



# THE NEW FRAMEWORK PLANNED FOR THE LEGAL RECOGNITION AND REGULATION OF MUSLIM MARRIAGES IN A SECULAR SOUTH AFRICA: FROM LITIGATION TO LAW REFORM

*Najma Moosa and Muneer Abduroaf*

**Abstrak:** Umat Islam yang berasal dari Hindia Timur dan anak benua India, memiliki sejarah di Afrika Selatan lebih dari tiga abad. Upaya Muslim Afrika Selatan untuk mengakui pernikahan Muslim mereka memiliki sejarah lebih dari tiga dekade, dimulai pada masa pemerintahan minoritas kulit putih atau apartheid dan berakhir selama demokrasi. Meskipun Konstitusi Republik Afrika Selatan, 1996, membuat ketentuan agar pernikahan Muslim diakui secara formal dan terpisah melalui undang-undang, namun hal itu adalah sebuah ironi keadilan bahwa hingga saat ini, tidak ada kerangka legislatif untuk pengakuan dan pengaturan konsekuensinya. Berdasarkan hal itu, artikel ini secara kritis menganalisis perkembangan litigasi dan peradilan saat ini serta reformasi hukum dan proses kebijakan yang berkaitan dengan pengakuan formal dan masa depan pernikahan Muslim di Afrika Selatan. Kerangka hukum tersebut tidak memberikan rincian apapun mengenai mengapa pernikahan Muslim tetap tidak diakui atau isi hukum substantif dan peraturan pernikahan Muslim.

**Kata kunci:** Afrika Selatan; kerangka pernikahan baru; pengakuan pernikahan Muslim; litigasi dan perkembangan yudisial; reformasi hukum dan inisiatif kebijakan

**Abstract:** Muslims, who originate from the East Indies and the Indian sub-continent, have a history in South Africa dating back more than three centuries. Attempts by South African Muslims to have their Muslim marriages (*nikāhs*) recognized have a history spanning more than three decades, starting during white minority or apartheid rule and concluding during democracy. Although the Constitution of the Republic of South Africa, 1996, makes provision for Muslim marriages to be formally and separately recognized through legislation, it is a travesty of justice that there is, to date, no legislative framework for the recognition and regulation of the consequences flowing from such marriages. This article critically analyses recent and current litigation and judicial developments and parallel law reform and policy processes pertaining to the formal, future recognition and regulation of Muslim marriages in South Africa. As such, it does not provide any detail regarding why Muslim marriages remain unrecognized or the substantive law content and regulation of Muslim marriages.

**Keywords:** South Africa; new marriage framework; recognition of Muslim marriages; litigation and judicial developments; law reform and policy initiatives

## Introduction

South Africa is a constitutional democracy. Muslims originating from the East Indies and the Indian sub-continent (Indonesia, Malaysia, and India) have a history in South Africa dating back over three centuries. Although a broad overview of the South African discourse on Muslim Personal Law (MPL) from its inception to the present falls outside the scope of this article, attempts by Muslims to have their Muslim marriages (*nikāhs*) recognized have a history spanning more than three decades, starting during white minority or apartheid rule and concluding during democracy (Moosa & Dangor, 2019; Moosa, 2011). The Constitution of the Republic of South Africa, 1996 makes provision for all religious marriages, including Muslim marriages and/or MPL, to be formally and separately recognized through legislation. As a result, the possibility of the recognition and application of MPL in South Africa has enjoyed the attention of the South African government for many years but without fruition. An amended version of a 2003 Muslim Marriages Bill (MMB) was already approved by Cabinet some twelve years ago in 2010 but has yet to be enacted. Therefore, it is considered a travesty of justice that there is, to date, no legislative framework for the recognition and regulation of Muslim marriages. The judiciary has a series of MPL-related cases since the adoption of the final Constitution, acknowledged such non-recognition as discriminatory, but no court has formally declared a Muslim marriage valid to date. While we currently await the outcome of another MPL matter which has yet again reached the apex or the Constitutional Court (CC), the legal status and validity of Muslim marriages remain unresolved issues.

The COVID-19 pandemic and lockdown started in South Africa in March 2020 and continued till April 2022. Fortunately, during this time, court cases dealing with the non-recognition of Muslim marriages and law reform and policy initiatives dealing with the recognition of Muslim marriages continued. As a result, there is currently an ambitious move afoot by two different arms of government to have either a unified (one) or an omnibus (umbrella) marriage law for all South Africans, including Muslims, after 2024. This article examines the litigation and judicial developments and the law reform and policy

processes involved to determine whether it will result in the legal validity of Muslim marriages and what the implications, if any, will be for the 2010 MMB.

This article is divided into five parts: Introduction and Conclusion Part 2 of the article provides a historical and general overview of Muslims and the non-recognition of their marriages in South Africa. Part 3, by setting out the processes leading from litigation to law reform, analyses the role of litigation and case law in spurring this law reform and policy processes. Part 4 examines the law reform and policy processes currently underway, how and whether they will work, and possible implications, if any, for the 2010 MMB as an already existing version of proposed legislation to govern aspects of MPL in the South African context. In doing so, there will be some overlap between Parts 3 and 4.

### **Muslims and the Non-Recognition of Their Marriages in South Africa**

The 1996 Constitution is the supreme or apex law in South Africa. Its main aim is to avoid the past injustices generated in overlapping periods of South Africa's history by Dutch and British colonialism, apartheid rule, or politically motivated racial segregation and patriarchy.

Apartheid rule started in 1948 and lasted until 1994, when democracy was attained through the coming into effect of the first democratic Constitution of the Republic of South Africa, Act 200 of 1993 (the 1993 or interim Constitution). While democracy has been a major turning point in its history, patriarchal values, which ought to have ended with it, remain a questionable and an inherent component of South African cultural and religious identity. Because Muslim women live in a largely patriarchal religious society, they generally still face gender discrimination on the basis of their sex. This is exacerbated by the fact that Muslim marriages, like all religious marriages, remain formally unrecognized in South Africa. Historically, South Africa experienced two periods each of Dutch and British colonial rule, starting with Dutch colonialism in the mid-seventeenth century and terminating with a period of British colonialism at the end of the nineteenth century. Although South Africa became a Union under

white minority rule in 1910, and British colonialism terminated at the end of the nineteenth century, it was still regarded as a British colony until 1961, when the country became a Republic (Oliver & Oliver, 2017). During the first period of Dutch rule, Islam was introduced into South Africa, initially at the Cape (now the Western Cape Province), by Muslims who hailed from the Malay-Indonesian Archipelago (East Indies). Subsequently, during the period of British rule, Muslims also arrived from the Indian sub-continent. They settled in the Cape Colony as well as in the Natal region (now KwaZulu-Natal) (da Costa, 1994; Mahida, 1993; Moosa, 2021).

The current (2021) mid-year population of South Africa stands at over 60 million, of which black Africans constitute over 80% (*Statistical Release P0302*). Religious affiliation has not formed part of published population censuses in South Africa since 2001, so there is, unfortunately, no official population census data to accurately gauge the number of Muslims currently living in South Africa. Relying on statistics in the latest (2015) General Household Survey, Christians were estimated to constitute 86% of a then total population of some 54 million, while Muslims were estimated to constitute merely 1.9% (or roughly 1 million). Hindus were estimated to constitute 0.9% of the population and Jews, 0.2%. Although the number of Muslims would have increased since 2015, according to the latest General Household Survey conducted in 2015, Muslims were estimated to make up a small fraction (over one million) of the then-total population of 54 million. Although these statistics confirm that the majority of South African citizens are predominantly Christian, it also highlights that Muslims constitute the largest of three (Muslim, Hindu, and Jewish) religious minorities and that the largest number of Muslims were located in the Western Cape Province.

MPL is a body of private law pertaining to inter alia, marriage, divorce, inheritance, polygyny, custody, and guardianship that regulates family relationships (Moosa & Dangor, 2019). While Muslim marriages and divorces are regulated by the prescriptions of the Islamic law (sharia), as a consequence of colonialism, the South African common law (a combination of Roman-Dutch Law and English Law) still regulates most aspects of South African family law.

Section 15(1) of the final Constitution guarantees freedom of religion, belief, and opinion. This grants everyone the right to follow their own religion and, when read with s30 of the Constitution, to participate in their cultural life. Section 15(3) also makes provision for all religious marriages, including Muslim marriages (*nikāhs*) and/or MPL, to be formally and separately recognized through legislation (s15(3)(a), s15(3)(a)(i) and s15(3)(a)(ii)). However, it does so without constitutionalizing the right to have such marriages recognized (Moosa, 1996: 356). Furthermore, once recognized, religious marriages, including Muslim marriages, must be consistent (s15(3)(b)) with other provisions in the Constitution's Bill of Rights, like equality (s9) and dignity (s10). Although the Constitution makes allowance for the recognition of Muslim marriages, the legal status and validity of Muslim marriages currently remain unresolved issues.

The judiciary has in a series of MPL-related cases since the adoption of the final Constitution, and more earnestly since 2014, acknowledged that non-recognition of Muslim marriages is discriminatory; and this has prompted some legislative changes favorable to Muslim women and children. The Women's Legal Centre (WLC), an NGO established in 1999 to advance women's rights by conducting constitutional litigation and advocacy on gender issues, has played an instrumental role in these legislative changes by bringing relevant applications to court (Samaai, n.d.). We currently await the outcome of a matter initially brought by the Women's Legal Centre Trust (WLCT) to the Western Cape High Court in 2014, which has now reached the CC. The WLCT brought the matter in the public interest before the court and was represented by the WLC.

Since the largest number of Muslims hail from the Western Cape, it is not surprising that the cases dealing with legal challenges pertaining to MPL matters that have been initiated either by or on behalf of Muslim women, largely emanate from this province. The trends reflected in these cases have, from 1994 to date, largely been positive but only go as far as providing relief on a case-by-case basis. These cases have prompted changes to legislation to include Muslims under its protective ambit. Although the judiciary has increasingly urged the legislature to enact legislation recognizing Muslim marriages and

regulating their consequences, no court has formally declared a Muslim marriage valid. The constitutional principle of separation of powers between the three interdependent arms of government (executive, legislature, and judiciary) has been in operation since the adoption of the final Constitution in 1996.

The most recent investigation (Project 59) into the recognition of Muslim marriages (*nikāhs*) by the South African Law Reform Commission (SALRC), the governmental body responsible for considering law reform, started in 1999 and concluded in 2003, yielded a proposed, essentially sharia compliant, draft Muslim Marriages Bill (2003 MMB). This Bill was submitted to the then Minister of Justice and Constitutional Development. The main author of this article was a member of the SALRC Project Committee responsible for drafting the 2003 MMB. In 2010, seven years later, the Draft Muslim Marriages Bill, 2010, an amended version of the 2003 MMB (hereafter the 2010 MMB), was approved by Cabinet and published for public comment. However, to date, it has not yet been enacted, and no recognition has ensued.

Like Muslim marriages (*nikāhs*), life-long (permanent) same-sex and opposite-sex partnerships are also not formally legally recognized, although they too reached a Bill stage. In 2008 the Department of Home Affairs (DHA), the department of the South African government which manages the solemnization and registration of marriages formally recognized in South Africa, published a draft Domestic Partnership Bill for public comment. Parliament has to date not passed legislation that regulates the relationships of couples who have not entered into marriage but who cohabit in long-term or permanent life partnerships. While these partnerships are not afforded the same status as a marriage, they are also afforded some protection in South Africa. As citizens Muslims are not precluded from entering into these types of relationships.

Currently, three different forms of marriage are recognized in South Africa and managed by the DHA. Although they are governed by different statutes, one pro-democracy and two post-democracy, all present some human rights concerns and loopholes. These marriages are civil marriages (1961), customary African marriages (1998), and civil

unions (2006)(Civil Union Act, 2016; Marriage Act, 1961; Recognition of Customary Marriages Act, 1998). The first form is the default civil marriage in terms of the Marriage Act (No 25 of 1961), which was introduced in 1961, the same year that the country became a Republic and overlapped with a period of apartheid rule when there was no clear separation between state and religion (church). Although some of the provisions of the Marriage Act, therefore, indicate a clear bias towards Christianity, it is ultimately a civil and not a Christian marriage that is automatically recognized as legal. Nonetheless, the Marriage Act was, and still is, available to monogamous opposite-sex (heterosexual) couples regardless of race or religion. Statistics in 2017 highlight it to be the preferred choice of many South Africans probably because it offers more security in the future for those entering it. In comparison to 135 458 civil marriages entered into in terms of the Marriage Act, only 2 588 customary marriages and 1 357 civil unions were registered in South Africa in 2017 (Statistics South Africa, 2019).

Next in line was the African customary marriage of black South Africans. Although they always constituted the majority of the total population, their marriages were only formally recognized in 1998 in terms of the Recognition of Customary Marriages Act (RCMA) (No 120 of 1998) (Recognition of Customary Marriages Act, 1998). The RCMA came into operation on 15 November 2000, more than two years after the final Constitution came into force on 4 February 1997. Ironically, although such recognition occurred during the process of removing racially discriminatory legislation, these marriages are only available to monogamous and polygynous opposite-sex black South African couples. The fact that these marriages are only available to 'blacks' can be construed to amount to them having received special treatment while the religious marriages of the rest of the population remain unrecognized and may, for these reasons, also be subject to constitutional challenge and scrutiny. The RCMA was followed eight years later in 2006 by a further form, the recognition of civil unions or partnerships in terms of the Civil Union Act (CUA) (No 17 of 2006) (Civil Union Act, 2016). Unlike the RCMA, the CUA has no restrictions based on race and is available to monogamous opposite-sex and same-sex (homosexual) couples who can decide to label their relationship a marriage or a partnership. These facts make the CUA

a truly inclusive Act because it does not draw a distinction between couples on the basis of their race or gender.

Although Muslims are currently precluded from utilizing the RCMA because the definition of a customary marriage in South Africa does not include marriages concluded in accordance with religious rites, Part 3 will highlight a little-known or publicized current attempt by the DHA to change the status quo to include Muslim marriages within the ambit of the RCMA.

As citizens, Muslims currently have the option of entering into civil marriages and civil unions, although both forms may be subject to further restriction by Muslim religious authorities (ulama). Muslim clerics (*imāms*), who since 2014 qualify as civil marriage officers in terms of the Marriage Act (1961), will not conduct interfaith *nikāḥs* and will usually only conduct civil marriages (which are by default in community of property) if the matrimonial property system chosen by the parties conform with Islamic law standards (usually out of community of property and without accrual). However, such an option may not necessarily offer the spouse most in need of support (usually the wife) optimal financial protection upon the termination of a marriage by death or divorce. Although s 9 of the Constitution (equality clause) makes provision for the protection of both a heterosexual and homosexual sexual orientation, mainstream ulama, who deem same-sex marriages to be forbidden in Islam, will only approve of Muslims entering into opposite-sex civil unions in terms of the CUA. Nonetheless, there is a gay *imām* in the Western Cape who, although currently single, has entered into a long-term same-sex partnership and interfaith same-sex *nikāḥ* with a Hindu partner. He also officiates at same-sex *nikāḥs* and civil unions in terms of the CUA (2006) for Muslim and interfaith couples (Moosa & America, 2022).

It is not uncommon for South African Muslims to only enter into a heterosexual Muslim marriage (*nikāḥ*) without also entering into a further legally recognized civil marriage because of fundamental differences between the two. For example, the Marriage Act does not make provision for polygyny and is by default in community of property. Hence, if Muslim marriages are formally recognized without also formally regulating their consequences, it will be as if the status quo

had remained unchanged for women and children. Although nothing precludes Muslims, or persons from any other faiths, from utilizing the Marriage Act (1961), doing so does not legalize the Muslim marriage or *nikāh* itself. In such cases, civil marriage is usually preceded by a *nikāh* (Marriage Act, 1961).

There are currently two parallel law reform processes underway managed by two different arms of government to consider the rationalization of all existing South African marriage laws and the recognition of religious marriages and permanent life partnership relationships within its broad ambit. The first process is being driven by the SALRC under the auspices of the Department of Justice and Constitutional Development (DOJ & CD) at the suggestion of the Minister of Home Affairs. As a result, a new investigation was initiated by the SALRC, and a new Project Committee was established. This investigation has thus far yielded an Issue Paper and a Discussion Paper. The Discussion Paper proposes the adoption of a draft Bill, the Single Marriage Statute (SMS), which contains two Bills as two alternative options. However, it appears that, except for minor definitional differences, the content of both Bills is almost identical. A final report is expected to be submitted by the Minister of Justice to the Minister of Home Affairs.

Although the first process was suggested by the Minister of Home Affairs, the second process is being driven by the DHA itself. The DHA is seeking to develop a marriage policy for South Africa and has thus far produced a draft policy discussion paper, the Green Paper on Marriages (draft marriage policy or Green Paper), in which three options, including the SMS, are being considered. It can be gauged from these options that the DHA and the SALRC are not *ad idem* on what the best possible solution for South Africa's marriage law should be. The SALRC favors the adoption of the SMS to simply recognize all types of relationships worthy of protection, to prescribe minimum requirements for such relationships, and to leave their peculiar requirements (and consequences) within the discretion of the parties. The DHA does not agree that the proposed SMS may be the best solution or that it will pass constitutional muster. Civil law currently regulates the consequences of all existing marriages. This means that these laws will also have

to be amended to include (and not merely accommodate) the newly recognized marriages and relationships. There are currently several SALRC investigations already underway. Although both processes highlight a continued commitment and development to change the status quo of non-recognition, it is unclear why there are two processes and why the one, quite uncharacteristically, preceded the other.

Both processes are currently still underway. It is hoped that these processes will conclude by 2024 and thereafter culminate in formal legislation being put in place recognizing all types of marriages and relationships. However, neither process makes provision for every possible eventuality. For example, they do not include same-sex *nikāhs* within their ambit.

### **The Role of Litigation and the Judiciary in Prompting the Formal Recognition of *Nikāhs* through Law Reform**

Muslim women and children face practical challenges (maintenance, inheritance, domestic violence etc.) due to the non-recognition of Muslim marriages. Over the past few decades have had to rely on court interventions and legislative concessions to redress the consequences of non-recognition. These changes in the law merely accommodate them but do not provide recognition to Muslim marriages. This is because when Muslim women enter Muslim marriages, they do not automatically have the same legal rights and protections as spouses in civil marriages, civil unions, and customary marriages have on the death of a spouse or upon divorce. Consequently, with the assistance of the WLC, Muslim women have approached courts through test cases. This has resulted in a piecemeal amendment to legislation pertaining to inheritance, maintenance, and children's rights to include them and their children within its protective ambit. The WLCT has brought these applications for the formal recognition of Muslim marriage and the regulation of its consequences because of the continued failure on the part of the government to enact such legislation. For a further and more detailed discussion of the cases leading up to the latest CC decision (Amien & Moosa, 2021 p 388-391). As indicated in Part 2, a concrete legislative proposal in the form of a draft Muslim MMB has already been in place since 2003. An adapted version of this Bill (2010 MMB)

was tabled in Parliament in December 2010 and published for public comment in 2011 (Draft Muslim Marriages Bill, 2011). However, this only occurred after an unsuccessful 2009 CC application was brought by the WLCT (*Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 at para 1), in which it sought to oblige the government to speed up the process of recognition by enacting legislation both recognizing and regulating Muslim marriages (*nikāhs*). Since the WLCT took an unprecedented step in bringing its application directly to the CC (the highest or apex Court in South Africa), the CC unanimously dismissed its application. Given the obligation and role that other organs of State, such as the Ministries of Justice and Home Affairs, ought also to play in the enactment of the legislation, the CC did not allow the WLCT direct access because it is not a court of both "first and final instance" and because it found that the matter would be best served by the intervention of other courts (at paras 21 and 27-28). The CC judgment, therefore, does not consider whether Parliament may be under an obligation to enact legislation recognizing Muslim marriages nor whether such legislation would be consistent with the Chapter Two provisions of the Bill of Rights of the Constitution.

As also apparent from *Faro v Bingham* (2013), another problematic Muslim marriage application brought by the WLCT to the Western Cape High Court, that "...it seems that the Bill is not in truth on the legislative calendar for this year [2013]" (at para 42) (*Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others*, 2014). It was probably removed from Parliament's review list because of a lack of consensus among the Muslim community. On 25 October 2013, Judge Rogers, the presiding judge in *Faro v Bingham*, ordered the DOJ & CD to map out "... by no later than 15 July 2014...the progress made in respect of the enactment of the Muslim Marriages Bill of 2011 *and/or any similar legislation*" (at para 47(c)(ii)). Our emphasis is added in italics.

Undaunted, the government did not change the status quo through the enactment of the MMB, nor did it expand the ambit of such recognition to include "any similar legislation". Instead, the deadline set by the Court merely prompted the government, through its Ministry of Home Affairs, to train and, by 30 April 2014, to register many Muslim clerics (*imāms*) as civil marriage officers (Muslim Marriage Officers or

MMOs) (Moosa & Abduroaf', 2017). In the Western Cape Province, this occurred under the auspices of the Muslim Judicial Council (SA) (MJC-SA), a non-profit religious tribunal based there and where Muslims are also predominantly located. The MJC-SA, established in 1945, is one of the oldest and most influential Muslim religious authorities in South Africa (see History of the MJC). As an umbrella body, it represents the most significant number of religious authorities (ulama) and mosques in South Africa. This means that although *imāms* of these mosques may officiate at both Muslim marriages (*nikāḥs*) and civil marriages (in terms of the Marriage Act of 1961) between Muslim couples, it is the civil marriage, if also entered, and not the *nikāḥ*, that is accorded formal, legal recognition (Marriage Act, 1961). The co-author of this article is both a member of the MJC-SA and a MMO. The main author of this article alerted him to the fact that such accreditation, being uniquely of limited duration, would lapse if not renewed. He informed the MJC-SA of this, and as a result of a follow-up process by the MJC-SA with the DHA, the DHA renewed the accreditation of *imāms*. In the case of the co-author, the DHA, in a letter dated 15 December 2021, renewed his accreditation as a civil marriage officer to 30 April 2025.

Since the government failed to meet the deadline set in the *Faro* case to report on the progress of the MMB and given the unsustainability of a hitherto piecemeal approach, in 2014, the WLCT decided to proceed with the judicial route originally advised by the CC in 2009. In *Women's Legal Centre Trust v President of the Republic of South Africa* (2014), the WLCT, in another unprecedented step, re-launched its application in the Western Cape High Court, seeking to oblige the government to enact legislation within a year in a renewed bid to speed up the process of recognition (*Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others*, 2014). This application, postponed several times, eventually proceeded as a class action (*Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others*). The judgment in the case was finally handed down by a full bench on 31 August 2018. The three judges included a male (Desai, J) and a female (Salie-Hlophe, J) judge who, because they are also Muslim, would be familiar with the plight of Muslim women at grassroots and community levels.

The main relief sought by the WLCT was for a declaration by the High Court stating that the President, the Cabinet, and Parliament have basically failed in their constitutional obligations to enact legislation governing Muslim marriages and regulating their consequences. The main relief, the declaratory order, was granted. The Court (at para 252) declared that

"1...[T]he State is obliged by section 7(2) [the state must respect, protect, promote and fulfill the rights in the Bill of Rights] of the Constitution to respect, protect, promote and fulfill the rights in sections 9 [equality], 10 [dignity], 15 [freedom of religion], 28 [best interests of children], 31 [freedom of religion read with section 31 to practice religion] and 34 [access to courts] of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 [diligent performance of obligations] of the Constitution, legislation to recognize marriages solemnized in accordance with the tenets of Sharia law ('Muslim marriages') as valid marriages and to regulate the consequences of such recognition. 2...the President and the Cabinet have failed to fulfill their respective constitutional obligations as stipulated in paragraph 1 above, and such conduct is invalid. 3. The President and Cabinet, together with Parliament, are directed to rectify the failure within 24 months of the date of this order...5. In the event that legislation...is not enacted within 24 months...the following order shall come into effect: 5.1 It is declared that a union, validly concluded as a marriage in terms of Sharia law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of Sharia law) be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable...".

If the State fails to meet the condition to pass legislation by 31 August 2020 (within the stipulated two-year period), the Court ordered interim relief until the legislation is enacted. The interim relief provided by the Court basically entailed that the Divorce Act 70 of 1979 would apply to such Muslim marriages upon their dissolution. Compared to their counterparts in a civil marriage, Muslim women, married according to religious rites, are afforded little protection when their marriages end in divorce. The interim relief aligns with the outcome of yet another case (*R v R*) in the Western Cape High Court, decided in 2015, where Bremridge, AJ found that "a marriage as contemplated by the Divorce Act, must be considered or interpreted to include a Muslim marriage" (at para 51). Therefore, the Court construed that the Divorce Act was not limited to civil marriages.

In granting an extended time frame, the Court in the 2018 WLCT case followed a similar pattern to the cases prior to it. Similarly, the Court (at para 188) also left it to the discretion of Parliament to decide what form the legislation should take, for example, either to amend the common law through legislative reform or by enacting legislation to recognize and regulate Muslim marriages. Para 188 of the judgment reads as follows: "The steps taken by the executive respondents by introducing the Bill or contemplating an omnibus Bill seem to be an acknowledgment that legislation is the most reasonable and effective way of protecting the rights implicated. This remedy does not dictate to the other arms what options to take. The Court is not involved in what form the legislation should take. Whether or not the relevant parties decide to vary or revive the Bill that has been in discussion for many years, introduce new legislation, vary current marriage legislation, or adopt omnibus legislation remains a choice for the executive and the legislature."

For a detailed analysis of this case and the cases that followed it, see Amien et al. (2021: 388-391). Since the interim relief granted stated that secular South African law consequences, for example, pertaining to the Divorce Act, would automatically apply to these Islamic marriages, there appear to be a number of problems with these consequences insofar as their (non) compliance with Islamic law (sharia) is concerned (Abduroaf, 2020).

Notwithstanding possible clashes between the proposed interim relief and Islamic law, which ought to govern Muslim marriages, the WLCT (2018) case was taken on appeal by the State to the Supreme Court of Appeal (SCA). While the CC is the highest court for constitutional matters, the SCA, formerly the Appellate Division (AD), is the highest court for criminal and civil cases. The WLCT cross-appealed the matter. Given a separation of powers, when the unanimous landmark judgment of the SCA was handed down in December 2020, the SCA (at paras 24-25 and 43) did not agree with the High Court's finding that the President, State, Cabinet, and Parliament were obliged in terms of the Constitution to enact such legislation, but nonetheless granted immediate (not interim) relief as part of its order (at para 51). It agreed that the Civil Marriage Act (1961) and the Divorce Act (1979) were unconstitutional because they did not recognize Muslim marriages.

The Court ordered the President, together with Parliament, to remedy the defects in the legislation within 24 months (bullet 1.7, para 51). Further, pending the coming into force of legislation to rectify the order of unconstitutionality, the Divorce Act can apply to the termination of Muslim marriages regardless of when the *nikāh* was concluded (bullet 1.8, para 51). The declarations of constitutional invalidity have been referred to the CC for confirmation.

In a nutshell, the SCA replaced the order of the Western Cape High Court and set aside its para 5. In bullets 1.1, 1.9, and 1.10 of para 51 of its order, the SCA declared as follows:

"1.1 The Marriage Act...and the Divorce Act...are declared to be inconsistent with ss 9, 10, 28, and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognize marriages solemnized in accordance with sharia law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition...1.9 It is declared that, from the date of this order, s12(2) of the Children's Act 38 of 2005 applies to Muslim marriages concluded after the date of this order. 1.10 For the purpose of applying paragraph 1.9 above, the provisions of ss 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b), and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 shall apply, mutatis mutandis, to Muslim marriages."

Judgment in the SCA case was handed down on 20 December 2020. Following its order, we see a surprising new development emanating from the DHA based on the order. The DHA is responsible for the maintenance of the National Population Register (NPR), which includes the recording of marriages and deaths. We have indicated in Part 2, and as will be detailed in Part 4, that the DHA has its own parallel process underway, which also envisages the recognition of *nikāhs*. However, it appears, quite apart from that process, that the DHA, to have Muslim marriages (*nikāhs*) registered, now envisages the registration of such religious marriages as valid customary marriages under the RCMA (1998).

This is evident from an official circular (dated 6 January 2022 and signed by the Director-General of Home Affairs) sent to the MJC-SA informing it of its directive (official instruction) to this effect. A copy of the circular containing this directive sent to the MJC-SA is on file with the authors of this article. The text in bold in the following quotation appears in bold in the circular. The DHA makes it clear in the circular

that the directive has been issued to comply with what appears to be bullets 1.1 and 1.10 of the SCA order, which are also quoted in the circular:

"Following the order, all registering officers, appointed in terms of the Recognition of Customary Marriages Act, 1998...are required to comply with the order and register Muslim marriages in accordance with the provisions of sections 3(1)(a), 3(3)(a) and 3(3)(b), 3(4)(a) and 3(4)(b), and 3(5) of the Recognition Act with the necessary modifications. Therefore, front offices are expected to register Muslim marriages in line with the processes followed in registering customary marriages".

Section 3 of the RCMA deals with the requirements for the validity of customary marriages. Such registration is envisaged only to take place at DHA offices and be affected by DHA officials. The emphasis is, therefore, on the registration as a customary marriage of a religious *nikāh* marriage solemnized by *imāms* and has nothing to do with their role as trained civil marriage officers. The RCMA does not provide for marriage officers because it originally aimed at recognizing marriages conducted under customary law. It merely provides for registering officers. The primary author's doctoral dissertation was written during the momentous period (1993-1996) when the interim Constitution was promulgated and eventually replaced by the final Constitution. In 1993, South Africa promulgated its first democratic (interim) Constitution. The interim Constitution came into effect on 27 April 1994 and governed South Africa during the transitional period leading up to and following the first democratic elections in April 1994. It remained in force until 3 February 1997, when it was replaced by the 1996 Constitution. This Constitution came into force on 4 February 1997.

In her dissertation, Moosa (1996) highlighted that MPL, although influenced by custom, is essentially religious in nature and explained why it, therefore, cannot be confused or equated with African customary or indigenous law. Further, both the interim and final Constitutions have acknowledged this distinction by making separate provisions for religious law and customary law (Mbatha & Moosa, 2007; Moosa, 1996). To elaborate on its directive, the DHA subsequently arranged for a DHA official, Mr. Yusuf Simons, and a Western Cape delegation to meet with members of the executive council of the MJC-SA and its legal desk at the MJC-SA offices in Athlone, Cape Town. Although two physical

meetings were held on the 3rd and 10<sup>th</sup> February 2022, both meetings were also conducted as hybrid meetings with DHA staff from its Head Office and MJC-SA members. Many of the members of the MJC-SA legal desk are lawyers, and the investigation of the recognition of Muslim Marriages in South Africa forms part of its mandate. The co-author of this article attended and participated in these meetings as the Head of the MJC-SA legal desk. At the first meeting, questions were posed by the MJC-SA, and the DHA attempted to answer these questions at the second meeting. The DHA stands firm in its interpretation of the SCA order that this is what it is required to do. However, the MJC-SA disagrees with this interpretation and also envisages practical problems with its implementation.

The application of s 3(1)(a) of the RCMA to Muslim marriages concluded in terms of Islamic law would be quite problematic. Section 3 deals with the requirements for the validity of customary marriages. Section 3(1)(a) provides that: '(1) For a customary marriage entered into after the commencement of this Act to be valid - (a) the prospective spouses...(ii) must both consent to be married to each other under customary law...'. The application of this section is problematic because a couple that wants to marry in terms of Islamic law would never agree to be married to each other under customary law. Had this been the case, they might as well have just concluded a customary marriage, not a marriage based on Islamic law. The purpose of a Muslim marriage would be based on the understanding that Islamic law consequences would apply to the marriage and not the consequences in terms of customary law. As it stands, the RCMA also incorporates civil law consequences. We contend that the rationale for wanting to include Muslim marriages within the ambit of the RCMA may have little to do with the SCA judgment and more to do with the fact that, in comparison to Muslim marriages, much more progress has been made with the RCMA.

While the SCA (2020) decision is the most current one, it is interesting to note that the WLCT, in the High Court (2018) case (at para 36), had claimed interim relief pending the enactment of legislation recognizing and regulating Muslim marriages by enabling a reading-in to the RCMA (1998) to afford such recognition and regulation of Muslim marriages:

"Pending the promulgation of legislation, to remedy these inconsistencies, in the interim, WLC seeks a reading-in to be done in the Recognition Act [RCMA] to provide for the recognition and regulation of Muslim marriages."

We further contend that while the SCA ordered that pending such legislation (recognizing Muslim marriages and regulating its consequences), a Muslim marriage may be dissolved in accordance with the Divorce Act, this does not imply that the SCA has, in fact, thereby accorded Muslim marriages formal recognition as the author of an article analyzing the implications of this case for Muslim women and children as far as divorce is concerned, may believe it does: "[t]his matter has given Muslim marriages recognition" (Moolla, 2021).

In his article, the author also highlights that "[a]t the SCA hearing, Saldulker J questioned the counsel for the State as to what the pragmatic solution was for women and children whose constitutional rights were being infringed daily. She highlighted those Muslim women could not wait another 20 years" (Moolla, 2021).

In the judgment, the SCA (at para 50) stated:

"The importance of recognizing Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children are a vulnerable group in a pluralistic society such as ours. The non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children, including their right to dignity, to be free from unfair discrimination, their right to equality, and access to a court. Appropriate recognition and regulation of Muslim marriages will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatization and marginalization experienced by parties to Muslim marriages, including the most vulnerable, women and children."

Saldulker, JA, one of the two judges who penned the judgment, happens to be a Muslim woman herself and would therefore be familiar with their plight at community and grassroots levels.

The SCA's order of invalidity was referred to the CC for confirmation. The matter was heard on 5 August 2021, but judgment has been reserved. At the time of submission of this article for publication, the judgment had still not yet been handed down. The process, therefore, remains in abeyance. Depending on the outcome of the CC judgment, there are a few possible scenarios as to how

such future recognition is intended to take place. Parliament could, for example, either enact the 2010 MMB since it already exists and both comprehensively recognizes and regulates Muslim marriages and divorces or, as intimated in the 2018 WLCT case, it could enact different legislation which affords recognition to all religious marriages but without necessarily also regulating the consequences flowing therefrom. These options and their possible implications are fully discussed in the next Part.

As will be further detailed in Part 4, the Court in the *Faro* case, although it specifically referred to recognition in the context of the 2010 MMB, also extended the ambit to include "...*any similar legislation*." It is reported in the 2018 WLCT case (at paras 24 and 26) that the two arms of government, the DOJ & CD and the DHA, were, in fact, at the time already in the process of investigating a "Possible Omnibus Bill":

"The Minister of Justice submits that the two Departments [Home Affairs and Justice] are to take the process forward by looking at the amendments to the existing legislative framework to give effect to the above approach or even exploring the possibility of drafting an entirely new Bill which regulates the registration of all religious marriages and the dissolution thereof. The Departments believe this approach should be more acceptable to the Muslim community... Now it appears that there are investigations by the Law Reform Commission that are being undertaken to develop a paper on one Marriage Act for all religions."

Judge Rogers, in the 2013 *Faro* case (at para 44), warned that "[t]here may come a time when owing to continued lethargy or paralysis on the part of the executive promoters of legislation in this field, a court will need to intervene." This does not mean that the judiciary intends to usurp the role of Parliament by compelling the legislature to introduce specific legislation. The government has, for example, amended existing laws to ensure that sexual minorities, like homosexuals, are protected from unfair discrimination. In most of these instances, the judiciary, including the CC, prompted these changes. These changes include the recognition of same-sex marriages or partnerships with the passing of the CUA in 2006. The CUA came into being as a direct result of a landmark decision (*Minister of Home Affairs and Another v Fourie and Another*) of the CC (President of the RSA and Another v Women's Legal Centre Trust and Others; Minister

of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA); 2021 (2) SA 381, 2020). The Court, in this case, ruled unanimously that same-sex couples have a constitutional right to marry. The judgment gave Parliament one year to pass legislation to this effect, and as a result, the CUA came into effect on 30 November 2006. As indicated in Part 2, a possible argument that can still be raised against a similar recognition of Muslim marriages is the understanding that the while s15(3) of the Constitution makes provision for the recognition of all religious marriages, it does so without constitutionalizing the right to have such marriages recognized. On the other hand, it could, for example, also be argued that just like the right to same-sex sexual orientation is guaranteed in s9(3) (equality clause) of the Constitution, discrimination on the basis of religion and marital status, which like sexual orientation are equally immutable s9(3) considerations, may also be deemed to be unfair and therefore unlawful.

The State opposed the WLCT's 2018 application (in which the MJC-SA is cited as an *amicus*) to order the government to enact legislation recognizing Muslim marriages. Ulama bodies like the MJC-SA, a founding member of the mainstream ulama body, the United Ulema Council of South Africa (UUCSA), whose members may hold opposing or different views in this regard, continue to date to remain supportive that such recognition occurs through the 2010 MMB. This has been confirmed by the co-author of this article, who oversees the legal desk of the MJC-SA dealing with such recognition. However, from the State's perspective, given the hitherto lack of consensus among Muslims regarding the recognition of Muslim marriages in terms of the MMB, this may no longer be or seem like a viable option to consider. Further, it may consider its proposed initiatives referred to under the heading "Possible Omnibus Bill" in the 2018 WLCT case to be a less controversial and more viable alternative to recognition for all religious marriages.

The State is required to request the input of the public, which would include the Muslim community. While some members may welcome the recognition in the form of a rationalized Act, others may not. We contend that a lack of participation or lack of constructive

input on the part of the community in these parallel processes may not necessarily stymie the State's progress and determination to succeed this time around. As it is, the State has wasted enough time and resources in countering litigation, paying costs, and scrambling to meet judicial deadlines set to report on its progress regarding the recognition.

In the next Part, we more fully explore the government reform and policy initiatives referred to in this Part and in Part 2, which are currently still underway and whether these will be to the satisfaction of the Muslim community, and if so, whether this may also mean the sounding of the death knell of the 2010 MMB.

### **The Law Reform, Policy Initiatives, and Processes**

Currently, two parallel law reform processes are underway contemplating amendments to South Africa's marriage laws. The one process is being administered by the SALRC and has, to date, produced an Issue Paper and a Discussion Paper. The other parallel process is administered by the DHA, which has produced a draft marriage policy or Green Paper.

As evident from both these SALRC papers (to be detailed in Part 4 (i)), the Issue Paper was the first document published by the SALRC during its investigation and was the first step in the consultation process with all stakeholders, including the community at large. As such, it does not contain proposals for law reform. The Discussion Paper, the second paper published by the SALRC, is based on feedback received on the Issue Paper and includes draft legislation. However, these are merely preliminary and not final proposals that aim to elicit further public responses to the solutions (draft legislation) proposed by the SALRC and serve as the basis for further deliberations by the SALRC. These responses will be collated and evaluated to prepare the report setting out the SALRC's final recommendations (inclusive of draft legislation) to be submitted to the Minister of Justice and Correctional Services for his submission, in turn, to the Minister of Home Affairs.

The SALRC has produced an SMS, a draft version of what proposes an entirely new Act. In doing so, it appears to have put the cart before the horse because there is a definitive legislative process to be followed

before a Bill is tabled in Parliament and becomes law (see the summary of legislative process). According to the stages involved in this process, Bills are usually preceded by Green Papers (which express possible solutions that have not yet been adopted by the government) and White Papers (which express a policy position of the government that has been approved by the Cabinet) and not the other way around as happened in this case. The process would ordinarily start with the drafting of a discussion document called a Green Paper, as was done in this case by the Ministry or Department of Home Affairs, to give an indication of its thinking on a particular policy. This Green Paper was published for public comment. Sometimes a Green Paper is followed by the drafting, along similar lines, of a more refined discussion document called a White Paper which, as indicated, is a broad statement of government policy. The DHA is still in the process of producing a White Paper (see Know your Green Paper on Marriages).

Although the rationale for the duplication of processes remains unclear, as well as what these processes would entail for Muslim marriages, the aim of both processes appears to want to achieve the same end goal, namely, the drafting of "overarching" legislation to afford recognition and protection to all forms of marriages (including Muslim marriages) and relationships. Although the implications, if any, for the MMB (2010) as an already existing version of proposed legislation to govern aspects of MPL in the South African context is therefore also uncertain (Amien, 2020; Amien & Moosa, 2021; Osman, 2021), we proffer some predictions in this regard below.

### **The Cart Before the Horse: SALRC Issue, Discussion Papers, and DHA Green Paper**

The information in this Part has been extracted from the Issue Paper (p iii, pp 1 and 5) and the Discussion Paper (p iii, pp 1, 5, 6, 140, and 158), which are available on the websites detailed in the reference section at the end of the article. The updated information on the Discussion Paper was gleaned from personal communication between the main author of this article and the Project Leader responsible for this investigation, Wesahl Domingo, on 17 and 22 April 2022. In 2013, following an invitation from the then Minister of Justice and Constitutional Development to suggest areas to be included in

the SALRC's research program, the then Minister of Home Affairs suggested the inclusion of an investigation of the development of an SMS for South Africa. The inclusion of this investigation was approved in November 2017.

An Advisory Committee of the SALRC was appointed for this investigation. Members included several academics and Justice Mahomed Navsa of the SCA (also the Project Leader of the 2003 MMB). Wesahl Domingo, a member of the SALRC, was appointed the Project Leader. Both Navsa and Domingo are practicing Muslims.

On 16 March 2019, the first document of this investigation, Issue Paper 35 (Project 144 Single Marriage Statute Issue Paper 35), was approved by the SALRC for publication. It was published for comment on 8 April 2019. An initial closing date (31 July 2019) was extended to 31 August 2019. Briefly, the Issue Paper had the following two options available for the proposed legislation: (i) a single (unified) marriage statute with a unified set of requirements applying to all marriages (SMS) or (ii) a single statute containing different chapters which reflect the requirements and consequences of both currently recognized marriages and marriages proposed for recognition. This option could be deemed an omnibus (umbrella) marriage statute.

While the aim of both an SMS and omnibus legislation is to accord recognition to all existing recognized marriage laws and those not hitherto recognized, they propose to do so by following different routes. The specific aim of the SMS is to adopt a "one-size-fits-all approach" and rationalize and govern all these marriages in one piece of legislation through a uniform set of requirements but without regulating its legal consequences. As is currently the case with existing marriages, these consequences will have to be determined by other legislation. However, this would mean that instead of merely accommodating Muslim women and children under laws like the Matrimonial Property Act 88 of 1984; Divorce Act 70 of 1979; Children's Act 38 of 2005; Maintenance of Surviving Spouses Act 27 of 1990; and Maintenance Act 99 of 1998, these laws will have to be formally amended to cater for Muslim marriages. This will also be the case with the investigations into the review of several of these laws that are currently in progress. For example, the SALRC Advisory Committee Project 100E on the Review of Aspects of Matrimonial Property Law. An Issue Paper has

been published, inviting comments for the drafting of a Discussion Paper, including how the matrimonial property regimes of religious marriages should be regulated.

On the other hand, Omnibus legislation aims to provide for the recognition of the different kinds of marriages through the incorporation in a proposed Bill of several separate chapters for each marriage. For example, the 2010 MMB could be incorporated into the omnibus legislation as a chapter on its own. This would have solved the issue of regulation of consequences being dealt with in terms of Islamic law. The same could apply to each of the existing marriage laws, which may also require some amendment because of the loopholes mentioned in Part 2.

Based on responses received, the Issue Paper was followed by the publication of a second document, the Discussion Paper (2022). It was published in January 2021 and amended on 13 May 2021. The initial closing date for comment (31 March 2021) was extended to 17 May 2021.

As was the case with the Issue Paper, the Discussion Paper contains a background explanation of the current position in South Africa. Specific mention is made to the WLCT SCA judgment (at the time, there was no CC hearing as that only took place in August 2021). The Discussion Paper includes the SALRC's provisional proposals for draft legislation. As an integrated paper, it contains two proposals but no longer contains the option or possibility of an omnibus approach which would have made allowance for the incorporation of the 2010 MMB.

Instead, it contains the following two proposed legislative options: The first option is proposed in the Protected Relationships Bill (Annexure B1: 135-152 of the Discussion Paper), and the second option is proposed in the Recognition and Registration of Marriages and Life Partnerships Bill (Annexure B2: 153-171 of the Discussion Paper).

These proposed Bills only consider the SMS approach, which basically means that one set of principles will govern all marriages and will only deal with recognition and registration and not regulation (consequences). While this is unfortunate, it does refer to several existing South African Acts or statutes that would automatically govern the consequences of all marriages recognized in terms of this proposed SMS.

For the purposes of Muslim marriages, this is problematic because those Acts are based on secular and not Islamic Law.

Although two Bills are proposed as alternative options, except for minor differences (whether a marriage should be labeled as a "protected relationship" or a "life partnership"), their substantive contents are basically identical and are literally cut (and pasted) from the same cloth. Although this poses a problem for the Muslim community, both versions of the Bill refer to a contract that would be taken into consideration in the event where there is, for example, a dissolution of marriage which could also govern the marriage of the parties instead of existing legislation. As indicated, the proposed Bills adopt a minimalist approach and deal only with recognition and registration, not consequences usually regulated by civil law. However, both Bills appear to leave the regulation of the consequences to the discretion of the parties in these relationships. For example, s 8(3) in both Bills in the Discussion Paper refers to a contract in terms of which two parties can contract themselves into the consequences of the marriage. It states that "[a] registering officer must, if satisfied that a marriage or life partnership has been entered into, register the relationship by recording – ... (g) the particulars of a partnership agreement...". There would therefore be nothing preventing Muslims from entering a contract to regulate the consequences of their marriage, which will be taken into consideration upon its dissolution. Similar to the current civil marriage status in the Marriages Act (1961), where a Muslim couple enters into an antenuptial contract and sets out the conditions in it, the consequences are not governed by legislation but by contract (Marriage Act, 1961). However, in this way, the door is also left open for ulama to be still able to influence the regulation of such contracts, which may, as explained in Part 2, be to the detriment of women.

As of April 2022, the Bill has not been finalized. After the closing date for comments (May 2021), online workshops were held. The Project Committee is now at the stage of finalizing the Bill and taking into consideration the comments from the public. The final draft of the Bill is expected to be sent to the rest of the Commissioners in June 2022. The next step would be for a report (with draft legislation) setting out the SALRC's final recommendations to be submitted to the Minister of Justice and Correctional Services, Mr. R Lamola, for submission to the

Minister of Home Affairs, Mr. A Motsoaledi. Upon inquiry, Professor Domingo indicated that the final report that will be submitted to the Minister will have one Bill. Since they were (as of April 2022) still collating all the information from their stakeholder engagements, the Project Committee has not decided which of the two Bills they prefer or will put forward.

Although it will not really matter which of the two Bills is eventually favored by the Project Committee because they are so similar, it appears that the DHA, although it includes the option, does not favor an SMS approach and, therefore, by implication, either of the two Bills. In its Green Paper detailed below, the DHA makes it clear that an SMS would be found to be unconstitutional if challenged because it does not take into consideration the nuances of the cultural and religious communities. We contend that this problem could have been avoided if the SMS had been published by the SALRC at the same time as, and not before, the publication of the Policy Paper (the Green Paper), as should have been the case.

Although the DHA Green Paper on Marriages was published later than the Discussion Paper published by the SALRC Project Committee, it was within the same time that feedback or comment was required from the South African community for both papers (South Africa, 2022).

The DHA published a Green Paper on Marriages in South Africa for public comment on its proposed changes in May 2021. The Green Paper was published on 4 May 2021 and the DHA, with the marriage legal framework as a key policy focus area, considered three options. These are summarized and quoted verbatim as follows:

In order to enable regulation of all marriages in accordance with sections 9, 10, 15, and 31 of the Constitution, the following legislative options are recommended:

Option 1: Single Marriage Act. A single Marriage Act has a unified set of requirements and consequences applying to all marriages. This option may not be suitable for the country's mixed legal system and might not pass the Constitutional muster.

Option 2: Omnibus or Umbrella Marriage Act. The omnibus legislation is a single act that will contain different chapters for a diverse set of legal requirements for civil marriages, civil unions, customary marriages, and other marriages that are not regulated by the current legislation.

Option 3: Parallel Marriages Acts. The retention of the status quo is also an option that requires consideration. This option will require the enactment of more marriage legislation that must cater to the marriages that are excluded by the current marriage legislation.

The new legal framework will enable regulation of all marriages in accordance with sections 9, 10, 15, and 31 of the Constitution (South Africa, 2022).

In 2021/2022 annual performance plan, the DHA sums up the rationale of its process as follows: "The legislation that regulates marriages in South Africa was developed without an overarching policy that is based on constitutional values (e.g., equality, non-discrimination, and human dignity) and the understanding of modern societal dynamics. Instead of creating a harmonized system of marriage in South Africa, the State [has adopted a piecemeal approach and] has sought to give recognition to different marriage rituals through passing a range [three to be precise, the Marriage Act, the RCMA, and the CUA] of different marriage laws. Despite all the changes that have been made in the marriage legislation post-1994, serious gaps remain in the current legislation. ["For instance, the current legislation does not regulate some religious marriages such as the Hindu, Muslim and other customary marriages that are practiced in some African or royal families" (Department of Home Affairs, 2020)] The [envisaged] new marriage act [in the form of single or omnibus legislation] will enable South Africans of different sexual orientation, religious and cultural persuasions to conclude legal marriages that will accord with the doctrine of equality, non-discrimination and human dignity as encapsulated in the Constitution of the RSA" (Department of Home Affairs, 2021a). This was also reported in "South Africa is changing its marriage laws from next year".

In the normal course of events, the Issue Paper and Discussion Paper would stem from the Green Paper, and the Project Committee would draft Bills based on a policy. What happened here was "a cart before the horse approach". There was already an Issue Paper with the two possibilities; there was a Discussion Paper with two Draft Bills which totally left out the omnibus possibility or even the possibility of having single pieces of legislation for all South African religious and cultural communities. As indicated, the Green Paper basically makes allowances

for all these three options (in the form of the SMS, an omnibus approach where the MMB can become one of the chapters in the Act, and separate legislation) (Department of Home Affairs, 2021b).

Suppose Muslim and other religious marriages are to be recognized in terms of the proposed legislation. In that case, it remains to be seen whether the provision will be made for religious authorities to act as designated marriage officers and how this will be done.

As shown, when the DHA refers to the SMS, it indicates that it is most likely unconstitutional. This is quite interesting and begs the question of why the Discussion Paper would go ahead and propose an SMS and request comments concerning it when the DHA's Green Paper clearly indicates that it will most likely not pass constitutional muster.

Another point that is quite interesting concerns the matrimonial property regime position in terms of the Green Paper and the Discussion Paper.

Para 4.10 (pages 59 and 60) of the Green Paper states that '[c]ivil marriages of black persons that were entered into before 1988 will be brought on par with other marriages. However, going forward, no marriage regimes should be regarded as a default position. All couples must be provided with an opportunity to elect a particular marriage regime knowingly.'

The DHA, in para 9 of its document summarizing the Green Paper, reiterates the current status quo pertaining to marital regimes as follows:

- '9.1 There are three marriage regimes applicable in South Africa in terms of the Matrimonial Property Act 88 of 1984 [MPA]. That is marriage in community of property, marriage out of community of property with accrual, and marriage out of community of property without accrual.
- 9.2 Marriage in community of property is the default marriage regime in South Africa. If the intending spouses marry without an antenuptial contract, their marriage will be automatically in community of property.
- 9.3 Some religious marriages are automatically out of community of property (South Africa, 2022).

The DHA further reiterates that their policy proposal is '[n]o marriage regime should be regarded as a default position. During pre-marital counseling, the marriage officer must ensure that the intending spouses understand the legal implications of a chosen marriage regime' (South Africa, 2022).

In so doing, it makes allowances for those Muslims wishing to strictly abide with an understanding of the sharia that the assets of spouses must be kept separately, to utilize and regulate their marital regime as out of community of property without the accrual system.

While the consequences of a customary law marriage are the same as the civil law, the recent unanimous judgment of the CC in *Sithole vs Sithole* handed down on 14 April 2021 declared that all marriages of black persons under s 22(6) of the colonial era Black Administration Act 38 of 1927 are in a community of property. This is irrespective of whether they occurred before the commencement of the MPA (1984), the Marriage Act (1961), the CUA (2006), and the RCMA (1998). Since the Court also ruled that the effect of the judgment is retroactive, this means that all existing customary law marriages are now regarded as in community of property, as is currently the case with all marriages under the Marriage Act (1961) and the CUA (2006). However, Parliament is yet to reflect the *Sithole* judgment in legislation. The public consultation version of the Green Paper is dated 20 April 2021. Although it refers to the outcome of the *Sithole* decision in the court *a quo* (KZN High Court, p59, note 64), it does not refer to the CC case.

Point 8 of the Schedule to both Bills found in the Discussion Paper (pages 148 and 166) states that '[t]he insertion after the definition of "listed securities" of the following definition: "[s]pouse" for the purposes of this Act [MPA] must be construed to mean in relation to any person, the partner of such person in a relationship in terms of the Protected Relationships Act, ... (Act No. ... of ...)...' [at page 148] and '[t]he insertion after the definition of "listed securities" of the following definition: "[s]pouse" for the purposes of this Act [MPA] must be construed to mean in relation to any person, the partner of such person in a relationship in terms of the Recognition and Registration of Marriages and Life Partnerships Act, ... (Act No. ... of ...);...' [at page 166].

It is noted that the default position in terms of the MPA is in community of property.

The DHA has set the following timeframes as a "roadmap" to meet its planned performance target of implementing the marriage policy. It appears that only the first step can be ticked off at this stage:

"Gazetting the draft marriage policy [Green Paper] for public comments by 30 April 2021[;] Submitting the marriage policy [White Paper] to Cabinet for approval by 31 March 2022[;] Submitting the Marriage Bill [new marriage legislation] to Cabinet for approval by 31 March 2023 [; and] Submitting the Marriage Bill to Parliament for approval by 31 March 2024" (South Africa, 2022).

Being cognizant that the promulgation of law is only anticipated after 2024, the WLC hosted a webinar (From Litigation to Law Reform) on 21 October 2021, which the co-authors of this article attended. The online round-table discussion focused on the need for South Africa to recognize Muslim marriages through legislation and the remedies that must be put in place in the interim period for Muslim women whose marriages are terminated by death or divorce to ensure them the protection of the law. Therefore, the discussion also considered the need to implement interim relief that the CC might provide.

## **Conclusion**

This article has highlighted that a gap in our statutory law still exists insofar as the recognition of Muslim marriages is concerned. The aim of the visionary 2010 MMB was to formally recognize Muslim marriages in South Africa for the first time. It is unfortunate that we have not had the chance to see its application in practice because it has not yet been approved and promulgated.

We contend that the MMB may have been of little value to the women at the time (and the generations prior to them) who showed little interest in it (they did not, for example, think of divorce as a concern). However, for the subsequent generation with its higher divorce rate, the recognition of Muslim marriages becomes imperative, especially since Muslim women have little bargaining power in a divorce. The fact that the then SALRC Project Committee managed to reach a Bill stage with the MMB for the first time should therefore not be discounted. The then Project Committee did not misread the situation - there was a need for this type of recognition - it was just ahead of its time.

The current parallel initiatives to rationalize the recognition of all types of marriages in South Africa for the first time, although duplicitous, are therefore long overdue and should be welcomed. However, "the devil will be in the detail" (Amien, 2020) since "...law reform cannot be

implemented - or evaluated - in silos" (Osman, 2021: 3). It appears that the outcome will result in religious marriages being regulated by a secular State after 2024 when some resolution of the question of recognition of Muslim marriages can be expected. This may yet mean that the 2010 MMB, which was not a "quick fix" solution, but a considered attempt over several years to address the substantive inequality experienced by especially Muslim women, could have a role to play and, therefore, possibly be enacted. The awaited outcome of the CC judgment may provide interim relief or even lead to different results.

## References

- Abduroaf, M. (2020). *Analysis of the Women's Legal Centre Trust Case*. <https://www.derebus.org.za/analysis-of-the-womens-legal-centre-trust-case> .
- Amien, W. (2020). *South Africa's Failure to Legislate on Religious Marriages Leaves Women Vulnerable*. <https://theconversation.com/south-africa-failure-to-legislate-on-religious-marriages-leaves-women-vulnerable-140371> .
- Amien, W., & Moosa, N. (2021). Chapter 14: "Muslim Personal Law" in Rautenbach. In C. Rautenbach (Ed.), *Introduction to Legal Pluralism in South Africa 6th edition* (pp. 373–412). LexisNexis.
- Civil Union Act, Pub. L. No. 17 (2016).
- Constitution of the Republic of South Africa, (1996).
- da Costa, Y. (1994). Muslims in Greater Cape Town: A Problem of Identity. *The British Journal of Sociology*, 45(2). <https://doi.org/10.2307/591494>
- Department of Home Affairs. (2020). *Strategic Plan 2020/25*. [http://www.dha.gov.za/images/files2/dha\\_strategic\\_plan2020\\_25\\_web.pdf](http://www.dha.gov.za/images/files2/dha_strategic_plan2020_25_web.pdf).
- Department of Home Affairs. (2021a). *Annual Performance Plan 2021/22*. [http://www.dha.gov.za/images/annualreports/dha\\_app\\_2021\\_web\\_small.pdf](http://www.dha.gov.za/images/annualreports/dha_app_2021_web_small.pdf).
- Department of Home Affairs. (2021b). *Green Paper on Marriages in South Africa: Public Consultation Version of 20 April 2021*. [https://www.gov.za/sites/default/files/gcis\\_document/202105/44529gon398.pdf](https://www.gov.za/sites/default/files/gcis_document/202105/44529gon398.pdf) .
- Discussion Paper. (2022). *Project 144 Single Marriage Statute Discussion Paper 152*. <https://www.justice.gov.za/salrc/dpapers/dp152-prj144-singlemarriagestatute-may2021.pdf>.
- Draft Muslim Marriages Bill. (2011). *General Notice 37, Government Gazette 33946 of 21 January 2011, 3-29*. <https://static.pmg.org.za/bills/110117/muslim-marriages-bill.pdf>.
- Mahida, E. M. (1993). *History of Muslims in South Africa: A Chronology*. Arabic Study Circle.
- Marriage Act, Pub. L. No. 25 (1961).

- Mbatha, L., & Moosa, N. (2007). Culture and Religion. In E. Bonthuys & C. Albertyn (Eds.), *Gender, law and justice* (pp. 158–194). Juta.
- Moolla, M. (2021). *Has Muslim Personal Law Been Given Recognition In The Light Of The Recent Appeal Court Judgment?* <https://www.Derebus.Org.Za/Has-Muslim-Personal-Law-Been-given-Recognition-in-the-Light-of-the-Recent-Appeal-Court-Judgment/> .
- Moosa, N. (1996). *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 (MPL)*. University of the Western Cape.
- Moosa, N. (2021). *The Mystery of the Apostasy of Shaykh Yusuf of Makassar's Alleged Grandchildren: The Children of the Rajah of Tambora*.
- Moosa, N., & Abduroaaf, M. (2017). *South Africa Implications of The Official Designation Of Muslim Clergy As Authorised Civil Marriage Officers For Muslim Polygynous, Interfaith And Same-Sex Marriages In South Africa*. [www.mjc.org.za/index.php?option=comContent&view=article&id=104&Itemid=21](http://www.mjc.org.za/index.php?option=comContent&view=article&id=104&Itemid=21)
- Moosa, N., & America, Z. (2022). *Constitutional Implications of Homosexual Sexual Orientation, Homosexuality and Same-Sex Civil Marriages and Nikāhs for Succession and the Inheritance Rights and Testamentary Freedom of Homosexual Muslims in South Africa*. The International Survey of Family Law (ISFL).
- Moosa, N., & Dangor, S. (2019). An introduction to Muslim Personal Law: Past to Present. In *Muslim Personal Law in South Africa: Evolution and Future Status*.
- Moosa, Najma. (2011). *Unveiling the Mind : the Legal Position of Women in Islam : a South African Context*. Juta.
- Oliver, E., & Oliver, W. H. (2017). The Colonisation of South Africa: A Unique Case. *HTS Teologiese Studies / Theological Studies*, 73(3). <https://doi.org/10.4102/hts.v73i3.4498>
- Osman, F. (2021). Comment on the Single Marriage Statute: Implications for Customary Marriages, Polygynous Marriages and Life Partnerships. *Potchefstroom Electronic Law Journal*, 24. <https://doi.org/10.17159/1727-3781/2021/v24i0a10471>
- President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA); 2021 (2) SA 381, (2020).
- Recognition of Customary Marriages Act, Pub. L. No. 120 (1998).
- Samaai, S. (n.d.). *Women's Legal Centre*. <https://wlce.Co.Za/about-Us/>.
- South Africa. (2022). *Know your Green Paper on Marriages in South Africa*. [Http://www.Dha.Gov.Za/Index.Php/Notices/1449-Know-Your-Green-Paper-on-Marriages-in-South-Africa](http://www.Dha.Gov.Za/Index.Php/Notices/1449-Know-Your-Green-Paper-on-Marriages-in-South-Africa).

Statistics South Africa. (2019). *Marriages and Divorces 2017*. [Http://Www.Statssa.Gov.Za/Publications/P0307/P03072017.Pdf](http://www.statssa.gov.za/publications/P0307/P03072017.pdf) .

Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others, Pub. L. No. 22481 (2014).

---

**Najma Moosa<sup>1</sup> and Muncer Abduroaf<sup>2</sup>**

<sup>1</sup>The Department of Private Law, University of the Western Cape (UWC), South Africa.

<sup>2</sup>The Department of Criminal Justice and Procedure (UWC), South Africa.

E-mail: <sup>1</sup>nmoosa@uwc.ac.za, <sup>2</sup>mabduroaf@uwc.ac.za