

SOUTH AFRICA¹

OVERVIEW OF MUSLIM FAMILY LAWS & PRACTICES

(Updated as at 31 May 2017)

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 uncodified? 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 are there different codified laws for different sects within Islam? If uncodified, 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</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 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>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 registered their marriage under the Marriage Act.¹⁴</p> <ul style="list-style-type: none"> In 1999, in the case of <i>Amod v Multilateral Motor</i> 	<p>South Africa ratified CEDAW without reservations.²³</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 inequities and hardships for Muslim women.²⁴</p> <p>In 2014, the Department of Home Affairs</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 access to the protection that the South African legal system accord spouses.²⁶</p> <p>Muslim marriage officers and other members of the community have also incorporated Muslim marriage</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.²⁷</p> <p>According to media reports.²⁸</p> <ul style="list-style-type: none"> There is an estimated 750,000 Muslim marriages that are not legally recognised in South Africa;

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

¹⁴ Megan Harrington-Johnson, "Muslim marriage and divorce", *De Rebus*, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

<p><i>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>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>South Africa recognises civil, customary and religious marriages:⁴</p> <ul style="list-style-type: none"> • The main codified laws that govern civil marriages are the Marriage⁵ and Divorce⁶ Acts; • The main codified law that 	<p><i>Vehicle Accidents Fund</i>,¹⁵ the Supreme Court of Appeal held that a Muslim widow in a monogamous marriage that was contracted according to Muslim rites and whose husband had died in an accident was entitled to compensation for the loss of support her husband would have been obligated to</p>	<p>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</p>	<p>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 a restriction of protections provided by the civil system. An example of the first being inclusions of clauses on delegated <i>talaq</i> and consequences for polygamy within the</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
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²³ United Nations Treaty Collection Website, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en

²⁴ 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>

²⁶ 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/>

²⁷ UNDP, "Human Development Report 2016", Table 5, pp. 214-217, http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf

²⁸ 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>

³ Article 15(3) of South Africa's Constitution (2012), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

⁴ 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>

⁵ Marriage Act (1961), <http://www.gov.za/sites/www.gov.za/files/Act%2025%20of%201961.pdf>

⁶ Divorce Act (1979), <http://www.justice.gov.za/legislation/acts/1979-070.pdf>

	<p>govern customary marriages is the Recognition of Customary Marriages Act.⁷</p> <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 monogamous one may enter into a parallel civil marriage at the same 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.⁸</p> <p>The establishment of a South African Law Reform Commission Project Committee on Muslim marriages and related matters resulted in the drafting of a Muslim Marriage Bill ('MMB')⁹ but</p>	<p>provide her with during the subsistence of their marriage under Muslim law had it not been for his untimely death;¹⁶</p> <ul style="list-style-type: none"> • In 2004, in the case of <i>Daniels v Campbell NO and Others</i>,¹⁷ the Constitutional Court 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 	<p>the same register their marriage as a civil marriage.²⁵</p>	<p>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>	<p>law for reasons that include: (i) the belief that enacting 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 no need for</p>
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¹⁵ [1999] (4) SA 1319 (SCA), <http://www.saflii.org/za/cases/ZASCA/1999/76.pdf>
⁷ Recognition of Customary Marriages Act (1998), <http://www.justice.gov.za/legislation/acts/1998-120.pdf>
⁸ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, paras. 77-78
⁹ 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

	<p>the MMB has yet to be enacted into law.</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;¹⁰ and 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> 	<p>under the Maintenance of Surviving Spouses Act 27 of 1990;¹⁸</p> <ul style="list-style-type: none"> In 2005, in the case of <i>Khan v Khan</i>,¹⁹ the Pretoria High Court held that partners in Muslim marriages (whether monogamous or not) owe each other a duty of support, just as in civil marriages and, therefore, have the right to claim maintenance from one another in 			<p>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.²⁹</p> <ul style="list-style-type: none"> Marriages of South African Muslims (especially
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¹⁶ South Africa Responses to list of issues and questions, U.N. Doc. CEDAW/C/ZAF/Q/4/Add.1, para. 39,

¹⁷ <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>
[2004] (5) SA 331 (CC), <http://www.saflii.org/za/cases/ZACC/2004/14.pdf>

²⁵ 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/>

¹⁰ 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/>

¹⁸ Megan Harrington-Johnson, "Muslim marriage and divorce", *De Rebus*, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

¹⁹ [2005] (2) SA 272 (T), <http://www.dgrujudgements.co.za/sites/default/files/Goodey1.pdf>

	<p>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').¹¹ 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.¹²</p>	<p>terms of the Maintenance Act 99 of 1998,²⁰ and</p> <ul style="list-style-type: none"> In 2009, in the case of <i>Hassam v Jacobs NO and Others</i>,²¹ 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 marriages.²² 			<p>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 deemed the breadwinner in the family and the wife stays at home on his instructions, the
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²⁹ Information obtained from South African advocate, May 2017

¹¹ 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

¹² 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>

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

²¹ [2009] (5) SA 572 (CC), <http://www.saflii.org/za/cases/ZACC/2009/19.pdf>

²² Megan Harrington-Johnson, "Muslim marriage and divorce", *De Rebus*, 9 June 2015, <http://www.derebus.org.za/muslim-marriages-and-divorce/>

	<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 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.¹³</p>				<p>wife may be subject to economic abuse. Her husband may not necessarily be provided for her 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 the lower courts recognise the duty of spousal maintenance, albeit in a religious marriage, and grant orders. <p>According to the Women's Legal</p>
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¹³ Information obtained from South African advocate, May 2017; Ashraf Booley, "Divorce and the of *khol*": 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/ldd/v18/03.pdf>

					<p>Centre Trust (WLC):³⁰</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 requested for help due to lack of resources and capacity; • 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
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³⁰ 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>spouses in civil marriages. As Muslim marriages are not legally recognised, these women suffer devastating consequences 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
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					<p>Muslim women can rely to 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"> • In the past, very few Muslim clerics (<i>imams</i>) sought to be appointment as marriage officers
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					<p>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 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</p>
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					<p>– 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) 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 many advised women against ensuring that they have a share in</p>
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					<p>the marital property upon divorce by opting for a marriage out of community of property without any accrual.</p> <p>The WLC has filed a public interest litigation for the legal recognition of Muslim marriages in the South African courts. The application is expected to be heard on 27 August 2017.³¹</p>
<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</i></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</p>			<p>As Muslim marriages are not legally recognised, there is no formal minimum age verification process before a Muslim marriage is concluded.³⁵</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 15.³⁶</p>

³¹ 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>

³⁵ 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>

<p><i>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>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 12.³²</p> <p>Consequently, although the minimum legal age for marriage is 18 as per South African law,³³ 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.³⁴</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 common.³⁷</p>
<p>Women's consent to marriage</p> <p><i>Is a marriage valid without the woman's consent? Is the practice of forcing women to marry against</i></p>	<p>Regardless of their age, both prospective Muslim brides and grooms in South Africa must consent to the marriage.³⁸</p>		<p>The Government of South Africa in its 2010 report to the CEDAW Committee asserts that forced</p>	<p>As Muslim marriages are not legally recognised, no mechanism exists to officially</p>	<p>According to information on the ground, while forced marriages in the Muslim community</p>

³⁶ UNICEF, "The State of the World's Children 2016", Table 9, pp. 150-153, https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf

³² 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>;

³³ 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>

³⁴ 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>

³⁷ Information obtained from South African advocate, May 2017

³⁸ Information obtained from South African advocate, May 2017

<p><i>their will (ijbar) 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?</i></p> <p><u>Applicable CEDAW Provision</u> Article 16(1)(b) Paras. 15-16 GR21 Paras. 25-26, 33-34 GR29</p>			<p>marriage and abduction are criminalised.³⁹</p>	<p>register such marriages. A Muslim couple may register a marriage contracted in accordance with Muslim rites under the Marriage Act as a civil marriage.⁴⁰</p>	<p>do occur, they are uncommon. For instance:⁴¹</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 work experience, <i>ulamas</i> in the Western Cape will ask for the consent of the bride.
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³⁹ 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>

⁴⁰ 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/>

⁴¹ 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>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 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, ef-</p>
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					fectively continuing the cycle of poverty and entrenching their positions within the community as care providers. ⁴²
<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>Regardless of her age, a prospective Muslim bride in South Africa requires the consent of a marital guardian (<i>wali</i>) to enter into marriage. 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.⁴³</p> <p>Both Muslim spouses in South Africa may stipulate any legitimate condition in their marriage contract.⁴⁴</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.⁴⁵</p> <p>According to information on the ground, while it is possible for both spouses to stipulate any legitimate condition in their marriage contract.⁴⁶</p>

⁴² 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>

⁴³ Information obtained from South African advocate, May 2017

⁴⁴ Information obtained from South African advocate, May 2017

⁴⁵ Information obtained from South African advocate, May 2017

⁴⁶ Information obtained from South African advocate, May 2017

					<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 (<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
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					<p>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 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
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					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</p> <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>In South Africa, a man may only legally have more than one wife according to African custom and tradition under the Recognition of Customary Marriages Act.⁴⁷ 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.⁴⁸</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</p>	<p>The South African courts at all levels have, in a series of 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:⁴⁹</p> <ul style="list-style-type: none"> • In 1997, in the 		<p>A woman may stipulate in the marriage contract 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.⁵⁴</p>	<p>According to academic research and information on the ground, in practice:⁵⁵</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

⁴⁷ Recognition of Customary Marriages Act (1998), <http://www.justice.gov.za/legislation/acts/1998-120.pdf>; Information obtained from South African advocate, May 2017

⁴⁸ 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>;

⁴⁹ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 52

<p>Applicable CEDAW Provision Para. 14 GR21 Para. 34 GR29</p>	<p>the permission of a court or his existing wife or wives to enter into a polygamous marriage.</p>	<p>case of <i>Ryland v Edros</i>,⁵⁰ the Cape High Court refused to follow past judicial precedent that 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</p>			<p>regulations surrounding 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
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⁵⁴ 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>

⁵⁵ 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 microbicide 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

⁵⁰ [1997] (2) SA 690 (C)

		<p>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 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 School</i>);⁵¹</p> <ul style="list-style-type: none"> • In 2005, in the 		<p>marriage are adjudicated by Muslim clerics who generally have a conservative outlook and make 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
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⁵¹ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 53

		<p>case of <i>Khan v Khan</i>,⁵² the Pretoria High Court held that a polygamous Muslim marriages gave rise to a legal duty on the part of the husband to 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.”⁵³</p>		<p>divorce laws are 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 civil marriage in community of</p>
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⁵² [2005] (2) SA 272 (T)

⁵³ Hoodah Abrahams-Fayker, “Affidavit”, *Women’s Legal Center Trust v. President of the Republic of South Africa*, para. 58

					property, the second wife acquires rights over the assets of the husband, which may include assets which the first wife had contributed to. ⁵⁶
<p>Divorce rights</p> <p><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? 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 mar-</i></p>	<p>Divorce 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.⁵⁷</p> <p>There are three main ways in which Muslims can unofficially seek for divorce in South Africa:⁵⁸</p> <ul style="list-style-type: none"> • <i>Unilateral repudiation by the husband (talaq)</i>: This right to 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 			<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 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.⁶⁴</p>	<p>According to academic research, the WLC and information on the ground, some of the challenges that Muslim women face when seeking divorce include:⁶⁵</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

⁵⁶ Hoodah Abrahams-Fayker, “Affidavit”, *Women’s Legal Center Trust v. President of the Republic of South Africa*, para. 112

⁵⁷ Hoodah Abrahams-Fayker, “Affidavit”, *Women’s Legal Center Trust v. President of the Republic of South Africa*, para. 41

⁵⁸ 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

<p><i>riage contract? Is it mandatory to register a divorce?</i></p> <p><u>Applicable CEDAW Provision</u> Article 16(1)(c) Paras. 17-18 GR21 Paras. 34, 39-40 GR29</p>	<p>this is done via email, sms or whatsapp.⁵⁹</p> <p>A husband may delegate his unilateral right to divorce to his wife (<i>isma</i>) through a stipulation in the marriage contract,⁶⁰ 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) 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.⁶¹ In addition, a wife may seek 				<p>from remarrying according to Muslim law whilst the husband is free to marry another woman, thereby compounding the consequences of the marriage 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
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⁶⁴ 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

⁶⁵ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, paras. 113-115

⁵⁹ Information obtained from South African advocate, May 2017

⁶⁰ 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

⁶¹ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 113

	<p>divorce on the basis 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;⁶²</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 request for divorce from her husband in exchange for a mutually-agreed compensation to be paid by her to him. A <i>khul'</i> divorce 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 seek a <i>fasakh</i> divorce.⁶³ 				<p>divorce process can be long, difficult and unsuccessful;</p> <ul style="list-style-type: none"> • <i>Khul'</i> divorce is barely recognised in South Africa due to lack of: (i) awareness among South 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; • 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
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⁶² Information obtained from South African advocate, May 2017

⁶³ 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

					<p>situation where their civil marriage may be dissolved pursuant to the Divorce Act following a court order to that effect, but their 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</p>
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					her a <i>talaq</i> or granting a <i>faskh</i> . ⁶⁶
<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 stipulation be amended? If so, by who and on</i></p>	<p>Generally, upon divorce, a woman is entitled to:⁶⁷</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;⁶⁸ and Consolatory gift or compensation (<i>mut'ah</i>). <p>A Muslim marriage is generally regarded as being that of a marriage out of community property without any accrual.⁶⁹</p> <p>Following a divorce, fathers remain responsible for the</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 ordering interim</p>			<p>According to WLC:⁷⁵</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 without accrual was the preferred marital property regime;

⁶⁶ 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

⁶⁷ *Ryland v Edros* [1997] (2) SA 690 (C)

⁶⁸ 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>

⁶⁹ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para 41

<p><i>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>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.⁷⁰</p>	<p>maintenance:</p> <ul style="list-style-type: none"> In 1997, in the case of <i>Ryland v Edros</i>,⁷¹ 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 v Khan</i>,⁷² the Pretoria High Court held that polygamous Muslim marriages gave rise to a legal 			<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 despite their substantial contribution to the acquisition of the assets through their tending to the family needs and household chores. Many are
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⁷⁵ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, paras. 41, 103, 256.2

⁷⁰ Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 72.2

⁷¹ [1997] (2) SA 690 (C); Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 53

⁷² [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>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 2009 and 2010, in the cases of <i>Hoosain v Dangor</i>⁷³ and <i>AM v RM</i>,⁷⁴ 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 maintenance. 			<p>also forced out of their homes;⁷⁶</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 terms of South African law before they can jointly register for the property.
<p>Custody of Children <i>Do parents have equal rights over</i></p>	<p>The Children Act governs all matters relating to the rights of children. The issue of whether a</p>	<p>In 2014, in the case of <i>Adnaan Isaacs v Gadija Isaacs and</i></p>	<p>The Government of South Africa in its 2010 report to the</p>		

⁷³ [2009] JDR 1212; Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 62

⁷⁴ [2010] (2) SA 223 (ECP); Hoodah Abrahams-Fayker, "Affidavit", *Women's Legal Center Trust v. President of the Republic of South Africa*, para. 61

⁷⁶ 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><i>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 automatically lose custody upon re-marriage 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>marriage is a legal or not is 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 right to custody over her child.⁷⁷</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.⁷⁸ 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><i>the City of Cape Town,</i>⁷⁹ the woman and man contracted a marriage according to Muslim rites and decided to purchase city council housing as their first 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.</p>	<p>CEDAW Committee asserts that the paramount consideration on matters relating to custody and guardianship over children is that of the best interests of the child as guaranteed by the South African Constitution.⁸⁰</p>		
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⁷⁷ Information obtained from South African advocate, May 2017

⁷⁸ Sections 7,9 of the Children Act (2005), http://www.hpcs.co.za/Uploads/editor/UserFiles/downloads/legislations/acts/childrens_act_38_2005.pdf

⁷⁹ 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

⁸⁰ 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>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 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</p>			
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		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>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.⁸¹ 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.⁸²</p>		<p>The Government of South Africa in its 2010 report to the CEDAW Committee asserts that:⁸³</p> <ul style="list-style-type: none"> • The South African 		<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</p>

⁸¹ Sections 7, 9 of the Children Act (2005), http://www.hpcs.co.za/Uploads/editor/UserFiles/downloads/legislations/acts/childrens_act_38_2005.pdf

⁸² 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.civicactions.net/files/documents/AbortionMap2014.PDF>

⁸³ 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>Constitution and the legislative framework 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>religious norms and values may influence a woman's ability to freely exercise her reproductive rights.⁸⁴</p> <p>According to World Bank data, the total fertility rate decreased from 6.2 children per woman in 1960 to 2.3 in 2015.⁸⁵</p> <p>According to the UN Population Division's 2015 Trends in Contraceptive Use Worldwide:⁸⁶</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;
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⁸⁴ Information obtained from South African advocate, May 2017

⁸⁵ The World Bank, "Fertility rates, total (births per woman)", <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN>

⁸⁶ 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>

					<ul style="list-style-type: none"> • 13% of married women aged 15-49 have an unmet need for family planning services; and • 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 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>	<p>Article 12 of the Constitution provides that everyone has the right to freedom and security of the person.⁸⁷</p> <p>Article 21 of the Constitution:⁸⁸</p> <ul style="list-style-type: none"> • Guarantees everyone the right to freedom of movement and choice of residence within South Africa; • Provides that every South African has a right to a passport. <p>Article 29 of the Constitution</p>				<p>According to World Bank data, female labour force participation increased from 43% in 1990 to 45% in 2016.⁹⁰ During the same period, the male labour force participation decreased from 68% to 61%.⁹¹</p> <p>According to the 2016 UNDP Human Development Report:⁹²</p> <ul style="list-style-type: none"> • 74% of women

⁸⁷ Article 12 of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

⁸⁸ Article 21(1) of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

	<p>guarantees the right to a basic education.⁸⁹</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>over 25 have at least some secondary education as compared to 76% of men of the same age group;</p> <ul style="list-style-type: none"> • 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.
<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</i></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.⁹³ Consequently, a</p>	<p><i>In Daniels v Campbell NO and Others,</i>⁹⁵ the Constitutional Court determined that the word “spouse” as it</p>			<p>South African Muslims have wills stipulating that their estates must be distributed based on the principles of</p>

⁹⁰ 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>

⁹¹ 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>

⁹² 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

⁸⁹ Article 29 of South Africa’s Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

⁹³ 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/>

<p><i>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>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.⁹⁴</p>	<p>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>,⁹⁶ the court extended the decision in <i>Daniels</i> to Muslim wives in polygamous marriages.</p> <p>In <i>Taryn Faro v Bingham NO and others</i>,⁹⁷ the Court recognised the Muslim marriage in this case and through that, recognised the</p>			<p><i>Shari'ah.</i>⁹⁸</p>
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⁹⁵ [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.).

⁹⁴ 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/>

⁹⁶ [2009] (5) SA 572 (CC)

⁹⁷ 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

⁹⁸ Information obtained from South African advocate, May 2017

		woman as a surviving spouse for estate purposes.			
<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> GRs 12 & 19 Para. 40 GR21</p>	<p>Article 12 of the Constitution guarantees freedom from.⁹⁹</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.¹⁰⁰ Section 1 also defines 'domestic violence' as:</p> <ul style="list-style-type: none"> Physical abuse; 		<p>The Government of South Africa in its 2010 report to the CEDAW Committee:¹⁰²</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 	<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 complainants of domestic violence including finding them suitable shelter and explaining to them their available remedies.¹⁰³</p> <p>Any complainant of domestic violence can apply to a court for a protection order.¹⁰⁴</p>	<p>According to civil society groups:¹⁰⁵</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

⁹⁹ Article 12 of South Africa's Constitution (1996), https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en

¹⁰⁰ Section 4 of the Domestic Violence Act (1998), <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

¹⁰² 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>

¹⁰³ Section 2 of the Domestic Violence Act (1998), <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

¹⁰⁴ Section 4 of the Domestic Violence Act (1998), <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

	<ul style="list-style-type: none"> • Sexual abuse; • 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; or • Any other controlling or abusive behaviour towards a complainant. <p>Marital rape is criminalised in South Africa.¹⁰¹</p>		<p>that more needs to be done to protect victims of domestic violence, noting that women are often 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>Service reports on crime statistics each year, it does not 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
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¹⁰⁵ 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>

¹⁰¹ 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>

					2014, only 1.4% of police stations inspected (two out of 145) were 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>Applicable CEDAW Provision Article 9 Para. 6 GR21</p>	<p>Both a South African man and woman may pass their nationality to their non-South African spouse.¹⁰⁶</p> <p>A South African mother or father may pass their citizenship to their children regardless of where they are born.¹⁰⁷</p>				

¹⁰⁶ Section 14 of the South African Citizenship Act (1995), http://www.gov.za/sites/www.gov.za/files/a88-95_1.pdf

¹⁰⁷ 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