THE FORTHCOMING CONSTITUTIONAL COURT HEARING PERTAINING TO THE APPLICATION BY UUCSA AND THE KUFFAAR WOMEN'S LEGAL CENTRE IS DESIGNED TO SUBVERT THE SHARIAH

UUCSA'S KUFR TO MUTILATE AND DESTROY THE SHARIAH

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INTRODUCTION

Most Muslims are unaware of the sinister plot in which bogus UUCSA is currently involved in cahoots with the kuffaar Women's Legal Centre and the Munaafiq MJC. The conspiracy is to have the Shariah's *ahkaam (laws)* pertaining to Nikah, Talaaq, Custody, etc., abolished and to substitute in their place whatever kufr is dictated by the government in the light and ethos of the kufr constitution of the atheists.

What this Munaafiq cartel (UUCSA) is embarking on is the same old MPL and MMB kufr which the vast majority of the Muslim community had rejected with contempt. Whatever the cartel of Munaafiqeen had plotted in their MPL and MMB moves, has been regurgitated currently, albeit minus the MMB appellation. What bogus UUCSA is presently plotting to achieve with the aid of the kuffaar WLC and the kuffaar courts is nothing but old wine in a new bottle. They have discarded only the MMB designation while the demand for kufr consequences for recognition of Muslim marriages remains unchanged.

The shaitaani submission of UUCSA to the court explicitly begs for recognition of Muslim marriages along with the necessary corollary of ***regulating the consequences of such recognition.*** The consequences will be the effects of what the kufr law of the land have enacted as legislation. The 'consequences' do not refer to

Shar'i consequences. It is explicit kufr consequences which expel the proponent thereof from the fold of Islam.

Lajnatun Nisaa-il Muslimaat, a Muslim Women's body has become one of the Respondents in the forthcoming Constitutional Court case, and is contesting the kufr claims and submissions of the Munaafiq UUCSA who is concealing behind the skirts of the kuffaar female's legal organization.

The *Lajnah* is fighting the Kufr of the kuffaar WLC and the kufr of bogus UUCSA. In the ensuing pages appear the Lajnah's arguments to the constitutional court. Advocate Abu Bakr Omar of Zehir Omar Attorneys is acting on behalf of the Lajnah.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
CC CASE NO: CCT 24/21
SCA CASE NO: 612/19
CASE NO: 22481/14

In the matter between:
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Appellant

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Appellant

and

WOMEN'S LEGAL CENTRE TRUST AND OTHERS First to Eighth Respondents

CASE NO: 4466/2013

In the matter between:
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Appellant

And

TARRYN FARO AND OTHERS First to Eighth Respondents

CASE NO: 13877/2015

In the matter between
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Appellant

And

RUWAYDA ESAU AND OTHERS First to Sixth Respondents
LAJNATUN NISAA-IL MUSLIMAAT, FIFTH RESPONDENT IN THE WLC CASE:

WRITTEN ARGUMENTS

INTRODUCTION

1. The *fons et origo* of this matter was a failed application by the applicant ("**the WLC**") for direct access to the Constitutional Court ("**CC**") when Cameron JA writing for the Court,[1] expressly acknowledged at Paragraph 28 that the issues "*elicited an intense response from a wide range of organisations concerned with the position of women in the Muslim community, the application of Islamic law and the*

[1] Women's Legal Centre Trust v. President of the RSA and Others 2009 (6) SA 94 (CC)
In 2009 the Women's Legal Centre Trust ("WLC") sought the same/ similar relief from the CC as it did from the court of first instance ("*the court aquo*"). The fifth respondent herein, Lajnatul Nisa il-Muslimaat, applied for leave to intervene before the CC. Although, in the unanimous judgement at para 3 the court recorded that it did not deal with the merits of the WLC's claims, it did set out a brief history regarding Islamic marriages and South African secular law: (*8) In July 2003 the South African law reform commission submitted a report entitled "Islamic marriages and related matters (project 59)" to the Minister. The report included a draft Muslim marriages Bill. This was produced after extensive notice and comment process that included meetings and workshops with various organisations representing sections of the Muslim community.*
The bill includes details of provisions recognising Muslim Marriages as valid and regulating their consequences. However, it proved controversial and progress on its passage appears to have stalled.

interest of the Muslim community as a whole" and *"It is clear from these applications that not only the legal issues, but also the factual issues are much in dispute. They may require the resolution of conflicting expert and other evidence*".

2. Regarding the complexities involved, Cameron JA stated at paragraph 29, *"the ventilation of the difficult issues the application involves in the High Court, followed possibly by a considered judgement from the SCA, will ensure that the views of these organisations, and the evidence that may be germane to their contentions, will properly be considered."*
3. Six years later, and notwithstanding the aforesaid remarks by the CC, the WLC in November 2015[2] sought semi urgent relief from the *court a quo*. The relief sought affected every single Muslim couple married in South Africa in terms of Islamic rites/Shari'ah law, who wittingly or unwittingly did not conclude a civil marriage in South Africa.

4. The fifth respondent, as an association of Muslim woman, had a direct interest in the relief sought and successfully applied to intervene in the proceedings before the court *a quo*.

5. The fifth respondent is the only non-state party, which is a respondent in this Appeal, which has a divergent view to the Women's Legal Centre Trust and its efforts for secular regulation of Muslim/ Shari'ah marriages.

6. The order granted by the court *a quo* had, and the order Supreme Court of Appeal ("**SCA")** has, far reaching consequences for every single Muslim.

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[2] CB Volume 1, pg1

7. The relief was based on the facts in the WLC, Faro and Esau cases and not on Parliamentary process or the vote of the Muslim Community at large which had already opposed and quashed the Muslim Marriages Bill ("**MMB**").

IMPORTANT EVENTS BEFORE THE SUPREME COURT OF APPEAL

8. The President of the Republic as the first appellant and the Minister of Justice and Constitutional Development as the second appellant ("**the State**") appealed to the SCA with the leave of the court *a quo*. Consistent with the various affidavits filed on behalf of the State before the High Court, the State filed comprehensive heads of argument asserting that the appeal gave rise to 3 issues, namely:

8.1 whether in failing to prepare, initiate, introduce, enact and bring into operation legislation recognising Muslim marriages solemnised in accordance with Sharia law, the President had infringed sections 9, 10 and 13 of the Constitution;
8.2 whether there was a constitutional obligation on the state to enact legislation recognising Muslim marriages; and
8.3 in the event a breach of constitutional obligation was established, what the appropriate remedy was and in particular whether the rectification ordered by the court of first instance (the adoption of legislation) constitutes competent and appropriate relief.
9. The State competently, persuasively, and correctly contended in its heads of argument that the appeal before the SCA should be determined in its favour on all three issues.

10. However, at the commencement of the appeal, counsel for the State made a startling concession of sorts ("**the concession**") albeit at the invitation of the SCA, namely that the Marriages Act 25 of 1961 ("**the Marriages Act**") and Divorce Act 70 of 1979 ("**the Divorce Act**") are unconstitutional in as far as they do not recognise Muslim marriages. This was taken by the SCA, as seen in its judgment[3] to be dispositive of the issue.

11. Significantly there was no debate of the basis for the request to concede, nor of the concession itself, in the face of comprehensive and legally sound written submissions on behalf of the State.
12. We submit that the concession was not properly made. The State's heads of argument properly negated the concession.

13. Aside from lending its support from the reasons in the High Court judgement, the SCA did not grapple with or test those reasons against the written submissions of the State which it is submitted rendered the concession untenable.

14. It appears, with respect, that as a result of the concession, the SCA deemed it unnecessary to engage with alternatively attach appropriate weight to the issues of the doctrine of entanglement, freedom of religion and freedom of choice, well knowing that any declaration of constitutional invalidity would have to be confirmed by this Court, and this Court would require and benefit from its opinion(s) on same.

[3] President, RSA and Others v Women's Legal Centre Trust and Others 2021 (2) SA 381 (SCA) at para 15

15. The authorities relied on by the SCA[4] do not advance the proposition that the two acts are wanting in constitutionality for want of special mention of Shari'ah marriages. These are cases that relate to the plight and conduct of individual Muslim persons, respectively. They do not speak to discrimination of nor by the Muslim community and Shari'ah law.

16. To this extent, we submit with respect, that the SCA erred. It remained incumbent upon it (as it does on this Court) to fully consider the question of constitutionality, despite the concession, and to satisfy itself on the issues and that the concession was properly made.[5]

17. In regard to Muslim marriages and secular recognition, the Department of Home Affairs conceded in its pleadings that divided opinion could affect the unity and stability of the Muslim community and furthermore, might create unnecessary tension between various parts of the Muslim community and the State at large, which the department has sought to avoid at all costs.[6]

18. The State's preference according to the affidavit filed on behalf of the Minister of Home Affairs is for there to be large

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[4] Ryland v Edros 1997 (2) SA 690 (C) (1997 (1) BCLR 77; [1996] 4 All SA 557); Amod v Multilateral Vehicle Accidents Fund (Commissioner for Gender Equality Intervening) 1999 (4) SA 1319 (SCA) ([1999] 4 All SA 421); Daniels v Campbell NO and Others 2004 (5) SA 331 (CC) (2004 (7) BCLR 735; [2004] ZACC 14) paras 74 – 75; Khan v Khan 2005 (2) SA 272 (T).

[5] Volks NO v Robinson and Others (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005) at para 26 & 27

[6] CB Volume 2, HAF 45 to the FA page 187; para 62-68

support for any such legislation. Its reasons are that legislation on matters concerning religion, extends very much into the private sphere of life, it must therefore accord with religious prescripts. The legislation, if not largely supported, will become a very divisive measure not only within the community but also amongst and within families and between the community and the State at large.

19. It is against this backdrop that we submit, in seminal matters of public importance such as the present, this Court as the apex Court must scrutinise the concession, along with the pleadings filed of record, and all submissions, in the face of legal precedent and doctrine.

20. It is expected that the heads to be filed on behalf of the State will put up the same arguments to be of assistance to this Court, notwithstanding the concession. If the State does not do so, or adequately do so, then the fifth respondent will seek to place the State's heads of argument before the SCA before the above Court.

PROLOGUE

21. Neither Hindu nor Jewish nor Buddhist marriages are regulated by secular law. In fact, no religion's marriages are specifically regulated by secular law.

22. In the President's answering affidavit, the following is stated: "*the MMB has not been approved by cabinet and therefore has also not been submitted to Parliament*".[7] It is against the backdrop of Cabinet's decision not to approve the draft bill to afford secular recognition and not force

[7] CB Volume 2, Para 18, pg 161

through legislation in the face of dissensus (a recognition by the State not to become entangled in matters of religion and an appreciation that neither section 7 nor section 15 of the Constitution compelled it to do so) as well as the principal of separation of powers, freedom of religion as a direct right and the doctrine of entanglement that this matter must be approached.

23. In reply to the fifth respondent's contention that the majority of Muslims and Muslim organizations are opposed to the State regulation of Muslim Marriages (actual objections to parliament were put up as annexures), the WLC baldly denied that the Muslim public in general are opposed. The WLC did not produce evidence to counter the respondent's case and evidence under oath.

24. In a constitutional democracy, should the necessary vote not be secured in parliament, legislation to regulate Muslim marriages should not be enacted or signed into law by the President. The effect of the SCA's declaratory relief ordered emasculates the Constitution's carefully crafted scheme for democratic governance. It ignores the institutional space afforded to the Executive by the doctrine of separation of powers.

25. The pleadings reveal that Government engaged the issue for nearly two decades and owing to vociferous objections, dissensus and complexities with religious rights, attempts to legislate Muslim marriages were unsuccessful.[8]

[8] Supplementary CB Volume 2, par 158-170, par 196.1, where the WLC sets out its version of events and engagements on the Muslim marriage issue.

26. On the WLC's own version, objections to the proposed Muslim marriages bill were delivered by individuals and organizations as far back as 2007[9]. In its founding affidavit at para 211, reference is made to evidence in the hands of the Minister confirming 13 742 SMS messages objecting, 7184 petitions and 77 substantive comments from individuals objecting.

27. Further, the WLC's complaint at para 196.1[10] is that "*the process of achieving legal recognition of Muslim marriages through the legislative has been fraught (sic)".* The process was indeed fraught with dissensus and shut the door to any allegation of culpability against the President, Speaker or the other State respondents. That the Court is now expected to act against Muslim religion is troubling.

28. In reply to the fifth respondent's contentions about the various organizations and objections to secular regulation in paragraph 12 of its answering affidavit, the WLC again baldly denied same. [11]As a result, the fifth respondent re-iterated the organizations[12] per the list annexed thereto, i.e., who opposed the MMB secular regulation of Muslim marriages, and who supported the fifth respondent in its opposition.

29. It is submitted with respect that this Court ought to accept the fifth respondent's evidence[13] and take cognizance of the State's efforts.

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[9] Supplementary CB Volume 2, par 228, pg 143.15

[10] Supplementary CB Volume 2, par 196.1, pg 143.3

[11] WLC Replying Affidavit to fifth Respondent's Answering Affidavit- para 54

[12] Sixth Respondents AA deposed to by Mufti AS Dessai, para 11-15 pg 1680

30. The WLC's attempt to undermine the efforts of those against the Muslim Marriages Bill and secular regulation, by accusing those dissenting to be in the '*minority'*, is wrong and contrary to democratic endeavour.

31. The alleged inconsistency with Section 9 of the constitution is not justified. The vast majority of Muslims do not consider non-recognition of their religious marriages to be discriminatory.

32. On the contrary, Muslims regard secular recognition to be discriminatory against them on the basis of religion because they are being singled out for such 'recognition' while the religious marriages of Jews, Hindus, etc. are exempted from such recognition.
33. Why are Muslims being singled out for this unwanted legal recognition which their community deems an intrusion into their religious affairs which in turn proscribes their freedom of religion which the constitution guarantees?

34. The Marriage act is likewise not inconsistent with section 10 as alleged.

35. The Affidavits filed on behalf of the State and fifth respondent, as well as the annexures to the WLC's Founding Affidavit concerning the legislative process regarding the MMB speak to the fact that the Muslim community believes that its dignity and its right to have its dignity respected and protected are in permitting them to regulate their own marital affairs, and for the state to refrain from imposing on Muslims unwanted 'secular recognition' of their marriages.

36. The State correctly backed off becoming entangled in the mire of religious doctrines and tenets of Islam/Shar'iah law.

37. Muslims regard the WLC's attempts at regulation loathful and characterised by singling out of Muslims and targeting their religion, by non-Muslims or nonpracticing Muslims.

38. There is nothing in Section 28 of the Constitution which is being violated by Muslim marriages which are not accorded legal recognition. It is legally untenable to claim that the Marriage Act is inconsistent with this section on the basis of there being no legal recognition for Shari'ah marriages.

39. The alleged inconsistency with section 34 of the constitution is also not justified. Non-recognition of Shari'ah marriages does not debar any Muslim from access to court.

40. Any person professing to be a Muslim who feels that his/her dignity is adversely affected by no secular regulation is free to resort to the secular marriage laws and to the courts. Such Muslims are not debarred from pursuing the secular path. There is no need for the State to enact legislation, nor any discrimination for the recognition of Muslim marriages.

41. The simple solution for disgruntled 'Muslims' or for modernist 'Muslims' who are averse to Shari'ah marriages or its consequences, is to avail themselves of secular law and 'marry' in terms of such laws which afford them recognition.

42. It is unjustifiable and discriminatory to subject an entire community to measures which are loathsome and invalid in terms of the community's religious law.

43. The WLC's case centres on allegations of differentiation. In Prinsloo v Van der Linde[14] the CC held that if each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be sure not to be unfair, the court would be called upon to review the justifiability and fairness of just about the whole legislative program and almost all executive conduct. As the court then continued, it is impossible to govern a modern country efficiently and to harmonize the interests of all its people for the common good without differentiation and without classification which treats people differently and which impact on people differently.

44. In opposition to the argument that Muslim marriages are discriminated against as a result of non-recognition, we re-iterate that there is no legislation recognizing any form of religious marriage, be it Hindu, Jewish, Islamic, Buddhist or any other religion. The approach adopted under the current framework is to regulate only secular marriages and to afford religious communities the freedom to conclude religious marriages in accordance with a prescripts of their particular religion.

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[14] Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) at para 17

45. One of the key ingredients of any person's dignity is the right to believe or not to believe and to act or not to act according to his or her beliefs or not beliefs.[15]

46. In Fourie v Minister of Home Affairs[16], in the minority judgment by Farlam JA, the SCA affirmed that the law is concerned only with marriage as a secular institution.

47. What ought to have put to rest the issue of the constitutionality of the Marriages Act and the Divorce Act with reference to non-recognition of Muslim marriages, was the submission with reference to Minister of Home Affairs v Fourie (Doctors for Life International, Lesbian and Gay Equality Project v Minister of Home Affairs[17] where it was held: "*in the open and democratic society contemplated by the constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the court is to recognize this sphere which each inhabits, not to force the one into the sphere of the other*."

48. In the circumstances, the allegation that Muslims are discriminated against is baseless. If anything, earmarking Muslims and their religion for secular regulation considering the complexities of Sharia'h law and the doctrine of entanglement, the diverse South African and African population, objection by Muslims and dissensus amongst

[15] Christian Education South Africa v Minister of Education 2004 SA 757 at Para 36

[16] Fourie v Minister of Home Affairs 2005 3 SA 429 SCA

[17] Minister of Home Affairs v Fourie (Doctors for Life International, Lesbian and Gay Equality Project v Minister of Home Affairs 2006 1 SA 524 CC

Muslims, and the separation of powers, causes impermissible discrimination.

49. The fifth respondent submits in response to the allegation that there is discrimination between women in Muslim marriages and those in secular marriages, that even if this court holds otherwise, the discrimination is in any event fair for reasons discussed above.

ISSUES/ SUBMISSIONS

50. The fifth respondent submits that:

50.1 the WLC do not represent the Muslim community;

50.2 one of the greatest infractions of human dignity is to deny someone what they legitimately contracted for and expect, who are Muslim persons *in casu*;

50.3 the facts relied on by the WLC pertain to the regulation of the consequences of Muslim marriages (and Muslim personal law) under Shariah law, spoken to in their pleadings, in situations where secular law does not regulate those types of circumstances;

50.4 the absence of recognition is now being used as a platform to regulate consequences catered for by Shari'ah law which the Marital parties contracted for by excluding secular law;

50.5 however, the secular law and the Constitution in particular specifically protect the right to freely practice religion, and Islam *in casu*;

50.6 in religion, and Islam *in casu*, Marriage is more than contractual, it is covenantal, it is sacred, and secular law cannot regulate it without diminishing it;

50.7 the real issue is the consequences of termination and the WLC's case does not focus on a lawful solution of that issue within the context of religion, an *in casu* why Muslim Marriages have been singled out;

50.8 the relief granted by the High Court, and the SCA, in making findings regarding the recognition of Muslim Marriages, for the sake of then regulating same within secular law, and restricting the Shari'ah law, has no explicit basis of support in the WLC pleadings;

50.9 constitutional attacks on the validity of legislation must be pleaded explicitly and with specificity to enable the State to know what case it has to meet and adduce the evidence necessary to do so;[18]

50.10 apart from the fact that the WLC pleadings are inadequate, the State heads of argument are dispositive of the WLC case;

50.11 the MMB was the only legitimate approach and in the case for the State, it failed constitutional muster;

[18] Prince v President of the Law Society of Good Hope 2001 (2) SA 388 (CC) para 22, as quoted by Navsa J in Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (2021) ZASCA 95 (1 July 2021) para 95.

50.12 the MMB is not what was brought before the Court *a quo*; 50.13 the State parties incorrectly conceded as they did;

50.14 as a result the SCA's judgement contains broad conclusions based on the concession;

50.15 no issue falls to be taken with the SCA finding that the State is not under an obligation to enact legislation under the Constitution, [19] and that paragraph 1 of the High Court Order fell to be set aside;

50.16 the real issue is not whether the Marriage and Divorce acts discriminate against Muslim woman. They do not discriminate against any woman;

50.17 the issue whether these acts should have provided for the automatic recognition of marriages concluded under Shari'ah law was dispositively dealt with by the State. Clearly, they could never have. They were never designed and intended for anything other than secular regulation of marriages of people who chose to regulate their marriages by secular law;

50.18 the Marriages Act and the Divorce Act are not unconstitutional in as far as they do not recognise marriages solemnised in terms of Shari'ah law and the declaratory relief granted in paragraphs 1.1 to 1.3 of the SCA order ought not to have been granted;

50.19 the declaratory and interim relief ordered by the SCA, impermissibly:

[19] Concluded in paragraphs [43 and 44].

50.19.1 has the effect of de-recognising Muslim Marriages;

50.19.2 intrudes upon the rights of Muslims to practice their religion, Islam, freely; and

50.19.3 in fact, and in law, infringes on the doctrine of separation of powers;

50.20 the pleadings do not even purport making out a case that any of the marriages relied on by the WLC let alone Muslim marriages for that matter, were/ are entered into through coercion, or lack of consensus;

50.21 no case is made out for any of the relief granted by the court *a quo* or the SCA;

50.22 the WLC pleadings before and after amendment are characterised by a lack of specificity for the relief ultimately prayed for or granted by the SCA;

50.23 the crux of the matter is that like all women and married people in South Africa, Muslims have always been free to register their marriage in accordance with secular law or have such a marriage recognised for such consequences where polygamy is a factor, by approaching a court; and

50.24 no case whatsoever is made out for Muslim marriages and Muslim personal law under Shar'iah law to be changed by order of Court.

TRANSMOGRIFICATION[20]

[20] Oxford Dictionary of English: To transform in a surprising or magical manner.

51. The most profound argument against legislative intervention into Muslim personal law in a secular democracy is that it will inexorably lead to a transmogrification of Shari'ah (Islamic law) and to a contamination of its sacred sources.

52. Transmogrification and contamination take place in fundamental ways. To mention two:

52.1 First, there is a fundamental difference in the procedural law, including the law of evidence, between the secular and Islamic legal systems. The present model purports to apply Muslim personal law within a secular rather than an Islamic procedural system. It is axiomatic that if the law relating to the admissibility of evidence is different, as it clearly is, the result of its application would inevitably be different. In the article of
Asghar Ali of the Centre for Study of Society and Secularism Mombai, he states:
"*The British Government, after it seized power from Mughals, established its own courts, which also heard cases pertaining to Muslim marriage, divorce, inheritance etc. In most of these courts there were either British or non-Muslim judges who did not know Shari'ah law or if even Muslim judges heard these cases, most of them were trained in British laws. What these judges did was to consult Hidayah, written by Mirghayani, a Muslim Hanafi scholar, and translated into English by Mr. Hamilton. Often, they also consulted some Maulavi before delivering the judgment. Since the cases were heard in these British courts, the procedural law followed was English law and substantive law was based on Hidayah, it came to be known as Anglo-Mohammedan law. The judgments in these cases delivered*

by higher courts became precedents for subsequent cases and thus whole corpus of law came into existence based on these judgments which came to be known as Anglo-Mohammedan law and renamed as Muslim personal law as calling it Anglo- Mohammedan law which was embarrassing. Thus, to call it Shari'ah law would be a misnomer."[21]

52.2 Second, as pointed out in the above quotation the idea that non-Muslim judges could interpret Quran and Sunnah when they do not believe in it, is foreign and impermissible in Islamic law and will inevitably lead to contamination of sacred principles. These judges with respect, do not know Arabic, do not understand the text of Quran and the sciences of Hadith (prophetic teachings) and are simply not qualified in the principles of Islamic Jurisprudence to enable them to do what the Bill requires. In Shari'ah a judgment is only acceptable if the Qadi (Judge) is a Muslim, who is knowledgeable in Quran and Hadith. There are no secular Judges in South Africa that we are aware of, who have any Islamic law training and even those Muslim judges, to our knowledge, that serve in the
Judiciary, face this fundamental problem. This idea will not find favour with most Muslims.

53. While it is recognised that some in the Muslim community favoured the MMB it must be pointed out that the State does not intervene in this manner in other religions and should not so intervene in the Muslim faith. The potential for future conflict is inevitable and foreseeable. For example, what will happen if the court, in a case where a

[21] Why Codification of Muslim personal Law? By Asghar Ali Engineer 02 May, 2009 Secular Perspective https://www.countercurrents.org/engineer020509.htm

non-Muslim judge, issues a Faskh and the husband believes that the marriage is still binding under Islamic law? Or what happens if the court overrules the issuing of a Talaq (divorce)? Or what will happen if under Islamic law the Talaq is valid but under section 9(3) the court obliges the man to maintain the women beyond the confinement (iddah) period where the Talaq is disputed?

54. State regulation in the name of Islam which leads to un-Islamic consequences offends the religious rights of at least those who are opposed to secular recognition.

55. Muslims are not allowed to make unlawful that which is lawful.

Transmogrification[22] through Constitutional attack

56. The Bill of Rights in the Constitution is the supreme law of the land. All laws must be interpreted in accordance with the values in the Bill of Rights. It is inevitable that changes to the substantive Islamic jurisprudence, must occur either within the context of the initial legislation or through subsequent attacks concerning its Constitutionality or through subsequent secular judicial interpretation. The resulting jurisprudence is not Islamic but secular.

57. The change to Islamic law ironically will be done under the banner of an Act of Parliament that purports to recognise Muslim Personal Law when in truth it seeks to change it.

[22] Oxford Dictionary of English: To transform in a surprising or magical manner.

58. There is an inherent risk that the Shari'ah will be altered to bring it in line with the Constitution but under the name of Islam. This is precisely what has happened to African customary law already. It has been 'developed' with secular principles.[23]

59. What distinguishes African customary law from religion is that it is custom, malleable by practice and usages over time. It is not the inerrant and unchangeable of Gods, i.e., religion!

60. In the Supreme Court of India in the matter of Shayara Bano v Union of India and others, [24] the court became entangled in Islamic law by interpreting the Holy Quaran and has ultimately eroded the right to freely practice Islam. It is imperative that our constitutional democracy is protected from what the above Court can see in the proverbial "crystal ball" of Shayara Bano v Union of India and others and its divisive societal consequences.

Transmogrification and contamination of Islamic law using the Constitution

61. To take one example: under the present model a Muslim husband has a right to exercise Talaq on broader grounds than the wife has to obtain a Faskh (an annulment). This may violate the right to equality and international conventions such as the Convention on the Elimination of All

[23] See: BHE and others v the Magistrate Khayelitsha and others 2005 (1) BCLR 1 (CC); Bannatyne v Bannatyne and Another 2003 (2) BCLR 111 (CC); Shilubana and others v Nwamitwa and others 2008 (9) BCLR 914 (CC)

[24] Writ Petition (C) No. 118 of 2016. Copy can be provided on request.

Forms of Discrimination against Women. However, it allows the spouse to freely dissolve the marriage on the same grounds. In order to read the legislation and interpret it in accordance with the Constitution a court would have to broaden the grounds for a Faskh beyond levels acceptable to Muslims who have divergent but sincerely held views.

62. Under the Shari'ah women do not have the right to automatically issue a Talaq but men do. This too, may violate the equality clause and it is impossible to remedy this without giving women the exact same procedural rights to divorce.

63. Secular interference with Islamic religion and Shari'ah law is untenable. The doctrine of entanglement is recognised for good reason.

DECLARATORY RELIEF GRANTED BY THE SCA

64. In upholding both the appeal and cross appeal, the SCA declared *inter alia*:

"1.1 The Marriage Act 25 of 1961 (the Marriage Act) and the Divorce Act 70 of 1979 (the Divorce Act) are declared to be inconsistent with ss 9, 10, 28 and 34 of the Constitution of the Republic of South Africa, 1996, in that they fail to recognise marriages solemnised in accordance with Sharia law (Muslim marriages) as valid marriages (which have not been registered as civil marriages) as being valid for all purposes in South Africa, and to regulate the consequences of such recognition.

1.2…

1.3 It is declared that s 7(3) of the Divorce Act is inconsistent with ss 9, 10, and 34 of the Constitution insofar as it fails to provide for the redistribution of assets, on the dissolution of a Muslim marriage, when such redistribution would be just.

1.4 It is declared that s 9(1) of the Divorce Act is inconsistent with ss 9, 10 and 34 of the Constitution insofar as it fails to make provision for the forfeiture of the patrimonial benefits of a Muslim marriage at the time of its dissolution in the same or similar terms as it does in respect of other marriages. (Own emphasis)

65. In addition, the SCA granted interim relief, as a just and equitable remedy; that pending the coming into force of legislation or amendments to existing legislation, that a union, validly concluded as a marriage in terms of Sharia law and subsisting at the date of its order, or, which has been terminated in terms of Sharia law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and

(b) the provisions of s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

(c) In the case of a husband who is a spouse in more than one Muslim marriage, the court shall:

(i) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just, and;
(ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

66. The effect of the interim relief ordered by the SCA pending parliament attending to the alleged unconstitutionalities in the Marriage Act and Divorce Act, is that the rights affirmed in Minister of Home Affairs v Fourie [25] are eroded.

67. In the interim, the mutually respectful co-existence between the secular and the sacred has been breached. The SCA has de-recognized the sphere which each inhabits and forced the one into the sphere of the other.

68. We submit that what must be preserved at all costs is the event where a couple enter into an Islamic marriage and choose not to conclude a civil marriage or not to conclude a contract regulating the marriage, that the consequence of that marriage will be regulated in accordance with the prescripts of Shari'ah.

69. The freedom to make this conscious choice is constitutionally entrenched and must be protected. This freedom of choice is inextricably linked to the difficult to

[25] At footnote 19 above

define term, "dignity", as stated in Teddy Bear Clinic[26] by this Court.

70. The interim relief ordered by the SCA, is a step too far. The doctrine of separation of powers requires the legislature to make law and the courts to interpret and apply it to the best of their ability.[27] The interim recognition of Muslim marriages absent any framework by the legislature amounts to making law, a function reserved for the legislature, not the courts.

71. Considering the complexities, even alluded to by the SCA, for the same reasons offered by the State and elaborated upon in the affidavits filed on behalf of the State and fifth respondent, that militate against secular recognition, the interim relief ordered will do untold violence to the Constitution's carefully crafted scheme for democratic governance and the legislature's carefully crafted scheme for recognition of secular marriages. The relief ignores the institutional space afforded to the state by the doctrine of separation of powers.

72. It is with respect incongruous for the SCA to have granted interim relief and accorded secular recognition to Shari'ah marriages. It negated the consequences stemming from Shari'ah marriages. The consequences of Shari'ah marriages are widely at variance with the consequences of secular and other religious marriages. It is discriminatory and unconstitutional to accept part of the Shari'ah and to

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[26] Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35; 2014 (2) SA 168 (CC) (3 October 2013)

[27] National Credit Regulator v Opperman 2013 2 SA 1 CC

reject the other part, even in the interim, viz., the consequences of Shari'ah marriages.

73. It should be well understood that a Shari'ah marriage can never be dissolved by a court or any secular law. Regardless of the secular law or the court's decree of 'divorce', Muslims will not accept dissolution of their marriages without Talaq or a formal Faskh (Annulment) issued by a Council of Ulama. Thus, recognition of a Shari'ah marriage without the requisite of Shar'iah consequences in the event of dissolution will create irresoluble problems. Legally, in terms of secular law, it will be said that the marriage has been dissolved by the court's decree, whilst religiously, the couple will remain in wedlock by virtue of the Nikah bond being intact.

74. This incongruous and undesirable problem will be the consequence of State or Court entanglement in religious tenets.

75. Neither the enactment of legislation nor the interim relief regulating Muslim marriages will prevent scenarios such as the cases in Daniels, Moosa N.O, Faro and Esau etc. Such disputes will be perennial regardless of any legislation or interim relief recognizing Muslim marriages.

76. Ultimately, the courts will have to decide the disputes. It is therefore superfluous to have such interim relief granted or legislation enacted.

77. Recognition/ regulation is not a panacea. The isolated cases can and will still have to be decided by the courts.

78. The problem is not 'recognition' of Muslim marriages. The real issue pertains to the regulation of the consequences of such recognition. If a Muslim does not accept a court's decree of divorce to be valid, then the husband, if he feels that he has valid Islamic grounds, will withhold Talaq. The woman who has a decree of divorce from a court will thus still be in his Nikah. The woman's rejection of the Shari'ah law applicable to her case will render her an apostate in Islam.

79. Just as secular recognition and regulation would, the interim relief will open up a pandora's box of problems and injustices for the Muslim community. This will be the consequence of the State and Court's interference in religious matters. It will be tantamount to denial of Muslim religious freedom which the Constitution affords.

80. The separation of powers issue, as well as the doctrine of entanglement lie at the core of the relief granted by the High Court and the SCA. We submit so for the following reasons *inter alia*:

80.1 it cannot be gainsaid that the state faced serious opposition by Muslims to the promulgation of legislation recognizing Muslim marriages. Accepting that the legislature abandoned the exercise in respect of the Muslim Marriages Bill for this legitimate reason, it was clearly then improper for the SCA to simply forge ahead and recognize Muslim marriages for the purposes of interim relief in circumstances, where legitimate legislative process was employed, recognition was opposed, and such process legitimately abandoned;

80.2 it is inconceivable that the courts can make law that the legislature, through the ordinary operation of its machinery, did not;

80.3 the doctrine of entanglement applies as much to the courts as it does to the legislature attempting to regulate Muslim marriages; and

80.4 the interim relief has the same effect, although for a shorter period, as a legislative choice. In My Vote Counts cited above, this court held that it is for parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant. With respect, the SCA, in the interim relief granted, impermissibly trenched on parliament's terrain.

81. Recognition of Muslim marriages in the secular realm amounts to derecognition of Muslim marriages, which originate in the Shari'ah. The effect of the order permitting divorce in Islamic marriages under the Divorce Act in the interim, is to replace and substitute Talaq (divorce) regulated by the Holy Quran and Shari'ah.

82. There are fewer clearer examples of entanglement in doctrinal issues, transmogrification, and erosion of the right to freely practice one's religion than the one *in casu*. The effect of the interim relief permitting divorce in Islamic marriages under the Divorce Act, is to replace and substitute Talaq (divorce) regulated by the Holy Quran and Shari'ah.

83. The concepts of Talaq and Faskh will be replaced with proceedings for a divorce under the Divorce Act. This undoubtedly creates far reaching inroads into the principles of Shari'ah in that a divorce may only be granted by a court

on either one of the two grounds identified in section 3. Since the scheme of the Divorce Act is clearly premised on a monogamous marriage, it is anomalous to subject Muslim marriages, in the interim, which are polygamous, to the Divorce Act, as polygamous marriages are manifestly inconsistent with it. A simple example is that section 4 (2) of the Divorce Act identifies as a factor that is indicative of an irretrievable breakdown in a marriage, where the "defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship".

84. By recognizing Muslim marriages under the Marriage Act and the Divorce Act in the interim, the proprietary consequences in section 7 (3) of the Divorce Act, will apply to Muslim marriages. This again will substitute the present position in terms where all the propriety consequences of a marriage concluded under Shar'iah will on divorce, be regulated by Shar'iah. This amounts to an infringement of religious rights and freedoms of all Muslims in South Africa (whether they agree with recognition or not), in the interim, and without justification.

85. The interim relief by the SCA is problematic in that it has the effect of wholesale recognition of marriages concluded under Shar'iah. In other words, because it will apply to every marriage which is in existence when the order became operative, which marriages were purportedly concluded no matter how long and the circumstances thereof, even if there is no documentary proof and the Imam is no longer available to attest to the marriage.

86. In ITAC v SCAW SA[28] it was held: "when a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is incomplete, it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if the interdictory relief is not granted.

87. In National Treasury and Others v Opposition to Urban Tolling Alliance [29] at para 84, Justice Froneman pointed out that the court found that the interdict improperly breached the separation of powers in intruding upon the formulation and implementation of international trade policy, a matter that resides in the heartland of national executive function.

CONCLUSION AND COSTS

88. In the event that the above Court upholds the findings of constitutional invalidity, then we submit that a just and equitable remedy be carved out only in the Esau and Faro matters.

89. There is no case made out for immediate interim relief that affects thousands of Muslims not represented in these proceedings, especially where the legislature has faced clamouring opposition to previous attempts to regulate Muslim marriages and will face same again. The application to individuals not before court should be restricted so as not to interfere in the private lives and religious rights of those who do not support secular recognition but who in fact

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[28] ITAC v SCAW SA 2010 ZACC (6) 2012 4 SA 618 CC

[29] National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC)

oppose it. Muslim persons affected by this approach still have access to courts.

90. Should this court decide to uphold the SCA's reasoning, the proposed enactment should not be a draconian measure bringing the entire Muslim community within its purview. Muslims who are averse to recognition must be given the right to opt out and to submit themselves to the Shari'ah. Such voluntary submission to the Shari'ah is not detrimental to others. It is a purely personal choice applicable to persons who make the choice of their own free will.

91. There is no valid reason for arbitrarily imposing recognition since such recognition will be a denial of a host of Shari'ah tenets which Muslims religiously and fervently submit to, and which they believe are necessary for their eternal salvation in the Life After.

92. It is submitted that it is irreconcilable with the right to freedom of religion and to the freedom to practice Islam, to subvert Muslim marriages to the secular law. Regulation presents endless, foreseeable constitutional problems.

93. The fifth respondent submits that the order of the court *a quo* ought to be set aside and each party be ordered to pay their own costs.

Reg Willis
Abu Bakr Omar
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Sandton
8 July 202

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