EXAMINING THE ROLE OF THE LEGISLATURE AND JUDICIARY IN THE CONTEXT OF TRADITIONAL AND RELIGIOUS PERSONAL AND FAMILY LAW SYSTEMS IN SOUTH AFRICA

Student full name: Kayla Morgan

Student number: Mrgkay002

Qualification: LLM in Human Rights Law

Supervisor: Prof. Waheeda Amien

Word count: 24 949

DECLARATION

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed by:	Date:
K.Morgan	8 February 2024

Table of Contents

I. CHAPTER ONE: INTRODUCTION

Personal law systems usually deal with family law matters, such as matters related to succession and inheritance. Personal law systems are a type of legal framework in which diverse groups, within the same country, follow different sets of laws based on their ethnic or religious identity.[1] South Africa has a diverse population with a variety of ethnic and religious groups. A survey from 2016 indicates that Christianity is the largest practicing faith, however, there are still many groups practising traditional African religion, Islam, Hinduism, Buddhism, Bahaism, and Judaism.[2] The Constitution of the Republic of South Africa, 1996 ('the Constitution') establishes a constitutional dedication to multiculturalism through its commitment to legal pluralism by providing for the right to freedom of religion,[3] the individual and collective right to culture and religion,[4] and does not prevent the establishment of legislation recognising religious or traditional personal law systems.[5] South Africa is bound, not only by its Bill of Rights to provide for the sufficient protection of the right to freedom of religion and the right to culture, but also by regional and international obligations as contained in the International Covenant on Civil and Political Rights ('ICCPR'),[6] International Covenant on Economic, Social and Cultural Rights ('ICESCR'),[7] the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW');[8] the African Charter on Human and People's Rights ('African Charter'),[9] and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Maputo Protocol'),[10] all of which South Africa has signed and ratified.

---

[1] Hadas Tagari 'Personal Family Law Systems - A Comparative and International Human Rights Analysis.' (2012) 8(2) International Journal of Law in Context 231-252.
[2] Zanele Mngadi 'Official Guide to South Africa 2018/19' (2019) 16 GCIS at 15, available at *complete guide.pdf (gcis.gov.za)* . The figures show the number of people practising their faith are: Christianity- 43 423 717; traditional African religion- 2 454 887; Islam- 892 685; Hinduism- 561 268; Buddhism- 24 808; Bahaism- 6 881; and Judaism- 49 470.
[3] Section 15(1) of the Constitution of the Republic of South Africa, 1996.
[4] Section 30 and 31 of the Constitution of the Republic of South Africa, 1996.
[5] Section 15(3)(a) of the Constitution of the Republic of South Africa, 1996.
[6] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[7] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[8] UN General Assembly*, Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol.1249, p.13. Ratified by South Africa in 1995.
[9] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[10] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

Although South Africa's legal system is pluralistic in nature, this paper considers whether it is given effect to; particularly whether the right to freedom of religion and the right to culture are sufficiently protected. In determining this issue, the paper examines the role the legislature and the judiciary play in the context of traditional and religious personal and family law systems in South Africa.

First, it is important to contextualise how traditional and religious personal and family law systems in South Africa were treated historically. It is important because, historically, traditional African and religious personal law systems were not recognised,[11] and this had the effect of oppressing and undermining the inherent dignity of majority of the population, namely African, coloured, and Indian people who were subject to their traditional or religious personal law systems.[12] It undermined their dignity by portraying the message that their marriages were not worthy of protection and were 'immoral'.[13] Even when some form of recognition was given to traditional African personal law systems through indirect rule, it was still subject to the repugnancy clause which had the effect of distorting African customary law.[14] For example, the concept of 'lobolo'[15] was understood by the colonialists as 'bride price' which they believed was the sale of the wife.[16] However, women who took part in lobolo neither regarded it as a sale nor derogatory to their dignity but rather as symbolic of the conclusion of a marriage and evidence of a new matrimonial relationship.[17] Essentially, the majority of the population was excluded from the legal consequences and benefits that flow from legal recognition of personal law systems, such as inheritance and maintenance. This also had the effect of disproportionately impacting women who were subject to traditional or religious personal law systems as they were the ones often approaching the court for relief due to their husband's family denying the existence of a marriage,[18] the husband refusing to comply

[11] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[12] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 7.
[13] *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1016.
[14] L Mofokeng, C Himonga & T Nhlapo 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[15] Section 1 of the Recognition of Customary Marriages Act 120 of 1998 defines 'lobolo' as: 'the property in cash or in kind, whether known as *lobolo, bogadi, bohalt, xuma, lumalo, thaka, ikhazi, magadi, emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.'
[16] C.R.M. Dlamini 'The Role of Customary Law in Meeting Social Needs' 1991 *AJ* 71.
[17] Ibid.
[18] *Mabena v Letsoala* 1998 (2) SA 1068 (T).

with their traditional or religious personal law,[19] or because of the lack of safeguards afforded to women in their respective religious personal laws and secularly.[20]

Secondly, once we begin to understand the historical position of traditional and religious personal law systems, we are able to comprehend the significance of the Constitution, namely the Bill of Rights, along with the regional and international human rights obligations that the legislature and the judiciary must uphold. Through this post-apartheid lens, the paper first analyses various case law and legislation relating to traditional African personal law systems, such as the Recognition of Customary Marriages Act 120 of 1998 ('RCMA'), and the Reform of Customary Law of Succession and Regulation of Related Matters 11 of 2009 ('RCLSA'). This paper argues that in the context of traditional African personal law systems, the legislature has taken necessary steps to remedy the historical lack of recognition which has a significant impact on restoring the dignity and human rights of those previously excluded. By enacting legislation such as the RCMA, the legislature has given equal rights and status to the spouses in an African customary marriage.[21] This advances women's rights from the historical subjugation in which they were considered minors who were under the guardianship of their husbands.[22] However, the legislature does not escape criticisms as it has been noted that the registration requirement, although not essential to the validity of a customary marriage,[23] presents practical problems.[24] In reality, spouses are not registering their marriage.[25] This prevents spousal benefits from being granted speedily as compared to their civil-law counterparts who have marriage certificates.[26] To be granted the spousal benefits, evidence of a valid marriage is required, and it often leads women to be the one who needs to register the marriage to prevent the inhibition of the spousal benefit.[27] This may not always be possible for the woman to do due to the unequal bargaining power that exists in the relationship in which the husband refuses to register the marriage.[28] In addition, the lack of a marriage

[19] *Taylor v Kurtstag NO & others* 2005 (1) SA 362 (W).
[20] *Women's Legal Centre Trust v President of the Republic of South Africa and others* (2022) ZACC 23 (28 June 2022) para 17.
[21] Section 6 of the Recognition of Customary Marriages Act 120 of 1998.
[22] *Mabena v Letsoala* 1998 (2) SA 1068 (T) at 1072-3.
[23] *Kambule v The Master* 2007 (3) SA 403 (E) at 409–410.
[24] Roxanne Juliane Kovacs, Sibongile Ndashe and Jennifer Williams 'Twelve years later: how the Recognition of Customary Marriages Act of 1998 is failing women in South Africa' 2013 Acta Juridica 273.
[25] Siyabonga Sibisi 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44 Nelson Mandela University 516.
[26] Ibid.
[27] Ibid.
[28] Roxanne Juliane Kovacs, Sibongile Ndashe and Jennifer Williams 'Twelve years later: how the Recognition of Customary Marriages Act of 1998 is failing women in South Africa.' 2013 Acta Juridica 273.

certificate in an unregistered customary marriage may create problems where the spouse enters into a subsequent secret marriage.[29] In such a situation, courts have acknowledged that an invalid civil marriage would be in a stronger position than an unregistered valid customary marriage due to the marriage certificate which acts as a *prima facie* valid marriage certificate.[30] A further practical problem is when spouses attempt to claim from the Road Accident Fund ('RAF'). For the RAF to find the existence of a duty of support, registered customary marriages are placed in a stronger position compared to unregistered customary marriages which may have to litigate to prove the existence of their valid marriage.[31] By examining these criticisms of the legislature, the paper highlights some of the shortcomings of the legislature in providing sufficient protection of the right to culture and women's rights in the context of African traditional personal law systems. The judiciary, it is argued, has taken an inconsistent approach in applying and enforcing African customary law, especially in regard to what constitutes a valid customary marriage, which has put women in vulnerable positions. In some cases, the courts have found the payment of lobolo in full to be a requirement for customary law,[32] in other cases the partial payment of lobolo did not invalidate a customary marriage.[33] The courts have also been inconsistent in whether the 'handing over' of the bride to the bridegroom's family is an essential requirement of a customary marriage.[34] This inconsistency has led to women being excluded from spousal benefits due to their marriages being invalidated. Thus, it is argued that the right to culture and freedom of religion have not been sufficiently protected by the legislature and the judiciary.

Thirdly, the paper then examines the role of the legislature and judiciary in protecting the right to freedom of religion in the context of religious personal and family law systems. In determining whether the legislature has sufficiently protected the right to freedom of religion, it becomes clear that the answer is in the negative due to the lack of enacted legislation recognising and regulating Muslim marriages. The result of no enacted legislation recognising and regulating religious marriages is that many marriages operate in an unofficial and unregulated sphere, and this leaves women in these marriages vulnerable.[35] This is because

[29] Siyabonga Sibisi 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44 Nelson Mandela University 527.
[30] *Ngcwabe-Sobekwa v Sitela* [2020] ZAECMHC para 28.
[31] *TZ obo Minors v Road Accident Fund* [2021] ZAGPPHC 367.
[32] *Mthembu v Letsela* 2000 3 SA 867 (SCA).
[33] *Mkabe v Minister of Home Affairs & others* (2016) ZAGPPHC 460.
[34] *Mxiki v Mbatha* (2014) ZAGPPHC 825; and *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).
[35] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 72.

gender discriminatory rules and practices are maintained by religious authorities which work to the detriment of women. For example, in South Africa, the *ulamā,* a religious body that pronounces on matters relating to the interpretations of Islamic law,[36] often have adopted traditional and conservative interpretations of Islamic law.[37] These traditional and conservative interpretations regarding Muslim divorce have resulted in unequal rights between men and women.[38] In South Africa, Muslim men can divorce through triple *ṭalāq* which allows them to immediately and irrevocably terminate the marriage without allowing the wife to be heard.[39] The *ulamā* will grant *ṭalāq* certificates arbitrarily without any consultation with the wife, whilst if the wife wanted to leave the marriage she is required to get permission from the *ulamā* to obtain a *faskh*.[40] Thus, legislation is needed to regulate religious marriages and to ensure women can practice their religion whilst also ensuring women's human rights are protected. The paper also discusses the steps taken by the judiciary to recognise Muslim marriages which has provided necessary protection for women. The judiciary has done this by extending various statutes to include spouses in religious marriages which has allowed these spouses, mainly women, to claim spousal benefits such as maintenance,[41] inheritance,[42] and from the RAF.[43] Despite the non-existent legislation recognising religious marriages, the judiciary stepped in to provide necessary protection for vulnerable women, who are subject to their religious personal law systems and are not afforded adequate safeguards. However, this does not provide sufficient protection of women's rights and the right to freedom of religion.

A. STATEMENT OF THE PROBLEM

The problem to be addressed in this paper concerns the role of the legislature and judiciary in protecting the right to freedom of religion and the right to culture in the context of traditional and religious personal and family law systems in South Africa. The problem is that non-recognition and nonregulation of traditional and religious marriages and personal law systems violates South Africa's constitutional guarantee of the right to culture and freedom of religion,[44]

[36] Ibid at 66.
[37] Ibid at 65.
[38] Ibid.
[39] Ibid at 66. *Talaq* is an exclusive right of men to unilaterally repudiate their marriage.
[40] Waheeda Amien 'Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly at 732. *Faskh* is a fault-based divorce that is available to both men and women.
[41] *Ryland v Edros* 1997 (2) SA 690 (C); *Khan v Khan* 2005 2 SA 272 (T).
[42] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC).
[43] *Amod v Multilateral Motor Vehicle Accidents Fund (commission for gender equality intervening)* 1999 (4) SA 1319 (SCA).
[44] Section 15, 30 and 31 of the Constitution of the Republic of South Africa, 1996.

as well as the regional and international obligations to protect the right to culture,[45] freedom of religion,[46] and equality between spouses which South Africa is bound to.[47] The preamble of the Constitution stipulates:

> We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.

To heal the divisions of the past, it is important to understand the problems of the past. The systems of colonialism and Apartheid both sought control of the majority population, consisting of African, coloured, and Indian people by suppressing their personal law systems and imposing the ideas of the white, Christian colonialists.[48] The system of Apartheid institutionalised racial segregation and discrimination which created a racial hierarchy and division, placing white Europeans on top and black Africans at the bottom.[49] The religious and traditional personal and family law systems that did not accord with the dominant legal system, common law, was deemed contrary to public policy or 'immoral'.[50] For example, polygyny was a practice considered to be inconsistent with the general principles of 'civilisation'.[51] The repugnancy clause was used both during colonialism and Apartheid in which traditional and religious personal law systems were judged against the English understanding of natural justice, equity, and fairness in order to advance the supremacy of European culture and intellect.[52] Anything that did not align with this English understanding of natural justice was not recognised. For example, polygynous marriages were not recognised as valid marriages. However, this repugnant attitude towards polygyny extended to any form of personal law system that condoned polygyny even if the marriage itself was not polygynous. This meant African customary marriages, Muslim marriages, Hindu marriages, and Jewish marriages, to name a few, were excluded from any form of legal protection even if the marriage was de facto

[45] Article 27 of the International Covenant on Civil and Political Rights; Article 15(1)(a) of the International Covenant on Economic, Social, and Cultural Rights; and article 17(2) of the African Charter on Human and Peoples Rights.
[46] Article 18 and 27 of the International Covenant on Civil and Political Rights; and article 8 of the African Charter on Human and Peoples Rights.
[47] Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women.
[48] L Mofokeng, C Himonga & T Nhlapo 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[49] The Group Areas Act 41 of 1950, the Bantu Education Act 47 of 1953, the Native Land Act 27 of 1913, and the Native Trust and Land Act 18 of 1936.
[50] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[51] Ibid.
[52] Emile Zitzke 'A Decolonial Critique of Private Law and Human Rights' (2018) 34 *SAJHR* at 497.

monogamous.[53] The effect of Apartheid was that the right to culture and freedom of religion were not recognised rights for the majority population and were heavily restricted by segregating and oppressive laws. For example, the Group Areas Act 41 of 1950 forcibly removed communities along racial lines which had the effect of cutting community ties, impacting cultural and religious life as places of worship were segregated according to race too.[54] This had the result of undermining the dignity of majority of the population as their culture and religion were essentially deemed unworthy of protection.[55] Justice Mokgoro captures it perfectly in *Minister of Finance v Van Heerden* when she states:

> Apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority, nor did it only deprive the majority of the right to self-actualisation and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, it also systematically dehumanised them, striking at the core of their human dignity. The disparate impact of the system is today still deeply entrenched.[56]

This problem of non-recognition also has harsh consequences for women in particular.[57] For example, in many traditional and religious personal law systems, polygyny is allowed which means that the husband can marry more than one woman. Similarly, in many traditional and religious personal law systems it is the husband who has the authority to divorce. For example, in Islam, the husband can unilaterally issue a *talaq*;[58] in Judaism, it is the husband who needs to issue a *get* in order to divorce.[59] In Hinduism, divorce is not permissible.[60] If the religious marriage were to breakdown, it is the woman who is trapped in a vulnerable position with no escape as the husband has the ability to enter into subsequent marriages. Further problems that will arise is the wife will not be able to claim any spousal benefits guaranteed by the state such as maintenance or inheritance as their religious marriage is not recognised as a valid marriage according to state law. Once we understand the problems

---

[53] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[54] Patricia Johnson-Castle 'The Group Areas Act of 1950' *South African History Online* 15 March 2021, available at *https://www.sahistory.org.za/article/group-areas-act-1950,* accessed on 10 November 2023.
[55] L Mofokeng, C Himonga & T Nhlapo 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[56] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 70.
[57] *Women's Legal Centre Trust v President of the Republic of South Africa and others* (2022) ZACC 23 (28 June 2022).
[58] W Amien, N Moosa & C Rautenbach 'Muslim Personal Law' in Christa Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 5 ed (2018) 371-412.
[59] C Rautenbach 'Jewish Personal Law' in Christa Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 6 ed (2021) 337-369.
[60] *Singh v Ramparsad* 2007 (3) SA 445 (D) para 7.

created by our past, we begin to understand the aims and objectives of the Constitution: to heal the divisions of the past.[61] Section 15 of the Constitution provides for the right to freedom of religion and belief. Importantly, section 15(3)(a) provides:

> This section does not prevent legislation recognising- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.

Section 15(3)(a) leaves it to the legislature to recognise religious and traditional personal and family law systems through the enactment of legislation. It was on this basis that the legislature enacted the Recognition of Customary Marriages Act 120 of 1998. Although the Constitution provides for the protection of fundamental human rights, this paper examines the role of the legislature and judiciary in protecting the right to freedom of religion and culture and whether the legislature and judiciary's actions uphold the obligations set out by the Constitution. By examining the role of the legislature and judiciary, the paper highlights the problems of non-recognition and nonregulation of religious and traditional personal law systems and the extent to which religious and traditional personal law systems are recognised and regulated.

B. RESEARCH QUESTION

The research question addressed is: what is the role the South African legislature and judiciary play in protecting the right to culture and freedom of religion in the context of religious and traditional personal law systems? The following sub-questions are also addressed:

- How were the right to culture and freedom of religion treated during Apartheid and has there been a change in the treatment of these rights post-Apartheid?
- Has the South African legislature and judiciary provided sufficient protection for the right to culture and freedom of religion within the context of traditional and religious personal law systems?
- What steps, if any, have been taken to provide sufficient protection?
- Has the South African judiciary filled the gap of non-recognition of religious marriages to ensure the right to freedom of religion and women's rights are sufficiently protected?
- What are the effects of nonregulation of traditional and religious personal law systems on women?

[61] Preamble of the Constitution of the Republic of South Africa, 1996.

C. SIGNIFICANCE OF THE STUDY

During Apartheid, one of the main objectives was to control the population and to create a homogenous state based on conservative, racist, and Christian ideologies.[62] The common law was the dominant legal system and traditional and religious personal law systems were not recognised.[63] This meant that customary marriages and religious marriages were not legally recognised and were considered invalid. Parties to both customary and religious marriages not only had their dignity and livelihood impaired but were also denied the legal benefits that flow from recognition, such as inheritance and maintenance.[64] Women and children in these marriages often suffered disproportionately because first, when their husbands died, they were not legally recognised as the spouse who is entitled to inherit from the deceased's estate according to the common law.[65] Secondly, children were deemed illegitimate and were disinherited from their father's estate.[66] Thirdly, civil marriages were given priority over customary and religious marriages which left women in vulnerable positions.[67] For example, husbands were allowed to take on multiple wives according to certain traditional and religious personal law systems. However, if they subsequently married according to civil law with another woman, the civil marriage was given priority and every other marriage was deemed invalid. Since the enactment of the Constitution of the Republic of South Africa, 1996, the right to culture and freedom of religion are recognised rights which enjoy guaranteed protection in the Bill of Rights.[68] The aim and objective of this research is to find out whether the recognised right to culture and freedom of religion are in fact sufficiently protected as guaranteed by the Constitution. Human rights and democratic principles form the founding principles of our Constitution and it is clear that the aim of the Bill of Rights is to ground the new democratic South Africa on the values of human dignity, equality, and freedom, all of which were previously limited and denied for the majority African, coloured and Indian population.[69] The state is under an obligation to respect, protect, promote, and fulfil the rights in the Bill of Rights,[70]

---

[62] Waheeda Amien & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 Maryland Journal of International Law 505 at 506.
[63] Ibid at 508.
[64] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61.
[65] W Amien 'South African women's legal experiences of Muslim personal law' in Lauren Fielder & Kyriaki Topidi (eds) *Religion as Empowerment – Global Legal Perspectives* (2016) 53-77 at 53.
[66] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.
[67] *Bronn v Fritz Bronn's Executors & others* 1860 (3) Searle 313 at 318.
[68] Section 15, 30, and 31 of the Constitution of the Republic of South Africa, 1996.
[69] Section 7 of the Constitution of the Republic of South Africa, 1996.
[70] Section 7(2) of the Constitution of the Republic of South Africa, 1996.

namely, the right to culture and freedom of religion.[71] Examining whether the legislature and judiciary have respected, protected, promoted, and fulfilled the right to culture and freedom of religion is significant for affirming the legitimisation of our constitutional democracy. If the right to culture and freedom of religion are not sufficiently respected or protected by the state, namely the legislature and judiciary, it undermines the constitutional guarantee of these rights and ultimately violates the supremacy of the Constitution.[72] This research is significant because it holds the state accountable not only to their constitutional obligations but their international obligations too. South Africa is a state party to various international and regional human rights instruments and has ratified numerous United Nations human rights treaties such as the International Covenant on Civil and Political Rights ('ICCPR'),[73] and the African Charter on Human and Peoples Rights ('Banjul Charter').[74] This means that South Africa is bound by these treaties. Article 27 of the ICCPR stipulates:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 of the ICCPR protects the enjoyment and practice of minority cultures and religions. One of the aims of the ICCPR, as stated in the preamble, is to recognise the inherent dignity of every human being.[75] In giving effect to this international obligation not to deny the enjoyment and practice of cultures and religion, it is imperative that recognition is provided for those who choose to marry according to their religious customs and traditions. In doing so, states protect the dignity of vulnerable parties who may suffer from non-recognition. Further, article 8 of the Banjul Charter provides:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

[71] Section 15, 30 and 31 of the Constitution of the Republic of South Africa, 1996.
[72] Section 2 of the Constitution of the Republic of South Africa, 1996.
[73] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[74] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[75] Preamble of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Article 8 of the Banjul Charter obliges states to provide for the guaranteed protection of the right to freedom of religion. However, the right to culture and freedom of religion are not absolute rights as they must still be consistent with the Bill of Rights.[76] The aim of this study is to determine whether South Africa has upheld and fulfilled its constitutional and international obligations by looking into the role the legislature and judiciary have played in protecting the right to culture and freedom of religion in the context of traditional and religious personal law systems. Through this examination, the study sought to argue that the actions taken by the legislature and judiciary have been necessary to protect both the right to culture and freedom of religion, but these rights have not been given sufficient protection due to lack of regulation of the traditional and religious personal law systems.

D. RESEARCH METHODOLOGY

The methodology adopted is desk-based and doctrinal. The methodology comprises of a review and analysis of case law from the South African judiciary, legislation such as the Recognition of Customary Marriages Act 120 of 1998 and Reform of Customary Law of Succession and Regulation of Related Matters 11 of 2009. This research also includes a desk-based review of regional and international treaties such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women; the African Charter on Human and Peoples Rights; and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Maputo Protocol') in order to examine whether South Africa's legislature and judiciary are fulfilling their regional and international obligations. Finally, academic literature such as articles in journals, chapters in academic books, and academic textbooks are also considered. No empirical research has been conducted.

E. LIMITATIONS

A limitation of this study is that the executive branch of government is not examined. The analysis of case law and legislation allows for the legislature and judiciary to be criticised and analysed more readily. The case law examined reflects how legislation, such as the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 12 of 2009, is enforced between individuals rather than by the executive. Another limitation of this study is the focus on traditional and

[76] Section 30, 31(2), and 36 of the Constitution of the Republic of South Africa, 1996.

religious personal law systems, namely marriages and succession. The study does not consider the common law system except in instances to compare the treatment of traditional and religious personal law systems. In addition, it is to narrow the research to provide a more analytical review of whether the right to culture and freedom of religion is sufficiently protected. Finally, in terms of the religious personal law systems, Muslim marriages will only be considered, to the exclusion of other religious personal law systems. This is because Islam makes up a large portion of the minority religions in South Africa which suffer from non-recognition. In addition, there have been extensive developments in the judicial system pertaining to Muslim marriages.

F. CHAPTER SYNOPSIS

Chapter two analyses the position of African customary law and religious marriages during the colonial and Apartheid eras. The main sources of law relied upon are the Law of Evidence Amendment Act 45 of 1988, the Black Administration Act 38 of 1927, and case law on how the concept of public policy denied and limited cultural and religious rights. Academic literature is used to discuss the impact colonialism and Apartheid had on the nature and development of cultural and religious rights. Finally, the paper briefly introduces the dramatic change caused by the enactment of the Constitution. The purpose of providing a historical overview of the position of African customary law and religious marriages is to highlight the context in which the constitutional rights were founded and the importance of their protection. The system of Apartheid struck at the core of human dignity for the majority African, coloured, and Indian population and its effects can still be felt today. However, the Constitution paves the way for social transformation by guaranteeing rights to all South Africans which were previously denied during Apartheid. Essentially, it is important to have a historical overview so that we do not repeat the divisions of the past.

Chapter three focuses specifically on African customary law and how it has been treated since the enactment of the Constitution, namely its recognition in legislation and its application in court. The main sources of law relied upon are the Recognition of Customary Marriages Act 120 of 1998 (‘RCMA’), the Reform of Customary Law of Succession and Regulation of Related Matters 11 of 2009(‘RCLSA’), and case law that highlights the approach courts have taken towards developing and protecting African customary law. This is to determine the role the legislature and judiciary play in protecting the right to culture and what steps they have taken, if any, in providing sufficient protection. This chapter argues that the legislature has

taken the necessary steps to recognise African customary marriages and African customary law of succession. The necessary steps taken include the recognition of both monogamous and polygamous marriages,[77] the equality of spouses,[78] including women in inheritance claims,[79] and the provision made for living customary law to celebrate and negotiate according to the individual's customary law.[80] However, this latter provision has created problems for the judiciary who has the difficult task of ascertaining the requirements of a customary marriage and ensuring the development of African customary law is in line with the right to culture and consistent with the Constitution. It is argued in this chapter that the legislature and judiciary have not provided sufficient protection for the right to culture in the context of traditional personal law systems.

Chapter four focuses on religious marriages, namely Muslim marriages. The chapter analyses whether there has been a change in the treatment of religious marriages since the enactment of the Constitution. The chapter analyses the legislature's lack of enactment of legislation recognising and regulating religious marriages and the effect it has had on individuals practising their religious personal law system. The paper argues that the legislature effectively failed to sufficiently protect the right to freedom of religion in the context of religious personal law systems as individuals have had to litigate their rights in order to receive protection, but many vulnerable parties have suffered as a result of this. The judiciary, on the other hand, has developed statutes to incorporate parties to religious marriages. Since most of the developments of religious marriages has been made by the judiciary, the main source of law used is case law. It is then argued that the judiciary has filled the gap of non-recognition of religious marriages to ensure that the right to freedom of religion and women's rights are protected. Although this recognition of Muslim marriages by the court has been necessary, the lack of regulation of Muslim personal law does not sufficiently protect women's rights and the right to freedom of religion. By ordering the President and Cabinet, together with Parliament, to enact legislation recognising religious marriages within 24 months,[81] the judiciary has taken necessary steps to hold the legislature accountable and to ensure vulnerable parties are protected. However, the lack of regulation of religious personal law systems keeps women in vulnerable positions as gender discriminatory practices are maintained due to the lack of

[77] Section 2 of the Recognition of Customary Marriages Act 120 of 1998.
[78] Section 6 of the Recognition of Customary Marriages Act 120 of 1998.
[79] Section 4 of the Reform of Customary Law of Succession and Regulation of Related Matters 11 of 2009.
[80] Section 3 of the Recognition of Customary Marriages Act 120 of 1998.
[81] *Women's Legal Centre Trust v President of the Republic of South Africa and others* (2022) ZACC 23 (28 June 2022).

regulation. Thus, the legislature and judiciary have not provided sufficient protection for women's rights and their right to freedom of religion in the context of religious personal law systems.

The concluding chapter summarises the arguments made in each chapter to highlight the insufficient protection provided by the legislature and judiciary. It concludes the paper by answering the research questions: what is the role the South African legislature and judiciary play in protecting the right to culture and freedom of religion in the context of traditional and religious personal law systems? Essentially, the paper has argued that the legislature and judiciary have failed in their constitutional and international obligation to provide sufficient protection for the right to culture and freedom of religion. As a result of this failure, it has harsh implications for women who are subject to their traditional or religious personal law system. They are either subjected to discriminatory practices, unable to enforce benefits under their own personal law system or invalidated by the uncertain judiciary.

II. CHAPTER TWO: THE HISTORICAL POSITION OF AFRICAN CUSTOMARY MARRIAGES AND RELIGIOUS MARRIAGES

A. INTRODUCTION

This chapter aims to provide a historical context of the treatment of African customary and religious marriages. It aims to answer the sub-question of how the right to culture and freedom of religion were treated during colonialism and Apartheid. This chapter provides context for the argument that the historical treatment of traditional and religious personal law systems still plays a role in how it is treated today. By determining this question, the following chapters can analyse whether the legislature and judiciary have changed how the right to culture and freedom of religion were treated historically and whether the rights have been afforded sufficient protection in the context of traditional and religious personal law systems.

First, this chapter focuses on the period of colonialism. The policy of indirect rule had a major effect on the trajectory of indigenous laws as it ultimately resulted in the codification of African customary law and its stagnation.[82] Indirect rule was a colonial governance strategy used to ensure the control of their colonial subjects.[83] It entailed the use of traditional authorities and structures that applied and enforced indigenous laws provided they complied with colonial laws.[84] The codification of African customary law resulted in the distortion of African customary law.[85] The effect of this today is that there is a struggle between the accuracy of official customary law and the ascertainment of living customary law.[86] The significance of this for our purposes is that the majority African population were not able to practise their culture and religion effectively as practices that did not suit the colonial interests or culture were denied and not recognised. Thus, the right to culture and freedom of religion were not recognised rights nor protected by the legislature or judiciary during colonialism.

---

[82] L Mofokeng, C Himonga & T Nhlapo 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] L Mofokeng, C Himonga & T Nhlapo 'The nature and concept of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South African. Post Apartheid and Living Law Perspectives* (2014) stipulates that the difference between official and living customary law is that official customary law was established through the transference of a flexible body of customary law into a written and rigid version of customary law. Official customary law comprises codified customary laws and other legislation, court precedents and textbooks. Living customary law, on the other hand, is flexible laws that evolve with the changing society and represent the actual customs and practices of the indigenous community.

Secondly, the chapter focuses on the concept of public policy and how it was used to deny recognition of traditional and religious personal and family law systems. Public policy was a religiously informed doctrine that took a conservative, racist, and Christian-based approach.[87] Public policy was used to deny many citizens the right to culture and freedom of religion by reflecting the values of the white, Christian population.[88] Customary marriages and religious marriages were considered contrary to public policy due to the potential for polygamy even if the marriage was de facto monogamous.[89] The chapter then discusses various legislation that was used to further oppress the majority African, Coloured and Indian population such as the Black Administration Act 38 of 1927 and the Law of Evidence Amendment Act 45 of 1988. The Black Administration Act was one of the means used to enforce the state's agenda of segregation and control of the indigenous population.[90] In addition, section 1 of the Law of Evidence Amendment Act 45 of 1988 contained a repugnancy clause which was used to judge African customary law against the English understanding of natural justice, equity, and fairness.[91] This resulted in the alteration or moulding of existing customary law to align with official requirements.[92] The repugnancy clause was used to advance the supremacy of European culture and intellect by subjecting the whole South African population to what the white European settlers deemed appropriate.[93] As intended by the Apartheid regime, the majority black African, coloured, and Indian population were excluded from the legal system as their traditional and religious personal law systems were denied recognition. Whilst the policy of indirect rule was enforced upon the indigenous African population, religious personal law systems such as Islam and Hinduism were forced to operate parallel to the common law and only in the private sphere.[94]

Finally, the concluding section of the chapter highlights the treatment of traditional and religious personal law systems which is that African customary marriages and religious

[87] W Amien 'South African women's legal experiences of Muslim personal law' in Lauren Fielder & Kyriaki Topidi (eds) *Religion as Empowerment – Global Legal Perspectives* (2016) 53-77 at 54.
[88] *Ryland v Edros* 1997 (2) SA 690 (C) at 707.
[89] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[90] Fatima Osman 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 22 Potchefstroom Electronic Law Journal 1.
[91] Emile Zitzke 'A Decolonial Critique of Private Law and Human Rights' (2018) 34 *SAJHR* at 497.
[92] L Mofokeng, C Himonga & T Nhlapo 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[93] Emile Zitzke 'A Decolonial Critique of Private Law and Human Rights' (2018) 34 *SAJHR* at 497.
[94] Waheeda Amien & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 Maryland Journal of International Law 505 at 507.

marriages were not recognised as valid marriages in South Africa.[95] Recognition was limited to common law marriages which were defined as 'the legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts.'[96] The effect of this was that the African, Coloured, and Indian population had their dignity impaired as their most intimate relationships were not recognised and their right to culture and freedom of religion were denied as oppressive, racist laws prevented them from effectively practicing their culture and religion.[97] However, with the advent of the Constitution of the Republic of South Africa, 1996, this historical denial of the right to culture and freedom of religion were changed.[98]

B. COLONIALISM

Initially, under British rule, the policy of assimilation or direct rule was used to replace indigenous practices and indigenous groups were subjected to the authority of colonial laws.[99] For example, indigenous practices of communal land tenure were replaced with European customs such as individual titles to land. The British set up colonial courts in the Cape Colony that were run by colonialists who applied African customary law.[100] The effect of this was that the state officials who applied African customary law imposed their values and beliefs into African customary law due to their misunderstanding and ignorance of the content and nature of African customary law.[101] Essentially, African customary law was being applied from a colonialist point of view. For example, colonial authorities only recognised aspects of African customary law that aligned with their objectives and modified other indigenous practices to suit their interests.[102] The assimilation project was then replaced by indirect rule due to the increasing resistance by indigenous communities and the increasing cost of maintaining colonial governments to govern indigenous communities.[103] Indirect rule was used as a tool to

[95] *Bronn v Fritz Bronn's Executors & others* 1860 (3) Searle 313; *Seedat's Executors v The Master (Natal)* 1917 (AD) 302; *Ismail v Ismail* 1983 (1) SA 1006 (A).
[96] *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019.
[97] The Group Areas Act 41 of 1950; the Natives (Urban Areas) Act 21 of 1923; Bantu Education Act 47 of 1953; Immorality Act 21 of 1950.
[98] Section 15, 30 and 31 of the Constitution of the Republic of South Africa, 1996.
[99] Francois Du Bois 'Introduction to South African Law: History, System and Sources' in Cornelius G, Van der Merwe & Jacques E. Du Plessis (eds) *Introduction to the Law of South Africa* (2004) at 13.
[100] L Mofokeng, C Himonga & T Nhlapo et al 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[101] L Mofokeng, C Himonga, T Nhlapo et al 'The Nature and Concept of Customary Law' in Chuma Himonga & Thanadabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 2.
[102] Ibid.
[103] L Mofokeng, C Himonga & T Nhlapo et al 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.

divide the majority African population into smaller 'tribes' to create the illusion that there was not a majority indigenous population and to give indigenous African communities the false impression of independence and group autonomy.[104] In a Memorandum of 1879 the following policy was outlined:

> The Government of the Natives cannot be carried on under the common law of the country. They are not yet sufficiently advanced in civilisation to understand or be ruled by it. It is essential that they should for some time to come be governed under and by their own laws and customs. [105]

Thus, the acknowledgement of customary law by colonial and apartheid administrations was not because they acknowledged indigenous individuals as beings with decision-making capacity, creative abilities, and equal moral worth, encompassing the right to self-governance.[106] Instead, the acknowledgment of customary law primarily stemmed from the state's aim to divide and oppress black individuals, as utilizing the indigenous system and people seemed most effective in achieving these objectives.[107] In Natal, the policy of indirect rule was adopted which entailed the establishment of traditional leaders who applied African customary law instead of state officials, however, the traditional leaders were still subject to state oversight.[108] This was an attempt to further the political agenda of controlling the population.[109] To maintain and further the objective of a racially segregated state, a parallel legal system developed.[110] Although common law became the dominant legal system in South Africa, the policy of indirect rule allowed for the survival of some indigenous law. However, indigenous law was only applied in matters concerning family relationships and the repugnancy clause had the effect of diluting the indigenous character of customary law.[111] In addition, there was potential for abuse and the distortion of African customary law as certain voices were privileged.[112] In the Cape, the state

---

[104] Ibid.
[105] N. S. Peart 'Section 11(1) of the Black Administration Act No. 38 of 1927: The Application of the Repugnancy Clause' 1982 Acta Juridica 99 at 102.
[106] MI Madondo 'Constitutional Challenges in the Post-Apartheid Era' (2019) 82 Journal for Contemporary Roman-Dutch Law 4 at 559.
[107] L Mofokeng, C Himonga & T Nhlapo et al 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[108] Ibid.
[109] Ibid.
[110] Francois Du Bois 'Introduction to South African Law: History, System and Sources' in Cornelius G, Van der Merwe & Jacques E. Du Plessis (eds) *Introduction to the Law of South Africa* (2004) at 14.
[111] Ibid.
[112] L Mofokeng, C Himonga & T Nhlapo et al 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.

officials relied on the words of male elders in the community to ascertain the African customary law which enforced patriarchal views and was open to manipulation of the law.[113] In Natal, the traditional leaders would manipulate and distort the law to appease the state officials who had oversight of them and to create laws that benefitted them.[114] These laws were then codified into official customary law. Besides the issue of distortion, further issues arose such as the translation of African customary law. For example, in succession matters, the crux of the matter was the transference of responsibility to the heir who was under an obligation to take care of the surviving family members.[115] However, upon codification, succession matters became focused on inheritance and the right of the male heir to acquire all the family property.[116] Another example would be the concept of lobolo which came to be translated by the colonialists as 'bride price' and was believed to be the sale of the wife and derogatory to their dignity.[117] However, women who took part in lobolo neither regarded it as a sale nor derogatory to their dignity but rather symbolic of the conclusion of a marriage and evidence of a new matrimonial relationship.[118] Thus, lobolo expresses what those governed by African customary law regard as a valid marriage. The policies endorsed during colonialism were aimed at maintaining the subjugation and control of the majority indigenous population and had the ancillary effect of distorting African customary law. Essentially, the majority African population were denied the right to culture and freedom of religion as their traditional personal law systems, African customary law, were not afforded sufficient protection or application. The denial of rights was further entrenched during Apartheid where the concept of public policy was used to deny the recognition of traditional and religious personal law systems.

C. PUBLIC POLICY

Lobolo and polygyny were two concepts that were deemed immoral and contrary to public policy. In *Kaba v Ntela* 1910 TPD 964, the respondent sought to recover ten heads of cattle that he paid as lobolo and to obtain custody of the children of the marriage.[119] The native commissioner found in favour of the respondent,[120] however, on appeal, the state court found

[113] Ibid.
[114] Ibid.
[115] L Mofokeng, C Himonga & T Nhlapo et al 'The Customary Law of Succession' in Chuma Himonga & Thandabantu Nhlapo *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 9.
[116] Section 23 of the Black Administration Act 38 of 1927.
[117] C.R.M. Dlamini 'The Role of Customary Law in Meeting Social Needs' 1991 *AJ* 71.
[118] Ibid.
[119] *Kaba v Ntela* 1910 TPD 964 at 965.
[120] Ibid at 964.

African customary marriages and lobolo are immoral and contrary to public policy.[121] The issues to be determined before the court were firstly, whether the marriage was a valid one;[122] and, secondly, if it was not, whether the respondent was nevertheless entitled to receive back the lobolo cattle, and to the custody of the minor children.[123] In dealing with the first question, the Transvaal High Court had to consider whether polygynous marriages are valid marriages.[124] The court relied on various case law, notably *Mashia Ebrahim v Mahomed Essop* 1905 T.S 59 where the Chief Justice on the Transvaal colony stated:

> Now it is quite certain that if this marriage were a polygamous one it would not be recognised in this country, no matter whether it was recognised as valid in other countries or not. With us marriage is the union of one man with one woman, to the exclusion, while it lasts, of all others; and no union would be regarded as a marriage in this country, even though it were called and might be recognised as a marriage elsewhere, if it was allowable for the parties to legally marry a second time during its existence.[125]

In addition, the court found that African customary marriages are not consistent with the general principles of 'civilisation' because of their polygamous character.[126] Thus, the court found the marriage to be invalid.[127] In determining the second question the court relied on *Malgas v Gakavu* (1891) 6 EDC 225 where it was stated that 'lobolo is a consideration given for future immoral cohabitation, and therefore, being illegal, cannot be recovered in a court of law.'[128] As a result, the respondent failed in his claim to recover the lobolo.[129] Finally, the children born of an invalid marriage are considered illegitimate and without a father.[130] The court relied on *Koytyo v Sibaru* 7 EDC 186 where it was determined that any child born of a native marriage is considered illegitimate and the father has no rights to custody.[131] As seen from these cases, public policy took a Eurocentric approach that deemed African customary marriages as immoral. Declaring African customary marriages as immoral impacted not only the spouses of an African customary marriage but also the children born of the marriage. The spouses were

[121] Ibid at 971.
[122] Ibid at 965.
[123] Ibid.
[124] *Kaba v Ntela* 1910 TPD 964 at 967.
[125] *Mashia Ebrahim v Mahomed Essop* 1905 T.S 59 at 61.
[126] The court relied on section 2 of Law 4 of 1885 which provides: 'The laws, habits and customs hitherto observed among the natives shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with the general principles of civilisation recognised in the civilised world.'
[127] *Kaba v Ntela* 1910 TPD 964 at 969.
[128] *Malgas v Gakavu* (1891) 6 EDC 225 at 226.
[129] *Kaba v Ntela* 1910 TPD 964 at 969.
[130] Ibid.
[131] *Koytyo v Sibaru* 7 EDC 186.

affected as their most intimate relationships were not recognised and they were left in vulnerable positions because of it. They were unable to receive any benefits that accrue from marriage nor were they able to have their living customary law enforced by a court of law without it being modified by the repugnancy clause. Children, too, were impacted as they were declared illegitimate and this came with numerous disadvantages such as being discriminated against, being denied benefits such as inheritance, and the implications it had on a child's dignity.

The judiciary's perception of polygyny as an immoral practice was also evident in religious marriages that were not Christian. The case of *Ismail v Ismail* 1983 (1) SA 1006 (A) concerned a Muslim couple who underwent a marriage ceremony according to Muslim custom.[132] The defendant had terminated the marriage and the plaintiff sought to claim maintenance, delivery of the *mahr*,[133] and payment of the value of two sets of gold jewellery.[134] The court a quo found that the marriage between the parties was a polygynous one and relied on the established refusal in case law to recognise such marriages on the grounds of public policy.[135] Ultimately, the appeal court had to determine if this decision was correct. The Court relied on the common law definition of marriage and emphasised the concept of monogamy as a fundamental element of marriage.[136] Despite the evidence that the parties were in a de facto monogamous marriage, the Court stated that a marriage is still potentially polygynous if it is celebrated according to customs which allow for polygyny.[137] The Court upheld the court a quo's decision by finding that the marriage was contra bonos mores.[138] Essentially, the Court did not want to depart from the long-standing case law which consistently refused to recognise polygynous unions.[139]

The introduction of the Black Administration Act in 1927 marked the beginning of a dual system of law by establishing a separate but inferior system of law for black South Africans whilst the common law applied to the rest.[140] Essentially, it was the main tool used to entrench

[132] *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1017.
[133] *Mahr* refers to the 'dower payable by the husband to the wife' in Waheeda Amien & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 Maryland Journal of International Law 505 at 525.
[134] Ibid at 1019.
[135] Ibid.
[136] Ibid at 1024.
[137] Ibid at 1020.
[138] Ibid at 1027.
[139] *Bronn v Fritz Bronn's Executors & others* (1860) 3 Searle 313 at 318; *Ngqobela v Sihele* 1893 (10) SC 346 at 352; *Kaba v Ntela* 1910 TS 964 at 969.
[140] Sanele Sibanda 'When is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17 Human Rights Brief 31.

the system of indirect rule by empowering traditional leaders as agents of the colonial state.[141] Section 11(1) of the Black Administration Act provides that the court had discretion to apply customary law, except where the law was contrary to natural justice or public policy. This section also provided for lobolo to be recognised as a concept that is not repugnant to the principles of public policy which is a shift away from *Kaba v Ntela*. Although the Black Administration Act has now been repealed, the Law of Evidence Amendment Act, which also contains a repugnancy clause, remains in force. Section 1(1) provides:

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.[142]

Even though this section remains in force, the concept of public policy has changed. The transition into a constitutional democracy and the establishment of the Bill of Rights changed the values underpinning public policy. The Bill of Rights extended the concept of public policy to incorporate the values shared by the community at large rather than only one section of it as was the case under Apartheid.[143] The case of *Ryland v Edros* 1996 (4) All SA 557 (C) was one of the first cases since the enactment of the Constitution that highlights the change in public policy towards Muslim marriages. In *Rylands v Edros,* which concerned a couple who were married according to Islamic rites,[144] the Cape High Court groundbreakingly departed from the *Ismail* decision.[145] The Court found that:

> It is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.[146]

Notably, the Court emphasised the principles of equality and tolerance of diversity as values that now underpin public policy.[147] This case resulted in the recognition of monogamous Muslim marriages as an enforceable contract in South African law and granted Mrs Edros

[141] Ibid at 32.
[142] Section 1(1) of the Law of Evidence Amendment Act 45 of 1988.
[143] *Ryland v Edros* (1996) 4 All SA 557 (C).
[144] Ibid.
[145] Ibid at 711.
[146] Ibid at 707.
[147] Ibid at 709.

spousal maintenance.[148] This is important because it shows a shift in the treatment of the right to culture and freedom of religion whilst also protecting the rights of women in the context of religious personal law systems.

African customary law has also been elevated to a position of equality with the common law as section 211(3) of the Constitution stipulates that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' In addition to the Constitution recognising African customary law as an independent source of law, the Constitutional Court acknowledges that customary law must be seen as an integral part of our law rather than through the common law lens like in the past.[149] Although customary law is regarded as an independent source of law and its ultimate validity comes from the Constitution itself, it is subject to and must accord with the Constitution as is the case with any other law.[150] This is because the Constitution is the supreme law of South Africa and any law or conduct that is inconsistent with the Constitution is considered invalid.[151] Importantly, the Constitution commits South Africa to legal pluralism by allowing for the enactment of legislation that recognises traditional and religious personal and family law systems which comes a long way from our divisive past.[152] As a result, legislation has been enacted to recognise traditional personal and family law systems, namely the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 which will be discussed in the following chapter.

D. CONCLUSION

This chapter provided a historical overview of the treatment of traditional and religious personal law systems. First, during colonialism, the policy of direct rule was enforced which attempted to assimilate everyone, mainly the indigenous African population, into the English common law.[153] Assimilation required the denial of traditional and religious personal law systems. When the policy of direct rule was proven to be too costly and increased indigenous

[148] Ibid at 718.
[149] *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18 para 51.
[150] Section 211(3) of the Constitution of the Republic of South Africa, 1996. In cases *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580; *Alexkor Ltd & another v The Richtersveld Community & others* [2003] ZACC 18; and *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC) the Constitutional Court have recognised the requirement of customary law to accord with the Constitution.
[151] Section 2 of the Constitution of the Republic of South Africa, 1996.
[152] Section 15(3)(a)(ii) of the Constitution of the Republic of South Africa, 1996.
[153] L Mofokeng, C Himonga & T Nhlapo et al 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.

resistance, the colonial British government enforced the policy of indirect rule.[154] Although the policy of indirect rule gave the impression that African customary law was allowed to be enforced, it was in fact under heavy colonial oversight which limited and distorted the nature and enforcement of African traditional and religious personal law systems. For example, polygyny and lobolo were considered immoral and uncivilised.[155] Since African customary marriages and religious marriages, such as Muslim, Hindu, and Jewish marriages, allowed for polygyny they were immediately invalid even if the marriage was a de facto monogamous marriage.[156] During Apartheid, the concept of public policy and the repugnancy clause were used as tools to invalidate traditional and religious personal law systems. Public policy was informed by racist, conservative, and Christian values in which monogamy was seen as a fundamental value of marriage.[157] Thus, African customary marriages, Muslim marriages, Hindu marriages, and Jewish marriages were still not considered valid marriages during the Apartheid era. The Black Administration Act and Law of Evidence Amendment Act contained a repugnancy clause which had the effect of diluting African customary law.[158] This was because African customary law was judged according to the English understanding of what was just and anything that did not align with this understanding was considered invalid.[159] The ignorance of state officials as to the content and nature of African customary law also led to the distortion of African customary law as they did not attempt to ascertain the true content of African customary law.[160] Essentially, traditional and religious personal law systems were not recognised and if they were recognised, they were limited to the extent that they complied with English common law. Ultimately, people practising and following their traditional and religious personal law systems were excluded from the dominant legal system in the context of marriages. Thus, this chapter answers the first part of the first sub-question: How were the right to culture and freedom of religion treated during Apartheid? The short answer is that the right to culture and freedom of religion were not recognised rights. Those who followed their

[154] Ibid.
[155] *Malgas v Gakavu* (1891) 6 EDC 225; *Mashia Ebrahim v Mahomed Essop* 1905 T.S 59; *Kaba v Ntela* 1910 TPD 964; *Ismail v Ismail* 1983 (1) SA 1006 (A).
[156] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[157] Waheeda Amien & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 Maryland Journal of International Law 505 at 506; W Amien 'South African women's legal experiences of Muslim personal law' in Lauren Fielder & Kyriaki Topidi (eds) *Religion as Empowerment – Global Legal Perspectives* (2016) 53-77 at 54.
[158] Section 11(1) of the Black Administration Act 38 of 1927 and section 1 of the Law of Evidence Amendment Act 45 of 1988.
[159] Emile Zitzke 'A Decolonial Critique of Private Law and Human Rights' (2018) 34 *SAJHR* at 497.
[160] L Mofokeng, C Himonga & T Nhlapo et al 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.

traditional and religious personal law systems, such as getting married according to their customs or religion, were excluded from state law and were not recognised as valid marriages. The effect of this was that the majority African, coloured, and Indian population were denied the benefits that flow from recognition of a marriage. For example, they could not claim inheritance upon the death of a spouse as they were not considered the surviving spouse in terms of the Intestate Succession Act 81 of 1987;[161] they could not claim maintenance upon divorce as the marriage was invalid to begin with;[162] and their children were deemed illegitimate.[163] These examples mainly impacted on women in these unrecognised marriages due to men usually being the breadwinner, whilst women cared for the home, and because men were able to enter into subsequent marriages.[164] Thus, women were left in a vulnerable position. The lack of recognition of the right to culture and freedom of religion impaired the dignity of a large section of South African society. This chapter also briefly touches on the second part of the first sub-question: has there been a change in the treatment of these rights post-Apartheid? The enactment of the Constitution, specifically the Bill of Rights, brought about dramatic changes to South African society. The right to culture and freedom of religion are now recognised rights and the state is under an obligation to respect and protect these rights.[165] In addition, the values of equality and tolerance of diversity are some of the values that now inform public policy.[166] The case of *Rylands v Edros* was also briefly discussed as it is an important case for highlighting the beginning of change in the treatment of traditional and religious personal law systems. The Court acknowledged that the values of public policy have changed since the Constitution came into force as it is now the values shared by the community at large that inform public policy rather than only one section as was the position in the past.[167] Importantly, the Constitution allows for the enactment of legislation that recognises traditional and personal law systems and this has resulted in the enactment of the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and

[161] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580; *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC).
[162] *Ismail v Ismail* 1983 (1) SA 1006 (A); *Ryland v Edros* (1996) 4 All SA 557 (C); *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC); *Khan v Khan* 2005 2 SA 272 (T).
[163] *Koytyo v Sibaru* 7 EDC 186.
[164] Waheeda Amien 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 Acta Juridica 192-218 at 205,206.
[165] Section 7(2) of the Constitution of the Republic of South Africa, 1996.
[166] *Ryland v Edros* (1996) 4 All SA 557 (C) at 709.
[167] Ibid at 707.

Regulation of Related Matters 11 of 2009. Thus, the right to culture and freedom of religion enjoys guaranteed protection by the Constitution.[168]

[168] Section 15, 30 and 31 of the Constitution of the Republic of South Africa, 1996.

III. CHAPTER THREE: AFRICAN CUSTOMARY LAW

A. INTRODUCTION

This chapter focuses on the legislature and judiciary's treatment of African customary law in post-Apartheid South Africa. This chapter aims to address the sub-questions: has the South African legislature and judiciary provided sufficient protection for the right to culture within the context of traditional personal law systems? And what steps, if any, have been taken to provide sufficient protection? The argument put forth is that the legislature and judiciary have not provided sufficient protection for women practising African customary law. Although the necessary developments have been made such as legislation being enacted to recognise and regulate African customary law,[169] it has still brought about practical problems for women due to its poor drafting. For example, the Recognition of Customary Marriages 120 of 1998 ('RCMA') requires the husband of an African customary marriage to conclude a contract that would regulate the matrimonial system of his marriage.[170] However, in practice this requirement is impractical due to various reasons such as lack of awareness of the requirement, the costs accumulated by hiring a lawyer to draft such documents required, and the power dynamics between husbands and wives.[171] Thus, the requirement is rarely enforced by those entering African customary marriages, resulting in lack of regulation of the proprietary consequences of polygynous customary marriages. As will become clear through the paper's discussion of case law, it is usually women who approach the court to have their customary marriage declared valid and this is either to assert their rights to succession or seek a divorce.[172] A further argument made is that the ability of individuals to practise their right to culture depends on the judiciary and legislature's application and enforcement of living customary law. The importance of the right to culture is that it represents a transition from our racist past where cultural differences were used as a means of legitimating the control and rule of white people whilst weakening the unity amongst African communities.[173] Thus, the protection of the right to culture is essential in our constitutional democracy. The judiciary, it is argued, takes an inconsistent approach in its application and enforcement of African customary law. This will

[169] The Recognition of Customary Marriages Act 120 of 1998.
[170] Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998.
[171] Chuma 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.
[172] Thandabantu Nhlapo 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 Journal of Southern African Studies 273 at 275.
[173] Lisa Fishbayn 'Litigating the Right to Culture: Family Law in the New South Africa' (1999) 13(2) *International Journal of Law, Policy and the Family* 147 at 152.

be shown through the judiciary's interpretation and application of section 3(1)(b) of the RCMA where the requirement of lobolo and integration of the bride has been contested as requirements for a valid customary marriage. By taking an inconsistent approach, the judiciary has created uncertainty in what the essentials are of a valid customary marriage, and this has impacted women in African customary marriage. The uncertainty of what constitutes a valid African customary marriage has resulted in the invalidation of customary marriages which women face the brunt of as they are unable to practice their right to culture and claim for certain benefits such as inheritance.

The chapter first discusses the judiciary's approach to developing African customary law of succession by analysing three cases: *Mthembu v Letsela* 2000 3 SA 867 (SCA), *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), and *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580. The first case shows how courts have uncritically applied official customary law even where it infringes on rights contained in the Bill of Rights. The second case demonstrates the ability of courts to recognise when there have been developments in living customary law. The third case highlights the failure of the court to develop African customary law and its ease of replacing customary laws with common law. This is to advance the argument that the judiciary's inconsistent application and enforcement of African customary law impacts the individual's right to practice their culture. Thus, it is suggested that in to bring African customary law in line with the Constitution, courts should keep in mind the values underlining African concepts so that the developed African customary law is still recognisable to the people practising African customary law.[174]

This chapter then discusses the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 ('RCLSA'). It analyses the various provisions of the RCLSA and finds that the RCLSA both imports common law rules and accommodates African customary law, resulting in a modified version of African customary law. It is argued that the RCLSA failed to preserve the African values that underlie African customary law of succession such as the notion of 'stepping into the shoes' of the deceased by taking on the responsibilities of care over the deceased's dependants. However, the RCLSA is a necessary development for

[174] Thandabantu Nhlapo 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 Journal of Southern African Studies 273 at 289.

women as the rule of male primogeniture no longer persists which allows them to inherit from their deceased husband's estate.

The chapter then discusses the Recognition of Customary Marriages Act 120 of 1998. It is argued that the legislature took a similar approach in the RCMA as it did in the RCLSA. This is because it imports certain provisions from common law such as the consent and age requirement which are seen as necessary additions to African customary marriages to prevent child marriages and harmful practices such as *ukuthwala*.[175] The RCMA also attempts to accommodate living customary law in section 3(1)(b) as it is a flexible provision that allows groups to marry according to their customary law systems. Although the provision has been argued as vague, it does allow communities to maintain their traditional requirements whilst also evolving the law to recognise modern developments.[176] However, this makes it a difficult task for the judiciary to ascertain whether a valid customary marriage was concluded which leads us to the next section of the chapter- the judiciary's inconsistent approach to African customary marriages.

The chapter then discusses the inconsistent approach of the judiciary in its determinations of whether the payment of lobolo in full is a requirement of a valid customary marriage and whether the 'handing over' of the bride is a requirement of a valid customary marriage. To support the argument that the judiciary has taken an inconsistent approach to African customary marriages, the cases of *Mthembu v Letsela* 2000 3 SA 867 (SCA); *Mkabe v Minister of Home Affairs & others* (2016) ZAGPPHC 460, *Mxiki v Mbatha* (2014) ZAGPPHC 825; and *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) are discussed. The result of the inconsistency of what constitutes a valid customary marriage is that it impairs the ability of individuals to practice their culture as it may be deemed invalid depending on the side of the bed the judiciary wakes up on. In addition, this puts women and children in a position where they are unable to inherit from their husband's or father's estate. Thus, this chapter aims to argue that the legislature and judiciary have not provided sufficient protection for the right to culture in the context of traditional personal law systems.

[175] *Jezile v S & others* 2016 (2) SA 62 (WCC). *Ukuthwala* also refers to an 'abduction marriage' and is a marriage that can take place without the consent of the woman. See Kate Rice 'Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation about Gender, Rights and Generational Authority Among the Xhosa' (2014) 40 *Journal of Southern African Studies* 381-399.
[176] T Nhlapo 'Missed Opportunities in Customary Marriage Law in South Africa: Law versus Culture … Again' in Jens Scherpe & Stephen Gilmore (eds) *Family Matters: Essays in honour of John* Eekelaar (2022) 403-418 at 409.

B. THE DEVELOPMENT OF AFRICAN CUSTOMARY LAW OF SUCCESSION

In the case of *Mthembu v Letsela* 2000 3 SA 867 (SCA) the deceased was the holder of a 99-year leasehold title, and he lived on the property with the appellant, Ms Mthembu.[177] The deceased's mother, sister, and father, who is the respondent in this case, also lived on the property.[178] The appellant sought to have the provisions of section 23(2) of the Black Administration Act declared invalid on the basis that the rule of primogeniture unfairly discriminates women based on sex.[179] The respondent relied on the rule of male primogeniture as well as section 30 of the Constitution which guarantees everyone the right to participate in the cultural life of one's choice.[180] The rule of male primogeniture was stated as:

> The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue, the second son becomes heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue, his father succeeds ... Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable, and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary, from his own resources, and not to expel them from his home.[181]

When discussing whether the rule of primogeniture conflicts with the right to dignity, the Transvaal Provincial Division found 'there can be no question that the succession rule preserves rather than offends the dignity of the persons affected.'[182] In addition, the appellant claimed that she was the widow of the deceased as she alleged that they entered into a customary law marriage 14 months before the deceased died.[183] As evidence for her contention that she was in a customary marriage with the deceased, she produced a receipt of the first instalment of R900 towards her lobolo of R2000.[184] However, the Supreme Court of Appeal found that the marriage was invalid due to the failure of the deceased to pay the entire lobolo

[177] *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 2.
[178] Ibid.
[179] Ibid para 4.
[180] *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) at 945.
[181] *Mthembu v Letsela* (2000) 3 All SA 219 (A) para 8.
[182] *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) at 947.
[183] *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 5.
[184] Ibid.

amount.[185] This finding meant that Ms Mthembu was unable to claim from her deceased husband's estate and this not only left her in a vulnerable position but also her daughter who now is considered illegitimate and also unable to inherit from her deceased father's estate.[186] The Supreme Court of Appeal seemed to have relied on a strict interpretation of a quote from an article by Burman even where the author herself stated that payment of lobolo, at least in part, is a crucial element for transferring the child into the father's family.[187] The objection of lobolo not being paid in full to invalidate a customary marriage is one of a few reasons that have been used to challenge the validity of a customary marriage and the judiciary's decisions relating to these challenges have produced uncertainty. This will be discussed further under the discussion of the judiciary's inconsistent approach to African customary marriages.

In *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), the Constitutional Court set out a three-part test for ascertaining and developing African customary law. The case concerned the appointment of Ms Shilubana as the traditional leader of the Valoyi community.[188] Her father had been *hosi* of the community but upon his death her uncle, Hosi Richard, took chieftainship.[189] This was because of the rule of male primogeniture which prohibited women from succeeding as *hosi*.[190] However, it was decided by the Valoyi community, namely the Royal Family and the Valoyi Tribal Authority including *Hosi* Richard, that Ms Shilubana would succeed her uncle and be appointed as *hosi*.[191] Before *Hosi* Richard died, he wrote a letter which has been accepted by the Supreme Court of Appeal as a withdrawal of his support for Ms Shilubana's chieftainship.[192] Once *Hosi* Richard died, his son interdicted the appointment of Ms Shilubana as *hosi*, claiming that he was entitled to succeed his father as *hosi.*[193] The Constitutional Court had to determine if the Valoyi community possessed the power to institute traditional leadership in a house that had been deprived of it due to gender discrimination.[194] The court established a test to determine what the legal position is under customary law and provided that first, both the traditions and present practice of a community must be considered.[195] Secondly, courts must respect the rights of communities and their authorities to

[185] Ibid para 17.
[186] Ibid para 33.
[187] Sandra Burman 'Illegitimacy and the African Family in a Changing South Africa' 1991 Acta Juridica 36 at 41.
[188] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) para 3.
[189] Ibid. *Hosi* refers to the chief of the community.
[190] Ibid.
[191] Ibid para 5.
[192] Ibid para 6.
[193] Ibid para 6,7.
[194] Ibid para 1.
[195] Ibid para 44.

amend and repeal their laws.[196] This is because of the inherent nature of customary law as an evolving system of law. Finally, courts must be mindful of the impact customary law has on the lives of people.[197] Thus, a balance must be struck between the need for flexibility and development on one hand and the value of legal certainty on the other.[198] An important feature of giving effect to customary law and essentially the right to culture is to allow for developments within the community and to engage with the living customary law. As in *Shilubana*, the Constitutional Court recognised the ability of the Valoyi community to develop their rules of succession regarding traditional leaders and engaged with the living customary law which allowed Ms Shilubana, a woman, to succeed a man as *hosi*. This fosters the right of individuals to practice their culture.

In other instances, instead of developing African customary law, the courts have struck down African customary law and replaced it with common law. The case of *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 is a case in point. This case concerned intestate succession under African customary law. The deceased was survived by his two minor daughters who were unable to inherit from their deceased father's estate due to the rule of male primogeniture as contained in section 23 of the Black Administration Act 38 of 1927 and its regulations.[199] In *Bhe* the deceased's father claimed the right to inherit the estate and he sought to sell off the assets, namely the immovable property, to cover the deceased's funeral expenses.[200] The consequence of the sale of the immovable property would have rendered both the deceased's minor daughters and Ms Bhe homeless.[201] The Constitutional Court found the rule of male primogeniture to be inconsistent with the Constitution on the basis that it violates the right to equality,[202] human dignity,[203] and the rights of extra-marital children to inherit.[204] Instead of keeping the values that underline the rule of primogeniture, which is to support and maintain the dependents of the deceased and not expel them from the home,[205] and eliminating the discriminatory part, the majority replaced the rule with common law rules of succession, namely through the Intestate Succession Act 81

[196] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) para 45.
[197] Ibid para 47.
[198] Ibid.
[199] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 para 16.
[200] Ibid para 17.
[201] Ibid.
[202] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 para 91.
[203] Ibid para 92.
[204] Ibid para 93.
[205] *Mthembu v Letsela* (2000) 3 All SA 219 (A) para 8.

of 1987. The majority replaced section 23 of the Black Administration Act with section 1 of the Intestate Succession Act. The problem with this decision is that the Intestate Succession Act was enacted on the premise of a nuclear family model and is inadequate in catering for the various models that arise in customary law succession, nor would it accommodate extended family members which are a feature of customary practices.[206]

African customary law differentiates various types of property: house property, family property, and personal property.[207] Family property is essentially the property that is administered by the household head for all the houses (in the case of polygyny). The minority in *Bhe* importantly notes that the context in which the rule of male primogeniture developed was one where the family property belonged to the whole family and, as the family head, the father acted as the manager and caretaker of the property.[208] When the head died, the family property stayed within the family and the successor then 'stepped into the shoes' of the deceased where he would continue to carry out the duties and obligations of the deceased.[209] This system was for the benefit of the family. Under the Intestate Succession Act, the heir is not required to maintain the family property and the dependents within the household. They are not required to continue to carry out the duties and obligations of the deceased.[210] Instead, they are afforded exclusive ownership of the whole estate. The family property system is, however, by no means perfect. As noticed by Justice Ngcobo's minority judgment, the changing economic and social conditions such as poverty and unemployment coupled with the failure to care for the deceased's dependants has resulted in successors not always fulfilling their duties of supporting and maintaining the vulnerable family members.[211] Despite the criticisms of the *Bhe* decision, the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 ('RCLSA') was enacted to regulate African customary law of succession.

[206] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 para 118.
[207] Lesala Mofokeng, Chuma Himonga & Thandabantu Nhlapo et al 'Historical overview of customary law' in *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[208] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 para 168.
[209] Ibid para 76.
[210] Chuma Himonga 'Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32 *Southern African Public Law* at 11.
[211] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 para 173.

C. THE REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS ACT

The case of *Bhe* abolished the customary law of succession codified by the Black Administration Act and its regulations and applied civil law, the Intestate Succession Act, to the customary law of succession.[212] The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 ('RCLSA') is a modification of African customary law as it attempts to accommodate various forms of relationships that exist in African customary law but are not included in the common law. For example, Section 2(2) of the RCLSA provides:

> (2) In the application of the Intestate Succession Act –
>
> (b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;
> (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

This is important because it is an attempt to extend the Intestate Succession Act to apply beyond the nuclear family model and make provision for factual situations that exist in customary environments. The legislation mainly concerns the succession rules that apply to the inheritance of the deceased's property whereas the African customary law of succession previously focused on the succession of status to determine who would 'step into the shoes' of the deceased by taking on the responsibilities of care towards the deceased's dependants.[213] The succession of property was ancillary to this.[214] However, when African customary law of succession was codified in the Black Administration Act, the nature of the law changed by shifting the focus of succession to the inheritance of property while discarding the concept of transference of responsibility and the duty of support owed to the deceased's dependants.[215] The RCLSA solidifies this position by taking an individualised stance towards succession, ignoring the rights and duties of the successor when it had the opportunity to legally enforce the responsibilities of the successor. A positive effect of the RCLSA is that it does not

[212] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 para 136.
[213] Fatima Osman 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' 2019 22 PELJ 66 at 8.
[214] Ibid.
[215] Ibid.

distinguish between beneficiaries on the grounds of status or gender.[216] For example, illegitimate children can benefit despite their illegitimate status whereas in African customary law, illegitimate children cannot inherit from their father's estate, only their mothers.[217] The abolition of the rule of male primogeniture and the discriminatory treatment of illegitimate children are necessary improvements to customary law as these developments are in accordance with the Constitution. The Recognition of Customary Marriages Act 120 of 1998 takes a similar approach where it imports certain common laws of marriage but also accommodates the various ways customary marriages come into existence.

D. RECOGNITION OF CUSTOMARY MARRIAGES ACT

The Recognition of Customary Marriages Act 120 of 1998 ('RCMA') has brought notable benefits to the regulation of African customary law and especially women's status under customary law. Section 6 of the RCMA elevates women to equal status and capacity as their husbands. The codification of African customary law unfortunately fossilised a patriarchal understanding of African customary law, essentially equating women as minors who are under the guardianship of their husbands.[218] This meant that women were unable to use or dispose of their assets according to the law. Thus, the elevation of the status of women in the RCMA brings necessary developments to the historical position of women in African customary marriages. Section 2 provides for the recognition of customary marriages which officially affords legislative recognition to customary marriages. This is also a necessary development from the historical position of customary marriages where they were deemed contrary to public policy. It not only affords spouses in customary marriages the legal consequences and benefits that ensue from recognition, but it aligns with the Constitution's commitment to equality and respecting cultural diversity by realising the dignity and worth of customary marriages and by giving effect to the right of individuals to live and practice their culture. Section 3 stipulates the requirements for a valid customary marriage which sets 18 as the minimum required age of parties and both parties must consent to be married to each other under customary law.[219] These requirements are important as they prevent child marriages and harmful practices such as *ukuthwala*. A few of the criticisms of the RCMA are first, the RCMA makes no provision for whether the consent of the first wife is required for the husband to enter into a

[216] Section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
[217] *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 33.
[218] Section 11(3) of the Black Administration Act 38 of 1927.
[219] Section 3 (1)(a) of the Recognition of Customary Marriages Act 120 of 1998.

subsequent marriage. This has resulted in women having to approach the court to determine this issue.[220] Further, the RCMA requires the husband to conclude a contract that would regulate the matrimonial system of his marriage.[221] However, in practice this requirement was impractical due to various reasons such as lack of awareness of the requirement, the costs accumulated by hiring a lawyer to draft such documents required, and the power dynamics between husbands and wives.[222] The same can be said about the registration requirement. Although lack of registration does not invalidate the marriage,[223] registration of a marriage is *prima facie* proof of the existence of a valid marriage. Thus, when women seek to claim maintenance after a divorce or inherit from their deceased husband's estate, they will need to prove the existence of a valid customary marriage. It puts women in customary marriages on the backfoot compared to their civil law counterparts.[224] This is because a marriage certificate is prima facie proof of a valid civil marriage. For example, if a husband were to enter into a subsequent civil marriage after already being in an unregistered customary marriage, although the civil marriage will be unlawful,[225] it will be easier for the civil spouse to claim inheritance with her marriage certificate compared to the spouse who is in an unregistered customary marriage and still has to prove the validity of her marriage.[226] Finally, section 3(1)(b) of the RCMA provides:

> 3. (1) For a customary marriage entered into after the commencement of this Act to be valid –
>
> (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The flexibility of this provision allows different groups to marry according to their own customary laws and is an attempt by the legislature to allow for living customary law.[227] It allows parties to marry in accordance with their respective customary legal frameworks,

---

[220] *Mayelane v Ngwenyama & others* 2013 (4) SA 415 (CC).
[221] Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998.
[222] Chuma 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.
[223] Section 4(9) of the Recognition of Customary Marriages Act 120 of 1998.
[224] Siyabonga Sibisi 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44 Nelson Mandela University 527 at 516.
[225] Section 3(2) of the Recognition of Customary Marriages Act 120 of 1998.
[226] Siyabonga Sibisi 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44 Nelson Mandela University 527 at 526.
[227] Thandabantu Nhlapo 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 Journal of Southern African Studies 155 at 280.

maintaining the traditional requirements whilst recognising modern developments.[228] However, the judiciary has had the difficult task of attempting to ascertain whether a valid African customary marriage was concluded especially when various objections are made to the validity of the marriage relating to the payment of lobolo, in full or part, and the 'handing over' of the bride.[229] The judiciary has been inconsistent in its approach to these issues which has resulted in uncertainty of the requirements of African customary marriages. This also has the effect of impairing on women's right to practice their culture and their right to human dignity.

E. JUDICIARY'S INCONSISTENT APPROACH TO AFRICAN CUSTOMARY MARRIAGES

The judiciary has taken an inconsistent approach towards determining the validity of African customary marriages, especially when determining issues pertaining to the payment of lobolo and the 'handing over' of the bride. The cases to be discussed relating to the payment of lobolo are *Mthembu v Letsela* 2000 3 SA 867 (SCA) and *Mkabe v Minister of Home Affairs & others* (2016) ZAGPPHC 460, and the cases relating to the 'handing over' of the bride are *Mxiki v Mbatha* (2014) ZAGPPHC 825; and *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

The facts of *Mthembu* have already been set out earlier in the paper, however, the facts that are necessary for discussion are that the appellant claimed she was the customary wife of the deceased and provided evidence supporting her claim. The evidence put forward was a receipt of the first instalment of R900 towards her lobolo of R2000.[230] The deceased, however, died before the full payment of lobolo was made. The appellant argued that since there had been an agreement between the appellant and the deceased, coupled with the partial payment of lobolo, a customary marriage existed.[231] The appellant relied on an article that stipulated:

> In customary law, a child born within a customary union is presumed to be legitimate and thus part of its father's family. However, as outlined above, the crucial element in the marriage which transfers the child into the father's family is not the ceremony, as in civil law, but the payment of bridewealth, at least in part.[232]

---

[228] T Nhlapo 'Missed Opportunities in Customary Marriage Law in South Africa: Law versus Culture … Again' in Jens Scherpe & Stephen Gilmore (eds) *Family Matters: Essays in honour of John* Eekelaar (2022) 403-418 at 409.
[229] Thandabantu Nhlapo 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 Journal of Southern African Studies 155 at 278.
[230] *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 5.
[231] Ibid para 16.
[232] Sandra Burman 'Illegitimacy and the African Family in a Changing South Africa' (1991) Acta Juridica 36 at 41.

The Supreme Court of Appeal rejected the appellant's interpretation of this article and adopted a strict interpretation which found no customary marriage to be in existence between the appellant and the deceased.[233] Thus, the Court took the approach that the payment of lobolo in full was an essential requirement for African customary marriages. However, this approach then changed in *Mkabe v Minister of Home Affairs & others* (2016) ZAGPPHC 460 when a man sought to have his customary marriage recognised after the death of his wife.

In *Mkabe* there had been an agreement between the families that the plaintiff was to pay the deceased's family R12 000 as lobolo.[234] However, only R9 000 was paid by the plaintiff but he argued that this did not invalidate the marriage.[235] The North Gauteng High Court acknowledged the evolution of customary law and found:

> Customary Law has evolved over the years and that payment of ilobolo in full cannot be such an essential requirement to invalidate a customary marriage. Suitable arrangements can be made for payment of ilobolo and if the other requirements of a customary marriage have been met, a valid customary marriage can be entered into by the parties. So ilobolo does not have to be paid in full as alleged by the defendants before a valid customary marriage can be entered into between the parties.[236]

Mkabe also had to deal with the issue of 'handing over' of the bride as the defendant alleged that the 'handing over' is an essential requirement for a valid customary marriage which was not fulfilled by the plaintiff.[237] The Court rejected this argument that 'handing over' of the bride is an essential requirement due to the financial constraints tied to the rituals and ceremonies for integrating the bride into the bridegroom's family.[238] Thus, the payment of lobolo in full was now considered not necessary and the 'handing over' of the bride was also not an essential requirement. However, this was not always the position as will be seen in *Mxiki v Mbatha* (2014) ZAGPPHC 825 where it was determined by the North Gauteng High Court that the 'handing over' of the bride to the bridegroom's family is the most essential requirement of a customary marriage.[239]

In *Mxiki,* it was alleged by the appellant that she and the deceased concluded customary marriage and began living together in which a child was born out of the relationship.[240] As

[233] *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 17.
[234] *Mkabe v Minister of Home Affairs & others* (2016) ZAGPPHC 460 para 5.
[235] Ibid para 24.
[236] Ibid para 35.
[237] Ibid para 36.
[238] Ibid para 38.
[239] *Mxiki v Mbatha* (2014) ZAGPPHC 825 para 11.
[240] Ibid para 2.

evidence for the existence of a valid customary marriage, the appellant provided a receipt of the first instalment of R10 000 towards her lobolo.[241] However, the deceased died before lobolo was paid out in full. In addition, the deceased's father contends that a customary marriage did not exist as the appellant was never 'handed over' to the deceased's family and this is a requirement for customary marriages.[242] The Court agreed with the father's contention by finding that even if the lobolo was paid in full, the 'handing over' of the bride is what constitutes a valid customary marriage.[243] Finally, another approach taken by the judiciary is that the 'handing over' of the bride is unconstitutional.

In *Sengadi v Tsambo* 2019 (4) SA 50 (GJ), the applicant sought a declaratory order confirming her customary law marriage with the deceased. The deceased's father, however, contested this on the basis that there had been no 'handing over' of the bride to his family.[244] The High Court rejected this contention on the basis that customary law has evolved since the precolonial era, stating that the respondent has relied on a rigid form of customary law and living customary law allows for the waiver of the 'handing over' requirement.[245] The Court went further to find that the 'handing over' requirement is unconstitutional on the basis that it is inconsistent with the values of equality, dignity, and non-discrimination.[246] The Court stated:

> It also infringes the female spouse's freedom of opinion and control over her marital status because the assumption implicit in the D intractable customary-law custom, that if the bride is not handed over there cannot have been a valid customary-law marriage, adumbrates the patriarchal nature of the pre-constitutional customary law, when the consent and opinion of women were not solicited and were irrelevant because women were regarded as perpetual minors with no rights.[247]

Thus, the Court found that the requirement of 'handing over' does not pass constitutional scrutiny.[248] As seen in this discussion of case law, the judiciary has been inconsistent in its approach to African customary marriages. Lobolo is required to be paid in full for a customary marriage to be valid; the validity of a customary marriage does not depend on full payment of lobolo; the 'handing over' of the bride is the most essential requirement of a customary

[241] Ibid para 3.
[242] Ibid para 4.
[243] Ibid para 10.
[244] *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) para 14.
[245] Ibid para 20, 21.
[246] Ibid para 34.
[247] Ibid para 35.
[248] However, on appeal, in *Tsambo v Sengadi* (2020) ZASCA 46, the Supreme Court of Appeal found that there was no basis for the High Court to declare the practice unconstitutional as it was not raised by the parties.

marriage; 'handing over' is not an essential requirement as times have changed; and 'handing over' of the bride is unconstitutional. This inconsistent approach is harmful to women because from the cases discussed, we see that women and children are left in vulnerable positions. In *Mthembu* a child was declared illegitimate and unable to inherit from her deceased father's estate and in *Mxiki* the wife was unable to inherit from her deceased husband's estate.

F. CONCLUSION

This chapter addresses the sub-question: has the legislature and judiciary provided sufficient protection for the right to culture in the context of traditional personal law systems? It is argued that they have not. It is further argued that the ability of individuals to practice and enforce their right to culture depends on the legislature and judiciary's application and enforcement of living customary law. The arguments are addressed by first, considering the judiciary's approach towards the rule of male primogeniture by considering case law where the judiciary failed to develop and decide on the rule of primogeniture;[249] where the judiciary recognised the developments of living customary law;[250] and where the judiciary struck down the rule of primogeniture and applied common law rues of intestate.[251] This inconsistent approach of the judiciary to develop African customary law fails to cement African customary law as a credible and independent legal system which affects the right to culture.[252] The legislature and judiciary are criticised for the inability to keep African values in mind when developing and enacting legislation regulating African customary law of succession which has resulted in imposing laws that do not adequately cater to customary environments.[253] The legislature and judiciary are also criticised for their lack of sufficient protection of African customary marriages. The laws put in place by the legislature to regulate the consequences of African customary marriages are not accessible to the community at large due to a lack of awareness and the high costs that are required to draft the documents needed.[254] Thus, in practice, the regulations set out in the RCMA are rarely followed. Finally, the inconsistent approach by the judiciary in ascertaining and applying the requirements of a valid customary marriage does not sufficiently

[249] *Mthembu v Letsela* 2000 3 SA 867 (SCA).
[250] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).
[251] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580.
[252] Thandabantu Nhlapo 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 Journal of Southern African Studies 273.
[253] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580.
[254] Chuma 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.

protect women in customary marriages and their right to culture. It has had the opposite effect by placing women and children in vulnerable positions. Therefore, the legislature and judiciary have not provided sufficient protection for the right to culture in the context of traditional personal law systems.

IV. CHAPTER FOUR: MUSLIM MARRIAGES

A. INTRODUCTION

This chapter focuses on the legislature and judiciary's treatment of religious marriages, namely Muslim marriages, in post-Apartheid South Africa. This chapter aims to address the sub-questions: has the South African legislature and judiciary provided sufficient protection for the right to freedom of religion within the context of religious personal law systems? What steps, if any, have been taken to provide sufficient protection? Has the South African judiciary filled the gap of non-recognition of religious marriages to ensure the right to freedom of religion and women's rights are sufficiently protected? And what are the effects of the nonregulation of religious personal law systems on women? The argument put forth is that the legislature and judiciary have not provided sufficient protection for the right to freedom of religion nor women's' right to equality and dignity in the context of religious personal law systems. This is because the position of individuals in religious marriages remained in the same position they were in during colonialism and Apartheid, in the context of religious personal law systems, until recognition was finally afforded in 2022 in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23. Although individuals and religious communities are now able to practise their faith in the public sphere,[255] non-regulation forces religious personal law systems to operate unofficially and parallel to the common law.[256] This administration of religious personal law systems outside the scope of the secular courts primarily affects women.[257] For example, Muslims in South African have organised themselves into *ulamā* bodies that have taken on the role of pronouncing Islam-related matters.[258] Problems that arise for Muslim women are that the *ulamā* in South Africa often adhere to a traditional and conservative interpretations of Islamic law and this has resulted in prejudicial rules and practices towards women.[259] An instance of this is the *ulamā's* acceptance of the implication linked to the payment of *mahr* which is that the payment of *mahr* necessitates the wife's sexual submission to her husband.[260] The non-recognition of religious marriages prevents women from accessing the South African legal framework and non-regulation allows

[255] Section 15 and 31 of the Constitution of the Republic of South Africa, 1996.
[256] Waheeda Amien & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 Maryland Journal of International Law 505 at 517.
[257] Ibid 520.
[258] Ibid. *Ulamā* bodies take a quasi-judicial role which allows them to oversee conflicts arising within the Muslim community, namely those related to marriage and divorce.
[259] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 72.
[260] Ibid at 71.

gender discriminatory rules and practises to be enforced in the private sphere and can escape accountability.[261] Providing for the official recognition and regulation of religious marriages will allow women in these marriages to practise their religion whilst also having access to the constitutional protection of equality and dignity.[262] This would guarantee the sufficient protection of the right to freedom of religion and other fundamental human rights. This chapter further argues that non-recognition and nonregulation of religious marriages is inconsistent with South Africa's international and regional obligations as contained in the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW');[263] and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Maputo Protocol').[264] These human rights instruments contain provisions that oblige states to ensure the equal enjoyment of rights between men and women in relation to marriage.[265] In addition, it is argued, these human rights instruments also oblige states to enact legislation that recognises and regulates religious marriages.[266] Since the legislature has failed to enact any legislation that recognises and regulates religious marriages, it has failed to give effect to its international and regional obligations. The judiciary, on the other hand, has provided some ad hoc relief to women in religious marriages by recognising the consequences that flow from certain religious marriages as an attempt to fill the lacuna left by the legislature.

First, this chapter looks at the judiciary's response to recognising the consequences that flow from Muslim marriages in post-Apartheid South Africa. The judiciary has gradually included spouses in Muslim marriages to statutes such as the Maintenance of Surviving Spouses Act 27 of 1990,[267] Intestate Succession Act 81 of 1987,[268] and the Maintenance Act 99 of 1998.[269] The effect of this is that Muslim women can claim spousal benefits such as inheritance and maintenance which they previously were denied. Thus, some relief has been given to women

[261] Ibid.
[262] W Amien 'The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa' in Mavis Maclean and John Eekelaar (eds) *Managing Family Justice in Diverse Societies* (2013) 107-123 at 119.
[263] UN General Assembly*, Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol.1249, p.13.
[264] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.
[265] Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women; and Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.
[266] Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.
[267] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC); *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.
[268] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC); *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.
[269] *Khan v Khan* 2005 (2) SA 272 (T).

in Muslim marriages despite legislation regulating the marriage. However, this relief is not enough as regulation is required to give sufficient protection to women's rights and the right to freedom of religion.

The chapter then discusses the effects of nonregulation on women. It is argued that nonrecognition violates South Africa's international and regional obligations to ensure equal rights between men and women in marriage and divorce. This is because the effects of the nonregulation of Muslim marriages in South Africa have resulted in the enforcement of traditional and conservative interpretations of Islamic law by *ulamā* bodies. Islamic forms of divorce such as the triple *talaq* and rules on succession are discussed to illustrate the gender discriminatory effects of enforcing a traditional and conservative interpretation.

B. RECOGNITION OF MUSLIM MARRIAGES

For a marriage to be recognised in South African law it must either comply with civil law, either the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006, or customary law, the Recognition of Customary Marriages Act 120 of 1998. One of the requirements for a civil marriage is that the marriage must be officiated by a marriage officer.[270] *Imams* can be designated as marriage officers so that when they conclude a Muslim marriage it will automatically be recognised as a legal marriage.[271] However, the Muslim marriage would in effect become a civil marriage and one consequence that flows from civil marriage is that the default matrimonial property regime is in community of property.[272] This is contrary to the traditional Islamic law rule that each spouse should have their own separate estate at all times.[273] However, this traditional Islamic law rule is itself harmful to women as most of the assets accumulated during the marriage tend to form part of the husband's estate, leaving the wife with nothing in her estate.[274] Thus, a more equitable solution needs to be enforced where there is recognition of Muslim marriages whilst also ensuring the regulation of Islamic law is consistent with human rights standards.[275] Another consequence that flows from a civil

[270] Section 11 of the Marriage Act 25 of 1961.
[271] W Amien 'The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa' in Mavis Maclean and John Eekelaar (eds) *Managing Family Justice in Diverse Societies* (2013) at 108.
[272] *Edelstein v Edelstein* 1952 3 SA 1 (A) para 10.
[273] Waheeda Amien 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 Acta Juridica 192-218 at 196.
[274] Waheeda Amien 'Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly at 734.
[275] Waheeda 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.

marriage is that polygyny is not allowed.[276] These consequences are a few of the reasons why *imams* do not apply to become marriage officers and why many Muslims do not conclude civil marriages. It is viewed as un-Islamic.[277] As a result, many South African Muslims continue to marry solely according to their Islamic rites and outside the scope of secular law.[278] Recently, in the case of *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 the judiciary gave common law recognition of Muslim marriages, however, it ordered Parliament and the President to enact legislation to regulate the marriage.[279] Previously, the lack of recognition was problematic because firstly, it impaired the dignity of spouses not to have their most intimate relationship recognised based on their religion.[280] Secondly, women in Muslim marriages were left in vulnerable positions as they could not claim for civil spousal benefits, such as inheritance or maintenance, nor could they claim for benefits under Muslim family law.[281] Thirdly, children born of the marriage were stigmatised as illegitimate.[282] Today, the lack of regulation is problematic because it leaves the operation of religious personal law systems unregulated which allows for the maintenance of gender-discriminatory rules and practices, positioning Muslim women in a vulnerable position.[283] To answer the sub-question of whether the judiciary has filled the lacuna of non-recognition of religious marriages, it is necessary to analyse the case law that led up to *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.

The case of *Ryland v Edros* 1997 (2) SA 690 (C) marked the first case post-Apartheid to recognise Muslim marriages as a legally enforceable contract. The plaintiff and defendant in this case were married according to Muslim rites until the plaintiff invoked his unilateral Islamic right to divorce, known as *talaq*,[284] and instructed the defendant to vacate the home they occupied together.[285] The defendant defended the action and, in her plea, claimed for arrear

[276] Waheeda Amien & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 Maryland Journal of International Law 505.
[277] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 84.
[278] Waheeda Amien 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 Acta Juridica 192-218 at 207.
[279] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 para 86.
[280] Ibid para 57.
[281] Waheeda 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.
[282] Ibid.
[283] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61.
[284] Waheeda Amien 'Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly at 745.
[285] *Ryland v Edros* 1997 (2) SA 690 (C) at 696.

maintenance accumulating over the subsistence of the marriage, a consolatory gift and transfer of an equitable share of the growth of the plaintiff's estate- all of which she claims she is entitled to due to the contractual agreement that arose from their marriage.[286] According to Islamic law, the husband is obliged to provide his wife with *nafqah* which primarily refers to accommodation, food and clothing.[287] Thus, the wife is entitled to be maintained by her husband during their marriage and if he fails to do so, she is entitled to claim the cost of the *nafqah*.[288] The plaintiff admitted to the fact that their marriage constituted a contractual agreement according to Islamic law.[289] The Court, in reaching its decision, had to decide whether the *Ismail* decision should be followed and phenomenally departed from the long standing notion of public policy as understood by the Apartheid-era judiciary by finding that the values of equality and tolerance of diversity allow for the recognition and enforceability of a Muslim marriage contract.[290] The Court further found that the agreement between the parties obliged the plaintiff to maintain the defendant during the existence of their marriage as well as for three months after the issuing of the *talaq* and that any debt in regard to unpaid maintenance would not be prescribe.[291] Thus, the claim for arrear maintenance did not prescribe and the defendant was entitled to this claim and the claim for the consolatory gift.[292] However, the court rejected the defendant's claim for an equitable share of the growth of the plaintiff's estate.[293] The defendant relied on Malaysian legislation which recognises this rule to support her argument that she is entitled to an equitable share as both Malaysia and the majority of Muslims in the Western Cape adhere to the *Shafi'* school of thought.[294] Thus, she argues the Malaysian rule is applicable to the Muslim communities in the Western Cape. The Court recognised that the Malaysian custom is not in conflict with Islamic law but still rejected this rule on the basis that the evidence did not show that this was a custom followed in the Western Cape.[295] Effectively, this judgment reinforced the patriarchal notions that underpin Muslim customs in the Western Cape instead of advancing a more progressive interpretation of Islamic law.[296] This case is important in many respects. Although it does not explicitly provide

[286] Ibid.
[287] Ibid at 699.
[288] Ibid.
[289] Ibid.
[290] Ibid at 710.
[291] Ibid at 711.
[292] Ibid at 714.
[293] Ibid at 717.
[294] Ibid at 715.
[295] Ibid at 717.
[296] Waheeda Amien 'Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly at 738.

recognition for Muslim marriages as valid marriages, it considers monogamous Muslim marriages to be a contractual agreement with certain obligations that flow from it. As a result, spouses can claim maintenance as a consequence that flows from a Muslim marriage, or rather their contractual agreement.

The case of *Amod v Multilateral Motor Vehicle Accidents Fund (commission for gender equality intervening)* 1999 (4) SA 1319 (SCA) was a case where the judiciary extended a dependents action to afford a spouse in a Muslim marriage some form of protection. The case concerned a wife to a Muslim marriage who sought relief from the respondent due to a motor collision which caused the death of her husband.[297] The court relied on the two propositions set out in *Union Government v Warneke* 1911 AD 657 which were first, the claim for dependents action was a flexible remedy which is required to adapt to modern times and secondly, when adapting to the modern times, the rationale of the remedy must be kept in mind which is to afford relief to dependents whom the deceased had a legal duty to support.[298] Since a Muslim marriage was considered a contractual agreement,[299] the Court found that the deceased had a duty to support the appellant on the basis of the Muslim marriage contract and this duty was legally enforceable.[300] In determining whether the legal right of the appellant to be afforded support is worthy of protection, the court held

> The insistence that the duty of support which such a serious de facto monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the boni mores of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community…[301]

Thus, the court emphasised the importance of the Constitution in changing the values that underpin public policy and the appellant was recognised as a spouse for the the common law dependant's action. [302]

---

[297] *Amod v Multilateral Motor Vehicle Accidents Fund (commission for gender equality intervening)* 1999 (4) SA 1319 (SCA) para 1.
[298] Ibid para 10.
[299] *Ryland v Edros* 1997 (2) SA 690 (C).
[300] *Amod v Multilateral Motor Vehicle Accidents Fund (commission for gender equality intervening)* 1999 (4) SA 1319 (SCA) para 14 and 15.
[301] Ibid para 20.
[302] Ibid para 32.

Following *Amod* was *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) which dealt with intestate succession after the death of the applicant's husband. The deceased and the applicant were married according to Muslim rites, however, the Master of the High Court refused to recognise the applicant as a 'spouse' as defined in section 1 of the Intestate Succession Act 81 of 1987 and 'survivor' as defined in section 2(1) of the Maintenance of the Surviving Spouses Act 27 of 1990.[303] This was because the Muslim marriage was not recognised as a lawful marriage.[304] The Court emphasised the cultural and racial hegemonic appropriation of the word 'spouse' during Apartheid to discriminatory exclude Muslim spouses and provided that this interpretation is no longer sustainable in our constitutional democracy.[305] The Court found that it was linguistically possible to include a spouse in a monogamous Muslim marriage into the ordinary meaning of the word 'spouse'.[306] The Court also acknowledged that the purpose of both the Intestate Succession Act and the Maintenance of Surviving Spouses Act is to provide relief to widows who are a vulnerable section of society.[307] Thus, the Court reasoned that the purpose of the abovementioned Acts would be frustrated if Muslim widows were excluded on the basis that their marriage does not accord with the Marriage Act.[308] The Court held that 'constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word "spouse" a broad and inclusive construction.'[309] Thus, the word 'spouse' and 'survivor' as provided for in the Intestate Succession Act and Maintenance of Surviving Spouses respectively, was found to be constitutionally valid as the ordinary meaning of the word 'spouse' encompassed a spouse in a monogamous Muslim marriage.[310] All the cases discussed concerned monogamous Muslim marriages and in each case, the courts did not consider whether the judgments would extend to polygynous Muslim marriages. This was until *Khan v Khan* 2005 (2) SA 272 (T).

Khan was concerned with a polygynous Muslim marriage and the court had to determine whether the appellant had the duty to support and maintain the respondent in accordance with the Maintenance Act 99 of 1998. In the argument, the appellant used *Daniels v Campbell* to support his argument that a duty to support and maintain a spouse only arises in monogamous Muslim

[303] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) para 8.
[304] Ibid para 18.
[305] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) para 19.
[306] Ibid.
[307] Ibid para 22.
[308] Ibid para 23.
[309] Ibid para 21.
[310] Ibid para 37.

marriages thereby exempting the appellant in this case.[311] The Court discussed the flexibility of the duty of support to adapt to the changing social and economic contexts as it has already been extended by our courts to cover grandparents, brothers and sisters, same-sex partnerships, and illegitimate children to their paternal grandparents.[312] In addition, the Court relied on the change in public policy by looking to *Amod* and *Daniels* and found that to deny a Muslim wife in a polygamous marriage the right to maintenance that a Muslim wife in a monogamous Muslim marriage enjoys would be 'blatant discrimination'.[313] Thus, the Court held that spouses in both a monogamous and polygynous Muslim marriage are entitled to maintenance and are included in the Maintenance of Surviving Spouses Act.[314]

The case of *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC) further extended the protection of spouses in polygynous Muslim marriages by including widows in polygynous Muslim marriages in the Intestate Succession Act. This case concerned the validity of section 1(4)(f) of the Intestate Succession Act to the extent that it does not include spouses in a polygynous Muslim marriage.[315] The Court found that the ordinary meaning of the singular word 'spouse' in the Intestate Succession Act was not capable of including multiple spouses in a polygynous Muslim marriage.[316] The Court had to determine whether the exclusion of widows in polygynous Muslim marriages from the Intestate Succession Act amounts to unfair discrimination.[317] The Court discussed the previous position of Muslim marriages by looking to *Ismail* and, similar to the approach in *Daniels,* found that the *Ismail* decision no longer has a place in our constitutional democracy.[318] First, the court found that the Marriage Act differentiates between widows married in terms of Muslim rites and widows married in terms of the Marriage Act; women in monogamous Muslim marriages and women in polygynous Muslim marriages; and between women in polygynous customary marriages and women in polygynous Muslim marriages.[319] Secondly, the Court found that this differentiation amounts to discrimination by taking into consideration the historical context in which Muslim marriages were not afforded recognition and stated that this position cannot pass constitutional scrutiny today.[320] Thirdly, the court found that this discrimination was not a justifiable limitation as the

[311] Ibid at 277.
[312] Ibid at 280.
[313] *Khan v Khan* 2005 2 SA 272 (T) at 283.
[314] Ibid.
[315] *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC) para 1.
[316] Ibid para 48.
[317] Ibid para 20.
[318] Ibid para 25.
[319] Ibid para 31.
[320] Ibid para 33.

Court took into account the vulnerable position of these widows in the Muslim community and the prejudice they face by their exclusion.[321] Finally, in finding that spouses to a polygynous Muslim marriage are no less worthy of protection than those in civil or African customary law marriages, the Court held that the word 'spouse' as contained in section 1(4)(f) of the Intestate Succession Act is unconstitutional and invalid to the extent that it does not include all the spouses in polygynous Muslim marriages.[322] The Court ordered a reading in of 'or spouses' after the word 'spouse' in the Intestate Succession Act to include widows in polygynous Muslim marriages.[323]

The case which finally gave Muslim marriages recognition by including Muslim marriages in the interpretation of the common law definition of marriage was *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 ('WLCT case'). The Women's Legal Centre Trust ('WLCT') brought the matter in the public interest claiming that the President and Cabinet have failed to protect, promote, and fulfil various constitutional rights by not enacting legislation that recognises and regulates Muslim marriages.[324] Two other separate applications were combined with the WLCT case to form a consolidated application. The first matter, the 'Faro matter', concerned a Muslim marriage between Ms Faro and the deceased. Before the deceased died, he obtained a *talaq* certificate which amounts to an Islamic divorce.[325] However, it was revoked when the deceased and Ms Faro continued to have intimate marital relations.[326] Upon his death, Ms Faro was appointed as the executrix of his estate but unbeknown to Ms Faro, a stepdaughter of the deceased from a previous marriage sought to claim from the estate by invalidating the reconciliation between the deceased and Ms Faro.[327] The stepdaughter's quest involved approaching the Muslim Judicial Council (MJC) to try and obtain a certificate of annulment. When this proved unsuccessful, she approached a son of the deceased from another previous marriage to produce a contradictory affidavit denying the reconciliation between the deceased and Ms Faro. [328] As a result the MJC confirmed the validity of the *talaq* which resulted in the Master of the High Court disinheriting Ms Faro from the deceased's estate as their marriage was considered to be terminated.[329] Ms Faro ultimately

[321] *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC) para 41.
[322] Ibid para 53.
[323] Ibid para 57.
[324] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 para 8.
[325] Ibid para 9.
[326] Ibid para 10.
[327] Ibid 10.
[328] Ibid para 11.
[329] Ibid.

approached the court to have the Masters decision set aside by recognising her as the deceased's spouse for the purposes of the Intestate Succession Act and Maintenance of Surviving Spouses Act.[330] In addition, she sought an order declaring Muslim marriages valid under the Marriage Act.[331] The Esau matter concerned Mrs Esau who launched an urgent application for an interdict against the Government Employees Pension Fund and the Minister of Justice to prevent them from paying out 50% of her husband's pension interest.[332] The High Court granted the interdict but what falls part of the consolidated application is the order she sought declaring that the failure of the state to enact legislation that recognises and regulates Muslim marriages amounted to discrimination against Muslim women and contrary to the Constitution.[333] In the consolidated application, the Constitutional Court had to determine whether the Supreme Court of Appeal was correct in finding constitutional invalidity of the Marriage Act and Divorce Act 70 of 1979 insofar as they do not recognise Muslim marriages as valid marriages.[334] The Constitutional Court considered the historical treatment of Muslim marriages and how it continues into our constitutional dispensation.[335] The Constitutional Court relied on *Daniels* and *Hassam* in finding that the exclusion of Muslim marriages in the Marriage Act and Divorce Act is discriminatory as this exclusion is only based on the fact that they are not married under civil law but in terms of Islamic law.[336] This is important because the Constitutional Court is acknowledging that lack of recognition means that Muslim women have no access to relief at all. They are not entitled to any protection under legislation such as the Maintenance of Surviving Spouses Act or Intestate Succession Act as the unlawfulness of their marriage does not regard Muslim women as spouses. Further, Muslim women cannot secure any benefits under Muslim personal law as it is unrecognised and unenforceable in courts. The argument that these consequences of non-recognition are a result of the woman's failure to conclude a marriage that complies with civil law or to construct a marriage contract that enforces her rights under Islamic law ignores the unequal bargaining power that exists in marriages.[337] This should not mean that Muslim women are unworthy of protection. The Constitutional Court acknowledged this unequal bargaining power and upheld the Supreme

[330] Ibid para 12.
[331] Ibid.
[332] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 para 14.
[333] Ibid.
[334] Ibid para 26.
[335] Ibid para 43.
[336] Ibid para 48.
[337] *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) para 18.

Court of Appeal's constitutional invalidity of the Marriage Act and the Divorce Act.[338] The order of constitutional invalidity was suspended for 24 months to allow the President and Cabinet, with Parliament, to amend existing legislation or enact new legislation that recognises and regulates Muslim marriages.[339] With currently 4 months remaining, we continue to wait for the legislature to meet its deadline.

A discussion of case law leading up to the recognition of Muslim marriages is important because it highlights the gradual changes taken by the judiciary to protect the rights of women and the right to freedom of religion. It also highlights the implications that non-recognition has on women in these marriages and the need for the legislature to enact legislation. However, it is not just recognition that is needed but also regulation of Muslim marriages to protect women from gender discriminatory practices whilst also allowing them to enforce their rights under Muslim personal law.

C. REGULATION OF MUSLIM MARRIAGES

The lack of regulation of Muslim marriages, it is argued, violates South Africa's international and regional obligations of ensuring gender equality in marital relations. Article 16(1)(a)-(d) and (h) of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') provides:

> (1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
> (a) The same right to enter into marriage;
> (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
> (c) The same rights and responsibilities during marriage and at its dissolution;
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

Additionally, Article 16(1)(h) of the CEDAW provides for equal rights between spouses in respect of the 'ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.' The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Maputo Protocol')

[338] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23 para 55 and 83.
[339] Ibid para 86.

mandates that states pass laws allowing for the registration of all marriages, including those performed under Islamic customs, in accordance with their national legislation. Article 6(d) of the Maputo Protocol provides:

> States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:
>
> Every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised.

The legislature's failure to enact legislation that regulates Muslim marriages has resulted in the maintenance of gender discriminatory practices and unequal rights between men and women in relation to marriage and divorce. For example, the *ulamā* bodies in South Africa, often adopt traditional and conservative interpretations of Islamic law. This can be seen by the acceptance of triple *talaq* as a form of divorce which enables husbands to arbitrarily terminate the marriage without allowing the wife to be heard.[340] Husbands also are not required to obtain anyone's permission to divorce but it has become a practice in South Africa for husbands to obtain a *talaq* certificate from the *ulamā*.[341] These certificates are often given arbitrarily without consulting the wife as was done in the case of *Faro v Bingham & others* (2013) ZAWCHC 159. This case highlights the ease a husband in a Muslim marriage can discard his wife and it is enabled by the *ulamā* bodies. The facts of this case have already been discussed as it was one of the matters in the consolidated application of *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23. Briefly, Ms Faro was unable to inherit from her deceased husband's estate due to the Muslim Judicial Council, one of the *ulamā* bodies, confirming that her marriage was terminated by way of *talaq* even though Ms Faro and the deceased had subsequently reconciled in which he revoked the *talaq*.[342] The effect of this was that Ms Faro was rendered homeless and her children were taken into state care.[343] If Ms Faro was not able to approach the judiciary system to have her marriage validated, she would have remained in that vulnerable position. Another traditional and conservative interpretation that has been adopted is the obligation of the husband to support his wife only

[340] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 66.
[341] Ibid.
[342] Ibid at 67.
[343] *Faro v Bingham & others* (2013) ZAWCHC 159 para 9.

until the end of the *iddah* period which leaves women in a financially vulnerable position after the marriage.[344]

The proprietary consequences of Muslim marriages is that the spouses are deemed to have kept their assets separate throughout the whole marriage.[345] This, however, is not the case as assets are usually placed under the husband's name.[346] For example in *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC), which was already discussed, Ms Daniels had property allocated to her from the City of Cape Town as she met the requirements of the housing policy of the time.[347] However, once she married the deceased and informed the City of her Muslim marriage, the property was then put under the deceased's name.[348] This was because the housing policy of the time would not allow Ms Daniels to own the property.[349] Essentially, the Muslim marriage was recognised for the purposes of the housing policy but was not recognised for the purposes of the Intestate Succession Act 81 of 1987. The importance of this example is that Ms Daniels was unable to have her property under her name as a separate estate and if she were to get a divorce under Islamic law, she would be left financially impoverished as the assets would be considered her husband's separate estate. Her husband would only be obliged to support her until 3 months after the termination of the marriage. After that, she would be financially destitute.[350] The only way out of this position would be for couples in a Muslim marriage to conclude a marriage agreement regulating their matrimonial property. However, this is rarely done due to unequal bargaining power present in marriages.[351] Thus, the nonexistence of legislation regulating Muslim marriages results in the maintenance of gender discriminatory practices and puts Muslim women in a vulnerable position with no relief. Further, it allows for unequal rights between men and women in Muslim marriages which is inconsistent with the international and regional obligations as set out above. The legislature and the judiciary have failed to provide sufficient protection for women's rights and the right

[344] *Iddah* period refers to a waiting period of three menstrual cycles that is observed by a woman after divorce or death. See more in Amira Mashhour 'Islamic Law and Gender Equality- Could There be a Common Ground? A Study of Divorce and Polygamy in Shariah Law and Contemporary Legislation in Tunisia and Egypt' 2014 *Human Rights Quarterly* 562-592.
[345] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 71.
[346] Ibid.
[347] *Daniels v Campbell NO & others* 2003 JDR 0400 (C) at 6.
[348] Ibid at 7.
[349] Ibid.
[350] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 71.
[351] Waheeda Amien 'Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly at 745.

to freedom of religion due to its lack of regulation which has allowed for discriminatory practices.

D. CONCLUSION

This chapter addresses the sub-questions: has the South African legislature and judiciary provided sufficient protection for the right to freedom of religion within the context of religious personal law systems? What steps, if any, have been taken to provide sufficient protection? Has the judiciary filled the gap of non-recognition of religious marriages to ensure the right to freedom of religion and women's rights are sufficiently protected? And what are the effects of nonregulation of religious personal law systems on women? This chapter has argued that the legislature and judiciary have not provided sufficient protection for the right to freedom of religion within the context of religious personal law systems. This became evident from the lack of legislation recognising and regulating Muslim marriages. The effect of nonregulation of Muslim personal law harshly impacts Muslim women due to the traditional and conservative interpretations of Islamic law taken by the *ulamā* bodies in South Africa. The examples of divorce and succession were used to show that women have unequal rights as the issuing of *talaq* certificates is often done in an arbitrary manner and the rules relating to separate estates leave women in financially vulnerable positions. However, the chapter does acknowledge the steps taken by the judiciary to recognise Muslim marriages and afford Muslim women protection. Although recognition has been an important stepping stone for protecting the right to freedom of religion, the lack of regulation does not sufficiently protect the right to freedom of religion along with women's constitutional rights to equality and human dignity.

V. CONCLUDING CHAPTER

First, the paper looked at the historical position of African customary marriage and religious marriages, mainly Muslim marriages. An analysis of the periods of colonialism and Apartheid illustrated that the policy of indirect rule distorted African customary law as the application of African customary law was still subject to state oversight and the state's ignorance of the nature of customary law led to misunderstandings of African customary law.[352] For example, lobolo was understood by the colonialists as 'bride price' which was considered derogatory to the dignity of women, whereas women who took part in lobolo considered it symbolic of the conclusion of a valid customary marriage and not derogatory to their dignity.[353] In addition, anything that did not suit the colonial interests or culture was denied recognition which meant African customary marriages and religious marriages that allowed for polygyny were not recognised as valid marriages.[354] Public policy and the repugnancy clause were tools used to advance European culture as the values that informed public policy took a conservative, racist, and Christian-based approach.[355] Ultimately, traditional and religious personal law systems were not recognised and the right to culture and freedom of religion were denied. However, once the Constitution of the Republic of South Africa, 1996 came into operation, the values that underpin public policy were changed are it is now informed by values shared by the community at large rather than only the white minority as was the case during Apartheid.[356]

Secondly, the paper analysed the position of African customary law in post-Apartheid South Africa to determine whether the right to culture and freedom of religion is afforded sufficient protection in the context of traditional personal law systems. The argument made was that the legislature and judiciary have not provided sufficient protection, and this was addressed by highlighting the inconsistent approach taken by the judiciary in its application and development, or lack thereof, of African customary law. This inconsistency has impaired women's right to have their marriage protected and to practice their culture. In addition, the legislature is criticised for its inability to enact legislation that preserves the values underlining African concepts and instead imported laws that do not adequately cater to customary

[352] Lesala Mofokeng, Chuma Himonga & Thandabantu Nhlapo et al 'Historical overview of customary law' in *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) ch 1.
[353] C.R.M. Dlamini 'The Role of Customary Law in Meeting Social Needs' 1991 *AJ* 71.
[354] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[355] W Amien 'South African women's legal experiences of Muslim personal law' in Lauren Fielder & Kyriaki Topidi (eds) *Religion as Empowerment – Global Legal Perspectives* (2016) 53-77 at 54.
[356] *Ryland v Edros* (1996) 4 All SA 557 (C).

environments.[357] Thus, it is argued that the failure of the legislature to apply and enforce living customary law has impaired the right of individuals to practice their culture.

Thirdly, the paper analysed the position of Muslim marriages in post-Apartheid South Africa to determine whether the right to freedom of religion is afforded sufficient protection in the context of religious personal law systems. It was argued that the legislature and judiciary have not provided sufficient protection because of the lack of legislation recognising and regulating Muslim personal law. The nonregulation of Muslim personal law has allowed for gender discriminatory practices to escape constitutional accountability and women face the brunt of both non-recognition and non-regulation.[358] Recognition of Muslim marriages has provided necessary protection for Muslim women as they are now able to claim from civil law such as the Intestate Succession Act and the Maintenance of Surviving Spouses Act.[359] Although judicial relief has been helpful for Muslim women, it is not sufficient to protect the constitutional rights of Muslim women and children. Legislative intervention is required. Thus, the South African legislature and judiciary have not provided sufficient protection for the right to culture and freedom of religion in the context of traditional and religious personal law systems.

[357] *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580.
[358] Waheeda Amien 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 61 at 72.
[359] *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.

BIBLIOGRAPHY

Primary sources

Constitution

The Constitution of the Republic of South Africa, 1996.

International human rights instruments

African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

UN General Assembly*, Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol.1249, p.13. Ratified by South Africa in 1995.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Statute

Black Administration Act 38 of 1927.

Divorce Act 70 of 1979.

Intestate Succession Act 81 of 1987.

Law of Evidence Amendment Act 45 of 1988.

Maintenance Act 99 of 1998.

Maintenance of Surviving Spouses Act 27 of 1990.

Marriage Act 25 of 1961.

Recognition of Customary Marriages Act 120 of 1998.

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

The Group Areas Act 41 of 1950.

Case law

Alexkor Ltd & another v The Richtersveld Community & others (2003) ZACC 18.

Amod v Multilateral Motor Vehicle Accidents Fund (commission for gender equality intervening) 1999 (4) SA 1319 (SCA).

Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae) 2005 (1) SA 580.

Bronn v Fritz Bronn's Executors & others 1860 (3) Searle 313.

Daniels v Campbell 2004 (5) SA 331 (CC).

Edelstein v Edelstein 1952 3 SA 1 (A).

Faro v Bingham & others (2013) ZAWCHC 159.

Hassam v Jacobs NO & others 2009 (5) SA 572 (CC).

Ismail v Ismail 1983 (1) SA 1006 (A).

Jezile v S & others 2016 (2) SA 62 (WCC).

Kaba v Ntela 1910 TPD 964.

Khan v Khan 2005 2 SA 272 (T).

Koytyo v Sibaru 7 E.D.C 186.

Mabena v Letsoala 1998 (2) SA 1068 (T).

Malgas v Gakavu 6 E.D.C 225.

Mashia Ebrahim v Mahomed Essop 1905 T.S 59.

Mayelane v Ngwenyama & others 2013 (4) SA 415 (CC).

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC).

Mkabe v Minister of Home Affairs & others (2016) ZAGPPHC 460.

Mthembu v Letsela (2000) 3 All SA 219 (A).

Mxiki v Mbatha (2014) ZAGPPHC 825.

Ngcwabe-Sobekwa v Sitela [2020] ZAECMHC.

Ngqobela v Sihele (1893) 10 SC 346.

Richtersveld Community & others v Alexkor Ltd & another 2003 (6) SA 104 (SCA).

Ryland v Edros (1996) 4 All SA 557 (C).

Sengadi v Tsambo 2019 (4) SA 50 (GJ).

Shilubana & others v Nwamitwa 2009 (2) SA 66 (CC).

Singh v Ramparsad and Others 2007 (3) SA 445 (D).

Taylor v Kurtsag NO and Others 2005 (1) SA 362 (W).

TZ obo Minors v Road Accident Fund [2021] ZAGPPHC 367.

Union Government v Warneke 1911 AD 657.

Women's Legal Centre Trust v President of the Republic of South Africa and others (2022) ZACC 23 (28 June 2022).

Secondary sources

Amien, Waheeda 'A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context' (2010) 24 *International Journal of Law, Policy and the Family* 361-396.

Amien, Waheeda 'Islamic Family Law Reform in Muslim-Minority Countries: The Case of South Africa' (2020) 1 *Journal of Islamic Law* 57-105.

Amien, Waheeda; N Moosa & C Rautenbach 'Muslim Personal Law' in Christa Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 5 ed (2018) LexisNexis, Durban 371-412.

Amien, Waheeda & Dhammamegha Annie Leatt 'Legislating Religious Freedom: An Example of Muslim Marriages in South Africa' (2014) 29 *Maryland Journal of International Law* 505-547.

Amien, Waheeda 'Overcoming the Conflict Between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' (2006) 28 Human Rights Quarterly 729-754.

Amien, Waheeda 'South African women's legal experiences of Muslim personal law' in Lauren Fielder & Kyriaki Topidi (eds) *Religion as Empowerment – Global Legal Perspectives* (2016) Routledge 53-77.

Amien, Waheeda 'The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa' in Mavis Maclean and John Eekelaar (eds) *Managing Family Justice in Diverse Societies* (2013) Hart Publishing, Oxford 107-123.

Amien, Waheeda 'The viability for women's rights of incorporating Islamic inheritance laws into the South African legal system' 2014 *Acta Juridica* 192-218.

Burman, Sandra 'Illegitimacy and the African Family in a Changing South Africa' 1991 Acta Juridica 36-51.

Dlamini, C.R.M 'The Role of Customary Law in Meeting Social Needs' 1991 *AJ* 71-85.

Du Bois, Francois 'Introduction to South African Law: History, System and Sources' in Cornelius G, Van der Merwe & Jacques E. Du Plessis (eds) *Introduction to the Law of South Africa* (2004) 1-53.

Fishbayn, Lisa 'Litigating the Right to Culture: Family Law in the New South Africa' (1999) 13 *International Journal of Law, Policy and the Family* 147-173.

Himonga, Chuma 'Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32 *Southern African Public Law* 1-18.

Himonga, Chuma '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.

Johnson-Castle, Patricia 'The Group Areas Act of 1950' *South African History Online* 15 March 2021, available at *https://www.sahistory.org.za/article/group-areas-act-1950*, accessed on 10 November 2023.

Kovacs, Roxanne J; Sibongile Ndashe & Jennifer Williams 'Twelve years later: how the Recognition of Customary Marriages Act of 1998 is failing women in South Africa' 2013 *Acta Juridica* 273.

Madondo, M I 'Constitutional Challenges in the Post-Apartheid Era' (2019) 82 *Journal for Contemporary Roman-Dutch Law* 4.

Mngadi, Zanele 'Official Guide to South Africa 2018/19' (2019) 16 GCIS, available at *complete guide.pdf (gcis.gov.za)* .

Mofokeng, L; Chuma Himonga; Thandabantu Nhlapo & IP Maithufi 'Historical overview of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa. Post Apartheid and Living Law Perspectives* (2014) Oxford University Press Southern Africa, Cape Town.

Mofokeng, L; Chuma Himonga; Thandabantu Nhlapo & IP Maithufi 'The nature and concept of customary law' in Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South African. Post Apartheid and Living Law Perspectives* (2014) Oxford University Press Southern Africa, Cape Town.

Nhlapo, Thandabantu 'Customary Marriage: Missteps Threaten the Constitutional Ideal of Common Citizenship' (2021) 47 *Journal of Southern African Studies* 273-289.

Nhlapo, Thandabantu 'Missed Opportunities in Customary Marriage Law in South Africa: Law versus Culture … Again' in Jens Scherpe & Stephen Gilmore (eds) *Family Matters: Essays in honour of John* Eekelaar (2022) Cambridge University Press 403-418.

Osman, Fatima 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 22 *Potchefstroom Electronic Law Journal* 1-24.

Peart, N S 'Section 11(1) of the Black Administration Act No. 38 of 1927: The Application of the Repugnancy Clause' 1982 *Acta Juridica* 99-116.

Rautenbach, Christa 'Jewish Personal Law' in Christa Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 6 ed (2021) 337-369.

Sibanda, Sanele 'When is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation' (2010) 17 *Human Rights Brief* 31-35.

Sibisi, Siyabonga 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44 *Obiter* 515-533.

Tagari, Hadas 'Personal Family Law Systems - A Comparative and International Human Rights Analysis.' (2012) 8 *International Journal of Law in Context* 231-252.

Zitzke, Emile 'A Decolonial Critique of Private Law and Human Rights' 2018 *SAJHR* 492-516.