts have been made at defining marriage and the family, and in many instances these definitions often reflect differing and conflicting ideological, cultural and religious values.[320] There is no common-law or statutory definition of family, but as a result of one's involvement with families, one tends to think that one knows instinctively what families are:

> "Families have long been viewed as among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus regarding what exactly constitutes a family. Thus '[W]e speak of families as though we all knew what family are,' we see no need to define the concepts embedded within the term."[321]

As the family is a central organizing structure of society, what constitutes a family has far reaching implications for legal and social policy.[322] Families are regarded as bearing the primary responsibility for the upbringing and acculturation of children as well as for taking care of the sick and the old. Families in essence provide communities that give personal meaning and value to our lives.

Despite a universal commitment to the institution of "family", as the central organizing structure of society, there appears to be no consensus as to what constitutes a family.[323] The reason for this is because as families are viewed as the most essential and universal units of society, this sense of shared experience of family has led to an unexamined consensus regarding what exactly constitutes a family.[324] Of particular importance in this regard is the manner in which the Constitutional Court expressed itself about the omission of marriage and family rights from the final Constitution in *Ex Parte Chairperson of the Constitutional Assembly, Ex parte: In re Certification of the Constitution of the RSA:*[325]

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319 Barratt *et al Law of Persons and the Family* 173.

320 Mosikatsana 1996 *SALJ* 549.

321 Mosikatsana 1996 *SALJ* 550.

322 Bainham "Family Law in a Pluralistic Society" 1995 *Journal of Law and Society* 234.

323 Noble "Same-sex Marriage under the Final Constitution" 1997 *Responsa Meridiana* 91 92.

324 *Ibid*.

325 1996 (10) BCLR 1253 (CC).

> "Families are constituted, function and are dissolved in such a variety of ways and the possible outcomes of constitutionalizing family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or pursue family life as a fundamental right that is appropriate for definition in constitutional terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection. These are seen as questions which relate to the history, culture and special circumstances of each society permitting no universal solutions."[326]

Traditionally, South African family law deals with the nuclear family. This is a social unit made up of a husband, wife and their children.[327] Other definitions of family include grandparents, aunts, uncles, nieces, nephews, cousins and even persons more distantly related by "blood" or marriage.[328] Many people may even include step-relations, or adoptive or foster families, as well as close friends and their children in their perceptions of what constitutes a family.[329]

Legally speaking, however, a family is limited to particular relationships and the rights and responsibilities arising out of these relationships, the most important being the relationship established by heterosexual marriages (that is, between husband and wife), and that created by procreation (that is, between parent and child).[330] While the above definition as set out by law will often reflect relationships recognized in society at large as family relationships, there will be instances where the legal and social definition and expectation differ.[331] It is therefore submitted that the traditional approach of the courts to adopt the legal definition of family in effect ignores the reality of cultural diversity and the value of pluralism of the new liberal and democratic society. The courts have justified their approach by assuming that, as the family has long been viewed as one of the most essential and universal units of society, everyone should

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326 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA supra* para 99.

327 Krüger "Appearance and Reality: Constitutional Protection of the Institutions of Marriage and the Family" 2003 *THRHR* 285.

328 Heaton & Kruger *South African Family Law* 3.

329 Lind 1995 *SALJ* 482.

330 Heaton & Kruger *South African Family Law* 3; Barratt *et al Law of Persons and the Family* 173.

331 For example, the concept of "family" (people whom they spend holidays and special events with), for a couple in a domestic partnership, living with their children, may include the one partners ex-husband and his wife and child; the partner's boyfriend's ex-mother-in-law and her sister; his ex-wife and her boyfriend; the other partner's mom and stepfather as well as the stepbrother and his wife, their biological child and their adopted child.

know what constitutes a family, and there is therefore no need to define the concept embedded within the term.[332] Where the perceptions of family are inconsistent, as is the case in South Africa, the above assumptions made by the court can be problematic as in reality there are various forms which a family can assume, for example, homosexual couples, cohabitation, African customary marriages,[333] Hindu, Jewish and Muslim marriages, all of which do not conform to the traditional family model.

Since the enactment of the Constitution, profound legal developments in the field of family law have taken place. These changes appear to strike at the most basic assumptions underlying marriage and the family. The Constitution supports a diverse family law that treats individuals equally in permitting them to choose their family relationships and to bestow state function of their preference.[334] It is submitted that, as a result of the growing number of diverse lifestyles and alternate family forms, the exclusive nature of the common-law definition no longer reflects the social reality that exists in present day South Africa. Therefore, the traditional legal definition of marriage is therefore no longer acceptable for the majority of the South African population, as is evidenced from the quote below:

> "While the family has remained fundamental to social organization, the present generation has witnessed considerable relaxation in the grip which the marriage institution has held over family life. This has been the result of changes in the public opinion, which has come to place a high value on respect for individual fulfillment and free choice, on tolerance of diversity of styles in personal relationships and on concern for the well-being of all persons in society."[335]

These developments indicate that the courts as well as the legislature have given recognition to the fact that the notion of family is influenced by culture and changes over time.[336] Furthermore, recognition is given to the fact that the nucleus model of a single generation, heterosexual, civilly married couple with children born within

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332 Mosikatsana 1996 *SALJ* 550.

333 As indicated in Chap 1 of this thesis, customary marriages have been granted legal recognition in terms of the Recognition of Customary Marriages Act 120 of 1998.

334 South African Law Reform Commission Discussion Paper 104 Project 118 *Domestic Partnerships* (August 2003) 177.

335 Zuckerman "Formality and the Family-Reform and Status Quo" 1980 *Law Quarterly Review* 248.

336 *Chairperson of the Constitutional Assembly, Ex parte: In re Certification of the Constitution of the Republic of South Africa supra*; *Minister of Home Affairs v Fourie (Doctors for Life International & Others, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs) supra*. See also Recognition of Customary Marriages Act 120 of 1998 and the Civil Union Act 17 of 2006.

wedlock, in modern day South Africa, is neither the norm or the only form of family that is worthy of legal recognition by the courts and legislature.[337]

It is important that the concept of "family" reflects the heterogeneous reality of South African society. Changes in family formation and social norms place a duty on the South African legal system to redefine the concept "family". The imposition of this legal duty can be seen from the following dictum:[338]

> "…[T]he law must be constantly on the move, vigilant and flexible to current economic and social conditions…" and "if it (the law) fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose."

The judiciary's attempt to redefine the concept "family" has led to the position of the family being the subject of numerous court cases. In *Dawood and Others v Minister of Home Affairs*[339] O'Regan J, stated the following:

> "…[F]amilies come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognizing the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."

In the spirit of tolerance to which the new Constitution dedicates itself, one finds an ethic that supports a diverse family law which treats individuals equally by freeing them to choose their family relationships and to appropriate the power of the state to entrench those relationships.[340]

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337 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs supra* paras 30 & 37.

338 *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZSC) 832 D-E.

339 *Supra* para 31.

340 Lind 1995 *SALJ* 485.

2 4 3 THE LAW OF ENGLAND AND WALES

The fact that the notion of family is difficult to define can be seen from international law, statutory law as well as English case law.[341] Similarly, neither statutory law nor the common law provides a definition of "family".[342]

What is clear is that the stereotypical idea of the ideal family consisting of a mother, father and children is not the family form, which the majority of members in society experience.[343] A family is, therefore, not solely confined to parties who have entered into a civil marriage, but also encompasses the relationship where parties are cohabiting outside the confines of a marriage.[344] In recent years the concept of family has undergone considerable changes and is at present not only limited to married families nor heterosexual cohabitation, but also includes the extended family[345] and same-sex couples.[346] In terms of the Family Law Act 1996 (as amended) the family is deemed to include step-parents and step-children, as well as the relatives of a former spouse or cohabitant.[347]

The importance of families, as well as the extended family, was emphasized by the House of Lords in *Huang v Secretary of State for the Home Department,*[348] where it was stated that the family is the group upon which people rely for social, emotional and financial support.[349] The court went further to state that the family is such an important unit in society that a prolonged and unavoidable separation from the family seriously inhibits the individual's ability to lead a full and fulfilling life.[350]

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341 For example, although article 8(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) guarantees the right to respect family life, no definition of family or family life is provided. Neither does article 16 of the Universal Declaration of Human Rights, which regards the family as the natural and fundamental group unit of society, provide a definition of the family. It is submitted that the failure to provide a definition of family in art 16 is deliberate so as to accommodate the different party states who each have different cultures and societies and notions as to what constitutes "family".

342 For a discussion on the definition of "family" see Diduck & Kaganas *Family Law, Gender and the State* (2012) 3-34.

343 Herring *Family Law* 1.

344 *Keegan v Ireland* [1994] 18 EHRR 342.

345 Burton *Family Law* 3.

346 See para 2 3 3 of this thesis.

347 Cretney, Mason & Bailey-Harris *Principles of Family Law* (2003) 64.

348 [2007] UKH L 11; [2007] 2 AC 167.

349 *Supra* para 18.

350 *Ibid*.

These sentiments were echoed by the Labour Government in 2008, which described the family as the bedrock of society which nurtures children, helps to build strength and moral values in young people and which provides the love and encouragement that enables people to live fulfilling lives.[351]

Traditionally, the State has given preference to the institution of marriage and has actively encouraged parties to marry.[352] Marriage is regarded as the ideal community[353] that makes provision for the creation of a framework in which members of society can experience their life as making sense.[354] The reasons advanced by the Government for endorsing the institution of marriage are:

(a) Marriage is regarded as the "building blocks" of society and it is therefore essential for the well-being of society.[355]

(b) In England and Wales the institution of marriage is endorsed by the Government as the best environment in which to raise children, as it is submitted that marriage relationships are more stable than unmarried relationships.[356]

(c) By virtue of the State managing and regulating the marriage from the time it is solemnized to its dissolution, it makes provision for the continued welfare of children, and that spousal property is divided in a just and fair manner at the dissolution of the marriage.[357]

(d) The institution of marriage provides an economic benefit to the State as firstly, when an unmarried person becomes ill or unemployed, the financial burden is placed squarely on the shoulders of the State, whereas in the case of spouses,

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351 Cabinet Office (2008) 1.

352 The State explicitly encourages marriages by providing tax advantages to married couples which are not available to unmarried persons.

353 Reece *Divorcing Responsibility* (2003) 106.

354 Berger & Keller "Marriage and the Construction of Reality"1999 46 *Diogenes* 1.

355 *Campbell v Campbell* [1977] 1 All ER 1 at 6.

356 Burton *Family Law* 13; Herring *Family Law* 39.

357 Herring *Family Law* 92.

they will rely on each other. Secondly, married couples that share accommodation require less housing than two unmarried persons.[358]

2 4 4 COMPARISON

From the discussion above, it is clear that the institution of marriage and the concept of family is of vital importance and worthy of protection in Islamic, South African and English law. Furthermore, all three legal systems also attach equal importance and significance to the institution of marriage as a necessary and fundamental social institution. To this extent marriage is regarded as an institution that enhances healthy family structures and is pivotal in providing social stability.

Islamic, South African and English law, furthermore, regard marriage as the institution that provides companionship, love, conjugal rights, comfort and loyalty to each other. In essence, when two parties enter into a marriage it is regarded as the uniting of two souls physically, mentally and emotionally.

However, the main difference between these three legal systems is that South African and English family law has extended the definition of family to include diverse family forms and has granted legal protection to alternate family forms. This is not the position in Islamic law that adopts a more narrow approach to what constitutes the family. The differences between the three legal systems serves to highlight the different ideological principles on which Islamic law is premised in comparison to South African and English law.

2 5 THE LEGAL REQUIREMENTS FOR A VALID MARRIAGE

This section will consider the legal requirements of a marriage in all three jurisdictions with specific reference to capacity, consent, lawfulness and formalities.

358 Herring *Family Law* 92. Whether these assertions by the State hold true is debatable but it is nonetheless used to encourage parties to enter into a marriage as is evidenced by the State's public statements and policies in respect of the institution of marriage.

2 5 1 ISLAMIC LAW

The *Shafi'i* school of jurisprudence prescribes the following requirements for the solemnization of a marriage according to Muslim rites:[359]

(a) The parties must possess capacity to marry each other;
(b) there must be consensus between the parties and the guardian of the prospective bride must consent to the marriage;
(c) the marriage must be lawful; and lastly,
(d) the marriage must conform to the certain formalities prescribed in terms of *Shari'ah*.

2 5 1 1 LEGAL CAPACITY

In order for a valid marriage to be concluded both the parties must possess legal capacity. The marriage will be deemed to be void in the absence of legal capacity. Factors such as age and mental capacity affect the legal capacity of a person.[360]

(i) Age

In terms of Islamic law no particular age has been stipulated for marriage.[361] *Shari'ah* allows for the conclusion of a marriage when the age of puberty (*mukallaf* or *bulugh*) is reached.[362] Puberty is determined by signs of physical maturation or, where there is no declaration of puberty, there is a presumption that puberty has been reached, in the case of girl, when she has reached the age of nine years and, in the case of a boy, when he has reached the age of twelve years.[363] It is submitted that differing climatic, hereditary, physical and social conditions existing in different countries affect the age at which a person is deemed to be marriageable. As a result no particular age is

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359 Doi *Women in the Shari'ah* 48.

360 Rautenbach & Bekker *Introduction to Legal Pluralism* 366.

361 Siddiqi *The Family Laws of Islam* 68.

362 Ibn Rushd *The Distinguished Jurist's Primer: A Translation of Bidayat Al-Mujtahid* 4; Esposito with DeLong-Bas *Women in Muslim Family Law* 15; Ahmed *Muslim Law of Divorce* 913; Pearl *A Textbook on Muslim Law* 43.

363 In the past, marriages at a young age were common but in recent times countries like Sudan and Tunisia have a legislated age when the parties are deemed to have the necessary capacity to conclude a marriage. For example, in Sudan the marriageable age for a girl is deemed to be sixteen years and in Tunisia it is twenty-two years. See para 2 5 2 1 (i) & para 2 5 3 (1) (i) of this thesis in respect of the age requirement in terms of South African and English law respectively.

stipulated as there would be a difference as to the marriageable age in the different countries.[364]

In the event of a minor concluding a marriage, the consent of the minor as well as the guardian of the minor must be obtained.[365] A minor who is given in marriage by his or her guardian without the minor's consent, has the option of repudiating the marriage when reaching the age of majority.[366] In contrast, the marriage of the minor without the consent of the guardian will be rendered voidable, and the validity of the marriage depends on whether or not the guardian will ratify the marriage.[367]

(ii) Mental capacity

The general rule in respect of a person who suffers from mental illness is that the person is allowed to conclude a marriage, subject to the condition that he or she informs the person with whom he or she wishes to marry about his or her mental condition.[368] Where the one party accepts or gives indications of accepting that his or her future spouse suffers from mental illness, the party loses the right to have the marriage annulled.[369]

According to the majority of Islamic jurists, mental illness renders a marriage null and void and the innocent spouse can have the marriage annulled if he or she had been unaware that the other party suffered from mental illness at the time that the marriage was concluded.[370]

Provision is also made for the guardian of the woman or an Islamic judge to grant consent on behalf of the mentally ill woman to enter into a marriage so as to protect her from having illicit sexual relations, provided a physician gives evidence that the marriage can cure the woman of her mental illness.[371]

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364 Siddiqi *Family Laws of Islam* 68.

365 Siddiqi *The Family Laws of Islam* 70; Ayoup *Fiqh of Muslim Family* 22.

366 *Ibid*.

367 Siddiqi *The Family Laws of Islam* 71.

368 Al-Qayyim *Zaad Al-Ma'aad* (1998) Vol 5 166.

369 *Ibid*.

370 Ibn Qudaamah *Al-Mughni* (2013) Vol 7 140; *Al-Mawsu'ah al-Fiqhiyyah* (1983) Vol 16 108.

371 This is the view as expressed by *Imam* Shafi'i. See also Ayoup *Fiqh of Muslim Family* 36; Nawawi *Minhaj et Taliban: A Manual of Muhammadan Law* 289-290.

2 5 1 2 CONSENT

(i) The consent of the prospective groom and bride

Both parties to the proposed marriage must have the intention to enter into a marriage with each other.[372] Consent on the part of both parties constitutes an essential requirement for a valid marriage.[373] This mutual consent is referred to as *ijab*, which in essence is an affirmation or declaration, and *qabul* meaning acceptance or consent.[374] The man as well as the woman has the freedom to choose their marriage partners.[375] The parents or guardian of the woman and the man cannot force them to enter into a marriage with a person whom they do not wish to marry.[376] The parents or guardian can advise the parties contemplating marriage with regard to their choice of a marriage partner, but there is no justification for forced marriages in Islam.[377] Where the parents or guardian marries a woman to someone without obtaining her consent, the marriage is null and void.[378] The tradition of the Prophet Muhammad (PBUH) provides the following with regard to the issue of consent:

> "A woman without a husband (or divorced or a widow) must not be married until she is consulted, and a virgin must not be married until her permission is sought, and her silence implies her consent."[379]

It is narrated that a virgin girl approached the Prophet Muhammad (PBUH) and informed him that her father had married her to a man without obtaining her consent. The Prophet Muhammad (PBUH) gave her the choice to repudiate the marriage.[380] Irrespective of whether a woman was divorced or widowed, her consent must be obtained before a further marriage can be concluded. The *Quran* states:

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372 Doi *Shari'ah: The Islamic Law* 123.

373 Alkhuli *The Light of Islam* 70.

374 Siddiqi *The Family Laws of Islam* 68.

375 Doi *Shari'ah: The Islamic Law* 123.

376 Siddiqi *The Family Laws of Marriage* 69.

377 Alkhuli *The Light of Islam* 72. Therefore, a marriage entered into under duress is null and void.

378 Ayuop *Fiqh of Muslim Family* 22.

379 Al-Qushayri *Sahih Muslim*: *The Book of Marriage Hadeeth 3303* (1998) Vol 8.

380 Doi *Women in Shari'ah (Islamic Law)* 35.

> "And when you divorce women and they have come to the end of their waiting period, hinder them not from marrying other men if they have agreed with each other in a fair manner."[381]

> "And if you die and leave behind wives, they bequeath thereby to their widows one year's maintenance without their being obliged to leave but if they leave of their own accord, there is no blame on you for what they do with themselves in a lawful manner."[382]

Whether the woman was married or not, her consent had to be obtained in order for a valid marriage to be contracted. It is submitted that a woman who was previously married is more mature and would therefore be more inclined to express whether or not she consents to the proposed marriage.[383] An unmarried woman, who may be hesitant to express her opinion due to shyness, is permitted to express her consent by observing silence.[384] The virgin bride must however be informed in advance by the *Imam* conducting the wedding ceremony that her silence will be deemed to constitute consent.[385]

The marriage ceremony can take place, either in a gathering of men with neither the bride nor any other women being present, or, alternatively it can take place in the presence of the bride, in which case she may give consent without her guardian announcing it on her behalf. Where the marriage ceremony takes place in the absence of the bride, her consent is still required, but her guardian would give consent on her behalf. The *Imam* is also allowed to approach the bride himself and obtain the necessary consent from her; this being done in the presence of two formal witnesses.

(ii) The consent of the guardian of the prospective bride

A marriage contracted without the consent of the woman's guardian will be invalid.[386] To this effect, the *Quran* states as follows*:*

> "So marry them with the permission of their masters."[387]

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381 Chap 2; verse 232.

382 Chap 2; verse 234.

383 Ayoup *Fiqh of Muslim Family* 22.

384 Siddiqi *The Family Laws of Islam* 70; Ayoup *Fiqh of Muslim Family* 22.

385 Ayoub *Fiqh of Muslim Family* 24.

386 Ayoub *Fiqh of Muslim Family* 26; Doi *Shari'ah: The Islamic Law* 140.

387 *An-Nisa*; verse 25.

Furthermore, an authentic narration of the Prophet Muhammad (PBUH) states that where any woman who enters into married life without the permission of her guardian, the marriage will be null and void.[388] This is the view held by the majority of the schools of jurisprudence, except the *Hanafi* school of jurisprudence.[389]

A Muslim judge can replace the guardian's consent in the following circumstances, namely:[390]

(i) where the guardian unreasonably withholds such consent;
(ii) where the guardian is on a journey further than eighty-one kilometers from home; or
(iii) the guardian is in a state of pilgrim sanctity.[391]

In order for the guardian's consent to be valid, the guardian must be male, legally responsible, a Muslim of good moral character and of sound judgment.[392] All the schools of jurisprudence, except the *Hanafi* school are in agreement that the woman's guardian must be appointed from her paternal male family.[393] Ayoup, is, however, of the opinion that the appointment of a guardian should not be restricted to the paternal side of the woman's family.[394] The order of preference for the appointment of a guardian is as follows: firstly, her father and then her grandfather or great-grandfather if her father is deceased, and thereafter her brothers, brothers' sons or sisters' sons or father's brothers, and so on.[395]

388 Doi *Shari'ah: The Islamic Law* 141.

389 Doi *Shari'ah: The Islamic Law* 140. This school is of the opinion that it is permissible for a woman to enter into a marriage without the consent of her guardian.

390 Ayoup *Fiqh of Muslim Family* 26.

391 Pilgrimage takes place on the ninth day of the last lunar month of the year, namely *Dhil-Hijja*. On the ninth day, the pilgrim proceeds to the plain of Arafa in Saudi Arabia and spends the entire day solely in the worship of Allah.

392 Al-Misri *et al Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (2008) 518.

393 Ayoup *Fiqh of Muslim Family* 29.

394 *Ibid*.

395 Siddiqi *The Family Laws of Islam* 71.

The consent of the guardian is also required where a minor male wishes to enter into a marriage.[396] According to the *Shafi'i* school of jurisprudence, only the father or grandfather of the minor will suffice as a guardian who can consent to the marriage of the minor.[397]

The following people cannot be guardians:[398]

(i) a male relative who is mentally ill;
(ii) a non-Muslim;
(iii) a person whose judgment is affected due to old age or weak-mindedness; and
(iv) a minor.

2 5 1 3 LAWFULNESS

Despite both parties to the prospective marriage possessing the necessary capacity to act and consenting to the marriage, the marriage can be rendered void on the ground of unlawfulness.[399] As stated above, it is an essential requirement for a valid marriage that the female partner to a proposed marriage must immediately be eligible for marriage to the person who proposed.[400] In other words, there must be no impediments in terms of Islamic law that prevent the marriage from taking place. In this regard the impediments prohibiting marriage may be divided into either permanent or temporary impediments.[401]

(i) Permanent impediments

A permanent impediment that renders a marriage unlawful would be that the parties are in a prohibited degree of relationship.[402]

According to the *Quran*, a man is prohibited from entering into a marriage with the following females:

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396 Siddiqi *The Family Laws of Islam* 73.
397 Doi *Shari'ah: The Islamic Law* 142.
398 Ayoup *Fiqh of Muslim Family* 32; Siddiqi *Family Laws of Islam* 72.
399 Doi *Shari'ah: The Islamic Law* 124.
400 Sabiq *Fiqh Us-Sunnah* 382.
401 Rautenbach & Bekker Introduction to *Legal Pluralism* 366-367; Doi *Women in the Shari'ah* 36.
402 Doi *Shari'ah: The Islamic Law* 124.

> "Forbidden unto you are your (1) mothers, (2) and your daughters, (3) and your sisters (4) and your father's sisters, (5) and your mother's sisters, (6) and your brother's daughters, (7) and your sister's daughters, (8) and your foster mothers, (9) and your foster sisters, (10) and your mother's in-law, (11) and your step-daughters who are under your protection (born) of your women unto whom you have gone in – but if you have not gone into them, then it is no sin for you (to marry their daughters), (12) and the wives of your sons who (spring) from your own loins, (13) and (it is forbidden unto you) that you should have two sisters together, except what has already happened (of that nature) in the past, for Allah is indeed forgiving, merciful (14) and all married women (are forbidden) unto you save those (captives) whom your right hands possess."[403]

Islamic jurisprudence has classed these fourteen women who are prohibited from marriage into three groups, namely, consanguinity (blood relationship), affinity (relationship by marriage) and lastly fosterage.[404] The prohibited degrees of relationship by consanguinity (*nasab)* include the first seven categories mentioned in the *Quranic* verse above. The prohibition relating to a marriage between a man and his mother includes his biological mother as well as his stepmother.[405] This prohibition further extends to both maternal and paternal grandparents.[406] The prohibition concerning marriage to a sister includes a biological and foster sister, and extends to both the father and the mother's side.[407] Furthermore marriage to a maternal or paternal aunt is prohibited.[408] The marriage between the classes of persons mentioned above is prohibited, regardless whether the relationship stems from a biological or step-relationship or whether it is paternal or maternal.[409]

As far as the prohibition by affinity is concerned a man is prohibited from marrying certain females who are related to him by virtue of his marriage.[410] A man would therefore be prohibited from marrying any ascendants or descendants of his wife, for example, his mother-in-law, or step-daughter.[411] All four jurisprudential Islamic schools of thought are in agreement that a marriage between a man and his mother-

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403 Chap 4; verse 23.
404 Ayoup *Fiqh of Muslim Family* 83.
405 *Ibid*.
406 Ayoup *Fiqh of Muslim Family* 84.
407 *Ibid*.
408 *Ibid*.
409 Ayoup *Fiqh of Muslim Family* 85.
410 *Ibid*.
411 *Ibid*.

in-law is prohibited, even where the marriage between him and his wife was not consummated.[412] A man may also not enter into a marriage with his sister-in-law, as he cannot be married to two sisters at the same time. However, the man can marry his sister-in-law should he get divorced, or upon the death of his wife. The *Quran* states:

> "(Forbidden to you is)…that you have two real sisters together as wives at one and the same time."[413]

The marriage between a woman and a man who are related through a fosterage relationship is also prohibited.[414] Based on the *Quranic* verse cited above, a woman who has suckled a child should be treated in the same manner as the biological mother with regard to this prohibition of marriage.[415] The same applies to the husband of such a woman. Therefore all the relations that are unlawful in respect of the biological parents in terms of consanguinity should apply to the foster parents. In terms of the traditions of the Prophet Muhammad (PBUH) it is stated:

> "Suckling makes unlawful what birth (blood) makes unlawful."[416]

Adoption in terms of Islamic law is prohibited and has been nullified in the *Quran* by the following verse:

> *"… nor has He made your adopted sons your real sons…"*[417]

Furthermore, as mentioned previously, Islam only allows a marriage to be concluded between parties of the opposite sex and therefore, same-sex marriages are not possible.[418]

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412 Siddiqi *The Family Laws of Islam* 64.

413 Chap 4; verse 23.

414 Siddiqi *The Family Laws of Islam* 63. The term "fosterage" in Islam denotes being kind towards a child, giving him or her a righteous religious upbringing and sound direction and teaching him or her that which will benefit him in this world and in the hereafter.

415 Siddiqi *The Family Laws of Islam* 63.

416 Al-Bukhari *Sahih Muslim*: *The Book of Marriage Hadeeth 2938* (1998) Vol 8.

417 *Al-Azhaad*; verse 4.

418 See para 2 3 1 of this thesis.

(ii) Temporary impediments

Temporary impediments or prohibitions arise as a result of the special circumstances in which the parties find themselves.[419] Temporary impediments which render a marriage void are the following:

- the existence of a previous valid marriage in certain circumstances,
- an irrevocable divorce, and
- difference of religion.[420]

During the subsistence of a valid marriage, the woman is not allowed to enter into a subsequent marriage, without the first marriage being terminated either by death or divorce.[421] In addition to this, the woman has to observe the compulsory waiting period (*iddah*) before she can enter into a valid marriage.[422] A man who already has four wives, is prohibited from entering into a marriage with a fifth wife, unless he divorces one of his other wives.[423] The following *Quranic* verses substantiate what is stated above:

> "Prohibited to you …. woman already married."[424] and
>
> "Divorced women shall wait concerning themselves for three monthly courses."[425]

Where an irrevocable divorce has taken place, the woman is temporarily prohibited from remarrying her former husband.[426] In order for her to remarry her former husband, she has to first enter into a valid marriage with a third party, and only when this marriage is terminated,[427] either through death or divorce, can she remarry her first husband.[428]

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419 Doi *Shari'ah: The Islamic Law* 125.
420 Doi *Women in the Shari'ah* 38.
421 *Ibid*.
422 *Ibid.*
423 *Ibid.*
424 Chap 4; verse 23-24.
425 Chap 2; verse 228.
426 Rautenbach & Bekker *Introduction to Legal Pluralism* 375.
427 Doi *Women in Shari'ah* 47.
428 Doi *Shari'ah: The Islamic Law* 178.

In terms of the *Quran,* the marriage of a Muslim woman to a man of a different religion, that is, a non-Muslim, is strictly prohibited.[429] To this extent the *Quran* states:

> "They are not lawful (wives) for the disbelievers, nor are the disbelievers lawful (husbands) for them."[430] and

> "And give not your (daughters) in marriage to *Al-Mushrikoon* until they believe (in Allah alone) and verily, a believing slave is better than a (free) *Mushrik* (idolater), even though he pleases you…."[431]

Islamic law draws a distinction between a man and a woman in respect of this impediment, as a Muslim man is allowed to marry a non-Muslim woman (*kitabiyyah*) who believes in a revealed religion.[432] A Muslim believes in all the prophets and the revealed books, as Islam encompasses all religions.[433] Christianity and Judaism are regarded as revealed religions according to Islam.[434] The following verse of the *Quran* allows a Muslim man to marry a non-Muslim woman who believes in a revealed religion:

> "This day are (all) good things made lawful for you. The food of the People of the Book is lawful for you and yours is lawful for them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time, when you give them their due dowers and desire chastity, not lewdness, nor secret intrigues."[435]

The *rationale* for this distinction being ascribed to the fact that the structure of the family in Islam is patriarchal in nature and the husband is regarded as being the head of the household.[436] Therefore, if a Muslim woman marries a non-Muslim man, the latter being the head of the household, may influence his Muslim wife directly or indirectly to abandon her Islamic beliefs.[437] It must be born in mind, however, that despite the

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429 Sabiq *Fiqh Us-Sunnah* 363; Hallaq *The Origins and Evolution of Islamic Law* 23; Esposito & DeLong-Bas *Women in Mulsim Family Law* 19; Fyzee *Outlines of Mohammadan Law* 93; Ajijola *Introduction to Islamic Law* 150.

430 Chap 60; verse 10.

431 Chap 2; verse 221.

432 Doi *Women in Shari'ah* 44.

433 *Ibid*.

434 *Ibid*.

435 Chap 5; verse 5.

436 Doi *Women in Shari'ah* 41.

437 Alkhuli *The Light of Islam* 69.

Quran granting approval for a Muslim man to marry a *kitabiyyah,* such a marriage should in practice be avoided as the latter may attend church or a synagogue, consume alcohol or eat pork as this would not be in conflict with her religion, but which would be contrary to the teachings of Islam and may affect the behaviour of the children born of the marriage negatively.[438]

2 5 1 4 FORMALITIES

(i) Witnesses for the marriage

The general principle in terms of Islamic law is that for a marriage to be validly concluded the presence of at least four people is required, namely, the guardian of the bride, the bridegroom or his representative and two witnesses.[439] The witnesses are required to be just, free persons over the age of puberty who are not blind, deaf, mute or mentally ill.[440]

The presence of witnesses at the marriage ceremony is essential to ensure compliance with the publicity requirement.[441] Furthermore, the following *hadeeth* of the Prophet Muhammad (PBUH) shows the importance of witnesses as an essential requirement for a contract of marriage:

> "There is no marriage without witnesses" and "There can be no marriage without a guardian and two honest witnesses."[442]

The presence of two males or one male and two female witnesses is required at the wedding ceremony. If both parties to the marriage are Muslim, then it is required for the witnesses to be Muslim as well.

(ii) Offer (Ijab) and acceptance (qabul) of the marriage proposal

From a legal perspective as in any other contract, a marriage contract (*aqd-un-nikah*) can be concluded only through the pillars (*arkan*) of offer and acceptance by the two

438 Doi *Women in Islam* 45.
439 Ba'-kathah *Tuh-fatul Ikhwaan* 143.
440 *Ibid*.
441 Rautenbach & Bekker *Introduction to Legal Pluralism* 366.
442 Ayoup *Fiqh of Muslim Family* 60.

principals or their proxies.[443] There must be a meeting of the minds by means of the offer and acceptance. The proposal for marriage and the acceptance thereof must be clearly conveyed, and there must be no room for ambiguity.[444] In addition, the acceptance of the marriage proposal must take place in the same meeting where the offer for marriage is made.[445]

(iii) The parties must agree on the dowry

Despite the fact that all the major schools of jurisprudence are in agreement that there must be agreement in respect of the dowry, the absence of agreement does not affect the validity of the marriage.[446]

(iv) The publicity of the marriage

The marriage must be publicized.[447] The publicity requirement serves to differentiate the institution of marriage from mere fornication.[448] By entering into a marriage the parties to the marriage are in effect pronouncing publically that their souls are united, and that children born of the union will be deemed to be children born of married persons.[449] The public announcement also serves to warn others not to interfere with the conjugal relations of the married couple.[450] If no public announcement is made, or there are no witnesses present, the union between the parties merely amounts to fornication and not a marriage.[451] This is the position despite the fact that both the parties have consented to the marriage, as the factor that distinguishes a marriage from a clandestine relationship, is its publicity.[452] The following verse of the *Quran* can be used to substantiate this position:

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443 Ba'-kathah *Tuh-fatul Ikhwaan* 143. In terms of Islamic law, marriage by proxy is permissible whereby the woman delegates the conclusion of her marriage to her guardian.

444 *Ibid*.

445 Doi *Women in the Shari'ah* 48.

446 Doi *Women in Shari'ah* 48. A detailed discussion on dowry is undertaken in para 2 6 1 1 1 (i) of this thesis.

447 Ayoup *Fiqh of Muslim Family* 53.

448 Alkhuli *The Light of Islam* 71.

449 Siddiqi *The Family Laws of Islam* 77.

450 *Ibid*.

451 Alkhuli *The Light of Islam* 71.

452 *Ibid*.

> "Taking them in marriage, not fornicating, nor taking them for paramours in secret."[453]

There are several reported traditions of the Prophet Muhammad (PBUH) that stipulate that the marriage must be made public, for example:

> "The demarcation between lawful and unlawful things in marriage is proclamation and duff."[454]

There are two ways in which this requirement can be met, namely, there must be witnesses present at the time when the marriage contract is concluded, and secondly, the religious scholar (*Imam*) performing the marriage must deliver a special sermon whereby the marriage is publicized.[455]

(v) Place of marriage

It is not a prerequisite for the validity of a marriage nor is it *sunnah* for the marriage to be concluded in a mosque.[456] It is, however, *mustahab* or desirable that the marriage be concluded in a mosque for the sake of the *barakah* (blessing) and also so that the marriage is made public.[457] This is also the position advocated by the Permanent Committee for Islamic Rulings and Verdicts.[458]

2 5 1 5 *MUSTAHAB* (COMMENDABLE) ACTS

In addition to the legal requirements that must be met for the marriage to be valid and enforceable, Islamic law also regards the following acts, which are performed at the time that the marriage is concluded, as *mustahab* or commendable acts.[459]

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453 Chap 4; 24.

454 Bin Isa *Tirmidhi: Hadeeth Encyclopaedia Hadeeth 3* (1998).

455 Alkhuli *The Light of Islam* 71.

456 *Al-Mawsu'ah Al-Fiqhiyyah: The Fiqh Encyclopaedia* (1983) Vol 37 214; Al-Ramli *Nihaayat Al-Muhtaaj* (1967) Vol 7 185.

457 Buhuti *Kashshaaf Al-Qinaa* (2009) Vol 2 368; Zadeh *Majma Al-Anhar* (1901) Vol 1 317.

458 Daweesh *Fataawa Al-Lajnah Al-Daa'imah* 110.

459 Ayoup *Fiqh of Muslim Family* 51.

(i) Khutbah (sermon)

Before the marriage is announced, the *Imam*[460] delivers a wedding sermon, whereby he advises both the prospective husband and wife how they should conduct themselves as a married couple.[461] Both parties are, furthermore, reminded of the rights and responsibilities they will have towards each other once they enter into a marriage.[462] At the conclusion of the marriage sermon, an announcement is made that the parties have accepted each other as husband and wife.[463] The *Imam* also announces the dower at the same time that the marriage is concluded.[464]

(ii) The marriage feast (walima)

The giving of a *walima* is a confirmed *sunnah* in Islam. The Prophet Muhammad (PBUH) said to Abdul-Rahmaan ibn 'Awf:[465]

> "May Allah bless you. Give a walima even if it is with one sheep."

This is also proven by the *hadeeth* of Anas which states as follows:[466]

> "When the day dawned the Messenger of Allah (blessings and peace of Allah be upon him) was a bridegroom to Zaynab bint Jahsh, whom he married in Madinah, and he invited the people to eat in the forenoon."

After the marriage ceremony has been concluded, the bride is taken to her husband's home and this is followed by the *walima*.[467] The bridegroom hosts the *walima*.[468] The wedding feast is celebrated in accordance with the traditions of the Prophet Muhammad (PBUH).[469] The *walima* also serves as a means to fulfill the requirement that the marriage must be made public.[470]

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460 An *Imam* is a religious scholar who holds an Islamic leadership position and generally refers to the leader of a mosque and a Muslim community. His duties include teaching the faithful about the *Quran*, and leading them through their prayers in a mosque.

461 Siddiqi *The Family Laws of Islam* 88.

462 Doi *Women in Shari'ah* 48.

463 Siddiqi *The Family Laws of Islam* 88.

464 *Ibid.*

465 Al-Bukhaari *Sahih Muslim: The Book of Marriage Hadeeth No 1427* (1998).

466 Al-Bukhaari *Sahih Muslim: The Book of Marriage Hadeeth No 1428* (1998).

467 Siddiqi *The Family Laws of Islam* 91.

468 *Ibid*.

469 Nawawi *Minhaj et Taliban: A Manual of Muhammadan Law* 314.

470 *Ibid*.

(iii) Announcing the marriage by beating the tambourine or drums (duffs)

In order for the marriage to be announced publically, it is permissible to play the tambourine or beat the duffs.[471]

2 5 2 SOUTH AFRICAN LAW

For the purposes of a comparative analysis, the legal requirements for a valid civil marriage in terms of South African law is discussed first, and thereafter the requirements of a marriage concluded in terms of English law. In order for parties to enter into a valid civil marriage,[472] the following essential requirements must be met:[473]

(a) the parties must have capacity to marry each other;
(b) there must be consensus between the parties;
(c) the marriage must be lawful; and lastly,
(d) the wedding ceremony must conform to the prescribed formalities as stipulated in the Marriage Act.

2 5 2 1 CAPACITY TO MARRY

Owing to the fact that marriage is such an important juristic act, it will only be regarded as legally binding if the parties thereto fully understand the nature, purport and consequences of their actions.[474] Persons who are mentally ill and minors under the age of puberty are precluded from entering into a marriage as they have no capacity to marry.[475]

(i) Age

In terms of South African law the age of puberty for girls and boys is set at twelve and fourteen respectively.[476] A child under the age of puberty has no capacity to enter into

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471 Ayoup *Fiqh of Muslim Family* 53.

472 A civil marriage is a marriage concluded in terms of the Marriage Act 25 of 1961, or the Civil Union Act 17 of 2006.

473 Barratt *et al Law of Persons and the Family* 237.

474 *Ibid.*

475 Heaton & Kruger *South African Family Law* 14.

476 This has been the rule since Roman-law times. See Nicholas *An Introduction to Roman Law* (2008) 91.

a marriage.[477] A marriage concluded by a child below the age of puberty is void *ab initio* and has no legal effect.

Children over the age of puberty have capacity to enter into a civil marriage in terms of the Marriage Act, or a customary marriage in terms of the Recognition of Customary Marriages Act, provided the required legal consent has been obtained. Section 3(3) of the Recognition of Customary Marriages Act provides that if either of the prospective spouses is a minor, both of the parents or the guardian of minor spouse, must consent to the marriage. Notwithstanding the rules of customary law relating to age, section 17 of the Children's Act provides that the age of majority for both men and women is eighteen years. Section 1 of the Civil Union Act excludes a minor from entering into a civil union, even where the necessary legal consent has been obtained as section 1 of the Civil Union Act defines a civil union as "the voluntary union of two persons who are both eighteen years of age or older. Section 24(1) of the Marriage Act specifically provides that a marriage officer may solemnize a marriage only where one or both of the parties are minors where the necessary legal consent has been granted in writing.

Minors who have reached the age of puberty require the consent of their guardians to enter into a marriage, unless the court orders otherwise.[478] In the absence of the parent's or guardian's consent, for example where they are not available to consent, section 25(1) of the Marriage Act and section 3(3)(b) of the Recognition of Customary Marriages Act provide that parents' or guardian's consent can be replaced with the consent of the presiding officer of the Children's Court. Where the parents are fully capable of consenting to the marriage of their child but one or both are refusing to do so, the presiding officer of the Children's Court cannot replace their consent.[479] Where the parents, guardian or presiding officer of the Children's Court withhold consent for the minor to enter into a marriage, the minor can approach the High Court to consent to the marriage.[480] Section 25(4) furthermore provides that the application by the minor will only be successful where the judge is of the opinion that refusal to grant consent

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477 Sinclair *The Law of Marriage* (1996) 367; Grotius 1.5.3 identifies these as the ages at which minors may enter into a marriage.

478 S 18(3)(c)(i), read with s 18(5) of the Children's Act 38 of 2005; s 3(3)(a) of the Recognition of Customary Marriages Act.

479 S 25(1) of the Marriage Act.

480 S 25(4) of the Marriage Act; s 3(3)(b) of the Recognition of Customary Marriages Act.

by the parent/guardian or the commissioner is without adequate reason and contrary to the best interests of the minor child.[481]

Section 26(1) of the Marriage Act provides that, in addition to parental consent,[482] the written consent of the Minister of Home Affairs is required where a girl between the ages of twelve and fifteen and a boy between the ages of fourteen and eighteen wish to enter into a civil marriage. All minors below the age of eighteen years, but over the age of puberty, require the written consent of the Minister of Home Affairs if they wish to enter into a customary marriage.[483]

The conclusion of a marriage terminates minority, and a minor who has been married before requires no consent to remarry.[484]

(ii) Persons that are mentally-ill persons

The marriage of a person who is *de facto* mentally ill is void and of no legal effect.[485] Owing to the highly personal nature of a marriage, the curator cannot consent to the marriage on behalf of the person who is mentally ill.[486] This position prevails not only when the person is not able to understand the legal nature and consequences of the juristic act, but also when the person is influenced by hallucinations caused by the mental illness.[487] Certification that the person is mentally ill, and the appointment of a curator to the person do not *per se* affect the person's capacity to act.[488] Whether or not a person is mentally ill is a question of fact. A marriage concluded when the mentally ill person experiences a *lucidum intervallum*, that is, a temporary period of sanity, is valid and enforceable.[489] Certification is important as far as the onus of proof is concerned. Where a person has been declared mentally ill, the burden of proof is on

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481 *Ibid.*

482 The consent of the Minister of Home Affairs is additional and cannot therefore replace the consent of the parents, guardians, commissioner or that of the High Court.

483 S 3(1)(a)(i) read with s 3(4)(a) of the Recognition of Customary Marriages Act.

484 S 24(2) of the Marriage Act.

485 Barratt *et al Law of Persons and the Family* 238.

486 *Lange v Lange* 1945 AD 332.

487 *Ibid*.

488 Barratt *et al Law of Persons and the Family* 96; Heaton & Kruger *South African Family Law* 15.

489 *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669, where a curator failed in his action to have a certified mentally-ill person's marriage annulled as the latter proved that he was not mentally ill at the time that the marriage was concluded and he therefore possessed full capacity to act.

that person to prove that he or she is not mentally ill.[490] In contrast, in the absence of any certification, it is the person who alleges mental illness who bears the onus of proving the mental illness.[491]

2 5 2 2 CONSENSUS

From the definition of the term "marriage"[492] it is clear that as marriage is the voluntary union between two people. A valid marriage can only come into existence if both parties give voluntary informed consent to the marriage.[493] During the marriage ceremony the marriage officer must expressly ask both parties whether they accept each other as husband and wife.[494] The parties are then required to answer in the affirmative if they so wish to get married.[495] The marriage officer is not allowed to solemnize the marriage if one of the parties is absent or replies in the negative.[496] There are certain factors that negate consensus, namely, material mistake,[497] misrepresentation[498] and duress.[499]

2 5 2 3 LAWFULNESS

(i) Prohibited degrees of relationship

While persons can have capacity to marry, they can still be prohibited from marrying each other. Persons who are too closely related either by consanguinity or by affinity

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490 *Prinsloo's Curator Bonis v Crafford and Prinsloo* 1905 TS 669.

491 *Ibid*.

492 See para 2 3 2 of this thesis.

493 Barratt *et al Law of Persons and the Family* 242.

494 S 30 of the Marriage Act; s 11 of the Civil Union Act.

495 Heaton & Kruger *South African Family Law* 34.

496 *Ibid*.

497 A material mistake by one or both of the parties renders the marriage voidable. Two kinds of material mistake can be identified, namely, *error in negotio* (mistake concerning the nature of the juristic act) and *error in personam* (mistake concerning the identity of the other party). However, the only form of mistake that occurs in practice is *error in negotio.* Marriage by proxy is not allowed in South African law and because both parties have to be physically present at the wedding ceremony, the likelihood of *error in personam* happening in practice is negligible*. Benjamin v Salkander* (1908) 25 SC 512; *Rubens v Rubens* (1909) 26 SC 617 and *Kanatopsky v Kanatopsky* 1935 EDL 308.

498 A marriage is rendered voidable if one of the parties makes false misrepresentations or creates false impressions by concealing important information that should have been disclosed. The fraudulent concealment of sterility or impotence are examples of misrepresentation which render a marriage voidable. See *Venter v Venter* 1949 (4) SA 123 (W); *Van Niekerk v Van Niekerk* 1959 (4) SA 658 (GW).

499 Duress or intimidation negates voluntary consent and renders the marriage voidable. Physical violence, a threat of physical violence, or any other forms of intimidation qualifies as duress or intimidation. See *Smith v Smith* 1948 (4) SA 61 (N).

may not marry each other.[500] With regard to consanguinity, where parties are related by blood in a direct line they are prohibited form marrying each other.[501] As far as consanguinity in a collateral line is concerned, parties may enter into a marriage, provided there are four or more degrees of relationship between them.[502] Cousins are permitted to marry under South African law.

In respect of affinity, a person may not marry anyone to whom his or her spouse is related by blood in a direct line.[503] This prohibition continues even after the marriage has ended, whether by death or divorce. Insofar as prohibitions with regard to affinity in a collateral line are concerned, section 28 of the Marriage Act provides that there are no prohibitions between a person and his spouse's relations in a collateral line.

In terms of section 242(2)(c) and section 3 of the Children's Act[504] a marriage between an adopted child and his adoptive parents is prohibited. Other than this impediment, adoption creates no further prohibitions in respect of marriage, and an adopted child may therefore marry anyone in his adoptive family.[505]

Section 3(6) of the Recognition of Customary Marriages provides that the law relating to the prohibited degrees of relationship is still determined by customary law and therefore, remains unaltered notwithstanding the enactment of the Recognition of Customary Marriages Act.[506]

(ii) An existing civil or customary marriage or civil union

In terms of the Marriage Act and Civil Union Act[507] parties are prohibited from marrying each other where one or both of them are already married to someone else or entered

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500 Heaton & Kruger *South African Family Law* 26. Heaton and Kruger submits that while the precise origin of the prohibited degrees or relationship is uncertain, the most important reasons for the impediments appear to be biological, socio-economic, ethical-moralistic and/or religious.

501 Barratt *et al Law of Persons and the Family* 239-242; Heaton & Kruger *South African Family Law* 26-28.

502 Barratt *et al Law of Persons and the Family* 241; Heaton & Kruger *South African Family Law* 28.

503 *Ibid.*

504 38 of 2005.

505 Barratt *et al Law of Persons and the Family* 242; Heaton & Kruger *South African Family Law* 26.

506 See Rautenbach & Bekker *Introduction to Legal Pluralism* 101 for a description of the guidelines pertaining to the prohibited degrees of relationship.

507 S 8(2).

into a civil union,[508] or are married to someone else in terms of customary law.[509] In other words, polygynous marriages are not allowed when parties enter into a civil marriage or union.[510]

Where a married person enters into another civil marriage, the second marriage will be unlawful and void and therefore have no legal effect.[511] In this instance the person will have committed the crime of bigamy.[512] However, where a married spouse believed in good faith that he or she was divorced while this is not the case, or where the unmarried spouse was oblivious of the other spouse's existing civil marriage, the marriage will be putative[513] and as a result will be void.[514]

(iii) Persons of the same sex

The enactment of the Civil Union Act in 2006 permits same-sex as well as opposite partners opposite to enter into a civil union. Civil marriages in terms of the Marriage Act, however, are reserved for heterosexual couples.[515] In terms of customary law, parties of the same-sex cannot enter into a customary marriage.

2 5 2 4 PRESCRIBED FORMALITIES

The Marriage Act and Civil Union Act set out almost identical formalities for the ceremony that must be met for the marriage to be valid. Non-compliance with these requirements this the marriage will result in the marriage being rendered void.[516]

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508 This is a common rule set out by Grotius 1.5.2; Voet 23.2.1 and other Roman-Dutch writers.

509 Ss 3(2) and 10(4) of the Recognition of Customary Marriages Act.

510 The Recognition of Customary Marriages Act does make provision for polygynous marriages.

511 Grotius 2.5.2.

512 Barratt *et al Law of Persons and the Family* 239; Heaton & Kruger *South African Family Law* 26.

513 A marriage is putative if one or both of the parties believed in good faith that the marriage they were entering into was a valid civil marriage and was unaware of the defect which rendered their marriage void. See *Prinsloo v Prinsloo* 1958 (3) SA 759 (T); *Naicker v Naidoo* 1959 (3) SA 768 (N); *Moola v Aulsebrook No* 1983 (1) SA 687 (N).

514 Barratt *et al Law of Persons and the Family* 255; Heaton & Kruger *South African Family Law* 26; Lee and Honore *Lee and Honore's Family, Things and Succession* para 49. A putative marriage exists when one or both of the parties enter into a civil marriage while being unaware that there is a defect which renders their marriage void. See *Ngubane v Ngubane* 1983 (2) SA 770 (T) and *Solomons v Abrams* 1991 (4) SA 437 (W).

515 *W v W* 1976 (2) SA 308 (W); *Simms v Simms* 1981 (4) SA 186 (D).

516 *Minister of Home Affairs v Fourie (Doctors for Life International & Others, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs) supra*. See Barratt *et al Law of Persons and the Family* 246; Heaton & Kruger *South African Family Law* 30. Whilst the failure to adhere to some of the formalities may render the marriage void, other prescribed formalities are of less importance and non-compliance will not affect the validity of the marriage.

(i) Witnesses

Owing to the requirement that a marriage "must be undertaken in a public and formal way"[517] section 29(2) of the Marriage Act and section 10(2) of the Civil Union Act require the presence of the prospective spouses and two competent witnesses at the time that the marriage is solemnized. As mentioned previously, marriage by proxy is no longer permitted and the parties must be personally present at the solemnization of their marriage.[518]

(ii) Place and time of the wedding

In terms of section 29(2) of the Marriage Act and section 10(2) of the Civil Union Act a marriage can be solemnized in the following places: a private or public dwelling-house with open doors; a church or other building used for religious service. These sections, however, do not prohibit a marriage officer from solemnizing a marriage in another place provided there are valid reasons for solemnization occurring in that place.[519] A marriage may be solemnized on any day of the week between the hours of eight in the morning and four in the afternoon.[520]

(iii) Marriage officers

In terms of section 11(2) of the Marriage Act and section 4 of the Civil Union Act, only a duly appointed marriage officer may solemnize a marriage. The marriage will be deemed to be void if this requirement is not met.[521] Section 2(1) of the Marriage Act and section 1 of the Civil Union Act provides that all magistrates and all special justices of the peace are marriage officers *ex officio.*[522] Furthermore, section 11(2) of the Marriage Act provides that someone who purports to be a duly appointed marriage officer, without having the required authority to do so, is guilty of an offence.

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517 *Minister of Home Affairs v Fourie (Doctors for Life International & Others, Amici Curiae; Lesbian & Gay Equality Project v Minister of Home Affairs) supra* para 64.

518 S 20 (2) of the Marriage Act; s 10(2) of the Civil Union Act which requires the presence of both parties at the solemnization of their marriage.

519 For example, the solemnization takes place in the hospital because one of the parties is seriously ill. See *Ex parte Dow* 1987 (3) SA 829 (D).

520 S 29(1) of the Marriage Act; s 10 (1) of the Civil Union Act.

521 *Ex parte L (also known as A)* 1947 (3) SA 50 (C).

522 By virtue of their office.

Traditionally, Muslim marriages have not been granted legal recognition, due to the fact that the marriage is not solemnized by a designated marriage officer as required in terms of the Marriage Act, but by an *Imam*.[523] Religious ministers or leaders were not required by law to be duly appointed marriages officers in terms of the Marriage Act when solemnizing marriages in terms of religious law only.[524] However, in terms of section 3(1) of the Marriage Act a minister of religion and other officials in religious organizations may on application to the Minister of Home Affairs also be appointed as designated marriage officers.[525]

Section 2(2) of the Marriage Act and section 1 of the Civil Union Act furthermore authorizes the Minister of Home Affairs to appoint persons employed in the public, diplomatic or consular service as designated marriage officers. These appointments can either be made generally, or for any specified class of persons or country or area.[526] Where a person has acted in good faith, and believed that he was duly appointed as marriage officer in a specific area or for a specific time without in fact having been appointed as such, the Minister of Home Affairs may in writing authorize that the person be appointed as a marriage officer during the period, within the area or in respect the particular civil marriages.[527]

(iv) Objections

In terms of section 23 of the Marriage Act and section 9 of the Civil Union Act any objections to the proposed marriage must be lodged with the marriage officer who will solemnize the marriage. The marriage officer is under an obligation to investigate the basis of the objection, and can solemnize the marriage only once it is established that there is no lawful impediment to the proposed marriage.[528]

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523 See para 4 2 of this thesis.

524 S 11(3) of the Marriage Act.

525 The Civil Union Act is much broader in scope and is not expressly limited to Christianity, Judaism, Islam or any other Indian religions. The Civil Union Act therefore makes it possible for people holding responsible positions in a wide variety of religious organizations to become marriage officers, for example followers of the Wiccan faith. See Barratt *et al Law of Persons and the Family* 246. See also para 4 2 of this thesis.

526 S 2(2) of the Marriage Act; s 1 of the Civil Union Act which defines a marriage officer with reference to s 2 of the Marriage Act.

527 S 6(1) & (2) of the Marriage Act.

528 S 23 of the Marriage Act; s 9 of the Civil Union Act.

(v) Proof of age and identity

Before the marriage officer can solemnize the marriage, both parties to the proposed marriage must produce their identity document and the prescribed affidavit.[529]

(vi) The marriage formula

In order for the marriage to be solemnized it is essential that the marriage officer ask each of the parties whether there is any legal impediment preventing them from entering into a marriage, and whether he or she is prepared to accept the other as his or her lawfully wedded wife or husband respectfully.[530] The parties must reply in the affirmative in order for the wedding to proceed.[531] After replying in the affirmative, the marriage officer will request that the parties give each the right hand, whereupon the marriage officer will declare them husband and wife.[532] It is at this moment that the marriage comes into existence.[533]

(vii) Registration of the marriage

Section 29A of the Marriage Act, section 12 of the Civil Union Act and section 4(3) (b) of the Recognition of Customary Marriages Act describe the essential elements of the registration of the marriage as being, firstly, the signing of the marriage register or other prescribed documents by the marriage officer, the parties to the marriage and the two competent witnesses and secondly, that the marriage register or other prescribed documents must be forwarded to a regional or district representative of the Department of Home Affairs. Non-registration of the marriage does not affect the validity of the marriage, but serves as *prima facie* proof that the marriage has been solemnized.[534]

2 5 3 THE LAW OF ENGLAND AND WALES

The following legal requirements must be met for a marriage to be valid in terms of English law:

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529 S 12 of the Marriage Act; s 7 of the Civil Union Act.

530 Hutchison *et al* 107. The wording of the marriage formula contained in s 11(2) of the Civil Union Act is almost identical to the formula contained in s 30(1) of the Marriage Act.

531 S 30(1) of the Marriage Act; s 11(2) of the Civil Union Act.

532 *Ibid*.

533 Heaton & Kruger *South African Family Law* 32.

534 Heaton & Kruger *South African Family Law* 32.

2 5 3 1 CAPACITY

Capacity to marry can affect the individual[535] as well as the couple.[536] Where the parties conclude a marriage without possessing the necessary capacity, the marriage will be deemed to be void.

(i) Age

Section 1(1) of the Family Law Reform Act 1969, section 2 of the Marriage Act 1949 and section 11(a)(ii) of the Matrimonial Causes Act 1973 provide that both parties must be sixteen years or older to conclude a valid marriage. A person domiciled in England or Wales is, therefore, not allowed to conclude a marriage with a person under the age of sixteen years.[537] This is an absolute restriction and the marriage will therefore be deemed to be void, even where a person believed in good faith that he or she had attained the required age. In terms of section 3 of the Marriage Act 1949 the consent of the parent or guardian in whom parental rights and responsibilities are vested is required in the event of the marriage of a sixteen- or seventeen-year old minor.[538] Where the parent or guardian refuses to consent to the impending marriage, or is unable to give the consent by reason of absence, inaccessibility or disability, the consent of the court may replace the parent's or guardian's consent.[539]

(ii) Mental capacity

The Mental Capacity Act 2005 provides the statutory framework for persons who lack capacity to make decisions for themselves as a result of mental illness. The issue of incapacity due to mental illness is specific both to the particular decision and to the time at which the decision is taken. A mentally ill person lacks capacity to enter into a legally binding marriage.[540] Therefore, a marriage concluded by a person who is

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535 For example, age and the marital status of the individual affect the person's status when he or she wants to conclude a marriage. See Probert *Family and Succession Law in England and Wales* 72.

536 For example, whether or not the couple are related within the prohibited degrees of relationship, affects their status to conclude a valid marriage. See Probert *Family and Succession Law in England and Wales* 72.

537 *Pugh v Pugh* [1951] 2 All ER 680. In this case the marriage between a 15-year old Hungarian girl and a British domiciled soldier was declared void. The marriage was concluded in Austria and was deemed to be valid in terms of Austrian and Hungarian law but not in England as this was the law of the husband's domicile.

538 The Family Reform Act 1969 changed the age of majority from 21 to 18 years.

539 S 3 of the Marriage Act 1949. See Cretney *et al Principles of Family Law* 12.

540 Re Beaney [1978] 1 W.L.R. 770.

suffering from a mental disorder[541] at the time the marriage is concluded is rendered voidable.[542] In contrast, a marriage entered into by a mentally ill person during a *lucid intervallum* is valid. In terms of section 27(1) of the Mental Capacity Act 2005, the court and/or any individual (including a parent) cannot in any circumstances give consent to marriage on behalf of an adult who lacks the capacity to give his/her own consent.

2 5 3 2 CONSENT

In canon law marriage was concluded when the two parties consented thereto, and there was no marriage where there was no true consent.[543] In other words, in the absence of true consent the marriage would be void. This remained the position in England and Wales until the enactment of Nullity of Marriage Act 1971. As a consequence of the enactment of the Nullity of Marriage Act 1971 a marriage concluded after the 31 July 1971 would be voidable in the absence of true consent.[544] The Matrimonial Causes Act 1973 recognizes duress, mistake and unsoundness of mind or otherwise[545] as the four circumstances that vitiate consent and therefore renders the marriage voidable.

2 5 3 3 LAWFULNESS

(i) Prohibited degrees of relationship

Section 6(2) of the Marriage (Prohibited Degrees of Relationship) Act 1986 regulates the prohibited degrees of relationship by consanguinity and affinity. The intending spouses must not be related to each other within the related degrees of consanguinity or affinity.[546] In so far as consanguinity is concerned, a person may not enter into a marriage with his or her grandparent, parent, child, grandchild, sibling, aunt or uncle and niece or nephew.[547] Cousins are permitted to enter into a marriage under English

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541 As defined by the Mental Health Act 1983.

542 *Bennett v Bennett* [1969] 1 All ER 539. The person must unfit for marriage as a result of the mental disorder. In other words, the person must be incapable of carrying out the ordinary duties and obligations of marriage. S 12(c), Part II, Ch 1, para199 of the Matrimonial Causes Act 1973; s 50(1)(a), Part II, Ch 2, para 234 of the Civil Partnership Act 2004.

543 Cretney *et al Principles of Family Law* 56. Consent arising from duress, mistake or insanity rendered the marriage void.

544 S 12(c) of the Matrimonial Causes Act 1973.

545 The Matrimonial Causes Act refers to factors other than duress and mistake, for example, drunkenness, fraud and misrepresentation.

546 S 11(a)(i) of the Matrimonial Causes Act 1973; s 1 of the Marriage Act 1949.

547 Marriage Act 1949, Sch.1 Pt I.

law.[548] An adopted child cannot conclude a marriage with his or her adoptive parents as they are deemed to be within the prohibited degree of relationship.[549] Similarly, the adopted child remains within the same prohibited degree of relationship in respect of his or her natural parents as if the adoption order had never been granted.[550] There is, however, no bar to an adopted person marrying his or her adoptive sister or brother or other members of their adoptive families.[551]

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The relationship by affinity prohibits the conclusion of a marriage between a step-parent and his or her step-child and between a step-grandparent and step-grandchild.[552] The prohibition is not absolute as a marriage is allowed where both parties are over the age of twenty-one, and the parties have not lived together as parent and child at any time before the child was eighteen.[553] The rationale for the restriction is the protection of minors from potentially exploitative relationships with a person who has been a parent to them.[554]

(ii) Existence of a valid marriage

Section 11(b) of the Matrimonial Causes Act 1973 a person from entering into a marriage with a third party where he or she is already married or in a civil partnership with someone else. This prohibition is absolute. Where parties enter into a marriage in contravention with this absolute prohibition, they will be guilty of the crime of bigamy. Therefore, an honest belief that the previous marriage or civil partnership has been terminated, or that the previous spouse or partner has died, is irrelevant for these purposes.[555] A prior marriage or civil partnership always renders a later marriage

548 Herring *Family Law* 50.

549 Marriage Acts 1949-1986, Sched. 1, Pt 1.

550 S 47(1) of the Adoption Act 1976.

551 Probert *Family and Succession Law in England and Wales* 74.

552 Marriage Act 1949, Sch.1 Pt II.

553 Probert *Family and Succession Law in England and Wales* 73.

554 Probert *Family and Succession Law in England and Wales* 73. The restrictions that existed previously, that prohibited former in-laws from concluding a marriage, have been abolished. See *B and L v UK* [2006] 1 F.L.R. 35.

555 Where uncertainty exists as to whether or not the first spouse is alive, the court has to firstly grant a decree of presumption of death and the dissolution of the marriage before the other spouse can enter into a subsequent marriage. See Probert *Family and Succession Law in England and Wales* 72.

void.[556] Where a spouse concludes a second marriage without terminating the first marriage, but lacks the required *mens rea*, the spouse will not be guilty of the crime of bigamy.[557] Section 11(d) of the Matrimonial Causes Act provides that a person who is domiciled in England and Wales does not possess capacity to enter into a polygamous marriage overseas, irrespective of whether the marriage is solemnized in a country where polygamy is allowed. However, where the parties are domiciled in a country that recognizes polygyny and conclude a polygynous marriage in this country, English law will recognize this marriage as a valid one.

(iii) Persons who are of the same sex

As indicated previously the enactment of the Marriage (Same-Sex Couples) 2013 legalized same-sex marriages in England and Wales. See paragraph 2 3 3 of the thesis for a discussion of the status of marriages concluded by same-sex partners.

2 5 3 4 FORMALITIES OF MARRIAGE

The three key stages to the solemnization of a marriage in so far as the formalities are concerned are preliminaries, celebration and registration.[558] The failure to observe the required formalities can, but does not necessarily, render the marriage void.[559] If the parties knowingly and willfully choose not to comply with the formalities as set out in the Marriage Act 1949, the marriage is deemed to be void.

(i) Preliminaries

(1) Parental consent

The issue of parental consent has already been discussed under 2 5 3 (a)(i) of the thesis.

((2) Publicizing the intention to marry*

The parties to the impending marriage are required by law to publicize the intended marriage so that any legal obstacles will present themself before the marriage is

556 *Baindall v Baindall* [1946] 1 All ER 342; *Padolecchia v Padolecchia* [1967] 3 All ER 863; *Maples v Maples* [1987] 3 All ER 188.

557 Probert *Family and Succession Law in England and Wales* 73; Cretney *et al Principles of Family Law* 47. See also *R v Gould* [1968] 2 WLR 643; *R v Sagoo* [1975] 2 All ER 926.

558 Probert *Family and Succession Law in England and Wales* 76.

559 Burton *Family Law* 13.

solemnized.[560] Parties who elect to marry according to the rites of the Church of England are given a choice as to which of the preliminaries they wish to observe, the most popular one being the posting of banns in the parishes where they reside.[561] Where the couples wish to avoid this publicity, they are allowed marry by license, which requires them to declare their freedom to conclude the marriage to the relevant church authorities.[562] In addition to the two options mentioned above, parties can also marry by special license, which is obtained from the Archbishop of Canterbury and which allows the parties to be married at any time or place.[563]

In addition to the above preliminaries, a marriage in the Church of England may also be preceded by civil preliminaries.[564] The same preliminaries apply to civil weddings and to marriages celebrated according to non-Anglican rites. In terms of the civil preliminaries the parties are required to give notice of their intention to marry in person to their local superintendent registrar.[565] The details of the parties will be displayed at the superintendent's office for a period of fifteen days and, provided no objections are lodged against the impending marriage, the superintendent will issue a certificate authorizing the marriage to go ahead.[566]

(ii) Celebration

(1) The place of celebration

A marriage solemnized according to the rites of the Church of England must be conducted in the Anglican Church, unless the parties have opted to be married by special license.[567] The Marriage Act does not specify the place where Jews and Quakers should solemnize their marriage and has instead left it to the religious authorities to set their own requirements in respect of the place of marriage.[568] In order for members of other religious denominations to conclude a marriage according to the

560 Probert *Family and Succession Law in England and Wales* 76.

561 S 5 of the Marriage Act 1949.

562 Probert *Family and Succession Law in England and Wales* 77.

563 Cretney *et al Principles of Family Law* 21.

564 S 17 of the Marriage Act 1949.

565 S 27 of the Marriage Act 1949. Cretney *et al Principles of Family Law* 16.

566 S 27 of the Marriage Act 1949. Cretney *et al Principles of Family Law* 17.

567 Marriage Act 1949, s 12 (marriage with banns); s 15 (marriage by common license); s 17 (marriage under superintendent registrar's certificate).

568 Probert *Family Law and Succession in England and Wales* 78.

rites of their religion at their local place of worship, it must be registered and licensed for marriages, and the celebrant must be authorized to conduct marriage ceremonies.[569] Where the local place of worship does not comply with these requirements[570] the spouses will have to conclude a civil ceremony of marriage, either in addition to, or instead of the religious marriage for their marriage to be legally recognized.[571]

A civil ceremony can be concluded at any place that has the approval of the local authority.[572] Persons who are terminally ill are allowed to conclude a marriage at their home or in a hospital, while those persons who are house-bound, or who have been detained, may enter into a marriage at the place where they are confined.[573]

(2) The celebrant (marriage officer)

An Anglican marriage must be solemnized by a clergyman of the Church of England.[574] The marriage is deemed to be void if the parties knowingly and willfully consent to the solemnization of their marriage by a person who is not under Holy orders.[575] Similarly, a civil marriage is void if the parties knowingly and willfully consent to the solemnization of their marriage by a person who is not a superintendent registrar.[576] The celebration of Jews and Quakers is determined by the relevant religious authorities.[577] In respect of other religious marriages celebrated in registered buildings, these must be solemnized by either an authorized person[578] or a superintendent registrar.[579]

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569 *Ibid*.

570 There are large numbers of mosques and temples which are not registered and licensed places of worship.

571 Probert *Family Law and Succession in England and Wales* 78.

572 Marriage Act 1994.

573 S 27 of the Marriage Act 1949 as amended by the Marriage Act 1983.

574 S 25 of the Marriage Act 1949.

575 *Ibid*.

576 S 49(g) of the Marriage Act 1949.

577 Probert *Family Law and Succession in England and Wales* 79.

578 In terms of s 43 of the Marriage Act 1949 the person must be authorized by the trustees or governing body of the building and duly noted to the Registrar-General.

579 S 49(f) of the Marriage Act 1949.

(3) The content of the ceremony

Where the parties conclude their marriage according to the rites of the Church of England, the relevant religious authorities determine the content of the marriage ceremony.[580] In the case of civil marriages, the parties themselves determine the content of the ceremony.[581] Parties to civil marriages and religious marriages celebrated in registered buildings[582] must make a declaration that they are free to marry each other and that they take one another as husband and wife.[583]

(iii) Registration of marriages and civil partnerships

All marriages and civil partnerships that are solemnized in England and Wales must be registered.[584] Non-registration of the marriage does not affect the validity of the marriage.[585] The responsibility for the registration of the marriage is borne by the person conducting the marriage ceremony,[586] or the person who is appointed for the purpose of registering the marriage.[587] The Marriage Act 1949 does not require the marriage or civil partnership to be reregistered in England or Wales where it was celebrated overseas, even where the parties travelled overseas only for the purpose of concluding their marriage.[588]

2 5 4 COMPARISON

A notable similarity between Islamic, South African and English law is that a marriage is concluded by an offer and the acceptance of the offer of marriage. Furthermore, as far as the requirements for a valid marriage are concerned, while all three legal systems share common requirements, there are marked differences as to what these requirements entail. These differences are discussed with reference to the

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580 Probert *Family Law and Succession in England and Wales* 79.

581 *Ibid*.

582 In other words, marriages that are not conducted according to the rites of the Church of England, or Jewish law or the religious rites of Quakers. Probert *Family and Succession Law in England and Wales* 79.

583 S 44(3) of the Marriage Act 1949. See Cretney *et al Principles of Family Law* 27.

584 S 65 of the Marriage Act.

585 Probert *Family and Succession Law in England and Wales* 80.

586 S 47 of the Marriage Act 1949. For example, in the case of an Anglican wedding, the clergyman will be responsible for the registration of the marriage.

587 The secretary of the synagogue will register the marriage where a marriage according to the Jewish faith is concluded, and the registering officer of the Society of Friend's will register the marriage in the case of Quakers.

588 Probert *Family and Succession Law in England and Wales* 43.

requirements for a valid marriage, namely, legal capacity, consensus, lawfulness and formalities.

Whilst all three legal systems require that the prospective bride and groom must possess the necessary capacity to enter in to a marriage, the difference in respect of this requirement lies in the fact that, while South African and English legal systems prescribe definite categories of ages for marriage, Islamic law requires the parties to reach the age of puberty without stipulating a specific age. However, in respect of Islamic law a presumption arises that the age of puberty for girls is nine years old and twelve years old for boys. In respect of South African and English law, the age of puberty is deemed to be twelve and fifteen for girls and boys respectively.

Similarly, all three legal systems require the parties to the marriage to be of sound mind when entering into the marriage, Islamic law makes provision for a person with mentally illness to conclude a marriage, provided that the mental illness is disclosed to the other party. Islamic law also makes provision for a woman with mentally illness to conclude a valid marriage where a physician leads evidence that the marriage would be a cure for the mental illness. In contrast, both South African and English law regards the marriage of a person with mentally illness as valid only if the person experiences a *lucidum intervallum* at the time the marriage is concluded. Bar this exception, the marriage of a person suffering from mental illness is void. Therefore, if a person is unable to consent to his or her marriage as a result of mental illness, the parent or guardian is also prohibited from granting consent to the marriage.

Whilst consent is a common requirement for all three legal systems, Islamic law requires that, in addition to the consent of the prospective bride, her guardian also has to give his consent in order for the marriage to be valid. This is the position irrespective of the age of the woman entering into the marriage. It is only where the prospective groom is a minor that the consent of his guardian is required. This is in stark contrast to South African and English law where only the consent of the woman is required, unless she is a minor. Cognizance must, however, be taken of the fact that the age of minority differs in the South African and English legal systems. It also has to be noted that both the 2003 and 2011 MMB's provide that the prospective groom and bride must be eighteen years old to conclude a valid marriage. Both Bills furthermore make provision where the parties to the marriage are minors. In terms of the *Shafi'i* school

of jurisprudence, a woman who wishes to enter into a marriage requires the consent of her guardian irrespective of her age. This position must be reflected in legislation that is passed to recognize and regulate Muslim marriages.

Another significant difference between Islamic law and South African and English law is that Islamic law provides that where a woman is hesitant to express her opinion due to shyness, her silence is deemed to amount to consent. This is subject to the proviso that she is informed in advance that her silence will be deemed to constitute consent. In terms of both South African and English law both prospective spouses must expressly consent to the impending marriage.

Insofar as the requirement of lawfulness is concerned, the prohibitions with regard to consanguinity and affinity are very similar for all three legal systems. However, the institution of adoption is not recognized in Islamic law but prohibited degrees of relationship, is created where fosterage has occurred.

A profound difference between Islamic on the one hand, and South African and English law on the other, relates to the choice of a marriage partner. Islamic law strictly prohibits the marriage between a Muslim woman and a non-Muslim man. In contrast, South African and English family law places no legal prohibition in respect of a marriage between parties who have different religious beliefs.

Islamic law makes provision for polygynous marriages as it allows the man to have a maximum of four wives at a time. A man who already has four wives, is prohibited from entering into a marriage with a fifth wife, unless he divorces one of his other wives. A married Muslim woman is, however, prohibited from entering into another marriage without the first marriage being terminated either by death or divorce. In addition to this, the woman has to observe the compulsory waiting period before she can enter into a valid marriage. These prohibitions do not exist in South African or English law. Civil marriages and unions concluded in terms of South African or English law are strictly monogamous, and a person who concludes a civil marriage or union with more than one spouse is guilty of bigamy.

Islamic law, unlike South African and English law, does not make provision for same-sex marriages or unions.

In respect of the witnesses, Islam draws a distinction between circumstances where the witnesses are male or female. If there are two males present to witness the conclusion of the marriage, this will suffice. The presence of one male witness must be accompanied by two female witnesses for the marriage to be valid. South African and English law draws no such distinction.

Although the payment of dowry to the prospective bride is not an essential requirement for the validity of the marriage, it is still regarded as indispensable to a marriage concluded in terms of Muslim rites. In South African law[589] and English law, where a civil marriage is concluded, there is no payment of dowry to the prospective bride.

Both Islamic law and English law require the observance of formalities in respect of the publication of the marriage. English law, however, requires the publication of the intended marriage and further draws a distinction between a marriage concluded in terms of the rites of the Church of England and that of a concluded by special license, the former requiring publication whilst the latter does not. Islamic law requires publication of the marriage only after it has been concluded so as to differentiate the marriage from mere fornication. South African law contains no requirements in respect of the publication of the marriage, either before or after the marriage is concluded except that the marriage must be solemnized in public office or private dwelling with open doors so as to avoid clandestine marriages.[590]

As far as the place for the conclusion of the marriage is concerned, Islamic law is not prescriptive in this regard and a marriage can be solemnized at any place, although it is preferable that it be concluded in a mosque. In terms of South African law, the Marriage Act provides that a marriage can be solemnized at any public or private

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589 A similar position prevails where parties enter into a customary union where the payment of *lobolo* does not affect the contractual validity of the marriage, but is nonetheless an indispensable aspect of a customary union as many South Africans who live according to customary law, are of the opinion that, despite full compliance with the prescribed requirements of a valid marriage, this marriage would not be regarded as a "real marriage" if no arrangements have been made for the payment of *lobolo*. Rautenbach & Bekker *Introduction to Legal Pluralism* 103.

590 S 29(2) of the Marriage Act 25 of 1961.

dwelling. English law requires a marriage to be solemnized in the Anglican Church where the marriage is concluded according to the rites of the English Church unless the parties have elected to be married by special license. If the parties wish to conclude a civil marriage, the place where the marriage is solemnized must have the approval of the local authority.

A marriage in terms of Islamic rites can be concluded by a learned religious scholar or the father of the bride can elect to conclude the marriage. In contrast, both South African and English law requires that a designated marriage officer solemnize the marriage.

Both South African and English law require the marriage to be registered. However, non-registration of the marriage with the local authorities does not affect the validity of the marriage. A marriage in terms of Islamic rites is not registered. The person performing the marriage will issue the parties with a marriage certificate but no relevant official authority exists for the registration of the marriage.

2 6 MARITAL RIGHTS AND DUTIES

The legal consequences of a marriage have far-reaching consequences for the spouses in respect of their person and their property. As far as the legal consequences of marriage are concerned, a distinction can be drawn between the personal and proprietary consequences of a marriage.[591]

2 6 1 PERSONAL CONSEQUENCES

2 6 1 1 ISLAMIC LAW

2 6 1 1 1 THE DUTIES OF THE HUSBAND

The duties of the husband include the payment of dower, maintenance, the provision of suitable accommodation, treating the wife with kindness and displaying equality where he has entered into a polygamous marriage.

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591 As indicated in Chap 1, parental rights and responsibilities acquired by parents at the conclusion of a marriage in respect of the children born of the marriage falls outside the scope of the thesis and will, therefore, not be discussed.

(i) Dower

The first and foremost duty of the husband is the payment of dower to the wife.[592] The payment of a dower (*mahr*) is an indispensable component of an Islamic-marriage contract.[593] *Mahr* is anything of value and it incorporates either a sum of money or property which becomes payable by the husband to the wife after the prospective spouses have agreed to conclude the marriage.[594] The payment of dower at the conclusion of the marriage is obligatory on the husband.[595] In this regard the *Quran* says:

> "And give the women (on marriage) their dower as a free gift."[596]

> "And lawful for you are all women besides those, provided that you seek them with your property, taking them in marriage, not committing fornication. Then as to those whom you profit (by marrying), give them their dower as appointed."[597]

The validity of the marriage will not be affected by the fact that the amount of dower has not been specified or paid at the time of marriage.[598] The husband, however, is not discharged from his duty to make payment of the dower.[599] In this instance the payment of the dower has to be made at the time that the marriage is consummated or any time thereafter.[600]

The dower becomes the sole property of the bride.[601] The dower remains the property of the wife, even where the marriage is dissolved through divorce.[602] The wife becomes the owner of the dower immediately when the marriage is solemnized.[603]

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592 Siddiqi *The Family Laws of Islam* 106.

593 Siddiqi *The Family Laws of Islam* 107.

594 Nasir The Status of *Women Under Islamic Law* 87; Doi *Shariah: The Islamic Law* 158-166.

595 Siddiqi *The Family Laws of Islam* 79; Ibn Rushd *The Distinguished Jurist's Primer: A Translation of Bidayat and Islamic Jurisprudence* 23.

596 Chap 4; verse 4.

597 Chap 4; verse 24.

598 Siddiqi *The Family Laws of Islam* 80.

599 *Ibid*.

600 *Ibid.*

601 Doi *Shari'ah: The Islamic Law* 158; *The Holy Quran*, chap 4; verse 4.

602 Doi *Shari'ah: The Islamic Law* 158. The only exception to this principle is when the marriage is dissolved by means of a *khula*, that is, where the marriage is dissolved at the request of the wife in consideration of the return of all or a portion of the dower paid to her.

603 Doi *Shari'ah: The Islamic Law* 159.

The sum or value of the dower is not prescribed by law, rather it may be decided by the parties, or it may be determined *via* the operation of Islamic law, with due regard to the social status of the parties.[604] However, the dower must be something of value, even if it is worth a small amount.[605] There is also no limit as to the amount that can be paid as dower.[606] The *Quran* states as follows:

> "The wealthy according to his means and the straitened according to his means."[607]

Where the amount of dower has not been specified, it will be determined according to the circumstances of the husband and the social standing of the wife.[608] In terms of Islamic jurisprudence this is referred to as customary dower (unspecified dowry).[609] In other words, the amount of dower that is customarily paid for the females in her family would constitute her dower. Should the husband fail to pay the dower during his lifetime, it becomes a debt against his estate.[610]

The dower is paid firstly, to safeguard the woman's economic or financial position after the marriage has taken place, as she is not obligated to inform, nor consult, her husband as to how the dower will be used.[611] Secondly, the dower serves as an indication by which the seriousness and commitment of the husband is shown in the marriage[612] and as a symbol of respect for the wife.[613] Thirdly, the dower serves as *prima facie* proof that the husband is financially in a position to establish a family and to bear the responsibility of housing and taking care of his wife and the children born of the marriage.[614] Lastly, the dower, particularly where the parties have agreed upon a deferred dowry, acts as a deterrent for a divorce occurring, as it forces the husband

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604 Siddiqi *The Family Laws of Islam* 81.
605 Doi *Shari'ah: The Islamic Law* 164.
606 Doi *Shari'ah: The Islamic Law* 165.
607 Chap 2; verse 236.
608 Alkhuli *The Light of Islam* 70.
609 The Arabic term for customary dower is *mahr mithl.*
610 Siddiqi *The Family Laws of Islam* 81.
611 Esposito *Women in Muslim Family Law* (1982) 24.
612 Alkhuli *The Light of Islam* 71.
613 Ajijola *Introduction to Islamic Law* 117, 154.
614 Alkhuli *The Light of Islam* 71; Ajijola *Introduction to Islamic Law* 154.

to give due consideration before divorcing his wife, as the dower becomes payable once a divorce takes place.[615]

The dower does not constitute a bride price with which the husband purchases the wife upon the payment of dower.[616] The purpose thereof is to emphasize the prestige and importance of the contract of marriage.[617] Furthermore, the dower is regarded as a token of the husband's love and affection that he offers to the wife when they enter into the contract of marriage.[618]

The dower can be classified as either specified or unspecified.[619] The former constitutes the amount of dower that upon which the parties agreed at the time of marriage, or after the marriage has been solemnized.[620] The unspecified dower is not settled at the time of the marriage or immediately thereafter, but is determined according to the social position of the wife's family (*mahr-mithl*).[621] The specified dower can be either prompt dowry (*mahr mua'jjal*), in terms of which payment is made at the time that the marriage is contracted, or alternatively, a deferred dowry (*mahr muwajjal*), which is paid at the dissolution of the marriage through either death or divorce.[622]

The payment of the dower can be effected in one of three ways, namely:[623]

(i) the transfer of the dower to the wife immediately on the conclusion of the marriage;
(ii) the payment of the dower may be deferred to a later date; or
(iii) the payment of a portion of the dower at the conclusion of the marriage, the balance to be paid if and when the marriage is dissolved by divorce or death of the husband.

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615 *Ibid.*
616 Siddiqi *The Family Laws of Islam* 81.
617 Siddiqi *The Family Laws of Islam* 81; Doi *Women in Shari'ah* 154.
618 *Ibid*.
619 Doi *Shari'ah: The Islamic Law* 160.
620 Doi *Shari'ah: the Islamic Law* 161.
621 *Ibid***.**
622 Alkhuli *The Light of Islam* 70.
623 *Ibid*.

The manner in which payment of the dower is effected depends on the terms of the marriage contract between the husband and wife, and in the absence of a marriage contract it would depend on the custom[624] of the country in which they are living.[625]

The right to dower is an inalienable right of the wife in that it is taken for granted even if it is not expressly stated in the marriage contract, and the wife does not lose her right to payment of a dower through prescription alone.[626]

Where the marriage is dissolved before consummation takes place, and the dissolution is due to the fault of the wife, the latter forfeits her right to receive the dower.[627]

(ii) Maintenance (Nafaqah)

The second duty of the husband is to provide maintenance to his wife as the wife has the right to be provided with food, clothing and housing at the expense of the husband, on a scale suitable to his means.[628] Sabiq is of the opinion that a husband is also under an obligation to provide access to health care to his wife.[629] To this extent the *Quran* provides:

> "Let him who has abundance spend out of his abundance, and he whose provision is measured, let him spend of that which Allah has given him. Allah asks naught of any soul save that which He has given it."[630]

With regard to the amount of maintenance, the position and social status of both spouses must be taken into account.[631] Where both spouses are wealthy, the maintenance provided to the wife should be of that standard.[632] The same applies

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624 For example, dowry may be given in the form of cash, furniture, jewelry, a pilgrimage to the holy lands etc.

625 Siddiqi *The Family Laws of Islam* 84.

626 Nasir *The Islamic Law of Personal Status* (2002) 84.

627 Nawawi *Minhaj et Taliban: A Manual of Muhammadan Law* 311.

628 Siddiqi *The Family Laws of Islam* 107; Ibn Rushd *The Distinguished Jurist's Primer* 63; Sabiq *Fiqh Us-Sunnah* 363; Ajijola *Introduction to Islamic Law* 192; Ahmed *Muslim Law of Divorce* 711.

629 Sabiq *Fiqh Us-Sunnah* 51.

630 *The Holy Quran,*chap 65; verse 7.

631 Siddiqi *The Family Laws of Islam* 108.

632 *Ibid*.

where both spouses are not financially well off.[633] If a wife is wealthy and the husband is not, the wife in this instance would be entitled to reasonable maintenance.[634]

Maintenance (*nafaqah*) is primarily the husband's duty, regardless of the private means of the wife.[635] The wife is under no obligation to contribute financially towards the running of the household, and where she does, she may claim such amounts from her husband.[636] Furthermore, if the wife cannot perform her household duties due to illness, or where the wife is wealthy and wife refuses to do any domestic work as she considers it to be below her dignity, it is the duty of the husband to provide her with cooked food, for example.[637]

In terms of Islamic law the wife is also entitled to maintenance in the following circumstances:[638]

(i) The marriage has been solemnized, but the wife has not yet gone to live with her husband and is still living with her parents. However, if the husband requests her to live with him and she refuses, she would in these circumstances lose the right to maintenance.

(ii) The wife refuses to live with her husband due to the fact that he has not yet paid the dower to her.

(iii) The wife is living with her parents with the permission of her husband.

(iv) The wife is living with the parents due to her becoming ill. Should the husband request that she returns to the marital home during her illness, and she refuses to do so, the husband is absolved from the expense of her treatment for her illness. He would therefore be responsible only for clothing and feeding her.

633 *Ibid*.

634 *Ibid.*

635 Siddiqi *The Family Laws of Islam* 107.

636 Siddiqi *The Family Laws of Islam* 108.

637 Siddiqi *The Family Laws of Islam* 108-109.

638 Siddiqi *The Family Laws of Islam* 108.

Where the marriage is dissolved, the husband is under an obligation to provide accommodation and maintain the wife during the three-month waiting period (*iddah*).[639] This is in accordance with the following *Quranic* injunction:

> "Let women live in (*iddah*) in the same way as you live according to your means. Annoy them not, so as to restrict them."[640]

Once the three-month waiting period has elapsed, the husband is not obliged to pay maintenance to his former wife.[641]

According to the *Shafi'i madhhab*, where the husband fails to *nafaqah* his wife, this constitutes a debt that the husband is obliged to pay to the wife.[642] In other words, the wife is entitled to claim for arrear *nafaqah* during and after the termination of the marriage.[643]

(iii) Residence

The general rule is that the husband is under an obligation to provide his wife with suitable accommodation or housing according to his means as long as the marriage subsists.[644] This is stipulated by the following *Quranic* injunction:

> "Lodge them where you dwell, according to your means."[645]

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639 Ayoub *Fiqh of Muslim Family* 347; Ibn Rushd *The Distinguished Jurist's Primer* 114; Sabiq *Fiqh Us-Sunnah* 57-58; Schacht *An Introduction to Islamic Law* 168.

640 Chap 65; verse 6.

641 The rule applies unless the wife is pregnant or is breastfeeding, in which case the husband is obliged to maintain the wife until the birth of the child or the completion of breastfeeding. To this extent, *The Holy Quran* 65:6 states: "And if they carry (life) in their wombs, then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense."

642 Esposito & DeLong-Bas *Women in Muslim Family Law* 115.

643 Esposito & DeLong-Bas *Women in Muslim Family Law* 115; Carroll "Divorced Women in India: Shah Bano, the Muslim Women Act, and the Significance of the Bangladeshi Decision" in Carroll (ed) in *Shah Bano and the Muslim Women Act. A decade on: The Right of Divorced Muslim Women to Mataa* (1998) France, India: Women Living Under Muslim Laws and Women's Research Action Group 35. In contrast, the *Hanafi madhhab* only recognizes the concept of arrear maintenance where the spouses have explicitly agreed that the wife would be entitled to it.

644 Siddiqi *The Family Laws of Islam* 109.

645 Chap 65; verse 6.

This is also the position where the marriage is terminated by divorce, as the divorced wife is entitled to remain in the marital home during her period of *iddah*.[646] For as long as the marriage subsists, the husband bears the sole responsibility of providing accommodation and maintenance for his wife.[647] Where the husband has leased property to provide accommodation for his wife, he bears the sole responsibility to pay the rental of the property.[648]

(iv) Treatment of wives

The Prophet Muhammad (PBUH) in his last sermon repeatedly admonished the men to treat their wives with kindness and respect, and in fact laid great emphasis upon kind and good treatment towards the wife.[649] To this effect, the traditions of the Prophet Muhammad (PBUH), provide as follows:

> "The best of you is the best in the treatment of his wife."
>
> "O' people! You have certain rights over your wives and so have your wives over you…. They are the trust of Allah in your hands. So treat them with all kindness."[650]

Similarly, the following verses of the *Quran* can be cited to emphasize the manner in which a husband should treat his wife or wives:

> "Keep them in good fellowship."[651]
>
> "Live with them (wives) on a footing of kindness and equity. If you take a dislike to them it may be that you dislike a thing, and Allah brings about through it a great deal of good."[652]

The husband is, therefore, obliged to treat his wife with kindness, love and respect in order for peace and happiness to prevail within the marital home.

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646 Siddiqi *The Family Laws of Islam* 109.

647 *Ibid*.

648 Ba'-kathah *Tuh-fatul Ikhwaan* 157.

649 Siddiqi *The Family Laws of Islam* 109.

650 Al-Qushayri *Sahih Muslim*: *The Book of Marriage Hadeeth 3466* (1998) Vol 8.

651 Chap 22; verse 229.

652 Chap 4; verse 19.

(v) Equality between wives

Where the husband is practicing polygyny, it is incumbent upon him to treat all the wives equally as all the wives are deemed to be equal in status and should enjoy equal rights.[653] The husband is therefore required to treat all his wives equally with regard to the provision of maintenance as well as the time spent with each wife.[654] It is for this reason that, should the husband not be in a position to show equal treatment towards all his wives, the *Quran* states the following:

> "And if you fear that you cannot do justice (to so many women) then (confine yourself to) only one."[655]

Islam, however, acknowledges that it is not possible for the husband to treat each wife equally as far as his affections are concerned.[656] It is for this reason that the *Quran* states:

> "You will not be able to deal equally between your wives however much you wish, but turn away not altogether (from one) leaving her in suspense. If you do good and guard against evil, surely Allah is ever-forgiving and merciful."[657]

2 6 1 1 2 THE DUTIES OF THE WIFE

Islam allows the wife certain rights that place duties upon the husband, but similarly the wife owes certain duties towards the husband.

(i) Guarding the husband's rights

Faithfulness and chastity are regarded as the first duties of the wife.[658] Simply put, the wife must refrain from extra-marital relationships, and the failure to observe this duty constitutes adultery and justifies divorce.[659] In the husband's absence it is the duty of

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653 Siddiqi *The Family Laws of Islam* 115.
654 *Ibid.*
655 Chap 4; verse 3.
656 Siddiqi *The Family Laws of Islam* 116.
657 Chap 4; verse 129.
658 Siddiqi *The Family Laws of Islam* 118.
659 *Ibid*.

the wife to guard his possessions, which include his offspring, property and honour.[660] In this regard the *Quran* states as follows:

> "The good women in the absence of their husbands guard their rights as Allah has enjoined upon them to be guarded."[661]

(ii) Management of household affairs

The second duty of the wife includes the supervision of the family home, as well as the improvement and protection of the family relationships.[662] The primary duties of the wife can therefore be listed as the management of the household and the rearing of the children.[663] These duties do not detract from fact that a woman, more specifically a wife, has the right to engage in employment, to seek education and even to defend her country in the same manner as a man, if she is required to do so.[664]

The wife is under no obligation to provide personal services, such as cooking meals and cleaning the marital home.[665] Where she does undertake these duties it is regarded as a favour that she does for her husband. According to the *Sunnah* practices of the Prophet Muhammad (PBUH),[666] both the husband and the wife should assist each other with regard to duties in the marital home.[667]

(iii) Headship of the family

Although Islam advocates the idea that the marital home is viewed as a kingdom ruled by both husband and wife, Islam is patriarchal in nature and the husband is regarded as the head of the family who has the decisive say in all matters.[668] The wife is, therefore, required to obey her husband in matters relating to the well-being and happiness of the family unit, as well as in matters relating to the upbringing of their

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660 *Ibid*.

661 Chap 4; verse 34.

662 Nasir *The Status of Women Under Islamic Law* 81.

663 Alkhuli *The Light of Islam* 78.

664 *Ibid*.

665 Siddiqi *The Family Laws of Islam* 119.

666 The Prophet Muhammad (PBUH) assisted his wives in the household, whether it was milking the goats, patching clothes or cleaning household utensils.

667 Siddiqi *The Family Laws of Islam* 119.

668 Alkhuli *The Light of Islam* 77.

children.[669] A wife may, however, refuse to obey her husband if he requires her to do that which is contrary to the teachings and rulings of Islam.[670] If the husband, for example, forbids the wife to do the compulsory fasting during the month of *Ramadan,* the wife is not required to obey him.[671]

In so far as the rights and duties of both spouses are concerned, it is important to bear in mind that the marital rights and duties arising from the marriage depend solely on the commitment of the parties towards each other and their obedience to the *Quran* and the teachings of Islam.

(iv) Family name

Upon the solemnization of the marriage, a Muslim woman does not lose any of the rights she has prior to the marriage, and as a married woman she retains her individuality and her name.[672] Although in practice most women accept their husbands' surnames, Islam permits women to retain their maiden surnames.[673] In fact, the opinion amongst the majority of Islamic jurists is that the woman is required by Islamic law to retain her surname and not adopt that of her husband's.[674]

2 6 1 2 SOUTH AFRICAN LAW

2 6 1 2 1 MAINTENANCE

According to the common law, one of invariable consequences of a civil marriage is the reciprocal duty of support that arises between spouses as soon as the marriage is solemnized.[675] The reciprocal duty of support between spouses applies to all marriages concluded in terms of civil law,[676] regardless which matrimonial property regime the parties choose to regulate their marriage.[677] Furthermore, the duty of support subsists throughout the marriage and can under certain circumstances be

669 Siddiqi *The Family Laws of Islam* 120.

670 Siddiqi *The Family Laws of Islam* 122.

671 *Ibid*.

672 Alkhuli *The Light of Islam* 76.

673 *Ibid*.

674 Al-Bukhaari *Sahih Muslim: The Book of Marriage Hadeeth No 6391* (1998).

675 *Oberholzer v Oberholzer* 1947 (3) SA 294 (O); *Reyneke v Reyneke* 1990 (3) SA 927 (E); *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC).

676 This includes marriages entered into in terms of the Civil Union Act and the Recognition of Customary Marriages Act.

677 Barratt *et al Law of Persons and the Family* 264.

extended, despite the fact that the marriage has been terminated either through divorce or by the death of one of the parties to the marriage.[678]

The reciprocal duty of support arises when the spouse who claims maintenance is in need of it, and the spouse from whom maintenance is claimed, is in a financial position to provide the maintenance claimed.[679] In *Reyneke v Reyneke*[680] the court held that a maintenance order could be granted only if the court is satisfied that the person from whom maintenance is claimed is in a position to make payment.[681] The court adopted this approach, despite the fact that in this case the husband deliberately and fraudulently impoverished himself in order to frustrate the maintenance claim of his wife.[682]

The reciprocal duty of support means that both the husband and wife have a duty to support each other on a *pro rata* basis according to their respective means.[683] In terms of the common law, spouses can fulfill the duty to support in one of two ways, namely, by providing the necessary finances to purchase what the other requires, or alternatively by providing certain kinds of services, such as doing the housework in the marital home or looking after the children born of the marriage.[684] The provision of accommodation, food, clothing, medical expenses and litigation costs are examples of items that typically fall within the duty of support. The duty of support is not limited merely to the bare necessities of life, but is rather determined by the spouses' standard of living, their financial means or income and the cost of living.[685] Therefore, overseas holidays, weekly visits to the hairdresser and expensive cars, for example, are items

678 Divorce Act 70 of 1979; Maintenance of Surviving Spouses Act 27 of 1990. Hutchison *et al Wille's Principles* 111.

679 Voet 25.3; Boberg *Boberg's Law of Persons and the Family* (1999) 233-234; Heaton & Kruger *South African Family Law* 44.

680 *Supra*.

681 *Reyneke v Reyneke supra* 933.

682 *Ibid*.

683 Barratt *et al Law of Persons and the Family* 265.

684 *Ibid*.

685 In *Young v Coleman* 1956 (4) SA 213 (N) at 218 it was held that because the common-law duty of support is not limited to the bare necessities of life, the social and economic status of the spouse providing the maintenance may mean that the spouse will have to provide the other spouse with more than what the average household requires.

that may well fall within the duty to support if the person from whom support is being claimed is a wealthy person.[686]

Where the duty to support is not being fulfilled, the spouse claiming maintenance can enforce the duty of support by instituting a maintenance claim in either the High Court or the Maintenance Court.[687] In terms of section 3 of the Maintenance Act, maintenance courts are empowered to grant both maintenance orders and civil and criminal sanctions where a party fails to comply with the maintenance order. The general rule with regard to arrear maintenance is that it cannot be claimed if the spouse could sufficiently support himself without incurring debts during the period in which the other spouse failed to provide maintenance.[688] This, however, does not apply where the spouse claiming maintenance has to incur debts in order to maintain him or herself, or where the arrear maintenance is being claimed in terms of a court order granted in terms of section 7(2) of the Divorce Act, or a maintenance agreement concluded by the parties.[689]

However, where a third party supports one of the spouses where the other spouse fails in his or her duty to provide spousal support, the third party can claim for a reimbursement on the basis of either unjustified enrichment or *negotiorum gestio* from the guilty spouse.[690] This principle does not apply where no duty of support exists between the spouses,[691] where the expense was not reasonable and falls outside the scope of duty of support;[692] and lastly, the duty of support has already been fulfilled.[693]

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686 In *Gammon v McClure* 1925 CPD 137 the court held that the amount Mrs Gammon had spent on clothing and accommodation was reasonable bearing in mind her social status.

687 Barratt *et al Law of Persons and the Family* 266.

688 *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 141 G-H; Boberg *Boberg's Law of Persons and the Family* (1999) 238.

689 *Young v Coleman supra*.

690 *Gammon v McClure supra* at 139 the court held that a reciprocal duty of support existed between spouses, and where a spouse did not fulfill his duty of support, he is liable to reimburse third parties.

691 For example, where no valid marriage exists between the parties or where the parties have indeed entered into a valid marriage, but are living separately due to the one spouse's fault. In this case, the spouse who caused the separation loses his or her right to support and the innocent party no longer has a duty to provide support.

692 In *Excell* v *Douglas* 1924 CPD 472 the court held that the money spent by the wife on clothing was extravagant, having taken the spouses standard of living into account. As a result only a third of what Mrs Excell bought was deemed to be within the scope of Mr Excell's duty of support.

693 *Excell v Douglas supra* at 481.

Furthermore, both spouses in a civil marriage have the power to bind each other in contract for the things and services that are necessary for the running of the joint household, irrespective of the matrimonial property system regulating the marriage, and irrespective of which spouse buys the household necessaries.[694] The capacity to conclude binding contracts for the purchase of household necessities is an automatic consequence of marriage that cannot be excluded by an ante-nuptial contract.[695] In modern times, spouses share the duty to purchase and pay for household necessities on a *pro rata* basis according to their means.[696]

The spouses will only have the power to bind each other contractually for the purchase of household necessities if they have entered into a valid civil marriage,[697] if a joint household exists at the time the purchase is made,[698] and the item purchased must be a household necessity.[699]

2 6 1 2 2 RESIDENCE

One of the most important invariable consequences of a civil marriage is the creation of the *consortium omnis vitae*[700] that includes the duty and the right to live together in their marital home.[701] The general rule is that neither of the spouses can evict the other from the marital home irrespective of the matrimonial property regime, and irrespective of which one owns the marital home.[702] The right to live in the marital home includes the right to possession and use of the household furniture and other effects, regardless of which one owns the items.[703] In the event where one of the

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694 Ss 17(5) and 23 of the Matrimonial Property Act 88 of 1984 regulate the purchase of household necessities in respect of marriages in and out of community of property respectively.

695 Voet 23.2.46. See also *Reloomel v Ramsay* 1920 TPD 371; *Excell v Douglas supra*.

696 Barratt *et al Law of Persons and the Family* 273.

697 All the legal requirements as discussed in para 2 5 2 of this thesis must be met.

698 In *Reloomel v Ramsay supra* at 376 the court held that there will be a joint household even if one of the spouses is temporarily absent from the home. In *Excell v Douglas supra* at 484 the court held that there was no joint household where the spouses had lived apart for many years. Subsequently the wife could not bind the husband for the purchases she made.

699 The courts employ two tests, namely, the subjective and objective tests to determine whether the item purchased is a household necessity. See *Reloomel v Ramsay supra* and *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* 1951 (1) SA 730 (T).

700 See *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) and *Grobbelaar v Havenga* 1964 (3) SA 522 (N) for the definition of the term "*consortium omnis vitae*".

701 *Badenhorst v Badenhorst* 1964 (2) SA 676 (T).

702 *Owen v Owen* 1968 (1) SA 480 (E); *Whittingham v Whittingham* 1974 (2) SA 636 (R).

703 *Whittingham v Whittingham supra*; *Buck v Buck* 1974 (1) SA 609 (R).

spouses threatens the other spouse in respect of the use and enjoyment of the marital home or the household effects, the threatened spouse can apply for an interdict to prevent this.[704] Where one spouse has already been evicted from the marital home, or has been dispossessed of household goods, the aggrieved spouse can apply by means of the *mandament van spolie* either to regain possession of the marital home or the household effects.[705] The *mandament van spolie* can also be used to regain possession of household effects, as the one spouse cannot dispose of the household furnishings and effects and leave the other spouse with only the "empty shell of the matrimonial home".[706]

The exception to the general rule that a spouse cannot be evicted from the marital home can arise in domestic violence matters where a spouse applies for a protection order in terms of the Domestic Violence Act.[707] If a protection order is granted, the guilty spouse may be prevented from entering the marital home or living in it.

2 6 1 2 3 TREATMENT OF SPOUSES

Closely related to the treatment of spouses, is the creation and protection of the *consortium omnis vitae* which automatically arises when a civil marriage is concluded. Although the term "*consortium omnis vitae"* does not lend itself to precise legal definition, it has been described in numerous cases in the following manner:[708]

> "…an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. These embrace intangibles, such as loyalty and sympathetic care and affection, concern… as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common house-hold or in supporting – generating business."[709]

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704 *Buck v Buck supra*; *Du Plessis v Du Plessis* 1976 (1) SA 284 (W); *Glass v Glass* 1980 (3) SA 263 (W).

705 *Rosenbuck v Rosenbuck* 1975 (1) SA 181 (W); *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D); *Coetzee v Coetzee* 1982 (1) SA 933 (C); *Manga v Manga* 1992 (4) SA 502 (ZSC); *Ross v Ross* 1994 (1) SA 865 (SE); *Du Randt v Du Randt* 1995 (1) SA 401 (O). In *Oglodzinski v Oglodzinski supra*, Mrs Oglodzinski changed the locks of the marital home while her husband was at work. On his return from work he found himself locked out of the flat. The court granted Mr Oglodzinski the *mandament von spolie* to regain possession of the flat.

706 In *Ross v Ross supra* Mrs Ross disposed of household effects and furnishings while her husband was out of town. The court granted Mr Ross the *mandament von spolie for the recovery of the items so disposed.* See also *Whittingham v Whittingham supra*.

707 116 of 1998.

708 Heaton *South African Family Law* 42.

709 *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) 9.

In *Grobbelaar v Havenga*[710] it was held that

> "Companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state. Taken together, they make up the consortium."

Spouses are, therefore, required to treat each other with love and respect and to remain loyal and faithful to each other. However, despite the fact that the spouses have *consortium* duties towards each other, these duties cannot be enforced in a court of law.[711] Where one or both spouses fail in performing the interpersonal aspects of the *consortium*, the aggrieved spouse can institute an action for divorce on the basis that the marriage has broken down irretrievably.[712]

2 6 1 2 4 FAMILY NAME

In modern South African society, most married women still assume their husbands' surname although it is not necessary for them to do so.[713] In terms of section 26(1) of the Births and Deaths Registration Act[714] a person is not allowed to change his or her surname unless the required authorization has been obtained from the Director-General of Home Affairs. Section 26(1), however, does not apply to women who marry or who have been married because a wife does not need official permission to assume her husband's surname after the solemnization of the marriage,[715] or after having assumed his surname, to resume a surname she bore at any prior time,[716] or add a her married surname to any surname she bore at any prior time.[717] A divorced or widowed woman may assume a surname she bore at any previous time.[718] Where a man wishes to assume his wife's surname, or add it to his own surname, he is required to apply to the Director-General of Home Affairs for permission.[719] In addition to the differential treatment of men and women as cited above, there is also differential

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710 1964 (3) SA 522 (N) at 525.

711 *Boon v Boon* (1898) 8 CTR 397.

712 See para 3 3 2 of this thesis for a discussion on the grounds of divorce in terms of South African law.

713 Heaton & Kruger *South African Family Law* 59.

714 51 of 1992.

715 S 26(1)(a).

716 S 26(1)(a) and (b).

717 S 26(1)(c). In other words the wife can create a double-barrelled surname.

718 Labuschagne & Bakker "Naamsvoering en die Behoefte aan 'n Socio-juridiese Identiteit: 'n Regsantropologiese en Menseregtelike Perspektief"1999 62 *THRHR* 176 185-189.

719 S 26(1) of the Births and Deaths Registration Act.

treatment between men married in terms of the Marriage Act and partners in a civil union, as section 26(1) of the Births and Deaths Registration Act allows spouses to a civil union to change their surnames without obtaining official consent from the Director-General of Home Affairs to do so. It is submitted that there is no constitutionally acceptable justification for the differentiation.

2 6 1 2 5 HEADSHIP OF THE FAMILY

In terms of the common law the husband was head of family who had the decisive say in all matters concerning the common life of the spouses, for example, where and in what style they live.[720] The husband's common-law status as head of the family was expressly incorporated into section 13 of the Matrimonial Property Act,[721] which provided that, although the husband's marital power over the wife was abolished, this would not affect the husband's position as the head of the family. The legislature attempted to remove the husband's headship with the enactment of section 30 of the General Law Fourth Amendment Act,[722] which repealed section 13 of the Matrimonial Property Act. Sinclair submits that, although section 13 was repealed, the common-law rule in respect of the husband as the head of the family remained unchanged.[723] However, in modern South African society, the husband's common-law headship of the family has very little practical significance and no longer has any substantial content, as the major practical aspects of the husband's headship has been abolished through the enactment of several other statutes.[724] The continued existence of the common-law rule in respect of the husband's headship is unconstitutional as it discriminatory on the ground of gender, which is a violation of sections 9 and 10 of the Constitution.[725]

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720 Heaton & Kruger *South African Family Law* 60. Huber *Hedendaegsche Rechtsgeleerdheydt* 1.9.10-13.

721 88 of 1984.

722 132 of 1993.

723 Sinclair *The Law of Marriage* 439.

724 In terms of s 1(1) of the Domicile Act 3 of 1992, married women acquire a domicile of choice and no longer acquire a domicile of dependence in the place where their husbands are domiciled. The Children's Act 38 of 2005, bestows co-guardianship of children born of the marriage on both spouses. S 11 of the Matrimonial Property Act 88 of 1994, abolished the husband's marital power and control over the wife's "person and property" for all forms of marriage. See Heaton & Kruger *South African Family Law* 60.

725 Heaton & Kruger *South African Family Law* 60.

2 6 1 3 THE LAW OF ENGLAND AND WALES

2 6 1 3 1 MAINTENANCE

In terms of the common law the husband had a duty to support his wife according to his means.[726] The Equality Act 2010 has abolished the sex-specific rule. At present the duty of support is at present regulated by statute,[727] which provides that a reciprocal duty of support exists between the spouses at the conclusion of the marriage. Where one spouse fails to discharge the duty of support, the aggrieved spouse can lodge an application to court for an order for financial provision.[728] The Domestic Proceedings and Magistrates' Court Act 1978 authorizes a magistrate court to grant periodical or lump-sum financial orders where one spouse has failed to provide reasonable maintenance for the other spouse.[729] Where one spouse has not discharged his or her duty to provide reasonable maintenance to the other spouse, an application for maintenance can also be lodged in the county court or the High Court.[730]

Furthermore, there is no legislation regulating the specific obligations of the spouses during the subsistence of the marriage.[731] There is no requirement that the spouses share the expenses of the household equally, or even that each spouse is required to make a fair contribution to the expenses of the household.[732] The only specific provision relating to the expenses of the household is in respect of the ownership of any surplus saved from a housekeeping allowance.[733] In terms of the common-law rules, ownership of the surplus belonged to the spouse who provided the allowance.[734] The common-law rule was amended by the Married Women's Property Act 1964 which provided that a wife is entitled to half of any savings she made out of a housekeeping allowance. The Equality Act 2010 subsequently changed this by providing that any surplus savings are to be shared between the spouses irrespective who provided the housekeeping allowance.[735]

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726 Probert *Family and Succession Law in England and Wales* 85.

727 Domestic Proceedings and Magistrate Courts Act 1978; Matrimonial Causes Act 1973.

728 S 27 of the Matrimonial Causes Act 1973.

729 S 1.

730 S 27 of the Matrimonial Causes Act 1973.

731 *Ibid*.

732 *Ibid*.

733 *Ibid*.

734 *Ibid*.

735 S 200 of the Equality Act 2010.

2 6 1 3 2 RESIDENCE

There is no statutory code or provisions regulating the ownership or disposition of the matrimonial home.[736] Whilst each spouse acquires the right to occupy the matrimonial home, the ownership thereof is governed, largely by the law of trusts.[737] A spouse who has sole legal[738] and beneficial[739] ownership of the matrimonial home is at liberty to dispose of the matrimonial home as he or she deems fit, without consulting the other spouse.[740] There are certain steps that the aggrieved spouse can take to prevent the other spouse from disposing of the marital home without obtaining consent, but the protection afforded in this instance is not automatic and simply serves to delay the sale of the matrimonial home.[741]

Where the parties are joint beneficial owners of the matrimonial home each spouse has the right of occupation.[742] Where one spouse is the sole legal owner but the other spouse has a beneficial interest in the matrimonial home, the former spouse is obligated to consult the latter in respect of any dealings with the matrimonial home.[743] Where the spouse who is the sole legal owner sells the property, the proceeds thereof are divided according to the spouses' respective beneficial interests.[744]

The right to occupy the marital home as a consequence of statutory "home rights" means that the exclusion of one spouse from the marital home by the other spouse can take place only where this is court-sanctioned.[745] Section 33(3) of the Family Law Act 1996 also authorizes the court to make an order granting a spouse who is not currently occupying the marital home, the right of entry and occupation even where the

736 Probert *Family and Succession Law in England and Wales* 177.

737 *Ibid*.

738 A legal owner has the right to sell and mortgage the property and decides who has the right to occupy the property.

739 A beneficial owner has the right to occupy the property subject to the decision of the legal owner, and has the right also to share in the proceeds if the property is sold. It often happens that the legal and beneficial owners are the same persons, for example, a married couple.

740 Probert *Family and Succession Law in England and Wales* 177.

741 Probert *Family and Succession Law in England and Wales* 178.

742 Probert *Family and Succession Law in England and Wales* 181.

743 S 11 of the Trusts of Land and Appointment of Trustees Act 1996.

744 Probert *Family and Succession Law in England and Wales* 182.

745 S 30 of the Family Law Act 1996.

other spouse is opposed to it. The general rule in respect of the termination of home rights is that it is terminated only at the dissolution of the marriage, whether by death, divorce or annulment.

2 6 1 3 3 TREATMENT OF SPOUSES

Traditionally, on the conclusion of a marriage a consortium was created between the spouses which included, amongst others, the practical aspects of living together in marriage, the right to sexual intercourse, the right to occupy the matrimonial home and respect for marital confidences.[746] In *Best v Samuel Fox & Co Ltd*[747] the court described "*consortium*" as a "bundle of rights" which includes the right of the parties to live together as husband and wife and the right to the company and society of each other. Therefore, once the marriage is concluded the spouses are required to live together as husband and wife as this forms part of the legal concept of consortium.[748] The importance of the spouses living together can be inferred from the fact that a spouse may apply for a divorce on the ground of desertion if the other spouse refuses to live with him or her.[749] Despite the spouses having the right to consortium, it is not a right that the law allows the individual to enforce, either through self-help[750] or by an order of the court.[751]

2 6 1 3 4 FAMILY NAME

Although there is no legal obligation for a woman to do so, and while either spouse can adopt the other's surname on the conclusion of a marriage, it is generally the wife who adopts the surname of her husband.[752] It is, however, becoming increasingly common for the spouses to retain their own surname or to combine their surnames.[753] Where the marriage is terminated either by death or divorce, a woman is not under obligation to resume her maiden name where she had adopted the surname of her husband.[754]

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746 Burton *Family Law* 36.

747 [1952] A.C.716 at 736. See also *Argyll v Argyll* [1965] 1 All ER 611.

748 Probert *Family and Succession Law in England and Wales* 85.

749 *Ibid*.

750 *R v Jackson* [1981] 1 Q.B. 671.

751 *Best v Samuel Fox & Co Ltd supra* 731. The action for the restitution of conjugal rights was abolished in 1970.

752 Probert *Family and Succession Law in England and Wales* 55.

753 Probert *Family and Succession Law in England and Wales* 89.

754 Probert *Family and Succession Law in England and Wales* 55.

An adult, male or female, is allowed in terms of the law to adopt whatever surname or forename he or she chooses, as long as there is no intent to deceive.[755] Despite no formal procedure required to effect a name change, State officials will require documentary proof before effecting the name change.[756]

2 6 1 4 COMPARISON

The differences between the three legal systems relate to the payment of dowry, maintenance, residence, headship of the husband and family name.

As far as similarities between the three legal systems are concerned, in Islamic, South African and English law, marriage creates a *consortium omnis vitae* between the spouses which requires both the husband and wife to remain faithful to each other and to treat each other with kindness, to live together and to support each other. Islamic, South African and English law does not require a woman to assume the surname of her husband when concluding a marriage.

Although it is not a legal requirement and does not affect the validity of the marriage, in terms of Islamic law an obligation rests upon the husband to pay dowry to his wife. There exists no such obligation when the parties enter into a marriage in terms of South African or English law.

Unlike the position in Islamic law where the husband bears the sole duty of support, the position in South African and English law as far as spousal maintenance is concerned, is that there is a reciprocal duty of support between spouses. Furthermore, in terms of South African and English law this reciprocal duty of support exists throughout the marriage, and can be extended in certain circumstances even at the dissolution of the marriage. The prevailing position in Islamic law is that the husband bears the sole responsibility of support during the subsistence of the marriage, and where the marriage is dissolved through divorce, the husband is obligated only to maintain the woman for a period of three months after the divorce has taken place.

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755 For example, a divorced woman may continue to use the surname of her ex-husband but not to pretend that she is still married to him. See Probert *Family and Succession Law in England and Wales* 55.

756 The person wanting to effect a name change can provide the required evidence by executing a deed poll which has to be enrolled in the Central Office of the Supreme Court. Probert *Family and Succession Law in England and Wales* 55.

Islamic law delegates the management of the household and the purchases relating to the household to the wife. The husband is, however, required to provide the financial means to his wife in order for her to fulfill this duty. South African law grants both spouses the authority to bind each other for the purchase of household necessities and where the parties are married in community of property, section 15 of the Matrimonial Property Act grants both spouses equal powers of administration in respect of the joint estate. In terms of English law there is no requirement that the spouses share the expenses of the household equally, or even that each spouse is required to make a fair contribution to the expenses of the household. This position differs markedly from both the Islamic law as well as the South African law position.

As far as the marital home is concerned, in Islamic law it is the sole duty of the husband to provide the wife with suitable accommodation according to his means. The wife is entitled to remain in the marital home during the subsistence of the marriage as well as during her *iddah* period where the marriage is dissolved by divorce. Once the *iddah* period expires, the husband is allowed to evict the wife from the marital home. In terms of South African and English law, both parties have the right to occupy the marital home during the subsistence of the marriage and neither spouse can evict the other from the marital home.

Islamic law requires the wife to be obedient to the husband in respect of all matters unless it is contrary to the principles of Islam. In terms of South African law, there is no similar duty upon the wife where the parties are civilly married in terms of the Marriage Act or Civil Union Act. However, Islamic law and South African common law are to a certain extent patriarchal in nature as the husband is regarded as the head of the family who has the decisive say in matters relating to the family. The common-law rule, however, is subject to constitutional scrutiny as it discriminates on the basis of sex or gender in terms of section 9 and 10 of the Constitution.[757]

[757] Heaton & Kruger *South African Family Law* 62.

2 6 2 PROPERTY RIGHTS

2 6 2 1 ISLAMIC LAW

2 6 2 1 1 PROPERTY RIGHTS

Community of property is not recognized under Islamic law. Spouses to an Islamic marriage maintain separate estates and each spouse retains sole ownership and control of his or her property, whether movable or immovable, and whether acquired before or after the marriage.[758] According to authentic narrations from Islamic jurists,[759] a person is only allowed to receive benefits and wealth which was earned through lawful means, and if the parties are married in terms of a shared matrimonial property system,[760] for example, one becomes entitled to receive benefits to which one is not Islamically entitled.[761] The following injunction from the *Quran* can be cited in this respect:

> "To men is allotted what they earn and to women what they earn."[762]

The complete separation of assets is often very prejudicial to a spouse who is not the primary breadwinner as a spouse who has very little income or no income at all is unable to amass his or her own estate, If an asset is registered only in the husband's name, for example, the wife has no legal claim to the asset. This could prove to be very disadvantageous to her if the marriage is dissolved by divorce and she has no assets to her name.

Under Islamic law the woman enjoys the absolute right to earn, acquire and inherit property.[763] She also possesses the right of ownership over her goods and wealth independent of any male.[764] She is entitled to instruct any person of her choice to deal

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758 Rautenbach & Bekker *Introduction to Legal Pluralism* 368.

759 Ibn Katheer *Tafseer al-Quran al-Adheem* (2003) Vol 1 93.

760 See para 2 6 2 2 of this thesis for a discussion on the matrimonial property regimes regulating the estates of spouses in terms of South African law.

761 The *Ulama* in South Africa are unanimous that only the matrimonial property regime that is *Shari'ah* compliant, is the standard ante-nuptial contract where there is no sharing of assets and liabilities during the subsistence of the marriage. This may prove to be problematic as the wife may be left destitute where all or most of the assets accrued during the subsistence of the marriage is registered in the husband's name.

762 *Surah Al-Nisa*; verse 33.

763 Doi *Women in Shari'ah* 147; 162.

764 Bulbulia "Women's Rights and Marital Status: Are We Moving Closer to Islamic Law?" *De Rebus* 431.

with her property without consulting with her husband, and has the right to dispose of her assets as she sees fit.[765] Muslim jurists are unanimous[766] that, where the wife is of sound mind, the husband does not have the right to object to the manner in which his wife manages her wealth,[767] and the husband does not have the right to dispose of the wealth of his wife, except with her consent.[768] It is clear, therefore, that the woman does not forego any of her property rights by reason of marriage.[769]

2 6 2 1 2 THE MARRIAGE CONTRACT

Besides the duties that flow automatically when the parties enter into a marriage, the parties can also regulate their marriage by means of a marriage contract. Before the parties conclude the marriage they may enter into a prenuptial agreement, or *taqliq,* in terms of which they can agree upon any legal condition or conditions.[770] The prenuptial agreement may include a condition, for example, that the woman shall retain the right to dissolve the marriage, or that the husband may not marry a second wife during the subsistence of the first marriage,[771] or that upon marriage that they live in a certain city or country.[772] In essence, the parties can also enter into a marriage contract to regulate their marital assets.[773]

Whilst the marriage contract is usually concluded before the solemnization of the marriage, nothing prohibits the spouses from adding new provisions to the marriage contract, provided this is done in writing and attested by two competent witnesses.[774] The conclusion of a marriage contract is indicative of the nature of marriage as a

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765 Al-Jibreen *Fataawa al-Mar'ah al-Muslimah* (1996) Vol 2 674. See also Roodt "Marriages under Islamic Law and Patrimonial Consequences and Financial Relief" 1995 *Codicillus* 50 51.

766 This is the opinion of the *Hanafi'i*, *Shafi'i* and *Hanbali* schools of Islamic jurisprudence. See also Ibn Qudaamah *Al-Mughni* 513.

767 The wife may dispose of her assets by distributing it as gifts, or by giving them away in charity, and can give up her rights to money that is owed to her without consulting with her husband.

768 Sa'ad *Mawsoo'at Al-Ijmaa Fi'l-Fiqh Al-Islami* (1985) Vol 2 566.

769 Al-Tahaawi *Sharh al-Ma'aani al-Athaar* (1994) Vol 4 352. See also Rautenbach & Bekker *Introduction to Legal Pluralism* 366.

770 Alkhuli *The Light of Islam* 72. The prospective spouses have the right to negotiate conditions which will apply to marriage provided these conditions are not contrary to the meaning of marriage. For example, the parties cannot agree to live separately.

771 Alkhuli *The Light of Islam* 73.

772 Alkhuli *The Light of Islam* 72.

773 There is uncertainty whether the parties will use the marriage contract to enter into a matrimonial property regime which is contrary to the dictates of Islamic law.

774 The *Quran,* chap 5; verse 1.

contract whereby each spouse has the right to set certain conditions in respect of the marriage, and it also demonstrates the manner in which Islam protects the rights and welfare the prospective wife, by allowing her the right to lay down certain conditions before she signs the marriage certificate.[775]

Cognizance must, however, be taken of the fact that conclusion of the marriage contract essentially depends on consensus between the parties. Due to the unequal distribution of power between a man and a woman, the latter may lack the negotiation power to, firstly, insist that a marriage contract be concluded and secondly, to insist that certain provisions which will offer them protection during the subsistence of the marriage, be included in the marriage contract. In addition to the above limitations in respect of the marriage, where one of the spouses is in breach of the marriage contract, the aggrieved spouse may be reluctant to institute action in a secular court of law to enforce his or her rights.

2 6 2 2 SOUTH AFRICAN LAW

At present there are three matrimonial property systems that regulate the patrimonial consequences upon the conclusion, as well as the dissolution of a civil marriage, namely, in community of property, out of community of property excluding the accrual sharing and lastly, out of community of property including the accrual.

It is important for future spouses to choose a suitable matrimonial property system before conclude a marriage, as a civil marriage not only has far-reaching consequences for spouses in respect of their persons, but also with regard to their estates. Furthermore, the general rule with regard to an ante-nuptial contract is that it must be concluded before the marriage is solemnized.[776] It is therefore imperative that the parties decide on the matrimonial property regime for the ante-nuptial contract to be timeously concluded. Furthermore, it is important for the parties to know which rules apply with regard to their assets at the dissolution of the marriage, whether this occurs through death or divorce.

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775 Alkhuli *The Light of Islam* 73.

776 S 88 of the Deeds Registries Act makes provision for the postnuptial execution and registration of an ante-nuptial contract.

2 6 2 2 1 MATRIMONIAL PROPERTY SYSTEMS

(i) Marriage in community of property

Marriage in community of property is regarded as the default matrimonial property system in South Africa. In other words, couples are deemed to be married in community of property when they enter into a civil marriage, and have not concluded an ante-nuptial contract.[777] Marriage in community of property can be avoided if the spouses enter into a valid postnuptial contract in terms of which community of property and community of profit and loss are excluded[778] or alternatively, where the husband is domiciled in a foreign country where the default matrimonial property system is out of community of property.[779]

Where the spouses are married in community of property, they are automatically joint co-owners of an indivisible half-share of all assets and liabilities, irrespective whether these assets or liabilities had been acquired before the marriage was concluded or during the subsistence of the marriage.[780] Upon marriage, the spouses' separate estates merge to form a joint estate.[781] This takes place *via* operation of law the moment the parties enter into a marriage, and therefore no transfer of movable property, registration of immovable property or cession of rights from the one spouse to the other is required.[782] There are, however, certain asserts which are excluded from the joint estate, for example, assets excluded by means of a will.[783]

As stated above, a marriage in community of property results in a community of liabilities as both spouses become liable for each other's debts, irrespective of whether the debt was incurred before the marriage was concluded, or whether such debt arose

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777 S 86 of the Deeds Registries Act 47 of 1937 provides that unless an ante-nuptial contract is registered in terms of s 87 of the Act, it is of no force or effect against anyone who is not a party to it. The marriage will therefore be deemed to be in community of property insofar as the spouses' creditors and debtors are concerned.

778 S 88 of the Deeds Registries Act 47 of 1937.

779 *Frankel's Estate v The Master* 1950 (1) SA 220 (A).

780 *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *De Wet v Jurgens* 1970(3) SA 38 (A); *Mazibuko v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA).

781 *Ibid*.

782 *Ex parte Menzies* 1993 (3) SA 799 (C); *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520 (T).

783 Barratt *et al Law of Persons and the Family* 287-288; Heaton & Kruger *South African Family Law* 63-66.

during the subsistence of the marriage.[784] Spouses are joint debtors and therefore cannot stand surety for each other.[785] It is submitted that the fact that one spouse is liable for the debts incurred by the other spouse is one of the main disadvantages of a marriage in community of property.

The administration of the joint estate for spouses married in community of property is regulated by section 15 of the Matrimonial Property Act. In terms of section 15(1) either spouse can perform any juristic act in respect of the joint estate, without the other's consent, except for those transactions specifically excluded by the Act. This allows spouses to act independently of each other in respect of the joint estate, except for those transactions specifically excluded by the Act.[786] Section 15(2) and (3) and section 17(1) of the Matrimonial Property Act regulate the position where the consent of both spouses is required. Different kinds of consent are required depending on the nature of the juristic act that the spouses wish to conclude.[787]

Other than the juristic acts mentioned in section 15(2) and (3) and section 17, no consent is required for juristic acts not specifically referred to in the Matrimonial Property Act. In terms of section 15(6) spousal consent is also not required for juristic acts concluded by a spouse in the course of his or her trade, profession or business.[788]

The community of property matrimonial property system has far-reaching consequences for parties due to the fact that as soon as the marriage is solemnized, the principle of joint liability arises resulting in neither spouse being protected against the other's creditors.[789] A liquidity problem can also arise at the death of one of the spouses as the executor is both entitled and obliged to liquidate some, or even all, of

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784 Voet 23.2.80; Matthaeus *Paroemia* vol II 22.

785 *Nedbank v Van Zyl* 1990 (2) SA 469 (A).

786 The consent of both spouses is required for certain important transactions which may have a significant impact on the joint estate.

787 For example, prior written consent, attested by two competent witnesses is required in respect of surety agreements.

788 It is important to ascertain whether the spouse is performing the juristic act as part of his/her profession/business or whether the spouse is performing such juristic act privately. If such juristic act is being performed in the ordinary course of their business, then the provisions of s 15(2) do not apply. However, the spouse would require consent from the other spouse if the juristic act is concluded in his or her private capacity. See *Distillers Corporation v Modise* 2001 (4) SA 1071 (O); *ABSA v Lydenburg Passasiersdienste BK* 1995 (3) SA 314 (T).

789 S 17(5) of the Matrimonial Property Act.

the assets of the joint estate to meet the claims of creditors.[790] Furthermore, even where the spouses do not have creditors, the surviving spouse may still experience liquidity problems when the heirs inheritances become due as the executor is authorized to liquidate part, or even the entire joint estate, to meet the claims of the heirs.[791]

(ii) Marriage out of community of property and community of profit and loss without the accrual

The fundamental rule in respect of the matrimonial property system, out of community of property, and community of profit and loss without the accrual, is that there is no merging of estates of the spouses as each spouse retains their separate estate.[792] All assets acquired and liabilities incurred before the marriage was concluded, and everything earned or acquired during the course of the marriage, falls into the separate estate of each spouse.[793] Unlike a marriage in community of property, the spouses do not automatically share ownership in their assets and liabilities.[794] It is as if the spouses were legal strangers to each other. There is no joint administration of assets, and neither do the spouses require the consent of each other when entering into transactions or incurring debts.[795] However, spouses married out of community of property share mutual duties of spousal support,[796] as well as responsibilities for the expenses of the joint household.[797] Spouses married out of community of property, however, can become joint owners of property and even joint holders of a bank account.[798] In contrast to the position of spouses married in community of property, spouses married out of community of property are merely ordinary co-owners as their shares in the joint property are divisible and can be sold to third parties.[799]

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790 *Williams v Williams* (1896)13 SC 200.

791 Heaton & Kruger *South African Family Law* 116.

792 Barratt *et al Law of Persons and the Family* 310-311; Heaton & Kruger *South African Family Law* 92.

793 *Ibid*.

794 *Rosengarten v O'Brien* 1912 TPD 834; *Williamson v Wagenaar* 1940 EDL 244.

795 *Rohloff v Ocean Accident & Guarantee Corp Ltd* 1960 (2) SA 291 (A); *Van Wyk v Groch* 1968 (3) SA 240 (E).

796 See para 2 6 1 2 1 of this thesis.

797 *Ibid*.

798 Mostert & Pope *The Principles of the Law of Property* (2010) 96-100.

799 *Ibid*.

If spouses wish to be married out of community of property, they have to conclude an ante-nuptial contract before they enter into a marriage. Where the intention of the parties is to keep their estates completely separate, the ante-nuptial contract must exclude both the community-of-property system, and the accrual system.[800] In order for an ante-nuptial contract to be valid against third parties, it must be registered in terms of section 87 of the Deeds Registries Act.[801] Section 87 provides that a notary must sign the ante-nuptial contract. If the ante-nuptial contract is executed in South Africa, it must be registered in a deeds office within three months of execution. If, however, it is executed outside South Africa, it must be registered in a deeds office within six months of execution. Where the spouses do not comply with the requirements as set out in section 87, they may bring an application to the High Court in terms of section 88 for postnuptial execution and registration of the ante-nuptial contract.

The spouses can include any provision in their ante-nuptial contract, provided the provision is not impossible, illegal, contrary to public policy or contrary to the nature of marriage.[802] For example, an ante-nuptial contract can contain marriage-settlement[803] or- succession clauses,[804] or even a right of recourse if one spouse contributed more than his or her *pro rata* share in respect of household necessities. However, the main objective of an ante-nuptial clause is the regulation of the spouses' matrimonial property system.[805]

The general rule in respect of the amendment and cancellation of an ante-nuptial contract is that the parties can cancel or amend the ante-nuptial contract up until the time that the marriage takes place, but once the marriage has been solemnized, the parties will not be allowed to cancel or amend the ante-nuptial contract.[806] However,

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800 Barratt *et al Law of Persons and the Family* 311-312; Heaton & Kruger *South African Family Law* 90.

801 47 of 1937.

802 *Ex parte Wismer* 1950 (2) SA 195 (C); Hahlo *Law of Husband and Wife* (1985) 259.

803 A marriage settlement is a donation which one spouse makes to the other in an ante-nuptial contract.

804 The spouses can agree in an ante-nuptial contract as to how their estate should be devolved upon their deaths.

805 Heaton & Kruger *South African Family Law* 83.

806 *Union Government (Minister of Finance) v Larkan* 1916 AD 212; *Honey v Honey* 1992 (3) SA 609 (W).

where the ante-nuptial contract does not properly reflect the intention of the parties, or does not properly convey the terms of their actual contract, the parties can approach the High Court for an amendment or cancellation of their ante-nuptial contract.[807] In respect of the termination of an ante-nuptial contract, this occurs only when all the contractual obligations contained in the ante-nuptial contract have been met.[808]

(iii) Marriage out of community of property including the accrual

Section 2 of the Matrimonial Property Act provides that the accrual applies to all marriages entered out of community of property from 1 November 1984, unless the parties specifically elected to exclude the accrual system.

The accrual system is referred to as a type of deferred community-of-property system as it allows the spouses to retain separate estates during the subsistence of the marriage, but at the dissolution of the marriage, the spouses share in the financial growth that their respective estates have accrued during the course of the marriage.[809] The underlying principle of the accrual system is that the efforts of both spouses contributed towards the accumulation of their estates during the course of the marriage.[810] In terms of section 3(2) of the Matrimonial Property Act, the accrual system allows the spouse whose estate shows a no-accrual or a smaller accrual than the estate of the other spouse, a share in the estate of the spouse who has a greater accrual, for an amount equal to half of the difference between the accrual of the respective estates of the spouses. Generally, the accrual claim only arises at the dissolution of the marriage, but section 8 of the Matrimonial Property Act makes provision for immediate division if the conduct of one spouse seriously prejudices, or will seriously prejudice, the other spouse's right to share in the accrual at the dissolution of the marriage. In terms of section 8(1) the court will grant the order for the immediate division if it is satisfied that the division is necessary to protect the interests of the applicant spouse, because of the actions of the other spouse, and that no third party will be prejudiced as a result of the immediate division of the accrual. The order for the division of the accrual can be made in accordance with the Act, or

807 *Ex parte Mouton* 1929 TPD 406; *Ex parte Coetzee* 1984 (2) SA 363 (W).

808 Heaton & Kruger *South African Family Law* 88.

809 S 3(1) of the Matrimonial Property Act.

810 Hutchison *et al Wille's Principles of South African Law* 164.

such other basis as it deems fit. In addition to the order for the division of the accrual, the court can order that another matrimonial property regime regulate the marriage in the future.[811] In so far the calculation of the accrual is concerned, the accrual or growth of the estate is the amount by which the net value of the estate at dissolution exceeds the net value of the estate at commencement of the marriage.[812] The net value is deemed to be the value of the estate after all the outstanding debts have been settled and all amounts owed to the estate have been collected.[813]

Despite the fact that the spouses retain separate estates during subsistence of the marriage, spouses married in terms of the accrual system must provide for household necessaries *pro rata* according to their financial means, and are jointly and severally liable to third parties who supply the household with necessaries.[814] A reciprocal duty of support arises where the parties are married out of community of property, subject to the accrual system.[815]

2 6 2 3 THE LAW OF ENGLAND AND WALES

Despite the fact that there is no statutory code regulating the matrimonial property regimes in England and Wales, the the default matrimonial property system is out of community of property in terms of which each spouse retains ownership and control over all his or her own property, whether or not the property is acquired before or during the subsistence of the marriage.[816] Although the matrimonial property regime being out of community of property, at divorce little regard is paid to strict ownership rights when deciding how property should be allocated on the basis of need.[817] Ownership of assets, especially those assets that were acquired before the conclusion of the

811 S 8(2) of the Matrimonial Property Act 88 of 1984.

812 S 4(1)(a).

813 *Ibid*.

814 See para 2 6 1 2 1 of this thesis.

815 *Ibid*.

816 *Charman v Charman* [2007] EWCA Civ 503 para 124.

817 In support of what is stated above Sir Mark Potter, the then President of the Family Division stated the following in *Charman v Charman supra* where the following: "[a]lmost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce."

marriage, may be taken into consideration when deciding how the surplus should be divided.[818]

2 6 2 4 COMPARISON

As mentioned previously, in Islamic law the general rule as far as the matrimonial property regimes are concerned, is that the marriage is out of community of property with no sharing of assets or liabilities. During the subsistence of the marriage the spouses are deemed to be legal strangers to each other, and therefore do not require consent from each other to enter into contracts or when incurring debts. In Islamic law there is also no joint administration of assets acquired by the spouses during the subsistence of the marriage. Similarly, a marriage out of community of property with the accrual is also foreign to Islamic law. The parties can elect to enter into a marriage contract to regulate their marital property in a manner that best suits them. In contrast to the position described above, there are currently three matrimonial property regimes in operation in South Africa, each with its own advantages and disadvantages. In terms of English law, whilst there is the default matrimonial property regime is that of a marriage out of community of property, where the marriage is dissolved by divorce little regard is paid to strict ownership rights.[819]

2 7 CONCLUSION

From the discussion above, it is evident that, whilst Islamic, South African and English law attach great importance and significance to the family and the institution of marriage, these legal systems differ in respect of the legal protection afforded to the family. Islamic law recognizes only the family unit that exists within the confines of a marriage. South African and English family law acknowledge that the family unit is much more complex than merely consisting of the husband, wife and their children, but is inclusive of other relationships as well. As a result the ambit and scope protection offered by the South African and English legal system in respect of the family is extensive as it seeks to accommodate alternative family relationships. A case in point is the legalization of same-sex marriages. The enactment of the Civil Union Act by the

818 *Ibid*.

819 See para 3 4 3 of this thesis.

South African legislature and the enactment of the Marriages (Same Sex Couples) Act 2013 bears testament to fact that "families come in all shapes and sizes."[820]

Furthermore, the adoption of certain international human rights legislation and the enactment of the Constitution dictated that South African family law undergo considerable changes so as to bring the law in conformity with international law, the Bill of Rights and the intrinsic values contained in the Constitution. Whilst the importance of the Constitution as the supreme law of the land cannot be undermined, cognizance must be taken of the fact that the Constitution, in particular, the Bill of Rights is individual centered and based on western values and philosophies, which is fundamentally different to the principles of Islamic law. The question that needs to be addressed is, therefore, whether western ideologies should in this day and age be used as the yardstick for marriages concluded in terms of Islamic law.

The fundamental difference between Islamic law on the one hand, and the South African and English legal systems on the other, indicates that Islamic law will never completely comply with international equality rights or with the South African Constitution. The conflict between the right to equality, especially insofar as women's right to equality is concerned, and the right to religious freedom will always exist in respect of Islamic law. The fact that Islamic law is fundamentally different to both South African and English law does not make it wrong but merely different. It is therefore imperative that, if South African society is to overcome past discrimination and achieve the vision of equality that is fundamental to a constitutional democracy, the courts, as well as the State, must recognize and promote the full range of diversity that is prevalent in South Africa. This inevitably includes the recognition of Muslim marriages in South Africa.

820 *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs supra* at para 31.

CHAPTER 3
THE DISSOLUTION OF A MARRIAGE IN TERMS OF ISLAMIC LAW, SOUTH AFRICAN LAW AND ENGLISH LAW

3 1 INTRODUCTION

Chapter three should be read with chapter two as a unit, as it compares the dissolution of a marriage as well as the legal consequences thereof in Islamic law, South African law and English law. The definition of the term "marriage"[821] in all three legal systems clearly illustrates that a marriage should ideally only be terminated at the death of either spouse.[822] Whilst Islamic, South African law and English law discourage divorce and encourage reconciliation between spouses, all three legal systems recognize that, under certain circumstances, it may become impossible to continue with the marriage and that divorce is the only alternative.[823] This is particularly so where cordial relations between the spouses become distinctly impossible. The parties should, therefore, embark upon the termination of a marriage through divorce only as a measure of last resort. The reality in modern day society is that divorce, like marriage, has become firmly entrenched as part of the familial and societal lives of people.

Therefore, a comprehensive set of rules and principles regulating the dissolution of a marriage has been developed by the Islamic, South African and English legal systems so as to minimize the harmful effects that the dissolution of a marriage can have on the family, especially where there are children born of the marriage. The primary aims of rules and principles regulating the termination of a marriage are to promote social stability by reducing hostility between the spouses. It is also to ensure that equity prevails in respect of the economic consequences of the divorce. In addition to the economic consequences that require regulation, most of the personal consequences of a marriage end when the marriage is terminated. As stated previously, the objective of the comparative analysis between these three legal systems is to establish how

821 Discussed in para 2 3 of this thesis.

822 All three legal systems advocate the view that when a marriage is concluded the spouses enter into a life-long relationship.

823 Sabiq *fiqh Us-Sunnah* 51; Esposito *Islam the Straight Path* 78, 83. Barratt *Law of Persons and the Family* 332; Herring *Family Law* 105-107.

Muslim family law can be recognized and implemented in South Africa notwithstanding the differences that exist between these legal systems.

3 2 DISSOLUTION OF A MARRIAGE BY DEATH

3 2 1 ISLAMIC LAW

In terms of Islamic law the dissolution of a marriage can be effected either by the death of one of the spouses to the marriage.

As discussed in chapter two,[824] the matrimonial property regime of marriages concluded in terms of Islamic rites is one of complete separation of estates. There is also no sharing of assets at the termination of the marriage by death. Both the husband and wife can, however, inherit from each other upon the death of the other spouse. In order for the rights of inheritance to come into existence between a husband and wife, there must be compliance with the following two conditions:[825]

(a) the existence of a valid marriage. For the purposes of inheritance (*mirath*) it is not required that consummation of the marriage has taken place; and
(b) proof by the surviving spouse that a valid marriage existed at the time of death of the spouse. Where the husband has issued a revocable (*raji*) divorce and woman is under *iddah* at the time of death of her husband, she has the right to inherit from her deceased husband. In contrast, where the divorce is final and irrevocable, the wife is not permitted to inherit.

Whilst Islam encourages parties to draw up a will, there is no real freedom of testation due to the following two restrictions Islamic law places on the drafting of a will:[826]

(a) where a testator nominates a legatee in a will, the beneficiary cannot be one of the heirs of the testator because in terms of Islamic rules of succession, an heir inherits irrespective whether there is a will or not;
(b) a beneficiary named in the will cannot receive a bequest from the testator of more than one-third of his estate.

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824 See para 2 6 2 of this thesis.
825 Doi *Women in Shari'ah* 166.
826 Alkhuli *The Light of Islam* 97.

This means that a testator cannot, for example, disinherit the one child or his wife for that matter, as one of the principles of Islamic law of inheritance is that the wife, children born of the marriage and the parents of the husband or wife inherit in all cases, although not in equal shares.[827] Islam limits the power of testamentary disposition to one-third of the testator's estate, as the remaining two-thirds must be distributed amongst the heirs.[828] The rules of inheritance are, however, subject to the condition that, before the heirs inherit, all the deceased's debts, including funeral expenses, must first be settled and effect must be given to bequests and legacies.[829]

Initially, insofar as the maintenance of the surviving spouse is concerned, the following *Quranic* verse applied:[830]

> "And those of you who die and leave behind wives should bequeath for their wives a year's maintenance (and residence) without turning them out."

The above verse allows the surviving widow to remain in the marital home, that is, the husband's home and to be maintained from the husband's estate for a period of one year. This verse was later abrogated by the following verses of the *Quran*:

> "And those of you who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days."[831]

> "In that which you leave, their (your wives') share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave."[832]

The surviving widow is, therefore, allowed to be maintained from the estate of her deceased husband for a period of four months and ten days, namely, her period of *iddah* after the death of her husband. Thereafter the rules of inheritance come into effect.[833]

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827 *Ibid*.

828 Doi *Women in Shari'ah* 165. Examples of heirs would be the wife or wives, children and the parents of the deceased.

829 Alkhuli *The Light of Islam* 96.

830 Chap 2; verse 240.

831 Chap 2; verse 234.

832 Chap 4; verse 12.

833 Ibn Katheer *Tafseer al-Qur'anal-Adheem* (2003) Vol 1 218.

3 2 2 SOUTH AFRICAN LAW

The dissolution of a civil marriage[834] can occur through the death of one or both of the spouses. As soon as the marriage is terminated, the personal consequences of the marriage, that is, the *consortium omnis vitae* and spousal maintenance duty,[835] end. The manner in which the matrimonial property is divided upon the death of one or both of the spouses depends on the matrimonial property system that regulates their marriage.

3 2 2 1 MARRIAGES IN COMMUNITY OF PROPERTY

Where the parties were married in community of property prior to death, the marriage as well as the community of property between the spouses end and each spouse is entitled to half of the joint spousal estate.[836] The Administration of Estates Act regulates the winding up of the joint estate.[837] In terms of the Act, control of the joint estate is transferred to the executor for winding up before the surviving spouse receives his or her half share of the joint estate.[838] The executor has to pay all debts owed by the joint estate and exact payment for all debts that are owed to the joint estate.[839] Only once the executor has discharged these duties, is half the net balance of the joint estate delivered to the surviving spouse by virtue of the matrimonial property system that regulated the marriage, and not because of the laws of inheritance.[840] The deceased spouse's net half of the joint estate is devolved amongst his or her heirs.

As soon as the executor assumes control over the joint estate, the surviving spouse is permitted to deal only with the assets in the joint estate for specified purposes[841] unless he or she has the consent of the Master of the High Court to do otherwise.[842]

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834 This includes civil unions concluded in terms of the Civil Union Act 17 of 2006.

835 Where the marriage is terminated by the death of the one spouse, the surviving spouse can claim maintenance from the deceased spouse's estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990. See para 3 2 2 4 of this thesis.

836 Voet 23.2.90; Grotius 2.11.13; Van Leeuwen 4.23.11.

837 66 of 1965.

838 Barratt *Law of Persons and the Family* 327.

839 *Ibid.*

840 *Estate Sayle v Commissioner of Inland Revenue supra*.

841 The surviving spouse can pay for funeral expenses and can claim reasonable maintenance from the joint estate.

842 Heaton & Kruger *South African Family Law* 116; Barratt *et al Law of Persons and the Family* 327.

When the marriage is terminated by the death of one of the spouses, the disadvantages attached to a marriage in community-of-property become apparent, namely:[843]

(i) the executor can and must liquidate some or all of the joint estate's assets to meet creditors' claims;[844]
(ii) the executor can and must liquidate some or all of the joint estate's assets to pay heirs in order to give effect to a will; and
(iii) the control of the joint estate is removed from the surviving spouse.

More often than not this deprives the surviving spouse of his or her only shelter or means of income if there were insufficient liquid assets to accommodate bequests in a will. It may then be necessary to liquidate the matrimonial home in order to pay out testamentary beneficiaries.

3 2 2 2 MARRIAGES OUT OF COMMUNITY OF PROPERTY EXCLUDING THE ACCRUAL

As indicated previously, an ante-nuptial contract is not terminated by death of one or both of the spouses, but rather by the fulfilment of all the conditions of the ante-nuptial contract.[845] The executor deals only with the estate of the deceased spouse.

If the surviving spouse has any claim against the deceased estate, he or she must lodge a claim against the deceased estate with the executor.[846] This can include a claim for household necessaries in terms of section 23 of the Matrimonial Property Act, where the one spouse contributed more than his or her *pro rata* share to household necessaries. In cases where the parties were married out of community of property without the accrual before 1 November 1984, an automatic right of recourse exists where the one spouse contributed more than his or her *pro rata* share. Spouses who entered into a marriage after the coming into operation of the Matrimonial Property Act,

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843 Barratt *et al Law of Persons and the Family* 327; Heaton & Kruger *South African Family Law* 116.
844 *Williams v Williams* (1896) 13 SC 200.
845 See para 2 6 2 2 of this thesis.
846 *Barnard v Van der Merwe* 2012 (3) SA 304 (GNP).

no longer enjoy this automatic right of recourse. Spouses can, if they so wish, agree to a right of recourse in terms of their ante-nuptial contract.[847]

3 2 2 3 MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH THE ACCRUAL

Where the spouses are married in terms of the accrual system, the calculation of the accrual occurs when the marriage is terminated. A claim will be lodged against the deceased's estate where the accrual of the surviving spouse is less than that of the deceased.[848] In contrast, where the deceased estate shows a smaller accrual, it is the duty of the executor to lodge a claim against the surviving spouse for the payment of the accrual.

3 2 2 4 CLAIMS OF THE SURVIVING SPOUSE

In addition to the above consequences, where the marriage is dissolved through death, claims based on inheritance and maintenance also arise upon the death of one or both of the spouses. Where the deceased has left a valid will, effect must be given to claims based on inheritance. Where the deceased died without a valid will, the rules of intestate succession, as set out in the Intestate Succession Act,[849] will apply.

In terms of section 2(1) of the Maintenance of Surviving Spouses Act,[850] a surviving spouse can also institute a claim against the deceased's estate for his or her reasonable maintenance needs until his or her death or remarriage, to the extent that she cannot provide for these needs from her own means and earnings. To determine what "reasonable maintenance needs" are, the court takes the following factors into consideration, namely, the amount available in deceased estate for distribution to heirs and legatees,[851] the surviving spouse's existing and expected means, earning capacity, financial needs and obligations,[852] the duration of the marriage,[853] the surviving spouse's standard of living during the marriage,[854] the surviving spouse's age

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847 S 23(1) and (4) of the Matrimonial Property Act.
848 Heaton & Kruger *South African Family Law* 116.
849 81 of 1987.
850 27 of 1990.
851 S 3(a) of the Maintenance of Surviving Spouses Act 27 of 1990.
852 S 3(b).
853 S 3(b).
854 S 3(c).

at the time of the deceased's death,[855] and any other relevant factors. The amount claimed by the surviving spouse will, therefore, be reduced or denied if there are insufficient funds in the deceased's estate,[856] or in situations where the surviving spouse is in a position to provide maintenance for him- or herself. The deceased's children also have a claim against the estate for their reasonable maintenance needs.[857] The claim of the surviving spouse and the dependent children of the deceased has the same order of preference. In terms of section 2(3)(b), where the claims of the surviving spouse and the dependent children compete with one another, and the amount available in the deceased's estate is insufficient to meet the claims in full, these claims will be reduced proportionally.

Surviving spouses who are married in terms of the Recognition of Customary Marriages Act, the Civil Union Act, as well as surviving spouses married according to Muslim rites,[858] qualify as a "survivor" in terms of the Maintenance of Surviving Spouses Act. This does not apply to the surviving partner of a life-partnership as the law does not impose a duty of support between unmarried persons.[859]

It must, however, be noted that the relief provided to the surviving Muslim spouse in terms of the Maintenance of Surviving Spouses Act, is contrary to the principles of Islamic law as the wife is only entitled to maintenance from her deceased husband's estate during the *iddah* period.[860] Thereafter she becomes the responsibility of her guardian.

3 2 3 THE LAW OF ENGLAND AND WALES

A marriage is terminated by the death of one or both of the spouses.[861] At the death of a spouse, the surviving spouse automatically acquires a right to inherit assets form

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855 *Ibid*.

856 In *Oshry v Feldman* 2010 (6) SA 19 (SCA) the amount available in the deceased's estate was insufficient to accommodate the claim of the surviving spouse and she was therefore obliged to rely on her adult sons for ongoing maintenance.

857 S 2(3)(a).

858 This position prevails irrespective whether the spouses are parties to a monogamous or polygamous Muslim marriage. See *Daniels v Campbell NO supra* and *Hassam v Jacobs NO supra*.

859 *Volks NO v Robinson supra*.

860 See para 4 4 2 of this thesis.

861 Herring *Family Law* 135.

the estate where the deceased spouse had died intestate.[862] The surviving spouse furthermore acquires the automatic right to apply for financial provision from the deceased spouse's estate where the provision made for the surviving spouse is insufficient.[863] The surviving spouse also has an action against third parties whose wrongful act caused the death of the deceased spouse.[864]

3 2 4 COMPARISON

In Islamic law, due to the marriage being out of community of property, the spouses cannot lay claim to each other's estates where the marriage is terminated by the death of one of the spouses. The spouses can, however, inherit from each other. In contrast, in terms of South African law the division of the marital property depends exclusively on the matrimonial property system regulating the spouses' marriage. In English law, the surviving spouse automatically acquires a right to inherit from the estate of the deceased spouse unless the latter executes a valid will which excludes the surviving spouse. The surviving spouse is also entitled to lodge a claim for maintenance against the deceased spouse's estate.

Islamic law of inheritance does not recognize freedom of testation and the husband cannot disinherit the wife whilst the marriage is still in existence. Both South African and English law allows the spouses freedom of testation. In terms of South African law, in particular, where the parties are married in community of property or subject to the accrual, for example, the spouses can still prevent the other of inheriting his or her half portion of the estate, or his or her portion of the accrual.

A further significant difference between Islamic law and the other two legal systems is that at the termination of a marriage by death, both South African and English law permit the parties to enter into another marriage immediately. In contrast, Islamic law requires the woman to observe a period of mourning.[865] This rule does not apply to the man where the parties were married in terms of Islamic rites, as he is allowed to enter into a marriage immediately upon the death of his wife.

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862 Probert *Family and Succession Law in England and Wales* 85.

863 *Ibid*.

864 S 1(3) of the Fatal Accidents Act 1976.

865 See para 2 5 1 3 (ii) of this thesis.

Furthermore, in terms of Islamic law, after the death of her husband, the widow once again becomes the responsibility of her guardian, who is under an obligation to maintain her.[866] The surviving spouse is only allowed to be maintained from the estate of her deceased husband for a period of four months and ten days after the demise of her husband.[867] South African law makes provision for the widow of the deceased to claim for maintenance in terms of the Maintenance of the Surviving Spouses Act.[868] As mentioned previously, surviving spouses married according to Muslim rites[869] qualify as a "survivor" in terms of the Maintenance of Surviving Spouses Act, allowing the surviving spouse to lodge a claim for maintenance against the deceased spouse's estate. Although this claim is allowed in terms of South African law, it conflicts with the teachings and principles of Islamic law, as the surviving wife becomes the responsibility of her guardian, and would not be allowed to lodge a claim against her deceased husband's estate.[870] Similarly, English law also makes provision for the surviving spouse to lodge a claim for maintenance against the deceased spouse's estate.

3 3 DISSOLUTION OF A MARRIAGE BY DIVORCE

3 3 1 ISLAMIC LAW

3 3 1 1 INTRODUCTION

Where the marital relationship has broken down and the parties can no longer live together in peace and harmony, Islam recognizes the fact that the termination of the marriage is inevitable.[871] There is no value in keeping a marriage together when the union has been rendered meaningless and has no future due to the breakdown of the marital relationship.[872] The marriage will subsist only for as long as the spouses have love and respect for each other.[873] Leaving matters unresolved where the marital

866 See para 3 2 1 of this thesis.

867 *Ibid*.

868 S 7(2).

869 This position prevails irrespective whether the spouses are parties to a monogamous or polygamous Muslim marriage. See *Daniels v Campbell NO supra* and *Hassam v Jacobs NO supra*.

870 See para 4 4 2 of this thesis.

871 Ur-Rahman *Muhammad: Encyclopaedia of Seerah* Vol (II) 58; Moosa *Unveiling the Mind* (2004) 117.

872 Keene *Believers in One God* (1983) 168.

873 Ayoup *Fiqh of Muslim Family* 182.

relationship has broken down, and where the spouses can no longer live together is regarded as un-Islamic and unethical on the part of spouses. The *Quran* states:

> "You are never able to be fair and just between women, even if it is your ardent desire: but not away (from your wife) altogether, so as to leave her (as it were) hanging (in the air). If you come to a friendly understanding, and practice self-restraint, Allah is oft-forgiving, merciful."[874]

Islam, therefore, grants recognition to the necessity of divorce. While divorce is allowed in instances of absolute necessity, it is clear that Islam does not regard it as desirable. The Prophet Muhammad (PBUH) stated the following in this respect:

> "Of all lawful things, divorce is the most detestable thing in the sight of Allah."[875]

The *Quran*, furthermore, provides as follows:

> "But consort with them in kindness; for if you hate them it may happen that you hate a thing wherein Allah has placed much goodness."[876]

The above verse implores spouses to try their utmost to keep the marriage intact. The act of divorce should, therefore, be considered only as a last resort, after all attempts at reconciliation have failed.

3 3 1 2 DEFINITION OF DIVORCE

The literal meaning of the word *talaq* is to "set free".[877] In terms of Islamic law *talaq* is defined as "the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent, or his wife duly authorized by him to do so, using the word *talaq,* a derivative or a synonym thereof".[878] Sabiq defines the term divorce as the release of the tie of marriage, in other words, the termination of the marital relationship.[879] From the definition the following can be deduced, firstly, that the right of *talaq* as a method of terminating the marriage is a right generally exclusively

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874 Chap 4; verse 129.

875 Ayoup *Fiqh of Muslim Family* 185.

876 Chap 4; verse 19.

877 Doi *Shari'ah: The Islamic Law* 168.

878 Nasir *The Status of Women Under Islamic Law* 120.

879 Sabiq *Fiqh Us-Sunnah* (1989) Vol 3 112.

reserved for the husband.[880] Furthermore, the right of *talaq* is entirely at the discretion of the husband.[881] Where the husband is guilty of misconduct,[882] and the wife wishes to terminate the marriage as a result thereof, she is required to apply to the relevant Muslim authority[883] for the annulment (*faskh*) of the marriage. The exception to the above general rule is where the husband grants the wife permission to *talaq* herself.[884] For example, if the husband says to his wife "*talaq* yourself" and she immediately responds "I *talaq* myself", this would constitute a valid termination of the marriage.[885] It is imperative that the wife accepts the husband's offer to *talaq* herself immediately, as he in entitled to withdraw the offer.[886] The marriage will not be terminated if she accepts the offer after the lapsing of time, as there must be immediate acceptance of the offer.[887] Secondly, the husband may appoint or delegate someone to pronounce the divorce on his behalf.[888] Thirdly, *Shari'ah* does not prescribe any formalities in respect of the manner in which the divorce must be pronounced.[889] For example, no witnesses are required to be present at the time that the *talaq* is pronounced, nor is the presence or the consent of the wife required for the *talaq*.[890]

3 3 1 3 PRE-DIVORCE PROCEDURE

Before a divorce is issued, all attempts must be undertaken to reconcile the parties. To this effect the *Quran* provides as follows:

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880 Ba'-kathah *Tuh-fatul Ikhwaan* 164; Doi *Women in the Shari'ah* 84.

881 Rautenbach & Bekker *Introduction to Legal Pluralism* 374. In certain instances the discretionary right of the husband to issue a *talaq* can be problematic as the husband is seldom held accountable to an external forum in the exercise of his right to *talaq*. See also Pearl *A Textbook on Muslim Law* 89. See para 4 3 of this thesis.

882 Examples of misconduct would include but is not limited to failing to maintain the wife or cruelty on the part of the husband towards the wife. See Moodley "The Islamic Laws of Divorce, Polygamy and Succession (2001) *Codicillus* 8 9; Rautenbach & Bekker Introduction to *Legal Pluralism* 379.

883 The *Ulama* or one of the Judicial Councils will suffice as a relevant Muslim authority.

884 Ba'-kathah *Tuh-fatul Ikhwaan* 165.

885 *Ibid*.

886 *Ibid*.

887 *Ibid*.

888 Sabiq *Fiqh Us-Sunnah* 128.

889 Ahmad *The Muslim Law of Divorce* (1984) 28-30; Moosa *Unveiling the Mind* 118; Rautenbach & Bekker *Introduction to Legal Pluralism* 374.

890 Sabiq *Fiqh Us-Sunnah* 128.

> "And if you fear a breach between them (husband and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware."[891]

The above *Quranic* verse advises the spouses how to settle disputes (*shiqaq*) that arise between them that could possibly cause a breakdown of the marital relationship. In the interests of fairness and justice, the verse advocates the appointment of an arbiter from the family of each spouse.[892] The role of the two appointed arbiters is to assist the spouses in the reconciliation process by probing into the real cause of the disharmony between the spouses, and to assist the spouses to find a solution to the dispute.[893] According to the *Shafi'i* school of thought, the arbiters are not authorized to pass any final decree, but are permitted to make recommendations for reconciliation between the spouses.[894] These recommendations may either be accepted or rejected by the spouses.[895] However, if the spouses authorize the arbiters to effect a divorce, or to take any other measure, they will be deemed to be bound by their decision.[896] Only if all attempts at reconciliation have failed, may a divorce be sought.[897] Reconciliation between the two spouses is encouraged as far as possible. The *Quran* states:

> "But if they disagree and must part, Allah will provide abundance for all from His all-reaching bounty: for Allah is He who cares for all and is wise."[898]

3 3 1 4 GROUNDS FOR DIVORCE

Divorce is permitted when married life is a source of misery and unhappiness for the spouses to the marriage.[899] Besides the breakdown of the marital relationship, a divorce may also be sought if the husband is impotent or sterile, or the wife is chronically ill.[900] The spouses are allowed to part ways where they are incompatible as far as temperament is concerned, to such an extent that they cannot live together

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891 Chap 4; verse 35.
892 Alkhuli *The Light of Islam* 84.
893 *Ibid*.
894 Siddiqi *The Family Laws of Islam* 217.
895 *Ibid*.
896 *Ibid*.
897 Alkhuli *The Light of Islam* 84.
898 Chap 4; verse 130.
899 Alkhuli *The Light of Islam* 82.
900 Alkhuli *The Light of Islam* 84.

in marital agreement.[901] It is submitted that in such a case divorce is a better option for the spouses, any offspring born of the marriage as well as for the society at large. Compelling the spouses to live together may invoke hatred between them as this would render the marriage meaningless. The wife is also allowed to seek a divorce if the husband is serving a sentence of life imprisonment, or is absent and his whereabouts are unknown, or where the husband is unable to bear the financial responsibility of maintaining his wife.[902] A further ground for divorce is the misconduct of either the husband or the wife,[903] for example, if either the wife or the husband commits adultery. In this instance an action for divorce can be instituted.

3 3 1 5 FORMS OF DIVORCE

There are various verses of the *Quran* indicating that a divorce may be effected orally or in writing, in the presence of two competent witnesses.

> "Then, when they have reached their term, take them back in kindness or part from them in kindness, and call to witness two just men among you, and keep your testimony upright for Allah."[904]

(i) Orally

1. *Sareeh* (Explicit terms): This is where the word "*talaq*" is explicitly used and the marriage is terminated whether the husband had the necessary intention or not to terminate the marriage.[905] Examples of explicit terms would be "I *talaq* you" or "I divorce you".
2. *Kinaayah* (Ambiguous terms): This is where the husband uses other terms beside the word "*talaq"* to convey his intention to terminate the marriage. When terms other than the word "*talaq*" are used, it is important to establish the intention of the husband, whether or not he intended to end the marriage. Examples of ambiguous terms would be "I hereby set you free", "Begin your *iddah*" or "You are no more my wife from this moment forward."

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901 Siddiqi *The Family Laws of Islam* 218.

902 *Ibid.*

903 *Ibid.*

904 Chap 65; verse 2.

905 Ba'-kathah *Tuh-fatul Ikhwaan* 164.

(ii) Writing

The marriage is similarly terminated if the *talaq* is written down.[906] The wording must be clear and unambiguous and must convey the meaning that the marriage is being terminated.[907] A dispute may arise as to the authenticity of the author of the divorce later. In this case, it must be proven that the husband is the person wrote the letter with the intention of terminating the marriage.[908]

Whether the divorce is effected orally or in writing, the words uttered or written must convey the intention that the marriage is being dissolved.[909] Therefore, where the divorce is issued under duress, or when the husband becomes mentally ill, the marriage is not dissolved and the divorce does not become effective.[910] However, where the husband utters the word "*talaq"* in jest or playfully to his wife, the marriage will be deemed to be dissolved.[911] This is the case, despite the fact that there was no intention on the part of the husband to terminate the marriage.[912]

Where a *talaq* is issued under duress, in order for the *talaq* to be declared null and void, the husband has to prove the following, namely:

- the person making the threat is capable and in a position to carry out the threat;
- it was impossible for him to avoid the threat;[913] and
- the husband must genuinely believe that the threat would be carried out if he fails to divorce his wife.[914]

The four schools of Islamic jurisprudence agree that the divorce of an unconscious person who is in that condition because of a reason, other than intoxication, is null and

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906 Ba'-kathah *Tuh-fatul Ikhwaan* 165.
907 Sabiq *Fiqh Us-Sunnah* 124.
908 Ba'-kathah *Tuh-fatul Ikhwaan* 165.
909 Sabiq *Fiqh Us-Sunnah* 125.
910 *Ibid*.
911 Ba'-kathah *Tuh-fatul Ikhwaan* 166.
912 *Ibid*.
913 For example, the husband was held captive and could not escape. Ba'kathah *Tuh-fatul Ikhwaan* 166.
914 Ba'-kathah *Tuh-fatul Ikhwaan* 166.

void.[915] They are also unanimous that the uttering of the word *talaq* whilst asleep does not result in the termination of such marriage.[916] It is reported in an authentic *hadeeth* that the Prophet Muhammad (PBUH) stated the following:

> "There are three people who are not blamed (for their actions): the sleeping person until he wakes up, the child until he becomes mature and the crazy person until he becomes conscious."[917]

Islam prohibits the intake of any intoxicating substances, such as drugs and alcohol.[918] In the event of the husband voluntarily or willingly ingesting an intoxicating substance that affects his powers of reasoning, and pronounces a *talaq* whilst in this condition, the marriage is terminated.[919] However, if the husband's power of reasoning is affected through non-sinful means, for example, through sickness or mental illness and he pronounces a *talaq* while so afflicted, the *talaq* will not be valid.[920]

3 3 1 6 RESTRICTIONS ON DIVORCE

Owing to the fact that Islam discourages divorce, certain restrictions have been placed on the spouse's right to seek a divorce. These restrictions are the following:[921]

(i) The husband is not allowed to divorce his wife during the period she is menstruating. The reason for this restriction is that sexual intercourse is prohibited during this period, and the abstinence of sexual relations may cause cold relations between the husband and wife. This restriction on divorce therefore seeks to ensure that the husband is not merely seeking divorce because he is deprived of sexual intercourse. According to an authentic *hadeeth*, when the Prophet Muhammad (PBUH) was informed that one of his companions, Abdullah ibn Umar, had divorced one of his wives during her

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915 Ayoup *Fiqh of Muslim Family* 192.

916 *Ibid*.

917 An authentic *hadeeth* reported by Abu Dawud.

918 *Surah Al-Maa'idah*; verses 90-91, where it is stated: "O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, *Al-ansab* and *Al-azlam* (arrows for seeking luck or derision) are an abomination of *Shaitaan"s* (Satan) handiwork. *Shaitaan* wants only to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the remembrance of Allah and from *As-salat* (prayer). So, will you not abstain."

919 Ba'-kathah Tuh-fatul Ikhwaan 166; Ayoup *Fiqh of Muslim Family* 192.

920 *Ibid*.

921 Alkhuli *The Light of Islam* 85.

period of menstruation, he became enraged and commanded Abdullah ibn Umar to take her back, and to divorce her if he still wishes to do so after the period of menstruation had passed.

(ii) Before a divorce can take place, the spouses must submit themselves to mediation.[922] It is only upon the failure of such reconciliation attempts by two judges that the spouses would be allowed to proceed with a divorce.

(iii) Where a divorce is instituted, a waiting period (*iddah*) of three months after the divorce must be observed by the wife. In the case of a pregnant woman, the waiting period is extended until the birth of the child. During the *iddah* period the woman is prohibited from entering into a marriage with a third party, but can remarry her first husband. The compulsory waiting period provides both parties with an opportunity to reconsider the divorce and to remarry each other if they wish to do so.

(iv) The husband is prohibited from evicting the wife from the marital home once the divorce takes place. The wife may remain in the marital home for the duration of the *iddah* period.

(v) Both spouses are encouraged to remarry each other during and after the waiting period.

(vi) In the case of a revocable divorce, the spouses are presented with two opportunities to remarry each other, after the first and second divorce has been issued.

(vii) Where a third divorce is issued, the divorce is irrevocable, and the wife is prohibited from remarrying her first husband, unless she has entered into a marriage with a third party and this marriage is terminated either through death or divorce.

3 3 1 7 NUMBER OF *TALAQ*

Islamic law only permits a man to divorce his wife in three separate and distinct periods, usually three-monthly courses.[923] During these periods the parties may try to reconcile, but if this proves to be unsuccessful, the divorce becomes effective after the lapse of the third period.[924] In other words, in Islam the husband possesses the power

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922 See para 3 3 1 3 of this thesis.

923 Siddiqi *The Family Laws of Islam* 219.

924 Doi *Shari'ah: The Islamic Law* 173.

of three *talaq*, which need not all be given in order for the marriage to be terminated.[925] For example, if the husband pronounces one *talaq,* and the wife completes her three-month period of *iddah* as required, the marriage is deemed to be terminated. However, if the parties wish to remarry each other after the *iddah* period they may do so, but the husband now only has two *talaq*. If the husband thereafter issues her with another two *talaq,*[926] he has used up all his rights of *talaq*. If he now wishes to remarry his ex-wife, he would only be allowed to do so once she has entered into a marriage with a third party, consummation has occurred and the subsequent marriage has been properly terminated.[927]

Where the husband pronounces for example, "I give you three *talaq*" or "I *talaq* you. I *talaq* you. I *talaq* you" all at once, this will constitute three *talaqs*.[928] However, if it is established that the husband repeated "I *talaq* you" thrice purely for the sake of emphasis, then this will constitute only one *talaq*.[929] Similarly, where the husband pronounces a *talaq* and later, when he relates that he pronounced the *talaq,* and he utters these words again, this will amount to one *talaq* being pronounced.[930]

3 3 1 8 TYPES OF *TALAQ*

A divorce initiated by the husband can be effected in one of two ways, namely, the *talaq al-sunna* or the *talaq al-bid'a.*[931]

(i) Talaq al-sunna

This method of divorce is recommended by Islamic law, and is in accordance with the *Quran* and the traditions of Prophet Mohammed (PBUH).[932] In terms of this method of divorce the husband must pronounce only one *talaq* or repudiation during the period when the wife is in a state of purity.[933] The underlying purpose for these conditions is

925 Ba'-kathah *Tuh-fatul Ikhwaan* 167.

926 The remaining *talaq* may be given at once or separately with the period of times in between when the wife is required to sit in *iddah*. Hallaq *The Origins and Evolution of Islamic Law* (2005) 23.

927 Ba'-kathah *Tuh-fatul Ikhwaan* 167.

928 *Ibid*.

929 *Ibid*.

930 *Ibid*.

931 Ba'-kathah *Tuh-fatul Ikhwaan* 168.

932 Ayoup *Fiqh of Muslim Family* 186.

933 The husband cannot issue a divorce while the wife is menstruating.

to prevent the permanent termination of the marriage.[934] These conditions also allow the husband to revoke the *talaq* or repudiation when better sense prevails, especially when the repudiation has been issued in a hasty and rash manner without proper consideration being given.[935] During this period of separation, after the announcement of a *talaq*, the marriage continues to subsist between parties.[936] Where the parties reconcile during the wife's *iddah* period, there is no need for a new marriage contract to be concluded.[937] However, if the husband has issued one or even two *talaq*, and he abstains from sexual intercourse with his wife, and no reconciliation tales place during the period of *iddah*, a complete cessation of the marital rights and duties between the spouses takes place.[938] Should the spouses then wish to reconcile, a new contract of marriage would be required and the parties need to agree upon a new dowry.[939] Where the husband has issued one *talaq* and the parties decide not to reconcile after the expiry of the period of *iddah*, the wife is allowed to enter into a marriage with a third party, without her having to issue the other two *talaqs*.[940]

A distinction should be drawn between revocable and irrevocable divorces.[941] The method of divorce described above is an example of a revocable divorce (*raj'i*). A *talaq al–raji* becomes effective only at the end of the waiting period (*iddah*) that starts after the first or second "divorce" is pronounced.[942] During the waiting period the woman remains the legal wife of the husband, and the husband is under an obligation to support his wife financially.[943] Whilst the parties are still in a position to reconcile and resume their marital relationship, a divorce with the possibility of reconciliation is allowed only twice.[944] Thereafter the parties must make a final decision to either dissolve the marriage permanently, or to continue with the marriage.[945] In this regard the *Quran* states:

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934 Siddiqi *The Family Laws of Islam* 223.
935 Doi *Shari'ah: The Islamic Law* 175.
936 Doi *Shari'ah: The Islamic Law* 175; Siddiqi *The Family Laws of Islam* 223.
937 Doi *Shari'ah: The Islamic Law* 176.
938 Ibn Qudaamah *Al-Mugni* 98.
939 Doi *Shari'ah: The Islamic Law* 176.
940 Ibn Qudaamah *Al-Mugni* 98.
941 Doi *Shari'ah: The Islamic Law* 177; Ba-kathah *Tuh-fatul Ikhwaan* 169.
942 *Ibid*.
943 Doi *Shari'ah: The Islamic Law* 176; Al-Fawzaan *Al-Mulakhkhas Al-Fiqhi* (2001) Vol 2 317.
944 *Ibid*.
945 *Ibid*.

> "A divorce is only permissible twice: After that the parties should either hold together on equitable terms or separate with kindness."[946]

An irrevocable divorce (*ba'in*) is a divorce where the husband has made all three pronouncements.[947] In this instance the marriage is dissolved with immediate effect.[948] When the husband pronounces the third *talaq*, it becomes a *talaq al-ba'in*, severing the marital rights and duties between the spouses.[949] This means that the parties cannot enter into a marriage unless the former wife marries a third person and the latter voluntarily divorces her.[950]

(ii) Talaq al-bid'a

This second method to effect a divorce is not in accordance with the rules laid down by prophetic tradition, and is known as *talaq al-bid'a* or the innovated divorce.[951] This method of divorce is not recommended, as the divorce becomes irrevocable as soon as it is pronounced.[952] In terms of this method of divorce the husband issues the divorce in one sitting or conveys all three divorces in writing.[953] For example, the husband pronounces the divorce by uttering: "I divorce you. I divorce you. I divorce you." Where the husband exercises his right of repudiation on three successive occasions as stated in the example, the divorce becomes irrevocable.[954] Once the divorce becomes irrevocable, the parties are absolutely forbidden to remarry each other ever again as an irrevocable divorce severs the marital ties forever.[955]

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946 Chap 2; verse 229.

947 Sabiq *Fiqh Us-Sunnah* 149.

948 *Ibid*.

949 Doi *Shari'ah: The Islamic Law* 178.

950 In pre-Islamic times, the *tahlil* or *halalah* was practised. In this case the husband issued an irrevocable divorce and thereafter wanted to remarry his wife. He entered into an agreement with a third party to the effect that he would marry the woman and divorce her after having had sexual intercourse with her. Islam prohibits this practice. The Prophet Muhammad (PBUH) invoked the curse of Allah on those persons who practised *tahlil* or *halalah*. Sabiq *Fiqh Us-Sunnah* 145, 178 & 363. *Quran* chap 2; verse 230.

951 This divorce is commonly known as the "three-in-one", "triple" or instant divorce.

952 Doi *Shari'ah: The Islamic Law* 179.

953 Siddiqi *The Family Laws of Islam* 224.

954 Cachalia *Future of Muslim Family Law in South Africa* (1991) 69.

955 Bulbulia "Women's Rights and Marital Status: Are We Moving Closer to Islamic Law?" 1983 *De Rebus* 431 432.

(iii) Khula

Khula can be defined as the termination of the marriage by the husband uttering the words "*talaq"* or "*khula",* and whereby he accepts compensation for freeing his wife from the marriage.[956] An example of this kind of divorce is when the husband and wife reach agreement that the husband will *talaq* his wife*,* on condition that she returns what she received as dowry to him.[957] The spouses can agree on any amount of compensation, but it must be a fixed amount and it must have economic value.[958] However, the amount of compensation paid by the wife must not exceed that which she received as dowry.[959] Furthermore, the parties have to agree on all the aspects of the contract in respect of the *khula*.

The wife can use this method of divorce where she has suffered cruelty and abuse at the hands of her husband or where the husband has deserted her.[960]

To this effect the *Quran* states:[961]

> "If a wife fears cruelty or desertion on her husband's part; there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if you practise self-restraint, Allah is well-acquainted with all that you do."

In addition to the reasons cited above, the wife can also apply for a *khula* where she has an aversion to the physical appearance of her husband.[962] It is reported in an authentic *hadeeth*[963] that Jamila bint Ubi bin Salool, the wife of Thabit bin Qais, approached the Prophet Muhammad (PBUH) requesting the termination of her marriage as she was repulsed by the physical appearance of her husband to such an extent that she feared that she would transgress the laws of Allah if she remained in

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956 Ba'-kathah *Tuh-fatul Ikhwaan* 171; Siddiqi *The Family Laws of Islam* 230; Al-Misri *et al Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* 562.

957 Doi *Shari'ah: The Islamic Law* 193.

958 Ba'-kathah *Tuh-fatul Ikhwaan* 171.

959 Doi *Women in Shari'ah* 96.

960 *Ibid*.

961 Chap 4; verse 128. The rules in respect of *khula* are also found in the following injunctions of the *Quran* verses 4; 20 and 4; 130.

962 Siddiqi *The Family Laws of Islam* 232.

963 This authentic *hadeeth* is narrated by *Imams* Malik, Ahmad and Bukhari.

the marriage.[964] The Prophet Muhammad (PBUH) inquired from her whether she would return the garden which Thabit bin Qais gave her as dowry in return for the termination of her marriage.[965] When she replied in the affirmative, the Prophet Muhammad (PBUH) instructed Thabit bin Qais to accept the garden as compensation and to divorce her.[966]

The effect of a *khula* is that such divorce is rendered irrevocable and should therefore as a method of divorce be resorted to only in extreme circumstances.[967] It is reported that the Prophet Muhammad (PBUH) said:

> "If any woman asks for divorce from her husband without any specific reason, the fragrance of Paradise will be unlawful for her."[968]

The fact that the marriage dissolved by *khula* renders the divorce irrevocable means that the husband forfeits his right to reconcile with his wife.[969] However, the parties can still remarry each other if they mutually agree to do so.[970]

The general rule in respect of *khula* is that all the conditions and restrictions applicable to *talaq* similarly apply to *khula*.[971] There are, however, differences of opinion amongst the schools of jurisprudence whether *khula* can be effected during the period of menstruation.[972] While some jurists[973] are of the opinion that the *khula* should not be pronounced during the period of menstruation, others[974] submit that as the wife has to pay compensation in order to obtain a *khula,* and due to the fact that the *khula* is

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964 Siddiqi *The Family Laws of Islam* 233-234; Ayuop *Fiqh of Islam* 279-280; Doi *Shari'ah: The Islamic Law* 194.

965 *Ibid*.

966 *Ibid*.

967 Doi *Women in Shari'ah* 98.

968 Al-Shawkani *Fath al-Qadeer* (2007) 214.

969 Doi *Shari'ah: The Islamic Law* 194.

970 Doi *Women in Shari'ah* 98.

971 Siddiqi *The Family Laws of Islam* 232.

972 Doi *Women in Shari'ah* 99.

973 The *Hanafi* school of jurisprudence considers the granting of a *khula* during the period of menstruation as *makrooh* (undesirable).

974 For example, the *Maliki* and *Hanbali* schools of jurisprudence.

brought about by mutual agreement between the parties, the issue of menstruation should have no effect on the validity of the *khula*.[975]

(iv) Divorce by mutual agreement (Mubara'ah)

In certain circumstances the wife might not be in a financial position to pay the husband compensation, as required when the marriage is terminated by *khula*.[976] The spouses to the marriage can, however, still dissolve the marriage if they mutually agree to do so.[977] Where the husband makes an offer for a mutually agreed divorce, he may not withdraw his offer before the wife has given him an answer.[978] Should the wife accept the offer for a mutually agreed divorce, the divorce is effective immediately.[979] In contrast, if the wife makes the initial offer of a mutually agreed divorce, she is entitled to withdraw the offer at any time before acceptance by the husband.[980]

(v) Judicial divorce (Tafriq)

Islam makes provision for the pronouncement of a divorce by judicial intervention.[981] This is where an Islamic court arbitrates the marital dispute and pronounces a divorce.[982] This is a method of divorce by judicial separation.[983] Either the husband or the wife can institute an action for judicial separation. The two methods for judicial divorce are known as *li'an* and *faskh.*

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975 Doi *Women in Shari'ah* 100.

976 Schacht *An Introduction to Islamic Law* 164; Fyzee *Outlines of Mohammadan Law* 155; Ahmed *Muslim Law of Divorce* 221.

977 Doi *Women in Islam* 97.

978 Esposito & DeLong-Bas *Women in Muslim Family Law* 32; Rautenbach & Bekker *Introduction to Legal Pluralism* 379.

979 Fyzee *Outlines of Mohammadan Law* 155.

980 Rautenbach & Bekker *Introduction to Legal Pluralism* 379.

981 Doi *Shariah: The Islamic Law* 170-172; Sabiq *Fiqh Us-Sunnah* 51; Pearl *A Textbook on Muslim Law* 108-109.

982 Rautenbach & Bekker *Introduction to Legal Pluralism* 379. In South Africa there are no Islamic courts, and the parties in this case would approach the local *Ulama* or Judicial Council for a pronouncement of divorce.

983 Nasir *The Status of Women Under Islamic Law* 134.

- *Li'an*

False accusations of adultery and fornication, especially against chaste persons, are strictly prohibited in terms of *Shari'ah*.[984] It is therefore incumbent upon the person who accuses another of such immoral misconduct, to produce four witnesses who are able to provide eyewitness accounts of the misconduct in question.[985] Where the husband levels such accusations[986] and has no witnesses to attest to his accusations, and the wife furthermore denies his accusations, *li'an* will ensue.[987] In other words, *li'an or* mutual imprecation brings about separation between the husband and wife when one of the spouses utters four oaths and one curse upon oneself.[988] The oaths are uttered to show one's own truthfulness. It is stated in the Quran:

> "And as for those who accuse their wives and have no witnesses except themselves, the evidence of one of these should be taken four times, calling Allah to witness that he is of the truthful ones. And the fifth time that the curse of Allah be on him if he is one of the liars."[989]

Where the husband, for example, accuses his wife of committing adultery, the spouses have to appear before a *Qadi* (judge), and the husband has to repeat under oath four times that his accusation bears the truth.[990] On the fifth time the husband invokes the curse of Allah if his accusation is false.[991] The wife in turn has to repeat under oath four times that the husband's accusation is false.[992] She is also required to invoke the curse of Allah.[993] Where both spouses have taken these oaths, the *Qadi* will issue an order that the parties be separated and the marriage is thereby annulled.[994] The parties are barred from ever remarrying each other.[995]

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984 Alkhuli *The Light of Islam* 106. The punishment for a person convicted of falsely accusing another person of adultery is eighty lashes, and not admitting evidence from the guilty party throughout his life.

985 Ba'-kathah *Tuh-fatul Ikhwaan* 172.

986 The husband can either accuse the wife of fornication or adultery, or he can deny that he is the father of the child, or alternatively he can deny that she is pregnant from him.

987 Doi S*hari'ah: The Islamic Law* 188.

988 Ba'-kathah *Tuh-fatul Ikhwaan* 172.

989 Chap 24; verse 6.

990 Ba'-kathah *Tuh-fatul Ikhwaan* 173.

991 *Ibid*.

992 Doi *Shari'ah: The Islamic Law* 189.

993 *Ibid*.

994 Ba'-kathah *Tuh-fatul Ikhwaan* 174.

995 Ba'-kathah *Tuh-fatul Ikhwaan* 175.

However, if the husband refuses to take these oaths after making these accusations against his wife, he will be punished.[996] Similarly, punishment will be meted out to the husband if he chooses to withdraw during the course of taking the oaths.[997] Where the wife refuses to take the required oath, and the husband has already taken the oaths, she invites upon herself the punishment for adultery.[998] *Li'an* differs vastly from the situation where the marriage is terminated through divorce, because even where the divorce is irrevocable, the spouses may remarry each other after the wife has entered into a marriage with a third party, and such marriage is dissolved at a later stage.[999] Where the marriage is dissolved by *li'an*, the spouses are prohibited from marrying each other forever.

- *Faskh*

The literal meaning of the term *faskh* is "to annul a deed" or to "rescind a bargain".[1000] The definition of *faskh* as it pertains to a marriage is the annulment or abrogation of the contract of marriage by the *Qadi* at the instigation of the wife.[1001] *Faskh* is the only method by which a wife can obtain a divorce without the husband's consent and participation.[1002] The marriage will be annulled if the *Qadi* is satisfied that the wife is prejudiced by the marriage.[1003]

Where the wife wishes to apply for a *faskh*, this may be done on one of the following grounds:[1004]

(1) injury or discord;
(2) failure to maintain;
(3) defect on the part of the husband;[1005]
(4) husband's absence *sine causa* or imprisonment;

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996 The punishment meted to the husband is eighty lashes.
997 Ba'-kathah *Tuh-fatul Ikhwaan* 175.
998 The punishment for adultery is death. Where the wife admits to committing adultery, she will be punished and lose her life.
999 Ayoup *Fiqh of Muslim Family* 320.
1000 Doi *Shari'ah: The Islamic Law* 171.
1001 Doi *Women in the Shari'ah* 90.
1002 Nasir *The Islamic Law of Personal Status* 120-133.
1003 Doi *Women in the Shari'ah* 90.
1004 Moodley "The Islamic Laws of Divorce, Polygamy and Succession" (2001) *Codicillus* 8 9.
1005 For example, where the husband is impotent, or suffers from mental illness.

(5) cruelty; or

(6) incompatibility.

(vi) Other grounds for terminating a marriage

(1) Apostasy: The marriage is automatically and immediately annulled where the husband turns apostate and renounces Islam.[1006] This is in conformity with the following verse of the *Quran*:[1007]

> "They (the Muslim women) are not lawful for the disbelievers."

(2) *Elaa*: *Elaa* is the temporary separation between husband and wife, where the husband in anger takes an oath that he will refrain from having sexual intercourse with his wife for a period of four months.[1008] The marriage would be dissolved when the husband does not resume sexual relations with his wife at the end of the four-month period. This practice can be substantiated by the following verse of the *Quran*:[1009]

> "Those who forswear their wives must wait for four months then if they change their mind, lo! Allah is forgiving, merciful. And if they decide upon divorce (let them remember) Allah is hearer, knower."

Once the four-month period has lapsed, the wife has the right to demand that her husband resume sexual relations with her, or else he must *talaq* her.[1010] Furthermore, once the four-month period has lapsed, the spouses are required to remarry each other if they wish to continue to live together as husband and wife.[1011] Where the husband, however, has sexual intercourse with his wife

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1006 Siddiqi *The Family Laws of Islam* 237.

1007 Chap 60; verse 10.

1008 Siddiqi *The Family Laws of Islam* 238; Ba'-kathah *Tuh-fatul Ikhwaan* 170. *Elaa* was in fact a practice observed prior to the advent of Islam, where the wife was kept in a state of suspense for an indefinite period of time her husband took such oath, as the oath to refrain from sexual intercourse with his wife had no time period. The wife would have neither the position of a wife nor that of a divorced woman who could then enter into another marriage. Islam brought relief to the wife in such a position by introducing the four-month time limit.

1009 Chap 2; verses 226-227.

1010 Ba'-kathah *Tuh-fatul Ikhwaan* 171.

1011 Sidiqi *The Family Laws of Islam* 238.

before the expiry of the four month period, the marriage remains intact, but the husband has to give compensation for breaching the oath.[1012]

In order for *elaa* to come into effect, the husband must take an oath that he will refrain from sexual relations with his wife for four months.[1013] Where the parties separate, even where this is for an indefinite period of time, but without the husband taking the oath, the laws of *elaa* do not apply.[1014]

3 3 1 9 *IDDAH*

(i) Introduction

In terms of Islamic law *iddah* can be defined as a compulsory period of waiting imposed on the woman after the death of her husband or on her divorce. During this time the wife is prohibited from remarriage.[1015] The period of waiting is incumbent on the woman as is evidenced from the following verse of the *Quran*:[1016]

> "Divorced women shall wait concerning themselves for three monthly periods. Nor it is lawful for them to hide what Allah has created in their wombs, if they have faith in Allah and the last day. And their husbands have the better right to take them back in that period, if they wish to reconcile. And women shall have rights similar to their rights against them, according to what is equitable, but men shall have a degree (of advantage) over them, and Allah is exalted in power, wise."

The reasons given by *Shari'ah* for the compulsory period of waiting are fourfold: [1017]

(i) The *iddah* provides the spouses with an opportunity to reconsider as to whether the divorce should be revoked or made final.

(ii) It allows the parties to determine whether or not the wife is pregnant by her husband so that there may be no confusion as to the paternity of the child.

1012 Ba'-kathah *Tuh-fatul Ikhwaan* 170. The husband in this instance is required to free a slave; or feed ten people or clothe ten people. Where the husband lacks the financial means to do so, he is required to fast for three days.

1013 This opinion is shared by the *Shafi'i* and *Hanafi* schools of jurisprudence.

1014 Siddiqi *The Family Laws of Islam* 239.

1015 Doi *Shari'ah: The Islamic Law* 198; Sabiq *Fiqh Us-Sunnah: Doctrine of Sunnah of the Holy Prophet* 146, 197; Schact *An Introduction to Islamic Law* (1964) 166.

1016 Chap 2; verse 228.

1017 Siddiqi *The Family Laws of Islam* 220-221.

(iii) To provide the widow with a mourning period where the marriage is dissolved through the death of the husband.[1018]

(iv) To provide the wife with *nafaqah* for a definite period after the marriage ends.[1019]

(ii) Different kinds of iddah

The various kinds of *iddah* are namely:

- The *iddah* of women who menstruate

This type of *iddah* comes into effect where the marriage has been terminated by *talaq* or *faskh* either by the husband or wife.[1020] In this instance the *iddah* is compulsory after sexual intercourse has occurred between the spouses, even though there is complete certainty that the wife is not pregnant at the time when the *talaq* or *faskh* is pronounced.[1021]

The time period for this type of *iddah* is three periods of menstruation.[1022] For example, if the wife is divorced at the time when she is not menstruating, she will complete her period of *iddah* at the onset of her third menstruation.[1023] Where the wife is divorced at the time she is menstruating, the *iddah* will end with the onset of the fourth menstruation.[1024]

- The *iddah* of a *mustahaadhah*

Mustahaadhah refers to a woman who experiences menstruation which continues for longer than the normal period of menstruation, or to a person who experiences irregular cycles of menstruation.[1025] The *iddah* period in this case is three calendar months.[1026]

1018 Sabiq *Fiqh us-Sunnah: Doctrine of Sunnah of the Holy Prophet* 198, 208; Esposito Islam, the Straight Path 78, 83; Esposito & DeLong-Bas *Women in Muslim Family Law* 120; Hallaq *The Origins and Evolution of Islamic Law* 23; Pearl *A Textbook on Muslim Law* 52.

1019 *Ibid*.

1020 Ba'-kathah *Tuh-fatul Ikhwaan* 174.

1021 Ba'-kathah *Tuh-fatul Ikhwaan* 175.

1022 Siddiqi *The Family Laws of Islam* 220.

1023 Ba'-kathah *Tuh-fatul Ikhwaan* 175.

1024 *Ibid*.

1025 *Ibid.*

1026 *Ibid*.

- The *iddah* of women who have passed the age of menstruation

The waiting period prescribed for these women is three months.[1027] The *Quran* states the following in this respect:

> "And for such of your women as despair of menstruation, if you doubt, their period (of waiting) shall be three months, along with those who have it not."[1028]

- The *iddah* of a widow

Where the marriage has been terminated by the death of the husband, the widow has to observe an *iddah* period of four months and ten days.[1029] The extra time period has been prescribed in the *Quran* to allow the widow to mourn the loss of her husband. The *Quran* states:

> "If any one of you die and leaves widows behind him they shall wait concerning themselves for four months and ten days: when they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner. And Allah is well acquainted with what you do."[1030]

However, if the wife receives the tidings that her husband has passed away, only after four months and ten days have passed, then her *iddah* is regarded as being over since her knowledge of his death is not a requirement for the *iddah* to commence.[1031]

Where the husband disappears and his whereabouts are unknown, and it is not known whether the husband is still alive, the wife will not be able to remarry until there is certainty as to his death, or alternately whether he has divorced his wife in the interim.[1032] If reliable evidence is brought that the husband has indeed died, the wife will then be allowed to remarry.[1033] The view advocated by the *Shafi'i* school of jurisprudence, is that where no such evidence is produced, the wife is required to wait for a period of four years from the date of her husband's disappearance and sit in *iddah*

1027 *Ibid*.

1028 Chap 4; verse 65.

1029 Ba'-kathah *Tuh-fatul Ikhwaan* 176.

1030 Chap 2; verse 234.

1031 Al-Misri *et al Reliance of a Traveller: A Classic Manual of Islamic Sacred Law* 571.

1032 Ba'-kathah *Tuh-fatul Ikhwaan* 176.

1033 Ba'-kathah *Tuh-fatul Ikhwaan* 176-177.

before she is allowed to remarry.[1034] In this instance the order of a *qadi* is required to dissolve the marriage.[1035]

- The *iddah* of a pregnant woman

The pregnant woman remains in the period of *iddah* until she gives birth to the child.[1036] Therefore, if the woman is eight months pregnant, and she gives birth to the child at nine months, her period of *iddah* would be one month.[1037] However, if the woman is two months pregnant at the time the marriage is dissolved, and she gives birth at nine months, her period of *iddah* would be deemed to be the intervening seven months.[1038] This is the ruling whether the marriage is dissolved by *talaq* or as a result of the death of the husband.[1039]

There is no period of *iddah* for a woman whose marriage was not consummated.[1040] The following verse of the *Quran* provides guidance in this respect:

> "O you who believe! When you marry believing women, and then divorce them before you have touched them, no period of *iddah* have you to count in respect of them."[1041]

However, if the husband dies before the marriage is consummated the surviving wife has to observe the period of *iddah* out of loyalty for her deceased husband.[1042]

(iii) The rights of the woman in iddah

During the period of *iddah* the wife is prohibited from remarriage.[1043] She is entitled to remain in the marital home for the duration of the *iddah,* whether the marriage has been terminated by *talaq,* annulment or the death of the husband.[1044] The husband

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1034 Ba'-kathah *Tuh-fatul Ikhwaan* 176.
1035 Ba'-kathah *Tuh-fatul Ikhwaan* 177.
1036 Sabiq *Fiqh Us-sunnah* 201.
1037 *Ibid*.
1038 *Ibid*.
1039 *Ibid*.
1040 Doi *Shari'ah: The Islamic Law* 200.
1041 Chap 33; verse 49.
1042 Sabiq *Fqh Us-Sunnah* 197.
1043 Doi *Shari'ah: The Islamic Law* 203.
1044 *Ibid*.

cannot evict her from the marital home.[1045] Similarly, no one is allowed to evict the wife from the marital home in the event of the death of her husband.[1046] Where the deceased husband died without providing the widow with a place to live, the duty to provide suitable lodgings for her falls on the heirs of the deceased.[1047]

A woman in a state of *iddah* is not allowed to leave her house to attend social functions, visit family and friends or for recreation.[1048] The only time such woman can leave her home is for necessity, for example to purchase food or to go to work.[1049]

In the same manner in which a comparative analysis was undertaken in chapter 2, divorce law in terms of both South African law and English is discussed and compared to Islamic law.

3 3 2 SOUTH AFRICAN LAW

3 3 2 1 INTRODUCTION

As a result of the enactment of the Divorce Act 70 of 1979, the law relating to divorce was changed to a no-fault divorce system, as far as the grounds for divorce were concerned.[1050] Notwithstanding the fact that divorce is no longer fault-based, the misconduct of the parties is still a factor that is taken into consideration with regard to the patrimonial consequences of divorce.[1051]

3 3 2 2 DEFINITION OF DIVORCE

The Divorce Act does not provide a definition of the term “divorce” but merely refers to the term “divorce action” as being “action by which an application is made for a decree

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1045 Ba’-kathah *Tuh-fatul Ikhwaan* 177; Al-Misri *et al Reliance of a Traveller: A Classic Manual of Islamic Sacred Law* 569.

1046 *Ibid*.

1047 *Ibid*.

1048 Ayoup *Fiqh of Muslim Family* 331-332.

1049 Ba’-kathah *Tuh-fatul Ikhwaan* 177-178.

1050 Barratt *et al Law of Persons and the Family* 334.

1051 For example, orders for forfeiture of patrimonial benefits, redistribution orders and spousal maintenance orders. See Heaton & Kruger *South African Family Law* 130.

of divorce or other relief in connection with the divorce."[1052] The ordinary meaning of divorce as defined by the Oxford dictionary is the "legal ending of a marriage".[1053]

The Divorce Act is gender neutral and either the husband or the wife can institute an action for divorce on one of the grounds of divorce as stipulated in the Divorce Act.

3 3 2 3 PRE-DIVORCE PROCEDURE

Although the spouses are encouraged to institute an action for divorce as a last resort, the Divorce Act, unlike *Shari'ah* does not prescribe any pre-divorce procedure. In other words, whilst the spouses can be encouraged to embark on mediation with the view of reconciliation, there is no legal duty on them to do so. The judiciary has, however, emphasized that mediation should be given preference over litigation in family disputes.[1054]

3 3 2 4 GROUNDS FOR DIVORCE

Previously, the four recognized grounds for divorce were adultery, malicious desertion, incurable mental illness lasting seven years and lastly, imprisonment for at least five years after having been declared a habitual criminal.[1055] The Divorce Act replaced these grounds of divorce and introduced irretrievable breakdown of the marriage[1056] and mental illness as well as continuous unconsciousness[1057] as the grounds of divorce. The widening and relaxing of the grounds of divorce have resulted in South Africa being described as one of the easiest countries in the world in which to obtain a

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1052 S 1 of the Divorce Act 70 of 1979. "Other relief" referred to in s 1 includes:

"(a) An action *pendente lite* for an interdict or interim custody of, access to, a minor child of the marriage concerned or for the payment of maintenance; or

(b) An application for a contribution towards the costs of such action or to institute such action, or to make application *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application."

1053 Hawkins, Delahunty & McDonald *Oxford Mini School Dictionary* (2002) 191.

1054 In *MB v NB* 2010 (3) SA 220 (GSI) the court capped the fees of the lawyers involved because they had failed to advise their clients to mediate their dispute before resorting to litigation. See also *FS v JJ* 2011 (3) SA 126 (SCA) which endorsed the decision in *MB v NB*.

1055 Adultery and malicious desertion are common-law grounds of divorce. Incurable mental illness for not less than seven years and imprisonment of the defendant spouse for at least five years, after being declared a habitual criminal as grounds of divorce were introduced in 1935 by the Divorce Laws Amendment Act 32 of 1935.

1056 S 4(1).

1057 S 5(1) and (2).

divorce, as a divorce is essentially available on demand.[1058]

Section 3 of the Divorce Act provides for the following no-fault grounds of divorce, namely, irretrievable breakdown of the marriage, mental illness or continuous unconsciousness.

(i) Irretrievable breakdown of the marriage

When a spouse cites that the marriage has broken down irretrievably as the ground upon which the divorce is sought, the spouse has to prove the following:[1059]

(1) the marriage relationship has disintegrated to the point where it is no longer a normal marriage relationship; and
(2) there must be no reasonable prospect of the restoration of a normal marriage relationship between the spouses in the future.

In other words, the *consortium omnis vitae* between the spouses must have been either destroyed or violated.[1060] In order to determine whether this has indeed occurred, the court employs a subjective and an objective approach.[1061] A combination of the subjective and objective approach dictates that the court will consider whether the marriage has broken down irretrievably from the point of view of the spouses concerned, taking into account the fact that the plaintiff is suing for divorce whilst also taking into account its own interpretation of the facts and circumstances of the marriage, by paying attention to the history and present state of the marriage.[1062] Where both spouses indicate that they no longer wish to be married to each other, the courts will conclude that the marriage has broken down irretrievably.[1063] This is the position even where one of the spouses does not want to get divorced and wants to save the marriage.[1064] Where the other spouse is determined to end the marriage, the

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1058 Hawkey "Africans Catch the Divorce Bug" *Sunday Times Live* 29 November 2009.
1059 S 4(1) of the Divorce Act 70 of 1979.
1060 *Schwartz v Schwartz* 1984 (4) SA 467 (A); *Naidoo v Naidoo* 1985 (1) SA 366 (T).
1061 *Schwartz v Schwartz supra*; *Naidoo v Naidoo supra*; *Swart v Swart* 1980 (4) SA 364 (O).
1062 *Ibid*.
1063 *Singh v Singh* 1983 (1) SA 781 (C) at 786D.
1064 Barratt *et al Law of Persons and the Family* 337.

court will conclude that the marriage has broken down irretrievably.[1065]

Section 4(2) provides certain guidelines to assist the court in its determination as to whether the marriage has broken down irretrievably.[1066]

(ii) Mental illness or continuous unconsciousness

Section 5(1) and (2) as special grounds for divorce are very detailed, narrow, precise and require the evidence of medical experts to be cited as grounds for divorce. The reason for these stringent requirements is that a spouse who is mentally ill, or in a state continuous unconsciousness, is particularly vulnerable.[1067]

The question that arises is whether a spouse instituting divorce proceedings must cite the grounds as set out in section 4, or that of section 5, where the defendant spouse is for example, mentally ill. From the court decisions[1068] it is clear that where the defendant spouse is, for example, mentally ill, the plaintiff can decide whether to institute a divorce in terms of section 4 or section 5. By citing irretrievable breakdown of the marriage as the ground for divorce, the plaintiff can escape the stringent requirements set out in terms of section 5.

3 3 2 5 FORMS OF DIVORCE

From the definition of the term “divorce” it can be deduced that a civil marriage can only be dissolved by instituting a divorce action in a court of law. The spouses, therefore, cannot on their own accord, either orally or in writing, terminate their marriage without involving the courts.

1065 Ibid.

1066 For example, the parties have not lived together as husband and wife for a period of one year, or the defendant has committed adultery, and the plaintiff finds it irreconcilable to continue with the marriage. The guidelines provided in s 4(2) are not a closed list and the court can find that the marriage has broken down irretrievably due to the presence of other factors, or in contrast that the marriage has not broken down irretrievably, despite the presence of the guidelines set out in s 4(2).

1067 S 5(3) makes provision for the court to appoint a lawyer to represent the best interests of the mentally-ill spouse or the spouse who is in a state of continued unconsciousness, and the court can order that the plaintiff pays for the lawyer representing the defendant spouse. S 5(4) provides for the possibility that the plaintiff furnish security with regard to any financial benefits that the defendant spouse may be entitled to at the dissolution of the marriage. Where a divorce is sought on the grounds of s 5(1) or (2), an application for the forfeiture order cannot be made.

1068 *Smit v Smit* 1982 (4) SA 34 (O); *Ott v Raubenheimer NO* 1985 (2) SA 851 (O); *Dickson v Dickson* 1981 (3) SA 856 (W).

3 3 2 6 RESTRICTIONS ON DIVORCE

As the use of the word "may" in sections 3, 4 and 5 of the Divorce Act implies that a court can refuse to grant a divorce even if one of the grounds of divorce has been proved, the question arises is whether or not a court has a discretion to grant or refuse a divorce.[1069] If the court is of the opinion that there is a reasonable prospect that the *consortium omnis vitae* between the spouses can be restored so that the spouses can resume a normal marriage relationship, the court will not have the power to grant a divorce, as irretrievable breakdown is a requirement for divorce in terms of section 4 of the Divorce Act.[1070] In this respect section 4(3) makes provision for the court to postpone divorce proceedings if it appears to the court that there is a reasonable possibility that the spouses may become reconciled through marriage counselling or further reflection. In contrast, if the court is satisfied that the marriage has broken down irretrievably, and there is no reasonable prospect of restoring a normal marriage relationship between the spouses, the court is obliged to grant the divorce.[1071]

Furthermore, in terms of section 6 of the Divorce Act, the court can also refuse, and in fact cannot grant a decree of divorce until the court is satisfied that the provisions with regard to the welfare of any minor children are satisfactory, or are the best that can be effected in the circumstances.

Section 5A regulates the position where the parties have concluded a religious marriage in addition to a civil marriage. Section 5A provides that a court can refuse to grant the divorce until a spouse who has the power to procure a religious divorce takes the necessary steps to do so. Although section 5A was originally inserted to provide relief for Jewish wives, section 5A is not limited to the Jewish faith and can be used by anyone practising other religions in appropriate circumstances including adherents of Islam.[1072]

1069 *Schwartz v Schwartz supra* at 474.

1070 *Ibid*.

1071 *Ibid*.

1072 *Amar v Amar* 1999 (3) SA 604 (W).

3 3 3 THE LAW OF ENGLAND AND WALES

3 3 3 1 INTRODUCTION

Initially when the dissolution of a marriage by divorce was introduced in 1857, adultery was the only ground of divorce.[1073] This position prevailed until 1937 when three additional grounds of divorce were added, namely, cruelty, desertion and incurable insanity.[1074] In 1969, the Divorce Reform Act provided that irretrievable breakdown of the marriage was the sole ground for divorce.[1075] The law regulating divorce law has been consolidated in the Matrimonial Causes Act 1973.[1076]

3 3 3 2 DEFINITION OF DIVORCE

A divorce brings an end to a legal relationship that exists between married spouses as when a decree absolute of divorce is granted this terminates the legal rights and obligations that the parties owe each other during the subsistence of the marriage.[1077]

3 3 3 3 PRE-DIVORCE PROCEDURE

Section 6(1) of the Matrimonial Causes Act 1973 provides that if a petitioner consults a solicitor with regard to the institution of divorce action, the solicitor is required to certify whether or not the possibility of reconciliation has been discussed, and furthermore, whether the names and addresses of organizations or people that can assist the spouses have been provided. The aim of section 6(1) is to ensure that the solicitor reflects carefully on whether the parties ought to consider reconciliation.[1078]

3 3 3 4 GROUNDS FOR DIVORCE

As indicated above, the Divorce Reform Act 1969 provides that the sole ground for divorce is that the marriage between the spouses must have broken down irretrievably.

1073 Divorce and Matrimonial Causes Act 1857.

1074 Matrimonial Causes Act 1937.

1075 Burton *Family Law* 77.

1076 Douglas *An Introduction to Family Law* (2004) 177.

1077 All decrees of divorce are, in the first instance, decrees *nisi* that do not legally terminate the marriage. However, a decree *nisi* may be made absolute on the application of a party in whose favour it was granted, six weeks after the decree was pronounced. The party against whom the decree was granted may also make an application after three month for it to be made absolute. The time period between the decree *nisi* and the decree absolute is in often used to negotiate the financial settlements and other consequences that flow from the dissolution of the marriage. Herring *Family Law* 110.

1078 Herring *Family Law* 118.

To establish whether or not the marriage had broken down irretrievably, one of five facts has to be proven, namely adultery, unreasonable behaviour, desertion, living apart for two years with the respondent's consent or living apart for five years.[1079]

(i) Adultery

The definition ascribed to "adultery" is the voluntary sexual intercourse between a married person and a person of the opposite sex, whether married or not, who is not the married person's spouse.[1080] The marriage is deemed to have broken down irretrievably where the one spouse has committed adultery and the other spouse finds it intolerable to live with the guilty spouse.[1081] The spouse (petitioner) applying for the divorce cannot rely on his or her own adultery.[1082] In terms of section 1(2)(a) of the Matrimonial Causes Act 1973, the petitioner is required to prove that the other spouse (respondent) had committed adultery, and is required to demonstrate that the petitioner finds it intolerable to live with the respondent.[1083] The courts have, however, held that, despite the presence of two elements namely, the adultery and the fact that innocent spouse finds it intolerable to live with the guilty spouse, the latter element does not necessarily have to be linked to the first.[1084] The fact that one spouse finds it intolerable to live with the guilty spouse is not necessarily attributed to the adultery.[1085]

The spouses are barred from instituting an action for divorce on the ground of adultery where the spouses have continued to live together for six months or more (whether continuously or in an aggregate of shorter periods) after the discovery of the adultery.[1086] It is the discovery of the adultery, and not the date of its commission, which is used to calculate the six months, and it is therefore still possible to institute an action for divorce on the ground of adultery which occurred many years ago, provided discovery thereof is within the time period prescribed in section 2(1).[1087]

1079 Probert *Family and Succession Law in England and Wales* 106.

1080 Burton *Family Law* 79.

1081 S 1(2)(a) of the Matrimonial Causes Act 1973.

1082 Herring *Family Law* 111.

1083 See para 2 3 3 of this thesis.

1084 *Cleary v Cleary and Hutton* [1974] 1 W.L.R. 73; *Carr v Carr* [1974] 1 WLR 1534; [1974] 1 All ER 1193, CA.

1085 *Goodrich v Goodrich* [1971] 1 WLR 1142; [1971] 2 All ER 1340.

1086 S 2(1) of the Matrimonial Causes Act 1973. Cretney *et al Principles of Family Law* 281.

1087 Burton *Family Law* 83.

(ii) Unreasonable behaviour

Section 1(2)(b)[1088] provides that an irretrievable breakdown of the marriage can be inferred where one spouse behaves in such a manner that the other spouse can no longer reasonably be expected to live with the guilty spouse. The courts use objective and subjective tests to establish whether or not this is indeed the case.[1089] The central question which the courts are required to ask is, whether any right-thinking person would come to the conclusion that one spouse behaved in such a manner that the other spouse cannot reasonably be expected to live with the guilty spouse, regard being had to all the circumstances and the character and personalities of the spouses.[1090] The modern approach to establishing what constitutes unreasonable behaviour is primarily concerned with assessing any conduct that is not trivial in nature, and considering the conduct objectively to establish the effect it has on the spouse petitioning for the divorce.[1091] Examples of behaviour which was found to be sufficient for the petitioner to succeed with the application for divorce are, namely violence;[1092] insensitivity, lack of communication or excessive unsociability;[1093] bullying or constant criticism;[1094] financial irresponsibility or excessive financial restriction;[1095] emotional[1096] or sexual dissatisfaction,[1097] boredom and growing apart.[1098]

(iii) Desertion

Where the one spouse has deserted the other spouse for a continuous period of two years immediately prior to the institution of an action for divorce, it can be inferred that the marriage has broken down irretrievably.[1099] Despite the explicit reference to a

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1088 Matrimonial Causes Act 1973.

1089 The test is objective in that the test is that of reasonableness and subjective as the characteristics of the individual applicant are taken into account. See *Livingstone-Stallard v Livingstone-Stallard* [1974] Fam. 47, which was adopted by the Court of Appeal in *O'Neill v O'Neill* [1975] 1 W.L.R. 118.

1090 *Buffery v Buffery* [1980] 2 FLR 365; *Livingstone-Stallard v Livingstone-Stallard supra* at 54; *O'Neill v O'Neill supra*.

1091 *Birch v Birch* [1992] 1 FLR 564.

1092 *Bergin v Bergin* [1983] 1 All ER 905.

1093 *Bannister v Bannister* [1980] 10 Fam Law 240, CA.

1094 *Livingstone-Stallard v Livingstone-Stallard supra*.

1095 *Cartr-Fea v Carter-Fea* [1987] Fam Law 131.

1096 *Pheasant v Pheasant* [1972] 2 WLR 353.

1097 *Dowden v Dowden* [1977] 8 Fam Law 106.

1098 *Morgan v Morgan* [1973] 117 SJ 223.

1099 S 1(2)(c) of the Matrimonial Causes Act 1973. Cretney *et al Principles of Family Law* 288.

continuous period of two years in section 1(2)(c), section 2(5) qualifies this by providing that periods of cohabitation totaling less than six months will not be taken into account towards the two-year period stipulated in section 1(2)(c).

Desertion comprises of both a physical and mental dimension, as there must be both physical separation and the intention to desert.[1100] This requirement is deemed to be met even though the spouses continue to live in the same house, as long as they have established separate households.[1101]

(iv) Living apart for two years plus the respondent's consent

In an attempt to reduce the animosity and bitterness that usually arises between spouses who are divorcing, there was a move away from fault-based divorce law with the introduction of this ground for divorce.[1102] To meet the requirements set out in this ground of divorce, either one of the spouses must leave the marital home, or where the spouses continue to live in the same house as long as they have established separate households.[1103] The requisite "continuous" period of separation can be made up of shorter periods, provided the interludes of cohabitation do not exceed six months.[1104]

Insofar as the consent requirement is concerned, only consent to the divorce and not to the separation is required.[1105]

(v) Living apart for five years

In terms of this ground of divorce the spouses are required to live apart for a continuous period of five years immediately preceding the institution of the application for divorce. This constitutes an innovation when divorce law was reformed in 1969, as for the first time a divorce was allowed against the wishes of the innocent spouse.[1106]

1100 *Le Brocq v Le Brocq* [1964] W.L.R.1085.

1101 *Ibid*.

1102 S 1(2)(d) of the Matrimonial Causes Act 1973.

1103 *Mouncer v Mouncer* [1972] 1 W.L.R. 321.

1104 S 2(5) of the Matrimonial Causes Act 1973. Cretney *et al Principles of Family Law* 289 – 290.

1105 *Santos v Santos* [1972] Fam Law 247.

1106 S 1(2)(e) of the Matrimonial Causes Act 1973.

3 3 3 5 RESTRICTIONS ON DIVORCE

In order to encourage newly married spouses to give their marriage a chance, the law provides that they may not petition for a divorce during the first year of marriage.[1107] This is an absolute bar to which there are no exceptions.[1108]

3 3 4 COMPARISON

Notwithstanding the fact that Islamic, South African and English law value the institution of marriage and attach importance thereto, all three legal systems legal systems acknowledge the necessity of terminating the marriage in certain circumstances. This is especially so, as none of the three legal system expects the spouses to remain in a marriage where the marriage relationship is acrimonious and unhappy.

Besides this similarity, there are also fundamental differences between the laws relating to divorce in these three legal systems.

In terms of Islamic law the right to divorce is the exclusive right of the husband. Where the wife wants to terminate the marriage, special grounds have to be present in order for her to do so. The husband is also allowed to unilaterally issue a divorce without intervention from any religious authority. Where the wife wants to terminate the marriage she has to approach the relevant religious authority in order to do so. Islamic law, therefore, differentiates between the dissolution of the marriage when instituted by the husband and when instituted by the wife. On the other hand, where South African and English divorce law is concerned, both the husband and wife have the same right to institute an action of divorce, based on the same grounds and the same rules.

Before the parties can terminate their marriage, Islamic law makes it incumbent on the spouses to appoint two arbiters, one from the family of each spouse, in order to assist the spouses to reconcile. Although, in terms of English law, a solicitor is required to certify whether or not the possibility of reconciliation has been discussed there is no

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1107 S 3(1) of the Matrimonial Causes Act 1973 inserted by s 1 of the Matrimonial and Family Proceedings Act 1984.

1108 *Butler v Butler* [1990] Fam Law 21.

legal duty on the parties to submit themselves to mediation. The same applies where the solicitor is also required to enquire whether or not the spouses have been given the names and addresses of organizations or people that can assist the spouses should they to reconcile. Parties married in terms of South African civil law cannot be compelled to mediate or arbitrate their dispute before instituting an action for divorce, although it is strongly encouraged.

Insofar as the grounds of divorces are concerned, there are vast differences between Islamic and South African law. In particular, in Islam adultery is regarded as a ground of divorce. Islamic law also allows a spouse to institute an action for divorce where the one spouse is chronically ill, impotent, sterile, serving life imprisonment, or is absent and his whereabouts are unknown. In contrast, when South African law shifted to a no-fault divorce, adultery as ground of divorce was relegated to a mere factor to be taken into consideration to determine whether or not the marriage has broken down irretrievably. In other words, adultery is no longer a ground of divorce. South African divorce law recognizes the irretrievable breakdown of the marriage as well as mental illness and continuous unconsciousness as grounds for divorce. English law, on the other hand, only recognizes one ground of divorce, namely, the irretrievable breakdown of the marriage. The fact that the one spouse has committed adultery can be used to establish that the marriage has broken down irretrievably.

A fundamental difference between the legal systems is that in terms of Islamic law the husband is allowed to terminate the marriage in writing or orally, without court intervention. In contrast, where the spouses are married in terms of South African or English law, an action for divorce must be instituted in a court of law. A divorce can, therefore, only be granted where the court legally terminates the marriage.

Despite the fact that in all three legal systems there are certain restrictions in place before a decree of divorce is granted, the restrictions encountered in Islamic law differs vastly from that found in South African and English law.

A divorce initiated in terms of Islamic law becomes effective immediately the moment it is pronounced. This does, however, not mean that the divorce is at this stage finalized. The marriage may still remain valid. If the parties reconcile before the end

of the three-month *iddah* period, there is no need for them to remarry as the marriage remains intact. In contrast, when a civil court issues a decree of divorce, the divorce is finalized for all intents and purposes. In South African and English law, once the order of divorce is pronounced, the marriage is terminated, and should the parties wish to reconcile, they will have to conclude another marriage to do so.

Lastly, for spouses married in terms of South African law, there is no period of *iddah* for the wife, irrespective of whether the marriage is terminated by death or divorce as is the case in Islamic law. In South African law the parties can remarry as soon as the divorce is finalized.

These differences again highlight the dilemma of Muslims in South Africa, England and Wales as the law of divorce in terms of Islamic law differs vastly from that of South African and English law.

3 4 ECONOMIC CONSEQUENCES OF DIVORCE

3 4 1 ISLAMIC LAW

3 4 1 1 INTRODUCTION

The dissolution of a marriage has far reaching economic implications for the spouses of the marriage. In respect of the dissolution of a marriage in terms of Islamic law, the following consequences warrant discussion, namely, the division of the matrimonial property, maintenance, the position of the dowry and inheritance.

3 4 1 2 DIVISION OF THE MATRIMONIAL PROPERTY

As indicated in chapter two,[1109] the spouses retain sole rights of ownership and control over their individual property as a marriage concluded in terms of Islamic law is a non-sharing system unless the parties have entered into a marriage contract. Where a marriage contract has been entered into prior to the conclusion of the marriage, the matrimonial property will be divided according to the terms of the marriage contract.

[1109] See para 2 6 2 1 of this thesis.

3 4 1 3 MAINTENANCE (*NAFAQAH*) AFTER THE DISSOLUTION OF THE MARRIAGE

As discussed previously, the husband is obligated to maintain his wife during the subsistence of the marriage.[1110] Subject to certain conditions, this duty continues, even in the event of the marriage being dissolved by divorce.[1111] The *Quran* states as follows:

> "Let the women live in *iddah* in the same style as you live, according to your means. Trouble them not so you make things difficult for them. And if they are pregnant, then spend your substenance on them (maintain them) until they deliver (the baby); and if they suckle your child, give them recompense; and take mutual counsel together, according to what is just and reasonable."[1112]

Where the divorce is revocable, the husband is still obliged to maintain the wife and provide her with accommodation, food, drink and clothing for the period of three months after the divorce – the *iddah* or waiting period.[1113] The rationale is that the woman is still a wife as long as the *iddah* continues and she is, therefore, entitled to the same maintenance as another wife.[1114] Where the divorce is irrevocable, the wife is not entitled to maintenance.[1115] After the three-month *iddah* period has lapsed, the husband ceases to be responsible for the maintenance of his former wife, as they are regarded as strangers.[1116] It should be noted, however, that the wife may in certain instances not be entitled to maintenance during the *iddah* period.[1117]

1110 Doi *Shari'ah: The Islamic Law* 204; Ayoup *Fiqh of Muslim Family* 351.

1111 Doi *Women in Shari'ah* 108; Siddiqi *The Family Laws of Islam* 109.

1112 Chap 65; verse 6.

1113 *Quran* chap 65; verse 6; Qasmi *The Complete System of Divorce* (2002) 217.

1114 Al-Fawzaan *Al-Mulakhkhas al-Fiqhi* 317.

1115 *Ibid*.

1116 Qasmi *The Complete System of Divorce* 223; Moosa and Karbanee "An Exploration of Mata'a Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-)opening a Veritable Pandora's Box" 2004 (2) *Law, Democracy and Development* 269 with reference to the *Quran* chap 2; verse 223 and chap 65; verse 1 and 6.

1117 Nasir notes that, where the failure of the marriage was as a result of "some cause of a criminal nature originating from the woman, such as her apostasy or her misbehaviour" she may not have a claim (Nasir *The Status of Women Under Islamic Law* 143).

Where the wife is pregnant at the time of divorce the husband has to maintain her for the entire duration of the pregnancy, as well as during the time that she is breast-feeding the child.[1118] The *Quran* states:[1119]

> "And if they are pregnant, then spend on them till they lay down their burden."

The husband is therefore under an obligation to maintain his pregnant wife during the course of the pregnancy, and after the delivery of the baby he is further obligated to pay his wife for breastfeeding the baby.[1120] However, after the delivery of the baby he is not obligated to maintain his ex-wife.[1121]

In Islamic law, the responsibility of the maintenance of the divorced woman reverts to her relatives: her son, or father, or other relations.[1122] As far as the former wife is concerned, as soon as the *iddah* period has expired, she no longer has a claim for maintenance against her former husband, although she can claim for child-minding services.[1123]

At the time of the divorce, the wife is entitled also to any unpaid maintenance due to her that accumulated during the course of the marriage, as this is a debt against the

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1118 Vahed *Islamic Law (Shari'ah): An Introduction to the Principles of Islamic Law* (2005) 32 with reference to *Quran* chap 65; verse 6. The breast-feeding may last for up to two years (Sakr *Family Values in Islam* (undated) 48).

1119 *Al-Talaaq* 65:6.

1120 *Al-Mawsoo'ah al-Fiqhiyyah* (1983) Vol 17 311.

1121 *Ibid*.

1122 The obligation to maintain an ex-wife shifts to her former family according to the *Shari'ah* principle that the burden to maintain is borne by whomever stands to inherit from the woman (Vahed *Islamic Law* 32). The obligation falls on her mature son (Qasmi *The Complete System of Divorce* 228), and if that option is not available, her father. If her father is unable to maintain her, this responsibility falls on her brothers (Qasmi *The Complete System of Divorce* 228). Where there are no brothers, the responsibility falls on the public treasury (known as the *Baytul Mal*) (Sallie *Maintenance and Child-care According to Islamic Law* (2001)105). This is problematic as the *Baytul Mal* has to support the indigent, the homeless and the unemployed, and in South Africa the public treasury does not have sufficient funds to adequately support those in need of support. This may result in the wife becoming destitute. Qasmi argues that she can compel her relations to maintain her through *Shari'ah* institutions (Qasmi *The Complete System of Divorce* 229). Moosa and Karbanee regard this possibility as cold comfort.

1123 Doi *Shari'ah: The Islamic Law* 206; Denson & Carnelley "The Awarding of Post-divorce Maintenance to a Muslim Ex-wife and Children in the South African Courts: The Interaction between Divine and Secular Law" 2009 30 3 *Obiter* 679 686.

husband's estate, which does not prescribe.[1124] The father, besides maintaining his children, is also responsible for the cost of childcare.[1125] Where the children are in the custody of the mother, their father is under an obligation to remunerate her for the childcare services which she renders by taking care of their children.[1126] The father or former husband must provide housing for her and the children born of the marriage.[1127] Furthermore, he has to provide the food and all other necessaries to ensure that his children are not left destitute and impoverished.[1128]

3 4 1 4 POSITION OF DOWRY ON DIVORCE

When a marriage has been concluded without stipulating the dowry and the spouses terminate the marriage before consummation takes place, there is no liability on the husband to make any payment of dowry.[1129] However, the following verse of the *Quran* recommends that the husband pay something to the wife according to his means and ability, as some harm has been done to her reputation due to the divorce.[1130]

> "It is no sin if you divorce your wives while you have not yet touched them or fixed any dowry for them. In such a case, pay them something anyhow."[1131]

Where the amount of dowry is stipulated and agreed upon before the marriage is concluded, and the divorce takes place before the consummation of the marriage, the husband has to pay the wife half of the fixed amount.[1132]

The woman who seeks to terminate her marriage by *khula* also has to pay back the whole or at least a portion of the dowry she received from her husband.[1133] Where the marriage is dissolved after consummation has taken place, and the amount fixed as

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1124 Expert witnesses' testimony in the case of *Ryland v Edros supra* 711f-g. The evidence referred specifically to the *Shafi'i* school of Islam. See also Sallie *Maintenance and Child-care According to Islamic Law* 43.

1125 Sallie *Maintenance and Child-care According to Islamic Law* 43.

1126 *Ibid*.

1127 This accommodation must be fully furnished and made comfortable to satisfy their needs. See Sallie *Maintenance and Child-care According to Islamic Law* 43.

1128 Sallie *Maintenance and Child-care According to Islamic Law* 44.

1129 Doi *Women in Shari'ah* 159.

1130 Ur-Rahman *Muhammad: Encyclopaedia of Seerah* (1989) 67.

1131 Chap 2; verse 236.

1132 Chap 2; verse 237. See also Doi *Women in Shari'ah* 159.

1133 See para 3 3 1 8 (iii) of this thesis.

dowry has not been paid by the husband, the wife is entitled to the full amount of dowry.[1134]

3 4 1 5 INHERITANCE

The termination of the marriage by divorce has certain legal implications on inheritance. Islam limits the power of testamentary disposition to one-third of the testator's estate, as the remaining two-thirds must be distributed amongst the heirs.[1135] Insofar as the spouses are concerned, they may inherit from each other if the divorce is revocable.[1136] In this instance, if either spouse dies during the period of *iddah*, the surviving spouse is entitled to inherit from the deceased.[1137] Where the divorce is revocable, the wife inherits a fourth of the deceased husband's estate, where the latter died without any offspring.[1138] Where the deceased husband dies leaving children, the wife inherits only an eighth of his estate.[1139] Where the husband dies leaving no children, but more than one widow, the surviving widows' collective share is one quarter.[1140] Where the deceased leaves children and more than one- widow, their collective share is one-eighth.[1141] These rules are, however, subject to the condition that before the heirs inherit, all the deceased's debt, which includes funeral expenses, must first be settled and effect must be given to bequests and legacies.[1142] In the event of an irrevocable divorce, the spouses are not allowed to inherit from each other.[1143]

3 4 1 6 PENSION-SHARING

As the spouses maintain completely separate estates during the subsistence of the marriage, they are not entitled to share each other's pension at divorce.

1134 Doi *Women in Shari'ah* 158.
1135 Doi *Women in Shari'ah* 165.
1136 Ahmad *The Muslim Law in Divorce* (1984) 82.
1137 *Ibid*.
1138 Alkhuli *The Light of Islam* 99.
1139 *Ibid*.
1140 *Ibid*.
1141 *Ibid*.
1142 Alkhuli *The Light of Islam* 96.
1143 Esposito *Women in the Muslim Family* (2001) 35.

3 4 2 SOUTH AFRICAN LAW

3 4 2 1 INTRODUCTION

The most important economic consequences of divorce, namely, the division of the spouses' marital property, maintenance matters between the spouses, the interests of the children born of the marriage[1144] and the costs issues, are regulated by sections 6 – 10 of the Divorce Act. Section 7(1) of the Divorce Act regulates the situation where the divorcing spouses enter into a settlement agreement that stipulates how the spouses' assets are to be divided, and for the payment of spousal maintenance. In terms of section 7(1) the court can make this settlement agreement an order of court. The settlement agreement in the majority of cases relates to matters concerning the division of the spouses' assets, the payment of spousal maintenance and matters concerning access and contact with any minor children born of the marriage, but it can include any provision, provided that the provision is not illegal or *contra bonos mores*.[1145]

Section 7(1) furthermore grants the court a discretion as to whether or not to incorporate the spouse's settlement agreement into the divorce order. This written settlement can exclude all or parts of the written settlement agreement. As divorce proceedings are very costly and time consuming, it is often in the spouses' interest to enter into a settlement agreement. Where the court granting the divorce, incorporates all or parts of the settlement agreement into the divorce order, it becomes an order of the court.[1146] In other words, failure to comply with the provisions of the deed of settlement will result in the immediate attachment of property in execution of the settlement agreement, as well as the possibility of imprisonment for contempt of court on the part of the guilty party.[1147]

Where the court elects not to make the spouses' settlement agreement an order of the court, it can nevertheless still have legal consequences as it is a binding contract, and can be enforced in the in the same way as any other contract.[1148]

1144 As indicated previously in Chap 1, a discussion on the law of parent and child falls outside the ambit of research undertaken for purposes of this thesis.

1145 *Middleton v Middleton* 2010 (1) SA 179 (D).

1146 *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A); *PL v YL* 2013 (6) SA (ECG).

1147 *Ibid*.

1148 Barratt *et al Law of Persons and the Family* 345.

In the event of the spouses not being able to reach an agreement, the terms of their divorce will be decided in court.[1149]

3 4 2 2 DIVISION OF THE MATRIMONIAL PROPERTY

South African divorce law is no longer based on fault or blameworthiness by a spouse as far as the grounds for divorce is concerned.[1150] However, certain consequences of divorce are influenced by who is to blame for the breakdown of the marriage, and this can cause the court to depart from the ordinary rules of division when making an order for the division of the spouses' assets.[1151] In other words, the effect of divorce on the division of the spouses' property depends on the matrimonial property system applicable to the marriage, and whether or not the court has ordered a forfeiture of benefits in terms of section 9 of the Divorce Act or an order for spousal maintenance. Where the marriage is out of community of property and was concluded before 1984, the division of the spouses' assets can further be influenced by a redistribution order.[1152] In both applications for a forfeiture of patrimonial benefits and redistribution orders, the conduct of the spouses is taken into account.[1153]

(i) Forfeiture of patrimonial benefits

Section 9 of the Divorce Act makes provision for the forfeiture of patrimonial benefits. The court, when granting an order for divorce can, depending on the circumstances of the particular case, deviate from the ordinary rules in respect of the division of the marital property and order a complete or partial forfeiture of benefits.[1154] In other words, in terms of a forfeiture order, the erring spouse can be deprived of some or all of the patrimonial benefits that he or she would ordinarily be entitled to by virtue of the matrimonial property regime that regulates the marriage.[1155] The underlying idea of section 9(1) is that a person should not be allowed to benefit financially from a marriage

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1149 *Ibid*.

1150 See para 3 3 2 1 of this thesis.

1151 Barratt *et al Family Law and the Family* 345.

1152 Heaton & Kruger *South African Family Law* 129.

1153 *Ibid*.

1154 S 9(1).

1155 Barratt *et al Law of Persons and the Family* 346.

that has broken down irretrievably because he or she erred.[1156] Where the court grants a forfeiture order, the innocent spouse is entitled to retain such forfeited assets.[1157] The erring spouse does not forfeit the assets he or she brought into the marriage; he or she merely loses the claim he or she has to the assets of the other spouse.[1158]

Where the marriage is in community of property and an order for the total forfeiture has been made, the erring spouse will receive only those assets that he or she brought into the joint estate, and will not be able to claim the assets the other spouse brought into the marriage as a result of the other spouse's effort.[1159] Where the marriage was regulated by the accrual system, the right to share in the accrual of the other spouse's estate is forfeited.[1160] The court can also order the forfeiture of assets that a spouse would be entitled to in terms of an ante-nuptial contract.[1161]

An order for the forfeiture of patrimonial benefits will be granted if the court is satisfied that erring spouse against whom the order is sought, will be "unduly benefited" if the court does not make a forfeiture order against him or her.[1162] In determining whether or not to grant the order, the court must take into account the duration of the marriage, the circumstances which led to the breakdown of the marriage and any substantial misconduct on the part of either spouse.[1163] Not all these factors need not be present or viewed cumulatively.[1164] The point of departure would be to consider first whether or not the spouse against whom the forfeiture order is sought, would in fact be benefited.[1165] This is a purely factual issue.[1166] Once this has been established, the court must determine, having regard to the three above-mentioned factors, whether or not that spouse will be unduly benefited in relation to the other spouse if the forfeiture order is not granted.[1167] It must be borne in mind that, due to the wording of section

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1156 Barratt *et al Law of Persons and the Family* 348.
1157 *Rousalis v Rousalis* 1980 (3) SA 446 (C).
1158 *Ibid*.
1159 *Smith v Smith* 1937 WLD 126.
1160 Heaton & Kruger *South African Family Law* 136.
1161 *Watt v Watt* 1984 (2) SA 455 (W).
1162 S 9(1).
1163 S 9(1).
1164 *Wijker v Wijker* 1993 (4) SA 720 (A) at 729E.
1165 *Wijker v Wijker supra* at 727D.
1166 *Ibid*.
1167 *Wijker v Wijker supra* at 729E.

9(1), the court is limited to those factors stated in section 9(1). This position was confirmed in *Botha v Botha,*[1168] where it was held that the court could not take any factors into account that fall outside those listed in section 9(1) in its consideration whether or not to grant a forfeiture order.[1169]

As far substantial misconduct is concerned, this is but one factor that the court takes into account, and the court can grant a forfeiture order, even if there is no substantial misconduct or fault on the part of the spouse against whom the order is sought.[1170]

A forfeiture order cannot be used to circumvent the normal consequences that arise as a result of the matrimonial property system that the parties chose to regulate their marriage.[1171]

(ii) Redistribution of patrimonial assets

Prior to the enactment of the Matrimonial Property Act in 1984, if a woman did not want to be subject to her husband's marital power, the parties concluded a marriage out of community of property. The standard ante-nuptial contract more often than not resulted in very unfortunate consequences for the wife, who found herself in the situation where she was a housewife and mother for most of her married life, and was therefore unable to amass an estate of her own.[1172] At the dissolution of the marriage she would not be able to share in the assets that her husband accumulated during the subsistence of the marriage, and inevitably would leave the marriage with only that with which she entered the marriage.[1173] The introduction of the accrual system in 1984 brought relief to spouses who entered into a marriage after 1 November 1984. As the Act was not retrospective, the relief did not extend to marriages contracted out of community of property before 1st November 1984.[1174] The legislature therefore

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1168 2006 (4) SA 144 (SCA).

1169 *Botha v Botha supra* at para 8.

1170 Barratt *et al Law of Persons and the Family* 349.

1171 Heaton & Kruger *South African Family Law* 135. See also *Wijker v Wijker supra*.

1172 For a comprehensive discussion of the disadvantages of the standard form ante-nuptial contract, see South African Law Commission *Report Pertaining to the Matrimonial Property Law* (RP 26/1982) 12.1.

1173 *Ibid*.

1174 Skelton *et al Family Law in South Africa* 159.

inserted sections 7(3) to (6) into the Divorce Act.[1175] Sections 7(3) to (6) seek to provide relief to spouses married subject to a complete separation of property prior to the enactment of the Matrimonial Property Act or the Marriage and Matrimonial Property Law Amendment Act.[1176]

Section 7(3) bestows on the court the discretionary power to issue an order that the assets or part of assets of the one spouse be transferred to the other spouse in order for justice to prevail.[1177] The court cannot make a redistribution order on its own accord, and the party seeking redistribution, must apply for the order.[1178]

In terms of section 7(3) only the following spouses may apply for a redistribution order: spouses who were married (prior to the commencement of the Matrimonial Property Act) with an ante-nuptial contract that excludes community of property, community of profit and loss, and the accrual, or who were married prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act in terms of section 22(6) of the Black Administration Act.[1179]

Section 7(4) sets out two further requirements that must be met in order for the court to exercise its discretion whether or not to grant the order for the redistribution of assets. In terms of section 7(4) the court can only grant a redistribution order if it is satisfied that it is equitable and just, because the spouse who seeks a redistribution order has contributed directly or indirectly to the maintenance or increase of the other spouse's estate during the subsistence of the marriage. The contribution by the spouse to the maintenance or increase of the other spouse's estate, need not have been in monetary form.[1180] The contribution can be in one of the following ways:[1181]

(i) by rendering services, for example where the spouse works in the other spouse's business without compensation, or receives a very small salary;

1175 Skelton *et al Family Law* 159; Heaton & Kruger *South African Family Law* 138.

1176 3 of 1988.

1177 Heaton & Kruger *South African Family Law* 138; Barratt *et al Law of Persons and the Family* 352; Skelton *et al Family Law* 159.

1178 *Beaumont v Beaumont* 1987 (1) SA 967 (A).

1179 38 of 1927.

1180 *Katz v Katz* 1989 (3) SA 1 (A).

1181 S 7(4) of the Divorce Act.

(ii) by saving expenses which would otherwise have been incurred, for example, by staying at home as mother and housewife; or

(iii) in any other manner, in other words, any other kind of contribution would be taken into account.

The wording of section 7(4) allows the court a wide discretion to determine whether or not a contribution has been made by the spouse seeking a redistribution order, as the latter can request a transfer if he or she had made "any kind" of contribution towards the maintenance or increase of the other spouse's estate.[1182] Section 7(4) goes a long way in recognizing that the role played by women as the homemaker, allowing the husband to further his career, should not be undervalued[1183] and must be afforded due weight.[1184]

In addition to the requirements set out in sections 7(3) and (4), the court is also required to take the following factors listed in section 7(5) into account:

(i) the existing means and obligations of the parties;

(ii) any donation one spouse made to the other during the subsistence of the marriage, or which is still owed in terms of the ante-nuptial contract entered into by the parties;

(iii) any order for forfeiture of patrimonial benefits in terms of section 9 of the Divorce Act; or

(iv) any other factor that, in the opinion of the court, should be taken into account.

The wording in (iv) above gives the court a very wide discretion in the exercise of its power whether or not to grant the redistribution order. Although section 7(5) does not specifically list the factors, the court can take into account past court decisions, which have indicated that "any other factor" encompasses the misconduct of the spouses.[1185] Whilst the courts acknowledged misconduct as a relevant factor, it cautioned that the court must adopt a conservative approach when considering misconduct, and that it

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1182 Barratt *et al Law of Persons and the Family* 352.

1183 *Beaumont v Beaumont supra*; *Katz v Katz supra*; *Kirkland v Kirkland* 2006 (6) SA 144 (C); *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); *Buttner v Buttner* 2006 (3) SA (SCA).

1184 *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at para 29.

1185 *Beaumont v Beaumont supra*; *Buttner v Buttner supra*.

must considered only when there is conspicuous disparity between the conduct of the spouses, especially where there had been gross misconduct.[1186]

Where the court reaches the decision to grant a redistribution order, it has to decide what proportion of the assets must be transferred to the spouse with the fewer assets.[1187] Previously, the courts adopted the English law guideline that one-third of the spouses' combined assets should be transferred to the spouse who owns fewer assets.[1188] This approach was, however, rejected in *Beaumont v Beaumont*.[1189] The court held that its discretion should not be limited by guidelines, but that it must rather consider all the factors listed in terms of the Divorce Act, and any other factor that the court deems necessary to take into account.[1190] The court chose to start with a clean slate to determine the extent of the redistribution.[1191]

Mention must be made of the fact that section 7(3) may fall foul of the rights guaranteed in the Constitution, in particular, the right to equality as redistribution orders are available only to spouses who concluded a marriage before the commencement date of the Matrimonial Property Act.[1192] In other words, spouses married out of community of property prior to 1984 enjoy the protection offered in terms of section 7(3), whilst a spouse married after 1984 will not enjoy this protection.[1193] The decision in *Gumede v President of SA,*[1194] which allows spouses married in terms of customary law to apply for a redistribution order, regardless of when they married, and which matrimonial property system applied to their marriage, lends weight to the argument that granting redistribution orders for spouses married in terms customary law, while denying it to others, appears to violate section 9 of the Constitution.[1195]

1186 *Beaumont v Beaumont* 1987 *supra* at 994-995.

1187 *Van Gysen v Van Gysen* 1986 (1) SA 56 (C); *MacGregor v MacGregor* 1986 (3) SA 644(C).

1188 *Beaumont v Beaumont* supra; *MacGregor v MacGregor supra*.

1189 1987 (1) SA 967 (A).

1190 *Beaumont v Beaumont supra* at 991F. See also *Childs v Childs* 2003 (2) SA 187 (SCA); *Bezuidenhout v Bezuidenhout supra*; *Buttner v Buttner supra*; *Kirkland v Kirkland supra*.

1191 *Beaumont v Beaumont supra* at 998F-G.

1192 Barratt *et al Law of Persons and the Family* 358.

1193 *Ibid*.

1194 2009 (3) SA 152 (CC).

1195 Barratt *et al Law of Persons and the Family* 359; Heaton "Family Law" *Annual Survey of South African Law* (2009) 440 at 460-463.

3 4 2 3 SPOUSAL MAINTENANCE AFTER DIVORCE

During the subsistence of the marriage, spouses have reciprocal *pro rata* duties to maintain each other. The general rule is that the reciprocal duty of support between spouses is terminated at the dissolution of the marriage, either by death or divorce. However, where the marriage is dissolved by divorce, the Divorce Act in section 7(1) makes provision for on-going maintenance in terms of a settlement order concluded between the spouses.

Where the spouses cannot reach consensus,[1196] section 7(2) empowers the court to issue an order for the payment of maintenance by one spouse to the other. The maintenance order, granted in terms of section 7(2), must be granted simultaneously with the divorce order.[1197] In other words, a spouse will not be allowed to claim spousal maintenance once the decree of divorce has been issued.[1198] Prior to the Divorce Act maintenance orders would remain in effect until the death or remarriage of the spouse in whose favour the order was granted. Cognizance was given to the fact that in the past women were not financially independent during the subsistence of the marriage, and when the marriage was terminated by divorce, it was accepted that the husband would continue to financially support his former wife until she either remarried or until she died.[1199] Societal changes have taken place over the years and more and more women have entered the workplace.[1200] These changes are reflected in court decisions as the courts have on more than one occasion denied an application for maintenance where the spouse claiming maintenance, was employed and was in a position to support him- or herself.[1201] Changes in social policy has dictated a move away the principle that, once a marriage was concluded, the spouse was entitled to lifelong financial support even after the termination of the marriage.[1202] Where circumstances allowed, the courts have leaned towards the “clean-break” model of maintenance which breaks the mould of lifelong spousal maintenance after the

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1196 As discussed in para 3 4 2 1 above.

1197 S 8(1) of the Divorce Act.

1198 *Ibid*.

1199 Heaton & Kruger *South African Family Law* 160.

1200 Barratt *Law of Persons and the Family* 360.

1201 *Botha v Botha* 2009 (3) SA 89 (W); *Kooverjee v Kooverjee* 2006 (6) SA 127 (C).

1202 Barratt *et al Law of Persons and the Family* 360.

termination of the marriage by divorce.[1203] In its most extreme form the "clean-break" principle advocates the complete termination of any economic relationship between the spouses upon divorce.[1204] In other words, neither of the spouses will receive, nor be required to pay, maintenance to each other.

In terms of section 7(2), if the court in exercising its discretion decides to award a maintenance order, then such an order must be just. Having stated this, the court is bound to recognize that certain situations will arise where it will be in the interests of justice to grant a maintenance order after a divorce.[1205] The courts have also recognized that the spouse applying for maintenance might not currently be employed, but if granted the opportunity, can be trained or retrained in order to secure employment in the future. In this instance the court can grant a spouse rehabilitative maintenance.[1206] When deciding whether to grant rehabilitative or permanent maintenance, the court considers the following factors pertaining to the spouse applying for maintenance: age, earning capacity, qualifications, length of absence from the labour market, duration of the marriage, minor children born of the marriage, financial ability of the spouse against whom a maintenance order is sought to support the other spouse, and the presence of fault.[1207] In its consideration as to whether or not grant spousal maintenance, the court is also under a constitutional obligation to promote equality between men and women.[1208] In some instances, however, in order to achieve substantive equality, the court is required by necessity to treat husbands and wives differently.[1209]

Section 7(2) provides a list of factors which the court must take into account in the exercise of its discretion whether or not it is just or fair to grant a maintenance order. The factors listed in section 7(2) are the following:

(i) the existing or prospective means of the parties.

1203 *Ibid*.
1204 *Beaumont v Beaumont supra*.
1205 *Grasso v Grasso* 1987 (1) SA 48 (C).
1206 *Botha v Botha supra*; *Kroon v Kroon* 1986 (4) SA 616 (E).
1207 *Kroon v Kroon supra*; *Pommerel v Pommerel* 1990 (1) SA 998 (E).
1208 *Kooverjee v Kooverjee supra*.
1209 *Kooverjee v Kooverjee supra* at para 11.2.6.

(ii) the earning capacity of the parties.

(iii) the spouses' financial needs and obligations.

(iv) the age of each spouse.

(v) the spouses' standard of living prior to the dissolution of the marriage by divorce.

(vi) the duration of the marriage.

(vii) the conduct of the spouses as far as it is relevant to the breakdown of the marriage.

(viii) whether any redistribution order has been granted.

(ix) any other factor, which in the court's discretion, should be taken into account.

None of the factors listed in section 7(2) are dominant and are not listed in order of importance.[1210] Furthermore, only conduct that is relevant to the breakdown of the marriage is considered, and fault assumes greater relevance if there has been gross misconduct on the part of one of the spouses.[1211] In the same manner that a redistribution order under section 7(3) is taken into account when a maintenance order in terms of section 7(2) is considered, a maintenance order can also be taken into account when the nature or extent of a redistribution order is to be determined.[1212] Section 7(2) furthermore empowers the court to take "any other factor" into account in order to issue a maintenance order that is just. Factors that the courts have, for example, taken into account, are the best interests of the minor children born of the marriage,[1213] the child-rearing responsibilities of the spouse claiming maintenance,[1214] and the inflation rate.[1215]

3 4 2 4 INHERITANCE

Section 2B of the Wills Act[1216] provides that if a testator dies within three months of the dissolution of his or her marriage,[1217] any will which he executed prior to the dissolution

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1210 *Swart v Swart supra*; *Grasso v Grasso supra*.

1211 *Swart v Swart supra*.

1212 Heaton & Kruger *South African Family Law* 141.

1213 *Grasso v Grasso supra*.

1214 *Kroon v Kroon supra*.

1215 *Vedovato v Vedovato* 1980 (1) SA 772 (T).

1216 7 of 1953.

1217 S 2B applies irrespective whether the marriage was dissolved by divorce or annulment.

of the marriage will be implemented as if his or her former spouse had died before the dissolution of the marriage and the former spouse will, therefore, not be entitled to inherit from the deceased testator's estate. This position prevails unless it is clear from the contents of the will that the testator intended his or her former spouse to inherit notwithstanding the dissolution of the marriage. Therefore, if the testator does not want his or her former spouse to inherit, he or she must revoke the existing will. If the testator dies more than three months after the dissolution of the marriage and has not revoked an existing will that would have benefited his or her former spouse, the latter will inherit from the deceased testator's estate in terms of the will.[1218]

3 4 2 5 PENSION-SHARING ORDERS

Section 7(7)(a) of the Divorce Act states that a spouse's pension interest is part of his or her assets at divorce for the purpose of determining the patrimonial benefits to which the spouses may be entitled.[1219] Therefore, even where the divorce order does not expressly make mention of the spouses pension interest, the value of the pension interest is automatically included for the purposes of determining the proprietary consequences of the divorce.[1220] In terms of section 7(8)(a) of the Divorce Act, the court granting the divorce is empowered to order the member's fund to pay the non-member spouse's portion directly to him or her when the member spouse becomes entitled to his or her pension.[1221]

3 4 3 THE LAW OF ENGLAND AND WALES

3 4 3 1 INTRODUCTION

As indicated in chapter two,[1222] at divorce little regard is paid to strict ownership rights when deciding how property should be allocated as the proprietary consequences of divorce is not determined by the marital property regime applicable to or chosen by the spouses to the marriage. However, the parties are at liberty to enter into an agreement

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1218 Sonnekus in Heaton (ed) *Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 49-50.

1219 *Maharaj v Maharaj* [2002] 2 All SA 34 (D); 2002 (2) SA 648 (D).

1220 *Fritz v Fundsatwork Unbrella Pension Fund* 2013 (4) SA492 (ECP); *Macallister v Macallister* [2013] JOL 30404 (KZD); *Kotze v Kotze* [2013] JOL 30037 (WCC); *Motsetse v Motsetse* [2015] 2 All SA 495 (FB) and *Ndaba v Ndaba* [2017] 1 All SA 33 SCA.

1221 See also s 37D(1)(d)(i) of the Pension Funds Act 24 of 1956.

1222 See para 2 6 2 3 of this thesis.

regulating how the division of assets should divided be in the event of a divorce.[1223] The agreement can be concluded either before the parties enter into the marriage or after the spouses have separated.[1224] The agreement does not have to be made an order of the court. Private agreements between the spouses can take the form of pre-nuptial agreements, post-nuptial agreements, separation agreements, consent orders and financial dispute resolutions.

In respect of pre-nuptial agreements, the decision in *Radmacher v Granatino*[1225] confirmed the validity of pre-nuptial agreements, and that it was no longer regarded as being contrary to public policy.[1226] In *Radmacher v Granatino* the approach adopted by the court was that effect should be given to a pre-nuptial agreement that was concluded with the informed consent of the spouses, each spouse appreciating the full legal implications of the agreement, unless in the prevailing circumstances it would not be fair to hold the spouses to their agreement.[1227] In its consideration as to whether or not it would be fair to hold the spouses to their agreement, the court considered the factors that relate to the conclusion of the agreement, as well as those that relate to the subsequent relationship between the parties.[1228] A pre-nuptial agreement is deemed to carry more weight if both spouses received independent legal advice before the conclusion of the agreement; if there was full disclosure of all assets by each spouse; and where there was no duress or undue pressure to conclude the agreement.[1229] However, even where the pre-nuptial agreement was freely concluded with full disclosure, it will not automatically be upheld in a court of law.[1230]

Furthermore, the court held in *Radmacher v Granatino* that there was no material distinction between pre-nuptial and post-nuptial agreements.[1231] Post-nuptial

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1223 Probert *Family and Succession Law in England and Wales* 192.

1224 *Ibid*.

1225 [2010] UKSC 42.

1226 *Radmacher v Granantino supra* at para 52.

1227 *Radmacher v Granantino supra* at para 75.

1228 *Ibid*.

1229 *Kremen v Agrest (N0.11) (Financial Remedy: Non-disclosure: Post-nuptial Agreement* [2012] EWHC 45 (Fam), par 74; *GS v L* [2011] EWHC 1759b (Fam), par 77; *B v S (Financial Remedy: Marital Property Regime* [2012] EWHC 265 (Fam), para 20.

1230 *Radmacher v Granatino supra* at para 77 where the court held that respect for individual autonomy will not be allowed to prejudice the reasonable requirements of any children born of the marriage.

1231 *Radmacher v Granantino supra* at para 60.

agreements would therefore be enforceable between the spouses, even if they were not capable of binding the court.[1232]

The existence of a separation agreement will be taken into consideration by the court in exercising its discretion to achieve an outcome which is just and fair as stipulated under section 25 of the Matrimonial Causes Act 1973. The pertinent questions that the court has to ask in this respect are:[1233]

(i) How was the separation agreement made?
(ii) Did the parties attach importance to it?
(iii) Have the parties acted on the separation agreement?

The courts will more likely than not uphold a separation agreement entered into between the spouses unless there is very good reason to depart from its terms.[1234]

The spouses who enter into a written settlement agreement in which they agree on the division of their assets can approach the court to make a consent order on the terms agreed.[1235] The consent order constitutes an order of the court that makes it more difficult to challenge.[1236] A court order will be overturned only if there is proof of some element that vitiates the basis of the order.[1237]

In order to encourage parties towards settlement in respect of the division of their assets, financial dispute resolution was introduced in 2000. Financial dispute resolution consists of strong judicial case management as well as an "early neutral evaluation" by a judge as to what order would possibly be granted if the parties went to court.[1238]

1232 *Radmacher v Granantino supra* at para 60. See also *MacLeod v MacLeod* [2008] UKPC 68.

1233 *G v G (Financial Provision: Separation Agreement)* [2000] 2 F.L.R. 18 FD.

1234 *Edgar v Edgar* [1980] 1 WLR 1410. Examples of good reason would be the presence of fraud, duress, undue influence.

1235 S 33A of the Matrimonial Causes Act 1973.

1236 *De Lasala v De Lasala* [1980] A.C. 546.

1237 *Rose v Rose* [2002] EWCA Civ 208. Examples of factors which will vitiate the order are misrepresentation, mistake, or material non-disclosure.

1238 *Rose v Rose* [2002] 1 F.L.R. 978.

The agreement reached by the spouses as a consequence of the financial dispute resolution is deemed to be a binding order of court.[1239]

3 4 3 2 DIVISION OF MATRIMONIAL PROPERTY

The Matrimonial Causes Act gives the court extensive powers to issue a range of financial orders;[1240] property adjustments orders;[1241] pension-sharing orders;[1242] and orders for the sale of any property belonging to the spouses.[1243] The courts take the following factors into account to determine how the assets should be divided on divorce, namely:[1244]

- the income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future;
- the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future;
- the standard of living enjoyed by the spouses before the breakdown of the marriage;
- the age of the spouses and the duration of the marriage;
- any physical or mental disability either of the spouses may have;
- the contributions which each of the spouses has made or is or is likely to make in the foreseeable future towards the welfare of the family;
- the conduct of each of the spouses where the disregard of the conduct would be inequitable; and
- the value to each of the spouses of any, for example, a pension that a spouse will lose the chance of acquiring because of the dissolution of the marriage.

The list of factors mentioned above is not exhaustive, as the courts are also instructed in terms of section 25(1) to have regard to all the circumstances of the case. In practice,

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1239 *Ibid*.

1240 S 23 allows the court to make orders for secured or unsecured periodical payments or a lump-sum payment.

1241 S 24 allows the court make orders for the transfer or settlement or property, or for the variation of an existing settlement.

1242 S 24B.

1243 S 24A.

1244 S 25(2).

the courts tend to focus on the needs of the spouses and that of the children born of the marriage, and therefore in the case involving spouses with modest assets, the primary caregiver was more than often given more than half of the estate.[1245] In contrast, where the divorcing spouses were wealthy, the spouse who had not personally generated the wealth, was allocated significantly less than half of the assets.[1246]

The decision of the House of Lords in *White v White*[1247] heralded a change in the courts' approach in so far as the allocation of assets between divorcing spouses, as the court held that the primary objective in applying the Matrimonial Causes Act is to achieve a fair outcome between the spouses.[1248] Lord Nicholls, who delivered the main judgment, emphasized that in order to achieve a fair outcome between the divorcing spouses, there should be no discrimination between the husband and wife and their respective roles, and furthermore that there should be no bias against the homemaker in favour of the spouse who has amassed assets.[1249] The consequence of the decision in *White v White* was that the courts were prepared to award the wives a larger share in the assets where the divorcing parties were very wealthy.[1250]

The key principles in respect of the allocation of assets of divorcing parties as formulated by case law are firstly, the focus of the courts will primarily be on meeting the needs of the children and their primary caregiver, where the resources of the spouses are insufficient to meet their needs.[1251] Secondly, where the divorcing spouses have more than sufficient resources to meet their needs, these resources may be shared depending on the source of the resources, the contributions of the spouses and all the circumstances of the case.[1252]

1245 *Scott v Scott* [1978] 1 W.L.R. 723.

1246 *O'D v O'D* [1976] Fam. 83; *Page v Page* [1981] 2 F.L.R. 198; *Dart v Dart* [1996] 2 F.L.R. 286; *Conran v Conran* [1997] 2 F.L.R. 615.

1247 [2000] 2 F.L.R 981.

1248 *Supra* at 989.

1249 *Ibid*.

1250 *McFarlane v McFarlane* [2006] UKHL 24.

1251 *B v B (Financial Provision: Welfare of Child and Conduct)* [2002 1 F.L.R. 555.

1252 *McFarlane v McFarlane supra* at para 68.

3 4 3 3 MAINTENANCE

In respect of post-spousal maintenance, the court is also required to consider the desirability of a clean break between the divorcing spouses insofar as the economic consequences of the divorce are concerned.[1253] For example, the court must consider whether or not it would be appropriate to exercise its powers to ensure that the financial obligations of the divorcing spouses are terminated as soon as possible after the decree of divorce.[1254] The desirability of a clean break may also influence whether the provision is made by way of lump sum or periodical payments, but it cannot affect the actual amount deemed appropriate.[1255]

Where the court makes an order for periodical payments, the court is also required to consider whether or not it would be appropriate to specify the time period for which the order would last.[1256] The court can furthermore direct that no application should be made in the future to increase the period of time.[1257] Cognizance must be taken of the fact that periodical payments will automatically terminate where the recipient remarries.[1258] Where the recipient merely cohabits with a third party, it is within the court's discretion whether or not the payments should cease.[1259]

In terms of section 23(1)(b) of the Matrimonial Causes Act 1973, an order for secured periodical payments can also be made which is effective even after the death of the payer.[1260] Orders for secured periodical payments are generally made where the payer has a bad track record or he or she might leave the country to work elsewhere, and simultaneously take assets out of the jurisdiction of the court, and where the payer is particularly wealthy or impecunious and it is necessary to protect the position of the payee.[1261]

1253 *Ibid*.

1254 *H v H (Financial Provision)* [2009] EWHC 494 (Fam), where the court held that the clean break was inappropriate because the wife was not able to adjust to the termination of her financial dependence on her husband without her undergoing undue hardship.

1255 *Robin v Robin* [2010] EWCA Civ 1171

1256 S 25A(2) of the Matrimonial Causes Act 1973.

1257 S 28(1A) of the Matrimonial Causes Act 1973.

1258 S 28(1)(a) of the Matrimonial Causes Act 1973.

1259 *Fleming v Fleming* [2003] EWCA Civ 1841 par 9; *Grey v Grey* [2009] EWCA Civ 1424.

1260 Burton *Family Law* 160.

1261 In *Agget v Agget* [1962] 1 WLR 183; [1962] 1 All ER 190 the husband was so irresponsible that payments were secured against his house. In *Parker v Parker* [1972] 2 WLR 21; [1972] 1 All ER 410 a second mortgage was taken out on the husband's house to secure an annuity.

3 4 3 4 INHERITANCE

In terms of article 26 of the Inheritance Act 1962, the right of succession between spouses is cancelled by legal separation, divorce, and by the voiding of their marriage by judgment.

3 4 3 5 PENSION-SHARING ORDERS

The courts are also empowered to make two types of orders in respect of a spouse's pension, namely, an order for attachment of the spouse's pension[1262] or an order for pension sharing. In terms of an attachment order the court makes an order for that part of the pension to be paid directly to the ex-spouse when it falls due.[1263] The disadvantages of this order are that the ex-spouse is required to wait until the pension becomes due, and it is also uncertain what the value of the pension will be when it is eventually paid.[1264] The preferred order is an order for pension-sharing in terms of which the person's pension right is shared with the ex-spouse who can either leave it in the pension scheme, or reinvest it elsewhere.[1265] This enables the ex-spouse to receive the benefits of the pension as if she had accrued them herself, independently of the circumstances of the other spouse.[1266]

3 4 4 COMPARISON

There are stark differences between Islamic, South African and English law in so far as the economic consequences flowing from divorce are concerned. The matrimonial property regime of a marriage concluded in terms of Islamic rites is one of complete separation. Both spouses therefore leave the marriage on divorce with their separate assets. Unlike South African and English law, Islamic law does not make provision for the sharing of assets at the termination of the marriage on divorce. In particular, a claim for the forfeiture of patrimonial benefits and a redistribution order which is allowed in terms of South African divorce law is foreign to Islamic law. In South African law, the division of the marital assets is determined by matrimonial property regime regulating

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1262 This order was originally introduced by s 166 of the Pension Act 1995, inserting s 25B-D into the Matrimonial Causes Act 1973.

1263 Douglas *An Introduction to Family Law* 195.

1264 *Ibid*.

1265 *Ibid*.

1266 *Ibid.*

the spouses' marriage. In contrast, in terms of English law, the division of matrimonial property at divorce is determined by the courts, unless the parties have entered into private agreements in respect of their estates.

It is also clear from the discussion above, that the position in Islamic law with regard to the post-divorce maintenance differs from that in South African and English law in the following respects: firstly, the duty of maintenance in South African law is reciprocal during the marriage, and the duty rests on both the husband and the wife depending on their circumstances, whilst in Islam the duty falls only on the husband. Secondly, in South African law, the duty to maintain terminates at the date of the divorce, unless there is an agreement between the parties to the contrary, or a court order to that effect. In Islam maintenance of the wife terminates three months after the divorce. In other words, the husband's spousal duty of support does not extend beyond the *iddah* period and after the *iddah* period the husband ceases to be responsible for the maintenance of his ex-wife. There is no provision for the duty to continue, either by agreement or by a court order. The exception to this rule is when the ex-wife is pregnant or where she is still breastfeeding.

Unlike South African and English law, in Islamic law arrear maintenance is regarded as a debt against the husband which does not prescribe.

South African and English law do not require the husband to pay dowry to his wife, and therefore there is no need for rules regulating the dowry at the dissolution of the marriage as is the case in Islamic law.

In respect of Islamic law, the dissolution of the marriage by divorce does not necessarily terminate the rights of succession between the parties as in the case of a revocable divorce, the surviving spouse is entitled to inherit from the deceased if either spouse dies during the *iddah* period. In South African, the rights of succession between the spouses are terminated at divorce unless the provisions of section 2B of the Will Act are applicable. The rights of succession between the spouses are cancelled at the termination of the marriage in terms of English law.

Whilst both South African and English law makes provision for pension-sharing order, there is no similar provision in Islamic law.

3 5 CONCLUSION

The purpose of this chapter was to highlight the fundamental differences with regard to the principles and rules governing the termination of a marriage, either by the death of one or both of the spouses or by means of a divorce in Islamic, South African and English law. The aim was to reinforce what was stated in chapter two of the thesis, namely, that Islamic law will never completely comply with international equality rights or with the South African Constitution. Furthermore, as Islamic law is regarded as divine law it is highly improbable that major changes to MPL to bring it in line with the Constitution, in particular gender equality, will be acceptable to adherents of the Muslim faith.

Whilst all three legal systems recognize the importance of marriage as the cornerstone of society and that the dissolution of the marriage through divorce should be embarked on as a last resort, all three legal systems have developed a comprehensive set of rules and principles regulating divorce. Each legal system, however, has its own provisions in respect of law relating to divorce. Underlying the various sets of rules of divorce are Islamic legal theories *vis-à-vis* human rights and gender legal theories. It is clear from the comparative analysis of divorce law that Islamic divorce law is irreconcilable with the western human rights approach adopted by South Africa and England and Wales in respect of divorce law. In particular, the right to equality and the right to freedom of religion is what is at the crux of the dilemma. Legal principles firmly established in Islamic law appear to be in direct conflict with the gender equality and human rights. Where these rights prove to be irreconcilable, the question that arises is, whether Islamic law should bow down to the Constitution, which would essentially involve changing and adapting Islamic law to accommodate the Constitution, or whether the Constitution should be adapted to accommodate Islamic law. It must be borne in mind that, although Islamic divorce law may appear oppressive as far as the rights of women are concerned, the overall spirit of Islamic divorce law lays emphasis on both equity and decent behaviour between the parties.

In chapter two and three the comparison between the three legal systems demonstrate that, whilst there are some underlying principles that are similar, the rules and principles in Islamic law are clearly fundamentally different form that of South African law and English law. The attempts to give effect to the consequences of marriages concluded in terms of Muslim rites in both South African law and English law has led to a unique set of rules that are not always *Shari'ah* compliant. The discussion that follows in chapter four and five of this thesis demonstrates the dilemma and profound difficulties experienced by Muslims living in South Africa and England and Wales, who practice MPL.

CHAPTER 4
MUSLIM PERSONAL LAW IN SOUTH AFRICA

4 1 INTRODUCTION

Chapter four focuses on the specific legal experiences of Muslims practicing MPL in South Africa, a constitutional democracy. The chapter starts with a broader legal context, the problems experienced as a result of the conflict between the Constitution and Islamic law and the historical attempts to address these issues. As mentioned in the introductory chapter, South Africa is a country rich in cultural diversity. To this extent South Africa has been described as a "rainbow nation" due to its multicultural, multi-ethnic and multi-religious society.[1267] South African society consists largely of Christians (representing a large number of denominations) and other religious minorities, consisting of Muslims, Jews and Hindus while the rest of the so-called Western population is mainly subject to the secular laws of South Africa.[1268] Despite this cultural diversity, the recognition of systems of religious, personal or family law for certain cultural and religious groups has either been limited or is virtually non-existent. This position prevails notwithstanding the fact that the enactment of the Constitution empowers the legislature to recognize systems of religious laws and to enact legislation recognizing marriages that is concluded under any system of religious, personal or family law.[1269] Whilst South African Muslims are allowed to freely practice MPL on an individual and collective basis, no formal and legal recognition and thus enforcement mechanisms of MPL exists. This has caused widespread social injustice and inequality to Muslims living in South Africa resulting in oppression and discrimination, particularly so for women where issues of divorce, maintenance, parental rights and responsibilities towards children and inheritance are concerned.[1270]

The legal recognition and implementation of MPL, in particular the legal recognition of Muslim marriages, have been and are contentious issues, with a volatile history spanning over more than two decades and four government changes.

1267 The term "rainbow nation" is a term that was coined by the former Archbishop Desmond Tutu. Rautenbach "Islamic Marriages in South Africa: *Quo Vodimus*?" 2003 69 (1) *Koers* 121 122.

1268 Rautenbach "Islamic Marriages in South Africa: *Quo Vodimus*?" 2003 69 (1) *Koers* 121 122.

1269 S 15 of the Constitution.

1270 The consequences of the non-recognition of Muslim marriages are discussed in para 4 3 of this thesis.

The legislature[1271] and the judiciary have at times come to the assistance of spouses married according to Muslim rites.[1272] However, the South African courts have historically adopted a piecemeal, *ad hoc* approach to issues arising from disputes where the spouses are married by Muslim rites.[1273] In other words, the courts have been prepared to grant legal recognition to some of the consequences flowing from Muslim marriages, but not to Muslim marriages *per se.*[1274] Notwithstanding the *ad hoc* recognition of certain consequences of Muslim marriages by the judiciary, these judgments were never intended to incorporate Islamic law into the South African legal system, and therefore cannot adequately address the hardships faced by spouses married by Muslim rites.[1275] Cognizance must, therefore, be given to the fact the South African legal approach to religious marriages, Muslim marriages in particular, is in need urgent of legal reform and that a holistic solution in so far as the recognition of MPL is required. Whilst these court decisions alleviated the plight of Muslim women, the inconsistency between the court decisions and *Shari'ah* raised alarm amongst the *Ulama* and the South African Muslim community in general. It is submitted that these court decisions that are in conflict with MPL, will ultimately lead to the emergence of a distorted set of laws relating to Muslim family law.

In addition to seeking legal recognition, this long and exhaustive battle for the recognition of Muslim marriages has also become a battle between conservative and progressive sections of the Muslim community, each attempting to influence the drafting of legislation towards legal recognition. The difficulty in giving effect to section 15(3) which makes provision for the recognition of religious marriages through the enactment of legislation lies in the fact that any legislation enacted to grant recognition

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1271 See para 1 2 and para 4 5 of this thesis.

1272 See para 4 4 of this thesis.

1273 Moosa *The Dissolution of a Muslim Marriage or Hindu Marriage by Divorce* in Heaton (ed) *The Law of Divorce and Dissolution of Partnerships in South Africa* (2014) 287.

1274 For example, *Rylands v Edros supra*; *Amod v Multilateral Motor Vehicle Accidents Fund supra*. The judiciary maintains that it is the role of the legislature to grant recognition to Muslim marriages by means of enacting legislation as the legislature has chosen not to amend the Marriages Act.

1275 In *Khan v Khan supra* the court recognized a duty of support in a *de facto* polygynous Muslim marriage which extended beyond the *iddah* period. In *Daniels v Campbell supra* and *Hassam v Jacobs supra* the court granted the wife of a deceased, married according to Islamic law, the right to inherit in terms of the Intestate Succession Act in a manner inconsistent with the principles of Islamic law of inheritance.

to MPL, and to Muslim marriages in particular, is subject to the Constitution.[1276] The presence of gender discrimination, especially relating to the rights of women in Islam, raises the difficult question as how to strike a balance between right to religious identity and freedom on the one hand, and the right to equality on the other hand.[1277]

4 2 REASONS FOR THE NON-RECOGNITION OF MUSLIM MARRIAGES IN SOUTH AFRICA

As stated previously in chapter two, the common-law definition of marriage is "the voluntary union for life in common of one man and one woman to the exclusion of all others while it lasts".[1278] Therefore, only civil marriages, which are monogamous in nature, have been recognized in terms of South African law because they possess the element of exclusiveness.[1279] A marriage that did not meet the requirements as set out in terms of the civil law was therefore regarded as invalid. From its inception Muslim marriages have allowed for the plurality of spouses, which led to strong opposition from certain sectors of the Western world who refused to recognize these unions. In South Africa, Muslim marriages, according to Islamic rites, were viewed as *contra bonos mores* because of their polygamous nature.[1280] Non-recognition of Muslim marriages has in the past meant that any consequences flowing from the marriage could not be enforced.[1281] Notwithstanding the fact that the parties to a potentially polygamous marriage concluded in terms of Muslim rites may regard themselves as married, there was and still is no legal connection between them.[1282]

1276 Henrard *Minority Protection in Post-apartheid South Africa: Human Rights, Minority Rights and Self-determination* (2002) 205.

1277 *Ibid*.

1278 Lee & Honore *Lee and Honore's Family, Things and Succession* (1983) para 21; Sinclair *The Law of Marriage* (1996) 305.

1279 Rautenbach 2003 *Koers* 123.

1280 *Ismail v Ismail supra* at 1025C, where it was held that the "claims are based on custom or contract which arises directly from, and is intimately connected with, the polygamous relationship entered into by the parties… it follows from this that, if the polygamous relationship is regarded as void on the grounds of public policy, the custom or the contract is also vitiated." However, it should be noted that South African law is not consistent in this regard. Firstly, African customary marriages, even if actually polygamous, are accorded legislative recognition in terms of the Recognition of Customary Marriages Act, 120 of 1998. Secondly, despite being void, polygamous Muslim unions have certain legal consequences attached to them, for example, Muslim marriages are recognized for the purposes of insolvency as section 21 (3) of the Insolvency Act, 24 of 1936, describes the word "spouse" to include a wife or husband married "according to any law or custom".

1281 Maitufi "Possible Recognition of Polygamous Marriages: *Ryland v Edros* 1997 2 SA 690 (C)" 1997 *THRHR* 695.

1282 The consequences of non-recognition are very serious indeed, particularly for the wives in such a union.

The refusal to grant recognition to potentially polygamous unions has always been based on the ground of public policy. It therefore becomes necessary to discuss the concept "public policy", as it is submitted that the notion of "public policy" as adopted by the courts prior to 1994 can no longer still be regarded as the yardstick to measure the validity of marriages in the light of South Africa's democratization and the enactment of the Constitution.[1283]

It is difficult to define the concept of "public policy" in a heterogeneous society. Public policy, its determination and the parameters in which it should operate in a free and democratic society, have always posed a direct threat for marriages entered into according to the tenets of Islamic law. Courts have treated the concept "public policy" with great circumspection, as evidenced by the remarks made in the following two cases: In *Kader v Kader*[1284] Lewis AJP, held that:

> "[p]ublic policy is a very unruly horse and once you get astride it you will never know where it will carry you".[1285]

In *Olsen v Standaloft*[1286] Baron JA, resorted to the conventional methods of finding answers to this problematic concept by asking the following questions:

> "Who are the public with whose welfare we are concerned? How does one approach the problems in societies in which there are several ethnic and cultural groups? Where the persons concerned are members of such a group, is the court entitled to have regard to culture and traditions of that group in considering the question of potential harm? Or is the correct approach to consider the potential harm to the society as a whole, but taking into account that the society is not homogenous?"[1287]

Despite posing these pertinent questions, Baron JA, never provided any answers to the questions in his judgment. Kerr[1288] states that these two questions should have

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1283 Palser "An Evaluation of the Position of Potentially Polygamous Marriages in a Democratic South Africa" 1998 *Journal for Juridical Science* 85.

1284 1972 (3) SA 203 (RA).

1285 *Kader v Kader supra* 209C.

1286 1983 (2) SA 668 (ZCS).

1287 *Olsen v Standaloft supra* 678H-679A.

1288 Kerr "Back to the Problems of a Hundred or More Years Ago: Public Policy Concerning Contracts Relating to Marriages that are Potentially or Actually Polygamous" 1984 *SALJ* 445.

been answered in the affirmative. The reason is that, when potential harm to a society as a whole is considered, due regard should be taken of the culture and traditions of the group in question, and of other groups, if any, with similar traditions.

Furthermore, Muslim marriages have traditionally not been granted legal recognition, as these marriages are solemnized by an *Iman* who is not a designated marriage officer as required by the Marriage Act.[1289] In terms of section 3 of the Marriage Act, *Imams* can also be appointed as designated marriage officers, with the result that when they perform Muslim marriages, these are tantamount to legally recognized civil marriages.[1290] However, in reality there are very few *Imams* who apply to be appointed as designated marriage officers, as this precludes them from performing polygamous marriages.[1291]

In May 2014, a pilot project was undertaken by the Department of Home Affairs to train more than one hundred *Imams* to officiate over unions that will be recognized by the South African legal system. The *Imams* were required to attend a three-day course during which they were educated on the Marriage Act. In addition, they were required to write an exam in order to be appointed as designated marriage officers. These *Imams* are now authorized to act as designated marriage officers in terms of the Marriage Act.[1292] The effect of this designation is that the *Imams* will be authorized to issue a marriage certificates in terms of South African law, where the parties simultaneously enter into a Muslim and civil marriage.[1293] The civil marriage, however, takes preference over the marriage entered into in terms of Muslim rites in the event of a dispute arising between the spouses. Notably absent from the training course were *Imams* from the Eastern Cape.

This initiative by the Department of Home affairs does not, however, amount to legal recognition in respect of Muslim marriages.[1294]

1289 S 11(2) of the Marriage Act 25 of 1961.

1290 Amien "The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa" in Maclean & Eekelaar (eds) *Managing Family Justice in Diverse Societies* (2013) 108.

1291 *Ibid.*

1292 25 of 1961.

1293 Harrington-Johnson "Muslim Marriages and Divorce" May 2015 *De Rebus* 40 41.

1294 *Ibid*.

4 3 CONSEQUENCES OF NON-RECOGNITION

Despite the fact that Muslim marriages are not granted recognition in terms of South African law, Muslims continue to regulate their domestic affairs according to Islamic law, in that they are married by a representative of the Muslim clergy, who performs the marriage in a mosque.[1295] If a breakdown of a marriage occurs, the marriage is effectively dissolved by the *talaq* procedure.[1296] Since the arrival of the first Muslims in South Africa more than three-hundred years ago, the regulation and administration of MPL have been overseen by the local *Ulama* Councils (Muslim clergy). All disputes between Muslims relating to marriage, divorce, succession and access and contact of children are therefore referred to the *Ulama.*[1297] This has led to the existence of an informal legal pluralism co-existing with South African law. In other words, South African law and Islamic law exist side by side as Muslims follow certain practices that do not enjoy formal recognition in terms of South African law.[1298] The result is that Muslims live under state law (common law) in the public sphere and under non-state law (Islamic-law rules and principles) in the private sphere.[1299]

In the light of the above, it must be emphasized that the non-recognition of Muslim marriages impacts severely on the parties to these marriages, particularly on women and children, who, as vulnerable groups, are currently disadvantaged both on a social and economic level. The regulation and administration of MPL by the *Ulama* has also come under criticism as women, in particular, are often left at the mercy and whims of religious institutes, whose interpretation of Islamic law is more often than not at the expense of women and their rights.[1300] Non-recognition of Muslim marriages in essence means that there is no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage, or any orders that are made by

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1295 Amien "Reflections on the Recognition of African Customary Marriages in South Africa: Seeking Insights for the Recognition of Muslim Marriages" 2013 13 *Acta Juridica* 357 359.

1296 See para 3 3 of this thesis.

1297 Manjoo "Legislative Recognition of Muslim Marriages in South Africa" 2004 32 2 *International Journal of Legal Information* 271 273.

1298 Rautenbach ""Work in Progress": Some Comments on the Status of Religious Legal Systems in Relation to the Bill of Rights" 2003 9 *Fundamina* 134. See also Domingo "Muslim Personal Law in South Africa: Until Two Legal Systems Do Us Part or Meet" 2011 Vol 32 (2) *Obiter* 377 380.

1299 Rautenbach ""Work in Progress": Some Comments on the Status of Religious Legal Systems in Relation to the Bill of Rights" 2003 9 *Fundamina* 134.

1300 Manjoo 2004 *International Journal of Legal Information* 273.

the *Ulama* at the dissolution of the marriage, thereby creating a perilous situation.[1301] The *Ulama,* while professing to have moral authority over the Muslim community, can merely draw on the moral conscience of Muslim spouses to adhere to *Shari'ah,* but cannot compel compliance as their orders lack the force of law. For example, a theological body that pronounces an annulment of a marriage does not have the force of law to ensure that the ruling is implemented. In reality, the theological body may chastise the erring husband regarding his religious duty where he, for example, does not provide maintenance for the wife during her *iddah* period, but it cannot enforce the implementation of the ruling.[1302] The erring husband may choose to ignore the ruling. A man who divorces his wife can, therefore, abandon his responsibilities to his wife and children born of the marriage, without ever having to deal with any legal process or the consequences following the legal process. As a result, women who seek to claim financial or other rights at the time of divorce, are forced to embark on litigation that is both very costly and time-consuming.[1303]

When parties enter into a marriage in terms of Muslim rites, the following consequences flow from the marriage:

(1) In terms of MPL the husband is under an obligation to maintain his wife or wives and children according to his means.[1304]
(2) The spouses maintain separate assets.[1305]
(3) Any contribution by a wife to support her husband during the subsistence of the marriage is regarded as a debt which does not prescribe.[1306]

However, due to the socio-economic conditions prevailing in present-day South Africa, a large percentage of women are forced into the labour market. This in effect means that women are contributing to the maintenance and financial support of their husbands and children. When the marriage is dissolved, the reality for many women is that they

1301 Shabodien "Making Haste Slowly: Legislating Muslim Marriages in South Africa" Muslim Marriages in South Africa Workshop 14 December 2010.
1302 Moosa *The Dissolution of a Muslim Marriage or Hindu Marriage by Divorce* (2014) 286.
1303 Moosa *The Dissolution of a Muslim Marriage or Hindu Marriage by Divorce* 286. See also para 1 1 of this thesis.
1304 Siddiqi *The Family Laws of Islam* 107.
1305 Rautenbach & Bekker *Introduction to Legal Pluralism* 368.
1306 Nasir *The Status of Women under Islamic Law* 107.

have not amassed an estate of their own, as their resources were used to maintain their families. Furthermore, in terms of South African law, in contrast to Islamic law, a three-year period of prescription applies in respect of claims for civil debts. This makes it extremely difficult, and often almost impossible, to claim for any contribution that the wife has made during the subsistence of the marriage (which was contracted in terms of Muslim rites) when the marriage is dissolved.

Women married according to Islamic law face further hardship when their husbands enter into a marriage with another spouse in terms of South African civil law. In other words, the first marriage is contracted in terms of Islamic law and the second marriage with a further spouse is contracted in terms of South African civil law. For example, where a woman married according to Muslim rites applied for a council house, council policies required that the house be registered in the name of the husband, as Muslim marriages are not legally recognized. The house is deemed to form part of his estate. Where the husband marries a second wife in terms of South African civil law, and this marriage is in community of property, the council house becomes part of the joint estate of the husband and his second wife.[1307] Despite the first wife and her children occupying the council house, she is in effect left at the mercy of the second wife.[1308]

In addition to the social and economic hardship endured by Muslim women, they are also faced with inner emotional turmoil, as they are often torn between their religious affiliations and convictions and the hardships they have to endure. Women in this position find it difficult to reconcile the fact that their religious beliefs condone the hardships they are enduring, where the *Ulama* do not see fit to grant them some form of redress.[1309]

Notwithstanding the fact that there is no legal prohibition preventing Muslims from entering into a civil marriage in terms of the Marriage Act, thereby allowing them access to and protection of the legal consequences that flow from a civil marriage, very few

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1307 Nongogo, O'Sullivan, De Villiers and Valentine "Comment on South African Law Commission Discussion Paper" January 2002 www.wlce.co.za?advocacy/submission19.php (accessed 2006-02-16).

1308 *Ibid*.

1309 Abrahams-Fayker "South Africa Engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages" 2011 Issue 15 *Feminist Africa* 39 47. See para 1 2 of this thesis.

Muslims exercise this option. Amien states that the reasons for Muslims not exercising the option of entering into a civil marriage are:[1310]

(1) the *Ulama* actively discourage Muslims from entering into civil marriages as they advocate the view that civil marriages are unIslamic.[1311]
(2) it is not part of the culture of Muslims in South Africa to conclude a civil marriage in addition to a marriage concluded in terms of Muslim rites.

From the discussion above it can be deduced that because Muslim marriages are not granted legal recognition, parties to these marriages, where they are financially vulnerable, are left without much legal protection. Therefore, until the time that legal recognition is granted to Muslim marriages, these problems experienced within the Muslim community will continue to persist, leaving Muslim women and their children vulnerable to abuse and mistreatment. It is also apparent that the operation of unofficial legal pluralism is not functioning in the best interests of Muslim women in South Africa.[1312] On the one hand, Muslim women are not privy to exercise the rights that arise from a civil marriage, and on the other hand, they may be excluded from the benefits under Islamic law, as there is no mechanism to enforce a decision made by a religious body in respect of a marriage concluded in terms of Muslim rites.[1313]

4 4 JUDICIAL RECOGNITION OF MUSLIM MARRIAGES

4 4 1 BEFORE THE ENACTMENT OF THE CONSTITUTION

Before the introduction of the interim Constitution,[1314] the interpretation of public policy in cases like *Seedat's Executor v The Master (Natal)*[1315] and *Ismail v Ismail,*[1316] afforded no legitimacy to marriages concluded under Islamic rites. In *Seedat's Executor's v The Master (Natal)* a potentially polygamous union was defined as follows:

1310 Amien 2013 13 *Acta Juridica* 360.

1311 The *Ulama* regard civil marriages as un-Islamic because it precludes the parties from entering into polygynous marriages and the default matrimonial property system is that of in community property which is contrary to the teachings and principles of Islam.

1312 Amien "The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa" 119.

1313 See para 1 2 of this thesis.

1314 Constitution of the Republic of South Africa, Act 200 of 1993.

1315 *Supra*.

1316 *Supra.*

> "… the nature of which is consistent with the husband marrying another wife during its continuance. Whether he exercises his privilege or not is beside the question. The fact that the man and the woman contract on the basis that he shall be at liberty to do so differentiates their relationship from that to which we give the name of marriage, and stamps their union as polygamous".[1317]

In the *Seedat* case the deceased concluded two *de facto* polygynous marriages in terms of Muslim rites, one while he was domiciled in India and the other while he was domiciled in South Africa. Both marriages were regarded as legally valid in terms of Indian law. The issues which the Appellate Division had consider were, firstly, whether or not foreign polygynous marriages were legally valid in South Africa and secondly, whether or not children born of these marriages are legitimate.[1318] The Appellate Division accepted the rule that potentially polygynous marriages are not granted legal recognition in South Africa and extended this rule to foreign marriages, irrespective of whether or not these marriages were deemed to be legally valid by the country in which they were concluded.[1319] To this extent, the court stated that such a union will not be granted recognition as a valid marriage, as "polygamy vitally affects the nature of the most important relationship into which human beings can enter and it is therefore reprobated by the majority of civilized people, on grounds of morality and religion".[1320] In the same case it was stated that anything that is "fundamentally opposed to our principles and institutions is contrary to public policy",[1321] as is the case with polygamous unions. With regard to the second issue, the court held that the children born of the first marriage were legitimate, provided the law of the domicile of origin regarded them as legitimate.[1322] The children born of the second marriage were, however, deemed to be born out of wedlock as South African law does not grant legal recognition to Muslim marriages.

In *Ismail v Ismail*[1323] the plaintiff, who was married to the defendant by Muslim rites, sued the defendant for the enforcement of certain proprietary consequences arising

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1317 *Seedat v Seedat supra* 308.
1318 *Seedat v Seedat supra* 307.
1319 *Seedat v Seedat supra* 307-308.
1320 *Seedat v Seedat supra* 307.
1321 *Seedat v Seedat supra* 309.
1322 *Seedat v Seedat supra* 308-311.
1323 *Supra*.

from their marriage, namely arrear maintenance and deferred dowry.[1324] These claims were based on Muslim custom and contract, and not on the grounds of recognition of the marriage.[1325] The plaintiff also averred that her claims were based on the variable consequences of marriage, and that it is only the invariable consequences that are of relevance to the State.[1326] However, the Appellate Division rejected the plaintiff's claims since the marriage was potentially polygamous and did not enjoy *ad hoc* recognition. It therefore remained contrary to public policy and these claims could not give rise to a civil action.[1327]

From the outcome of this case it is apparent that anything contrary to the accepted customs and usages of society was deemed to be contrary to public policy. In *Ismail* the marriage was denied recognition on the ground of public policy because it violated the principle of equality, and not because the potentially polygamous marriage was considered unchristian or immoral. In criticizing the above decision, Kaganas and Murray[1328] make the following comment:

> "By refusing her claim, the court compounded the inequalities that it identified in Mrs Ismail's marriage. Mr Ismail was home and dry, able to avoid maintenance obligations because the union he entered into treated his wife less favourably than himself. Mrs Ismail was left with the dubious comfort of legal rhetoric proclaiming rights of women. Rather than redressing inequality the case recalls the tensions between different cultural traditions in South Africa and women are caught in the cross-fire".

The decisions in *Seedat* and *Ismail* once again confirmed support for the non-recognition of polygamous unions. The courts took the view that the status of civil marriages would be undermined if polygamous unions were recognized.[1329] In both these cases it was irrelevant to the judiciary whether or not Muslim marriages were actually monogamous during the lifetime of the spouses or that the marriage had been concluded in a country that regarded it as legally valid. The mere fact that Muslim

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1324 *Ismail v Ismail supra* 1019A.

1325 *Ismail v Ismail supra* 1020C-D.

1326 *Ismail v Ismail supra* 1021.

1327 *Ismail v Ismail supra* 1024D-1026B. See also Church "Constitutional Equality and the Position of Women in a Multicultural Society" 1995 *CILSA* 289.

1328 "Law, Women and the Family: The Question of Polygamy in a New South Africa" 1991 *Acta Juridica* 116 119.

1329 *Ismail v Ismail supra* 1024D-G.

marriages were regarded as being potentially polygynous precluded any legal recognition.

4 4 2 AFTER THE ENACTMENT OF THE CONSTITUTION

As mentioned previously,[1330] after the enactment of the Constitution, the courts passed judgments which assisted spouses who were married in terms of Islamic law. The courts adopted a piecemeal approach to marital disputes arising between spouses married in term of Muslim rites and granted recognition to certain consequences flowing from Muslim marriages but did not grant legal recognition to Muslim marriages *per se*. A discussion of these cases is undertaken.

One of the first cases to be decided in terms of the interim Constitution was that of *Kalla and Another v The Master and Others.*[1331] The case involved freedom of religion and, in particular, the validity of marriages conducted according to Islamic rites. In this case, concerning a will executed in 1977, the deceased, who had married his wife by Islamic rites in India in 1948, bequeathed twenty thousand rand to her and a further twenty thousand rand to a local Mosque. The wife challenged this in court and claimed apportionment of the deceased estate on the ground that she had been married in community of property, and further that a universal partnership existed between her and her husband.[1332] The wife contended that the decision of *Ismail v Ismail* was no longer valid since the constitutional entrenchment of religious freedom for unions concluded under systems of religious law.

The *Kalla* case raised the question whether section 14(1) which entrenches freedom of conscience, religion, thought, belief and opinion, opened the door to the recognition of hitherto invalid polygamous unions, concluded under systems of religious law.[1333] The court disposed of the wife's contentions with the argument that section 241(8) of the interim Constitution precludes the retroactive operation of section 14(1), as the events material to the case occurred before the commencement of the Constitution.

1330 See para 1 2 of this thesis.

1331 1994 (4) BCLR 79 (T).

1332 It is interesting to note that the marriage had been recognized by the Department of Home Affairs and so recorded in the population register.

1333 Bonthuys "Whither the Validity of Marriages Concluded under a System of Religious Law under the Transitional Constitution" 1995 *SA Public Law* 200.

The decision of the Master recognizing the marriage as a valid marriage was thereby set aside.

The decision that finally broke the long established pattern of non-recognition of potentially polygamous marriages that are *de facto* monogamous, was that of *Ryland v Edros*.[1334] The importance of this case lies in the fact that it redefines the meaning that has been attributed to the term "public policy", as it was understood in our legal system before 27 April 1994. The case also shows that certain consequences of the marital relationship that had not been granted legal recognition because of their potential polygamous nature, could be enforced. In this case the parties entered into a monogamous marriage according to Muslim rites in 1976.[1335] The husband divorced the wife in 1992 by issuing her with a *talaq*.[1336] The plaintiff instituted an action to have the defendant evicted from their matrimonial home, and the defendant in return claimed for arrear maintenance,[1337] a consolatory gift,[1338] and an equitable share on the growth of her husband's estate.[1339] The court was not called upon to determine the validity of the marriage or grant recognition to the marriage, but was required to decide whether the decision in the *Ismail* case[1340] prevented the parties from relying on the marriage contract that formed the basis of their Muslim marriage.[1341]

To reach a decision concerning the above issue, Farlam J relied on provisions as contained in the Preamble of the Constitution, which recognize equality between men and women and people of all races, as well as the equality clause as contained in section 8 of the interim Constitution.[1342] Farlam J had to determine whether or not public policy that previously dictated the non-enforcement of consequences of an unrecognized marriage, could still preclude it from enforcing these consequences. In this respect, Farlam J came to the following conclusion:

1334 1997 (2) SA 690 (C).

1335 *Ryland v Edros supra* 696C-697G.

1336 *Ibid*.

1337 For the period of the marriage.

1338 *Ryland v Edros supra* 696G. The wife alleged that the divorce was without just cause.

1339 *Ryland v Edros supra* 696H. The wife alleged that she had contributed labour, effort and money to the husband's estate, and that she was therefore entitled to an equitable portion thereof.

1340 *Ismail v Ismail supra*.

1341 *Ryland v Edros supra* 707E-F.

1342 S 9 of the Constitution.

> "It is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right–thinking people in the community and not only by one section of it. It is clear, in my view, that in the Ismail case the views (or presumed views) of only one group in our plural society were taken into account."[1343]

The court held that the *ratio* in the *Ismail* case was in conflict with the spirit, purport and objects of the Constitution, and therefore the values underlying Chapter 3 of the Constitution must prevail.[1344] The learned judge further asserted that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution.[1345] Consequently, he held that the *Ismail* decision no longer operated to preclude a court from enforcing such claims as those brought by the defendant.[1346] The essence of the judgment was that the contractual agreements flowing from a marriage, that is potentially polygamous in nature, would not be rendered unenforceable, provided that the terms and obligations emanating from such contracts are not contrary to public policy. It was also held that public policy is essentially a question of fact.[1347] Furthermore, public opinion can alter from time to time. It is as though Farlam J is boldly stating that the "unruly horse" described in the *Kader*[1348] case, can be tamed and domesticated. This case opens the door for resolving the need to balance multiculturalism in South Africa.[1349] However, despite the progressive decision taken in the *Ryland* case, the following comments can be made:

- Firstly, an extensive investigation of polygamy was not conducted as the judgment failed to address the question whether polygamous marriages should be recognized.
- Secondly, the decision is only applicable to unions that are *de facto* monogamous.

1343 *Ryland v Edros supra* 707G-H.
1344 *Ryland v Edros supra* 705.
1345 Palser 1998 *Journal for Judicial Science* 87.
1346 *Ryland v Edros supra* 709C.
1347 *Ryland v Edros supra* 704B.
1348 *Kader v Kader* 1972 (3) SA 203 (RA).
1349 Mahomed "Case Note: *Ryland v Edros* (1996) 4 All SA 557 (C)" 1997 *De Rebus* 189.

Nevertheless, the decision is to be welcomed as it states that public policy is no longer a vague and arbitrary concept, but that public policy now operates within definitive parameters and is guided by the interpretation of the provisions of section 35(3) of the Constitution.[1350]

In *Amod v Multilateral Motor Vehicle Accident Fund*[1351] the court was once again faced with a challenge to the validity of the decision of the Appellate Division in the case of *Ismail v Ismail*.[1352] In this case the plaintiff was married to Omar Shaik Amod by Islamic rites, and the marriage subsisted for six years until his death in a motor vehicle accident on 25 July 1993.[1353] The deceased was the breadwinner of the family and supported the applicant throughout marriage.[1354] The applicant lodged a claim against the Multilateral Motor Vehicle Accident Fund (the "MMF")[1355] for compensation for loss of support arising from the death of her husband. It was common cause that the accident was due to the negligence of the other driver. The MMF denied liability on the ground that the marriage between the parties was a void Muslim marriage.[1356] The applicant contended that her deceased husband had a contractual duty to support her.[1357]

The issue was whether the contractual duty of support which a husband owed his wife in terms of their Islamic marriage, satisfied the requirements of a dependent's action for loss of support against a third party. In other words, the question was whether the MMF was liable to compensate Mrs Amod (the plaintiff) for loss of support of the deceased husband to whom she was married according to Islamic rites. The traditional

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1350 S 35(3) of the interim Constitution corresponds with s 39(2) of the Constitution which reads as follows:

> "(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

1351 1997 (12) BCLR 1716 (D).

1352 *Supra*. It was held that a marriage entered into according to Muslim rites was not lawful and that consequently the marriage itself, as well as any contracts or customs flowing from it, were invalid.

1353 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1719C-H.

1354 *Ibid*.

1355 The MMF Act is the predecessor of the Road Accident Fund Act.

1356 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1719C-H.

1357 In terms of Islamic law, marriage is a contract in terms of which the husband is under an obligation to support and maintain his wife. See para 2 3 1 of this thesis.

approach in South African law, namely that a common-law duty of support only arises in respect of either a lawful marriage or a blood relationship, was challenged.

In response to the above traditional legal position, counsel for the plaintiff put forward the following two arguments:[1358]

(1) Public policy has evolved sufficiently since 1982 when the *Ismail* case was decided, and consequently Islamic marriages should, as a matter of public policy, no longer be considered unlawful.
(2) Alternatively, it was submitted that the court should in terms of section 35(3) of the interim Constitution or section 39(2), read with sections 8(2) and (3) of the 1996 Constitution, develop the common law to recognize a duty of support arising out of an Islamic marriage.

The court *a quo* held that, due to the decision of the *Ismail*[1359] case, which held that Muslim marriages are contrary to public policy, a duty of support did not exist where the parties were married in terms of Islamic law.[1360] The court furthermore held that the onus to prove that there had been a change in public policy regarding the conclusion of Muslim marriages, rested on the applicant.[1361] The court *a quo* dismissed the first argument on the ground that it could not be established on the evidence before the court that a change of public policy had occurred since the *Ismail* case.[1362]

With regard to the second argument, the court held that there was no provision in the Constitution that indicated that the court was to have legislative powers.[1363] The court further held that the intention behind section 8(3)(a) was that, if there was a silence in the common law with regard to giving effect to a right in the Bill of Rights, and the legislature did not give effect to such a right, the court must amplify the common law

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1358 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1720C-1722E. See also Clark & Kerr "Dependent's Action for Loss of support: Are Women Married by Islamic Rites Victims of Unfair Discrimination?" 1999 *SALJ* 20.

1359 *Supra*.

1360 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1719I.

1361 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1720.

1362 *Ibid*.

1363 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1723C-D.

to eliminate such silence.[1364] Consequently, it was not the intention of section 8(3)(a) that the court be granted the power to eliminate or alter an existing principle of the common law.[1365] This was the task of the legislature.[1366] The court came to the conclusion that it may not alter the existing claim for loss of support to include a duty to support in terms of a contractual relationship arising from a Muslim marriage.[1367] Based on this it was held that the defendant was not legally liable to compensate the plaintiff for loss of support of her deceased husband, as a legal duty of support only arose out of a lawful marriage.[1368]

The matter was taken on appeal directly to the Constitutional Court.[1369] The crucial issue that had to be decided by the Constitutional Court was whether the common law should be developed to allow the appellant to claim damages for loss of support. The application for leave to appeal was dismissed as the Constitutional Court took the view that this question fell primarily within the jurisdiction of the Supreme Court of Appeal. This decision illustrates the reluctance or caution displayed on the part of the courts to apply the Bill of Rights directly to private relationships.[1370]

An application for leave to appeal was made to the Supreme Court of Appeal.[1371] When considering the matter on appeal, Mahomed CJ stated that the *boni mores* of the community in the current constitutional democracy would not lend support to decision that denies a duty of support arising from a *de facto* Muslim monogamous marriage, whilst recognizing the same duty of support arising from a similarly solemnized marriage in accordance with the Christian faith, and which even affords recognition to polygamous marriages solemnized in accordance with African customary law.[1372] He furthermore stated that the inequality, arbitrariness and

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1364 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1723H-I.

1365 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1723H-I. See also Jazbhay "Case Notes" 1998 *De Rebus* 42.

1366 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1723H-I.

1367 *Amod v Multilateral Motor Vehicle Accident Fund supra* 1726E.

1368 *Ibid*.

1369 *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC).

1370 Rautenbach and Du Plessis "The Extension of the Dependent's Action for Loss of Support and the Recognition of Muslim Marriages: The Saga Continues" 2000 *THRHR* 302 304.

1371 *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

1372 *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening) supra* 1332G.

intolerance inherent in such a conclusion would be inconsistent with the new ethos that prevailed on 25 July 1993 when the cause of action in the present matter commenced.[1373]

The Supreme Court of Appeal found that the appellant had a good cause of action, based on the facts in that firstly, the deceased had had a legally enforceable duty to support the appellant; secondly, the duty arose from a solemn marriage in accordance with tenets of a recognized and accepted faith; and thirdly, it was a duty which deserved recognition and protection for the purposes of the dependent's action.[1374] Mahomed CJ stated that the correct approach is not to determine whether the marriage was lawful at common law or not, but to enquire whether or not the deceased was under a legal duty to support the appellant during the subsistence of the marriage and, if so, whether the right of the widow was, in the circumstances, a right which deserved protection for the purposes of the defendant's action.[1375] The court based its findings on firstly, an "important shift in the identifiable *boni mores* of the community" that "must also manifest itself in a corresponding evolution in the relevant parameters of application in this area",[1376] and secondly, on the test laid down in *Santam Bpk v Henery*.[1377]

The test as laid down in *Santam v Henery* is as follows:

- The claimant for loss of support resulting from the unlawful death of the deceased must establish that the deceased had a duty to support the dependent.
- It had to be a legally enforceable duty.
- The right of the dependent to support had to be worthy of protection by the law.

1373 *Ibid*.

1374 *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening) supra* 1331B.

1375 *Amod v Multilateral vehicle Accidents Fund (Commission for Gender Equality Intervening) supra* 1327F.

1376 *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening) supra* 1329I.

1377 1999 (3) SA 421 (SCA).

- The preceding element had to be determined by applying the *boni mores*.[1378]

The court found that Mrs Amod was owed a legal duty of support arising from her marriage. Accordingly, the MMF was held to be legally liable to compensate the widow for loss of support of her deceased husband.[1379]

For the first time, a South African court was prepared to recognize an action for loss of support by a surviving Muslim spouse married in terms of Islamic law. The decision in the *Amod* case can be heralded as a landmark case regarding the rights of Muslims in South Africa for the following reasons:[1380]

(1) The insistence of the court in previous decisions that the duty of support that a potentially polygamous, but *de facto,* monogamous marriage, imposed on the husband was not worthy of legal protection, could not be justified. The court held that this was inconsistent with the new ethos of tolerance, pluralism and religious freedom in the present constitutional legal order, and was an untenable basis for the determination of the *boni mores* of society.[1381]

(2) The crucial enquiry was whether the relationship between the deceased and the dependent was one that deserved recognition and protection at common law.[1382]

(3) Although the court reached its findings without any reliance on the interpretation clauses of either the interim or final Constitution, Mahomed CJ stated that if the common law is trapped within the limitations of its past, it will lose its legitimacy and effectiveness "in the pursuit of justice among the citizens of a democratic society".[1383] The court based its approach on Roman-Dutch natural law concepts of justice and equality. Mahomed CJ stated that the proper remedy is for the legislature to effect statutory relief for Muslim widows,

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1378 *Supra* 427H-J.

1379 Mahomed "Another Landmark Decision in *Amod (born Peer) and Another v Multilateral Vehicle Accidents Fund* 1999 4 All SA 421 (A)" 2000 *De Rebus* 37.

1380 Goolam "The "Potentially Polygamous" Saga: When will it End?" 2000 *THRHR* 22.

1381 *Amod v Multilateral Vehicle Accidents Funds (Commission for Gender Equality Intervening) supra* 1327I-1328C.

1382 The approach adopted by Mahomed CJ is one which will afford welcome and long-overdue relief to Muslim widows.

1383 *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening) supra* 1330A.

as it did in the case of widows married by African customary law by virtue of the provisions of section 31 of the Book of Laws Amendment Act, 76 of 1963.

Although being heralded as the landmark case regarding the rights of Muslims in South Africa, the effect of the decision in *Amod* is limited in two ways. Firstly, it is only the claim of a surviving spouse[1384] for loss of support that has been extended to spouses married in terms of unrecognized Muslim law. Muslim marriages have not been granted legal recognition.[1385] Secondly, the court did not deal with polygamous marriages. This can be concluded from the following statement made by Mahomed CJ:

> "I have deliberately emphasized in this judgment the *de facto* monogamous character of the Muslim marriage between the appellant and the deceased in the present matter. I do not thereby wish to be understood as saying that, if the deceased had been party to a plurality of continuing unions, his dependents would necessarily fall in a dependent's action based on a duty which the deceased might have towards such dependents. I prefer to leave that issue entirely open."[1386]

It is uncertain whether the court would have followed the same route if the appellant's marriage had been polygamous.[1387]

The decision of the Cape Provincial Division in *Daniels v Campbell NO and Others*[1388] regarding the intestate succession rights of a spouse in a monogamous Muslim marriage further extends the *ad hoc* legal recognition granted to religious unions. In this case the applicant, Juleiga Daniels, had married Mogamat Amien Daniels (the deceased) in accordance with Muslim rites on 2 March 1977.[1389] The marriage, which was monogamous at all times, had not been solemnized by a marriage officer appointed in terms of the Marriage Act.[1390] No children were born of this marriage.[1391] On 27 November 1994, Mogamat Amien Daniels died intestate.[1392] The main asset in

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1384 Married in terms of a valid civil marriage.

1385 Rautenbach and Du Plessis 2000 *THRHR* 313.

1386 *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening) supra* 1330B-D.

1387 Goldblatt "Reviewing the Road Accident Fund" 2000 *De Rebus* 30.

1388 2003 All SA 139 (C).

1389 *Daniels v Campbell NO and Others supra* 142.

1390 *Ibid*.

1391 *Ibid*.

1392 *Ibid*.

his deceased estate was a house (hereafter referred to as the "property").[1393] Throughout the marriage until his death, the deceased and the applicant lived on the property.[1394]

In terms of the Intestate Succession Act, 81 of 1987, the surviving spouse of a deceased person is entitled to inherit from the intestate deceased estate.[1395] In so far as section 2 of the Maintenance of Surviving Spouses Act, 27 of 1990, is concerned, provision is made for the surviving spouse to claim for maintenance against the estate of the deceased spouse where the marriage has been dissolved by death.[1396] However, neither this Act nor the Intestate Succession Act contains a definition of the word "spouse". The meaning that is attributed to the word "spouse" in each of these Acts is what lies at the core of this case.

The issues that the court had to determine can be summarized as follows:[1397]

(1) Whether the word "spouse", as utilized in the Intestate Succession Act and the Maintenance of the Surviving Spouses Act, could be interpreted to include a person in the position of the applicant, in other words, a husband or wife married in terms of Muslim rites in a *de facto* monogamous union.

1393 *Ibid*.

1394 *Ibid*.

1395 The order of intestate succession is set out in detail in s 1 of the Act and provides as follows:

> "(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and −
>
> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
>
> (c) is survived by a spouse as well as a descendant −
>
> (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette [fixed at present at R125 000.00 – see GN 483 in Government Gazette 11188 of 18 March 1988], whichever is the greater; and
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> (ii) such descendant shall inherit the residue (if any) of the intestate estate."

1396 S 2 provides the following:

> "(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide there for from his own means and earnings."

1397 *Daniels v Campbell NO and Others supra* 139.

(2) Whether the failure to provide for persons referred to in (1) as "spouses" can be regarded as unconstitutional and invalid, and if this is the case, whether this invalidity can be remedied by reading in the provisions proposed by the applicant.

In the determination of the above issues, Van Heerden J stated that it was clear from several judgments of the Constitutional Court, that the concept of equality must be understood in a substantive, rather than a formal, sense.[1398] This necessarily required an acute awareness of the lived reality of people's lives, and an understanding of how real-life conditions of individuals and groups have reinforced vulnerability, disadvantage and harm.[1399] Furthermore, the court held that the present interpretation of the word "spouse" differentiates between *de facto* monogamous marriages concluded in terms of Muslim rites on the one hand, and marriages entered into in accordance with Christian and Jewish rites, and also non-religious (civil) marriages.[1400] This differentiation flows from and is limited to the religion, belief and cultural background of persons in the position of the applicant. In other words, being a practising Muslim, the applicant entered into a marriage in accordance with Muslim rites. This being a potentially polygynous marriage, it did not comply with the meaning of the term "marriage" underlying the provisions of the Marriage Act. As a result of the cultural practices of the Muslim community within which the applicant lived, the applicant and her husband neglected to have their marriage solemnized by a marriage officer as required in terms of the Marriage Act.[1401] Van Heerden J stated that it was the interplay between the applicant's religious beliefs and the cultural practices in her community, as well as the fact that South African law had failed to accommodate these beliefs and practices that have caused the applicant to be in her present position.[1402]

In terms of section 9(2) of the Constitution, religion, belief and culture are all prohibited grounds of discrimination, and in terms of section 9(4) of the Constitution, this

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1398 *Daniels v Campbell NO and Others supra* 162.

1399 *Ibid*.

1400 *Daniels v Campbell NO and Others supra* 163.

1401 *Ibid*.

1402 In other words, the applicant's marriage was not recognized as valid in South African law and she did not enjoy the protection afforded to "spouses" by virtue of, *inter alia*, the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

differentiation is presumed to constitute unfair discrimination until the contrary is proven.[1403] The non-recognition of the applicant as a "spouse" in terms of the relevant Acts would result in the estate of the deceased to be distributed in a manner that is both inconsistent with MPL, and which discriminates unfairly against the applicant, by ignoring the reality of her *de facto* monogamous marriage to the deceased.[1404]

In view of this, Van Heerden J concluded that the impugned provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act were in breach of the equality clause contained in section 8 of the interim Constitution.[1405] In determining the appropriate remedy, the court held that the mere declaration that the challenged provisions were unconstitutional was insufficient.[1406] Ancillary relief of "reading into" the challenged provisions wording that would cure the constitutional defect and provide the applicant with meaningful relief, was required.[1407] The court therefore made the following order:[1408]

(1) The omission from section 1(4) of the Intestate Succession Act 81 of 1987, of the following definition was declared to be unconstitutional and invalid: "'spouse' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union".

(2) Section 1(4) of the Intestate Succession Act 81 of 1987, was to be read as though it included the following paragraph after paragraph (f):

> "(g) 'spouse' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union."

(3) The orders in paragraphs 1 and 2 above would have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of the order.

(4) The omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990, of the words "and includes the surviving

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1403 *Daniels v Campbell NO and Others supra* 164.
1404 *Daniels v Campbell NO and Others supra* 165.
1405 *Daniels v Campbell NO and Others supra* 171.
1406 *Daniels v Campbell NO and Others supra* 174.
1407 *Ibid*.
1408 *Daniels v Campbell NO and Others supra* 175.

husband and wife of a *de facto* monogamous union solemnized in accordance with Muslim rites", at the end of the existing definition, was declared to be unconstitutional and invalid.

(5) The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990, was to be read as if it included the following words after the words "dissolved by death":

> "and includes the surviving husband or wife of a *de facto* monogamous union solemnized in accordance with Muslim rites."

The decision in *Daniels v Campbell No and Others* was confirmed by the Constitutional Court.[1409]

It must, however, be stated that despite the fact that the court came to the assistance of the widow in the *Daniel's* case by allowing the wife of a Muslim marriage to inherit intestate and to claim for maintenance from the deceased husband's estate, the decision is in conflict with the rules and principles of Islamic law. There is no freedom of testation in Islamic law and the maintenance of the wife married in terms of Muslim rites is restricted to the *iddah* period.

In the decision of *Hassam v Jacobs NO and Others*[1410] the Cape Provincial Division was faced with the question whether a spouse to a *de facto* polygamous Muslim marriage was entitled to the benefits as provided to a surviving spouse in terms of the Intestate succession Act 81 of 1987, as well as the Maintenance of Surviving Spouses Act 27 of 1990.[1411] In other words, the court was called on to determine whether the decision reached in *Daniels v Campbell* could be extended to a *de facto* polygamous Muslim marriage. In this case the applicant and the deceased entered into a marriage in accordance with Muslim rites on the 3 December 1972.[1412] The parties continued to live together as husband and wife until the deceased's death on 22 August 2001.[1413]

1409 *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).

1410 *Supra*.

1411 *Hassam v Jacobs NO supra* 351. Bakker "Toepassing van Islamitiese Reg in Suid-Afrika: *Hassam v Jacobs* 2008 4 All SA 350 (C)" 2008 *Obiter* 533 540.

1412 *Hassam v Jacobs NO supra* 351.

1413 *Hassam v Jacobs NO supra* 352.

Prior to the deceased's death he entered into a second marriage in 2000 with the third respondent, also in terms of Muslim rites.[1414]

The primary issue in this matter was to what a widow's portion in terms of the Intestate Succession Act amounted and whether the surviving spouses of a *de facto* polygamous Muslim Marriage had a claim for reasonable maintenance in terms of the Maintenance of Surviving Spouses Act.[1415]

The court held that in defining the term "spouse" in a manner which is consistent with the foundational constitutional values of human dignity, equality and freedom, there was no justification not to apply the equitable principles underlying the Intestate Succession Act and the Maintenance of Surviving Spouse Act to Muslim widows in a *de facto* polygamous Muslim Marriage.[1416] There was therefore no justification for excluding the widow of a polygamous Muslim Marriage from the provisions of the Intestate Succession Act or the Maintenance of Surviving Spouses Act.[1417] Furthermore, the continued exclusion of the widows of polygamous Muslim marriages from the benefits of these two Acts would unfairly discriminatory against them, and would amount to a violation of their right to religion and culture, as well as the infringement of their right to dignity.[1418] With regard to the issue as to whether widows of polygamous Muslim marriages are included in the definition of the term "survivor" (as used in the Maintenance of Surviving Spouse Act) and "spouse" (as used as the Intestate Succession Act), the court held that these terms included a surviving spouse to a polygamous Muslim marriage.[1419]

Furthermore, the court held that section 1(4)(f) of the Intestate Succession Act was inconsistent with the Constitution on the basis of marital status, religion, culture and the right to dignity, as it made provision only for a spouse in a *de facto* monogamous

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1414 *Ibid*.

1415 *Hassam v Jacobs NO supra* 351.

1416 *Hassam v Jacobs NO supra* 356. In *Daniels v Campbell NO and Others supra* paras 22-23 it was stated that the purpose of these two Acts is to provide relief to a particularly vulnerable section of society namely, widows with a view to obviating their bereavement being compounded by dependence and possible homelessness.

1417 *Hassam v Jacobs NO supra* 356.

1418 *Ibid*.

1419 *Hassam v Jacobs NO supra* 357. See Denson & Van der Walt "Cold Comfort for Parties to a Muslim Marriage: *Hassam v Jacobs NO* [2008] 4 SA 350 (C)" 2009 Vol 30 (1) *Obiter* 188.

Muslim marriage to be an heir in the estate of her deceased husband.[1420] Section 1(4)(f) of the Intestate Succession Act now has to be read so as to include all the widows of a *de facto* polygynous Muslim marriage.[1421]

In *Hassam v Jacobs NO*[1422] an application was made for confirmation of the decision of the Western Cape High Court, which declared section 1(4)(f) of the Intestate Succession Act to be inconsistent with the Constitution as it makes provision for one spouse only in a Muslim Marriage to be an heir. In the confirmation proceedings before the Constitutional Court the issues for consideration were, firstly, whether the exclusion of the spouses in polygynous Muslim marriages from the Intestate Succession Act violated section 9(3) of the Constitution, and if it did, whether this exclusion constituted unfair discrimination which could not be justified under section 36 of the Constitution.[1423] Secondly, the court had to consider that, if this exclusion violates section 9(3) of the Constitution, whether the word "spouse" in the Intestate Succession Act could be read to include a "spouse" in a polygynous Muslim marriage.[1424] The last issue which the court had to consider was what the appropriate relief would be if the word "spouses" in the Intestate Succession Act did not lend itself to include spouses in polygynous Muslim marriage.[1425]

In addressing the first issue, Nkabinde J found that the Intestate Succession Act differentiated between widows married in terms of the Marriage Act 25 of 1961 and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between polygynous customary marriages and those in polygynous Muslim marriages.[1426] The differentiation and exclusion of spouses in polygynous Muslim marriages was found to be in conflict with the Constitution, as the right to equality prohibits unfair discrimination on the basis of marital status. The right to equality before the law and equal protection

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1420 *Hassam v Jacobs NO supra* 358.

1421 *Ibid*.

1422 2009 (11) BCLR 1148 (CC). See Denson & Van der Walt "Cold Comfort for Parties to a Muslim Marriage: *Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women's Legal Centre Trust as Amici Curiae)* [2009] ZACC 19" 2010 Vol 31 (1) *Obiter* 201.

1423 *Hassam v Jacobs NO supra* 1156.

1424 *Ibid*.

1425 *Ibid*.

1426 *Hassam v Jacobs NO supra* 1160.

of the law are foundational.[1427] Furthermore, the court held that this differentiation amounts to discrimination, as the failure to grant widows of polygynous Muslim marriages the benefits of the Intestate Succession Act, will result in these widows being caused significant and material disadvantages that the equality provision expressly wishes to avoid.[1428] The plight of widows in a monogamous Muslim marriage had since the decision in the *Daniels* case been improved as they were now recognized as spouses under the Intestate Succession Act.[1429] Widows in polygynous Muslim marriages, however, still suffered the effects of non-recognition, and the differentiation between the spouses in a monogamous Muslim marriage and those in a polygynous Muslim marriage, amounted to unfair discrimination.[1430] Nkabinde J held that it would be constitutionally unacceptable and unjust to grant a widow of a monogamous Muslim marriage the protection offered by the Intestate Succession Act, but to deny the same protection to widows of a polygynous Muslim marriage.[1431] The exclusion of women in the position of the applicant from the protection of the Intestate Succession Act, therefore, unfairly discriminated against them on the grounds of religion, marital status and gender. The exclusion and unfair discrimination could not be justified under section 36 of the Constitution.[1432] In other words, this exclusion could not be justified in a society that is guided by principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

With regard to the second issue, the court held that the word "spouse" as it appeared in the Intestate Succession Act, did not include more than one partner to a marriage, and consequently section 1 of this Act had to be read as though the words "or spouses" appeared after the word "spouse" wherever it appeared in section 1 of the Act.[1433] In the formulation of the appropriate remedy Nkabinde referred to section 172(1) of the Constitution, which required a court, when deciding a constitutional matter within its power, to declare that any law that was inconsistent with the Constitution is invalid to the extent of its inconsistency.[1434] Section 172(1) furthermore required the court to

1427 *Ibid*.
1428 *Hassam v Jacobs NO supra* 1161.
1429 *Ibid*.
1430 *Ibid*.
1431 *Hassam v Jacobs NO supra* 1162.
1432 *Ibid*.
1433 *Hassam v Jacobs NO supra* 1163.
1434 *Hassam v Jacobs NO supra* 1165.

make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of validity for any period, and on any conditions, to allow the competent authority to correct the defect.[1435] It was therefore held that as the word "spouse" in the Intestate Succession Act was not reasonably capable of being understood to include more than one spouse in the context of a polygynous union in order to remedy the defect, the words "or spouses" were to be read-in after each use of the word "spouse" in the Act.[1436] It was held that the declaration of invalidity should operate retrospectively with effect from 27 April 1994, except that it did not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate.[1437]

The Constitutional Court confirmed the decision of the Western Cape High Court that women who are party to a polygynous Muslim marriage concluded under MPL, are spouses for the purpose of inheriting in terms of the Intestate Succession Act, or claiming from estates of the deceased in terms of the Maintenance of Surviving Spouses Act.[1438]

Once again, despite the fact that this decision alleviated the plight of Muslim women, it is contrary to *Shariah* for the same reasons stated previously under the discussion of the *Daniels* case above.

The judiciary has also adjudicated in favour of Muslim women, where they have lodged claims for maintenance against their ex-husbands to whom they were married in terms of Muslim rites. In *Khan v Khan,*[1439] the court confirmed the enforcement of maintenance orders for Muslim wives during their marriages, including polygamous wives. In *Khan v Khan*, it was found that, as there is a legal duty on a husband to maintain his Muslim wife/wives during the marriage, the Maintenance Act 99 of 1998 is applicable.[1440] In this matter the court held that the preamble to the Maintenance Act emphasized the establishment of a fair system of maintenance premised on the

1435 *Ibid*.
1436 *Hassam v Jacobs NO supra* 1166.
1437 *Hassam v Jacobs NO supra* 1167.
1438 *Ibid*.
1439 2005 (2) SA 272 (T).
1440 *Khan v Khan supra* 283.

fundamental rights in the Constitution, and that the common-law duty of support was flexible and had expanded over time to include many types of relationships.[1441] The court furthermore held that the purpose of family law was to protect vulnerable family members and ensure fairness in disputes arising from the termination of relationships.[1442] The court regarded polygamous marriages as a family structure that must be protected by law, and that parties to a Muslim marriage – whether monogamous or not – were entitled to maintenance.[1443] The decision in *Khan v Khan* laid the foundation for maintenance courts to adjudicate on maintenance matters, where the parties were married in terms of Muslim rites only.[1444]

Similarly, the duty of the husband to support his wife to whom he was still married in accordance with Muslim rites, has been recognised for purposes of Rule 43 applications pending a civil divorce action, even though the validity of the marriage was challenged.[1445] *In Mahomed v Mahomed*,[1446] the parties entered into a marriage according to Muslim rites in 1998, and one daughter was born (in 1999) as a result of the marriage. The wife brought a Rule 43-application for maintenance of herself and her child *pendente lite*. Her husband argued *inter alia* that they had already been divorced in terms of Islamic law. A civil-divorce action was pending between the parties wherein the wife claimed a (secular) decree of divorce as well as post-divorce maintenance for herself and her minor daughter. Leaving aside the arguments about the status of the Muslim marriage and divorce in terms of South African law that would fully be canvassed only at trial, Revelas J confirmed the decisions in earlier cases that, notwithstanding the fact that the parties were married in terms of Muslim rites, a party was not precluded from obtaining relief in terms of Rule 43. The court therefore found that the wife was entitled to maintenance *pendente lite* (in the civil courts), irrespective

1441 *Khan v Khan supra* 279.

1442 *Khan v Khan supra* 281.

1443 *Khan v Khan supra* 283.

1444 Mention must, however, be made of the fact that whilst the husband bears the primary duty of support towards his wife and children during the subsistence of the marriage, he is obligated to provide the wife with maintenance for only three months where the marriage is dissolved. See para 3 4 1 3 of this thesis.

1445 *Cassim v Cassim* (Part A) (TPD) (unreported case number 39543/2006 dated 2006-12-15; and *Jamalodeen v Moola* (NPD) unreported case number 1835/06, as read *with Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W).

1446 [2009] JOL 23733 (ECP).

of whether the husband had uttered the three *talaqs* or not.[1447] The respondent was *inter alia* ordered to pay maintenance to the applicant and their minor daughter to the amount of R2500 and R3000 respectively, presumably until the date of the (civil) divorce-court decision.[1448]

In *Hoosain Dangor*[1449] the applicant, Ms Hoosain brought an application in terms of Rule 43 of the Uniform Rules of Court for interim maintenance for herself and her minor daughter, as well as a contribution towards the costs in the main divorce order.[1450] The court held that interim maintenance is part and parcel of the general duty of a husband to support his wife and children, and the mere fact that the parties are married in terms of Muslim rites, does not preclude the husband from fulfilling that duty.[1451]

Whilst the decisions above appear to be a ground-breaking decisions, as they allow Muslim wives the opportunity to claim post-divorce maintenance for a period longer than the three-month *iddah* period where they are married in terms of Islamic law, they are in fact contrary to the principles of Islamic law as a divorced woman is only entitled to maintenance from her ex-husband for three months after the divorce.[1452]

In *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another*[1453] the issue of a spouse's claim to the other spouse's pension interest in terms of a divorce order was adjudicated on by the pension funds adjudicator. In this case the marriage concluded in terms of Muslim rites between the complainant, Ms Tryon and her former spouse, Mr Wade, was dissolved on 21 September 2007 in terms of the tenets of Islamic law.[1454] The dissolution of the marriage and the settlement

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1447 Para 13. The court noted that a divorce in Muslim law comes into effect after notification by the husband to the wife of the divorce (*talaq*) three times (para 2).

1448 The wife, in the main civil divorce action, is claiming recognition of her Muslim marriage in terms of South African law; in the alternative, that the Marriage Act 25 of 1961 is unconstitutional in so far as it does not recognise Muslim marriages. In the further alternative, she seeks a declaratory order regarding the Divorce Act 70 of 1979 to include marriages concluded in terms of Islamic law (para 3).

1449 *Supra*.

1450 *Hoosein v Dangor supra* 57.

1451 *Hoosein v Dongor supra* 65. See also Abrahams-Fayker 2011 *Feminist Africa* 55.

1452 See para 3 4 1 3 of this thesis. There is no authority in terms of Islamic law which supports the position that a woman is entitled to maintenance after the period of *iddah* has expired.

1453 Unreported case no: PFA/GA/8796/2011/TCM.

1454 *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another supra* para 2.

agreement between the parties was made an order of the South Gauteng High Court on the 21 September 2011.[1455] In terms of the settlement agreement the complainant was entitled to fifty percent of the value of the fund. Furthermore, in terms of the settlement agreement, Mr Wade undertook to take all reasonable steps to ensure that the complainant receives payment of the fifty percent of the value of the fund.[1456] To this extent, he also undertook to be personally liable for the payment of an amount equal to the fifty percent value of the fund, if the pension fund fails to make payment to Ms Tryon. The pension fund failed to make payment of Ms Tryon's share of the pension interest according to the settlement agreement.[1457]

The issue that the pension fund adjudicator had to decide was whether or not a spouse married in terms of Muslim rites could share in the other spouse's pension interest on divorce.[1458] The adjudicator ruled that a spouse married and divorced only in terms of Islamic had a right to share in the other spouse's pension interest on divorce.[1459] The member spouse's retirement fund would have to make payment to the non-member spouse if the agreement reached between the spouses regarding the division of pension interest reflects this and it has been made an order of court. This case illustrates once again that despite the court coming to the assistance of the Muslim wife, the decision of the pension fund adjudicator is contrary to the principles of Islamic law as spouses to Muslim marriage are not entitled to share each other's pension interest at divorce.[1460]

In the decision of *Faro v Bingham NO and Others*[1461] the vulnerability of women married in terms of Muslim rites, and the consequences of the lack of legislation regulating the position of persons married by Muslim rites, as well as the dissolution of

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1455 *Ibid*.

1456 *Ibid*.

1457 *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another supra* para 3.

1458 *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another supra* para 5.

1459 *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another supra* para 6.

1460 See para 3 4 1 6 of this thesis.

1461 Delivered on 25 October 2013 by the Western Cape High Court (WCHC); (4466/2013) [2013] ZAWCHC 159.

the marriage, was once again highlighted.[1462] In this case the applicant, Tarryn Faro, married Ely according to Muslim rites in 2008. As a result of an argument between Faro and Ely, the latter was granted a *talaq* on 24 August 2009.[1463] Faro was pregnant at the time and the couple decided to reconcile shortly after the 24 August 2009, and no further *talaq* was pronounced before the death of her husband on 4 March 2010.[1464] According to Islamic law, a *talaq* can be revoked by the parties resuming sexual intercourse during the period of *iddah*.

Ely died intestate and Faro was appointed as executrix of his estate on 21 April 2010.[1465] Faro was unaware of the fact, that mere weeks before her appointment as executrix, Naziema Bardien, Ely's daughter from his previous marriage, had obtained a certificate from the Muslim Judicial Council (MJC), declaring that the marriage between Faro and Ely had been annulled.[1466] Owing to Faro's difficulty in proving that she was indeed married to Ely at the time of his demise, the Master of the High Court informed Faro that it would not be possible to wind up the estate until the dispute in respect of her marital status had been resolved.[1467] In June 2010 the MJC issued a letter confirming that Faro and Ely were married at the time of his death.[1468] The letter by the MJC was issued subsequent to an affidavit by the applicant concerning the post-*talaq* reconciliation being submitted to the MJC. Faro's affidavit was corroborated by affidavits by Ely's son from a prior marriage, as well as from a social worker.[1469] The confirmation letter from the MJC was withdrawn when Ely's son from the previous marriage denied that there had been a reconciliation between his father and Faro, and that the previous affidavit was blank when he signed it.[1470] The *talaq* between Faro and Ely therefore stood.[1471]

1462 *Faro v Bingham NO & Others supra* para 1.
1463 *Faro v Bingham NO & Others supra* para 3.
1464 *Faro v Bingham NO & Others supra* para 4.
1465 *Faro v Bingham NO & Others supra* para 5.
1466 *Ibid*.
1467 *Faro v Bingham NO & Others supra* para 6.
1468 *Ibid*.
1469 *Ibid*.
1470 *Faro v Bingham NO & Others supra* para 7.
1471 *Ibid*.

As a result Faro, together with her two minor children, was forcefully evicted from the marital home by Ely's children from his previous marriage. The result was that she was left destitute and ended up living in shelters or on the street. Her minor children were taken into care.[1472] Faro sought relief in the Cape High Court in March 2013.[1473] The initial ruling of the Master of the High Court was set aside by the WCHC.[1474] The WCHC instructed the replacement executor to provide for her claim in the liquidation and distribution account as a spouse in terms of the Intestate of Succession Act and survivor in terms of the Maintenance of Surviving Spouses Act.[1475] As a result of the numerous delays with regard to the enactment of the MMB into legislation, the presiding judge issued the following warning in the Faro case:

> "There may come a time when, owing to the continued lethargy or paralysis on the part of the executive promoters of legislation in this field, a court will need to intervene."[1476]

As a result, the court ordered the Minister of Justice and Constitutional Development to file a supplementary affidavit by 15 July 2014, detailing the progress made with regard to the enactment of the MMB into legislation.[1477]

This case again highlights the vulnerability of women in Muslim marriages.[1478] Because Muslim marriages are not legal in South Africa, unlike civil marriages, there are no protective measures in place. Similarly the protective measures afforded by the Divorce Act are not enjoyed by parties married in terms of Muslim rites. Parties to a Muslim marriage, more so women, are not always in a position to legally enforce their Islamic rights, and can furthermore not hold the *Ulama* accountable should discriminatory decisions be made.

1472 *Faro v Bingham NO & Others supra* para 9.

1473 *Faro v Bingham NO & Others supra* para 17.

1474 *Faro v Bingham NO & Others supra* para 32.

1475 *Ibid*.

1476 *Faro v Bingham NO & Others supra* para 44.

1477 *Faro v Bingham NO & Others supra* para 47(c)(ii) & (iii).

1478 http://voices.news24.com/saber-jazbhay/2013/10/once-more-under-the-microscope-how-vulnerable-are-muslim-women-in-relogiously-sanctioned-but-unregistered-marriages (accessed 2013-11-15).

In *Rose v Rose and Others*[1479] the question arose whether the proprietary consequences of a marriage concluded in terms of Muslim rites only, can be regulated by the Divorce Act where the marriage is subsequently terminated by the husband issuing his wife a *talaq.* In this case the parties concluded a marriage in terms of Muslim rites in March 1988 whilst the husband was already civilly married to another party in terms of the Marriage Act.[1480] The marriage between the plaintiff and defendant was subsequently annulled by the Muslim Judicial Council on 20 July 2009.[1481] The plaintiff proceeded to institute action against her ex-husband (first defendant) in the Western Cape High Court claiming, firstly, the payment of one thousand rand monthly maintenance from the date of the annulment of the marriage or alternatively at the expiration of her *iddah* until her death or remarriage as contemplated in terms of section 7(2) of the Divorce Act; secondly, that the first defendant's pension interest in the third defendant[1482] be declared to be part of his assets; and lastly, that the third defendant be ordered to pay the plaintiff half of the first defendant's pension fund as valued at the 23 October 2008.[1483]

In consideration of the plaintiff's claim the court identified the following two issues:[1484]

(a) whether the marriage between the parties concluded in terms of Muslim rites was valid notwithstanding the prior civil marriage between the defendant and another woman;
(b) whether the first defendant's prior existing civil marriage would prevent the plaintiff from claiming relief in respect of the proprietary consequences of her Islamic marriage to the first defendant.

In respect of the first issue, the court held that the plaintiff's entitlement to the relief set out in the stated case was not dependent on a determination of the validity or invalidity of the Islamic marriage entered into with the first defendant.[1485] The High Court

1479 [2015] 2 All SA 352 (WCC).
1480 In other words, he was legally married to another woman when he concluded the marriage in terms of Muslim rites with the plaintiff. The civil marriage was concluded in 1975.
1481 *Rose v Rose and Others supra* 354 para 11.
1482 Transnet Retirement Fund was cited as the third defendant.
1483 *Rose v Rose and Others supra* 357 para 29.
1484 *Rose v Rose and Others supra* 355 para 17.
1485 *Rose v Rose and Others supra* 357 para 32.

adopted the approach of the Constitutional Court[1486] in respect of Muslim marriages and subsequently held that for the purposes of South African law, the plaintiff's marriage to the first defendant was not considered to have been validly contracted.[1487]

In consideration of the second issue, the Court stated that the plaintiff was in essence seeking to challenge the legal effect of the *talaq*, in particular seeking the regulation of the proprietary consequences of her Islamic marriage by the Divorce Act. In this respect, the court held that a marriage as contemplated by the Divorce Act must be considered or interpreted to include a Muslim marriage.[1488] Furthermore, the court held that it would be unconstitutional to afford protection to spouses in monogamous Muslim marriages but not those in polygamous Muslim marriages.[1489] Therefore, the first defendant's prior civil marriage did constitute a bar to any claim the plaintiff might have to the relief sought by her.[1490] In other words, the court held that a wife married according to Muslim rites could invoke sections 7(2) and (8) of the Divorce Act to claim for post-divorce maintenance and a share of her husband's pension interest.[1491]

Prior to the decision in *Rose v Rose and Others* parties who concluded a marriage in terms of Muslim rites could not claim their share of the assets of their marriage to their former husband's if their husband was already civilly married to another woman at the time that he married her. The decision in *Rose v Rose and Others* changed this position as the court took cognizance of the fact that Muslim men often practise polygyny and that their polygamous marriages can be civil, religious or customary. Furthermore the mere fact that a Muslim marriage is polygamous should not prejudice the spouses to the union.[1492]

Whilst it is acknowledged that the decision in *Rose v Rose* and Others brought relief to the lived reality of the plaintiff who had been married to the first defendant for more

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1486 *Rose v Rose and Others supra* 357 para 33.

1487 *Rose v Rose and Others supra* 361 para 61.

1488 *Rose v Rose and Others supra* 360 para 51.

1489 *Rose v Rose and Others supra* 360 para 52.

1490 *Rose v Rose and Others supra* 361 para 61.

1491 *Ibid*.

1492 Heaton & Kruger are, however, of the opinion that the court's decision in *Rose v Rose* is incorrect because any marriage that a party to an existing civil marriage concludes with a third party is void due to the monogamous nature of civil marriages. See Heaton & Kruger *South African Family Law* 246.

than twenty years, this decision is once again in conflict with the principles and rulings of Islamic law as the ex-wife is not entitled to claim a share from her husband's pension interest, and she is also not allowed to claim maintenance after the lapse of the *iddah* period.[1493]

From the above discussion it is evident that prior to the advent of the present constitutional era, the South African courts, apart from certain statutory exceptions, consistently refused to recognize and give effect to Muslim marriages because they were potentially polygamous, and therefore regarded as being contrary to public policy. After the enactment of the interim Constitution in 1993, and the final Constitution in 1996, the fundamental values of the Constitution took precedence and the courts, although not granting full recognition to Muslim marriages, were prepared to grant *ad hoc* recognition to the consequences that flowed from Muslim marriages. Whilst one must welcome the protection afforded by the courts, it must be acknowledged that these decisions are often arbitrary, contextual in nature and are of an interim nature. The judiciary has also in none of these decisions granted legal recognition of Muslim marriages.

Notwithstanding the fact that the decisions in the cases discussed above alleviated the plight of the applicants and provided some measure of relief to the lived reality of the applicants in these cases, cognizance must be given to the fact that these decisions are contrary to the teachings and rulings of Islam. The general rule in Islamic law is that a woman is entitled to maintenance only during the *iddah* period, and thereafter she ceases to be the responsibility of her ex-husband.[1494] A claim for maintenance against the estate of her deceased husband in terms of the Maintenance of Surviving Spouses Act, which extends over and above the *iddah* period, is against the rulings of Islamic law. Furthermore, a Muslim husband is not allowed to lodge a claim in terms of the Maintenance of Surviving Spouse Act, as in terms of Islamic law he bears the primary duty of support and cannot claim maintenance from his wife's estate. Parties to Muslim marriages are also not entitled to claim to claim a share from her husband's pension interest as this is contrary to the principles of Islamic law.

1493 See para 1 2 of this thesis.

1494 See para 3 4 1 3 of this thesis.

Furthermore, the decisions by courts granting maintenance orders in favour of Muslim wives post-divorce appear to be in conflict with the majority of rulings and teachings of Islamic law that once the *iddah* period has expired, the wife is not entitled to claim for maintenance from her former husband.[1495] To be better aligned with the *Shari'ah*, the applicant in the *Mahomed* case, for example, should rather have claimed for child-minding services which she was rendering by taking care of their minor daughter.

Although these decisions provided much needed relief to the applicants, they will therefore not be acceptable to any religious authorities. Muslims who wish to remain faithful to the teachings and principles of Islam are therefore in a dilemma, and may be ostracized by the Muslim community if they follow the decisions in cases which conflict with Islamic law.[1496] The need for legislation recognizing and regulating MPL, Muslim marriages in particular, has become increasingly prevalent and a matter of urgency in the light of court decisions that are in conflict with Islamic law.

4 5 STATUTORY RECOGNITION OF RELIGIOUS MARRIAGES

The legislature has in certain statutes explicitly included spouses who are married in terms of religious law. These statutes do this by defining the term "marriage" to include a religious marriage, or by defining the term "spouse" to include a partner married by religious law.[1497] For the purposes of the Births and Deaths Registration Act,[1498] the Children's Act,[1499] the Domestic Violence Act,[1500] the Insolvency Act[1501] and the Criminal Procedure Act,[1502] the term "marriage" includes a customary union concluded according to indigenous law or custom, and a marriage solemnized or concluded according to the tenets of any religion. The Income Tax Act,[1503] the Transfer Duty

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1495 Qasmi *The Complete System of Divorce* (2002) 217. There are exceptions such as in India as seen in the decision of *Mohd Ahmed Khan v Shah Banu Begum & Ors supra*.

1496 Moosagie "Is the Muslim Marriages Bill Absolutely Necessary? Presented at the Muslim Marriages in South Africa Workshop held on 14 December 2010; Patel Unpublished document in the form of questions and answers.

1497 See para 1 2 of this thesis for examples of statutes that grant legal recognition to religious marriages.

1498 S 2 of the Births and Deaths Registration Act 51 of 1992.

1499 S 1 of the Children's Act 38 of 2005.

1500 S 1 of the Domestic Violence Act 116 of 1998.

1501 S 21(3) of the Insolvency Act 24 of 1936.

1502 S 195(2) of the Criminal Procedure Act 51 of 1977.

1503 S 1 of the Income Tax Act 58 of 1962.

Act,[1504] the Estate Duty Act,[1505] the Pension Funds Act,[1506] the Civil Proceedings Evidence Act,[1507] the Intestate Succession Act[1508] and the Maintenance of Surviving Spouses Act[1509] define the term "spouse" to include a partner in a union recognized as a marriage in accordance with the tenets of any religion. The statutory recognition of Muslim marriages is indicative of the plurality of South African society.

4 6 THE CONSTITUTION AND ITS EFFECT ON THE STATUS AND CONSEQUENCES OF MUSLIM MARRIAGES

Having considered the various approaches followed by the courts, an evaluation of these approaches in the light of the Constitution needs to be considered. Of particular importance are the relevant provisions of the Bill of Rights that pertain broadly to religion, culture, dignity and equality. One of the principles that the Constitution promotes is that of tolerance of difference in that it seeks to protect, amongst others, the rights of different religious communities and their members to practice and manifest their religion, and to have religious associations.[1510]

4 6 1 FREEDOM OF RELIGION, CONSCIENCE, THOUGHT, BELIEF AND OPINION

In terms of section 15(1) of the Constitution everyone has the right to freedom of conscience, religion, thought, belief and opinion. Included in the right to religious freedom is the right to hold religious beliefs, to propagate religious doctrine and to manifest religious belief in worship and practice.[1511] Section 15(1) appears to grant to those who wish to be married under Customary, Hindu, Jewish or Muslim law the freedom to do so because it involves a decision based on conscience, thought, belief and opinion, and in the case of Muslim, Hindu and Jewish law, it also involves a decision based on religion.

1504 S 1 of the Transfer Duty Act 40 of 1949.

1505 S 1 of the Estate Duty Act 45 of 1955.

1506 S 1 of the Pension Funds Act 24 of 1956.

1507 S 10A of the Civil Proceedings Evidence Act 25 of 1965.

1508 S 1 of the Intestate Succession Act 81 of 1987.

1509 S 1 of the Maintenance of Surviving Spouses Act 27 of 1990.

1510 Amien "The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa" 107.

1511 Smith "Freedom of Religion under the Final Constitution" 1997 *SALJ* 217.

As has been discussed earlier, despite the fact that marriages can be concluded in accordance with Muslim rites, these marriages and the consequences flowing from them do not enjoy the same protection that is accorded to civil marriages. This seems to be contrary to the provisions of section 15. Although section 15 does not deny the State from recognizing or supporting religion, it does require the State to treat all religions equally. The State is required to act fairly and equitably in its dealings with the various religions in South Africa.[1512] The Constitution does not allow the explicit endorsement of one religion over others, as this would amount to a threat to the free exercise of religion. When governmental prestige, power and financial support are placed behind a particular religious belief, the result is that religious minorities are indirectly forced to conform to the religion officially approved by the Government.[1513] Fairness and even-handedness in relation to diverse religions are necessary components of freedom of religion.[1514]

In this respect, Sachs J in the case of *S v Lawrence*; *S v Negal*; *S v Solberg*[1515] commented as follows:

> "The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose beliefs, grant privilege to impose advantages on adherents of any particular beliefs, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalize people who have different beliefs."

Furthermore, section 15(3)(a) does not prevent legislation from recognizing (i) marriages concluded under any tradition or a system of religious, personal or family; or (ii) systems of personal and family law under any tradition, or adhered to by any persons professing a particular religion; and secondly, recognition in terms of paragraph (a) must be consistent with section 15 and other provisions of the Constitution.[1516]

1512 *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) 1217A.

1513 *Ibid*.

1514 *S v Lawrence*; *S v Negal*; *S v Solberg supra* 1218B-C.

1515 *S v Solberg supra* 1218B-C.

1516 In interpreting s 15 reference must be to the interpretation clause, s 39, which provides:
"(1) When interpreting the Bill of Rights, a court, tribunal or forum –

Section 15(3) indicates that, while recognition of religious legal systems or polygamous marriages concluded according to religious rites, would be granted legal recognition, this recognition must be consistent with the Bill of Rights and other provisions of the Constitution.[1517] The provision that the recognition of marriages, Muslim marriages in particular, must be consistent with the other provisions of the Constitution is bound to create conflict. Goolam[1518] states the following with regard to this conflict:

> "The reason for this is that the Bill of Rights is individual-centred, based on Western ideas while Islamic law, like African law, has as its underlying principle the idea of communitarianism. The fundamental question which needs to be answered, therefore is: Why should Western ideas and philosophy serve as the yardstick, particularly in South Africa, an African country? A further crucial question is: Why should a legal system such as Islam, based as it is on divine revelation, play second fiddle to a secular, human legal system?"

Religious-based marriages, giving effect to personal and family law, are often regarded as discriminating against women[1519] on the grounds of gender and sexual orientation. It is submitted that this discrimination should be permissible in so far as it is required by the tenets of the religion.[1520]

It is also submitted that polygamy should not be singled out as the predominant characteristic of religious marriages currently not enjoying legal recognition. The institution of marriages performed under religious rites should rather be viewed holistically so as to determine whether indeed there is discrimination against women, and whether such marriages do in fact violate gender equality. It is further submitted

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(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

1517 Currie *et al The Bill of Rights Handbook* (2005) 355.

1518 Goolam in Rautenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems* 120.

1519 *Eg,* polygamy is seen as discriminatory against women; in Jewish and Muslim law it is easier for men to divorce women than for women to divorce men.

1520 Currie *et al The Bill of Rights Handbook* 340.

that if marriages performed under religious rites are not granted legal recognition, this will merely compound the inequalities presently experienced by women in a polygamous marriage and those who are not in such a relationship, as well as the inequalities experienced between the various women married to the same man.

4 6 2 THE RIGHT TO CULTURE

Section 30 of the Constitution provides that "everyone has the right to participate in the cultural life of their choice" and "to enjoy their culture, practise their religion and use their language". The deduction that can be drawn from section 30 is that potentially polygamous marriages should be granted legal recognition and protection if they involve marrying according to their culture. Culture plays a very important role in the lives of Muslims to the extent that the Islamic legal position has become part of the local Islamic culture, and therefore, to be a practising Muslim, one would enter into a marriage by Muslim rites according to the tenets of Islam. This would usually involve the cultural practices of the Muslim community. Islam does not differentiate between religion, law and morals.

Section 30 is, however, subject to the general provision that the right to culture and religion should not be in conflict with any other provision as contained in the Bill of Rights. The decision in *Christian Education South Africa v Minister of Education*[1521] illustrates this principle. In this case the applicant, an association representing 196 independent Christian schools, challenged the constitutionality of section 10 of the South African Schools Act[1522] that prohibited the administration of corporal punishment. The applicant contended that it constituted a violation of religious and cultural freedom, since corporal punishment of children was a vital part of the Christian religion.[1523] The High Court held that the applicant had not shown that the belief in corporal punishment was a sincerely-held religious belief, nor that the prohibition constituted a substantial burden on the freedom of religion of the association's members, since other forms of punishment and correction of children that were acceptable to the members of the association, were not prohibited by the South African

1521 1999 (9) BCLR 951 (SE).

1522 84 of 1996.

1523 Currie *et al The Bill of Rights Handbook* 635.

Schools Act.[1524] With regard to the argument that the prohibition was a violation of the right to practice a religion in community with others in terms of section 31(1), the court held that because corporal punishment was an infringement of the right to dignity and freedom from degrading punishment,[1525] contained in the Bill of Rights,

> "to allow corporal punishment to be administered at Applicant's schools, even if it is done in the exercise of the religious beliefs or culture of those involved, would be to allow the applicant's members to practice (sic) their religion or culture in a manner inconsistent with the Bill of Rights in contravention of s 31(2) of the Constitution."[1526]

The matter was taken on appeal to the Constitutional Court.[1527] The Constitutional Court declined to decide whether the prohibition of corporal punishment was a violation of section 31, or whether corporal punishment was a practice inconsistent with the Bill of Rights for purposes of section 31(2). However, the court remarked that section 31(2) ensures that members of communities cannot use their right to culture and religion to shield practices which offend the Bill of Rights.[1528]

From the discussion above, it is apparent that court interpreted the right to freedom of religion as not being an absolute right and that it can be limited for the greater good[1529] as was the case in *Christian Education South Africa v Minister of Education* where the rights of parents to practise their religion was restricted when it was contrary to the best interests of the child.[1530] Rautenbach submits where there is a conflict between the right to freedom of religion and equality, the latter will trump the former as both sections 30 and 31 of the Constitution are subject to the qualification that the exercise of freedom of religion must not be in conflict with the other provisions of the Constitution.[1531] She, furthermore, submits that, where there is a conflict between gender equality and the religion and cultural-related right, the wording of sections 30

1524 84 of 1996.

1525 S 10 of the Constitution.

1526 *Christian Education South Africa v Minister of Education supra* 1999 965B-C.

1527 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

1528 *Christian Education South Africa v Minister of Education supra* 774A-C.

1529 *Christian Education South Africa v Minister of Education supra* paras 29-31.

1530 *Christian Education South Africa v Minister of Education supra* para 44.

1531 Rautenbach and Bekker *Introduction to Legal Pluralism* 84.

and 31 of the Constitution dictates that the right to equality outweighs culture and religion.[1532]

Whilst the arguments above are noted, it is submitted that where the parties voluntarily and with informed consent submit themselves to the religion Islam, they should be allowed to practice their religion as it is prescribed by the *Quran* and the *Sunnah* of the Prophet Muhammad (PBUH), even where these practices conflict with the Bill of Rights.[1533] Furthermore, if the parties voluntarily and with informed consent enter into a marriage in terms of Muslim rites, the consequences arising from the marriage should apply even if this is contrary to the western idea of equality.

4 6 3 THE RIGHT TO HUMAN DIGNITY

Section 10 of the final Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected".[1534] The protection of human dignity is inherent in the protection of virtually all other rights, to the extent that it can be regarded as a pre-eminent value in the Constitution, even more so than the right to life.[1535] All rights contained in the Bill of Rights must be interpreted to promote the Constitution's ambition of creating an "open and democratic society based on human dignity, equality and freedom".[1536] In describing the right to human dignity and the right to life as the most important human rights, the Constitutional Court in *S v Makwanyane*[1537] stated the following:

> "Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in … [the Bill of Rights]."[1538] and

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."[1539]

1532 *Ibid*.

1533 See para 1 2 of this thesis.

1534 S 10 of the final Constitution corresponds with s 10 of the interim Constitution.

1535 Devenish *Commentary on the South African Constitution* 51.

1536 S 39 of the Constitution of the Republic of South Africa, 1996.

1537 1995 (3) SA 391 (CC) para 144.

1538 *S v Makwanyane supra* para 328.

1539 *S v Makwanyane supra* para 144.

Human dignity is not only an enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights and it is further of central importance in the limitation enquiry in terms of section 36 of the Constitution.[1540] In respect of marriage and family life, Van Heerden J held in *Dawood, Shalabi, Thomas v Minister of Home Affairs*[1541] that the right to dignity must be interpreted to afford legal protection to the institutions of marriage and family life, with this protection extending at the very least to the core elements of these institutions, namely, the right and duty of spouses to live together as spouses in community of life.[1542]

The above approach, as expounded by Van Heerden J was confirmed by the Constitutional Court,[1543] where O'Regan J held that the Constitutional Court indeed protected the rights of persons to marry freely and to raise a family.[1544]

In this respect, the Constitutional Court elaborated as follows:

> "The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfillment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right of dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right of dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity."[1545]

From the discussion above it could be understood to indicate that potentially polygamous marriages could and should be recognized so as to uphold the dignity of persons who marry outside of the civil law. However, it is apparent from the court

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1540 Currie *et al The Bill of Rights Handbook* 278.

1541 *Supra.*

1542 *Dawood, v Minister of Home Affairs supra* para 30.

1543 *Supra*.

1544 *Dawood v Minister of Home Affairs supra* para 28.

1545 *Dawood v Minister of Home Affairs supra* para 37.

decisions discussed above that Muslim marriages and the recognition of these marriages are regarded as being prejudicial to women and therefore violate their dignity. As a result, Muslim marriages are not afforded recognition.[1546]

The two positions as set out above necessarily warrant a discussion on equality as section 9 of the final Constitution, in order to determine how the conflict between the right to equality and the right to freedom of religion should be addressed.[1547]

4 6 4 THE RIGHT TO EQUALITY

4 6 4 1 THE MEANING OF EQUALITY

(i) Introduction

Section 9(1) of the final Constitution stipulates that everyone is equal before the law and has the right of equal protection and benefit of the law. The Constitution further defines equality as including "the full and equal enjoyment of all rights and freedoms".[1548] To promote the attainment of equality, provision is made for legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.[1549] The Constitution furthermore prohibits the State, as well as any individual, from unfairly discriminating 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.[1550] For this reason the Constitution stipulates that national legislation must be enacted to prevent or prohibit such unfair discrimination.[1551] Discrimination under one of the grounds listed under section 9(3) is presumed to be unfair unless it is proved that the discrimination is fair.[1552]

The aim of section 9 is to create an egalitarian society where justice and fairness prevail, and where all people are treated as human beings with dignity and self-worth. The question which now arises is what this equality guarantee in terms of section 9

1546 Palser 1998 *Journal for Juridical Science* 89.

1547 See Chap 1 of this thesis.

1548 S 9(2) of the Constitution.

1549 S ((2) of the Constitution. See para 4 6 4 4 of this thesis.

1550 S 9(3) of the Constitution.

1551 S 9(4) of the Constitution; and see para 4 6 4 4 of this thesis for a discussion of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

1552 S 9(5) of the Constitution of the Republic of South Africa, 1996.

means for the purposes of the dilemma for spouses married in terms of Muslim rites, Muslim women in particular. This necessitates an investigation into the approach adopted by the Constitutional Court.

(ii) Non-discrimination as the core element of equality

The Constitutional Court has situated the anti-discrimination principle firmly at the heart of its approach to equality.[1553] For a claimant to succeed with an equality challenge, it will therefore almost always be necessary to frame the matter as one of "unfair discrimination" and not in terms of a general claim to equality.[1554] The approach of the Constitutional Court to view the guarantee of equality in section 9 as little more than a guarantee of non-discrimination, in effect means that the manner in which the court determines whether an impugned provision constitutes unfair discrimination, becomes extremely important.[1555] In *The National Coalition for Gay and Lesbian Equality v Minister of Justice*[1556] the Constitutional Court justified its approach with reference to the text of section 9, as well as the following to policy considerations:[1557]

- institutional aptness;
- functional effectiveness;
- technical discipline;
- historical congruency;
- compatibility with international practice; and

1553 The Constitutional Court has dealt with equality in a substantive manner in the following cases: *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC); *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC); *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC); 1997 4 SA 1 (CC); *Harksen v Lane NO* 1997 11 BCLR 1489 (CC); 1998 (1) SA 300 (CC); *Larbi-Odam v MEC for Education (North West Province)* 1997 (12) BCLR 1655 (CC); 1998 (1) SA 745 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC); and *The National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC). All, but the last of these cases actually dealt with s 8 of the interim Constitution, but when it finally had the opportunity to deal with equality in terms in s 9 of the 1996 Constitution in *The National Coalition for Gay and Lesbian Equality v Minister of Justice supra* the court proceeded on the assumption that "the equality jurisprudence and analysis developed by this Court in relation to section 8 of the interim Constitution is applicable equally to section 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions" (1530F para 15).

1554 De Vos "Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court" 2000 *THRHR* 64.

1555 Woolman & Bishop *Constitutional Law of South Africa* 35-4.

1556 *Supra* 1530-1533 paras 15-19.

1557 *The National Coalition for Gay and Lesbian Equality v The Minister of Justice supra* 1571-1572 para 123.

- conceptual sensitivity.

Sachs J elaborated on these policy considerations with the following statement:[1558]

> "By developing its equality jurisprudence around the concept of unfair discrimination this court engages in a structured discourse centred on respect for human rights and non-discrimination. It reduces the danger of over-intrusive judicial intervention in matters of broad social policy, while emphasizing the court's special responsibility for protecting fundamental rights in an affirmative manner. It also diminishes the possibility of the court being inundated by unmeritorious claims, and best enables the court to focus on its special vocation, to use the techniques for which it has a special aptitude, and to defend the interests for which it has a particular responsibility. Finally, it places the court's jurisprudence in the context of evolving human rights concepts throughout the world, and of our country's own special history."

Being mindful of criticism of the concept of equality as being labeled as "empty", "complex" and "elusive",[1559] the Constitutional Court has made a conscious decision to focus its equality jurisprudence on the concept of non-discrimination.

(iii) The centrality of human dignity

The Constitutional Court has furthermore adopted the approach that at its core the equality guarantee protects individuals' "human dignity".[1560] The centrality of human dignity for equality jurisprudence was first established in *President of Republic of South Africa v Hugo*,[1561] where Goldstone J made the following remark:[1562]

> "The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."

The court placed human dignity at the heart of its equality enquiry. The court furthermore provided a broad and expansive definition of human dignity as it stated that human dignity will be impaired wherever a legally relevant differentiation treats

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1558 *Ibid*.

1559 Fagan "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" 1998 *SAJHR* 220.

1560 De Vos 2000 *THRHR* 65.

1561 *Supra*.

1562 *President of Republic of South Africa v Hugo supra* 728H-729B.

people as “second-class” citizens or “demeans them” or “treats them as less capable for no good reason”, or otherwise offends “fundamental human dignity”, or where it violates an individual’s self-esteem and personal integrity.[1563]

The view of equality as inextricably linked to the concept of human dignity, has been reiterated in subsequent Constitutional Court judgments[1564] and has further been explained in *Prinsloo v Van der Linde*.[1565] The court gave an expansive interpretation of what constitutes discriminatory treatment by adding that, not only an infringement of human dignity, but also “other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner”,[1566] could constitute a harm prohibited by the non-discrimination provisions of the Constitution.[1567] The concept of human dignity used by the court appears to be closely linked to the idea that all human beings have an equal moral worth, regardless of differences between them. Where this equal moral worth is denied by legal provisions, the court will find that there has been an impairment of “fundamental human dignity”, or that the complainant has been adversely affected in a comparably serious manner.[1568] From the discussion above, one can conclude that the concept of “fundamental human dignity” should act as a guiding factor to capture the idea of humans as equally capable and deserving of concern, respect and consideration.[1569]

4 6 4 2 FORMAL AND SUBSTANTIVE EQUALITY

As the apartheid social and legal system was based on inequality and discrimination, the right of equality is very important to the post-apartheid constitutional order. In *Brink v Kitshoff NO*[1570] the Constitutional Court stated the following:

1563 Albertyn and Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248 260.

1564 *President of the Republic of South Africa v Hugo supra* para 41; *Harksen v Lane supra* para 50.

1565 *Supra*.

1566 *Prinsloo v Van der Linde supra* 773E-774B. See also *Harksen v Lane supra* 1511G-H: “Whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.”

1567 De Vos 2000 *THRHR* 66.

1568 *Ibid*.

1569 This formulation was first used by the Canadian Supreme Court in *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 171: “The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized as human beings deserving of concern, respect, and consideration.”

1570 *Supra* para 40 (O’ Regan J).

> "Apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society."

Consequently, as a result of the legacy of inequality from the past, the constitutional commitment to equality cannot simply be understood as a commitment to formal equality. Several judgments delivered by the Constitutional Court have indicated that the Constitution guarantees substantive equality. The right to equality must also be interpreted and applied purposively and contextually, with due regard to impact and disadvantage in order that the values underlying the Constitution are promoted.[1571] It is therefore not sufficient to remove the racist laws from the books and to ensure that similar laws cannot be enacted in future, as this will result in formal equality and not substantive equality as envisaged by the Constitution.

Formal equality means sameness of treatment: the law must treat individuals in the same manner regardless of the circumstances within which they find themselves.[1572] As formal equality is blind to entrenched, structural inequality, it completely ignores actual social and economic disparities between individuals and groups. A reliance on formal equality may actually exacerbate inequality, as equality has to address actual conditions of human life, and not an abstract concept of identical treatment, which is equally applicable to all.[1573] It is for this reason that the Constitutional Court has delivered several judgments in which it has indicated that equality must be understood substantively, and not formally.[1574] The Constitutional Court has explicitly rejected the traditional, liberal conception of equality based on the notion of sameness and similar treatment.

1571 Albertyn and Goldblatt "The Decriminalization of Gay Sexual Offences: *National Coalition of Gay and Lesbian Equality v The Minister of Justice* 1998 6 BCLR 726 (W)" 1999 *SAJHR* 461 462.

1572 Albertyn and Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 *SAJHR* 149 153.

1573 De Vos 2000 *THRHR* 67.

1574 *President of the Republic of South Africa v Hugo supra* 129G; *Brink v Kitshoff NO supra* 768G and *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* 1565H-1566A.

In contrast to formal equality, substantive equality examines the actual social and economic conditions of individuals and groups in order to determine whether the Constitution's commitment to equality is being upheld. Substantive equality accepts the reality of the present injustice, caused by past discrimination. As a result, those individuals or groups who were discriminated against in the past and are presently disadvantaged, are now entitled to preferential or advantaged treatment so that real equality for all will ultimately emerge in society in the future.[1575] In other words, the law should recognize the unequal life chances occasioned by race, gender, socio-economic status and a host of other factors, which affect a person's ability to compete on an equal footing.

The following example will demonstrate the differences between formal and substantive equality, as these two approaches to the equality might yield very different outcomes in practice.

The provision of benefits to employees is usually linked to length of service. The social responsibility born by women for raising children inevitably results in an interruption of their employment. The result is that women generally do not achieve the necessary length of service to qualify for benefits. A formal application of equality would not find this to be an instance of gender discrimination because of the social context, which causes the inequality, and this would not be taken into account. Substantive inequality, on the other hand, would take into account the implications of women's child-rearing roles, and would consequently find that a rule that links benefits to the length of service, discriminates against women.

It is for these reasons that the Constitutional Court has aligned itself into an understanding of equality that seeks to address and remedy material inequalities. In *President of Republic of South Africa v Hugo* the Constitutional Court stated the following:[1576]

> "We need to develop a concept of unfair discrimination which recognizes that although 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

1575 This is expressly provided for in s 9(2) which is an affirmative-action provision.

1576 *Supra* 729G-H.

> upon identical treatment in all circumstances before that goal is achieved. This view is already clear in the court's endorsement of 'human dignity' at the heart of equality jurisprudence, since it is based on the notion that all individuals have equal moral worth, not that all individuals are actually born free and equal. 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 furthers the constitutional goal of equality or not. A classification, which is unfair in one context, may not necessarily be unfair in a different context."

In the *National Coalition for Gay and Lesbian Equality* case Sachs J once again confirmed that equality should be interpreted contextually:[1577]

> "Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a person-centred rather than a formula-based position, and analyzing them contextually rather than abstractly."

In elaborating further on the Constitutional Court's substantive approach to equality, Ackermann J stated the following:

> "[i]t is insufficient for the constitution merely to ensure, through its Bill of Rights, that statutory provisions, which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[1578]

In *Brink v Kitshoff NO*,[1579] where the Constitutional Court was called upon to deal with an alleged breach of the right to equality, it indicated that the context in which equality must be judged is formed, firstly, by the constitutional text in its entirety and, secondly, by the country's recent history.[1580] Therefore, any consideration of whether a legally relevant differentiation actually constitutes a breach of section 9, will first have to take into account the history of the group or groups to which the complainant belongs. Where such provisions contribute to the creation or perpetuation of patterns of group disadvantage for groups disfavoured in the past, or groups that continue to be

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1577 *The National Coalition for Gay and Lesbian Equality v Minister of Justice supra* 1565H-1566A.

1578 *The National Coalition for Gay and Lesbian Equality v Minister of Justice supra* 1546 para 60.

1579 *Supra*.

1580 Of particular significance was the systematic discrimination suffered by black people under apartheid. Systematic patterns of discrimination on grounds other than race may have caused, and may continue to cause, considerable harm. See *Brink v Kitshoff supra* 768H-J.

disfavoured in society, it will be very difficult for the court to find the measures constitutional. However, where the legally-relevant differentiation is aimed not at the creation or perpetuation of patterns of group disadvantage, but instead is aimed at breaking down those structural inequalities, and thus at reaching for "true" or "substantive" equality, the court will be reluctant to declare the measures unconstitutional.[1581]

The Constitutional Court's approach to substantive approach to equality was further demonstrated in the case of *Daniels v Campbell NO and Others*, where it was held that:

> "The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives of women have been compelled to lead by law and by legally-backed practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women."[1582]

Therefore, as the court's approach requires a contextual approach, the ongoing structural inequality in society may be taken into account when deciding on the fairness of the discrimination.[1583]

4 6 4 3 THE CONSTITUTIONAL COURT'S ANALYSIS OF SECTION 9

In order to develop the interpretation approach to equality in a substantive and contextual manner, the Constitutional Court set out the "equality test" in *Harksen v Lane NO*.[1584] Rautenbach submits that the test developed by the Constitutional Court in the *Harksen* case is not well integrated with the right to equality as a whole, and with the general provisions as it relates to the application of the Bill of Rights.[1585] Owing to the shortcomings of the guidelines set by the Constitutional Court, they propose that the following steps should instead be followed:[1586]

(1) has there been any differentiation?

1581 *Brink v Kitshoff NO supra* 769C.

1582 *Daniels v Campbell NO and Others* para 22.

1583 De Vos 2000 *THRHR* 68.

1584 *Supra* 1511E-J.

1585 Rautenbach *Rautenbach-Malherbe Constitutional Law* (2012) 331.

1586 Rautenbach *Rautenbach-Malherbe Constitutional Law* 332. See also Woolman & Bishop *Constitutional Law of South Africa* 35-18.

(2) if so, what kind of differentiation is it?

(3) can the differentiation be justified in terms of the general-limitation clause?

From the above discussion one can deduce that an understanding of the contextual analysis within transformative-equality jurisprudence entails locating the impugned Act within real-life conditions and understanding both disadvantages and harm. This, in effect, means that the following has to be done, namely:

- the socio-economic conditions of the individuals and group concerned must be examined;
- the impact of the impugned provision on social patterns and systematic forms of disadvantage must be identified;
- the complex and compound nature of group disadvantage and privilege must be understood by looking at grounds of discrimination in an intersectional manner; and
- the historical context of the case must be fully appreciated and explored.[1587]

4 6 4 4 EQUALITY *VERSUS* RELIGIOUS-FAMILY LAWS

Equality is relevant for the discussion *in casu* as persons who enter into Muslim marriages should be treated equally in comparison to those who enter into marriages according to South African civil law. In contrast, however, potentially polygamous marriages can be regarded as being discriminatory against women on the grounds of sex and gender. In other words, potentially polygamous marriages may offend against the principle of gender and the prohibition of discrimination based on sex.

As discussed previously, Muslim marriages have been denied recognition on the ground that they are potentially polygamous. In *Ismail v Ismail*[1588] Muslim marriages were denied recognition on the ground that they violated the principle of equality in two respects: firstly, the bride is not present at the ceremony;[1589] and secondly, it is more

1587 Albertyn and Goldblatt 1998 *SAJHR* 263.

1588 *Supra*.

1589 *Ismail v Ismail supra* 1024H.

difficult for women than men to obtain a divorce.[1590] Kaganas and Murray[1591] argue that possibly the equality issue was invoked in *Ismail* merely to provide a new rationalization for old prejudices.

In a similar vein, Roodt argues that religion-based marriages, giving effect to personal and family law, are often regarded as discriminating against women[1592] on the grounds of sex and gender equality and that Muslim marriages offend against the principle of equality in that:[1593]

(i) the husband determines the composition of the family;
(ii) women bear the responsibility for the children yet, have no rights over them;
(iii) husbands are often unable to give sufficient money and attention to all their wives; and
(iv) women are allowed to be dominated, sexually stereotyped and treated as property.

In addition to what is stated above, when viewed from a western ideological perspective, the following aspects of *Shari'ah* is regarded as discriminatory and infringes on women's right to equality: polygyny, *iddah*, witnesses to a marriage, maintenance, *hilala*, divorce as the exclusive right of the husband and inheritance.

Customary law is similarly patriarchal in nature, yet it is legally recognized in South Africa. In terms of South African common-law the husband is the head of the family.[1594] The common-law rule that the husband is the head of the family was expressly incorporated into section 13 of the Matrimonial Property Act.[1595] In 1993, the legislator attempted to remove the position of the husband as head of the family by deleting the reference to it from section 13.[1596] However, as the true source of the rule regarding

1590 *Ibid*.
1591 1991 *Acta Juridica* 116 125.
1592 For example, in Jewish and Muslim law it is easier for men to divorce women than for women to divorce men.
1593 Roodt "Marriages under Islamic Law and Patrimonial Consequences and Financial Relief" 1995 *Codicillus* 50 57.
1594 Voet 23.4.20.
1595 88 of 1984.
1596 General Law Fourth Amendment Act 132 of 1993.

the husband's headship is the common law, the deletion of it from section 13, merely reinstated the common-law position.[1597] South African law of marriage is therefore also patriarchal in nature.[1598]

Furthermore, it should be borne in mind that monogamy is also no guarantee for equality, and that the treatment of women as property, gender stereotyping and domination are issues not limited to polygyny. Whilst it is acknowledged that polygyny could discriminate against women and cause equality, as Islamic law only allows polygyny whereby the wife is not afforded the liberty of taking another husband. However, it should be pointed out that women who do enter into potentially polygamous marriages are not forced to do so, as consent on the part of both parties to the marriage is required. In other words, women who choose to live according to a particular religious subject, voluntarily subject themselves to the laws of that system, even if this means that they are unequal to their male counterparts. Rautenbach, however, submits that to accept this argument would serve as a deterrent to transformation in all spheres of South African society, based on equality and human dignity.[1599] The Constitution places the State under duty to promote the achievement of equality.[1600] Equality is a right that applies and is available to all South African citizens, irrespective of their religious affiliation.

Amien, furthermore, submits that while a second, third or fourth wife may choose to enter into a polygynous marriage, this is not the case with first wife as her consent is not required where her husband wishes to enter into a subsequent marriage.[1601] It is submitted that this argument is flawed as when the first wife enters into a marriage in terms of Muslim rites she does this with the knowledge that her marriage is potentially

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1597 Heaton & Kruger *South African Family Law* 60.

1598 Heaton & Kruger *South African Family Law* 60. These authors submit that the rule regarding the husband's headship would have to be declared unconstitutional if it were ever challenged as it clearly constitutes unjustifiable unfair discrimination on the ground of sex and gender and also constitutes an unjustifiable infringement of wives' right to dignity.

1599 Rautenbach "Gender Equality and Religious Family Laws in South Africa 2003 3 (1) *Quarterly Law Journal* 1 13.

1600 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) para 62.

1601 Amien A Consideration of the Conflict between Women's Right to Equality and Freedom of Religion when Muslim Family Law is Assimilated, Accommodated or Integrated into Multicultural Constitutional Jurisdictions 33.

polygynous and that her husband may or may not in future enter into subsequent marriages.

Notwithstanding these arguments advanced by Rautenbach and Amien, it is submitted that women have the freedom of choice and where they choose to express this freedom by following adhering to the principles of Islamic law, the consequences of this choice must be embraced. In practice, the majority of Muslims spouses will conclude a marriage in terms of Islamic rites, as the consequences of not doing so entails not being married in the eyes of God and the community. Furthermore, the recognition of Muslim marriages would entail the proper regulation of polygyny whereby a man who wishes to enter into a subsequent marriage or marriages must be in a financial position to do so.

The husband has the right to unilaterally terminate the marriage without having to show good cause for the termination. He simply has to issue his wife with a *talaq*, and the marriage will be deemed to be terminated. In contrast, the wife can only have the marriage dissolved if she can satisfy a religious authority that her husband is guilty of misconduct. Doi submits that the reason for the granting the man the power of unilateral divorce lies in the that fact during the period of menstruation, although it is a normal physiological process, the woman's mental energy, muscular strength and dexterity are somewhat impaired during this period of time.[1602] He further submits that during the menstruation period there appears to be increased levels of nervous tension and greater muscular excitability.[1603] During the time of menstruation, psychologically the woman appears to experience greater impressionability, suggestibility, irritability, sensitivity and, to a variable extent, diminished self-control.[1604] Doi furthermore argues that, if women were given the power of unilateral divorce, there would be an increase in the divorce rate as a menstruating woman might be upset by trivial matters which would at any other time not provoke a discernible response, and she would then be more inclined to divorce her husband. Doi is of the opinion that, despite the husband having the unilateral right of divorce, Muslim men are abstemious with their power of

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1602 Doi *Women in Shari'ah* 94-95. The argument submitted by Doi is, however, flawed as Islamic law does not allow a divorce to be pronounced during the menstruation period. See para 3 3 1 6 of this thesis.

1603 *Ibid.*

1604 *Ibid*.

divorce, as the ethos of Muslim society affords a potent check on the wanton and recklessness of the power of the unilateral divorce by Muslim husbands.[1605] It is, however, submitted that the difference between men and women, whether perceived or real, biologically or socially, should not be allowed to justify discrimination against women.[1606]

Whilst *hilala*, *iddah*, witnesses to a marriage and spousal maintenance at the dissolution of the marriage appear to be discriminatory with regard to women's right to equality, these are all part and parcel of Islamic law and cannot changed merely to conform to western ideologies of equality. Adherents of Islam, therefore, cannot choose to comply with some aspects of Islamic law and discard those that do not suit them.

Furthermore, in terms of Islamic rules of inheritance, a woman inherits half of what her male counterpart stands to inherit.[1607] This ruling as stipulated in the *Quran* is in conflict with section 9(4) of the Constitution, as it discriminates against women on the basis of sex or gender. The reasons advanced by Islamic jurists for the seemingly unequal position Muslim women find themselves in with regard to inheritance are based on economic considerations and her position in the Islamic social structure, which is predominately patriarchal in nature.[1608] Doi submits that as Muslim women receive a dower and maintenance, this excludes them from a full share in terms of the inheritance, as the provision of the dower and the maintenance are exclusively the responsibility of the man.[1609] Other reasons advanced for the half-share ruling is that women are incapable of defending the community on an equal basis as her male counterparts,[1610] and women are free of the economic responsibilities that borne by their male counterparts.[1611]

1605 Doi *Women in Shari'ah* 96.

1606 Badat *A Socio-legal Analysis of the Position of Women in South Africa* (LLM-dissertation, University of Natal 1999) 1 *et seq.*

1607 *Quran* chap 4, verse 11.

1608 Doi *Women in Shari'ah* 163.

1609 *Ibid*.

1610 Fyzee *Outlines of Muhammadan Law* (1974) 448; Pearl *A Textbook on Muslim Personal Law* (1987) 2-3.

1611 Doi *Women in Shari'ah* 163; Nasir *The Islamic Law of Personal Status* 97.

It should, however, be noted that South Africa has committed itself to gender equality on both a national and international level. The following international conventions are of particular relevance in so far as women's right to equality and freedom of religion are concerned, namely, the International Covenant on Civil and Political Rights (ICCPR),[1612] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1613] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Whilst the above three conventions all contain provisions dealing with equality, only the ICCPR, in terms of articles 18 and 27, deals with both freedom of religion and equality. Article 18(1) grants everyone the right to freedom of thought, conscience and religion which includes the right to adopt a religion or belief of your choice as well as the freedom to manifest your religion or belief by means of worship, observance, practice and teaching. Article 18(1) is subject to the limitations prescribed in article 18(3) as it provides that the freedom to manifest one's religion is subject to limitations as are prescribed by law and which are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.

In addition, article 27 grants ethnic, religious and linguistic minorities the right to enjoy their own culture, to profess and practice their own religion and to use their own language. An interpretation of article 18(1) and (3) shows that, whilst the right to hold religious beliefs is protected without limitation the freedom to manifest one's religion is subject to limitation.[1614] In terms of article 27, State parties may be placed under a duty to adopt positive measures enabling ethnic minorities the right to enjoy their own culture, to profess and practice their own religion and to use their own language whilst at the same time respecting the principles of equality and non-discrimination.[1615] In a

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1612 The convention was adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976.

1613 The Convention was adopted by the G General Assembly Resolution 2200A (XXI) of 16 December 1966; entered into force on 3 January 1976.

1614 Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art 18) paras 3, 4, 8. Adopted by the Human Rights Committee, General Comment 22 Art 18(Forty-eighth session, 1993).

1615 Human Rights Committee, General Comment No. 23, Article 27. Fiftieth session, 1994. Adopted by the Human Rights Treaty Bodies, U.N. Doc. HR1/GEN/1/Rev.1 at 38 (1994).

similar vein, articles 2(1), 3, 23 and 26 seeks to protect the rights guaranteed by ICCPR, which includes the right to equality and non-discrimination.[1616]

On 29 January 1993 South Africa ratified the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), which provides specifically for the protection of women's rights. Article 15 of the Convention obliges state parties to ensure equality of men and women before the law and in civil matters. Articles 2(f), 5(a) and 16 compel States Parties both to condemn discrimination against women in the public and private spheres and to adopt positive measures to eliminate and prevent gender-based discrimination, including in marital and family relations.[1617] In particular, Article 16(1)(h) obliges state parties to take appropriate measures to ensure that spouses have the same rights of "ownership, acquisition, management, administration, enjoyment and disposition of property". It must be noted that many of the laws regulating Islamic marriages would fall foul of the provisions of CEDAW. The view adopted by the CEDAW Committee is that these provisions that contravene a woman's right to equality, should be discouraged at all costs and, furthermore, prohibited.[1618]

Section 39(1)(b) of the 1996 Constitution provides that international law must be considered when a court interprets the Bill of Rights. It is clear that these conventions must be taken into consideration when a dispute concerns discrimination against women. The provisions of the Convention could have a definite effect on the interpretation and application of any law relating to gender equality in South Africa.

In addition to the international conventions discussed above, on 2 February 2000 the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, (PEPUDA) was passed. The purpose of the Act is two-fold, namely to promote equality and to prevent unfair discrimination.[1619] In other words, the purpose of the Act is to place the state under an obligation when to promote equality and prohibit

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1616 Human Rights Committee, General Comment No. 22.

1617 For example, States Parties must ensure that women are not married without them having given their consent to the marriage even when this can be justified on religious grounds. See CEDAW General Comment No. 19.

1618 CEDAW General Comment No. 19.

1619 Rautenbach & Bekker *Introduction to Legal Pluralism* 80.

discrimination when legislation is enacted. In terms of section 1(viii) discrimination is defined as any act or omission that directly or indirectly withholds benefits, opportunities or advantages from any person on one or more grounds of the prohibited grounds. In terms of section 1(ix) equality includes both *de jure* and *de facto* equality and also equality in terms of outcomes. The Act applies to vertical and horizontal relationships and enjoys supremacy over all other Acts, except the 1996 Constitution, amending Acts of Parliament and the Employment Equity Act, 55 of 1998.[1620] In terms of section 8 specific forms of discrimination are identified which includes, *inter alia*, the prevention of women from inheriting family property,[1621] any practice (including traditional customary or religious practices) that impairs the dignity of women or undermines equality between men and women[1622] and any policy or conduct that unfairly limits access of women to land rights, finances and other resources.[1623] The Act also makes provision for the establishment of equality courts,[1624] the promotion of equality which entails an obligation being placed on the state and "all persons" to achieve this objective[1625] and the establishment of an Equality Review Committee consisting of seven members from various commissions.[1626] Section 33 sets out the powers, functions and term of office of the Equality Review Committee.

Furthermore, in terms of section 187 of the 1996 Constitution, a Commission for Gender Equality must be established. The duty of the Commission is to protect and promote respect for gender equality.[1627] Gender equality is recognized as both a value and a fundamental right in terms of sections 1(1); 7(1), 9, 36(1) and 39(1) of the 1996 Constitution.

From the discussion on the right of equality, it can inferred that equality in the context of the recognition of Muslim marriages means that effect must be given to substantive equality. In terms of Islamic law the term "equity" embodies substantive equality, and

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1620 *Ibid*.
1621 S 8(c).
1622 S 8(d).
1623 S 8(e).
1624 Chap 4 of the Act.
1625 Chap 5 of the Act.
1626 S 32 of the Act.
1627 Woolman & Bishop *Constitutional Law of South Africa* (looseleaf) (2014) 24D-1.

the Holy *Quran* has made provision for MPL to have certain built-in mechanisms so as to ensure substantive equality (equity) to both men and women.[1628]

Notwithstanding South Africa's commitment to gender equality on a national and international level, it is submitted that the failure to grant recognition to potentially polygamous marriages on the ground of gender equality, means that the plight of these women is exacerbated, in that they are left without effective legal protection, should their marriage in terms of Muslim rites be dissolved, either by death or divorce.[1629] Whilst acknowledging that the Constitution is the supreme law of the land, and consequently all legislation must conform thereto, the dire consequences that the non-recognition of Muslim marriages hold for parties to these marriages should also be taken into consideration. This remains the position in respect to legislation that seeks to incorporate religious or customary law. This is problematic because inherent to the legislature's attempt to enact legislation granting legal recognition to of MPL, is the stand-off between MPL as divine law and the Constitution as the supreme law of the land.

Notwithstanding the conflict between the right to equality and religious freedom, the legislature proposed the enactment of legislation in an attempt to address the consequences arising from the non-recognition and lack of regulation of Muslim marriages. A discussion of the proposed legislation follows in the next section.

4 7 MUSLIM MARRIAGES BILL

4 7 1 HISTORICAL BACKGROUND

Numerous attempts to have MPL recognized by the South African State have been made by Muslim-clergy groups.[1630] As early as 1975 the Institute of Islamic *Shari'ah* Studies made attempts to engage with the then Government in respect of the possible

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1628 Chap 3; verse 195 provides "Their Lord responded to them: 'I never fail to reward any worker among you for any work you do, be male or female, you are equal to one another'….." and chap chap 49; verse 13 provides "O Mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you in the Sight of Allah is the believer who has *Taqwa* (piety and righteousness). Verily, Allah is All-Knowing, All-Aware."

1629 In *Ismail v Ismail supra* the court compounded inequalities that it had identified.

1630 Manjoo 2004 *International Journal of Legal Information* 274.

recognition of MPL.[1631] This effort by the Institute of Islamic *Shari'ah* Council was rejected. The South African Law Commission (SALC) was not willing to embark on an investigation into the possible recognition of MPL on the basis that "the recognition of the relevant aspects of Islamic law could lead to confusion in South African law".[1632]

The State's position, as expressed by the SALC above, changed in 1987 when the SALC started eliciting comment from the Muslim community on MPL.[1633] The sudden change in Government's attitude was, however, met with suspicion and hesitation due to the prevailing political atmosphere of the late eighties and early nineties, as this shift in position was viewed as a political ploy to defuse Muslim resistance to the apartheid Government.[1634] A small minority of religious scholars were willing to engage Government on its initiative to achieve recognition for Muslim marriages. Needless to say, the SALC's attempt was a futile one.

Prior to the first democratic elections in 1994, the ANC made an electoral promise to the Muslim community that legal recognition would be granted to Muslim marriages once it assumed power.[1635] After 1994, the first attempt towards drafting legislation granting legal recognition to Muslim marriages was made by means of the establishment of the Muslim Personal Law Board. Organizations such as the Call of Islam, Muslim Youth Movement and *Ulama* bodies served on the Board. Despite the Board's good intentions, ideological differences among the members soon resulted in divisions.[1636] The Board members had diametrically opposing views with regard to the position of women in Islam, for example, the Call of Islam and the Muslim Youth Movement refused to accede to the incorporation of practices that would discriminate against women.[1637] A further contentious issue for the members of the Board was the representation of women in the decision-making structures of religious institutions. Whilst the *Ulama* rejected the representation of women in any decision-making

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1631 Moosa "Prospects for Muslim Law in South Africa: A History and Recent Developments" 1997 Vol 1996 Issue 3 *Yearbook of Islamic and Middle Eastern Law* 131 135.

1632 South African Law Commission Project 59, pg ii.

1633 Moosa 1997 *Yearbook of Islamic and Middle Eastern Law* 135.

1634 Moosa 1996 *Yearbook of Islamic and Middle Eastern Law* 135. See also Manjoo 2004 *International Journal of Legal Information* 274.

1635 Amien "Why Forsake Muslim Women?" 2012 Vol 42 *The Thinker* 26 27.

1636 Moosa 1997 *Yearbook of Islamic & Middle Eastern Law* 135.

1637 Shabodien "Making Haste Slowly: Legislating Muslim Marriages in South Africa" Muslim in South Africa Marriages Workshop 31.

structure, the Muslim Youth Movement and Call of Islam refused to accept the exclusion of women.[1638] Further ideological differences hinged on the fact that the *Ulama* emphatically submitted that the Q*uran* is derived from divine revelation and is, therefore, supreme. To subordinate the *Quran* to the Constitution would be contrary to Islamic law principles. In order to circumvent this subordination, it was argued that the freedom of religion clause should be exempted from the general limitation clause in terms of section 36 of the Constitution.[1639] Organizations such as the Call of Islam and the Muslim Youth Movement accepted the supremacy of the Constitution within the South African legal framework, and were of the opinion that a progressive interpretation of MPL would render the latter compatible with human-rights values as contained in the Constitution. Owing to all these ideological differences the Board's existence was short-lived.[1640]

In 1996 the SALC was entrusted with the task of investigating the possible recognition of MPL in South Africa. The SALC held two workshops in March 1997 with the view to engage the public in the planning of the investigation as to how the recognition of Muslim marriages could be achieved.[1641] A recommendation flowing from the outcome of the workshops was that a project committee be established. The project committee was established in terms of the South African Law Commission Act.[1642] The Minister of Justice received seventy-eight nominations for the appointment of the new project committee.[1643] Ultimately, nine Muslims were appointed as members of the Project Committee, three of whom were women, while it was chaired by Supreme Court judge, Justice Mohammed Navsa.[1644] On 30 March 1999 the SALC Project Committee was established to investigate the possibility of recognizing Muslim marriages.[1645] Over a

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1638 *Ibid.*

1639 Jeenah "The MPL Battle in South Africa. Gender Equality vs *Shari'ah*", presented at an international conference titled "*Shari'ah* Debates and its Perceptions by Muslim and Christians in Selected African Countries" Organized by the German Institute for Middle Eastern Studies, University of Bayreuth, Germany. Held in Limura, Kenya July 2004, 7.

1640 Amien 2012 *The Thinker* 27.

1641 Rautenbach "Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa" 2004 2 PER 1 3.

1642 19 of 1973.

1643 South African Law Commission Project 59 *Islamic Marriages and Related Matters: Discussion Paper 101* 5.

1644 South African Law Commission Project 59 *Islamic Marriages and Related Matters: Issue Paper 15* 200 ii.

1645 South African Law Commission Project 59 *Islamic Marriages and Related Matters: Discussion Paper 101* 5 at para 2.5.

four-year period until 2002, the Project committee entered into an extensive consultative process with the various sections of the South African Muslim community and secular human-rights organizations. An Issue Paper was published in July 2000 and a Discussion Paper 101 released late 2001 for public comment by 31 January 2002.[1646] The Issue Paper served to engage the public in identifying the key issues and problems experienced as result of the non-recognition of MPL.[1647] During the extensive four year consultative process, two competing ideologies were identified. The Gender Unit submitted that any legislation to be enacted must be consistent with the rights contained in the Bill of Rights, in particular with the equality clause.[1648] In the event of a conflict between the rights contained in the Bill of Rights and the principles of Islamic law, the Bill of Rights will override *Shari'ah*. The other, competitor, the *Ulama,* advocated for the preservation of *Shari'ah* without any adaptions. The Project Committee had to find a balance between the competing rights in a constitutional secular State.[1649] It is for this reason that the following is stated:

> "The challenge posed to the law and legal institutions within a democratic secular state is the manner in which and the extent to which it accommodates individual choice in matters of morality and religion. A tolerant society seeks to maximise individual liberty and freedom of choice. Implementation has to be technically feasible within the dominant system, whilst maintaining the integrity of Muslim Personal Law."[1650]

After much deliberation, the Project Committee submitted the following key recommendations in the form of the Discussion Paper on Islamic Marriages and Related Matters:[1651]

(1) The solemnization of marriages by designated marriage officers and the enforcement of the consequences of marriage through the courts - this provides a move away from the existing informal tribunals.

1646 Rautenbach 2004 PER 1 4.

1647 South African Law Commission Project 59 *Islamic Marriages and Related Matters: Discussion Paper 101* 5 at para 2.7.

1648 *Ibid*.

1649 South African Law Commission Project 59 *Islamic Marriages and Related Matters: Issue Paper 15* 3.

1650 *Ibid*.

1651 The Report contained draft legislation entitled the "Muslim Marriages Bill' which, if enacted, would recognize and regulate Muslim Marriages.

(2) The recognition of all existing marriages, both monogamous and polygamous Muslim marriages.

(3) The registration of all existing and future marriages.

(4) A property regime regulating Muslim marriages in terms of which all marriages should be out of community of property.

(5) The regulation of polygamous marriages and the proprietary consequences thereof by the courts.

(6) The option of the regulation of marriages in terms of the Muslim Marriages Act, where the spouses elect to do so.

(7) The confirmation of divorce in the form of a *talaq*, *faskh* or *khula* by the court.

(8) The prevalence of the Islamic law obligation of a husband to support his wife or wives and children. In addition, the judicial officer will be required to consider the Islamic rules of custody in custody disputes. In doing so, the standard of the best-interests-of-the-child will be the overriding factor.

(9) The recognition of a spouse married by Muslim rites for the purposes of the Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act 27 of 1990.

4 7 2 THE DRAFT MMB 2003

On 22 July 2003 the SALRC Project Committee submitted a comprehensive report, together with draft legislation that would provide for the legal recognition of Muslim marriages. The 2003 MMB was regarded as a reasonable compromise between the need to grant legal recognition to Muslim marriages, which conform to the principles of Islamic law, and whilst not absolutely consistent with gender equality, it was for the better part compatible with constitutional principles.[1652]

4 7 2 1 RECOGNITION AND REGULATION

The draft MMB 2003 provides for the recognition and the regulation of Muslim marriages in South Africa. To this extent the aims of the draft MMB 2003 closely mirrored the recommendations submitted by the Project Committee in the Discussion Paper on Islamic Marriages and Related matters.

[1652] Jeenah "The MPL Battle in South Africa. Gender Equality vs *Shari'ah*" *supra*.

Insofar as the regulation and registration of Muslim marriages are concerned, the 2003 MMB proposes to regulate Muslim marriages in the following manner:[1653]

- The MMB would regulate all marriages concluded before the Bill was passed, and these marriages for all intents and purposes would be deemed to be legal.[1654] The MMB therefore provided for both new marriages, as well as existing marriages. Parties to a Muslim marriage would have the choice to opt out, that is, if they did not wish the MMB to apply to their marriage, they would have the option of excluding the application of the Bill. This would mean that the marriage remains illegal in terms of South African law and would not be granted legal recognition. The result of an opt-out is that the parties would not be able to access the benefits for which the Bill made provision.
- In the case of new marriages, the legislation would provide for the following matters:[1655]
    - the age of consent would be18 years;
    - actual and informed consent to the conclusion of a marriage would have to be given in written form;
    - the designation of marriage officers who would be entitled to perform Islamic marriages;
    - the registration of marriages by the signing of a marriage register;
    - the formalities pertaining to the time, place and manner of solemnization of Islamic marriages;
    - the appropriate marriage formula for the solemnization of an Islamic marriage;
    - a prohibition on marriages within certain prohibited degrees of relationship, including the rules relating to fosterage according to MPL;
    - a standard contractual provision in terms of which a Muslim personal-law system would be established in the event of parties contemplating a Muslim marriage;
    - the prescription of penalties for false representations or statements.

1653 South African Law Reform Commission *Project 59 Islamic Marriages and Related Matters: Discussion Paper* 1015 at para 2.5; Amien "Muslim Marriages Bill Cannot Make Life Worse for Muslims" 2009 *Muslim Views* 16.

1654 Clause 2 of the draft MMB 2003.

1655 Clause 5 of the draft MMB 2003.

- For existing marriages to be recognized they would have to be registered.[1656]
- Regarding the registration of existing Islamic marriages, the parties would have to reach an agreement as to the appropriate matrimonial property regime.[1657]
- Further requirements stipulated by the MMB are that parties to the proposed marriage would have to be of the opposite sex, both parties would have to consent to the proposed marriage and the marriage must be solemnized by an *Imam* in the presence of two witnesses. The marriage would have to be registered by a marriage officer, who is a Muslim person with knowledge of Islamic law.[1658]
- The MMB also prohibited parties from entering simultaneously into a marriage in terms of the MMB and a civil marriage.[1659]
- The husband would be under an obligation to maintain his wife during the subsistence of the marriage, as well as during the period of *iddah,* should the marriage be dissolved through divorce.[1660]
- The duty of support as far as children born of the marriage is concerned would rest solely on the father, who would be required to support the children until they are self-supporting.[1661]
- Court approval would have to be obtained where the husband wishes to enter into further marriages.[1662] The existing wife or wives would have to be informed about the husband's application to enter into another marriage. In terms of the MMB, the existing wife or wives would then be granted an opportunity to express their views regarding the proposed marriage. In other words, the MMB made provision for all interested parties, particularly the existing wife or wives, to be joined in the proceedings. The court would grant permission to the husband to enter into another marriage, only where he was able to maintain equality between all the wives, as prescribed by the Holy *Quran*.

1656 Clause 6 of the draft MMB 2003.
1657 Clause 8 of the draft MMB 2003.
1658 Clause 6 of the draft MMB 2003.
1659 Clause 5 of the draft MMB 2003.
1660 Clause 12 of the draft MMB 2003.
1661 *Ibid*.
1662 Clause 8 of the draft MMB 2003.

- The default matrimonial property system regulating marriages, concluded in terms of the MMB, would be that of out of community of property in terms of which the parties would maintain separate estates.[1663] Should the parties wish for a different matrimonial property system to apply, they would both have to agree to this and their agreement would have to be recorded in an ante-nuptial contract.[1664]
- Regarding divorce and the potentially contentious issue of the termination of the marriage by *talaq*, there would have to be compelling reasons of public policy to preclude the dissolution of marriages, save on the type of grounds contemplated in the Divorce Act 70 of 1979.[1665] It is submitted that marriage officers should be required to recognize a *talaq* in the presence of the parties. Furthermore, a court should confirm a *talaq* before it takes effect for the record and official purposes, as well as in consonance with the Constitution.
- Any proposed legislation stipulating the grounds on which the conclusion of a polygamous marriage would be permissible, would have to be narrowly circumscribed in recognition of the limitations set out by the *Quran* itself.[1666]
- The formal dissolution of the Muslim marriage would have to be effected by the courts.[1667] Where the application for the divorce was uncontested, provision would be made for a Muslim judge to preside over the matter. In the case of an opposed the divorce, the MMB provides for the matter to be adjudicated by two Muslim assessors who possess specialized knowledge of Islamic law, as well as a Muslim judge in attendance.[1668]
- The MMB also grants recognition to the various forms of divorce as prescribed by Islamic law.[1669]

1663 Clause 8 of the draft MMB 2003.

1664 *Ibid*.

1665 Clause 9 of the draft MMB 2003.

1666 Clause 8 of the draft MMB 2003. Chap 4; verse 3 of the *Quran* provides: "If you fear you will not be able to deal justly with the orphans, marry women of your choice, two, three or four. But if you fear that you will not be able to deal justly with them, then only one." This verse is the only verse in the *Quran* which deals with polygamy. In terms of this verse polygamy was introduced subject to the certain conditions. If a man wishes to practice polygamy, he must have the financial resources to do so and in addition to this he must do equal justice to all his wives.

1667 Clause 9 of the draft MMB 2003.

1668 Clause 13 of the draft MMB 2003.

1669 Clause 9 of the draft MMB 2003.

- Where the parties had not entered into an ante-nuptial agreement to regulate the patrimonial consequences of their marriage, but either one or both of the spouses assisted or rendered services in the family business, or contributed towards the maintenance or increase of the other's estate, the court would be able to provide relief by ordering that the spouse who has contributed should be granted compensation.[1670] The court would furthermore have the discretion to provide relief by issuing an order for a *mut'ah*, a conciliatory gift, to the innocent spouse where justice and equity demand it.
- As wives and children frequently require special protection to ensure their continued welfare upon the dissolution of a marriage, protective measures similar to those in the Divorce Act 79 of 1979, and the Recognition of Customary Marriages Act 120 of 1998, are included in the statute, giving recognition to MPL.[1671]
- In matters relating to guardianship, care and contact with children born of the marriage, the court would be under an obligation to consider the law of "*Al-Hadaanah*" under Islamic law, the report of the Family Advocate and the standard of the best-interest-of-the-child.[1672]

The SALC correctly suggested that any proposed legislation, stipulating the grounds on which the conclusion of a polygamous marriage would be permissible, had to be narrowly circumscribed in recognition of the limitations set out by the *Quran* itself.[1673]

In terms of intended legislation above, a court must be vested with the discretion either to grant or to deny permission to contract a second marriage. Furthermore, it is in the case of Muslim marriages where an application is made by the man who wishes to enter into a subsequent marriage, the court must satisfy itself that the husband is able to maintain equality between his spouses as is prescribed by the *Quran*.[1674] In other

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1670 *Ibid*.

1671 *Ibid*.

1672 Clause 10 of the draft MMB 2003.

1673 Doi *Shar'iah: The Islamic Law* 147. It must be appreciated that polygamy is permissible only in extraordinary circumstances. There must be inexorable reasons for polygamy and the wives must be treated with absolute impartiality.

1674 S 7(6)-(9) of the Recognition of Customary Marriages Act merely requires the court to approve a written contract regulating the future matrimonial property system of the marriage where the man wishes to take a further wife.

words, the conditions under which a man may enter into a further marital union with another woman, would have to be set out satisfactorily. Although this requirement was met with resistance from certain members of the *Ulama*, it is submitted that because polygyny is permissible in terms of Islamic law it must be retained but it should be properly regulated, bearing in mind the hardships suffered by Muslim women where their husbands enter into subsequent marriages, despite not being in a financial position to do so.[1675]

In order to regulate Muslim marriages as far as possible within an Islamic law framework, the MMB provides for a Muslim judge, and, where necessary Islamic law experts acting as assessors, to adjudicate on opposing matters arising from MMB. This concession by the Project Committee did much to appease religious leaders within the Muslim community, and was in fact supported by the many members of the South African *Ulama.*[1676] However, there were dissenting *Ulama* who are of the opinion that a non-Muslim person cannot adjudicate on disputes relating to Muslim family law. To this extent *Mufti* Siraj Desai in his discussion on the proposed MMB emphatically stated that a non-Muslim state may not restrict, localize, regulate or legislate on any religious affair pertaining to Muslims.[1677]

Notwithstanding the ideal aspirations of the 2003 MMB,[1678] it did not translate into legislation.[1679]

4 7 2 2 CONCERNS AND CRITICISMS

Despite the largely consultative process that the draft MMB underwent, both religious leaders, including members within the Muslim community, and the Commission on Gender Equality (CGE) raised certain concerns. The latter was established as an independent statutory body in terms of section 187 of the Constitution.

1675 See para 4 3 of this thesis.

1676 Amien 2012 *The Thinker* 27.

1677 Desai "The Proposed Muslim Marriages Bill" (unpublished paper) 3.

1678 The ideal aspirations of the 2003 MMB was, firstly, the alleviation of hardships experienced by Muslim spouses as a result of non-recognition and secondly, the creation of legal certainty regarding the validity of Muslim marriages.

1679 The reason for this is unclear but it is suggested that one of the primary reasons is the perception that the MMB did not enjoy supported by all sections of the Muslim communities.

Mufti Desai raised the following are concerns in respect of the draft MMB 2003:[1680]

- The MMB contains an "opt-out" clause. This means that after the enactment and implementation of the Bill into legislation, Muslim spouses would be allowed the option of whether or not to register their marriages under the new Act. Therefore, in terms of clause 2 parties to a Muslim marriage would have to register in order for the new Act to apply to their marriage. This creates the impression that the "opt-out" clause undermines the law.[1681]
- The MMB is not exempted from the Bill of Rights as the Constitution is the supreme law of South Africa. The assimilation of Islamic laws into a non-Muslim Constitution would threaten to distort, and in some instances, even replace Islamic law.[1682]
- The Bill lays down certain conditions that have to be met before a man is allowed to enter into a second, third or fourth marriage. It is submitted by certain religious leaders that this would serve to effectively bar a man from entering into subsequent marriages, despite being able to support the wives in the subsequent marriages financially. This appears to undermine the *Quranic* injunction, which allows the man married in terms of Muslim rights to have a maximum of four wives at a time.[1683]
- The Bill prescribes the minimum age of eighteen for Muslim marriages. Clause 5(6) provides that a person under the age of eighteen who wishes to enter into a marriage in terms of the new Act, requires the consent of the Minister of Home Affairs or an authorized Muslim body. In terms of the *Hanafi* school of thought, a girl who has reached the age of puberty, in other words, a girl aged twelve or older can enter into a marriage without the consent of her father, who is regarded as her legal guardian in terms of Islamic law.[1684]
- The courts have, in certain instances, been given authority over Islamic law. Where a marriage is concluded in compliance with *Shari'ah,* but there is non-

1680 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 2-7.
1681 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 3.
1682 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 2.
1683 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 5.
1684 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 4.

compliance with some provisions listed in the MMB, the marriage can be declared void.

- The MMB allows for the marriage to be solemnized by a Muslim female. This is in contravention of Islamic law.
- The matrimonial property system, advocated and accepted in terms of Islamic law, is that of a marriage out of community of property without the accrual system. The MMB, however, makes provision for parties to change their matrimonial property regime at any time during the subsistence of the marriage. In terms of Islamic law a marriage in community of property or out of community of property, subject to the accrual, would not be *Shari'ah* compliant. The fact that spouses can change their matrimonial property regime has further implications as it impacts directly on the rights of heirs after the demise of either spouse.[1685]
- The husband would have to apply to court for permission to enter into a further marriage, and the success of this application would depend on whether the applicant could support more than one wife. It is submitted that the *Quran* has made it permissible for the man to take up to four wives, without having to seek prior permission from any authority. All that the *Quran* requires is that the husband maintains justice between all his wives.[1686]
- The draft MMB makes provision for certain requirements that have to be met when the husband intends to issue the wife with a *talaq*. These include the following: he would have to give due notice to his wife of his intention to *talaq* her; he has to register the *talaq* with a marriage officer in the presence of two competent witnesses within thirty days of issuing the *talaq*. This raises the concern that, if the marriage officer was not convinced that due notice was given to the wife, the marriage officer could refuse to register the *talaq. Mufti* Desai has submitted that this provision presents serious interference with regard to the laws relating to *talaq.*[1687]
- The MMB provides for *pendent lite* maintenance pending the outcome of divorce litigation. If the litigation has not been finalized at the end of the wife's period of *iddah*, this could very well mean that the husband will be forced to

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1685 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 5.

1686 *Ibid*.

1687 *Ibid*.

pay maintenance to the wife after her period of *iddah* has ended which would be in conflict with Islamic-law principles relating to maintenance after the dissolution of the marriage by divorce.[1688]

- It is argued that the imposition of fines, where it is proved that the provisions of the MMB have been transgressed, presents an infringement of the principles of Islamic law. For example, a marriage officer, who knowingly registers a marriage in contravention of the provisions of the Act, is guilty of an offence and is liable on conviction to a fine not exceeding R20 000.00. Furthermore, where a man acts in contravention of section 8(6), which requires that an application be made for court approval in order to enter into a further marriage, he will be guilty of an offence, and if found guilty, will be liable to a fine not exceeding R20 000.00.[1689]

Owing to the concerns raised above, the MMB 2003 did not enjoy the support of either the *Majlisul Ulama* in the Eastern Cape, neither that of the Islamic Unity Convention of the Western Cape, as they advocated the view that the MMB was not in compliance with Islamic law principles.[1690] *Mufti* Siraj Desai submitted that should legislation be enacted, it would be acceptable only if independent *Shari'ah* courts are established in order to ensure that all adjudication is strictly in accordance with Islamic law.[1691]

The CGE, whose mandate it was to promote respect for gender equality and protection, as well as the development and attainment of gender equality, also raised certain concerns relating to the rights of women when the MMB was released in 2003. Section 1(1) of the Commission for Gender Equality Act,[1692] as well as the Constitution, authorizes the CGE to monitor, investigate, research, educate, lobby, advise and report on matters concerning gender equality.[1693] It has also been empowered to evaluate any law proposed by Parliament, which would affect or be likely to affect,

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1688 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 6.

1689 Desai "The Proposed Muslim Marriages Bill" (Unpublished Paper) 7.

1690 Amien "A Chronological Overview of Events Leading to the Formulation of the Muslim Marriages Bill" presented at the Muslim Marriages in South Africa Workshop held 14 December 2010 at 11. Patel "Muslim Marriage Bill Comes to South Africa, not a Moment too Soon" March 2011 http://news.thedailymaverick.co.za/opinionista/2011-03-14-muslm-marriage-bill-comes-to-sa-not-a-moment-too-soon (accessed 2012-03-28).

1691 Desai "The Proposed Muslim Marriages Bill" (unpublished paper) 1.

1692 39 of 1996.

1693 Woolman & Bishop *Constitutional Law in South Africa* 24D-1.

gender equality or the status of women, and to furthermore make recommendations to Parliament in respect thereto.[1694] To this extent the CGE has played an advisory as well as a consultative role in respect of law-reforms efforts that aim to grant legal recognition to Muslim marriages.

The concerns expressed by the CGE can be summarized as follows:[1695]

- The CGE questioned the compatibility of MPL with the entrenched right of substantive equality as given expression to in the Constitution.[1696]
- Furthermore, the question was raised as to whether the draft MMB would codify Muslim marriages *per se,* or whether it would regulate the Islamic marriage system.[1697]
- The CGE furthermore expressed concern whether the MMB relates to the challenges and lived realities faced by Muslim women.[1698]
- The piecemeal approach to the codification of MPL was also questioned in light of its not granting recognition to MPL in its entirety.[1699]
- The inclusion of an opt-out clause was questioned as the clause would require the parties to jointly elect and not to be bound by the provisions of the MMB. The opt-out clause presupposes that there are equal power relations between the parties to the impending marriage, and that both parties have knowledge and access to resources and facilities.[1700]
- Despite the fact that the MMB states that both spouses are equal in status, capacity and financial independence, the MMB fails to take the disadvantages that women suffer into account, particularly with regard to the proprietary consequences of the marriage, as well and maintenance issues.[1701]
- The MMB recognizes and sanctions the practice of polygamy. It also provides legislative protective measures with which the husband is obliged to comply

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1694 Manjoo 2004 *International Journal of Legal Information* 271.

1695 *Ibid.*

1696 *Ibid.*

1697 *Ibid.*

1698 *Ibid.*

1699 *Ibid.*

1700 Manjoo 2004 *International Journal of Legal Information* 278-279.

1701 Manjoo 2004 *International Journal of Legal Information* 279.

before the court will approve an application allowing the husband to enter into further marriages. However, the right to polygamy would be restricted to the husband as women are not allowed to enter into multiple marriages. In addition, it is questionable whether men would follow the prescribed court process, as polygamy is made permissible in terms of an *Quranic* injunction, which requires only that the man to treat all his wives equitably and justly.[1702]

- The grounds for the dissolution of the marriage by divorce for men and women are different, as the right to *talaq* is a right and prerogative reserved for men only. When issuing a *talaq* the husband is not required to provide reasons for the termination of the marriage, and he is allowed to issue unilateral repudiation, even in the absence of his wife.[1703]
- During the subsistence of the marriage, the husband bears the sole responsibility of financially maintaining his wife and children born of the marriage. In terms of South African Family law, there is a reciprocal duty of support between a husband and wife and between parents and their children. The one-sided duty of support that falls squarely on the shoulders of the man in respect of his wife and children, raises issues of equality and discrimination.[1704]
- Whilst the MMB provides for the inclusion of Muslim judges and assessors in the adjudication process, it does not specify the qualifications of these Muslim judges and assessors, or the extent of their constitutional and Islamic law knowledge.[1705]

The CGE emphasized the supremacy of the Constitution over all other laws whether they be religious or customary law. Therefore, where a conflict arises between any right enshrined in the Constitution and religious law, the former would prevail. This is particularly so when a conflict arises between women's right to equality and religious law.

1702 *Ibid*.

1703 Manjoo 2004 *International Journal of Legal Information* 280.

1704 *Ibid*.

1705 Manjoo 2004 *International Journal of Legal Information* 281.

Besides the various concerns raised by the members of the Muslim clergy and the CGE, numerous concerns were also expressed as to whether or not the 2003 MMB would be in line with the rights contained in the Constitution, in particular with regard to women's right to equality. As a consequence, the South African Commission for Gender Equality drafted an alternative to the MMB, namely, the Recognition of Religious Marriages Bill (RRMB).

The aim of the RRMB is to grant recognition to all religious marriages without the codification of any one particular religion, and in this manner the protection afforded to spouses in civil marriages will then be extended to all religious marriages. The RRMB was of general application and would therefore grant recognition to all religious marriages. In terms of the RRMB, State regulation of religious marriages should be limited, as this function of regulation should be left to religious communities.[1706] The Gender Commission Bill was, however, not further pursued in the executive structures.

The release of the draft Bill in 2003 has been left largely unattended since it was drafted. As a result of the failure to table the draft Bill after its release in 2003, the Women's Legal Centre (WLC) on the 20 May 2009 brought an application for direct access to the Constitutional Court,[1707] seeking an order to force the President and Parliament to enact a law recognizing Muslim marriages. The applicant averred that the President and Parliament had failed to discharge their constitutional obligations of protection by not enacting a law that makes provision for the recognition of Muslim marriages.[1708] The applicant therefore sought an order that the Constitutional Court direct the President and Parliament to fulfill these obligations within eighteen months by "preparing, initiating, enacting and implementing an Act of Parliament providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa, and regulating the consequences of such recognition".[1709] In response to the application, the Minister of Justice opposed the application on two grounds, namely:

1706 Amien "The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa" 117.

1707 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae)* [2009] ZACC 20.

1708 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 9.

1709 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 1.

(i) Should an order be made by the Constitutional Court instructing Parliament to enact legislation granting recognition to Muslim marriages, this would be tantamount to interfering in a legislative process, and thus constitute a breach of the doctrine of separation of powers between the legislature and the judiciary.[1710]

(ii) The Minister contended that the lack of consensus among the various Muslim communities and religious bodies indicated that to enact legislation at this stage, was premature and that more time was required to consult with all interested parties.[1711]

In essence the issues for consideration were firstly, whether the obligations contended for by the applicant were within the meaning of section 167(4)(e)[1712] of the Constitution, and secondly, if they were not, whether it would be appropriate in all the circumstances for the Constitutional Court to be the court of the first and last instance in the application for direct access under section 167(6)(a).[1713]

The court, in dealing with these two issues, narrowed its arguments to that of jurisdiction, and did not deal with any part of the substantive relief claimed, nor did it consider whether Parliament or the President may be under an obligation to enact legislation to recognize Muslim Marriages.[1714] The court dismissed the application on the basis that the application in its present form was misconceived, as it was directed solely to the Constitutional Court and sought to engage the court's exclusive jurisdiction, by-passing other courts with constitutional jurisdiction.[1715] The court further held that the power to grant litigants direct access outside the court's exclusive

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1710 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 10.

1711 *Ibid*.

1712 S 167(4)(e) provides that the Constitutional Court only may decide that Parliament or the President has failed to fulfill a constitutional duty.

1713 S 167(6)(a) provides that national legislation or the rules of the Constitutional Court must allow a person, when it is in interests of justice and with leave of the Constitutional Court, to bring a matter directly to the Constitutional Court. *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 2.

1714 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 3.

1715 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 25.

competence is one that is rarely exercised by the court, and with good reason.[1716] If it were to act as a first and last instance, it would deprive all parties to a dispute of a right to appeal, and the court would also deprive itself of the benefit of the other courts' insights.[1717] Despite dismissing the application for direct access, the court emphasized that the outcome of the present application does not reflect on the substance of the claim that the President and Parliament are under a duty to enact legislation recognizing Muslim marriages.[1718]

4 7 3 MMB 2010

4 7 3 1 INTRODUCTION

The Islamic Marriages and Related Matters Report of July 2003[1719] formed the basis of the 2010 draft MMB. However, as a result of dissent expressed by various sections of the community, the original draft Bill underwent a considerable number of changes and omissions. An amended MMB was subsequently submitted to and approved by Cabinet on 14 December 2010.[1720]

4 7 3 2 RECOGNITION AND REGULATION

The aims of the 2010 MMB mirrored that of the 2003 MMB.[1721] The Preamble of the 2010 MMB provided for the following:

(i) recognition of Muslim marriages;
(ii) specification of the requirements for a valid Muslim marriage;
(iii) regulation of the registration of Muslim marriages;
(iv) recognition of the status and capacity of spouses in Muslim marriages;
(v) regulation of the proprietary consequences of Muslim marriages; and
(vi) regulation of the termination of Muslim marriages and the consequences thereof.

1716 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 27.

1717 *Ibid*.

1718 *Women's Legal Centre Trust v President of the Republic of South Africa (with the United Ulama Council of South Africa as Amici Curiae) supra* para 31.

1719 The Report contained the 2003 draft MMB.

1720 Amien 2012 *The Thinker* 28.

1721 The notable differences between the 2003 and 2010 MMB are discussed in para 4 7 3 3 of this thesis.

As a result of the MMB being tabled, the above application by the WLC was not pursued. The Department of Justice invited members of the public to tender submissions in respect of the 2010 MMB, and 31 May 2011 was set as the deadline for all submissions. Once again, the MMB generated vigorous debate within the Muslim community.[1722] The proposal that Muslim marriages be regulated by the enactment of legislation once again received mixed responses from the Muslim community. On the one hand, any legislation enacted is subject to the Constitution, as it is the supreme law of South Africa. On the other hand, those vehemently opposing the enactment of legislation clearly expressed that in terms of tenets of Islam, the *Quran* is regarded as the supreme law, and to subject it to constitutional supremacy would not be tolerated or be acceptable.[1723] A further concern submitted by the Muslim Lawyers Association to the Minister of Justice and Constitutional Development is that State regulation of Islamic law and jurisprudence may cause divisions within the Muslim community, and also between Muslims and the State.[1724] They were therefore fundamentally opposed to the MMB, because, as they submitted, whilst it appeared to grant legal recognition to Muslim marriages, the MMB in fact altered it through impermissible State regulation.[1725]

4 7 3 3 DIFFERENCES BETWEEN THE 2003 AND 2010 MMB

The 2010 MMB presented a marked departure from the original draft MMB 2003. The Department of Justice and Constitutional Development, without official notification and prior consultation, amended certain provisions of the 2003 MMB.[1726] The amendments to the 2003 MMB resulted in both a greater degree of secularization and Islamization of the 2010 MMB.[1727] Amien submits that the increased Islamization of the 2010 MMB which limits the sources of Islamic law may curtail progressive interpretations of MPL

1722 Van't Riet & Bodiat "Muslim Marriages and the Long Walk to Equality" 2011 *Without Prejudice* 10.

1723 Muslim Lawyers Association "Muslim Lawyers Association in Re: Muslim Marriages Bill" (no date) http://www.mlajhb.com/SUBMISSIONS_SA_LAW_COMMISSION.PDF (accessed 2012-08-09) 3.

1724 Muslim Lawyers Association "Muslim Lawyers Association in Re: Muslim Marriages Bill" (no date) http://www.mlajhb.com/SUBMISSIONS_SA_LAW_COMMISSION.PDF (accessed 2012-08-09) 5.

1725 Muslim Lawyers Association "Muslim Lawyers Association in Re: Muslim Marriages Bill" (no date) http://www.mlajhb.com/SUBMISSIONS_SA_LAW_COMMISSION.PDF (accessed 2012-08-09) 4-5.

1726 Amien 2013 *Acta Juridica* 362.

1727 Amien 2012 *The Thinker* 28.

to disputes arising from the MMB.[1728] The increased secularization of the MMB included firstly, the removal of the requirement that Muslim judges and Muslim-law experts should adjudicate over all disputes arising from the MMB, and secondly, the removal of the arbitration.[1729] The increased secularization led to dissatisfaction amongst the *Ulama* because of the belief that Islamic law must be adjudicated by Muslims, and the removal of the arbitration clause was viewed as limiting their capacity to continue to regulate MPL law within the community.[1730]

4 7 3 3 1 ARBITRATION

The *Quran* encourages parties, where they are experiencing a marital dispute, to bring a representative for each of them to assist them in order to resolve their dispute.[1731] Whilst the 2003 MMB provided for the compulsory mediation or voluntary arbitration of disputes, this clause was removed from the 2010 MMB. In terms of clauses 13 and 14 of the 2003 MMB, the decisions of mediators and arbitrators would have been binding. The reason for this omission is not clear, and it has been argued that there is no rationale between its omission in the 2010 version and its inclusion in the 2003 MMB. Clause 12 of the 2010 MMB does, however, make provision for compulsory mediation with an accredited mediation council as a preliminary requirement to court adjudication in respect of disputes arising between spouses during subsistence of the marriage. Clause 12 furthermore provides that a representative of their choice may represent each party at the proceedings, and that mediators have to submit the mediation agreement reached between the spouses to court within forty-five days.[1732] The court will thereafter assess and confirm the mediation agreement, provided the interests of minor children born of the marriage are protected.[1733] Where the dispute remains

1728 *Ibid*.

1729 *Ibid*.

1730 The amendments to the 2003 MMB caused the majority members of the *Ulama* to withdraw their support for the 2010 MMB on the basis that it was no longer in conformity with the principles of Islamic law. See United *Ulama* Council of South Africa *UUCSA Update on the Muslim Marriages Bill* (18 March 2011) available at http://www.councilofulama.co.za/index.php?option=com_contents&view=article&id=569:uucsa-update-on-the-muslim-marriages-bill&catid=44:social&Itemid=61 (accessed 2016-01-22).

1731 Chap 4; verse 35.

1732 S 12(3).

1733 *Ibid*.

unresolved after the expiry of the forty-five days after the date of the referral, the parties may refer the dispute to a court for adjudication.[1734]

At first glance this appears to be contrary to Islamic law, as the latter prescribes that before a divorce can take place, the spouses must submit themselves to mediation. It is only upon the failure of the reconciliation attempts by two judges that the spouses would be allowed to proceed with a divorce. However, despite the removal of the arbitration clause from the 2010 Bill, it nevertheless proposes that the parties first endeavour to mediate their dispute. It is submitted that this appears to be line with the spirit of the *Quranic* injunction[1735] that supports the contemporary understanding of mediation. The Muslim Lawyers Association strongly advocate the view that where there is a marital dispute involving Muslims, arbitration provides the best solution. It should be mentioned that section 2 of the Arbitration Act[1736] excludes any matrimonial matters or matters relating to the status of a person.

4 7 3 3 2 APPOINTMENT OF MUSLIM JUDGES

Islamic law prescribes that a judge (*qadi*) be appointed on the basis of his Islamic knowledge and his adherence to tenets of Islam.[1737] It is an immutable principle of Islamic law that only a Muslim judge can adjudicate on matters of MPL.[1738] Unsurprisingly, the United *Ulama* Council of South Africa in their submissions to the Minister of Justice and Constitutional Development reiterated that the solemnisation of a Muslim marriage, as well as the termination thereof, could only be effected by a Muslim.[1739] In addition, the Muslim Lawyers Association voiced their concern and indicated the unacceptability of non-Muslim judges presiding over disputes arising from Muslim marriages.[1740] These submissions were taken into consideration in respect of the 2003 MMB, which made provision for the appointment of a Muslim judge by the Judge President. In the event of the unavailability of a Muslim judge, the

1734 S 12(4).

1735 Chap 4; verse 35.

1736 42 of 1965.

1737 Ibn Farhoon *Tabsiratul Ahkaamfil Usoolil Aqthiyawa Minhajil Ahkaam* (1986) Vol 1 49.

1738 *Ibid*.

1739 United *Ulama* Council of South Africa Submission to the Minister of Justice and Constitutional Development on Amendments to the Muslim Marriages Bill 21 January 2011 para 12.4.

1740 South African Law Reform Commission Project 59 *Islamic Marriages and Related Matters:* Report (2003) 79 at para 3.268.

Minister of Justice and Constitutional Development was authorised to appoint a Muslim advocate or attorney of at least ten years practical experience as an acting judge.[1741]

The 2010 MMB does not contain the provision for the appointment of a Muslim judge to adjudicate on matters arising from the MMB. The reason for this exclusion is not known, but the WLC[1742] and Amien[1743] submit the removal of the provision relates to the paucity of Muslim judges with the South African judiciary. In addition, determining whether a judge is Muslim, could also be problematic. The question arises whether a judge who proclaims himself as Muslim, but who does not practice Islam, would qualify in terms of the MMB. In this instance the following Islamic legal maxim holds application:

> "[w]e judge people according to that which they reveal and it is only God that knows what they conceal."[1744]

In other words, the Muslim judge would be publically known as a Muslim with little regard being given to his private life.

The WLC submitted that the failure to appoint a Muslim judge would result in an undue backlog of cases. They conceded that for practical purposes the appointment of a Muslim judge to adjudicate on MPL matters would better serve the interests of Muslims.[1745]

The removal of the provision for the appointment of a Muslim judge can be remedied by inserting a provision in the MMB that would enable a judge to use Islamic law experts as either assessors or witnesses to testify as experts. The South African legal system makes provision for the appointment of assessors and expert witnesses. Furthermore, the explicit inclusion in the MMB of a provision for the appointment of assessors and expert witnesses, may go a long way to allay the concerns expressed by *Ulama*. There are, however, certain *Ulama* that hold the view MPL can only be

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1741 *Supra* 127.

1742 Women's Legal Centre *Workshop on Muslim Marriages and Relates Rights* 21 April 2012.

1743 Amien 2012 *The Thinker* 28.

1744 Al-Raazi *Tafseeru* Vol 6 190.

1745 Women's Legal Centre *Workshop on Muslim Marriages and Relationship Rights* 21 April 2012.

adjudicated upon by Muslims.[1746] *Mufti* Desai is emphatic that only a *Shari'ah* court or its substitute in the form of a panel of at least three *Ulama* can issue a *faskh* or the annulment of a marriage concluded in terms of Muslim rites. A *faskh* issued by a non-Muslim court presided by a non-Muslim judge is therefore not valid.[1747] The Muslim Lawyers Association has also strongly advocated the view that there is no *Shari'ah* justification for allowing a non-Muslim judge to make binding decisions in respect of MPL.

4 7 3 3 3 APPOINTMENT OF ASSESSORS

The provision for the appointment of assessors has been excluded from the 2010 MMB. The UUCSA in their submissions to the Minister of Justice state that the complexity of MPL cannot be fully understood by the judiciary, and that the appointment of assessors with the knowledge of the complex laws of the Islamic legal system would be advantageous for the following reasons:[1748]

(i) Muslim assessors would be sensitive to the adjudication of MPL as they are best informed with regard to the composition of the Muslim home.[1749]

(ii) The appointment of assessors and their participation in the adjudication process would lend credibility to the bench.[1750]

(iii) The appointment of assessors who possess a satisfactory level of *Shari'ah* knowledge would provide insight into *Shari'ah*.[1751]

As stated previously, the appointment of assessors will also remedy the situation in respect of a paucity of Muslim judges. UUCSA submits that where assessors are appointed, they must have authority along with the judge for findings on questions of fact and law in respect of Islamic law.[1752] This would be consistent with South African

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1746 Desai "The Proposed Muslim Marriages Bill" (unpublished paper) 6.

1747 This has serious consequences for the parties to a Muslim marriage as the wife believes that her marriage is terminated by the non-Muslim court when this is in fact not the case.

1748 UUCSA *Submissions to the Minister of Justice and Constitutional Development on Amendments to the Muslim Marriages Bill 21 January 2011* (May 2011).

1749 UUCSA *Submissions to the Minister of Justice and Constitutional Development on Amendments to the Muslim Marriages Bill 21 January 2011* (May 2011) para 12.11.

1750 *Ibid*.

1751 *Supra* para 12.14.

1752 *Supra* para 12.15.

legislation as the Criminal Procedure Act,[1753] as well as the Promotion of Equality and Prevention of Unfair Discriminating Act[1754] granting adjudicating authority to assessors.

4 7 3 4 CONCERNS AND CRITICISMS

Despite the amendments, exclusions and changes to the 2010 MMB, The Muslim Lawyers Association object to the draft MMB on the following grounds:[1755]

(a) In Islam, once a person reaches the age of puberty, the person becomes eligible for marriage. The MMB prescribes the age of marriage at eighteen and where the person is under the age of eighteen years, the consent of the Minister must be obtained in order for the marriage to be valid.

(b) There is no *Shari'ah* justification allowing a non-Muslim judge to make binding decisions on a Muslim about the meaning of the *Quran*.

(c) The fact that a non-Muslim may issue a *faskh* is objectionable.

(d) While the MMB purports to regard an irrevocable *talaq* as effective from the time of pronouncement, despite it not being registered, the efficacy is substantially diluted by section 9(3)(e), which requires a spouse to confirm the *talaq* in action proceedings within fourteen days after the registration thereof.

(e) Section 9(3)(g) allows a spouse to claim for maintenance during the *iddah* period, pending the outcome of court action. Action proceedings may take years to be finalized, and the period of maintenance may well extend beyond the *iddah* period. This is clearly in conflict with Islamic-law principles in respect of post-divorce maintenance.

(f) There is no *Shari'ah* justification for the criminalization of the failure to register a *talaq,*[1756] or to get permission from the court where the husband wants to enter into a polygamous marriage.[1757] The MMB therefore makes unlawful

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1753 51 of 1977.

1754 4 of 2000.

1755 Muslim Lawyers Association "Muslim Lawyers Association in Re: Muslim Marriages Bill" (no date) http://www.mlajhb.com/SUBMISSIONS_SA_LAW_COMMISSION.PDF (accessed 2012-08-09) 10.

1756 S 9(4) of the MMB.

1757 S 8(11) of the MMB.

what the *Quran* has made lawful, and it is therefore unacceptable as it alters Islamic law.

(g) The notion that a non-Muslim judge would be called upon to interpret the *Quran* and *sunnah* is impermissible in Islamic law, as it will inevitably lead to contamination of the rulings and principles of Islamic law. It is furthermore submitted that non-Muslim judges do not understand the text of the *Quran*, the sciences of prophetic teachings nor the principles of Islamic jurisprudence in order to enable them to do what the MMB requires. Therefore only a judgment pronounced by a *Qadi* would be acceptable.

(h) The MMB will be subject to the Constitution, and this will inevitably lead to changes to fundamental Islamic law principles. The resulting jurisprudence will no longer be Islamic but secular.

In addition to the above, the following concerns in respect of the 2010 MMB has also been raised by both gender activists and religious scholars:

(a) A Muslim husband can unilaterally terminate the marriage at any time without having to show fault. The wife can terminate the marriage by means of *khula* in terms of which she is required to compensate her husband. In terms of the 2010 MMB, the consent of the husband in respect of the wife's compensation must be obtained before *khula* can be effected. Amien submits that this concern can be put to rest if a less onerous interpretation of *khula* is adopted that does not require the consent of the husband.[1758]

(b) Clause 8 of the MMB provides that the matrimonial property regime applicable to Muslim marriage is that of out of community of property excluding the accrual. Gender activists are of the opinion that the matrimonial property regime in community of property should be the default system as this will serve to protect the vulnerable party to the marriage.[1759]

(c) Clause 2 of the MMB regulates the application of the MMB by making provision for an "opt-in" and "opt-out" clause. Clause 2 proposes that the MMB must apply automatically to all parties who are currently married in terms of Muslim

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1758 Amien 2012 *The Thinker* 29. The divorce laws of Egypt, Nigeria, Bangladesh, Pakistan and the Philippines do not require the consent of the husband for *khula* to be effected.

1759 *Ibid*.

rites, but allowing them to "opt-out" if they so wish. Spouses have an "opt-in" option where the marriage is concluded after the enactment of the MMB, or where the parties are currently married both civilly and in terms of Muslim rites. The *Ulama* favours the position where the only option is the "opt-in" one, whereas gender activists argue that "opt-out" option should be applicable. Whilst the "opt-in" and "opt-out" may have benefits, those may not serve the interests of vulnerable Muslim women who do not possess the power to make the choice whether or not to "opt-in or opt-out". Moosa submits that the task of the courts to give effect to the consequences of the marriage during the subsistence and termination thereof is made easier if the MMB automatically applies to all Muslim marriages.[1760]

(d) A pertinent question in respect of the MMB is the apparent conflict between MPL and the rights contained in the Constitution. As mentioned previously, any legislation that is enacted must be consistent with the Constitution. The WLC[1761] has submitted that, for the MMB to be consistent with the rights contained in the Constitution, the MMB should, firstly, apply automatically to all Muslim marriages but allow the parties the option of not having the MMB apply to their marriage. It is acknowledged that the spouses to a marriage often do not have equal bargaining power and that in the majority of instances, women are not in a position of power in the relationship to negotiate with their spouses to "opt-in". Secondly, it is submitted that provisions of the MMB must include a requirement relating to a minimum age of marriage to ensure that minor children are protected and forced marriages are prohibited.[1762] Thirdly, it is submitted that the default matrimonial property regime for Muslim marriages be marriage in community of property unless the parties to the marriage agree otherwise.[1763] This would address the issue of gender equality, as recognition is given to the differing effect the dissolution of a marriage has on men and women, taking into account the socio-economic disadvantages experienced by women in particular. Lastly, it is submitted that both spouses must enjoy equal rights and responsibilities during the

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1760 Moosa *The Dissolution of a Muslim or a Hindu Marriage by Divorce* 294.

1761 Women's Legal Centre Media Release, 31 May 2011.

1762 *Ibid*.

1763 *Ibid*.

subsistence of the marriage and on the termination of the marriage.[1764] At present Islamic law makes it easier for the husband to divorce his wife without any third-party intervention. The MMB distinguishes between the manner in which the husband and the wife can obtain a divorce, providing for a fault-based divorce on the part of the wife. To remedy the conflict between MPL and the Constitution, the WLC is advocating equal access to divorce on equal grounds for both the husband and wife. Whether or not the marriage had indeed broken down irretrievably should be determined by a court of law.

(e) One of the most contested issues in respect of the MMB is that, relating to jurisdiction, whether separate courts will be created to adjudicate disputes arising from MPL. The SALC has, however, ruled out the possibility for the establishment of separate *Shari'ah* courts presided over by Muslim jurists due to budgetary restraints.[1765] The SALC submitted that State resources would be severely burdened because, to create a separate *Shari'ah* court for Muslims, would place a duty on Parliament to create separate courts for all the religious groups in South Africa.[1766] Despite Parliament not facilitating the creation of *Shari'ah* courts, UUCSA continues to support the enactment of legislation recognizing Muslim marriages for the following two reasons:

(i) Muslims as a religious minority live in a majority non-Muslim state within a constitutional framework; and

(ii) the Islamic legal maxim "what cannot be achieved to the fullest extent should not be completely discarded".[1767]

UUCSA submits that the proper adjudication of MPL can only be effected in an Islamic state, which South Africa is not. UUCSA has, therefore, advocated the position that Muslims should implement as much as possible of MPL, and should not disregard the attempt to have recognition granted to MPL on the basis that MPL cannot be implemented to its fullest extent. UUCSA, although not unconditionally supportive of

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1764 *Ibid*.

1765 South African Law Reform Commission Project 59 *Islamic Marriages and Related Matters: Collation of Submissions on Discussion Paper 101: Islamic Marriages and Related Matters* 40 at para 5.2.

1766 *Ibid*.

1767 Kiraan "The Muslim Marriages Bill" on Sabahul Muslim http://www.radioislam.org.za/a/index.php?option=com=content&task=view&id=20762&itemid=125 accessed 2012-03-28 as broadcasted on Radio Islam March 2011.

the 2010 MMB, has recognized and understood the importance and necessity of engaging with the Government in respect of the process of legislative recognition of the Muslim marriages. A further motivating factor eliciting UUCSA's support for the Bill stems from decisions in cases like, for example, *Daniels v Campbell*, *Hassam v Jacobs* and *Khan v Khan,* which alleviated the hardships and plight of the applicants in each case, but which was decided in conflict with Islamic law.[1768] Through engagement with Government in the process towards the recognition of Muslim marriages, it is hoped that the proposed legislation will curtail judicial discretion and thereby restrict the court to the purpose, interpretation and ambit of the proposed Bill.[1769] Salooji submits that it is only in the legislated recognition of Muslim marriages "based on defined parameters of the *Shari'ah*" that MPL will be unimpeded by judicial intervention.[1770]

Despite the concerns raised by moderate women's rights advocates,[1771] they have adopted the view point that either version of the MMB should be enacted as legislation as soon as possible because the longer Muslim marriages are not granted legal recognition in South Africa, the longer Muslim women will continue to be marginalized and left without legal protection.[1772] They justify the strategy adopted by claiming that the enactment of legislation will ensure immediate protection for parties married in terms of Muslim rites.[1773] Amien submits that once legislation is enacted recognizing Muslim marriages, moderate women's rights advocates will in all probability launch constitutional challenges against the MMB to align it with the Constitution, in particular, gender equality.[1774]

In addition to what is stated above in respect of the objections raised with regard to certain provisions of the 2003 and 2010 MMB, the following is submitted: The primary

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1768 Moosagie "Is the Muslim Marriages Bill Absolutely Necessary? Presented at the Muslim Marriages in South Africa Workshop held on 14 December 2010; Moosagie "Muslim Marriages Bill: A Legal Quagmire" 2010 5 Masjidul Ulama of South Africa (ed) *The MPL Issue* 9.

1769 Salooji "MMB: Separating Fact from Fiction" (No Date) http://www.uucsa.net/index.php?option=com_content&view=article&id=16:mmb-separating-fact-from-fiction-by-ml-riad-saloji&catid=2:muslim-marraiges-bill&Itemid=5 (accessed 2011-12-12) 1–2.

1770 *Ibid*.

1771 For example, the WLC.

1772 Amien 2013 *Acta Juridica* 365.

1773 Telephonic conversation with Hoodah Abrahams-Fayker of the WLC in Cape Town on 20 November 2015.

1774 Amien 2013 *Acta Juridica* 365.

objection from the CGE is that the enactment of legislation granting recognition to Muslim marriages violates a woman's right to equality and should therefore be amended to comply with the right to equality. In other words, where a conflict arises between the right to equality and religious law, the former would prevail. Having noted the concerns expressed by the CGE, it is submitted that the *Ulama* will not grant any legislation their stamp of approval if this is in conflict with the principles of Islamic law, despite the fact that it conforms to the Bill of Rights. The *Ulama* exert an enormous amount of influence over the Muslim community and if the legislation is not acceptable to the *Ulama*, it will not be acceptable to Muslims in general.

Insofar as the "opt-out" clause is concerned, it is submitted that the parties to a Muslim marriage should be given the choice whether or not they would like the new Act to apply to their marriage. The crux of this thesis is that the right to religious freedom should trump the right to equality as far as Muslims spouses are concerned, because they have voluntarily consented and submitted and themselves to the religion of Islam.[1775] Parties to a Muslim marriage should, therefore, decide for themselves whether or not the MMB is applicable to them. Furthermore, in respect of the CGE objection to the opt-out clause as it presupposes that there are equal power relations between the parties to the impending marriage, it should be noted that unequal power relations also exist in civil marriages and customary marriages, yet these marriages are granted legal recognition.

In respect of the contentious issue of polygyny, it is submitted the call for the unregulated practice of polygyny is not in the spirit of Islam, which promotes fairness and justice. In the same vein, Islamic law requires that the man be in a financial position to enter into a subsequent marriage. Furthermore, as evidenced by the hardship experienced by Muslim women where their husbands elect to enter into a subsequent marriage, one cannot rely on the moral consciousness of the husband to comply with what is prescribed by the *Quran*. The regulation of polygyny in Muslim marriages is of paramount importance. In response to the concern raised by the CGE that with regard to the fact that the right to polygamy is restricted to the husband as women are not

[1775] See para 1 3 of this thesis.

allowed to enter into multiple marriages, it is submitted that similarly customary law allows only the husband to practice polygyny.[1776]

As mentioned previously, the default matrimonial property system in respect of Muslim marriages is out of community of property without the accrual. A marriage in *Shari'ah* is a contract between two parties. Therefore, the parties are at liberty to choose the terms and conditions of their marriage contract. There is, however, nothing to prevent the spouses from concluding a contract thereby regulating their marriage by an alternate matrimonial property system. To this extent clause 8 of the MMB makes provision for the spouses to register an alternative ante-nuptial contract, provided there is agreement in this respect by both spouses. Furthermore, spouses are allowed to change their matrimonial property system, provided there are sound reasons for the proposed change, as long as it does not disadvantage any third parties.[1777] It is also submitted that the argument by Mufti Siraj Desai that where Muslim spouses change their matrimonial property regime, it impacts directly on the rights of heirs after the demise of either spouse, is flawed as one is allowed to dispose of assets as one deems fit during one's lifetime.

The recognition of Muslim marriages would ensure that accountability on the part of the husband, especially where the marriage is terminated. The fact that only the husband is allowed to *talaq* his wife and, where the wife wishes to terminate the marriage she is required to prove fault, has been prescribed by the *Quran* and is not subject to change. However, if legislation is enacted recognizing Muslim marriages, the consequences flowing from a marriage and the effects of termination of a Muslim marriage can be properly regulated. This would entail making the husband, in particular, accountable for the duties he has undertaken when he entered into a marriage and also give the force of the law behind the rulings and decisions of the *Ulama* where the marriage is terminated.

Those who oppose the enactment of legislation recognizing and regulating Muslim marriages should bear in mind that the assimilation of Islamic laws into a non-Muslim

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1776 See para 1 1 of this thesis.

1777 S 8(3) of the MMB.

Constitution threatens to distort, and in some instances, even replace Islamic law. The current practice of instituting litigation in the court for the adjudication of marital disputes, has on numerous occasions resulted in the courts granting decisions which are not *Shari'ah*-compliant.[1778] Whilst these decisions have alleviated the hardships experienced by Muslim women, they are essentially in conflict with the principles of Islamic law.[1779] These decisions do not merely affect the litigants to the original dispute, but will impact on all Muslims in similar situations as the rulings are immediately binding. It is for this reason that the following was stated:

> "A distorted set of laws will eventually emerge governing our marriages. Our choice is to either have a regulated system which will be governed by the Muslim Marriages Act setting out the relevant Islamic law or to have an unregulated system which allows the courts to develop law pertaining to Muslim marriages on a haphazard basis with far reaching consequences for the whole community."[1780]

It is, therefore, submitted that the advantages of legislation, giving recognition to Muslim marriages, by far outweigh the disadvantages of non-recognition.

To this extent, the WLC brought an application in the Western Cape High Court on 17 December 2014,[1781] seeking an order to force the President and Parliament to enact a law recognizing Muslim marriages. In this application the WLC Trust is challenging the Government's failure to pass the legislation, despite it having been on the cards since the SA Law Reform Commission completed a draft Bill in 2003. There is no clear indication of when the legislation will be passed, hence the prompting of the WLC to take the issue to the Western Cape High Court.

In the application the WLC averred that the President, as the head of the national executive, together with the national cabinet and assembly, failed to fulfill the obligation

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1778 In *Khan v Khan supra* and *Mahomed v Mahomed supra* the court's decision that the husband is obliged to maintain the wife in a polygamous Muslim marriage is in accordance with common law. This decision extended the husband's maintenance obligations towards his ex-wife to beyond the *iddah* period. This decision is contrary to *Shari'ah.* Similarly, in *Daniels v Campbell supra,* the court ruled that the wife had the right to bring a claim for maintenance against her deceased husband's estate in terms of the Maintenance of Surviving Spouses Act. Once again, this is not in conformity with Islamic-law principles.

1779 See para 4 4 2 of this thesis.

1780 Yusuf Patel, Unpublished document in the form of question and answer.

1781 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces* Case No: 22481/14.

imposed on them in terms of section 7(2) of the Constitution to promote and fulfill the rights in sections 9(1), (2), (3) and (5), 10, 15(10) and (3), 28 (2), 31 and 34 of the Constitution.[1782] The WLC further called for the enactment of legislation providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa, as well as the regulation of the consequences flowing from the recognition of Muslim marriages.[1783] In the alternative, the WLC sought a declaration that the Marriage Act[1784] and the Divorce Act[1785] is inconsistent with sections 7(2), 9(1), (2), (3) and (5), 10, 15(10) and (3), 28(2), 31 and 34 of the Constitution.[1786] In the alternative to paragraphs 4, 7 and 8 cited above, a declaration was sought that, firstly, the Divorce Act apply to Muslim marriages; secondly, that Muslim marriages be deemed valid in terms of the Marriage Act, and lastly, that the common-law definition of marriage be extended to include Muslim marriages.[1787] The respondents were given until 13 January 2015 to lodge their intention to oppose the application. The bid by the WLC to speed up legislation to recognize Muslim marriages has been stymied by a Government request for more time to reply to the application.[1788] The Government had until August 2015 to respond to the application. On 2 December 2015, Judge Desai heard arguments from the WLC, the State, and other interested parties such as South African Lawyers for Change, the Commission for Gender Equality, United *Ulama* Council of South Africa (UCSA)[1789] and Lajnatun Nisaa-Il Muslimaat (the Association of Muslim Women of South Africa)[1790] on whether or not the law's failure to recognize Muslim marriages discriminated against women.[1791] Lajnatun Nisaa-Il Muslimaat and UCSA as intervening applicants, in a bid to discredit the WLC, argued that the WLC

1782 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces supra* para 4.

1783 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces supra* para 7.

1784 25 of 1961.

1785 70 of 1979.

1786 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces supra* para 8.

1787 *Women's Legal Centre Trust v President of the Republic of South Africa; Minister of Justice and Constitutional Development; Minister of Home Affairs; Speaker of the National Assembly; Chairperson of the National Council of Provinces supra* para 9.

1788 Weekend Argus 7 June 2015.

1789 This organization has the same name as UUCSA.

1790 Their membership consists of approximately 1000 members.

1791 Bernado "Women's Rights Body Compared to Pet Cat" 2 December 2015 *IOL News*.

was unfit to appear before the Western Cape High Court in the case of the MMB. Furthermore, it was argued that, if the MMB is enacted as legislation, it would be subject to the Constitution and thus unacceptable in terms of *Shari'ah*. The ruling on the application by the Association of Muslim Women of South Africa and UCSA was heard on 5 February 2016.[1792] In this matter the court ruled that Lajnatun Nisaa-Il Muslimaat and UCSA would be admitted as intervening parties.

To date, the main application is still ongoing and the matter which was initially set down for May 2016 has been postponed until 28 August 2017. WLC is expected to ask the court to compel government to pass legislation that would give Muslim marriages legal status without being prescriptive as to what the legislation should entail.[1793]

4 8 CONCLUSION

The Constitution makes provision for legislation recognizing marriages or systems of personal and family law under MPL.[1794] It is evident from the discussion of various cases,[1795] that public policy is now more tolerant towards marriages concluded according to Islamic rites. Muslim marriages could and should therefore be afforded legal recognition. The failure to grant recognition of all Muslim marriages as valid marriages, as well as the failure to provide for mechanisms regulating the consequences of recognition, can be regarded as breaches of the right to equality, the right to dignity, the right to freedom of conscience, religion, thought, belief and opinion, the right to participate in the cultural life of one's choice and the right to enjoy and practice religion. In the absence of the legal recognition of Muslim marriages, Muslims, particularly Muslim women, have to endure many hardships and challenges. With the result, the married lives of Muslims remain unpredictable and outside their control. Spouses, who conclude a marriage in terms of Muslim rites, do not fully enjoy the rights afforded to other spouses married in accordance with South African civil law. Furthermore, many of the affected parties married in terms of Muslim rites do not have access to legal advice or the resources to litigate through the courts.

1792 *Ibid*.

1793 *Ibid*.

1794 S 15(3) of the Constitution.

1795 *Ryland v Edros supra*, *Amod v Multilateral Vehicle Accidents Fund (Commission for Gender Equality Intervening) supra*.

It is submitted that legal recognition of Muslim marriages will make a profound difference, as it will provide a regulatory legal framework, securing the rights of parties married in terms of Islamic rites. The legal recognition and regulation of Muslim marriages will also, to a certain extent, serve to alleviate the problems experienced by women married in terms of *Shari'ah* in matters such as divorce, maintenance and the care and contact of children. Due to the lack of legal recognition of Muslim marriages, the position at present is that at the dissolution of the marriage, the parties to a Muslim marriage firstly have to prove that they were indeed married before the marriage can be dissolved. The inequalities experienced by Muslim women are further highlighted as the burden of protecting their rights falls on women and they are forced to embark on costly, time-consuming and emotionally-draining litigation.

Whilst the courts have made inroads towards the legal recognition of MPL in South Africa, it should be acknowledged that access to the court system is available only to those who possess the financial resources. The problems relating to non-recognition of Muslim marriages persist, especially for Muslim women who have to approach the courts to enforce their rights where the marriage has been terminated through divorce. As this inevitably involves a High Court application, it is costly and time-consuming and as a result, access to the courts is available only to litigants who have the means to embark on litigation. It should also be noted that the court decisions relating to Muslim marriages are contrary to the principles of Islamic law and it has to a certain extent "bastardized" Islamic law. Notwithstanding these challenges, it is imperative that legal recognition be granted to Muslim marriages so as to alleviate the hardships and inequality experienced by women who are married in terms of Muslim rites.

The challenges in respect of the recognition of Muslim marriages are twofold, namely, should recognition be granted to Muslim marriages, this recognition is subject to the provisions of the Constitution. The legislature is faced with the challenge of framing Islamic marriage law in terms of the general intention of the Constitution, with particular consideration being given to the rights contained in the Bill of Rights. In terms of the recognition of Muslim marriages in South Africa, it is apparent that a conflict exists between the right to religious freedom and the right to equality. It is submitted that this conflict is irreconcilable. It is, furthermore, submitted that it legally impossible to give effect to both these conflicting rights as, although the Constitution is the supreme law

of South Africa, it is still nonetheless man-made. In contrast, Islamic law is based on divine revelation. The question which needs to be addressed is why should western ideologies and philosophies be used as the yardstick to determine what is acceptable and what is not. Islam as a legal system, which is based on divine revelation should not be required to bow down to the Constitution?

This conflict existing between MPL and the Constitution is a factor contributing to the delay in passing legislation recognizing Muslim marriages. Be that as it may, this challenge is not unique to the South African legislature as it has been similarly faced with this challenge in respect of the recognition of customary marriages. Caution should, however, be exercised when enacting legislation recognizing and regulating Muslim marriage, as legislation which is not *Shari'ah* compliant will not be accepted by the majority of Muslims living in South Africa. Although customary marriages have been granted legal recognition, this is subject to the rights contained in the Constitution. This has led to challenges to the rules of customary in the secular courts with the result that certain rules of customary which conflicts with the right to equality has been declared unconstitutional. This has led to the Recognition of Customary Act deemed to be paper law.[1796] It is, therefore, submitted that in the light of this irreconcilable conflict, religious freedom should trump the right to equality as it pertains to Muslim marriages on the basis that the parties to the marriage have voluntarily consented to conclude the marriage in terms of Muslim rites and have voluntarily selected that Islamic law apply to their marriage.

Secondly, a further challenge facing the legislature is that should Muslim marriage be granted legal recognition, what form this recognition should take. It is submitted that in granting legal recognition to Muslim marriages, a pluralist approach could be adopted, as informal legal pluralism already exists in South Africa in respect of MPL. South Africa is a pluralistic society, as there are different cultural and religious groups co-existing in the same social sphere. The South African legal system simultaneously grants recognition and the enforcement of more than one legal system as is evident

[1796] See Himonga *The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa* in Fenrich, Galizzi & Higgins (eds) *The Future of African Customary Law* (2013) 31; Himonga & Moore *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015) for a general overview in this respect.

with the enactment of the Recognition of Customary Marriages Act.[1797] Should the pluralist approach be adopted, the regulation of Muslim marriages will take place expressly by statute. The Recognition of Customary Marriages Act[1798] implicitly makes provision for polygamy amongst black South Africans. The Act recognizes customary marriages where a person is a spouse in more than one customary marriage, and where the marriage was concluded either before or after the enactment of the said Act. For the sake of consistency, the recognition of potentially polygamous Muslim marriages may require the enactment of a statute equivalent to that of the Recognition of Customary Marriages Act and the Civil Union Act.[1799]

In this respect the enactment of the MMB into legislation could possibly be the mechanism for the recognition and regulation of Muslim marriages. Notwithstanding the vigorous debate and concerns expressed amongst the *Ulama* and the amendments to the 2010 MMB, the latter has not been rejected outright, as moderate and progressive members of the *Ulama* are willing to negotiate with the Department of Justice to fine-tune the MMB where required.[1800] This is important, as without the support of the *Ulama,* the MMB will receive very little support and acceptance amongst the Muslim community.

Having stated this, it must be noted, however, that despite the largely consultative process that the draft 2003 and 2010 draft Bills, it has not received unanimous support from the *Ulama* as the latter holds the view that the provisions of the proposed MMB are not *Shari'ah* compliant and therefore unacceptable. The fact that any legislation passed must comply with the rules and principles of *Shari'ah* is a major factor contributing to the delay in passing legislation granting recognition to Muslim marriages. The diversity of the South African Muslim community is reflected in the diverse responses to and expectations of the MMB. The Muslim religious leaders are divided in their response in respect of the enactment of the MMB as legislation.

1797 Palser 1998 *Journal for Juridical Science* 93.

1798 120 of 1998.

1799 17 of 2006.

1800 Moulana Yusuf Patel, the secretary-general of UUCSA, has assured that UUCSA will continue to participate in the process of development of legislation recognizing Muslim marriages. http://www.alqalam.co.za/index.php?option=com_content&view=article&id=296:muslim accessed 2011-02-17.

Although the decisions taken by the *Ulama* are not legally binding and enforceable, they do carry substantial moral weight amongst the Muslim communities. Therefore, should the MMB be enacted into legislation without the support of the major religious bodies and the Muslim communities in South Africa or if the MMB is perceived to be in conflict with the rules and principles of Islamic law, the result will be mere paper law. It is, therefore, submitted that despite the legislature's attempt to adopt a pluralist approach by proposing a separate piece of legislation to grant recognition to Muslim marriages, there is a need for the legislature to rethink the approach that has to date been adopted.[1801] Notwithstanding the fact that the legislature has provided two draft Bills in 2003 and 2010, no legislation has to date been enacted granting recognition to Muslim marriages. It is submitted that it is highly unlikely that the *Ulama* will compromise the principles of Islamic law for the sake of legal recognition of Muslim marriages.

Notwithstanding the challenges described above, it is imperative that legal recognition be granted to Muslim marriages in order to give effect to the principle of equality advocated in both Islamic and South African law and to alleviate the injustices and hardships experienced by Muslim women. The question is therefore no longer whether or not Muslim marriages should be granted legal recognition but rather what form the recognition should take and if the legislature embarks on the enactment of legislation, how this legislative recognition can be affected.

[1801] See para 6 2 of this thesis for a discussion of an alternative solution for the recognition of Muslim marriages.

CHAPTER 5
MUSLIM PERSONAL LAW IN ENGLAND AND WALES

5 1 INTRODUCTION

Chapter five, like chapter four, focusses on the adoption of MPL in a national context. This necessitates a discussion on the extent to which MPL has been recognized and accommodated into English law. The purpose of this investigation is to establish whether or not the English legal system has remedied the conflict, which inherently exists between Islamic law and a constitutional democracy, such as England and Wales.

At present British society is *de facto* and *de jure* multi-faceted and multi-layered.[1802] This is evidenced by the multiple religions, cultures and races co-existing in Britain.[1803] Islam is the second largest religion in Britain in terms of the number of adherents.[1804] Muslims, therefore, constitute a large portion of the minority groups living in Britain. Islam, being the common identifying factor, differentiates Muslims from other minority groups in Britain. The British Government stance of "one country, one law" and the failure or unwillingness of British Muslims to assimilate or integrate into Britain's legal system has resulted in the emergence of a parallel Muslim society that lives according to the laws and principles of *Shari'ah*.[1805] Muslims have elected not to jettison their religious laws.[1806] A survey undertaken in 1989 concluded that, where MPL conflicted with English law, 66% of Muslims indicated that they would rather follow MPL.[1807] Whilst Muslims in Britain[1808] conduct their lives, marriages, divorces and the rearing of their children, according to the teachings and principles of *Shari'ah*, they

1802 Yilmaz "Muslim Law in Britain: Reflections in the Socio-legal Sphere and Differential Treatment" 2000 Vol 20 2 *Journal of Muslim Minority Affairs* 353.

1803 *Ibid*.

1804 Yilmaz "Law as Chameleon: The Question of Incorporation of Muslim Personal Law into English Law" 2001 Vol 21 2 *Journal of Muslim Minority Affairs* 297.

1805 Kern "Britain v Muslim Immigration" http://www.gatestoneinstitute.org/2056/britain-vs-muslim-immigration (accessed 2014-03-25).

1806 Yilmaz 2001 *Journal of Muslim Minority Affairs* 297.

1807 Hiro *Black British, White British: A History of Race Relations in Britain* (1991) 192; Poulter *Ethnicity, Law and Human Rights: The English Experience* (1998) 203.

1808 As is the case with Muslims in other countries.

simultaneously draw on English family law and customary law.[1809] This has led to the creation of a hybrid field of law, namely, British-Muslim family law.[1810] British-Muslim family law is defined as a collection of hybrid legal practices that are formulated and at times modified by existing principles and norms of English family law, legal culture, personal religious identity, community customs as well as principles of Islamic law.[1811] British citizens who go through the legal process as Muslims, apply it. The result is that British Muslims are increasingly expected to navigate between the different legal systems to regulate their private lives.[1812]

5 2 HISTORICAL BACKGROUND

The mid-nineteenth century saw the first relatively permanent Muslim populations being established in Cardiff, Liverpool, Manchester, South Shields and London's East End.[1813] Large groups of Muslims from Pakistan and Bangladesh migrated to Britain after the Second World War, while smaller Muslim communities migrated from Africa, Cyprus, Malaysia and the Middle East.[1814] This can be described as the period of economic migration, where migrants regarded themselves as transients whose aim was to earn money in the United Kingdom, which could then be sent to their families in their countries of origin. During the 1950s Muslim migration to Britain took place on a smaller scale, but there was once again an increase in migration in 1961 as a result impending legislation which would curtail automatic entry into the United Kingdom.[1815] As a result of the restrictive Commonwealth Immigrants Act, there was an increase in migration during the early 1970s. During this period, migrants' perceptions of themselves as transients began to change, and they started making emotional and financial investments in a long-term stay in Britain by also relocating their families to

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1809 Hiro *Black British, White British: A History of Race Relations in Britain* (1991) 192; Poulter *Ethnicity, Law and Human Rights: The English Experience* (1998) 203.

1810 Pilgrim "British-Muslim Family Law and Citizenship" 2012 Vol 16 5 *Citizenship Studies* 769 770. A practical example of the application of this hybrid system of law is where a registered solicitor offering Islamic legal services stipulates in the divorce certificate that the respondent has ten days within which to dispute the *talaq*. This is an innovation in terms of Islamic law, but is the standard deadline of response in terms of English legal practice.

1811 Pilgrim 2012 *Citizenship Studies* 770.

1812 Yilmaz "The Challenge of Post-modern Legality and Muslim Legal Pluralism in England" 2002 Vol 28 2 *Journal of Ethnic and Migration Studies* 343 351.

1813 Ansari "Muslims in Britain" (August 2002) *Minority Rights Group International Report* 6. See also Gilliat-Ray *Muslims in Britain* (2010) 1-27.

1814 Brah *Cartographies of Diaspora: Contesting Identities* (1996) 21.

1815 The Commonwealth Immigrants Act was enacted as legislation in 1962.

Britain.[1816] During the 1980s and 1990s there was an increase in refugees and asylum-seekers due the political upheaval and conflict in countries such as Iran, Iraq and Afghanistan, for example. Once again this led to a growth of immigration in Britain.[1817]

In 2001 there were approximately 1.6 million Muslims[1818] living in the United Kingdom, with Pakistanis and their descendants constituting the largest group. For the first time a census included a religious question.[1819] According to Government figures based on the Census 2001, 46% of Muslims living in Britain in 2001 were born in the United Kingdom, while the rest were born in countries outside the United Kingdom which includes but is not limited to, Pakistan, Bangladesh, Somalia and Kenya.[1820] Since the 2001 Census the British Muslim population has increased at an alarming rate. This figure grew to 1,870,000 in 2004, to 2,422,000 in 2008 and to 2,869,000 in 2010.[1821]

Owing to the fact that the British Muslim population came from different parts of the world, it is not homogenous, and this is very much reflected in the cultural aspects of their lives. The growing number of Muslims in Britain saw the emergence of a network of mosques that became the centres for religious, social and political activity. By the mid-1990s there were 839 mosques established in Britain as well as 950 Muslim organizations, ranging from self-help groups to nationwide "umbrella" organizations.[1822] The growing number of Muslims, as well as the number of mosques and Muslim organizations in Britain, has changed Muslim perceptions of themselves as they no longer view themselves as migrants but as permanent settlers.[1823] This change in perception has created new challenges for Muslims, this being that they do indeed belong to British society, having to adjust to British institutions and practices, while at the same time maintain their Islamic identity.

1816 Brah *Cartographies of Diaspora*: *Contesting Identities* 27.

1817 Ansari "Muslims in Britain" (2002) 6.

1818 According to Census 2001, Pakistanis and their descendants constitute 43% of the British Muslim Community. Daniels "Sharia, Anglican-style" 10 March 2008 *National Review* 24 26.

1819 This constitutes 2.8% of the total British population.

1820 Hansard (official report of debates in the British Parliament); Pew Research Centre September 2010.

1821 *Ibid.*

1822 Vertovec & Peach *Islam in Europe* (1997) 24.

1823 *Ibid*.

5 3 THE NON-RECOGNITION OF MUSLIM MARRIAGES IN BRITAIN

5 3 1 STATE'S RESPONSE TO THE RECOGNITION OF MUSLIM MARRIAGES

Notwithstanding the fact that Muslims are living in Britain, which is a non-Muslim country, Muslims show a preference to be regulated by the principles of Islamic law, especially in the sphere of family law.[1824] Muslims living in non-Muslim states will at best seek to formalize the application of Islamic law within the State's own legal system.[1825] For this reason certain Muslim groups in Britain have been campaigning for the recognition and implementation of MPL, in order to autonomously regulate family-law issues according to Islamic law.[1826] To this effect, a resolution was taken by the Union of Muslim Organisations of the United Kingdom and Ireland (hereafter referred to as UMO) during the 1970s, calling for the formal recognition of MPL as a separate legal system that would automatically apply to British Muslims.[1827] A proposal to this effect was drafted and submitted to the various Government ministers with the aim of it being brought before Parliament for subsequent enactment. In 1984 a Muslim Charter was drafted, which called for the recognition of MPL.[1828] The demand for legal recognition was repeated in a meeting between UMO and Home Office ministers in 1989, and was publically made in 1996 again.[1829] In 1998, the appeal by the UMO to integrate Islamic family law into legislation, which embraced the ECHR to the then Home Secretary, Jack Straw, was once again rejected.[1830]

The basis of the UMO call for the recognition of Muslim family law as a separate legal system arose from the following five causes:[1831]

(i) Muslim family values are held in very high regard by Muslims, due to the fact that Islamic legal principles, beliefs and family relations are closely intertwined.

1824 Yilmaz 2001 *Journal of Muslim Minority Affairs* 297.

1825 Yilmaz *Journal of Muslim Minority Affairs* 299.

1826 Yilmaz 2001 *Journal of Muslim Minority Affairs* 297.

1827 Modood "Muslim Views on Religious Identity and Racial Equality" 1993 Vol 19 3 *New Community* 513.

1828 Joly *Britannia's Crescent: Making Place for Muslims in British Society* (1995) 15.

1829 Poulter *Ethnicity, Law and Human Rights: The English Experience* 202; *British Muslims Monthly Survey,* Birmingham: Centre for the Study of Islam and Christian-Muslim Relations (December 1996) 15.

1830 Ansari "Muslims in Britain" Report 2002 23.

1831 Yilmaz 2001 *Journal of Muslim Minority Affairs* 299.

(ii) Muslim adherence to Muslim family law has become even more precious due to the fact that aspects of Muslim law has given way to Western law in many countries.

(iii) Article 9 of the ECHR guarantees freedom of choice of religion and the right to practice religion to everyone, and in the interest of religious tolerance, Muslim family law should be granted legal recognition as a separate legal system.

(iv) As a method of avoiding the social ills prevailing in British society,[1832] MPL should be the legal system applicable to British Muslims.

The State's reasons for the rejection of the resolution, formulated by the UMO, were based on the ground that the uniform system of law practised by Britain did not cater for the incorporation of MPL.[1833] In other words, the same rules of English law had to apply uniformly to all English citizens, irrespective whether or not they are Muslim.[1834] Secondly, it was submitted that, as a result of the numerous versions of family law, it would be difficult to determine which version should be applied in a particular case.[1835] The third justification for rejecting the incorporation of Muslim family law into the British legal system relates to the interpretation of Muslim law, namely whether or an English judge could interpret Muslim family law, and whether or not his or her interpretation would be correct.[1836] Furthermore, the question arises as to whether, in the event of a specially established Muslim court interpreting Muslim family law, the interpretation would be acceptable to all the different groups of Muslims in Britain.[1837] Lastly, Muslim family law is often in conflict with fundamental human rights, especially in respect of the violation of the rights of women.[1838]

Conflicts between English civil law and Islamic law have been viewed as temporary, as the Government believed that ethnic minorities would eventually follow the law of the land.[1839] While Muslims in England and Wales have indeed been influenced by

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1832 For example, prostitution, pre- and extramarital sexual intercourse and abortions.

1833 Poulter *The Claim to a Separate Islamic System of Personal Law for British Muslims* (1990) 158.

1834 This argument falls flat as religious concessions are made for Jews and Quakers.

1835 Yilmaz 2001 *Journal of Muslim Minority Affairs* 300.

1836 *Ibid*.

1837 Poulter *The Claim to a Separate Islamic System of Personal Law for British Muslims* 158.

1838 *Ibid*.

1839 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 345.

urbanization and modernization, they have clearly shown a preference for the application of Islamic law, and have therefore not lost their Islamic identity.[1840]

While British Muslims experience immense challenges in being British and Muslim at the same time, they have adopted a middle-way approach as they remain faithful to Islam, while identifying fully with Britain.[1841] Integration in this sense means the adaption of British structures to facilitate the practice of Islam within British society.[1842] The assimilation of British cultural patterns by Muslims has not materialized, and Muslims are rather developing their own distinctive lifestyles, with the result that Islamic laws and customs are increasingly prevalent within British society.[1843]

One of the most significant calls for the accommodation of Islamic law in England came from then Anglican Archbishop Rowan Williams in his lecture on 7 February 2008, when he stated that the accommodation of Muslim family law in England was unavoidable.[1844] In his lecture, Williams used Islam as his primary example in exploring the growing challenge of accommodating communities who, while regarding themselves as British citizens, relate to something other than the British legal system alone.[1845] Williams stated that he foresees problems arising where this dual identity is not recognized.[1846] He furthermore, considered what degree of accommodation the British legal system can and should provide to minority communities who, in turn, have their own strongly entrenched legal and moral rules and codes.[1847] In his address, Williams carefully explored avenues of potential plural or supplementary jurisdictions that could lead to the possible recognition of Islamic law in Britain.[1848] Other issues explored by Williams included the theoretical and practical issues arising from the

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1840 *Ibid*.

1841 Modood 1993 *New Community* 514.

1842 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 345.

1843 Joly *Britannia's Crescent: Making a Place for Muslims in British Society* 183.

1844 Rowan Williams, Archbishop of Canterbury, delivered the lecture at the Royal Courts of Justice titled "Civil and Religious Law in England: A Religious Perspective" 7 February 2008. This lecture was reprinted in Ahdar & Aroney (eds) *Shari'a in the West* (2010).

1845 Ahdar & Aroney *Shari'a in the West* 293.

1846 *Ibid*.

1847 Ahdar & Aroney *Shari'a in the West* 294.

1848 Ahdar & Aroney *Shari'a in the West* 298.

situation where a person has allegiance to the tenets of his or her faith, as well as to the secular law of his or her State. Williams identified the following difficulties:[1849]

(a) The ability of the secular court to distinguish purely cultural habits from seriously-rooted matters of faith. To achieve this would require the secular court access to a recognized religious authority acting for a religious group. As far as Muslims were concerned, the role and value of *Shari'ah* councils would have to be enhanced and developed.

(b) The difficulties that could arise if a religious court had been empowered to determine matters, especially family-law matters, finally and authoritatively. This could lead to a religious court reinforcing elements that are repressive, and that could have serious consequences in respect of women.

(c) The wisdom of qualifying a person's commitment to a secular-legal monopoly is questioned. Williams, however, argues that in a plural society the law should be viewed as a mechanism protecting a person against the loss of certain basic liberties, and the right to demand reasons for the infringement of these liberties.

The address by Williams received much criticism and adverse media coverage.[1850] In fact, the address by Williams generated more than two-hundred and fifty articles worldwide in the space of one month, with the vast majority denouncing his address.[1851] The remarks that Williams made a few days after his address as a result of the eruption of the negative media coverage, clearly shows that he was not advocating for the establishment of a parallel legal system, which would see the

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1849 Ahdar & Aroney *Shari'a in the West* 298. See also The Hon. Mr Justice McFarlane "Am I Bothered?: The Relevance of Religious Courts to a Civil Judge" Keynote Address 18 May 2011 British Religious Courts: Marriage Divorce and Civil Law Cardiff Law School, Cardiff University 3-4.

1850 The Hon. Mr Justice McFarlane "Am I Bothered?: The Relevance of Religious Courts to a Civil Judge" Keynote Address 18 May 2011 British Religious Courts: Marriage Divorce and Civil Law Cardiff Law School, Cardiff University; Catherine Bennett "It's One Sharia Law for Men and Another for Women" Guardian February 9, 2008; http://www.guardian.co.uk/commentisfree/2008/feb/10/religion/law (accessed 2014-04-24); *Daniels "Sharia. Anglican-style" 2008 National Review; Jackson"'Transformative* Accommodation' and Religious Law" 2009 *Ecclesiastical Law Journal* 131.

1851 Witte & Nichols "The Frontiers of Marital Pluralism" in Nichols (ed) *Marriage and Divorce in a Multicultural Context: Multi-tiered Marriage and the Boundaries of Civil Law and Religion* 2012 357 357. See also Daniels "Rowan Williams on *Shari'a*, Secularism, and Surprise" 2014 Vol 49 (3) *Journal of Ecumenical Studies* 405.

establishment of independent *Shari'ah* courts.[1852] Neither was Williams advocating for the direct implementation and enforcement of Islamic law in the civil English courts.[1853] He was, instead, posing a series of hard but unavoidable questions relating to marital, cultural and religious identity and practice in Western democratic societies, that have committed themselves to human rights for everyone.[1854] In other words, Williams was not advocating for full-fledged application of Islamic law, but rather for an improvement in the inclusion of religious sensitivities into the British legal process.[1855]

Four months after the William's address, Lord Phillips publically declared that certain elements of *Shari'ah*, including family law, need to be embraced as *Shari'ah* seemed to be here to stay.[1856] Lord Phillips further stated that the English legal system "already goes a long way towards accommodating the Archbishop's suggestions in respect of Islamic law".[1857] Despite these assertions, Lord Phillip made it abundantly clear that the establishment of parallel *Shari'ah* courts would not take place in England.[1858] He emphasized that those who live in England and Wales are governed by English law, and are subject to the jurisdiction of the English courts, but that the English legal system accommodates Muslims, for example, to conduct their lives according to Islamic law, provided it does not conflict with any rights guaranteed by English law.[1859] This is and continues to be the official position adopted by the State in respect the Islamic law of marriage. To summarize, the law of England and Wales does not grant recognition to marriages concluded and terminated in terms of Muslim rites only, and therefore does not recognize any processes and decisions made by *Shari'ah* councils.

1852 Nichols "Religion, Marriage and Pluralism" 2011 Vol 25 *Emory International Journal of Law Review* 967 at 977.

1853 *Ibid*.

1854 *Ibid*.

1855 Ahdar & Aroney *Shari'a in the West* 302.

1856 Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, Speech at the East London Muslim Centre: "Equality before the Law" 3 July 2008, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/lcj_equality_before_the_law_030708.pdf (accessed 2014-04-24). Reprinted in Ahdar & Aroney *Shari'a in the West* 309 at 317.

1857 *Ibid*.

1858 The Hon. Mr Justice McFarlane "Am I Bothered? The Relevance of Religious Courts to a Civil Judge" Keynote Address 18 May 2011 British Religious Courts: Marriage Divorce and Civil Law Cardiff Law School, Cardiff University 6.

1859 *Ibid*.

The reality for Muslims living in Britain is, therefore, that the non-recognition and non-regulation of MPL, perpetuates the disadvantages suffered by women, particularly those who conclude a marriage in terms of Muslim rites only, the very people the Government is supposed to protect.[1860]

5 3 2 LEGISLATION: DIFFERENTIAL TREATMENT

As stated above, English law does not grant legal recognition to marriages concluded in terms of Islamic law only.[1861] This is the status *quo,* despite the fact that Article 9 of the ECHR guarantees freedom of choice of religion and the right to practice religion to everyone living in Europe. In addition to Article 9, Article 2 of the First Protocol to the ECHR guarantees the right of education according to religious reliefs to everyone living in Europe.[1862] As a signatory to the ECHR, the convention places Britain under an obligation to secure and give effect to the rights that the Convention seeks to uphold and protect, and is furthermore under a duty to ensure that there is an effective remedy before a national authority should a violation of the rights contained under ECHR be contravened.[1863] In addition to the ECHR, the Human Rights Act 1998[1864] also grants British Muslims the right to freedom of thought, conscience and religion.[1865] The purpose of the enactment of the Human Rights Act 1998 is firstly, to secure the human rights set out in the ECHR for everyone in the United Kingdom, and secondly, to provide an effective remedy to protect these rights in court.[1866] In other words, the Human Rights Act 1998 places a statutory duty on the judiciary to enforce the rights contained in the ECHR.[1867] Section 13, in particular, requires that regard must be paid to the importance of the right to freedom of thought, conscience and religion when court decisions affecting the exercise of those rights by religious organizations are taken. Although that it is clear from section 13 that this provision extends beyond the established Church, the effect of this provision has not materialized, as MPL is

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1860 *Ibid*.

1861 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

1862 Kiviorg "Collective Religious Autonomy *versus* Individual Rights: A Challenge for the ECHR" 2014 Vol 39 *Review of Central and East European Law* 315 319.

1863 Art 1.

1864 The Human Rights Act came into force on October 2000.

1865 Ansari "Muslims in Britain" Report 2003 at 29.

1866 *Ibid*.

1867 Khaliq "The Accommodation and Regulation of Islam and Muslim Practices in English Law" 2002 Vol 6 31 *Ecclesiastical Law Journal* 332 334.

presently not granted legal recognition by the English civil courts.[1868] As far as English law is concerned, statutory and the common law regulate all matters of domestic-family law.[1869] Therefore issues relating to marriage, divorce, residence, custody and maintenance of children are decided exclusively by specially designated judges in the Family Division of the High Court and in the County Courts, which apply a unified and single set of English legal principles to all irrespective of race or creed.[1870]

Complementary to the Human Rights Act 1998 is the Equality Act 2010,[1871] which prohibits discrimination on the grounds of religion or belief.[1872] In terms of section 10 religion and belief are defined as:

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
(2) Belief means any religious or philosophical belief and a reference to a belief includes a reference to a lack of belief.

The broad definition of the terms "religion" and "belief" means that it can include the religious and philosophical beliefs of any religion. Section 29 of the Equality Act 2010 prohibits direct and indirect discrimination, harassment and victimization, especially where education and employment are concerned. Furthermore, the Act contains certain exceptions applicable to religion or belief in employment and service delivery.[1873]

Despite the well-developed legal framework for protecting the rights of individuals to express and practise religion and belief, the approach adopted by the English legal system has been that of exclusion and non-recognition, insofar as Muslim marriages

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1868 *Ibid*.

1869 Edge "Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism" in Griffith-Jones (ed) Islam and English Law (2013) 125.

1870 The designated judges are generally former family-law practitioners who possess considerable expertise in the intricacies and complexities of family law.

1871 The full Act is applicable to only England and Wales. S 217 of the Equality Act 2010.

1872 S 29(8) of the Equality Act.

1873 Schedule 3, s 29 and Schedule 23, s 2 of the Equality Act 2010. For example, the goods and services exclusion makes it possible for ministers of religion to provide a service to persons of one sex only provided this is essential in order to comply with the rules and principles of the religion.

are concerned. This has caused considerable hardship to Muslims who are married in terms of Islamic law only.[1874]

In terms of English law there is a clear separation between State and religion.[1875] Religious law is therefore not recognized in a legal sense in the civil and public sphere.[1876] The Home Office has always refused to consider the registration of religious affiliation, and until 2001 religious affiliation was not even the subject of inquiry.[1877] MPL can be applied by members of the Muslim community, but this will not carry any weight in respect of English law as Islamic law is regarded as having the status of moral and not legal rules.[1878] The official stance therefore adopted by the Home Office is that religion plays no part in matters of law and Muslims, for example, are subject to the English legal system in the same manner as the other citizens of England and Wales.[1879] However, despite this assertion, British Muslims continue to apply MPL as an unofficial law, clearly indicating that the exclusion from religion from the legal sphere has not seen the demise of religion.[1880]

English law has, *via* the enactments of statutes and case law, made certain concessions with regard to family law in respect of Jews and Quakers, as both minority groups are exempt from the rules in respect of the solemnization of marriage, which are regulated in terms of the Marriage Acts 1949 - 1996.[1881] Jews and Quakers are also exempt from the rules regulating the solemnization and registration of their marriages, as they do not have to celebrate their marriages during the daytime and in a registered building.[1882] Furthermore, the presence of an official appointed by the State authorities at the solemnization of the marriage is not a requirement, and neither

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1874 This is so especially with regard to the rights and duties between spouses and divorcees, the legal status of children, the eligibility to State benefits and when death occurs.

1875 Yilmaz 2001 *Journal of Muslim Minority Affairs* 298.

1876 *Ibid*.

1877 The Government responded to the criticism and included a question regarding religious affiliation in the 2001 census.

1878 Yilmaz 2001 *Journal of Muslim Minority Affairs* 298.

1879 *Ibid*.

1880 Menski *Law, Religion and South Asians* (1996) 16.

1881 Pilgrim 2012 *Citizenship Studies* 771. See also Shelley "English, Christian or Muslim Law: Deconstructing Some Myths" 2015 Vol 26 (3) *Islam and Christian-Muslim Relations* 307 310.

1882 Bradney *Religions, Rights and Laws* (1993) 42.

is registration of the marriage.[1883] These exemptions have not been granted to other minority groups in Britain.[1884]

In addition, the Divorce (Religious Marriages) Act 2002 introduced section 10A into the Matrimonial Causes Act 1973.[1885] In terms of section 10A either spouse may apply for an order that a decree absolute not be granted until a declaration is made by both spouses that the appropriate steps have been taken to dissolve the marriage in terms of Jewish law, or the custom of any other religious group, including Islam.[1886] The declaration must be produced in court.[1887] In other words, section 10A provides a mechanism whereby judges can refuse to grant a civil divorce until the dissolution of the religious marriage in respect of members of the Jewish faith has been procured.[1888] This mechanism circumvents the situation of a "limping" marriage whereby Jewish women might be civilly divorced but remain married under in terms of their Jewish faith, as the husband has not pronounced a "*ghet*", releasing the wife from the religious marriage.[1889] Spouses married in terms of Islamic law experience the same problem in respect of "limping" marriages, but are not protected under section 10A, despite being one of the largest religious groups in Britain.[1890] This position prevails despite the wording of the Divorce (Religious Marriages) Act 2002 being wide enough to accommodate other religious groups.[1891]

The English legal system's approach as to who qualifies as ethnic minority to warrant protection in terms of the Race Relations Act 1976, is wrought with inconsistencies.[1892] Whilst no protection exists for other minority groups, the Race Relations Act 1976

1883 Ss 26(1), 35(4), 43(3) and 75(1)(a) of the Marriage Act 1949. These exemptions as they pertain to the marriages of Jews and Quakers imply that civil recognition has been granted to these two types of marriages.

1884 Bradley *Religions, Rights and Laws* 43.

1885 The Hon Mr Justice McFarlane "Am I Bothered?: The Relevance of Religious Courts to a Civil Judge" Keynote Address !8 May 2011 British Religious Courts: Marriage Divorce and Civil Law Cardiff Law School, Cardiff University.

1886 *Ibid*.

1887 S 10A of the Divorce (Religious Marriages) Act 2002.

1888 Pilgrim 2012 *Citizenship Studies* 772.

1889 *Ibid*.

1890 Where Muslim spouses have also entered into a civil marriage, the latter takes preference over the marriage concluded into in terms of Muslim rites and the consequences of the civil marriage applies.

1891 Pilgrim 2012 *Citizenship Studies* 772.

1892 Yilmaz 2000 *Journal of Muslim Minority Affairs* 356.

grants full protection to Jews and Sikhs.[1893] Sikhs do not constitute a separate racial group as required by the Race Relations Act 1976, but instead constitute a religious group.[1894] Despite this, Sikhs are recognized as a separate ethnic-minority group by English law within the ambit of the Race Relations Act 1976.[1895] Muslims fall outside the ambit of the Race Relations Act, as they are not deemed to be an ethnic-minority group.[1896]

The English legal system is also inconsistent in the manner in which it grants recognition to the laws and customs of ethnic-minority groups.[1897] The English legal system has adopted a piecemeal *ad hoc* approach in respect of the recognition of the laws and customs of minority groups.[1898] This piecemeal and *ad hoc* recognition by the English legal system of certain ethic minority groups is indicative of differential treatment and has increased the burden of assimilation on Muslims and other ethnic minorities.[1899]

Many Muslims therefore perceive English law to be discriminatory and showing a bias towards certain minority groups as the criteria for making exceptions and distinctions are not consistently applied.[1900] The State's position with regard to the recognition of MPL in England has forced Muslims to reorganize their lifestyles, resulting in the emergence of a Muslim post-modern legality which is most prevalent in the field of family law.[1901]

1893 Yilmaz 2001 *Journal of Muslim Minority Affairs* 298. See also the report by the Runnymede Trust (TRT) *Islamaphobia* (1997).

1894 Yilmaz 2000 *Journal of Muslim Minority Affairs* 356.

1895 Yilmaz 2000 *Journal of Muslim Minority Affairs* 356. See also *Mandla v Dowell Lee* 1983 1 All ER 1062 (HL), where the House of Lords defined seven criteria by which, according to the Race Relations Act 1976, a group of people can be classed as an ethnic group. The two essential criteria of the seven identified that will indicate that a group has met the requirements set out in the Race Relations Act 1976 are namely, a long-shared history and a cultural tradition of its own. Religion falls under the non-essential criteria in terms of the Race Relations Act 1976.

1896 Modood *Racial Equality, Colour, Culture and Justice* (1994) 14.

1897 Yilmaz 2001 *Journal of Muslim Minority Affairs* 298.

1898 *Ibid*.

1899 Modood *Racial Equality, Colour, Culture and Justice* 14.

1900 Yilmaz 2001 *Journal of Muslim Minority Affairs* 298.

1901 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 347.

5 3 3 THE JUDICIARY'S RESPONSE TO THE RECOGNITION OF MUSLIM MARRIAGES

The courts have tended to resist the recognition of marriages concluded in terms of Muslim rites.[1902] This has resulted in hardship for Muslims living in Britain, as the non-recognition of their marriages means that they cannot institute an action for divorce in the English courts, nor can parties inherit from each other as legitimate heirs under English law.[1903] This is evidenced by court decisions over the years. As a result of the problems relating to unregistered Muslim marriages, the court in *A-M v A-M (Divorce Jurisdiction: Validity of Marriage)*[1904] created a new category, that of "non-marriages." Hughes J held that where the parties concluded an unregistered Islamic marriage in London, they were in a non-marriage.[1905] As the marriage was not concluded in terms of the Marriage Act, which is the only type of marriage recognized in England and Wales, the court therefore held that it lacked jurisdiction to pronounce on the nullity of the marriage.[1906] Similarly, in *Al-Saedy v Musawi*[1907] the court held that a presumption of a marriage that arises from long cohabitation and reputation of being married cannot be applied to validate an Islamic marriage, as English civil law does not grant recognition to Islamic marriages and therefore holds the view that, where parties enter into a marriage in terms of Muslim rites, no marriage is created at all.[1908]

In *AAA v ASH, The Registrar General for England and Wales, The Secretary of State for Justice, The Advocate to the Court provided by the Attorney General,*[1909] a British-Muslim father applied to the court for the recognition of his unregistered Islamic marriage that had been concluded in England, in order that he could be afforded parental rights and responsibilities over a child born of the marriage.[1910] When the parties concluded the marriage in terms of Muslim rites, they did so, fully aware that

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1902 Edge "Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism" 129.

1903 Edge "Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism" 133.

1904 [2001] 2 FLR 6.

1905 *A-M v A-M (Divorce Jurisdiction: Validity of Marriage) supra* para 24.

1906 *Ibid*.

1907 [2010] EWHC 3293.

1908 *Al-Saedy v Musawi supra* para 1.

1909 [2009] EWHC 636.

1910 *AAA v ASH, The Registrar General for England and Wales, The Secretary of State for Justice, The Advocate to the Court provided by the Attorney General supra* para 8.

the marriage was not recognized as a valid marriage under English law.[1911] In other words, they deliberately chose not to conclude their marriage at a mosque that was registered, which would then have resulted in their marriage being recognized under English law.[1912] The court held that their marriage was a non-marriage and that no matrimonial relief could be granted to the applicant, and that he had no real rights in respect of the child born of the marriage.[1913]

Notwithstanding the decisions in the cases above, the English courts, being fully aware of the problems associated with unregistered Islamic marriages, have on occasion come to the assistance of parties married in terms of Muslim rites only. It is evident from case law[1914] that dowry payments will be taken into account in proceedings in accordance with section 25 of the Matrimonial Causes Act 1973 to ensure that the principles of justice and equity are upheld to both parties. This is particularly relevant where cultural or religious beliefs advocate the importance of dowries. A case in point is the decision in *Uddin v Choudhury & Ors,*[1915] where the Civil Division of the Court of Appeal for England and Wales was prepared to accept evidence of an arranged marriage under *Shari'ah* for the purposes of civil proceedings.[1916] A *nikah* had taken place in Battersea Town Hall in August 2003, but the intended civil ceremony had never taken place because the marriage between the parties had failed.[1917] On the application of the bride, the Islamic *Shari'ah* Council pronounced a *Shari'ah* decree of divorce in December 2004.[1918] The subsequent dispute was for the recovery of money, which the husband alleged had been accepted by his wife's family during the marriage.[1919] The ex-wife lodged a counter-claim alleging that her ex-husband had agreed to pay her a certain sum as dowry, and that this amount was still outstanding

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1911 *AAA v ASH, The Registrar General for England and Wales, The Secretary of State for Justice, The Advocate to the Court provided by the Attorney General supra* para 44.

1912 *AAA v ASH, The Registrar General for England and Wales, The Secretary of State for Justice, The Advocate to the Court provided by the Attorney General supra* para 48.

1913 *AAA v ASH, The Registrar General for England and Wales, The Secretary of State for Justice, The Advocate to the Court provided by the Attorney General supra* para 69.

1914 *NA v MOT* [2004] EWHC 471 (Fam), [2004] All ER (D) 238; *Otobo v Otobo* [2002] EWCA Civ 949; *Uddin v Choudhury & Ors* [2009] EWCA Civ 1205.

1915 *Choudhury & Ors supra*.

1916 *Choudhury & Ors supra* para 2.

1917 *Ibid*.

1918 *Ibid*.

1919 Paras 2-3.

at the time of divorce.[1920] It was held that the agreement concluded by the parties in terms of *Shari'ah* was valid and should be honoured.[1921] On appeal the court confirmed the decision of the lower court as being legally and procedurally sound.[1922] The Court of Appeal stated that, whilst the English law did not recognize a marriage concluded in terms of Muslim rites, the marriage contract concluded between the two parties was valid and had legal effect.[1923]

Uddin v Choudhury & Ors was one of the first cases that involved the overlapping of Islamic law principles and the English legal system within the English courts.[1924] This decision led to controversy with regard to the issue as to whether English civil courts are allowed to consider awards made by *Shari'ah* councils and arbitration tribunals.[1925]

Besides seeking legal redress through ancillary relief proceedings, an action for breach of contract can also be instituted where the husband refuses to honour the *nikah* contract where the agreed amount of dowry is stipulated.[1926] In *Shahnaz v Rizwan*[1927] the husband issued a *talaq* dissolving the marriage. In terms of the *nikah* contract the deferred dowry became payable at the dissolution of the marriage.[1928] The wife (plaintiff) instituted action in the civil court, claiming the amount of £1,400, being the equivalent of the deferred dowry.[1929] Her claim was upheld on the basis that it was according to a recognized contractual obligation which was enforceable under Islamic law by ordinary civil action.[1930] The closest which an English court came to recognizing an unregistered Muslim marriage is in the case *MA v JA,*[1931] where the court held that a marriage concluded in terms of Muslim rites in a registered mosque was deemed to

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1920 Para 3.

1921 Para 11. Similar decisions were reached in *Na v MOT* [2004] EWHC 471 (Fam) and *Otobo v Otobo* [2002] EWCA Civ 949.

1922 *Choudhury & Ors supra* para 11.

1923 *Ibid*.

1924 Bowen "How Could English Courts Recognize Shariah" 2010 Vol 7 3 *University of St Thomas Law Journal* 411 424.

1925 *Ibid*.

1926 *Shahnaz v Rizwan* [1965] 1 QB 390.

1927 *Shahnaz v Rizwan supra*.

1928 *Ibid*.

1929 *Ibid*.

1930 *Shahnaz v Rizwan supra* 401.

1931 [2012] EWHC 2219.

be a valid marriage in terms of English law, even though the person performing the marriage did not properly register the marriage.

Edge submits that the judiciary's *ad hoc* piecemeal approach to Muslim marriages, in addition to stretching existing concepts of law, also leads to uncertainty in respect of the application of the law, which ultimately affects the more vulnerable members of society.[1932] He furthermore submits that the long-term solution would be to facilitate the recognition of marriages concluded into in terms of Muslim rites.[1933] As a result of the *ad hoc* piecemeal decisions by the English judiciary, a situation similar to that in South Africa is developing where the courts are passing judgments which is contrary to the rules and principles of Islam.

5 4 APPLICATION OF MPL IN BRITAIN

5 4 1 SOLEMNIZATION OF A MARRIAGE IN BRITAIN: *NIKAH*

For a marriage to be legally recognised under English law, the marriage must comply with all the preliminary civil requirements as stipulated in the Marriage Act 1949.[1934] A civil marriage must therefore be concluded in a registered building, and the marriage ceremony must be performed by an individual, registered as a marriage officer.[1935] While most of the Anglicans meet the requirements stipulated in the Marriage Act 1949, the majority of religious marriages do not meet these requirements.[1936] English law does not grant legal recognition to a marriage concluded by the parties in terms of religious rites only.[1937] Therefore, where the parties enter into a religious ceremony without fulfilling the preliminary civil requirements, the marriage will not be granted legal recognition by English law.[1938] In this instance the parties are regarded as merely cohabitees and not as spouses to a valid marriage.[1939] This position prevails despite

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1932 Edge "Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism" 130-131.

1933 *Ibid*.

1934 Yilmaz "Marriage Solemnization among Turks in Britain: The Emergence of a Hybrid Anglo-Muslim Turkish Law" 2004 Vol 24 1 *Journal of Muslim Affairs* 57 60.

1935 Marriage Act 1949. See para 2 5 3 of this thesis.

1936 Bano "An Exploratory Study of *Shari'ah* Council in England with respect to Family Law" School of Law, University of Reading 2 October 2012 10.

1937 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

1938 Yilmaz 2004 *Journal of Muslim Affairs* 60.

1939 Bano "An Exploratory Study of *Shari'ah* Council in England with respect to Family Law" School of Law, University of Reading 2 October 2012 11. See also Warraich & Balchin "Recognizing the

the parties regarding themselves married.[1940] Where a civil marriage is followed by a religious ceremony in an unregistered building, the civil marriage will take preference over the religious one as the civil marriage is the only marriage which English law recognizes.[1941] An unregistered Muslim marriage is deemed void even if the parties wilfully and knowingly contracted the marriage.[1942]

The other option for Muslim couples who seek to be regarded as spouses and not as cohabitees, is to undergo a civil marriage in addition to a *nikah* in terms of Islamic law.[1943] In addition, certain mosques have opted to have their officials appointed as marriage officers, acting on behalf of the registry who can solemnize a marriage according to both *Shari'ah* and English law.[1944]

Up until 1990, in terms of sections 12 and 45(1) of the Marriage Act 1949, British Muslims could conclude a marriage in a registry office or a registered building, the latter which had to be a separate building, certified under the Places of Worship Registration Act 1855 as a place of worship only.[1945] While most churches complied with this requirement, mosques in general did not, as they were not exclusively places of worship, but used as cultural centres as well.[1946] As a result, in 1991 there were only 74 mosques out of a total of 452 that complied with the requirement set out in the Places of Worship Registration Act.[1947] This requirement was relaxed with the enactment of the Marriage (Registration of Buildings) Act 1990 and the Marriage Act 1994, which amended the Marriage Act 1949, allowing buildings to become registered as "approved premises" where a valid registration can take place.[1948] Parties to Muslim

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Unrecognized: Inter-country Cases and Muslim Marriages & Divorces in Britain" A Policy Research by Women Living under Muslim Laws 2006 WLUML Publications 2.

1940 Bano "An Exploratory Study of *Shari'ah* Council in England with respect to Family Law" School of Law, University of Reading 2 October 2012 11.

1941 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 347.

1942 *Ibid*.

1943 Bano "An Exploratory Study of *Shari'ah* Council in England with respect to Family Law" School of Law, University of Reading 2 October 2012 10-11.

1944 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 348.

1945 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 347.

1946 *Ibid*.

1947 *Ibid*.

1948 *Ibid*.

marriage can now enter into a marriage in terms of section 26(1) of the Marriage Act 1949 at a registered mosque.[1949]

There is, however, a certain amount of reluctance on the part of *Imams,* or heads of some mosques, to register the mosque as a place of worship.[1950] This reluctance can be ascribed to firstly, the fact that the solemnization of polygamous marriages or marriages involving persons who are under the English law age of consent, would continue to be concluded in the mosque even where it is registered.[1951] These marriages would be deemed to be valid and enforceable under Islamic law, but not under English law.[1952] Secondly, as indicated previously,[1953] it is not a prerequisite for the validity of a marriage, nor is it *sunnah* that the marriage be concluded in a mosque. Edge submits that only small percentage of marriages in terms of Muslim rites are concluded in a mosque, as most marriages are concluded at home or in the offices of a *Shari'ah* council.[1954] There is therefore very little reason to register the mosque for the celebration of marriages.

In terms of MPL, it is not necessary for both parties to the proposed marriage to be present at the conclusion of the marriage.[1955] The bride is allowed to have a representative (*wakil*) to act on her behalf.[1956] More often than not, the wedding ceremony is conducted with the parties being in separate rooms, making declarations separately.[1957] This conflicts with the Marriage Act 1949, as sections 44 and 45(1) require the presence of both parties when the marriage vows are exchanged, using a standard marriage formula. Non-compliance with these requirements renders the marriage void.

1949 The mosque must be registered as a place of worship in order for a marriage to be concluded at the mosque.

1950 Edge "Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism" 127.

1951 *Ibid*.

1952 *Ibid*.

1953 See para 2 5 1 4 (v) of this thesis.

1954 Edge "Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism" 127.

1955 Daweesh Fataawa al-Lajnah ad-Daa'imah 180; Ibn Qudaamah *Al-Mughni* 239.

1956 *Ibid*.

1957 *Ibid*.

To summarise, at present there are three options available for Muslims living in England and Wales in so far as the conclusion of a marriage is concerned.[1958]

(i) The conclusion of a *nikah*. The union does not enjoy legal recognition, but English courts are willing to grant the spouses a right of recourse as far as the contractual obligations arising from the *nikah* are concerned.

(ii) The simultaneous conclusion of a *nikah* and a marriage in terms of English law. The dual ceremony would be performed in a building registered as a place of worship and a place for the registration of a marriage ceremony in accordance with the Places of Worship Registration Act 1855, as well as section 41 of the Marriage Act 1949.

(iii) The conclusion of two separate ceremonies, the *nikah* and the civil ceremony. In this case, both the *nikah* and the civil ceremony are recognized, but the civil ceremony takes preference over the religious ceremony.

Yilmaz submits that Muslims living in England and Wales who choose to observe both English and Islamic law do so because, despite being civilly married they will not be regarded as married in the eyes of God and the community.[1959] Only after the *nikah* takes place will the marriage be consummated. This is a clear indication that for Muslims the nature of the marital relationship is determined by the religious marriage, as where no *nikah* is concluded, the marriage is viewed as sinful and illegitimate from a religious and cultural perspective.[1960] The conclusion of a religious marriage is very important to Muslims, as it confers social and religious recognition of their relationship.[1961] As a result, many British Muslims enter into both a religious and civil marriage, as the latter is legally recognised and acts as a safety mechanism to protect the parties during the subsistence of the marriage and at the dissolution thereof.[1962] Yilmaz submits that most Muslims in England marry twice, and in doing so thereby

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1958 Ali "Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts" 2013 Vol 25 2 *Child and Family Law Quarterly* 113 118.

1959 Yilmaz 2001 *Journal of Ethnic and Migration Studies* 348.

1960 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 348; Hamilton *Family Law and Religion* (1995) 74; Hiro *Black British, White British: A History of Race Relations in Britain* (1991) 159.

1961 Bano "An Exploratory Study of *Shari'ah* Council in England with respect to Family Law" School of Law, University of Reading 2 October 2012 11.

1962 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 348.

meet the requirements of both Islamic law and English, and furthermore incorporates the officially legal rules into their unofficial laws.[1963]

5 4 2 SOLEMNIZATION OF A MARRIAGE OUTSIDE BRITAIN: *NIKAH*

Where the parties have entered into a *nikah* outside Britain, and where there is no dispute between the parties that a *nikah* was indeed concluded, the validity of the marriage can be proven, firstly by the parties producing a marriage certificate or similar document issued under the law of the country where the marriage was concluded, or secondly, by producing a certified copy of the document, or lastly by producing a document which the parties obtained from the register of marriages kept under the law of the country where the parties entered into the marriage.[1964] Where the certificate is not in English it must be accompanied by a translation which is certified by a notary public, or it must be authenticated by a statement of truth.[1965] Where there is no marriage certificate, or in the event of the marriage being concluded by local custom, an affidavit of the local law is usually obtained from a local lawyer.[1966]

Despite a polygamous marriage being regarded as null and void in English law, the rules of English private international law grants recognition to polygamous marriages that are concluded outside England or Wales, provided they satisfy the English rules of private international law for the determining the validity of such marriages.[1967] In other words, if polygyny is legal in the country where the parties concluded the polygamous marriage, then English law will recognize the marriage as valid and enforceable, unless there is some strong reason to the contrary.[1968] If a polygamous marriage is concluded without any civil ceremony in England or Wales, the marriage is deemed void irrespective of the parties domicile, as English law does not recognize polygamous marriages.[1969] A polygamous marriage concluded abroad by a person

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1963 *Ibid*.

1964 FPR r10.14 (2).

1965 *Ibid*.

1966 Hodson "Recognition of Foreign Marriages and Divorces" in Hodson (ed) 2008 *A Practical Guide to International Family Law* 6.

1967 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 349.

1968 Rule 73 Dicey and Morris.

1969 Rule 71 of Dicey and Morris. See *R v Bham* (1961) QB 159 (CCA).

who is domiciled in England or Wales is void.[1970] In other words, a person domiciled in England or Wales cannot conclude a polygamous marriage under English law.[1971] Despite English law regarding polygamy as illegal and contrary to public policy, Muslims living in England and Wales nonetheless continue the practice of polygamy and have clearly shown that the practice of Islamic law will always be given preference to over official English law.[1972]

5 4 3 TERMINATION OF A MARRIAGE: *TALAQ*

Where the parties have entered into a *nikah* as well as a civil marriage in terms of the Marriage Act, the English courts can make a pronouncement of divorce in respect of the civil marriage.[1973] English courts can, however, not dissolve a *nikah*.[1974] As a result the parties may be divorced in terms of civil law but are still very much married in terms of Islamic law.[1975] This is problematic as the parties may be divorced in terms of the civil law but the *nikah* is still in existence.[1976] This position is referred to as a "limping marriage".[1977] The consequence hereof is that, despite the woman being divorced civilly, in the eyes of the community she will still be regarded as a married woman if her husband does not divorce her in terms of Islamic law.[1978] Until such time that a divorce is secured under Islamic law, the civil divorce is inconsequential.[1979] Further hardship experienced by women married in term Muslim rites include that of the husband using the "limping marriage" scenario to his advantage and choosing not to divorce his wife in terms of Islamic law until the official civil-law divorce procedures

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1970 S 5 Private International Law (Miscellaneous Provisions) Act 1995. See Yilmaz 2002 *Journal of Ethnic and Migration Studies* 349.

1971 S 11(b) of the Matrimonial Causes Act 1973.

1972 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 349.

1973 *Ibid*.

1974 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 350.

1975 *Ibid*.

1976 *Ibid*.

1977 Badawi "Muslim Justice in a Secular State" in King (ed) *God's Law versus State Law: The Construction of an Islamic Identity in Western Europe* (1995) 73 at 77; Chryssides "Britain's Changing Faiths: Adaptation in a New Environment" in Parsons (ed) *The Growth of Religious Diversity: Britain from 1945* (1994) 55 at 66.The problem that Jewish women experienced where they could not enter into another religious marriage without first obtaining a religious divorce from their husbands was remedied by the Divorce (Religious Marriages) Act 2002.

1978 Pearl & Menski *Muslim Family Law* (1998) 393 – 398.

1979 *Ibid*.

have been completed. In this way he can in effect blackmail his wife to negotiate a divorce settlement which is favourable to him.[1980]

In order to dissolve the *nikah*, an application must be made to a *Shari'ah* council.[1981] To effectively dissolve both the civil and the *nikah*, the parties are therefore required to divorce twice.[1982] The flexible nature of English divorce law has, however, greatly facilitated this process as divorce has become an administrative process.[1983] In an undefended divorce application the judge pronounces a *decree nisi* without a hearing.[1984] This flexible procedure has resulted in British Muslims being able to maintain Islamic divorce law almost unmodified.[1985] Once the civil divorce has been obtained British Muslims use this to rubber-stamp the Islamic law-divorce procedure, as the *Shari'ah* council requires the dissolution of the marriage in terms of the civil law before a divorce certificate will be issued.[1986]

Research conducted by Warraich and Balchin[1987] shows that there are tens of thousands of British Muslims as well as non-British spouses of British Muslims who may conclude marriages and undergo divorces that are not granted legal recognition in English law. Despite the 1970 Hague Convention on Recognition of Legal Separations and Divorces[1988] that sought to explicitly remedy the "limping-marriages" situation described above, the reality is that Muslims spouses still experience legal uncertainty in respect of their marriages and divorces.

5 5 MECHANISMS DEVELOPED FOR THE APPLICATION OF MPL

Owing to non-recognition and the desire to go through the English legal system as Muslims, the British Muslim community has devised an internal regulatory framework

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1980 Hamilton *Family Law and Religion* (1995) 118-120.

1981 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

1982 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 350.

1983 Golden *Everyday Law* (1996) 34.

1984 *Ibid*.

1985 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 350.

1986 *Ibid*.

1987 Warraich & Balchin "Recognizing the Un-recognized: Inter-country Cases and Muslim Marriages and Divorces" (January) 2006 *Policy Research by Women Living Under Muslim Laws*.

1988 Britain is a signatory to this Convention.

for the settling of disputes, particularly where it relates to family-law matters.[1989] Traditionally, Muslim family matters have always been handled extra-judiciously and thereby kept it out of the hands of the courts.[1990] Yilmaz ascribes the following reasons for the internal regulatory framework for dispute settlement:[1991]

(i) Islamic law is regarded as divine law, and the perception that many Muslims may have is that the secular authority of Western man-made law lacks the legitimacy and moral standing to deal with complex issues that may arise from MPL.
(ii) Owing to concerns in respect of honour, Muslims would not want to air their dirty laundry in public.
(iii) The non-recognition of MPL by the English legal system has led to poor communication and negative feelings towards the English legal system.

It is precisely these factors that provided the impetus for the emergence of Islamic *Shari'ah* councils.[1992] Muslims have, therefore, elected to withdraw to a certain extent from the official legal system and State institutions in respect of family-law matters and have in response developed their own methods of dispute resolution.[1993] With the establishment of *Shari'ah* councils British Muslims have found a mechanism for dispute resolution that takes both religion and culture into account.[1994]

5 5 1 *SHARI'AH* COUNCILS

(i) Introduction

The most constructive development in recent years has been the establishment of *Shari'ah* councils in England that are devoted to the informal settlement of disputes between Muslims in terms of Islamic law.[1995] There are approximately eighty-five

1989 Yilmaz 2001*Journal of Muslim Minority Affairs* 298.
1990 *Ibid*.
1991 *Ibid*.
1992 *Ibid*.
1993 Brechin "A Study of the use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns it Raises for Human Rights" 2013 *Ecclesiastical Law Journal (UK)* 293 295.
1994 *Ibid*.
1995 Yilmaz 2001 *Journal of Muslim Minority Affairs* 303.

Shari'ah councils operating in the Britain.[1996] The *Shari'ah* councils are particularly strong in the London and Birmingham areas.[1997] *Shari'ah* councils include informal mechanisms[1998] as well as the Muslim Arbitration Tribunal (MAT).[1999] Whilst the *Shari'ah* councils have jurisdiction to make rulings on a wide variety of legal disputes,[2000] approximately ninety *per cent* of their case load consists of Islamic divorces at the request of a wife.[2001]

Research undertaken by Bano[2002] indicates that the emergence of *Shari'ah* councils was in response to the needs of Muslim communities living in Britain. They draw their legitimacy from the fact that Muslims need institutions that can meet their religious needs, and thereby prevent disorder within the Muslim community.[2003] One of the primary problems encountered in respect of Muslim marriages is that the marriage may have been dissolved by the civil courts, but the marriage in terms of Islamic law has remained intact.[2004] The *Shari'ah* councils were established to prevent this "limping-marriage" scenario and grant women who find themselves in this situation, a divorce certificate in terms of Islamic law.[2005] Furthermore, the reluctance and inaction of the

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1996 Maret 2013 *Boston College International & Comparative Law Review* 255. See also Civitas, an independent think tank which did a survey on *Shari'ah* councils in 2009.

1997 Bowen 2010 *University of St Thomas Law Journal* 418.

1998 An example of an informal mechanism would be the local mosque. In fact most of the *Shari'ah* councils in operation in Britain are closely linked to mosques.

1999 MAT was established in 2007 and is housed in the Hijaz College Islamic University in Nuneaton, Britain. MAT has jurisdiction to make legally binding decisions in accordance with the Arbitration Act 1996. Commercial disputes only are arbitrated by MAT and it does not arbitrate in matters of divorce. See Ali 2013 *Child and Family Law Quarterly* 126; Bowen 2010 *University of St Thomas Law Journal* 412.

2000 For example, advice in matters of inheritance, commercial-law contracts, domestic violence and child-residence disputes. Scorer "A Question of Judgement" 2015 *New Humanist* 36 38.

2001 The reason for this can be attributed to the fact that men do not need to approach a *Shari'ah* council in order to obtain a divorce or a divorce certificate, as they have the *talaq* at their disposal. In contrast, women can have the marriage dissolved without the permission of their husbands but are required to do this through a religious organization or a scholar, hence the use of *Shari'ah* councils. See Ali 2013 *Child and Family Law Quarterly* 114.

2002 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 6. Dr Bano's research also shows that there is no single authoritative definition of the term "*Shari'ah* council" and cautions that care should be taken when using the terms. She does, however, concede that the majority of organizations which the term "*Shari'ah* council" can be applied to all appear to have the primary role of assisting Muslims involved in disputes, in particular when securing a religious divorce.

2003 Bowen 2010 *University of St Thomas Law Journal* 422.

2004 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 11.

2005 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 7; See also Pearl & Menski *Muslim Family Law* (1998).

State and the judiciary to recognize Islamic law and resolve disputes arising between Muslims in the context of Islamic family law, further provided the impetus for the establishment of *Shari'ah* councils.[2006]

The aim of the *Shari'ah* councils is to resolve disputes within an Islamic framework by providing counselling, mediation and reconciliation services.[2007] *Shari'ah* councils apply the principles of at least one of the four schools of Islamic jurisprudence, and are therefore not bound to apply one particular school of Islamic jurisprudence.[2008] The *Shari'ah* councils are willing to offer the parties the benefits of any school of jurisprudence that suit their particular needs, irrespective whether this is the school prevailing in their country of origin, domicile or nationality.[2009] Although this has its advantages, more often than not this can result in "forum shopping".[2010] In practice, where a dispute arises, one or both parties will first ascertain what school of thought the *Shari'ah* council applies before submitting their dispute.[2011] In addition, where one or both of the parties are not happy with the decision of the *Shari'ah* council, they may approach another *Shari'ah* council.[2012]

The fact that each *Shari'ah* council applies a different interpretation of Islamic law may in turn lead to huge disparities in the manner in which the *Sharia'ah* councils operate and ultimately the decisions made by them.[2013] The *Shari'ah* councils also operate autonomously from one another and are therefore not bound by the decisions made

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2006 Yilmaz 2001 *Journal of Muslim Minority Affairs* 303.

2007 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 7; See also Pearl & Menski *Muslim Family Law* (1998).

2008 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 22. See also Yilmaz *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* 2005 172.

2009 Yilmaz 2001 *Journal of Muslim Minority Affairs* 304.

2010 Bano "Muslim Family Justice and Human Rights" 2007 Vol 2 2 *Journal of Comparative Law* 1.

2011 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2012 *Ibid*.

2013 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 10.

by another council.[2014] Each council determines its own procedures.[2015] It must, however, be reiterated that the advice given by the *Shari'ah* councils is ultimately based on Islamic interpretations of family and marriage rules, based on the two primary sources in Islam, namely, the *Quran* and the *Sunnah*.[2016]

Where the parties are divorced in terms of English law, the woman may still be at the mercy of her ex-husband, as a civil divorce without an Islamic divorce, means that the woman is still regarded as married in the eyes of the community.[2017] Where the husband refuses to *talaq* his wife, he cannot be compelled to do so by the *Shari'ah* council.[2018] The lack of legal-binding authority reflects the true limitation of the *Shari'ah* councils' powers.[2019]

Concerns have also been expressed over gender-based discrimination against women, as they are not allowed to participate in decision-making processes of the *Shari'ah* councils.[2020] Other concerns relate to the privacy of the proceedings, as one of the parties may be coerced or pressured to participate in the proceedings or even be deprived of certain rights which are guaranteed under the civil-legal system.[2021] Despite the parties voluntarily resorting to seek the services of the *Shari'ah* councils, there is still room for abuse, as it is often women who are placed in a poorer position than what they would have been had the matter been heard by the civil courts.[2022]

2014 Keynote address by The Hon. Mr Justice McFarlane "Am I Bothered? The Relevance of Religious Courts to a Civil Judge" 18 May 2011 at Cardiff Law School, Cardiff University. See also Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 19.

2015 Bowen 2010 *University of St Thomas Law Journal* 422.

2016 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 20.

2017 Ali 2013 *Child and Family Law Quarterly* 133.

2018 *Ibid*.

2019 Ali 2013 *Child and Family Law Quarterly* 133; Bowen 2010 *University of St Thomas Law Journal* 412. The councils can, however, grant the woman a *faskh*.

2020 Maret 2013 *Boston College International and Comparative Law Review* 266.

2021 *Ibid*.

2022 *Ibid*.

(ii) Administration

As far as the administration of the *Shari'ah* councils is concerned, it is generally administered by a panel of religious scholars and volunteers.[2023] The members of the panel of religious scholars consist of males between the ages of 35 and 80 years who have been trained as *Imams,* having received formal Islamic jurisprudential education.[2024] Women do not form part of these panels but do in some instances assist with counselling of women who approach the *Shari'ah* councils.[2025]

(iii) Formal process

Shari'ah councils have adopted a two-pronged formal process which is applied when a matter is brought before them.[2026] Firstly, when an applicant approaches the *Shari'ah* council, the primary advisors who are two or more people who are chosen from the ranks of religious scholars, will meet with the applicant to determine the facts of the case.[2027] At a later stage the primary advisors will also meet with the spouse of the applicant, and with family members of both the wife and husband in order to collate all the facts of the matter.[2028] These meetings are on-going as the primary advisors mediate the matter. Secondly, the council panel, which consists of between five and twelve religious scholars together with the primary advisors, meets on a monthly basis to discuss all the matters brought to the *Shari'ah* council and to issue divorce certificates.[2029]

The process adopted by the *Shari'ah* councils can be summarized as follows:[2030]

(i) The applicant approaches the *Shari'ah* council to obtain a divorce, for example.

(ii) The primary religious advisor has a face-to-face meeting with the applicant.

2023 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 21.

2024 *Ibid*.

2025 *Ibid*.

2026 *Ibid*.

2027 *Ibid*.

2028 *Ibid*.

2029 *Ibid*.

2030 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 23.

(iii) The applicant fills in an application form in which the grounds for divorce are cited.

(iv) The applicant is required to pay the administrative fee to process the application.

(v) Notice of the application for divorce is sent to the husband, with a request to provide his version of events.

(vi) Further notice is sent to the husband where he does not respond to the first notice.

(vii) Thereafter arrangements are made for all the parties concerned to meet in order for the primary religious advisor to facilitate mediation between the parties.

(viii) On completion of the meetings between the spouses and the religious advisor, and once all the evidence has been collated, a copy of the file is forwarded to the council panel.

(ix) A date is set for when the matter will be discussed by the council panel.

(x) At this meeting a decision will be made regarding whether or not to issue a divorce certificate.

The Islamic *Shari'ah* Council, which was established in 1982, and is based in east London, also requires women seeking a divorce to comply with the following:[2031]

(i) initiation of civil-court divorce proceedings where the parties have concluded a religious and civil marriage;

(ii) evidence that the couple must have been separated for at least one year prior to the divorce application;

(iii) provide assurances that the husband will be able to have access and contact with the children born of the marriage, after the divorce has been granted; and

(iv) in certain instances, the return of the dower given by the husband to wife at the conclusion of the marriage.

2031 Maret 2013 *Boston College International & Comparative Law Review* 259. See also Bowen 2010 *University of St Thomas Law Journal* 419.

The councillors are likely to proceed more quickly with the wife's request for a divorce where the civil courts have already granted a final divorce.[2032] This lends evidence to the fact that the councillors wish to work in a manner that complements the proceedings and decisions of the English civil courts.[2033] Councillors are aware of the collaboration between the Rabbinical tribunals[2034] and the English family courts, and therefore aspire to develop the same kind of collaboration by adopting steps that align their own procedures close to that followed by the civil court with the view that in the future English courts may grant legal recognition to their decisions.[2035]

(iv) Enforceability of the divorce certificates

Whilst the *Shari'ah* councils are able to grant a divorce and the subsequent divorce certificate, there are no mechanisms or sanctions in place to enforce the terms and conditions of the divorce, especially with regard to maintenance of the wife during the *iddah* period.[2036] Whether or not the parties adhere to the decision of the *Shari'ah* council, depend very much on the God consciousness and goodwill of the ex-husband.[2037]

Despite the non-enforceability of the religious divorce certificates, research undertaken by Bano indicates that most *Shari'ah* councils have been reluctant to accept state intervention to enforce their rulings.[2038] The reason for this being that it might result in a loss of trust and credibility within the Muslim communities.[2039] In practice, the *Shari'ah* councils seek to avoid any conflict with the State-legal system, and do not seek to replace civil-law mechanisms.[2040] *Shari'ah* councils are therefore not seeking legal recognition.[2041]

2032 Bowen 2010 *University of St Thomas Law Journal* 420.

2033 *Ibid*.

2034 For example, the *Beth Din*.

2035 Bowen 2010 *University of St Thomas Law Journal* 420.

2036 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 23.

2037 *Ibid*.

2038 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 24.

2039 *Ibid*.

2040 Bano "An Exploratory Study of *Shari'ah* Councils in England with respect to Family Law" School of Law, University of Reading 2 October 2012 7.

2041 Shelley 2015 *Islam and Christian-Muslim Relations* 319.

Insofar as the decisions of the *Shari'ah* councils are concerned, the various *Shari'ah* councils generally respect one another's decisions, and there exists general consensus in respect of procedural matters.[2042]

(v) Case study of the Birmingham Central Mosque Shari'ah Council

The Birmingham Central Mosque *Shari'ah* council was established in the late 1990s.[2043] Whilst this council applies all four schools of Islamic jurisprudence, it only rules on Islamic divorce.[2044] Proudman distinguishes between the following two processes conducted by the Birmingham Central Mosque *Shari'ah* Council:[2045]

(1) Parties married in terms of Islamic law only

In this instance the council implements a gender-specific procedure where the parties seek the dissolution of their *nikah*.[2046] Where the husband seeks the dissolution of the marriage, he can pronounce the *talaq,* either three times consecutively or on three separate occasions, as prescribed by Islamic law.[2047] Thereafter the wife enters into her period of *iddah* when the rules relating to *iddah* and reconciliation during *iddah* apply.[2048] In such a case, where the husband unilaterally *talaqs* his wife, he can do so without referring the matter to the *Shari'ah* council.[2049] However, the husband or the wife can apply to the *Shari'ah* council for an Islamic *talaq* certificate which serves as *prima facie* proof that the couple are divorced.[2050]

As Islamic law does not make allowances for women to unilaterally divorce their husbands, ninety-eight *per cent* of divorce petitioners at the Birmingham Central

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2042 Bowen 2010 *University of St Thomas Law Journal* 418.

2043 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2044 *Ibid*.

2045 *Ibid*.

2046 *Ibid*.

2047 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2048 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2049 *Ibid*.

2050 *Ibid*.

Mosque *Shari'ah* council are women.[2051] The wife (petitioner) is required to complete an application when she approaches the council for a divorce, and in addition to the application, the wife must provide an acceptable form of identification as well as the *nikah* contract (certificate).[2052] She is also required to pay a fee of £100 to cover administration costs.[2053] A further £100 will be payable to the *Shari'ah* council once the council issues the divorce certificate.[2054] Where the *nikah* contract cannot be produced, the wife will have to provide the council with a sworn statement along with evidence that a *nikah* was concluded.[2055] The wife must state the ground or grounds of divorce upon which she will rely.[2056] The Birmingham Central Mosque *Shari'ah* council recognizes sixteen grounds of divorce.[2057] The wife is then required to provide as much evidence as is possible to substantiate her case.[2058] Once the application stage has been completed, a date is set when the wife will meet with the *Shari'ah* council's reconciliation unit in order to discuss the breakdown of the marriage.[2059] Thereafter the council will send the husband (respondent) up to three letters informing him of the wife's application for the dissolution of the marriage, with the request for the husband to respond immediately to the letter or letters sent by the council.[2060] Where the husband responds to the *Shari'ah* council's letter and, provided both spouses are in agreement, the council will make arrangements for a joint-reconciliation meeting.[2061] However, where the husband fails to respond to the letters, or in the event that the joint-reconciliation meeting proves to be unsuccessful, the spouses will then be required to present their case before the panel of arbitrators.[2062]

2051 *Ibid*.

2052 *Ibid*.

2053 *Ibid*.

2054 *Ibid*.

2055 *Ibid*.

2056 *Ibid*.

2057 For example, desertion, intolerance of the husband's consumption of alcohol or drugs, domestic violence and polygamy without the wife's consent. Although the council allows polygamy without the wife's consent as a ground of divorce, in Islamic law the wife's consent is not a requirement where the husband enters into a second or even third marriage. The husband can inform his wife of his impending marriage to another woman out of courtesy, but is not required to obtain his wife's consent to enter into another marriage.

2058 If the wife is relying on domestic violence as a ground of divorce she is required to furnish the council with certified copies of medical reports, court orders and police records.

2059 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2060 *Ibid*.

2061 *Ibid*.

2062 *Ibid*.

This panel consists of three *Shari'ah* arbitrators who sit at the Birmingham Central Mosque on one day of each month ruling on divorce matters which come before them.[2063] At this final hearing before the arbitrators, both parties are granted the opportunity to orally present their cases.[2064] Both spouses are also requested to bring two competent witnesses to the final hearing who can attest to the events leading to the breakdown of the marriage.[2065] Where the spouses are unable to provide witnesses, they are required to furnish reasons why they are unable to do so.[2066]

As mentioned previously, the Birmingham Central Mosque *Shari'ah* council only issues rulings on divorce matters, and does not have jurisdiction to rule on matters such as child contact and access.[2067] The arbitrator is, however, allowed to enquire about contact arrangements in respect of children born of the marriage, and to emphasize the importance of the children having contact with both parents. [2068]

On the basis of the evidence presented to them, the arbitrators will decide whether or not to grant the dissolution of the marriage at the instance of the wife.[2069] The fact that the parties are divorced in a civil court at the time an application for *talaq* is sought, will serve as an indication to the arbitrators that the marriage has broken down irretrievably.[2070] In fact, where the parties are married in terms of civil law, the *Shari'ah* council will grant a *talaq* only once a civil divorce has been obtained.[2071] Where they rule for the dissolution of the marriage, the next step for them is to determine whether

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2063 *Ibid*.

2064 In practice, however, it is seldom that the husband as respondent attends the hearing before the panel of arbitrators.

2065 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2066 In practice, the arbitrators will continue to arbitrate the matter, despite the absence of the required witnesses.

2067 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2068 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2069 Pilgrim 2012 *Citizenship Studies* 771.

2070 *Ibid*.

2071 Pilgrim 2012 *Citizenship Studies* 771. This requirement by the Birmingham *Shari'ah* council is a typical example of a hybrid interplay where an Islamic legal institution recognizes British civil law and even stipulates it as an additional requirement before a *talaq* will be granted.

to grant the wife a *khula, faskh* or *tafreeq*.[2072] An Islamic divorce certificate is issued to both the husband and wife on the finalization of the divorce.[2073]

(2) Parties married in terms of both Islamic law and civil law

Once a divorce is obtained from the civil court, an application can be lodged with the Birmingham Central Mosque *Shari'ah* council for the dissolution of the marriage in terms of Islamic law.[2074] The petitioner, whether it is the husband or the wife, is required to submit the completed application form, £200 and a copy of the decree absolute from the civil court to the *Shari'ah* council.[2075] An Islamic divorce will thereafter be issued.[2076] In the event of the respondent lodging an objection to the petitioner's application for an Islamic divorce, the respondent will be granted an opportunity to present his case before the *Shari'ah* council.[2077] It is, however, highly improbable that the *Shari'ah* council will refuse to issue an Islamic divorce as the order for the dissolution of the marriage by the civil court is indicative that reconciliation between the parties is very unlikely.[2078]

While Birmingham Central Mosque *Shari'ah* council makes rulings only relating to divorce matters, it does not have jurisdiction in matters where the wife wants to claim for any unpaid dowry.[2079]

Research undertaken by Machteld Zee,[2080] a legal scholar at Leiden University, may have thwarted the legal recognition of *Shari'ah* councils in Britain. A report by the "Independent" on 5 December 2015 stated that her findings that were unveiled in the Houses of Parliament on 12 January 2016, are based on the most detailed and informed analysis of the workings of British *Shari'ah* councils ever undertaken by an

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2072 The type of divorce granted depends on both the wife and the husband's circumstances.

2073 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2074 In practice an Islamic divorce is granted swiftly where there are parallel civil proceedings for the dissolution of the marriage.

2075 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2076 *Ibid*.

2077 *Ibid*.

2078 *Ibid*.

2079 *Ibid*.

2080 *Choosing Sharia? Multiculturalism, Islamic Fundamentalism and British Sharia Councils.*

independent researcher. For the purposes of her research, she was able to attend fifteen hours of hearings at the Islamic *Shari'ah* Council in Leyton, east London, and the Birmingham Central Mosque *Shari'ah* council.[2081] Her research included attendance of more than a dozen cases as well as interviews with an array of *Shari'ah* experts including nine *qadis.* The research finding of Zee that casts *Shari'ah* councils in a bad light as will once again serve to ignite the debate as to whether or not to grant legal recognition to *Shari'ah* in Britain. In addition to this, the government in the United Kingdom has authorized an independent review to be undertaken to determine the extent to which *Shari'ah* councils or courts are applying *Shari'ah* in a manner that is incompatible with the official legal system.[2082] Former Home Secretary, Theresa May, indicated that the government authorized the review amid concerns that *Shari'ah* courts could be discriminating against women.[2083]

5 5 2 ISLAMIC LEGAL SERVICES

In response to the demand by Muslims who wish to conduct their affairs according to the principles of Islamic law, solicitors are offering Islamic legal services which include the development of specialized strategies that can bridge the gap between English law and Islamic law.[2084] These Islamic legal services have produced a special case of hybrid British-Muslim law, as both Islamic and English law are applied and combined.[2085] The services offered include the issuing of Islamic divorce certificates,[2086] the drafting of wills which comply with both the principles of Islamic law and English legal principles.[2087] The Islamic legal services offered by solicitors affords their Muslim clients peace of mind as they conduct their affairs in compliance with Islamic principles, whilst at the same time entering into a binding legal document prepared by a registered solicitor.[2088]

2081 Independent, 4 December 2015; Legalbrief Today 7 December 2015.

2082 Smith "Government to Review Sharia Courts" 22 December 2015 The Law Society Gazette.

2083 Scorer 2015 *New Humanist* 36.

2084 Pilgrim 2012 *Citizenship Studies* 772.

2085 *Ibid*.

2086 *Talaq* certificates are issued where the divorce proceedings are initiated by the husband and a *khul* where the divorce is initiated by the woman.

2087 Pilgrim 2012 *Citizenship Studies* 772.

2088 Pilgrim 2012 *Citizenship Studies* 773.

In order to provide Islamic legal services solicitors are required to have knowledge of both Islamic and English law that would usually entail a law degree and qualification to practice as a solicitor, in addition to an academic qualifications in Islamic law from an university either in or outside the United Kingdom.[2089]

5 5 3 THE MARRIAGE CONTRACT

In August 2008, the Muslim Institute in London published a "Muslim marriage contract".[2090] Dr Ghyasuddin Siddiqui, Director of the Muslim Institute and one of the authors of the Muslim marriage contract, stated that the contract was the result of four years' research.[2091] The Muslim marriages' contract was endorsed by leading Muslim organizations, including the *Imams* and Mosques' Council, the Muslim Council of Britain, the Muslim Parliament of Great Britain, the Muslim Law (*Shari'ah*) Council of the United Kingdom and the Utrujj Foundation.[2092] The contract seeks to remedy the situation where woman, in particular, are denied any financial rights at the dissolution of their marriage concluded in terms of Muslim rites only.[2093] The contract contains the following provisions:[2094]

(a) The presence of two witnesses (this requirement is gender/faith neutral);

(b) A provision in the contract precluding either spouse from being physically, verbally or sexually abusive towards each other and children born of the marriage;

(c) A waiver by the husband of his right to polygamy;

(d) The automatic delegation of the right of divorce to the wife (*talaq-i-tafweed*);[2095] and

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2089 Pilgrim 2012 *Citizenship Studies* 772.

2090 Griffith-Jones "Religious Rights and the Public Interest" in Griffith-Jones (ed) *Islam and English Law* (2013) 188.

2091 Siddiqui http://www.muslimparliament.org.uk/Documentation/Muuslim%20Marriage%20Contract.pdf (accessed 2014-11-03).

2092 *Ibid*.

2093 *Ibid*.

2094 Griffith-Jones "Religious Rights and the Public Interest" 198.

2095 The husband's right of *talaq* is not affected. This provision enables the wife to initiate a divorce and to retain all the financial rights agreed upon in the marriage contract.

(e) Where the marriage is dissolved, agreement by both spouses to accept the decision of the English civil courts in respect of the custody and care of children, and in respect of the division of the marital property.

Despite its publication in 2008, Griffith-Jones submits, that based on anecdotal evidence, the contract has not been widely used. Furthermore, opposition has been levelled against it from the more conservative Muslim communities.[2096] It is submitted that the contract dismisses accepted requirements for Islamic marriages, and proposes new requirements which have no jurisprudential basis.[2097]

5 6 REMEDIES AND SOLUTIONS

Proudman submits that, in order for spouses married in terms of Islamic law to enjoy greater protection, their *nikah* should be registered under English civil law.[2098] This will ensure that, when the marriage is dissolved through a divorce, all the parties, particularly women, are guaranteed the rights to which they are entitled.[2099] She furthermore submits that the increased registration of the *nikah* contracts under civil law may lead to an influx of ancillary-relief applications by wives, requesting financial relief including the payment of deferred dowry.[2100] English courts may then be inclined to grant greater recognition to the custom of dowry in ancillary-relief proceedings. In other words, wives would, therefore, no longer have to embark on instituting separate legal proceedings under contract law to obtain their dowry.[2101]

As indicated previously, civil courts have exclusive jurisdiction with regard to the dissolution of a marriage by divorce.[2102] This can at times prove to be problematic, particularly with regard to a Muslim marriage that has been dissolved by the civil courts,

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2096 Griffith-Jones "Religious Rights and the Public Interest" 198.

2097 Griffith-Jones "Religious Rights and the Public Interest" 198. For example, the contract does not require the marriage guardian (*wali*) for the bride, and Islamic law requires both witnesses to marriage between Muslims to be Muslim.

2098 Proudman "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry" 2012 http://www.familylawweek.co.za/site.aspx?i=95364 (accessed 2014-04-24).

2099 *Ibid*.

2100 *Ibid*.

2101 *Ibid*.

2102 Douglas *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (2011) 14.

but where the husband refuses to grant the wife a *talaq* or *vice versa*. As a result there is a need for greater legal recognition of the decisions of religious tribunals.[2103]

Thomson,[2104] a barrister in the United Kingdom, proposes the following as possible solutions to overcome the difficulties experienced by British Muslims:

(i) The incorporation of MPL into the domestic law of the United Kingdom;
(ii) the introduction of Islamic jurisprudence into civil-legal transactions by means of arbitration and subsequent binding arbitration agreements;
(iii) the establishment of *Shari'ah* courts where the advisors are conversant with all four schools of Islamic jurisprudence;
(iv) the *Shari'ah* councils are the precursors of what will eventually become the *Shari'ah* courts which must, however, be improved and unified;
(v) adjudication by the *Shari'ah* courts over all matters, including issues relating to inheritance, trade and commerce;[2105]
(vi) the recognition of MPL which will mean that the decision by a *Shari'ah* council will be binding and enforceable and recognized as such by the English courts, in the same manner that an arbitration award is binding and enforceable in the English courts; and
(vii) recognizing the role played by the *Shari'ah* courts as complementing and assisting the secular courts.[2106] This will assist in the realization in practice of the rights contained in Article 9 of the ECHR, as echoed by the Human Rights Act 1998.

Dr Suhaib Hasan, who has been presiding over *Shari'ah* councils in Britain for more than twenty-five years is of the opinion that the integration of aspects of MPL into the civil-legal system would in fact benefit British law.[2107] He submits that, if this does transpire, the result would be that divorces authorized by the *Shari'ah* councils could

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2103 *Ibid*.

2104 Ameli *et al Law and British Muslim* 81.

2105 At present the *Shari'ah* councils in operation in the United Kingdom deal almost exclusively with marriages and divorce issues.

2106 The establishment of the *Shari'ah* courts is not to replace the secular courts.

2107 Hasan, S http://sheikyermami.com/uk-if-sharia-law-is-implemented-this-country-will-be-a-haven-of-peace/ 20-01-2008.

then be rubber-stamped in the same manner that Jewish spouses have their divorces granted by the Beth Din, and these are recognized by the secular courts.[2108]

It is furthermore submitted that mosques should be encouraged to become places registered for the solemnization of marriages, as required in terms of the Marriages Acts.[2109] Mosques so registered are then able to perform the *nikah* under *Shari'ah* law and simultaneously conduct marriages, recognized under English and Welsh law. This will in turn ensure that Muslim spouses married in Britain have protection of their marital rights and access to secular courts should the needs arise.

Poulter, however, is of the opinion that the English legal system is flexible and offers reasonable accommodation of the religious and cultural needs of the ethnic minorities.[2110] The current policy adapting the essentially monistic English legal system on an *ad hoc* basis should be retained.[2111] He encourages Muslim organizations to participate in the general-law reform process.[2112] He furthermore recommends that legal professionals should undergo training in respect of the religions and cultures of the various minority groups.[2113] The courts should also include expert lay members in the court hearings which involve cultural and religious issues.[2114]

From the discussion above it is clear that the non-existence in English law of comprehensive legislation that serves to protect individuals from religious discrimination, is indeed problematic.[2115] For this reason Ameli submits that the inequality that arises from the disparity between the treatment of different minorities can be remedied in the following manner:[2116]

(a) Enacting new legislation to address religious discrimination, or alternatively;

2108 *Ibid*.

2109 http://muslimmarriagecontract.org/registration.html (accessed 2014-11-0 3).

2110 Poulter "The Claim to a Separate Islamic System of Personal Law for British Muslims" in Chilbi and Connors (eds) *Islamic Family Law* (1990) 164.

2111 *Ibid*.

2112 Poulter *Ethnicity, Law and Human Rights: The English Experience* 233.

2113 *Ibid*.

2114 *Ibid*.

2115 Ameli *et al Law and British Muslims* Project (2006) 86

2116 *Ibid*.

(b) extending the Race Relations Act to cover religious discrimination as well.

The Race Relations Act 1976 endorses the different treatment of minorities living in Britain by granting protection of some religious groups and not others.[2117] This disparity requires urgent reform firstly, by redressing the imbalance of existing legislation and secondly, by committing to a long-term reassessment of the current legal system, commencing by researching how it presently serves all communities.[2118] In other words, the recognition and rights granted to certain ethnic minorities must be extended to include Muslims. Equality demands that MPL should be recognized. *Shari'ah* courts should also be established in the same manner that the *Beth Dien* courts was instituted for the Jews.[2119]

On 7 December 2015, a report was released by an independent commission consisting of twenty commissioners and chaired by Baroness Butler-Sloss.[2120] After undertaking a two year investigation with regard to the role of religion and belief in British society, the commissioners made certain recommendations. The following recommendations are of particular relevance:[2121]

(i) There should be an increase in religious and belief literacy at all societal levels as this would reduce the potential for stereotyping and misunderstanding the religious beliefs of minority groups in Britain. To achieve this, the commission recommended the drafting of religious and belief literacy programmes and projects that would include an annual awards scheme to recognize and celebrate best practice in the media.

(ii) National and civic events, including coronation ceremonies, should reflect the pluralistic nature and the shift in religious beliefs of British society. For example, it was recommended that the House of Lords include a wider range of religious traditions and not only that of the Church of England.

2117 Yilmaz 2000 *Journal of Muslim Minority Affairs* 356. See para 5 3 2 of this thesis.

2118 Ameli *et al Law and British Muslims* (2006) 86.

2119 *Ibid*.

2120 Butler-Sloss "Report of the Commission on Religion and Belief in British Public Life: Living with Difference – Community, Diversity and the Common Good" (7 December 2015). The Commission was established in 2013.

2121 Butler-Sloss "Report of the Commission on Religion and Belief in British Public Life: Living with Difference – Community, Diversity and the Common Good" 7.

(iii) It was recommended that there be a reduction in the number of Church of England bishops in the House of Lords from twenty-six to sixteen, with a greater representation of other religions.

(iv) A panel of experts on religion and relief should be established. The role of the panel would be to advise the Independent Press Standards Organization in the event of complaints arising in respect of media coverage on religious and belief matters.

(v) Relevant public institutions and organizations should promote opportunities for interreligious and inter-worldview encounter and dialogue.

(vi) Religious organizations delivering social services should not be disadvantaged when applying for funding.

(vii) The Minister of Justice should provide guidance on compliance with United Kingdom standards of gender equality and judicial independence in respect of ecclesiastical courts such as the Beth Din and *Shari'ah* councils.[2122]

(viii) It was recommended that the Minister of Justice authorize the Law Commission to review the anomalies in respect of the legal definitions of race, ethnicity and religions. The Law Commission should then make recommendations ensuring that all religious traditions are treated equally.

5 7 CONCLUSION

From the discussion above it is clear that British Muslims, like other Muslims living in non-Muslim countries, aspire to be regulated by the principles and rulings of Islamic law, and seek the relevant formalization within the English legal system. In other words, British Muslims seek the recognition and application of MPL even from a non-Muslim Government. To date English law has not been able to deal adequately with the cultural and religious diversity existing within Britain, and has, as a result, adopted a piecemeal approach to regulate minority groups that is inconsistent, haphazard and uncoordinated. The position adopted by the State is that Muslims should rather adapt to the formal legal system than request for recognition of MPL. In other words, the state is prepared to accept social pluralism but not legal pluralism. As a result the

[2122] In their investigation, the commissioners established that there was a great deal of misunderstanding in respect of religious tribunals and councils, especially *Shari'ah* councils. The commissioners furthermore acknowledged that there was concern in respect of the *Shari'ah* councils as far as gender quality was concerned.

position adopted by Muslims in Britain is that of "avoidance reaction" by means of which they tend to stay clear of the official legal system by making use of *Shari'ah* councils in order to resolve their disputes, while at the same time following English law as part of their adaptation process.

It should be noted that British Muslims law enjoy a degree of religious and cultural autonomy that has allowed them to be part of British society, while at the same time adhering to their religious and cultural values. This has resulted in a formally unrecognized and unregulated quasi-judicial system coming into existence and, operating alongside the civil-legal system. Whilst the English legal system has not made many formal allowances for the incorporation of Islamic law into English law, it has also not prevented Muslims from practising their faith. The ability of Muslims living in England and Wales to skilfully navigate between Islamic law and English law has demonstrated that they can become British citizens without losing their Muslim identity.

The development of alternate mechanisms in the form of *Shari'ah* councils, for example, has allowed Muslims to resolve disputes without having to resort to the English civil courts. Research has shown that the decisions by *Shari'ah* councils are generally honoured and implemented.[2123]

Despite the developments transpiring in England and Wales in respect of MPL, it is submitted that the State bears the responsibility of monitoring the social-legal sphere and needs to adapt accordingly in response to the demands of reality to ensure that there is no discrimination against ethnic minorities or members of society in general. Furthermore, the approach adopted by the State should not be of an *ad hoc* character in the hope of the demise of Islamic law[2124] (as it has currently been doing), but it should instead seek to strike a balance between the demands of the socio-legal sphere and the political stand of the State.

In chapter six, a comparison is made between the solutions adopted in South African law and English law *vis-a-vis* MPL.

2123 Yilmaz *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* 172.

2124 Yilmaz 2002 *Journal of Ethnic and Migration Studies* 345.

CHAPTER 6
CONCLUSION

6 1 INTRODUCTION

In this thesis, Islamic law is compared to South African and English national law as it pertains to the law of marriage and divorce. In addition, the interpretation of Islamic law in these jurisdictions is discussed. The purpose of this comparison is to highlight the similarities and the differences between South African law, English law and Islamic law, thereby illustrating the dilemma and the profound difficulties experienced by Muslims who live in countries where MPL, Muslim marriages, in particular are not granted legal recognition and are therefore left largely unregulated. The South African and English legal systems, have each in its own unique way adapted, either through legislation, the judiciary and extra-judicial platforms, in order to ameliorate the plight of Muslims, especially women. These adaptions to Islamic law have not always been *Shari'ah* compliant.

Moreover, it is evident from the research undertaken that whilst South Africa and England and Wales have been particularly accommodating towards Muslims with regard to the establishment of Muslim schools, charities and banking law, Muslim marriages have not been granted legal recognition. Insofar as the recognition and regulation of Muslim marriages are concerned, these legal systems have followed similar paths, in that a piecemeal and *ad hoc* approach has been adopted regarding Muslim marriages. In essence, this only recognizes certain consequences flowing from Muslim marriages. This has, however not resulted in the recognition of Muslim marriages *per se*. This remains a huge stumbling block for Muslims.

In South Africa, whilst the *ad hoc* approach adopted by the courts in respect of Muslim marriages has alleviated the plight of parties to a Muslim marriage to a certain extent, it has also resulted in court decisions that have been at odds with the rules and principles of Islamic law. The vindication of rights that are not in line with *Shari'ah* results in an empty victory, which is unconscionable for adherents of Islam. The non-recognition of Muslim marriages has also meant that parties have had to approach the courts to settle marital disputes, which is a very time-consuming and costly exercise.

This has meant that only those who have the financial means to embark on litigation, have been able to approach the courts for assistance.

Furthermore, as a consequence of the non-recognition of their marriages, Muslims living in South Africa and England and Wales have developed internal regulatory mechanisms to deal with disputes according to the principles of Islamic law. The decisions of these internal mechanisms lack legal force, and there are no legal consequences where the disputing parties refuse to comply with the decision made by a religious authority. Decisions made by religious authorities lack the force of law and reliance is therefore placed on the moral conscience of Muslim spouses to adhere to *Shari'ah*. This has resulted in hardships and injustices for Muslim women in particular, who may remain trapped in a marriage where the husband refuses to issue her with a *talaq*, or who may find herself destitute where her husband refuses to fulfill his Islamic duty of maintaining her and the children born of the marriage. To date the adaptions within the South African and English legal systems to provide some relief to Muslims remain wholly unsatisfactory. Recognition would change the status of affairs to a large extent.

The reality in South Africa is that there is a dire need for the recognition and subsequent regulation of Muslim marriages. Without formal legal recognition of Muslim marriages, the plight of Muslim women will remain unheard and unchecked. The recognition and regulation of Muslim marriages will also promote legal certainty and predictability, particularly insofar as the personal and economic consequences of Muslim marriages are concerned. This will serve as a tool of empowerment and also urge Muslim spouses to fulfill their Islamic marital obligations knowing that legal consequences will follow where these do not take place.

Owing to the challenges and difficulties Muslims experience due to the legal non-recognition and non-regulation of their marriages concluded in terms of Muslim rites, the issue in South Africa is no longer whether or not Muslim marriages should be granted legal recognition, but rather what form such recognition and regulation should take. Whatever the format, it should be *Shari'ah* compliant. The acceptance of any legislation granting recognition of Muslim marriages which do not comply with the principles of Islamic law is a violation of the *Quran* and *Sunnah* and it will not be

endorsed by the *Ulama*. Legislation that contradicts and is not in conformity with *Shari'ah* is, therefore, not feasible and will not be accepted by the *Ulama* or the Muslim community in South Africa. This is evidenced by the fact that despite the release of two draft Bills which seek to grant recognition to Muslim marriages, no legislation has been enacted because the Bills have not unanimously been accepted by the *Ulama*. As mentioned previously, the *Ulama* exert considerable influence over members of the Muslim community and if there is no "buy-in" from the *Ulama* in respect of legislation recognizing Muslim marriages, there will be no "buy-in" from the members of the Muslim community.

For the reasons cited above and throughout this thesis, the following recommendations discussed below should be taken into consideration in respect of the recognition and regulation of Muslim marriages in South Africa.

6 2 LEGISLATION

6 2 1 GENERAL LEGISLATION

It is submitted that the enactment of legislation that grants recognition to Muslim marriages can take the form of general legislation, where state recognition is granted to all religious marriages, whether it be Muslim, Hindu or Jewish marriages. The state's interest in regulating people's most private and intimate relationships is threefold, namely, their identity as citizens; secondly, to know that people are indeed married and thirdly, that the best interests of children born of the marriage are protected. General legislation would mean that the state would require the marriage to be registered. However, the prescribed requirements, formalities and the consequences of the marriage would be determined by the chosen religious system of the spouses. There are only two possible minimum requirements that can be set in such a statute, namely, the minimum age and the consent requirement. Be that as it may, this would mean that once the spouses have registered their marriage with the relevant state authority, their marriage would be legally recognized and the invariable consequences flowing from that marriage would come into operation. In other words, in the case of Muslim marriages the personal and proprietary consequences of the marriage would be regulated in terms of Islamic law. In the event of a marital dispute, spouses would have access to the courts and other dispute resolution mechanisms and would therefore be able to enforce the consequences flowing from the marriage because the

marriage is legally recognized. State regulation of religious marriages would, therefore, be limited, as this function of regulation would be left to religious communities.[2125] The enactment of general legislation recognizing and Muslim marriages will be a means to address the hardships, inequalities and discrimination which Muslims experience in South Africa as a result of the non-recognition of their marriages. It will enable parties to enforce their Islamic law rights and hold parties accountable in fulfilling their marital obligations, thereby averting the potential for abuse of Islamic law.

Furthermore, by means of the enactment of general legislation recognizing all marriages, South Africa family law would be fulfilling its purpose, which include, the protection of the more economically vulnerable members of the family, the promotion of fairness within the family and the creation of legal certainty and predictability within family law. The enactment of general legislation will also be less time consuming and expensive as single piece of legislation will grant legal recognition to all religious marriages in South Africa instead of having the various family forms being granted legal recognition by separate pieces of legislation. Separate pieces of legislation may also serve to marginalize Muslims within the South African society as it may reinforce the notion that Muslims do not belong in South Africa and therefore require separate legislation to regulate their affairs.

Although this may be a long-term solution that may be suitable for all South African marriages, the South African Parliament appears to favour a pluralist approach in granting legal recognition to family forms that do not conform to the civil law. In other words, the enactment of general legislation recognizing Muslim marriages by the legislature is not preferred. This is evident from the enactment of separate legislation regulating customary marriages and civil unions. The South African Parliament may therefore, for the sake of consistency, enact legislation equivalent to that of the Recognition of Customary Marriages Act and the Civil Union Act, to regulate Muslim marriages. The fact that Parliament produced two MMBs' in 2003 and 2010 with the aim of granting recognition of Muslim marriages bears testimony to this fact.

[2125] Amien "The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa" 117.

Notwithstanding the preference shown by the legislature, it must be noted that the major religious bodies representing the Muslim communities in South Africa have to date been unable to reach consensus as to whether or not the two draft Bills are compliant with the principles expounded in terms of Islamic law. They have also not reached consensus as to how those provisions of the two Bills that is deemed to be in conflict with *Shari'ah*, can be corrected. What is, however, certain is that, as long as there are provisions in the Bill that are not *Shari'ah* compliant, the Bill will not be accepted by religious scholars within the Muslim community and this will affect the implementation of the Bill if it is enacted as legislation. It is therefore submitted that the legislature should reconsider granting recognition to Muslim marriages by enacting legislation that takes the form of general legislation as described above.

6 2 2 MUSLIM MARRIAGES ACT

As discussed above, the legislature has shown a preference for the recognition of Muslim marriages in South Africa *via* the enactment of legislation in the form of the MMB in 2003 and an amended MMB in 2010. In this respect, South Africa has surpassed the position in England and Wales in respect of the advancing the recognition and regulation of Muslim marriages. To date no legislation recognizing and regulating Muslim marriages has been proposed in England and Wales.

The dilemma in respect of the 2003 and 2010 MMBs is that religious scholars and organizations in South Africa have not unanimously accepted MMB because it is not *Shari'ah* compliant. The result being, that to date the MMB has not been enacted into legislation. This is the position notwithstanding the largely consultative process that the draft MMB underwent. Furthermore, South Africa, being a constitutional democracy, faces challenges in respect of the enactment of legislation that could be in conflict with Bill of Rights. The difficulty in enacting legislation recognizing and regulating Muslim marriages lies in having to strike a balance between religious freedom and the State's obligation to enact legislation for the common good of all South African citizens. On the one hand, Muslim religious scholars are advocating for the full and unchanged recognition of their religion, which includes rules and principles that may conflict with the rights contained in the Constitution on the basis that it is inconsistent with gender equality. The State, on the other hand, has to ensure constitutional protection of the

rights of the adherents to their religion, and at the same time it has a legal duty to ensure that effect is given to the rights contained in the Constitution. The fact that Islam regards religious laws and principles as sacred and immune to censure is an extremely complicating factor and in essence means that the conflict between the constitutional values and Islamic religious rules and values is irreconcilable.[2126]

All legislation that is enacted in South Africa is subject to the Constitution as the supreme law of the land. Legislation recognizing and regulating MPL is not excluded from this and must therefore conform to the rights enshrined in the Constitution. The MMB, if it is enacted as legislation, will have to pass constitutional muster which immediately leads to a stand-off between Islamic law as divine law, and the Constitution as the supreme (*albeit* man-made) law of South Africa. In order for the enactment of legislation granting legal recognition to MPL not to fall foul of constitutional values, all the discriminatory elements of Islamic law would have to be removed, otherwise it will be in conflict with section 15(3)(b) of the Constitution.[2127] Should this occur, it is inevitable that this will involve substantial changes to Islamic law of jurisprudence, either through the enactment of legislation recognizing and regulating Muslim marriages, or when the legislation is constitutionally challenged or through subsequent judicial interpretation.[2128] A case in point is the substantial changes that occurred to African customary law.[2129] If all the discriminatory elements of Islamic law were subsequently removed by legislation, this may prove to be unacceptable to Muslim communities.

As stated previously, religious scholars within the Muslim community exert tremendous influence, and if they advocate the view that MMB is not *Shari'ah*-compliant, there will be no buy-in from the community. The result is that legislation granting recognition to Muslim marriages will be mere paper law.

2126 Rautenbach "'Work in Progress': Some Comments on the Status of Religious Legal Systems in Relation to the Bill of Rights" 2003 9 *Fundamina* 134 149.

2127 Freedman, J in "*Christian Education SA v Minister of Education of the Government of RSA* 1999 (9) BCLR 951 (E)".

2128 Muslim Lawyers Association " Muslim Lawyers Association in Re: The Muslim Marriages Bill" (no date) http://www.mlajhb.com/Submissions-TO-SA-LAW-COMMISSION.pdf (accessed 2102-08009)

2129 *Bhe and Others v The Magistrate Khayelitsha and Others* 2005 (1) BCLR 1 (CC); *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111 (CC); *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).

The attempt to align Islamic law with the Constitution would be irreconcilable and, should the legislature forge ahead in enacting legislation recognizing Muslim marriages that does not conflict with the Constitution, it will result in legislation that is inconsistent with Islamic principles and practices. As South Africa is constitutionally bound to ensure that the rights contained in the Bill of Rights are protected and implemented, it will have to strike a balance so that the right to religious freedom is not promoted at the expense of women's right to equality. Whilst this is acknowledged, the need for recognition of Muslim marriages as well as the need to offer protection to parties to a marriage in terms of Muslim rites is a reality in South Africa.

Should the legislature continue to pursue the enactment of the MMB into legislation that will grant recognition to Muslim marriages, caution should be exercised that the fundamental aspects of MPL are not compromised. As discussed throughout the thesis, the enactment of legislation recognizing Muslim marriages will only be accepted by religious leaders and members within the Muslim community if it complies with the rules and principles of Islamic law.

If Parliament fails to enact legislation, either in the form of general legislation or the MMB, recognizing and regulating Muslim marriages, the recommendations below should be considered.

6 3 ARBITRATION

In order to maintain the sanctity and purity of Islamic law, the Muslim Lawyers Association advocates the view that legislative intervention should be kept to a minimum, and where legislative intervention does occur, it should only be legislation that enables disputes to be resolved through mediation and arbitration.[2130] To achieve this objective it would necessarily mean the removal of section 2(a) of the Arbitration Act,[2131] which excludes any matrimonial cause or any matter incidental thereto from arbitration. To advance their argument that arbitration provides the best solution in

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2130 Muslim Lawyers Association "The Muslim Lawyers Association in Re: The Muslim Marriages Bill" (no date) http://www.mlajhb.com/Submissions_TO_SA_LAW_COMMISSION.pdf (accessed 2102-08-2009).

2131 42 of 1965.

respect of marital disputes involving Muslims, the Muslim Lawyers Association lists the following advantages of arbitration:[2132]

(i) the private regulation of disputes with no additional burden on the State;
(ii) provision of opportunities of self-regulation;
(iii) the accommodation of the different schools of Islamic jurisprudence;
(iv) reduction in the risk of selective morality;
(v) reduction of the possibility of divisions within the Muslim community;
(vi) diminishing the potential for serious tensions between the Muslim community and the State; and
(vii) the involvement and role of Muslim scholars in the arbitration process, which would include being held accountable for the decisions made by these scholars.

In addition to the Muslim Lawyers Association, the SALC has also advocated for the use of arbitration in matrimonial matters, with the exception of disputes involving minor children.[2133] This is in line with section 12 of the MMB, which recommends the use of mediation councils to settle matrimonial disputes. Motala submits that the establishment of arbitration councils in South Africa to regulate MPL would result in the preservation of religious autonomy within the South African Muslim community.[2134] The disputing parties will also have a certain degree of autonomy as they will agree contractually, firstly, to refer their dispute relating to MPL to either a religious authority, arbitration council or an independent religious organization for arbitration. Secondly, the parties will reach agreement on which of the schools of Islamic jurisprudence will govern their dispute.[2135] From an Islamic perspective, arbitration will satisfy the requirement that, in the event of a marital dispute, the parties are required to submit their dispute to an arbitrator.[2136]

2132 Muslim Lawyers Association "The Muslim Lawyers Association in Re: The Muslim Marriages Bill" (no date) http://www.mlajhb.com/Submissions_TO_SA_LAW_COMMISSION.pdf (accessed 2102-08009).

2133 SALC "Law Reform Commission Project 94 on Domestic Arbitration", Draft Bill s 5(1).

2134 Motala "Discussion Paper: Proposals for Muslim Personal Law" unpublished article dated June 2005.

2135 *Ibid*.

2136 *Quran* Chap 4, verse 35.

Despite the distinct advantages in respect of arbitration,[2137] the conflict between Islamic law and the Constitution remains and therefore, should an arbitration agreement or award contain a provision that is contrary to the Constitution, it will be null and void.[2138] Notwithstanding the establishment of MAT in England, its jurisdiction is limited to the arbitration of commercial disputes and it specifically does not arbitrate in matters relating to marital dispute, divorces in particular. Whilst the inclusion of marital disputes within the jurisdiction of the Arbitration Act would serve to appease concerns expressed by religious scholars, it is questionable as to whether this will indeed be realized in South Africa. It is therefore submitted that despite the fact that arbitration is recognized and encouraged in terms of Islamic law, this does not appear to be a viable option as the form by which would grant legal recognition to Muslim marriages in South Africa.

6 4 *SHARI'AH* COURTS

Whilst South Africa is a secular state, it does make allowances for both religious and cultural freedom within the boundaries of the Constitution.[2139] The possibility exists that the recognition of MPL be achieved under jurisdiction of *Shari'ah* courts. This would entail the establishment of *Shari'ah* courts parallel to the South African civil courts, which would be presided over by Muslim jurists. This would be a means of avoiding the problems relating to jurisdiction, as religious scholars are questioning who and which courts will authorize to deal with marital disputes in respect of Muslim parties. The *Al Jama-ah* Muslim political party[2140] and the Muslim Lawyers Association,[2141] in particular, have submitted that the only acceptable jurisdiction is that which is established in terms of Islamic law. For this reason they submit that the

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2137 The settlement reached between the disputing parties will more likely be in line with the principles of Islamic law; the confidentiality aspect of arbitration prevents the details of disputes being aired in public, with the result that the modesty of the parties is protected which is very important in Islam; it is speedier and less costly than traditional litigation.

2138 Notwithstanding, the establishment of MAT in England, its jurisdiction is limited to the arbitration of commercial disputes and it specifically does not arbitrate in matters relating to marital dispute, divorces in particular.

2139 Ss 15, 30 and 31 of the Constitution.

2140 Al Jama-ah "Comment: Superior Courts Bill 2010 (Deadline 30 June 2010)" June 2010 http://www.aljama.co.za/2011/03/31/manifesto-political-position-on-the-muslim-marriage-bill-mmb-2011/ (accessed 2012-10-15).

2141 Muslim Lawyers Association "Muslim Lawyers Association in Re: Muslim Marriages Bill" (no date) http://www.mlajhb.com/SUBMISSIONS_TO_SA_LAW_COMMISSION.pdf (accessed 2012-08-09); Al Jama-ah "Manifesto & Political Position on The Muslim Marriage Bill (MMB) 2011" March 2011.

establishment of *Shari'ah* courts will satisfy the jurisdiction issue and serve to protect Islamic law from secular interference.

The Muslim Lawyers Association have questioned the wisdom of secular courts being given authority to adjudicate MPL as this can result in the transmogrification and the contamination of Islamic law and its sacred sources.[2142] The reality within the South African Muslim community is that adjudication of matters relating to MPL has been the exclusive domain of the *Ulama*. This has changed over recent years as a result of Muslims resorting to the courts for matters relating to MPL.[2143] It must, however, be borne in mind that adjudication of matters of MPL in South African civil courts is usually done as a last resort.[2144] If *Shari'ah* courts are established, this problem will be reduced.

Notwithstanding the fact that the establishment of *Shari'ah* courts could be a solution as far as the implementation of MPL is concerned, the harsh reality is that the establishment of *Shari'ah* courts in South Africa now is not an option for two reasons. Firstly, budgetary constraints on the part of the State have meant that the establishment of *Shari'ah* courts in South Africa is not feasible. Secondly, the successful implementation and functioning of *Shari'ah* courts can only be achieved if there is one autonomous national body which regulates MPL matters in respect of all Muslims in South Africa. At present an autonomous national body does not exist in South Africa. Furthermore, Rautenbach submits that, while the establishment of *Shari'ah* courts may be plausible, experience in other countries has proved that it inevitably leads to a conflict of laws.[2145] The result is that the courts are often so involved in issues dealing with conflict of laws that the real issues between the disputing parties vanish in a "mist of confusion and perplexity".[2146]

2142 Muslim Lawyers Association "Muslim Lawyers Association in Re: Muslim Marriages Bill" (no date) http://www.mlajhb.com/SUBMISSIONS_TO_SA_LAW_COMMISSION.pdf (accessed 2012-08-09) 67; Al Jama-ah "Manifesto & Political Position on The Muslim Marriage Bill (MMB) 2011" March 2011 http://www.aljama.co.za/2011/03/31/manifesto-political-position-on-the-muslim-marriage-bill-mmb-2011/ (accessed 2012-10-22).

2143 See Chap 4 of this thesis.

2144 For example, when various religious bodies in the Muslim community have been approached, and despite their attempts at intervention, the dispute remains unresolved.

2145 Rautenbach "Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa" 2004 (2) *PER* 1 at 23.

2146 *Ibid*.

Similarly, in England and Wales, due to the policy of "one country one law" the stance taken by the State is that the establishment of parallel *Shari'ah* courts is not an option. Notwithstanding calls for the English legal system to embrace and accommodate Islamic law, it is clear that should this indeed occur, it would not include the establishment of a parallel legal system or the establishment of independent *Shari'ah* courts. The position in England and Wales at present is that, whilst the English legal system will accommodate Islamic law, it will do so only to the extent that it does not conflict with the official English legal system.

It is therefore submitted that for the reasons stated above, the establishment of *Shari'ah* courts is not a feasible solution for recognizing and regulating Muslim marriages in South Africa.

6 5 *SHARI'AH* COUNCILS

As discussed previously,[2147] owing to the non-recognition of their marriages, Muslims in South Africa and England and Wales have developed an internal, extra-judicial regulatory framework in the form of *Shari'ah* councils to settle their disputes with the provision of counseling, mediation and reconciliation services. Both in South Africa and in England and Wales, *Shari'ah* councils adjudicate on religious matters but lack the legal status of civil courts. As a result the decisions made by *Shari'ah* councils lack legal force, and whether or not the parties adhere to the decision of the *Shari'ah* council, depends on the God-consciousness and goodwill of the parties. Furthermore, the *Shari'ah* councils are not accountable to anyone for the decisions they make. It is submitted that a possible solution to the problems experienced by Muslims as a result of non-recognition of MPL would be to grant *Shari'ah* councils legal recognition so that the decisions made and the processes followed when adjudicating on marital disputes are open to scrutiny. These councils are therefore held accountable for decisions that they make, especially where these decisions are discriminatory.

An argument in favour of *Shari'ah* councils is that it should be granted legal recognition based on the principle of religious freedom. Should this occur, it would enable Muslims

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2147 Chaps 4 and 6 of this thesis.

the freedom to regulate their domestic lives in accordance with Islamic law, and it would grant *Shari'ah* councils the autonomy and freedom to apply their own internal law and procedures to guide and govern the domestic lives of adherents to the Islamic faith. It is, however, submitted that the State will consider the legal recognition of *Shari'ah* councils only where strict guarantees are undertaken by the *Shari'ah* councils in respect of due process of law, equal protection under the law and respect of fundamental human rights. Whether *Shari'ah* councils are in a position to undertake these guarantees is open to question.

As mentioned in chapter five, the research undertaken by Machteld Zee on *Shari'ah* councils has cast a shadow for the legal recognition of *Shari'ah* councils in Britain. One has to bear in mind that the research conducted by Zee is not from an Islamic perspective but rather from a western human rights premise. As indicated previously in chapters two and three, Islamic law will never completely conform to the human rights philosophies and ideologies of the West.

6 6 CONCLUSION

It is submitted that Muslim marriages must be granted legal recognition and protection and this must be in a manner acceptable to Muslims. It is furthermore submitted that delays in granting recognition to Muslim marriages in fact means that Muslim women will continue to be marginalized and left without adequate protection.

It should be noted that the State has shown a preference for the enactment of legislation to recognize and regulate Muslim marriages. The same approach was adopted in respect of customary law with the enactment of the Recognition of Customary Marriages Act, and the recognition of same-sex partners with the enactment of the Civil Union Act. It is submitted that the legislature should reconsider their approach as, notwithstanding the release of two MMBs, there is no consensus amongst the *Ulama* and although the MMBs has not been rejected outright, it has not been accepted either.

The call for the recognition and regulation of Muslim marriages *via* the enactment of legislation must be in conformity with the principles and rules of Islamic law. Based on Islamic legal theories as discussed in chapter one, it is therefore submitted that

because the conflict between religious freedom and the right to equality is irreconcilable, the former should trump the latter. The *Quran*, being the literal word of God, commands Muslims to follow the *Quran* both outwardly and inwardly and to adhere to its teachings.

It is, therefore, with bated breath that the decision of the application by the Women's Legal Centre to compel Parliament to enact legislation recognizing Muslim marriages is awaited. The matter has been set down for 28 August 2017.

> "The same religion has He established for you as that which He enjoined on Noah – the religion which has been sent by inspiration to you (O Muhammad PBUH) – and that which was enjoined on Abraham, Moses and Jesus: Steadfastly uphold the true faith, and do not break up your unity therein. And even though that (unity of faith) to which thou callest them appears oppressive to those who worship other things than God or forces a share in His divinity, hard is the way to which Thou callest them. God draws unto Himself those whom He pleases and guides unto Himself those who turn to Him."[2148]

> "… and in whomsoever you differ, the verdict thereof is with Allah."[2149]

[2148] Ch 42; verse 13.

[2149] Ch 42; verse 10.

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