

SOUTH AFRICA¹
OVERVIEW OF MUSLIM FAMILY LAWS & PRACTICES
(Updated as at 2 April 2022)

Family Law Matter	Description				
	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Equality of spouses in marriage</p> <p><i>Is there a Constitutional provision on equality and are there exceptions? Are there specific laws that recognise marriage as a partnership of equals i.e. are family laws and/or other laws relating to marriage and family relations codified or uncoded? If codified, what are the titles of all the applicable laws? If codified, do these laws apply to all citizens irrespective of religion? If not, do these laws apply to all Muslims or</i></p>	<p>Article 9 of the Constitution states that:²</p> <ul style="list-style-type: none"> • Everyone is equal before the law and has the right to equal protection and benefit of the law; • The State and individuals cannot discriminate against anyone on several basis, including sex and marital status; • The State is permitted to 	<p>Over the last two decades, the South African judiciary has, on a case-by-case basis, incrementally accorded women who contracted their marriage according to Muslim rites but did not register their marriage as a civil marriage certain rights that they would have had had they</p>	<p>South Africa ratified CEDAW without reservations.³²</p> <p>The Government of South Africa in its 2011 response to the CEDAW Committee's list of issues and questions acknowledged that the non-recognition of Muslim marriages through codified law has resulted in gross</p>	<p>As Muslim marriages are not legally recognised, Muslim couples who marry according to Muslim rites ought to also register their marriage as a civil marriage according to the Marriage Act should they wish to be have full</p>	<p>According to the 2016 UNDP Human Development Report, South Africa ranked 119 on the UNDP Human Development Index and 90 on the UNDP Gender Inequality Index.³⁶</p> <p>According to media reports:³⁷</p> <ul style="list-style-type: none"> • There is an

¹ This Musawah project to map Muslim Family Laws globally was led by Zainah Anwar and coordinated by Lead Researcher Sharmila Sharma, with substantive support from Salma Waheedi and students at the International Human Rights Clinic, Harvard Law School. For this South Africa country table, we would also like to thank Darshana Prakasam from Harvard Law School, and Dr. Fatima Seedat, Farhana Ismail and Hoodah Abrahams-Fayker for their inputs in its preparation.

² Article 9 of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

³² United Nations Treaty Collection Website, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-8&chapter=4&clang=en

³⁶ UNDP, "Human Development Report 2016", Table 5, pp. 214-217, http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf

³⁷ Jen Thorpe, "South African Activists Call for Legal Recognition of Muslim Marriages", News Deeply, 2 November 2016, <https://www.newsdeeply.com/womenandgirls/articles/2016/11/02/south-african-activists-call-legal-recognition-muslim-marriages>; Marelise Van Der Merwe, The Muslim Marriage Bill: Will it finally see the light of day?, The Daily Maverick, 8 September 2016, <https://www.dailymaverick.co.za/article/2016-09-08-the-muslim-marriage-bill-will-it-finally-see-the-light-of-day/#.WQlhZKwfmI>; Ilham Rawoot, "Marriage Bill causes rift among Muslims", Mail & Guardian, 11 March 2011, <https://mg.co.za/article/2011-03-18-marriage-bill-causes-rift-among-muslims>

<p><i>are there different codified laws for different sects within Islam? If uncoded, or if codified laws do not sufficiently address a particular issue, how is the issue addressed e.g. what Muslim school of law is applicable? Do these laws explicitly state gender-stereotypical roles between husbands and wives e.g. the husband is the head of the household or the wife is the primary caregiver?</i></p> <p><u>Applicable CEDAW Provision</u> Article 16(1)(c) Paras. 17-18 GR21 Paras. 54-55 GR29</p>	<p>take legislative or other measures to protect persons or groups disadvantaged by unfair discrimination (the Constitution does not provide for a clear definition what is fair and unfair discrimination).</p> <p>Article 15(3) of the Constitution provides for the enactment of legislation relating to marriage and family relations based on different traditional systems and religious beliefs but such legislation must not be inconsistent with the Constitution.³</p> <p>The Constitutional Court has also adopted an interpretation of equality that accommodates substantive equality⁴.</p>	<p>registered their marriage under the Marriage Act. This has somewhat afforded Muslim women some rights enshrined in the constitution on a piecemeal and limited basis:²⁰</p> <ul style="list-style-type: none"> • In 1999, in the case of <i>Amod v Multilateral Motor Vehicle Accidents Fund</i>,²¹ the Supreme Court of Appeal held that a Muslim widow in a monogamous marriage that was contracted 	<p>inequities and hardships for Muslim women.³³</p> <p>In 2014, the Department of Home Affairs appointed over 100 Muslim clerics (<i>imams</i>) who are authorised to solemnise marriages of Muslim couples by way of Muslim rites and at the same time issue marriage certificates in accordance with the Marriage Act in order to further facilitate Muslim couples wishing to contract their marriage in accordance with Muslim rites and at the same register their</p>	<p>access to the protection that the South African legal system accord spouses.</p> <p>Muslim marriage officers and other members of the community have also incorporated Muslim marriage contracts as part of the Ante Nuptial Contract before registering the marriage as a civil marriage. This functions either as added protections for women or it can also serve as</p>	<p>estimated 750,000 Muslim marriages that are not legally recognised in South Africa;</p> <ul style="list-style-type: none"> • Muslim Family Law is practiced in unofficial forums but not recognised or regulated by the state. The outcome is that women and children in Muslim marriages often find themselves in untenable, situations, as is evidenced in case
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³ Article 15(3) of South Africa's Constitution (2012), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

⁴ The Constitutional Court discussed substantive equality in the matters of *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para 50 and *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) at para 22.

²⁰ Megan Harrington-Johnson, "Muslim marriage and divorce", *De Rebus*, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

²¹ [1999] (4) SA 1319 (SCA), <http://www.saflii.org/za/cases/ZASCA/1999/76.pdf>

³³ South Africa Responses to list of issues and questions, U.N. Doc. CEDAW/C/ZAF/Q/4/Add.1, para. 40, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

	South Africa recognises civil, customary, same - sex marriages. ⁵	according to Muslim rites and whose husband had died in an accident was	marriage as a civil marriage. ³⁴ In August 2019 the	a restriction of protections provided by the civil system. An	law ³⁸ and scholarship ³⁹ .
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⁵ South Africa State party report, U.N. Doc. CEDAW/C/ZAF/1 (1998), pp. 104-105, South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), para. 16.1, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>. Accessed 10 November 2021.

³⁴ Juan Smuts and Mumtaz Sondas, "Imams as marriage officers – a feasible option or not?", Abraham & Gross, 16 March 2017, <http://www.abgross.co.za/imams-as-marriage-officers/>; Megan Harrington-Johnson, "Muslim marriage and divorce", De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>; Madeleine Pretorius, "Muslim Marriages", Webbers, 7 April 2016, <http://www.webberslaw.com/muslim-marriages/>

³⁸ Women's Legal Centre. 2017. "The non-recognition of Muslim Marriages, two decade long law reform process." Facebook page, 2017, <https://m.facebook.com/WLCCapeTown/photos/a.414591803229/10157793689128230/?type=3&source=57>. Accessed 18 November 2021; Also see: Breslaw, S. 2013. Muslim spouses- Are they equally married? De Rebus. 30. 1 December. Available at: <http://www.derebus.org.za/muslim-spouses-equally-married/> [2021 November 21]; Harrington-Johnston, M. 2015. Muslim Marriages and Divorce De Rebus. 93. May. Available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/journals/DEREBUS/2015/93.html&query=muslim%20marriage%20and%20divorce> [2021. November 15].

³⁹ Abdullah, Somaya. "Social work, family welfare, and Muslim personal law in South Africa." *Journal of Social Welfare and Family Law* 34.3 (2012): 315-323; Abrahams-Fayker, Hoodah. "South African Engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages." (2015); Amien, Waheeda. "A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context." *International Journal of Law, Policy and the Family* 24.3 (2010): 361-396; Carnelley, Marita, and Suhayfa Bhamjee. "Protecting a wife financially at the time of divorce-a comparison between South African women married in terms of South African civil law and Islamic law, with specific reference to the mahr." *Obiter* 33.3 (2012): 482-502; Denson, Razaana, and Marita 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." *Obiter* 30.3 (2009): 679-701; Gabru, N. "Dilemma of Muslim women regarding divorce in South Africa." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7.2 (2004); Hoel, Nina. "Engaging religious leaders: South African Muslim women's experiences in matters pertaining to divorce initiatives." *Social Dynamics* 38.2 (2012): 184-200; Moosa, Najma. "The interim and final constitutions and Muslim personal law: implications for South African Muslim women." *Stellenbosch L. Rev.* 9 (1998): 196; Moosa, Najma. "An overview of post-divorce support for Muslim children in the context of South African Law, Islamic Law and the proposed 2010 Muslim Marriages Bill." *International Journal of Liability and Scientific Enquiry* 6.1-3 (2013): 27-41; Moosa, Najma. "Faskh (divorce) and intestate succession in Islamic and South African law: impact of the watershed judgment in Hassam v Jacobs and the Muslim Marriages Bill." *Acta Juridica* 2014.1 (2014): 160-191; Moosa, Najma, and Shaheena 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?." *Law, Democracy & Development* 8.2 (2004): 267-288; Rasool, Shahana, and Muhammed Suleman. "Muslim women overcoming marital violence: breaking through 'structural and cultural prisons' created by religious leaders." *Agenda* 30.3 (2016): 39-49; Tayob, Abdulkader. "Muslim Personal Law—Women's Experiences And Perspectives'." *Annual Review of Islam in South Africa* 6 (2003): 30-34; See also news articles: Ismail, Farhana. 2018. The MPL Network: Centering Women's Experiences of Islamic Law. *Daily Vox*, 17 April. Available: <https://www.thedailyvox.co.za/the-mpl-network-centering-womens-experiences-of-islamic-law-farhana-ismail/>. accessed 21 November 2021; Ismail, Farhana. 2018. Want To Enter Into A Muslim Marriage In SA? Here Are Your (Complicated) Options. *Daily Vox*, 18 April. Available: <https://www.thedailyvox.co.za/want-to-enter-into-a-muslim-marriage-in-sa-here-are-your-complicated-options-mpl-network/>. Accessed 21 November 2021.

	<ul style="list-style-type: none"> • The main codified laws that govern civil marriages are the Marriage⁶ and Divorce⁷ Acts; • The main codified law that governs customary marriages is the Recognition of Customary Marriages Act.⁸ • The main codified law that govern same-sex marriages is the Civil Unions Act⁹ <p>There is no specific codified law that govern Muslim marriages and family relations and neither does the Marriage Act nor the Recognition of Customary Marriages Act specifically provide for the legal recognition of Muslim marriages. Based on Section 3 of the Marriage Act, Muslim couples who intend for their marriage to be a</p>	<p>entitled to compensation for the loss of support her husband would have been obligated to provide her with during the subsistence of their marriage under Muslim law had it not been for his untimely death. In effect, parties in a monogamous Muslim marriage should be awarded the same damages as parties to civil marriages;²²</p> <ul style="list-style-type: none"> • In 2004, in the case of <i>Daniels v Campbell NO and Others</i>,²³ the Constitutional Court 	<p>Department of Home Affairs proposed a new marriage policy green paper for public comment. The main emphasis in the green paper was to gauge what a single marriage policy would ultimately incorporate³⁵.</p>	<p>example of the first being inclusions of clauses on delegated <i>talaq</i> and consequences for polygamy within the civil contract. In the second instance, traditional doctrinal norms are entrenched through restrictions being made on provisions provided by the divorce and maintenance acts.</p>	<ul style="list-style-type: none"> • The Muslim Marriage Bill has yet to be enacted into law because of divided opinion among the South African Muslim community for and against the enactment of the law. Some segments of the Muslim community, particularly conservative Muslim groups, are against the enactment of the law for reasons that include: (i) the belief that enacting
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⁶ Marriage Act (1961), <http://www.gov.za/sites/www.gov.za/files/Act%2025%20of%201961.pdf>

⁷ Divorce Act (1979), <http://www.justice.gov.za/legislation/acts/1979-070.pdf>

⁸ Recognition of Customary Marriages Act (1998), <http://www.justice.gov.za/legislation/acts/1998-120.pdf>

⁹ Civil Unions Act (2006), <https://www.gov.za/documents/civil-union-act>

²² South Africa Responses to list of issues and questions, U.N. Doc. CEDAW/C/ZAF/Q/4/Add.1, para. 39, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>
²³ [2004] (5) SA 331 (CC), <http://www.saflii.org/za/cases/ZACC/2004/14.pdf>

³⁵ Department of Home Affairs Green Paper on Marriages in South Africa.

<http://www.dha.gov.za/index.php/notices/1449-know-your-green-paper-on-marriages-in-south-africa>. Accessed 18 November 2021.

	<p>monogamous one may enter into a parallel civil marriage at the same time as they contract their marriage based on Muslim rites by having their marriage solemnised by a Muslim cleric (<i>imam</i>) who is a designated marriage officer under the Marriage Act.¹⁰</p> <p>In 1999 the establishment of a South African Law Reform Commission Project Committee (SALRC) on Muslim marriages and related matters resulted in the drafting of a Muslim Marriage Bill ('MMB')¹¹ but the MMB has yet to be enacted into law.</p> <p>In 2010, the Bill was submitted to cabinet and approved for public comment.</p> <p>In 2011 it was intended to be introduced to Parliament but was instead shelved¹².</p>	<p>decided that a Muslim wife in a monogamous Muslim marriage has the right to inherit and to claim maintenance from her deceased husband's estate as provided for under the Intestate Succession Act 81 of 1987 and also under the Maintenance of Surviving Spouses Act 27 of 1990;²⁴</p> <ul style="list-style-type: none"> • In 2005, in the case of <i>Khan v Khan</i>,²⁵ the Pretoria High Court held that partners in Muslim marriages (whether monogamous or not) owe each other 			<p>legislation to govern Muslim marriages erodes the teachings of Islam; (ii) the belief that a secular state should not be regulating a family law system that has for centuries been regulated within the private domain by members adhering to that religion; (iii) the belief that uncodified Muslim law already provide for the protection of women and as such, there was</p>
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¹⁰ Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, paras. 77-78
¹¹ Department of Justice and Constitutional Development, "Invitation to Comment on the Muslim Marriage Bill", Notice 37 of 2011, http://www.gov.za/sites/www.gov.za/files/33946_gen37.pdf
¹² Women's Legal Centre. 2017. The non-recognition of Muslim Marriages, two decade long law reform process. Available: <https://m.facebook.com/WLCCapeTown/photos/a.414591803229/10157793689128230/?type=3&source=57>. Accessed 12 November 2021.
²⁴ Megan Harrington-Johnson, "Muslim marriage and divorce", De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>
²⁵ [2005] (2) SA 272 (T), <http://www.dgrujudgements.co.za/sites/default/files/Goodey1.pdf>

	<p>In April 2014 the Department of Justice's, SALRC issue paper 35 on a Single Marriage statute is released for public comment¹³. It includes Muslim marriages into a single marriage statute or as a chapter in an omnibus statute. The intention is to provide legislation that incorporates all marriages in South Africa- including customary and religious marriages. This process occurs separately to the marriage policy process through the Department of Home Affairs.(see section on policy in this regard¹⁴).</p> <p>In September 2021, the SALRC published issue paper 41¹⁵ on the review of aspects of matrimonial property law for public comment. This raises debate about the compliance of</p>	<p>a duty of support, just as in civil marriages and, therefore, have the right to claim maintenance from one another in terms of the Maintenance Act 99 of 1998;²⁶ and</p> <ul style="list-style-type: none"> • In 2009, in the case of <i>Hassam v Jacobs NO and Others</i>,²⁷ the Constitutional Court held that the right to claim maintenance from a deceased spouse's estate, as decided in the <i>Daniels</i> case, also extends to polygamous Muslim 			<p>no need for codified law in this regard; and (iv) having specific legislation regulating Muslim marriages singles out Islam rather than other religions which also faced issues of gender equality.</p> <p>According to information on the ground, in practice (also see footnote 35):⁴⁰</p> <ul style="list-style-type: none"> • Marriages of South African Muslims
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¹³ South African Law Reform Commission, Project 144, 'Single Marriage Statute', Issue Paper 35 (2019) 7.

¹⁴ Department of Home Affairs Green Paper on Marriages in South Africa.

<http://www.dha.gov.za/index.php/notices/1449-know-your-green-paper-on-marriages-in-south-africa>. Accessed 12 November 2021.

¹⁵ South African Law Reform Commission, Project 100E, 'Review of Aspects of Matrimonial Property Law', Revised Issue Paper 34 (2021) accessed at: <https://www.justice.gov.za/salrc/ipapers/ip41-prj100E-MatrimonialPropertyLawReview-6Sep2021.pdf>

²⁶ Megan Harrington-Johnson, "Muslim marriage and divorce", De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

²⁷ [2009] (5) SA 572 (CC), <http://www.saflii.org/za/cases/ZACC/2009/19.pdf>

⁴⁰ Information obtained from South African advocate, May 2017

	<p>Islamic law with shared marital property regimes. To date there is no legislation recognising or regulating Muslim Marriage in South Africa.</p> <p>Consequently:</p> <ul style="list-style-type: none"> The law is, at best, ambiguous on the legal status of Muslim marriages in South Africa, whereby Muslim marriages are not legally recognised and regulated under codified law but are given recognition through judicial precedence on a case-by-case basis;¹⁶ and 	<p>marriages.²⁸</p> <p>In 2014 the WLC filed a public interest litigation for the legal recognition of Muslim marriages in the South African courts. The application was heard in August 2017.²⁹</p> <p>In 2018 the Western Cape High Court found that the state had failed in its duty to recognise Muslim Marriages and the State was ordered to enact legislation within 2 years³⁰.</p>			<p>(especially younger Muslim couples), are based on expectations of mutuality and reciprocity. It is only at the dissolution of the marriage or death that the dissonance between the <i>fiqh</i> marital framework and lived experience is exposed;</p> <ul style="list-style-type: none"> Even though the husband may be
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¹⁶ South African Law Reform Commission, “Project 59: Islamic marriages and related matters”, 2003, para. 2.4-2.6, http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf; South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), p. 145, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>; Megan Harrington-Johnson, “Muslim marriage and divorce”, De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>; Juan Smuts, “Muslim marriages – officially recognised as legal in South Africa”, Abraham & Gross Attorneys, 7 October 2014, <http://www.abgross.co.za/muslim-marriages-officially-recognised-as-legal-in-south-africa/>; Abdul Buckus, “What is the legal status of a (nikah) Muslim marriage in South Africa?”, Bregman and Moodley Attorneys, <http://www.bregmans.co.za/what-is-the-legal-status-of-a-nikah-muslim-marriage-in-south-africa/>

²⁸ Megan Harrington-Johnson, “Muslim marriage and divorce”, De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

²⁹ Tammy Petersen, “Muslim marriage case to be heard in August”, News 24, 20 March 2017, <http://www.news24.com/SouthAfrica/News/muslim-marriage-case-to-be-heard-in-august-20170320>; Tammy Petersen, “Legality of Muslim marriage a religious, human rights, issue – divorcee”, News 24, 24 March 2017, <http://www.news24.com/SouthAfrica/News/legality-of-muslim-marriage-a-religious-human-rights-issue-divorcee-20170324>; Francesca Villette, “Muslim marriage dispute lands in court”, IOL, 4 March 2015, <http://www.iol.co.za/news/crime-courts/muslim-marriage-dispute-lands-in-court-1827178>

³⁰ Women’s Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham N.O. and Others, Esau v Esau and Others 2018 (6) SA 598 (WCC).

	<ul style="list-style-type: none"> In the absence of codified laws specifically governing Muslim marriages and family relations in South Africa, in practice, such matters are governed officially by judicial precedence and unofficially by a combination of <i>Shari'ah</i> principles and Muslim jurisprudence (<i>fiqh</i>) as applied and adjudicated upon on a case-by-case basis by different South African Muslim religious bodies (<i>ulama</i>) such as the Muslim Judicial Council ('MJC') and the United Ulama Council ('UUC').¹⁷ These religious bodies do not have any formal powers to enforce their rulings. As Sunni Muslims form the majority of the Muslim minority population in South Africa, the rules of Sunni 	<p>In 2019 the State appealed the judgement at the Superior Court of Appeal(SCA) and In December 2020, the SCA ruled that the State had infringed its constitutional obligations and that both the Marriages Act and Divorce Act are unconstitutional for failing to include Muslim marriages.³¹</p> <p>The matter was then heard in the Constitutional Court in August 2021. State conceded that they were in breach of their constitutional obligations to recognize Muslim marriages but argued that they have no constitutional</p>			<p>deemed the breadwinner in the family and the wife stays at home on his instructions, the wife may be subject to economic abuse. Her husband may not necessarily be provided for financially whether she is obedient or not;</p> <ul style="list-style-type: none"> Empowered Muslim women are turning to the courts to assert their right by seeking spousal maintenance in the lower courts. In the constitutional context, some of
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¹⁷ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 55; Abdul Kariem Toffar, "Administration of Islamic Law of Marriage and Divorce in South Africa", 1993, pp. 215-216,
http://researchspace.ukzn.ac.za/bitstream/handle/10413/7352/Toffar_Abdul_Kariem_1993.pdf?sequence=1&isAllowed=y

³¹ *President of the RSA and Another v Womens Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* [2020] ZASCA 177 para 51 (1.1).

	<p>Schools are predominantly applied in South African Muslim personal matters by the Muslim religious bodies. In this regard, generally, the rules of Shafi'i <i>fiqh</i> apply in the West Coast and rules of Hanafi <i>fiqh</i> apply in the East Coast and Gauteng.¹⁸</p> <p>Based on Shafi'i and Hanafi <i>fiqh</i>, the relationship between a Muslim husband and wife is framed along the following lines: Marriage is viewed as a contract between the husband and the wife. As head of the family, a husband bears the responsibility as sole provider and protector of his family and is duty bound to meet the needs of his wife and children, including providing the necessary finance for their food, housing, clothing, healthcare and other living expenses. In return for such maintenance</p>	<p>obligation to legislate the regulation of Muslim marriage. Judgment has been reserved in this matter.</p>			<p>the lower courts recognise the duty of spousal maintenance, albeit in a religious marriage, and grant orders.</p> <p>According to the Women's Legal Centre Trust (WLC):⁴¹</p> <ul style="list-style-type: none"> • Over a 13-year period (2001-2014), the WLC represented 753 women with queries related to their Muslim marriages and at the same time had to turn away hundreds of other women who have
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¹⁸ Information obtained from South African advocate, May 2017. The Hanafi jurists are split amongst the Deoband and Barelwi School and for the most part they follow the Indian consensus of those schools; Ebrahim Moosa, "Prospects for Muslim Law in South Africa: A History and Recent Developments", (Islamic & Middle Eastern Law, 3, 1996), p. 131, <http://politics-of-religious-freedom.berkeley.edu/files/2015/06/Ebrahim-Moosa-Prospects-for-Muslim-Law-in-South-Africa.pdf>; Najma Moosa, "Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa", (South African Law Journal, 13, 1998), p. 480, <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/648/MoosaChildrenRights1998.pdf?sequence=3>

⁴¹ Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, paras. 40, 43, 79.1-79.2, 86.3, 87, 103, 249, 254

	<p>and protection, the wife is required to obey and submit to her husband, including ceding primary parental authority over their children to him. The degree to which the maintenance-for-obedience marital framework is entrenched in the relationship of Muslim spouses depends primarily on the financial independence of the wife.¹⁹</p>				<p>requested for help due to lack of resources and capacity;</p> <ul style="list-style-type: none"> • Many women who have consulted the WLC are older women who received little or no education in apartheid South Africa. They had entered into Muslim marriages without being aware that they do not have the same rights as spouses in civil marriages. As Muslim marriages are not legally recognised, these women suffer devastating consequences
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¹⁹ Information obtained from South African advocate, May 2017; Ashraf Booley, "Divorce and the of khul': A type of no fault divorce found within an Islamic legal framework", (Law, Democracy and Development, 18, 2014), p. 45, <http://www.scielo.org.za/pdf/idd/v18/03.pdf>

					<p>because they start off with the position of having limited marital and divorce rights before the law. As such, they are left remediless when seeking to enforce their rights with regard to maintenance, dissolution of marriage, marital property and custody and guardianship over their children unless they have the financial means to fight for their rights in court;</p> <ul style="list-style-type: none"> • With very limited access to legal enforcement mechanisms upon which Muslim women can rely to
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					<p>enforce their marital and divorce rights, when seeking redress in this regard, Muslim women are vulnerable to decisions made by Muslim religious bodies that do not themselves have any formal powers to enforce their rulings. These religious bodies are sometimes exclusively controlled by men and make decisions regarding Muslim personal matters in ways that are favourable to husbands;</p> <ul style="list-style-type: none"> • Many Muslim couples refuse to be married under
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					<p>the Marriages Act because they find it misaligned with religious rules and practices ⁴².</p> <ul style="list-style-type: none"> • In the past, very few Muslim clerics (<i>imams</i>) sought to be appointment as marriage officers under Section 3 of the Marriage Act. As a result, the majority of marriages contracted according to Muslim rites in the past have not been solemnised in terms of the Marriage Act. The 2014 drive to appoint <i>imams</i> as marriage officers
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⁴² Amien, Waheeda. "Reflections on the recognition of African customary marriages in South Africa: Seeking insights for the recognition of Muslim marriages." *Acta Juridica* 2013.1 (2013): 357-384.

					<p>under the Marriage Act does not necessarily better protect the rights of women in Muslim marriages, especially those from socioeconomically disadvantaged backgrounds for reasons that include: (i) the approach of having a marriage contracted according to Muslim rites and the Marriage Act – an option that has always been available to the Muslim community – is not necessarily commonly practiced by the community as evidenced by past practices; (ii)</p>
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					<p>Based on a survey of 20 <i>imams</i> conducted by the WLC, there is clear bias in favour of patriarchy on their part when advising women regarding their marital and divorce rights e.g. some have advised against the registration of the marriage under the Marriage Act despite their authorisation as a marriage officer under the Act and most advised women against ensuring that they have a share in the marital property upon divorce by opting for a marriage out of community of property without</p>
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					any accrual.
	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Minimum and equal legal age for marriage</p> <p><i>Is there a minimum age of marriage? Are there exceptions to the minimum age (e.g. min. age at 18, with exceptions to 16)? Is there an absolute minimum age without exceptions? Is there equality in the minimum age of marriage? Does the minimum age of marriage match the age of majority? Is there a minimum age verification process before the marriage is concluded?</i></p> <p><u>Applicable CEDAW Provision</u> Article 16(2) Paras. 36-39 GR21</p>	<p>It is widely understood that there is no specific minimum age for marriage under Muslim law; marriageable age coincides with the occurrence of puberty. Generally, based on the rules of Shafi'i and Hanafi <i>fiqh</i>, respectively, the marriageable age among South African Muslims of the Shafi'i School is set at 15 for both females and males while South African Muslims of the Hanafi School sets the marriageable age at no later than 17 for females and 18 for males, with a presumption that girls do not reach puberty before nine and boys before 12.⁴³</p>		<p>In the 2021 concluding observations made by the CEDAW committee on the SA states report, the committee recommended, that the State party amend the Recognition of Customary Marriages Act to raise the minimum age of marriage to 18 years for both girls and boys and enforce the prohibition of child and forced marriage⁴⁶.</p>	<p>As Muslim marriages are not legally recognised, there is no formal minimum age verification process before a Muslim marriage is concluded.⁴⁷</p>	<p>According to UNICEF's State of the World's Children 2016 report, 6% of women aged 20- 24 in South Africa were first married by 18 and 1% by 15.⁴⁸</p> <p>According to information on the ground, based on anecdotal evidence derived from community work experience, child marriages among Muslims in Western Cape are not</p>

⁴³ Andrea Buchler and Christina Schlatter, "Marriage Age in Islamic and Contemporary Muslim Family Law: A Comparative Survey, (Electronic Journal of Islamic and Middle Eastern Law, 1, 2013), p. 40, http://www.zora.uzh.ch/78204/1/Beitrag_Buechler_Schlatter_final.pdf; Woodrow Wilson International Centre for Scholars, "Best Practices": Progressive Family Laws in Muslim Countries", 2005, p. 8, <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf>; Najma Moosa, "Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa", (South African Law Journal, 13, 1998), pp. 490-491, <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/648/MoosaChildrenRights1998.pdf?sequence=3>;

⁴⁶ Concluding Observations by CEDAW Committee to SA State Party Report, 18-21 November 2021. <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>.

⁴⁷ Information obtained from South African advocate, May 2017; Legal Resource Centre, "Submission made in respect of child, early and forced marriage", Submission to the UN Office of the High Commissioner on Human Rights (OHCHR), 2013, pp. 7-8, <http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/LegalResourceCentre.pdf>

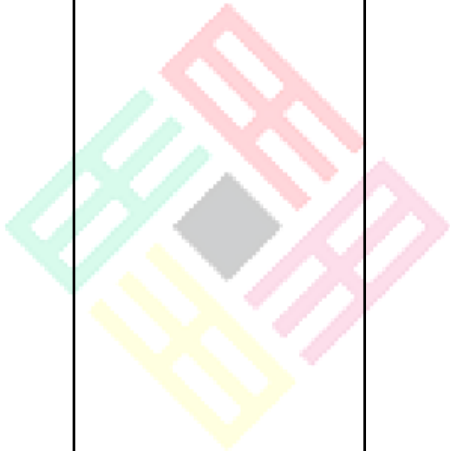
⁴⁸ UNICEF, "The State of the World's Children 2016", Table 9, pp. 150-153, https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf

	<p>Consequently, although the minimum legal age for marriage is 18 as per South African law,⁴⁴ South African Muslim clerics may permit marriages of persons below 18. As Muslim marriages are not legally recognised, such under-aged Muslim marriages are not officially recorded.⁴⁵</p> <p>In addition the Recognition of Customary Marriages Act allows for child marriage with the consent of parents and this could easily be extended to other customary marriages if the legislation exists (See the CEDAW recommendations in the section on 'policy' in this regard.</p>				common. ⁴⁹
	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Women's consent to marriage <i>Is a marriage valid without the</i></p>	Regardless of their age, both prospective Muslim brides and grooms in South Africa must		The Government of South Africa in its 2010 report to the CEDAW	As Muslim marriages are not legally recognised,	According to information on the ground, while forced

⁴⁴ South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), para. 16.20, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

⁴⁵ Information obtained from South African advocate, May 2017; Legal Resource Centre, "Submission made in respect of child, early and forced marriage", Submission to the UN Office of the High Commissioner on Human Rights (OHCHR), 2013, pp. 7-8, <http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/LegalResourceCentre.pdf>

⁴⁹ Information obtained from South African advocate, May 2017

<p>woman's consent? Is the practice of forcing women to marry against their will (<i>ijbar</i>) prohibited? Is there a standard marriage contract? If so, what are its broad provisions and is there anything particular in the contract that ought to be highlighted on the basis that it advances women's rights or otherwise? Is it mandatory to register a marriage?</p> <p><u>Applicable CEDAW Provision</u> Article 16(1)(b) Paras. 15-16 GR21 Paras. 25-26, 33-34 GR29</p>	<p>consent to the marriage.⁵⁰</p>		<p>Committee asserts that forced marriage and abduction are criminalised.⁵¹</p>	<p>no mechanism exists to officially register such marriages. A Muslim couple may register a marriage contracted in accordance with Muslim rites under the Marriage Act as a civil marriage.⁵²</p>	<p>marriages in the Muslim community do occur, they are uncommon. For instance:⁵³</p> <ul style="list-style-type: none"> • While based on the rules of Shafi'i <i>fiqh</i>, a prospective bride's father is allowed the right of <i>ijbar</i> to arrange the first marriage of a virgin daughter, <i>ijbar</i> marriages are not widely practised among South African Muslims; • Based on anecdotal evidence derived from community
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⁵⁰ Information obtained from South African advocate, May 2017

⁵¹ South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), para. 16.4, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

⁵² Juan Smuts and Mumtaz Sondas, "Imams as marriage officers – a feasible option or not?", Abraham & Gross, 16 March 2017, <http://www.abgross.co.za/imams-as-marriage-officers/>; Megan Harrington-Johnson, "Muslim marriage and divorce", De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>; Abdul Buckus, "What is the legal status of a (nikah) Muslim marriage in South Africa?", Bregman and Moodley Attorneys, <http://www.bregmans.co.za/what-is-the-legal-status-of-a-nikah-muslim-marriage-in-south-africa/>

⁵³ Information obtained from South African advocate, May 2017; Woodrow Wilson International Centre for Scholars, "Best Practices': Progressive Family Laws in Muslim Countries", 2005, p. 16, <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf>

					<p>work experience, <i>ulamas</i> in the Western Cape will ask for the consent of the bride.</p> <p>According to the Legal Resource Centre, there is a very real risk of forced marriages in instances involving Muslim teenage girls who fall pregnant. As Muslim marriages are not legally recognised, these girls are married off without much formalities apart from those provided for under Muslim rites so as to avoid shaming the family and allow for the child to be born in wedlock. The girl might not wish to enter into the marriage but would feel compelled to</p>
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					<p>conclude the marriage as it is culturally and religiously expected of her to do so. Very often these young girls leave school to commence their lives as married women and are not allowed to complete their education, effectively continuing the cycle of poverty and entrenching their positions within the community as care providers.⁵⁴</p>
	Description				

⁵⁴ Legal Resource Centre, "Submission made in respect of child, early and forced marriage", Submission to the UN Office of the High Commissioner on Human Rights (OHCHR), 2013, p. 8, <http://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/LegalResourceCentre.pdf>

	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Women’s capacity to enter into marriage</p> <p><i>Is consent of a marital guardian (wali) required? If so, can a woman choose her own wali? Can a woman go before a court or other competent authority to seek permission to marry if her wali refuses to consent to her marriage? Can a woman negotiate her marital rights prior to marriage and can these rights be changed during marriage? If so, who can change these rights and under what circumstances e.g. mutual consent?</i></p> <p><u>Applicable CEDAW Provision</u> Articles 16(1)(a), 16(1)(b) Paras. 15-16 GR21 Para. 34 GR29</p>	<p>There is a parallel system of marriage in place in South Africa⁵⁵. In the context of the Islamic marriage which is not state- regulated, and regardless of her age, a prospective Muslim bride requires the consent of a marital guardian (<i>wali</i>) to enter into an Islamic marriage contract. The <i>wali</i> must be Muslim and a male relative (father, grandfather, etc.). If the <i>wali</i> opposes the marriage without a valid reason, a prospective bride may refer the matter to the relevant South African Muslim religious body (e.g. MJC) for redress.⁵⁶</p> <p>Both Muslim spouses in South Africa may stipulate any legitimate condition in their Islamic marriage contract</p>				<p>According to information on the ground, there has been progression in Muslim communities in the Western Cape whereby although the <i>wali</i> is present at the marriage ceremony (<i>nikah</i>), the bride who is also present at the <i>nikah</i> expresses her consent to marriage.⁶⁰</p> <p>According to information on the ground, while it is possible for both spouses to stipulate any legitimate condition in their marriage</p>

⁵⁵ Ismail, Farhana. 2018. Want To Enter Into A Muslim Marriage In SA? Here Are Your (Complicated) Options. Daily Vox, 18 April. Available: <https://www.thedailyvox.co.za/want-to-enter-into-a-muslim-marriage-in-sa-here-are-your-complicated-options-mpl-network/>. Accessed 21 November 2021.

⁵⁶ Information obtained from South African advocate, May 2017; Additional information obtained from the MPL Network 2021

⁶⁰ Information obtained from South African advocate, May 2017

	<p>including tafwid and khula clauses.⁵⁷</p> <p>Similarly, both Muslim spouses in South Africa may stipulate any legitimate condition in their civil marriage contract provided it is not <i>contra bono mores</i>.</p> <p>Both spouses can negotiate between three marital property regimes in the civil system: a community of property shared regime; an antenuptial with accrual system; and an antenuptial without accrual system.</p> <p>Often, ulama insist on the ANC without accrual system, regardless of circumstance. Imam marriage officers will not solemnise marriages under the marriages Act if a couple chooses another system of marital property⁵⁸. This removes choice for Muslim spouses entering into a civil marriage and doesn't afford them the full range of protections provided by the existing Marriages Act.</p>				<p>contract.⁶¹</p> <ul style="list-style-type: none"> • Many Muslim couples are not aware of: (i) their right to stipulate valid conditions into their marriage contracts; and/or (ii) what valid conditions they can include in their contracts. Generally when a Muslim marriage officer officiates a Muslim marriage (<i>nikah</i>), the civil marriage contract is drawn up by a lawyer, and/or the Muslim marital rights components such as the delegation of the right to divorce from the husband to wife
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⁵⁷ Information obtained from South African advocate, May 2017

⁵⁸ Focus Group Discussions. Muslim Personal Law Network workshop, August 2018, University of Cape Town.

⁶¹ Information obtained from South African advocate, May 2017

	<p>In September 2021, the SALRC published issue paper 41⁵⁹ on the review of aspects of matrimonial property law for public comment. This raises debate about the compliance of Islamic law with shared marital property regimes.</p>				<p>(<i>tafwid</i>) are either left out or included with a few valid conditions. The full list of valid conditions as provided by the rules of the various Muslim <i>fiqh</i> is not presented by the Muslim marriage officer to the couple, thereby limiting their choice of stipulations;</p> <ul style="list-style-type: none"> • Where Muslim couples do include stipulations in their marriage contract, the most common ones centre around: (i) <i>tafwid</i> (both conditional and
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⁵⁹ South African Law Reform Commission, Project 100E, 'Review of Aspects of Matrimonial Property Law ', Revised Issue Paper 34 (2021) accessed at: <https://www.justice.gov.za/salrc/ipapers/ip41-prj100E-MatrimonialPropertyLawReview-6Sep2021.pdf>

					<p>unconditional); (ii) consequences in the instances of polygamy; (iii) the stipulated marital property regime; (iv) counselling, mediation and dissolution processes and procedures; (v) maintenance and financial responsibilities before and after children; (vi) consequences in the case of the dissolution of the marriage with respect of financial maintenance after divorce and the consolatory compensation or gift (<i>mu'tah</i>).</p>
Polygamous marriages	In South Africa, a man may only legally have more than one wife according to African custom and	The South African courts at all levels have, in a series of		A woman may stipulate in the marriage contract	According to academic research and information on

<p><i>Does the law prohibit polygamy or impose strict conditions on such practice? Is the permission of the court required for a polygamous marriage? Is the permission of an existing wife required for a polygamous marriage? Is it necessary to inform an existing wife of the polygamous marriage? Are temporary marriages such as traveler's marriages (misyar) recognised? Is it necessary to register a polygamous marriage? Can a woman stipulate in the marriage contract that her intended husband cannot enter into a polygamous marriage?</i></p> <p><u>Applicable CEDAW Provision</u> Para. 14 GR21</p>	<p>tradition under the Recognition of Customary Marriages Act.⁶² However, a Muslim man may marry up to four wives at one time. Consequently, South African Muslim clerics permit such marriages on condition that the man is able to treat his wives equally, both materially and otherwise.⁶³</p> <p>As Muslim marriages are not legally recognised, a Muslim man may enter into an unofficial polygamous marriage without much formalities i.e. there is no legal requirement for him to seek the permission of a court or his existing wife or wives to enter into a polygamous</p>	<p>cases, held the view that the continuing non-recognition of Muslim marriages by law due to their potential to be polygamous and consequently contrary to public policy is discriminatory and deeply injurious to those negatively affected.⁶⁴</p> <ul style="list-style-type: none"> • In 1997, in the case of <i>Ryland v Edros</i>,⁶⁵ the Cape High Court refused to follow past judicial precedent that 		<p>that her husband may not take another wife. If the husband breaches this term of the marriage contract, the woman may go to a Muslim religious body to request for a divorce.⁷⁴</p>	<p>the ground, in practice:⁷⁵</p> <ul style="list-style-type: none"> • Polygamy is an accepted but uncommon practice among South African Muslims; • Many polygamous marriages occur as a result of infidelity. In the absence of any regulations surrounding
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⁶² Recognition of Customary Marriages Act (1998), <http://www.justice.gov.za/legislation/acts/1998-120.pdf>; Information obtained from South African advocate, May 2017

⁶³ Tsoaledi Daniel Thobejane, "An Exploration of Polygamous Marriages: A Worldview", (Mediterranean Journal of Social Sciences, 5:27, 2014), p. 1064, <http://www.mcser.org/journal/index.php/mjss/article/viewFile/5179/4996>; N. Moosa, "Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS", (PER/PELJ, 12:3, 2009), pp. 76-77, <http://www.scielo.org.za/pdf/pej/v12n3/a04v12n3.pdf>;

⁶⁴ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 52

⁶⁵ [1997] (2) SA 690 (C)

⁷⁴ N. Moosa, "Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS", (PER/PELJ, 12:3, 2009), p. 80, <http://www.scielo.org.za/pdf/pej/v12n3/a04v12n3.pdf>

⁷⁵ Information obtained from South African advocate, May 2017; Kalim Rajab, "Polygamy: I know all about it", Daily Maverick, 7 May 2012, <https://www.dailymaverick.co.za/opinionista/2012-05-07-polygamy-i-know-all-about-it/#.WQnQN9qGPIU>; N. Heol, S. Shaikh, A. Kagee, "Muslim women's reflections on the acceptability of vaginal microbiodical products to prevent HIV infection", (Ethnicity & Health, 16:2, 2011), pp. 89-106; N. Moosa, "Polygynous Muslim Marriages in South Africa: Their Potential Impact on the Incidence of HIV/AIDS", (PER/PELJ, 12:3, 2009), p. 80, <http://www.scielo.org.za/pdf/pej/v12n3/a04v12n3.pdf>; Mogamat Yoesrie Toefy, "Divorce in the Muslim Community of the Western Cape: A Demographic study of 600 divorce records at the Muslim Judicial Council and National Ulama Council between 1994 and 1999", Masters Thesis University of Cape Town, 2002, <https://open.uct.ac.za/handle/11427/14057>; S. Bangstad, "When Muslims marry non-Muslims: Marriage as incorporation in a Cape Muslim community", (Islam and Christian-Muslim Relations, 15:3, 2004), pp. 349-364

<p>Para. 34 GR29</p>	<p>marriage.</p>	<p>declared Muslim marriages as legally invalid and as a result any customs or contracts flowing from them were also not legally enforceable because such marriages are actually or potentially polygamous and thus against public policy on the basis that to do otherwise would be inconsistent with the Bill of Rights in the then interim Constitution of South Africa. The Court thus proceeded to uphold the validity of terms of the marriage contract that were agreed to between the parties in the context of their Muslim marriage and</p>			<p>polygamous Muslim marriages, a man need not necessarily show the Muslim cleric officiating his new marriage any proof that he is able to treat his wives equally. It is also not uncommon for a man to marry another wife without necessarily informing the cleric or his existing wife or wives that he has an existing wife.</p> <ul style="list-style-type: none"> • Matters relating to polygamous marriage are adjudicated by Muslim clerics who generally have a conservative outlook and make
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		<p>granted the woman her claims for maintenance and a consolatory gift following a divorce after hearing evidence by an expert on Muslim law about the terms that were incorporated into Muslim marriage contracts in the South African Muslim community to which the parties belonged (<i>Shafi'i</i> School);⁶⁶</p> <ul style="list-style-type: none"> • In 2005, in the case of <i>Khan v Kahn</i>,⁶⁷ the Pretoria High Court held that a polygamous Muslim marriages gave rise to a legal duty on the part of the husband to 			<p>decisions in favour of Muslim men. They do not often effectively check that conditions of polygamous marriages are met e.g. they do not often explore whether the man can treat his wives equally.</p> <ul style="list-style-type: none"> • Inserting a clause in a marriage contract to the effect that the wife would be entitled to divorce her husband should he enter into a polygamous marriage offers little protection to the wife. Muslim divorce laws are
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⁶⁶ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 53

⁶⁷ [2005] (2) SA 272 (T)

		<p>maintain his wife as contemplated under the Maintenance Act 99 of 1998. The court explained that “the purpose of family law in general is to protect vulnerable family members and to ensure fairness in disputes that arise at the end of relationships. Polygamous marriages are a type of family and should be protected by family law.”⁶⁸</p> <p>In 2014 in <i>Rose vs Rose</i> ⁶⁹ the court granted the right to maintenance and a share in her former husband's pension to a wife who was married for 20 years in a religious marriage. At the point</p>			<p>interpreted to be particularly stringent, thus placing undue hardship and restrictions on the wife wishing to seek divorce following her husband's polygamous marriage.</p> <p>According to the WLC, they have handled cases where the husband had concluded a marriage with two wives – the first, a Muslim marriage and the second, a civil marriage in community of property. The second wife is thus afforded legal recognition and granted legal rights denied by to the first wife. By virtue of the</p>
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⁶⁸ Hoodah Abrahams-Fayker, “Affidavit”, Women’s Legal Center Trust v. President of the Republic of South Africa, para. 58

⁶⁹ *Rose vs Rose (WC)* SA unreported case no 14770/11, 2014.

		<p>of entry into the marriage the husband was already married to another woman in a civil marriage. Prior to this judgment, Muslim wives in this position were unable to claim their share of the assets of their marriage. The judgement determined that a polygynous Muslim marriage should not prejudice the spouses to the union. It aligned the case law with those pertaining to customary marriages.⁷⁰</p> <p>In the most recent <i>Moosa NO and Others v Harnaker and Others</i>⁷¹ case the exclusion of widows in polygynous Muslim marriages from the protection of section 2C(1) of the</p>			<p>civil marriage in community of property, the second wife acquires rights over the assets of the husband, which may include assets which the first wife had contributed to.⁷⁶</p>
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⁷⁰ Kemp and Associates Recent Developments Rose vs Rose 2015 accessed on <https://www.kemplaw.co.za/353-recent-developments-rose-v-rose>

⁷¹ *Moosa NO and Others v Harnaker and Others* (400/17) [2017] ZAWCHC 97.

⁷⁶ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 112

		<p>Wills Act⁷² was deemed to be unconstitutional and unjust.</p> <p>The court ordered that the appropriate remedy would be the reading-into a sub-section of the Wills Act, the following: ‘a surviving spouse’ includes every husband and wife of a de facto monogamous and polygynous Muslim marriage solemnised under the religion of Islam.”⁷³</p>			
<p>Divorce rights <i>Is there equal right to divorce between women and men? Can the husband divorce without reason and without having to go to court? What are the main forms of divorce?</i></p>	<p>There is no existing legislation regulating Muslim divorce in South Africa. If married in both systems Muslim wives are able to obtain a civil divorce through the Divorce Act, but concurrently obtaining a talaq</p>	<p>In 2014 in unreported case <i>S vs S</i>⁸⁵ a summons was issued on behalf of the wife in a Muslim marriage for a decree of divorce, spousal maintenance and a</p>		<p>As Muslim marriages are not legally recognised, there is no legal judicial body to whom a women in a Muslim marriage may approach to</p>	<p>According to academic research, the WLC and information on the ground, some of the challenges that Muslim women face when seeking</p>

⁷² Wills Act (1953) http://www.saflii.org/za/legis/consol_act/wa195391/. Accessed 16 November 2021.

⁷³ Law Report Moosa vs Harnakar 2017 <https://www.ghostdigest.com/articles/moosa-v-harnakar/55374>

⁸⁵ (S v S (GJ) (unreported case no 2014/05928, 26-9-2014).

<p><i>Can all forms of divorce be sought only through the courts? Are the grounds for divorce the same for the husband and wife? Is unilateral divorce by repudiation (talāq) prohibited? If unilateral divorce is not prohibited, what is the procedure i.e. is the presence of the spouse to be divorced required, are witnesses required, does the spouse seeking divorce need to go to court, is the divorced spouse informed of the divorce? Is the unilateral right to divorce delegated to the wife? If so, is it by law or through the marriage contract? Is it mandatory to register a divorce?</i></p>	<p>often proves difficult. Whether married in both systems or just in the religious system, Muslim wives struggle to be free of their <i>nikahs</i>, because of lack of knowledge about dissolution options and rigid ulama processes and requirements for <i>faskh</i>⁷⁷.</p> <p>Talaq rights between women and men are unequal. It is more difficult for Muslim wives to terminate their marriage, whereas their husbands are able to access divorce with relative ease through informal process and often without just cause.⁷⁸</p> <p>There are three main ways in which Muslims can unofficially seek for <i>talaq</i> in South Africa:⁷⁹</p> <ul style="list-style-type: none"> • <i>Unilateral repudiation by the husband (talaq)</i>: This right to 	<p>division of the joint estate. In the subsequent settlement agreement it was recorded that the court would grant a decree of divorce incorporating the settlement agreement; and that Mr S would, after the decree of divorce was granted, issue a <i>talaq</i>. The judge made an order upholding the joint estate agreement and stated that “the marriage is dissolved.” Significantly, the court recognised that a marriage between the parties did indeed exist, that the wife did not have to be</p>		<p>file for a <i>fasakh</i> divorce and is thus compelled to approach a Muslim religious body, which does not have any legal powers to enforce its ruling, to adjudicate her case.⁸⁷</p>	<p>divorce include:⁸⁸</p> <ul style="list-style-type: none"> • Where the husband deliberately withholds the <i>talaq</i>, it causes great hardship, oppression and misery to women, leaving them “suspended” without remedy, and precluded from remarrying according to Muslim law whilst the husband is free to marry another woman, thereby compounding the consequences of the marriage
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⁷⁷ Ismail, Farhana. 2018. The MPL Network: Centering Women’s Experiences of Islamic Law. Daily Vox, 17 April. Available: <https://www.thedailyvox.co.za/the-mpl-network-centering-womens-experiences-of-islamic-law-farhana-ismail/> .accessed 21 November 2021

⁷⁸ Hoodah Abrahams-Fayker, “Affidavit”, Women’s Legal Center Trust v. President of the Republic of South Africa, para. 41

⁷⁹ Hoodah Abrahams-Fayker, “Affidavit”, Women’s Legal Center Trust v. President of the Republic of South Africa, paras. 72.4, 113; N. Gabru, “Dilemma of Muslim Women Regarding Divorce in South Africa”, (PER/PELJ, 7:2, 2004), pp. 46-47, http://www.nwu.ac.za/files/images/2004x2x_gabru_art.pdf

⁸⁷ Hoodah Abrahams-Fayker, “Affidavit”, Women’s Legal Center Trust v. President of the Republic of South Africa, para. 113; Nadia KAssim, “A woman’s right to divorce in Islam”, (Red Dot Topics, 2:1, 2013), <http://www.irtiga.co.za/a-womans-right-to-divorce-in-islam/>; Abdul Kariem Toffar, “Administration of Islamic Law of Marriage and Divorce in South Africa”, 1993, p. 214, http://researchspace.ukzn.ac.za/bitstream/handle/10413/7352/Toffar_Abdul_Kariem_1993.pdf?sequence=1&isAllowed=y

⁸⁸ Hoodah Abrahams-Fayker, “Affidavit”, Women’s Legal Center Trust v. President of the Republic of South Africa, paras. 113-115

<p><u>Applicable CEDAW Provision</u> Article 16(1)(c) Paras. 17-18 GR21 Paras. 34, 39-40 GR29</p>	<p>unilaterally repudiate the marriage is vested only with the Muslim man. There are no formalities for a divorce by a husband beyond using the word <i>talaq</i> or a derivative or synonym thereof. Sometimes this is done via email, sms or whatsapp.⁸⁰</p> <p>A husband may delegate his unilateral right to divorce to his wife (<i>isma</i>) through a stipulation in the marriage contract,⁸¹ thus permitting her to pronounce <i>talāq</i> upon herself (<i>talāq-i-tafwid</i>).</p> <ul style="list-style-type: none"> • <i>Divorce by way of decree (fasakh)</i>: A wife may seek a decree from a Muslim cleric for the termination of the Muslim marriage on recognised grounds for divorce under Muslim law if her husband refused to pronounce <i>talaq</i>. Such grounds include the husband's: (i) failure to provide maintenance; (ii) 	<p>detained within the religious marital system, and that the shared 'partnership' was that of an in community of property regime. It inferred that these religious marriages should be recognised, and thus should be subject to the same property regimes that "apply to all other forms of civil marriage in South Africa, including customary marriages, namely, that if one does not conclude an antenuptial contract, the marriage is automatically one of community of property by operation of the law"⁸⁶.</p>			<p>breakdown, including proprietary issues;</p> <ul style="list-style-type: none"> • In terms of a <i>fasakh</i> divorce, sometimes, there are husbands who have refused to participate and/or submit to the mediation or appropriate dispute-resolution process initiated by the Muslim cleric. In such instances, the divorce process can be long, difficult and unsuccessful; • <i>Khul'</i> divorce is barely recognised in South Africa due to lack of: (i) awareness among South
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⁸⁰ Information obtained from South African advocate, May 2017

⁸¹ N. Gabru, "Dilemma of Muslim Women Regarding Divorce in South Africa", (PER/PELJ, 7:2, 2004), p. 49, http://www.nwu.ac.za/files/images/2004x2x_gabru_art.pdf

⁸⁶ Megan Harrington-Johnson, "Muslim marriage and divorce", De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

	<p>severe or incurable illness of which the wife was not aware at the time the marriage was concluded; (iii) prolonged absence without reasonable excuse; or (iv) long-term imprisonment.⁸² In addition, a wife may seek divorce on the basis of harm (<i>dharar</i>) conceptualised as physical and psychological abuse. Prior to her being granted a <i>fasakh</i> divorce, she and her husband have to undergo a reconciliation process;⁸³</p> <ul style="list-style-type: none"> • <i>Redemptive divorce (khul')</i>: A wife may seek divorce by way of <i>khul'</i> whereby she requests divorce from her husband in exchange for a mutually-agreed compensation to be paid by her to him. A <i>khul'</i> divorce often requires the consent of the husband and if the husband refuses to reach a settlement in terms of a <i>khul'</i> divorce, the wife will have to 				<p>African Muslim women about <i>khul'</i> divorce; (ii) redress to the wife if the husband does not consent to a <i>khul'</i> divorce;</p> <ul style="list-style-type: none"> • In cases where the couple has concluded their marriage according to Muslim rites and at the same time register their marriage as a civil marriages, women may find themselves in a situation where their civil marriage may be dissolved pursuant to the Divorce Act following a court order to that effect, but their
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⁸² Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 113

⁸³ Information obtained from South African advocate, May 2017

	<p>seek a <i>fasakh</i> divorce.⁸⁴</p>				<p>Muslim marriage remains undissolved because they are unable to obtain a <i>faskh</i> divorce. This effectively prevents them from being able to enter into another Muslim marriage, whilst the husband is free to enter into another civil marriage. Thus far, no civil courts, when granting the woman a divorce under her civil marriage, have addressed the dissolution of the Muslim marriage at the same time by ordering the husband to grant her a <i>talaq</i> or granting a</p>
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⁸⁴ Ashraf Booley, "Divorce and the of khul': A type of no fault divorce found within an Islamic legal framework", (Law, Democracy and Development, 18, 2014), pp. 50, 52, <http://www.scielo.org.za/pdf/lld/v18/03.pdf>; N. Gabru, "Dilemma of Muslim Women Regarding Divorce in South Africa", (PER/PELJ, 7:2, 2004), pp. 49-50, http://www.nwu.ac.za/files/images/2004x2x_gabru_art.pdf

					<i>faskh</i> . ⁸⁹
	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Women's financial rights after divorce</p> <p><i>Is there a legal concept of matrimonial assets? Is there equal division of marital property upon dissolution of the marriage? Is the woman's role as wife and mother recognised as contribution to the acquisition of assets? What spousal maintenance are available to the wife after a divorce? Is she entitled to maintenance during the waiting period after the divorce (iddah)? Is she entitled to a consolatory gift or compensation upon divorce (mut'ah)? Who is responsible for the financial maintenance of children following a divorce? Can the couple agree to the division of assets acquired during marriage in the marriage contract? Can this</i></p>	<p>The main codified law that govern women's financial Rights after divorce is the Maintenance⁹⁰Act 99 of 1998 and the Matrimonial Property Act 1984⁹¹ which regulates the distinct matrimonial property systems.</p> <p>In addition, the Supreme Court Act of 1959⁹² sets out uniform court rules which provide relief for a spouse who is without a source of income during divorce proceedings. Rule 43 of the High Court and Rule 58 of the Magistrates court provide spouses with interim relief measures which are supposed to be inexpensive and timeous. These measures are increasingly being used by spouses in Muslim Marriages as</p>	<p>Muslim couples, especially Muslim women, have turned to the courts all over the country to seek legal redress upon the dissolution of their marriages that were contracted according to Muslim rites with regard to their financial rights after a divorce. Most matters settle out of court. Where the cases do end up in court, the courts, in a series of cases have upheld the financial rights of Muslim spouses after a divorce, including</p>			<p>According to WLC:¹⁰²</p> <ul style="list-style-type: none"> • In a telephone survey of 20 Muslim clerics (<i>imam</i>) who are registered marriage officers under the Marriage Act, 15 stated that the preferred marital property regime is a marriage out of community of property as this regime follows <i>Shari'ah</i>; seven of them said that a pre-nuptial

⁸⁹ Abdul Kariem Toffar, "Administration of Islamic Law of Marriage and Divorce in South Africa", 1993, p. 214, http://researchspace.ukzn.ac.za/bitstream/handle/10413/7352/Toffar_Abdul_Kariem_1993.pdf?sequence=1&isAllowed=y

⁹⁰ Maintenance Act (1998) <https://www.gov.za/documents/maintenance-act>

⁹¹ Matrimonial Property Act (1984) <https://www.justice.gov.za/legislation/acts/1984-088.pdf>

⁹² The Supreme Court Act (1959), <https://www.justice.gov.za/legislation/acts/1959-059.pdf>

¹⁰² Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, paras. 41, 103, 256.2

<p><i>stipulation be amended? If so, by who and on what basis e.g. mutual consent?</i></p> <p><u>Applicable CEDAW Provision</u> Articles 16(1)(c), 16(1)(h) Paras. 30-33 GR21 Paras. 34-35, 43-48 GR29</p>	<p>case law develops.</p> <p>Outside of the civil system and in unofficial forums where normative fiqh-based interpretations of Islamic divorce law is practiced a woman is entitled to:⁹³</p> <ul style="list-style-type: none"> • Financial maintenance during the waiting period after the divorce (<i>iddah</i>). The <i>iddah</i> period is generally three months, unless she is pregnant or breastfeeding, in which case, she is entitled to maintenance until the baby is born or after the completion of the breast feeding;⁹⁴ and • Consolatory gift or compensation (<i>mut'ah</i>). <p>A Muslim marriage is generally regarded as being that of a</p>	<p>ordering interim maintenance:</p> <ul style="list-style-type: none"> • In 1997, in the case of <i>Ryland v Edros</i>;⁹⁷ the Cape High Court granted a Muslim woman maintenance spanning the better part of the duration of her marriage plus the <i>iddah</i> and a consolatory gift because her husband had divorced her without just cause; • In 2005, in the case of <i>Khan vs Kahn</i>⁹⁸ the Pretoria High 			<p>without accrual was the preferred marital property regime;</p> <ul style="list-style-type: none"> • The default property regime of marriage out of community property and without any accrual can cause Muslim wives financial hardship. Such a regime leaves them with inadequate proprietary claims over the assets acquired or improved upon during the subsistence of their marriage
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⁹³ Ryland v Edros [1997] (2) SA 690 (C)

⁹⁴ Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 72.2; Logan Govender, "Muslim woman sues for R50k maintenance", IOL, 27 July 2016, <http://www.iol.co.za/news/crime-courts/muslim-woman-sues-for-r50k-maintenance-2050343>; Ashraf Booley, "Divorce and the of khul": A type of no fault divorce found within an Islamic legal framework", (Law, Democracy and Development, 18, 2014), pp. 41-42, <http://www.scielo.org.za/pdf/ldd/v18/03.pdf>

⁹⁷ [1997] (2) SA 690 (C); Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 53

⁹⁸ [2005] (2) SA 272 (T); Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 58

	<p>marriage out of community property without any accrual.⁹⁵</p> <p>Following a divorce, fathers remain responsible for the financial maintenance of their children and if the mother is fully occupied in rearing the minor children, the father is obliged to remunerate her for her services.⁹⁶</p>	<p>Court held that both monogamous and polygamous Muslim marriages in accordance with Muslim rites gave rise to a legal duty on the part of the husband to maintain his wife as contemplated by the Maintenance Act;</p> <ul style="list-style-type: none"> • In 2008 in <i>Mahomed vs Mahomed</i>, this right to maintenance was extended to include a claim for interim maintenance in terms of a Rule 43 of the High Court rules. The judge 			<p>despite their substantial contribution to the acquisition of the assets through their tending to the family needs and household chores. Many are also forced out of their homes;¹⁰³</p> <ul style="list-style-type: none"> • Even where the parties had intended to purchase property in joint names, the property could not be jointly registered in both their names due to certain by-laws such as the a city council's Housing Code that require couples to be legally married in
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⁹⁵ Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para 41

⁹⁶ Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 72.2

¹⁰³ See also Waheeda Amien, "Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages", (Human Rights Quarterly, 28, 2006)

		<p>recognised increased inclinations in the SA courts to grant maintenance and other rights to those married by Muslim rites only⁹⁹.</p> <ul style="list-style-type: none"> • In 2009 and 2010, in the cases of <i>Hoosain v Dangor</i>¹⁰⁰ and <i>AM v RM</i>,¹⁰¹ the respective courts held that Rule 43 of the Uniform Rules extends to Muslim marriages that are not solemnised under the Marriage Act and made the relevant order for interim 			<p>terms of South African law before they can jointly register for the property.</p>
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⁹⁹ Mahomed vs Mahomed
https://www.researchgate.net/publication/334225044_A_discussion_of_Moosa_NO_and_Others_v_Harnaker_and_Others_illustrating_the_need_for_legal_recognition_of_Muslim_marriages_in_South_Africa

¹⁰⁰ [2009] JDR 1212; Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 62

¹⁰¹ [2010] (2) SA 223 (ECP); Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 61

		<p>maintenance.</p> <ul style="list-style-type: none"> • And in 2014 in Rose vs Rose. the Western Cape High Court ruled that the wife who was married for 20 years by Islamic rites, could claim for maintenance and a share in her former husbands pension. 			
	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Custody of Children</p> <p><i>Do parents have equal rights over the custody of their children? If no, who has priority right over the custody of the child? Is custody decided based on the best interest of the child? Do mothers</i></p>	<p>The Children Act governs all matters relating to the rights of children. The issue of whether a marriage is legal or not is a consideration. Therefore, a Muslim mother who may or may not be in a legally recognised marriage can seek legal redress through the courts when seeking redress regarding her</p>	<p>In 2014, in the case of <i>Adnaan Isaacs v Gadija Isaacs and the City of Cape Town</i>,¹⁰⁶ the woman and man contracted a marriage according to Muslim rites and decided to purchase city council housing as their first</p>	<p>The Government of South Africa in its 2010 report to the CEDAW Committee asserts that the paramount consideration on matters relating to custody and guardianship over children is that of the</p>		

¹⁰⁶ Goodwood Magistrate's Court, Case No. 2807/14; Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 256

<p><i>automatically lose custody upon remarriage or if she is deemed disobedient or when the child reaches a designated age when custody goes to father?</i></p> <p><u>Applicable CEDAW Provision</u> Articles 16(1)(d), 16(1)(f) Paras. 19-20 GR21</p>	<p>right to custody over her child.¹⁰⁴</p> <p>Pursuant to Sections 7 and 9 of the Children Act, the standard that the child's best interest is of paramount importance applies to all matters concerning the care, protection and well-being of the child.¹⁰⁵ Therefore, ultimately, even if the child is born in an unofficial Muslim marriage, his or her custody is determined on the basis of his or her best interest.</p>	<p>marital home. As Muslim marriages are not legally recognised, the property could not be jointly registered in the names of both woman and man based on the city council's by-laws and was thus registered only in the name of the man, although the woman signed as the wife. The proceeds of the sale from the first marital home was later used to purchase the couple's second marital home. Subsequently, the husband took on a new wife, purported to terminate the marriage with the woman and launched an application to evict her and her children in order to move into the property with his new wife. The</p>	<p>best interests of the child as guaranteed by the South African Constitution.¹⁰⁷</p>		
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¹⁰⁴ Information obtained from South African advocate, May 2017

¹⁰⁵ Sections 7,9 of the Children Act (2005), http://www.hpcs.co.za/Uploads/editor/UserFiles/downloads/legislations/acts/childrens_act_38_2005.pdf

¹⁰⁷ South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), para. 16.17, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

		<p>Magistrates court refused to grant the eviction holding that it would neither be just and equitable nor in the best interest of the children to evict the woman and the children from the second marital home in view of: (i) the woman's status as a single mother heading her household singlehandedly; (ii) the discrimination that the woman faced both in terms of the purchase of the first marital home and her divorce rights; and (iii) the fact that it was clear the woman has been unable to find alternative accommodation that is suitable for her and her children and is not likely to be able to do so in the near future.</p>			
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	Legislative Framework	Case Law	Policy	Procedure	Practice
<p>Guardianship of Children</p> <p><i>Do parents have equal rights over the guardianship of their children? If no, who has priority right over the guardianship of the child? Is guardianship decided based on the best interest of the child?</i></p> <p><u>Applicable CEDAW Provision</u> Articles 16(1)(d), 16(1)(f) Paras. 19-20 GR21</p>	<p>Pursuant to Sections 7 and 9 of the Children Act, the standard that the child's best interest is of paramount importance applies to all matters concerning the care, protection and well-being of the child.¹⁰⁸ Therefore, ultimately, even if the child is born in an unofficial Muslim marriage, his or her guardianship is determined on the basis of his or her best interest.</p>				
<p>Family Planning</p> <p><i>Do women require the consent of the husband to practise family planning, including abortions and sterilisation in law or in practice?</i></p> <p><u>Applicable CEDAW Provision</u></p>	<p>Abortion is permitted in South Africa provided the requirements are met.¹⁰⁹</p>		<p>The Government of South Africa in its 2010 report to the CEDAW Committee asserts that:¹¹⁰</p> <ul style="list-style-type: none"> • The South African Constitution and the legislative framework 		<p>While there is no legal requirement for consent of a husband to practise family planning, in practice, African customs and traditions as well as religious norms and values may influence a woman's</p>

¹⁰⁸ Sections 7, 9 of the Children Act (2005), http://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/legislations/acts/childrens_act_38_2005.pdf

¹⁰⁹ Section 2 of the Choice on Termination of Pregnancy Act (1996), <http://www.gov.za/sites/www.gov.za/files/Act92of1996.pdf>; Centre for Reproductive Rights, 'The World's Abortion Laws', 2014, <https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/AbortionMap2014.PDF>

¹¹⁰ South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), paras. 16.15, 16.16, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

<p>Articles 16(1)(e), 12 Paras. 21-23 GR21</p>			<p>recognise the reproductive rights of all women, including married women. This includes the right to choose whether or not to have children, the number of children and when to have them; and</p> <ul style="list-style-type: none"> • Administrative measures have focussed on ongoing provision of sexuality education and advice to women and girls as well as boys and men. 		<p>ability to freely exercise her reproductive rights.¹¹¹</p> <p>According to World Bank data, the total fertility rate decreased from 6.2 children per woman in 1960 to 2.3 in 2015.¹¹²</p> <p>According to the UN Population Division's 2015 Trends in Contraceptive Use Worldwide:¹¹³</p> <ul style="list-style-type: none"> • 64% of married women aged 15-49 are using a method of contraception, with 63% of women using a modern method; • 13% of married women aged
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¹¹¹ Information obtained from South African advocate, May 2017

¹¹² The World Bank, "Fertility rates, total (births per woman)", <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN>

¹¹³ United Nations Population Division, "Trends in Contraceptive Use Worldwide 2015", Annex Table 1, pp. 36-42, <http://www.un.org/en/development/desa/population/publications/pdf/family/trendsContraceptiveUse2015Report.pdf>

					<p>15-49 have an unmet need for family planning services; and</p> <ul style="list-style-type: none"> 83% of marriage women aged 15-49 had their demands for family planning satisfied by modern methods of contraception.
<p>Personal rights of spouses</p> <p><i>Does a woman need the consent of her spouse or guardian to work, choose a profession, leave the house, travel, drive, receive various health services, study, etc. on her behalf? Does a woman have the right to retain her birth name upon marriage or to choose her family name? Can</i></p>	<p>Article 12 of the Constitution provides that everyone has the right to freedom and security of the person.¹¹⁴</p> <p>Article 21 of the Constitution:¹¹⁵</p> <ul style="list-style-type: none"> Guarantees everyone the right to freedom of movement and choice of residence within South Africa; 				<p>According to World Bank data, female labour force participation increased from 43% in 1990 to 45% in 2016.¹¹⁷ During the same period, the male labour force participation decreased from 68% to 61%.¹¹⁸</p>

¹¹⁴ Article 12 of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en
¹¹⁵ Article 21(1) of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en
¹¹⁷ The World Bank, "Labour force participation rate, female (% of female population ages 15+) (modelled ILO estimate)", <http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>
¹¹⁸ The World Bank, "Labour force participation rate, male (% of male population ages 15+) (modelled ILO estimate)", <http://data.worldbank.org/indicator/SL.TLF.CACT.MA.ZS>

<p><i>a woman protect her personal rights through her marriage contract?</i></p> <p><u>Applicable CEDAW Provision</u> Article 16(1)(g) Para. 24 GR21 Para. 34 GR29</p>	<ul style="list-style-type: none"> Provides that every South African has a right to a passport. <p>Article 29 of the Constitution guarantees the right to a basic education.¹¹⁶</p> <p>Despite the constitutional provisions stating otherwise, the personal rights of married Muslim women in South Africa could potentially be restricted as a result of the maintenance-for-obedience marriage contractual framework.</p>				<p>According to the 2016 UNDP Human Development Report:¹¹⁹</p> <ul style="list-style-type: none"> 74% of women over 25 have at least some secondary education as compared to 76% of men of the same age group; 99% of females and males aged 15-24 are able to read and write a short simple sentence; and 83% of women are satisfied with their freedom of choice as compared to 88% of men.
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¹¹⁶ Article 29 of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

¹¹⁹ UNDP, "Human Development Report 2016", Tables 5, 9, 14, pp. 214-217, 230-233, 250-253, http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf

<p>Inheritance rights</p> <p><i>Are women and men in the same degree of relationship to a deceased entitled to equal shares in the estate and to equal rank in the order of succession? Are there procedures to address any inequalities in inheritance between women and men e.g. can a will be written, can beneficiaries agree to inherit equal shares of the estate or can the children agree to forgo their inheritance in favour of their mother upon the death of their father?</i></p> <p><u>Applicable CEDAW Provision</u> Paras. 34-35 GR21 Paras. 49-53 GR29</p>	<p>South African law allows for the freedom of testation, meaning where a deceased has a valid last will and testament, its stipulations must be given effect upon his or her demise.¹²⁰ Consequently, a Muslim can choose to make a will and freely stipulate how her or his estate ought to be distributed upon her or his death.</p> <p>If a Muslim dies intestate, according to South African case law, persons who contracted a marriage according to Muslim rites should be regarded as spouses for the purposes of the intestate succession and are entitled to inherit from their deceased partner's estate in accordance with the provisions of the Intestate Succession Act despite Muslim marriage not being legally recognised.¹²¹</p>	<p>In <i>Daniels v Campbell NO and Others</i>,¹²², the Constitutional Court determined that the word "spouse" as it was written in the Intestate Succession Act 81 of 1987 and Maintenance of the Surviving Spouses Act 27 of 1990 applied to Muslim spouses.</p> <p>In <i>Fatima Gabie Hassam v. John Hermanus Jacobs NO and Others</i>,¹²³ the court extended the decision in <i>Daniels</i> to Muslim wives in polygamous marriages.</p>			<p>South African Muslims have wills stipulating that their estates must be distributed based on the principles of <i>Shari'ah</i>.¹²⁸</p>
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¹²⁰ Abdul Buckus, "A Brief Overview of Islamic Inheritance from a South African Law Perspective", Bregman Moodley Attorneys, <http://www.bregmans.co.za/a-brief-overview-of-succession-in-terms-of-south-african-law/>

¹²¹ Abdul Buckus, "A Brief Overview of Islamic Inheritance from a South African Law Perspective", Bregman Moodley Attorneys, <http://www.bregmans.co.za/a-brief-overview-of-succession-in-terms-of-south-african-law/>

¹²² [2003] (9) BCLR 969 (C); 160209 Women's Legal Center Trust v. President of the Republic of South Africa, Affidavit by Hoodah Abrahams-Fayker, para 56; see also *Daniels v. Campbell NO and Others* 2005 (5) SA 331 (CC) at 341–42, 349–50 (S. Afr.).

¹²³ [2009] (5) SA 572 (CC)

¹²⁸ Information obtained from South African advocate, May 2017


		<p>In <i>Taryn Faro v Bingham NO and others</i>,¹²⁴ the Court recognised the Muslim marriage in this case and through that, recognised the woman as a surviving spouse for estate purposes.</p> <p>In the most recent <i>Moosa NO and Others v Harnaker and Others</i>¹²⁵ case the exclusion of widows in polygynous Muslim marriages from the protection of section 2C(1) of the Wills Act¹²⁶ was deemed to be unconstitutional and unjust¹²⁷.</p>			
	Legislative Framework	Case Law	Policy	Procedure	Practice

¹²⁴ Case No. 4466/2013 (unreported); Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, paras. 68-69

¹²⁵ *Moosa NO and Others v Harnaker and Others* (400/17) [2017] ZAWCHC 97

¹²⁶ Wills Act (1953) http://www.saflii.org/za/legis/consol_act/wa195391/

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<p>Violence against women in the family</p> <p><i>Are there laws that define what constitute domestic violence such as battery, female circumcision, marital rape and other forms of sexual assault and violence that affect a woman's mental health which are perpetuated by traditional attitudes? Is there specific legislation that recognises domestic violence as a crime? Is the husband allowed to discipline his wife? Can a suspected perpetrator marry his alleged abused victim to avoid punishment? Are there support services for women who are the victims of aggression or abuses?</i></p> <p><u>Applicable CEDAW Provision</u></p>	<p>Article 12 of the Constitution guarantees freedom from:¹²⁹</p> <ul style="list-style-type: none"> • All forms of violence from either public or private sources; and • Torture as well as cruel, inhuman and degrading treatment or punishment in any way. <p>The Domestic Violence Act makes provisions for the issuing of protection orders with regard to domestic violence. Section 1 of the Act defines domestic relationship in a manner that would include relationships within a Muslim marriage, legally recognised or not.¹³⁰ Section 1 also defines 'domestic violence' as:</p> <ul style="list-style-type: none"> • _____ Physical abuse; • _____ Sexual abuse; 		<p>The Government of South Africa in its 2010 report to the CEDAW Committee:¹³²</p> <ul style="list-style-type: none"> • Informed that the Domestic Violence Act is the key instrument available to women to vindicate their rights in relation to violence in the family whether from the spouse, members of the extended family or fellow residents; • Acknowledged that more needs to be done to protect victims of domestic violence, noting that women are often 	<p>The South African Police Service is specifically obligated by law to immediately or as soon as it is reasonably possible to do so, render assistance to immediate complainants of domestic violence including finding them suitable shelter and explaining to them their available remedies.¹³³</p> <p>Any complainant of domestic violence can apply to a court for a protection order.¹³⁴</p>	<p>According to civil society groups:¹³⁵</p> <ul style="list-style-type: none"> • Reliable data on domestic violence in South Africa is difficult to obtain because there is no crime termed "domestic violence". Instead, its multiple forms are captured across a range of different categories of criminal offense such as assault, pointing a firearm, intimidation, etc. • When the South African Police Service reports on crime statistics each year, it does not
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¹²⁹ Article 12 of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

¹³⁰ Section 4 of the Domestic Violence Act (1998), <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

¹³² South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), paras. 16.13, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

¹³³ Section 2 of the Domestic Violence Act (1998), <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

¹³⁴ Section 4 of the Domestic Violence Act (1998), <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

¹³⁵ Africa Check, "South Africa's 2014/15 Assault and Sexual Crime Statistics", FACTSHEET, <https://africacheck.org/factsheets/factsheet-south-africas-201415-assault-and-sexual-crime-statistics/>; Lisa Vetten, "Domestic violence in South Africa", Institute for Security Studies Policy Brief No. 71, November 2014, <https://issafrica.s3.amazonaws.com/site/uploads/PolBrief71.pdf>

<p>GRs 12 & 19 Para. 40 GR21</p>	<ul style="list-style-type: none"> ● _____ Emotional, verbal and psychological abuse; ● _____ Economic abuse; ● _____ Intimidation; ● _____ Harassment; ● _____ Stalking; ● _____ Damage to property; ● _____ Entry into the complainant's residence without consent, where the parties do not share the same residence; <p>or</p> <ul style="list-style-type: none"> ● _____ Any other controlling or abusive behaviour towards a complainant. <p>Marital rape is criminalised in South Africa.¹³¹</p>		<p>repeatedly assaulted or even killed after obtaining a protection order under the Domestic Violence Act;</p> <ul style="list-style-type: none"> ● The Domestic Violence Guidelines for all service providers across the criminal justice process have been issued and officials are being trained on the Guidelines in order to better protect victims of domestic violence. 		<p>state how many of these crimes were perpetrated in the context of domestic violence;</p> <ul style="list-style-type: none"> ● When analysing police statistics, researchers have found intimate partner violence to be significantly under-reported; ● The South Africa Police Service could do more to assist victims of domestic violence. The Civilian Secretariat for Police found that between October 2013 and March 2014, only 1.4% of police stations inspected (two out of 145) were
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¹³¹ Section 5 of the Prevention of Family Violence Act (1993), <http://www.justice.gov.za/legislation/acts/1993-133.pdf>; South Africa State party report, U.N. Doc. CEDAW/C/ZAF/3-4 (2010), para. 16.13, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>; Anne Look, "In Africa, criminalising marital rape remains controversial", VOA, 7 November 2013, <http://www.voanews.com/a/in-africa-criminalizing-marital-rape-remains-controversial/1786061.html>

					fully compliant with the Domestic Violence Act.
<p>Nationality rights</p> <p><i>Does a wife have the right to confer her citizenship on foreign husbands and children? Can the nationality of an adult woman be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality?</i></p> <p><u>Applicable CEDAW Provision</u> Article 9 Para. 6 GR21</p>	<p>Both a South African man and woman may pass their nationality to their non-South African spouse.¹³⁶</p> <p>A South African mother or father may pass their citizenship to their children regardless of where they are born.¹³⁷</p>				

¹³⁶ Section 14 of the South African Citizenship Act (1995), http://www.gov.za/sites/www.gov.za/files/a88-95_1.pdf

¹³⁷ Sections 2(1), 3(1) of the South African Citizenship Act (1995), http://www.gov.za/sites/www.gov.za/files/a88-95_1.pdf

ACCESS TO JUSTICE (please include sources to information as much as possible)

SYSTEM	PROCEDURES	CHALLENGES FOR WOMEN	GOOD PRACTICES IN COURT SYSTEM
<p><i>How are Muslim family law (i.e. marriage and family related) cases administered in your country? (E.g. Do you have a Quazi/Kadhi court system, family courts or civil courts?)</i></p> <p><i>How many courthouses/court rooms around the country that administer Muslim family law cases?</i></p> <p><i>If civil or Kadhi courts - what cases are handled by what courts?</i></p> <p><i>How many Muslim family law-related judges? Are there women working within the court system as judges/marriage registrars e.t.c?</i></p> <p><i>Do lawyers represent clients?</i></p> <p>Most Muslim marriage and divorce cases are administered by unofficial ulama councils. As already mentioned above in the section on legislative framework, the absence of codified laws specifically governing Muslim marriages and family</p>	<p><i>Are the procedures pertaining to family matters (e.g. divorce, maintenance etc) are defined in the family law and/or are there guidelines/policies available for judges/Kadhis?</i></p> <p><i>In general practice do judges/Kadhis follow procedures?</i></p> <p><i>How much judicial discretion do judges/Kadhis have over marriage and family matters? Are there appeal processes?</i></p> <p>In practice, each unofficial community forum like the MJC would have clear processes and procedures for alims to follow. These procedures are madhhab specific and differ slightly between the different religious bodies. Appeal processes are left to the discretion of the individual ulama councils¹⁴².</p>	<p><i>What are some key challenges that Muslim women face in accessing justice on family law matters?</i></p> <p><i>(E.g. lack of accessibility, costly, bad procedures, delayed processes, gender insensitive judges, etc?)</i></p> <p>In the unofficial community forums, women's experiences during divorce proceedings are that many ulama entrench male privilege. (Hoel 2011: 129). Women are expected to accept unjust and potentially dangerous marital relationships in the "spirit of reconciliation" even in instances of abuse and infidelity, are unable to get assistance in exiting marriages, and abusive husbands are ignored by some ulama. Even when ulama rulings during divorce proceedings are favourable, the ongoing lack of regulation of Muslim marriage and divorce in South Africa means there is no legal mechanism to enforce such¹⁴⁴.</p>	<p><i>Are there any good practices, procedures or policies that you would like to share pertaining to how courts in your country deal with family law cases?</i></p> <p><i>(E.g. prioritising certain types of cases, timely delivery of decisions, clear procedure, etc)</i></p> <p>The policies within the court system provide adequate protection for women. The problem lies with laborious processes, backlogs in the court system, understaffing and enforcement.</p>

¹⁴² Abduroaf, Muneer, panelist. Panel discussion. Muslim Personal Law Network Workshop, August 2018, University of Cape Town.

¹⁴⁴ Ismail, Farhana. An analysis of the discursive representations of women's sexual agency in online fatwas: a case study of askimam. org. Diss. 2015, p 38-9.

<p>relations in South Africa, these matters are governed officially by judicial precedence and unofficially by a combination of <i>Shari'ah</i> principles and Muslim jurisprudence (<i>fiqh</i>) as applied and adjudicated upon on a case-by-case basis by different South African Muslim religious bodies (<i>ulama</i>) such as the Muslim Judicial Council ('MJC') and the United Ulama Council ('UUC').¹³⁸ These religious bodies do not have any formal powers to enforce their rulings. As Sunni Muslims form the majority of the Muslim minority population in South Africa, the rules of Sunni Schools are predominantly applied in South African Muslim personal matters by the Muslim religious bodies. In this regard, generally, the rules of Shafi'i <i>fiqh</i> apply in the West Coast and rules of Hanafi <i>fiqh</i> apply in the East Coast and Gauteng.¹³⁹ Also as already mentioned above, there is an increasing body of case law which demonstrates that the South African lower</p>	<p>In the official civil system, South Africa has clear processes stipulated for divorce, mediation, proprietary consequences, maintenance and child custody¹⁴³.</p>	<p>When couples enter into the parallel system of marriage- both civil and religious- ulama who are registered marriage officers will not register marriages wherein couples agree to alternative property regimes. This diminishes the legal capacity of women as required by CEDAW Article 15 because choice, in terms of a shared marital property system, is not considered. Instead the power afforded to religious authorities by the State legitimises discriminatory religious doctrinal practices.¹⁴⁵</p> <p>Within the official civil court system, because of the lack of legislation, Muslim women experience inequality before the law, prolonged and expensive divorce processes, and unequal rights and responsibilities at dissolution. Muslim women are not treated equally to other South African</p>	
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- ¹³⁸ Hoodah Abrahams-Fayker, "Affidavit", Women's Legal Center Trust v. President of the Republic of South Africa, para. 55; Abdul Kariem Toffar, "Administration of Islamic Law of Marriage and Divorce in South Africa", 1993, pp. 215-216, http://researchspace.ukzn.ac.za/bitstream/handle/10413/7352/Toffar_Abdul_Kariem_1993.pdf?sequence=1&isAllowed=y
- ¹³⁹ Information obtained from South African advocate, May 2017. The Hanafi jurists are split amongst the Deoband and Barelwi School and for the most part they follow the Indian consensus of those schools; Ebrahim Moosa, "Prospects for Muslim Law in South Africa: A History and Recent Developments", (Islamic & Middle Eastern Law, 3, 1996), p. 131, <http://politics-of-religious-freedom.berkeley.edu/files/2015/06/Ebrahim-Moosa-Prospects-for-Muslim-Law-in-South-Africa.pdf>; Najma Moosa, "Muslim Personal Laws Affecting Children: Diversity, Practice and Implications for a New Children's Code for South Africa", (South African Law Journal, 13, 1998), p. 480, <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/648/MoosaChildrenRights1998.pdf?sequence=3>
- ¹⁴³ "South Africa: Family Laws and Regulations 2022." ICLG.com, 25 August.2021, <https://iclg.com/practice-areas/family-laws-and-regulations/south-africa>
- ¹⁴⁵ Seedat, Fatima. 2019. 'Intersections and Assemblages: South African's Negotiating Privilege and Marginality through Freedom of Religion and Sexual Difference' in Forster, Dion., Gerle, Elisabeth. and Gunner, Goran. ed. Freedom of Religion at Stake: Competing Claims among Faith Traditions, States, and Persons. Oregon: Pickwick Publishers. 199-220.

<p>and superior courts cases have afforded Muslim women some rights enshrined in the constitution on a piecemeal and limited basis:¹⁴⁰ Most of these cases have dealt with the financial consequences of a nikah either upon death or divorce and litigants are usually represented by an attorney. The South African superior courts, namely the Constitutional Court, the Supreme Court of Appeal, and the High Courts have a general jurisdiction over civil and criminal matters including divorce and family matters. At the lower court level there are designated divorce, maintenance and children's courts¹⁴¹.</p>		<p>women in civil divorce proceedings. If a Muslim woman is intent on the material benefits that ordinarily accrue through marriage (or access to the marital property which the couple had worked for collectively) she is first compelled to launch an application in the High Court for legal recognition of her marriage. This is a costly process and places severe hardships on Muslim women and children¹⁴⁶.</p> <p>Added to this, the challenges experienced by other South African women in the courts are also experienced by Muslim women. Court processes are too expensive, too intricate, formal and lengthy¹⁴⁷. Research in the maintenance courts point to a number of shortcomings which create severe hardships for</p>	
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¹⁴⁰ Megan Harrington-Johnson, "Muslim marriage and divorce", De Rebus, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

¹⁴¹ Catto, Amanda. "Family Law in South Africa: Overview." [https://uk.practicallaw.thomsonreuters.com/Document/I63cd7e63e68b11e398db8b09b4f043e0/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=tr](https://uk.practicallaw.thomsonreuters.com/Document/I63cd7e63e68b11e398db8b09b4f043e0/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=tr). Accessed 28 November 2021.

¹⁴⁶ MPL Network, South Africa, CEDAW Shadow Report, 18- 21 November 2021, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2489&Lang=en. Accessed 29 November 2021.

¹⁴⁷ Payne, Julien. "Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options." *Revue générale de droit* 30.4 (1999): 663-687.

		women and children within the court systems ¹⁴⁸ .	
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¹⁴⁸ Singh, D., K. Naidoo, and L. Mokolobate. "Coming to court for child support-the policy, the practice and reality. A case study of black women in the maintenance system at the Johannesburg Family Court [2002-2004]." *Acta Criminologica: African Journal of Criminology & Victimology* 17.2 (2004): 143-154; Coutts, Tamazin L. A critical analysis of the implementation of the Maintenance Act 99 of 1998: difficulties experienced by the unrepresented public in the Maintenance Court as a result of the poor implementation of the Act. Diss. 2014.