1. Introduction

Before the commencement of the South African Constitution in April 1994, marriages concluded under customary law and Muslim personal law were not regarded as valid marriages. The reasons for the non-recognition of these marriages were twofold: (a) non-compliance with the provisions of the Marriage Act on the one hand and (b) being proclaimed to be contra bonos mores due to being potentially polygynous, on the other. If a Muslim couple wanted to enter into a valid civil marriage, it had to be concluded in terms of the Marriage Act. Couples living in accordance with customary law had to meet other additional statutory requirements, all of which were race specific.

The commencement of the Constitution awoke expectations that South African marriage law would be reformed. The difficult question, however, was which method to follow to effect such reform. Various possibilities were at hand: unification, integration or harmonization of civil, customary and Muslim marriages. A mere technical adaptation of existing statutory provisions in order to effect a uniform model of marriage forms would clearly ignore the ideological, practical and constitutional dimensions of marriage law.

On an ideological level cultural and religion based pluralism had to be addressed as well. Marriage, as one of the external manifestations of cultural and religious values, is simultaneously the ideological foundation of the most intimate of relationships within the family. Considerations like existing values and practices, the acceptance of change (or contrary to that: the resistance to change) and the practicality of unification, integration or harmonization could hardly fall by the wayside.

Apart from the ideological dimensions, various practical issues also had to be dealt with. Civil marriages are characterised as being monogamous whereas customary and Muslim marriages are intrinsically potentially polygynous. First-mentioned marriages are furthermore linked with equal status of partners. In Muslim and customary marriages, however, spouses are apparently not on equal footing. Parental authority also has different meanings and contexts in the various marriage forms: civil marriages usually endorse equal parental authority whereas parental
authority focuses on the father as head of the family in customary and Muslim marriages.

The new paradigm for marriage laws in South Africa was embodied in sections 9, 15, 30 and 31 of the Constitution. The constitutional ideal of enabling a democratic society based on constitutional values of dignity, equality, the promotion of human rights and freedoms, as well as a non-racial and non-sexist approach clearly indicated a movement towards a respect for diversity and an acknowledgement of differences.

This resulted in the promulgation of the Recognition of Customary Marriages Act 120 of 1998 and the publication of a Draft Bill on Muslim marriages. The Recognition Act tends to mirror civil law resulting in culture mostly being sacrificed in favour of a form of unification. In the Bill, however, religion based principles of the Muslim culture were strictly adhered to.

It is the aim of this paper to determine how and to what extent constitutional principles have been weighed up against each other – especially in view of the ideological and practical dimensions of legal reform. It would seem that in these specific approaches to legal pluralism, religion based systems have emerged victorious and that culture as such, was negated to some extent.

The first section of the paper will deal with customary marriages. The traditional elements will first be set out after which the long process of recognition of these marriages will be discussed in full. Thereafter a similar approach will be followed in relation to Muslim marriages. An exposition regarding the current legal position in pluralistic South Africa will then be given. This section will focus on which elements of the traditional customary and Muslim marriage law have essentially been retained. Thereafter various possible solutions will be weighed up against each other and final comments regarding the possible way forward will conclude the discussion.

2. Customary marriages

2.1 Traditional customary marriages

2.1.1 Essential elements

Before the commencement of the Recognition of Customary Marriages Act in November 2000 the elements of a valid customary marriage were prescribed by traditional customary law. Customary law can be defined as:

“those legal systems originating from African societies as part of the culture of particular tribes or groups that have continued to exist, as supplemented, amended and or superseded by changing community values and the demands of a changing world, contact with societies that function within other legal backgrounds, contact with and influenced by other legal systems and direct and indirect influence of non-indigenous structures.”

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It is furthermore important to point out the differences between “living” and “official” customary law. The former is the embodiment of rules, customs and usages as adhered to by a specific community on a daily basis. These legal rules are not necessarily recognised by government. “Official” customary law on the other hand, refers to those rules that have either been recognised by government (eg, in the form of codes or legislation) or have been incorporated into publications dealing with customary law. Living and official customary law may differ from each other. It is thus quite possible that publications dealing with customary law may list the essential elements for concluding a valid customary marriage, whereas the specific community has in actual fact moved away from some of these elements or have adapted the requirements to suit their own needs.

Traditionally a marriage proposal is initiated by the man or his family group to the family of the woman. Very often initiative is taken on behest of the man or woman. Thereafter the marriage negotiations begin. Once all the negotiations have been finalised, a formal betrothal or engagement is announced, although it is not an essential preliminary or precondition for a marriage. The engagement then leads to a marriage. Originally the following two elements constituted a valid marriage:

- A consensual agreement between the two families concerning the two individuals to be married and the lobolo to be paid; and

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6 The adherence to these rules is also referred to as deep legal pluralism. This means that a broad approach to legal pluralism is followed, thereby acknowledging all the rules and customs of the community and not only those that have been recognized, formalized or endorsed by government. See for more detail concerning the various approaches to legal pluralism Van Niekerk “Legal Pluralism” in Bekker, Labuschagne and Vorster Introduction to Legal Pluralism in South Africa: Customary Law (2002) 3-8; Van Niekerk “State initiatives to incorporate non-state laws into the official legal order: a denial of legal pluralism” 2001 CILSA 3.
7 Compare in this regard Mabena v Letsoalo 1998 (2) SA 1068 (T). According to the official customary law only men are allowed to participate in the lobolo negotiations. In this case, however, the mother of the groom entered into the negotiations. The validity of that specific marriage was later questioned due to the conduct of the groom’s mother. The court followed a broad approach to legal pluralism, thereby taking note of the specific rules and customs practiced on a daily basis. In this specific community it had been acceptable for women to participate in the lobolo arrangements for a few decades already. Not only was the living law applied here, but customary law in general was also developed in accordance with the purport, spirit and objectives of the Constitution.
9 Also keep in mind that different tribal communities may have distinctive requirements. See especially Church 2004 LAWSA paras 116-125.
10 Or the husband-to-be and the girls’ family.
11 Ukuthwala is a form of abduction, especially among the Xhosa tribe, in which case the bride-to-be is kidnapped by the man or his family in order to compel the girl’s family to endorse the wedding negotiations. In these instances there can hardly be room for consent by the bride-to-be or her family. In some instances ukuthwala also constituted a delict for
The transfer of the bride to the family of the groom or to the groom himself.

In modern-times, but before the Recognition Act commenced, the following were the essential requirements for valid customary marriages:

- The father, of the man must consent to the marriage;
- The father of the woman must consent to the marriage;
- An agreement that lobolo will be paid, must be concluded;
- The husband-to-be must consent to the marriage;
- The wife-to-be must consent to the marriage;
- The wife must be transferred to the family of the husband or to the husband himself; and
- Neither the man nor the woman may be a partner in an existing civil marriage.

The essence of a customary marriage was captured as follows in Sila v Masuku, a 1937 decision: which damages could be claimed. This could, for example, be the case where the girls were kidnapped, but no marriage proposal followed. See also Church 2004 LAWSA par 109.

Lobolo is a form of bride wealth that is paid by the groom (or his family on his behalf) to the father of the bride or her family. S 1 of the Recognition of Customary Marriages Act 120 of 1998 defines lobolo as follows: “The property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, mogadi, emabheka or by any other name, which the 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” Lobolo was not recognised under colonial authorities – see par 2.2 below. See especially Maithufi and Moloi “The current legal status of customary marriages in South Africa” 2002 TSAR 610 in this regard.

Case law differs on whether all of the lobolo must be paid before a customary marriage is deemed to be valid. In the well-known Supreme Court of Appeal case, dealing with succession rights of females, Mthembu v Letsele 2000 (3) SA 867 (SCA) the court found that the marriage was not valid because all of the lobolo had not been paid at the time of the deceased’s death. On the other hand, the more recent case of Bhe v Magistrate Khayilithsha 2005 (1) BCLR 1 (CC), in which discriminatory practices dealing with inheritance rights have been declared to be unconstitutional, the court found that the marriage was in fact valid, because there had been an agreement to pay lobolo. The last-mentioned case therefore endorses an approach that an agreement to pay lobolo should be the focus and not the fact whether the full lobolo had been paid. This approach is also in line with that suggested by Olivier Indigenous Law (1995) 28; Prinsloo “Tweede aanval op inheemse opvolgingsreg” 1998 TSAR 771 772; Church 2004 LAWSA par 122.

In accordance with the original requirements, the consent of the wife-to-be was not an essential element. The families negotiated lobolo and the family of the wife-to-be consented on her behalf. In KwaZulu, however, the Zulu Code of Law provides that the wife-to-be should also consent in public – s 38. S 116(1)(b) of the Zulu Code constitutes a criminal offence if the family head or other person coerces a girl or woman to enter into a marriage. Despite this provision, the woman’s consent is generally assumed in customary law – if she does not want to go along with the marriage arrangements, she is expected to take the initiative and inform her father of her refusal.

See also the sources referred to in footnote 13 above.
“[The] process [of marriage] is gradual and involves a series of changes in (1) the attitude of the two contracting groups towards each other, (2) the actual transaction which consists of the exchange of the rights in the woman for cattle and thereafter follows (3) the adjustment of the woman in her new office: (a) her elevation from maidenhood to wifehood; (b) her departure from and farewell to the groups and its ancestors; and (c) her introduction to her new group and its ancestors and her affiliation thereto.”

It was furthermore imperative that there were no personal prohibitions on the specific prospective spouses to enter into a marriage. This generally entails the following: marriage between ascendants and descendants are prohibited as well as marriage between children from the same biological father. There are, however, major differences between the Nguni groups and other tribal affiliations concerning sexual relations and marriage between people related in other degrees of consanguinity.19

The wedding ceremonies are usually extensive and may last several days. The final step (apart from the payment of lobolo) is the transferral of the bride to the groom’s family and her formal integration into this family. It would seem as if the communities who adhere to these ceremonies do not distinguish between “strict legal” requirements and ceremonies and rituals – the whole package constitutes a valid marriage. The ceremonies and rituals therefore constitute the visible embodiment of the legal requirements.

Once all the ceremonies and rituals have been completed, the following is presumed, that (a) the father of the bride and groom respectively gave his consent; (b) that an agreement had been reached regarding lobolo, (c) that the girl had been handed over; and (d) that the man and the girl both agreed to marriage.20

There were no specific requirements for entering into a polygynous family structure. The usual requirements, as set out above, had to be met. Having said that, it was however, common that the groom could take the initiative to start marriage negotiations concerning the second wife, whereas the first wife’s negotiations were very much a family-operation.

2.1.2 Personal and proprietary consequences

Before the commencement of the Recognition Act, discussed in detail below, the personal consequences and effects of customary marriages were also governed by traditional customary law.21 As already eluded to above, the family played a very important role in the conclusion of the marriage by being involved from the outset by initiating the marriage, participating in the lobolo negotiations and thereafter attending and participating in the ceremonies and rituals. Consequently the marriage bound

18 Sila v Masuku 1937 NAC (N&T) 121.
19 See for a complete discussion Nel “The constitutionality of the crime of affinity incest: an argument based on the Recognition of Customary Marriages Act” 2002 Stell LR 331-351; Church 2004 LAWSA par 108.
20 Church 2004 LAWSA par 124.
21 Bennett Customary Law in South Africa 248-250; Pienaar 2002 Stell LR 263-265.
not only the two individuals, but also the two families.\textsuperscript{22} For the woman, particularly, it has special consequences since she is still deemed to form part of the husband’s family after his death.

In the case of polygynous marriages, each wife has a distinctive rank and status and formed an own proprietary and partly autonomous family unit within the polygynous family.\textsuperscript{23} Depending on the specific tribal affiliation, the polygynous family structure is either a complicated or a more straightforward one. In the first instance the first wife is usually the “chief” wife, the second wife the right-hand wife and the other wives are subordinate to these wives.\textsuperscript{24} If the more straightforward polygynous structure is relevant, the ranking of wives follow the chronological order of marriage. Although the wife has a great degree of autonomy in her own house, all of the wives are generally subject to the authority of the family head in all important matters. Traditionally, thus, equality in the marriage relationship is not prevalent,\textsuperscript{25} although exceptions to the rule may be encountered.

The family structure also has certain proprietary consequences. In a monogamous marriage set-up there is one undivided economic unit which is under the control of the family head. It consists of all the assets and income belonging to or collected or earned by the family members. It is not really a form of community of property in the true sense of the word, because the wife does not own 50\% of the property, nor is she entitled to 50\% of the estate.

In the case of a polygynous family structure, a distinction is drawn between general “family property” and “house property”.\textsuperscript{26} Family property is utilised by the family head to the benefit of the whole family and is under his control.\textsuperscript{27} Since the polygynous family structure consists of more than one “house”, house property also becomes relevant. In this instance the individual house has a large measure of autonomous control over the house property as such. Apart from the above-mentioned distinction between house and general family property, personal property also comes into play. This includes clothing and smaller items of a personal nature.

The marriage also had specific personal consequences for relationships within the family. For example, the husband exercised authority over his wife (or wives) and children born from the marriage(s) – very similar to the \textit{paterfamilias} of the Roman law.\textsuperscript{28} Irrespective of whether there was a polygynous or monogamous marriage, customary wives were usually subordinate to their husbands.\textsuperscript{29}

2.1.3 Dissolution of marriages and matters connected therewith

\begin{itemize}
  \item \textsuperscript{22} Church 2004 \textit{LAWSA} par 140.
  \item \textsuperscript{23} Bennett \textit{Customary Law in South Africa} 243-248; Pienaar 2002 \textit{Stell LR} 265-266.
  \item \textsuperscript{24} Church 2004 \textit{LAWSA} par 143.
  \item \textsuperscript{25} Compare Pienaar 2002 \textit{Stell LR} 263-265; Nicholson 2003 \textit{THRHR} 381-383.
  \item \textsuperscript{26} Bennett \textit{Customary law in South Africa} 254-259; Maithufi “Property Law” in Bekker, Labuschagne and Vorster \textit{Introduction to Legal Pluralism in South Africa} (2002) 54-56.
  \item \textsuperscript{27} Church 2004 \textit{LAWSA} par 146.
  \item \textsuperscript{28} Church 2004 \textit{LAWSA} par 144.
  \item \textsuperscript{29} Compare Pienaar 2002 \textit{Stell LR} 265-266; Nicholson 2003 \textit{THRHR} 385-386.
\end{itemize}
Under traditional customary law, marriages were usually terminated on the following grounds: adultery, barrenness and accusations of witchcraft. Although courts were generally not involved in divorce proceedings, and authors argue that it was a rather informal matter, there were some customary practices to be complied with before a marriage was deemed to have been terminated. This included, inter alia, that the elders of the community gathered to discuss the possible return of lobolo. In practice it was mainly the men who initiated divorce proceedings and the gathering referred to above was usually attended by male members only. If a man was willing to forfeit lobolo, he was entitled to unilaterally repudiate his wife. A woman could generally not resort to unilateral repudiation and had to enlist the assistance of the lobolo holder who may be reluctant to help since it might entail losing a portion of the lobolo.

The payment of lobolo vested custody over the children born from the marriage, in the husband and his family. Even though divorced wives were allowed to take their children with them when they returned to their fathers’ homesteads, they effectively had no authority over the children.

2.2 The long road to recognition

2.2.1 Background

Prior to the new political dispensation that commenced in April 1994, customary marriages were generally not recognised as valid marriages. Colonial authorities found customary law in general to be barbarous and inferior. As a legal system customary law during the colonial period received no formal recognition as such. Customary marriages, in particular, were considered to be repugnant to colonialists’ sense of propriety. The reasons were mainly the following: polygyny and lobolo (the

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31 In all the areas where the registration of customary marriages were compulsory before the commencement of the Recognition Act (in the former self-governing territory KwaZulu-Natal and the former national state Transkei), marriages could in fact only be terminated by a court order. In practice, however, many marriages were terminated without court orders.
32 The marriage could be terminated on agreement by the families involved.
33 Bennett Customary law in South Africa 270-274; Dlamini “Family Law” in Bekker, Labuschagne and Vorster Introduction to Legal Pluralism in South Africa: Customary Law (2002) 47. The return of at least one head of cattle symbolized the dissolution of the marriage.
34 Thembisile v Thembisile 2002 (2) SA 209 (TPD) 213D.
35 It is well-known, however, that wives in KwaZulu Natal were able to institute divorce proceedings without fathers’ assistance.
37 See for more detail in this regard Bennett Customary Law in South Africa 188-190; De Koker “Proving the existence of an African customary marriage” 2001 TSAR 257-275, especially 259-260; Olivier Introduction 2004 LAWSA paras 1-3.
38 As noted by the authors in footnote 5 above, although customary law was not recognised by colonial authorities it was, however, recognised in practice as a living legal system in all of the territories occupied by indigenous tribes.
payment of bride wealth)\textsuperscript{39} were both deemed to be against public policy and consequently unacceptable. Before the commencement of the Black Administration Act\textsuperscript{38} of 1927 in 1929 the four former provinces of the Union of South Africa regulated customary marriages and their consequences according to the province’s own requirements.\textsuperscript{40}

Consequently no legal uniformity prevailed until the Black Administration Act commenced. Not only was the aim of the Act to bring about uniformity within all of the provinces, but the Act also had as objective the introduction of a formal legal structure for the Black population in South Africa.\textsuperscript{41} Section 11(1) of the Act introduced the first uniform recognition of customary law in commissioner’s courts in South Africa. Although customary law was recognised and a prohibition on the courts’ declaring lobolo against public policy was legislated, customary marriages received no recognition. The recognition of customary law was furthermore subject to the repugnancy clause.\textsuperscript{42}

The Black Administration Act also contained provisions relating to civil marriages concluded by black persons.\textsuperscript{43} These marriages had to meet certain requirements before they were recognised. The subordinate legal status of customary marriages were confirmed since the Act provided that, if a male partner in a subsisting customary marriage entered into a civil marriage,\textsuperscript{44} the civil marriage dissolved the customary marriage resulting in the first wife and children being discarded.\textsuperscript{45}

Although the Black Administration Act attempted to bring about uniformity, the South African landscape changed since the promulgation of that Act. Due to the policy of separate development, four national states\textsuperscript{46} and six self-governing territories\textsuperscript{47} were

\textsuperscript{39} See in this regard also par 2.3.1 below. When lobolo (usually cattle) was paid in anticipation of a civil marriage lobolo was not immoral as such and the civil marriage was also recognised as being valid. See also Maithufi and Moloi 2002 TSAR 600-602.
\textsuperscript{40} See De Koker 2001 TSAR 259 – 260. The Cape Province promulgated the Native Succession Act 18 of 1864 thereby recognising certain consequences of customary marriages, in Transvaal special commissioners’ courts were created as early as 1885 to hear civil issues between Black parties – a similar approach was followed in Natal. The Orange Free State refrained form recognising customary law.
\textsuperscript{41} Despite the new political dispensation that commenced in 1994, large portions of this Act are still operative. See for the aims and objectives of the Black Administration Act De Koker 2001 TSAR 260; Olivier 2004 LAWSA par 11; Bennett Customary Law in South Africa 33-40.
\textsuperscript{42} The repugnancy clause still features in s 1(1) of the Law of Evidence Amendment Act 45 of 1988 – the section that presently authorises all courts to apply customary law. A legal rule is deemed to be repugnant if it is in conflict with one of the rules of natural justice (eg the audi et alteram partem-rule), if it is against public policy and if it in conflict with the SA Constitution.
\textsuperscript{43} S 22. This section was finally repealed by the Recognition of Customary Marriages Act 120 of 1998 when it commenced on 15 November 2000.
\textsuperscript{44} With the customary partner or another woman.
\textsuperscript{45} S 22(7) of the Black Administration Act provided that the proprietary position of the first wife and children from that customary marriage had to be the same as that of the later spouse. Unfortunately this section remained a dead letter since the practical implications were exactly the opposite: first wives and children were left destitute.
\textsuperscript{46} Transkei, Bophuthatswana, Ciskei and Venda.
\textsuperscript{47} Qwa-Qwa, KwaNdebele, KwaZulu, Lebowa, Gazankulu and KwaNkwane.
established since 1948. In Transkei, a national state in the south-eastern part of the country, customary marriages gained full recognition with the promulgation of the Transkei Marriage Act 21 of 1978.\(^{48}\)

The consequences for non-recognition of customary marriages were far-reaching.\(^{49}\) Children born from these marriages were deemed to be illegitimate, guardianship over these children was confused since the common law acknowledged the mother of illegitimate children to be the guardian, whereas in accordance with customary law guardianship vested in the husband (and his family) once *lobolo* had been paid, customary law widows were prohibited from instituting the dependant’s claim in the case of negligent causation of the death of the breadwinner\(^{50}\) and partners in customary marriages had the competence to enter into civil marriages with other persons.\(^{51}\)

### 2.2.2 Ad Hoc recognition of customary marriages

Despite the blanket non-recognition of customary marriages, the legislature stepped in to recognise these marriages for very specific purposes. These developments were mainly aimed at the amelioration of the position of female partners from customary marriages and their children:

- Section 21(3) of the Insolvency Act provides that the word “spouse” for purposes of this Act also means a wife or husband by virtue of a marriage according to any law or custom;
- Section 1 of the Income Tax Act 58 of 1962 defines “marriage” as any marriage, including persons joined together in a union recognised as a marriage in accordance with any law or custom – “husband”, “wife” and “spouse” has to be interpreted accordingly;
- Section 31 of the Black Law Amendment Act provides that a widow from a customary marriage can institute a dependant’s claim if the breadwinner had been killed negligently;
- For purposes of maintenance a black man is deemed to be the husband to his customary wife – section 5(6) of the Maintenance Act 23 of 1963;
- Section 1 of the Child Care Act 74 of 1983 provides that a marriage is any marriage recognised in terms of South African law or customary law for purposes of this Act; and

\(^{48}\) This Act recognized both customary and civil marriages. See for more detail Bennett *Customary Law in South Africa* 241-242.

\(^{49}\) See for more detail Maithufi and Moloi 2002 *TSAR* 602-603.

\(^{50}\) This was finally addressed in 1963 with the promulgation of s 31 of the Black Laws Amendment Act 76 of 1963 in which a statutory claim for maintenance was provided for.

\(^{51}\) This resulted in the dissolution of the existing customary marriage with extreme detrimental effects on customary wives and children. This “dual marriage” option was finally prevented with the promulgation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.
A customary union concluded in terms of indigenous law or custom is recognised for purposes of the Births and Death Registration Act 51 of 1992.

As early as 1986 the South African Law Commission recommended the full recognition of customary marriages. In order to remove the anomalies created by a piece-meal approach to the recognition of these marriages, the Law Commission again recommended the full recognition of customary marriages in 1996.

2.2.3 The Recognition of Customary Marriages

The Recognition of Customary Marriages Act 120 of 1998 passed through parliament in 1998 and commenced on 15 November 2000. The main objective of the Act is to place customary marriages and civil marriages on par with each other. For purposes of this Act “marriage” is defined as “a marriage concluded in accordance with customary law.” Recognising customary marriages also reflects on improving the legal position of women married in accordance with customary law and children born from these marriages. The Act also deals with the proprietary consequences of customary marriages.

2.3 Customary marriages after commencement of the Recognition of Customary Marriages Act

2.3.1 Essential elements

Although all marriages validly entered into, even before the commencement of the Act, are recognised to be valid marriages under the Recognition Act, all marriages entered into after 15 November 2000 would have to meet the following validity requirements:

(a) the prospective spouses must both be over the age of 18 years and must both consent to be married to each other under customary law. A prospective spouse under the age of 18 who wishes to enter into a marriage, has to get the consent of his or her parents or guardians in the absence of parents. If

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54 Memorandum on the objects of the Recognition of Customary Marriages Bill B11 OB-98 16.
55 S 1 Recognition of Customary Marriages Act 120 of 1998.
56 Church 2004 LAWSA par 126; Bennett Customary Law in South Africa 198-219; Dlamini Introduction to Legal Pluralism in South Africa: Customary Law 38-41. See also Mabuza v Mbatha 2003 (4) SA 218 (C).
57 S 3(1) of the Recognition Act. The practice of ukuthwala (see footnote 11 above) would exclude free consent. It would seem that such a practice is not in line with constitutional norms like equality and freedom.
the consent of the parents cannot be obtained, section 25 of the 1961 Marriage Act applies.\textsuperscript{58} 

(b) the prospective spouses should not be within the prohibited degrees, as determined by customary law.\textsuperscript{59} 

(c) the marriage must be negotiated and entered into or celebrated in accordance with customary law.\textsuperscript{60} This is a very subtle acknowledgement of culture-specific elements, as practised and adhered to by different tribal affiliations. According to Dlamini\textsuperscript{61} three phases of the marriage process are captured: phase (1) involves visits and social courtesies that culminate in consent to get married; phase (2) deals with the arrangement of lobolo and phase (3) refers to the formal departure from the bridal house to that of the bridegroom. Although lobolo is not specified in the Act authors\textsuperscript{62} contend and research\textsuperscript{63} indicates that modern marriage negotiations still adhere to the negotiation and payment thereof. During the subsistence of a customary marriage, no partner to such a marriage may conclude a civil marriage in accordance with the Marriage Act 25 of 1961.\textsuperscript{64}

Although there is a duty on the parties to have their marriage registered within three months of its conclusion,\textsuperscript{65} non-compliance does not render the marriage invalid.\textsuperscript{66} The marriage certificate is a record of the identity of the parties, the date of the marriage and any lobolo agreed to. If the marriage has not been registered, any party with sufficient interest may apply to the registering official who can issue a registration certificate after investigating the issue. Applications may also be made to the High Court or a divorce court for an order that a customary marriage should be registered or that its registration has to be amended or cancelled.\textsuperscript{67}

\textsuperscript{58} This entails that the Minister of Home Affairs or any other officer in the public service authorized in writing thereto by the Minister, may grant permission to a person under the age of 18 to enter into such marriage, if the Minister or such officer considers the marriage desirable and in the interest of the parties in question. The permission may also be granted retrospectively. The Commissioner of Child Welfare and a judge are also competent to grant such consent. See also Dlamini \textit{Introduction to Legal Pluralism in South Africa: Customary Law} 39.


\textsuperscript{60} S 3(1) of the Recognition Act. Again, exclusion of the ukuthwala custom.

\textsuperscript{61} \textit{Introduction to Legal Pluralism in South Africa: Customary Law} 42.

\textsuperscript{62} Dlamini \textit{Introduction to Legal Pluralism in South Africa: Customary Law} 42; Church 2004 \textit{LAWSA} par 122. See Bennett’s insightful discussion of this issue: \textit{Customary Law in South Africa} 234-236.

\textsuperscript{63} Law Commission \textit{Report on Customary Marriages} par 4.3.2.7 found that women do not consider lobolo demeaning or insulting; Vorster, Prinsloo and Van Niekerk “Urbanites’ Perception of lobolo: Mamelodi and Atteridgeville” \textit{Centre for Indigenous Law UNISA} (2000) 74 confirm that even urbanised communities deem marriages without the payment of lobolo as “incomplete”.

\textsuperscript{64} S 3(2) of the Recognition Act. It is not clear what the implications of non-compliance are.

\textsuperscript{65} S 4(3) of the Recognition Act.

\textsuperscript{66} Dlamini \textit{Introduction to Legal Pluralism in South Africa: Customary Law} 44-45; Bennett \textit{Customary Law in South Africa} 217-219; Church 2004 \textit{LAWSA} par 217.

\textsuperscript{67} S 4(7) of the Recognition Act.
Polygyny is recognised by the Act.\textsuperscript{68} Section 7(6) provides that a man, who wishes to marry a further wife, would now have to approach the court to approve a written contract which will regulate the future matrimonial property system of the marriages. Before this can be done, however, the existing (monogamous) matrimonial property system would have to be terminated by the court and a division of the matrimonial property has to be effected.\textsuperscript{69} The division of property has to be equitable and has to take into account all the relevant circumstances of all family groups involved. Thereafter the court considers the contract setting out the future patrimonial consequences and can (a) allow further amendments to the contract; (b) grant the order subject to conditions the court deems fit; or (c) refuse the application if the interests of the parties involved were not sufficiently considered in the contract. The existing partners as well as the prospective wife have to be joined in the application.\textsuperscript{70}

2.3.2 Personal and proprietary consequences

Under section 6 of the Recognition Act spouses have the same status and capacity, including the capacity to acquire assets and to dispose of them,\textsuperscript{71} to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law and subject to the marital property system.\textsuperscript{72} This is the case irrespective of when the customary marriage was entered into.

The proprietary consequences depend on the date when the marriage was concluded. If the marriage was concluded before 15 November 2000 the proprietary consequences will still be governed by the customary law.\textsuperscript{73} This means that, effectively, all property (except personal property) is still under the control of the family head – the husband, despite the point of departure that spouses are equal in status and capacity. The fact that the husband is in control of the property, has obvious negative effects on wives who want to acquire or dispose of property.

In all other instances where monogamous marriages have been concluded after the commencement of the Recognition Act, marriages are deemed to be in community of property and profit and loss, unless such consequences have specifically been excluded by way of an ante-nuptial agreement which regulates the matrimonial consequences of the marriage.\textsuperscript{74} In the case of no community of property, the parties are furthermore free to determine whether the accrual system is applicable to

\textsuperscript{68} S 2(3) of the Recognition Act. See in detail Bennett \textit{Customary Law in South Africa} 243-248.
\textsuperscript{69} S 7(6) of the Recognition Act.
\textsuperscript{70} S 7(8) of the Recognition Act.
\textsuperscript{71} This is not the full picture; however, if the marriage was concluded before the commencement of the Act, the proprietary consequences will still be governed by the customary law – as set out in par 2.1.2 above.
\textsuperscript{72} See for more detail Pienaar 2003 \textit{Stell LR} 256-272; Dlamini \textit{Introduction to Legal Pluralism in South Africa: Customary Law} 45; Bennett \textit{Customary Law in South Africa} 248-254; Church 2004 \textit{LAWSA} par 145; Nicholson 2003 \textit{THRHR} 384-386.
\textsuperscript{73} S 7(1) of the Recognition Act. See also Dlamini \textit{Introduction to Legal Pluralism in South Africa: Customary Law} 46-47; Bennett \textit{Customary Law in South Africa} 254-260; Church 2004 \textit{LAWSA} par 141.
\textsuperscript{74} S 7(2) – see also Church 2004 \textit{LAWSA} par 152.
their separate estates. Polygynous marriages, due to the existence of various houses, intrinsically do not lend themselves to community of profit or loss. In this scenario the only viable option is out of community of property without the accrual system.

Spouses married before the commencement of the Recognition Act may apply jointly to the court to change the matrimonial property system that applies to their marriage. Once the court is satisfied that all the requirements have been met, it may order the change and authorise the parties to enter into a written agreement regulating the future matrimonial consequences on conditions determined by the court, if relevant.

2.3.3 Dissolution of marriages and matters connected therewith

Irrespective of when marriages were entered into, all marriages have to be terminated by way of a court order and only on the basis of irretrievable breakdown of the marriage. The court can also make an order for the payment of maintenance. In order to determine the maintenance, the court is also empowered to take into account any arrangement or payment made under customary law, thereby also considering the payment of lobolo. The Mediation in Certain Divorce Matters Act and section 6 of the Divorce Act are also applicable to the dissolution of customary marriages. These provisions deal with the interests and welfare of children and with the appointment of family advocates and councillors to make recommendations regarding the custody and control of minor children of the marriage. Section 8(5) does, however, still provide for mediation by, for example, traditional leaders, before the final termination of the marriage.

2.3.4 Change of marriage system

Parties to a monogamous customary marriage, contracted under the Recognition Act may convert their customary marriage into a civil marriage in terms of the Marriage Act of 1961.

3. Muslim marriages

75 Bennett Customary Law in South Africa 254-260; Church 2004 LAWSA par 146.
76 Bennett Customary Law in South Africa 260-263; Church 2004 LAWSA par 152.
77 S 7(4)(a) of the Recognition Act.
78 S 8(1) of the Recognition Act. Compare Pienaar 2003 Stell LR 266-268; Dlamini Introduction to Legal Pluralism in South Africa: Customary Law 47-48; Bennett Customary Law in South Africa cha 10; Church 2004 LAWSA par 53.
79 S 8(4)(e) of the Recognition Act.
80 S 8(3)(e) of the Recognition Act.
81 24 of 1987.
82 70 of 1979.
83 Compare Church 2004 LAWSA par 153.
84 See also s 8(4)(d) of the Recognition Act.
85 S 10 of the Recognition Act.
86 See for more detail Dlamini Introduction to Legal Pluralism in South Africa: Customary Law 37-38; Bennett Customary Law in South Africa 238-239; Church 2004 LAWSA par 154.
3.1 Introduction

Islam literally means “surrender” or “submission” and is based on the unqualified submissions to the Will of God. Islam is a comprehensive system governing human conscience, intellect, and a human being’s relation with God, with him or herself, with other human beings and with the environment.

Islamic law is regarded as one of the major non-Western legal systems of the modern world. No distinction is made between law and religion, between state and church. Islamic law is inextricably intertwined with the belief system and the moral values of Islam.

The core principles are contained in the Quran, regarded by Muslims as the final word of God, a single source of law higher than the law of nations, constitutions and any legislation. The Quran contains specific rulings on family matters such as marriage, divorce and inheritance. The Quran is explained in practice through the Prophetic model, known as the Sunnah.

Because of its intrinsically divine basis and character of Islamic law in general and Muslim Personal law in particular, the preservation and effective implementation of this system is integral to, and is at the heart of, the preservation of the community itself, its distinct identity, character and ethos.

3.2 Muslim marriages: The existing position

3.2.1 Nature and purpose of marriage

The nature and purpose of marriage is summarized in the following two verses of the Quran:

a. “And of this signs is that He created mates for you from yourselves that you might find peace of mind in them and the He put between you love and compassion, surely these are signs for people who reflect.”

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88 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 15.
89 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 20.
90 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 20.
91 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 20.
92 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 16; Goolam in Schäfer(ed) Family Law Service 1.
93 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 16; Goolam in Schäfer(ed) Family Law Service 1.
94 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 16; Goolam in Schäfer(ed) Family Law Service 1; Report 5, see fn 5 for Ijma and Qiyas as secondary sources.
95 SALC Project 59 Report: Islamic Marriages and Related Matters 5.
96 Chapter 30 verse 21.
b. “They are your garments, and you are their garments”.

The simile of the garment has been used to capture the essence of the marital relationship. It emphasizes that the mind and souls of the spouses have to be so closely knit that they provide cover for each other.

3.2.2 Essential elements of marriage

The essential elements of a marriage contract are the two pillars of an offer and acceptance by the two principals or their proxies. As with any other contract there must be a meeting of the minds regarding the offer and the acceptance thereof. It follows that factors such as incapacity, minority and insanity can affect the validity of the marriage contract. The conditions for full legal capacity are age of majority and sanity. A person who has full legal capacity has the right to enter into a contract of marriage and is regarded as being guardian of himself or herself.

In the context of marriage, guardianship is exercised over a person with no or limited legal capacity. The guardian may conclude a marriage contract on behalf of a ward and it takes effect with the consent or acceptance of the ward. The guardian must act in the best interest of the ward.

The marriage contract also has to fulfill other requirements to be valid in terms of Shariah. The presence of witnesses is an essential element. Furthermore, the woman must be immediately eligible for marriage to the man who proposes, in other words, there must be no marriage impediments.

As to the contract itself, it is possible to include certain conditions. A woman can, for example, retain the right to dissolve the marriage, or stipulate that the husband may not marry a second wife.

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97 Chapter 2 verse 187.
98 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 61.
99 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 61.
100 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 61.
101 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 35-36.
102 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 35-36.
103 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 36.
104 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 36.
105 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 36.
106 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 61; Goolam in Schäfer(Ed) Family Law Service 6.
107 Goolam in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 62-63 for a detailed discussion of marriage impediments.
109 Goolam “Gender Equality in Islamic Family Law: Dispelling common Misconceptions and Misunderstanding” 2001 Stell LR 199 201. Goolam also points out that the majority of Muslim women around the world are unaware of the contract or pre-nuptial agreement. As a matter of fact, this pre-nuptial agreement should be read to the spouses at the marriage ceremony.
3.2.3 Personal and proprietary consequences of marriage

The concept of marital power is foreign to Islamic law. Likewise the concept of community of property is not recognized as spouses maintain separate estates during the subsistence of marriage. The proprietary consequences can best be described as a marriage out of community of property and out of community unity of profit and loss. This means that each spouse retains sole ownership and control of all property acquired before or after the marriage.

Under Islamic law a woman who has full legal capacity, whether single or married, has an absolute right to earn, acquire or inherit property. She may enter into any contract to acquire, alienate or burden her property independent of male control.

The above position is based on a reading of the Quran that reflects a general doctrine of gender equality. According to Goolam it is a doctrine that is qualified with the assertion that this is not an undifferentiated equality but one involving distinctive rights, within the framework of their distinctive responsibilities, for men and women. Interpreted within the context of the marital relationship, this means that spouses enjoy equal status and full contractual capacity.

a. Dower

The dower becomes payable by the husband to the wife as an obligation resulting from the marriage.

The dower may consist of cash or any item or property of value and, contrary to widely held misconceptions, is not seen as a bride-price. The value of the dower in order to make them aware of their rights and obligations and consequences of failure to comply with the obligations.

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110 Badat “Matrimonial property” in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 63.
111 Badat “Matrimonial property” in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 63.
112 Badat “Matrimonial property” in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 63.
113 Badat “Matrimonial property” in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 63.
114 Chapter 4 verse 1 where the following is stated: “O mankind rever you Guardian Lord who created you from a single being created, of the same essence, his mate and from them twain scattered (like seeds) countless men and women”. Also see chapter 2 verse 187 “They are your garments and you are their garments” from which the deduction can be made that neither spouse is inferior in status or dignity. Chapter 2 verse 228 confirms the nation of equality “And women shall have rights similar to the rights (men have) over them”.
115 Goolam in Ruateanbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 37
116 Badat in Rautenbach & Goolam (Eds) Introduction to Legal Pluralism in South Africa 63. Also see Quran chapter 4 verse 4: “And give women (an marriage) their dower as a free gift”. Goolam in Schäfer(Ed) Family Law Service 6(1).
is not prescribed by law and, depending on their economic and social standing, can be agreed upon by the parties.\footnote{118}

If the dower is transferred to the wife at the time of the marriage, she acquires sole ownership thereof.\footnote{119} The parties can also agree that payment will be deferred. Should the marriage then be dissolved by divorce or death of the husband, before transfer the wife has a claim against her husband or his estate.\footnote{120} It is important to note that in these circumstances, the claim for dower is separate and distinct from a claim for maintenance on divorce or inheritance upon death.\footnote{121}

b. Maintenance

The husband must maintain his wife and children during the subsistence of the marriage.\footnote{122} Upon dissolution of the marriage by divorce, the wife is entitled to claim reasonable maintenance during the three month period of iddah.\footnote{123} The husband’s obligation to maintain extends beyond this period if his former wife is pregnant or breast feeding. In these instances he is obligated to maintain her until the birth of the child or when she no longer breastfeeds.\footnote{124}

The Quran also provides for the payment of a consolatory gift upon divorce.\footnote{125}

\footnote{117} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63-64; Goolam in Schäfer(Ed) \textit{Family Law Service} 6(2).
\footnote{118} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63; Goolam in Schäfer (Ed) \textit{Family Law Service} 6(2).
\footnote{119} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63; Goolam in Schäfer (Ed) \textit{Family Law Service} 6(2) Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63-64; Goolam in Schäfer (Ed) \textit{Family Law Service} 6(2).
\footnote{120} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63; Goolam in Schäfer (Ed) \textit{Family Law Service} 6(2).
\footnote{122} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63: In Ismail v Ismail 1983 (1) SA 1006 (A) the court had to deal with, amongst other things, a claim by a woman married and divorced under Muslim rites only, for payment of the deferred dower as agreed upon at the time of the marriage. The (then) court of appeal conclude that it could not enforce any custom or contract which flowed from a Muslim marriage as the union was potentially polygamous, against public and not solemnized in accordance with the Marriage Act 25 of 1961.
\footnote{123} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 64; Goolam in Schäfer (Ed) \textit{Family Law Service} 8.
\footnote{124} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 63-64; Also see Quran chapter 65 verse 6: “Let women live (in iddah) in the same way as you live according to your means. Annoy them not, so as to restrict them”. 
\footnote{124} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 64; Goolam in Schäfer(Ed) \textit{Family Law Service} 8.
\footnote{125} Badat in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 64; In Ryland v Edros 1997(1) CLR 77(C) the spouses were married and divorced under Muslim rites. One of the questions the court had to rule on was whether the respondent, Ms Edros was entitled to a consolatory gift on the dissolution of her marriage. Expert witnesses on both sides agreed that in terms of Shafi jurisprudence she was as a divorced wife entitled thereto and the court found in her favour.
3.2.4 Dissolution of marriage

A Muslim marriage can be terminated by divorce at the behest of both men and woman when the continued existence of a marriage becomes impossible.\textsuperscript{126} Divorce, as a process can take place in different forms. It may be dissolved during the lifetime of the parties at the initiative of the husband or wife (talaq); based on mutual agreement (khula); or by judicial order (tafrig).\textsuperscript{127}

A detailed exposition of the actual content of the various forms of divorce falls beyond the scope of this discussion, and a few remarks will suffice.\textsuperscript{128} First, Moosa is keen to point out that there exists a common misconception amongst both Muslims and others that the right to divorce rests solely in the hands of the husband, which is often executed capriciously and to the wife’s detriment. What is true, is that the talaq, as the unilateral and exclusive right if the husband is the most common of all the divorce procedures. Second, many Muslims, especially women, are unaware of the various forms of divorce at their disposal. Third, women’s rights are diminished by interpretations of the Sunni schools of law which are sometimes at variance with the spirit of equality inherent in Islam.\textsuperscript{129}

3.3 The long road to recognition

3.3.1 Introduction

Historically, a marriage contracted according to Islamic law was regarded by South African courts as null and void \textit{ab initio}, and contrary to public policy. The rationale for non-recognition is the potentially polygamous nature thereof. In Ismail v Ismail\textsuperscript{130} the court stated that an Islamic marriage was “\textit{contra bonos mores} in the wider sense of the phrase, ie as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of society”.

3.3.2 Ad Hoc statutory recognition

A number of acts or sections in acts recognize religious marriages.\textsuperscript{131} For example, the Child Care Act 74 of 1983, Births and Deaths Registration Act 51 of 1992 and Domestic Violence Act 116 of 1998 apply in its totality to religious marriages. Other examples are as follow:

- Section 10A of the Civil Proceedings Evidence Act 25 of 1965 and section 195(2) of the Criminal Procedure Act 51 of 1977 recognise religious marriages for purposes of compelling a spouse as a witness in civil and criminal proceedings.

\textsuperscript{126}Moosa in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism in South Africa} 67
\textsuperscript{127}Goolam in Schäfer (Ed) \textit{Family Law Service} 6(2).
\textsuperscript{128}See in general Moosa in Rautenbach & Goolam (eds) \textit{Introduction to Legal Pluralism In South Africa} 67-71; Goolam in Schäfer (Ed) \textit{Family Law Service} 6(2)-7.
\textsuperscript{129}Moosa in Rautenbach & Goolam (Eds) \textit{Introduction to Legal Pluralism In South Africa} 71-72.
\textsuperscript{130}1983 (1) SA 1006 (AD) at 1026.
\textsuperscript{131}Cronjé & Heaton \textit{South African Family Law} 215-216.
Section 9(1)(f) read with section 1 of the Transfer Duty Act 40 of 1949 which exempt property inherited by a spouse in a religious marriage from transfer duty.

Section 4(q) read with section 1 of the Estate Duty Act 45 of 1955, which exempt property accruing to a spouse in a religious marriage from estate duty.

The above provisions apply to religious marriages regardless of whether they are de facto monogamous or polygynous.

3.3.3 Judicial recognition

*Ryland v Edros*\(^{132}\) was the first judgement that gave limited recognition to a de facto monogamous Muslim marriage. The court held that the contractual obligations following from the marriage can be enforced and recognized as between the spouses despite the fact that the marriage is potentially polygynous.

The court relied heavily on the principles of equality, dignity and freedom of religion enshrined in the new Constitution, as well as the values of tolerance of diversity, and the recognition of the plural nature of South African society. The court rejected the 1983 decision in *Ismail v Ismail*\(^{133}\) and held that the judgement represented the views of only one group of society.

In *Amod v Multilateral Motor Vechile Accidents Fund*\(^{134}\) the court extended the dependant’s action for loss of support to the surviving spouse in a de facto monogamous Muslim marriage. The court concluded that the new ethos of tolerance, pluralism and religious freedom required a new approach to Muslim marriages and that the boni mores of our society required that the contractual duty of support flowing from Muslim marriage should be recognized and legally enforceable.

As in *Ryland v Edros*, the decision was confined to a de facto monogamous Muslim marriage.

In a very recent judgement, *Daniels v Campbell*,\(^{135}\) the Constitutional Court held that a surviving spouse in a monogamous Muslim marriage qualifies as a “spouse” and “surviving spouse” in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. In view of the Constitution the old interpretation excluding a spouse in a Muslim marriage was held to be discriminatory and unsustainable.

Commendable as the above decisions are, it still offers no relief to Muslim women who are involved in polygamous marriages.

3.4 Law reform

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\(^{132}\) 1997 (1) BCLR 77 (C).

\(^{133}\) Supra.

\(^{134}\) 1999 (4) SG 1319 (SCA).

\(^{135}\) 2004 (7) BCLR 735 (CC).
The political transformation in South Africa, commencing with the adoption of the Interim Constitution\textsuperscript{136} on 27 April 1994 and a final Constitution\textsuperscript{137} on 4 February 1997 can be seen as the catalyst for the renewed attempt at the legal recognition and enforcement of aspects of Muslim Personal Law.\textsuperscript{138} During March 1997 two workshops were held in order to involve the public in the planning of the investigation as to the possible recognition of Muslim marriages.

Nominations were invited for appointment to the Project Committee. 78 Nominations were received and the Project Committee established by the Minister of Justice on 30 March 1999 is the result of those nominations.\textsuperscript{139} The terms of reference of the Project Committee was “to investigate Islamic marriages and related matters”.\textsuperscript{140}

It was clear from the outset that the Project Committee was deeply aware of the challenges faced by the task at hand. In the Issue Paper the following statement is made:\textsuperscript{141}

“If legislation is to be enacted which give recognition to aspects of Muslim Personal Law it will be necessary, in the first instance, to establish the parameters of such recognition. This task is in itself difficult because of the problem of implementation within the dominant legal system. The challenge posed to the law and legal institutions within a democratic secular state is the manner in which and the extent to which it accommodates individual choice in matters of morality and religion. A tolerant society seeks to maximize individual liberty and freedom of choice. Implementation has to be technically feasible within the dominant system. whilst maintaining the integrity of Muslim Personal Law”.

The most pressing issues identified requiring attention, were stated by the Project Committee as follows:\textsuperscript{142}

- The status of a spouse or spouses in a Muslim marriage or marriages;
- The status of children born of a Muslim marriage;
- the regulation of the termination of a Muslim marriage;
- the difficulties in enforcing maintenance and other obligations arising from a Muslim marriage
- the difficulties in enforcing custody of, and access to, minor children; and
- the proprietary consequences arising automatically from a Muslim marriage or its termination are not recognized of law, and therefore not enforceable”.

\textsuperscript{136} Act 200 of 1993.
\textsuperscript{137} Act 108 of 1996.
\textsuperscript{138} SALC Project 59 Report: \textit{Islamic Marriages and Related Matters} 1.
\textsuperscript{139} SALC Project 59 Report: \textit{Islamic Marriages and Related Matters} 1-2 and see footnote 2.
\textsuperscript{140} SALC Project 59 Report: \textit{Islamic Marriages and Related Matters} 1- 2.
\textsuperscript{141} SALC Project 59 Report: \textit{Islamic Marriages and Related Matters} 1.
\textsuperscript{142} SALC Project 59 Report: \textit{Islamic Marriages and Related Matters} 6.
Respondents were requested to formulate submissions regarding a number of proposals, ranging from the right to choose a marital system compatible with religious beliefs and with the Constitution, to validity requirements and the grounds on which the conclusion of a polygamous marriage would be permissible.

Various interested parties responded. These responses, together with a wide process of consultation and a number of workshops held, led to a Draft Bill proposed in Discussion Paper 101. Once again a process of consultation was followed and culminated in a draft Muslim Marriages Bill.

3.4.1 Introduction

In terms of the draft Bill all Muslim marriages concluded before the coming into operation of the Bill will be subject to its provisions unless the parties thereto elect to exclude those provisions. On the other hand, Muslim marriages concluded after the coming into operation of the Bill will only be subject to this provision if the parties thereto elect to be bound thereby. The marriage of parties who elect not to be bound by the provisions of the Bill will be governed only by Islamic law and will not be recognized as a valid marriage in terms of South African Law.

3.4.2 Essential Elements

The Draft Bill sets the following requirements for a Muslim marriage concluded after its coming into operation:

a. The prospective spouses must both consent to be married to each other. The marriage may be concluded by proxy but then the marriage officer must ascertain from the proxy whether the parties to the prospective marriage have consented thereto.

b. The prospective bride and groom must have attained the age of 18 years.

c. If either of the prospective spouses is a minor, both his or her parents or legal guardian must consent to the marriage.

d. The prospective spouses may not be within the prohibited degrees of relationship as determined by Islamic law.

e. Witnesses must be present as required by Islamic Law at the time the marriage is entered into.

f. The marriage must be contracted in accordance with the formulae prescribed by Islamic Law.

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143 Clause 2 (2).
144 Clause 2 (1).
145 Clause 2 (3) and (5); Cronjé & Heaton South African Family Law 218.
146 Clause 5 (1) (a).
147 Clause 5 (1) (b).
148 Clause 5 (1) (c).
149 Clause 5 (1) (d).
150 Clause 5 (4). Clause 10 of the Bill read with 5 1 of the Age of Majority Act sets the age of majority as 21 years.
151 Clause 5 (10).
152 Clause 6 (4).
g. The marriage officer who conducts the marriage ceremony must ensure that the spouses understand the registration procedures and must register the marriage. The marriage officer must also inform the parties that they are entitled to conclude a contract of their own choice regulating their marital regime or that they may conclude a standard contract. The parties must be provided with examples of such a contract.\textsuperscript{153}

3.4.3 Personal and proprietary consequences

In terms of clause 3 of the draft a wife and a husband in a Muslim marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and independence including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

A Muslim marriage to which the draft Bill applies will be out of community of property, excluding the accrual system unless the spouses mutually agree to enter into an antenuptial contract.\textsuperscript{154} A husband in a Muslim marriage to which the draft Bill applies and who wishes to enter into a further Muslim marriage with another woman, must obtain court approval of the marriage as well as approval of the written contract which will regulate the proprietary consequences of his marriages.\textsuperscript{155}

Clauses 8(6) to 8(10) regulate polygamy. When considering an application by a husband in a Muslim marriage for a further Muslim marriage, the court must grant approval if it is satisfied that the husband is able to maintain his spouses equally as prescribed by the \textit{Quran}.\textsuperscript{156}

3.4.4 Dissolution of the marriage

a. Dissolution by divorce

Clause 9 deals with the dissolution of a Muslim marriage. In essence it provides that a Muslim marriage may be dissolved by a court on any ground permitted by Islamic law.\textsuperscript{157} The different forms of divorce namely Talaq, Faskh and Khula are set out in clause 9(3) to 9(5).\textsuperscript{158}

The Mediation in Certain Divorce Matters Act 24 of 1987 and sections 6(1) and 6(2) of the Divorce Act 70 of 1979 which safeguards the welfare of minor and dependant children, will apply to the dissolution of a Muslim marriage.\textsuperscript{159} Clause 11(1) provides that the court, when making an order for the custody of or access to any minor child or in making any decision on guardianship, must, with due regard to Islamic law,

\textsuperscript{153} Clause 5 (1) (e) read with clause 6. Clause 1 (xv) defines a marriage officer as a Muslim with knowledge of Islamic law whom the Minister of Home Affairs or his or her delegate has appointed as a marriage officer for purposes of the proposed legislation.

\textsuperscript{154} Clause 8 (1).

\textsuperscript{155} Clause 8 (6).

\textsuperscript{156} Clause 8 (7).

\textsuperscript{157} Clause 9 (2).

\textsuperscript{158} See clauses 1 (xxiv); 1 (x) and 1 (xiii).

\textsuperscript{159} Clause 9 (6).
consider the welfare and best interests of the child. Due regard must also be given to the report and recommendations of the Family Advocate.\textsuperscript{160}

The consequences of divorce are stipulated in much detail in clause 9(7) of the Draft Bill with the aim to bring about legal certainty.\textsuperscript{161} The court is compelled for example, to order that the spouses assets be divided equally between them if this is just and equitable and in the absence of an agreement to this effect between the spouses.\textsuperscript{162}

This power may only be exercised if a party has in fact assisted or has otherwise rendered services in the operation or conduct of the family business or businesses during the subsistence of the marriage, or the parties have actually contributed during the subsistence of the marriage to the maintenance or increase in the estate of the other.\textsuperscript{163}

The court is also empowered to make an order for a conciliatory gift.\textsuperscript{164} Specific provision is made for the situation where the husband is a spouse in more than one Muslim marriage. The court must take into consideration all relevant factors, including the sequence of marriages, the post-nuptial alteration of the matrimonial property system and the court order regarding the matrimonial property system of the polygynous marriage.\textsuperscript{165}

When making a order for maintenance, the court must take into account all relevant factors, including past maintenance.\textsuperscript{166} The true essence of Islam law regarding maintenance is retained in clause 12 of the Bill. The provisions of the Maintenance Act 99 of 1998 is incorporated to apply, with the changes required by the context, in respect of the duty of any person to maintain any other person.\textsuperscript{167}

The pronouncement of dissolution of a marriage by a non-Muslim judge is not permissible in Islamic law.\textsuperscript{168} Consequently, provision is made in die Draft Bill for the head of the court to appoint a Muslim judge or acting judge to adjudicate disputes under the proposed legislation.\textsuperscript{169} The court must also be assisted by two Muslim assessors who shall have specialized knowledge of Islamic law.\textsuperscript{170}

As a result of the suggestions made by a substantial number of respondents regarding compulsory mediation and voluntary arbitration,\textsuperscript{171} clauses 13 and 14 have been included in the Draft Bill. As far as compulsory mediation is concerned,
provision is made for a dispute to be referred to a accredited Mediation Council before litigation is resorted to.\textsuperscript{172}

Parties to a Muslim marriage may agree to refer a dispute to an arbitrator.\textsuperscript{173} No arbitration award affecting the rights of children or the status of any person shall be effective unless confirmed by the High Court.

b Dissolution of marriage by death\textsuperscript{174}

The *Iddah* (waiting period) of a widow is 130 days if she is not pregnant.\textsuperscript{175} She may not marry during this waiting period. If she is pregnant, the *Iddah* extends until the time of delivery.\textsuperscript{176} Provision is also made for the surviving spouse to claim the deferred dower from the deceased spouse’s estate upon dissolution of the marriage by death.\textsuperscript{177}


It is an interesting, and necessary exercise to reflect on the extent to which traditional essential elements have been retained in the Recognition Act and the Draft Muslim Marriages Bill respectively.

With regard to customary marriages the following essential elements, as embodied in traditional customary law, have been retained in legislation:

- The provision that personal prohibitions on the conclusion of marriages have to be determined by customary law
- One of the validity requirements is that the marriage ceremonies and rituals have to be complied with in accordance with customary law. Although *lobolo* is not specifically mentioned here, it is deemed to have been included.
- Polygyny is recognised
- Mediation by traditional leaders before the final termination of a marriage is acknowledged

In all other respects customary marriages, as regulated by the Recognition Act of 1998, reflect civil marriages, as provided for in the Marriage Act of 1961. These include:

- The requirements regarding consent in general and the age of consent in particular (with additional provisions dealing with marriages concluded by minors)
- Proprietary consequences in the case of monogamous marriages mirror those of civil marriages, namely: in community of property as default system and out of community of property – with or without the accrual system

\begin{flushleft} \textsuperscript{172} Clause 14 (1). \\
\textsuperscript{173} Clauses 14 (3)–(6). \\
\textsuperscript{174} Cronjé & Heaton *South African Family Law* 221. \\
\textsuperscript{175} Clause 1 (xi). \\
\textsuperscript{176} Clause 1 (xi). \\
\textsuperscript{177} Clauses 1 (iii) and (vi). \end{flushleft}
Termination of marriages are identical with regard to the ground for divorce, the role courts have to play in granting a divorce order and considerations of maintenance, custody and guardianship of children.

Equal status and capacity for spouses in general.

The following provisions are *intrinsically foreign* to traditional customary marriages:

- Regulating marriages according to age limitations \(^{178}\)
- Regulating marriages concluded by minors by providing for the participation of the Minister and Commissioner in certain instances. \(^{179}\)
- Providing for marriages concluded by minors to be voidable in certain circumstances. \(^{179}\)
- Approaching and engaging courts in the termination of marriages.
- No provision for the return of *lobolo* with the termination of marriages. \(^{180}\)
- A matrimonial system of in community of property as the default matrimonial system as opposed to the traditional approach to house, family and personal property.
- Approaching and engaging courts in constituting a polygynous marriage.

With regard to Muslim marriages, it appears that the existing religious approach has largely been retained in the Draft Bill.

The foreign elements are the introduction of provisions of the Divorce Act, Mediation in Certain Matters Divorce Act, Marriage Act, Matrimonial Property Act and the Maintenance Act. But one has the distinct feeling that it has been introduced in a manner as to complement the religious core of the Draft Bill. Furthermore, these acts or relevant provisions thereof have been introduced to bring legal certainty regarding the pressing issues raised by the Project Committee.

In an attempt to rationalise the resultant unique legal position in which customary marriages have lost some of their culture-related elements and have in fact moved closer to civil marriages whereas Muslim marriages have managed to retain its religious essentials, various constitutional imperatives and other socio-economic and historical factors come into play.

With regard to customary marriages, sections 15(3) provides for legislation to be drafted recognising marriages concluded under any tradition or religion-based personal legal systems. Furthermore, section 30 affords everyone the right to participate in the cultural life of their choice and section 31(1)(a) provides that persons belonging to a cultural community may not be denied the right to enjoy their

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\(^{178}\) Marriages can traditionally be concluded once puberty has been reached and was not linked to a specific age.

\(^{179}\) Voidable marriages with regard to minors are foreign to customary law. If the parents are not available or do not consent to marriages, the guardians or close relatives (usually male relatives) act in their place. The Act is also silent on the possible matrimonial consequences of these “voidable” marriages.

\(^{180}\) Traditionally at least one head of cattle must be returned when termination of a marriage occurs. Although the Act provides that the conclusion of marriages have to be in line with the traditions and ceremonies of the tribe concerned, no such provision is included with regard to the termination of marriages.
culture.\textsuperscript{181} However, these rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Importantly, section 9, which enshrines the right to equality, also comes into play. In fact, section 9 poses the greatest challenge to the right to culture. Even though marriages are explicitly recognised as a result of section 15(3), certain aspects thereof - which directly flow from the right to culture, namely polygyny and lobolo - may be in conflict with the equality clause. On the other hand, many other culture specific essentials in relation to customary marriages have fallen by the wayside – despite the right to culture enshrined in the Bill of Rights.

In respect of Muslim marriages, freedom of religion and the right not to be discriminated against based on religion, must be weighed up against the right to sex and gender equality. The Draft Bill is in line with section 15(3)(a) of the Bill of Rights which permits legislation recognising marriages concluded under any tradition or a system of religious, personal family law. However, according to section 15(3)(b) such legislation must be consistent with the provisions of the Bill of Rights. Again, as with customary marriages, it can be argued that a practice such as polygyny, or the religious based Iddah (period of waiting) only applicable to women, infringes the right to gender equality.

Based on constitutional imperatives alone, it is difficult to explain the apparent integration of customary marriage laws into the dominant system of civil marriage law, and the apparent harmonisation between Muslim marriage law and civil marriage law.

Perhaps one has to keep in mind that culture as such, although unique and distinctive, is also flexible in nature. Religion and religious beliefs on the other hand, tend to be more rigid and less prone to change.\textsuperscript{182} Modern-day factors like urbanisation, globalisation and a general tendency to adhere to western practices may also have contributed to major changes in communities’ experiences and perceptions of culture. This, as well as pressure from traditional leaders during the negotiation phase,\textsuperscript{183} may explain why especially polygyny and lobolo have been retained whereas other culture-specific essentials were compromised on.

If the criteria is whether the essence of culture and religion-specific elements have been retained in the statutory regulation of Muslim and customary marriages respectively, it would seem that the right to practice one’s religion – as embodied in the Muslim Marriage Bill – won the prize. For that community, culture, religion and law are so interlinked that it is inconceivable that a marriage can be concluded without encompassing all of these elements.

5. Possible way forward

South Africa is a multi-cultural society – a true rainbow nation. It is a challenge indeed for the South African law to give effect to the cultural and religious diversity on

\footnotesize{\textsuperscript{181} See for more detail Bennett \textit{Customary Law in South Africa} cha 3; Cronjé and Heaton \textit{SA Family Law} 208-211.  
\textsuperscript{182} See also Bakker “Die weg vorentoe: Unifikasie of Pluralisme van die Suid-Afrikaanse Huweliksreg?” 2004 \textit{THRHR} 626-639.  
\textsuperscript{183}See Bennett \textit{Customary Law in South Africa} 77 for an overview of the negotiations preceding the final Constitution.}
the one hand and to strive to some form of legal certainty on the other. In the quest to determine whether unification, harmonisation or integration of the South African family law landscape is the ideal option, the role of the Constitution, as well as existing intimate, emotional relationships of family ties and the complexities of family law relationships, encountered on a daily basis, have to be kept in mind.

Unification\(^\text{184}\) entails one uniform system of family law, applicable to the whole of South Africa, irrespective of cultural or religious background or preference. In such a legal dispensation, the risk is real that many essential elements, deriving from cultural practices or religious beliefs, may be sacrificed. For many devout followers the price could be too high to pay.

Harmonisation on the other hand, means that various legal systems remain in tact and exist alongside each other, but that conflicting provisions are harmonised and brought in line with each other.\(^\text{185}\) This legal dispensation has the benefit that essential cultural and or religious elements of family law may be retained. When integration is opted for, individual systems are also retained, but aspects of one legal system may be integrated with that of another, thereby creating a synergy in relation to, for example, family law. In view of section 30 of the Constitution, which enshrines the right to culture and section 31 in which everyone’s right to join cultural communities\(^\text{186}\) are guaranteed, either harmonisation or integration of the South African family law would seem to be the better solution.

Family law is a vibrant, ever-changing complex discipline. Already many forms of relationships exist and are accommodated to a larger or lesser extent by the South African legal system. It also appears that, when existing legislative measures do not meet the unique needs and demands of communities, a mutation of existing rules take place, resulting in the legislative measures becoming mere paper law.

Perhaps the time has come to re-conceptualise the current family law landscape, keeping in mind that the Constitution heralds the right to culture and religion, that the South African society is diverse, that family law is vibrant and flexible, and finally that extra-legal family law rules have already developed in practice.

**Two main options are on the table:**

(a) **Accept the current legal dispensation in relation to family law and acknowledge and regulate the consequences.** The point of departure is that the following three marriage forms are recognised: (i) civil marriages, (ii) Muslim marriages in line with culture and religion; and (iii) statutory marriages with certain African customary law characteristics, but not “true traditional customary marriages” \(\textit{per se}\). In theory this approach endorses a certain measure of legal certainty. In practice, however, mutations of statutory provisions occur on a daily basis. These “mutations” are neither recognised, nor regulated, thereby inhibiting legal certainty to some extent.

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\(^{184}\) See for more detail Prinsloo “Pluralism and unification in family law in South Africa: 1990 *CILSA* 324-325.

\(^{185}\) Also compare Prinsloo 1990 *CILSA* 328-329; Bakker 2004 *THRHR* 631-632.

\(^{186}\) See in general Bennett *Customary law in South Africa* cha 3.
(b) Re-conceptualise the family law landscape. Civil, customary and Muslim marriages are all provided for. With regard to religion and culturally based marriages (customary law and Muslim marriages) a three legged model is proposed. Each leg embodies the following:

(i) An Act regulating the conclusion, content, consequences and termination of these marriages. The Recognition of Customary Marriages Act 120 of 1998 and the Muslim Marriage Bill fulfil this role. The main characteristic of these legislative measures is that they strive to incorporate cultural and religious essentials, but that certain elements derived from the national law (or civil marriage provisions) may also be incorporated. Marriages entered into under these provisions are recognised as valid marriages.

(ii) The option of concluding a civil marriage is still available to persons living in accordance with customary or Muslim law. The Marriage Act 25 of 1961 regulates these marriages.

(iii) In view of sections 30 and 31 of the Constitution, the introduction of a true cultural or religious marriage that contains all of the traditional essentials which have not been compromised by western or civil elements, is suggested. These marriages are thus concluded in terms of traditional customary or Muslim law and do not fall within the ambit of either the Recognition of Customary Marriages Act or the Muslim Marriage Bill. The elements that are foreign to these marriages, but have been incorporated in the present legislative measure regulating these marriages, will thus be excluded. For persons wanting to enter into a traditional customary marriage, for example, the matrimonial system of house, family and personal property is available.

6. Conclusion

The commencement of the Constitution served as catalyst for family law reform and the recognition of culturally based and religion based marriage laws. In a society where civil marriage law has been the dominant system, the importance of constitutional imperatives to bring about change must be emphasised.

In the absence of a court ruling, however, there is still no answer on the constitutional soundness of both the Recognition of Customary Marriages Act and the Draft Bill on Muslim Marriages.

The unification of family law poses great difficulties due to the fact that it forms part of an individual’s private sphere and is practised on a daily basis. Unification is also extremely difficult to achieve since it would pre-suppose communities’ consent that live in accordance with these rules. It would seem that the most practical way to deal with legal pluralism is to recognise pluralism, while at the same time, harmonising the personal law systems in line with the Constitution.

187 See the discussion in par 3.4.1 where provision is made for Muslim parties to opt out of the proposed Bill.
188 See par 4 above.
189 The right to culture has, however, to be tempered and contextualised by the right to equality. Although traditional customary law provides for autonomy with regard to house property, wives would need more authority in relation to family property, for example.