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The Genealogy of Ritual Belonging: Strategic Litigation, State Feminism, and the Recognition of Muslim Marriages in South Africa

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Abstract

For over a century, the South African secular state refused to legally recognise Islamic marriages (*nikah*), primarily due to their potentially polygynous nature. This statutory exclusion left Muslim women without civil legal protections during marriage, upon divorce, and at the death of a spouse. This article examines the fifteen-year strategic litigation campaign led by the Women's Legal Centre (WLCT), which culminated in the landmark 2022 Constitutional Court judgment. Utilising a qualitative analysis of public court filings, legal pleadings, and judicial decisions, the author explores how marginalised Muslim women used civil courts to bypass and challenge the exclusive authority of conservative male clerical councils (*ulama*). The article analyses this legal trajectory through two primary theoretical lenses: Robert Cover's concept of jurispathy (the state's suppression of a community's laws) and Afro-feminist frameworks. The findings reveal a critical tension in state-led legal reform. While the 2022 judgment secured vital financial and proprietary protections for women, it simultaneously introduced the limitations of 'state feminism' by replacing informal religious control with a rigid state bureaucracy. The paper argues that developing an authentic decolonial family law requires a jurisprudence that enforces the material and financial rights of African Muslim women without forcing their religious unions to conform entirely to Western, secular concepts of civil marriage.

Keywords: Muslim marriages; Women's Legal Centre; strategic litigation; clerical authority; legal pluralism; jurispathy; Afro-feminism; state feminism; South Africa

1. Introduction

For nearly three decades, South Africa's constitutional democracy harboured a profound structural contradiction. While the post-apartheid Constitution of 1996 boldly guarantees equality, dignity, religious freedom, and cultural participation as enshrined in Sections 9, 10, 15, and 31, women married exclusively under Islamic law remained systematically invisible to the state ([Constitution of the Republic of South Africa 1996](#)). Because the Department of Home Affairs did not register these unions, Muslim wives remained legally invisible. This lack of recognition meant that when a husband died, the state issued death certificates marking the deceased as 'never married'—a reality extensively documented in [Women's Legal Centre Trust v President of the Republic of South Africa and Others 2022](#) (5) SA 323 (CC) at paras 17 and 57 ([Moosa and Abduraoof 2022](#), p. 12).

The *nikah* (Islamic marriage contract) provides the primary framework for family life, lineage, and financial security within South African Muslim communities ([Amien 2010](#);



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Ismail and Seedat 2017). By denying it legal recognition, the state deprived Muslim women of standard statutory protections. Upon divorce or the death of a husband, these women could not automatically claim inheritance, spousal maintenance, pension interests, or the equitable redistribution of matrimonial property. These benefits were readily available to spouses in civil or customary marriages (Abduloaf and Moosa 2023b; Amien 2024). As Amien (2010, p. 363) observes, this regulatory gap left vulnerable women unable to legally enforce their matrimonial rights, exposing them to gender-based, discriminatory interpretations of religious law.

This legal vacuum created severe practical hardships for women within the domestic sphere. Wives frequently found themselves trapped in abusive relationships when husbands refused to grant a *talaq* (a husband's unilateral right to religious divorce). Conversely, men could cast wives out without financial resources through unofficial extra-judicial divorces. In *Faro v Marjorie Bingham N.O. and Others* (2013) ZAWCHC 159 at para 9, the High Court documented how this institutional gridlock left a widow destitute and homeless due to conflicting decisions by different provincial clerical councils (Amien 2020, p. 75). To survive, many women had to endure prolonged domestic abuse because they lacked the legal mechanisms to exit their marriages safely (Samodien 2023). Unofficial religious bodies often prioritised maintaining the marriage unit over the physical and mental safety of the wife (Ismail and Seedat 2017).

This lack of recognition persisted despite formal legislative proposals to fix the problem. The South African Law Reform Commission finalised a comprehensive draft Muslim Marriages Bill in 2003 to rectify these systemic vulnerabilities (Moosa and Abduloaf 2022). However, successive political administrations shelved the bill due to political calculation and deep ideological divisions within the Muslim community (Amien 2020). This long delay breached the state's positive obligation under Section 7(2) of the *Constitution of the Republic of South Africa 1996* to protect and fulfil the rights in the Bill of Rights. By deferring these reforms, the state maintained unequal legal structures that resembled the stratified family law system of the apartheid era (Moosa and Abduloaf 2014).

To challenge this state inaction, the Women's Legal Centre (WLC) launched a fifteen-year strategic litigation campaign. The WLC acted as an intermediary socio-legal actor, helping Muslim women move their domestic disputes from conservative religious tribunals to secular civil courts (Sezgin 2023). This strategy allowed women to bypass the exclusive interpretive authority of male clerical elders and demand that their marriages be protected under constitutional standards of gender equity and shared marital authority (Ismail and Seedat 2017).

However, this legal trajectory is not a simple story of progressive constitutional victory. Seen through an Afro-feminist lens, the WLC's reliance on civil courts introduces the problem of 'state feminism', a process where top-down state policies co-opt gender reform and strip it of its radical, grassroots potential (Tamale 2020). Using secular courts to regulate an Islamic practice risks creating a bureaucratic trap. It may simply exchange conservative clerical control for a rigid state administration, leaving the underlying colonial biases of family law untouched. Forcing the *nikah* into standard civil frameworks also imposes a Western legal logic that reduces a community-focused practice into a flat, transactional civil contract (Oyěwùmí 1997). This article explores how minority religious identities are policed and renegotiated in South Africa, demonstrating the structural limits of using a secular state bureaucracy to secure gender justice.

1.1. Comparative Legal Recognition and Legislative Delay

Within post-apartheid South Africa's legal pluralism, Muslim personal law has proven uniquely resistant to statutory integration, posing an enduring challenge to the state's

constitutional commitment to diversity. By contrast, other historically marginalized family systems were accommodated far more rapidly. Customary marriages, despite their regional complexities and internal variations, secured formal recognition under the *Recognition of Customary Marriages Act 120 of 1998*, with their protective frameworks further strengthened by a 2021 amendment addressing discriminatory property regimes (*Recognition of Customary Marriages Amendment Act 1 of 2021*). Similarly, Hindu marriages obtained baseline recognition through ministerial designations under the *Marriage Act 25 of 1961*, while same-sex unions received comprehensive legislative backing via the *Civil Union Act 17 of 2006*, enacted less than a year after the *Fourie* judgment (*Minister of Home Affairs and Another v Fourie and Another 2006*).

This uneven landscape reveals a distinct legislative hierarchy. As Amien (2020) observes, successive administrations displayed a profound inertia regarding decades of organized appeals from Muslim communities, a stark contrast to the swift legislative mobilisation that accommodated customary and same-sex unions. This disparate treatment has effectively institutionalised a multi-tiered system of citizenship, wherein the state prioritised the statutory inclusion of larger majoritarian or high-profile constituencies while leaving minority religious unions stranded in a zone of legal non-recognition (Moosa and Abduroaf 2022, pp. 3–4).

This state-enforced invisibility did not merely create a bureaucratic inconvenience; it reduced the *nikah* to a static legal anomaly, ignoring its reality as a lived space of relational meaning. The root of this legal exceptionalism reveals a deep structural dynamism. The post-apartheid state repeatedly deferred the regulation of Muslim family law, constrained by the complexities of addressing potential polygyny and navigating a decentralized religious landscape that lacks a single, hierarchical clerical authority (Amien 2010; Moosa and Abduroaf 2014).

As such, when the South African Law Reform Commission finalised the Draft Muslim Marriages Bill in 2003, the state shelved the legislation to avoid alienating conservative clerical factions and risking community friction over secular state involvement in religious doctrine (Moosa and Abduroaf 2022, pp. 3–4). Lacking the numerical weight or the unified organizational infrastructure of the customary-law constituency, marginalised Muslim women became the casualties of political expediency, their fundamental rights compromised to maintain an uneasy equilibrium with traditional religious leadership (Amien 2020).

1.2. Historical Non-Recognition and the Monogamous Marriage Paradigm

To understand why Islamic family law remained unrecognised, we must examine South Africa's colonial and apartheid-era histories of migration and legal exclusion. The South African Muslim community constitutes approximately 1.9 per cent of the national population and is composed of a diverse demographic formed through different historical waves of migration (Moosa and Abduroaf 2022, p. 5; Moosa et al. 2021, p. 67). The foundations of the community were established in the seventeenth and eighteenth centuries by Southeast Asian slaves, political exiles, and prisoners brought to the Cape by the Dutch East India Company, historically referred to as the 'Cape Malays' (Moosa and Abduroaf 2022, pp. 4–5; Amien 2021, p. 374). This population grew during British colonial rule with the arrival of South Asian indentured labourers and merchants who settled primarily in Natal and the Transvaal (Moosa and Abduroaf 2022).

For generations, this minority group operated with a deep and historically justified distrust toward formal state structures. During the apartheid era, the nationalist government used specific, conservative interpretations of Christian theology to justify its racial and social legal policies, while systematically excluding non-Christian and black identities

([Women's Legal Centre Trust \(WLCT\) 2022](#), p. 6). Because the Muslim community viewed the state legal system as an active instrument of racial and religious oppression, the *ulamā* (Islamic scholars) withdrew into an unofficial, non-state legal sphere. They established regional *jamiats* (provincial religious councils) to administer Muslim Personal Law internally ([Amien 2021](#)). The marital, divorce, and family decrees issued by these councils carried immense moral and social authority within the Muslim community, but they remained completely unenforceable within formal South African civil courts ([Amien 2021](#), p. 375; [2024](#), pp. 68–69).

This separation between religious practice and state law was reinforced by the South African common law, which built Western Christian and monogamous standards directly into the legal definition of civil marriage ([Moosa et al. 2021](#), p. 67). In [Mashia Ebrahim v Mahomed Essop](#) (1905, TS 59, p. 61), the court defined marriage strictly as the 'union of one man with one woman, to the exclusion, while it lasts, of all others.' Because Islamic jurisprudence permits *polygyny* (a husband marrying multiple wives), the civil courts categorised the *nikah* (Islamic marriage contract) as an inherently polygynous union. As a result, courts declared Islamic marriages fundamentally *contra bonos mores* (contrary to public policy and good morals) ([Moosa et al. 2021](#), pp. 67–68; [Amien 2024](#), p. 62).

High courts repeatedly confirmed this exclusion throughout the twentieth century. The court in [Seedat's Executors v The Master \(Natal\)](#) (1917, AD 302, p. 307) declared that polygyny was an institution rejected by civilised nations and was therefore unworthy of state recognition ([Amien 2021](#), p. 375). This was re-confirmed in [Ismail v Ismail](#) 1983 (1) SA 1006 (A)), where the court ruled that because the material terms of a Muslim marriage contract permitted a potentially polygynous structure, the marriage contract itself was contrary to public policy and legally void from its inception, a historical injustice recently summarised by the High Court in [Women's Legal Centre Trust v President of the Republic of South Africa and Others](#) 2018 (6) SA 598 (WCC) at para 5 ([Amien 2021](#), pp. 375–76). ([Women's Legal Centre Trust v President of the Republic of South Africa and Others](#) 2018, p. 5; [Amien 2021](#), pp. 375–76).

While the state excluded Islamic unions, it provided a flexible system of legal accommodation for other religious groups whose marriage practices aligned with the state's monogamous baseline. Christian and Jewish communities easily used the [Marriage Act 25 of 1961](#) to give their religious ceremonies immediate civil validity ([Amien 2024](#), p. 62). Under Section 3(1) of this Act, the Minister of Home Affairs regularly appointed Christian ministers and Jewish rabbis as state-recognised marriage officers ([Amien 2021](#), p. 381). Consequently, when a Jewish couple married under a *chuppah* (a traditional Jewish wedding canopy), the officiating rabbi acted simultaneously as a religious authority and an administrative agent of the state. This dual role automatically secured civil protections and default property rights for the marriage from the moment of celebration.

By contrast, the *nikah* faced major administrative hurdles. Although the Marriage Act technically allowed the government to appoint 'Mohammedan' marriage officers, members of the *ulamā* were effectively prevented from taking this status unless they agreed to enforce the state's strict monogamous requirements ([Amien 2020](#), pp. 92–93). Furthermore, civil marriages default to a regime of 'in community of property' (a system where all assets and debts are shared equally between spouses), which directly contradicts the strict Islamic law requirement for the complete separation of matrimonial estates. Because the state refused to register any union that was not legally monogamous, and because of these conflicting property regimes, the vast majority of Muslim imams remained outside the formal system until the launch of the 'Imam Project' in 2014 ([Amien 2021](#), p. 402). This institutional double standard penalised Muslim couples for maintaining their religious practices, leaving thousands of Muslim women without civil legal protections and forcing

them to choose between their faith and their constitutional rights to equality and dignity (Moosa and Abduroaf 2022, p. 3).

2. Materials and Methods

This paper uses a qualitative, socio-legal research design and a document-driven case study methodology to analyse the Women’s Legal Centre’s (WLC) fifteen-year strategic litigation campaign. This methodology treats the written litigation record as a primary source of data that records institutional conflict and structural legal harms. Rather than relying on primary empirical fieldwork, such as interviews or ethnographic observation, this study is conducted as a desktop and archival inquiry. It focuses exclusively on textual, legal, and organisational materials to evaluate how formal state legal frameworks interact with deeply held religious and ritual practices (Bowen 2009; Prior 2003). To comprehend how rights are negotiated between the state and minority communities, this methodological approach uses the legal pleadings and judicial texts as the main source of analysis.

2.1. Archival and Jurisprudential Materials

The empirical foundation of this study consists of the primary legal and institutional documentation generated during the WLC’s litigation campaign. To place these judicial milestones within their proper context, this litigation archive is examined alongside the WLC’s internal reports, public records, and earlier relevant jurisprudence. The source material traces the strategic progression of the case across three levels of the South African court system:

1. The initial 2009 application for direct access to the Constitutional Court;
2. The 2018 Western Cape High Court trial and subsequent judgment;
3. The 2021 Supreme Court of Appeal decision;
4. The definitive 2022 Constitutional Court ruling (*Women’s Legal Centre Trust v President of the Republic of South Africa and Others* 2022).

This trajectory is analysed alongside earlier foundational judgments concerning Muslim estates, specifically *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) and *Hassam v Jacobs NO and Others* 2009 (6) SA 572 (CC), as well as the WLC’s published annual reports (*Women’s Legal Centre Trust (WLCT) 2022, 2023*). Rather than treating these court records as simple timelines of procedural events, this paper applies qualitative document analysis to evaluate both digital and printed legal texts (Bowen 2009). This approach treats public court documents as social facts that are produced, used, and contested within specific institutional boundaries (Prior 2003). Although oral interviews fall outside the scope of this study, the paper captures the lived experiences of affected women by examining the ‘secondary voices’ preserved within the formal legal record (Bowen 2009). Centring the written affidavits and legal submissions of grassroots Muslim women’s networks—such as Shura Yabafazi (a coalition of Muslim women advocates) and the Muslim Youth Movement (MYM) Gender Desk—recovers an essential counter-narrative. These submissions directly challenged the conservative, male-dominated religious authorities who historically held exclusive control over the interpretation of the *nikah* (Islamic marriage contract) (Amien 2010).

2.2. Theoretical Framework

The analytical framework integrates three distinct theoretical approaches to evaluate South Africa’s plural legal system.

2.2.1. Adaptive Legal Pluralism and Structural Dynamics

First, drawing on [Diala \(2021\)](#) and [Diala and Rautenbach \(2024\)](#), the analysis adopts an adaptive legal pluralism perspective. This approach moves away from standard, state-centric ‘conflict-of-laws’ models to focus instead on how official state laws and unofficial community customs adapt through daily social practice and internal community dialogue. This pluralist lens is combined with [Cover’s \(1983\)](#) concepts of jurisgenesis (the capacity of a community to create its own internal legal meaning and norms) and jurispathy (the power of the state to suppress or destroy competing legal systems). These concepts provide the precise technical vocabulary needed to examine what happens when the secular state absorbs a religious practice.

2.2.2. Afro-Feminism and Translucence

To ground this critique in regional realities, this pluralist foundation is viewed through [Tamale’s \(2020\)](#) Afro-feminist framework alongside [Seedat’s \(2013\)](#) concept of translucence. Together, these theories challenge Western universal standards while preserving the specific, faith-based realities of African Muslim women.

[Tamale \(2020, pp. 67, 74\)](#) defines Afro-feminism as an analytical framework that dismantles patriarchal power by generating its own concepts rooted directly in diverse African histories, rather than relying on Western feminist models. Instead of using intersectionality as a vague academic catchphrase, this study uses it as a practical diagnostic tool to map how African women navigate overlapping systems of power, including colonial legal histories, national laws, and the demands of state citizenship. By confronting the ‘coloniality of being’—the internalised assumption that Eurocentric legal systems are the only valid standard of justice ([Tamale 2020, p. 93](#))—an Afro-feminist approach deconstructs family law to protect women’s material security and autonomy ([Tamale 2020, p. 10](#)).

Concurrently, [Seedat \(2013, p. 29\)](#) introduces translucence as a critical alternative to the deceptive ‘illusion of transparency’ found in conventional legal reform. Where an insistence on transparency assumes a false equivalence—relying on a Western liberal view that all women’s struggles are identical—translucence explicitly recognises alternative histories of religion, identity, and reason ([Seedat 2013, pp. 28–29](#)). By maintaining a deliberate critical distance between different intellectual systems, such as Islam and Western secular feminism, a translucent reading respects the unique, faith-based politics of Muslim women’s advocacy ([Seedat 2013, p. 27](#)). This allows religious actors to advocate for civil rights without being forced into a secular framework that erases their spiritual motivations or community identities ([Seedat 2013, pp. 27, 44](#)).

2.2.3. State Feminism and the Violence of Translation

Crucial to this combined decolonial framework is a critical engagement with ‘state feminism’. In this context, state feminism refers to a top-down, state-led approach to gender reform that relies primarily on secular statutory law and civil court mechanisms to achieve women’s rights ([Tamale 2020, pp. 331, 334](#)). Within a decolonial framework, state feminism contains an institutional contradiction: it attempts to secure emancipatory rights for women by using adversarial, state structures originally designed for colonial administration and patriarchal control ([Tamale 2020, pp. 11, 334](#)).

By forcing religious and customary practices into these state mechanisms, symbolic reforms—such as the formal recognition of a religious marriage—frequently leave the underlying colonial biases of family law completely untouched ([Tamale 2020, p. 334](#)). Furthermore, this top-down model risks state co-optation, where bureaucratic legibility (the state’s requirement that a practice be easily monitored and regulated) is prioritised over the complex relational structure of community life. This can flatten or displace living

community customs that organically provide financial or social protection for women (Tamale 2020, p. 331). Invoking secular courts to validate a sacred ritual can thus function as a legislative ‘Trojan horse’ (Tamale 2020, p. 339). In this scenario, formal legal inclusion masks ongoing gender inequality by simply exchanging the control of conservative male clerics for the control of a rigid state bureaucracy (Tamale 2020, p. 334).

This flattening points directly to the final concept of the framework: the ‘violence of translation’. This process occurs when non-Western worldviews, sacred rituals, and lineage-based family systems are forced to conform to Eurocentric legal, linguistic, and conceptual categories (Oyěwùmí 1997, pp. 85, 168–69; Seedat 2013, p. 29). This intellectual violence manifests when a secular legal system refuses to respect the unique nature of a religious tradition, seeking instead to engineer a false equivalence to make a sacred practice understandable to a civil court (Seedat 2013, pp. 29, 41–42).

In doing so, it imposes an alien ‘bio-logic’, the Western assumption that biological sex must rigidly dictate social roles and legal hierarchies, onto fluid community spaces, effectively creating rigid patriarchal binaries where they did not organically exist (Oyěwùmí 1997, p. ix, pp. 168–69). It also reduces complex family support networks into narrow legal categories, imposing an external, state-enforced system that misreads local labour and identity (Oyěwùmí 1997, pp. 16–17, 142). Integrated into our critique, the violence of translation acts as the specific mechanism inside the state’s legislative reform. While civil court interventions claim to liberate women by translating their traditional rights into statutory law, they do so using the state’s existing administrative tools. This process achieves formal state recognition but preserves bureaucratic control while quietly erasing the unique, faith-based meaning of the ritual itself (Seedat 2013, pp. 27, 29).

3. Methodology

3.1. Qualitative Document Analysis

To investigate the fifteen-year strategic litigation campaign surrounding South Africa’s *nikah* (Islamic marriage contract) marriages, this study uses a qualitative document analysis design. Document analysis provides a systematic procedure for reviewing and interpreting stable, existing texts, ensuring that the empirical material remains unaltered by the researcher’s presence (Bowen 2009, pp. 27–31). Because this research specifically evaluates major shifts in jurisprudence (the philosophy and development of law), applying this method to judicial opinions and court archives brings clear academic rigour to the traditional legal practice of reading case law (Hall and Wright 2008, p. 64). Rather than relying on primary interview data, the empirical foundation of this study rests on these archives, which serve as detailed historical records showing exactly how domestic and religious disputes are framed and adjudicated by the secular state (Hall and Wright 2008).

The primary dataset consists of public court filings, legal pleadings, heads of argument (written summaries of the legal arguments presented to the court), and the final written judgments generated by the Women’s Legal Centre (WLC) and opposing respondents. Temporally, the analysis spans from early localised challenges to the landmark 2022 Constitutional Court decision, capturing the evolution of legal arguments across the High Court, the Supreme Court of Appeal, and the Constitutional Court.

To process this extensive archive, the study integrated qualitative content analysis and thematic analysis protocols. Content analysis involves systematically categorising text to identify specific legal and factual claims, while thematic analysis is used to pinpoint and analyse recurring patterns of meaning across the dataset (Braun and Clarke 2006, p. 82; Schreier 2012). Following Bowen’s (2009, p. 27) three-level model of textual engagement, the court documents were subjected to initial skimming, followed by iterative thorough reading and deep qualitative interpretation.

The material was then evaluated using a thematic coding frame to classify text passages into specific categories (Schreier 2012, p. 1). This assignment of text passages to analytical categories remained a strictly controlled act of qualitative interpretation, avoiding premature numerical quantification (Mayring 2019). Specifically, the texts were read against a predefined category system anchored in the study's primary theoretical axes: legal pluralism, *jurispathy* (the state's suppression of a community's laws), state feminism, and decolonial translation. By systematically mapping these theoretical codes onto the legal pleadings and judgments, the analysis tracked exactly how sacred religious categories were translated and administratively restricted during their absorption into a secular civil framework.

3.2. Ethical Considerations and Data Availability

Because this research relies exclusively on publicly accessible jurisprudential archives, published court records, and open-access organisational reports, it did not involve human participants or primary field data collection. Consequently, formal institutional ethical clearance was not required. All cited case law and statutory materials reside in the public domain and are freely accessible via the Southern African Legal Information Institute (SAFLII) database and the official repository of the Constitutional Court of South Africa.

3.3. AI Disclosure

Generative artificial intelligence was utilised during the preparation of this manuscript solely to assist with structural formatting and language refinement. All substantive legal analysis, theoretical interpretations, and structural conclusions are entirely those of the author.

4. Results: The Legal Trajectory of the Islamic Marriage

The archival and legal records of this struggle show an uneven journey from complete institutional exclusion to constitutional recognition. Tracking this legal history reveals how the historical denial of legal status forced Muslim women to use strategic civil litigation. This approach transformed private domestic disputes into mechanisms of constitutional accountability, ultimately bypassing both the conservative traditional clerics and the delayed responses of the state legislature.

4.1. The Legacy of *Contra Bonos Mores* and Patchwork Court Rulings

Although Sections 15 and 211 of the Constitution of the Republic of South Africa (1996) formally introduced religious freedom and legal pluralism into South Africa's democratic order, constitutional protections for Muslim marriages initially remained purely theoretical. Under the apartheid-era Marriage Act 25 of 1961 and the Divorce Act 70 of 1979, potentially *polygynous* (allowing multiple wives) Islamic unions were categorised as *contra bonos mores* (a Latin legal term meaning 'contrary to public policy and good morals') (Moosa et al. 2021, pp. 67–68).

This statutory exclusion did more than simply deny a legal status. It rendered the *nikah* (Islamic marriage contract), a vital ritual of community belonging and family continuity, entirely invisible to civil law. This invisibility disrupted the legal transfer of family rights, inheritance, and financial authority within Muslim communities. In the post-apartheid era, the judiciary began to dismantle this colonial and apartheid legacy, but it did so through a highly incremental, case-by-case approach rather than broad legislative reform (Amien 2024) (Table 1).

Table 1. Timeline of key judicial results regarding Muslim marriages in South Africa.

Year	Case/Event	Legal Outcome/Result
1983	<i>Ismail v Ismail</i>	<i>Nikah</i> unions declared <i>contra bonos mores</i> ; total denial of civil recognition and contractual enforcement.
2004	<i>Daniels v Campbell NO</i>	Monogamous <i>nikah</i> unions recognised for purposes of intestate succession and maintenance under surviving spouses' legislation.
2009	<i>Hassam v Jacobs NO</i>	Legal recognition extended to polygynous <i>nikah</i> unions for intestate succession and maintenance claims.
2022	<i>WLC v President of the RSA</i>	Comprehensive civil recognition achieved; the Marriage Act and Divorce Act declared unconstitutional for failing to protect Muslim women and children.

Comprehensive civil recognition achieved; the Marriage Act and Divorce Act declared unconstitutional for failing to protect Muslim women and children. The timeline above highlights the structural drawbacks of piecemeal judicial reform. The judiciary's strategy only produced a fragile, reactive patchwork of legal relief before the decisive 2022 Constitutional Court intervention. Because courts consistently hesitated to grant wholesale statutory recognition, choosing instead to interpret specific pieces of social welfare and inheritance legislation on an ad hoc basis, generations of Muslim women remained outside the scope of comprehensive systemic protections (Moosa et al. 2021; Moosa and Abduroaf 2014).

Without an overarching, legally binding framework, fundamental rights to an enforceable religious divorce, automatic post-divorce financial maintenance, and guaranteed child custody remained entirely dependent on unofficial religious tribunals or the financial capacity of individual women to launch expensive High Court battles.

4.2. The State's Delay and the Legacy of Colonial Law

The historical trajectory of the Draft Muslim Marriages Bill (MMB) illustrates how the state used internal community disagreements to justify its own inaction. In July 2003, the South African Law Reform Commission (SALRC) finalised its Project 59 report, which outlined a legislative framework designed to align Islamic family law with constitutional rights (Moosa and Abduroaf 2022). However, when the state eventually published an adapted version of the Bill for public comment in January 2011, the legislative process became a site of intense conflict over religious authority (Moosa and Abduroaf 2022; Amien 2020).

While grassroots organisations, such as the Muslim Youth Movement Gender Desk and Shura Yabafazi, advocated for strong statutory protections that reflected the material realities of marginalised women, conservative clerical factions opposed state intervention, a conflict thoroughly documented in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2018 (6) SA 598 (WCC). Groups such as the Majlisul Ulama of South Africa rejected the Bill as an unacceptable secular intrusion, while simultaneously disputing the authority of more moderate bodies like the United Ulama Council of South Africa (UUCSA).

Using these internal theological fractures as an excuse, successive post-apartheid government cabinets indefinitely suspended the legislative process. Endorsing a warning originally issued by Rogers J in the 2013 Western Cape High Court matter of *Faro v Marjorie Bingham N.O. and Others*, the Full Bench in the 2018 *Women's Legal Centre Trust* judgment described this retreat into institutional inaction as a state of 'continued lethargy or paralysis' on the part of the executive promoters of legislation (2018 (6) SA 598 (WCC) at para 249).

This protracted political stalling reveals the systemic limits of post-apartheid legal reform. As Ndlovu-Gatsheni (2013, pp. 11, 16–19) observes, the postcolonial state frequently operates as a deracialised version of the old colonial administrative system. Because the underlying bureaucratic structure remains unaltered, it is fundamentally ill-equipped to accommodate African legal pluralism.

Under the guise of constitutional neutrality, the state remains bound to a colonial power matrix—a system that implicitly privileges Western, Christian-based civil norms and rationalities over non-Western knowledge and legal systems (Ndlovu-Gatsheni 2013, pp. 38, 51). Seen through this decolonial lens, the state's prolonged refusal to legislate is an active manifestation of coloniality (the lingering structural inequalities of colonial rule). Thus, the state maintains a legacy of epistemic exclusion (denying the legal validity of non-Western knowledge) by treating the Eurocentric civil marriage as the only acceptable normative standard, leaving Islamic marital practices legally unrecognised.

4.3. Systemic Exceptionalism and Bypassing Religious Gatekeepers

The state's prolonged inaction on Muslim family law contrasts sharply with its rapid regulatory mobilisation for other family structures. Customary marriages secured structured recognition through the [Recognition of Customary Marriages Act 120 of 1998](#), and same-sex unions obtained extensive statutory protections within a year of the landmark *Fourie* judgment (*Minister of Home Affairs and Another v Fourie and Another* 2006). Even Hindu marriages maintained baseline legal accommodations under the [Marriage Act 25 of 1961](#).

By contrast, the state deferred the rights of Muslim women indefinitely. It conditioned legal protection on achieving absolute community consensus, an impossible standard that was never demanded of other marginalised groups, such as those seeking same-sex unions or reproductive autonomy (Abduloaf and Moosa 2023a, p. 2; Amien 2020, p. 100). (Abduloaf and Moosa 2023a). This systemic exceptionalism (treating one specific group differently from all others within the legal framework) effectively signalled that the constitutional rights of Muslim women were politically negotiable. It subordinated guarantees of gender equality to the preservation of an uneasy political alliance between the state and conservative male clerics, with legislative initiatives frequently timed to coincide with national elections to secure the conservative 'Muslim vote' (Amien 2020, pp. 66, 81).

The WLC's strategic litigation campaign, culminating in the apex court decision of *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC), represents a decisive breakthrough that bypassed these historical gatekeepers entirely. Writing for a unanimous court, Tlaletsi AJ confirmed that the [Marriage Act 25 of 1961](#) and the [Divorce Act 70 of 1979](#) were fundamentally unconstitutional to the extent that they excluded Muslim marriages from civil recognition and failed to safeguard the rights of women and children (Abduloaf and Moosa 2023a, p. 2).

To remedy this legislative failure, the Court granted an interim order extending the default protections of a civil marriage to all valid *nikah* unions. This legal remedy effectively redirected dispute resolution away from male-dominated religious tribunals and toward an enforceable, rights-based civil court system. By using constitutional litigation, marginalised Muslim women transformed the *nikah* from a privately regulated ritual with no civil standing into a constitutionally recognised institution. This allowed them to claim financial and legal accountability from their spouses without having to abandon their religious and cultural identities.

5. Discussion

The trajectory of the Women's Legal Centre (WLC) litigation campaign highlights the changing dynamics of religious authority, legal pluralism, and gendered identity in post-

apartheid South Africa. Rather than treating the 2022 judgment merely as the endpoint of statutory reform, this discussion places the court records within broader structural tensions. When viewed through Robert Cover's concept of jurispathy (the state's power to suppress or destroy a competing legal system) alongside decolonial critiques of the colonial power matrix (the systemic bias favouring Western civil norms), the legal record reveals the significant compromises involved. Absorbing a highly relational, religious marriage covenant into a secular, rights-based framework requires profound institutional trade-offs.

5.1. *The WLC as Intermediary: Shifting the Nomos and Confronting Clerical Monopolies*

Operating beyond the usual boundaries of appellate litigation, the WLC fundamentally reconfigured the power dynamics of South Africa's plural legal system. The friction between parallel legal systems frequently worsens when marginalised minorities bypass formal state courts, defaulting instead to local traditional or religious authorities (Diala and Rautenbach 2024, p. 11). For decades, matrimonial conflicts involving Muslim women were largely insulated within extra-judicial (operating outside the formal legal system) Shari'a councils (Amien 2021, p. 375).

To understand this interpretive monopoly, one must examine the structure of South Africa's unofficial religious tribunals. In the absence of state regulation, the administration of Islamic family law fell to regional, male-dominated *ulama* (Islamic clerical) formations, most notably the Muslim Judicial Council (MJC) in the Western Cape and the Jamiatul Ulama in Gauteng and KwaZulu-Natal. Operating through dedicated judicial committees or Shari'a councils, these bodies functioned as de facto family courts for the domestic Muslim community. Within these closed spaces, male clerical elders maintained a rigid monopoly over the interpretation of both sacred texts and marital obligations (Amien 2024, p. 73).

While these tribunals lacked the statutory power to enforce their rulings through state mechanisms, they wielded immense social and spiritual authority. This power imbalance was particularly evident in divorce disputes. While a Muslim husband could easily execute a *talaq* (a unilateral divorce), a wife seeking a *faskh* (a judicial annulment) was forced to navigate an adversarial and deeply conservative clerical process. These tribunals frequently prioritised the preservation of the patriarchal family unit over women's physical and financial safety. They routinely advised vulnerable wives to display *sabr* (patience) and endure volatile, sometimes abusive domestic environments.

Because these religious decisions carried no weight in civil law, an institutional gridlock emerged. A woman granted a religious divorce remained legally married, and financially unprotected, in the eyes of the state. Conversely, a woman who obtained a civil divorce was still considered spiritually bound by the *ulama*. It was precisely this unaccountable institutional vacuum that the WLC sought to dismantle by subjecting the private decisions of these religious tribunals to constitutional scrutiny.

To break this patriarchal monopoly, the WLC positioned itself as an intermediary socio-legal actor. It employed what Seedat (2013, p. 29) terms translucence—a strategy that maintains a critical distance between religious realities and secular law. Instead of relying on a liberal assimilation strategy that falls for the 'illusion of transparency' (the false assumption that Islamic marriages are identical to secular civil unions), the Centre preserved the specific nature of the Islamic faith. Litigators translated private, religiously mediated grievances into actionable constitutional claims, yet consistently demanded that the state recognise the *nikah* (Islamic marriage contract) on its own relational terms.

Sustaining this translucent approach required advocating on two fronts simultaneously. Litigators had to articulate their claims using the rigid grammar of constitutional law to satisfy the judges, while simultaneously using Islamic ethical principles to retain legitimacy

among grassroots women's networks. Consequently, the Centre's most effective legal strategy was reframing the parliament's inaction. Legislative delay was no longer permitted to pass as a passive administrative oversight. Rather, it was exposed as an ongoing act of institutional jurispathy—the systematic suppression of a minority's *nomos* (a community's internal legal and moral universe) through deliberate state neglect (Cover 1983, pp. 4–5; Sezgin 2023, p. 1322). By demonstrating that extended legislative silence weaponised state secularism against the protective framework of the *nikah*, the WLC compelled the Court to intervene. This forced the state to accommodate religious specificity rather than erasing it through bureaucratic delay.

5.2. Systemic Harm and the Vulnerability of Religious Transitions

Grounding these abstract constitutional claims in the material realities of domestic life, the WLC demonstrated how this state-enforced exclusion generated systemic harm—a reality the Constitutional Court detailed extensively in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) at paragraphs 7, 9, and 80. Foundational matters such as *Faro v Bingham N.O. and Others* [2013] ZAWCHC 159 and *Esau v Esau and Others* (which were consolidated into the initial High Court action) served not as isolated administrative anomalies, but as concrete proof of the property deprivation and erasure of family lineages caused by the lingering colonial structures of South African family law. While traditional religious authorities routinely advised women to endure marital discord with patience, the material reality of exiting unrecognised unions was characterised by profound structural and personal isolation (Amien 2020, p. 73).

Remarkably, this structural exclusion did not operate in a vacuum; it mapped directly onto the racialised economic geography of post-apartheid South Africa. The denial of civil recognition disproportionately devastated historically disadvantaged women who were already navigating the compounded burdens of spatial apartheid and systemic poverty. By refusing to recognise the *nikah*, the state effectively amplified the extreme vulnerabilities inherent in delicate religious transitions, most notably the *iddah* (the mandatory Islamic mourning or waiting period following divorce or widowhood). Left entirely unregulated by statutory law, these transitional spaces inadvertently entrench patriarchal inequalities (Khosa-Nkatini et al. 2023, p. 5).

Stripped of a protective legislative framework, the *iddah* frequently lost its theological purpose as a sanctuary for emotional recovery and lineage verification. Instead, it devolved into a period of acute financial exposure and economic strangulation (Abduroaaf and Moosa 2023b, p. 308). At the precise moment religious law required them to remain cloistered at home, widows and divorced women faced devastating material crises, including the inability to access frozen estate bank accounts, halt evictions, or secure immediate child maintenance.

5.3. The Constitutional Litigation: *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC)

The decades-long campaign for the recognition of Islamic family law achieved its definitive legal resolution in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* (2022, (5) SA 323 (CC)). Rather than an isolated exercise in statutory interpretation, this landmark adjudication by the Constitutional Court exposed the profound institutional gridlock within the post-apartheid state's legislative and executive branches. The litigation represents a sophisticated use of public interest advocacy, systematically dismantling the state's long-standing defence of passive neutrality by reframing statutory non-recognition as an active source of constitutional harm.

5.3.1. The Procedural Trajectory of State Omission

The winding path of the WLC litigation highlights the deep-seated institutional resistance that characterised the state’s response to Muslim Personal Law (Table 2).

Table 2. Procedural Timeline of the *Women’s Legal Centre Trust* Strategic Litigation Campaign (2009–2026).

Date	Legal Stage	Description
2009	Direct Access Rejected	The Women’s Legal Centre Trust (WLCT) applied for direct access to the Constitutional Court. The apex court rejected this, ruling it was institutionally ill-equipped to act as a court of first instance on deeply contested theological disputes. (Women’s Legal Centre Trust v President of the Republic of South Africa and Others 2009)
August 2018	High Court Victory	Forced back to the High Court, the WLCT consolidated its application with individual claims from vulnerable spouses (Ms Tarryn Faro and Ms Ruwayda Esau). The Full Court ruled the state had a positive obligation to legislate, granting Parliament 24 months to cure the defect.
December 2020	Supreme Court of Appeal Intervention	The state appealed. The SCA affirmed the unconstitutionality of the Marriage and Divorce Acts but struck down the High Court’s mandatory directive compelling Parliament to enact specific legislation, citing the separation of powers.
2022	Constitutional Court Final Judgment	The apex court confirmed the constitutional violations and designed a suspended, multi-stage remedy with immediate retrospective interim relief dating back to 15 December 2014.
2024 to 2026	Legislative Extension	The President signed the Divorce Amendment Act 1 of 2024 to codify interim relief. However, comprehensive statutory reform stalled, prompting the Constitutional Court to extend Parliament’s final deadline to 27 June 2026.

5.3.2. The Anatomy of the Constitutional Violations

When the matter reached the Constitutional Court, the bench unanimously rejected the state’s characterisation of non-recognition as a harmless administrative omission. Instead, Acting Justice Tlaetsi found that the legislative status quo inflicted an interlocking series of constitutional rights violations ([Women’s Legal Centre Trust v President of the Republic of South Africa and Others 2022](#) (5) SA 323 (CC) at para 19). Because the state had already actively legislated domestic relations via the Marriage Act and the Divorce Act, the structural exclusion of Muslim marriages from these specific laws constituted a breach of the state’s positive obligation under Section 7(2) of the Constitution to ‘respect, protect, promote and fulfil’ constitutional guarantees (2022 (5) SA 323 (CC) at para 82). This statutory exclusion was found by the Constitutional Court to generate severe, multi-layered discrimination across an interlocking grid of constitutional protections. Specifically, the Court identified violations under the following provisions of the [Constitution of the Republic of South Africa \(1996\)](#): (Table 3).

Table 3. Typology of Bill of Rights Violations Established in the Women’s Legal Centre Trust Judgment.

Constitutional Right	Nature of the Legal Violation
Section 9 (Equality)	Direct discrimination based on religion and marital status, alongside systemic gender discrimination disproportionately penalising Muslim women.
Section 10 (Dignity)	Devalued intimate familial choices, conveying the message that the <i>nikah</i> is not worthy of state legal protection.
Section 28 (Children)	Deprived children of automatic judicial oversight during parental separation and statutory age protections under the Children’s Act.
Section 34 (Courts)	Barred Muslim spouses from using formal judicial infrastructure to secure equitable property and maintenance resolutions upon divorce.

5.3.3. The State’s Defences and the Separation of Powers

To resist an adverse judgment, the executive and the legislature relied on a conservative defence centred on judicial deference and political pragmatism. The state argued that the power to initiate policy lay exclusively with the executive, while the authority to pass legislation rested solely with Parliament (*Women’s Legal Centre Trust v President of the Republic of South Africa and Others 2022* (5) SA 323 (CC) at paras 16, 25). From this perspective, any judicial order commanding the legislature to enact a specific law would constitute an impermissible overreach into the domain of the political branches—an argument that sought to reify a rigid separation of powers as a shield against the state’s positive obligations under Section 7(2) of the Constitution.

To justify its long-standing legislative inaction, particularly its failure to enact the draft Muslim Marriages Bill finalised by the South African Law Reform Commission in 2003—the state cited deep internal ideological divisions within the domestic Muslim community during the earlier rounds of litigation (*Women’s Legal Centre Trust v President of the Republic of South Africa and Others 2018* (6) SA 598 (WCC) at para 266). The state asserted that conservative clerical formations strongly resisted state interference in what they deemed divine law. Forcing a uniform legislative framework onto a fractured religious minority, the state argued, would violate the principle of state neutrality and infringe upon religious freedom under Section 15 of the *Constitution of the Republic of South Africa 1996* (2018 (6) SA 598 (WCC) at para 236). Within a decolonial framework, this "neutrality" acts as a form of state-sanctioned *jurispathy*, where the government avoids the hard work of constitutional translation by hiding behind the supposed irreconcilability of the religious *nomos*.

5.3.4. The Remedial Framework and the 2026 Reality

The Constitutional Court resolved this tension by designing a sophisticated, multi-stage remedy that respected legislative autonomy while offering immediate, concrete protection to vulnerable litigants. The Court formally declared the *Marriage Act 25 of 1961* and the *Divorce Act 70 of 1979* unconstitutional to the extent of their under-inclusiveness, but suspended this declaration for 24 months to allow Parliament to cure the statutory defect (*Women’s Legal Centre Trust v President of the Republic of South Africa and Others 2022* (5) SA 323 (CC) at para 86, sub 1.6).

More importantly, the Court coupled this suspension with sweeping retrospective interim relief to address ongoing hardship during the legislative process. It ruled that all Muslim marriages subsisting as of 15 December 2014, the date the High Court proceedings

were instituted, could be formally dissolved by a civil court under the Divorce Act (2022 (5) SA 323 (CC) at para 86, sub 1.7). As a default interim property regime, the Court ordered that these marriages be treated as being out of community of property, shielding women from sudden liability for their spouses' debts (para 86, sub 1.7(a)). Most significantly, the Court declared Section 7(3) of the Divorce Act applicable to these unions, granting civil judges the statutory authority to order an equitable redistribution of assets upon divorce, regardless of when the *nikah* was originally celebrated (para 86, sub 1.7(b)).

The ongoing implementation of this remedial framework highlights the persistent difficulties of state-level translation. In May 2024, the President signed into law the Divorce Amendment Act 1 of 2024 ([Divorce Amendment Act 1 of 2024](#)), which formally codified the Constitutional Court's interim relief by textually amending the Divorce Act to explicitly include Muslim marriages ([Amien 2024](#), p. 101).

However, because the broader task of passing a comprehensive, standalone marriage statute stalled in Parliament as the initial 24-month deadline approached, the apex court had to step in again. In *Speaker of the National Assembly v Women's Legal Centre Trust and Others* (2024) ZACC 18, the Constitutional Court granted an extension, moving the final deadline for comprehensive statutory reform to 27 June 2026. This extension keeps the protective umbrella of the court-mandated interim relief active, while the legislature continues to grapple with the deep-seated structural challenges of integrating minority religious practices into a secular constitutional framework.

5.4. Dignified Jurispathy and the Violence of Translation

In responding to this acute precarity, the judgment in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) executed a form of "dignified jurispathy"—a respectful yet unequivocal subordination of a minority religious normative order to secular constitutional supremacy. Avoiding the "undignified jurispathy" seen in jurisdictions that categorically refuse to engage with Islamic family law and thus abandon women to a regulatory void ([Sezgin 2023](#)), the South African bench waded directly into the Muslim *nomos*. Yet, the very act of recognising the *nikah* necessitated a highly contested process of legal translation. By compelling a sacred covenant to conform to Eurocentric legal and conceptual architectures, the state risked perpetrating what [Oyèwùmí \(1997\)](#) and [Seedat \(2013\)](#) identify as the violence of translation. Although the judicial remedy is undeniably "jurisgenerative" ([Cover 1983](#)) in its creation of an institutional space for constitutionally compliant rights, it simultaneously engineers a false equivalence.

Here, it is vital to address a profound conceptual and doctrinal tension regarding the nature of the *nikah*. From the strict vantage point of classical Islamic jurisprudence (*fiqh*), marriage is categorised not as a sacred, unalterable sacrament or purely spiritual ritual (*ibadat*), but fundamentally as a civil transaction (*mu'amalat*). It is a legally binding contract initiated by offer (*ijab*) and acceptance (*qabul*), requiring a meeting of minds, the exchange of consideration (*mahr*), and the formal consent of the parties.

While this transactional definition remains doctrinally flawless under Islamic law, this paper deliberately employs the sociological and decolonial lexicon of "religious ritual" as a necessary political and epistemic intervention. If secular courts are permitted to view the *nikah* merely as a flat, transactional civil contract, they immediately default to a Eurocentric, liberal-humanist framework that reduces the marriage to a commercial or biological partnership. This creates what [Seedat \(2013\)](#) defines as the "illusion of transparency"—the false assumption that a non-Western legal mechanism can be seamlessly translated into Western legal categories without loss of meaning.

The material consequences of this translation are starkest when secular courts attempt to interpret Islamic financial covenants, such as the *mahr* (dower). Driven by an institutional

demand for bureaucratic legibility, the civil apparatus frequently transmutes the *mahr* into a standard contractual debt or subsumes it under the civil default of “community of property.” Such translations fundamentally flatten the *nikah*’s irreducible alterity.

Within the lived reality of the African Muslim diaspora, the *nikah* operates as far more than a commercial contract; it functions as a profound, performative ritual of community alignment, spiritual kinship, and lineage production. It is an embodied practice that binds the individual to a sacred *nomos*. By utilising the concept of ritual, this analysis deliberately resists the Western “bio-logic” (Oyěwùmí 1997) that seeks to strip the *nikah* of its transcendent, relational, and spiritual economy. The use of “ritual” is therefore not a doctrinal error, but an intentional decolonial methodology: it highlights the irreducible alterity of the practice, forcing the state to recognise that when it legislates on the *nikah*, it is not merely regulating a secular transaction, but intervening in a sacred, community-generating ontology.

5.5. Contested Epistemic Authority and Decolonial Reclamation

This violent translational process has inevitably intensified post-judgment debates over who retains the epistemic authority to define the *nikah*’s ritual boundaries (Moosa and Abdurroaf 2014, p. 186). As conservative clerical bodies fiercely defend their theological jurisdiction against state encroachment (Amien 2020, p. 102), progressive Islamic scholars and legal activists have positioned the Court’s ruling as a necessary, albeit externally facilitated, internal theological correction.

This friction has generated a paradoxical socio-legal alliance: grassroots feminist activists leveraging the secular, coercive power of constitutional judges to bypass the traditional *ulama*. Operating firmly within Tamale’s (2020) Afro-feminist paradigm—which insists on generating emancipatory discourses rooted directly in African and Muslim realities—these scholars assert that *Shari’a* itself demands the very material protections the secular state is now enforcing (Amien 2024, p. 83). As Shaikh (2003) notes, the Qur’anic injunction to “live with them in kindness” (4:19) establishes an unassailable religious duty to secure women’s enforceable material rights. From this vantage point, invoking constitutional supremacy is not an invasive secular disruption. Rather, it acts as a decolonial reclamation of the ritual’s foundational ethical core, utilising indigenous theological vernacular to rescue the *nikah* from centuries of patriarchal distortion (Seedat 2013).

5.6. The Imposition of “Bio-Logic” and the Limits of State Feminism

Nevertheless, an unreserved celebration of this judicial outcome risks obscuring a critical theoretical vulnerability. While the judgment undeniably secures indispensable material relief, an Afro-feminist critique demands deep scepticism regarding the mechanisms of its enforcement. As Oyěwùmí (1997) powerfully observes, Western epistemological frameworks inherently distort non-Western social realities by imposing an institutional “bio-logic”—a rigid, binary ontological lens foundational to Euro-Christian conceptualisations of civil marriage. The *nikah*, however, resists such narrow categorisation; it operates as a polycentric institution anchored in spiritual kinship and communal, rather than strictly biological, obligations. Conditioning legal protection upon the alignment of this ritual with the state’s secular, biological paradigm constitutes a profound epistemic violence. It replaces a dynamic, pluralistic living tradition with a rigid, state-sanctioned approximation of itself.

Ultimately, tethering the regulation of religious life to the secular state introduces the grave risk of institutionalising Tamale’s (2020) concept of “state feminism.” By supplanting the informal authority of the religious elite with a formalised state bureaucracy, this vector of reform functions as a legislative “Trojan horse” (Tamale 2020, p. 339). It attempts to

extract emancipatory rights through adversarial, “officialist” structures that were originally engineered for colonial control, thereby leaving the underlying, extractive architectures of South African family law completely intact.

This bureaucratic trap becomes most acutely visible in the resulting evidentiary burdens. The secular state’s relentless demand for paper legibility—written certificates, formalised registrations, and adversarial thresholds of proof—inevitably shifts the burden of establishing validity onto the shoulders of the most vulnerable women. The state’s repeated failure to meet its initial parliamentary deadlines to enact the mandated legislation only underscores that the 2022 judgment is not a finalised feminist triumph, but a highly unstable jurisprudential opening. It propels South African family law into an era of fraught, adaptive pluralism, demanding that the legal system secure material protections for marginalised women without flattening the translucent, deeply relational ontology of African Muslim ritual life into cold, evidentiary bureaucracy.

6. Conclusions

6.1. *The Achievement and the Limits of Judicial Intervention*

The Women’s Legal Centre’s litigation campaign resolved a prolonged administrative impasse. It compelled the post-apartheid state to recognise the *nikah* (Islamic marriage contract) not merely as a private contractual arrangement, but as a foundational site of African Muslim identity and family continuity. By translating individualised instances of domestic vulnerability into a systemic constitutional challenge, the campaign secured judicial intervention in a regulatory space paralysed by legislative inaction.

However, the Constitutional Court’s ruling in *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) also demonstrates the structural limitations of relying on a secular judiciary to resolve deep religious conflicts. Because the judgment functions as an act of ‘dignified jurispathy’ (respectfully subordinating a religious legal order to constitutional supremacy), it leaves a central tension unresolved: the state must now regulate a sacred ritual without compromising its internal theological logic.

This tension echoes the Afro-feminist critique that transferring regulatory authority from traditional religious structures to a secular state apparatus does not inherently yield systemic liberation. Imposing a rigid ‘state feminism’ that simply forces the *nikah* into a Eurocentric civil law framework risks providing only superficial protection. As Tamale (2020) cautions, formal law reform can function as a symbolic concession—amending statutory language while leaving the underlying drivers of gender injustice undisturbed. Avoiding this outcome requires moving beyond triumphalist legal narratives that frame judicial intervention as a rescue mission of liberal modernity. Such a paternalistic framing obscures the autonomous agency of women operating within faith-based ethical structures.

Applying Seedat’s (2013) paradigm of translucence—rather than demanding total state-centric transparency—provides a more viable analytical path. Translucence requires the state to enforce the material rights of Muslim women without demanding that their relational identities map exactly onto Western secular frameworks. While the WLC’s strategic intervention successfully dismantled decades of state denial, the task of crafting a decolonial family law remains an ongoing project. It must accommodate the specific nature of Islamic law while securing substantive gender equality in the post-apartheid democratic era.

6.2. *Material Realities and Legislative Minimums*

The WLC grounded its advocacy in the acute material vulnerabilities defining unrecognised unions, emphasising that the transition from a court order to statutory reality extends

beyond symbolic recognition. Non-recognition generates severe economic consequences, frequently leaving women destitute following the dissolution of a marriage through death or divorce (Amien 2024, p. 76; Women’s Legal Centre Trust (WLCT) 2023, pp. 18–19). Accordingly, translating the 2022 judgment into a substantive Muslim Marriages Act requires a legislative framework rooted in material imperatives that ensure “equal access to resources and rights” both during and after the relationship (Women’s Legal Centre Trust (WLCT) 2023, p. 10). To achieve this, the impending legislation must secure four baseline minimums:

- **Flexible Jurisdiction:** Establish an accessible opt-in or opt-out mechanism that secures civil protections while accommodating the religious autonomy of practitioners.
- **Protective Default Property Regimes:** To mitigate the economic marginalisation of wives, the default marital property regime should implement an asset-accrual system (where wealth accumulated during the marriage is shared equitably upon dissolution), unless explicitly excluded via an antenuptial contract.
- **Tribunal Oversight:** The state must establish oversight mechanisms for extra-judicial religious tribunals to ensure that informal mediation processes do not violate constitutional guarantees under the guise of religious freedom.
- **Progressive Jurisprudence:** The framework must remain responsive to evolving legal realities by integrating progressive *fatwas* (Islamic legal rulings) concerning maintenance allocations, child custody parameters, and equitable protections in polygynous unions.

The contested societal reception of the 2022 judgment highlights an ongoing dispute over who holds the authority to interpret these legal boundaries. Historically, state-led legislative processes have been exclusionary, frequently incorporating the perspectives of grassroots organisations, such as Shura Yabafazi and the Muslim Youth Movement (MYM) Gender Desk, only following sustained external pressure (Amien 2010). This persistent pattern of marginalisation indicates a lingering institutional reluctance to treat Muslim women as the primary stakeholders in reforming their own legal frameworks.

While strategic litigation effectively disrupts legislative inertia, it cannot unilaterally construct a decolonial legal order. The state’s repeated extensions of the parliamentary drafting deadlines illustrate that judicial victories act as catalysts for reform, not definitive resolutions. For the *nikah* to be regulated effectively as a lived African reality, the legislative process must shift from a top-down bureaucratic procedure to a model of participatory engagement. Ensuring that the women most vulnerable to the harms of non-recognition are positioned as central architects of their own legal institutions remains essential for transforming this judicial opening into a durable framework of equality and belonging.

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Abbreviations

The following abbreviations are used in this manuscript:

Abbreviation	Full Term
WLC	Women’s Legal Centre
WLCT	Women’s Legal Centre Trust

MMB	Muslim Marriages Bill
SALRC	South African Law Reform Commission
UUCSA	United Ulama Council of South Africa
MJC	Muslim Judicial Council
MYM	Muslim Youth Movement
SCA	Supreme Court of Appeal
CC	Constitutional Court
RSA	Republic of South Africa

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