

*Reflections on the recognition of African
customary marriages in South Africa:
seeking insights for the recognition of
Muslim marriages*

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In 1998, South Africa enacted the Recognition of Customary Marriages Act 120 of 1998 (RCMA), which for the first time in the history of the country afforded legal recognition to African customary marriages. The enactment of this legislation was effected in accordance with section 15(3)(a) of the Constitution of South Africa 1996. Through the same constitutional provision, the South African government proposes to enact legislation to afford legal recognition to Muslim marriages. The draft legislation recommending the recognition and regulation of Muslim marriages is known as the Muslim Marriages Bill (MMB). The MMB has generated a fair amount of controversy within the South African Muslim community and broader civil society.

In this paper, I undertake a comparative analysis of the RCMA and MMB with the specific aim of deriving lessons from the recognition of African customary marriages for the recognition of Muslim marriages. A reflection on the manner in which African customary marriages have been recognised and regulated reveals that the approach considered for the recognition and regulation of Muslim marriages must be impact-focused and context-driven. In particular, to advance constitutional rights and norms, I show that attention must be paid to the position of marginalised and vulnerable groups within the Muslim community, including women and children. At the same time, I demonstrate that in drafting legislation to recognise Muslim marriages, many competing interests are at play. As such, it may be necessary to entertain reasonable compromises to ensure that the legislation is enacted and that it contains the potential to safeguard the rights of the more marginalised members of the Muslim community.

I INTRODUCTION

For the past several years, my research has focused primarily on the human rights implications of Muslim marriages operating at the non-state level in South Africa. It has also considered the manner in which Muslim marriages should be afforded official or legal recognition within the state

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sphere and the human rights implications that may arise from such recognition.¹

Thus far, my discussions relating to the legal recognition of Muslim marriages have not taken cognisance of the research undertaken in respect of African customary marriages. In South Africa, the latter have enjoyed legal recognition for the past 13 years. It is my belief that a reflection on the manner in which African customary marriages have been afforded legal recognition in South Africa and the gendered implications of that recognition can potentially generate significant lessons for the legal recognition of Muslim marriages (and perhaps other religious marriages that also do not currently enjoy legal recognition, such as Hindu and Jewish marriages).

In this paper, I therefore reflect on the South African experience in recognising African customary marriages for the purpose of deriving insights for the legal recognition of Muslim marriages. Due to space constraints, I do not discuss case law relating to African customary marriages or Muslim marriages. I also do not consider the implications of establishing traditional courts and *Shari'a* (Islamic law) courts. Instead, I concentrate on the implications of enacting the Recognition of Customary Marriages Act 120 of 1998 (RCMA) and the proposed enactment of the Muslim Marriages Bill (MMB).² The paper presents a comparative analysis of the RCMA and MMB, but specifically for the purpose of ascertaining what lessons, if any, can be derived from the enactment of the one (RCMA) for the other (MMB).

The paper comprises six parts. It commences in Part 2 with an outline of the historical context for the enactment of the RCMA and the proposed enactment of the MMB. This is followed in Part 3 with a discussion of the regulation of African customary marriages. Thereafter, Part 4 deals with the proposed regulation of Muslim marriages followed by Part 5, which extracts the lessons derived from the comparative study. Finally, concluding remarks are captured in Part 6.

II HISTORICAL CONTEXT

Under colonial and apartheid rule in South Africa, the customary family laws of indigenous African communities, which comprise the over-

¹ W Amien 'Overcoming the conflict between the right to religious freedom and women's rights to equality – a South African case study of Muslim marriages' (2006) 28 *Human Rights Quarterly* 729–754; W Amien 'A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context' (2010) 24(3) *International Journal of Law, Policy and the Family* 361–396.

² Available at http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf, accessed 23 May 2013.

whelming majority of the total population of South Africa,³ and religious family laws of minority religious communities including the Muslim community,⁴ were marginalised. While African customary marriages received partial recognition,⁵ Muslim marriages did not receive any recognition.⁶ In fact, since the seventeenth century when Muslims were first brought to South Africa from various parts of South Asia, South-East Asia and Africa as slaves, political prisoners, convicts, indentured labourers and traders,⁷ they were prohibited from practising or propagating Islam in public – a crime that was punishable by death.⁸ They therefore practised their religion in private and regulated their religious family laws within the private sphere as well. Given their origins, most South African Muslims were classified either ‘Indian’ or ‘Coloured’ under the apartheid dispensation and were therefore also subject to racial discrimination.⁹ Most South African Muslims are today still located within those historically disadvantaged communities.

Muslim marriages have not yet been afforded legal recognition, thus South African Muslims continue to conclude *nikahs* (Muslim marriage ceremonies) within the non-state domain and to regulate Muslim family law themselves. Since the majority of South African Muslims follow the *Sunni* tradition, regulation of Muslim family law within most South African Muslim communities is informed by *Sunni* laws.¹⁰

The refusal to fully recognise African customary marriages and Muslim marriages stemmed from a colonial and Nationalist Party¹¹ perspective

³ According to Census 2011 results, indigenous Africans comprised 79.4 per cent of South Africa’s total population of 51 490 025; see <http://www.info.gov.za/aboutsa/people.htm>, accessed 28 May 2013.

⁴ According to Census 2001, Muslims comprised about 1.5 per cent of South Africa’s total population of 44 819 778; see <http://www.info.gov.za/aboutsa/people.htm>, accessed 28 May 2013.

⁵ Prior to 2000, customary marriages were recognised only in certain parts of KwaZulu-Natal (through the KwaZulu Act on the Code of Zulu Law 16 of 1985) and the former Transkei (through the Transkei Marriage Act 21 of 1978). Women’s Legal Centre *Recognition of Customary Marriages* (2011) at 5; M Mamashela ‘New families, new property, new laws: the practical effects of the Recognition of Customary Marriages Act’ (2004) 20 *SAJHR* 616–641 at 617.

⁶ *Bronn v Frits Bronn’s Executors and Others* 1860 3 Searle 313; *Seedat’s Executors v The Master (Natal)* 1917 AD 302; *Estate Mehta v Acting Master, High Court* 1958 (4) SA 252 (FC); *Kader v Kader* 1972 (3) SA 203 (R, AD); *Ismail v Ismail* 1983 (1) SA 1006 (AD).

⁷ E Moosa ‘The dilemma of Islamic rights schemes’ (2000–2001) 15 *Journal of Law and Religion* 185–215 at 211.

⁸ GJ van Niekerk ‘Legal pluralism’ in JC Bekker, C Rautenbach and NMI Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 8–9.

⁹ F Cachalia ‘Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry’ (1993) 56 *THRHR* 392–413 at 397.

¹⁰ Amien *HRQ* (n 1) at 731.

¹¹ The Nationalist Party assumed power in South Africa in 1948 when it introduced apartheid and ruled the country until 1993; see <http://www.sahistory.org.za/np-ascendancy-and-apartheid-1939-1950s> and <http://www.sahistory.org.za/ regime-unravels-1985-1991>, accessed 15 June 2013.

that the western Christian understanding of marriage should inform the requirements for a valid marriage, which included monogamy.¹² This resulted in a legal approach that regarded potentially polygynous marriages, such as African customary marriages and Muslim marriages as contrary to public policy.¹³ African customary marriages were further considered contrary to public policy because they included the practice of *lobolo* (bridewealth),¹⁴ which was also not inherent to Christian marriages.¹⁵ Thus, as Felicity Kaganas and Christina Murray observed, '[pre-1994] South African family law . . . privilege[d] one type of family and reluctantly [gave] second class status (or no status at all) to others.'¹⁶

Nevertheless, Muslims were (and still are) able to enter into civil marriages in accordance with the Marriage Act 25 of 1961.¹⁷ Only in this way are they able to access the legal consequences of civil marriages, including community of property, which enables both spouses to benefit equally from the joint marital estate.¹⁸ However, very few Muslims actually exercise this option due to religious and cultural reasons. First, many members of the *ulamâ* (Muslim clergy) discourage members of their congregation from entering into civil marriages by claiming that those marriages are unIslamic and therefore *harâm* (Islamically impermissible). The reasons for this claim are that a civil marriage would preclude Muslims from entering into polygynous marriages and would involve a default in community of property matrimonial property regime. The latter involves a joint matrimonial estate in which each spouse has a 50 per cent share. This is in contrast to the default regime under a traditional understanding of Islamic law, which requires the estates of spouses to be kept separate at all times. Secondly, it is simply not part of the culture within South African Muslim communities for Muslims to have civil marriages in addition to their Muslim marriages. Negative messages from the *ulamâ* about the Islamic impermissibility of civil marriages makes the transformation of that culture into one that is more accepting of civil marriages quite difficult. Thus, most South African Muslims conclude marriages that do not have legal protection. As marginalised members of the Muslim community, women are disproportionately affected by the

¹² *Bronn* supra (n 6) at 318, 320 and 321 (delivered by Hodges CJ) and 333 (delivered by Watermeyer J, concurring with the decision of the Chief Justice); F Kaganas and C Murray 'Law, women and the family: the question of polygyny in a new South Africa' 1991 *Acta Juridica* 116–134 at 116.

¹³ *Ismail* supra (n 6) at 1024D–F.

¹⁴ A description of *lobolo* is provided in the text attached to the following footnotes below (n 60, 66, 79, 82, 92 and 93).

¹⁵ C Dlamini 'Indigenous law and the Bill of Rights' in Butterworths *Bill of Rights Compendium* (2006) at 6A–11.

¹⁶ Kaganas and Murray (n 12) at 116.

¹⁷ Section 3.

¹⁸ Matrimonial Property Act 88 of 1984, ch III.

non-recognition of Muslim marriages. For instance, they are neither able to challenge Muslim family law rules that discriminate against them, nor enforce benefits that are recognised for women under Muslim family law.¹⁹

In contrast, indigenous Africans were not permitted to enter into civil marriages at all and were therefore not able to access the benefits attached to those marriages. This changed after 1994, so that they now also have the civil option available to them.²⁰ For those who enter customary unions only, the post-1994 Recognition of Customary Marriages Act (RCMA)²¹ regulates those marriages. The enactment of the RCMA signalled a significant departure from the colonial and apartheid governments' view of African customary marriages as inferior to Christian and civil marriages. For the first time in South African history, African customary marriages were afforded a place of pride within the country's legal framework and acknowledged as worthy of legal respect and recognition.²² In fact, African customary law in general, which had previously been subordinated to colonial and apartheid laws, has post-1994 been elevated to the same level as common law.²³ The only supreme law that now exists in South Africa is the Constitution, to which all other laws, including customary law and the common law, are equally subordinate.²⁴

In accordance with s 15(3)(a)(i) of the 1996 South African Constitution²⁵ and arising from consultations with relevant experts, traditional leaders, members of the *ulamá*, and civil society,²⁶ the ANC-led government respectively enacted the RCMA and drafted the Muslim Marriages

¹⁹ Amien *IJLP* (n 1) at 363.

²⁰ Recognition of Customary Marriages Act 120 of 1998, s 10(1).

²¹ *Ibid.* The RCMA came into effect in 2000.

²² P Andrews '“Big love”? The recognition of customary marriages in South Africa' (2007) 64(4) *Washington and Lee Law Review* 1483–1497 at 1495.

²³ Section 211(3) of the Constitution reads: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. C Himonga and C Bosch 'The application of African customary law under the Constitution of South Africa: problems solved or just beginning?' (2000) 117 *SALJ* 306–341 at 308; C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession' 2005 *Acta Juridica* 82–107 at 101; C Himonga 'African customary law in South Africa – many faces of *Bhe v Magistrate Khayelitsha*' (2005) *Recht In Afrika* 163–183 at 176.

²⁴ Section 2 of the Constitution declares: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' Section 8(1) provides: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

²⁵ Section 15(3)(a)(i) of the Constitution enables the enactment of legislation that recognises 'marriages concluded under tradition, or a system of religious, personal or family law'.

²⁶ South African Law Commission (Project 90) *The Harmonisation of the Common Law and the Indigenous Law. Report on Customary Marriages* (August 1998), available at http://salawreform.justice.gov.za/reports/r_prj90_cstm_1998aug.pdf, accessed 23 May 2013; South African Law

Bill (MMB).²⁷ The latter recommends the recognition and comprehensive regulation of Muslim marriages in South Africa. While the RCMA was passed fairly soon after its consultation processes began, the MMB is still not enacted despite having been submitted to the Minister of Justice and Constitutional Development (hereafter referred to as 'the Minister') in 2003 (this version of the Bill hereafter referred to as the '2003 MMB').²⁸ The main reason for the delay appears to be the *ulamâ's* reluctance to accept the second version of the MMB, which was approved by Cabinet in 2010 (this version of the Bill hereafter referred to as the '2010 MMB').²⁹

Without official notification or consultation, the Department of Justice and Constitutional Development (DoJ) amended a few provisions of the 2003 MMB, which caused the moderate (and majority) members of the *ulamâ*, who had previously supported the 2003 MMB, to withdraw their support for the 2010 MMB on the basis that it was no longer compliant with Islamic law.³⁰ Although most of the provisions of the 2003 MMB are retained in the 2010 MMB, the few changes that had been effected have halted the process of legislative recognition of Muslim marriages in South Africa.

Two provisions in particular have put the proverbial spanner in the works: First, moderate members of the *ulamâ* had agreed that a secular court could adjudicate disputes arising from the MMB, provided they were presided over by a Muslim judge with Islamic law experts acting as assessors. This was accordingly incorporated into the 2003 MMB.³¹ However, those provisos were removed in the 2010 MMB, which recommends that any secular judge, with or without assessors and regardless of religious affiliation, can adjudicate MMB-related disputes.³² Secondly, the 2003 MMB required disputes to be subjected to compulsory mediation or voluntary arbitration prior to the finalisation of divorce proceedings. The decisions of mediators and arbitrators would have been binding and the court would only have been able to overturn that aspect of the mediation or arbitration order that it considered to not be in the

Reform Commission (Project 59) *Islamic Marriages and Related Matters Report*, (July 2003), available at http://salawreform.justice.gov.za/reports/r_ptj59_2003jul.pdf, accessed 23 May 2013.

²⁷ See http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf, accessed 23 May 2013.

²⁸ I discuss the provisions of the 2003 MMB in greater detail in Amien (n 1 *IJLP*) at 361–396.

²⁹ See http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf, accessed 23 May 2013.

³⁰ 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_content&view=article&id=569:uucsa-update-on-the-muslim-marriages-bill&catid=44:social&Itemid=61, accessed 1 June 2013.

³¹ Clause 15, 2003 MMB.

³² Clause 1, 2010 MMB.

best interests of the children born of the marriage.³³ In contrast, the 2010 MMB does not make provision for compulsory mediation or arbitration, only voluntary mediation.³⁴ Moderate members of the *ulamâ* envisage the mediation/arbitration and assessing domains as those areas in which they would be able to exercise influence over the outcome of MMB-related disputes. This is the reason that they are conditioning their support for the 2010 MMB on the reinsertion of the requirements for Muslim judges, Islamic law experts as assessors, and compulsory mediation.

At the other end of the spectrum are those Muslim and secular extremists – who comprise a minority of dissidents – who reject outright the notion of a secular state regulating Muslim (or any religious) marriages. Muslim extremists dub the MMB the ‘*kufri* Bill’,³⁵ thereby conveying the message that any support for the MMB would be considered *harâm*. Among the secular extremists are also women’s rights advocates who are not willing to put up with legislation that is not entirely consistent with gender equality. They justify their position on the basis of s 15(3)(b) of the Constitution,³⁶ which requires that legislation recognising religious and customary marriages must be consistent with provisions of the Constitution, including gender equality. Thus, Muslim and secular extremists reject both versions of the MMB.³⁷

Adopting a somewhat more balanced and middle-of-the-road approach are those secular and Muslim women’s rights advocates who also acknowledge that both versions of the MMB have provisions that are problematic from a gendered perspective. Yet, they are willing to tolerate the enactment of either version of the MMB on the basis that it has the potential to provide more protection for Muslim women than they have without legal recognition of their marriages.³⁸

The main concerns that moderate women’s rights advocates have with the 2010 MMB relate to unequal divorce options and the fact that the

³³ Clauses 13–14, 2003 MMB.

³⁴ Clause 12, 2010 MMB.

³⁵ Loosely translated, it means they regard the MMB as un-Islamic.

³⁶ Section 15(3)(b) reads: ‘Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.’

³⁷ Majlisush Shura al Islam *Comments on the ‘Muslim’ Marriages Bill* (27 May 2011), available at http://www.themajlis.co.za/index.php?option=com_content&view=article&id=105:comments-on-the-muslim-marriages-bill-by-the-majlisush-shura-al-islam&catid=30:mpl&Itemid=41, accessed 1 June 2013; Legal Resources Centre *Submission of the Legal Resources Centre to the Department of Justice. The Muslim Marriages Bill, 2010* (15 March 2011), on file with author.

³⁸ Recognition of Muslim Marriages Forum *Comments to the Minister of Justice and Constitutional Development on the Muslim Marriages Bill* (23 May 2011); Shura Yabafazi (‘Consultation of Women’) *Submission on the Muslim Marriages Bill to the Minister of Justice and Constitutional Development* (31 May 2011); Women’s Legal Centre *Submissions on the Muslim Marriages Draft Bill* (May 2011); Tshwaranang Legal Advocacy Centre *Submission to the Department of Justice and Constitutional Development on the Muslim Marriages Bill* (31 May 2011). Submissions on file with author.

MMB does not include all the sources of Islamic law. Their first concern is that although the 2010 MMB includes the main forms of dissolving a Muslim marriage that are available to women and men, it retains a male-centred interpretation of divorce that militates against women. The methods of dissolution incorporated in the MMB include *talâq*, *tafwid-al-talâq*, *faskh* and *khul'a*.³⁹ *Talâq* is the unilateral and exclusive right of the husband to repudiate his wife on a no-fault basis.⁴⁰ If the husband exercises his right to *talâq*, he must pay his wife any outstanding *mahr* (dower) that he still owes her.⁴¹ *Tafwid-al-talâq* is the right that a husband delegates to his wife to *talâq* him on a conditional or unconditional basis.⁴² *Faskh* is a fault-based divorce available to either spouse, where the applicant must show that she or he is entitled to dissolution of the marriage on an Islamically permissible ground.⁴³ *Khul'a* is a no-fault based divorce, which is initiated by the wife, who has to pay some form of compensation that does not exceed her *mahr* so that she can be released from the marriage.⁴⁴ While the 2010 MMB incorporates the aforementioned descriptions of *talâq*, *tafwid-al-talâq* and *faskh*, it includes a conservative interpretation of *khul'a* that requires the husband's consent for the financial compensation to be paid by his wife. This effectively means that the husband can prevent his wife from obtaining a divorce.⁴⁵ Moderate women's rights advocates urge the DoJ to adopt the woman-friendly interpretation of *khul'a* that does not require the husband's consent,⁴⁶ which essentially is Islam's way of balancing the husband's unilateral right of *talâq* and affords the wife the same right to divorce. Precedent for the latter interpretation exists in several Muslim majority countries including Egypt, Nigeria, Bangladesh, Pakistan and the Philippines.⁴⁷

The second concern of moderate women's rights advocates is that the MMB limits the sources of Islamic law to only primary and secondary sources. The primary sources include the *Qur'ân* (primary text of Islam)

³⁹ Clause 1, 2010 MMB.

⁴⁰ I Rushd (transl IAK Nyazee) *The Distinguished Jurist's Primer: A Translation of Bidayat Al-Mujtahid* (1996) at 72, 75, 97 and 119.

⁴¹ *Mahr* is given to the bride/wife by the groom/husband either at the date of marriage or at an agreed time during the marriage, or in the absence of either, at dissolution of the marriage. It can be anything of value that is permissible under Islamic law. ARI Doi *Shariah: The Islamic Law* (1984) at 158–166.

⁴² J Schacht *An Introduction to Islamic Law* (1964) at 164.

⁴³ JL Esposito *Islam: The Straight Path* (1991) at 78 and 83.

⁴⁴ D Pearl *A Textbook on Muslim Law* (1979) at 102.

⁴⁵ The interpretation requiring the husband's consent is adopted by the *Hanafi* school of thought; KN Ahmad *Muslim Law of Divorce* (1978) at 219–220.

⁴⁶ Recognition of Muslim Marriages Forum (n 38) at 25. The *Shâfi'i* and *Mâlîki* schools of thought do not require the husband's consent: V Malik *Muslim Law of Marriage, Divorce and Maintenance* (1961) at 99.

⁴⁷ Women Living Under Muslim Laws *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World* (2003) at 278–279.

and *Sunnah* (sayings and practices of Prophet Muhammad). *Sunnah* are recorded in written form, called *ahadīth*. The secondary sources comprise *ijmā* (consensus of Muslim jurists) and *qiyās* (analogical deductions based on the primary sources).⁴⁸ By restricting the list of Islamic law sources to only primary and secondary sources, it will be difficult for an application of the MMB to be responsive to the lived socio-economic realities of Muslims. Instead, it could reinforce male-centred patriarchal interpretations of Islamic law that negatively affect women. To allow Islamic law to achieve its dynamic potential and develop in a way that advances women's rights, moderate women's rights advocates request that the DoJ include the numerous subsidiary sources of Islamic law into the MMB to enable *ijtihād* (independent reasoning). Subsidiary sources include among others, *maslahā* (public interest), *istihsān* (discretion to relax a rule where it would result in harm), *'urf* and *'adat* (practices followed within the community).⁴⁹

Despite the above concerns, moderate women's rights advocates recognise that the longer Muslim marriages are not afforded legal recognition in South Africa, the longer Muslim women will continue to be marginalised and left unprotected without access to legal recourse. The South African judiciary has made great strides in providing relief to Muslim female litigants, who suffer disadvantage as a result of non-recognition of their marriages.⁵⁰ However, it is a financially and emotionally exhausting endeavour to have to approach the court system each time they need to assert claims arising from their marriages. Not all women can afford to do so. After weighing up the cost of having either version of the MMB enacted against no legal recognition of Muslim marriages, moderate women's rights advocates prefer to have either version enacted as soon as possible. They justify this choice as a strategy to ensure immediate protection for women. Thereafter, they will most likely launch constitutional challenges against the MMB to enable a more gender-consistent interpretation of gender-impugned provisions.

In the next section, I consider in more detail the manner in which African customary marriages are regulated through the RCMA for the

⁴⁸ SS Ali *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (2000) at 19–22.

⁴⁹ Recognition of Muslim Marriages Forum (n 38) at 18; AAA Fyzee *Outlines of Muhammadan Law* (1949) at 21.

⁵⁰ *Ryland v Edros* 1997 (2) SA 690 (C); *Khan v Khan* 2005 (2) SA 272 (T); *Cassim v Cassim and Others* (Part A) (TPD) unreported case no 3954/06 (15 December 2006); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Mahomed v Mahomed* (ECP) unreported case no 2154/08 (Judgment delivered 29 May 2009); *Hoosain v Dangor* (WCC) unreported case no 18141/09 (Judgment delivered 18 November 2009); *Arendse v Arendse and Others* (WCC) Reportable judgment, case no 1659/2009 (Judgment delivered 20 August 2012); *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC).

purpose of extrapolating lessons for the regulation of Muslim marriages. Many leading scholars of African customary law and NGOs have commented on the provisions of the RCMA.⁵¹ It is not my intention to rehash their observations, except to draw on them to the extent that they offer useful parallel insights for the regulation of Muslim marriages in South Africa.

III REGULATION OF AFRICAN CUSTOMARY MARRIAGES

The RCMA recognises the following features that are particular to African customary marriages: *lobolo*; polygyny; requiring the marriage to be celebrated according to the tenets of customary law, thus enabling traditional leaders to mediate marital disputes prior to the finalisation of divorce proceedings; and expecting prohibitions of customary marriages on the grounds of consanguinity or affiliation to be determined by customary law.⁵²

However, most of the requirements and consequences for African customary marriages encapsulated in the RCMA are consistent with those of a civil marriage. Thus, African customary law experts, like Chuma Himonga, conclude that the RCMA reveals a legislative attempt to assimilate customary marriages into the civil understanding of marriage.⁵³ As illustrated in greater detail below, Himonga's observation is reinforced by the fact that the RCMA transforms the communal nature of African customary marriages, which traditionally represents a bond between families,⁵⁴ into an individualistic-based nuclear unit that characterises the western approach to marriage. Thus, most of the elements of marriage

⁵¹ Himonga *AJ* (n 23); Andrews (n 22); S Mnisi '(Post)colonial culture and the South African legal system: understanding the relationship between living customary law and state law' (2007) 28 *Zeitschrift für Rechtssoziologie* 241–251; S Sibanda 'When is the past not the past? reflections on customary law under South Africa's constitutional dispensation' (2009–2010) 17 *Human Rights Brief* 31–35; W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *SAJHR* 241–277 at 274; TW Bennett 'The conflict of laws' in JC Bekker, C Rautenbach and M Goolam (eds) *Introduction to Legal Pluralism in South Africa* 2 ed (2006) at 15–27; R-M Jansen 'The Recognition of Customary Marriages Act: many women still left out in the cold' (2002) 27(2) *Journal for Juridical Science* 115–128; JM Pienaar 'African customary wives in South Africa: is there spousal equality after the commencement of the Recognition of Customary Marriages Act?' (2003) 2 *Stellenbosch Law Review* 256–272; E Curran and E Bonthuys 'Customary law and domestic violence in rural South African communities' (2005) 21 *SAJHR* 607–635. The Women's Legal Centre (WLC), a non-governmental organisation in Cape Town, South Africa, which mainly litigates precedent-setting cases that impact on the rights of women, published a report in 2011 that reflects on ten years of implementation of the RCMA; see Women's Legal Centre *Recognition of Customary Marriages* (2011), available at http://www.wlce.co.za/morph_assets/themelets/explorer/relationship%20rights/general/Recognition%20of%20Customary%20Marriages.pdf, accessed 24 May 2013.

⁵² Sections 1, 2(4), 3(1)(b), 3(6), 8(4)(e), and 8(5).

⁵³ Himonga *AJ* (n 23) at 85.

⁵⁴ *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 18; Curran and Bonthuys (n 51) at 615.

that have a greater significant impact on power relations between spouses mimic those of civil marriages. For instance, traditional African customary law is not known to have set a minimum marriageable age for spouses and requires the consent of the spouses' fathers in order for them to enter into an African customary marriage. Yet, the RCMA sets a minimum marriageable age for both spouses and requires each to provide her and his consent to the marriage.⁵⁵ In the event that spouses are below the minimum marriageable age, the same steps as provided for in the Marriage Act are included in the RCMA to obtain the consent of the minor's guardians and/or Minister of Home Affairs.⁵⁶ Furthermore, the RMCA replaces the traditional manner in which an African customary marriage is gradually concluded over a period of time with the expectation that the marriage should be entered into immediately.⁵⁷ African customary law does not traditionally include the notion of a matrimonial property regime, since property was meant to be administered for the benefit of the family. The RCMA, however, incorporates provisions of the Matrimonial Property Act 88 of 1984⁵⁸ and establishes community of property as the default matrimonial property system for *de facto* monogamous customary marriages.⁵⁹ As mentioned previously, this enables each spouse entering into a customary marriage to have a 50 per cent claim in the joint matrimonial estate. Under traditional African customary law, children born of a marriage where *lobolo* had been paid belonged to their father and his family.⁶⁰ In contrast, the RCMA enables equal parental rights and responsibilities to be awarded in relation to children born of the marriage.⁶¹ Moreover, traditional African customary law emphasises the interests of the husband and his family when it comes to determining issues relating to guardianship, custody and access of the children.⁶² Yet, the RCMA requires a court to consider only the best interests of the child.⁶³ Finally, under traditional African customary law, dissolution of the marriage was negotiated between the families of the spouses and not between spouses themselves.⁶⁴ In contrast, the RCMA incorporates provisions of the Divorce Act 70 of 1979 and stipulates that a divorce action must be brought by either or both spouses on the ground of the

⁵⁵ Section 3(1)(a).

⁵⁶ Sections 3(3), 4 and 5.

⁵⁷ Curran and Bonthuys (n 51) at 615.

⁵⁸ Ch III.

⁵⁹ Section 7.

⁶⁰ Pienaar (n 51) at 267.

⁶¹ Children's Act 38 of 2005, ch 3.

⁶² Pienaar (n 51) at 268.

⁶³ Section 8(4)(d) of the RCMA, read with s 9 of the Children's Act, s 28 of the Constitution; see also ch 3 of the Children's Act of 2005.

⁶⁴ Himonga *AJ* (n 23) at 89.

‘irretrievable breakdown of the marriage’. The latter is defined in the RCMA in the same way as it is defined in the Divorce Act.⁶⁵

Even where the RCMA incorporates traditional features of African customary marriages, it does not do it in quite a traditional manner. For instance, *lobolo* is not included as a compulsory requirement for the conclusion of a valid customary marriage.⁶⁶ Polygyny would most likely have been abolished, but for the recognition by law-makers that enforcing such a prohibition would have been difficult.⁶⁷ Abolition of polygyny would also have undoubtedly left polygynous wives without legal protection.⁶⁸ The lawmakers therefore chose to legalise it, subject to certain built-in safeguards that are not characteristic of African customary law. The safeguards include a prerequisite that the husband must apply to court for approval of a written contract regulating the subsequent marriage and requiring interested parties, including existing wives, to be joined in the application.⁶⁹

The attempt to infuse African customary marriages with individual rights and obligations akin to those that typify western-type marriages seems to have arisen from a good faith intention of the legislature to ameliorate the disadvantaged position of indigenous African women as a result of the application of ‘official’ customary law.⁷⁰ Official customary law is recorded in text books, academic commentaries, case law and legislation.⁷¹ It derives from a colonial attempt to superimpose western law onto African customary law.⁷² It also comprises the selective perspectives of male elders and traditional leaders, whom the colonisers and apartheid era judiciary had relied on to determine the content of customary law, because they had assumed that these elders and leaders represented the views of everyone within traditional African communities.⁷³ The views of African women were therefore excluded, with the result that official customary law reflected a particular male bias that had harmful

⁶⁵ Section 8(2) of the RCMA mimics s 4(1) of the Divorce Act, which reads: ‘A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.’

⁶⁶ South African Law Commission (n 27) at viii, para 4.3.2.8.

⁶⁷ *Ibid* at x, para 6.1.25.

⁶⁸ Andrews (n 22) at 321.

⁶⁹ Section 7(4)(b) and (7)(a)–(b).

⁷⁰ South African Law Commission (n 26) at ix–x; Women’s Legal Centre (n 51) at 5.

⁷¹ AJ Kerr ‘The nature and future of customary law’ (2009) 40 *SALJ* 677–689 at 679.

⁷² GJ van Niekerk ‘Indigenous law in South Africa – a historical and comparative perspective’ (1990) 18(1) *Codicillus* 34–43 at 35.

⁷³ W van der Meide ‘Gender equality v right to culture’ (1999) 28 *SALJ* 100–112 at 100 and 105.

implications for women.⁷⁴ For instance, under official customary law, wives were subjected to the control and authority of their husbands as the family head.⁷⁵ They were treated as perpetual minors with no legal capacity to transact without the assistance of their guardians.⁷⁶ They were not permitted to own property;⁷⁷ whatever monies and other property they acquired before and during marriage became the property of their husbands so that, on dissolution of the marriage, they were not entitled to receive anything, even if they had contributed to the maintenance or growth of the marital estate.⁷⁸ While their husbands had the right to unilaterally repudiate their wives if they (the husbands) were prepared to forfeit the *lobolo*, wives did not have the capacity to initiate divorce proceedings; this could only be done at the behest of their fathers, who had discretion to do so in cases of serious maltreatment and upon return of the *lobolo* that had been paid.⁷⁹ Husbands were permitted to enter into polygynous unions without requiring the approval of anyone other than the bride's father or applicable male relative.⁸⁰ Women were not permitted to inherit or become chiefs.⁸¹ And as mentioned previously, if *lobolo* had been paid, the mother did not have authority over the children born of the marriage.⁸²

In contrast, traditional African customary law afforded women a great deal of respect, allowed them to wield much influence over decision-making within the family, and, along with men, permitted them to own property that was meant to be used for the benefit of the family.⁸³ So even though patriarchy existed in pre-colonial African customary law, it was applied in a way that prioritised communal interests, with the result that female members of the community were protected.⁸⁴ There was therefore no need for a matrimonial property regime in African customary marriages, like there exists in western-type marriages, because the emphasis was on ensuring that all members of the community were taken care of rather than on ownership of property.⁸⁵ However, the colonial and

⁷⁴ J Williams and J Klusener *Submissions to the Western Cape Provincial Parliament: Traditional Court's Bill 2012* (2012) at 20.

⁷⁵ Van der Meide (n 73) at 102–103.

⁷⁶ Pienaar (n 51) at 264.

⁷⁷ C Zungu 'Gender equality and customary law in South Africa' in T Falola and B House-Soremekun (eds) *Gender, Sexuality and Mothering in Africa* (2011) 235–249 at 235–236.

⁷⁸ *Ibid* at 238.

⁷⁹ Curran and Bonthuys (n 51) at 621.

⁸⁰ Andrews (n 22) at 1486.

⁸¹ Zungu (n 77) at 235–236, 240 and 242. The male primogeniture rule was abolished by the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC).

⁸² Pienaar (n 51) at 267.

⁸³ *Gumede supra* (n 54) at para 18; Van der Meide (n 73) at 106.

⁸⁴ Curran and Bonthuys (n 51) at 613.

⁸⁵ Van der Meide (n 73) at 107.

apartheid laws codified African customary law in a way that entrenched patriarchy in a particularly pernicious manner.⁸⁶ It is therefore not surprising that given the vast divergence described above between traditional African customary law and official customary law, the latter has come to be viewed as a terribly distorted version of traditional African customary law.⁸⁷

Apart from the RCMA provisions described earlier to combat the gender-based discriminatory effects of official customary law, the legislature's attempt to promote gender equality within African customary marriages is no more evident than in the inclusion of s 6 entitled "Equal status and capacity of spouses":

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

The Constitutional Court interprets this provision as abolishing the husband's marital power over his wife and affording the spouses' equal dignity and capacity in the marriage.⁸⁸ However, Ericka Curran and Elsje Bonthuys observe that the provision affords a wife 'full status' and not 'equal status'. They argue that this difference in wording may cause a court to interpret the provision as enabling a husband to retain his position as head of the household.⁸⁹ JM Pienaar also contends that, since the legislation does not remove any rights and powers that a wife may have under customary law, this might entrench inequality among polygynous wives, since a first wife might be able to retain her traditional status as the more powerful wife.⁹⁰ With due respect to the aforementioned scholars, the Constitutional Court has thus far interpreted African customary law in a way that promotes gender equality.⁹¹ It is therefore

⁸⁶ *Gumede* supra (n 54) at para 17. A Claassens and S Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) 25 *SAJHR* 491–516 at 507.

⁸⁷ TW Bennett 'Legal pluralism and the family in South Africa: lessons from customary law reform' (2011) 25 *Emory International Law Review* 1029–1059 at 1042.

⁸⁸ *Gumede* supra (n 54) at para 32.

⁸⁹ Curran and Bonthuys (n 51) at 620.

⁹⁰ Pienaar (n 51) at 259.

⁹¹ In the case of *Bhe* supra (n 81), the court struck down the male primogeniture rule. In *Shilubana*, the court gave effect to a tribal decision to appoint a woman as chief; see *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC). In *Gumede* supra (n 54), the court enabled the default matrimonial property regime of community of property to also apply to *de facto* monogamous marriages that had been entered into prior to the enactment of the RCMA. More recently, in *Mayelane*, the court developed the customary law of the Xitsonga community in accordance with the Constitution by requiring the consent of the first wife for the validity of a subsequent customary marriage; see *Mayelane v Ngwenyama and Others* [2013] ZACC 14 (Judgment handed down 30 May 2013).

unlikely that the Court will interpret the provisions of the RCMA in a way that engenders inequality between any of the spouses in a customary marriage.

In addition to the assimilation approach already mentioned, a secondary approach is evident in the enactment of the RCMA, namely, that it reinforces codification of certain official customary law rules, which may have negative consequences for women. For instance, the provision that enables the court to take into consideration any arrangement entered into under customary law when making an order for maintenance could be counter-productive for women. The payment of *lobolo* had traditionally been intended to provide security for the wife and children in the event of dissolution of the marriage.⁹² Since *lobolo* had traditionally been paid in the form of cattle or other livestock, such security would have existed when the marriage ended. However, these days, *lobolo* is frequently paid in cash, which is usually spent by the time the marriage ends.⁹³ If *lobolo* has been paid, the court might make a lesser maintenance order, which may cause the wife to find herself in a financially destitute position.⁹⁴

Despite the *bona fide* attempt of the legislature to protect and advance the rights of women in African customary marriages, the RCMA is also criticised for not reflecting 'living' customary law.⁹⁵ Living customary law refers to those customs that are practised within indigenous African communities, which may vary from community to community.⁹⁶ Unlike official customary law, which is the fruit of a written tradition, living customary law develops through oral tradition.⁹⁷ This informs the fluid, dynamic and adaptable nature of living customary law, which allows it to be more responsive to the lived realities of indigenous African communities.⁹⁸ In contrast, official customary law is counter-intuitive to the traditional nature of African customary law because it fossilises the rules, thereby making them rigid and far more difficult to develop in response to the changing needs of society.⁹⁹ Sindiso Mnisi Weeks observes that there is a disjuncture between the codified version of African customary law and the living customary law, as practised within indigenous African communities, in that the former is not necessarily a true reflection of the

⁹² Pienaar (n 51) at 267.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Lehnert (n 51) at 274.

⁹⁶ Himonga *Recht In Afrika* (n 23) at 168; GJ van Niekerk 'Legal pluralism' in JC Bekker, C Rautenbach and M Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) at 5 fn 3.

⁹⁷ Himonga *Recht In Afrika* (n 23) at 168.

⁹⁸ Ibid.

⁹⁹ Ibid.

latter.¹⁰⁰ Hence, official customary law has less potential than living customary law to engender substantive justice.¹⁰¹

By regulating African customary marriages in a way that does not enable recognition of living customary law, the RCMA fails to address the root causes of patriarchal African customary rules and instead promises superficial protection.¹⁰² In fact, the RCMA may be precisely that against which the legislators sought to protect women, namely, the application of official customary law. Put differently, the RCMA is tantamount to another form of official customary law, which incorporates and codifies features that are unfamiliar to many indigenous African communities.¹⁰³ Consequently, implementation of the RCMA becomes challenging especially in rural African communities.¹⁰⁴ Had the RCMA enabled application of living customary law, its aims and objectives may have been more easily accepted by members of indigenous African communities, which would have facilitated smoother implementation of the legislation.¹⁰⁵ However, numerous implementation problems have arisen because the RCMA is not suitably responsive to the lived realities of indigenous African communities. For instance, registration of marriages is a foreign concept in those communities. Therefore, the requirement that African customary marriages must be registered is seldom followed.¹⁰⁶ Although lack of registration does not affect the validity of the marriage, the registration requirement has been misunderstood by officials from the Department of Home Affairs who refuse to recognise unregistered African customary marriages as valid.¹⁰⁷ This has been particularly problematic for spouses wishing to apply for divorce and those claiming against their spouse's intestate estate.¹⁰⁸ Another example relates to the requirement that existing wives must be joined in applications for polygynous marriages.¹⁰⁹ Himonga observes that African wives in rural areas are unable to afford the costs involved to travel to courts and the costs of legal procedures.¹¹⁰ Thus, polygynous marriages continue to be entered into in the traditional manner without the provisions of the RCMA being implemented.¹¹¹

¹⁰⁰ Mnisi (n 51) at 247.

¹⁰¹ Van der Meide (n 73) at 104.

¹⁰² Andrews (n 22) at 331.

¹⁰³ Himonga *AJ* (n 23) at 91.

¹⁰⁴ Lehnert (n 51) at 274.

¹⁰⁵ Williams and Klusener (n 74) at 22 argue that the oral nature of living customary law allows it to be more easily understood and accepted by the indigenous African communities.

¹⁰⁶ RCMA, s 4.

¹⁰⁷ Women's Legal Centre (n 5) at 12.

¹⁰⁸ *Ibid.*

¹⁰⁹ RCMA, s 7(6).

¹¹⁰ Himonga *AJ* (n 23) at 106.

¹¹¹ *Ibid.*

In contrast, most of the provisions in the MMB incorporate traditional Islamic law features of a Muslim marriage as practised within South African Muslim communities. In the following section, those provisions are described in greater detail. Thus, if enacted, the MMB may be far easier for Muslims to implement, since many of the requirements for marriage would be familiar to them.

IV REGULATION OF MUSLIM MARRIAGES

Before embarking on a description of some of the Islamic law rights and obligations in marriage and divorce, a brief historical context regarding the development of Islamic law might be in order.

During pre-seventh century Arabia, which Muslims refer to as the period of *Jahilliya* ('Age of Ignorance'), patriarchal rules and customs resulted in the oppression of females.¹¹² Throughout this time, female infanticide was rife; men were permitted to marry as many wives as they wished; women had no right to divorce; women had no right to acquire, own or manage property; a woman's consent to marriage was not required; women were sold in marriage through the payment of *mahr* by husbands to their fathers; women had no rights over their children; women had no right to inherit; and they were not allowed to participate in public matters.

Islam was introduced as a response to the socio-economic realities of seventh-century Arabia. One of its primary aims was to eradicate the ills of *Jahilliya* by advancing social justice, providing protection to females, uplifting their position and restoring their dignity.¹¹³ This was achieved through the implementation of reforms, which emanated from the primary sources of Islamic law to promote the Islamic objectives of equality, justice, freedom, fairness, and the protection of human welfare.¹¹⁴ The reforms included: the abolition of female infanticide; limitations on polygyny; granting females full property rights including ownership of their *mahr*; allowing them to be contracting parties in their own marriages; affording them the right to divorce; recognising their right to be maintained during and after marriage; enabling them to participate in public and religious matters; and permitting them to succeed on inheritance.¹¹⁵ Consequently, many Muslim scholars contend that the spirit, norms and values that emanate from Islam, as revealed in the primary

¹¹² AE Mayer *Islam and Human Rights: Tradition and Politics* (1999) at 97–98.

¹¹³ *Ibid.*

¹¹⁴ S Sabiq *Fiqh Us-Sunnah. Doctrine of Sunnah of the Holy Prophet* (n d) at 105; Z Mir-Hosseini 'The construction of gender in Islamic legal thought and strategies for reform' (2003) 1(1) *Journal of Women in the Middle East and the Islamic World* 1–28 at 13; M Badran *Feminism in Islam: Secular and Religious Convergences* (2009) at 323.

¹¹⁵ JL Esposito with N DeLong-Bas *Women in Muslim Family Law* 2 ed (2001) at 4, 14 and 23. WB Hallaq *The Origins and Evolution of Islamic Law* (2005) at 22–23.

sources, promote human dignity and gender equality and do not endorse inequality between the sexes.¹¹⁶

Although the reforms that were introduced through Islam were considered revolutionary for the seventh century,¹¹⁷ they were still heavily influenced by patriarchal norms.¹¹⁸ As a result, there was an expectation that females would be taken care of by their male relatives.¹¹⁹ For instance, inheritance for females was stipulated at a lesser ratio than males, because seventh-century Arabian society required male relatives to use their greater share of the inheritance to support their female relatives.¹²⁰ Some reforms also may have been intended to be introduced gradually, otherwise they may not have been immediately accepted by and implemented within the community. Hence, some scholars argue that polygyny was not prohibited outright.¹²¹ Yet, there is a suggestion in the *Qur'ân* that polygyny should not be followed, since the limits prescribed by the *Qur'ân*, namely, that a husband must treat each of his wives justly or equally, are not capable of being adhered to.¹²²

From its inception, Islamic law was intended to be developed in response to the changing needs of societies. This in a way mirrors the operation of living customary law. Thus, the recognition of secondary and subsidiary sources of Islamic law, which are not all text-based, such as *urf* and *adat*, was an acknowledgment that the primary sources may not have all the solutions to challenges presented within societies. In fact, the application of *ijtihâd* ensured that Islamic law would constantly evolve and be responsive to the lived realities of communities.¹²³ However, around the thirteenth century, after the formation of the four *Sunni madhâhib*

¹¹⁶ Cachalia (n 9) at 403; N Moosa 'Human rights in Islam' (1998) 14 *South African Law Journal* 508–524 at 510.

¹¹⁷ Ali (n 48) at 56.

¹¹⁸ A Wadud *Quran and Woman: Rereading the Sacred Text from a Woman's Perspective* (1999) at 80–81.

¹¹⁹ *Qur'ân* 4:34: 'Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means.'

¹²⁰ *Qur'ân* 4:7: 'From what is left by the parents and those nearest related there is a share for men and a share for women, whether the property be small or large, – a determinate share.'; *Qur'ân* 4:11: 'God (thus) directs you as regards your children's (inheritance): to the male, a portion equal to that of two females.'; *Qur'ân* 4:176: '[If the deceased leaves behind] brothers and sisters, (they share), the male having twice the share of the female.'

¹²¹ N Moosa 'The interim and final constitutions and Muslim personal law: implications for South African Muslim women' (1998) 9(2) *Stellenbosch Law Review* 196–206 at 197.

¹²² *Qur'ân* 4:3: 'If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.' But then the *Qur'ân* advises in 4:129: 'Ye are never able to be fair and just as between women, even if it is your ardent desire.'

¹²³ Ali (n 48) at 80; E Moosa 'Prospects for Muslim Law in South Africa: a history and recent developments' (1996) 3 *Yearbook of Islamic and Middle Eastern Law* 130–155 at 144 and 149.

(schools of thought),¹²⁴ *Sunni* Muslim jurists decided that the development of Islamic law was complete and they no longer officially permitted the application of *ijtihād*.¹²⁵ A period of *taqlīd* commenced in which Islamic law was rigidly interpreted and applied by *fuqaha* (legal jurists) within the narrow confines of the *Sunni madhāhib*.¹²⁶ The founders of the *Sunni madhāhib* lived during the eighth and ninth centuries, so their interpretations of the primary sources of Islamic law were also informed by patriarchal norms that pervaded Arabian society.¹²⁷ With the ‘closing of the doors of *ijtihād*’,¹²⁸ the patriarchal interpretations of the founders of the *Sunni madhāhib* were followed blindly by subsequent *fuqaha* and now also inform present *Sunni* mainstream understandings of Islamic law.¹²⁹

The official clampdown on *ijtihād* meant that *fiqh* (Islamic jurisprudence) could not develop sufficiently to satisfactorily respond to and address the challenges that arose in societies during the post-*ijtihād* era.¹³⁰ The developmental nature of Islamic law was thus hampered and it assumed an antiquated disposition.¹³¹ In particular, the patriarchal norms that informed interpretations by *fuqaha* resulted in rulings that were based on an assumption of gender inequality.¹³² The objectives of Islamic law, including gender equality, could therefore not be fully realised.¹³³ Instead of promoting one of the *Qur’ān*’s primary purposes, which is to respect and protect the human dignity of females, centuries of traditional, conservative and androcentric interpretations of the primary sources of Islamic law caused a deviation from Islam’s true ethos.¹³⁴ Those interpretations resulted in rules that discriminate against females, thereby reducing the rights that Islam had originally afforded them, relegating them to an inferior status vis-à-vis men and contributing to their oppression.¹³⁵ For

¹²⁴ The *Sunni madhāhib* include *Hanafī*, *Māliki*, *Shāfi’ī* and *Hanbali*. Each *madhhab* is named after its founder: Ab–Hanīfa (699–767 AD), Muhammad Al–Imām Mālik ibn Anas (713–795 AD), Muhammad ibn Idrīs al–Shāfi’ī (767–820 AD) and Ahmed ibn Hanbal (780–855 AD). AA An–Na’im ‘Shari’a and Islamic Family Law: Transition and Transformation’ in AA An–Na’im (ed) *Islamic Family Law in a Changing World: A Global Resource Book* (2002) 1–22 at 5.

¹²⁵ AA An–Na’im ‘The dichotomy between religious and secular discourse in Islamic societies’ in M Afkhami (ed) *Faith and Freedom: Women’s Human Rights in the Muslim World* (1995) at 91. *Ijihād* is, however, still permitted within the *Shi’i* tradition: Esposito (n 43) at 78 and 83.

¹²⁶ MAE Bulbulia ‘The ethical foundations and distinctive features of Islamic law’ (1985) 8 *Comparative and International Law Journal of Southern Africa* 215–236 at 224.

¹²⁷ Hallaq (n 115) at 157.

¹²⁸ Schacht (n 42) at 71.

¹²⁹ D Pearl and W Menski *Muslim Family Law* 3 ed (1998) at 29.

¹³⁰ An–Na’im (n 125) at 56–58.

¹³¹ Moosa (n 123) at 144.

¹³² Mir–Hosseini (n 114) at 13.

¹³³ *Ibid.*

¹³⁴ Mayer (n 112) at 97–98.

¹³⁵ M Afkhami ‘Introduction’ in M Afkhami (ed) *Faith and Freedom: Women’s Human Rights in the Muslim World* (1995) at 10.

example, the conservative interpretation of *khul'a* mentioned earlier in this paper clearly illustrates the impact that patriarchal readings had on the erosion of women's divorce rights in present-day Islamic law.

Consequently, what has emerged in the application of Islamic law within South African Muslim communities is a medley of traditional benefits that Islamic law affords to women, coupled with patriarchal expectations. For example, the South African *ulamâ* recognise that a husband has the sole obligation to maintain his wife and children. However, they also accept a patriarchal interpretation of the husband's maintenance obligation, as requiring his wife's obedience.¹³⁶ Similarly, while they require payment of *mahr* by the husband to the wife to validate the Muslim marriage,¹³⁷ they accept the various traditional purposes for *mahr*,¹³⁸ including the sexist expectation that once agreement regarding *mahr* is reached, a wife must provide sex on demand to her husband unless it is during an Islamically impermissible time, such as menstruation.¹³⁹ The South African *ulamâ* are further selective about which Islamic law benefits they encourage. For instance, as indicated previously, traditional Islamic law expects spouses to maintain separate estates from the date of marriage until its dissolution.¹⁴⁰ The reason for this rule, during the context of seventh-century Arabia, was to protect a wife's right to acquire, own and manage her own property. However, the rule also enables labour performed by one spouse in the home to be remunerated by the other spouse, for women to be compensated for breastfeeding and for either spouse to be compensated for contributions to the maintenance or growth of the other's estate. While the South African *ulamâ* are quick to assert the first part of the rule, they do not easily encourage the second part of the rule. Moreover, they recognise polygyny, but do not ensure that the *Qur'anic* limits that are placed on it are strictly followed.

¹³⁶ Such a patriarchal interpretation is based on a conservative translation of *Qur'ân* 4:34, one of which is offered by Abdullah Yusuf Ali, which reads: 'Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means of (annoyance).; see Abdullah Yusuf Ali (transl) *The Holy Qur'ân* (1946).

¹³⁷ AD Ajjola *Introduction to Islamic Law* (1981) at 117 and 154.

¹³⁸ Some consider the payment of *mahr* as a symbol of respect for the wife. Some regard it as a form of security for the wife, given that the parties' estates are kept separate throughout the marriage. Others, like Ajjola (ibid), view it as a deterrent 'against the husband's arbitrary power of divorce.'

¹³⁹ Mir-Hosseini (n 114) at 13.

¹⁴⁰ K Ali 'Progressive Muslims and Islamic jurisprudence: the necessity for critical engagement with marriage and divorce law' in O Safi (ed) *Progressive Muslims* (2003) 163–189 at 175.

The MMB incorporates many of the traditional benefits recognised under Islamic law, including those mentioned in the previous paragraph, but is silent on the patriarchal expectations accompanying those benefits. Presumably, those expectations will have to be clarified by the judiciary. Given the internal limitation contained in s 15(3)(b) of the Constitution, and the fact that the judiciary has endeavoured to promote gender justice in the cases regarding Muslim marriages and African customary marriages that it has thus far adjudicated,¹⁴¹ there is hope that it will interpret the provisions of the MMB in a manner that advances gender equality.

Not only does the MMB include provisions that recognise features of Muslim marriages that are practised within South African Muslim communities, it also incorporates those that are recognised under Islamic law, but that are not practised within those communities.

Features particular to Muslim marriages that are practised within South African Muslim communities, which are incorporated into the MMB include:¹⁴² marriage by proxy, where the bride's *wali* (guardian) or his *waqil* (representative) enters into the *nikahnama* (marriage contract) on her behalf;¹⁴³ a default out of community of property regime excluding the accrual system;¹⁴⁴ the husband's unilateral obligation to maintain his wife and children;¹⁴⁵ mediation preceding the finalisation of divorce;¹⁴⁶ various forms of divorce available to women and men, which are mentioned

¹⁴¹ See *Ryland v Edros* 1997 (2) SA 690 (C); *Khan v Khan* 2005 (2) SA 272 (T); *Cassim v Cassim and Others* (Part A) (TPD) unreported case no 3954/06 (15 December 2006); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Mahomed v Mahomed* (ECP) unreported case no 2154/08 (Judgment delivered 29 May 2009); *Hoosain v Dangor* (WCC) unreported case no 18141/09 (Judgment delivered 18 November 2009); *Arendse v Arendse and Others* (WCC) Reportable judgment, case no 1659/2009 (Judgment delivered 20 August 2012); *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC). Also, *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC); *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC); *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) and *Mayelani v Ngwenyama and Others* [2013] ZACC 14 (Judgment handed down 30 May 2013).

¹⁴² I describe the features of the MMB in greater detail in Amien (n 1 *IJLP*) at 374–380.

¹⁴³ 2010 MMB, cl 5.

¹⁴⁴ *Ibid*, cl 8(1). The accrual system enables spouses to enter the marriage with separate estates and to maintain separate estates during the marriage. At dissolution of the marriage, spouses share in the accrual of each other's estates. See ss 2 and 3 of the Matrimonial Property Act 88 of 1984. Section 2 provides: 'Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded . . . is subject to the accrual system . . . except in so far as that system is expressly excluded by the antenuptial contract. Section 3 provides: 'At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.'

¹⁴⁵ *Ibid*, cl 11(2)(a)–(b).

¹⁴⁶ *Ibid*, cl 12.

earlier in this paper;¹⁴⁷ the expectation that a woman should observe *iddah* ('waiting period') following the dissolution of her marriage;¹⁴⁸ and when making an order for guardianship, custody and access of minor children born of the marriage, a court must consider Islamic law when determining what is in the best interests of the child.¹⁴⁹

Features of a Muslim marriage incorporated into the MMB that are recognised under Islamic law but that are not practised within South African Muslim communities include: the right of both spouses' to be compensated for the maintenance or growth of each others estates;¹⁵⁰ a wife's right to be remunerated for breastfeeding and to be compensated for her services rendered in her husband's or his family's business;¹⁵¹ a wife's right to receive compensatory payment namely, *mut'ah al-talâq* in the event that the marriage is terminated at the unjustified behest of the husband;¹⁵² that polygyny be permitted only according to the prerequisites laid down by the *Qur'ân*;¹⁵³ and since Islamic law does not recognise the principle of prescription for civil claims, the MMB recommends that any unpaid arrear maintenance owed by the husband should be exempt from the provisions of the Prescription Act 68 of 1969.¹⁵⁴

As a result of receiving input from traditional and progressive Muslim scholars, drafters of the MMB included the more progressive rules from among the four *Sunni madhâhib*. The rationale for framing the rights and obligations recognised in the MMB within the *Sunni* paradigm is most likely due to the fact that the majority of South Africans follow the *Sunni madhhab*. However, the MMB still does not incorporate all the Islamic law rules that have the potential to balance out negative effects of other rules. For instance, a spouse's right to be compensated for unpaid labour in the home is not explicitly included in the MMB. In the current South African context, the out of community of property matrimonial regime militates against many Muslim women who are unable to amass estates during the marriage and then find themselves financially destitute at the dissolution of the marriage.¹⁵⁵ By simply drawing on the paradigm of traditional *Sunni* law, a claim for their unpaid labour in the home could ensure that a

¹⁴⁷ Ibid, cl 1.

¹⁴⁸ Ibid, cl 1. In the case of divorce, *iddah* must be observed for three menstrual cycles or three months and in the case of death, it lasts for four menstrual cycles or four months and ten days. If the woman is pregnant, *iddah* extends until the birth of the child regardless whether or not the marriage terminates as a result of divorce or death. While observing *iddah*, a woman may not socialise and is expected to remain in the house. In particular, she is not permitted to become romantically involved with anyone or marry during this period. Doi (n 41) at 198–203.

¹⁴⁹ 2010 MMB, cl 10(1).

¹⁵⁰ Ibid, cl 9(8)(b)(ii).

¹⁵¹ Ibid, cl 11(2).

¹⁵² Ibid, cl 9(8)(g).

¹⁵³ Ibid, cl 8(4)–(11).

¹⁵⁴ 2010 MMB, cl 11(5).

¹⁵⁵ Recognition of Muslim Marriages Forum (n 38) at 21.

wife is financially protected when the marriage is terminated. In fact, Muslim women's rights advocates go one step further and argue for a default community of property regime or an out of community of property regime subject to accrual.¹⁵⁶ Unlike African customary law, where the notions of community of property or accrual are foreign, those two regimes could be justified through the prism of Islamic contract law. Since a Muslim marriage is regarded as a contract – the terms of which are negotiated and agreed to between the spouses, a default matrimonial property regime is tantamount to implicit agreement about that regime unless the parties agree otherwise. Although the MMB enables parties to opt out of the default regime,¹⁵⁷ it would require spouses who are sufficiently empowered to exercise that choice. For the many South African Muslim women who are not in that position, a default community of property or accrual system could provide more protection.

The fact that the MMB is drafted within the framework of *Sunni* law also means that certain groups, such as the minority group of *Shi'ite* followers within the South African Muslim communities, same-sex Muslim couples and inter-religious couples where the male is not Muslim or the female is of a religion other than Christianity or Judaism, may be excluded from the ambit of the MMB.¹⁵⁸ At the same time, those who may not be able to marry in terms of the MMB would not be completely without protection. If they wish, they could still have a *nikah* coupled with a civil registration of marriage. *Shi'ite* and inter-religious couples could derive civil benefits under the Marriage Act and same-sex couples could do the same under the Civil Union Act 17 of 2006.

Thus far, the manner of regulating African customary marriages and Muslim marriages appears to be quite different. As mentioned previously, greater effort has been made to ensure consistency between African customary marriages and civil marriages. In contrast, the MMB essentially proposes integration of the nuanced features of Muslim marriages into the

¹⁵⁶ Ibid at 22.

¹⁵⁷ 2010 MMB, cl 8(1).

¹⁵⁸ Clause 1 of the 2010 MMB defines a Muslim as 'a person who believes in the oneness of Allah and who believes in the Holy Messenger Muhammad as the final prophet and who has faith in all the essentials of Islam'. If a *Sunni* understanding of this definition is adopted, it could exclude followers of the *Shi'i* tradition from being able to register their marriages in terms of the MMB. The MMB also explicitly excludes same-sex couples through its definition of a Muslim marriage as 'a marriage between a man and a woman contracted in accordance with Islamic law only'. Inter-religious marriages may further be excluded if a traditional and conservative understanding of marriage is adopted. A traditional approach to *Qur'ân* 5:6 is that Muslim men are permitted to marry only Jewish and Christian women without requiring them to convert. *Qur'ân* 5:6 reads '(Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the people of the Book'. In contrast, *Qur'ân* 2:221 is conservatively interpreted to mean that Muslim women are not permitted to marry any non-Muslim men unless they convert to Islam. *Qur'ân* 2:221 reads Do not . . . marry (your girls) to unbelievers until they believe.'

South African secular framework.¹⁵⁹ Yet, an interesting trend between the regulation of African customary marriages and Muslim marriages is also discernable. Where practically feasible, the legislators appear to try to maintain consistency between civil, customary and religious marriages with the features of a civil marriage as the benchmark. For instance, provisions in the RCMA and MMB relating to consent, proof of age, method of registering a marriage and processes to change a matrimonial property regime are very similar to the requirements for civil marriages.¹⁶⁰ Furthermore, legislators also appear to try to maintain consistency between certain provisions in the RCMA and MMB that are not found in the Marriage Act, such as clauses relating to the administrative requirements for polygyny and the equal status and capacity of spouses.¹⁶¹

Normative considerations relating to assimilation aside,¹⁶² it may be that legislators incline toward assimilation to make administration of the different marriages easier. Unless assimilation efforts erode the very protections that they were intended to provide, there should be no problem with trying to maintain consistency among different types of marriages for procedural purposes. To make this determination, an assessment of each context must be made. For instance, the study of African customary marriages in this paper demonstrates that the superimposition of civil requirements for registration does not work in rural African indigenous communities. However, it may work in South African Muslim communities, which reside mostly in urban areas. The same argument applies to attempts at consistency between African customary marriages and Muslim marriages. The clauses mentioned in the previous paragraph relating to polygyny and the equal status and capacity of spouses are not inconsistent with the requirements of Islamic law, so no harm was done there. Perhaps the drafters of the MMB had actually applied their minds to the impact that an attempt at consistency between procedural requirements for African customary marriages and Muslim marriages would have on traditional Islamic law rules and the South African Muslim communities.

In the next section, I attempt to extract insights from the comparative study undertaken in this paper between the regulation of African customary marriages and Muslim marriages. When I first started working on this project, I anticipated deriving one, at most two insights. I was therefore

¹⁵⁹ Amien *IJLP* (n 1) at 374.

¹⁶⁰ 2010 MMB, cl 5–8. RCMA, ss 3–5 and 10.

¹⁶¹ 2010 MMB, cl 3 and 6. Clause 3 reads: 'A wife and a husband in a Muslim marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.'

¹⁶² Here, I refer to the assumption that the system that is being set as the bench-mark for assimilation is superior.

pleasantly surprised to discover the emergence of several significant lessons for the regulation of Muslim marriages.

V INSIGHTS OBTAINED FROM THE REGULATION OF AFRICAN CUSTOMARY MARRIAGES FOR THE REGULATION OF MUSLIM MARRIAGES

The lessons that can be gleaned from the regulation of African customary marriages can broadly be identified according to the following categories, most of which are interlinked: problems associated with assimilation; necessity for consultation with diverse voices within communities; need for buy-in to legislation; risks attached to codification; need to consider context and impact of legislation; and potential for gendered reform of laws.

The first main lesson emanating from this study relates to problems associated with assimilation. It has already been alluded to in this paper that assimilation can be problematic from a normative perspective when the achievement of consistency between laws is based on an assumption that one type of law is superior to another. From an impact perspective, the transplantation of characteristics from one type of legal system to a wholly different type of legal system carries with it the inherent risk that nuanced aspects of the transplanted system might be overlooked during the assimilation process, which could further marginalise already marginalised members of the community, including women.¹⁶³ In this way, assimilation attempts that involve the superimposition of concepts and requirements that are alien to a culture or religion might not be followed by members of those communities. The intended protections of the legislation might therefore be lost on its intended beneficiaries. At the same time, assimilation that is promoted to produce consistency for administrative purposes might be workable, provided it does not result in implementation difficulties that negate the aims of the legislation.

To determine how best to draft the legislation in a way that will ensure maximum impact, consultation with all the relevant voices within the targeted communities is crucial. This means that drafters must obtain insights from not only those who purport to be the leaders of the communities, but also from ordinary members of the communities, including women. It should also not be assumed that those who claim to be women's rights advocates necessarily represent the views of all women within the communities. In the same way, it should not be assumed that the views of those who claim to be the leaders of communities necessarily represent the views of all the members of those communities.

¹⁶³ Amien *IJLP* (n 1) at 368–369.

To ensure implementation, there is a further need for the intended beneficiaries of the legislation to buy-in to the legislation. In the context of Muslim marriages, this unfortunately means that the majority of the *ulamâ* need to be satisfied with the legislation because they have the power to discourage Muslims from registering their marriages under the MMB. Unlike the RCMA, the MMB requires those marriages entered into after its commencement to be registered in order for them to be valid.¹⁶⁴ The legislature should give serious consideration to changing this requirement to mimic the approach adopted in the RCMA, because to impose registration for the purposes of validity will further disempower marginalised women.

Nevertheless, the more pertinent question is how much of the *ulamâ*'s demands must be conceded? Through s 15(3)(b), the Constitution appears to provide clear guidance: legislation recognising religious marriages cannot be inconsistent with other provisions of the Constitution, including gender equality. However, in order for the legislation to have the required effect, it needs to have the approval of the majority of the *ulamâ*. So we find ourselves in a circuitous route, where gender equality is pitted against freedom of religion. It seems therefore that the only way out of the quagmire is to adopt a balanced approach that involves reasonable compromises in respect of both rights.

Can the *ulamâ*'s current demands, mentioned earlier in the paper, then be construed as reasonable? I would argue that in respect of compulsory mediation, this could be conceded, provided the mediation orders are appealable. The latter should provide sufficient protection against orders that discriminate against female litigants. On the question of Muslim judges and Islamic law experts as assessors: it will not be practically feasible for every MMB-related dispute to be adjudicated by a Muslim judge because the South African judiciary simply does not have enough Muslim judges to enable a sufficient turnaround time for cases, to ensure that justice is speedily achieved.¹⁶⁵ However, the demand for Islamic law experts to preside with a judge as assessors is reasonable, since the South African judicial system is not yet equipped with judges who are experts in Islamic law.

A further lesson derived from the regulation of African customary marriages is the risk that rules underscored by patriarchal norms could become ossified through codification. Perhaps one way to address that is for the judiciary to ensure that it constantly interprets the legislation in a way that is responsive to the changing needs of African indigenous communities. The imperative to adopt this interpretive approach is provided for in s 39(2) of the Constitution, which reads:

¹⁶⁴ 2010 MMB, cl 6(1)(a) and 10.

¹⁶⁵ Amien *IJLP* (n 1) at 378.

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.

In this way, the judiciary might enable a measure of consistency between living customary law and codified law as it pertains to African customary marriages. Of course, such a process could be time-consuming and may not be capable of being responsive at the same rate at which norms and practices evolve within communities. Similarly, the regulation of Muslim marriages also has the potential of codifying potentially discriminatory rules. If that happens, it will be up to the judiciary to interpret the legislation in a manner that is consistent with the Constitution, particularly gender equality.

This is why it is important to ensure from the outset that legislation purporting to regulate marriages contains mechanisms that can reflect the lived realities of the people that it aims to protect. In the case of African customary marriages, the need to embody living customary law to ensure that the legislation is responsive to the changing needs of African indigenous communities has been highlighted. In the context of Muslim marriages, it is important to incorporate subsidiary sources of Islamic law into the legislation to enable a process of *ijtihad*. In this way, Islamic law as it pertains to Muslim marriage and divorce can develop in a way that meets the socio-economic realities of South African Muslim communities. Gendered reform of Islamic law then also becomes possible, because reliance on the whole body of sources of Islamic law can enable progressive interpretations that will be consistent with gender equality.

VI CONCLUSION

South Africa has emerged from a particularly ugly history, characterised by systemic discrimination including religious and cultural discrimination, which was directed mainly at communities that suffered racial discrimination. There was therefore a direct link between racial discrimination and religious and cultural discrimination. Consequently, the adoption of a Constitution that not only prohibits unfair discrimination on the basis of race¹⁶⁶ but also promotes tolerance and respect for religious and cultural diversity¹⁶⁷ signalled a significant achievement for those who had struggled against the racist laws of the apartheid regime.

The enactment of the RCMA and the steps taken to draft legislation to afford recognition to Muslim marriages demonstrates the ANC-led government's commitment to grant equal respect to different marriage systems. The manner in which the RCMA was drafted also indicates an

¹⁶⁶ Section 9(3).

¹⁶⁷ South African Constitution, ss 15, 30 and 31.

intention to promote equality between spouses. However, in attempting to achieve this aim, the legislature adopted a misguided approach, involving the direct injection of rules from the civil model of marriage into African customary marriages. Although the civil law rules relating to marriage advance formal equality, in the context of African customary marriages they do not always result in substantive equality. This is then a manifestation of assimilation gone wrong. So, when considering the adoption of assimilation techniques for drafting legislation to recognise different types of marriages, including Muslim marriages, this paper illustrates that it is imperative to determine the potential impact that those techniques could have on communities targeted by the legislation.

The paper also demonstrates that impact cannot be considered in isolation of context. The context of targeted communities is essential to determine what is required to ensure that the legislation will have its desired effect and that it will be optimally utilised by its intended beneficiaries. In the context of African indigenous communities, the oral tradition of living customary law facilitates a dynamism that enables customary law to be shaped in accordance with the changing socio-economic conditions of the communities. Similarly, the inherent potential for Islamic law to develop in a manner that is responsive to the needs of Muslim communities requires the utilisation of sources that are not only text-based. Therefore, in order for legislation to be responsive to the needs of communities, it must integrate mechanisms and methodologies inherent to the religious and cultural traditions that can aid the development of religious and cultural laws in a socially responsive manner.

It appears then that the most important insight that surfaces from the comparative study is that there is no one-size-fits-all solution for the recognition of different types of religious and cultural marriages. Whichever approach is adopted to recognise Muslim marriages (or any other religious and cultural marriage) must be context-driven and impact-focused. With regard to the latter, the potential impact that legislation could have for marginalised members of a religious and cultural community who are in need of the most protection must receive particular consideration. In the case of Muslim marriages, this would be women and children. In this way, legislation recognising Muslim marriages can ensure the advancement of constitutional rights and norms.