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THE IMPERATIVE TO IMPLEMENT MUSLIM PERSONAL LAW IN SOUTH AFRICA

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DECLARATION

I declare that *'The Imperative to Implement Muslim Personal Law in South Africa'* is my own work, that it has not been submitted before for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

_____

Mohammed Moolla

1 June 2021

DEDICATION

I dedicate this work to all those women and children of South Africa who have endured prejudice and discrimination as a result of non-recognition of Muslim Personal Law.

ACKNOWLEDGEMENTS

Firstly, I would like to thank my Creator (Allah Almighty) who gave me the ability to further my studies, and to complete this thesis.

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Finally, I would like to express my gratitude and appreciation to my loving wife, Fatima, for her assistance and invaluable input. I also thank my daughters, Aisha and Safiya, for having patience with me during the time of writing the thesis.

Glossary

Ahadith:
A collection of narrations containing the sayings and actions of the Prophet Muhammad (pbuh), as well as matters he approved. They constitute the major source of guidance for Muslims apart from the Qur'an.

Al-Nisa:
An Arabic word meaning 'women' and also the title of the fourth chapter of the Qur'an.

Shari'ah:
Literally, it means 'the clear, well-trodden path'. *Shari'ah* is the Islamic legal system or the name given to the body of Islamic law. It is derived from the Qur'an, ahadith, the juristic texts of the four schools of jurisprudence, and Fatwas (Islamic rulings).

Sunnah:
An Arabic word for traditional customs and practices. In the Islamic community it refers to the traditions and practices of the Last Prophet, Prophet Muhammad (pbuh).

Hanafi:
This is one of the four principal Sunni schools of Islamic jurisprudence that was founded by Imam Abu Hanifah. The school predominates in Central Asia, India, Pakistan, Turkey, and the countries of the former Ottoman Empire.

Hanbali:
This is one of the four Sunni schools of Islamic jurisprudence founded by Imam Ahmed Hanbal. Its adherents are predominantly in Saudi Arabia.

Khul':
An Arabic term referring to a husband agreeing to divorce his wife in exchange for the wife returning the *mahr* (dowry).

Iddah:
An Arabic word referring to a waiting period, specifically the waiting period that a woman must observe after the death of her husband or after a divorce, during which she may not marry another man. Its purpose is to ensure that the father of any child born after the cessation of a n*ikah* (marriage) is known.

Ijma':
An Arabic word meaning consensus. Technically, it refers to the unanimous agreement of the jurists about a particular issue.

Ijtihad:
Juristic reasoning to deduce rulings or verdicts in Islam.

Qur'an:
The sacred book in Islam that is the word of the Almighty.

Qiyas:
The process of deductive analogy in which a ruling relating to an existing situation is applied to a novel situation by the identification of an effective cause that is the same in both situations.

Maliki:
This is one of the schools of Islamic jurisprudence founded by Imam Malik. It predominates in Egypt, Tunisia, Algeria, and Morocco.

Mahr:
In Islam, a *mahr* is a dowry given by the groom to the bride at the time of the Islamic marriage. The *mahr* may consist of property, such as money or jewellery, or a benefit, such as a promise to teach the bride a portion of the Qur'an.

Nikah:
An Arabic word referring to a contract of marriage.

RA:
An abbreviation referring to the Arabic phrase '*radi Allahu 'anhu'*, which means 'may Allah be pleased with him'. It is used as a term of respect and a prayer after mentioning the names of the companions of the Prophet Muhammad and other righteous persons.

Pbuh:
An abbreviation for 'peace be upon him', which is used to refer to the Arabic phrase '*salla Allahu 'alayhi wa sallam'*. The phrase literally means 'the prayers and peace of Allah be upon him' and is used to signify respect and prayer after mentioning the name of the Prophet Muhammad.

Shafi'i:
This is one of the four schools of Islamic jurisprudence, derived from the teachings of Imam Abu Abd Allah Muhammad ibn Idris al-Shafi'i. This school predominates in East Africa, Yemen, Malaysia, and Indonesia, as well as among the Kurds.

Talaq:
An Arabic word referring to a husband's divorce of his wife.

ABSTRACT

It has been more than 25 years since the Interim Constitution came into effect and a Bill of Rights was introduced. Yet Muslim Personal Law (MPL) still has no legal recognition in South Africa. This thesis investigates how this causes serious problems for Muslim women who suffer grave injustices upon divorce due to the non-recognition and non-regulation of Muslim marriages. It highlights the State refusal to enact legislation despite the dicta and obiter comments from the courts spanning more than two decades enjoining the state to effect legislation to achieve this purpose. South African law is still fundamentally lacking in the recognition of the rights of parties to marriages contracted only in terms of MPL. For couples married in accordance with civil law, marriages and divorces are dealt with under the relevant statutes, namely the Marriage Act 25 of 1961, the Civil Union Act 17 of 2006 and the Divorce Act 70 of 1979. No provision has been made in statutory law for MPL. Previously the courts have held that this was due to the potentially polygynous nature of Muslim marriages. Muslim marriages are inadequately regulated resulting in serious hardships to Muslim women and children. This thesis furthermore investigates the need to recognize MPL. This thesis analyses the history of MPL and the initiatives by the State relating to the recognition of Muslim marriages. It highlights international conventions which South Africa has signed, case law, the role of the Constitution, as well as legislation that gives effect to MPL. It concludes with an overall analysis and recommendations for implementing MPL in South Africa.

KEY WORDS

- *Muslim Women*
- *Islamic Law*
- *South African law*
- *The Constitution*
- *Marriage*
- *Custody*
- *Access and Maintenance of Children*
- *Divorce*
- *Muslim Marriages Bill*
- *The Single Marriage Statute*
- *Muslim Personal Law*

CHAPTER ONE

INTRODUCTION

1.1. Overview of the research

This thesis addresses the problems and difficulties caused to Muslim women in South Africa as a result of the failure to recognise Muslim Personal Law (MPL). The thesis furthermore investigates the need to recognise MPL in South Africa. Islam is by no means a monolithic religion as it is split into two main branches, *Shi'a* and *Sunni,* as well as other minor groups.[1] Most Muslims are *Sunni*. The dominant schools found in *Sunni* Islam are: *Hanafi*[2], *Maliki*[3], *Hanbali*[4] and *Shafi'i*.[5] There are many significant differences between these schools. In South Africa, the majority of the Muslims are *Sunni* and follow the *Shafi'i* and *Hanafi* schools of law. Due to

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1 Essack F 'Understanding the *Shi'a-Sunni* divide in Islam' *Cape Argus* 21 May 2018 2. (About 80% of the Muslim world are *Sunni* and about 18% *Shi'a*. The latter are concentrated in Iran and Bahrain, where they form the majority, and in Pakistan and Saudi Arabia, where they are large minorities. Historically, the divisions started soon after the Prophet's (pbuh) demise in 632. The *Shi'as* claim that the rightful leadership of the community belongs to his family and that of his nephew, Ali Ibn Abi Talib (RA), who was designated by the Prophet (pbuh) as his successor. *Sunnis* believe that the community chose Sayyidina Abu Bakr al-Siddiq as the leader. Furthermore, *Sunnis* have a deep reverence for all the Companions of the Prophet while *Shi'as* only recognise those who identified with Ali (RA). In South Africa, *Sunni* Islam was the only visible expression of Islam until the 1979 revolution in Iran. *Shi'as* currently have three custom-built mosques in Cape Town, Verulam and Johannesburg and 17 small community-prayer spaces.

2 The *Hanafi* school is one of the four schools of religious law, derived from the teachings of Imam Abu Hanifah (700-767). They acknowledge the *Qur'an* and a*hadith* as primary sources of law and are noted for their extensive reliance on systematic reasoning in the absence of a precedent. This school currently predominates in Central Asia, India, Pakistan, Turkey, and the countries of the former Ottoman Empire. Moosa N *Unveiling the Mind – The Legal Position of Women in Islam – A South African Context* (2011) 151. Al Khin M and Al Bughaa M *Al-Fiqh Al-Manhajee 'Alaa Madhhab Al-Imaam Al* Shafi'ee (2000) Vol 2, 276 – 277.

3 The *Maliki* school is one of the four schools of religious law, derived from the teachings of Imam Malik ibn Abbas in the 8th century. Characterized by a strong emphasis on hadith, many doctrines are attributed to reliance on the practice of the companions in Madinah as a source of law. Imam Malik was known to have used *Ra'y* (personal opinion) and *Qiyas* (analogy). The Maliki school is predominantly in Upper Egypt, Sudan, Bahrain, United Arab Emirates and Kuwait. Moosa N (2011) 151. Al Khin M and Al Bughaa (2000) 277.

4 The *Hanbali* school is one of the four schools of religious law. It is named after the Iraqi scholar Ahmad ibn Hanbal who lived in the 9th century. The school recognises the following as sources of law: The *Qur'an*, a*hadith*, *Fatwas* of the Companions, and reasoning by analogy (*qiyas*). It encourages the practice of independent reasoning (*ijtihad*) through study of Qur'an and a*hadith*. Moosa N (2011) 151. Al Khin M and Al Bughaa (2000) 277.

5 The *Shafi'i* school is one of the four *Sunni* schools of religious law, derived from the teachings of Imam Abd Allah Muhammad ibn Idris al-Shafi'i (767- 820). They reject provincial dependence on traditional community practice and argue for unquestioning acceptance of the *Hadith* (traditions concerning life and utterances of Prophet Muhammad (pbuh)) as a major basis for legal and religious judgments and for the use of analogical reasoning (*qiyas*) when no clear directives could be found in the *Qur'an* or *Hadith*. The consensus of the scholars of the community (*ijma*) was accepted but not stressed. The *Shafi'i* school predominates in East Africa, Yemen, Malaysia, and Indonesia, as well as among the Kurds. Moosa N (2011) 151. Al Khin M and Al Bughaa (2000) 277.

constraints, this mini thesis will focus on the *Shafi'i* and *Hanafi* schools. MPL means the laws that deal with marriage and succession amongst Muslims.

Due to the constraints of the limited word count, this mini thesis will cover marriage itself, divorce, custody, care, contact and maintenance. MPL is Islamic law that comes from the Qur'an[6] and *Sunnah*[7] which are the two primary sources of Islam. The Qur'an gives rise to the *Sunnah* by saying,

> 'O you who will believe, obey God and the Prophet… and if you are at variance over something, refer it to God and the Messenger.'[8]

The *Sunnah*, in essence, is a record of the Prophet Muhammad's (pbuh) sayings, actions, and tacit approval of the sayings and actions of others.

The third source of Islamic law is *Qiyas*[9] (reasoning by analogy). The jurists use this method to broaden an existing rule to encompass a situation that the Qur'an and Sunnah do not address directly. The fourth source of Islamic law is *Ijma'*[10] (which means consensus). It is used in cases which are not dealt with explicitly in the Qur'an or ahadith. *Ijma'* constitutes the unanimous agreement of a group of jurists of a particular age on a specific issue.

1.2. Significance of the research

Muslims in South Africa constitute a minority religious group that is subject to dual legal systems.[11] Since the advent of South Africa's non-racial constitutional democracy twenty-six years ago, numerous Muslims have remained, or have become, parties to Muslim marriages, which are not recognised as valid marriages in South Africa for many purposes. The views expressed by the courts in the pre-democratic era judgments dealing with Muslim marriages were based on the dominant views at the time as to, inter alia:

- what ought to constitute a so-called 'civilised' religious practice;

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6 The terms '*Al-Qur'an'* and 'the *Qur'an'* are used interchangeably in this thesis. Muslims believe that the Qur'an is the word of *Allah* (God Almighty). Where reference is made to verses from the Qur'an, the first number in the brackets refers to the chapter number of the *Qur'an* and the number after that refers to the verse in the chapter. Muslims consider the *Qur'an* to be the *Ipsissima Verba Dei* ('the precise words of Allah') and the principal source of Islamic law vouchsafed to Muhammad (pbuh) who expounded and interpreted its provisions by way of word and action.

7 '*Sunnah'* means the way of life of Prophet Muhammad (pbuh).

8 Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) (4: 59).

9 Farooq M O 'Analogical reasoning (Qiyas) and the Commodification of Women: Applying Commercial Concepts to Marital Relationship in Islamic Law' *Islam and Civilisational Renewal*, Vol 3. No.1 154.

10 Esposito JL '*Women in Muslim Family Law'* (1982) 7.

11 Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD Thesis, University of Western Cape, 2018) 2.

- which unions ought to be regarded as being an anathema to dominant Christian norms;
- which marriages would not be regarded as acceptable by the majority of white "civilised" people on grounds of morality and religion; and
- which marriages were contrary to public policy[12].

The judiciary displayed an attitude of intolerance towards Muslims practising Islam during the colonial and apartheid eras.[13] In the *Ismail* case in particular, the court regarded the recognition of polygynous unions solemnised under the tenets of the Muslim faith as void on the ground of it being contrary to accepted customs and usages, then regarded as morally binding on all members of society. Recognition of polygynous unions was seen as a regressive step and entirely immoral.[14]

The perpetuation in South Africa of the religious and social marginalisation of Muslims, which in the past coincided strongly with racial discrimination (the majority of Muslims being Black) and their political disempowerment, is shameful, and ought to be a remnant of the past. The significance of this research demonstrates that the failure to recognise MPL not only impairs the fundamental human dignity of Muslims, but perpetuates the unacceptable discrimination exemplified by the cases it discusses.[15]

This thesis provides insight that there is an obligation on the government to recognise MPL and this consequence flows directly from the Constitution.[16]

1.3. Current position with regard to the topic

MPL has been canvassed in books, journal articles, the media and recent cases. Several authors have noted that the failure to recognise MPL has serious practical consequences.[17] They state that the effect is that Muslim women, in particular, are not able to access the legal system for the purposes of entering into, regulating the consequences of, or dissolving their marriages, and of ensuring that the custody,

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12 *Seedat's Executors v The Master* 1917 AD 302; *Kader v Kader* 1972 (3) SA 203 (RA) and *Ismail v Ismail* 1983(1) SA 1006 (AD).

13 *Bronn v Fritz Bronn's Executors and Others* 1860 (3) SA 313; *Mashia Ebrahim v Mahomed Essop* 1905 TS 59; *Seedat's Executors v The Master* 1917 AD 302; *Kader v Kader* 1972 (3) SA 203 (RA) and *Ismail v Ismail* 1983 (1) SA 1006 (AD) are a reflection of the dim views of the past.

14 *Ismail v Ismail* 1983 (1) SA 1006 (AD) at 1017.

15 Amien W 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Right to Equality: A South African Case Study of Muslim Marriages' (2006) *Human Rights Quarterly* Vol 28 (3) 729-754. Cases referred to are: *Bronn v Fritz Bronn's Executors and Others* 1860 (3) SA 313; *Mashia Ebrahim v Mahomed Essop* 1905 TS 59; *Seedat's Executors v The Master* 1917 AD 302; *Kader v Kader* 1972 (3) SA 203 (RA) and *Ismail v Ismail* 1983 (1) SA 1006 (AD).

16 Constitution of the Republic of South Africa, 1996.

17 Amien W (2006) 734.

access and maintenance of their minor children is properly regulated in the event of a divorce.[18]

This state of affairs has been particularly prejudicial to Muslim women. They are often socially vulnerable and, in many instances, the victims of deep patterns of disadvantage. Like other communities, South Africa is still markedly patriarchal, and it is more difficult for women than men to receive income, acquire property and thereby ensure that they and their children are not dependent or homeless if their marriages are dissolved by death or divorce.[19]

The vulnerability of Muslim women is compounded by the unavailability of legal enforcement mechanisms to which the Muslim community can turn to enforce MPL, which governs the dissolution of Muslim marriages through divorce and its consequences. This, in turn, forces the Muslim community to turn to religious and cultural tribunals or decision-making bodies, 'which are largely, if not exclusively controlled by men.'[20]

After divorce, many Muslim women are left with wholly inadequate proprietary claims and are often forced out of their homes.[21]

1.4. Aim of the thesis and research questions

The aim of this thesis is to illustrate that there is a need for the enactment of legislation granting recognition to MPL to be implemented in South Africa and an obligation on the Government to recognise MPL. These consequences flow from the Constitution.[22]

The main research questions are:

- Is there a need for the enactment of legislation recognising MPL?
- Can the problems experienced by Muslims, particularly Muslim women, be remedied by the registration of their marriages as registration would provide these women with access to the courts?

1.5 Literature review

A review of the literature is based on an analysis and examination of accessible books, journals, reviews, reports, and internet resources. This list is not exhaustive and will be confined to a critical assessment and survey of the pertinent and relevant literature available on the topic. In their recent book, Moosa and Dangor add

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18 Amien W 'South Africa's Failure to Legislate on Religious Marriages Leave Women Vulnerable' *The Conversation* (16 June 2020).

19 Shoaib A The Draft Muslim Marriage Bill: Freedom of religion vs Protection of Muslim Women in South Africa (unpublished LLM thesis, University of Witwatersrand, 2018) 3.

20 Shoaib A (2018) 4.

21 South African Law Commission Paper (Project 59) Islamic Marriages and Related Matters Issue Paper 15 (2000) 5.

22 Constitution of the Republic of South Africa, 1996.

substance to the debate and impetus surrounding MPL. They concentrate on the main issue, the recognition of MPL in South Africa, by referring to articles that have been written by various academics and lawyers.[23]

Judge Essa Moosa was of the view that the broader interests of the Muslim community are better served by the recognition of MPL than by the judicial development of the common law to accommodate the recognition of Muslim marriages and the consequences flowing from such marriages on a case-by-case basis.[24]

Motala argues that religion is an area where there are many complexities and uncertainties, which require interpretation by the *Ulama*, and judges are not qualified to make these pronouncements. Thus, the courts cannot and should not develop religions against the backdrop of the values of the Constitution.[25]

Manjoo indicated that the reality in South Africa is that women are generally of a lower socio-economic status than men, hence it is highly unlikely that they will be able to use legal provisions effectively to protect their interests. She was concerned that certain religious laws were biased against women. She argues that religious leaders are being granted greater authority in dispute resolution.[26]

Domingo also believes that MPL should not be in the exclusive hands of the community as it presently is, nor should it be in the exclusive hands of the State as proposed in the Muslim Marriages Bill (MMB). She states that some women regard the MMB as their panacea, whilst other women regard it as poison to their religion.[27]

Moosajee argues that once the MMB is adopted, promulgated, and comes into effect, it will assume a life of its own. It will be beyond the control or influence of any person or institution. Effectively, Muslims will lose control as to how it will be interpreted by the Supreme Court of Appeal (SCA)and the Constitutional Court.[28]

Rautenbach poses the very pertinent question: Must South African courts turn a blind eye to the signals they are receiving only because the issue arises from a religious legal system not recognised by South African law, or do they have a

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23 Dangor S and Moosa N '*Muslim Personal Law in South Africa Evolution and Future Status*' (2019).

24 Moosa E 'Muslim Marriages Bill – Mapping the Ongoing Socio Ethico-Legal Challenges Facing South African Women' in Dangor S and Moosa N *Muslim Personal Law in South Africa Evolution and Future Status* (2019) 396.

25 Motala Z 'The Draft Bill on the Recognition of Muslim Marriage: An Unwise Improvident and Questionable Constitutional Exercise' (November 2004) *The Comparative and International Law Journal of South Africa*, Vol 37, No.3.

26 Manjoo R 'The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights Program at Harvard Law School Working Paper July 2007.

27 Domingo W 'The Case of Recognition of Muslim Personal Law in South Africa: Colonialism, Apartheid and Constitutional Democracy' in Possami A *The Sociology of Sharia: Case Studies from Around the World* (2013) 181.

28 Moosajee MA E 'The Muslim Marriages Bill – a legal Quagmire' in Dangor S and Moosa N *Muslim Personal Law in South Africa Evolution and Future Status* (2019) 228.

responsibility to extend the protection of law to everybody living in South Africa? She is also of the view that Parliament has a duty to ensure that there is statute giving protection to MPL. This will assist the courts in that they will have something to work with rather than repeatedly create law, which is not their primary function.[29]

Abrahams-Fayker, who had first-hand experience at the Women's Legal Centre (WLC) in Cape Town, states that although the courts have made significant progress in the recognition of MPL in South Africa, one cannot rely on them to provide relief to the majority of Muslim women who do not have the financial resources, education, and time to turn to the courts for relief. Civil marriages do not make provision for polygynous marriages. It is imperative that legislation is implemented which can give Muslim women the protection of the courts and ensure that religious principles will be respected. She also contends that Muslim women are at the mercy of religious scholars whose decisions are skewed in favour of men.[30]

According to Amien of the Law, Race and Gender Project at the University of Cape Town, the current *status quo* in the Muslim community militates against women. She notes that religious scholars prefer Islamic courts, and if this is not feasible, secular judges assisted by Muslim assessors who are Islamic law experts would be acceptable. Her concern is that assessors may be conservative. She is also of the view that if the regulation of Muslim marriages is left to the religious communities, it would leave the door open for gendered discriminatory religious rules and practices to be maintained.[31]

Shoaib argues that legislating matters of religion will open the floodgates of litigation where the court, in its attempt to reconcile Shari'ah with the Constitution, will mutilate it to such an extent that it will no longer resemble a sacred law. She argues that the formalistic approach is contrary to the objectives of protecting women and a more flexible approach is required, one that takes into account the circumstances of each case and moulds solutions which are effective in furthering the ultimate objective. Her view is that the case law has been developed sufficiently and therefore regulation is not necessary. South Africa provides enough protection in the form of law.[32]

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29 Rautenbach C 'Some Comments on the Current and Future Status of Muslim Personal Law In South Africa', available at: *http://www.researchgate.net/publication/2663397_some_comments the_current_and_future_status-of_Muslim_Personal_Law in_South_Africa* (accessed 8 October 2020).

30 Abrahams Fayker H, 'South African Engagement with Muslim Personal Law': The Women's Legal Centre, Cape Town, available at *http://awdlibrary.org/handle/123456789/436* (accessed 8 October 2020).

31 Amien W 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Right to Equality: A South African Case Study of Muslim Marriages' (2006) *Human Rights Quarterly* Vol 28 (3) 729 – 754.

32 Shoaib A (2018) 5.

Moosa, on the other hand, believes that it remains to be seen to what extent the courts will continue to provide relief. He believes that the courts might well reach a point where they will say that it is the duty of the legislature to provide guidance.[33]

Judge Navsa indicates that there is not a long way to go before the structural forces that prevent women from claiming what is rightfully theirs are overcome. He stresses that justice must be ensured and schisms n any part of society must be prevented.[34]

This thesis looks at the urgent need for the recognition of MPL in a way that conforms to the foundational values of the Constitution. In the absence of legislative guidelines regarding Muslim marriages and the consequences that flow from them, South African courts have been progressive by continuously making orders that give effect to some of the obligations arising from Muslim marriages. For example, the Constitutional court in the case of *Daniels v Campbell NO and others*[35] declared section 1 of the Intestate Succession Act 81 of 1987 and section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 unconstitutional and invalid as they excluded a husband and wife married in accordance with Muslim rites in a *de facto* monogamous union. Prior to this, a wife married in accordance with Muslim rites could neither inherit from her deceased spouse's intestate estate nor lay claim to reasonable maintenance from such estate[36].

In the case of *Harnaker[37],* the court was called upon to interpret section 2C (1) of the Wills Act[38] in the context of polygynous marriages.

In the case of *Ryland v Edros,*[39] it was decided that as a Muslim marriage is a contract from which certain proprietary obligations flow, this was reason enough to impose some of the consequences of a civil marriage on a Muslim marriage. The court recognised the contractual consequences of the marriage contract between a Muslim husband and wife.

Furthermore, in *Amod v Multilateral Motor Vehicle Accident Fund,[40]* the court held that a spouse in a monogamous Muslim marriage may be a dependent and, accordingly, the wife was entitled to claim loss of support. The claim of a surviving spouse was extended to spouses married in terms of unrecognised Islamic law.

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33 Moosa E 'Prospects for Muslim Law in South Africa : A History and Recent Developments' *Yearbook of Islamic and Middle Eastern Law* 3 (2020) 134.

34 Navsa MS 'Muslim Personal Law – An Update' in Dangor S and Moosa N *Muslim Personal Law in South Africa – Evolution and Future Status* (2019) 44.

35 *Daniels v Campbell NO and Others* 2004 (5) SA 331 (C).

36 *Daniels v Campbell NO and Others* 2004 (5) SA 331 (C).

37 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (CC).

38 S2C(1) of the Wills Act 7 of 1953 states that '[i]f any descendant or testator excluding a minor or a mentally ill descendent, who, together with the surviving spouse of the testator, is entitled to a benefit of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.

39 Ryland v Edros 1997 (2) SA 690 (CC) 717.

40 *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 SCA para 30.

In the *Women's Legal Centre Trust (WLCT) and others v The President of RSA and Others,*[41] the SCA dealt with the issue of whether there is a constitutional obligation on the State to enact legislation recognising Muslim marriages and, if so, in the event that a breach of constitutional obligation is established, what remedy is appropriate. UUCSA supported the application brought by the WLCT. It agreed that there were rights violations, especially the right to dignity, and that the State had a duty to protect, promote, respect and fulfil these rights. UUCSA also contended that piecemeal litigation is undesirable as it may lead to uncertainty and fragmented jurisprudence which is contrary to the rule of law.

1.6 Research Methodology

This study adopts a flexible approach which is primarily based on secondary research. The sources and materials consist mainly of books, journal articles and online material. The analysis is based on a number of key research methodologies. The main religious sources are the *Qur'an* and *Sunnah*. The main secular sources include national legislation, international conventions, and case law. As a Magistrate at the Wynberg Magistrates Court, the author has experience of many of the problems faced by Muslim women as a result of the state's failure to legalise MPL.

1.7 Chapter breakdown

The first chapter introduces the thesis in broad terms as well as the sources of MPL. Chapter two charts and navigates the history of the Muslim community in South Africa and analyses the status of MPL during the Dutch period. Muslims have always practiced their religion but despite having been granted formal freedom to practice their religion since 1804, they could not give effect to their personal laws.[42]

The primary purpose of chapter three is to explore and unearth MPL, specifically the law relating to marriage, divorce, custody, and maintenance. The holy Prophet Muhammad (pbuh) declared that marriage was one of the most sacred practices and added, as reported by Anas (RA),

> 'Whoever dislikes my way of life is not of me. When a man has married he has made his religion half perfect, then let him fear God for the remaining half.'[43]

Chapter four looks at the Constitution, specifically the provisions of the Bill of Rights as it pertains to the law of marriage in South Africa. It considers how the Constitution[44] recognises the diverse groups that live in South Africa and aims to

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41 *WLC Trust and Others v The President of South Africa and Others* 2018 (6) SA 598 (WCC), Case no. 612/19 (2020) ZASCA 177 (18 December 2020).

42 Moosa N The Interim and Final Constitutions and Muslim Personal Law: Implication for South African Muslim Women *STELL LR* (1998) Vol 2 199 -200.

43 Muslim I *Sahih Muslim Kitab Al Nikah (Book of Marriage)* Vol 8 (1980) 2.

44 Constitution of the Republic of South Africa, 1996.

foster a society that is tolerant of diversity and does not favour one religion over another.

Chapter five looks at South Africa's international law obligations as a signatory to certain conventions and charters, for example, South Africa was a signatory to the Women's Convention CEDAW[45] in 1993. Section 39(1) b of the Constitution requests that a court of law must take cognisance of all international law applicable to the protection of human rights when interpreting the provisions of the Bill of Rights.

Chapter six examines the South African Law Reform Commission (SALRC) Project, the Muslim Marriages Bill (MMB), and the Imam Project. This chapter also looks at the proponents for and against the Bill as well as the reasons for the different stances. It considers the rationale for introducing the Imam Project, which entailed the supply of Muslim marriage officers to give Muslim marriages legal status. The actual goal was to streamline the process so that a *Nikah* and a civil marriage could take place at the same time. The chapter outlines the problems with this proposition.

Chapter seven looks at MPL through the courts. It examines Muslim marriages from the time they were viewed as potentially polygynous[46] through to the most recent case[47] where the court declared that the President and Cabinet have failed to fulfil the constitutional obligation to respect, promote and fulfil the rights of the Constitution.

Chapter eight looks at South African legislation and reviews the case law before and after the enactment of the Constitution.

Chapter nine highlights the Single Marriage Statute and Omnibus Bill and concludes with recommendations and an analysis of the conclusions reached in the preceding chapters.

45 The Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted 18 December 1979, G.A. Res.34/180, U.N. Doc A/34/46 (1980).

46 *Ismail v Ismail* 1983 SA 1006 (A).

47 *President of the RSA and Another v WLCT and Others* (612/19) [2020] ZASCA 177 (18 December 2020).

CHAPTER TWO

HISTORY OF THE MUSLIM COMMUNITY IN SOUTH AFRICA

2.1 Introduction

South Africa was subject to approximately 350 years of colonialism.[48] During this time apartheid dominated the South African legal system.[49] The Cape was colonised by Dutch settlers on 6 April 1652. It remained under Dutch rule until 1795 when it fell to British occupation. It reverted to Dutch rule in 1803 and back to British occupation in 1806.[50]

The Muslim contribution is aptly captured in the following words of former President Nelson Mandela:

> 'Our country can proudly claim Muslims as brothers and sisters, compatriots, freedom fighters and leaders, revered by our nation. They have written their names on the roll of honour with blood, sweat and tears.'[51]

2.2. Arrival of the first Muslims

The religion of Islam was introduced into South Africa in the seventeenth century AD.[52]

The first Muslim is recorded to have stepped onto the South African shore in 1654. A group of Muslims came to the shores of South Africa at the Cape of Storms (Cape Town) as political exiles on 2 April 1694 under the leadership of Sheikh Yusuf of Macassar. One of the most popular leaders of the Muslims in the Cape was known as Tuan Guru[53] who was exiled to Cape Town in 1780. Upon his release, he formed

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48 South African Charter on Human and Peoples Rights – Chapter 2 'Introduction to the SA Legal System' available at http//www.justice.gov.za/policy/ accessed on 28th May 2021.

49 Apartheid was a political and social system in South Africa during the era of White minority rule. It enforced racial discrimination against non-Whites, mainly focused on skin colour and facial features. A distinction was drawn between South African common law, the 'law of the white people, and the traditional African law which was referred to as 'native law'. This 'native law' was supposed to represent customary law (unwritten) of the indigenous people, Colonial and apartheid rule not only marginalized indigenous or customary law but in the process of interpretation, legislation was given a slant which facilitated colonial and apartheid rule.

50 Abduroaf M *The Impact of South African Law on the Islamic Law of Succession* (unpublished LLD thesis, University of the Western Cape 2018) 63.

51 Address by President Nelson Mandela at Intercultural Celebration in Johannesburg on 30 January 1998 available at :*www.mandela.gov.za.>1998>980130_eid* (accessed on 1 December 2020).

52 Abduroaf M *The Impact of South African Law on Islamic Law of Succession* (unpublished LLD Thesis, University of the Western Cape, 2018) 3.

53 Imam Abdullah ibn Kadi (Qadri) Abdus Salaam, known as Tuan Guru, the son of a Qadi. Born in 1712, he was a Prince from Tidore in the Ternate Islands of Indonesia.

part of the free black community.[54] He was instrumental in consolidating the Muslim community in the Cape.[55]

2.3. Muslim Family Law during Batavian Period

After 1795, the Batavians made a number of legislative reforms that shaped the future of the colony and that of the Muslims at the Cape. Crucial concessions were made to the Muslim community, *inter alia,* Muslims were granted permission to erect a place of worship[56] and, on 25th October 1805, the first land grant was made available for a Muslim cemetery.[57] Muslims were allowed to contract a marriage according to Islamic law.[58]

The law required that the marriage be publicly announced. The governor at the time, De Mist, made some changes which dispensed with the obligation to make the cumbersome journey to Cape Town as residents of Graaff-Reinet and Stellenbosch could appear before a Magistrate and two assessors of the district in which the bride had resided in the three previous months. Imams continued to conduct marriages according to Islamic law.[59]

2.4. The Legal Status of MPL in the Nineteenth and Twentieth Centuries

By 1806, Islam had become well established in the Cape and was an increasingly observable phenomenon. In the course of the nineteenth and twentieth centuries, the legal status of Muslim marriages was challenged by the courts.[60] Muslim marriages were conducted by recognised officials, but the main challenges were the issue of polygyny and repudiation of marriage. From 1910, there was no statutory provision preventing Muslims from contracting marriages according to Islamic rites or stating that Muslim marriages were invalid. It was the courts rather than the legislature that challenged the validity of Muslim marriages.[61]

54 'Free blacks' meant all free persons wholly or partially of African (but not Khoikhoi or Asian descent).

55 Tayob AK *Islamic Resurgence in South Africa: The Muslim Youth Movement* (1995) 39-77.

56 Tuan Guru converted a warehouse, attached to Coridons House, and used it as a madrasah and later converted it to a masjid which is now known as Auwal Masjid, the first Mosque to be established in South Africa. See Tayob AK (1995) 44.

57 Tayob AK *Islamic Resurgence in South Africa: The Muslim Youth Movement* (1995).

58 *Ryland v Edros* 1997 (2) SA 690 (C) para 10.

59 Bradlow FR and Caines M *Early Cape Muslims: Study of the Mosques, Genealogy and Origins* (1978) 19.

60 Tayob AK (1995) 49.

61 Allie S 'A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa from the Eighteenth to the Twentieth Century' in Dangor S and Moosa N *Muslim Personal Law in South Africa Evolution and Future Status* (2019) 38.

Towards the end of the nineteenth century, the courts began to consider the union between Muslims as unsanctioned, according to the tenets of the Roman Dutch legal system and prevalent English ideas.[62]

The prevalent English idea was of marriage as a monogamous union.[63]

Similar views were also later advanced by South African courts, whose attitudes were uncompromising towards Muslim marriages.[64]

Throughout the twentieth century, the courts objected strongly to the recognition of Muslim marriages, primarily on grounds of their admission of polygyny and repudiation. Like indigenous African law, which allows a husband to enter into subsequent marriages during the subsistence of the first one, MPL similarly makes provision for polygyny.[65]

The question of polygynous marriages was also dealt with at considerable length in the appeal division of the South African in the case of *Ismail v Ismail* in 1983. Polygyny was held to be a bar to the recognition of Muslim marriages.

Any Muslim marriage contracted in or outside the Republic of South Africa was invalid and the status of married person was not conferred upon parties of such marriages.[66]

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62 Allie S (2019) 39. See also the leading case, *Seedat's Executors v The Master Natal*,1917 AD at 302 where Justice Innes said, 'But there are exceptions to the widely accepted rule by which foreign courts recognise the validity of a marriage in accordance with local law. And one of them is based upon the principle that no country is under an obligation on grounds of international comity to recognise a legal relation which is repugnant to the moral principles of its people. Polygamy vitally affects the nature of the most important relationship into which human beings enter. It is disapproved of by the majority of civilised peoples, on grounds of morality and religion, and the courts of a country which forbid it are not justified in recognising a polygamous union as a valid marriage. By a polygamous union, I mean one the nature of which is consistent with the husband marrying another wife during its continuance. Whether he exercises his privilege or not is beside the question. The fact that the man and woman contract on the basis that he shall be at liberty to do so differentiates their relationship from that which we give the name marriage, and stamps their union as polygamous.'

63 This was the opinion propounded by Lord Penzance in the landmark case of *Hyde v Hyde and Woodmansee*, (L.R) IP&D 130 1866. where he concluded marriage to be, 'the voluntary union for life of one man and a woman to the exclusion of all others; persons joined in the union not complying with the requirement could not be considered husband and wife…and so such persons were not entitled to the remedies, the adjudication, or the relief provided by such law.'

64 The court in the case of *Mashia Ebrahim v Mahomed Esso*p (1905 TS 50), 'With us marriage is the union of one man with one woman to the exclusion, while it lasts, of all others; and no union would be regarded as a marriage in this country even though it were called, and might be recognised as, marriage elsewhere, if it were allowable for the parties to legally marry a second time during its existence.'

65 Allie S 'A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa from the Eighteenth to the Twentieth Century' in Dangor S and Moosa N *Muslim Personal Law in South Africa Evolution and Future Status* (2019) 39. Polygyny is the practice of having more than one wife. Polygamy is the practice of having more than one spouse. Polyandry is the practice of having more than one husband.

66 Allie S (2019) 40.

Trengove J denounced the inequitable status and position of a wife of such a union in the case of *Ismail v Ismail*[67] as follows,

> 'In view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygynous unions solemnised under the tenets of the Muslim faith may even be regarded as a retrograde step; *ex facie* the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate the marriage unilaterally by simply issuing three talaaq, without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the Moulana that her husband has been guilty of misconduct. While this may be consistent with the tenets of the Muslim faith, it is entirely foreign to our notion of a conjugal relationship.'[68]

2.5. Conclusion

The non-recognition of Muslim marriages had and has serious consequences with far-reaching implications for Muslims who chose to conclude their marriage in terms of Muslim rites. While they may regard themselves as married according to the prescriptions of their own religious law, the law of the land regards them as unmarried and party to a union classified as cohabitation.[69]

Further consequences of the non-recognition of Muslim marriages were as follows:

- The children born of such a union were deemed to be illegitimate, and as result the natural father could not claim custody of the child as a right;[70]
- There was no reciprocal duty of support and a 'common law' wife had no claim to maintenance;[71]
- In the event of the wrongful death of the husband caused by a third party, the common law widow was not entitled to claim damages for loss of support from the third party;[72]

67 *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1017.

68 *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1017.

69 Allie S (2019) 41.

70 *Docrat v Bhayat* (1932) TPD 125. The position has since changed, and a father may apply to court for access, custody, and guardianship. The court will grant such orders if it is satisfied that they are in the best interests of the child.

71 In the case of *Khan V Khan* 2005(2) SA 272 (T) it was found that there was a responsibility on a husband to maintain his ex-wife to whom he was married in accordance with Muslim rites. It was held that the common law duty of support was a flexible concept developed and expanded over time by the Courts to cover a wide range of relationships.

72 The case of *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 subsequently gave recognition to a contractual right to support stemming from a marriage in terms of Islamic law for the purposes of a dependent's action.

- The South African law of succession also operated to the detriment of those whose marriages were solemnised according to Islamic law only;[73]
- As a result of the non- compliance with the formalities of the Marriage Act 25 of 1961, the wife and children born of such marriages were excluded from protection if the husband failed to draft an Islamic will during his lifetime;[74]

[73] This position also changed as the Constitutional Court in the case of *Daniels v Campbell NO and Others* 2004 (5) SA 331 (C) held that the word 'spouse' as used in the Intestate Succession Act 81 of 1987 includes the surviving partner to a monogamous Muslim marriage and the word 'survivor' as used in the Maintenance of Surviving Spouse Act 27 of 1990 includes the surviving partner to a monogamous Muslim marriage. The case of *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC) extended the application of the Intestate Succession Act and Maintenance of Surviving Spouses Act to spouses in *de facto* polygynous marriages.

[74] In the recent judgment of the SCA in The President of the RSA and Others v WLCT and Others (612/19) ZASCA (2020) 177 the Marriage Act 25 of 1961 and the Divorce Act 70 of 1979 were declared inconsistent with sections of the constitution.

CHAPTER THREE

MUSLIM PERSONAL LAW (MPL)

3.1. Introduction

MPL consists of Islamic family law pertaining to marriage, divorce, inheritance, polygyny, custody, contact and care and guardianship. MPL is religiously based private law. It has its origin in the *Qur'an* which is the primary source of Islamic law. Due to the word limit of this thesis, I will only discuss marriage, divorce, custody and maintenance of *Sunni* Muslims who follow the *Shafi'i* and *Hanafi* schools of law. There is a very small minority of *Shi'a* Muslims in South Africa.[75]

3.2. Marriage

Marriage has a special position in different cultures and religions. Despite differences in the limits and conditions of marriage, religions have many similarities in regard to the issue of marriage. It is a natural human vocation which enables one to attain peace and tranquillity.[76] From the viewpoint of sociologists, marriage and family formation fulfil many functions such as reproduction, socialization, protection, emotional support, and regulation of sexual behaviour.

In Islam, marriage and family are the most important social institutions, Islam considers marriage to be a 'solemn covenant'[77] and one of God's 'signs. Islam sees marriage as a means of preserving the social fabric of society. Based on Quranic verses, Muslim scholars consider marriage to be a natural act with two goals, one is achieving peace and tranquillity and the other is continuation of the human race.[78]

The holy Prophet Muhammad (pbuh) declared that marriage was one of the most sacred practices and added:

> 'Whoever dislikes my way of life is not of me.'[79]

A tradition reported by Anas (RA) says,

> 'When a man has married he has made his religion half perfect, then let him fear God for the remaining half.'[80]

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75 Essack F 'Understanding the Shia-Sunni divide in Islam' *Cape Argus* 21 May 2018 2.

76 Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) (4:21).

77 Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) (4:21).

78 Ali AY The Holy Qur'an – *English Translation of the Meanings and Commentary* (1934) (4:21).

79 Bukhari MI Ahmad AD and Ali M *English Translation of Sahih Al Bukhari* (1956) 144.

80 Siddiqui MM *Women in Islam* (1986) 32.

The underlying idea in the *Qur'an* is that marriage safeguards and protects chastity as it helps men and women to lead a life of chastity. Marriage is central to the growth and stability of the basic unit of society, the family.[81]

Marriage (n*ikah*) in Islam is recognised as a highly religious sacred covenant.[82] A Muslim man or woman who is of sound mind and who has attained puberty is considered to have the legal capacity to contract a valid marriage. Essential to the marriage is the offer of one contracting party and the acceptance of the other, occurring at the same meeting before two witnesses.[83]

These rights are justiciable in a court of law. It is open both to the husband and the wife to enter into an agreement prior to marriage on matters which they consider important for the regulation of their future relations. Such agreements are part of the marriage contract and judiciable in courts of law provided that they are not repugnant to the basic rights and obligations of husband and wife. A wife in Islam retains possession of her full legal personality.[84] Marriage is considered as a contract in Islam as Islamic marriages require acceptance of groom, bride and consent of the guardian ('*wali*') of the bride. The *wali* of the bride is normally a male relative of the bride, preferably her father. The bride is normally present at the signing of the marriage contract. If the conditions are met and the contract agreed upon, an Islamic marriage or wedding can take place. The marriage contract is also often signed by the bride. The consent of the bride is mandatory.

Under MPL, a woman enjoys the right to earn, acquire and inherit property, as well as the right of ownership over her goods and wealth, independent of any man. She has the unqualified right to enter into any contract of her own free will and to acquire, possess and own property, both movable and immovable, in her own name. She does not forgo these rights by reason of marriage. As a married woman she retains the full capacity to buy, sell, mortgage or hire, and to execute any legal or commercial transaction. The notion that a married woman ought to be assisted by her husband in these matters is unknown to Islam and nowhere is it suggested that she is subject to any form of legal disability simply because she is a woman or because she is married. A married woman even retains her maiden surname.

To safeguard the economic position of women after marriage, Islam has made it obligatory on the husband to pay her a reasonable amount as dower ('*mahr*').[85] The

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81 Mutahhari M *The Rights of Women in Islam* (1985) 53.

82 Esposito JL *Women in Muslim Family Law* (2001) 19.

83 Esposito JL (2001)19.

84 Esposito JL (2001) 16.

85 *Mahr* (dower) is payable by the husband to the wife, and it is not a consideration for the wife giving her consent to the marriage. The amount of the *mahr* and time of payment, if not paid at the time of the marriage, are matters for negotiation and agreement between the parties. However, an unpaid *mahr* ranks as a debt and on death of the husband, the wife is entitled, along with the creditors, to have it settled out of his estate.

sum or value of the dower is not prescribed by law, rather it may be decided by the parties, or it may be determined via the operation of Islamic law, with due regard to the social status of the parties. Where the amount of *mahr* has not been specified, it will be determined according to the circumstances of the husband and the social standing of the wife. In terms of Islamic jurisprudence, this is referred to as customary dower (unspecified dowry), in other words, the amount of dower that is customarily paid for the women in her family. The amount to be fixed as dower depends on the agreement between the parties and the object is to strengthen the financial position of the wife, so that she is not prevented, for lack of money, from defending her rights. Despite the fact that all major schools of jurisprudence agree that there must be agreement in respect of the dowry, the absence of agreement does not affect the validity of the marriage.[86]

Islam permits polygyny[87] but not polyandry. However, since the *Qur'an* has made it conditional on a just and equal treatment of wives, it is open to the state to prescribe under what conditions it will be allowed.[88]

3.3. Divorce

A marriage is dissolved by death or divorce. The Arabic word for divorce is '*talaq'* which means freeing or undoing the knot. *Talaq* signifies the dissolution of marriage by the pronouncement of certain words.[89] There are three kinds of divorce.

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86 Doi AR *Women in Shariah* (1989).

87 In Arabia, before the advent of Islam, polygyny was unlimited. Islam could not have abolished such a deep-rooted custom with its far-reaching economic effects in a sudden stroke. The Qur'an limited the number of wives to four under the strict condition of treating wives justly. It should not be understood that the Qur'an is exhorting believers to practice polygyny or that polygyny is ideal. The issue of polygyny always comes up. There are places and times for polygyny. The Qur'an states quite clearly, 'If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four, but if you fear that you shall not be able to deal justly with them, then only one.' (4:3) From the verse, the issue of polygyny cannot be understood apart from community obligations towards orphans and widows. Polygyny in Islam is a matter of mutual consent between the parties. It is clear that the permission of polygyny given by the Qur'an arose out of particular circumstances. Since these circumstances are likely to recur now and then in the life of the Muslim community and since there will always be individual cases where polygyny may become necessary in order to avoid more serious and social evils, it is not right to prohibit polygyny by legislation. See also Moosa N 'Polygynous Marriages in South Africa: Their Potential Impact on the Incidence of Hiv/Aids' (2009) *PELJ* 12 3.

88 Moosa N Polygynous Marriages in South Africa: Their Potential Impact on the Incidence of Hiv/Aids' (2009) *PELJ* 12 3.

89 Muslim I (1980) 3. *Talaq* is effected when a husband utters the word '*talaq'* or its equivalent in a language other than Arabic (for example, 'I repudiate you,' in English. When a marriage terminates through *talaq,* a husband is required to pay any outstanding *mahr* to the wife. *Talaq* is the exclusive preserve of the husband to unilaterally repudiate his wife without requiring grounds of repudiation. The *talaq* need not be given in the wife's presence or in the presence of witnesses or with the wife's knowledge or consent. One or two utterances of *talaq*

'*Talaq Ahsan'*, '*Talaq Hasan'* and '*Talaq Bid'a'*. '*Talaq Ahsan'* or most laudable divorce is where the husband repudiates his wife by making one pronouncement within the wife's term of purity (when the wife is not passing through her menses) and then she is left to observe her '*Iddah'*.[90]

'*Talaq Hasan'* or laudable divorce is where the husband repudiates an enjoyed wife by three pronouncements of divorce made during the wife's state of ritual purity with menstrual periods intervening between them. '*Talaq Bid'a'* or irregular divorce is where the husband repudiates his wife by three divorces at once. This is an irregular divorce which is against the spirit of *Sharia* and such a person who follows this course is an offender in the eyes of MPL.[91]

The right of a woman to demand the dissolution of marriage is known as '*Khul'* (meaning literally the putting off or taking off a thing). This kind of facility provides that the wife may secure a *Talaq* from her husband by returning the mahr in full or in part.[92]

If the husband is at fault, women can also initiate a judicial divorce through '*Faskh',*[93] '*Tafriq'*[94] or '*Ta'liq.'*[95] In Muslim countries, they present their case and prove certain grounds before a court.

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renders the marriage only tentatively terminated. This means that if the husband chooses to reconcile with his wife during the *iddah* (waiting period terminating on the completion of three periods of purity between menses observed by the wife followed by the utterance of '*talaq'*), the *talaq* is revoked and the marriage remains intact. The *talaq* becomes irrevocable if, after the completion of the *iddah*, the parties fail to reconcile or after utterance of the third *talaq*. After the first and second irrevocable *talaq*, the parties must remarry before they can reconcile. However, after the third *talaq*, the wife must first undergo '*hilalah'* before the parties remarry. '*Hilalah'* refers to an intervening marriage between the ex-wife and another man, which is consummated. This marriage must be dissolved by death or divorce before the woman and her previous husband may marry each other again.

90 '*Iddah'* (Arabic meaning 'period of waiting') is a period a woman must observe after a divorce or the death of her husband, during which she may not marry another man. During i*ddah* a woman must remain in seclusion in order to ascertain whether she is pregnant by her husband, and thus avoid any confusion of parentage. It is also a period for possible reconciliation and required payment of maintenance. If a marriage was not consummated, i*ddah* need not be observed, except in the case of a husband's death, since consummation may be subject of conflicting claims of paternity, inheritance, and maintenance. If the marriage is consummated before it is dissolved by divorce, the duration of the *iddah* is three periods of purity between menses. If the woman is pregnant, the *iddah* continues until her delivery. If the marriage is terminated by the husband's death, the *iddah* is four months and ten days from the death of the husband. If at the conclusion of this period, the widow is pregnant, her *iddah* continues until delivery of the child. See Esposito JL (1983) 21.

91 Muslim I, *Sahih Muslim Kitab Al Talaaq (Book of Divorce)* (1980) Vol 3.

92 Muslim I (1980) 754.

93 '*Faskh'* is the dissolution of a marriage by an Islamic court or Council where the wife wants to proceed with divorce, but the husband unreasonably refuses to grant the talaq. At this stage any outstanding *mahr* must be paid to the wife. Muslim I (1980) 754.

94 '*Tafriq'* is a divorce for certain allowable reasons, such as abuse or abandonment. This divorce is granted by a '*Qadi'* (religious judge). If a *tafriq* is granted, the marriage is dissolved, and the husband is obligated to pay the wife any deferred *mahr*. Muslim I (1980) 755.

95 '*Ta'liq'* is a divorce due to breach of any stipulation by the husband which is pronounced during the marriage solemnisation. Muslim I (1980) 756.

The rights and responsibilities consequent upon marriage are of such importance to the welfare of humanity that a high degree of sanctity is attached to it. Islam recognises the necessity of divorce in cases where marriages are poisoned to such a degree that peaceful home life is impossible.[96]

The *Qur'an* states,

> 'When you divorce women and they fulfil the term of their *iddah*, either take them back on equitable terms or set them free on equitable terms: but do not take them back to injure them, (or) to take advantage. If anyone does that, he wrongs his own soul.'[97]

Thus, the *Qur'an* encourages a divorced couple to treat each other amicably, and to sever ties neatly and firmly. Prophet Muhammad (pbuh) is reported to have said, 'divorce is the most hateful of all permitted acts to God'.[98] The *Qur'an* gives advice to the spouses whose partners are in the wrong, in an effort to save the marriage, and parties may separate peacefully and amicably if all reasonable measures fail.[99]

3.4. Custody

Children often bear the most painful consequences in the event of a divorce. Islamic law takes their needs into account and makes sure they are cared for.[100] The financial support of any children during marriage and after divorce rests solely with the father.[101]

MPL stipulates that physical custody of children must go to a Muslim who is in good physical and mental health and is in the best position to meet the children's needs.[102] Some jurists are of the view that custody is awarded to the mother if the child is under a certain age, and to the father if the child is older. Others allow older children to express a preference. Generally, it is recognised that young children and girls are best cared for by their mother. Decisions of the companions of the Prophet (pbuh) show that the mother has the priority right to custody of the child during its infancy.[103]

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96 Muslim I, *Sahih Muslim-Kitab Al Talaaq (The Book of Marriage)* (1980) Vol 8.

97 Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) (2:231).

98 Gabru N 'Dilemma of Muslim Women regarding Divorce in South Africa' (2004) *PELJ* Vol. 7. No.2.

99 Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) (2:241).

100 Mahdi Z and Malek N 'The Concept of Custody in Islamic Law' (2008) Arab Law Quarterly 13, 158.

101 Mahdi Z and Malek N (2008) 158.

102 Mahdi Z and Malek N (2008) 158.

103 Rafiq A 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)' *International Journal of Humanities and Social Science (*March 2014) Vol 4 No 5. Zayd bin Ishaq bin Jariyah narrated that once a child custody case was brought to Abu Bakr (RA) who decided in favour of the mother and then said I have heard the Holy Prophet (pbuh) say 'Do not separate a mother from her child'.

In the *Hanafi* school, the right to act as custodian is transferred from the mother to the mother's mother, then to the father's mother, then to the full sisters, then to the uterine sisters, then to the paternal sisters, then to the full sisters and so on till it reaches maternal and paternal aunts. The reasoning for this is that, in early years, the mother and other female relatives are more suitable for raising the young child (regardless of sex) with love, mercy, attention and motherly care.[104]

The apostasy of a man or a woman terminates his or her right of custody.[105] The period of custody for a boy is 7 years and for a girl is 9 years. The male child after reaching the age of understanding (7) is in need of education and acquiring masculine traits, which is the reason for him being transferred to the father. The female child, after reaching the age of understanding, is in need of being inculcated with female traits which she receives by living with her mother. After reaching puberty, she is in need of protection which the father offers. After transferral of custody from the mother to the father, the boy remains in the custody of the father until puberty, at which point, if he is mature and wise, he is free to choose with whom to live, or to live on his own. As regards the girl, custody remains with the father until she marries.[106]

According to the *Shafi'i* school of jurisprudence custody is transferred from the mother to the mother's mother, or her female ascendants, on condition that she inherits. It then goes to the father, then to his mother, or her female ascendants, on condition that she inherits, then to the nearest among the female relatives, and then to the nearest among the male relatives. A non-Muslim has no right to custody of a Muslim. There is no definite period of custody, the child shall remain with the mother until he or she is able to choose between the two parents. If the child does not choose then custody will lie with the mother.[107]

The mother is responsible for the upbringing, taking care of, protecting, cleaning, feeding, and clothing of the child. The father as the natural guardian of the child has the duty and responsibility to determine major decisions relating to the child's life such as discipline, education, religious upbringing, medical consent, consent to marriage and future career. All the expenses which relate to the upbringing of the child such as maintenance, accommodation, education, and other expenses also lie with the father. The reasoning is that it is the father's obligation to provide for the child's mother thus a greater reason for him to support his child. A child is attributed to his or her father and is part of him and thus the financial obligation is not waived

104 Mahdi Z and Malek N (2008) 158.
105 Rafiq A (2014) 270
106 Rafiq A (2014) 270
107 Al-Islam.org.2020, Custody (Al Hidanah). available at : *https://www.al-islam.org/five-schools-islamic-law-Sheik-muhammad-jawad-mughniyya/custody-al-hidanah* (accessed 23 December 2020).

except on account of financial disability. The father is also responsible for the education of the child by sending the child to school.[108]

In addition to this, the father has the responsibility to supervise the general upbringing of the child while it is staying with the mother or other female custodians.[109]

Custody is based on the best interests of the child and the judge is entitled to decide that the child is to remain in the custody of its mother if he sees that this is in its best interests.[110]

3.5. Maintenance

Maintenance, which includes food, lodging, clothing, and health care, is another important obligation of the husband. Maintenance is the husband's primary obligation, regardless of the wife's private means.[111]

Women have full property rights in Islam. Although both parties inherit from each other, neither acquires an interest in the property of a spouse because of the marriage.[112]

One of the most essential factors of a happy marriage is the right of free choice by either party. Islam has given this right to both men and women.

The *Qur'an* states,

> 'Wealth and children are the allurements of the life of this world.'[113]

The jurists are unanimous that children are amongst those entitled to maintenance under Islamic law. It is established that a father is primarily responsible to provide maintenance for his children. As regards to the extent of the duty to maintain, the jurists differ.[114]

The *Hanafi* jurists assert that the father is legally responsible to provide maintenance to his children as long as he is able to earn a living. According to their view, whether he is well off or not is not a condition for the liability of the father. This is because maintenance of his needy and incapable children is tantamount to saving his own life since his children are part of him. If he is a poor person, but is able to work, the responsibility for maintenance will not transfer to other family members. In a situation where there is a well-off mother or paternal grandfather, the maintenance may be

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108 Mahdi Z and Malek N (2008) 158.
109 Mahdi Z and Malek N (2008) 159.
110 Rafiq A (2014) 270.
111 Ibrahim HJI and Azizah M 'The Child's Right to Maintenance' (2011) *Arab Law Quarterly* Vol 25.
112 Islam MS Uddin MJ and Hoque K 'Inheritance Rights of Women in Islamic Law: An assessment' (2013) *International Journal of Islamic Thoughts* Vol 2.
113 Ali AY *The Holy Qur'an – English Translation and Commentary* (1934) (18:46).
114 Ibrahim HJI and Azizah M (2011) 420.

temporarily provided by them and it is considered to be a debt to be paid by the father when he is able to do so. The responsibility of the father to provide maintenance to his children will not cease unless he is unable to work due to chronic disease, or mental or physical disability. The duty to maintain his children terminates upon his death. The majority of the jurists (*Hanafi* and *Shafi'i*) are of the view that the responsibility of maintaining children of a deceased father transmits to other family members.[115]

There is no consensus among the jurists on the duration of entitlement of children to maintenance. The *Hanafi* scholars differentiate between boys and girls. In the case of girls, they agree that their entitlement to maintenance will come to an end when they get married. With respect to boys, there is a difference of opinion. *Hanafi* jurists are of the view that boys are eligible to maintenance till they reach working age although they have not reached the age of puberty. *Hanafis*, however, do not fix a minimum age for working. *Shafi'i* jurists do not differentiate between boys and girls. Their entitlement to maintenance will come to an end when they reach the age of puberty as there is no difference between boys and girls in terms of their capability to work or earn a living. Children are eligible to maintenance as long as they are poor and have no earnings of their own.[116]

3.6. Conclusion

The biggest challenge to Muslim women arises at the dissolution of the marriage, especially where there are issues of children, asset accumulation and divorce procedures. This problem escalates where there is conflict between the spouses which often leaves women helpless and without recourse, especially in the absence of a binding contract. A contract can be entered into to prevent a situation from occurring.

The lack of access to the legal system creates uncertainty regarding the consequences of the dissolution of the marriage. This is prejudicial to women, who are often vulnerable, both socially and economically, thus making it difficult for them to ensure that they and their children are not left homeless and destitute at the dissolution of their marriage. Women are often unaware of their rights in terms of the marriage contract as well as the fact that they have the power to shape the contents of these contracts.[117]

In theory, women have benefits in terms of the *shari'ah*, as mentioned in this chapter, such as maintenance during the marriage and the *iddah*, as well as an

115 Machae R Mohamad AB and Khareng M 'Children Maintenance: The Rights in Islamic Family Law' (2015) *Mediterranean Journal of Social Sciences* Vol. 6 No. 4 193.

116 Ibrahim HJI and Azizah M 'The Child's Right to Maintenance' (2011) *Arab Law Quarterly* Vol. 25.

117 Domingo W The Case of Recognition of Muslim Personal Law in South Africa: Colonialism, Apartheid and Constitutional Democracy' in Adam Possamai *The Sociology of Sharia: Case Studies from around the World* (2013).

entitlement to the *mahr*. However, these benefits are not enforced strictly, and it is not possible to enforce them without the implementation of MPL. The religious bodies do not have the power to implement it. More awareness is needed, and proper measures must be put in place for strict compliance. This can only be done by implementing MPL. There are severe and pertinent issues facing Muslim women who enter into a Muslim marriage without knowledge that they do not have the same rights as those women who enter into civil marriages. These problems can only be solved by implementing MPL legislation.

CHAPTER FOUR

SOUTH AFRICAN LAW OF MARRIAGE AND THE CONSTITUTION

4.1. Introduction

This chapter discusses the various sections of the Constitution in order to illustrate that there is an obligation to enact legislation recognising MPL. Other marriages are recognised but the State still fails to recognise Muslim marriages despite repeated calls by the South African Muslim communities to recognise them.

The Marriage Act 25 of 1961 set out the rules and regulations relevant to parties who enter into marriages and it afforded parties rights and protections as spouses. The Act defined 'marriage' as a union between one man and one woman. Muslim parties could get married in terms of the Marriage Act. However, the marriage officer cannot register a polygynous marriage as polygynous marriages are not recognised by the Marriage Act, and thus cannot be registered. Muslim marriages under the common law are not recognised and Muslim spouses are unable to access the courts to assert their rights. This lack of access to the courts means that those married according to Muslim law (*Shari'ah*) may not obtain a divorce through the court system. Muslim women have often found it exceptionally difficult to get a divorce. The Marriage Act 25 of 1961 also does not recognise polygynous marriages in cases of death or divorce. This also makes it difficult for female surviving spouses to access justice and a fair share of the marital assets. The unequal treatment under the law violates Muslim women's access to their constitutional rights. Without legislation to protect Muslim women in marriage, the constitutional rights as discussed hereunder are violated.

In 1996, the final South African Constitution was adopted, creating a democratic state founded on the values of human dignity and the advancement of equality, non-racialism and non-sexism, the supremacy of the Constitution, the rule of law, universal adult suffrage and a multiparty system of democracy in which free and fair elections are held regularly.[118]

Constitutional supremacy means that the Constitution is the supreme law of South Africa and that any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[119] South Africa promotes collaboration between religious communities and the secular state. It enables private and public accommodation of religious beliefs and practices. The Constitutional provisions relating to religious freedom afford all individuals the right to have, practise and disseminate their religious beliefs[120].

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118 s 1 of The Constitution of the Republic of South Africa, 1996.

119 s 2 of The Constitution of the Republic of South Africa, 1996.

120 Amien W 'A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context' (2010) *International Journal of Law, Policy and the Family* 24(3) 361-396.

Given the religious diversity of the South African population, it is appropriate that the government has adopted a cooperative approach towards religious communities. South Africa does not accommodate religious diversity without limitation.[121]

The Constitution also places both negative and positive obligations on the State to respect, protect, promote, and fulfil the rights in the Bill of Rights.[122]

4.2. Section 9 – The Right to Equality

In terms of section 9 of the Constitution,[123] every person is entitled to enjoy full and equal treatment of all rights and freedoms. The State may not discriminate directly against anyone. Religion and culture always exist in a close relation. Together with aesthetics and ethics, religion constitutes culture. Religion and culture cannot be separated.

The failure of the State to recognise and regulate Muslim marriages in terms of a statutory framework results in a differentiation between different categories of marriages – those that are recognised by the law, and those that are not. The equality claim is based on the fact that the non-recognition of Muslim marriages differentiates between spouses in civil marriages, on the one hand, and monogamous and polygynous spouses in African customary marriages and polygynous spouses in Muslim marriages, on the other.[124]The test for determining violation of the equality clause, particularly section 9(1) of the Constitution, which recognises everyone's right to equality before the law and to 'equal protection and benefit of the law,' and section 9(3) of the Constitution, which proscribes unfair discrimination on the grounds of among others, religion, marital status, gender, and sex, was established by the Constitutional Court in the case of *Harksen v Lane NO and Others.*[125]

The differentiation between the aforementioned categories of spouses is based on grounds of religion, marital status, gender, and sex.[126] Since these are listed grounds for unfair discrimination contained in section 9(3), the discrimination arising from the differentiation is presumed to be unfair in terms of section 9(5) of the Constitution. The unfair discrimination is of a direct and an indirect nature. Direct discrimination on the basis of religion and marital status arises from the fact that non-recognition of Muslim marriages negatively affects Muslim wives, husbands and children.[127]

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121 Dangor SE 'The Establishment and Consolidation of Islam in South Africa from Dutch Colonisation to the Present' (2003) *Historia* 48 203-220.

122 s 7(2) of The Constitution of the Republic of South Africa, 1996.

123 s 9 of the Constitution states: 'Everyone is equal before the law and has the rights to equal protection and benefit of the law.'

124 *Women's Legal Centre Trust v President of South Africa* 2018 (6) 598 (WCC).

125 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at paras 42-53.

126 *Women's Legal Centre Trust v President of South Africa and others* 2018 (6) 518 (WCC) at para 122.

127 *Women's Legal Centre Trust v President of South Africa and others* 2018 (6) 518 (WCC) at para 122. WLCT's heads of argument at para 336.

Indirect discrimination on the basis of gender and sex results from women being disparately affected by the non-recognition of Muslim marriages vis-à-vis Muslim men.[128] For example, gender discriminatory Islamic law rules and practices described earlier, such as unequal access to divorce, negatively affect Muslim wives while protecting Muslim husbands. Spouses in Muslim marriages do not enjoy protection and benefit before the law.

4.3. Section 10 – Right to Human Dignity

In *President of the Republic of South Africa v Hugo,*[129] the court identified dignity as a core value and purpose of the right, whilst retaining the idea of remedying disadvantage within the overall assessment of unfair discrimination:

> 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. Equality, as that concept is enshrined as a fundamental right means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental dignity.'

In terms of section 10 of the Constitution,[130] everyone has the right to have their dignity respected and protected. Dignity is a founding value in the Constitution along with equality and freedom.[131] Treating spouses in Muslim marriages as unworthy of protection of the law devalues, stigmatises, and further marginalises them. The non-recognition of Muslim marriages conveys the message that Muslim spouses are not equal in worth to spouses whose marriages are recognised. This compounds the marginalisation of an already marginalised community that has suffered historical discrimination on the basis of race and religion. Muslim women are the victims here. The continued non-recognition of Muslim marriages infringes the right to dignity.

In the case of *Moosa NO v Minister of Justice*, the court held that failing to recognise a Muslim marriage is to hold that it is not worthy of legal protection, and that this

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128 *Women's Legal Centre Trust v President of South Africa and Others* 2018 (6) 518 (WCC), heads of argument at para 337.

129 *President of Republic of South Africa v Hugo* 1997(4) SA 1 (CC). See also *Prinsloo v Van der Linde 1997* (3) 1012 (CC).

130 s10 of the Constitution states: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

131 *Daniels v Campbell* 2004(5) SA 331(CC) at para 54-55.

infringes on the right to human dignity in the most fundamental way: 'its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman.'[132]

The failure to recognise and regulate Muslim marriages is the ultimate infringement of, and affront to, the dignity and sense of self-worth of many women in the Muslim community.

The Constitutional Court in *Daniels v Campbell* observed, 'religious marginalisation coincided strongly with racial discrimination, social exclusion and political disempowerment.'[133]

4.4. Section 34 – Right to Access Courts

In terms of section 34 of the Constitution,[134] everyone has the right to have any dispute in a fair public hearing before a court or forum.

The right of access to courts is a pre-requisite to the enjoyment of other constitutional rights. Without it, the extensive protections and guarantees provided in the Bill of Rights are meaningless. The failure of the law to recognise Muslim marriages creates a barrier for Muslim spouses to access the courts, for the following reasons:

First, as Muslim marriages do not exist in the eyes of South African law, it is impossible to cite a cause of action in order to bring that matter to court and seek relief in terms of that 'non-marriage.' Secondly, without the teeth of the law, it is difficult to enforce rights like maintenance. Thirdly, only the very privileged among the Muslim community are able to afford litigation of this nature.

The Muslim community has made numerous attempts to have aspects of MPL, or, at the very least, Muslim marriages, recognised.[135] A significant sector of the Muslim community feel strongly that the advantages of legislation far outweigh the disadvantages in that the community will benefit from having a legislative framework and that MPL, which is based on fairness and justice, can be compatible with the Constitution.[136]

The effect of regulation by the Muslim clergy has been problematic in that as a community organisation its funding is limited, meaning it has insufficient resources to provide Muslim women with the urgent assistance that they require, including

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132 *Moosa NO and Others v Minister of Justice* 2018 (5) SA 13 (CC) 16.

133 *Daniels v Campbell* 2004 (5) SA (CC) at para 20.

134 s34 of the Constitution states: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

135 Amien W 'A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Secular Context' (2010) 24(3) *International Journal of Law, Policy and Family* 363-365.

136 Amien W (2010) 365.

approaching a court for relief. The Muslim clergy have also been criticized for serious shortcomings when addressing the plight of women in that their decisions are 'skewed in favour of men'.[137] It has also been reported to the WLC that women struggle to get divorces. Women also find it difficult to reconcile their religious beliefs and condone pain and suffering where the clergy do not grant them redress based on the religious doctrine afforded to them.[138]

4.5. Section 28(2) – Best interests of the child

In terms of section 28(2) of the Constitution,[139] a child's best interests are of paramount importance.

Due to the lack of recognition and regulation of Muslim marriages, there is no 'automatic' court oversight in the event of the termination of a Muslim marriage.

The best interests of the minor children born of Muslim marriages are not automatically subject to court oversight when there is a Muslim divorce.[140]

In contrast, a civil divorce or legal dissolution of an African customary marriage that involves minor children immediately activates intervention by the Family Advocate's Office followed by judicial oversight to ensure that the child's best interests are protected.[141] Therefore, the lacuna in the law means that there is no legal and administrative infrastructure protecting the rights of children born of Muslim marriages in terms of section 28 of the Constitution.

Muslim wives are not able to challenge gender discriminatory rules and practices, such as the triple *talaq* issued in one sitting by the husband, which negates the wife's right to the *audi alteram partem* (right to be heard) rule, and the arbitrary manner in which *Ulama* issue a certificate as we saw in the case of *Faro v Bingham*.[142] Other such practices include problems with the adjudication of *faskh* hearings, as well as unequal treatment between men and women relating to consent in marriage, *mahr*, *nafaqah*(support), and matrimonial property. The traditional and conservative interpretations of Islamic law by certain *ulama* cannot be attended to by the civil courts. This is the imperative for the legal recognition and regulation of MPL in South Africa.

The option to register a civil marriage is not available to polygynous Muslim spouses since a civil marriage only affords legal recognition to *de facto* monogamous

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137 Amien W (2010) 366.

138 Abrahams-Fayker H 'South African Engagement with Muslim Personal Law; The Women's Legal Centre, Cape Town and Women in Muslim Marriages' *Feminist Africa* 15-40.

139 s28(2) of the Constitution states: 'A child's best interests are of paramount importance in every matter concerning the child.'

140 *Women's Legal Centre Trust and Other v The President and Others* 2018 (6) SA para 59.

141 s6 of Divorce Act 70 of 1979 and s4 of Mediation in Certain Divorce Matters Act 24 of 1987.

142 *Faro v Bingham* Case No. 4466 (2013).

marriages. The civil marriage option does not provide an adequate solution for the challenges presented by the non-recognition of Muslim marriages.

4.6. Section 7(2) – Duty of State to Respect, Protect, Promote and Fulfil the Rights in the Bill of Rights

Section 7(2) of the Constitution[143] obliges the State to respect, protect, promote, and fulfil the rights in the Bill of Rights.

This section dictates that the State is not simply required to refrain from interfering with the enjoyment of constitutional rights, but that it must actively ensure the realisation of these rights.

The duty to respect implies that the State must not interfere with the enjoyment of constitutional rights. The duty to protect implies that the State must protect against any interference of the enjoyment of constitutional rights. The duty to promote implies that the State must use its power to assist individuals in realising their constitutional rights. The duty to fulfil implies that the State must act to adopt appropriate measures (like creating legislation) so that people who do not currently enjoy access to rights, can gain access.[144]

In 1999, the SALRC constituted a Project Committee to draft legislation to recognise and regulate Muslim marriages. In 2003, the SALRC Project Committee submitted the draft MMB to the Ministry of Justice and Constitutional Development.[145] The first MMB was negotiated as a result of protracted discussion between the SALRC Project Committee and various sections of civil society and Muslim communities in South Africa. By 2009 there was no further progress towards the recognition of Muslim marriages.

The Constitutional Court has recognised in several judgments that section 7(2) places both negative and positive obligations on the State to ensure the realisation of constitutional rights.[146]

In view of the fact that women and children of Muslim marriages fail to enjoy their rights to equality, dignity, access to courts, and, as regards children, to the application of the principle of the best interests of the child, the State has a positive obligation (a constitutional obligation) to create a viable statutory framework to recognise and regulate Muslim marriages.

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143 s7(2) of the Constitution states: 'The State must respect, protect, promote and fulfil the rights in the Bill of Rights.'

144 *Women's Legal Centre Trust and Others v The President and Others* 2018 (6) SA para 35.

145 *Islamic Marriages and Related Matters: Report* [Project 59] South African Law Reform Commission 110 (2003).

146 *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at para 16 and *Minister of Home Affairs v National Institute for Crime Prevention and The Reintegration of Offender* (Nicro) and Others 2005 (3) SA 280 (CC) at para 28.

4.7. Section 15 (3) *(a)* – The Right to Freedom of Religion, Belief and Opinion

The right to freedom of conscience and religion is said to be one of the oldest of the internationally recognised human freedoms. The Constitutional court accorded it a singular status in *Prince v President, Cape Law Society and Other:* 'The constitutional right to practice one's religion is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.'[147]

One of the reasons why the right is so important is that it is deemed be integral to our dignity, growth and self-worth.[148]

Section 15(3)*(a)* of the Constitution[149] permits and, therefore, constitutionally empowers the State to introduce legislation to recognise and regulate MPL.

Section 15(3) must be read with section 7(2), holistically and purposively, giving rise to a mandatory obligation triggered by section 7(2). This leads one to deduce that the State has a positive duty to enact appropriate legislation to recognise and regulate MPL.

Religion is recognised as being important to culture and society and the courts have recognised this.[150] Religion and culture always exist in a close relation. Together with aesthetics and ethics, religion constitutes culture. Religion and culture cannot be separated. Islam must not be viewed as a culture as the essence of Islam is religious. However, it cannot be denied that religion is a cultural expression.

The importance of religion 'for millions in all walks of life' is not limited to a particular religion. The protection of freedom of religion in the Bill of Rights is also not limited to a particular religion.

The adoption of the Constitution[151] heralded a new era of constitutional dispensation and democratic order in South Africa.

147 *Prince v President, Cape Law Society and Other* 2001 (2) SA 388 (CC).

148 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 35.

149 s15(3)*(a)* of the Constitution states: 'This section [the rights to freedom of religion, belief and opinion] does not prevent legislation recognising-
(i) marriages concluded under any tradition, or a system of religious, personal or family law; or
(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion'.

150 In the well-known case dealing with corporal punishment, the Constitutional Court said: 'For many believers, their relationship with God or creation is central to all activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.' [*Christian Education South Africa v Minister of Education* 2000 (4) SA757 (CC)].

151 Constitution of the Republic of South Africa, 1996.

One of the main aims of the Constitution is to 'lay foundations for a democratic and open society in which every citizen is equally protected by the law.'[152]

The Constitution recognises the diverse groups of people living in it and recognises that, 'South Africa belongs to all who live in it and we should be united in our diversity.'[153] The Constitution aims to foster a society that is tolerant of diversity and one that does not favour one religion over another. This is evident in section 15, which protects freedom of religion, belief and opinion, and section 31, which protects the collective right of religious committees to practise their religion and to establish and maintain religious associations.[154]

The South African government's commitment to international human rights is unquestionable as evidenced by its signing and ratifying a number of binding international human rights instruments. South Africa would be failing in its international obligations if it did not protect women from discriminatory practices in systems of family law such as MPL. We should not leave the development of principles to the courts on a case-by-case basis.

Litigation is not ideal for airing all the relevant issues in relation to important matters.[155] It is not the best strategy for a society to use as a method for nation building or the creation of communities of respect. The nature of litigation means that all the important issues are not necessarily resolved, often for political reasons. There is the question of costs and the affordability of going to court. Many of those in a position to make important arguments can simply not afford to be there.[156]

Justice Albie Sachs, formerly of the Constitutional Court, made the following thoughtful comment regarding the search for equality:

> 'Equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling of homogenisation of behaviour but an acknowledgement of acceptance of difference. At the very

152 Preamble of the Constitution of the Republic of South Africa,1996.

153 Preamble of the Constitution of the Republic of South Africa,1996.

154 s15(3) *(a)* permits the enactment of religious marriages or religious personal or family law systems. An internal limitation was added to s15(3)(a) that provides that any legislation that purports to recognise religious marriages or family law systems must be consistent with other constitutional provisions including gender equality. This section does not preclude marriages entered into by Muslims in terms of their religious tenets, provided that Muslims' personal or family law systems conform to the values and principles enshrined in the Constitution. Therefore, rights in the Constitution are not absolute, as they are subject to the limitation clause in s36.

155 Benson I 'Religious interfaith work in Canada and South Africa with particular focus on the drafting of a South African charter of religious rights and freedoms' *Lex View*,(2013) Vol 69.

156 Benson (2013) 3.

least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that brings to any society.'[157]

In the case of *Christian Education*, the majority of the court was quite willing to comment on the importance of religious beliefs to South African society:[158]

> 'The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients to any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has that capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.'

In the case of *Fourie*, the majority of the court found religious beliefs and their associations to be socially important in these terms:

> 'Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of people's temper and culture, and for many believers a significant part of their way of life. Religious organisations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied'.[159]

Clearly, the court finds religion not simply an 'individual' matter but something important for the community and the whole society.[160]

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157 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR at 1574-5.

158 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 758.

159 *Minister of Home Affairs and Another v Fourie and Doctors for Life International and Other; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) paras 90 – 93.

160 Benson IT (2013) 4.

The Court continued, however, with this observation, setting out a limitation on the public use of religious argumentation:

> 'It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Whether or not the Biblical texts support his beliefs would certainly not be a question which this court could entertain. From a constitutional point of view, what matters is for the court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in court. Further than that the court could not be expected to go'.[161]

Sachs J further stated:

> 'In an 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 recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.'[162]

The SCA in the judgment of the *President of RSA and others v WLCT and Others*[163] summed it up accurately:

> 'The importance of recognising Muslim marriages in our constitutional democracy cannot be gainsaid. In South Africa, Muslim women and children are a vulnerable group in a pluralistic society such as ours. The non-recognition of Muslim marriages is a travesty and a violation of the constitutional rights of women and children, in particular, including their right

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161 *Minister of Home Affairs and Another v Fourie and Doctors for Life International and Other; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC) paras 92, 93 and 98.

162 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 CC,1998 12 BCLR 1517.

163 *President of RSA and Others v WLCT and Others* 2018 (6) SA 598 (WCC) SCA Reportable Case No. 612/19 Judgment delivered on 18 December 2020.

to dignity, to be free from unfair discrimination, their right to equality and to access to court. Appropriate recognition and regulation of Muslim marriages will afford protection and bring an end to the systematic and pervasive unfair discrimination, stigmatisation and marginalisation experienced by parties to Muslim marriages, including the most vulnerable, women and children. The following words of Moseneke J in *Daniels* resonate: I am acutely alive to the scorn and palpable injustice the Muslim community has had to endure in the past on account of the legal non-recognition of marriages celebrated in accordance with Islamic law. The tenets of our Constitution promise religious voluntarism, diversity and independence within the context of the supremacy of the Constitution. The legislature has still not redressed, as foreshadowed by the Constitution, issues of inequality in relation to Islamic marriages and succession.'

The Western Cape High court found in the *WLCT* case cited above that the *status quo* violated section 15 of the Constitution. The SCA, however, pointed out that section 15 was permissive, and not peremptory. The section does not oblige the State to enact legislation recognising marriages, but merely permits it. Therefore, it was of the view that the High Court may have erred.

4.8. Conclusion

African customary marriages are recognised as valid marriages in terms of the Recognition of Customary Marriages Act 120 of 1998, which came into force in 2000. Same-sex couples have also been afforded the opportunity to access legal rights and obligations that attach to a civil marriage by being able to enter into civil unions registered under the Civil Unions Act 17 of 2006. The above rights were duly granted to keep the law in line with the Constitution. The Marriage Act 25 of 1961 has also fallen foul of the Constitution and was declared unconstitutional at the recent SCA hearing.

As seen above, the main codified law that governs customary marriages is the Recognition of Customary Marriages Act.[164] There is still no specified law that governs Muslim marriages or provides for the recognition of Muslim marriages.

The systemic discrimination caused by the continued non-recognition of Muslim marriages is perpetuated by the South African State's delay in affording legal recognition to MPL, which has resulted in Muslim women, in particular, having to experience unnecessary hardships.

The State in the WLC court matter blamed lack of consensus about the MMB for this state of affairs. However, that is not a good enough reason not to enact legislation when non-recognition of Muslim marriages results in a violation of rights against Muslim parties. The State has already enacted other pieces of legislation that were

[164] Recognition of Customary Marriages Act 120 of 1998.

more contentious, for example, the call for the recognition of same-sex unions as well as the woman's right to choose to terminate her pregnancy, which elicited huge cries from religious communities.

The State enacted the Civil Union Act[165] which recognises same-sex unions and the Choice on Termination of Pregnancy Act.[166] In terms of section 2(1)(a), this Actgives effect to a woman's right to choose to abort her foetus during the first three months of pregnancy.

The State has claimed that South African Muslims do not support the MMB. This is not correct, as UUCSA - the umbrella body of numerous Muslim organisations - has confirmed its support. UUCSA submitted in the WLC matter that inclusion of adjudication by a secular court comprising Muslim judges and assessors was to be included in the final version of the MMB.[167] They also suggested, as an alternative, that a secular judge, guided by Islamic law experts sitting as assessors, is consistent with Islamic law.

The State has not yet indicated any willingness to discuss and negotiate a satisfactory solution with the relevant stakeholders in the South African Muslim communities. The delay by the State to afford legal recognition to Muslim marriages is unreasonable.

165 Civil Union Act 17 of 2006.
166 Choice on Termination of Pregnancy Act 92 of 1996.
167 *Women's Legal Centre Trust and Others v The President and Others* 2018 (6) SA para 22.

CHAPTER FIVE

SOUTH AFRICA's INTERNATIONAL LAW OBLIGATIONS

5.1. Introduction

For over forty years, from 1948 to 1990, South Africa was in conflict with both the international community and international law. Apartheid, premised on race discrimination and the denial of human rights, was contrary both to the law of the United Nations Charter[168] and norms of human rights, non-discrimination and self-determination generated by the post-World War II order. South Africa became a pariah state within the international community; a delinquent state in the context of the 'new' international law of human rights.[169]

All this has changed. South Africa is now a democratic state with a democratically elected parliament. Human rights and racial equality are constitutionally protected, and there is a new attitude towards international law. Whereas international law was seen as a threat to the State, it is now viewed as one of the pillars of the new democracy.[170]

5.2. International Law

Section 232 of the Constitution provides that customary international law is law in the Republic of South Africa, unless it is inconsistent with the Constitution or legislation.

While section 233[171] gives greater weight to international law, the court will take into account whether the relevant international law is binding on South Africa. In terms of section 39(1) of the Constitution the courts are expressly obliged to consider international law when interpreting the Bill of Rights.

In terms of section 39(1) of the Constitution,[172]

> 'When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom…and must consider international law.'

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168 South Africa was one of the 51 founding members of the United Nations. On 12 November 1974 the United Nations General Assembly suspended South Africa from participating in its work due to international opposition to the policy of apartheid. See http:www.sahistory.org.za (accessed 1 June 2021).

169 Dugard J 'International Law and the South African Constitution' 8 *European Journal of International Law* 77 (1997).

170 Dugard J (1997) 77.

171 s233 provides that, when interpreting legislation, courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

172 Constitution of the Republic of South Africa,1996.

In the case of *S v Makwanyane,*[173] the former Chief Justice Chaskalson of the Constitutional Court described the role of international law as follows:

> 'Public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which (the Bill of Rights) can be evaluated and understood, and for that purpose, decisions of tribunals delaying with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.'

In the *Grootboom*[174] case, Justice Yacoob of the Constitutional Court said,

> 'The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.'[175]

The Constitutional court accepted the position in *Makwanyane*[176] that international law for the purposes of section 39(1) b of the Constitution[177] includes both binding and non-binding international law to create the framework for interpretation. However, Yacoob J, made this subject to a proviso, stating that while international law might be a guide to interpretation, 'the weight attached to any particular principle or rule of international law will vary.'[178]

The *Grootboom* case implemented several economic, social and cultural rights guaranteed by the Constitution.[179] The decision illuminates the role in such reasoning of human rights treaties to which South Africa is a state party and signatory. The court in this matter turned its consideration to international law and its impact on the interpretation of section 26 of the Constitution. During argument considerable weight was given d to international law and the court took note of section 39 of the Constitution, which obligates the courts to consider international law as a tool for interpreting the Bill of Rights. Public international law was taken to include, moreover, binding and non-binding law, with the latter including not only decisions of international tribunals dealing with instruments comparable to the Bill of Rights, but also the reports of specialised international agencies.

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173 *The State v Makwanyane* 1995 (3) SA (CC) para 35.
174 *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46(CC) at para 26.
175 Sections 231-35 of the Constitution regulate the application of international law.
176 *S v Makwanyane* 1995 (3) SA 391 (CC).
177 Constitution of the Republic of South Africa, 1996.
178 Government of the Republic of South Africa v Grootboom and Others 2001(1) SA 46
179 Constitution of the Republic of South Africa, 1996.

It is also noted that the court in the *Grootboom* case ordered the Government to devise a policy that included a preference for the most disadvantaged.[180] The Constitutional Court has made it clear that it will also participate in an international dialogue concerning the content of socioeconomic rights – a dialogue in which the court will both draw upon international and comparative sources of interpretation, and develop its own body of interpretation upon which others at international and comparative level can draw.[181]

5.3. International Human Rights instruments

South Africa ratified the International Covenant on Civil and Political Rights (ICCPR)[182] in 1998; signed the International Covenant on Economic, Social and Cultural Rights (ICESR)[183] in 1994; ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995; and ratified the African Charter of Human and People's Rights (African Charter)[184] in 1996. All these documents speak of the central place of equality norms in a democratic and pluralistic society. Articles 18 and 26 of the ICCPR promote both the individual's freedom of religion and equality.

Article 16 of CEDAW commands state parties to 'ensure on a basis of equality on men and women.[185] CEDAW is a human rights instrument that relates to the protection of women.

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180 *Government of RSA and Others v Grootboom and Others* 2001 (1) SA (CC) para 99.

181 Fitzpatrick J and Ron C 'Republic of South Africa v Grootboom. Case No. CCT11/00. 2000 (11) BCLR 1169 and Minister of Health v Treatment Action Campaign Case No. 8/02' *The American Journal of International Law* Vol 97 no.3 2003 669-680 JSTOR, *www,jstor.org/stable/3109853* (accessed 1 June 2021).

182 The United Nations General Assembly (1966) International Covenant on Civil and Political Rights (ICCPR) treaty series 999, 171 signed by South Africa in 1994. Available at: http:///www.refworld.org/docid/3ae6b310html (accessed 1June 2021)

183 The United Nations General Assembly (1966) International Covenant on Economic, Social and Cultural Rights (ICESR) Vol. 993 signed by South Africa in October 1994 and ratified by South Africa in January 2015.

184 African Charter on Human and Peoples Rights adopted 27 June 1981 and came into force in 1980 OAU Doc. CAB/LEG/67/3 rev.5,21 ILM (1982) 58. Article 2 entitles every individual to the enjoyment and rights and freedom in the Charter, without distinction of any kind such as race, ethnic group, colour, sex or religion. Article 17 (2) and (3) states, 'Every individual may freely take part in the cultural life of his or her community.'

185 Article 16 of CEDAW - the right to enter into marriage; the right freely to choose a spouse and enter into marriage only with free and full consent; the rights and responsibilities during marriage and its dissolution; the rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children will be paramount; the rights to decide freely and responsibly on the number and spacing of their children and have access to information, education and means to enable them to exercise these rights; the rights and responsibilities to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; the personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; the

The preamble of the African Charter of Human and People's Rights mandates all member states to achieve genuine equality and dignity for all people and to dismantle all forms of discrimination. It honours both the universalist aspirations of the United Nations Charter and Universal Declaration of Human Rights, and also the traditions and values of Africa which should 'inspire and characterise their reflection on the concept of human and people's rights.'[186]

The Maputo Protocol was adopted in July 2003 and came into force in November 2005. South Africa ratified the Maputo Protocol which was entitled the Protocol to the African Charter of Human and People's Rights on the Rights of Women in Africa. The Protocol comprehensively enumerates the rights of women, imposing obligations on the ratifying states to ensure maximum protection of women's rights, prevent discrimination and undertake measures to ensure women are given appropriate space for development, equal opportunities and full protection of social, economic and civil rights.

The preamble proclaims the rights of women to be 'inalienable, interdependent and indivisible human rights.'[187] They are inalienable as they can never be taken away or

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rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

186 African Charter on Human and Peoples Rights adopted 27 June 1981 and came into force in 1986 OAU Doc. CAB/LEG/67/3 rev.5,21 ILM (1982) 58. Article 2 entitles every individual to the enjoyment of the rights and freedoms in the Charter, without distinction of any kind such as race, ethnic group, colour, sex and religion. Article 3 states that every individual shall be equal before the law and entitled to equal protection of the law. Article 8 guarantees freedom of conscience, profession and the free practice of religion. Article 17(2) and (3) state, 'Every individual may freely take part in the cultural life of his or her community'. The promotion and protection of morals and traditional values recognised by the community shall be the state's duty. Article 18(3) requires states to eliminate 'every discrimination against women' and to protect women's rights as stipulated in the international declarations and conventions. In this way, the African Charter emphasises women's rights by referring to pertinent international law, such as the ICCPR and CEDAW. Article 19 states, 'All people shall be equal, they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.' Article 20 refers to the 'unquestionable and inalienable right to self-determination. At first glance, the question that arises is whether the people referred to signify groups determined by nationality (e. g. South Africans) or groups based on some other identity marker such as race, ethnicity, culture, or religion, e. g. Muslims).

187 Protocol on the African Charter on Human and People's Rights on the Rights of Women in Africa (informally called the 'Maputo Protocol'). Relevant articles include:

- Article 2 states that harmful cultural and traditional practices are those which are based on the idea of inferiority or the superiority of either the sexes, or on stereotyped roles for women and men.
- Article 17 strengthens the above provision which states that women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. Women are guaranteed the right to participate in the determination of cultural policies and should decide what is positive for them. Tradition is not inviolate and such change is necessary to promote the free development of women's personalities.
- Article 6 on marriage requires states to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Article 6(c) states that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage

given away. They are interdependent as they cannot be enjoyed without each other, for example, making progress in civil and political rights makes it easier to exercise economic and cultural rights. They are indivisible which also makes them equally important and cannot be separated.

The provisions of the Maputo Protocol confirm that where the individual rights of women collide with the cultural or religious rights of a group, it is the former that must be given special protection.[188]

International law has been integral to the development of human rights. In view of the fact that the South African Constitution compels courts to have regard to international law in applying the Bill of Rights, it will remain an important aspect of the interpretation of rights domestically.

5.4. Conclusion

Upon proper perusal of the international provisions, it is clear that their purpose and import are to advance equality between men and women or spouses. They require the states parties to enact legislation and take measures. In fact, the SCA overruled the judgment of the High Court in the matter of the *President of RSA and others v WLCT and Others*[189] and found that the state had no obligation to enact legislation but had a duty to correct the invalid position and the court could not tell the state how to go about doing so.

The remedying of the *status quo* could take the form of legislation or it could take some other form. It is not limited to the enactment of legislation. It is submitted that there is a need for MPL to be recognised. There is no provision to establish equality between women married under different marital regimes. However, they may be

and family, including polygynous marital relationships, are promoted and protected. The protocol, while promoting monogamous marriages, recognises the existence of polygynous marriages and the need for protection of the rights and interests of women in such marriages.

- Article 7 ensures protection of women's rights by law, requiring that all marriages must be annulled or divorced by judicial order. Article 7 states that states parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. This entails that they shall:
  - (i) have the same rights to seek separation, divorce or annulment of a marriage;
  - (ii) have reciprocal rights and responsibilities towards their children; and
  - (iii) have the right to an equitable sharing of the joint property deriving from the marriage;
- Article 8 requires reform of relevant discriminatory laws and practices.

188 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (informally called the 'Maputo Protocol') available at *http://www.Africa-Union. Org/officialdocuments* (accessed on 1 December 2020).

189 *President of RSA and Others v WLCT and Others* 2018 (6) SA 598 (WCC) SCA Reportable Case No. 612/19 Judgment delivered on 18 December 2020.

used and taken into consideration when drafting legislation to give effect to implementing MPL.

CHAPTER SIX

STATES INITIATIVES RELATING TO RECOGNITION OF MPL

6.1. Introduction

The South African Law Reform Commission (SALRC) has been involved in investigations for the recognition of MPL since 1990.[190] The first project committee that was appointed did not make much progress. The reasons for the delay are not very clear. It seems that the finalisation of the Constitution[191] and the divergence of opinion on contentious issues are some of the reasons that could be advanced. The SALRC did not publish any of its findings for discussion.[192] The MPL Board was established to work toward drafting legislation to recognise MPL. The Board consisted of conservative and progressive elements from the Muslim communities but was unable to reach unanimity regarding the way in which MPL ought to be recognised.[193] The *ulama* did not want MPL to be subjected to a constitutional framework based on human right values on the basis that the latter ostensibly conflicts with *shari'ah.* The more progressive elements argued that there is no conflict, therefore they had no problem with MPL being subjected to constitutional scrutiny. The division caused the MPLB to disband within a year of its establishment.[194]

In 1996, the SALRC showed renewed interest in the investigation and recommended the appointment of a body specifically tasked with investigating the legal recognition of Muslim marriages and related matters, and with drafting legislation to recognise and regulate Muslim marriages in accordance with the Constitution. During March 1997, the SALRC held two workshops in order to involve members of the public and interested parties. The then Minister of Justice appointed a new project committee from 78 nominations received.

The new project committee issued the first issue paper at the end of May 2000 and circulated it for public comment in July 2000.[195]

190 South African Law Commission Discussion Paper 101 (Project 59) Islamic Marriages and Related Matters Report (2003) 106 available at: www.justice.gov.za/salrc/reports/r prj59 2003jul.pdf (accessed 17 December 2020).

191 Constitution of the Republic of South Africa, 1996.

192 Rautenbach C 'Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa' *PER/PELJ* 2004 (7) 2 98.

193 Amien W 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Right to Equality: A South African Case Study on Muslim Marriages' *Human Rights Quarterly* 28 (2006) 729-754.

194 Moosa E 'Prospects for Muslim Law in South Africa: A History and Recent Developments' (1996) *Islamic and Middle Eastern Law* 130 -131.

195 South African Law Commission Discussion Paper 101 (Project 59) Islamic Marriages and Related Matters Report (2003) 106 available at: www.justice.gov.za/salrc/reports/r prj59 2003jul.pdf (accessed 17 December 2020).

6.2. Islamic Marriages Bill (IMB 2001)

Between 2000 and 2002, a public process ensued involving various bodies within the Muslim committee. The draft bill made provision for, *inter alia*, the recognition of Muslim marriages, the registration, proprietary consequences and dissolution of Muslim marriages, and the status and capacity of spouses in Muslim marriages. In January 2002, the Project Committee issued Discussion Paper 101, including a draft Bill for the Recognition of Muslim Marriages. A full report of the SALRC on Islamic Marriages and Related Matters was handed to the then Minister of Justice in July 2003.[196]

6.3. Muslim Marriages Bill (MMB 2003)

In the period 2003 to 2004, various responses to the SALRC's report, including the draft Bill it had prepared, were lodged for consideration to the Minister of Justice. In October 2004, the Project Committee reconvened to discuss concerns expressed in a number of responses it had received.

In March 2005, an amendment to the proposed draft bill was submitted by the Project committee. According to the Minister of Justice, between 2008 and 2009 the Bill was in the final stages of preparation for submission to Cabinet. However due to the intensity of objections, the constitutional issues raised and sensitivities of some aspects of the Bill, the Minister was of the view that the Bill should be published for comment before it could finally be considered by Cabinet.[197]

The establishment of a SALRC Project Committee on Muslim marriages and related matters resulted in the drafting of a MMB.

6.4. The Muslim Marriages Bill (MMB 2010)

The new MMB addresses, *inter alia*, the recognition of Muslim marriages, the requirements for a valid Muslim marriage, and the registration of Muslim marriages. It recognises the status and capacity of Muslim spouses, regulates the proprietary consequences of Muslim marriages, and also regulates their termination. The bill contains an opting out provision for persons who do not wish to be bound by it.[198]

On 8 December 2010, a decision was taken by Cabinet that the MMB be published for public comment. On 21 January 2011, the MMB was published in the Government Gazette. The MMB applies to Muslim marriages concluded after the enactment of the MMB where the parties elect to be bound by it. It may also apply to existing Muslim marriages (those that have been entered into before the MMB) where parties elect not to be bound by it within thirty-six months of enactment. In addition, it may apply to existing civil marriages (marriages that are governed by

196 Moosa N (2011) 154.
197 Moosa N (2011) 155.
198 s 2 of MMB 2010.

Muslim rites and where the parties have also entered into a civil marriage before the MMB is enacted) where the parties elect to make it applicable, as long as any vested proprietary rights arising from a marriage in community of property or a marriage subject to the accrual system, or arising in terms of an ante-nuptial contract, remain unaffected.[199]

The debate on the 2010 MMB focused on certain administrative matters, such as the opting out clause, non-Muslim judges, and arbitration. The 2010 MMB retained the role of marriage officers and mediation but removed arbitration, Muslim judges and assessors. The 2010 MMB proposes voluntary mediation to enable parties to settle their dispute before adjudication. The Bill also proposes that a secular court should adjudicate over MPL-related matters.

6.5. Reaction to the MMB 2010

Varied responses were received from the different groups within the Muslim community. Amongst other issues, there was concern and dissatisfaction with the deletion of a Muslim Judge presiding over cases as well how polygyny would be regulated. According to the Minister, more than 13,742 comments opposed to the Bill were received by short cellular phone comments. Approximately 7,184 signed petitions were received expressing objections to the Bill and a further 77 substantive comments were received from individuals who objected to the promotion of the Bill on various grounds. These objections are that the provisions of the Bill are in conflict with '*shari'ah* law',[200]that they are 'un-Islamic,' and that several of the provisions are unconstitutional in that they infringe the religious freedom of Muslims and their right to equality.[201]

Approximately 734 messages were received in support of the Bill. Support of the Bill appears to be minimal compared to the voluminous objections to the Bill.[202]

According to the WLC, there was no dedicated phone number for submissions, and apparently unsolicited text messages were not retained. It also appears that there was no recording of unsolicited messages in support. Many messages were linked to names on the petitions, which shared surnames and addresses, but did not reflect age. A number of messages objecting to the WLC' Constitutional Court application appeared to have been informed that WLC seeks to change the *Qur'an*.[203]

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199 s 2 MMB 2010.

200 *Shari'ah* is 'Islamic canonical law based on the teachings of the *Qur'an* and the traditions of the Prophet (pbuh) (*Hadith* and *Sunnah*) prescribing both religious and secular duties and sometimes retributive penalties for lawbreaking. See Moosa N (2011) 151.

201 Dadoo Y and Cassim F 'The Debate regarding Muslim Personal Law in South Africa: Achieving a Balancing of Interests' in Dangor S and Moosa N *Muslim Personal Law in South Africa Evolution and Future Status* (2019) 61.

202 *WLCT and Others v The President of RSA and Others* 2018 (6) SA 598 (WCC), Founding Affidavit, CB, Vol 1 p143.9 para 210. See also Judgment at para 21.

203 *WLCT and Others v The President of RSA and Others* 2018 (6) SA 598 (WCC), Founding Affidavit, CB, Vol 1 p143.9 para 214.

Nevertheless, one of the bodies, the United Ulema of South Africa (UUCSA), who seemingly represented the majority of the Muslims in South Africa, indicated that there were more Muslims in the country who supported the Bill than those who did. The Minister of Justice submitted that it was difficult to gauge the level of support for the Bill by the Muslim community in light of the number of individual objections received, in contrast to those in support thereof. He said that even if the proponents of the Bill were larger in number than the opponents, the parliamentary process for the enactment of the Bill was bound to be turbulent.[204]

The Minister was of the view that the divisions could create unnecessary tension and had to be avoided at all costs.[205]

There was no reason why the 2010 MMB did not proceed to promulgation. The only excuse given was that there were objections and further consultation was required, but years have passed and there have been no efforts to enter into such consultations.[206]

Some Muslim organisations such as the Majlis[207] indicated that any legislative intervention in MPL would lead to the transmogrification of the *shari'ah*. They pointed out that the MMB attempts to strike a balance between the tenets of the *shari'ah* and the Constitution failed dismally. The Islamic law concepts of *talaq*, *faskh, khul'* and *iddah,* which have been incorporated into the Bill, can only be exercised by, or apply to, either a husband or a wife, and are not discriminatory on the basis of gender.

The late Judge Essa Moosa[208] stated that the motivation for the introduction of the MMB was fourfold: first, the abuse of polygyny within the Muslim community was becoming a social problem and was spiralling out of control and causing immense suffering to women and children; secondly, Muslim marriages and decrees of divorce are not registered legally; thirdly, for a Muslim woman to enforce her rights she has to go to court, which can be a very costly exercise; and fourthly, the development of the common law for the relief sought can take place in a haphazard way and the relief sought will depend on the facts of each and every case. The 2010 MMB sought to address these issues.[209]

The biggest challenge that the Muslim community faced was that there was no consensus on whether they wanted the MMB or not. Within the Muslim community

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204 Rawoot I 'Marriage Bill causes Rift amongst Muslims' Mail & Guardian Online (18 March 2011), available at: *http://www.mg.co.za/article/2011-03-18-marriage-bill-causes-rift-amongst-muslims* (accessed 1 November 2020).

205 *WLCT and Others v The President of RSA and Others* 2018 (6) SA 598 (WCC), Founding Affidavit, CB, Vol 1 p143.9 para 216.

206 *WLCT and Others v The President of RSA and Others* 2018 (6) SA 598 (WCC), Founding Affidavit, CB, Vol 1 p144.9 para 218.

207 The Majlis is a Muslim organisation based in Port Elizabeth headed by Maulana A S Desai.

208 Moosa E 'Muslim Marriages Bill – Mapping the Ongoing Socio Ethico-Legal Challenges Facing South African Women' in Dangor S and Moosa N Muslim Personal Law in South Africa Evolution and Future Status (2019) 397.

209 Moosa E (2019) 397.

there were three main positions on the MMB. The first is the ultra-conservative view as represented by the conservative *Ulama* and organisations. Their view was that *shari'ah* is divine law and irrefutable, whereas the Constitution is man-made and cannot under any circumstances trump divine law. It would be difficult to persuade them. The second is the radical view represented by some academics and women lobbyists. They have reservations that women will get justice from a Muslim male-dominated bench.[210] They believe that Muslim women stand a better chance of getting justice before a secular court. The third is the moderate view of those who take a progressive stand. This view is supported by the Ulama Council of South Africa, including the Muslim Judicial Council, Muslim Assembly and other progressive Muslim organisations. They represent the majority of Muslims in the country.[211]

An academic writer, Waheeda Amien, indicates her point of view is that the main reason for the bill was that, 'many men do not honour their obligations under *Shari'ah* law.'[212] She proposes the best approach is a gender-nuanced integrated approach to protect the rights of Muslim women in South Africa so that MPL does not conflict with gender equality.[213] She proposes state regulation of Muslim family law. There were also concerns about the exclusion of certain compensatory benefits for women, the reduced value given to the testimony of Muslim female witnesses in a marriage ceremony, unequal rights given to women on divorce, the inappropriate and inequitable use of alternative dispute mechanisms, and the reinforcing of a patriarchal framework by the 2010 MMB. However, the progressive Muslims and gender activists recognise that 2010 MMB promises to provide more protection for women then they currently have.[214]

Naeem Jeena, director of Freedom of Expression Movement, and former Muslim Youth Movement President, author and community leader wrote,

> '…for Muslim women, many of whom also viewed the impending introduction of Muslim family legislation as some kind of panacea that will solve the problem they had experienced, the manner in which the discourse was initially framed was not destined to ease their burden but, rather, to legitimise their oppression. The battle for MPL legislation has been a long and exhausting one. Over the past decade, it has been a battle between conservative and progressive sections of the Muslim community attempting to influence the drafting of legislation by the Project Committee of the SALRC. The Commission has finally arrived at a draft bill that most sections of the

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210 Moosa E (2019) 398.

211 Moosa E (2019) 397.

212 Rawoot I 'Marriage Bill causes rift among Muslims' Mail & Guardian Online (18 March 2011), available at : *http://www.mg.co.za/article/2011-03-18-marriage-bill-causes-rift-among-muslims* (accessed 14 June 2020).

213 Amien W 'A South African case study for recognition of Muslim family law in a minority secular context' (2010) 24 (3) *International Journal of Law, Policy and Family* 361-96 at 362.

214 Amien W (2010) 362.

community have decided to accept. Very few role players are completely pleased with the document but most feel that it is a document they can live with.'[215]

In a nutshell, there are three sides to the issue. On one side, a group of the Muslim population in South Africa have been trying to get recognition of Muslim marriages in South African law, either to gain more authority in their interpretations, or believing that it will regulate and correct many of the injustices facing Muslim women, who currently have no real rights in marriages not acknowledged by the State. Another side vehemently opposes the passing of any such bill, on the grounds that it is against *shari'ah*. They believe that many of the clauses, which aim to protect and promote the rights of women, challenge orthodox Muslim viewpoints, such as the legal age of marriage, polygyny and inheritance. The third party comprises the non-Muslim groups which have become embroiled in the issue, some out of concern, others to 'liberate Muslim women from Islam.'[216]

6.6. The Imam Project

The Judiciary has in a series of MPL cases acknowledged that the non-recognition of Muslim marriages is discriminatory. This prompted some legislative changes favourable to Muslim women and children. Unfortunately, the protective measures that arises in respect of civil marriages concluded in terms of South African law, do not arise in respect of marriages concluded in terms of Muslim rites. As a consequence, in order to enjoy these protective measures litigation must be instituted. This is very costly and has resulted in *ad hoc* piecemeal recognition of Muslim marriages.

In 2013, the WLC brought the matter of *Faro v Bingam*[217] to the Western Cape High Court. In this case, the court verified that the MJC 'has no statutory or religious authority finally to determine questions as to whether a marriage has been validly concluded or dissolved in accordance with the tenets of Islam'. The Court lambasted a government department for not making progress on enacting legislation recognising the validity of Muslim marriages.[218]

It ordered the Department of Justice and Constitutional Development to set out the progress it had made in respect of the enactment of the MMB by not later than 15 July 2014. Instead of the government changing the *status quo* through the enactment of the MMB, the deadline set by the court merely prompted the government through its Minister of Home Affairs to put in place the pilot project.

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215 Safiyyah 'A Marriage made in Parliament: South Africa's Muslim Personal Law Bill, Part1 available at :*https://www.patheos.com/blogsmmw/2009-05/a-marriage-made-in-parliament-south-africa's - muslim-*personal-law-bill-part1/(accessed on 30 November 2020).

216 Moosa E (2019) 398.

217 *Faro v Bingham NO and Others (*ZAWHC) unreported case number 4466/2013 (25th October 2013).

218 *Faro v Bingham NO and Others* (ZAWHC) unreported case number 4466/2013 (25th October 2013) para 5.

On the 30th April 2014, the Ministry in the Department of Home affairs in collaboration with the leadership of the MJC graduated and certified approximately 114 Muslim male clerics as civil marriage officers[219] in terms of section 3 of the Marriage Act.[220] This was done shortly before South Africa's fifth democratic elections that were due to take place on 7th May 2014. Subsequent training and opportunities increased the number to 227 and included three female Muslim civil marriage officers.[221]

The Ministers of Justice and Home Affairs saw this as a form of 'recognition' to Muslim couples. During the training of the imams, the respective Ministers encouraged them to advise prospective couples to enter into ante-nuptial contracts accommodating the religious tenets of the marriage provided that the provisions of the contract complied with the Constitution.[222]The Departments of Home Affairs and Justice were of the view that the ante-nuptial contracts could possibly form the basis for the division of property on dissolution of marriage, either by divorce or death. They could ensure that the tenets of Islam are taken into account, without giving preference to any particular school of jurisprudence.[223]

The rationale for introducing the project was to ensure a ready supply of Muslim marriage officers when Muslim marriages were legally recognised. However, Muslim marriages remain formally unrecognised and only the civil marriage may be registered by the Muslim marriage officers.[224]

During the congratulatory speech delivered to the Muslim marriage officers, the then Deputy President of South Africa, Kgalema Motlanthe, incorrectly intimated that the registration of Muslim marriages by Muslim marriage officers would henceforth accord such marriages legal status:

> '…the registration of Muslim unions will accord Muslim marriages legal status and with that, the protective instruments of the secular state may be accessed to ensure that these Qur'anic values are realised and complied with, within the constitutional state.'[225]

The Department of Home Affairs also provided incorrect information on its website:

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219 The Minister of Home Affairs available at: *http://www.dha.gov.za:8086/index.php/about-us/minister-of- home-affairs* (accessed 19 April 2020).

220 The Marriage Act 25 of 1961. (Civil marriages are governed by the Marriage Act since its date of commencement on 1 January 1962 and the regulation issued in terms of the Act).

221 Moosa N and Abduroaf M 'Implications of the Official Designation of Muslim Clergy as Authorised Civil Marriage Officers for Muslim Polygynous, Interfaith and Same-Sex Marriages in South Africa' in *The International Survey of Family Law* (2017) 91.

222 The Constitution of the Republic of South Africa, 1996.

223 Moosa N and Abduroaf M (2017) 91.

224 Moosa N and Abduroaf M (2017) 92.

225 Address by the Deputy President of South Africa at Old Mutual Park, Cape Town (30 April 2014), available at: *president-of-south-africa-the-graduation- ceremony-for-imams-qualifying-as-marriage-officers-old-mutual-park-cape-town-30042014-2014-04-30* (accessed 20 April 2020).

> 'The significance is that for the first time in South Africa's history, Muslim marriages conducted by these Imams will be recorded on the National Population Register, thereby receiving legal status and recognition afforded by the Constitution.'[226]

These comments were widely reported and created much confusion. The MJC and the UUCSA soon thereafter provided clarity and rectified the misconception.[227]

The Muslim marriage officers were vested with the capacity to officiate at civil marriages. The civil option was always available to Muslims. Muslim couples would enter into civil marriages in order to guarantee the validity of their relationship in terms of South African law.

The majority of Muslims do not enter into civil marriages because of the fundamental differences between the two (religious and secular) systems. Many still prefer the option of formal recognition of Muslim marriages.[228]

One of the goals of having Muslim marriage officers introduced should have been to streamline the process so that a *nikah* (Muslim marriage) and a civil marriage may take place on one occasion, as is usual with all other religious marriages officiated by civil marriage officers.

The WLC contacted the Muslim marriage officers anonymously so as to ensure that the responses received were authentic and accurately reflected the nature and content of the advice provided to Muslim women seeking assistance from the marriage officers in question.

The following emerged from these enquiries:

- The majority of the marriage officers preferred the out of community of property regime as this regime accords with the prescripts of *Shari'ah*.

- Only three marriage officers advised that a marriage in community of property was available or that the couple could choose which regime to apply.

- One marriage officer indicated he would perform the *Nikah* (Muslim marriage) if a couple wished but he would not conclude the civil marriage for them.

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226 Graduation Ceremony of Imams in Cape Town available at: http://www.homeaffairs.gov.za/index.php/statements-speeches/456-deputy-president-kgalema-mothlanthe-to-speak-at-graduation-ceremony- of-the-imams-in-cape-town-30-april-2014-at-10h00(accessed 20 April 2020).

227 Moosa N and Abduroaf M (2017) 97.

228 Moosa N and Abduroaf M (2017) 97.

- Another marriage officer indicated that he will only marry a couple if they have an ante-nuptial contract.

- One marriage officer indicated that in community of property would be advisable if the woman entering the marriage has no income or assets.

- The majority of the marriage officers advised that where the husband's first marriage was registered in terms of civil law, his second marriage could be concluded in terms of the *shari'ah* but could not be registered in terms of civil law.

- One of the marriage officers indicated that the second marriage could be registered as a traditional marriage with Home Affairs. Another marriage officer indicated that if the husband was already in a civil marriage, that it would be best for the second wife to marry in terms of an ante-nuptial contract as in the event of the husband's death, the second wife would inherit if she is married in terms of an ante-nuptial contract. (This with absolutely no regard to rights of the first wife.)

- There was also general consensus for the view that the permission and consent of the first wife is not a prerequisite for a man to enter into a marriage with a second wife. However, one of the marriage officers indicated that he would need to be satisfied that the man was properly taking care of his first wife before he would be willing to conclude the second marriage.

- Sixteen marriage officers provided details regarding procedures relating to the registration of a civil marriage. Of these, nine marriage officers made reference to a standard ante-nuptial contract available from the Muslim Judicial Council or their board of attorneys.

- Nine of the marriage officers only provided information relating to procedure for entering into a marriage out of community of property.

- One marriage officer indicated that if a couple would like to enter into a marriage in community of property, they have to go to the Department of Home Affairs, who would send them to a court to get married.

- One marriage officer refused to provide details regarding the procedure for entering into a civil marriage and merely explained how the civil marriage form contradicts the *shari'ah*.

- Another marriage officer advised that Muslim marriages take preference over South African law and that all documents issued by the MJC relating to a marriage are legally valid and take precedence over all other documents.

- One marriage officer advised against entering into a civil marriage.

6.7. The Single Marriage Statute or Omnibus Umbrella Legislation

South Africa is a multicultural society with 11 official languages.[229]It is also home to a large number of religions. Statistics released by Statistics SA in 2014 indicate that approximately 85% of the population described in the 2013 household survey follow the Christian religion, 5% ancestral, tribal, animist, or other traditional African religions; 2% of the population described themselves as Muslim; 0,2% Jewish;1% Hindu; and 5,6% of the population is not affiliated to any religion.[230]

As a result of our colonial and apartheid history, and in common with other many societies, South Africa has a pluralist system of marriage and family laws. This system is hierarchical in the sense that historical privilege afforded to certain European-derived forms of marriage continues to shape the legal recognition and, consequently, the rights afforded to partners in different marital and unmarried relationships.[231]

The Department of Home Affairs and the SALRC want to draft legislation to afford recognition to all forms of marriage. They believe that a Single Marriage Act applicable to all South Africans of different religious and cultural persuasions will accord with the doctrine of equality as enshrined in the Constitution. They propose 'a house with many doors', implying that there should be a single set of minimum requirements and consequences for marriage, which would be accessible through

229 s6(1) of the Constitution.

230 Statistics SA Statistical release P0318: General household survey 2013 18 June 2014 available at: *http.//www.statssa.gov.za/publications/P0318 2013.pdf* (accessed 25 June 2020).

231 Bonthuys Elsje 'A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System' (2016) (Volume 6) *Onati Socio-Legal Series* 1303 -1323 at 1309.

many cultural and religious 'doors' for Muslim, Hindu, Jewish, African and other communities alike. The Act could take the form of a Single (unified) Marriage Act or omnibus (umbrella) legislation.[232]

The Act would compromise a unified set of requirements (and possible consequences) for all marriages. Omnibus legislation would contain different chapters for the recognition of different kinds of marriages such as civil marriages, civil unions, customary marriages and religious marriages.[233]

The Act and omnibus legislation could afford recognition to all types of marriages, including civil, religious and customary marriages, and same-sex unions. While the Act would achieve this by pursuing a one-size-fits-all approach, omnibus legislation would incorporate several chapters, each purporting to recognise a different type of marriage.[234]

Recognition of all marriages will promote equality in that all marriages would be legally recognised and treated as legally valid. However, if the Single Marriage Act or omnibus legislation affords legal recognition to religious marriages, the regulation of the marriages will still be left to religious communities. An omnibus marriage statute that purports to afford blanket recognition to all forms of marriages creates the risk that discriminatory religious rules and practices continue unabated within the private sphere. Any effort to hold the communities constitutionally accountable may be hindered by the South African common law doctrine of religious entanglement where the judiciary could take the position that they cannot interfere in religious family laws since legislation leaves the regulation of those laws in the hands of religious communities.[235]

Earlier this year, the SALRC called for comment on a discussion paper which aims to introduce a Single Marriage Statute for South Africa.[236] The discussion paper proposes the introduction of two alternative draft bills:

- The Protected Relationships Bill, and
- The Recognition and Registration of Marriages and Life Partnerships Bill.

The bills seek to provide the recognition of protected relationships or marriages and life partnerships, regardless of the religious, cultural or other beliefs of the parties or the manner in which the relationship was formed.

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232 South African Law Commission Paper Issue Paper 35 (Project 144) Single Marriage Statute Issue Paper (2019) 6.

233 South African Law Commission Paper Issue Paper 35 (Project 144) Single Marriage Statute Issue Paper (2019) 5.

234 South African Law Commission Paper Issue Paper 35 (Project 144) Single Marriage Statute Issue Paper (2019) 6.

235 *De Langa v Presiding Bishop, Methodist Church of Southern Africa and Another* 2016 (1) SA (CC) at para 30.

236 South African Law Reform Commission Paper Issue Paper 152 (Project 144) Single Marriage Statute Issue Paper (2021).

Other issues covered by the draft bills include the capacity and age of the parties, the role of marriage officers, regulations for polygynous marriages and instances where a relationship is not officially solemnised.

Amending the common law definition of marriage to make provision for the recognition of all forms of marriage will not solve the current difficulties women face within their religious communities relating to discriminatory religious rules and practices. Religious rules and practices will not be able to be regulated through a single or unified marriage act. In particular, it will be difficult for women to obtain religious divorces. The state will have no responsibility to protect disparaged members within communities against harmful practices within those communities.

6.7. Conclusion

It is most unfortunate that the 2010 MMB has not seen the light of the day. However, there is hope that certain aspects could be drawn from it in implementing MPL in the future.

As regards the Imam Project, there is clear bias against advising women to enter into marriages in community of property. There is also ignorance of certain aspects of civil law as well as an incorrect understanding of all aspects of civil law relating to the different matrimonial regimes and patrimonial consequences thereof as well as the registration of civil marriages. The most vulnerable of women are going to rely on the information provided by these marriage officers who believe that they are equipped to provide legal advice. The most vulnerable will unequivocally accept the advice of their religious leader, and, in the case of young people entering into marriage, they may be compelled by their parents to do so.

A new Marriage Act will enable South Africans of different sexual orientations, religious and cultural persuasions to conclude legal marriages. It will allow for equitable treatment and respect for religious and customary beliefs in line with section 15 of the Constitution. However, it is uncertain whether such provisions will work for Muslim marriages. The bill emanates from the desire of the current Minister of Home Affairs, Naledi Pandor, that marriages adhere to uniform norms and that all marriages are registered and captured on the Department of Home Affairs' data system. She also suggests that the state should have no interest in who marries, and in how the religious or cultural rituals are conducted. It should have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage.[237] This will not solve the difficulties women face within the religious communities relating to discriminatory religious rules and practices. It may meet the requirement of formal equality, but not substantive equality as required by the Constitution. It is also inconsistent with the ethos of legal pluralism and the

[237] South African Law Commission Paper Issue Paper 152 (Project 144) Single Marriage Statute Issue paper (2021).

celebration of diversity which is promoted by the Constitution. It gives the impression that the state has no interest in protecting marginalised members of the community.

CHAPTER SEVEN

MUSLIM PERSONAL LAW THROUGH THE COURTS IN SOUTH AFRICA

7.1. Introduction

In terms of section 8(3) and 39(2) of the Constitution,[238] the courts have the power to develop the common law. Such development 'must promote the spirit, purport and object of the Bill of Rights.' Up to 1997, the courts have refused to develop the common law in order to afford legal protection to parties married in terms of Muslim rites because Muslim marriages are potentially polygynous and, therefore, *contra bonos mores* and invalid.[239] However, with the enactment of the Constitution, rights and freedoms based on culture and religion are guaranteed. These 'new' values embedded in the Constitution are reflected in the recent judgments of our courts that used their newly acquired development function to develop the South African common law in order to recognise some aspects of MPL.

The non-recognition of certain aspects of MPL causes unnecessary hardship, especially for women. A Muslim woman is often in a 'catch twenty-two' situation. For example, on the one hand attempts to divorce her husband in terms of Islamic law may be foiled by the relevant religious tribunal and, on the other hand, the South African courts may not provide the necessary relief, because they may not recognise the validity of her Muslim marriage.[240] The non-recognition of Muslim marriages has the effect that a person married in terms of the *shari'ah* has no right to approach a court of law for a decree of divorce. Muslim clerics often fail to resolve marital conflicts and to enforce financial duties (including the duty of the husband to provide maintenance for his wife and children). There is no consensus about the form or procedure for the Islamic institution to issue a *faskh* or to ensure its execution.

Husbands sometimes refuse to acknowledge the validity of such annulments since they reject the Islamic institution or its authority over their marriage for various factors. Some husbands refuse to divorce their wives in terms of Islamic law. They also refuse to reach a settlement so the wife may make use of her right to request a *khul'*. The wife in turn cannot turn to the South African judiciary to obtain a divorce, because of the non-recognition of her marriage. The result of this unwillingness on the part of the husband, and the non-recognition of the marriage in terms of South African law, leads to gross infringement of Muslim women's fundamental rights[241] as entrenched in the Constitution.

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238 Constitution of the Republic of South Africa,1996.

239 Rautenbach C (2003) *QUTLJJ* 169.

240 Rautenbach C (2003) *QUTLJJ* 168-169 and Gabru N (2004) *PER/PELJ* 44/204

241 The right of freedom and security of the person and the right of freedom of association are infringed by the husband by holding the wife captive in a marriage that has irretrievably broken down. The wife may not be able to enter another Islamic marriage until and unless the existing marriage has been terminated in terms of *shari'ah*. The husband infringes the woman's right as guaranteed in s 12(d) and 18 of the Constitution.

In the case of *Amar v Amar*,[242] the court held that the purpose of the Divorce Act[243] is to:

> 'create mechanisms whereby recalcitrant spouses can be encouraged or even pressurised into granting religious divorces where these are necessary to enable a spouse to remarry'.

The court found that the acts of the husband *in casu* were to withhold the *get* (Jewish divorce) in order to compel his wife to amend an agreement between them. It held that the most effective way to procure the co-operation of the husband to obtain a Jewish divorce would be to order the husband to pay maintenance to his wife until their marriage was dissolved in terms of Jewish law. However, this section may be of no assistance to couples whose religious marriages are not recognised in terms of South African law. They would not be able to approach a court for a divorce, because in order to obtain a divorce the marriage must be valid.[244]

The South African courts are increasingly faced with complex issues regarding the Muslim community. In the last few years there has been a definite change in the courts' attitude with regard to recognition of certain aspects of MPL. Contrary to the pre-1994 cases, recent cases attempt to develop the common law to give recognition to certain aspects of MPL.[245]

Ad hoc piecemeal recognition is given to certain consequences of Muslim marriages by the judiciary. It appears that it is highly unlikely that the judiciary intended to grant recognition to Muslim marriages in *toto*. It is important to acknowledge that these court decisions were often contrary to Islamic principles, although the plight of Muslim women was alleviated. This causes a tremendous amount of confusion.

In the case of *Ismail v Ismail*,[246] the appellant sought the proprietary consequences flowing from the termination of a marriage solemnised according to Muslim rites. The court refused to grant the rights to polygynous unions on the grounds of public

242 *Amar v Amar* 1999 (3) SA 604 W 606.

243 S5A of the Divorce Act 70 of 1979 states: 'if it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of religion or the religion of either of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power is to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any order that it finds just'.

244 Bonthuys E (2000) *SALJ* 8-16 and Van Schalkwyk (2000) *DJ* 186 -190.

245 Rautenbach C 2004 'Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa' (2004) *PELJ* (7) 2.

246 *Ismail v Ismail* 1983(1) SA 1006 (A). See also *Seedat's Executor v The Master (Natal)* 1917 AD 302 and *Kalla and Others v The Master and Others* 1995 (1) SA 261 (T).

policy. The court said, 'the union was contrary to the accepted norms that are morally binding on our society.'[247]

Section 15 of the South African Constitution[248] allows for the recognition of personal laws and religious communities. Section 31 of the Constitution allows cultural, religious and linguistic communities the right to enjoy their culture, practice of religion and use of their language.[249]

The ushering in of the constitutional democracy in South Africa heralded a shift in the jurisprudence of case law towards a democratic ethos rooted in the values of equality, tolerance and social justice. This was evident in the landmark decisions.

7.2. *Ryland v Edros* [1997]

The first case that deviated from a long line of decisions that were all against the recognition of Muslim marriages was the case of *Ryland v Edros.*[250] In *casu*, the husband instituted an action to have his wife evicted from their marital home after he issued her with an Islamic divorce. The Court had to decide whether a marriage contract entered into between parties married in terms of Islamic law, where the marriage was *de facto* monogamous, was against public policy.[251]

The court held that,

> 'it was inimical to all the values of the new South Africa for one group to impose its values on another and that the court should only brand a contract offensive to public policy if it was offensive to those values which are shared by the community at large, by all right thinking people in the community and not only by one section.'[252]

The Cape High Court recognised the *de facto* marriage by Muslim rites as a valid contract under the Constitution and demonstrated that the court could be called upon to ensure that parties to monogamous Muslim marriages comply with the terms of the contractual arrangement. The court held that the contractual obligations flowing

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247 *Ismail v Ismail* 1983(1) SA 1006 (A) 1017.

248 Constitution of the Republic of South Africa, 1996.

249 s31(1) of the Constitution states that 'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a.) to enjoy their culture, practise their religion and use their language.'

250 *Ryland v Edros* 1997(2) SA 690 (C).

251 The rules of public policy comprise the principles, often unwritten, on which social laws are based. Such rules are not necessarily general principles or legal norms. Public policies are filtered through a specific policy process. They are adopted and implemented through laws, regulatory measures and government action, and enforced by a public agency. Farlam J held that 'public policy is essentially a question of fact' and not a legal problem in the sense of the *boni mores* manifested in public opinion which alters from time to time. He based his decision on those values that have survived change through time, and which in turn become enshrined in the Constitution. We may thus infer that public policy is longer a vague and arbitrary creature that is open to abuse by an executive-minded judiciary. Rather it operates within definitive parameters and is guided by interpretation provision of the Constitution.

252 *Ryland v Edros* 1997(2) SA 707 at 707G.

from a *de facto* monogamous Muslim marriage can be recognised and enforced as between the spouses despite the fact that the marriage is potentially polygynous. The court rejected the 1983 decision of *Ismail v Ismail*[253] in which the Appellate Division (now SCA) had held that a polygynous union and the contractual obligations flowing from it could not be recognised because polygyny conflicts with public policy.[254]

Farlam J came to the conclusion that the marriage contract between the parties was not *contra bonos mores*. As a result, the *Ismail* case no longer 'operates to preclude a court from enforcing claims such as those brought by' parties to an Islamic union.

7.3. *Amod v Multilateral Motor Vehicle Accident Fund* [1999]

In the case of *Amod v Multilateral Motor Vehicles Accident Fund*,[255] Mrs Amod claimed damages from the Motor Vehicles Accident Fund after the death of her husband in a motor collision. The court held that the deceased had a common-law duty of support and therefore Mrs Amod was entitled to a dependent's action based on the new ethos of tolerance, pluralism and religious freedom not previously enjoyed during the apartheid regime.[256]

The SCA concluded that in view of the ethos of tolerance, pluralism and religious freedom which evidenced itself in the new South Africa even before the formal adoption of the interim Constitution,[257] the *boni mores* of our society require that the contractual duty of support which flows from a Muslim marriage should be recognised and be legally enforceable at common law. The Fund was therefore ordered to compensate Mrs Amod for her loss of support.

The court did emphasise that the marriage had been a *de facto* monogamous one, and that it left open the issue of whether dependents would have an action for loss of support in the case of a *de facto* polygynous marriage.[258]

7.4. *Daniels v Campbell* [2004]

In the case of *Daniels v Campbell,*[259] Zuleigha Daniels married Mogamat Amien Daniels in 1977 according to Muslim rites. In 1994, Mr Daniels died without leaving a will. The only real asset in the estate was a house in Hanover Park. The house was first occupied by Mrs Daniels as a rental from the City of Cape Town in 1969.

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253 *Ismail v Ismail* 1983 1 SA 1006 (A).

254 Mahomed 1997 *De Rebus* 189, Church 1997 *THRHR* 292, Ferreira and Robinson 1997 *THRHR* 303, Bonthys 2002 *SALJ* 761 -762, Van Schalkwyk 2003 *De Jure* 313 -314.

255 *Amod v Multilateral Motor Vehicles Accident Fund* 1999 (4) SA 1319 (SCA). See also Freedman 1998 *THRHR* 532, Clark and Kerr 1999 *SALJ* 20, Goldblatt 2000, *SAJHR* 138, Goolam 2000 *THRHR* 522.

256 *Amod v Multilateral Motor Vehicles Accidents Fund* 1999 (SA) 1319 SCA;1999 4 All SA 21(A).

257 Constitution of the Republic of South Africa, 1996.

258 *Amod v Multilateral Motor Vehicles Accident Fund* 1999 (4) SA 1319 SCA;1999 4 All SA 421(A).

259 *Daniels v Campbell NO and Others* 2004 (5) SA 331(C) 2.

When Mr and Mrs Daniels married, the housing policy dictated that the tenancy be transferred to Mr Daniels as he was deemed to be the principal breadwinner. Consequently, when he died, the property formed part of his estate. The Intestate Succession Act[260] stipulated that the surviving spouse will inherit the estate. The surviving spouse was considered to be a party of a legal marriage. The Maintenance of the Surviving Spouses Act[261] stipulated that a spouse may claim maintenance from the deceased estate, 'spouse' being considered where parties were married civilly.

The primary legal issue was whether Mrs Daniel could be deemed to be the surviving spouse of the estate of her deceased husband when their marriage was solemnised according to Muslim rites only, so that she could claim a benefit as an heir and receive maintenance?

In terms of the Intestate Succession Act[262] and the Maintenance of Surviving Spouses Act,[263] the surviving spouse of the deceased has a right to inherit and be maintained. However, the Master of the High court (who administers deceased estates) failed to acknowledge Mrs Daniels as a spouse because her marriage was not solemnised by a marriage officer appointed in terms of the Marriage Act.[264]

An application was made to the Cape High Court in 1999 to have Mrs Daniels rights asserted as her late husband's surviving spouse in terms of her constitutional right to freedom of religion, equality and dignity.

Judge Van Heerden said,

> 'Marriages by Muslim rites have not been recognised by South African courts as valid marriages, first because such marriages are potentially polygamous and hence contrary to public policy and secondly because such marriages are not solemnised by authorised marriage officers in accordance with the Marriage Act 25 of 1961…an appropriate remedy must mean an effective remedy for breach, for without an effective remedy for breach, the values underlying the rights entrenched in the constitution cannot be properly upheld or advanced. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal.'[265]

The High Court declared Mrs Daniels to be a spouse so that she could be deemed to be an heir to her deceased husband's estate and claim maintenance from the estate.

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260 Intestate Succession Act 81 of 1987.
261 Maintenance of the Surviving Spouses Act 20 of 1980.
262 Intestate Succession Act 81 of 1987.
263 Maintenance of Surviving Spouses Act 20 of 1990.
264 Marriage Act 25 of 1961.
265 *Daniels v Campbell NO and Others* 2004 (5) SA 331(C) at para 9.

The Constitutional Court confirmed that Mrs. Daniels must be considered as a beneficiary of her deceased husband's estate.[266]

The Constitutional Court agreed with the High Court that relevant legislation be declared inconsistent with the Constitution, whereby in terms of section 1(4) of the Intestate Succession Act,[267] the definition of 'spouse' shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous marriage and in terms of section 1 of the Maintenance of Surviving Spouses Act[268] 'survivor' shall be deemed to include the surviving husband or wife of a *de facto* monogamous union in accordance with Muslim rites.

7.5. *Khan v Khan* [2005]

In the case of *Khan v Khan,*[269] the Court considered whether there is a legal duty on the appellant, in terms of the Maintenance Act,[270] to maintain the respondent, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygynous one. The court held that the Maintenance Act emphasised the establishment of a fair system of maintenance premised on the fundamental rights in the Constitution, that the common law duty of support was flexible and had expanded over time to include many types of relationships. Furthermore, the purpose of the family was to protect the vulnerable family members and ensure fairness in disputes arising from the termination of relationships. A polygynous marriage was a family structure and should thus be protected by family law and that partners to Muslim marriages, whether monogamous or not, were entitled to maintenance. Maintenance courts thus have jurisdiction to hear maintenance matters.[271]

7.6. *Hassam v Jacobs* [2008]

In the case of *Hassam v Jacobs,*[272] Mrs Fatima Gabie Hassan made an application to court concerning the estate of late Ebrahim Hassam, as one of the two current wives of the deceased, to whom they were both married according to Muslim rites. She asked the court to provide clarity on the validity of the marriages.

Fatima Gabie Hassan married Ebrahim Hassam in accordance with Muslim rites on 3 December 1972. On the 10 February 1990 Ebrahim Hassam acquired property in Cape Town that served as their matrimonial home for them and their children. In June 1998, Fatima obtain a '*faskh'* to terminate their marriage. Their marriage was not considered terminated because they reconciled within three months and

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266 Daniels v Campbell NO and Others 2004 7 BCLR 735 (CC); Cronje and Heaton *Casebook on Family Law* 84.
267 Intestate Succession Act 81 of 1987.
268 Maintenance of Surviving Spouses Act 27 of 1990
269 *Khan v Khan* 2005 (2) SA 272 (T)
270 Maintenance Act 99 of 1998.
271 *Khan v Khan* 2005 (2) SA 272 (T) para 5.
272 *Hassam v Jacobs* NO and Others 2009 (5) SA 572 CC para 4.

continued to live together as husband and wife until his death on 22 August 2001. Ebrahim Hassam also married Miriam Hassam in or about 2000 and there were three children born of the marriage. He died without leaving a will. When his estate was reported to the Master's office, the Master refused to acknowledge Fatima Gabie Hassam as a spouse because Miriam Hassam was also a spouse. Fatima Gabie Hassam sought to challenge her rights as a spouse. She applied to the Cape High Court asking that she be declared the spouse of the deceased because she was first married to the deceased.[273]

The legal issue was whether, upon the death of their husband, the surviving spouses of a polygynous marriage contracted in accordance with Muslim law are entitled to benefits created by the Intestate Succession Act.[274] In terms of the legislation relating to intestate succession and maintenance of surviving spouses, there is no provision for polygynous Muslim marriages allowing more than one wife to inherit intestate and be maintained.[275]

The purpose of the Acts in question was to provide relief to a vulnerable section of the community, namely widows who face dependence and potential homelessness. Women who are parties to polygynous marriages fall into this category.

The order was made declaring the word 'survivor', as used in the Maintenance of Surviving Spouses Act,[276] to include a surviving partner to a polygynous Muslim marriage. The word 'spouse' as used in the Intestate Succession Act,[277]included a surviving partner in a polygynous marriage. Fatima Gabie Hassam as well as Miriam Hassam were, for the purposes of the Intestate Succession Act,[278] 'spouses' of the late Ebrahim Hassam. Section 1(4)f was declared inconsistent with the Constitution,[279] to the extent that it only made provision for one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband.

The section was substituted with a statement that if more than one spouse survived a deceased person, the estate would be divided by dividing the value of the estate by the number of children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased. Each surviving spouse will inherit a child's share of the intestate estate or the amount fixed from time to time by the Minister of Justice and Constitutional Development, whichever is greater. This case

273 Osman-Hyder M, 'The Impact and Consequences of Hassam v Jacobs 2009 11 BCLR 1148 (CC)' 22 *Stell LR.* (2011) 233.
274 Intestate Succession Act 81 of 1987.
275 Osman-Hyder M (2011) 233.
276 Maintenance of Surviving Spouses Act 27 of 1990.
277 Intestate Succession Act 81 of 1987.
278 Intestate Succession Act 81 of 1987.
279 Constitution of the Republic of South Africa, 1996.

was a major step, giving recognition to polygynous marriages and entrenching constitutional rights.[280]

7.7. *Mahomed v Mahomed* [2009]

The case of *Mahomed v Mahomed*[281] was an interim application for maintenance in terms of Rule 43 where Judge Revelas recognised that an increased tendency had developed in our courts to enforce maintenance and other rights to spouses married in terms of Islamic law, even though the legislature did not legally recognise an Islamic marriage as a marriage in terms of the Marriage Act.[282] The rule 43 application was granted in terms of which the Respondent was ordered to pay maintenance for the Applicant and his minor child and had to pay a contribution to costs.

7.8. *Hoosein v Dangor* [2010]

In the case of *Hoosein v Dangor,*[283] Ms Hoosein brought a Rule 43 application where she sought maintenance for herself and her minor daughter and sought a contribution for costs in the main divorce action. The court found that interim maintenance arose from the general duty of a husband to support his wife and children and that he is not precluded from doing so because they were married by Muslim rites. This meant that the word 'spouse' as used in the Rule 43 application included a spouse to a marriage concluded under Islamic law. The Rule 43 application makes provision for legal costs to be paid by the other side as well as maintenance of the spouse and children until the main action is finalised.

In Islamic law, the husband who divorces his wife has a number of legal obligations towards her, including maintenance and payment of any outstanding dower. The duty to maintain is usually confined to the period of the *iddah* (waiting period) which is observed when the notice of divorce ('*talaq*') comes to the knowledge of the wife. Only the *Hanafi* school makes provision for extended maintenance ('*ujrah*') of the mother who has custody of the children. As far as an irrevocable divorce is concerned, the different schools of Islamic law have divergent opinions as to what maintenance the wife is entitled to. While the Hanafi school provides maintenance to the wife in all instances, the other three schools do so only if she is pregnant.[284]

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280 Samaai S, May C and Gihwala H 'Equal Rights and Recognition: Extending the Protection in the Wills Act to Women in Polygamous Marriages' in Dangor S and Moosa N *Muslim Personal Law in South Africa Evolution and Future Status* (2019) 308.

281 *Mahomed v Mahomed* [2009] JOL 233733(ECP).

282 Marriage Act 25 of 1961.

283 *Hoosein v Dangor* (2010) 2 All 55 (WCC).

284 Minces J *The House of Obedience: Women in Arab Society* (1989) at 65; Pearl D *A Textbook of Muslim Personal Law* 2 ed (1987) at 69.

The *Qur'an* in chapter two, Verse 241 makes specific reference to maintenance of divorced women: 'For divorced women maintenance (should be provided) on a reasonable scale. This is a duty on the righteous.'[285]

The verse does not qualify the period. The amount and method of maintenance is unspecified. The preceding verse 240 makes provision for widows (a year's maintenance and residence).[286]

Divorce in South African law is no longer based on the fault of the party. The effect has been to embed the 'clean break' principle when dealing with the division of assets and the maintenance of spouses on divorce.

De Jong[287] proposes that where women have been supported by their husbands during the marriage, where they have cared for children and perhaps sacrificed careers, they should be granted post-divorce maintenance whereas (for example) younger women without children with careers should not receive it.

The various common law approaches suggest that, without legislation, it would be difficult to ask the courts to grant Muslim women post-divorce maintenance, even if it is religiously sanctioned. This is partly because the courts are unwilling to enter the realm of doctrine entanglement. It may also be unjust to impose a responsibility for alimony on Muslim husbands but not on those of other faiths. Legislation which gives effect to the Muslim man's obligation to maintain his wife after divorce might face similar difficulties. Obvious challenges would relate, *inter alia*, to the right to dignity and right not to be discriminated against on the basis of religion and gender. This is also a typical case where although the plight of the Applicant was alleviated, it may well be a judgment contrary to Islamic law and may create confusion in the future. This is another reason for the imperative for the implementation of MPL.

7.9. *Rose v Rose* [2014]

The Western Cape High Court held in the case of *Rose v Rose,*[288] that Faiza Rose, a nurse from Simons Town who was married to one Faizel Rose for 20 years, could claim for maintenance and a share of her former husband's pension. This is another ground-breaking judgment as when Faiza married Faizal under Islamic law in 1988 he was legally married to another woman. That marriage ended a few months later and his marriage was annulled by the MJC in 2009.

Prior to this judgement, spouses in Muslim marriages were unable to claim their share of assets of their marriage to their former husbands if their husband was

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285 Ali AY *The Holy Qur'an – English Translation of the Meanings and Commentary* (1934) (2:241).

286 Ali AY The Holy Qur'an – *English Translation of the Meanings and Commentary* (1934) (2:240).

287 De Jong M 'New Trends Regarding Maintenance of Spouses upon Divorce' (1999) *Tydskrif vir die Suid-Afrikaanse* Reg at 80.

288 *Rose v Rose* (WCC) (Unreported case no.14770/11 13 August 2014.

already married to another woman at the time of their marriage. However, in this case the court held the Muslim men often enter into more than one marriage simultaneously, that marriages can be civil, religious or customary, and the mere fact that a Muslim marriage is polygynous should not prejudice spouses to the union.

7.10. *Moosa NO and Others v Harneker and Others* [2017]

In the case of *Moosa NO and Others v Harneker and Others*[289]the court had to decide whether in the light of the equality provisions of the Constitution, section 2C (1) of the Wills Act 7 of 1953 could be extended to protect surviving spouses in polygynous Muslim marriages.[290] The court found that that section 2C (1) was unfairly discriminatory in that the wife who married the deceased in terms of Islamic law was being directly discriminated against because of her religion and marital status and that the section 'is withholding benefits from a certain group of persons, namely, those women in polygynous Muslim marriages' and the court found this exclusion to be 'constitutionally unacceptable and unjust'.[291] The court ordered that the Registrar of Deeds' decision that the second wife was not a 'surviving spouse' be reviewed and set aside, and the second wife be declared a surviving spouse, and that the Registrar of Deeds was to register the transfer of the property from the deceased's name into the name of both wives.[292] This was another victory for Muslim women as the court came to the aid of Muslim women by removing unconstitutional and discriminatory sections of legislation.

7.11*. Women's Legal Centre Trust (WLCT) and others v The President of the Republic of South Africa and others* [2018]

In the case of *WLCT v President of Republic of South Africa and others,* [293] the Applicant brought an application in terms of section 167 of the Constitution[294] for an order declaring that the President in his capacity as head of the National Executive had failed to fulfil the obligation imposed on him by section 7(2) of the Constitution[295] to protect, promote and fulfil the rights of the Constitution[296] and by failing to prepare and initiate diligently without delay a Bill to provide for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition.

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289 *Moosa NO and Others v Minister of Justice and Correctional Services and Others* 2018 (5) SA 13 (CC).

290 s2C*(1)* of the Wills Act states '[i]f any descendants of a testator, excluding a minor or a mentally ill descendant who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.'

291 *Moosa NO and Others v Harnakar and Others* 2017 (6) SA 425 (CC) para 32 -3.

292 *Moosa NO and Others v Harnakar and Others* 2017 (6) SA 425 (CC) para 39.

293 *WLCT and Others v President of the RSA 2009* (6) SA 94 (CC).

294 Constitution of the Republic of South Africa, 1996.

295 Constitution of the Republic of South Africa, 1996.

296 Constitution of the Republic of South Africa,1996.

The court advocated that the provision envisaged only constitutional obligations imposed specifically and exclusively on the President or Parliament alone.

The High Court judgment handed down on 31st August 2018[297] provided no instant relief to Muslim women who have borne and continue to bear the brunt of suffering due to lack of recognition of Muslim marriages. It does not imply that Muslim marriages are now deemed to be valid or afforded legal protection. On 31st August 2018, the court in *Faro v Bingham NO and Others* ordered the government to change the current *status quo* to formally recognise a Muslim marriage and regulate its consequences (especially those pertaining to, and flowing from, its dissolution) and this time, to do so within twenty-four months (or two years) from the date of the judgment.[298]

The President and the Minister of Justice and Constitutional Development appealed certain aspects of the Judgment, and the Applicant WLCT then cross appealed[299]. The President and Minister were of the view that the High Court had erred in regard to its findings and the WLCT also felt that the High Court had erred but with regard to certain other aspects. The matter was heard by the SCA, with five judges making up the full bench.

As far as the main issues were concerned, all parties agreed that the High Court was correct. However, they differed with regard to the following three points:

Firstly, the High Court found that the state had an obligation to enact legislation recognising Muslim marriages. The SCA overruled this and found there was no such obligation as while the state was under an obligation to correct the invalid position, the courts could not prescribe to the state the manner in which this should be achieved. It said that the state had a duty to correct the invalid position, but that the court could not tell the state how to go about doing so. The remedying could take the form of legislation, or it could take another form. It was not limited to the enactment of legislation. Thus, the appeal succeeded on this point.[300]

Secondly, the High Court found that the *status quo* violated section 15 of the Constitution. The Appeal Court pointed out that section 15 was permissive, and not peremptory. This section does not oblige the state to enact legislation recognising

297 *President of RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and others; Minister of Justice and Constitutional Development v Esau and Others (*Case no.612/19) [2020] ZASCA 177 (18 December 2020).

298 *President of RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and others; Minister of Justice and Constitutional Development v Esau and Others* (Case no.612/19) [2020] ZASCA 177 (18 December 2020).

299 *President of RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and others; Minister of Justice and Constitutional Development v Esau and Others* (Case no.612/19) [2020] ZASCA 177 (18 December 2020).

300 *President of RSA and Another v Women's Legal Centre Trust and Others: Minister of Justice and Constitutional Development v Faro and Others: Minister of Justice and Constitutional Development v Esau and Others (*Case no.612/19) [2020] ZASCA 177 (18 December 2020) para 44.

religious marriages, but merely permits it. Thus, the High Court erred in this regard.[301]

Thirdly, the High Court made its order applicable from the date of its judgment. The WLC wanted the High Court findings to be backdated and applicable from April 1994. The SCA did not agree as backdating the order would create profound unforeseen circumstances.

The SCA left it to Parliament to decide whether or not to backdate the change.[302]

The main relief was the same as the High Court had granted.

The judgment placed those married by way of *Nikah* in a position similar to those married in terms of the Marriage Act. The High Court had already granted that order. As things stand the judgment does not make MPL part of South African law. There is still a need for South Africa to implement MPL.

7.12. Conclusion

Although there has been some progress in the recognition of MPL in South Africa through the courts, one cannot rely on the courts to provide relief to the majority of Muslim women who do not have the financial resources, education and time to turn to the courts for relief. The change that has come about in MPL through the various cases is due primarily to the Constitution which has given all individuals equal rights. The courts cannot pass law arbitrarily as the duty of the courts is to apply the law. Piecemeal legislation is costly and time consuming and not available to the average Muslim woman.[303]

In the absence of the availability of the forfeiture of assets on divorce, women are often left destitute on termination of a Muslim marriage, particularly when they are not sufficiently empowered to exert their rights to negotiate and contract the terms of their marriage at its inception, as is the case with the poor and most vulnerable of society. Most of the assets acquired during the Muslim marriage accumulate in the husband's estate.

The effect hereof is that on dissolution of the Muslim marriage, the Muslim wife is usually left with a virtually non-existent estate and she has no remedy to obtain an equitable distribution of her husband's assets as would be available to a woman who is able to rely on the Divorce Act.[304] The omission is a further infringement of the

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301 *President of RSA and Another v Women's Legal Centre Trust and Others: Minister of Justice and Constitutional Development v Faro and Others: Minister of Justice and Constitutional Development v Esau and Others* (Case no.612/19) [2020] ZASCA 177 (18 December 2020) para 47.

302 *President of RSA and Another v Women's Legal Centre Trust and Others: Minister of Justice and Constitutional Development v Faro and Others: Minister of Justice and Constitutional Development v Esau and Others* (Case no.612/19) [2020] ZASCA 177 (18 December 2020).

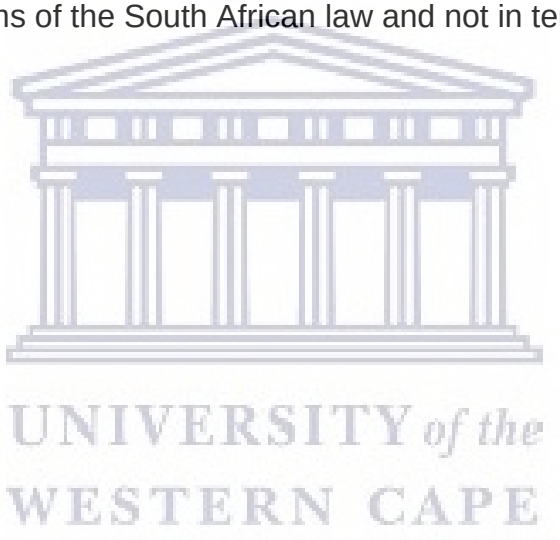
303 Abrahams-Fayker H (2019) 271.

304 Divorce Act 70 of 1979.

right to equality. Even attempts to obtain maintenance by invoking the Maintenance Act,[305] both in relation to the wife and children, can drag on for many years.

There is a dire need to address the proprietary consequences of marriages that have been terminated in terms of Islamic law. There is a need for legislation to help the broader Muslim community to ensure that women's rights are protected. Legislation not recognising Muslim marriages is inconsistent with fundamental rights, equality, human dignity, freedom of religion, belief and opinion, rights of children, language, the rights of cultural, religious and linguistic communities, access to courts, and the diligent performance of constitutional obligations.

No cases have (to date) been heard by the Constitutional Court that concern the constitutionality of Islamic law. Some authors have reviewed Constitutional Court cases and critically analysed the decisions.[306] These cases include claims made by spouses who were married in terms of Islamic law. The authors of the texts generally see the judgments as victorious for the South African Muslim community. The relief has been granted in terms of the South African law and not in terms of Islamic law.



305 Maintenance Act 99 of 1998.

306 The texts include Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts – The Past Meeting the Present and Thoughts for the Future* (2014); Osman-Hyder M 'The Impact and Consequences of *Hassam v Jacobs NO* on Polygynous Marriages [a Discussion of the *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC)' (2011) 2 *Stellenbosch Law Review* 233, 246.

CHAPTER EIGHT

SOUTH AFRICAN LEGISLATION GIVING RECOGNITION TO MUSLIM MARRIAGES

8.1. Introduction

There are several statutes which were adopted or amended recently, and which include parties to Muslim marriages. Various Acts or sections of Acts expressly provide that they apply to religious marriages. The numerous Acts in South Africa recognise certain aspects of Muslim marriages.

8.2. Various Acts recognising aspects of Muslim Marriages

8.2.1. Divorce Act

In terms of section 5A of the Divorce Act,[307](as amended) a court is empowered to refuse to grant a decree of divorce to parties married 'civilly' (that is in accordance with the Marriage Act)[308] and by religious rites if the religious marriage has not been dissolved and it will prevent them or either one of them from remarrying.

8.2.2. Insolvency Act

In terms of section 21(13) of the Insolvency Act[309](which deals with the effect of the sequestration of the separate estate of one or two spouses who are not living apart under a judicial order of separation), the word 'spouse' includes a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another.

8.2.3. Domestic Violence Act

Section 1 of the Domestic Violence Act,[310] includes in the definition of that term a relationship where the parties are or were married to each other, including marriage according to any law, custom or religion.[311]

8.2.4. Children's Act

In terms of section 1 of the Children's Act[312], a 'marriage' means a marriage recognised in terms of South African law or customary law or concluded in accordance with a system of religious law subject to specified procedures with any

307 Divorce Act 70 of 1979 as amended by s1 of Divorce Amendment Act 95 0f 1996.
308 Marriage Act 25 of 1961
309 Insolvency Act 24 of 1936.
310 Domestic Violence Act 116 of 1998.
311 *Omar v Government of the Republic of South Africa and Others* 2006 (2) SA 289 (CC).
312 Children's Act 38 of 2005. See *O v W* (ZAWCHC) unreported case no.21412/17) [2018] 61 (25 May 2018).

reference to a husband, wife, widower, widow, divorced person, married person, or spouse construed accordingly.

8.2.5. Births and Deaths Registration Act

In terms of section 1(2) of the Births and Deaths Registration Act[313] (as inserted by section 1*(b)* of the Births and Deaths Registration Amendment Act 40 of 1996), 'marriage' includes a marriage solemnised or concluded according to the tenets of any religion which is recognised by the Minister of Home Affairs. It adds that the Minister must recognise the marriage if upon the submission of information in the prescribed form he or she is satisfied that it was in fact concluded or solemnised. Section 11(1) and (3) of the Births and Deaths Registration Act provide that any parent or guardian of a child born from parents married to each other by virtue of a marriage recognised by the Minister in terms of section 1(2) may, if such child is a minor, or such child himself or herself may, if he or she is of age, at any time after the registration of the birth of such child as a birth out of wedlock, apply to the Director General to amend the registration of his or her birth as if his or her parents were married to each other at the time of his or her birth, and thereupon the Director-General shall, if satisfied that the Trust is competent to make application, and that the alleged parents of the child are in fact his or her parents and that their marriage to each other has been recognised by the Minister, amend the registration of birth in the prescribed manner as if such a child's parents were legally married to each other at the time of his or her birth.[314]

8.2.6. Taxation legislation

In terms of section 1 of the Income Tax Act, (as inserted by section 5*(j)* of the Taxation Laws Amendment Act 5 of 2001), a 'spouse' is defined, amongst other things, as a person who has a partner in a union recognised as a marriage in accordance with the tenets of any religion. It adds that 'married', 'husband' or 'wife' shall be construed accordingly. This recognition is subject to the proviso that in the absence of proof to the contrary, such a marriage shall be deemed to be a marriage or union without community of property.[315]

The definition of 'spouse' in section 1 of the Transfer Duty Act[316] (as inserted by section 1*(d)* of the Taxation Laws Amendment Act 5 of 2001) and in section 1 of the Estate Duty Act[317] (as inserted by section 1(1) of the Revenue Laws Amendment Act

313 Births and Deaths Registration Act 51 of 1992.See Breslaw S 'Muslim Spouses – Are they Equally Married' *De Rebus* (2013) 246.

314 Births and Deaths Registration Act 51 of 1992.

315 Income Tax Act 58 of 1962.

316 Transfer Duty Act 40 of 1949. See also Breslaw S (2013) 247. 'Similarly, the Transfer Duty Act exempts from duty property inherited from the deceased estate of a spouse married in terms of Muslim law. The Act also provides an exemption on property accruing to a surviving spouse to a Muslim marriage from the estate of the deceased spouse.'

317 Estate Duty Act 45 of 1955.

59 of 2000 and amended by section 3*(b)* of the Taxation Laws Amendment Act 5 of 2001) are to the same effect.

The definition of 'spouse' in the Value Added Tax Act[318] (as amended by section 117*(c)* of the Revenue Laws Amendment Act 31 of 2005), includes the partner of a person in a union recognised as a marriage in accordance with the tenets of any religion.

8.2.7. Pension legislation

Section 1 of the Government Employees Pension Law 1996 defines 'dependent' in a manner which includes the spouse of the member or pensioner, including a party to a union recognised as a marriage under the tenets of any religion and defines 'spouse' in a manner which includes a person who is a husband or wife in terms of the tenets of any religion, of the member or pensioner at the date of the member's or pensioner's death.[319]

Section 31(2) of the Special Pensions Act,[320] provides that in application of the definition of 'spouse' in section 31(1), 'marriage relationship' means, amongst other things, a union which is recognised as marriage in accordance with the tenets of any religion.

Section 1 of the Demobilisation Act 99 of 1996 defines 'dependent', for the purpose of section 7 (a gratuity provision), in a manner which includes any surviving spouse, by virtue of a marriage or a union which is recognised as a marriage in accordance with the tenets of a religion, of a person who, but for his or her death, would have been eligible for demobilisation.

'Spouse' in section 1 of the Pension Funds Act[321] (as inserted by section 1*(a)* of the Pension Funds Amendment Act 11 of 2007), means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, the Recognition Act, the Civil Union Act, or the tenets of any religion.

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318 Value Added Tax Act 89 of 1991. Breslaw S (2013) 248.

319 Government Employees Pension Law Amendment Act No.21 of 2004.

320 Special Pensions Act 69 of 1996. See also *Rose v Rose* (WCC) unreported case no. 14770/11(13 August 2014) which dealt with the case of Muslim woman in a polygynous marriage who could claim maintenance as well as a share of her former husband's pension [*R v R and Others* 2015 (2) ALL 352 (WCC) (29 January 2015)]. In*Tyron TY v Nedgroup Defined Contribution Pension and Provident Funds and Another* (unreported case no. PFA/GA8 96/2011/TCM) the Pension Funds Adjudicator had to deal with the question of whether a spouse in a Muslim marriage can share in the other spouse's pension interest on divorce. The adjudicator ruled that it is possible for a spouse married and divorced in terms of Muslim law only to share in the other spouse's pension interest on divorce. The member spouse's retirement fund would have to make payment to the non-member spouse if the agreement reached between the spouses regarding the division of pension interest states as much and has been made an order. See Harrington-Johnson M 'Muslim Marriages and Divorce' (2015) *De Rebus* 93.

321 Pension Funds Act 24 of 1956. See *L v L* (ZAFSHC) unreported case no. 5345//2017 (27 February 2020). *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 SCA.

The definition of 'recognised marriage' in section 2 of the schedule to the Transnet Pension Fund Amendment Act 41 of 2000 (as substituted by GN 620 of 13 July 2007), defines 'recognised marriage', in relation to a pensioner, in a manner which includes marriage by religious rites.

Section 52 of the Financial Services Amendment Act which came into effect in February 2014, tries to expand pension-splitting where asset splitting takes place pursuant to a court order. It makes provision for Muslim spouses to access their spouse's pension.

8.2.8. Civil Court and Criminal Court legislation

Section 195(2) of the Criminal Procedure Act[322] (as substituted by section 4 of the Justice Laws Rationalisation Act 18 of 1996), which forms part of a provision specifying when the husband or wife of an accused shall be competent but not compellable to give evidence for the prosecution in criminal proceedings and when he or she shall be competent and compellable to give evidence for the prosecution at such proceeding, provides that for the purposes of the Law of Evidence in criminal proceedings 'marriage' shall include amongst other things, any marriage concluded under any system of religious law.

Section 10A of the Civil Proceedings Evidence Act[323] (as inserted by section 4 of the Justice Laws Rationalisation Act 18 of 1996), which immediately follows a provision (section 10) that no husband shall be compelled to disclose any communication made to him by his wife during the marriage and no wife shall be compelled to disclose any communication made to her husband during the marriage, provides that, amongst others, any marriage concluded under any system of religious law, shall be regarded as a valid marriage for the purposes of the Law of Evidence.

8.3. Conclusion

The legislation that recognises Muslim marriages for practical reasons is indicative of the plurality of South African society.[324] It does not make sense that Muslim marriages are recognised for certain purposes, but not when the parties to a Muslim marriage turn to the courts for the recognition of their union. Recognition must be given to MPL or, at least, Muslim marriages must be recognised as valid marriages.

322 Criminal Procedure Act 51 of 1977. See Breslaw S (2013) 249.

323 Civil Proceedings Evidence Act 25 of 1965. See Breslaw (2013) 250: 'a spouse to a Muslim marriage may not be compelled to testify in civil or criminal proceedings against his or her spouse, as is the case with spouses who are civilly married'.

324 Rautenbach C 'Muslim Personal Law and the Meaning of 'Law' in the South African and Indian Constitution' *PELJ* 1999 (Vol. 2) 2.

CHAPTER NINE

RECOMMENDATIONS AND CONCLUSION

9.1. Introduction

In 2011, the present author's point t of view in respect of the lack of recognition of Muslim marriages was recorded by Judge Essa Moosa in his article[325] in the following manner:

> 'If the Bill does not go through we would go back another twenty years. I sit at the courts and see 75% of Muslim people suffering because we do not have our Islamic marriages recognised. The *Ulema* (religious bodies) do not have teeth to exercise power over husbands who do not respect basic Islamic rights of their wives and their children. I do not say that the Bill is perfect but once we get approval we could work together to iron out issues.'[326]

The failure to recognise Muslim marriages impairs the fundamental dignity of Muslims.[327] It has serious practical consequences for Muslims. Important issues such as divorce, maintenance (for spouses and children) after divorce, proprietary rights arising from marriages, custody, and access to children after divorce are inadequately regulated or entirely unregulated by South African law.

The effect hereof is that Muslim women, in particular, are not able to access the legal system for the purpose of either entering into, regulating the consequences of, or dissolving their marriages and ensuring that custody, access and maintenance of their minor children on divorce is properly regulated.

This state of affairs has been particularly prejudicial to Muslim women. They are often socially vulnerable and, in many instances, the victims. The treatment of Muslim women in South Africa remains markedly patriarchal. It is more difficult for them to receive income and acquire property. They, as well as their children, run great risks of being homeless when their marriages are dissolved by death or divorce.[328]

Judge Navsa,[329] in an article on MPL, indicated that in his travel through the country, the SALRC encountered the constant complaint especially from women that they have to struggle to have their Islamic rights recognised and enforced. He referred to the comments of judges who argue that the refusal to recognise Muslim marriages

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325 Moosa E 'Muslim Marriages Bill – Mapping the Ongoing Socio-Ethico-Legal Challenges facing South African Women' in Dangor S and Moosa N *Muslim Personal Law in South Africa – Evolution and Future Status* (2019) 397.

326 Moosa E (2019) 397.

327 Amien W 'Overcoming the Conflict between the Right to freedom of religion and Women's Right to Equality: A South African Case Study of Muslim Marriages' (2006) *Human Rights Quarterly* Vol 28 (3) 729-754.

328 Shoaib A (2018) 3.

329 Navsa M S (2019) 48.

and their consequences on the grounds that they are potentially polygynous is inconsistent with the values of equality, tolerance, pluralism, human dignity and religious freedom, as well as the right of people not to be forced to subordinate themselves to the cultural and religious norms of others. He also advises that the SALRC had worked hard to accommodate as broad a range of opinion as possible, to the extent of providing parties with a choice to have their marriages regulated either by Islamic law or South African law. He proposed that a balance be struck between those who subscribe to a belief system and the Constitution that permits statutory regulation of matters within the belief system.[330]

Women are often left destitute on termination of a Muslim marriage, more so where they are not sufficiently empowered to exert their rights to negotiate and contract the terms of their marriage at its inception, as is often the case of the poor and most vulnerable of society, or where they live in communities where it is not acceptable for women to do so. It is often the case that most of the assets acquired during the marriage are acquired in the husband's name and accumulate in the husband's estate. The effect hereof is that on dissolution of the marriage, the wife is usually left with a virtually non-existent estate. In the absence of recognition, Muslim women have no remedy to obtain an equitable distribution of their husband's assets or a forfeiture of benefits in that provisions such as section 7(3), read with section 7(4)[331] and section 9(1)[332] of the Divorce Act, are not at their disposal. The economic hardship is compounded by the reality that it is Muslim women who most often will be the primary caregivers of children.[333]

The interim relief granted by the SCA in the case of the *President of RSA and Others* v *WLCT and Others*[334] was more favourable than the relief granted by the High court. The court ordered that during the 24 months that the State has to adopt new or amended legislation, Muslim women will be able to go to the divorce court in terms of the Divorce Act to seek a divorce. The interim relief is important to so many women in South Africa who have their rights denied because they have not had legal remedies in the way that other women have had. The interim relief is subject to the Constitutional Court proceedings and not immediately in effect.

The research shows that there is a serious violation of rights. Muslim women are unfairly discriminated against on the basis of religion, marital status, gender and sex.

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330 Dangor S and Moosa N (2019) 406.

331 s7(3) read with s7(4) of the Divorce Act vests courts with an equitable jurisdiction to order a redistribution of property where marriages are out of community of property, and contracted before the commencement of the Matrimonial Property Act in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded.

332 Spouses whose marriages are recognised may, on divorce, apply for an order in terms of s9(1) of the Divorce Act that the other spouse forfeit the benefits of marriage in community of property wholly or in part, where they would unduly benefit if such an order is not granted.

333 Amien W (2016) 745.

334 *WLCT and Others v President of the RSA and Others* 2018 (6) SA (Supreme Court of Appeal unreported case no. 612/19 WCHC Case no.22481/2014).

At the recent SCA hearing of *Women's Legal Centre and Other v The President and Others*,[335] the learned Judge Salduker questioned counsel for the state as to the pragmatic solution for Muslim women and children whose constitutional rights were infringed on a daily basis. She also highlighted that Muslim women cannot wait for another twenty years and there is an urgent need to find a remedy.[336]

The violation of rights has been found to be one which permeates and defines the very ethos upon which the Constitution is premised. The South African government has a duty to ensure that the civil liberties of all citizens are protected.

Muslim women suffer disproportionately as a result of lack of legal protection. They are often in a position of economic dependency and vulnerability within their marriages, leaving them at risk of destitution if the marriage is dissolved through death or divorce. Certain conservative interpretations of Islamic law compound the vulnerability of women in these marriages. Women in Muslim marriages are denied a host of protections that are afforded to women in legally recognised and regulated forms of marriage, including adequate safeguards where their husbands decide to take a second wife, the ability to approach courts for a decree of divorce, the ability to seek equitable division of marital property on divorce, the ability to obtain speedy and efficient custody and access orders on dissolution of the marriage.

The recognition to be afforded to MPL and its consequences flows directly from the rights in the Bill of Rights. The state has a duty to put in place reasonable and effective regulatory and/or policy measures affording recognition to the consequences of Muslim marriages. The continued inaction on the part of the state to put in place any reasonable measures has resulted in ongoing violations of constitutionally protected rights.

9.2. Recommendations and Conclusion

This research shows that the most reasonable and effective way to ensure that constitutional obligations can be fulfilled is to ensure that MPL is recognised for all purposes in South Africa and to regulate the consequences of such recognition.

The South African courts have been progressive by continuously making orders that give effect to some of the obligations arising from Islamic marriages. The discriminatory impact of non-recognition and non-regulation has been repeatedly recognised by the courts.

However, Judge Essa Moosa[337] was of the view that it was in the broader interest of the Muslim community to have MPL recognised instead of having the courts develop

335 *WLCT and Others v President of the RSA and Others* 2018 (6) SA (SCA Case no. 612/19 WCHC Case no. 22481/2014.

336 Moolla M 'Has Muslim Personal law been given recognition in the light of the recent Appeal Court Judgment' (March 2021) *De Rebus* 23.

337 Moosa E (2019) 396.

the common law to accommodate the recognition of Muslim marriages and consequences flowing from such marriages on a case-by-case basis.

Rautenbach[338] is of the view that the South African common law is flexible and adaptable and should always change to meet the new demands that a diverse society may bring to the fore. She is also of the view that it will be unfair to leave the process of integration of Islamic law entirely in the hands of the judiciary. Parliament has a responsibility to ensure that the matter is laid to rest and a bill becomes statute. This will assist the courts in that they will have something to work with rather than repeatedly create law, which is not their primary function.

This research highlighted that the cases dealt with did not solve the issue of the non-recognition of Muslim marriages and the courts want the legislature to deal with the legality aspect. MPL legislation is the only solution.

It will take time to prepare and enact legislation and women in Muslim marriages will continue to suffer unfair discrimination and hardship. The High Court in the matter of *Women's Legal Centre Trust and others v The President and others*[339] recognised that the most pressing need is to allow Muslim women the option of approaching courts to obtain divorce orders and consequential relief, including a fair division of assets. The court held that, 'it cannot be disputed that the realm of divorce remains the main lacuna currently giving rise to potential injustice.' This injustice is not merely 'potential', it is present and ongoing and highlighted by the plight of the countless similarly placed women.[340]

The High Court refused to grant interim relief for three main reasons. The first was that the application of the Divorce Act to Muslim marriages may displace the *shar'iah*.[341] The second was that it was concerned that Islamic law does not make provision for the division of assets, as contemplated in section 7(3) of the Divorce Act[342] and that reading in may not be sufficient to deal with the complexities of Muslim marriages.[343]The third was that it suggested that Parliament should be given a 'free hand' to address these difficulties. The High Court did emphasis that,

> 'the application of the Divorce Act would mean that from the religious point of view, whilst it may be that the Muslim marriage can be terminated by any method under *Sharia* law, in its civil aspect the union would be terminable under the Divorce Act.'[344]

338 Rautenbach C 2004 'Some Comments on the Current (and Future) Status of Muslim Personal Law in South Africa' *PELJ* (7) 2.
339 *WLCT and Others v President of the RS A and Others* 2018 (6) SA.
340 *WLCT and Others v President of the RSA and Others* 2018 (6) SA Judgment at para 225.
341 *WLCT and Others v President of the RSA and Others* 2018 (6) SA Judgment at para 214 – 215.
342 Divorce Act 70 of 1979.
343 *WLCT and Others v President of RSA and others* 2018 (6) SA Judgment at para 222.
344 *WLCT and Others v President of RSA and others* 2018 (6) SA Judgment at para 227.

This meant that the *shari'ah* would not be displaced but would continue to exist in parallel with the new civil remedies. There would not be anything in the Divorce Act[345] to override the *shari'ah*. Muslim women who voluntarily choose to be bound by the precepts of the *shari'ah* will be able to be so bound either by electing not to approach the divorce court for divorce or by incorporating the terms of the *shari'ah* into the terms of the divorce order.

In view of the interim relief of the recent SCA judgment of the *President of RSA and others v WLCT* and others,[346] it is likely that the state will push ahead with the Single Marriage Act and omnibus legislation. The door for gendered discriminatory rules and practises will still be open as well. It will not be good enough for the state merely to recognise the different forms of marriages. It must have proper systems in place to regulate them too.

This research highlights the importance of the continued affront to the dignity and equality of the Muslim community, the lived realities of Muslim women and children not being able to enforce their rights, the state's inertia and lethargy in failing to create a viable statutory framework, and the state being called to account for their continued breach and failure to uphold the Constitution.

The Muslim community takes guidance from the *Qur'an* and teachings of Prophet Muhammad (pbuh). These teachings show there is no justification for denying any individual justice, equality and dignity. The Muslim community as well as the leadership in the community must ensure that the oppression of women will not take place.

In terms of the recent judgment, the state is obliged to prepare, initiate, introduce, enact, and bring into operation, diligently and without delay, legislation to recognise marriages solemnised in accordance with Islamic law and to regulate the consequences of such recognition. It remains to be seen how they will go about doing that. To ensure that the omnibus marriage statute is properly responsive to the nuances of the different types of marriages and caters for the specific needs within relevant communities, in depth consultation with the relevant stakeholders within those communities and broader civil society will be required, including women's rights groups. The MMB may be incorporated as a separate chapter and it would be a waste of tax-payer's money not to include it in the omnibus marriage statute. Perhaps the SALRC may engage with the relevant stakeholders within the South

345 Divorce Act 70 of 1979.

346 *President of the RSA and Others v WLCT and Others* (612/19) [2020] ZASCA 177 (18 December 2020) paragraph 1.7 of the order.' Paragraphs 1.1 to 1.4. above are suspended for a period of 24 months to enable the President and Cabinet, together with Parliament to remedy the foregoing defects by either amending legislation, or passing new legislation within 24 months, in order to ensure recognition of Muslim marriages as valid marriages for all purposes and to regulate the consequences arising from such recognition.'

African Muslim communities to address any outstanding issues or tensions in relation to the MMB.

It is submitted that an omnibus marriage statute should be enacted incorporating and including the MMB as a chapter that recognises and regulates the need for MPL to be implemented in South Africa. It is submitted further that the Single Marriage Act will not solve the current difficulties that women face within their religious communities. There is no guarantee for equal treatment of each case as religious rules and practices in each community are never the same. This makes it difficult to regulate through a Single Marriage Act. It will be easier to have an omnibus or umbrella marriage statute and incorporate chapters and amend the various Acts such as the Marriage Act, Divorce Act, Civil Union Act and Recognition of Customary Marriages Act. MPL could be enacted and incorporated into the omnibus or umbrella marriage statute.

The declaration of invalidity of the Marriage Act and Divorce Act in the recent SCA matter will not adequately protect the constitutional rights of Muslim women and children. It will likely result in ongoing discrimination and violation of constitutional rights either for years or decades or possibly indefinitely. There should have been an order declaring the state's obligation under section 7(2) of the Constitution to pass legislation recognising and regulating Muslim marriages and requiring the state to comply with that obligation. The executive and legislature should be ordered to enact legislation that will recognise and regulate Muslim marriages. The issue of section 7(2) will be re-litigated if the state fails to pass legislation recognising and regulating Muslim marriages. This thesis has great significance for the promotion of gender equality and rights of women in South Africa.

The research has shown that there can be no doubt that it is imperative and there is a dire need for MPL to be implemented in South Africa. It is high time for unfair discrimination to end and the enactment of legislation to recognise MPL. The state should be directed to prepare for public comment a draft bill to recognise MPL. The bill must be approved by Cabinet and introduced into Parliament within twelve months.

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