

# **THE BASTARDIZATION OF ISLAMIC LAW BY THE SOUTH AFRICAN COURTS**

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## **SUMMARY**

Notwithstanding the fact that South Africa is a country rich in cultural diversity, and despite section 15 of the Constitution, the recognition of systems of religious, personal or family law for certain cultural and religious groups has either been limited or is virtually non-existent. This is particularly true in the case of Muslim marriages. To this extent, marriages concluded in terms of Islamic rites do not enjoy the same legal recognition that is accorded to civil and customary marriages. Non-recognition of Muslim marriages has dire consequences for the parties to the marriage, more so for women who are parties to Muslim marriages as there is no legal regulatory framework to enforce any of the consequences that arise as a result of the marriage. Therefore, in most cases, parties to a Muslim marriage are left without adequate legal protection, where the marriage is dissolved either by death or divorce. The non-recognition of Muslim marriages effectively means that despite the fact that the parties to a Muslim marriage may regard themselves as married, there is no legal connection between them.

Despite South Africa's commitment to the right of equality and freedom of religion, the courts have acknowledged that the failure to grant recognition to Muslim marriages on the ground of gender equality, has worsened the plight of women in these marriages, in that they were left without effective legal protection during the

subsistence of the marriage and also when the marriage is dissolved either by death or divorce. Whilst the *ad hoc* recognition of certain consequences of Muslim marriages by the judiciary has gone some way to redress the plight of Muslim women and provided relief to the lived realities of Muslim women, these decisions are in fact contrary to the teachings and principles of Islam and therefore problematic for Muslims. These court decisions that are in conflict with Muslim Personal Law (MPL) will ultimately lead to the emergence of a distorted set of laws relating to Muslim family law. This is a real cause for concern. A discussion of these cases is undertaken in this article.

## 1 INTRODUCTION

From the outset, it must be stated that this article is written from an Islamic legal theory perspective, which is contrary to western legal theory, as the latter adopts a human rights perspective. The basis of modern western democratic societies is a constitution that is premised on human rights and equality and which advocates the notion that the rights contained in the constitution reign supreme in all matters, religion included. Therefore, where a conflict arises in respect of the freedom of religion and the right to equality, western ideologies and philosophies dictate that the latter trump the former. This would inevitably mean that religious law would have to be adapted and ultimately amended so that it is in compliance with the constitution. From an Islamic religious perspective, this is not feasible and practising Muslims will find this untenable. This may be legally uncomfortable in South Africa as a constitutional democracy but it is the reality for the adherents of the Muslim faith.

Insofar as Islamic law is concerned, the general sources on which all its beliefs, principles and rulings are based are the *Quran*<sup>1</sup> and *Sunnah*.<sup>2</sup> As Muslims believe that the *Quran* is the literal word of God, Islam is regarded as a divinely revealed religion. Therefore, the pillars on which Islam rests are infallible texts that were sent down from heaven and are represented in the verses of the Holy *Quran* and the texts of the Prophetic *Sunnah*. From these two sources, the scholars derived other principles on which rulings may be based. These are, namely, *ijma* (scholarly consensus) and *qiyas* (analogy)<sup>3</sup>.

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<sup>1</sup> The literal meaning of *Quran* in Arabic means "the book to read". Adherents of the Islamic faith accept the *Quran* to be the literal word of God as conveyed directly to the Prophet Muhammad (PBUH).

<sup>2</sup> *Sunnah* refers to the traditions of the Prophet Muhammad (PBUH) that includes his sayings, actions and approval, or disapproval of the actions of others. The tradition of the Prophet Muhammad (PBUH) is an important source of Islam as it demonstrates the manner in which a certain injunction mentioned in the *Quran* has to be performed. The *Sunnah* constitutes the guiding principles to which all Muslims should strive to adhere.

<sup>3</sup> The secondary sources of *Shari'ah* are *ijma*, *qiyas* and *ijihad*. *Ijma* refers to the consensus amongst Muslim jurists in respect of questions of *Shari'ah* that are not allowed to be in conflict with the *Quran* or *Sunnah*; *qiyas* refers to analogical deduction, that enables a Muslim jurist, after engaging a process of study and reasoning, to transfer an existing rule by analogy to a similar situation; *ijihad* refers to the exercising of independent juristic reasoning or the formation of individual opinions or creative reinterpretations of the law. It is submitted that *ijihad* ended with the formation of the four schools of Islamic jurisprudence, namely, *Shafi'i*, *Hanafi*, *Maliki* and *Hanbali*.

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

“And so judge between them by what Allah has revealed ... and follow not their vain desires ...”<sup>4</sup>

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

“[b]ut beware of them lest they turn you far away from some of that which Allah has sent down to you ...”<sup>5</sup>

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

“And whoever does not judge by what Allah has revealed, such are the *kaafiroon* (non-believer)”<sup>6</sup>.

“[A]nd whoever does not judge by that which Allah has revealed, such are the *zaalimoon* (polytheists and wrongdoers)”<sup>7</sup>.

“[A]nd whoever does not judge by what Allah has revealed (then) such (people) are the *faasiqoon* (rebellious or disobedient)”<sup>8</sup>.

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

Islam is a religion that guides Muslims on all aspects of human life. The value system of a Muslim originates primarily from the Holy *Quran* and the progress of a Muslim is forever dependent on its application. In Islam, no distinction is drawn between law and religion. For Muslims, Islam is more than a mere religion and for them, it constitutes a way of life. In reality, Islam dictates every aspect of a practising Muslim’s life, whether it be aspects relating to the observance of prayer, charity,<sup>9</sup> fasting, pilgrimage marriage, divorce or other everyday aspects of one’s life.<sup>9</sup>

Closely linked to this is the concept of *taqwa* (piety and righteousness) that states that every believer should be mindful of God’s omnipresence,<sup>10</sup> that no act goes unrecorded and no one escapes the accountability of his or her doings. *Taqwa* is what guides practising Muslims in their desire to conform to the teachings and principles of *Shari’ah*. A case in point is the decision of the Indian Supreme Court in *Mohd Ahmed Khan v Shah Banu*

<sup>4</sup> Chap 5; verse 49.

<sup>5</sup> *Ibid.*

<sup>6</sup> Chap 5; verse 44.

<sup>7</sup> Chap 5; verse 45.

<sup>8</sup> Chap 5; verse 47.

<sup>9</sup> Alkhuli *The Light of Islam* (1981) 26.

<sup>10</sup> Muslims believe in the constant presence of Allah (God).

*Begum* where the court made a decision with regard to spousal maintenance that was contrary to the principles of Islamic law.<sup>11</sup> Therefore, if a secular court makes a decision that is not *Shari'ah* compliant, the parties themselves will not feel bound by it.

This is the current dilemma facing Muslims in South Africa with regard to the recognition of Islamic law, where the Constitution dictates that *Shari'ah* be amended to bring it in line with the Bill of Rights. The courts, therefore, make decisions in cases that involve Muslim Personal Law, which is in line with the Constitution but contrary to the rules and principles of Islamic law. Based on what is expounded above in respect of Islamic legal theories, practising Muslims will find this incomprehensible. Whilst it is acknowledged that the premise on which this article is based is contrary to western ideologies and principles, the crux thereof is that Islam, as a divinely revealed religion, should not have to bow down to the Constitution, which is man-made. The following quotation encapsulates the argument of this article:

“The reason for this is that the Bill of Rights is individual-centred, based on Western ideas while Islamic law, like African law, has as its underlying principle the idea of communitarianism. The fundamental question which needs to be answered, therefore, is: Why should Western ideas and philosophy serve as the yardstick, particularly in South Africa, an African country? A further crucial question is: Why should a legal system such as Islam, based as it is on divine revelation, play second fiddle to a secular, human legal system?”<sup>12</sup>

## 2 JUDICIAL RECOGNITION OF MUSLIM MARRIAGES

The South African courts have historically adopted a piecemeal, *ad hoc* approach to issues arising from disputes where the spouses are married by Muslim rites.<sup>13</sup> In other words, the courts have been prepared to grant legal recognition to some of the consequences flowing from Muslim marriages, but not to Muslim marriages *per se*.<sup>14</sup> This position prevailed despite the enactment of the interim Constitution in 1993, and the final Constitution in

<sup>11</sup> [1985] INSC 99 (23 April 1985). In this case, the court granted the plaintiff, a 70-year-old Muslim woman who was divorced by her husband, maintenance until her remarriage. The court's decision was based on the (secular) law. The court overruled the husband's objection that in terms of Islamic law she is not entitled to maintenance. Islamic leaders rejected the decision as an unlawful interference with Muslim Personal law and argued that the secular courts took it on themselves to interpret the *Quran* and thus disturbed the understanding of India's society that was based on privacy and the autonomy of the chosen personal law. Shah Banu herself eventually wrote a public letter declaring that as a true believer she now understood that her actions were wrong and that as a good Muslim she was rejecting the decision of the Supreme Court. She thanked the religious leaders for saving her.

<sup>12</sup> Goolam in Rautenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa Part II Religious Legal Systems* (2002) 120.

<sup>13</sup> Moosa *The Dissolution of a Muslim Marriage or Hindu Marriage by Divorce* in Heaton (ed) *The Law of Divorce and Dissolution of Partnerships in South Africa* (2014) 287.

<sup>14</sup> For eg, *Rylands v Edros* 1997 (2) SA690 (C); *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (4) SA 753 (CC). The judiciary maintains that it is the role of the legislature to grant recognition to Muslim marriages by means of enacting legislation as the legislature has chosen not to amend the Marriages Act.

1996, as from post-constitutional judicial decisions it is apparent that *ad hoc* recognition has been granted to certain consequences of Muslim marriages.<sup>15</sup>

Notwithstanding the *ad hoc* recognition of certain consequences of Muslim marriages by the judiciary, these judgments were never intended to incorporate Islamic law into the South African legal system, and therefore cannot adequately address the hardships faced by spouses married by Muslim rites. Whilst these court decisions alleviated the plight of Muslim women, the inconsistency between the court decisions and *Shari'ah* has raised alarm amongst the *Ulama* and the South African Muslim community in general. These court decisions that are in conflict with Muslim Personal Law, will ultimately lead to the emergence of a distorted set of laws relating to Muslim family law.

The purpose of the discussion of these cases below is to demonstrate that all these decisions, while constitutionally sound, are not always *Shari'ah* compliant and are therefore problematic for Muslims. In other words, the court cases discussed below caused a conflict between the South African legal solution insofar as Muslim marriages are concerned and principles and rules of Islamic law.

### 3 COURT DECISIONS

In *Ryland v Edros*<sup>16</sup> the parties concluded a marriage according to Muslim rites in 1976.<sup>17</sup> Their marriage was *de facto* monogamous and they did not conclude a civil marriage in terms of Marriage Act 25 of 1961. The husband divorced the wife in 1992 by issuing her with a *talaq*.<sup>18</sup> The plaintiff instituted an action to have the defendant evicted from their matrimonial home, and the defendant in return claimed for arrear maintenance,<sup>19</sup> a consolatory gift,<sup>20</sup> and an equitable share on the growth of her husband's estate.<sup>21</sup> The court was not called upon to determine the validity of the marriage or grant recognition to the marriage but was required to decide whether the decision in *Ismail v Ismail*<sup>22</sup> prevented the parties from relying on the marriage

<sup>15</sup> *Khan v Khan* 2005 (2) SA 272 (T); *AM v RM* 2010 (2) SA 223 (ECP); *Hoosein v Dangor* [2010] 2 All SA 55 (WCC), 2010 (4) BCLR 362 (WCC); *Daniels v Campbell NO* 2003 (9) BCLR 969 (C); *Hassam v Jacobs* 2008 (4) SA 350 (C).

<sup>16</sup> 1997 (2) SA 690 (C).

<sup>17</sup> *Ryland v Edros supra* 696C–697G.

<sup>18</sup> *Ibid.*

<sup>19</sup> For the period of the marriage.

<sup>20</sup> *Ryland v Edros supra* 696G. The wife alleged that the divorce was without just cause.

<sup>21</sup> *Ryland v Edros supra* 696H. The wife alleged that she had contributed labour, effort and money to the husband's estate, and that she was therefore entitled to an equitable portion thereof.

<sup>22</sup> 1983 (1) SA 1006 AD. In this case, the plaintiff, who was married to the defendant by Muslim rites, sued the defendant for the enforcement of certain proprietary consequences arising from their marriage, namely arrear maintenance and deferred dowry. The Appellate Division rejected the plaintiff's claims since the marriage was potentially polygamous and did not enjoy *ad hoc* recognition. It therefore remained contrary to public policy and these claims could not give rise to a civil action.

contract that formed the basis of their Muslim marriage.<sup>23</sup> In giving due consideration to the defendant's claims under the marriage agreement, the court took into account the rules and principles of Islamic law as it pertains to maintenance.<sup>24</sup> Notwithstanding the fact that the court acknowledged that the husband bears the primary duty of maintenance in terms of Islamic law, the court held that the rules of South African civil law apply in determining whether or not the defendant's claim for arrear maintenance prescribed after a period of three years. By applying the rule that a debt prescribes after a period of three years as set out in the Prescription Act,<sup>25</sup> the defendant was only allowed to claim for arrear maintenance for part of the period she was married. The court upheld her claim for the consolatory gift. The court rejected the defendant's claim for an equitable share of her contribution to her husband's estate as the nature and application of this rule in terms of Islamic law had not been adequately proved.

While the decision of the court in *Ryland v Edros* was widely welcomed and celebrated for its non-discriminatory approach to Muslim Personal Law, it was nonetheless in conflict with the rules and principles of Islamic law insofar as it relates to the prescription of a debt. In terms of Islamic law, a debt does not prescribe after a period of three years.<sup>26</sup> At the time of the divorce, the wife is entitled also to any unpaid maintenance due to her that accumulated during the course of the marriage, as this is a debt against the husband's estate, which does not prescribe.<sup>27</sup> There is no period of prescription in terms of Islamic law and the debt remains until the debtor settles it or if he dies the debt must be settled from his estate.

The decision of the Cape Provincial Division in *Daniels v Campbell NO*<sup>28</sup> regarding the intestate succession rights of a spouse in a monogamous Muslim marriage further extends the *ad hoc* legal recognition granted to religious unions. In this case, the applicant, Juleiga Daniels, had married Mogamat Amien Daniels (the deceased) in accordance with Muslim rites on 2 March 1977.<sup>29</sup> The marriage, which was monogamous at all times, had not been solemnized by a marriage officer appointed in terms of the Marriage Act.<sup>30</sup> No children were born of this marriage.<sup>31</sup> On 27 November 1994, Mogamat Amien Daniels died intestate.<sup>32</sup> The main asset in his deceased

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<sup>23</sup> *Ryland v Edros supra* 707E–F.

<sup>24</sup> *Ryland v Edros supra* 711E–H.

<sup>25</sup> 68 of 1969.

<sup>26</sup> Nasir *The Islamic Law of Personal Status* (2002) 84.

<sup>27</sup> Expert witnesses' testimony in the case of *Ryland v Edros supra* 711f–g. The evidence referred specifically to the *Shafi'i* school of Islam. See also Sallie *Maintenance and Child-care According to Islamic Law* (2001) 43.

<sup>28</sup> 2003 All SA 139 (C).

<sup>29</sup> *Daniels v Campbell NO supra* 142.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

estate was a house (hereinafter “the property”).<sup>33</sup> Throughout the marriage until his death, the deceased and the applicant lived on the property.<sup>34</sup>

In terms of the Intestate Succession Act, 81 of 1987, the surviving spouse of a deceased person is entitled to inherit from the intestate deceased estate.<sup>35</sup> Insofar as section 2 of the Maintenance of Surviving Spouses Act, 27 of 1990, is concerned, provision is made for the surviving spouse to claim for maintenance against the estate of the deceased spouse where death has dissolved the marriage.<sup>36</sup> However, neither this Act nor the Intestate Succession Act contains a definition of the word “spouse”. The meaning that is attributed to the word “spouse” in each of these Acts is what lies at the core of this case.

The issues that the court had to determine can be summarized as follows:<sup>37</sup>

- (1) Whether the word “spouse”, as utilized in the Intestate Succession Act and the Maintenance of the Surviving Spouses Act, could be interpreted to include a person in the position of the applicant, in other words, a husband or wife married in terms of Muslim rites in a *de facto* monogamous union.
- (2) Whether the failure to provide for persons referred to in (1) as “spouses” can be regarded as unconstitutional and invalid, and if this is the case, whether reading in the provisions proposed by the applicant can remedy this invalidity.

In the determination of the above issues, Van Heerden J stated that it was clear from several judgments of the Constitutional Court, that the concept of equality must be understood in a substantive, rather than a formal, sense.<sup>38</sup>

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> The order of intestate succession is set out in detail in s 1 of the Act and provides as follows:

“(1) If after the commencement of this Act a person (hereinafter referred to as the ‘deceased’) dies intestate, either wholly or in part, and –

- (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
- (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
- (c) is survived by a spouse as well as a descendant –
  - (i) such spouse shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette [fixed at present at R125 000.00 – see GN 483 in Government Gazette 11188 of 18 March 1988], whichever is the greater; and
  - (ii) such descendant shall inherit the residue (if any) of the intestate estate.”

<sup>36</sup> S 2 provides the following:

“(1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide there for from his own means and earnings.”

<sup>37</sup> *Daniels v Campbell NO supra* 139.

<sup>38</sup> *Daniels v Campbell NO supra* 162.

This necessarily required an acute awareness of the lived reality of people's lives, and an understanding of how real-life conditions of individuals and groups have reinforced vulnerability, disadvantage and harm.<sup>39</sup> Furthermore, the court held that the present interpretation of the word "spouse" differentiates between *de facto* monogamous marriages concluded in terms of Muslim rites on the one hand, and marriages entered into in accordance with Christian and Jewish rites, and non-religious (civil) marriages.<sup>40</sup> This differentiation flows from and is limited to the religion, belief and cultural background of persons in the position of the applicant. In other words, being a practising Muslim, the applicant entered into a marriage in accordance with Muslim rites. This being a potentially polygynous marriage, it did not comply with the meaning of the term "marriage" underlying the provisions of the Marriage Act. As a result of the cultural practices of the Muslim community within which the applicant lived, the applicant and her husband neglected to have their marriage solemnized by a marriage officer as required in terms of the Marriage Act.<sup>41</sup> Van Heerden J stated that it was the interplay between the applicant's religious beliefs and the cultural practices in her community, as well as the fact that South African law had failed to accommodate these beliefs and practices that have caused the applicant to be in her present position.<sup>42</sup>

In terms of section 9(2) of the Constitution, religion, belief and culture are all prohibited grounds of discrimination, and in terms of section 9(4) of the Constitution, this differentiation is presumed to constitute unfair discrimination until the contrary is proven.<sup>43</sup> The non-recognition of the applicant as a "spouse" in terms of the relevant Acts would result in the estate of the deceased to be distributed in a manner that is both inconsistent with MPL, and which discriminates unfairly against the applicant, by ignoring the reality of her *de facto* monogamous marriage to the deceased.<sup>44</sup>

In view of this, Van Heerden J concluded that the impugned provisions of the Intestate Succession Act and the Maintenance of Surviving Spouses Act were in breach of the equality clause contained in section 8 of the interim Constitution.<sup>45</sup> In determining the appropriate remedy, the court held that the mere declaration that the challenged provisions were unconstitutional was insufficient.<sup>46</sup> Ancillary relief of "reading into" the challenged provisions wording that would cure the constitutional defect and provide the applicant

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Daniels v Campbell NO supra* 163.

<sup>41</sup> *Ibid.*

<sup>42</sup> In other words, the applicant's marriage was not recognized as valid in South African law and she did not enjoy the protection afforded to "spouses" by virtue of, *inter alia*, the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

<sup>43</sup> *Daniels v Campbell NO supra* 164.

<sup>44</sup> *Daniels v Campbell NO supra* 165.

<sup>45</sup> *Daniels v Campbell NO supra* 171.

<sup>46</sup> *Daniels v Campbell NO supra* 174.



with meaningful relief, was required.<sup>47</sup> The court, therefore, made the following order:<sup>48</sup>

- (1) The omission from Section 1(4) of the Intestate Succession Act 81 of 1987, of the following definition, was declared unconstitutional and invalid: “‘spouse’ shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union”.
- (2) Section 1(4) of the Intestate Succession Act 81 of 1987, was to be read as though it included the following paragraph after paragraph (f):

“(g) ‘spouse’ shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union.”

- (3) The orders in paragraphs 1 and 2 above would have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of the order.
- (4) The omission from the definition of “survivor” in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990, of the words “and includes the surviving husband and wife of a *de facto* monogamous union solemnized in accordance with Muslim rites”, at the end of the existing definition, was declared to be unconstitutional and invalid.
- (5) The definition of “survivor” in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990, was to be read as if it included the following words after the words “dissolved by death”:

“and includes the surviving husband or wife of a *de facto* monogamous union solemnized in accordance with Muslim rites”.

The Constitutional Court confirmed the decision in *Daniels v Campbell* No.<sup>49</sup>

It must, however, be stated that despite the fact that the court came to the assistance of the widow in the *Daniel’s* case by allowing the wife of a Muslim marriage to inherit intestate and to claim for maintenance from the deceased husband’s estate, the decision is in conflict with the rules and principles of Islamic law. Whilst Islam encourages parties to draw up a will, there is no real freedom of testation due to the following two restrictions Islamic law places on the drafting of a will:<sup>50</sup>

- (a) where a testator nominates a legatee in a will, the beneficiary cannot be one of the heirs of the testator because in terms of the Islamic rules of succession, an heir inherits irrespective whether there is a will or not;
- (b) a beneficiary named in the will cannot receive a bequest from the testator of more than one-third of his estate.

This means that a testator cannot for example, disinherit the one child or his wife for that matter, as one of the principles of Islamic law of inheritance is that the wife, children born of the marriage and the parents of the husband

<sup>47</sup> *Ibid.*

<sup>48</sup> *Daniels v Campbell* NO *supra* 175.

<sup>49</sup> *Daniels v Campbell* NO 2004 (5) SA 331 (CC).

<sup>50</sup> Alkhuli *The Light of Islam* 97.

or wife inherit in all cases, although not in equal shares.<sup>51</sup> Islam limits the power of testamentary disposition to one-third of the testator's estate, as the remaining two-thirds must be distributed amongst the heirs.<sup>52</sup> The rules of inheritance are, however, subject to the condition that, before the heirs inherit, all the deceased's debts, including funeral expenses, must first be settled and effect must be given to bequests and legacies.<sup>53</sup> Where the deceased husband dies, leaving children, the wife inherits only an eighth of his estate.<sup>54</sup> Where the husband dies leaving no children, but more than one widow, the surviving widows' collective share is one quarter.<sup>55</sup> Where the deceased leaves children and more than one- widow, their collective share is one-eighth.<sup>56</sup>

During the subsistence of the marriage, the husband has the primary duty to provide maintenance to his wife, which includes the right to be provided with food, clothing and housing at the expense of the husband, on a scale suitable to his means.<sup>57</sup> This position prevails regardless of the private means of the wife.<sup>58</sup> The wife is under no obligation to contribute financially towards the running of the household, and where she does, she may claim such amounts from her husband.<sup>59</sup> Furthermore, if the wife cannot perform her household duties due to illness, or where the wife is wealthy and refuses to do any domestic work as she considers it to be below her dignity, it is the duty of the husband to provide her with cooked food, for example.<sup>60</sup>

At the dissolution of the marriage by divorce, the husband is still obliged to maintain the wife and provide her with accommodation, food, drink and clothing for the period of three months after the divorce – the *iddah* or waiting period.<sup>61</sup> The rationale is that the woman is still a wife as long as the *iddah* continues and she is therefore, entitled to the same maintenance as another wife.<sup>62</sup> This is the position when the husband issues a revocable divorce.<sup>63</sup> However, where the divorce is irrevocable, the wife is not entitled to maintenance.<sup>64</sup> After the three-month *iddah* period has lapsed, the husband ceases to be responsible for the maintenance of his former wife, as

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<sup>51</sup> *Ibid.*

<sup>52</sup> Doi *Women in Shari'ah* 165. Examples of heirs would be the wife or wives, children and the parents of the deceased.

<sup>53</sup> Alkhuli *The Light of Islam* 96.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Siddiqi *The Family Laws of Islam* (1984) 107; Ibn Rushd *The Distinguished Jurist's Primer* (1996) 63; Sabiq *Fiqh Us-Sunnah* (1989) 363; Ajjijola *Introduction to Islamic Law* (1981) 192; Ahmad *Muslim Law of Divorce* (1978) 711.

<sup>58</sup> Siddiqi *The Family Laws of Islam* 107.

<sup>59</sup> Siddiqi *The Family Laws of Islam* 108.

<sup>60</sup> Siddiqi *The Family Laws of Islam* 108–109.

<sup>61</sup> *Quran* chap 65; verse 6; Qasmi *The Complete System of Divorce* (2002) 217.

<sup>62</sup> Al-Fawzaan *Al-Mulakhkhas al-Fiqhi* (2001) 317.

<sup>63</sup> For the distinction between a revocable and irrevocable divorce see Doi *Shari'ah: The Islamic Law* (1984) 177; Ba-kathah *Tuh-fatul Ikhwaan* (1984) 169.

<sup>64</sup> *Ibid.*

they are regarded as strangers.<sup>65</sup> It should be noted, however, that the wife may in certain instances not be entitled to maintenance during the *iddah* period.<sup>66</sup> For example, where the wife is pregnant at the time of divorce the husband has to maintain her for the entire duration of the pregnancy, as well as during the time that she is breastfeeding the child.<sup>67</sup> The husband is therefore under an obligation to maintain his pregnant wife during the course of the pregnancy, and after the delivery of the baby, he is further obligated to pay his wife for breastfeeding the baby.<sup>68</sup> However, after the delivery of the baby he is not obligated to maintain his ex-wife.<sup>69</sup>

In Islamic law, the responsibility of the maintenance of the divorced woman reverts to her relatives: her son, or father, or other relations.<sup>70</sup> As far as the former wife is concerned, as soon as the *iddah* period has expired, she no longer has a claim for maintenance against her former husband, although she can claim for child-minding services.<sup>71</sup> The father, besides maintaining his children, is also responsible for the cost of childcare.<sup>72</sup> Where the children are in the custody of the mother, their father is under an obligation to remunerate her for the childcare services that she renders by taking care of their children.<sup>73</sup> The father or former husband must provide housing for her and the children born of the marriage.<sup>74</sup> Furthermore, he has

<sup>65</sup> Qasmi *The Complete System of Divorce* 223; Moosa and Karbanee "An Exploration of Mata'a Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-)opening a Veritable Pandora's Box" 2004 2 *Law, Democracy and Development* 269 with reference to the *Quran* chap 2; verse 223 and chap 65; verse 1 and 6.

<sup>66</sup> Nasir notes that, where the failure of the marriage was as a result of "some cause of a criminal nature originating from the woman, such as her apostasy or her misbehaviour" she may not have a claim (Nasir *The Status of Women Under Islamic Law* (2009) 143).

<sup>67</sup> Vahed *Islamic Law (Shari'ah): An Introduction to the Principles of Islamic Law* (2005) 32 with reference to *Quran* chap 65; verse 6. The breast-feeding may last for up to two years (Sakr *Family Values in Islam* (undated) 48).

<sup>68</sup> *Al-Mawsoo'ah al-Fiqhiyyah* (1983) Vol 17 311.

<sup>69</sup> *Ibid.*

<sup>70</sup> The obligation to maintain an ex-wife shifts to her former family according to the *Shari'ah* principle that the burden to maintain is borne by whoever stands to inherit from the woman (Vahed *Islamic Law (Shari'ah): An Introduction to the Principles of Islamic Law* 32). The obligation falls on her mature son (Qasmi *The Complete System of Divorce* 228), and if that option is not available, her father. If her father is unable to maintain her, this responsibility falls on her brothers (Qasmi *The Complete System of Divorce* 228). Where there are no brothers, the responsibility falls on the public treasury (known as the *Baytul Mal*) (Sallie *Maintenance and Child-care According to Islamic Law* 105). This is problematic as the *Baytul Mal* has to support the indigent, the homeless and the unemployed, and in South Africa, the public treasury does not have sufficient funds to adequately support those in need of support. This may result in the wife becoming destitute. Qasmi argues that she can compel her relations to maintain her through *Shari'ah* institutions (Qasmi *The Complete System of Divorce* 229). Moosa and Karbanee regard this possibility as cold comfort.

<sup>71</sup> Doi *Shari'ah: The Islamic Law* 206; Denson and Carnelley "The Awarding of Post-divorce Maintenance to a Muslim Ex-wife and Children in the South African Courts: The Interaction between Divine and Secular Law" 2009 30(3) *Obiter* 679 686.

<sup>72</sup> Sallie *Maintenance and Child-care According to Islamic Law* 43.

<sup>73</sup> *Ibid.*

<sup>74</sup> This accommodation must be fully furnished and made comfortable to satisfy their needs. See Sallie *Maintenance and Child-care According to Islamic Law* 43.

to provide the food and all other necessities to ensure that his children are not left destitute and impoverished.<sup>75</sup>

In the light of what is stated above, the decision in *Daniels v Campbell* with regard to the surviving wife's claim for maintenance against her deceased husband's estate is clearly contrary to the rules and principles of Islamic law as the maintenance of the wife married in terms of Muslim rites is restricted to the *iddah* period. The general rule in Islamic law is that a woman is entitled to maintenance only during the *iddah* period, and thereafter she ceases to be the responsibility of her ex-husband. A claim for maintenance against the estate of her deceased husband in terms of the Maintenance of Surviving Spouses Act, which extends over and above the *iddah* period, is against the rulings of Islamic law. Furthermore, a Muslim husband is not allowed to lodge a claim in terms of the Maintenance of Surviving Spouse Act, as in terms of Islamic law, he bears the primary duty of support and cannot claim maintenance from his wife's estate.

In the decision of *Hassam v Jacobs NO*<sup>76</sup> the Cape Provincial Division was faced with the question whether a spouse to a *de facto* polygamous Muslim marriage was entitled to the benefits as provided to a surviving spouse in terms of the Intestate Succession Act 81 of 1987, as well as the Maintenance of Surviving Spouses Act 27 of 1990.<sup>77</sup> In other words, the court was called on to determine whether the decision reached in *Daniels v Campbell* could be extended to a *de facto* polygamous Muslim marriage. In this case, the applicant and the deceased entered into a marriage in accordance with Muslim rites on the 3 December 1972.<sup>78</sup> The parties continued to live together as husband and wife until the deceased's death on 22 August 2001.<sup>79</sup> Prior to the deceased's death, he entered into a second marriage in 2000 with the third respondent, also in terms of Muslim rites.<sup>80</sup>

The primary issue in this matter was to what a widow's portion in terms of the Intestate Succession Act amounted and whether the surviving spouses of a *de facto* polygamous Muslim marriage had a claim for reasonable maintenance in terms of the Maintenance of Surviving Spouses Act.<sup>81</sup>

The court held that in defining the term "spouse" in a manner, which is consistent with the foundational constitutional values of human dignity, equality and freedom, there was no justification not to apply the equitable principles underlying the Intestate Succession Act and the Maintenance of Surviving Spouse Act to Muslim widows in a *de facto* polygamous Muslim marriage.<sup>82</sup> There was, therefore, no justification for excluding the widow of a

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<sup>75</sup> *Sallie Maintenance and Child-care According to Islamic Law* 44.

<sup>76</sup> 2008 (4) All SA 350 (C).

<sup>77</sup> *Hassam v Jacobs NO supra* 351. Bakker "Toepassing van Islamitiese Reg in Suid-Afrika: *Hassam v Jacobs* 2008 4 All SA 350 (C)" 2008 *Obiter* 533 540.

<sup>78</sup> *Hassam v Jacobs NO supra* 351.

<sup>79</sup> *Hassam v Jacobs NO supra* 352.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Hassam v Jacobs NO supra* 351.

<sup>82</sup> *Hassam v Jacobs NO supra* 356. In *Daniels v Campbell NO supra* it was stated that the purpose of these two Acts is to provide relief to a particularly vulnerable section of society

polygamous Muslim marriage from the provisions of the Intestate Succession Act or the Maintenance of Surviving Spouses Act.<sup>83</sup> Furthermore, the continued exclusion of the widows of polygamous Muslim marriages from the benefits of these two Acts would unfairly discriminatory against them, and would amount to a violation of their right to religion and culture, as well as the infringement of their right to dignity.<sup>84</sup> With regard to the issue as to whether widows of polygamous Muslim marriages are included in the definition of the term “survivor” (as used in the Maintenance of Surviving Spouse Act) and “spouse” (as used as the Intestate Succession Act), the court held that these terms included a surviving spouse to a polygamous Muslim marriage.<sup>85</sup>

Furthermore, the court held that section 1(4)(f) of the Intestate Succession Act was inconsistent with the Constitution on the basis of marital status, religion, culture and the right to dignity, as it made provision only for a spouse in a *de facto* monogamous Muslim marriage to be an heir in the estate of her deceased husband.<sup>86</sup> Section 1(4)(f) of the Intestate Succession Act now has to be read so as to include all the widows of a *de facto* polygynous Muslim marriage.<sup>87</sup>

In *Hassam v Jacobs NO*<sup>88</sup> an application was made for confirmation of the decision of the Western Cape High Court, which declared section 1(4)(f) of the Intestate Succession Act to be inconsistent with the Constitution as it makes provision for one spouse only in a Muslim marriage to be an heir. In the confirmation proceedings before the Constitutional Court the issues for consideration were, firstly, whether the exclusion of the spouses in polygynous Muslim marriages from the Intestate Succession Act violated section 9(3) of the Constitution, and if it did, whether this exclusion constituted unfair discrimination that could not be justified under section 36 of the Constitution.<sup>89</sup> Secondly, the court had to consider that, if this exclusion violates section 9(3) of the Constitution, whether the word “spouse” in the Intestate Succession Act could be read to include a “spouse” in a polygynous Muslim marriage.<sup>90</sup> The last issue, which the court had to consider, was what the appropriate relief would be if the word “spouses” in the Intestate Succession Act did not lend itself to include spouses in a polygynous Muslim marriage.<sup>91</sup>

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namely, widows with a view to obviating their bereavement being compounded by dependence and possible homelessness.

<sup>83</sup> *Hassam v Jacobs NO supra* 356.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Hassam v Jacobs NO supra* 357. See Denson and Van der Walt “Cold Comfort for Parties to a Muslim Marriage: *Hassam v Jacobs NO* [2008] 4 SA 350 (C)” 2009 30(1) *Obiter* 188.

<sup>86</sup> *Hassam v Jacobs NO supra* 358.

<sup>87</sup> *Ibid.*

<sup>88</sup> 2009 (11) BCLR 1148 (CC). See Denson and Van der Walt “Cold Comfort for Parties to a Muslim Marriage: *Hassam v Jacobs NO* (*Muslim Youth Movement of South Africa and Women’s Legal Centre Trust as Amici Curiae*) [2009] ZACC 19” 2010 31(1) *Obiter* 201.

<sup>89</sup> *Hassam v Jacobs NO supra* 1156.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

In addressing the first issue, Nkabinde J found that the Intestate Succession Act differentiated between widows married in terms of the Marriage Act 25 of 1961 and those married in terms of Muslim rites; between widows in monogamous Muslim marriages and those in polygynous Muslim marriages; and between polygynous customary marriages and those in polygynous Muslim marriages.<sup>92</sup> The differentiation and exclusion of spouses in polygynous Muslim marriages was found to be in conflict with the Constitution, as the right to equality prohibits unfair discrimination based on marital status. The right to equality before the law and equal protection of the law are foundational.<sup>93</sup> Furthermore, the court held that this differentiation amounts to discrimination, as the failure to grant widows of polygynous Muslim marriages the benefits of the Intestate Succession Act, will result in these widows being caused significant and material disadvantages that the equality provision expressly wishes to avoid.<sup>94</sup> The plight of widows in a monogamous Muslim marriage has since the decision in the *Daniels* case been improved as they were now recognised as spouses under the Intestate Succession Act.<sup>95</sup> Widows in polygynous Muslim marriages, however, still suffered the effects of non-recognition, and the differentiation between the spouses in a monogamous Muslim marriage and those in a polygynous Muslim marriage amounted to unfair discrimination.<sup>96</sup> Nkabinde J held that it would be constitutionally unacceptable and unjust to grant a widow of a monogamous Muslim marriage the protection offered by the Intestate Succession Act but to deny the same protection to widows of a polygynous Muslim marriage.<sup>97</sup> The exclusion of women in the position of the applicant from the protection of the Intestate Succession Act, therefore, unfairly discriminated against them on the grounds of religion, marital status and gender. The exclusion and unfair discrimination could not be justified under section 36 of the Constitution.<sup>98</sup> In other words, this exclusion could not be justified in a society that is guided by principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

With regard to the second issue, the court held that the word “spouse” as it appeared in the Intestate Succession Act, did not include more than one partner to a marriage, and consequently section 1 of this Act had to be read as though the words “or spouses” appeared after the word “spouse” wherever it appeared in section 1 of the Act.<sup>99</sup> In the formulation of the appropriate remedy, Nkabinde referred to section 172(1) of the Constitution, which required a court, when deciding a constitutional matter within its power, to declare that any law that was inconsistent with the Constitution is invalid to the extent of its inconsistency.<sup>100</sup> Section 172(1) furthermore required the court to make any order that is just and equitable, including an

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<sup>92</sup> *Hassam v Jacobs NO supra* 1160.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Hassam v Jacobs NO supra* 1161.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Hassam v Jacobs NO supra* 1162.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Hassam v Jacobs NO supra* 1163.

<sup>100</sup> *Hassam v Jacobs NO supra* 1165.

order limiting the retrospective effect of the declaration of validity for any period, and on any conditions, to allow the competent authority to correct the defect.<sup>101</sup> It was therefore held that as the word “spouse” in the Intestate Succession Act was not reasonably capable of being understood to include more than one spouse in the context of a polygynous union in order to remedy the defect, the words “or spouses” were to be read-in after each use of the word “spouse” in the Act.<sup>102</sup> It was held that the declaration of invalidity should operate retrospectively with effect from 27 April 1994, except that it did not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate.<sup>103</sup>

The Constitutional Court confirmed the decision of the Western Cape High Court that women, who are party to a polygynous Muslim marriage concluded under MPL, are spouses for the purpose of inheriting in terms of the Intestate Succession Act or claiming from estates of the deceased in terms of the Maintenance of Surviving Spouses Act.<sup>104</sup>

Once again, despite the fact that this decision alleviated the plight of Muslim women, it is contrary to *Shariah* for the same reasons stated previously under the discussion of the *Daniels* case above.

The judiciary has also adjudicated in favour of Muslim women, where they have lodged claims for maintenance against their ex-husbands to whom they were married in terms of Muslim rites. In *Khan v Khan*,<sup>105</sup> the court was called upon to consider an appeal against the Nelspruit magistrate’s court, which awarded a maintenance order against a husband in favour of his wife while they were engaged in a de facto polygynous Muslim marriage.<sup>106</sup> The husband appealed the decision to the Transvaal High Court, which considered the following two key questions: Whether or not the husband in a polygynous Muslim marriage has a legally enforceable duty to support his wife and whether or not section 2(1) of the Maintenance Act legally obliges the husband in a polygynous Muslim marriage to support his wife.<sup>107</sup>

In this case, the court found that, as there is a legal duty on a husband to maintain his Muslim wife/wives during the marriage, the Maintenance Act 99 of 1998 is applicable.<sup>108</sup> In this matter, the court held that the preamble to the Maintenance Act emphasized the establishment of a fair system of maintenance premised on the fundamental rights in the Constitution and that the common-law duty of support was flexible and had expanded over time to include many types of relationships.<sup>109</sup> The court furthermore held that the purpose of the family law was to protect vulnerable family members and ensure fairness in disputes arising from the termination of relationships.<sup>110</sup>

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Hassam v Jacobs NO supra* 1166.

<sup>103</sup> *Hassam v Jacobs NO supra* 1167.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Supra.*

<sup>106</sup> *Khan v Khan supra* 274.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Khan v Khan supra* 283.

<sup>109</sup> *Khan v Khan supra* 279.

<sup>110</sup> *Khan v Khan supra* 281.

The court regarded polygamous marriages as a family structure that must be protected by law, and that parties to a Muslim marriage – whether monogamous or not – were entitled to maintenance.<sup>111</sup> The court, therefore, confirmed the enforcement of maintenance orders for Muslim wives during their marriages, including polygamous wives.

Although the decision in *Khan v Khan* was essentially not in conflict with the principles of Islamic law, it laid the foundation for maintenance courts to adjudicate on maintenance matters, where the parties were married in terms of Muslim rites only.<sup>112</sup>

Similarly, the duty of the husband to support his wife to whom he was still married in accordance with Muslim rites, has been recognised for purposes of Rule 43 applications pending a civil divorce action, even though the validity of the marriage was challenged.<sup>113</sup> In *Mahomed v Mahomed*,<sup>114</sup> the parties entered into a marriage according to Muslim rites in 1998, and one daughter was born (in 1999) as a result of the marriage. The wife brought a Rule 43-application for maintenance of herself and her child *pendente lite*. Her husband argued, *inter alia*, that they had already been divorced in terms of Islamic law. A civil divorce action was pending between the parties wherein the wife claimed a (secular) decree of divorce as well as post-divorce maintenance for herself and her minor daughter. Leaving aside the arguments about the status of the Muslim marriage and divorce in terms of South African law that would fully be canvassed only at trial, Revelas J confirmed the decisions in earlier cases that, notwithstanding the fact that the parties were married in terms of Muslim rites, a party was not precluded from obtaining relief in terms of Rule 43. The court, therefore, found that the wife was entitled to maintenance *pendente lite* (in the civil courts), irrespective of whether the husband had uttered the three *talaqs* or not.<sup>115</sup> The respondent was *inter alia* ordered to pay maintenance to the applicant and their minor daughter to the amount of R2500 and R3000 respectively, presumably until the date of the (civil) divorce-court decision.<sup>116</sup>

Decisions by courts granting maintenance orders in favour of Muslim wives post-divorce appear to be in conflict with the majority of rulings and teachings of Islamic law that once the *iddah* period has expired, the wife is

<sup>111</sup> *Khan v Khan supra* 283.

<sup>112</sup> Mention must, however, be made of the fact that whilst the husband bears the primary duty of support towards his wife and children during the subsistence of the marriage, he is obligated to provide the wife with maintenance for only three months where the marriage is dissolved.

<sup>113</sup> *Cassim v Cassim (Part A) (TPD)* (unreported case number 39543/2006 dated 2006-12-15; and *Jamalodeen v Moola (NPD)* unreported case number 1835/06, as read with *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W).

<sup>114</sup> [2009] JOL 23733 (ECP).

<sup>115</sup> Par 13. The court noted that a divorce in Muslim law comes into effect after notification by the husband to the wife of the divorce (*talaq*) three times (par 2).

<sup>116</sup> The wife, in the main civil divorce action, is claiming recognition of her Muslim marriage in terms of South African law; in the alternative, that the Marriage Act 25 of 1961 is unconstitutional in so far as it does not recognise Muslim marriages. In the further alternative, she seeks a declaratory order regarding the Divorce Act 70 of 1979 to include marriages concluded in terms of Islamic law (par 3).



not entitled to claim for maintenance from her former husband.<sup>117</sup> To be better aligned with the *Shari'ah*, the applicant in the *Mahomed* case, for example, should rather have claimed for child-minding services that she was rendering by taking care of their minor daughter.

In *Hoosain Dangor*<sup>118</sup> the applicant, Ms Hoosain brought an application in terms of Rule 43 of the Uniform Rules of Court for interim maintenance for herself and her minor daughter, as well as a contribution towards the costs in the main divorce order.<sup>119</sup> The court held that interim maintenance is part and parcel of the general duty of a husband to support his wife and children, and the mere fact that the parties are married in terms of Muslim rites does not preclude the husband from fulfilling that duty.<sup>120</sup> The court furthermore held that the word "spouse" in Rule 43(1) of the Uniform rules also includes a person who alleges that he or she is a spouse notwithstanding the denial of an allegation of validity in respect of the marriage.

Whilst the decisions above appear to be groundbreaking decisions, as they allow Muslim wives the opportunity to claim post-divorce maintenance for a period longer than the three-month *iddah* period where they are married in terms of Islamic law, they are in fact, contrary to the principles of Islamic law as a divorced woman is only entitled to maintenance from her ex-husband for three months after the divorce.<sup>121</sup>

In *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds*<sup>122</sup> the issue of a spouse's claim to the other spouse's pension interest in terms of a divorce order was adjudicated on by the pension funds adjudicator. In this case, the marriage concluded in terms of Muslim rites between the complainant, Ms Tryon and her former spouse, Mr Wade, was dissolved on 21 September 2007 in terms of the tenets of Islamic law.<sup>123</sup> The dissolution of the marriage and the settlement agreement between the parties was made an order of the South Gauteng High Court on the 21 September 2011.<sup>124</sup> In terms of the settlement agreement the complainant was entitled to fifty percent of the value of the fund. Furthermore, in terms of the settlement agreement, Mr Wade undertook to take all reasonable steps to ensure that the complainant receives payment of the fifty percent of the value of the fund.<sup>125</sup> To this extent, he also undertook to be personally liable for the payment of an amount equal to the fifty percent value of the fund, if the pension fund fails to make payment to Ms Tryon. The pension fund failed

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<sup>117</sup> Qasmi *The Complete System of Divorce* 217. There are exceptions such as in India as seen in the decision of *Mohd Ahmed Khan v Shah Banu Begum supra*.

<sup>118</sup> *Supra*.

<sup>119</sup> *Hoosain v Dangor supra* 57.

<sup>120</sup> *Hoosain v Dangor supra* 65. See also Abrahams-Fayker *Feminist Africa* (2011) 55.

<sup>121</sup> There is no authority in terms of Islamic law, which supports the position that a woman is entitled to maintenance after the period of *iddah* has expired.

<sup>122</sup> Unreported case no: PFA/GA/8796/2011/TCM.

<sup>123</sup> *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds supra* par 2.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid*.

to make payment of Ms Tryon's share of the pension interest according to the settlement agreement.<sup>126</sup>

The issue that the pension fund adjudicator had to decide was whether or not a spouse married in terms of Muslim rites could share in the other spouse's pension interest on divorce.<sup>127</sup> The adjudicator ruled that a spouse married and divorced only in terms of Islamic had a right to share in the other spouse's pension interest on divorce.<sup>128</sup> The member spouse's retirement fund would have to make payment to the non-member spouse if the agreement reached between the spouses regarding the division of pension interest reflects this and it has been made an order of the court.

The community of property is not recognised under Islamic law. Spouses to an Islamic marriage maintain separate estates and each spouse retains sole ownership and control of his or her property, whether movable or immovable, and whether acquired before or after the marriage.<sup>129</sup> According to authentic narrations from Islamic jurists,<sup>130</sup> a person is only allowed to receive benefits and wealth, which was earned through lawful means, and if the parties are married in terms of a shared matrimonial property system,<sup>131</sup> for example, one becomes entitled to receive benefits to which one is not Islamically entitled.<sup>132</sup> The following injunction from the *Quran* can be cited in this respect:

"To men is allotted what they earn and to women what they earn."<sup>133</sup>

This case illustrates once again that despite the court coming to the assistance of the Muslim wife, the decision of the pension fund adjudicator is contrary to the principles of Islamic law, as spouses to Muslim marriage are not entitled to share each other's pension interest at divorce. As the spouses maintain completely separate estates during the subsistence of the marriage, they are not entitled to share each other's pension at divorce.

In *Rose v Rose*<sup>134</sup> the question arose whether the Divorce Act, can regulate the proprietary consequences of a marriage concluded in terms of Muslim rites only where the husband issuing his wife a *talaq* subsequently terminates the marriage. In this case, the parties concluded a marriage in terms of Muslim rites in March 1988 whilst the husband was already civilly

<sup>126</sup> *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds supra* par 3.

<sup>127</sup> *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds supra* par 5.

<sup>128</sup> *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds supra* par 6.

<sup>129</sup> Rautenbach and Bekker *Introduction to Legal Pluralism* (2014) 368.

<sup>130</sup> Ibn Katheer *Tafseer al-Quran al-Adheem* (2003) Vol 1 93.

<sup>131</sup> See Barratt, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* (2017) 282–323 for a discussion on the matrimonial property regimes regulating the estates of spouses in terms of South African law.

<sup>132</sup> The *Ulama* in South Africa are unanimous that only the matrimonial property regime that is *Shari'ah* compliant, is the standard ante-nuptial contract where there is no sharing of assets and liabilities during the subsistence of the marriage. This may prove to be problematic as the wife may be left destitute where all or most of the assets accrued during the subsistence of the marriage is registered in the husband's name.

<sup>133</sup> *Surah Al-Nisa*; verse 33.

<sup>134</sup> [2015] 2 All SA 352 (WCC).

married to another party in terms of the Marriage Act.<sup>135</sup> The Muslim Judicial Council subsequently annulled the marriage between the plaintiff and defendant on 20 July 2009.<sup>136</sup> The plaintiff proceeded to institute action against her ex-husband (first defendant) in the Western Cape High Court claiming, firstly, the payment of one thousand rand monthly maintenance from the date of the annulment of the marriage or alternatively at the expiration of her *iddah* until her death or remarriage as contemplated in terms of section 7(2) of the Divorce Act; secondly, that the first defendant's pension interest in the third defendant<sup>137</sup> be declared to be part of his assets; and lastly, that the third defendant be ordered to pay the plaintiff half of the first defendant's pension fund as valued at the 23 October 2008.<sup>138</sup>

In consideration of the plaintiff's claim, the court identified the following two issues:<sup>139</sup>

- (a) whether the marriage between the parties concluded in terms of Muslim rites was valid notwithstanding the prior civil marriage between the defendant and another woman;
- (b) whether the first defendant's prior, existing civil marriage would prevent the plaintiff from claiming relief in respect of the proprietary consequences of her Islamic marriage to the first defendant.

In respect of the first issue, the court held that the plaintiff's entitlement to the relief set out in the stated case was not dependent on a determination of the validity or invalidity of the Islamic marriage entered into with the first defendant.<sup>140</sup> The High Court adopted the approach of the Constitutional Court<sup>141</sup> in respect of Muslim marriages and subsequently held that for the purposes of South African law, the plaintiff's marriage to the first defendant was not considered to have been validly contracted.<sup>142</sup>

In consideration of the second issue, the Court stated that the plaintiff was, in essence, seeking to challenge the legal effect of the *talaq*, in particular seeking the regulation of the proprietary consequences of her Islamic marriage by the Divorce Act. In this respect, the court held that a marriage as contemplated by the Divorce Act must be considered or interpreted to include a Muslim marriage.<sup>143</sup> Furthermore, the court held that it would be unconstitutional to afford protection to spouses in monogamous Muslim marriages but not those in polygamous Muslim marriages.<sup>144</sup> Therefore, the first defendant's prior civil marriage did constitute a bar to any claim the plaintiff might have to the relief sought by her.<sup>145</sup> In other words,

<sup>135</sup> In other words, he was legally married to another woman when he concluded the marriage in terms of Muslim rites with the plaintiff. The civil marriage was concluded in 1975.

<sup>136</sup> *Rose v Rose supra* 354 par 11.

<sup>137</sup> Transnet Retirement Fund was cited as the third defendant.

<sup>138</sup> *Rose v Rose supra* 357 par 29.

<sup>139</sup> *Rose v Rose supra* 355 par 17.

<sup>140</sup> *Rose v Rose supra* 357 par 32.

<sup>141</sup> *Rose v Rose supra* 357 par 33.

<sup>142</sup> *Rose v Rose supra* 361 par 61.

<sup>143</sup> *Rose v Rose supra* 360 par 51.

<sup>144</sup> *Rose v Rose supra* 360 par 52.

<sup>145</sup> *Rose v Rose supra* 361 par 61.

the court held that a wife married according to Muslim rites could invoke Sections 7(2) and (8) of the Divorce Act to claim for post-divorce maintenance and a share of her husband's pension interest.<sup>146</sup>

Prior to the decision in *Rose v Rose* parties who concluded a marriage in terms of Muslim rites could not claim their share of the assets of their marriage to their former husband's if their husband was already civilly married to another woman at the time that he married her. The decision in *Rose v Rose* changed this position as the court took cognizance of the fact that Muslim men often practise polygyny and that their polygamous marriages can be civil, religious or customary. Furthermore, the mere fact that a Muslim marriage is polygamous should not prejudice the spouses to the union.<sup>147</sup>

Whilst it is acknowledged that the decision in *Rose v Rose* brought relief to the lived reality of the plaintiff who had been married to the first defendant for more than twenty years, this decision is once again in conflict with the principles and rulings of Islamic law as the ex-wife is not entitled to claim a share from her husband's pension interest, and she is also not allowed to claim maintenance after the lapse of the *iddah* period.

#### 4 CONCLUSION

From the above discussion after the enactment of the Constitution, the fundamental values of the Constitution evidently took precedence and the courts, although not granting full recognition to Muslim marriages, were prepared to grant *ad hoc* recognition to the consequences that flowed from Muslim marriages. Whilst one must welcome the protection afforded by the courts, it must be acknowledged that these decisions are often arbitrary, contextual in nature and are of an interim nature. The judiciary has also in none of these decisions granted legal recognition of Muslim marriages. Furthermore, notwithstanding the fact that the decisions in the cases discussed above alleviated the plight of the applicants and provided some measure of relief to the lived reality of the applicants in these cases, cognizance must be given to the fact that these decisions are contrary to the teachings and rulings of Islam.

Although these decisions provided much-needed relief to the applicants, they will therefore not be acceptable to any religious authorities. Muslims who wish to remain faithful to the teachings and principles of Islam are therefore in a dilemma and may be ostracized by the Muslim community if they follow the decisions in cases that conflict with Islamic law.<sup>148</sup> The need for recognising and regulating MPL, Muslim marriages, in particular, has

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<sup>146</sup> *Ibid.*

<sup>147</sup> Heaton and Kruger are, however, of the opinion that the court's decision in *Rose v Rose* is incorrect because any marriage that a party to an existing civil marriage concludes with a third party is void due to the monogamous nature of civil marriages. See Heaton and Kruger *South African Family Law* (2015) 246.

<sup>148</sup> Moosagie "Is the Muslim Marriages Bill Absolutely Necessary? Presented at the Muslim Marriages in South Africa Workshop held on 14 December 2010; Patel Unpublished document in the form of questions and answers.

become increasingly prevalent and a matter of urgency in the light of court decisions that are in conflict with Islamic law.

In conclusion, whilst the importance of the Constitution as the supreme law of the land cannot be undermined, cognizance must be taken of the fact that the Constitution, in particular, the Bill of Rights is individual-centred and based on western values and philosophies, which is fundamentally different to the principles of Islamic law. Therefore, should western ideologies in this day and age be used as the yardstick for marriages concluded in terms of Islamic law, a conflict will always arise between South African law and Islamic law as the latter will never completely comply with international equality rights or with the South African Constitution? The fact that Islamic law is fundamentally different to South Africa does not make it wrong but merely different. It is therefore imperative that, if South African society is to overcome past discrimination and achieve the vision of equality that is fundamental to a constitutional democracy, the courts, as well as the State, must recognise and promote the full range of diversity that is prevalent in South Africa. This inevitably includes the recognition of Muslim marriages in South Africa without this recognition breaching the fundamental principles and rules of Islamic Personal law.