What We Owe to Women: How the Governance of Muslim Marriage in South Africa Impacts Muslim Women

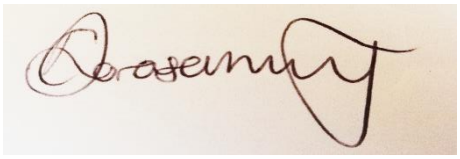
A Dissertation Submitted in Full Fulfilment of the Requirements for a Master of Arts by Research in Development Studies

By Cassandra Dorasamy

Supervised by Professor Srila Roy

Declaration

I declare that this research is my own work and that all use of the work of others has been referenced. This research is submitted for the Degree of Master of Arts by Research in Development Studies at the University of the Witwatersrand. It has not been submitted for any other degree at any other university.



25th April 2021

Acknowledgements

This research would not be possible without the support of a number of people, some of whom I'd like to mention here. To my parents, thank you for caring for my well-being and supporting me during this research. To my brother Yeogan, thank for your support and your willingness to help wherever needed. Thank you to Noor Ahmad and Elishua Ngoma for being my companions on this journey. To Faatimah Essack, thank you for sharing your passion and insights into the topic of recognition with me. The legal fraternity is lucky to have you. To Waris, thank you for both shouldering my anxieties and pushing me to think deeper and write better. Thank you to Professor Srila Roy for opening the door for me to complete this degree. You have been incredibly patient and supportive during this project, for which I am thankful.

I am grateful for the support of the Governing Intimacies Project and the Wits Postgraduate Merit Award.

I dedicate this work to my late grandmother, Saroj Rajah, and to my Uva, Muthamah Margaret Chetty.

Abstract

State recognition of Muslim marriages in South Africa is an issue that has been debated extensively for many years. Whilst the debate continues, this research documents the experiences of Muslim women who are engaged in legal disputes concerning Muslim Personal Law (MPL) and the experiences of practitioners who work on such matters. The research unpacks three topics emanating from their narratives: representation and power in the public participation process for the Muslim Marriages Bill, the innovative and sometimes blended strategies of practitioners working on MPL related matters, and the individual experiences of Muslim women personally engaged in MPL disputes. The research shows how Muslim women in unrecognised marriages have fallen between two systems of law- the religious and the civil- resulting in them being unable to access their Islamic rights and their constitutionally based rights. Within the context of gender inequality, socio-economic inequality, and limited state capacity to support access to justice and enforce the law, this research raises questions about the efficacy of the law to ensure justice for Muslim women through state recognition. It points to the need for organising beyond the law to ensure gender justice in the civil legal system and gender-just applications of Islamic law in the religious system.

Table of Contents

List of Acronyms

ANC	African National Congress
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CGE	Commission for Gender Equality
DHA	Department of Home Affairs
DOJ	Department of Justice
GBV	Gender Based Violence
MJC	Muslim Judicial Council
MMB	Muslim Marriages Bill
MPL	Muslim Personal Law
MPLB	Muslim Personal Law Board
MPLN	Muslim Personal Law Network
MYM	Muslim Youth Movement
RCMA	Recognition of Customary Marriages Act
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
UUCSA	United Ulama Council of South Africa
WLC	Women's Legal Centre
WNC	Women's National Coalition

Glossary

Faskh	A judicial dissolution of a Muslim marriage made by application of a husband or wife.
Fatwa	The formal ruling or legal opinion of a religious scholar on a point of Islamic law.
Fiqh	Islamic jurisprudence
Iddah	The waiting period observed by women upon divorce or death of a spouse during which she may not remarry. In instances of divorce, the wife is entitled to maintenance during this period.
Ijtihad	Independent reasoning used to apply Shariah to modern contexts.
Mahr	Dower
Mata'a	Gift
Nafaqah	Maintenance
Nikah	Islamic marriage or marriage ceremony
Sabr	Patience
Shariah	Islamic law
Talaq	Divorce initiated by the husband
Talaq al-tafwid	Right of divorce that can be delegated to wives
Ulama	Learned religious scholars

Chapter 1: Introduction

"The starting point of feminist work must be found in the lives of women and not in legal definitions" – T.S Dahl (1986)

The legal recognition of Muslim marriage in South Africa is a topic that has been extensively debated for many years. At the heart of the debate are contested meanings and approaches to the practice of Islamic law. The debate has raised many questions about the relationship of minority groups to the state – should communities be left to govern their own personal laws, or should the state regulate their practices? If Muslim marriage is to be recognised, what should the legislation look like? Should the responsibilities of governing Muslim marriage be shared between the state and religious judicial councils? In an ideologically diverse religious community, who gets to decide on these matters?

The issue of legal recognition was recently brought back into public debate through the Women's Legal Centre Trust v The President of the Republic of South Africa judgement in August 2018. The Western Cape High Court found that by not enacting legislation recognising Muslim marriages, the state had failed in its obligations to respect, protect, promote and fulfil the following constitutional rights: the right to equality (s9); human dignity (s10), freedom of religion, belief and opinion (s15); children's rights (s28); the rights of cultural, religious and linguistic communities (s31); and the right to access to courts (s34). Such conduct on the part of the state was found to be invalid. The court instructed government to pass legislation giving recognition to Muslim marriage within 24 months. The Supreme Court of Appeal confirmed this obligation on the state in a judgement handed down in December 2020. The matter is expected to be heard by the Constitutional Court during 2021.

The cost of the nonrecognition of Muslim marriage has widely been reported to negatively impact Muslim women and children. This research is concerned with experiences of nonrecognition, specifically those of South African Muslim women affected by issues relating to Muslim Personal Law (MPL), and of legal practitioners working in the family law sector. It looks at their experiences of navigating both religious and secular legal systems in pursuit of just outcomes, specific to their situations. Whilst relaying the experiences of

individual women, and that of practitioners who represent individuals like them, I will inevitably touch on some of the broader issues that were raised in the questions above, namely those concerned with contested representation and power in the legislative process which has not led to recognition thus far. I will also advance new socio-legal research on the topic, exploring the legal and extralegal options available to protect the social and financial interests of Muslim women in unregistered Islamic marriages. Lastly, I will explore the impact of nonrecognition through the narratives of Muslim women with the aim of building new conversations around legal recognition and the role of state law in regulating intimate relationships in South Africa.

1.1 Background and Context

Section 15 of the South African constitution recognises the right to freedom of religion, Subsection 3 states that the provisions do not prevent the enactment of legislation recognising marriages and personal laws of any religion or tradition provided that the legislation is consistent with other rights in the constitution. Currently, to be recognised and regulated by South African law, marriages must be registered by a marriage officer under the Marriage Act, the Civil Union Act, or the Recognition of Customary Marriages Act (RCMA). Muslim couples can register their marriage under the Marriage Act or the Civil Union Act. There are various reasons as to why a Muslim couple may decide not to register their marriage. Amien (2019) attributes this to an "anti-civil marriage culture", fuelled by messages from the ulama that civil marriages are *haram* (forbidden) (2019, p.95). Other potential reasons include the preclusion of polygamy from the Civil Union Act and the Marriage Act, preventing polygamous marriages from being registered.

The consequences of nonrecognition are that Muslim spouses are not afforded the same rights provided to couples married under the Marriage Act, Civil Union Act, or the RCMA. Without state recognition, unregistered Muslim marriages fall under the jurisdiction of Muslim judicial bodies that apply Sharia as an "unofficial community code parallel to state law" (Abdullah, 2012, p.318). Although Islam does not provide for an official clergy in its practice, South Africa has a "socially recognised class of religious leaders called Ulama" that, together with community leaders (imams) make up the judicial bodies (Domingo, 2015, p.181). The judicial bodies preside over Muslim family life, offering counselling, conducting marriages, and overseeing divorces. They have played this role since the 17th century when Muslims arrived in what is now known as South Africa. The bodies are mostly made up of

men and are affiliated with different theological schools, as will be discussed in the next section. The exclusive jurisdiction of religious bodies poses challenges to their own practice, with consequences for those seeking assistance from them. This is succinctly summed up by Domingo (2015, p.182):

> The decisions of these judicial bodies have no legal enforcement and are merely binding on the conscience of Muslims. Their decisions do have social and religious authority among Muslims, however some may argue that they are gender biased in favour of husbands. Many Muslim women have expressed their dissatisfaction with the way in which their cases are handled by the judicial bodies. They encounter unnecessary delays, they pay more for a request to have their marriage dissolved than men do and they are told to have patience, even where they have a legitimate grievance. The lack of support and women's lack of knowledge of their Islamic rights place women in a very vulnerable position. (Domingo, 2015, p.182).

Speaking at a workshop on Muslim marriages in South Africa, Commissioner for Gender Equality, Rosieda Shabodien (2010) observes that in most instances of divorce amongst heterosexual couples, it is men who decide on how "the spoils of the marriage" will be shared, often leaving women with the short end of the stick. This situation is exacerbated for women in unregistered Muslim marriages and, indeed, women in unregistered Hindu marriages and domestic partnerships. In as much as claims for legal recognition are usually based on the politics of identity and belonging, they carry with them significant redistributive potential, which is evident in the case of Muslim marriage. As currently practiced, Muslim marriages are generally concluded out of community of property, without the accrual system. This means that the assets of either spouse are kept separately, and neither is entitled to the others estate. Technically, wives are not obligated to contribute to the maintenance of the household. Keeping a separate estate was originally intended to protect women's property interests. Based on this principle, there is no division of assets should there be a divorce. Furthermore, the general practice of MPL in South Africa allows women to claim maintenance for the duration of the three-month *iddah* or waiting period before a divorce is finalised, and nothing beyond that (Kabarnee and Moosa, 2004). These practices do not reflect the reality that women *do* contribute to the maintenance of households through financial contributions and household labour (Hoel et al, 2011; Lesch and Parker, 2018).

Another more affective issue associated with nonrecognition (that has also been highlighted during the COVID-19 pandemic) is the marital status of Muslim couples recorded on death

certificates. Due to the government not having a record of unregistered Muslim marriages, the death certificates of spouses married only under Islamic rites reflect their marital status as "single". As leader of the Al Jamah-ah party, Ganief Hendricks explains:

> Women cannot have a final view of their husbands after a Covid-19 death and all they have is a death certificate which states, "never married". How insensitive and cruel after many years of marriage. (Al Jama-ah, 2020).

The fact that nonrecognition results in social harms for the Muslim community and for Muslim women in particular is widely acknowledged in the debate for recognition. It is with these harms in mind that requests for state recognition of Muslim marriages have been made by both Muslim judicial bodies and progressive political groupings. However, as will be shown throughout this dissertation, the content of legislation giving recognition is highly contested by the various stakeholders. The status quo remains harmful for Muslim women in unregistered marriages who have trouble accessing their Islamic rights and their South African legal rights. The multiple tensions undergirding the recognition of Muslim marriages is depicted in the picture below. The picture is of Muslim women protesting outside the Western Cape High Court in 2018, during proceedings on the Women's Legal Centre v The President of the Republic of South Africa case. During the case, the Women's Legal Centre (WLC) argued that the state had failed in its Constitutional duties to "respect, protect and promote" the rights of Muslim spouses. The women are holding signs saying, "Muslim Women Matter", "I have a right to my home", "Women need better access to SA's Justice System", "Men don't speak for me", and "Are Muslims in South Africa not considered South African because we don't have protection like other SA women" (Gonstana and Postman, 2017)

Image 1 Muslim women protesting outside the Western Cape High Court. Photo by Zoe Postman ("Muslim Marriages Under Court Scrutiny", GroundUp, 2017).

Many Muslim women who do not find relief through the religious judicial system pursue civil legal avenues to find a desirable outcome for their situation. However, without a statutory framework, the work of lawyers in these cases is difficult. This has led to a series of litigation aimed at developing the common law to clearly define the rights of Muslim spouses in unregistered marriages. This research will look at the experiences of women who have taken this route. Whilst it was my intention to focus solely on their experiences with civil law, their experiences of the religious judicial system were a core part of their narrative, making it impossible to separate the two. The same can be said for my interviews with Muslim legal practitioners, for whom the two legal practices overlapped on MPL cases.

1.2 Research Questions

This project endeavours to answer the following question:

- What is the impact of the "nonrecognition" of Muslim marriage on Muslim women?

This question prompts the following questions:

- What are Muslim women's experiences of resolving issues of personal law in the absence of legal recognition?
- How do legal practitioners provide assistance on MPL related matters in the absence of a regulatory framework?

- What responsibility does the state have to respond to the consequences of nonrecognition?

1.3 The Local and Historical Context

The status of Muslim marriages in South Africa has shifted under various political regimes. The colonial administration, for example, was more willing to recognise the validity of Muslim marriages than the apartheid government, which took a strong stance against potentially polygamous marriages (Jones-Pauly and Tuqan, 2011). Given that the history of Muslim marriage in South Africa[1] is long and complex, this section will begin with a brief overview of Muslims in South Africa and will thereafter focus on developments in the recognition debate from the apartheid era onwards.

The first recorded Muslims in South Africa arrived in the Cape soon after the arrival of the Dutch East India Company (VOC). They were brought as soldiers from the West Indies, enlisted to support the VOC against the Khoisan resistance to their presence in 1658 (Baderoon, 2014; Mahida, 1993). Having no source of labour in the settlement and a policy against enslaving indigenous populations, the VOC imported slaves from the Indian Ocean region (East Africa, the African islands of the Indian Ocean, South and South-East Asia). The colony was used to exile political prisoners from South East Asia (E. Moosa, 1996). It was within this population of slaves that the majority of Muslims arrived in the region. Islam offered "a degree of independent slave culture" (Worden, 1985 in Baderoon, 2014), so much so that the term "Malay", "which refers to the lingua franca Bahasa Melayu spoken by enslaved people at the Cape…became the word for Muslim in the Cape" (Baderoon, 2014, p.9).

In Natal, many Muslims arrived as indentured labourers or traders (also known as "passenger Indians") during the 1860 system of indenture. Both Muslim and Hindu customs fell under the category "Indian". As such, Vahed (2000) argues that Muslims in Natal have been studied as part of the oppressed Indian community, with scant attention given to the internal

[1] See Allie (2019). "A legal and historical excursus of Muslim personal law in the colonial Cape, South Africa, from the eighteenth to the twentieth century", for a detailed account of the regulation of MPL in the Cape. See also Dhupelia-Mesthrie. U. (2014). "Split Households: Indian Wives, Cape Town Husbands and Immigration Laws, 1900s to 1940s"; Sheik, N.E. (2018) "Making the Personal Civil: The Protector's Office and the Administration of Indian Personal Law in Colonial Natal, 1872-1907"; and Hiralal, K. (2018) "'What is the meaning of the word "wife"?' The Impact of the immigration laws on the wives of resident Indians in South Africa 1897-1930". The latter list of work focuses on how colonial administrative interventions into personal law were aimed at controlling the movement of Indian women- both from India to South Africa and within the colony. In Natal, Hindu and Muslim personal laws fell under the administration of "Indian personal law".

differences within the community in this region. The histories and experiences of Muslims in Natal and the Cape are, naturally, quite different. One example of such differences is that Cape Ulama were generally trained in Saudi Arabia or Egypt and Indian Ulama in Natal and the Transvaal were trained in seminaries in Pakistan and India (E. Moosa, 1996). Whilst the majority of Muslims in South Africa fall within the Indian or Coloured racial groupings, there is also a growing population of Black South African Muslims. Some have attributed this to the presence of Muslim immigrants in formerly demarcated Black townships, saying that immigrants from Central and West Africa have brought a more "Africanised Islam" to South Africa (Bell, 2004). Black Muslims have at times been marginalised by both the Black community and the Indian Muslim community because of the characterisation of Islam as an Indian religion (Jeppe and Vahed, 2005; Ebrahim, 2018). Contrary to this association of Islam with Indianness, Gabauer (2019) documents the unique development of Black Muslim identity in formerly demarcated Black townships. Gabauer writes that Black Muslim identity has been used to defy colonial notions of "orderly African indigeneity" and to inspire hope and a reconfiguration of the self in post-apartheid South Africa.

Apart from regional and racial differences, there are also different madhabs or versions of Islamic law (N. Moosa and Dangor, 2019). Najma Moosa (2011) describes Islam as a tree that has two main roots – the Quran and the Sunna. These are the primary sources which form the basis of Sharia. Referring to Islamic law or jurisprudence, "Sharia" is "the interpretation and application of the primary sources" by early Muslim jurists, forming the four different Islamic schools of thought in the Sunni tradition, namely the Maliki, Hanafi, Shafi'i, and Hanbali schools. Most Muslims in South Africa follow the Hanafi or Shafi'i Sunni schools of Islamic law. There are also some who follow the Maliki school, and others who follow the Ja'fari school in the Shi'a tradition.

In 1975, the Director of the Institute of Shari'a Islamic Studies in Cape Town requested that elements of MPL be recognised by the apartheid government. The South African Law Commission responded by saying that it was unwilling to launch an investigation because recognising aspects of Islamic law "could lead to confusion in South African law" and that "the existing rules of South African law do not prohibit a Muslim from living in accordance with the relevant directions of Islamic law" (SALC, 1975, in E.Moosa, p.135). It therefore came as a surprise when the Law Commission decided to investigate the recognition of MPL in 1985, inviting comments from the Muslim community. The investigation was perceived to be part of the apartheid governments strategy of consolidating power and was met with

suspicion by anti-apartheid groups who resisted the offer, refusing to align itself with an oppressive government (Amien and Leatt, 2014; Jeenah, 2006; Dangor and Moosa, 2019). This position was not taken lightly, given the relief that recognition would provide to Muslims, a concern shared by both the comrades and the religious bodies (E. Moosa, 1996). Thus, when South Africa transitioned into the democratic era, many Muslims saw this as an opportunity to finally have their personal laws officially recognised.

During the transitional negotiations to democracy, the Muslim Judicial Council (MJC) made a "special appeal" to the new democratic government to recognise MPL. It was the shared goal of having MPL recognised that brought Muslim judicial bodies together in 1994, resulting in the formation of the United Ulama Council of South Africa (UUCSA) (Dangor and Moosa, 2019). The African National Congress (ANC) made an electoral pledge to recognise MPL if it came into power (E. Moosa, 1996; Cassim and Dadoo, 2019). The ANC took steps toward honouring this pledge in August 1994 when a Muslim Personal Law Board (hereafter referred to as "The Board") was formed with the mandate of recognising MPL (Abrahams- Fayker, 2019; Dangor and Moosa, 2019). A taskforce convened by two members of the ANC - Ismail Vadi and Ahmed Kathrada - invited the Jamiatul Ulama, the Muslim Youth Movement, the Call of Islam, and the Islamic Council of South Africa for an initial consultative meeting in April 1994. By the time The Board officially formed in August 1994, many other organisations and stakeholders were brought into consultation. The Board consisted of eighty people from the various organisations (Dangor and Moosa, 2019).

During this time, a 'Campaign for a Just Muslim Personal Law' was led by the Gender Desk of the Muslim Youth Movement (MYM). The MYM was represented by the Gender Desk on The Board. The position of the MYM Gender Desk and the Call of Islam was clear- that any recognition of MPL should be subject to the equality clause of the constitution. The United Ulama Council, on the other hand, argued that MPL should be exempted from the Bill of Rights (Bux, 2004). At a constitutional assembly hearing, a representative of the Jamiat ul Ulama KZN suggested that the freedom of religion clause should override other clauses of the Bill of Rights to avoid conflict between MPL and the Bill of Rights (Bux, 2004, p.98). This position echoed that of African traditional leaders who firmly opposed the inclusion of the equality clause in the constitution (Shabodien, 1995).

The struggle for a gender just MPL falls within the broader context of the struggle for gender equality in South Africa, playing itself out in both the constitutional negotiations and in MPL

Board discussions. Where conservatives argued that the equality clause of the constitution should not be applied to MPL, the MYM defended it, arguing that the equality clause is consistent with the ethos of Islam[2]. The MYM organised Muslim women to attend the meetings of the board and challenged the conservatism of The Board's president, eventually staging a walk out for not being allowed to speak in meetings and being forced to wear headscarves (Amien, 2014; Jeenah, 2006).

The Board quickly collapsed due to the ideological differences between progressive and conservative voices, but the period was marked by heightened Islamic feminist activism.[3] The Recognition of Muslim Marriages Forum (RMMF) summarises the reason for the collapse of the board like so:

> The Main contributing factor for the collapse was the diametrically opposing views on the status of women in Islam. Simply put: there were those who believe that Islam promotes gender parity and equality and those who were of the conviction that gender equality is anathema to Islam (RMMF Comments to the Minister of Justice, 2011, p.5)

Farid Esack and Ebrahim Moosa provide a deep socio-historical analysis to flesh out the differences between "progressives" and "conservatives" and their "diametrically opposing views" during this period. In doing so, they bring much needed critique to the configuration of power between religious bodies and the state in the early 1990s at the expense of progressive Islamic thought. Prior to the formation of the Muslim Personal Law Board, Esack (1992) warned that:

> It is not the Call or the MYM that will deliver the masses on polling day. The politically and theologically conservative MJC or their reactionary counterparts in Natal and the Transvaal may do so. Much as the ANC may value the sophisticated and liberated interpretations of Islam and the Call and the MYM may offer, it is also increasingly a political party rather than a liberation organisation. Their political objectives on the one hand and the dexterity and power of the conservative clerics on the other make the latter far more likely allies for the ANC.

[2] At the same time, similar conversations were occurring between traditional leaders and the National Women's Coalition at CODESA. The inclusion of the equality clause in the constitution was ultimately a product of South African women's organised struggle. See Albertyn, C. (1994). "Women and the Transition to Democracy in South Africa"; and Hassim, S. (2002). ""A Conspiracy of Women": The Women's Movement in South Africa's Transition to Democracy".

[3] Islamic feminism can be defined as a practice rooted in an Islamic framework that gives women rights and informs the commitment to equality and social justice (Hoel, 2013; Jeenah, 2006; Patel, 2018)

The concern of progressive Muslims, whom Ebrahim Moosa refers to as “nouveaux ulema”, was the joining of hands between religious bodies and the new ruling government that would cement a traditionalist approach to Islam- one that follows “doctrinal formulations of their respective legal schools” (E. Moosa, 1996, p.140). The nouveaux ulema, on the other hand, take a reformist approach that views Shariah as flexible and responsive to the social context. They are “South Africans who were trained in traditional Muslim seminaries abroad. They differ from their general ulama counterparts in so far as their juristic-theology is also informed by the social sciences and they critically engage with tradition” (Ibdi, p.138). This progressive re-interpretative Islamic thought “runs concomitantly with progressive political thought” in South Africa (Esack, 1992, p.174). Muslim social and political movements in the 1980’s, namely the Muslim Youth Movement, the Call of Islam, The Muslim Students Association, and Qibla, had a rich theological and ideological configuration geared at providing theological impetus for anti-apartheid activities. Their concerns went beyond the immediate threat of apartheid and included issues of gender and the environmental crisis. Moosa refers to their brand of thought as “the Muslim version of liberation theology” (p.138) that most of the religious bodies found difficult to digest. Reconciling these approaches to Shariah proved to be nearly impossible in the early years of South African democracy.

After the collapse of The Board and the establishment of the South African Constitution, the next attempt at resolving the issue of nonrecognition came through the South African Law Reform Commission (SALRC) in 1999. SALRC established a Project Committee to investigate “Islamic Marriage and Related Matters”. There was a significant shift in the language used to describe the project. The committee was tasked with providing draft legislation for the recognition of Muslim marriages as opposed to the system of MPL. During the initial stages of this process, the committee consulted mostly with the ulama. This was opposed by women’s rights activists who insisted that “the ulama does not necessarily speak for all Muslims and that the voices of Muslim women should also be heard” (Amein, 2019, p.108). Many advocacy groups were formed to ensure that Muslim women’s voices were heard and that proposed legislation responded to the needs of all parties (Amien, 2019). The

groups included Shura Yabafazi ('Consultation of Women')[4], The Recognition of Muslim Marriages Forum[5], and the Coalition of Muslim Women.

This period also marked the beginning of litigation that would advance the rights of Muslim spouses (discussed further in chapter 4). Between 1994 and 1999, the Cape High Court was called on to "consider the consequences" of a Muslim marriage in *Ryland v Edros [1997]*[6]. The court enforced the contract resulting from Muslim marital rites, without having to consider the legal status of the marriage itself. Thus, began a series of partial advancements in the rights of Muslim spouses, won through the courts. However, on the arm of the legislature, the progress of the Project Committee was relatively slower. After extensive public engagement, the Project Committee submitted a draft of the Muslim Marriages Bill (MMB) to the Minister of Justice in 2003. Many concerns were raised about the rights of Muslim women in the bill, including the differences in the grounds for a *faskh* and for a *talaq*, the *iddah* period only being applicable to women, the default matrimonial regime being out of community of property, and the proposal for mediation and arbitration which was argued to be against women's best interest (Navsa, 2019). In response to these concerns, the South African Commission for Gender Equality (CGE)[7] drafted their own bill, the Recognition of Religious Marriages Bill, in 2005. The bill was not pursued outside the gender commission.

The delay between the submission of the MMB and any concrete action to enact it promted the Women's Legal Centre to apply for direct access to the Constitutional Court in 2009 to argue that the state had failed in its constitutional obligation to recognise Muslim marriages. The Women's Legal Centre (WLC) is as an African feminist organisation that seeks to "defend and protect the rights of vulnerable and marginalised women, in particular black women, and to promote their access to justice and equitable resources", as well as to "advance women's freedom from violence, substantive equality, and agency in all aspects of

[4] Shura Yabafazi is a community-based organisation concerned with women's issues and Muslim family laws.
[5] The Recognition of Muslim Marriages Forum was established in 2008 and is facilitated by the Commission for Gender Equality. It is comprised of a number of scholars, concerned individuals who are fighting for the recognition of Muslim marriages "in a way that will protect Muslim women" (RMMF, Comments to the Department of Home Affairs, 2009, p.1)
[6] Thoerayah Ryland was represented by Soraya Bosch, the "legal mind" behind the Campaign for a Just Muslim Personal Law. The campaign opted to pursue recognition of Muslim marriages through the courts after the collapse of the Muslim Personal Law Board. (Jeenah, 2006)
[7] The Commission for Gender Equality (CGE) is an entity established in terms of section 119 of the Constitution. The commission is mandated to promote gender equality and to advise Parliament on laws that may "affect gender equality and the status of women" (Preamble of the Commission on Gender Equality Act 29 of 1996).

their lives - at home, at work, in the community, and within society at large." (Women's Legal Centre, n.d). Their application was unsuccessful[8] but the government was spurred into action. The Department of Justice submitted an amended version of the MMB to cabinet in 2010. Although cabinet approved the draft bill, it was not presented in parliament. The WLC claims that the MMB has been removed from parliamentary review (Dangor and Moosa, 2019). The WLC initiated its second case in 2014, resulting in the historic High Court judgement in 2018.

Both the Department of Justice (DOJ) and the WLC appealed the 2018 High Court judgement. On the issue of legislation, the DOJ appealed the restrictive time frame placed on them to enact legislation. The DOJ, at the time, was engaged in researching an omnibus legislation that would deal with the recognition and dissolution of all religious marriages which they wish to see through. The DOJ was also concerned that the judgment allows other religious communities to pursue similar litigation (Department of Justice and Constitutional Development, 2018). The WLC's appeal was due to the judgement not providing interim relief to women who currently need their marriages to be recognised "so that their rights to housing, land and property are protected until legislation is enacted" (Women's Legal Centre, 2019). The WLC took issue with four other findings of the court, including the court's finding that Muslim marriages are currently out of community of property and the court's failure to compel the Minister of Justice to put in place measures to ensure that Muslim women have access to the rights already granted to them through the courts. In addition to confirming the responsibility of the state to enact legislation recognising Muslim marriage, the Supreme Court of Appeal provided interim relief to Muslim women in the December 2020 judgement. It allows for women in existing Muslim marriages or who have been divorced religiously but have already launched claims in court, to approach the court for a divorce under the Divorce Act (1979). This may allow women to claim for post-divorce maintenance and a division of assets in terms of section 7 of the Divorce Act.

It is unclear whether the MMB will ever be passed. Currently, the Department of Home Affairs rather than the Department of Justice appears to be taking the lead on developing South African marriage policy. The Department of Home Affairs has

[8] The Constitutional Court was of the opinion that the case would benefit form a multi-stage litigation process which "has the advantage of isolating and clarifying issues as well as bringing to the fore the evidence that is most pertinent to them". (Women's Legal Centre Trust v President of the Republic of South Africa and Others, 2009, par28.) This meant that the WLC would have to start the case at the High Court and work its way up to the Constitutional Court, which is the court of final appeal.

initiated an investigation by SALRC into the creation of a Single Marriage Act. The purpose of the Act is to harmonise the multiple systems of law governing South African marriages whilst balancing the need to retain their distinctiveness. Minister Naledi Pandor notes that the state has "few vested interests as it pertains to the institution of marriage" which relate to "the acquisition of citizenship, the establishment of consent and the marital age" and state "protection" over polygamous marriages (Issue Paper 35, 2019, p. 2). The Department of Home Affairs also has the responsibility to ensure an accurate population registry. Beyond this, "the state should have no interest in who one marries, how the religious or cultural rituals are conducted and should therefore have no interest in giving legal legitimacy to one or other practice in relation to the conclusion of a marriage" (Ibid.)

As such, the Department of Home Affairs has proposed that the legislation can take one of two forms: either a single act with universal requirements for South African marriages, or an omnibus/umbrella legislation laying out detailed requirements for religious and cultural groups. In the latter arrangement, it is possible that an amended version of the MMB could be included in the act. The Department of Home Affairs is committed to submitting a bill to cabinet for approval by the end of March 2022 (Department of Home Affairs, 2019). At this early stage, the content and form that the legislation will take is unclear, although the paper highlights that "academic consensus", presumably from the academic advisors on the project committee, favours a single set of universal requirements over an omnibus act.

Writing on the contextual shifts that have occurred since the start of the recognition debate, Seedat notes that the state's strategy has moved from one of legislative reform through the Ministry of Justice to one of "regularising the population register through the Ministry of Home Affairs" (2019, p.186). This has resulted in a shift away from the tasks of community consultation and consensus building to the "administrative task" of registering more Muslim religious leaders as marriage officers. Another shift is that Muslim marriages are not "wholly ignored". The courts have offered "tacit" recognition to Muslim marriages. However, the lack of legislation continues to create problems such as legal uncertainty, an uneven application of Muslim personal law, and an expensive court system. The third shift is that "Muslim judicial bodies have gradually moved to the centre of state politics", positioning themselves as representatives of the Muslim community. Seedat highlights that although these groups are formed privately, with no democratic consultation with the Muslim community, the state

prioritises these groups in its relationship with the Muslim community. The bodies are "exclusive in terms of gender and race". Seedat offers the following insights on the consequences of this relationship (2019, p.188):

> The form and functioning of the judicial bodies bring to the fore the ways in which Muslim religious authority is co-opted and reproduced by the South African state, so that ethnically African, female and queer Muslims are excluded from religious authority…Their move to the centre of Muslim-state relations suggests that future state responses to the discriminatory effects of the non-recognition of Muslim marriage are not likely to include the perspectives of ethnically African, female, or queer Muslims generally.

The fourth shift that Seedat observes is the appearance of an emerging South African Muslim legal custom. This is illustrated by a shift in local practice, where, for example, more women negotiate a delegated talaq, an increased interest in marriage contracts, claims to maintenance and marital property, and women educating themselves online on their Islamic rights. Seedat notes that there is insufficient research to determine the nature of this shift. By documenting the experiences of Muslim women and practitioners traversing the religious and civil legal landscapes, this research contributes to research in this area, albeit in a limited way.

1.4 Methodology

The research took on a qualitative research design, guided by the following feminist research principles outlined by Kumar (2019): The experiences and perspectives of women will be the focus, the researcher will be reflexive and aware of power relations, and the research will highlight women's issues and promote equality.

The aim of the research is to understand Muslim women's experiences of navigating issues of MPL in the absence of state recognition and regulation. It aims to explore the everyday workings of nonrecognition through individual narratives. Where narratives have once been criticised for being "an imprecise way of representing the world", narrative research in socio-legal studies is now as much celebrated for its "particularity, ambiguity and imprecision" as it has been criticised (Ewick and Silbey, 1995, p.198). As Kathy Abrams claims: "complex narratives are, first and foremost, a promising vehicle for introducing legal decision-makers to a more complex, ambiguous legal subject" (Abrams, 1993, in Ewick and Silbey, 1995,

p.198). Narrative is used as a method in this research to do precisely this- to introduce more complex, ambiguous legal subjects to the recognition debate. The research will bring into focus the social consequences of nonrecognition, invoking narratives "as a mode of observation, a vantage from which the world can be seen or heard" (Ewick and Silbey, 1995, p.203).

As pointed out by Domingo (2005), to try and speak of Muslim women's experiences of MPL is an enormous task. Muslim women's experiences will vary depending on where they are located, their race, class, social support, and a host of other variables. There is no unified experience, as will be shown in the chapters that follow. The research therefore focuses on 'depth' rather than 'breadth', looking at individual experiences and how they connect with the broader social context. In doing so, it confirms Domingo's remark, raising further questions for the governance of Muslim marriage. The choice to focus on "depth" is informed by the nature of the questions proposed and is made in consideration of methodologies used in other in-depth qualitative studies with the similar aim of understanding lived experiences (Abrahams, 2011; Davids, 2004, Hassem, 2008).

In-depth, semi-structured interviews were adopted as the primary means of data collection. There were two groups of people that needed to be interviewed. The first being Muslim women seeking legal help on MPL related matters, and the second being the practitioners who provide assistance on such matters. The aim of both sets of interviews was to acquire rich narratives, told on the terms of the participants, in order to answer the research questions and offer a contribution to the ongoing debate on Muslim marriage that is rooted in the complexity of the women's experiences.

Researchers who use narrative cannot avoid "tensions, contradictions or power imbalances" but can be "good enough" researchers by describing their decision- making process and being honest about what is lost and what is gained in these decisions (Luttrell, 2005, p.243). What follows is a guide through the data collection and data analysis phases of the research and the obstacles that challenged the neat roll out of the research design.

1.4.1 Data Collection

- Pre-research meetings

My background knowledge on the topic of recognition stemmed from an 'Introduction to Law' module that I took in my first year of undergraduate studies and from my own reading

on the Women's Legal Centre Trust v The President case. My understanding was, therefore, primarily framed by the language of rights, legislation, and case law. To understand the social elements of the issue, I reached out to friends and members of the Wits and UKZN communities whom I knew had an interest in the topic. The most frequent questions posed to me were "have you spoken to the Women's Legal Centre", followed by "do you know about the Muslim Personal Law Network". These recommendations were clear indicators of which stakeholders held weight in the debate. I am extremely grateful for the generous input and offerings of assistance from friends and scholars who demonstrated the fact that the success of research is hinged on the kindness of people who are willing to share their time and labour in support of a project.

- Finding Participants:

As mentioned above, there were two different groups of participants that were interviewed. In my data collection process, I first reached out to practitioners. The "practitioners" are a combination of lawyers, legal advisors, social workers, and activists.

Due to their very public engagement on the topic of recognition, the first organisation that I met with was the Women's Legal Centre, followed by the Legal Café and the Wits Law Clinic. The objective of these interviews was to get a sense of the types of legal issues (pertaining to Muslim marriage) that they encounter, what obstacles they face in resolving these matters, their experiences of working with Muslim women in need of legal recourse, and their perspectives on the Muslim marriage debate. Anecdotes from different cases that they had encountered were particularly useful for the characterisation of cases in both personal, everyday language and technical legal jargon.

Following the leads from my pre-research meetings, I met with members of the Muslim Personal Law Network. The women that I spoke to from the network were either lawyers or academics.

Some of the practitioners interviewed are themselves "Muslim women" who's perspectives were not only informed by their legal practice but from their personal and political involvement in the recognition of Muslim marriages. Some also had affiliations with more than one organisation. The information of the practitioners is listed in the table below Those who requested to remain anonymous are listed as such. Pseudonyms have been assigned to some of these participants whose interviews were heavily relied on.

Name	Occupation	Organisation/s
Ighsaan Higgins	Attorney	Legal Café
Charlene May	Attorney	Women's Legal Centre
Anonymous	Legal Practitioner	Women's Legal Centre
Rumana Goolam Mahomed	Attorney	Rumana Mahomed Attorneys Muslim Personal Law Network
Anonymous	Fourth year law student	Wits Law Clinic
Stephen Tuson	Attorney and Professor	Wits Law Clinic
Philippa Kruger	Attorney and Professor	Wits Law Clinic
Yasmeen (pseudonym)	Attorney	Two public interest firms in Johannesburg.
Anonymous	Lecturer	Muslim Personal Law Network
Sabera Timol	Social Worker	Kennilworth Respite Centre
Jamila (pseudonym)	Advocate	Government Department

Table 1 Details of Practitioners

The second group of participants were Muslim women who have turned to the law to resolve MPL matters. It was difficult to find women who wanted to share their experiences. I had hoped that some of the women in this group would be identified through the initial meetings with practitioners. Most attorneys interviewed were willing to speak to or share information

of the research with their clients. This method yielded one participant who was willing to share her experience with me.

Concurrently, I shared a short summary of the research with my personal network. The summary explained the objectives of the research, outlined the respondents sought after, and invited people who were interested to contact me. The message was shared on WhatsApp groups and a Facebook group. This resulted in three participants- who are all referred to by their pseudonyms here: Advocate Jamila, whose daughter heard about my research and put me in contact with her; Ruweida, who was in the middle of a divorce, and Ayesha who wanted to share her story of being married and divorced twice.

Lastly, I created a shorter, bite size image explaining the research and inviting participants. This was shared on Twitter and WhatsApp groups and generated a lot more attention. I received calls from people who were interested in the topic and had suggestions of who to speak to. Significantly, this method put me in touch with two community activists. The first is based in Thembelihle, south of Johannesburg, and through his network I found my final two participants. The second is based in Cape Town and has a long history of activism on the topic of recognition. When we first spoke, he sounded confident that there would be women to speak to within his community. Afterall, this was a common issue that he frequently encountered. He called me a week later to inform me that all the women he had approached did not want to speak about their personal experiences. Women did not want to speak about the trauma that they have experienced, especially when there is no justice in sight. This sentiment was echoed by the attorneys who reached out to their clientele.

The delicacy of the topic was something that I had been aware of and something that I tried to mitigate through the language that I used in the research invitations. In both my personalised messages to individuals identified as possible participants and passive invites on social media, I was careful to use non-intrusive language that invited participants to respond, “if they are willing”. On two occasions, I received positive indicators of outright willingness to participate, and on both occasions, it was from women who had achieved closure or who had a confident plan of how to bring their situation to a close. One woman expressed gratitude for being given the opportunity to share her story, which she thought she would never get to do in her lifetime. The other woman repeated throughout the interview that I could write a book on her life, much like Luttrell and other researchers experienced when conducting research on women’s life stories (Luttrell, 2005). Whilst the other three women indicated their

willingness by responding to my invite and, on one occasion, inviting me into their personal space, the emotion with which they spoke was a strong reminder that this was no easy subject matter.

At the end of this process, I had five interviewees in the second category of participants. All interviewees are referred to by pseudonyms throughout the research. Some of their personal details are deliberately vague to protect their identities. The class positions of the participants can be described as lower to upper middle class. However, four of the five participants, the exception being Ayesha, were financially dependent on their husband with no significant assets of their own. This meant that when someone like Ruweida divorced her husband, she went from living lavishly to struggling to survive financially. Both Ruweida and Zakirah experienced severe and long-lasting financial insecurity because of their legal dispute. The details of the participants are as follows:

Name	Age	Race	Location	Occupation	Education
Ruweida	56	Indian	Johannesburg	Administrator	Grade 9
Zakirah	46	Coloured	-	Educator	Tertiary Education
Ayesha	35	Indian	Johannesburg	Madressah teacher	Tertiary Education
Fatima	33	Indian	Lenasia	Unemployed	Grade 11
Femida	27	Black	Thembelihle	Unemployed	Grade 11

Table 2 Demographic Details of Participants

Where we had a choice of location, the interviews were conducted at a place of the women's choosing. The intention was for the location to be an environment in which the women felt most comfortable as a means to encourage women to speak freely and partly guide the interview process (Davids, 2003). However, due to COVID-19 lockdown restrictions, I only got to meet two of the participants in person. The other three participants were interviewed over phone calls. All follow-up interviews were also telephonic.

I supplemented my interviews with news articles and case law that make mention of Muslim women's legal battles with MPL related matters.

1.4.2 Data Analysis:

My approach to data analysis was informed by the workshops of Professor Suzan van Zyl as part of the Wits Humanities Graduate Seminar Series in 2019 and 2020. My first step was to transcribe the interviews. I transcribed some of the interviews by myself and some through a transcription service. For those that I had transcribed through a transcription service, I reviewed to ensure the accuracy of the transcripts. I listened and relistened to bits of audio to capture the tone of participants, especially where there was ambiguity around their comments. After transcribing and reviewing transcripts, I made summaries of each interview whilst simultaneously identifying key themes for each interview. This occurred for both sets of data.

For the second set of data, the interviews with women, I additionally organised the interviews into a coherent narrative across a timeline. This method of "restorying" is a means of analysing narratives and developing a coherent framework within which to understand an individual's story (Creswell and Poth, 2018, p.131).

Afterwards, I did a lateral comparison of the interviews of each data set to identify recurring themes throughout. I then organised them according to which would best answer my research questions, and which are new or emerging ideas that I did not anticipate for in my proposal.

1.5 Overview of Chapters

From the data analysis process, three empirical chapters emerged. The first focuses on views and perceptions of the state from both groups of participants. The second relays the experiences of practitioners and the strategies that they have adopted to mitigate the harms associated with nonrecognition. The last chapter looks at the individual women's experiences of seeking recourse through the religious and legal systems. It details their unique legal issues, their specific circumstances, and the action that they took to seek just outcomes in their situations.

Chapter 2: Literature Review

Introduction

The literature review provides a framework for understanding this research in the context of broader conceptual issues, namely multicultural feminism and the dilemmas of feminist legal strategies. It also maps the research that has been done on the recognition of Muslim marriages and on the lived experiences of South African Muslim women. The literature review is framed around four themes: The Paradox of Multiculturalism; Gender and Law Reform; Legal Pluralism and Muslim Marriage in South Africa; and Muslim Women in South Africa.

The first section looks at how attempts by the state to accommodate the practices of cultural and religious groups sometimes increases the scope for rights violations against persons within the group, particularly women. The section outlines key feminist perspectives, with a particular focus on those seeking to "dislodge the binary" between group rights and human rights. The second section will look at the potential and limitations of law reform to ensure gender equality in women's lived experiences. "Gender and Law Reform" builds on some of the main ideas expressed in the first section, demonstrating how differences within communities' manifest in family law reform.

Following this, "Legal Pluralism in South Africa" will discuss the pluralistic nature of the South African legal system and will review the contributions made by scholars on how Muslim marriage can be recognised within such a system. The last section will review studies that have been conducted on the lived experiences of Muslim women in South Africa, positioning this project as a contribution to empirical research on Muslim women's experiences of religious and civil law.

2.1. The Paradox of Multiculturalism

In multicultural societies, governments will inevitably have to ask themselves if cultural or religious laws and systems of governance should be incorporated into the state's administration, and if so, how? States will need to decide on whether to simply extend citizenship rights, as is, to all individuals or to accommodate the cultural and religious practices of distinct groups into the state's system of governance (Gouws and Stasiulis, 2014). Multicultural policies seek to include different cultural or religious groups into systems of governance without erasing their distinct identities and practices. These measures

are a means of addressing inequality between groups. In South Africa, resolving inter-group inequality was a key objective of the liberation struggle against apartheid. As Cachalia (2019) writes, the liberation struggle "has at the same time been a struggle for the consolidation of a single South African nation embracing a diversity of linguistic, cultural and religious communities" (p. 69). South Africa is a prime example of how a multicultural ethos symbolises a break away from old hegemonic regimes of power that used the law to produce racialised inequality.

A problem remains, however, when multicultural policies aimed at reducing inequality *between* groups end up furthering inequality *within* groups. Shachar (2000) calls this phenomenon the paradox of multicultural vulnerability. The paradox only arises where the group in question holds practices that put individual rights at risk and where such practices are accommodated by the state. In this situation, 'at-risk group members' within the group:

> are being asked to shoulder a disproportionate share of the costs of multiculturalism. Under such conditions, well-meaning accommodations by the state may leave certain group members vulnerable to maltreatment within the group, and may, in effect, work to reinforce some of the most hierarchical elements of a culture. (Shachar, 2000, p.65)

Although recognition through accommodation may hold benefits for the group, multiculturalists must ask "who, however, gets to define what the group's 'established traditions' are?" and "which voices from within an identity group should be recognised by the state as representative of the 'integrity of a group's culture'" (Shachar, 2000, p.73). Accommodation into the state, "is never just an act of recognition" (Shachar, 2000, p.73). It is a process by which the state legitimises certain interpretations and practices within a group. It is generally the leaders of the group who determine the "authentic" practices and laws for the group and define the group's traditions, without much dialogue with the group. This leaves those suggesting new interpretations, especially women, open to ostracization and accusations of "cultural betrayal" (Shachar, 2000, p.73). Whatever differences that exist within the group are hidden behind the representation of the group made by its leaders.

Shachar further explains that because family laws are often markers of cultural group's distinctness, states are likely to accommodate group practices in this area of governance, either through legislative intervention or through non-intervention, which gives the group full autonomy over their practices. Because women play a fundamental role in reproducing group identity, norms and practices through the family unit, family laws that uphold gender biases

may place women in a position where their group rights conflict with their individual rights. The tension between group rights and women's rights in accommodationist policies has inspired feminist critiques of multicultural policies. Susan Moller Okin (1999), for example argues that the rights of minority groups should not be protected when they conflict with gender equality, and then proceeds to cite personal laws, polygamy and clitoridectomy as examples of the dangers of protecting group rights. Okin's analysis has been criticized for making sweeping claims about religions and cultures, women in these religions and cultures, and the presumed "progressiveness" of western states (Al-hibri, 1999; Hong, 1999). Okin's analysis points to a broader problem that occurs when discussing women's rights and group rights. The binary framing of women's rights- as ostensibly western and progressive- and group rights- ostensibly discriminatory and backward- produces a form of "othering" where non-western religion and culture is painted as unequivocally antagonistic to gender equality (Gouws and Stasiulis, 2014). This furthers an a-historical and narrow view of religion and culture as intransient- a view that does not take into account the multiple factors informing the composition of group laws and practices. Homi. K. Bhabha aptly summed up the critique of Okin's analysis when he said: "Put patriarchy in the dock by all means but put it in a relevant context" (1999, p.81).

In putting patriarchal practices in its relevant social context, Gouws and Stasiulis suggest in their book "Gender and Multiculturalism- North-South Perspectives" (2016), that we can begin to dislodge the oppositional structure of the human rights and group rights debate. To make this case, Du Toit (2016) deconstructs the "universality" of human rights, and claims to culture that act like universals in local contexts. Drawing on a range of feminist theorists and Aristotle's notion *of phronesis*, Du Toit proposes an understanding of universals, including universal human rights, as contested and contextual in nature as opposed to "timeless and abstract" knowledge that is "straightforwardly applicable in every new situation" (p.27). Du Toit then turns to look at religious and cultural claims that act as universals, specifically those that "resist women's equality" and brandish claims for equality as "necessarily alien, external" and "imperialist" (p.28). Culture, like human rights, is internally contested. As such, claims to a "pure culture" must be searched for the possible ideological function of the claim. Du Toit suggests that claims to a "pure culture" often seek to stabilise group identity in the face of external threat, such as minority group traditions in multicultural contexts. Women are once again at the centre of attempts to control and protect group identity.

Women's sexuality, for example, is generally understood as "a marker of collective identity" (Du Toit, 2014, p.18). Their experiences, however, may not align with claims being made on behalf of the culture, as will be shown in the case below. Therefore, Du Toit argues that claims to culture should be informed "by the singular and the unique, and in particular by women's voices and concerns" (p.18) and should be kept open to debate, allowing the culture to be "informed and reformed" by the material ways in which it is invoked. Du Toit uses the example of the Zuma rape trial[9] to show precisely how claims to an intransient culture are at odds with the embodied experience of members of that culture. Du Toit summarises the universal and the "singular and particular" in the following comment:

> If Kwesi (sic) had been allowed to explain her interpretation of what being Zulu means to her in contemporary South Africa, how it touches on and informs her womanhood, as well as her sexual autonomy and freedom. If she was allowed to show what Africanness and Zuluness as cultural universals mean for her as a concrete individual and self-proclaimed lesbian, she would probably have opted for a broadening of the concept of Zuluness to embrace, to be made congruent with the material realities of her life as a female, gay Zulu of the new South Africa nation… If the court had allowed Kwesi's interpretation of her Zulu identity to inform everyone better what it may mean to be a Zulu in present-day South Africa, I suspect that Zuma's definition (drawing on all the widely disseminated, well established stereotypes of Zulu virility) would have been revealed as too narrow, untenable, not universal enough to include very many actual Zulus.

The Zuma rape trial is one example of the contested nature of culture and the role of the court in legitimising certain interpretations of custom in South Africa. Writing on South African law reform, Albertyn (2013), like Du Toit, notes that there is a gap between 'those who 'speak for' culture or religion and those who 'live' it", and that the latter group may hold less essentialist understandings of their group identity and practices (p. 393). Furthermore, there are intra-cultural claims being made by women within cultural groups in South Africa that

[9] Former President Jacob Zuma was tired and acquitted of rape charges in 2007. He went on to become president in 2009. Zuma's defence relied heavily on claims about sex and sexuality in Zulu culture. 'Khwezi' is the pseudonym given to Fezekile Ntsukela Kuzwayo- the woman who accused Zuma of rape- to protect her identity during the trial. The trial subjected Kuzwayo to attacks from supporters of Zuma, including the ANC Women's League. For a reflection on the shifting discourse around Zuma and the rape trial, see Hassim, S. "Why, a decade on, a new book on Zuma's rape trial has finally hit home". *The Conversation.* 5th October, 2017. Available at: https://theconversation.com/why-a-decade-on-a-new-book-on-zumas-rape-trial-has-finally-hit-home-85262

seek to redefine certain cultural norms or patriarchal interpretations of religious texts. Albertyn cautions that in any family law reform process, there is the potential to place the burden of cultural misrecognition on women "by failing to see the gender dimensions of both misrecognition and maldistribution" (2013, p.390). However, engaging with differences within groups – in both interpretations of texts or lived experiences - the law reform process may be able to produce a greater balance between women's rights and group rights. Albertyn explains:

> It is in the notion that values are contingent and overlapping, that open debate about values is possible and desirable, and that cultural and religious precepts and practices can survive – and respond to - constitutional scrutiny, that the possibilities of law reform that respects sameness and difference are found (Albertyn, 2013, p.394)

There is much to be drawn from debates on family law reform in India, where Muslims are also a minority community. When it comes to the recognition of personal laws in India, Flavia Agnes' (2012) study of the intersection of gender and identity in Muslim women's experiences shows how a binary debate between women's rights and group rights can be harmful for women *within* minority groups. This is typified in the reaction to the Shah Bano judgement which dealt with a post-divorce maintenance claim for a Muslim marriage. In 1985, after a ten-year legal battle against her husband for maintenance, Shah Bano won her case at the highest court in India. The judgement (and the ruling Congress party that was seen to be in support of the judgement) received backlash from the Muslim community. The Congress party revoked its earlier support of the judgement and adhering to the calls from some Muslim leaders, supported a separate legislation based on Islamic jurisprudence for Muslim women getting divorced. This sparked two responses – from the Hindu right who saw the government's move as pandering to minority interests, and from feminists who saw this as a contravention of the principle of gender equality (Mankekar, 1995; Pathak and Rajan, 1989). The position of the Indian women's movement on Muslim women and the Uniform Civil Code[10] had to evolve past a stringent understanding of "equality" when they realised that their position fell into the anti-Muslim sentiments of the Hindu right wing (Agnes, 2012; Rajan, 2000; Sezgin, 2016). Agnes shows that a binary debate between group rights and women's rights does not benefit women who fall within the

[10] Currently, India has different systems of personal law for different religious groupings. The constitution provides for a uniform code in keeping with the secular trajectory of the post-colonial state. See Rajan (2008).

margins, ultimately demonstrated in Shah Bano feeling compelled to choose between being a devout Muslim and her entitlement to her claim for maintenance. She eventually renounced her claim for maintenance.

Feminists like Amanda Gouws, Louise Du Toit, and Ayelet Shachar seek solutions that do not force women like Shah Bano into choosing between their allegiance to their religion or culture and their individual rights. Shachar, for example, proposes an approach that sees women as "rights bearers" and "cultural bearers" and regards women's rights as encompassing of both human rights and group rights (Shachar 2000, Shachar, 2009). From this perspective, Shachar (2009) proposes an interactive system of governance that moves between the secular-religious divide and that is sensitive to context. She asks "…what is owed to those women whose legal dilemmas … often arise from the fact that their lives are already affected by the interplay between overlapping systems of identification, authority, and belief." (2009, p. 144).

Shachar's model of "transformative accommodation" seeks to reconcile individual and group rights and is based on three rules:1. The state and the minority group will share jurisdiction through the division of issues into 'sub-matters' over which each has an allocated jurisdiction; 2. Neither the state nor the minority group may have sole authority over an issue; 3. An individual can choose between state or group authority at any point. The "competition" created between the state and religious or community leaders is said to encourage intra-communal dialogue (Domingo, 2019). The model has been criticised for not taking into account the factors that may hinder women's ability to choose between jurisdictions and has been expanded by suggestions to capacitate women to make such choices (Bond, 2008 and Mitnick, 2003 in Domingo, 2019). Whilst recognising the limitations of Shachar's model, Domingo finds in it a foundation for thinking "in a more creative and pluralistic manner" for a model within which "a Muslim woman can enjoy her rights under Islamic law and her rights as a citizen of South Africa" (2019, p.328).

The debates around multiculturalism lays a foundation for understanding the difficulties of law reform, where much of the tensions discussed in this section play out. The next section will discuss South African feminist perspectives on the use of the law to improve the position of women in South Africa, especially in the area of family law.

2.2. Gender and Law Reform

Feminist legal scholars have long deliberated on the efficacy of using legal processes to advance women's interests (Artz and Smythe, 2007). On the one hand, the law regulates access to resources and benefits, provided only through recognition from the law. On the other hand, the law sets boundaries of inclusion and exclusion that may subvert broader goals for gender equality and further entrench traditional gender roles or institutions like marriage. South African feminist literature seems to agree on a set of fundamental ideas about the law: 1. That it is a fundamentally patriarchal institution, likely to reproduce sexist ideas, 2. that its impact is limited by a number of socio-economic factors that prevent women from accessing the law as well as by the constraints of the state to enforce the law; and 3. that the law is only one site of what should be a multipronged struggle for gender justice. Legal strategies should be supplemented by broader social and political strategies (Artz and Smythe, 2007; Albertyn 2011)

Many laws have been produced since 1994 to address women's status and subordination in the private sphere. A strong alliance between the Women's National Coalition (WNC), the ANC and a vigorous civil society provided a useful moment for feminist law making in the early days of democracy. During this period, the Recognition of Customary Marriages Act (1998), the Domestic Violence Act (1998), and the Choice of Termination of Pregnancy Act (1996) were passed into law. However, from 1999-2004, the political process of law making began to slow down. SALRC investigations into African customary inheritance, Islamic marriage, sex work, and cohabitation and domestic partnerships, did not result in legislation (Albertyn, 2005). As a result, litigators such as the WLC turned to the courts to defend and promote the right to equality resulting in some victories[11] for women's rights.

There is, however, a gap between the right to equality and material realities. Using the work of Nancy Fraser, Albertyn (2011) asks whether the law has been able to reduce social and economic equality between men and women in both status (through recognition) and redistribution of wealth. Broadly, Albertyn argues that the law plays an important normative role that provides strategic opportunities for women to access justice, but that it is limited in its ability to change women's material realities. Before detailing Albertyn's work, it is useful

[11] For example, the Bhe and Others v Magistrate and Others (2005) challenged the customary laws of inheritance that prevented daughters from inheriting and won at the Constitutional Court. The Bwanya v Master of the High Court (2020) case addressed the inability of persons in domestic partnerships to inherit under the Intestate Succession Act (ISA).

to look at Fraser's framing of the tension between recognition and redistributive claims that seek validation from the law. According to Fraser, social justice claims in recent times appear to be divided into claims for redistribution and claims for recognition, with claims for recognition becoming more prominent since the 1990's (Fraser, 2003; Fraser, 2007). Redistributive claims call for a just distribution of resources and wealth. Movements calling for redistributive policies were primarily organised around class and were criticised for ignoring other differences such as race and gender. Undergirding calls for recognition, on the other hand, are identity claims or the recognition of these differences. The goal of "recognition politics" is to build a "difference friendly world, where assimilation to majority or dominant cultural norms is no longer the price for equal respect" (Fraser, 2003, p.7).

There are two interrelated ways in which the law may prevent or produce/reproduce inequality. The first is found in the way the law defines those who have access to its benefits, creating boundaries of inclusion and exclusion (Albertyn, 2005). The second is in the application of the law within the judicial system and how it is enforced through social institutions. Albertyn (2011) notes that the laws passed during the transition and early democratic years of South Africa improved the status of women in the private sphere, extending the ambit of the law from the public to the private. Through these recognition-based policies, women have gained access to resources through marriage, have laws that secure reproductive rights and have progressive legislation dealing with gender-based violence (GBV). However, the actual impact of these laws has been limited by poor implementation or by the limited parameters set by the law. For example, some provisions of the Domestic Violence Act (DMVA) are unavailable to spouses in unrecognised marriages (Bonthuys, 2014). Under legislation, domestic violence is considered as a factor in the distribution of the joint estate in divorces or in claims for spousal maintenance. Women in "unrecognised" relationships are not entitled to these redistributive mechanisms, leaving them vulnerable to abuse and making it difficult for some to leave abusive relationships. Furthermore, the courts have shown an unwillingness to consider domestic violence as a factor in most divorce cases except in exceptional circumstances. The violence experienced by women is often trivialised and seen as separate from the marital discord (Bonthuys, 2014).

Another concern is whether the content and application of the law transforms or relies on – and thereby strengthens - traditional gender roles. Albertyn argues that the transformatory potential of law to change gender roles has been contradictory. This is seen in laws and court judgements that shift "between arguments and concepts that reinforce traditional gender roles

and those that undermine them" (p. 151). In legal processes, arguments are sometimes made on the basis of women's traditional gender roles or on narratives of victimhood and dependency. For example, access to abortion was argued for on the basis of socio-economic conditions and health needs instead of on the right to reproductive autonomy and choice. For litigators, these arguments are expedient and built on the need to meet women's immediate needs (Albertyn, 2011; Artz and Smythe, 2007). However, they uphold gendered norms and institutions like family, marriage and community, that are often built on unequal gender relations. Albertyn describes these instances as accommodation through inclusion rather than transformation. An inclusionary approach extends the reach of recognition and redistribution through the law but does not transform the "structural conditions" creating systemic inequality. A transformative approach addresses such systemic inequalities by "restructuring the underlying generative framework" (Fraser, 1997, p.23 in Albertyn, 2011, p.144). Despite the potential for mixed outcomes, Albertyn argues that strategies of inclusion should not be dismissed:

> Strategies of inclusion are neither "wrong" nor insignificant, nor do they necessarily exist in isolation from more transformative approaches. Women have been granted a powerful array of rights and benefits by parliament and the courts in South Africa. Meeting women's practical needs enables more strategic objectives. (p.152)

Artz and Smythe (2007) also support a pragmatic relationship between feminist aims and the law- one that accepts that the law is limited in both its enforceability and its transformative potential. Writing on the contributions of feminists to the Sexual Offences bill over a ten-year process, Artz and Smythe (2007) highlight how feminist concerns for legislation that supports vulnerable victims gradually moved to the periphery. Nevertheless, they argue that for as long as women choose to make use of the criminal justice system, feminist activists have no choice but to engage with the law, accepting that the law is a site of struggle where a variety of interests compete for primacy.

Many of the critiques expressed by South African feminists are echoed by feminists in the Global South. I have benefitted from those stemming from India, where reforms to marriage laws have been in constant debate. Menon (2004) provides a comprehensive overview of the critiques of the law, which I summarise as follows: 1.Legal campaigns do not address the 'political and social basis for gender injustice' and, therefore, are not enough to transform a patriarchal society; 2. New legislation furthers the control of the state in the lives of women

and; 3. Changing the law is a time consuming strategy that does not affect real change; what is needed, instead, is a "mass-based militant politics" (Menon, 2004, p.6)

Srimati Basu's ethnography of family courts in India further highlights the insufficiency of the law to ensure gender justice. Basu (2015) demonstrates how the law can be used as a tool to advance and protect women's interests whilst reinforcing gendered norms. Instead of asking whether laws are 'good' or 'bad', Basu finds it more useful to "follow the ways they are utilised as new cultural horizons: to stretch the entitlements of marriage, calibrate the meanings of violence, or construct kinship" (2015, p. 4). This sentiment is expressed by some of the practitioners that were interviewed for this research. Nandita Haksar argues that the propensity to turn to the law is due to it being easier than "building a movement for an alternative vision" and suggests that law should only be used as a strategy when "the movement is strong enough to carry the law reform forward" (cited in Menon, 2004, p.6).

One example of the potential and limitations of the law that lends itself to the Muslim marriage debate is the Recognition of Customary Marriages Act (RCMA). The RCMA was a welcomed legislative intervention to remedy the status subordination of women in customary marriages. Black women were denied protection from both state and customary law during the colonial and apartheid systems, placing them outside of the law (Button, Himonga and Moore, 2016). They were given minority status in customary marriages during this period. The RCMA recognised women's equal status to men in customary marriages, with the same rights to children, decision making and property (Albertyn, 2011). It aimed to ameliorate the hardships that women faced at divorce by giving full legal recognition to customary marriages, setting the default marital property regime as in community of property, and shifting the authority to dissolve marriages to state courts which would be responsible for distributing the marital estate. However, the implementation of the RCMA is hindered by structural issues, as Button, Himonga and Moore (2016, p.300) write:

> …it has been argued that the RCMA is a mere 'paper tiger', owing to high litigation costs in state courts, the lack of awareness about the Act in rural areas, and the unequal power relations between spouses, which prevent women from negotiating for the application of the RCMA to the dissolution of their customary marriages.

In their research, Button, Himonga and Moore (2016) found that women believed state courts would provide more protection against inequitable outcomes of divorce. Despite this view, only 3 out of the 17 marriages in the research were dissolved in state courts. The rest

informally separated from their husbands without the benefit of a redistribution of the marital estate. Black South African women in customary marriages occupy "an exclusive and highly vulnerable socio-economic position" (p.105) and their experiences of divorce are shaped by gender, race, location and class (Himonga and Moore, 2017). In addition to the abovementioned structural barriers, Himonga and Moore found that the deep-seated belief amongst divorcees that marital property belongs to the husband or the husband's family prevents women from accessing their rights under the RCMA.

The case of the RCMA illustrates how new laws that are built on the principle of gender equality and aimed at providing social and financial security to women struggle to take root in the practices of groups (Nhlapo, 2017). Unlike Shachar's paradox of multicultural vulnerability, discussed above, where state laws entrench hierarchical elements of cultures to the detriment of women, the RCMA presents a case where progressive legislation is not always used by the women it aims to protect. There are many social and structural reasons as to why women may choose not to lay claim to their legal rights, but of concern in this section is instances where legislation either reifies western, constitutional provisions or uncontested representations of culture. There are examples of women's movements across the world that seek law reform on the basis of their interpretations of religious texts. The following examples look specifically at Muslim women's organising around personal laws in Egypt, India and Israel.

Singerman (2005, p.163) observes the trend for women's movements across the Muslim world to seek a shift in the balance of power in the private realm through law reform in order for them to access other freedoms fought for by the international feminist movement. Zaki (2017) uses the case of the Egyptian women's movement as an example of feminists innovatively drawing on an array of cultural, religious and political ideas to reform MPL. For many years, the Egyptian women's movement campaigned to increase women's access to divorce. Zaki writes that Egypt's pluralistic family law system contributed to the success of the campaign, allowing for activists to fight the battle of language and interpretation. Their struggle was both against the state and the religious establishment.

A unique form of resistance to the reform of personal laws is found in contexts where the laws in question belong to a minority group. Sezgin (2012) writes about the efforts of women to reform Muslim marriage and divorce laws in Israel and India – both countries in which Muslims form a minority group and have difficult relationships with the state. In Israel,

Palestinian women sought to increase the amount of maintenance awarded to Muslim women upon divorce by giving women the option of having their divorces adjudicated by civilian courts, as opposed to sharia courts. In India, Sezgin looks at how the women's movement has had to grapple with the complicated issue of triple *talaq* and the Universal Civil Code in light of anti-Muslim sentiment.[12] Women's strategies included strategic litigation (in the case of India), lobbying for legal reform (in the case of Israel), building alliances across communities and "forming hermeneutic communities that offer women friendly interpretations of Islam" in both cases (Sezgin, 2012, p.116). Sezgin (2010) suggests that when it comes to aligning personal laws with universal human rights, hermeneutic communities, or communities that engage in interpreting religious texts, hold the most potential for change, referring to their work as a "revolution in personal status systems". In India and Israel, legal reform, religious reform and intercommunity alliances formed a matrix of resistance targeting different seats of power.

2.3 Legal Pluralism and Muslim Marriage in South Africa

South Africa's legal system is also pluralistic, offering its own strategic opportunities to recognise and reform personal laws. Before looking at these opportunities, it is necessary to unpack what is meant by legal pluralism and why South Africa's legal system is considered as such. Legal pluralism refers to the co-existence of multiple legal systems (Opperman, 2006). It is a common feature of postcolonial states and remains an increasingly important issue of governance due to migration, transnationalism, and international human rights conventions (Bonthuys, 2016). It is estimated that roughly 80% of the developing world use non-state, religious or customary legal systems (Sezgin, 2010). In recent times, the role of non-state religious or customary legal systems has largely been truncated to the governance of personal status or family law matters (ibid). Legal pluralism does not require state recognition of different legal systems but should be taken as a fact of multicultural societies in which many legal systems are followed (van Niekerk, 2010). This describes a form deep legal pluralism in which non-state law operates without the regulation of the government. State or formal legal pluralism, on the other hand, involves the formal recognition and incorporation of traditional or religious legal systems into state regulation.

[12] See also Flavia Agnes (1999) "Law and Gender Inequality"; (2017) "Triple Talaq-Gender Concerns and Minority Safeguards within a Communalised Polity: Can Conditional Nikahnama Offer a Solution"; and Rajeswari Sunder Rajan (2000) "Women between community and state: some implications of the Uniform Civil Code debates in India".

As a fact of multicultural societies (van Niekerk, 2010), legal pluralism shares many of the concerns discussed in the first section of this literature review. Pluralistic legal systems are perceived to be harmful to the individuals under its jurisdiction and the systems are subject to much critique for their failure to align with human rights. This is often due to personal status systems entrenching patriarchal structures and gender inequalities, with severe consequences for "women, children, religious dissidents, secular individuals, and people who do not belong to a 'recognised' community (Sezgin, 2010, p. 21). Thus, when a personal status system is formally recognised by the state without undergoing reform, the discriminatory patterns within it are sanctioned and backed by the state. As illustrated in the historical context, this was a concern for Muslim progressives in South Africa who argued that any recognition of MPL in South Africa should be subject to the equality clause to ensure that gender discrimination is not enshrined in law.

The South African legal system can be described as a mixed or dual legal system (Rautenbach, 2010). The two systems comprising state law is the common law, which applies to all South Africans, and African customary law, which is applied in certain circumstances but is equal in status to the common law (ibid, Opperman, 2006). It is estimated that over 16 million Black South Africans live under customary law (Himonga and Moore, 2018). Non-state law, such as Muslim personal law continues to thrive between these systems. This not only occurs with religious and cultural family laws, but also in criminal matters where "people's courts" have dealt with criminality through their own methods due to the inaccessibility of the courts (Rautenbach, 2010). Legal pluralism raises many questions about whether and how religious and cultural laws should be included into state laws. The literature that I next consider looks at these questions in relation to the recognition of Muslim marriages in South Africa. It suggests three different measures that can be adopted to address the issue of non-recognition in South Africa: The codification of MPL, the recognition of Muslim marriages through legislation, and the recognition of Muslim marriages through the development of common law. Furthermore, the literature also shows how the debate around the recognition of Muslim marriages has progressed over time.

In anticipation of the legal recognition of Muslim marriages, Najma Moosa (1995) evaluated the conflicts between Islamic and South African laws of inheritance and succession, showing areas of compatibility and incompatibility. Moosa concluded that the best way to integrate MPL into the South African legal system is through separate legislation that would apply to all Muslims. This would resolve the contradictions between the two sets of law and mitigate

the harms attached to the non-recognition of Muslim marriages. The harms that Moosa discusses include the illegitimate status of children born of unregistered Muslim marriages and the legal consequences that follow, women's vulnerability in instances of divorce or death of a spouse, and the navigation of two conflicting legal systems that sometimes leads believers to disobey Islamic law. Moosa later wrote that the codification of MPL should be subject to the Bill of Rights, arguing that the spirit of equality in the Bill of Rights is consistent with that of Islam, thus safeguarding against patriarchal interpretations of Islam found in Islamic law (Moosa, 1998).

The need for Muslim Personal Laws to be subject to the Bill of Rights is echoed by many other legal scholars (Rautenbach (1999); Manjoo (2007); Amien (2010); Albertyn (2013)). Through an analysis of what is deemed "law" in the South African and Indian constitutions, Rautenbach additionally (1999) argues that the bill of rights also applies currently to unrecognised MPL. Rautenbach writes that the shift in language used to define law in the South African constitution- from "law in force" in the 1993 interim constitution to "all law" in the final constitution- suggests that the drafters of the constitution envisaged that there would be laws that would not be recognised as "laws in force" but that would still need to be "scrutinised in terms of the bill of rights" (1999, p.4). In other words, the constitution may have anticipated the needs of "deep legal pluralism" and so extended constitutional regulation to non-state/unrecognised systems of law. Additionally, unlike the Indian constitution that grants autonomy to systems of personal law, the constitution of South Africa would require formal (legislated) MPL to comply with the Bill of Rights.

Manjoo (2019) opposes the codification of MPL in the MMB and suggests that there are other ways to recognise the status of Muslim marriages. In her study of the implications of MPL for women's rights, Manjoo found that process of codification preferences one school of thought over another. This was one of the issues raised with the MMB which prioritised the interpretation of the dominant schools of Islam in South Africa- the Shafi and Hanafi. People interviewed in Manjoo's research felt that in choosing one school of interpretation over another, the state was "mandating what religious practices should be" (Manjoo, 2019, p.279). On the gender equality front, Manjoo found that the MMB contains provisions that could disadvantage women, such as the limited time frame which maintenance is provided during the *iddah* period and the default property regime being out of community of property without accrual. Instead of codification through the MMB, Manjoo advocates for legislation that recognises all marriages without attempting to codify any religious tenants. This is the

approach used by the Commission for Gender Equality (CGE) in the Recognition of Religious Marriages Bill (RRMB) and is an option being considered in the newly proposed Single Marriages Bill. As previously mentioned, the RRMB was drafted in response to concerns that the MMB posed a challenge to women's right to equality. The CGE handed over the RRMB to the South African Law Reform Commission but no public consultations were held on the bill.

According to Amien (2010), the RRMB was drafted with little consultation with the Muslim community. Furthermore, Amien argues that the RRMB and other approaches that seek to unify MPL with existing laws, conceals discriminatory practices by leaving the regulation of marriages to the private sphere. Amien finds both the RRMB and the Muslim Marriages Bill lacking in its approach to gender equality. She suggests that new legislation should adopt a Gender-Nuanced Integration (GNI) approach. The GNI approach applies in contexts where there is a constitution in place that enshrines gender equality and forms the highest law in the land. The GNI requires legislation to prioritise the right to equality over freedom of religion where there is constitutional protection of both. Key features of this approach include the need for regulation (as opposed to recognition alone) of Muslim marriages, and the role of the judiciary in employing gender sensitive interpretations of Muslim family law (Amien, 2010).

An alternative to recognising Muslim marriages through legislation is to give recognition by developing the common law through the courts (Rautenbach, 2004). The development of the common law is a duty on the courts mandated by the constitution. The courts have extended rights to Muslim spouses through the common law but have fallen short in recognising Muslim marriages as legal unions. Furthermore, Amien (2016) shows how the judiciary has extended recognition to elements of the Muslim personal law stemming from the marriage contract, namely, *nafaqah* (maintenance), and *mata'a* (compensatory gifts) in the Ryland v Edros case and *mahr* (dowry) in Arendse v Arendse. Rautenbach argues that the judiciary's "accommodation of religious and cultural diversity is acknowledging end even endorsing the existence of deep legal pluralism in South Africa" (2010, p. 147). This approach is attributed to new ways of interpreting legislation in democratic South Africa which pays attention to the "spirit" of the law guided by constitutional values rather than literal interpretations and the increased diversity within the judiciary post-1994. This new approach, Rautenbach says, indicates a shift from a "divided pluralistic society to one that is united in diversity" (p.162). Coming from a history of slavery, colonialism, and apartheid, a judiciary of this nature may be something worth celebrating. However, Rautenbach cautions against allowing deep legal

pluralism, under the guise of religious autonomy, to justify gender discrimination. Chapter 4 of this research provides a more detailed discussion of the rights that have been recognised in Muslim marriages through the courts and the gaps that still exist.

Taking a starkly different approach, Bonthuys argues that the state should no longer be involved in "regulating the condition and requirements for a valid marriage" (2016, p.1318). Given the decline in rates of marriage and the prevalence of households that are not organised around the conjugal pair, the focus on the institution of marriage in family law does not reflect the lived reality of South Africans. Bonthuys suggests a radical form of pluralism in which marriage itself is not afforded legal recognition. Rather, the law would recognise and regulate the rights and obligations stemming from a broader set of familiar relationships. In this way, no conception of marriage is privileged over another.

Whilst state legal pluralism offers the possibility of a relatively equal status for the personal laws of minority groups, it is important to remember that the establishment of state legal pluralism in the colonies reinforced and benefitted colonialism (Bonthuys, 2016). Vahed (2003) and Bonthuys (2016) observe that the colonial, Christian model of marriage remains the yardstick against which the legitimacy of other forms of marriage are measured. Vahed, writing amidst the 2003 debates on the draft Muslim Marriages Bill, reflects on the authority of the ulama, saying that regardless of legislation, South African Muslims will continue to follow the interpretations of the ulama, as they have always done.

2.4 Muslim Women in South Africa

The representation of Muslim women as an oppressed group in international media and politics is tied to the representation of Islam as uniquely patriarchal. Suh a representation has been used to justify new 'civilising missions' such as the United States invasion of Afghanistan and the banning of burqas in France (Bhabha, 1999; Patel, 2018; Mahmood, 2004; Vahed and Waetjien, 2010). Western feminism has contributed to this narrative of the Muslim woman in need of "saving" (Dangor, 2001; Lesch and Parker, 2018; Abu-Lughod, 2002). Homogenising narratives of Muslim women perpetuate perceptions of Islam as unequivocally oppressive and regressive, and of Muslim women as passive subjects of Islam. Muslim women have constantly had to fight such prejudices whilst having to fight patriarchal tendencies within their own communities (Abrahams, 2011; Patel, 2018).

South African history reflects the variety of spaces occupied by Muslim women who "have at various times simultaneously occupied positions of power and privilege, poverty and

periphery" (Davids in Blumberg, 2011). Research on Muslim women's experiences in South Africa is limited but growing (Abrahams, 2011; Davids, 2003, 2004). New research is needed to address the under representation and misrepresentation of Muslim women in South Africa. Even so, the emerging scholarship is not without its flaws. Leila David critiques the tendency of studies to brandish women as either being pious and religious, on the one hand or secular and rebellious, on the other (2003,2004). Lost in these characterisations, she argues, is the lived realities of Muslim women. My presentation of Muslim women's experiences of the law in this research aims to steer away from these flattening narratives. The narratives discussed in chapter 5 not only lean into the complexity of nonrecognition but attempt to give texture to the individuality of the participants.

Abrahams (2011) study of Muslim women in the Western Cape sought to understand how her participants "found ways of empowering themselves within the particular complex and often contradictory patriarchal structures of South African Islam as practiced in the Western Cape" (p.3). It also sought to challenge totalising perceptions of Muslim women as "oppressed victims". It looked at the participants' perceptions of power, agency, and empowerment. According to Abrahams, whilst the women identified Islam as a patriarchal institution, "instead of focusing on the ways in which Islamic shariah law limits their authority and agency; the women negotiate empowerment by fostering an awareness of the ways which Islam limits men's agency and burdens Muslim men with their roles as leaders and providers" (p.131). Similarly, Mohamed's (2006) doctoral research looks at how five Muslim women have interpreted *da'wah*, which refers to the practice of inviting people to Islam, in the context of what he describes as constrained and narrow interpretations of Islam. His research showed how the women made sense of religious texts, inspiring their social, economic, and religious contributions to post-apartheid South African reconstruction. Also with the aim of challenging stereotypical representations of Muslim women, Asmal's (2015) research looked at the life histories of five Muslim women involved in civic engagement in South Africa. The life-histories help "to track the broad social changes in the gendered worlds of Muslim women in South Africa's apartheid and post-apartheid "rainbow" periods eras that coincided with important global doctrinal shifts" (p.17). Thus, whilst Islam plays an important role in each of the women's lives, Asmal's study embeds their public engagement in the broader social context rather than solely in their faith.

All of the abovementioned studies look at how Muslim women interpret Islam in their individual contexts. The following studies relate specifically to Shariah and how women understand and access their Islamic rights.

Dangor's (2001) study compared the views of Muslim women with that of three types of international Islamic scholars- traditionalists, reformists, and modernists. Through a survey of 50 Muslim women from Johannesburg and Durban, he gauged opinions on a range of issues pertaining to public and private family life. Amongst those surveyed, the majority indicated that women have been deprived of their Shariah rights and that the law has been misconstrued by men, a sentiment echoed throughout my interviews for this research. The majority supported women's rights movements but not western models of it. Dangor explains this aversion to feminism and women's liberation movements as due to their objectives being beyond "the sensible amelioration of conditions" to "the drastic revision of society and, in particular, the redefinition of traditional sexual roles" (p. 126). A different study of 262 Muslim women in the Western Cape surveyed women's "opinions, perspectives and experiences of marriage, spousal relationships and decision making" (Hoel et al, 2011). The study found some contradictions between the women's understanding of gender roles according to Islam and their lived experiences. Women's experiences challenged the stereotypes of submissive women and abusive men in Muslim households and further indicated a shift in gender roles due to changing socio-economic conditions. This shift did not always correlate with their religious beliefs in a complimentary gender paradigm where men were envisioned to be the sole breadwinners. An in-depth study of eight middle class Muslim couples suggests that the shift in gender roles is limited to women's employment whilst the household division of labour remains the same (Lesch and Parker, 2018).

Tayob (2003) proposes that a new set of questions need to be asked in the MPL debate. To avoid the "unfortunate polarisation of human rights and Islamic law", he begins to ask questions about how MPL is experienced by women who at the time were divorced, undergoing divorce or whose husbands had taken second wives without their permission. The women in his research looked for solace, understanding and assistance within Islamic organisations and teachings. Tayob argues that the public debate over MPL obscures the role of religion in women's lives, for whom, "the choice between Islamic law and human rights was not an option". My research will take a different approach by looking at how Muslim women make the choice between Islamic law and civil law and what their experiences of both systems are in the absence of recognition.

Hoel (2012) documents the experiences of Muslim women seeking divorce from the Muslim Judicial Council (MJC) in the Western Cape. Hoel's research offers insight into the challenges that Muslim women faced in accessing their right to divorce through the MJC. Hoel found that the religious leaders enforced a "reconciliation at all costs" approach, often telling women to go back to their abusive marriages. The study shows how the conservative approach adopted by religious leaders did not align with the women's understanding of their rights, sometimes resulting in them acting against the advice of the MJC. The reconciliation approach put them at risk of physical and emotional abuse, and in cases of infidelity, HIV and other sexually transmitted diseases. Unlike the responses of the religious leaders, Hoel believes that the MMB could ensure better outcomes for women getting a divorce. Building on Hoel's research, my project will in part reflect on the experiences of Muslim women's engagement with religious bodies in Johannesburg and in Durban, whilst bringing into focus the overlap of their engagement with the religious system and the civil legal system.

There has been an increase in the number of formal and informal Muslim women's groups across South Africa (Hassem, 2008). Vahed and Waetjien describe such groups as "non-political models of organisation that may be used for political purposes" (2010, p.4). Indeed, women's groups, networks and even individuals who have identified the need, have done extensive work to educate Muslim women on their civil and Islamic rights. One group specifically challenging unjust practices of MPL is the Muslim Personal Law Network. The group is a "national network connected via WhatsApp, of diverse Muslim women activists, counsellors, lawyers, advocates, and academics whose work brings together research, law, psychology, and activism with real lived experiences of Islamic law in South Africa." (Ismail, 2018). The group itself does not hold a singular position on the MPL debate but are united under the principle of justice in the Muslim family. Three of the practitioners that I interviewed for this research are part of the MPL Network. Their perceptions and experiences of the legislative process and their experiences of assisting women in issues of MPL will be explored in chapters 3 and 4. The MPL Network is connected to the global movement Musawah- a movement that aims to ensure "justice and equality in the Muslim family" (Isaacs-Martin, 2016, p.119). Musawah is an organisation led by Muslim women that challenges the notion that women's rights are un-Islamic. It monitors state compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), offering "explanations and solutions" for the noncompliance of signatories to the convention (ibid, p.118). The work of Musawah shows how laws can be developed through

an Islamic framework to reflect and align with human rights, specifically the right to equality. In fact, their work is to "reclaim Islam's spirit of justice that advances human rights for women in Muslim contexts" (ibid. p.119). Their work is important in "dislodging the binary" between human rights and religious and cultural rights and is an important resource for organisations seeking to do the same in their own local contexts.

Conclusion:

The recognition of Muslim marriages will eventually come through a legal intervention of sort. This is in contrast to the current mode: accommodation through non-intervention which allows religious groups to regulate their own affairs, as is the current case with Muslim marriages in South Africa. Recognition will be a positive act of accommodation, aimed at creating certainty around the status of Muslim marriages in South Africa and ensuring protection for Muslim women- or so it is hoped. The literature review raised many key questions and concerns around this process.

Through a discussion of the position of women in minority groups in multicultural contexts, the first part of the literature review raised the following question: how are Muslim women positioned in relation to the community and the state? I argued that multiculturalism often comes at a cost which is ultimately born by women in minority communities, who sometimes find themselves caught between their individual rights and cultural rights. States adopting multicultural policies must find a way of ensuring that policies do not place women in a position where they have to choose between adhering to their faith and accessing their individual rights. In order to do this, the state must ensure that it is critical of internal power dynamics within communities, ensuring that claims to a "pure" culture are not voiced by local patriarchs alone, thereby erasing women's voices and concerns.

The second section further complicates the relationship between women and the state and provokes the following question in this research: whether, indeed, the recognition of Muslim marriages though the law will improve outcomes for women. It shows how even legislation that is seemingly informed by women's voices and concerns, namely the Recognition of Customary Marriages Act, struggle to take root in local practice. This is due to a range of factors, including the state's inability to ensure access to justice in a costly legal system. The impact of the law is not insignificant but is insufficient to ensure gender equality and gender justice.

The third section looked at South African legal pluralism and reiterated some of the concerns around the position of women within pluralistic legal systems. It then looked at the multiple approaches to recognising Muslim marriages in South Africa as discussed in the literature.

The fourth and final section looked at South African Muslim women in the literature, looking at the politics of representing Muslim women in research and discussing research done on the lives and lived experiences of South African Muslim women. In this section, I positioned this research in relation to other research that has been conducted on Muslim women in South Africa.

Chapter 3: Law Reform

Introduction

This chapter considers issues of power, voice, and representation in the law reform process and the factors that have prevented the enactment of legislation that recognises and regulates Muslim marriage. The first section of this chapter will focus on views expressed about the state emanating from the interviews conducted with Muslim women experiencing difficulties in the realm of personal law. The second section will consider the law reform process and the experiences of practitioners who have participated in this process. In laying out these different perspectives, the rest of this chapter will unpack the debate around the state's responsibility to enact legislation and the question of how the state should do this in the absence of any consensus within the Muslim community.

3.1 Everyday expectations of the state: frustration and uncertainty

Of the five women participants in this research, two had not heard about the Muslim Marriages Bill or the discussions around new legislation to regulate all South African marriages. The remaining three had varying degrees of knowledge of the Muslim marriages debate. This section will discuss their views of the state and legislation as expressed in their interviews.

Zakirah and Ruweida appear to be the most informed on the legislative process and believe that the enactment of legislation can improve people's lives. Zakirah believes that legislation would bring much needed relief to women in polygamous marriages and became visibly upset during our interview when discussing nonrecognition. She attributes the delay in legislation to men wanting to protect other men and blames "the big wigs" in the Muslim community for not wanting to relinquish their power, a view echoed by practitioners. "Its men benefiting and not wanting to be put at risk of not having those benefits anymore- where they can just do what they want regarding marriage", she said. Apart from her own case which showed how religious leaders were unable or unwilling to handle the complexity of certain matters (discussed in chapter five), Zakirah also referred to examples of how religious leaders are implicated in the hardship faced by women, illustrating the need for legislative regulation:

> I have a friend who is a second wife. When her husband doesn't give her what is her due, she talks to the maulana, and the maulana tells her she is wrong, so how does that work? That is ridiculous and that is a monthly situation with her where she has to always ask the maulana to step in, why? Eventually, she said to the maulana 'fuck you! You're just worried about the cheque he gives you! How do you sleep at night knowing that my child and I are suffering?

Zakirah raises this anecdote to express frustration at the argument that the implementation of MPL should be left to the Muslim community, and that it is the community that needs to reform, without legislative intervention. Given that Muslim religious leaders have acted as representatives of the whole community, Zakirah has no faith that religious leaders will act justly on their own accord. This would leave woman, like her friend, with little other recourse. Zakirah says:

> I think it's ridiculous that it (the MMB) hasn't come to fruition right. It is so silly because in Zulu culture they have rights you know. I mean, Muslim second, third families have been recognised for centuries why isn't it recognised by the government? It's ridiculous. It would make life so much easier for so many families.

Zakirah indirectly points to the practice of polygamy as the reason for Muslim marriages not being recognised. Like many other South African Muslims, Zakirah is frustrated that Muslim marriages have not yet been recognised despite polygamous relationships being practiced and "recognised" within the community for centuries. She refers to the Recognition of Customary Marriages Act as an example of how recognition has been extended to polygamous marriages, offering more protection for women and children. Ruweida similarly makes reference to the recognition of customary marriages, asking "what's the difference?". In other words, why are Muslim marriages not recognised in the same way that African customary marriages are. She answers her own question by saying that Muslims are probably concerned that legislation would interfere with Shariah. Ruweida does not share this sentiment and, at the time of the interview, was expectant that legislation would be passed within two years as directed in the 2018 Women's Legal Centre judgement. Although Ruweida did not have strong views to express about the legislative process, she drew connections between the impact of nonrecognition and her own ongoing divorce case. As will be discussed in chapter 5, her husband's lawyer is using the argument of nonrecognition to counter her claim to a portion of her husband's estate. According to her, nonrecognition is "where they are taking

advantage" and believes that if legislation were in place to recognise Muslim marriages, her position might have been improved.

Unlike Zakirah and Ruweida, Ayesha doubts the ability of law to protect people and questions whether legislation would lead to substantial improvements. Although she is critical of the government for "not taking Muslim marriages seriously" by not extending recognition to them, she is also critical of the legal system for being expensive and inaccessible. She specifically questions how legislation will benefit those who do not have money for lawyers. Femida is of the same view and has only approached the law in criminal matters (discussed in chapter 5) and would rather not involve the law in personal matters. In her view, the religious system is simpler and more accessible than the civil legal system. Notably, their views are not based on the possibility of legislation interfering with Shariah, but rather on their experience of state structures being expensive and difficult to navigate. Despite Ayesha and Femida's own difficulties with obtaining a divorce through the religious system, they believe that this is still an easier process than having to go through a court. That being said, both women expressed strong criticisms of the religious system in the interviews and, like all of the interviewees, believe that the application of MPL does not reflect the rights that Islam bestows on women, as Femida explains:

> I personally saw and experienced that Islam actually has given women a lot of rights, but we were groomed in such a way that we were told that we do not have much rights. It is the way that they groomed us, but Islam itself, it has given women a lot of rights, but the people who teaches Islam, they do not give the women their rights.

Femida's experience poignantly points to how power is exerted through the control of Islamic education. This impacts the practice of MPL which depends on how individuals and religious leaders understand Islamic rights and obligations. Hoel (2012) has shown how women's lack of knowledge can lead to prolonged divorce battles with religious bodies. One woman in Hoel's study who had a confident understanding of Shariah was able to stand her ground, insisting on her right of divorce. Ayesha and Femida's own practices of studying and teaching Islam as a religion that empowers women aligns with the views of some practitioners who believe that reform should occur within the religious system. Instead of legislation, these practitioners advocate for more education, especially around the marriage contract, and for more representation of women in religious bodies to ensure that MPL is applied fairly. Only two of the practitioners that I interviewed were of this view, with most

Muslim practitioners supporting a combination of legislative intervention and internal reform (as I detail in the next section). Ruweida and I discussed this view during our interview. She told me that she thinks that times are changing, that the younger generation are more educated on their rights. At the same time, in her situation, knowledge of her rights did not translate into relief:

> I know my rights, I do know. But the men don't worry. They think they're right. That's the problem. They don't see their faults. The position I am in all this time, the Maulana should have done something.

Fatima had not heard about the Muslim Marriages Bill or the possibility of new legislation but felt that government should do more to assist women who, like herself, have had to leave marriages "with nothing to show for". Fatima has received no spousal maintenance, no share of the marital property, and has struggled to keep custody of her children. She comments on the lack of options available to her:

> On our side, we only have the maulanas to go to, to solve a problem. We cannot go to anybody else. So, I think if government can get involved, that would really be a big help.

Although the experiences of the other interviewees are different in that they have sought legal options, from where Fatima is positioned, "the maulanas" were the only point of help. Where they fail, and where their ability to help is limited due to a lack of enforceability, women like Fatima find it difficult to know where to turn. Fatima follows this comment with an admission that although she feels government should do more, she is not sure *how* it would work because ultimately, "it's still going to go down to our maulana's".

Fatima points to another obstacle that government will have to bridge, that is, the sharing of authority between religious leaders and the courts and the perception that religious leaders are the ultimate authority on the application of MPL. This is an issue raised by Vahed's (2003) historical review of Islamic law in South Africa and the legislative process. Vahed speculates that "As Muslims have done for most of their stay in South Africa, they will continue to follow Islamic laws as interpreted by the Ulema and practice it on a de facto basis" (p.39).

Unlike strategic litigation (discussed in chapter 4), legislative law reform is a process that requires extensive public participation, community engagement and consensus building (Albertyn, 2013), making it a potentially long and tedious avenue. Although Fatima is not aware of it, and as noted at the start of this thesis, government has been involved in trying to help women in her position through the development of legislation since 1994. Moreover, Muslim religious leaders have had state recognition of personal laws on the agenda long before that, with the view that it would affirm the identity of Muslims in South Africa and alleviate some of the social difficulties of not being able to enforce Shariah.

The five interviewees' perspectives are a sample of the range of views that exist around the Muslim marriage debate. On the one hand, they see the law as a tool that offers protection to women and that is being withheld due to the interests of those in power (Zakirah). It can potentially mechanise the rights already provided by Islam (Ruweida). On the other hand, the law is seen as expensive and cumbersome, as communicated by Ayesha and Femida. Their experiences are discussed fully in chapter 5 and will demonstrate how their knowledge of Islamic rights were sometimes only able to provide strength and comfort in difficult times, and how other times it was operationalised to bring relief to individual circumstances. The rest of this chapter will focus on the law reform process and the experiences of practitioners engaged in it.

The South African Law Reform Commission (SALRC) was established to research, study and investigate all branches of South African law "in order to make recommendations for the development, improvement, modernisation or reform thereof" (South African Law Reform Commission Act, 1973, s4). As noted in the introduction, SALRC set up a project committee "to investigate Islamic marriages and related matters" in 1999. Dangor and Moosa write that "it was assumed that MPL, once recognised would naturally evolve and adapt to the needs of the South African Muslim community" (2019, p.11). This indicates an acceptance or anticipation that naturally, much like other laws that are subject to amendments, statutory recognition would be an imperfect adoption of laws that would reform as it is applied. However, the expressed purpose for the committee was not to reform MPL, but to adjust South African law to recognise Muslim marriages. The process took four years with the final report being released by the commission in 2003. The project is regarded as one of the most extensive public consultation processes in the

history of the commission (Navsa, 2019). The culmination of this process was a draft piece of legislation which would become the Muslim Marriages Bill (hereafter referred to as "the Bill".

3.2 The Duties of the State vs The Will of the Community

This section will focus on the experiences of practitioners involved in the legislative process. Each interviewee had their own characterisation of the issues around legislative recognition, but the majority were strongly in favour of enacting legislation. Three were apprehensive, two citing concerns that the religious and secular systems of law were incompatible, and one expressing concern that legislation may entrench gender inequalities. This section will hone into the experiences of four practitioners who, in addition to their everyday practices, have participated in the law-making process at different levels of governance. Ighsaan Higgins, attorney and co-founder of the Legal Café, has been part of the law reform process since the very first discussion was held by Justice Navsa in 1994, where the Muslim Personal Law Board[13] was conceptualised. He witnessed its formation, its demise, and the many subsequent interventions from government on the matter. Charlene May, representing the Women's Legal Centre, entered the fray through the centre's strategic litigation against the state which was key to driving developments on the Muslim Marriages Bill. At a community level, Rumana Mahomed and Advocate Jamila (not her real name) each developed initiatives to address issues that they found during the public consultation on the bill. These individual perspectives and experiences of engaging in the process are useful for understanding the complexity of law making and the need for mobilisation at all levels to ensure that legislation reflects the principle of gender equality and offers protection to women.

As demonstrated in the previous two chapters, it is common for Muslim women who seek assistance from legal practitioners in matters pertaining to family law to first approach their religious leaders for relief. In our interview, Rumana Mohamed described this as an issue of legitimacy where, naturally, when individuals encounter problems, they take it to a body that has standing in the community before pursuing legal routes. It is when they do not find relief in the religious process that they "take matters into their own hands" and seek the assistance of lawyers.

[13] The history of the Muslim Personal Law Board is discussed in Chapter 1.

It was the sheer number of Muslim women seeking legal advice from the Women's Legal Centre (WLC) on issues arising from nonrecognition that compelled the WLC to pursue strategic litigation against the state, as Charlene May explains:

> Look, I think in part we were just gatvol. You can only have a piecemeal approach for so long before even judges start asking you "why are you here?". When you do public interest law, strategic litigation, you know that something is a problem when you continuously have women coming to talk to you about the same thing. At some point, you get to the point where you say now, "now is the time".

Unlike earlier litigation that challenged specific sections of legislation (characteristic of a piecemeal approach), the 2018 case was significant for its call for full recognition and regulation of Muslim marriage. In the *Women's Legal Centre Trust v President of the Republic of South Africa and Others (2018)* (hereafter referred to as the WLC case), the WLC argued that the state has failed to "respect, protect, promote and fulfil the rights in the Bill of Rights" as required in section 7(2) of the Constitution, in the face of its constitutional and international obligations", thus violating the rights of Muslim women and children. They further argue that "the most effective way of dealing with this systemic violation of rights, is an enactment of statute" [par4]. However, based on the pattern of law seeking behaviour described above where civil law acts as a secondary option to religious law, some practitioners argue that the site of reform should be within the religious system rather than legislation. One practitioner referred to the will of Muslim women to make this point, asking if Muslim women want their marriages to be regulated by the state if they only resort to South African law as their last option. What Muslim women, and indeed, the Muslim community "want" in terms of regulation is of course an area of deep contestation but remains an important concern in the democratic law-making process. When I suggested that the majority of Muslim women may not want legislation to Charlene May, her response posed a different perspective on law seeking behaviour:

> I think in part the question is a bit of a fallacy. Like, do you want legislation against domestic violence? No, I want men to stop beating women. Do I want a Muslim Marriages Act? No, I want the state to recognise my marriage and give me the same protection that they give to every other woman. Did the Women's Legal Centre go out and meet with people and say "women, Muslim women, do you want to have a law?". No, the Muslim women who come to us every day say "I don't want to be evicted from my house, I want my husband to be able to maintain my children. I want the state to recognise my children in the same way that they recognise other

> children". And how do we do that? How does the state do that? The state does that at a policy level by developing a law on family law for the entire country that says this is how we're going to deal with everyone that wants to get married. And then the state says right, the next level after policy level is legislation, because that's what the Constitution says. The Constitution says the state has the obligation to develop laws and policies where necessary in order to realise the rights in the Constitution.

May's reference to women's everyday experiences highlights the responsibility of the state to ensure the realisation of rights for Muslim women as citizens of the country. This means that even if the recourse offered through civil law is generally perceived as a secondary option to that offered by religious law, the state still has an obligation to respond to the violation of rights experienced by a segment of its population. This approach filters through the contestation within the community to look squarely at the material harms and the violation of rights caused by nonrecognition. Whilst the official or "expressed" position may be against legislation, the behaviour of women suggests a desire for a different status quo. The Muslim women who are approaching lawyers with MPL matters may not be doing so with the politics of recognition in mind but are doing so in response to a more immediate need arising from nonrecognition. To meet this need, legal practitioners need a framework regulating the consequences of Muslim marriage- an instrument to protect and enforce the rights of Muslim women.

Using the example of The Prevention of Family Violence Act (1993), Igshaan Higgins argued in his interview with me that citizens should not have to find their own solutions to rights violations because it is the government's responsibility to develop laws that protect people. Historically, domestic violence was overlooked by police because it was seen as a personal, private matter. This public/private dichotomy prevailed until the legislature took action to regulate violent conduct in the private sphere. Higgins says that "they (the government) need to look at what's affecting people and how to prevent people from being marginalised and abused". In this respect, Higgins concludes that the state has failed Muslim women by not enacting legislation.

Both Higgins and May emphasise *how* the state should protect vulnerable people, which is through the development of legislation. They both also argue that it is the state's responsibility to act in the interest of Muslim women by enacting legislation. State recognition, in this case, would not only address the historical harm against a minority community but offer material redress to women in the form of legal protections. Legislative

regulation would provide certainty to Muslims on the consequences of their marriage and would make a range of civil protections available to Muslim women. This, of course, is assuming that legislation reflects the constitutional provision of equality.

In response to the WLC's legal challenge that the state has failed in its responsibilities, the President submitted that there was no actionable delay because the government has taken the necessary steps toward enacting legislation. Furthermore, the Minister of Justice contended that given the doctrine of entanglement[14], the diversity of opinion and the importance of freedom of religion, it would be unconstitutional for the court to direct the state to "regulate religion" through legislation [80], thus enforcing a strict distinction between state and religion. According to the Minister of Justice, when the Bill was published for comment in January 2011, they received 13 742 "short cellular phone comments", approximately 7184 signed petitions and 77 substantive comments objecting to the bill. The objections were that "the provisions of the Bill are in conflict with "*Sharia law*", are "*unIslamic*", and that several of the provisions are unconstitutional in that they infringe on the religious freedom of Muslims and their right to equality" [par 19]. In contrast, only 734 messages were received in support of the bill. However, The United Ulema Council of South Africa, claiming to represent the majority of Muslims in South Africa (a claim, which is contested by other bodies like the Mujlisul Ulama of South Africa), contended that there are more Muslims in support of the Bill than those who are against it [par 21]. The Minister of Justice submitted that even if there were majority support for the Bill, the process for enacting the Bill would likely be difficult [21].

The Minister of Justice's response belies government's history of passing highly contentious bills. In a critique of the enactment of controversial public policies, namely the Choice on Termination of Pregnancy Act, the Civil Union Act and the Abolition of capital punishment policy, Professor Mokoko Sebola (2016) argues that public participation processes in South Africa sometimes favour "the elite", who base their positions on the guidance of international human rights law, over the masses, whose positions are informed by religion and cultural systems. Sebola characterises South African society as largely religious and the policy decisions of the government as antagonistic towards the value system of the majority of South Africans. Whilst Sebola does not interrogate the possibility of a plurality of views

[14] The doctrine of entanglement refers to the legal restraint placed on courts in matters dealing with religious doctrine. The court is required to only decide on matters dealing with religious doctrine when absolutely necessary, and when doing so to avoid deciding on doctrinal issues. See Moley (2018).

within the religious communities he speaks for, Sebola's evidence of legislation passed in the presence of ardent opposition from religious lobby groups illustrates government's willingness to compromise on "public consensus" in the interest of promoting human rights. The question as to why this has not happened in the interest of Muslim women's rights remains.

Advocate Jamila is an advisor to government and has worked in the area of administrative and constitutional law. Throughout the interview, she reminded me that her opinions are likely informed by her "insider" position in government and her background which forces her to consider the practical questions of governance. From Advocate Jamila's perspective, government has made every effort to enact legislation and asks, "what was the state supposed to do if you as a community is stopping every effort that they make?". Whilst the WLC judgement in 2018 found that the state has failed in its duties, the question of how the state should fulfil its obligations in the absence of consensus from the Muslim community still stands. Advocate Jamila describes the law-making process and the predicament that government finds itself in when legislation is opposed:

> If you understand how legislation is made… you have a SIAS- a Socio-Economic Impact Assessment Study. After that you have a comment phase and if the interested and affected parties are themselves in overwhelming rejection of the bill what happens if the bill is passed? It's going to get challenged…and when the Constitutional court says 'Minister of Justice, go and pass the bill' who takes them on appeal? So tell me something how can they say this government is to blame? I don't know, you tell me.

3.3 "Who is this public?"

Advocate Jamila's palpable frustration stems from the lack of consensus within the community which, she argues, impedes government's ability to enact legislation. Her view, as will be discussed further below, is that there is not enough education on Islamic rights within the Muslim community, leading to fears that legislation would interfere with Shariah.

Charlene May, on the other hand, problematises the process of public participation in law making. According to May, the state's approach to public consultation is to advertise the issue and rely on people to come to them. This causes a problem for women who have historically been prevented from engaging on public issues. The process itself does not consider who the public is and what should be done to get the necessary voices heard, which

is not unique to the consultation on the Muslim Marriages Bill. May refers back to her experience from the proceedings in 2018 on the WLC case to illustrate the issue:

> Then you have this overall skewed view of what it is that people want and so it becomes easy, like in the MPL litigation that we did in the Western Cape High Court, it becomes easy for counsel on behalf of the Minister of Home Affairs to get up and say "the Muslim community doesn't want regulation". He certainly has not gone to the Muslim community to ask. But the Department of Home Affairs has received overwhelming participation in the process, to the extent that they haven't necessarily had the capacity to deal with everyone that's wanted to speak with them and they've gone with whoever was able to make the loudest noise and whoever was able to make the biggest impact. And that means, well resourced, well organised, well mobilised sectors of the Muslim community.

The Commission for Gender Equality raised similar issues in their study of the application of MPL in South Africa, namely the lack of representation of Muslim women in the consultative process. In response to the 1999 Issue Paper beginning the investigation into the legislation, the Commission for Gender Equality embarked on a consultative process of its own (Seedat, 2019). In their meetings with the ulama and during their community workshops, the commission noted "a lack of gender representivity (sic) among the individuals who are engaging with the Issue Paper", and further that most of the participants were "professionals and other specialists". As a result, their primary concern arising from the community workshops was "the limited awareness of women's experiences during this process" (2019, p.183). To deal with this "relative lack of women's voices", the Commission facilitated focus groups with Muslim women in Durban, Joburg and Cape Town, where their experiences of MPL were gauged. The women "complained of the disparity between their rights vis-à-vis those of other South African women" (p.184). They were interested in understanding the Issue Paper and how MPL affected their lives, and in participating in the law reform process. Most of the women were aware of the Issue Paper but very few of them knew how to participate in the process.

To assist with the necessary voices getting heard, the WLC works with communities to ensure that when there is public participation on a matter, communities are able to engage with it. In addition to strategic litigation, May describes the role and strategy of the WLC as one that provides capacity for women to raise their own voices, and where women are unable

to participate in public participation processes, their role is to ensure that "what [they] put before a portfolio committee is informed by the women within communities":

> I think what's important is that change needs to happen on the ground and women's lived realities need to change. And so it can't all be dependent on strategic litigation and judgements because we know that you can get a wonderful judgement in the Constitutional Court but that a woman living in Hyderveld on the Cape flats for instance might have no idea that actually, that advancement has been made and that she has rights and that those rights are protected. And so it's become increasingly important for us to work with organisations and with communities so that we ensure that when there is that public participation process, they are able to engage with it. And where they are not able to engage with it, that what we put before a portfolio committee is informed by women within the communities.

This statement was one of many made throughout the interview where May referred to the need for community organising beyond the law. The WLC's approach demonstrates one way in which a South African feminist legal organisation seeks to manage these tensions through a multi-faceted approach to its work. At another point, May spoke of the WLC being there to amplify and capacitate a feminist movement that exists in communities. During the WLC case, many Muslim women from the communities that they are connected with mobilised to voice their support of the proceedings and to share their experiences of discrimination on the steps of the Western Cape High Court (Gonstana and Postman, 2017).

During the public consultation on the MMB, Rumana Mahomed, a private attorney specialising in fiduciary law, estate planning and MPL, together with a few others, saw the need to form an organisation to represent their voices. Mahomed recalls there being many organisations formed during this time, some claiming to represent Muslim women, but none capturing their gender justice perspective of what legislation should look like. This led her and a few contemporaries to form the Coalition of Muslim Women (CMW), which consequently paved the way for the Muslim Personal Law Network.

> The Coalition of Muslim Women started off because at that time, we needed to create a voice representing the alternate view that was being published. There was a very conservative view that came through, it was very patriarchal in nature. Then there was this other sort of community- this is a group of so-called women that were set up representing the Muslim women of South Africa. And we said hold on a sec, they don't represent us. We were suspicious about their origins and we decided, well, we need to

> create- we can't just be sitting back and complaining. We need to create our voice. The voice of where we're dealing with this piece of legislation presented to us in a more constructive way, you know, which takes into account the legal thought, the thought on the ground by community activists and social workers. That's what the CMW was about. It was about educators and professionals and community activists all coming together.

The CMW, amongst other organisations like the Recognition of Muslim Marriages Forum and Shura Yabafazi, organised themselves to represent the difficulties that they and the women they represent encounter due to non-recognition. Their primary concern as practitioners is not the "theoretical battle" or the intellectual pursuits of academics, as Ighsaan Higgins framed it in our interview, but an end to the continued violation of Muslim women's rights and the subsequent abuse that they face (Recognition of Muslim Marriages Forum, 2011). However, those in favour of recognition and regulation still appeared to be outnumbered. Whilst professional organisations organised and lobbied, conservative voices employed tactics of fear to discourage support for the Muslim Marriages Bill. In March 2011, reports arose of unnamed organisations calling on the community to "oppose the Kufr Bill" (Rawoot, 2011).[15] The organisations distributed pamphlets, text messages, and emails with that message. Advocate Jamila described in our interview how such messages capitalised on fears within the community, spurring her into action:

> I think that people are fearful that if they agree to the Muslim Marriages Bill or if our marriages are regulated we will lose the essence of Sharia law and Islam and I think they are coming from a place of ignorance and the ignorance is fuelled by a patriarchal boys' club who have been sending out pamphlets every time the issue comes up, telling people, "vote against, vote against"…That's how I got involved, so I am (affiliated) with no one. I just read these pamphlets and they angered me because they were so misinforming people, telling people things like, if you agree to Muslim Marriages Act, we will be forced, the imams will be forced to perform homosexual marriages, those kinds of things.

The identity of the people or organisations behind those messages is unknown (Rawoot, 2011) but the damage done to the reputation of the Bill was significant. According to Advocate Jamila, the fear of "incurring the wrath of God" has prevented meaningful engagement on the application of Muslim Personal Law in most sections of the community. This has implications not only for women's rights, but as indicated by Advocate Jamila's

[15] Kufr means disbelief or ingratitude towards God (Oxford Islamic Studies Online) Available at: http://www.oxfordislamicstudies.com/article/opr/t125/e1323. (Accessed last on the 28 of March 2021)

comment, for queer Muslims. Her comment demonstrates a further compartmentalisation of reform, where LGBTQI+ rights are excluded from the reform process and weaponised to prevent any state regulation of Muslim personal law, demonstrating Seedat's (2019) concern that queer Muslims would be excluded from the legislative process. From her experience of being both within government and from the community, Advocate Jamila sees the issue with the consultation as "voices being influenced", rather than voices not being heard. She sees her voice, and the voices of other professional Muslim women in favour of the bill as insignificant compared to the vast number of Muslim women who are opposed to the bill. To counter the spread of misinformation in the community, Advocate Jamila set up workshops for women in the community where she would educate them on the Bill and on their Islamic rights. The issue was not just the realisation of constitutional rights, but the recognition of women's rights under Islam which continue to be violated through a patriarchal interpretation and application of Shariah. She proposes that the only way to shift the balance of power between men and women in Muslim marriages is through education. This is based on her experience of having to learn much of what she knows about her Islamic rights on her own:

> The formalised madrasa institutes as previously were when we were young- now I think it's broader- the education we were given were very patriarchal, it was within a very limited mindset. We were not (taught) about the marriage contract and how we could in the marriage contract dictate our rights as women. For instance, you can actually insist on getting the right of talaq, the right of talaq doesn't have to sit with your husband, you can ask for that right. But women were never taught this and because there is a lack of understanding of Arabic, most women don't understand what they are reading when they read the Quran and I say that about men as well, it's the same, it applies equally.

This concurs with Femida's experience of there being discrepancies between what was taught to her about her Islamic rights and what she learnt from her own studies of Islam. Provisions that protect the social and financial standing of women are under emphasised, reproducing a system that sustains gender inequality in the distribution of resources. This is seen clearly in Advocate Jamila's experiences of court:

> I sit in courts sometimes and hear women say they want to change their marital regime from in community of property to out of community of property without accrual because they believe that it is haram to be married in community of property. ***And it is not. It's not haram.*** You can dictate the terms of your marriage, you can say to a man "I will marry you on condition that every month you put 10,000 rands, I am just giving you as an example, into my account or that you'll buy me a house that is on my name only or

> that I will marry you on condition that anything you own I share half in. It's a contract… as long as it is legal, ethical and not immoral you can enter in any term in your contract.

The view that being married in community of property is *haram* is likely due to the advice of most South African ulama that the correct Islamic position is out of community of property without accrual (Bulbulia, 2019). This position is reflected in the Bill which sets the default property system as out of community of property excluding the accrual system unless there is a registered mutual agreement stating otherwise (s8(1) of the Bill). In addition to being contrary to the default regimes of the Marriage Act and the Recognition of Customary Marriages Act, the Bill assumes that contracts are negotiated on an equal footing, ignoring the reality of gender inequality in South Africa (Manjoo, 2019). In response to the implications of this, mainly for women, activists called for the Bill to set the default position as in community of property. The chair of the project committee, Justice Navsa says "to heed this call would be to change the substantive Islamic law" (2019, p.47) but this is, of course, contested by other scholars[16]. In order to ensure that woman are able to protect their financial interests under the Bill, more education was needed, a need that Advocate Jamila responded to in her personal capacity:

> I reached out to these Muslim women forums to discuss with them how to educate them on these issues and they immediately said, "it's wrong, it's wrong". In every part of the world women go to mosques not in South Africa, not in India, it comes from there. Here there are mosques that are open to women, but they are very limited… I think those of us that propagate and are in favour of the Muslim Marriages Bill, I think we are very few.

Advocate Jamila's personal views are that the Muslim men, and specifically Muslim attorneys who oppose the MMB are concerned with the regulation of their polygamous marriages. She contends, that men want to hold on to power and do not want to have to ask for permission from their wives to remarry or explain how they will provide for their two families and how their property will be divided, as would be required by the MMB. This concurs with what Justice Navsa (2019) writes in his reflection of the law reform process. Justice Navsa notes that the main objection to draft legislation from men was to provisions regulating polygamy. The provisions in question require that an application be made to the court for permission to take another wife and ensures that existing wives are informed of the

[16] Bulbulia (2019), on the other hand, argues that the default position can be out of community of property with an amended accrual system- one that is based on Islamic models of partnership.

application. Due to the abuse of the right to polygyny in Islam, the project committee opted for this "strict regulation" of polygyny which elicited a strong response, mainly from Muslim men. In Advocate Jamila's view, this response from men who are opposed to the Bill is fuelled by lust and power under the guise of cultural autonomy, and authenticity. Waheeda Amien similarly comments that many men have failed to perform their duties towards their wives under Sharia law, resulting in abuses that the Bill seeks to correct (Rawoot, 2011). She argues that opposition to the Bill is founded on fears of the "erosion of patriarchal power", echoing the sentiments of Zakirah and Ruweida.

As with any new legislation, government will have to consider a plethora of views. In its consideration, government must be guided by the values of the constitution and its transformative aim. In the interest of nation-building, however, it is necessary to ensure that ideals are deliberated upon, building consensus rather than furthering margins whilst ensuring that the state does not reinforce existing hierarchies of power in these deliberations. Speaking on the difficulties that she encounters in her practice, Rumana Mahomed suggests that whatever angle is adopted, the legislative response must ensure, simply, that people are okay:

> I really believe that if you look at the civil laws of our country, I just think that ultimately, it seeks to achieve exactly what the Shariah is seeking to achieve, which is justice, right? So whether you're going to use it through the Constitution, or whether you're going to use the Quran, the ultimate end is that the children must be fine. The wife must be fine, the husband must fine. Okay, and that's going to be determined culturally and socially, but ultimately, that's what those two bodies of laws are demanding.

Conclusion

In this chapter, two overarching views were teased out through the narratives and experiences of the interviewees. The first positions the lack of legislation as a failure of the state which has constitutional obligations to enact legislation and uphold the rights of all. The second sees the division within the Muslim community over the MMB as responsible for preventing the enactment of legislation. By placing these overarching perspectives in conversation, this chapter showed how various strategies were used to encourage law reform at both a community level – to drive education on the MMB and organise for women's representation in the law reform process, and at state level, to prompt the government to act through strategic litigation.

What became evident from the interviews is that the state was unable to engage with the diversity of views on the MMB, resulting in inaction due to the lack of consensus. This inaction meant the continued violation of Muslim women's rights which prompted the WLC to pursue litigation against the state on behalf of the women who turn to them for assistance. Charlene May raised the question of how the state engages with the Muslim community, saying that it is often well mobilised and well-resourced segments of the community who have their voices heard in the public participation process, a critique that is not unique to public engagement on the MMB. In such a climate, the work of the WLC, the Coalition for Muslim Women, and other civil society organisations are important in ensuring that women's voices and experiences are represented in the public participation process.

The experiences of the practitioners and the women also challenge the notion of a homogenous community with a single set of ideas of how MPL should be practiced – a notion that the government seems to be seeking in its requirement for "consensus". Rather, the anecdotes suggest the presence of powerful and wealthy men within the community who have thwarted the law reform process though their loud rejection of the MMB on the basis that is "un-Islamic". In this contested participatory process, Du Toit's (2014) argument that claims to a "pure" culture should be tested for its function and informed by women's voices and concerns, rings true. In observing calls for the MMB not to be passed on the basis of it being "un-Islamic" or an infringement of religious freedom, the state has indirectly affirmed the practice of MPL as it currently stands and allowed the continued violation of Muslim women's rights. The state does so in the face of many individuals and organisations that have come out in support of the Bill or of recognition more broadly and whose support is informed by Muslim women's lived experiences and a gender just interpretation of Islam.

Advocate Jamila, being both an advisor to government and a concerned Muslim woman, observed at a community level that women's voices were being influenced by fears crafted by some Muslim men. This is not to suggest that all Muslim women who opposed the Bill did so under the instruction of Muslim men, but rather to show how fear was used by organised groups to prevent the enactment of the Bill. Not only was there fear mongering during the public participation process, but participants expressed concern over how Muslim women are being educated about their rights. For Advocate Jamila, Ayesha and

Femida, their Islamic education did not sufficiently educate them on their rights, which they learnt through their own studies.

This chapter provided context to the legal issue- the nonrecognition of Muslim marriage- and highlighted the contentious nature of law-making in which multiple perspectives, interpretations, and interests compete. As illustrated, many of the contestations involved in the legislative process are ongoing and legislation does not appear to be in sight. The next chapter is concerned with what happens in the interim. It looks at how practitioners have developed strategies in the absence of a legislative framework to provide assistance to Muslim women on MPL matters.

Chapter 4: Law(s) in Practice

Introduction

> "While the executive, legislature and legal scholars struggle to come to terms with this phenomenon (deep legal pluralism), the courts have to deal on a daily basis with the harsh consequences of people still adhering to the legal rules of their un-recognised legal system" (Rautenbach, 2010, p. 172).

The previous chapter discussed the interaction between the state and various stakeholders in the development of legislation. It illustrated the challenges that still exist around developing a regulatory framework for Muslim marriage, begging the question of what options currently exist for Muslim women to assert their rights in the civil legal system. Through an analysis of interviews with legal practitioners, this chapter will attempt to map the everyday practice of law, and how Muslim women encounter it.

The first part of this chapter will look at what rights have been advanced through strategic litigation. The second part will look at the combination of strategies used by practitioners to ensure just outcomes for Muslim women. The final part will look at preventative strategies that secure women's social and economic rights through pre-marital contracts and estate planning. In spite of non-recognition, legal practitioners have found innovative ways of advancing Muslim women's rights through the pluralistic South African legal system. The interviews analysed for this section are with legal practitioners from the Women's Legal Centre, the Wits Law Clinic, the Legal Café, Rumana Mohamed who has her own legal practice, Yasmeen (not her real name) who worked at two prominent legal aid clinics in Johannesburg as an attorney, and Sabera Timol who runs a respite shelter for women. Through a mapping of their experiences, I paint a picture of how the law "penetrates society" through the everyday negotiations of legal practitioners and gender advocates (Solanki, 2013, p. 98). Because the South African legal system is pluralistic, attention needs to be paid to the multiple avenues available to advance gender justice, through civil laws, personal laws, and at the interface of both systems. This chapter aims to draw attention to the development of these avenues in the everyday practice of law.

4.1 Strategic Litigation

Strategic, or "impact" litigation is a legal strategy used to advance human rights. In this method, test cases challenging a specific area of law are filed in court. The decisions taken by the court creates a legal precedent that will hopefully benefit future claimants (Abrahams-Fayker, 2019). For example, the decision in the Amod v Multilateral Vehicle Fund (detailed below) has enabled Muslim widows to claim damages for loss of support since the judgement. Thus, a desired outcome of strategic litigation is that the case reaches the highest court in the country. This ensures that the legal precedent set by the case will be enforced in all other courts[17]. Strategic litigation can be a long and costly approach to reforming the law that may not always result in the desired outcome.

This method of advancing human rights has gained traction in Africa since the late 1990s (Bennet and Tamale, 2011) and is a common strategy used by women's organisations in other pluralistic jurisdictions, such as India. Sezgin writes that strategic litigation has been used to "challenge patriarchal norms, raise awareness within the community, and lay the groundwork for long-term institutional changes from within using the threat of external judicial intervention" (Sezgin, 2010, p.24). In the South African context, it has been used to ensure that constitutional rights are realised for all. Strategic litigation does this by clarifying the law, challenging discriminatory laws, and raising awareness on human rights issues, thereby pushing government accountability (Abrahams-Fayker, 2019). Strategic litigation is an especially useful tool to ensure protections for minority communities. It can be used by minority communities to advance the recognition of rights when there is a delay on the part of government to enact reforms, as is the case with South African Muslim marriages. It is in this rich tradition that strategic litigation has been used to advance the rights of Muslim spouses.

The Ryland v Edros (1997) case was the first legal success in this respect. The case is significant for its departure from apartheid and colonial era judgements that deemed Muslim marriages contrary to the "morals" of South African society for being potentially

[17] South Africa has a hierarchical court system with the Constitutional Court being the highest court of the land, followed by the Supreme Court of Appeal, the High Courts, and lastly magistrates' courts. Decisions taken by the Constitutional Court and the Supreme Court of Appeal are fully binding on lower courts. Judgements handed down in lower courts are considered by higher courts but are not fully binding. The decisions by High Courts in different jurisdictions are also not binding on each other. For example, a decision from the Western Cape High Court is not binding on the KwaZulu-Natal High Court. Du Bois, Francois. (2004). Introduction: History, Sources and Systems, in Introduction to the Law of South Africa Van der Merwe, C. G., & Du Plessis, J. E. (2004). *Introduction to the law of South Africa*. Kluwer Law Intl.

polygamous. Instead, and in direct contrast to the apartheid era, the *nikah* contract was recognised as a valid contract from which flows duties and responsibilities that can be enforced in civil courts. In this specific case, the ex-wife claimed arrears based on the Islamic duty of a husband to maintain his wife during their marriage *(nafaqah)*, a consolatory gift for being divorced without a just cause *(mata'a)*, and a transfer or payment of a portion of the growth of the husband's estate that accrued during the marriage. The court granted the first two claims but denied the last based on the fact that the Malaysian[18] custom relied upon to make the claim was not part of the local custom of the Western Cape Muslim community (Amien, 2016). The ex-wife was represented by the Legal Resource Centre.

In 1999, judgement was handed down on the Amod v Multilateral Motor Vehicle Accident Fund case, where a woman married only under Islamic rites approached the courts claiming damages for the loss of support due to the death of her husband. The Supreme Court of Appeal recognised the spousal duty of support in a monogamous Muslim marriage, thereby enabling her to claim for the loss of support due to the death of her husband. According to Amien (2016), recognition of the duty of support (or *nafaqah*) for the purposes of this claim created a pathway for Muslim wives to enforce their right to support through the Maintenance Act. This right was enforced in the Cassim v Cassim (2006) case for Muslim wives in monogamous marriages and in Khan v Khan (2005) for Muslim wives in polygynous marriages (Amien, 2016). Amien writes that allowing Muslim wives to access their *nafaqah* through the Maintenance Act increased their access to justice because women would now be able to enforce this through a maintenance court. Maintenance courts are more cost-effective and are likely to produce a quicker result than an ordinary magistrates' court (Amien, 2016, p. 61).

Regarding inheritance, in Daniels v Campbell (2004), the term "spouse" was broadened to include monogamous Muslim spouses married in terms of Muslim rites in the Intestate Succession Act and the Maintenance of Surviving Spouses Act. Hassam v Jacobs (2009) further extended this definition in the Intestate Succession Act to include more than one spouse in a polygamous marriage, reading in "or spouses" into the act. This enables Muslim

[18] The court relied on the testimonies of Islamic law experts to decide on the claims. The expert witness testifying on behalf of the ex-wife argued that Muslims in the Cape did not know the "true Islamic position" on the question of the division of the state. He argued that the court should be guided by the codified Malaysian family law, which is primarily based on the same school of thought that the former couple subscribed to. This would allow the ex-wife to claim for her tangible and intangible contributions. The expert on behalf of the ex-husband, a member of the Muslim Judicial Council, argued that the Muslim community does not practice this custom, which the judge agreed with (Amien, 2016, p.58).

wives to inherit intestate under civil law, or in other words, when there is no will left by the deceased.

One area that remains challenging for Muslim divorcees is the area of post-divorce maintenance. The WLC had initiated cases in this area, but due to clients settling out of court, they have not been able to advance the recognition of rights for Muslim spouses under the Divorce Act (1979). As previously mentioned, the default position of Islamic marriages is similar to that of the civil law understanding of "out of community of property". Both parties' estates remain separate, and each party is not entitled to claim from each other at the end of the marriage. In Sattar v Mowzer and the Minister of Justice, (2008) the WLC launched a case to show that religious marriages can be concluded in community of property. Their client was married under Islamic rites and according to her, there was an implicit agreement between her and her husband that the marriage was concluded in community of property. Building on the principles of Ryland v Edros, the centre took on the case to show that religious marriages could be concluded in community of property. The case was settled amicably out of court.

In another case of the WLC, their client, Ms Salie, was married under Islamic rites only and was divorced by *talaq*. Her husband attempted to evict her from the family home. The WLC sought an order declaring that the Divorce Act is unconstitutional "because it fails to provide women married in terms of Muslim rites with the same remedies that are available to women married in terms of civil marriages in community of property." (WLC, 2019, p.14)[19]. They further argued that "the Muslim Judicial Council is covered by the Promotion of Administrative Justice Act, and that the talaq which ended the marriage amounted to an unjust administrative action" (WLC, 2019, p.14). In the alternative, they argued "universal partnership, unjust enrichment and breach of contract" (Ibid). This matter was eventually also settled outside of court. It is uncertain whether the settlement of these cases outside of court would be the best outcome for the women involved in these cases, but what is clear is

[19] In 2009, the WLC was admitted as amicus on a case in which the applicant sought to have the Divorce Act apply to her marriage. In 2010, Ms Adams sought compensation for the extent to which his estate was enriched during their marriage when he divorced her. In taking this matter forward, the WLC sought to develop the laws around unjustified enrichment. Both matters were settled out of court. See the WLC annual reports for more cases.

that the purpose of strategic litigation can sometimes be at odds with the individual clients whose cases are used to reform a point of law. As a result, there is no significant judicial precedent on the division of assets or post-divorce maintenance for unregistered Muslim marriages. However, as previously mentioned, the Supreme Court of Appel confirmed in the latest judgement on the matter that the Divorce Act is unconstitutional for its failure to provide for the dissolution of Muslim marriages.

This brief overview of cases shows how litigation has extended the rights of Muslim wives by amending legislation and by creating judicial precedent. Since 1997, the law has progressed to recognise the rights and duties of a *nikah* contract, the right to be maintained during the subsistence of a monogamous or polygamous Muslim marriage, the right to receive interim maintenance pending the conclusion of divorce proceedings through a rule 43 application, and the right to inherit intestate upon the death of a spouse. Through a number of approaches, litigators can be said to have "successfully integrated the rights of women married in terms of Muslim laws and traditions with the rights contained in our Constitution" (May and Samaai, 2019, p.176). May and Samaai (2019) observe that this may be an "uncomfortable marriage" between the systems because whilst the individual's rights have been upheld, there is still no recognition afforded to the marriage itself. As such, there is no framework to regulate the consequences of the marriage. This is evidenced in the participant's experiences discussed in the next chapter, and the large number of cases that practitioners continue to see, bearing testament to the limitations of these victories.

What the WLC and other legal practitioners continue to advocate for is the full recognition of Muslim marriages in South Africa. The courts have successfully extended the rights of Muslim spouses but have maintained that the onus is on parliament to enact legislation recognising Muslim marriage. In the interim, practitioners on the ground use several strategies to mitigate the harms that still exist for Muslim women and children, as will be shown in the following section.

4.2 The law as a tool; the law as ammunition

This section is primarily concerned with the experiences of practitioners and the women who come to them seeking recourse on Muslim Personal Law (MPL) matters. It primarily looks at the experiences of practitioners from the Wits Law Clinic, the Women's Legal Centre (WLC) and the Legal Café. Being free or significantly cheaper than private practitioners, the clientele

of these organisations tend to be from a lower socio-economic background. As will be demonstrated, creative strategies are especially needed to protect Muslim women's property rights at the dissolution of marriage. In these instances, this is due to properties being registered on their husband's names and, due to nonrecognition, them having no automatic legal claim to their homes, leaving them with no option but to turn to lawyers.

With the cost of legal fees being a huge obstacle to access to justice for most South Africans, legal aid centres, law school clinics, public interest law organisations, and NGOs play a large role in enhancing access to justice. However, these organisations, particularly state funded legal aid clinics, are over-burdened and under resourced and the vast majority of South Africans are unable to afford the fees of private practitioners[20].

This also means that the decision to take on cases is made under a strict assessment of both the financial position of clients and the merits of the case. Under these conditions, only a select few can assert their rights to the court, as Greenbaum (2020, p.253) explains:

> The inability of poor people in general to fund legal services, bearing in mind that half of the population of the country lives below the poverty threshold, and the extremely high fees charged by legal practitioners suggests that access to justice is the preserve of the wealthy, or a very small number of indigent persons in narrowly defined circumstances.

To address the needs of the "missing middle", those who are unable to afford private legal fees and do not meet the needs assessment for legal aid (Brickhill, 2005 in Greenbaum, 2020), Ighsaan Higgins started the Legal Café in Cape Town. Ighsaan Higgins sees the law as leverage that can be wielded by women in vulnerable situations. He explained his rationale to me in our interview as follows:

> If somebody comes to a lawyer like myself with the amount of experience I've got, they would probably be able to charge you anything between R1500 and R2000 for an hour. And I saw that there's this gap in the market because people can't afford that. How does a woman who's been abused financially and in all possible ways… where does she find that kind of money? And all that she's going to get from that person is advice and not action. So, I decided to start the legal café to provide for the gap in the market; (for)

[20] The South African Law Reform Commission is currently investigating the issue of high legal fees (Issue Paper 36: Project 142- Investigation into Legal Fees, 2019) One of the issues that is highlighted in the issue paper is the potential for abuse due to an absence regulation around charging practices. Currently, attorney's fees are determined between the attorney and the client.

> people who need legal assistance, but they just don't know where to go and how to go about it.

The Legal Café runs as an informal legal advice office at a local restaurant. The café charges a fee of R350, which acts as a donation towards other projects such as community workshops, their soup kitchen, and the South African Young Leaders Academy. Clients receive coffee and legal advice in an environment that is intended to be less intimidating than attorney's offices. His many years of practicing as an attorney has taught him that being equipped with knowledge of the law can increase the bargaining power of women in vulnerable situations:

> And we have great success stories, you know? Sometimes people just need the advice; they don't even need to do anything. They must just have a peace of mind. Like a woman comes- and then here comes the women's issues. Muslim marriage. Woman's been married for 20 years, nothing on her name. Then her husband wants a divorce. Now she believes she must get out with nothing. So we tell them no hold it, we can use the principle of the universal partnership that was conducted in Butters v Mncora Eastern division case and you can actually get 50% of the assets. The minute she tells the husband this, that she's been to me and this is what I said, it's hands off after that.

The threat of the division of a joint estate is not one that is certain in the application of Muslim personal law in South Africa, leaving many women with the belief that they are not entitled to property, and empowering men to end marriages without consideration for the financial implications. But again, through judicial precedent, Higgins has found a way of securing women's financial position. Butters v Mncora is a case between a couple that had lived together "as husband and wife" for twenty years. They were engaged to be married for half of those years but had not been legally married when the relationship broke down, leaving the claimant with no entitlements to any of the wealth accrued during the marriage. However, the court found that the relationship satisfied the requirements of a Universal Partnership. No longer limited by a commercial understanding of a universal partnership, Judge Brand expressed "some sense of relief that non-financial contributions can be evaluated appropriately, giving effect to "the greater awareness in modern society" of the value of those contributions [22].

"It's an excellent defence if he brings an eviction application", Higgins tells me. "If he brings an eviction application their defence is to say that there is a matter pending dealing with this. So the matter must be placed on hold until the matter is heard."

The application for a universal partnership may take a long time to be heard, delaying the possibility of eviction and putting the parties in an ideal position to settle. This, according to Higgins, increases women's bargaining power and prevents women from being dispossessed of their property.

> The Legal Café uses the law as leverage. We don't have an imperative to take matters to court because we don't have offices, staff, etcetera - we do what is right for the client- we don't do what is expedient for the lawyer. We focus on the client and we solve the problem, we don't have to litigate.

Where advice does not work, Higgins has a panel of attorneys specialising in different fields. He negotiates a minimal cost with them to take matters forward. Although he is critical of lawyers pursuing litigation for profit, he has not shied away from using it when necessary to protect the rights of his clients. Higgins represented Mrs Gabbie Hassam in the Hassam v Jacobs case, seeing it through to the Constitutional Court. When I asked him how the case has improved access to justice for the clients he sees, he pointed to the obstacles that still exist without regulation:

> These are small victories, you know, in the bigger picture. Hassam's case might've been a constitutional court victory, the Daniels case was a constitutional court victory, but these are small victories - women must still go to court in order to assert their rights, and that is expensive. With the Hassam case, if I had to charge for it, it would've been a R2 million case.

Apart from the cost of litigation, a good example of the limitations of this approach is how subsequent cases have been brought where women in similar situations were denied the rights recognised through litigation. In 2010, the WLC was admitted as *amicus curiae* on a case in the Durban High Court. In the case, a man in a polygamous marriage died leaving two widows behind, one whom he was married to under civil law and the other to whom he was married under Islamic rites only. The state opposed the application of the spouse married under Islamic rites to have her marriage recognised, as in the Hassam case (WLC, 2010). The parties settled the matter outside of court but the case illustrates the state's preferential treatment of civil marriages and the ease with which it is willing to deny Muslim women their rights despite judicial precedent. The WLC annual reports are filled with such cases that are lesser known due to them being settled out of court. In the Moosa N.O v Harneker case, the WLC made a submission describing the women who approach their offices, saying:

> Many of the women who have consulted the WLC are older women who have received little or no education in apartheid South Africa, and entered Muslim marriages without being aware that they do not have the same rights as spouses in civil marriages and for who a divorce not regulated by law has been, or will be devastating. (*Harnaker* Amicus Heads of Argument in Gihwala, May, and Samaai, 2019, p.304).

In addition to strategic litigation, the WLC offers free legal advice and assistance that may not need litigation. Examples of this include assistance with filing protection orders, maintenance plans for children or spouses, and parenting plans where needed. One practitioner from the centre, who wanted to remain anonymous, took me through how the centre's most recent litigation on MPL has opened another avenue to protect women's property rights by preventing their husbands from selling their properties:

> Most of the time, women are already divorced (when they come to us), they've already been "talaqed". Therefore I will explain to them, because we can't say what might happen (with the WLC v the President case) but the interim relief that we have- though the marriage is not recognised- if you want a claim, there's property rights, the property is on his name, you want pension, whatever is in the marriage, you want a claim from it, you just go then to a normal civil court. Like a normal civil divorce, you get a summons, and you apply like you want a normal divorce but it's not going to go anywhere, it will be submitted but it won't go through to the court system because it is not recognised as yet. Therefore, the matters will pile up. Coming now, 2020 women's month, whichever way it's going to go, then the matters are going to go in. The ex-husbands then can't sell the houses which in most cases they do because the properties and titles are on their names- therefore they choose to sell the houses.

Until the claims are filed, women are advised not to leave the home. If there is a threat of violence, they are encouraged to obtain a protection order which also serves as a defence against eviction. The practitioner spoke strongly about the emotional distress that her clients face when they are divorced and forced to leave their homes:

> The difficulty that women have is when they have to leave a house that they've made a home. You know after the *talaq*, after the *iddah* period, someone new is coming in and they're getting put out. And now if she gets put out, if she's taking the kids out, going back home the locks are changed. Calling the police, the police can't help because it's a civil matter, there's no violence. But now she doesn't have entry to her house. And now, somebody else is there. I had one client that was literally too scared to leave the house because she knew if she left the house, coming back he would change the locks. And

> because of that the husband called the police to come and remove her because he remarried someone else and he "talaqed" her- she refused to leave. And they called the police and she refused to go out and the police is standing outside and she's by the window and she says "I'm not going to go out". Do you think that's nice for you? As a woman, besides being a Muslim woman, as a woman?

These are common cases that are seen at the WLC that form a part of the "status quo" of nonrecognition. Until there is a clear regulatory framework for Muslim marriage, a large number of women will be subjected to the arbitrariness of being divorced and forced out of their marital homes. This is also the case for women in domestic partnerships. The problem is a lack of regulation of the consequences of such partnerships.

This is also the case for Muslim widows whose marriages were unregistered. The persisting vulnerability of Muslim widows is expressed in a case dealt with by Professor Tuson from the Wits Law Clinic. At our interview, Professor Tuson shared an anecdote that illustrates the impact strategic litigation can have for Muslim women who are able to find representation. An elderly lady only married according to Islamic rites was bequeathed half of her husband's estate upon his death, and the other half was bequeathed to his nieces. However, the will was written with a wrong understanding of their marital property regime.

> He made a will and he said, I leave half of my **joint estate** with my wife to my nieces. And the other half of my **joint estate** to my wife. He was wrongly assumed they were married, and that there was a joint estate.

When it was pointed out that there was no legally valid marriage, and therefore no joint estate, the entire estate was awarded to the nieces, who threatened to evict the widow.

> So I wrote to the executor and said, okay, you're right. She doesn't inherit, but she is a surviving spouse. There's a case which recognizes Muslim women as a surviving spouse. And so we are proving a claim for maintenance against the estate. So when your husband dies, normally the wife can claim maintenance from the estate, so say he leaves it all to someone else, she can claim. The first claim to the estate is her maintenance, and then they divide the balance to the heirs as named in the will. So I got an actuaries report, which proved millions in maintenance for her…and that consumed the entire estate and so they awarded the entire estate to her as a basis of maintenance and then we got justice.

Both spouses in this anecdote were unaware that unlike in civil marriages in community of property, there is no joint estate created by a marriage conducted under Islamic rites only. Despite living in her home with her husband for thirty years and being married to her husband for however many more, her identity as a spouse is not something that is automatically recognised in law, resulting in her being faced with the threat of eviction.

The case that Professor Tuson is referring to is likely the Daniels v Campbell case. The case is a story of another woman who found herself at the brink of losing her home after the death of her husband- a home that she had occupied before her marriage. After they married, the tenancy was transferred unto her husband's name due to him being the primary breadwinner, as per the housing policy at that time (Abrahams-Fayker, 2019). Through the intervention of the WLC, the Constitutional Court confirmed that Mrs Daniels was indeed a surviving spouse in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act.

Prof Tuson added that if the executor had refused his letter, he would have litigated the very next day, "because the law is completely on our side". Professor Kruger added:

> You've got to have some sort of ground- ammunition with which to negotiate. And of course, then, if you if you threaten litigation, you've got to know you've got a winnable case.

The professors have also assisted a Muslim couple married under civil law in community property to change their marital property regime to out of community of property without accrual. More frequently, they assist with maintenance orders for children but without recognition, they are unable to assist with post-divorce spousal maintenance or with the redistribution of assets after a divorce. They have also found that these matters are mostly dealt with by the religious leaders, thereby limiting their role to matters relating to maintenance and custody.

The legal uncertainty surrounding Muslim marriages has often left couples confused about the status and consequences of their marriage, as demonstrated in this case. Thanks to the publicity of the WLC's case, more women are actively seeking information about the status of their marriages and their options. Charlene May, from the WLC told me in our interview that because there is confusion around the difference between custom and religion, some women believe that they are married under the Recognition of Customary Marriages Act. There is also the widespread misconception

that living in a domestic partnership makes you a common law spouse (May, 2020). One practitioner at the WLC describes a phenomenon where women phone in simply to get advice and find out what their options are, confirming Higgins's experience of clients needing "peace of mind". The practitioner describes the women as cautious, prefacing their conversations with a disclaimer: "They know they shouldn't be asking but they just want to know".

> We'd get calls from Joburg and Durban, you know, all over, when our matter is highlighted, because we are more savvy these days, it's like "I saw it on the news" or "I saw it there" or "I saw it on the newspaper therefore I've got this matter, how can you help me?" Even locally, you might know something, but your neighbour might not know. So you'll say just go to the Women's Legal Centre, they will deal with these matters. They deal with Muslim marriage matters so go to them.

Being armed with knowledge also assists when dealing with matters within the religious legal system. Rumana Mahomed mentions that a lot of women who do not get relief through the initial religious process now "google" their options and then approach her and her colleagues with an idea of the strategy that they want adopt. Mahomed ad her colleagues then have to explain the context of these solutions and whether or not they apply in the individual's circumstances.

One challenge described by both practitioners from the WLC and the Wits Law Clinic is the limited role that lawyers play in Muslim marriage matters. Although the law may be in their favour, many women prefer not to go beyond the traditionally understood prescripts of Muslim Personal Law. For the WLC and the Wits Law Clinic who strictly do not get involved in the religious aspects of the dissolution of the marriage, this can present a major limitation to how they can assist the Muslim women who come to them. What they can do is dependent on what the client instructs them to do. However, the distinction between religious and secular law is blurred by practitioners who have knowledge of Islamic law and opt to assist women with the religious aspects of their claims, providing relief for women who do not want to go beyond the prescripts of Islam. This is discussed in the next section.

4.3 Merging two systems of law

Women who do not want to go beyond the prescripts of Islamic law have few options to obtain recourse if they do not find it with their religious leaders (chapter 5 will discuss examples of this). The Wits Law Clinic and the WLC have both indicated that they do not

deal with the dissolution of Muslim marriages, thereby limiting their roles to custody and maintenance of children post-divorce. In some cases where the client requests it and if the merits of the case are strong, the Wits Law Clinic has indicated that they would pursue a universal partnership. This makes lawyers with an understanding of Islamic law and a willingness to step into the religious fray a necessity, especially for women who wish to operate within the framework of Shariah. As will be shown below, lawyers in this position find navigating the civil and religious laws difficult, but not impossible. Because of nonrecognition, part of the matter is dealt with in civil court and part with the religious bodies, increasing the breadth of work that needs to be done.

Yasmeen worked as an attorney in two public interest law organisations. Her daily work focused on socio-economic rights, but she encountered a few cases of women coming to the legal clinics for assistance in obtaining a *fasakh*. A *fasakh* is adjudicated by the religious bodies and therefore requires the arguments to be based on religious law. Yasmeen would prepare airtight arguments in both religious and civil law to present to religious bodies but, in all of her cases, she did not have much success:

> I think that trying to navigate both the constitutional rules, or the civil law and the Sharia is difficult, and you have to navigate it a lot. Especially when you're dealing with the traditional councils- you have to be very tactful.

Most of the women would abandon the process and continue to be married and live separately from their husbands, potentially due to the emotional distress experienced during these processes (see discussion in chapter 5). Some women in Hoel's (2012) focus group study showed how women approaching the Muslim Judicial Council for a *fasakh* would explain that even if the MJC did not award their request, they would move on with their lives separately from their husbands. One woman even expressed the belief that by observing the *iddah* period and living apart from her husband, she is divorced without needing to receive the *talaq* or the *fasakh*.

When I probed into what the difference would be between staying married but separated and being divorced, Yasmeen said that it had to do with moving on, being able to remarry, and being free to begin the next chapter of life. It also has to do with contact and care, where sometimes men still feel entitled to enter women's homes when in fact, they in a sense "do not belong" to them anymore- men do not have the same rights to be there that they did during their marriage. There needs to be respect of privacy and autonomy.

One of the challenges that Yasmeen faced in navigating civil law and Shariah is where clients would side with the religious body that they were approaching, despite Yasmeen's efforts at researching the best Shariah compliant option available to them. This was demonstrated in a case that she worked with where a woman wanted her husband to give her a talaq:

> So he said "okay, he'll give her a talaq on condition" and they drafted this agreement. And the agreement was so flawed, in the sense that it did not encapsulate the constitutional protection of the children, and also was not completely Islamic. From a legal perspective, it was not right, because he could just walk into her home and on the other end, Islamically that was wrong, because you are divorced. You can't just be entering your ex-wife's home.

Yasmeen then re-drafted the agreement with the help of a colleague who had more knowledge of Islamic law to make it "airtight on the legal basis and airtight on the Islamic basis". But their input was not well received by the religious body and was consequently rejected by their client:

> When we put it to them (the religious body), we were told that we were basically disbelievers. And I was really angry. I realised that as lawyers we're never going to be recognised, because we're going to be seen as always opting for the constitutional way forward, instead of the Islamic position. And I find that to be really problematic, because I think that you have to do it in a legal framework. Unfortunately, the woman signed the initial agreement, she didn't sign the one that we re-drafted. And she did it without my advice. But, I think that was also to say that women are going to be scared, and they're always going to go with what traditional- not all, most- are going to go with what traditional scholars' are saying.

Whilst Yasmeen's client may have been uncomfortable with the agreement drafted by her ex-husband, the weight of the religious body's response to Yasmeen's alternative agreement was enough to deter her. The client may not have gotten her desired outcome, but she was willing to rescind her appeal despite Yasmeen's agreement also being based on Shariah, illustrating how religious bodies still have the power to determine the "correct" interpretations of Shariah. This is something that Rumana Mahomed has experienced in her own practice in divorce matters where the husband refuses to give his wife a divorce:

> Women aren't aware of what their different options are and how to apply them. Even if they do know it's almost as if they are scared to apply it as well because its so unfamiliar.

> Its uncharted territory. and then there's this sort of belief that you have to do to it through an ulama body, that you have to go to the theological body, and you don't.

In addition to co-founding the Coalition of Muslim Women (discussed in chapter 4), Mahomed is also the co-founder of Taking Islam to the People (TIP) and an attorney specialising in fiduciary law, estate planning and Muslim marriage and divorce law. Through her legal practice in Durban, Mahomed has observed that the authority of the religious bodies often goes unchallenged. In her view, attorneys who practice in the area of Islamic law do not have a sufficient understanding of the intricacies of Shariah and tend to agree with whatever the religious bodies decide on the matter:

> And our theological bodies have a particular background that they come from. So they are unable to provide the women or say whichever party that they're dealing with a holistic, balanced perspective…. the Shariah is such that, yes, you will have your majority opinions and your minority opinions, but we're not limited to the majority because of context.

Here, Mahomed demonstrates what Esack (1992) referred to as moving from "text to context". Rather than approaching Shariah as one, immutable whole, practitioners rely on the jurisprudence that best fits the circumstances. Justice can therefore be found within the framework of Sharia, in a contextual application of the most relevant judgements. This is in stark contrast to the traditional approach taken by religious bodies. In order to do this, Mahomed draws on the wealth of knowledge that exists within the Muslim Personal Law Network.

> Very often we're accused- "you can shop around for different solutions to suit your frivolous lifestyle" and I don't think its that. We're dealing with very real issues of abuse and that sort of thing. And there are solutions (in Islam). We just need to find them and we need to, with an innovative eye, just apply them. The rules are there. Honestly, in my heart of hearts, I don't believe that we have a Creator who's going to allow injustice to prevail in any circumstance. And if He guarantees us that there's a solution to every problem, then we need to find it…You've got to seek that solution.

Mahomed's passionate statement is a reminder that a gender just application of MPL that resonates with women's lived experiences is borne out of continued re-interpretation based on context and struggle. Rather than relying on religious leaders to be the sole interpreters of Shariah and representatives of Islam, practitioners like herself have taken on these functions

to find a contextual approach to the practice of MPL. This approach is taken not only with the intention of finding relief for clients but with the belief that it is the Creator's intention to ensure justice.

One example of the need for a contextual approach is the issue of inheritance. Islamic inheritance laws traditionally award a double share of the inheritance to sons. According to practitioners, this double share is awarded with the expectation that the son would take on the responsibility of caring for the female and the vulnerable members in the family and ensuring their well-being. However, in both Mahomed and Higgins' experiences, it is often the case that sons inherit without regard for the principle behind it. Part of the challenge that they are experiencing in their practice is the lack of education on the principle behind the inheritance, Mahomed explains:

> There's no emphasis placed- no education coming from those who promote this double sharing to say that this double share comes with an obligation to take care of all the females in the family. I'm finding that people come into my office and they're adamant, "I'm supposed to get two shares, it is my right! Otherwise, my father's going to roll in his grave…" I feel that not enough is done in understanding that with that right goes an obligation. Unless you want that ticket to heaven- then rather, give up and take an equal sharing with your sisters so that you are not falling foul of that obligation.

This is something that Ighsaan has also grappled with and finds particularly challenging in his practice as it involves going against what most religious leaders apply in the South African context. These laws are subject to reform as in Turkey, for example, where inheritance laws do not discriminate according to gender (Musawah, 2019). In Dangor's survey of South African Muslim women's views on matters of personal law, only four out fifty respondents believed that the double share inheritance rule is discriminatory. The majority believed that the inheritance laws are not discriminatory because, as one respondent stated,

> This law has been decreed by Allah … Allah also states in the Qur'an that men are the protectors of women; so her husband, father, son or brother will always be obliged to take care of her needs (Dangor, 2001, p.115)

The four respondents who believed the laws were discriminatory cited widows being left destitute, men not fulfilling their obligations, and circumstances where women do not get

support from their families as reasons for their views. One of the four women gave her reason as follows:

> 'In this day and age, men are not in a position to take care of the women for whom he receives the excess of inheritance; so why should he inherit more?' (2001, p.115).

Megannon's (2020) working paper on the inheritance practices of Muslim families in the Western Cape indicates that although it can be argued that Muslim women are provided "a better assurance" of their socio-economic position through the obligations placed on men, where the obligations are not met, "women tend to experience downward social mobility" (p.18)

Mahomed has noticed in her engagements with religious bodies that there are a few maulanas "who have their ear to the ground" and are applying this approach of context and necessity. She attributes this to them being more attuned to the hardships that women are facing. Part of the problem that these religious bodies face is that their decisions are not enforceable. Mahomed describes incidents where the maulanas that she has engaged with would sit for hours, trying to counsel and assist couples, only for them to completely disregard their advice. The next chapter will speak more about these clergymen from the perspectives of women who have approached them, but more research is required on their experiences and on whether or not legislation might help them fulfil their roles more effectively. Like with the development of legislation, changes to the approach of religious bodies have required continuous engagement with the ulama, which the MPL network has done over the past few years with varying success. Nevertheless, Mahomed says that shifts happening amongst some religious bodies are "refreshing" after many years of butting heads with them:

> Those of us who have been applying it (the contextual approach) all these years have been labelled and called all sorts of names. But really, it has to happen that way. Otherwise, your belief system becomes irrelevant.

Through Mahomed's, Yasmeen's and to an extent, Higgin's work, we see how the ideological differences between "progressive Islamists" and traditional religious bodies, as discussed in chapters 2 and 3, encounter each other in the practice of Muslim family law. There have been some successes in this arena but the legal uncertainty due to nonrecognition means that these

successes are not guaranteed. It is with this in mind that more innovative measures become necessary to mitigate the consequences of nonrecognition.

4.4 Planning Tools

In 2014, at a 'Women in Islam, Women in South Africa' (WIWISA) seminar, Sheik AK Toffar, the deputy principal at International Peace College South Africa[21], stated that the recognition of Muslim marriages appears to have reached an "impasse" and there are only two practical options for the community: "waiting for the Muslim Marriages Bill (MMB) to eventually appear on the statute book or, in the interim, resort to some measure that may alleviate the trying circumstances resulting from non-recognition" (Toffar, 2019, p.401).

This chapter has highlighted some of the measures that practitioners have taken to alleviate some of the harms arising from nonrecognition. There are also strategies that emerged from the interviews which focus on preventing the harms of nonrecognition. The first deals with estate planning tools, which could protect the property rights of surviving spouses. The second is the marriage contract, which could offer security in the instance of divorce. These tools require planning in advance for any eventuality and may not be of use to those who have already found themselves at the end of a marriage and do not have security. It is for that reason that practitioners are calling for more education on these options, especially around the area of the marriage contract.

4.4.1 Estate Planning Tools:

The prevailing concern amongst the practitioners interviewed for this project is that women are being deprived of their property rights despite having contributed to households for their entire lives. Higgins uses the example of women who are left destitute when their husbands die because their children want their share of the property immediately, leaving the woman homeless:

> A man makes a will in Shariah law. Because a woman in terms of the Shariah law is entitled to one eighth of the property, and the children want their share from the one eighth, they tell their mother they want their share now and now the mother is sitting homeless… those are the issues that people need to be educated on all the time. When a

[21] International Peace College South Africa is a higher education institution offering academic programmes in Islamic Studies. https://www.ipsa-edu.org/about-us/who-we-are

> woman is supposed to get one eighth, what we do is apply a usufruct in that will. In that way the children must wait until the mother dies.

A usufruct is a legal right to occupy or use a property for a period, usually until the end of a person's lifetime. The owner of the property allocates this right in their will. This is a tool that can be used to protect widows from being dispossessed when their husband's die. "It's a simple thing", he says.

There are also options available within the framework of Shariah. As a fiduciary practitioner, Mahomed offers Shariah based estate planning tools to her Muslim clients. Using Shariah estate planning tools, Mahomed is able to safeguard the women's right to her home:

> For example, if a client's husband has given *mahr*, which is dower to his wife at the time of the *nikah*, and that may be whatever nominal amount. That *mahr* or dower can be increased. One of the estate planning tools is to increase the dower or *mahr* to provide security to the wife. So if they just have one property, that's their primary residence. If he does a normal Islamic will, then technically she only gets a percentage of that. But, he needs to give her some degree of security on his death. So by increasing the *mahr*, that becomes a liability against his estate because he is obliged to give that to her. And if he's unable to do that during his lifetime, it becomes a liability on his death. In so doing, we've secured the property for her, so that she's not having to share that property with her in laws and her children.

Through both the civil and Shariah based legal frameworks, Higgins and Mahomed have mechanisms to ensure the rights of their clients in the absence of a state regulatory framework. These mechanisms require advanced planning, meaning that both legal education and access to lawyers are necessary to ensure that these safeguards are put in place. Whilst Higgin's practice provides legal services at a minimal cost, Mahomed's practice is private, and she is not always able to assist clients *pro bono*.

4.4.2 The Marriage Contract:

The marriage contract is a tool that can be used to regulate the financial and social elements of a marriage. In the absence of legislation, many practitioners have advocated for its use to protect women entering into marriages. It can be drafted by lawyers, Muslim family law practitioners or ulama. Marriage in Islam is a contract between two persons and when the contract is not pre negotiated, it contains a set of general guidelines. Practitioners, like

Yasmeen, advocate for a more pro-active approach to the marriage contract where the terms of the marriage are deliberated on:

> When we did the courses on (the marriage contract), you can negotiate every aspect of it. So, from studying to working to, you know, maintenance for cooking and birthing your child. It's so wide and it could go to everything, and I think that is an important tool for concluding marriages.

When I asked how we go about enforcing women's Islamic rights, Mrs Timol, a social worker who runs a shelter for women and children, pointed to the marriage contract as an important tool to protect women's rights. She is hesitant about enacting legislation, believing that the religious system, in its truest form, is one that is fair. The problem that she finds is that people are not fully educated on their rights and obligations, especially when it comes to the marriage contract. The shelter that Mrs Timol runs is open to women of all backgrounds and most of the time services women who are leaving abusive relationships and need a place to get back on their feet. Apart from abuse, she sees many cases of Muslim marriages where the husband has married a second wife without the first wife's knowledge. Or where women are divorced or looking for a divorce and have no family support and the husband refuses to pay maintenance. In all of these cases, Mrs Timol says the women do not have *nikah* contracts, which she believes will prevent such things from happening. The contract gives couples the opportunity to detail their agreements on maintenance, polygyny, and property, and is a document that can be used in court to enforce the provisions of the contract. Mrs Timol believes that this will prevent the types of cases that she sees.

However, there remains a problem of education and of social stigma around marriage contracts, a problem that Mrs Timols feels should be included in The Muslim Marriages Bill. As Higgins lamented in his interview "no matter how much I preach contracts, love conquers all". Amien's (2016) study of women's legal experiences and the negotiation of contracts is also illustrative of the issues that women face when wanting to conclude a contract.

According to Amien (2016), women can include provisions in their marriage contract that "exclude or amend the default Islamic law position as understood by most religious leaders in the community" (p.71, p.16). The contract can include permission to work, further their education, have equal access to divorce through a *tafwid* (delegated talaq) that would not require their husband's or the ulama's permission. The contract could provide for an

equitable division of the estate upon divorce, equal rights to guardianship, custody and access of minor children during a marriage or after a divorce. The scope is wide and, as a negotiable document, the contract can be enforced in court.

However, through her work in drafting marriage contracts for young couples, Amien observes that the use of written *nikah* contracts is uncommon in South Africa owing, in her experience, to women "tending to more easily sacrifice their expectations of marriage than men do" (2016, p.72). In 1999, the Commission for Gender Equality found in their focus groups with Muslim women that most women do not have *nikah* contracts and were unaware that they could negotiate the terms of it. Furthermore, women found it difficult to negotiate the contract because of "the stigma attached to being a critical and informed woman" (Seedat, 2019, p.184). Although education around the marriage contract is improving, Amien's study describes the challenges that remain. One of them is the influence that parents and in-laws have in shaping the terms of the contract. In one instance, the bride's mother-in-law prevented her son from signing the contract because it gave his future wife too many Islamic rights. Amien does not elaborate on the details of these rights in this specific case. Despite these social factors influencing the drafting of the contract, Amien maintains that women's "negotiating power is strongest before the marriage contract is signed" (2016, p.76) because there is little motivation to sign a marriage contract after the *nikah*.

The marriage contract may be a more accessible tool to women because it can be drafted by ulama and Muslim family law practitioners who are not necessarily lawyers. However, its potential to protect women's interests in marriages is curtailed by social stigmas attached to asking for a negotiated marriage contract. Yasmeen observed that through more public conversation around the topic, more young Muslim women are opting to negotiate the terms of their marriage contract before getting married.

Conclusion:

This chapter attempted to paint a picture of how practitioners have responded to the harms caused by nonrecognition. It demonstrated a rich tapestry of interventions built on civil laws or a combination of both civil and religious laws. The chapter identified three main approaches. The first was the use of strategic litigation as a tool for advancing the rights of Muslim spouses. Whilst the focus of the section was on the strategy and outcomes of litigation, it is important to remember Charlene May and Seeham Samaai's reflection, that "The jurisprudence that has been developed in this time has been led by the perseverance of

women to obtain not only the recognition of their marriages, but also recognition of their constitutional rights" (May and Samaai, 2019, p.173).

The second identified strategy was the creative use of laws in everyday practice. This section illustrated both the limitations and successes of strategic litigation in practice. Through Ighsaan Higgin's anecdote, we also saw how education on available legal rights and protections can empower women to lay claim to assets accrued during marriage without needing to resort to legal action. Building on this, the third section showed how the distinctions between civil legal systems and religious legal systems are blurred for some Muslim practitioners. The practitioners represented in this section step into the religious fray to challenge interpretations that reify a tradition without taking into account the current social context. This section discussed the challenges facing these practitioners, who sometimes find themselves labelled as "disbelievers" for their contextual approach to Shariah.

Lastly, the final section of the chapter discussed interim measures that the practitioners interviewed advise Muslims to take whilst Muslim marriage remains unrecognised. The effective implementation of these strategies is hinged on Muslims being educated about their rights, on advanced planning, and on access to lawyers to implement these strategies. Key to the success of this is having negotiating power, especially in the case of the *nikah* contract, which is not always available to Muslim women. Nevertheless, these measures have the potential to secure the rights of Muslim women in the instance of divorce or death of a spouse.

The next chapter will look at how Muslim women have similarly utilised the pluralistic legal landscape in South Africa to pursue just outcomes in their individual circumstances.

Chapter 5: Living Between Laws

Introduction

> The entire community, everyone who knew my father in-law knew her as the second wife. And that all gets wiped away in death. It means nothing. Not because Muslim law dictates it but because man dictates it. They come up with their own fatwas to suit themselves- to push their own narratives so they succeed. (Zakirah, personal interview)

This chapter introduces the five participants of this study and their experiences of the nonrecognition of Muslim marriages. Whilst relaying their stories, this chapter will look at the affective and material impact that nonrecognition has on Muslim women. The first-hand accounts confirm what scholars have written – that the lack of legal recognition causes significant hardship for Muslim women, that accessing justice is a costly affair that few can afford, and that due to there being no system to enforce religious law, adherence to Muslim Personal Law (MPL) as instructed by maulanas depends on the conscience, even whims of individuals (Moosa, 2019).

As mentioned in the introduction, researchers have identified a need for more scholarship on the lived realities of Muslim women in South Africa (Abrahams, 2011; Davids, 2003; 2004). In literature on the MPL debate in particular, there is a gap in the representation of Muslim women's experiences of civil law proceedings in the absence of legislation. As previously mentioned, I originally intended on focusing exclusively on these experiences of civil law proceedings. However, the experiences of the interviewees painted a much larger picture of the current state of nonrecognition. They show the embeddedness of their experiences in both their social and religious contexts. This larger picture is inextricable from an analysis of Muslim women's experiences of South African family law and is much more valuable to the debate on the recognition of Muslim marriages.

The interviewees experiences will be presented in three sections. The first section will introduce the participants and detail their circumstances. The second section will look at the participant's experiences of resolving their issues within the religious legal system. Finally, the third section will recount the participants' experiences of the South African civil legal system.

5.1 Women's stories

Zakirah

> My mother-in-law was my father-in-law's second wife. So they were obviously only married according to Islamic rites. And they built the factory together but because she was the second wife, she didn't have any shares or anything. But everybody in the community knows the story of how she used to sew at night for the factory and during the day. She used to work at [name of factory]. So, all of a sudden nobody knows the history. It's like she didn't exist, she didn't matter.

Zakirah is a party to an inheritance dispute concerning her father-in-law's estate. Her brother-in-law, the son of her father-in-law's first marriage, is disputing the legitimacy of her husband, claiming that there is an inconsistency between the date of his birth and the date on his parent's marriage certificate. In Islamic law, the minimum period of pregnancy is six months. If a woman were to give birth before the six months are concluded, the child is considered to be illegitimate. The fact that there is an existing marriage when the child is born is not enough for the child to be considered legitimate. In order to establish legitimacy, the father must "expressly acknowledge paternity of the child since the mother may have had an affair with someone else prior to their marriage" (Abdouraf and Moosa, 2019, p.342). Zakirah's lawyer will have to prove that there was an expressed acknowledgement of paternity in order for them to inherit. According to the attorney, because Zakirah's father and mother-in-law's Islamic marriage is not recognised by the state, it makes building a case for Zakirah's husband an arduous process. Sadly, Zakirah's husband died before the case was concluded. In accordance with Islamic law, this meant that the decision to continue with the case is up to the next heir- their 15-year-old son. Since he is a minor, the weight of that decision rests on Zakirah.

Zakirah begins her account by referring to her mother-in-law's status, as her father-in-law's second wife, and her contribution to the family business. Although she did not have shareholder status, her labour for the business built her own reputation within the community. Her contribution- sewing for the factory during the day and at night- was instrumental to the growing prominence of the business and the family which would ultimately empower the "legitimate" heir to refute the status of his brother. As a result of the first family's refusal to acknowledge the second family, Zakirah's mother-in-law's contributions are effectively erased from the legacy of the business, the family, and the community within which she made her name.

In Zakirah's situation, the civil law became a tool to counter the narrative that her husband was illegitimate and to defend their status. For a family that Zakirah describes as private and not materialistically inclined, the decision to pursue a legal case did not come easily. The decision was one that Zakirah's husband and son would deliberate on extensively prior to his death. Zakirah explains the deeply emotional decision that she and her husband made to pursue the case as follows:

> For Abdul to get to a stage where he sought legal counsel, it wasn't about him at all. It was about his children. It was about his legacy for his kids, it was about his birth right, he cried for days over that, it was about his mother's honour, about them- the implications of what they were saying about the relationship that he couldn't handle.

Whilst most of Zakirah's account focused on the emotional effect of not being recognised as legitimate heirs, the dispute had major financial consequences for the family. When Zakirah's father-in-law died, her brother-in-law immediately dismissed her husband from their family business. They lost their livelihood and whilst Zakirah does not linger on it, she mentions instances of them "knowing what it is to go without". Zakirah uses these examples to both illustrate that they are not materialistically driven and to point to the precarious situation that the legal case and her brother-in-law's refusal to acknowledge their status has put them in. A change in their income appeared to have lost them the esteem they once had amongst their religious leaders who "knew which side their bread was buttered". The Jamiat was unable to come to a decision on the case due to the difficulty of establishing legitimacy. Their position is that if the marriage occurred within the required time frame to prove that Zakirah's husband is a legitimate heir, then they may inherit. If not, they are not entitled to inherit. The Jamiat's inability to resolve it leaves Zakirah's family with legal proceedings as their only alternative.

Before her husband died, Zakirah started her own small business in the education sector but still finds it difficult to stay afloat. On top of dealing with legal proceedings and having to solely navigate the cost of the case, Zakirah has had to deal with the loss of her husband of twenty years. Now Zakirah is left to fight to prove her husband's legitimacy on her own.

Being married under South African law was not something that Zakirah was concerned about. It was at her husband's insistence that they registered their marriage, some ten years after concluding their *nikah*. "He said that it was important that we do it. He said that if anything

happens to him, I need to be protected", she tells me. This proved to be effective. When he passed on, Zakirah did not encounter any legal issues with the distribution of his estate.

Zakirah's case demonstrates how the failings of both religious and state governance translate into vulnerability at an interpersonal level. The uncertainty caused by nonrecognition enables those with power - here, those considered legitimate heirs- to cause significant psychological and financial harm to others simply by casting aspersions on their legitimacy. Whilst in this case, the issue to be decided is the legitimacy of a child for the purposes of inheritance, arguments of legitimacy come into play in divorce cases where parties contest that an unregistered Islamic marriage is not a legitimate marriage under South African law. This was the case in Ruweida's story.

Ruweida

Marriages concluded under Islamic rites that are unregistered are not regulated by any of the official property regimes- in community of property, out of community of property, or out of community of property with the accrual system. These property regimes regulate the consequences of divorces, affording some degree of financial protection to spouses. Legally there is no joint estate created by a Muslim marriage that can be redistributed when the marriage is dissolved. Due to properties being registered on their husband's names, this has led to a number of Muslim women leaving divorces without any share in the marital home, assets acquired during the marriage, or maintenance beyond the prescribed *iddah* period (See chapter 4 for discussion). In other countries, Muslim family laws have developed to ensure that more is made available to women. For example, in Malaysia, the court may order the division of jointly acquired assets, giving due consideration to both tangible and non-tangible contributions that assisted the acquisition of assets (Musawah, 2011)[22]. Nonrecognition furthers this injustice for Muslim women by not providing the same redistributive protections that are available to women married under civil law.

In Ruweida's situation, her finances, including the shares that she had in their family business and the salary that she was receiving from the business all came to end when she sought legal assistance to get a divorce. Ruweida is a woman in her late fifties looking to divorce her husband of 34 years. She married at the age of 21 and raised five children with her husband but after many years of infidelity and emotional neglect, she decided to leave the

[22] This is the practice that was relied on in the Ryland v Edros case, where the applicant sought an equitable division of assets from her ex-husband after their divorce. See chapter 4 for the discussion.

marriage. Having spent the duration of her marriage caring for her kids, running a household and assisting her husband with his business, Ruweida has no financial security of her own. With only a grade 9 level education and no formal qualifications or experience, Ruweida has found it difficult to start over in her late fifties whilst still caring for their two youngest children. During their marriage, Ruweida's husband's wealth grew substantially. He now owns a building and a lucrative family business. Ruweida is looking for an acknowledgement of her contributions to the building of his wealth and her role in raising a family. Her husband pays maintenance for their two youngest children who live with her in their marital home. Due to her only being married Islamically, she has not been able to get a maintenance order for herself.

Ruweida's father believed in getting his daughters "court married" to protect their rights but, through what she calls "Murphy's law", Ruweida was the only one of the seven daughters who did not register her marriage. Ruweida is aware that the status of her Islamic marriage is not recognised by the state and uses the language of "partnership" to justify her claim, not only as part of her legal strategy but as part of the way she communicates her story.

> I was married for thirty odd years- doesn't that form a Universal Partnership? Because he has claimed- his lawyers have claimed- that we were married for thirty odd years- from 1984- in the Islamic law so there's no partnership, or some shit like that. No Universal partnership. I brought up five kids in this marriage- you know what I mean?

A Universal Partnership is a legally recognised relationship of mutual benefit that originally refers to commercial partnerships. It carries its own consequences upon dissolution and has been used as a legal strategy to grant a share of property accrued during "marriage like relationships" to women, such as religious marriages that are not recognised by the state and domestic partnerships. It requires that each of the parties contribute to the relationship, that the partnership benefits both parties, that the purpose of the partnership is for profit and that the contract between the parties is legitimate (Hager, 2020). It entitles the partner to a share of the property and, importantly, considers non-financial contributions such as "child-care and home making" (Bonthuys, 2016, p.2). Having her marriage recognised as a universal partnership would mean that Ruweida will get financial compensation for her non-financial contributions towards her husband's wealth. Although Ruweida does not directly refer to the legal requirements for a universal partnership, her firm resolve that her marriage constitutes a universal partnership demonstrates how she has understood and personalised the concept. She applies it by arguing that her non-financial contributions in the form of homemaking, child

rearing, and multifarious support in her husband's business ventures should be considered as contributions to the growth of his estate.

As discussed in chapter 3, the Muslim Marriages Bill establishes the default property regime for registered Muslim marriages as out of community of property. This means that unless couples change or set provisions for accrual in the ante-nuptial contract, at the end of the marriage, the spouses will only be entitled to what they brought into the marriage. However, the bill does provide that spouses who have contributed to a family business or who can show that they have made significant contributions to the growth of their spouses' wealth are entitled to an equitable share of the estate. Had the Muslim Marriages Bill been passed, and had Ruweida and her husband opted into it by registering their marriages under the act, Ruweida may have been entitled to such a claim with the pronouncement of a divorce order in court. Ruweida then would not have to rely on the Universal Partnership as a remedy.

The emotional and financial implications of the case have had an impact on both Ruweida and her daughter's physical and mental health. Ruweida has found a job as an administrator but the salary is not enough to cover all her personal expenses, let alone legal costs. Ruweida reiterates throughout the interview that she does not want her ex-husband's property, she wants survival. For her, survival would mean receiving her share of her husband's estate which would help her cover her monthly costs and assist her in building a more financially secure future for herself.

When I asked Ruweida whether she thinks that the legal recognition of Muslim marriage could have helped her situation, Ruweida said that it would probably would:

> Because then it would be like being married in court you know. That's where they're taking advantage. And his lawyer is Mr- X.

Ruweida mentioning her husband's lawyer is significant. Her husband's lawyer is a vocal opponent of the Muslim Marriages Bill, arguing that legislation would interfere with Shariah. He believes that the harms Muslim women encounter should be fixed within the religious system through the establishment of Shariah courts. Ruweida sees the lack of recognition for her marriage as where they are taking advantage- the point of vulnerability illustrating the abuse of nonrecognition to deny women claims to a share of the estate grown during a marriage.

Fatima

Fatima is 33 years old and recently divorced her husband of 16 years. Together, they have three young children aged 15,12 and 10. Fatima married her husband when she was 16 years old. South African law permits minors to get married with the written permission of their parents or legal guardian. Boys under the age of 18 and girls under the age of 16 additionally need the consent of the Minister of Home Affairs to conclude a marriage (Department of Home Affairs, n.d). This means that Fatima was not legally precluded from registering her marriage at the time. Islamic law permits marriage from the onset of puberty although, some Muslim countries have raised the minimum age for marriage to at least 18 years (Moosa, 2006; Moosa and Abdouraf, 2019). Like Ruweida, Fatima refers in her interview to the protection that she could have had if she had registered her marriage. However, Fatima tells me that she was too young when she got married to fully understand the consequences of her decision, let alone the registration of her marriage, saying "I was only 16":

> Today we get married young. We don't know what life holds. We don't listen. As much as our families would say, "this man is not good for you". We think we know. We want to get married, because we love this guy and whatever and then three years down the line, this man only disappoints us…

Fatima describes her husband as possessive and jealous. During their marriage, her life was under his strict supervision. He refused to allow her to work, although the extra income would have taken some financial pressure off of him. He would accuse her of infidelity if she left the home alone. Essentially, she felt that she had no life of her own. Adding to the emotional stress of not being able to earn her own income or lead her own life, Fatima's husband did not readily fulfil his role as "provider", frustrating her even further:

> He took me from my father's home. It was his responsibility to support me. But everything has been an issue right up to doing for the kids, his own kids! He was always complaining.

Fatima's husband worked as a spray painter on a contractual basis, a job which did not pay a lot but kept them afloat. Whilst he worked, Fatima took care of their children and the home. When his possessives turned into physical abuse, and when he started using drugs, Fatima decided to leave her marriage.

> Fifteen years I was always faithful to him and I've always been accused (of infidelity) constantly. Then it was drugs. Then it was abuse. So, eventually I said, you know what, I'm giving him chance after chance and he's only going and doing the same thing again. It's not working out.

Fatima does not go into details of the abuse but says that at one stage she had to file for a protection order to manage the situation. She also mentions times where her husband would not support her, leaving her to rely on her father. When she decided to leave her marriage, she approached a few different maulanas, the details of which will be provided in the next section. They were unable to assist her with her divorce because her husband was still interested in making their marriage work. It was only when she began to see another man that her husband acknowledged that the relationship was not working out and eventually gave her the divorce. Had this not happened, Fatima feared that she would never get a *talaq* and be able to move on with her life apart from him.

Fatima had always shared a close bond with her children. They stayed with her through every fight that she had with her husband. There were times when their fights would lead to her going back to her parents' house and the children would go with her. This is where she stayed once she got divorced. Once they got divorced, her ex-husband would visit the children, bringing them small gifts of money, but not directly contributing to their upkeep. He would also take them away over the weekends. It was then that Fatima noticed a shift in the children's attitudes towards her. Fatima believes that her ex-husband is trying to turn them away from her. As a result, the children now prefer to stay with him and are refusing to stay with her. There could be many reasons for her children's decision to stay with their father, but from what Fatima's perspective, this shift is due to her ex-husband's influence. Not being with her children, she says, is the most painful part of this chapter of her life.

Under Islamic law, Fatima is entitled to at least three months of maintenance during her *iddah* period, which she did not receive. Fatima wants to go to court for a maintenance order and to get custody of her children who are currently in her ex-husband's care. Due to the difficulty of the past year, she has not been able to do so yet. When asked what her ideal outcome would be, Fatima says the following:

> You know, the maulana clearly explained to him (the ex-husband). In these three months you are supposed to support me and see to my needs, and then after three months, I'm no longer his responsibility, but then the kids, there'll always be a responsibility. And in the three months he has done nothing for me. Nothing at all. So, you know, I would really like that he could still give me a little support, because I'm the kids' mother, until I get on my feet.

Although Fatima is not asking for anything beyond what is traditionally accepted in Islamic divorce law, Fatima's ex-husband does not comply with what the maulana directs him to do. There is no way of enforcing the maulana's directive, leaving the only possibility for maintenance to be getting one from court. This is the option that Fatima is considering but has not been able to act on during the past few months due to COVID-19. This would mean that the *iddah* period will probably collapse before she gets to make an application, making it unclear whether she will ever receive that maintenance. Now, her current situation has led her to think differently about the role of law in her marriage. Despite her support for her husband in the face of his abuse and her role in caring for and raising her children, she says:

> And yet today, I'm left with nothing. Not a car, not a home, no money, nothing. And so this time, I will definitely consider getting court registered. So, you know what, at the end of the day if something happens, I know I am covered.

When Fatima and I spoke, she was in the last month of her *iddah* period. Fatima is now 33 years old and wants to create a better life for herself. She tells me that she is looking for cashier, admin, or receptionist type jobs and that she has completed a computer literacy course. Having no work experience or money of her own, she needs financial support to set up her new life and get custody of her children. Her family has provided her with shelter and emotional support, but financially, she finds herself setback.

Ayesha

All four interviewees dealing with divorce had difficulty in obtaining one from their husbands. For Ayesha, this was the most difficult part of her experience. Ayesha went through two divorces and speaks strongly about the strain that this puts women under:

> It's basically holding you to ransom. Its like you're married, but you're not

> married. Because you're married, but you're "not married" you can't carry on with your life. It's emotionally very frustrating, because you don't know whether you're coming or going. They put you in a horrible predicament. So, you're moving, there is a parents' house, you move in there. You're single, but you're not single. You understand?

Ayesha is a mother of two, madrassa teacher and recent divorcee from her second marriage. She entered into her first marriage when she was 17 years old. It was concluded under Islamic rites and Ayesha did not register it. It was an arranged marriage that she agreed to, to please her parents. She agreed to it with an understanding between her and her future family that she would continue with her studies and delay having children until she was ready. Early into her marriage, her husband became physically and sexually abusive towards her. He also began to insist that they have children, which Ayesha was not ready for. The visible evidence of abuse eventually resulted in her parents intervening. However, Ayesha was eager to make her marriage work and decided that they should attend counselling with her maulana. The process included Ayesha's parents and her then in-laws which created more tension in already acrimonious meetings with their maulana. The sessions did not lead to any progress and Ayesha says that eventually "it finished up everyone's health". This was when Ayesha decided that they should proceed with a divorce but her maulana favoured them staying together. Her husband refused to give her the talaq, leading to the state of limbo that she describes. Ayesha returned her dowry, and her father paid her husband's family for the money they had spent on their house, but still, her husband would not budge. After a year and a half of uncertainty, she employed the help of a family friend who is an advocate and is educated on Islamic law. It was only through the intervention of the advocate that Ayesha received her divorce from her husband. The details of the advocate's intervention will be discussed in the last section of this chapter.

Being back home was not easy for Ayesha. The stigma attached to being a divorced woman in the community was a heavy weight for her to bear. To cope, Ayesha turned her attention towards education. She completed a degree in Islamic studies and as well as skills-based courses in cooking and baking. She also began to teach madressa. Her in-depth knowledge of Islam would ultimately empower her to carve her own way out of her second marriage.

Ayesha married her second husband in 2010 when she was 24 years old. This time, she says, her parents were "smarter" and arranged for her to register her marriage, although she was

not interested in the process at the time. Her father hired an attorney to draft an ante-nuptial contract for them. It is significant that Ayesha's father's business was taking off at that time. Growing up, Ayesha says that her family "did not know money" and were very poor. By the time of her second marriage, her family was in a better financial position than that of her future husband.

Ayesha's second marriage was a "love marriage". "I thought okay, the first time I did an arranged marriage, let's try love-marriage and see if it works", she explains. Unfortunately, her marriage was plagued by her husband's drug addiction. She describes her second husband as "a nice person at times" but with many demons. Throughout his difficulties with drug abuse and unemployment, Ayesha supported him until she found out that she was pregnant with their second child. Discovering that she was pregnant for the second time pushed her to consider whether the relationship was working and what the impact of his behaviour will be on their children. As with her first marriage, Ayesha's first point of action was to try and make the marriage work. She organised for him to get therapy and found support groups for him to join. During this time, he was uncooperative, and his behaviour did not change. When he left his job at her father's business, Ayesha finally asked him to leave their home. She then approached both her father's lawyer and her maulana for assistance with her divorce, which will be detailed in the sections below.

With the support of her parents and her own source of income, Ayesha has been able to care for her children comfortably without assistance from her ex-husband. During her iddah period, she joined a local women's group- the Single Muslim Women's Group. Despite its name, it caters for women of all faiths in the community, providing a support system for recent divorcees. They host monthly workshops for women, covering a range of topics such as financial planning and health and wellness.

> That group opened my eyes to more of how grateful I am because I realised lots of them don't have backing, lots of them don't have family, lots of them don't have support. Not even emotionally but say financially, because even though those that have, maybe they only have one parent that's alive, or they have both parents and both parents are working and can't help them or give them the extra support.

The two major difficulties that Ayesha faced was, firstly, not being able to leave her first marriage, and secondly, her husband not paying maintenance for their children in her second marriage. What is significant is how having her own job, parents that were financially well

off and willing to support her, and having her name on the marital property, protected her from the negative consequences of nonrecognition compared to her counterparts at the Single Muslim Women's Group.

Femida

Another factor that plays into women's ability to leave their marriages is there being an economic and social safety net to secure them once they leave (which is true across the board and not exclusive to Muslim marriages). As the women in Ayesha's support group have experienced, there are many difficulties that come with obtaining a divorce. Ayesha and Fatima had their parents to fall back on, and Ruweida had some assistance from her sisters. Femida's story shows how this is not the case for everyone.

Femida resides in Thembelihle with her husband, who is a maulana. They married in 2015 and have three children together. He is emotionally and physically abusive to her. She has also found evidence that he sexually abuses children, which he does with the full knowledge of the community, including the police. His power and status protect him from facing prosecution. Femida describes conversations that she has with community members where they tell her that what he does to their children is not so bad when compared to what he gives them in return- food and groceries. The state of poverty that the community lives in enables Femida's husband to act with impunity. As the Optimus (2016) study has shown, there is a pattern of under reporting sexual offences against children when the perpetrator provides financial support to the family. Furthermore, offences are less likely to be reported when it is committed by a family member or a powerful authority figure in the community (Optimus Study South Africa, 2016). Femida's husband meets both criteria. On one occasion, after being beaten by her husband, Femida sought assistance from the police, not realising how close a relationship her husband has with them. The officers joked with him, accepted his money, and left.

> I went to this police officer. I had blood all over me. My face was covered in blood. He hit me with the railing on my head. I had to have 21 stitches done and I went to the police officer and then I told him about my husband and they were all so keen on coming. When they came here, the first officer was like "oh it is this guy" and I am like "yes it is him". Then they were all like "oh, since it is this guy, there is nothing we can do for now. You can just sit and talk to each other and find a way out." Then they greeted each other and then in front of me

> my husband gave him R200 while I was watching and I was like "oh my God, this is so sad."

Femida's experience with the police illustrates the sad reality for many women reporting domestic violence in South Africa, only to receive no support from police services.[23] When her husband married his second and third wife, she begged him to release her with a talaq. When that did not work, she went to the Jamiat to help her get a divorce. The Jamiat advised her that wives have no right to say no to polygamy unless the husband is unable to maintain his wives. Since her husband did maintain them, Femida felt that she did not have a loophole to leave. In the interim, her husband's first and second wives also found themselves unhappy. Her husband refused to give them a talaq as well, but they managed to separate themselves from him without it. Femida tried to run away back to her parents' house, but her husband found her and talked her parents into making her go back with him. Femida explains:

> I did try to leave and then he found me and then he became aggressive, then he threatened to take the child and he threatened to hurt the child and I was so scared because he has so much influence everywhere that I go, and he is such a good speaker so I could not come out.

She tried getting a *fasakh* and a *khula* and spoke to members of an Islamic women's group that she was a part of, a predominantly Indian group from Lenasia, adjacent to Thembelihle. The feedback that Femida received from the Jamiat and from the group was to make *sabr*- to be patient because her situation is unique, and her husband is a religious man. Being the only Black women in the group, Femida felt that the other women could not fully understand her situation and was unsatisfied with their response and that of the Jamiat. The response of religious leaders to Femida's situation is consistent with what Shabodein says of women's experiences of MPL in South Africa. She writes that "women are often advised to reconcile, live more religiously or exorcise the devils within them" (Shabodien, 1995, p. 18) when

[23] This is another instance where well written laws do not find their way into practice due to the social context in which they are applied. The Domestic Violence Act prescribes a set of duties for police officers to ensure that people experiencing domestic violence are afforded the highest protection that the law can provide. Vetten (2017, p.7) summarises these duties as follows: "Members of the police must also assist complainants to find suitable shelter, and/ or to obtain medical treatment. In addition, they are obligated to serve notice on the abuser to appear in court; serve protection orders; arrest an abuser who has breached a protection order or committed a crime (even without a warrant); remove weapons from the abuser or from the home; and accompany the complainant to collect personal items from her/his residence."

encountering marital disputes.

For some time, Femida believed what she was told, that it was her duty to be patient, to pray and become a better wife. Through her volunteer work with a women's organisation in her community, she met a life coach who had recently converted to Islam. Femida took her under her wing and guided her in her faith, and she in turn counselled Femida on her marriage and the direction of her life. It was after this that Femida delved deeper into Islamic teachings on marriage, reaffirming her decision to find a way out of the marriage.

> I have realised that many women around me, many Muslim women who are in my situation, prefer to keep quiet and to distance themselves from talking about how they feel because… many other Muslim powerful men tend to do these things to their wives, but then the wives are like "no, we must make *sabr*- you must keep it in", you know, "you are fighting a battle" and they tell you all of that nonsense which is so not true.

When nothing worked, Femida decided to shift her focus from getting a *talaq* immediately to a long-term strategy that will enable her to leave safely. She is adamant that her husband must give her the talaq and will not look to anyone else, including lawyers to help her out. Femida gives two reasons for this. One, she is tired of trying to leave, and two, she fears that this is the only way she can leave the marriage alive. She has turned her attention to secretly helping women in her community who also find themselves in abusive relationships, and to completing her studies and finding work so that she will be able to support herself when she does get out of the marriage.

> So, I decided to open up my own group where women come and then they speak about their situations, but many opened up for two years. There were quite a few ladies. Then eventually I got more ladies coming in, but they came in anonymously. They decided to do a WhatsApp group instead of coming in physically.

Through this group, Femida has found herself providing an alternative source of counsel and guidance to women in her community. Using Islam as her basis, she advises women on how to approach their situations whilst avoiding giving them instructions on what to do. This, she says, requires a lot of research on her part and is

emotionally exhausting. But she wants to fill the gap and provide an alternative for women who are told to "make *sabr*" and stay in their abusive situations.

5.2 Engaging with religious leaders: the tale of two maulanas

Prior to looking at women's experiences with legal proceedings, it is necessary to consider their experiences with religious leaders which in all cases preceded engagement with the law and formed an integral part of the participants' narratives. It outlines two categories of maulanas that women often encounter, those who are willing to help but cannot, and those who are unwilling to help. From those who are willing to help, what is repeated across the narratives are religious leaders advising them to approach lawyers.

In Zakirah's situation, the Jamiat could not decide on the key issue of the case- whether or not Zakirah's husband was a legitimate heir to her father in-law's estate. For Zakirah, this was frustrating considering the close relationship that the family had shared with the religious community for so many years. Zakirah says that their religious leaders would be in and out of the offices of the family business whilst her father-in-law was alive. Her father-in-law would introduce her husband as his son, arguably showing "expressed acknowledgement of paternity" as required by Shariah (see discussion above). For the religious leaders to now be undecided was frustrating and offensive to Zakirah, who expected more from them. The Jamiat deferred to lawyers to decide on the matter, finding it too difficult to adjudicate the evidence themselves.

> When my father-in-law died we were grappling because we didn't know, because we were so spoilt, we didn't know what to do. We trusted my father-in-law's accountant who was an executor of his will and even the Jamiat agreed that my husband is due his inheritance. But then, when the son got involved, when the son disputed it, they changed their story. They brought up a whole lot of nonsense into it and when we were getting a lawyer, they didn't want us to get someone who is not Muslim so that delayed us more because we didn't know who to turn to…

When Ruweida decided to get a divorce, she knew that going to her religious leaders was not an option. She laughed when I asked her about seeking help from religious bodies:

> He's friends with all of them. You know that how it works- I'm sure with your religion. There's nobody for women. That's all I can tell you.

When her husband married his second wife, Ruweida sought religious council on how to sustain their marriage. Ruweida's husband had been unfaithful to her since the beginning of her marriage and did not inform her of his second marriage which she found out about by chance. Ruweida knew from her experience of seeking help during her marriage that their local religious leaders were not going to act on her behalf, leading her to go straight to an attorney when she decided to divorce her husband. However, her husband brought in his maulana at different parts of the settlement agreement to convince her to accept what he was putting on the table. He offered to let her keep the marital home, without maintenance, provided that she signs over her share of the business. Ruweida then sought assistance from a maulana in a different area who was known for helping women like herself ("he's been doing it for 35 years"), and the two maulana's acted as mediators for the parties. Ruweida describes the continuous back and forth between herself, her husband and the two maulanas, making offers and counter offers that did not result in anything tangible. At the same time, Ruweida's relationship with her attorney collapsed, for reasons that will be outlined in the next section, leaving her with no legal representation. Eventually, she says her maulana advised her to get another lawyer. "You know what", he told her "they're holding you by your jugular vein. You might as well get a lawyer". "Where do I get a lawyer?", she exclaimed.

Similarly, when Fatima's local maulanas were unable to assist with her divorce, she too sought the assistance of a maulana from a different area who was known for sympathising with the position of women. Fatima is of the opinion that maulanas in her area "are not for women, they're only for the men" because they could not give her a divorce without her husband's consent. She feared that she would never be able to get a divorce or get married again. Fatima applied for a *fasakh*, believing that she met all the requirements. A *fasakh* is a decree dissolving a marriage that can be applied for by either spouse (Abduroaf and Moosa, 2019). The requirements for a *fasakh* include where the husband commits harm against his wife, does not fulfil his spousal obligations, and where there is an irretrievable breakdown of the marriage. The Muslim Judicial Council guidelines do not indicate that consent of the other spouse is needed to apply for a *faskh*. In practice, however, it appears that applications for a *fasakh* can be rejected or significantly delayed if the husband shows

a willingness to reconcile (Abdouraf and Moosa, 2019; Hoel, 2012). The local maulanas did not know how to dissolve Fatima's marriage without her husband's consent. She says they believe that the divorce should only come from the husband. After a month of meetings with the maulana's, Fatima decided to look elsewhere:

> So, in a way these maulanas also gave me a really hard time like I cried out for help but each and every maulana gave me the same story. Everyone's giving me the same story. Then we went to the second week and third week, the same story. So, I said, you know what, I don't think I'm going to get a divorce. I don't think I'll be able to get married again. So, I contacted another maulana from Eldorado Park and he was willing to help me fast.

Not having a centralised Muslim judicial body to turn to allowed Fatima to find a judicial body that was more willing to affirm her right to a divorce. This is an example of forum shopping within a religious legal system, where individuals take advantage of the inconsistencies within it to pursue a favourable outcome. Sezgin (2010) explains that this is a common phenomenon in pluralistic legal systems where there are "multiple normative orderings with parallel jurisdictions" (p.22).

By this time, Fatima had already met her new partner, making her husband more willing to grant her the *talaq* after talking with the maulanas. Unfortunately, the maulanas were still unable to assist her with enforcing her right to maintenance during the *iddah* period or with custody. They too advised her to go straight to attorneys, which she has not been able to do yet.

Ayesha observes that at the time of her first divorce, the religious leaders prioritised keeping families together rather than women's experiences. "You never had a valid enough reason to leave", she told me. After a year and a half of feeling stuck in her marriage, Ayesha turned to a family friend who was an advocate and a specialist in Islamic law. Through his intervention, which will be detailed in the next section, she was able to get her divorce from her first husband.

Ayesha noticed a difference in the approach of religious leaders when she was contemplating her second divorce. She says:

> This was a new generation of religious (leaders) and more openminded and that are more geared up. This generation of religious ones- they do counselling courses, they do psychology courses, so they are more geared up, they are not one minded, they are more openminded because they have other skills as well.

The maulanas advised her to leave as soon as they heard that her husband was using drugs. Still, Ayesha wanted him to speak with them first and seek counsel. When this did not work, Ayesha knew that she had reached the end.

> So, then I went back to the religious leaders and I told them: "You know what, he doesn't want to go for help. I'm done.", so he said no we have to call him again and ask him directly and then we have to put it to the Head Office, the more advanced Religious Leaders, like the Pope kind of people, Head in Charge of the whole institute and then there is a whole process. I was like: "Excuse me, why can't it just be a simpler process, he doesn't want to make it work, I don't want to take him back, so why don't you just give it (the talaq) to me, why don't you just tell him to give it to me?", so he says no it's a process. I was like no shit, never mind, I don't need you people, because I am also a religious person, in the female version, I know exactly what to do, so I took things in my own hands.

Ayesha's story is quite a remarkable one, showing how knowledge of Islamic processes can translate into action. It is also a unique situation in that she was financially secure on her own and her husband was cooperative in this process. Ayesha completely bypassed the bureaucracy of the religious body that she was engaged with and supervised her own *talaq.* Although Ayesha was pleased by the progress made by religious leaders over the years, she still found their inability to respond to her situation limiting from her own understanding of the law. She had done the math. Her and her family had planned to embark on Hajj at the end of that year and she needed to ensure that she completed her *iddah* period before then. Islamic law is very simple, she says. She asked him if he is willing to work it out. He said no. She asked if he is willing to change. He also said no. She then asked him to grant her the divorce. He asked her if they could still be friends, and when she said yes, he agreed to the divorce and signed a document that she had prepared to confirm it.

Femida had been to her religious leaders several times for guidance and assistance in getting a divorce. When she continued to get the same response- to pray and make *sabr*- she decided

that it was not worth it anymore. She points to the system of power at play that enables her husband and other men to behave the way they do:

> So, eventually I stopped going and I was like, you know what, I'm not going to the Jamiat anymore, it's a waste of my time, a waste of my energy and the thing that I noticed or in my opinion- the men that does this stuff to other women, they *recognise* each other, so when you come forward with such problems and they know that they are also doing it, they immediately drop things for you because the minute he knows you start being empowered, you're going to go and empower his wife. Your wife is also going to pack up. It becomes personal. It is no more a thing of helping the community, it's more about saving themselves.

Empowerment in this statement is referring to women's ability to leave their marriages and live independently from their husbands. Femida says that men are afraid that once their wives know that they have an Islamic right to divorce them, their wives will begin to leave and their power will be undermined. Femida's description provides a powerful analysis of how patriarchal power upholds itself within her community. Although this is a localised experience, it is something that Commissioner of the Commission for Gender Equality raised at a Centre for Contemporary Islam workshop in 2010. Shobodien submitted that: "An important issue, often swept under the carpet, but loudly whispered about in the community, is that some individuals that make up the *ʿulamāʾ* are often themselves not above reproach, since some of them are guilty of precisely the issues which the women coming to their office are seeking assistance for" (CCI, p.27).

5.3 Experiences with legal proceedings

In the above cases we see the growing reliance on legal practitioners to facilitate the administration of justice on Islamic law matters. This is confirmed anecdotally by the experiences of legal practitioners outlined in the previous chapter who had to assist women with getting a religious divorce or with claims to property. It may be a natural consequence of women not getting their desired outcomes from the religious system. The role of the lawyer, as in Ayesha's case, begins to displace the role of the maulana who is unable to facilitate her divorce without her husband agreeing to divorce her. In Zakirah, Ruweida, and Fatima's cases, it was their religious leaders who advised them to go to seek legal help, knowing that

their authority in settling contested disputes is limited. Although there is no legal mechanism to compel men to grant women a religious divorce, the force of attorneys, as in Ruweida's and Ayesha's cases, is sometimes enough to shift the odds their favour. This only becomes possible where there is access to lawyers.

As seen through the experiences of the participants, the law is often women's final chance of obtaining justice. This does not mean, however, that experiences of the legal proceedings are any better than that of the religious proceedings, leading to a sense of being let down by both their religious system and civil legal system. This is poignantly expressed by Ruweida, who says:

> Unfortunately, now there's nobody for women these days. Unfortunately. They say the law- so I'm supposed to be able to walk into the law and get justice out of it. Thirty odd years, five children...

When Ruweida decided to divorce her husband, she had no desire to communicate with him. After years of unsuccessful back and forth between his maulana and herself, she decided that the best way to the leave the marriage would be to go to attorneys. Ruweida mentions three things that she wanted out of the legal proceedings: a *talaq*, maintenance for her children, and a share of her husband's estate that she helped to build. Four years later, Ruweida has only gotten one of those things- a maintenance order for their children which her ex-husband does not always honour. The legal proceedings have taken a physical toll on Ruweida and have left her despondent. Her relationship with her first attorney played a significant role in shaping her experience and perception of the law. Her first attorney's fees cost R100 000, which she went into debt to pay with "nothing to show for it". Additionally, she describes the first attorney as verbally abusive, saying:

> He was very abusive in a sense where (it was) nothing for him to tell you how stupid you are, you know, and all those kinds of things.

Her experience with her attorney was so profound that she started our interview by talking about him rather than about her husband or the circumstances leading up to her divorce. She describes him as rude, mis-leading, and obnoxious. But he had a good reputation for dealing with Islamic law matters and set high expectations that he would "fight the universal partnership route". She spent close to a year working with, paying him R100, 000 with no tangible outcomes. "He's messed up my life", she tells me. "I've come from an abusive relationship and I got abused by him. That's not fair."

Whilst the verbal and financial abuse that Ruweida received from her attorney may have been unique to her situation, the issue of high attorney's fees with no tangible outcomes is an issue that Ighsaan Higgins raised in my interview with him. He has found that in times of trouble, people approach attorneys without always being aware of their area of expertise. He says the attorney might have "no clue (on the matter) but he's interested in getting your money for that consultation. He's still going to hit you with the two grand, then he's going to tell you 'I'll refer you to another colleague of mine'. And then he gets a referral fee as well- so the client is screwed all the time".

The second attorney that Ruweida approached quickly got her a maintenance order for her children but following up to ensure that the order was fulfilled cost too much. Ruweida then decided to take a break from the case and spent a lot of time looking for the right lawyer. Ruweida cannot remember which lawyer, either her first or her second attorney, asked her husband sometime during 2017 to divorce her to which he responded that they must tell him if they want it "through sms or email". He has still not issued the *talaq*. When we last spoke, Ruweida had found an attorney who would take her case on contingency. Contingency fee agreements allow legal practitioners to only charge for legal proceedings if they are successful in the case. The practitioner is then able to charge at a higher rate than usual, but it means that clients are able to receive legal help without needing to pay money upfront (Nel, 2018). Ruweida and her attorney intend on pursuing a *fasakh* and arguing that the marriage formed a Universal Partnership. Ruweida tries to remain hopeful but maintains that her justice lies in the hereafter where punishment awaits not just for her husband but for the attorney who berated her and put her in debt.

Finding the right attorney was also a difficult process for Zakirah and her husband. The Jamiat had asked that they only engage with Muslim lawyers and because of the family being so well known within the community, it was difficult for Zakirah and her husband to find an attorney willing to take on the case. Zakirah's case has been going on for four years and she is struggling to keep up with legal fees. Despite her desire to assist her children in preserving their father and their grandparent's legacies, Zakirah feels that it is time to put the case to rest:

> I'm also gearing up to have the conversation with my son to say "Bismillah", life is too important. We've got to start living. I can't put you guys though this, you can't put yourselves through this. Let's just move on with our lives.

If Zakirah decides to continue, the next step is for them to take the case to the High Court. Litigation is a long and expensive road and Zakirah needs to find the funds to continue. Despite the whole community knowing that Zakirah's husband was his father's son, and that her mother-in-law was indeed her father in law's second wife, the question of their status needs to be settled legally in order for the children to inherit their share of the estate. This is their only option. As Zakirah explains:

> For me, I'm not materialistic. I don't care if the case gets won or lost because the emotions- it's too draining. *It's like having to prove that you belong*. My husband lost so many nights of sleep over this. The crying, the depression, I can't have my children going through the same thing. They know who they are. They know they are loved. They know who their family is. That for me is enough.

Ayesha describes legal proceedings as a "very horrible, emotional, terrible process" when you do not have money. Ayesha's experience working with the advocate who assisted her in getting a divorce from her first husband was a good one, primarily because he was a family friend whom she had a good relationship with and who did this for her pro bono. After her unsuccessful attempts at trying to get a divorce, Ayesha approached the advocate for assistance. He drafted a letter laying out an argument for her husband to issue her the *talaq* based on the Quran and Hadith. The advocate outlined the punishment that awaited those who did not release their wives and who ill- treated them. It was only after the advocate delivered his argument to him, in the form of a fifty-page document, that he agreed to grant her the divorce. The advocate came in to assist when her religious leaders could no longer assist her, leaving her with no other option. In her second divorce, Ayesha was more proactive in including lawyers when disputes arose. Instead of approaching religious leaders for guidance, as she did with her first marriage, Ayesha approached lawyers to assist in drafting a contract to determine how her marriage was going to proceed. Through her and her husband's lawyers, they negotiated an agreement stipulating that he will get help for his addiction, get regularly tested for drugs and get a job in order for the marriage to continue. Her husband wanted to move back into their home, which her lawyer thought was a fair condition, but Ayesha stood her ground:

> So, his lawyer says that he must move back in with me, I said: "No, no, no, no no!". He said: "But he wants to reconcile so he must move back.". I said: "No, he must stay there until he finds a job." They said: "Yes, but now you are working everything out for the

> children's sake.", I said: "No, I'm very sorry, he must stay there. I don't want him until he finds a job, I'm not looking after him.". Even my Lawyer said: "No but why are you being like that, you must support your husband.", I said: "No, I'm very sorry, for ten years I took his nonsense, he must stay there until he finds a job, I'm not looking after him.".

Here we see lawyers adopting the "reconciliation" approach, trying to make Ayesha's family stay together- a position Ayesha once heard from her religious leaders during her first marriage. Ayesha did not have any difficulties dissolving her second marriage legally, as it was registered, and she had an ante-nuptial contract. This meant that the legal consequences of the divorce were clear, she kept what she brought into the marriage and he kept what he brought to the marriage. Once her legal and religious divorces were complete, she went back to her lawyers to draft a maintenance plan for her children, who remained in her custody. Her ex-husband, however, did not comply with the maintenance order. She has stopped trying to enforce the maintenance order for her children because attorney's fees are too costly and because she is managing with the support of her father. According to Ayesha, unless you have connections and power, the law does not work for you. She believes that the responsibility lies with men to do what is right and refers to the story of one of the women in her support group to make her point:

> They got married when the husband and the wife never had money. And the wife stood with the husband for 30, 25 years and built his business or three four businesses, he had properties, and he doesn't want to give her a single cent. Not even maintenance, which is completely unfair. In God's eyes, in the South African court, in any religion because the woman that stood by you for so many years, and now you are wealthy, and you can't look after your four kids? Never seen you help your wife, never see you give her half, or even a quarter of your money, and you kick her to the curb and someone who doesn't have a degree or any clue of how to work or how to find work.

Whilst Ayesha calls into question the morality of the rich man who does not care for his wife and children and kicks his wife to the curb, the anecdote also aptly captures the problems with nonrecognition. Stories of Muslim women being divorced and left with no claim to the marital property or the wealth of their husbands that they helped build demonstrates the vulnerability that Muslim women in unregistered marriages are subject to in the absence of recognition.

Conclusion:

This chapter introduced the five participants of this study and shared their experiences of living within a religious legal system and a secular legal system. In the first section, the chapter demonstrated how legal nonrecognition can be tied to notions of legitimacy and illegitimacy causing both social and financial distress. This was shown in both Zakirah's inheritance dispute, and in Ruweida's divorce. The narratives of Femida and Ayesha in this section also illustrated the role that religious education and women's support groups play in assisting women navigate difficult divorces and difficult encounters with the religious system.

There was a shared perception that religious leaders do not think of women as their equals, resulting in abuses of power that do not reflect the true position of women in Islam. Ayesha was perhaps the most generous in her appraisal of the religious system, pointing to the ways in which maulanas have grown over the years, resulting in a better experience for her during her second divorce. Except for Femida, all the women were at one point told by their religious leaders to take their matters to attorneys. This is likely due to their inability to enforce their rulings, as in Fatima's case, or sometimes due to them not wanting to risk their financial support, as in Zakirah's case.

The final section illustrated instances of success and instances of abuse in the civil legal system. As Zakirah and Ruweida's cases show, legal proceedings, even when they are outside of court and between lawyers, are exceptionally expensive, slow, and may not lead to the desired outcome. This invokes the feeling that, as Ruweida poignantly stated, "there is no one for women". On the other hand, Ayesha experienced success working with an advocate to get her first divorce. Working between civil and religious law, the advocate pressured Ayesha's ex-husband into giving her a talaq. However, Ayesha has had to forfeit the expectation of maintenance for her children in her second marriage because the cost of enforcing her maintenance order would be too high. The existing problems within the civil legal system are a reminder that legislation recognising Muslim marriage will fall within a highly inaccessible civil legal system, something that needs to be considered when developing a response to Muslim women's lived experiences.

Chapter 6: Conclusion

This research has sought to contribute to an understanding of both the challenges and the opportunities that have arisen from the nonrecognition of Muslim marriage in South Africa. It does this through the experiences of legal practitioners and Muslim women resolving MPL related matters. The narratives in this research are varied. In documenting them, the research adds to an understanding of a growing localised Muslim legal practice, to empirical research on the lived experiences of Muslim women in South Africa, and to debates around legal pluralism and multiculturalism beyond.

Chapter 1 laid the context for the research by introducing the current governance landscape for Muslim marriages, explaining that in the absence of recognition, the governance of unregistered Muslim marriage rests with religious bodies unless individuals take their cases to civil courts. The chapter further described the local historical context and how recognition has always been a contested struggle over the meaning and interpretation of Islam. This struggle has been broadly described as a struggle between progressive and traditional sectors of the Muslim community. The chapter provided an overview of how the apartheid and ANC governments responded to calls from the Muslim community to recognise Muslim marriages. Chapter 1 ended with a discussion of the methodology used in this research, explaining how narrative based research in socio-legal studies can assist policy makers with comprehending complex legal subjects.

Chapter 2 situated this project within the following sets of debates: multiculturalism, gender and law reform, legal pluralism and the recognition of Muslim marriage, and Muslim women in South Africa. The first part of this chapter discussed how women in minority communities often find themselves bearing the brunt of misrecognition and explored how claims to a homogenised communal identity are always contested. This raises questions on how the power of representatives of a community is solidified through interactions with the state to the detriment of women and minorities within the community. In the context of this research, these differences were most noticeable in the establishment of the Muslim Personal Law Board and continued into every subsequent discussion on the nature and content of proposed legislation.

Building on this contextual setting, Chapter 3 explored the diversity of opinions and expectations of the state in the law reform process. The chapter outlined the participant's disappointment with both the state and the Muslim community, and their respective roles in delaying the enactment of legislation. It discussed the various strategies used by practitioners to ensure that: firstly, the state responded to calls for recognition; secondly, that Muslim women were educated on their Islamic and citizenry rights; and thirdly, that the voices and experiences of Muslim women and practitioners were represented in the law-making process. The chapter also begins to map specific forms of community organising in response to the Muslim Marriages Bill and how the public participation process became a terrain for ideological battle on the content and interpretation of MPL. Given that it is still uncertain when recognition will be given to Muslim marriage, this chapter laid the foundation for a continued discussion on "what happens in the interim"?

Chapter 4 sought to answer this question through mapping the strategies adopted by practitioners to protect Muslim women's rights in the absence of legislation, or state 'nonrecognition'. Combining the use of existing civil protections, the victories of strategic litigation, and for some practitioners, knowledge of Islamic law, they were able to at times provide some relief to their clients. Practitioners working between Islamic law and the civil legal system were labelled as non-believers for their contextual approach to the application of MPL. However, understanding their experiences and approaches are vital in the creation of response to nonrecognition that harmonises Islamic law and the South African constitution. Importantly, this chapter showed how justice can be made available to women at "multiple legal sites" (Gouws, 2016) in a system of legal pluralism, whilst also acknowledging the limitations in everyday practice of not having a regulatory framework for Muslim marriage. This chapter also began to discuss the poor state of access to justice, which puts pressure on the work of practitioners who have limited resources to decide which cases to pursue. This and the women participant's experiences raised questions about how incorporating MPL into the state's regulatory legal system will benefit those for whom the law is too expensive and inaccessible.

Chapter 5 looked at the experiences of individual Muslim women pursuing claims for a range of entitlements, including inheritance, post-divorce maintenance and a division of assets, and maintenance for children. It provided snapshots of women's experiences of both the civil and religious systems. Notably, it showed how due to the rulings of religious judicial bodies lacking enforceability, religious bodies advised women to seek help from attorneys. When the

participants were unable to find relief in the religious system, they looked to the civil legal system to access their rights. For the women in this research, the outcomes of the civil legal system were limited, resulting in them not being able to access their rights through the religious legal system *and* the civil legal system. As Ruweida expressed, this has led to a feeling that "there is no one for women". However, the experiences of women in enforcing basic court orders for child maintenance suggests that state recognition of Muslim marriage will not resolve all the problems that Muslim women face. Legal recognition does not guarantee women better outcomes, as South African feminists have shown through research on the Recognition of Customary Act, the Domestic Violence Act, and other key pieces of legislation aimed at protecting women's rights. The impact of the law is limited by socio-economic factors, such as class and location that prevent women from accessing their rights in a highly unequal legal system. Legal proceedings are also slow and expensive which, in addition to the financial implications, take a physical and emotional toll on litigants who may not get the desired outcome from the proceedings.

What is clear from the WLC judgements in 2018 and 2020 is that the state does have a responsibility to "respect, protect, promote and fulfil" the constitutional rights of Muslim women through the recognition of Muslim marriages. Despite the limitations of the law, recognition is "neither wrong nor insignificant" (Albertyn, 2011, p.152). The law can provide strategic opportunities, for those who can, to access their rights, and can be an important normative tool for organising outside of the law.

It has been 22 years since the South African Law Reform Commission began its investigation into the recognition of Muslim marriage. Without the efforts of organisations like the Women's Legal Centre to hold the state accountable to its obligations, it appears as though progress would not have been made towards recognition. Furthermore, the work of individuals like Advocate Jamila, and organisations like the Coalition for Muslim Women, are critical for ensuring that legislation reflects a gender-just interpretation of Islam, without which, women will continue to be suffer the harms of gender inequality. For example, speaking on the gender-neutral provisions of the MMB (such as the default property regime and the opt out clause), Rashida Manjoo writes 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 effectively use such provisions to protect their interests" (Manjoo, 2019, p.297).

It is in this context of a highly unequal society in which "women are generally of a lower socio-economic status", that this research contributes to an understanding of the harms of nonrecognition for Muslim women whilst questioning the ability of the law to ensure gender justice (as several feminist scholars do). The experiences of women and practitioners in this research illustrate the limitations of the law in ensuring that rights are realised for Muslim women and reflect the dilemmas of feminists engaging with the law. The context of inequality further raises the question of how justice is found for Muslim women whilst Muslim marriages remain unrecognised. This research documented the innovative response of practitioners who worked across laws, religious and civil legal systems, and extra-legal strategies to protect the rights of Muslim women. Lastly, this research showed how gender inequality and power still produce applications of religious law that do not reflect the personal interpretations of the women in this research. Their struggle to access their rights and their voices of objection to patriarchal interpretations of Islam are powerful pointers to what a gender-just practice of Muslim Personal Law could look like in South Africa.

References

- Abdullah, S. (2012). Social Work, Family Welfare, and Muslim Personal Law in South Africa. Journal of Social Welfare & Family Law. 34 (3), (pp. 315-323)
- Abduroaf, M. Moosa, N. Faskh (divorce)and intestate succession in Islamic and South African law: Impact of the watershed judgement in Hassam v Jacobs and the Muslim Marriages Bill. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 329-359.)
- Abrahams, Z. (2011). *Perceptions of Empowerment: A study of Muslim women living in the greater Cape Town Metropole* (Doctoral dissertation, University of the Western Cape).
- Abrahams-Fayker, H. (2019). South African Engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages. . In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 252-272.)
- Abu-Lughod, L. (2002). Do Muslim women really need saving? Anthropological reflections on cultural relativism and its others. *American anthropologist*, *104*(3), (pp.783-790)
- Agnes, F. (2012). From Shahbano to Kausar Bano: contextualizing the 'Muslim women' within a communalized polity. *South Asian Feminisms*, (pp.33-53)
- Albertyn, C. (2005) Defending and securing rights through law: Feminism, law and the courts in South Africa, *Politikon: South African Journal of Political Studies*, 32(2), (pp.217-237)
- Albertyn, C. (2011). Law, Gender and Inequality in South Africa. *Oxford Development Studies*. 39 (2), (pp.139-162)
- Albertyn, C. (2013). Religion, custom and gender: Marital law reform in South Africa. *International Journal of Law in Context*, 9(3), (pp.386-410)
- Al-Hibri, A, Y. (1999). Is Western Patriarchal Feminism Good for Third-World/Minority Women? In Cohen, J and Howard, M (Eds), *Is Multiculturalism Bad for Women? With Responses*, (pp. 43-46).
- Al Jama-ah. (2020)" 'Never Married' on Death Certificates of Muslims is Insulting" [Online]. Available at: https://www.aljama.co.za/never-married-on-death-certificates-of-muslims-is-insulting/ (Accessed: 30 September 2020)

- Allie, S. (2019). 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 (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp. 26-42)
- Amien, W. (2010). A South African case study for the recognition and regulation of Muslim family law in a minority Muslim secular context. *International journal of Law, Policy and the Family*, 24(3), (pp. 361-396)
- Amien, W. Leatt, D, A. (2014). Legislating Religious Freedom: An Example of Muslim Marriages in South Africa. Maryland Journal of International Law. 29(1). (pp.505-547).
- Amien, W. (2016). South African women's legal experiences of Muslim personal law. *Religion as Empowerment: Global legal perspectives*, (pp.53-78)
- Amien, W. (2019). The gendered benefits and costs of legal pluralism for Muslim family law in South Africa. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 94-111)
- Artz, L. Smythe, D. (2007). Feminism *vs*. the State?: A Decade of Sexual Offences Law Reform in South Africa. *Agenda*. 21 (74), (pp.6-18)
- Asmal, F. (2015). *Demystifying the Muslimah: changing subjectivities, civic engagement and public participation of Muslim woman in contemporary South Africa* (University of KwaZulu-Natal, Masters Dissertation).
- Baderoon, G. (2014). Regarding Muslims: From Slavery to Post-Apartheid. Wits University Press.
- Basu, S. (2015). The Trouble with Marriage: Feminists Confront Law and Violence in India (Vol. 1). University of California Press.
- Bell, G. (2004). "Islam is spreading among black South Africans". *IOL*. 14 November 20004. Retrieved from: https://www.iol.co.za/news/south-africa/islam-is-spreading-among-black-south-africans-226939.
- Bennet, J. and Tamale, S. (2011). Legal Voice: Challenges and Prospects in the Documentation of African legal feminism. *Feminist Africa 15 Legal Voice*.
- Bhabha, H, K. (1999). Liberalism's Sacred Cow. In Cohen, J and Howard, M (Eds), *Is Multiculturalism Bad for Women? With Responses*, (pp. 43-46)

- Blumberg, M. (2011). Lifting the Veil, Breaking Silences: Muslim Women in South Africa Interrogate Multiple Marginalities. *Contemporary Theatre Review*, *21*(1), (pp. 20-34)
- Bonthuys, E. (2014). Domestic Violence and Gendered Socio-Economic Rights: An Agenda for Research and Activism?, *South African Journal on Human Rights*, 30(1), (pp. 111-133)
- Bonthuys, E. (2016). A patchwork of marriages: The legal relevance of marriage in a plural legal system. Oñati Socio-Legal Series, 6(6).
- Bulbulia, M, F. (2019). The Proprietary Consequences of Muslim Marriages and Contractual Capacity of Spouses. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp. 49-67)
- Button, Himonga and Moore (2016) South Africa's System of Dispute Resolution Forums: The Role of the Family and the State in Customary Marriage Dissolution, *Journal of Southern African Studies*, 42(2), (pp.299-316)
- Bux, Z. (2004). *The changing roles of Muslim women in South Africa* (Masters dissertation, University of KwaZulu-Natal).
- Cachalia, F. (2019). Citizenship, Muslim Family Law and a Future South African Constitution. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp.43-48). Cape Town. Juta and Company (Pty) Ltd
- Cassim, F. Dadoo, Y. (2019). Muslim personal law in SA: Achieving a balancing of interests. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 49-67)
- Cresswell and Poth. (2018). Qualitative Inquiry and Research Design Choosing among Five Approaches. 4th Edition, SAGE Publications, Inc., Thousand Oaks.
- Dahl, T. S. (1986). Taking women as a starting point: Building women's law. International Journal of the Sociology of Law, (pp.239-247)
- Davids, L. (2003). Positioning Muslim women: A feminist narrative analysis. *Annual Review of Islam in South Africa*, *6*(December), (pp. 35-40)
- Davids, L. (2004). Muslim women in Cape Town: a feminist narrative analysis (Masters dissertation, University of Cape Town).

- Dangor, S. (2001). Historical perspective, current literature and an opinion survey among Muslim women in contemporary South Africa: A case study. *Journal of Muslim Minority Affairs*, *21*(1), (pp. 109-129)
- Dangor, S., Moosa, N. (2019). An Introduction to Muslim Personal law in South Africa: Past to Present. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp.1-25). Cape Town. Juta and Company (Pty) Ltd
- Department of Home Affairs. "Preparing to get married" Accessed on 6th of January 2021. Retrieved from: http://www.dha.gov.za/index.php/civic-services/marriagecertificates#:~:text=Consent%20to%20the%20marriage%20of,to%20obtain%20a%20marriage%20certificate.
- Department of Justice and Constitutional Development. (2011) Muslim Marriages Bill.
- Department of Justice. 'Government Appeals Western Cape High Court Judgement on Muslim Marriages'. 22 October 2018. Retrieved from: https://www.gov.za/speeches/muslim-marriages-22-oct-2018-0000
- Domingo, W. (2005). Marriage and Divorce: Opportunities and Challenges Facing South African Muslim Women with the Recognition of Muslim Personal Law. *Agenda Special Focus: Gender, Culture and Rights*, (pp. 68-77)
- Domingo, W. (2019). Muslim personal law in South Africa and women's religious rights and freedoms. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp.309-328). Cape Town. Juta and Company (Pty) Ltd
- Domingo, W. (2015). The Case of the Recognition of Muslim Personal Law in South Africa: Colonialism, Apartheid and Constitutional Democracy. In Possami, A, Richardson, J.T, Turner, B.S. (Eds) *The Sociology of Shari'a: Case Studies from around the World*. (pp.175- 195). Switzerland. Springer International Publishing.
- Du Toit, L. (2013) In the Name of What? Defusing the Rights-Culture Debate by Revisiting the Universals of Both Rights and Culture. In Gouws, A and Stasiulis, D (Eds). *Gender and Multiculturalism: North- South Perspectives*, (pp. 15-34)
- Ebrahim, S. (2018). "The Politics of the Other: Being a Black Muslim in South Africa". *Daily Vox*. 22 March 2018. Retrieved from:

https://www.thedailyvox.co.za/politics-of-the-other-being-black-muslim-in-south-africa-shaazia-ebrahim/

- Esack, F. (1992). Liberation, Human Rights, Gender and Islamic Law: The South African Case. In Lindholm, T. and Vogt, K. (Eds) *Islamic Law and Reform and Human Rights: Challenges and Rejoinders*. Nordic Human Rights Publications, Copehagen, (pp. 163- 196)
- Ewick, P. Silbey, S. (1995). Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative. *Law & Society Review* , Vol. 29, No. 2 (1995), (pp. 197-226)
- Fraser, N., Honneth, A., & Golb, J. (2003). *Redistribution or recognition?: a political-philosophical exchange*. Verso.
- Fraser, N. (2007). Feminist politics in the age of recognition: A two-dimensional approach to gender justice. *Studies in Social Justice*, *1*(1), (pp. 23-35)
- Gebauer, M. (2019). *Black Islam South Africa: Religious Territoriality, Conversion, and the Transgression of Orderly Indigeneity* (Doctoral dissertation, Johannes-Gutenberg Universität Mainz).
- Gihwala,H. May, C. Samaai, S. Equal Rights and Recognition: Extending the Protection in the Wills Act to Women in Polygynous Muslim Marriages. . In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 298-308)
- Gouws, A. (2014). Multiculturalism in South Africa: Dislodging the Binary between Universal Human Rights and Culture/Tradition. In Gouws, A and Stasiulis, D (Eds). *Gender and Multiculturalsim: North- South Perspectives*, (pp. 35-56)
- Gouws, A. Stasiulis, D. (2014). Introduction: Gender and Multiculturalism- Dislodging the Binary Between Universal Human Rights and Culture/Tradition: North-South Perspectives. In Gouws, A and Stasiulis, D (Eds). *Gender and Multiculturalsim: North- South Perspectives.* (pp.1-14)
- Gontsana, M., Postman, Z. 'Muslim Marriages Under Court Scrutiny'. *Groundup.* 28 August 2018. Retrieved from https://www.groundup.org.za/article/muslim-marriages-under-court-scrutiny/
- Greenbaum, L. (2020) Access to Justice for all: a reality or unfulfilled expectations?. *De Jure Law Journal, (*pp. 248-266)

- Hager, L. (2020). The Dissolution of Universal Partnerships in South African Law: Lessons to be learnt from Botswana, Zimbabwe and Namibia. *De Jure Law Journal*, (pp. 123-139)
- Hassem, Z. (2008). *An exploration of women's groups as a tool of empowerment for Muslim women in South Africa* (Masters Dissertation, University of the Witwatersrand).
- Himmonga and Moore (2017). Centring the intersection of race, class, and gender when a customary marriage ends. *Agenda*, 31(1), (pp.104-115)
- Himmonga, C. Moore, E. (2018). Living Customary Law and Families in South Africa. *Children, Families and the State*, 61.
- Hoel, N., Kagee, A., & Shaikh, S. D. (2011). South African Muslim women: Sexuality, marriage and reproductive choices. *Journal for Islamic studies*, *31*(1), (pp. 96-124)
- Hoel, N. (2012) Engaging religious leaders: South African Muslim women's experiences in matters pertaining to divorce initiatives. *Social Dynamics*, 38:2, (pp. 184-200)
- Isaacs-Martin, W. (2014). Muslim Women and Human Rights: Does Political Transformation Equal Social Transformation? In Gouws, A and Stasiulis, D (Eds). *Gender and Multiculturalism: North- South Perspectives*, (pp.113-132)
- Ismail, F. (2018). "MPL Network: Centering Women's Experiences of Islamic Law". The Daily Vox, 17 April 2018. Retrieved from: https://www.thedailyvox.co.za/the-mpl-network-centering-womens-experiences-of-islamic-law-farhana-ismail/
- Jeenah, N. E. (2006). The national liberation struggle and Islamic feminisms in South Africa. *In Women's studies international forum* 29(1), (pp. 27-41). Pergamon.
- Jeppe, S. Vahed, G. (2005). Multiple Communities: Muslims in post-apartheid South Africa. In *State of the Nation: South Africa 2004-2005*, (pp.252- 286)
- Jones-Pauly, C. Tuqan, A, D. (2011). *Women under Islam: gender, justice and the politics of Islamic law*. Tauris.
- Kabarnee, S. Moosa, N. (2004). An exploration of mata'a maintenance in anticipation of the recognition of Muslim marriages in South Africa:(Re-) opening a veritable Pandora's box?. *Law, Democracy & Development*, *8*(2), (pp. 267-288)
- Kumar, R. (2019). *Research methodology: A step-by-step guide for beginners*. Sage Publications Limited.

- Lesch, E. Parker, M. (2019). “We are Equal”! Gender Constructions in a Group of Middle-Class South African Muslim Couples. *Gender Issues, 36*(1), (pp. 23-45)
- Luttrel, W. (2005). “Good Enough” Methods for Life-Story Analysis. In Quin (Eds) Finding Culture in Talk: A Collection of Methods. Palgrave Macmillan, New York. (pp.243-268)
- Mahida, E.M. (1993). History of Muslims in South Africa: A Chronology. Arabic Study Circle.
- Mahmood, S. (2004). Politics of piety: The Islamic revival and the feminist subject. Princeton University Press.
- Manjoo, R. (2019). The Recognition of Muslim Marriages in South Africa: Implications for Women’s Human Rights. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp.43-48). Cape Town. Juta and Company (Pty) Ltd
- Mankekar, P. (1995). ’to Whom Does Ameena Belong?: Towards a Feminist Analysis of Childhood and Nationhood in Postcolonial India’.
- May, C. (2020) “The fight for equality in domestic relationships goes to the courts”. *Mail and Guadian*, 8 July 2020. Retrieved from: https://mg.co.za/opinion/2020-07-08-the-fight-for-equality-in-domestic-relationships-goes-to-the-courts/
- May, C. Samaai, S. A marriage of laws: The recognition of Islamic marriages through our courts. . In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 171-177)
- Megannon, V. (2020). Working Paper No. 450: Practices of inheritance amongst Muslim widows in Cape Town. Centre for Social Science Research. University of Cape Town.
- Menon, N. (2004). *Recovering subversion: Feminist politics beyond the law*. University of Illinois Press.
- Mohamed, S.I. (2006). *DA’WAH: Muslim women’s contribution to the reconstruction of the South African society through entrepreneurial and religious efforts*. (Doctoral Thesis, University of KwaZulu-Natal)
- Moley N.I. “Equality for all religions and cultures in the South African legal system”. Derebus, 1 July 2018. Retrieved from: http://www.derebus.org.za/equality-for-all-religions-and-cultures-in-the-south-african-legal-system/

- Moosa, Ebrahim. (1996). Prospects for Muslim law in South Africa: A history and recent developments. *Yearbook of Islamic and Middle Eastern Law Online*, *3*(1), 130-155.
- Moosa, Essa. (2019). Muslim Marriages Bill- Mapping the socio-ethico-legal challenges facing South African women. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. pp.309-328.
- Moosa, N. (1995). Muslim Personal Law- To be or not to be?. *Stellenbosch Law Review*. (pp. 417-424).
- Moosa, N. (1998). The interim and final constitutions and Muslim personal law: implications for South African Muslim women. *Stellenbosch Law Review.* (pp. 196-206)
- Moosa, N. (2006). 'Women, gender and child marriage: Sub Saharan Africa, Overview' in Joseph, S. (Eds.). *Encyclopedia of Women & Islamic Cultures: family, body, sexuality and health* (Vol. 3). Brill. (pp. 61-63)
- Musawah (2011). CEDAW and Muslim Family Laws: In search of Common Ground. Available at: https://www.musawah.org/resources/
- Musawah (2019). Positive Developments in Muslim Family Laws. Available at: https://www.musawah.org/resources/
- Navsa, M, S. (2019). Muslim Personal Law- An Update. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. (pp.43-48). Cape Town. Juta and Company (Pty) Ltd
- Nel, G. (2018). "Decoding s2(1)(a) and (b) of the Contingency Fees Act. *De Rebus*, 1 July 2018. Retrieved from: http://www.derebus.org.za/decoding-s-21a-and-b-of-the-contingency-fees-act/
- Nhlapo, T. (2017). Customary law in post-apartheid South Africa:constitutional confrontations in culture, gender and 'living law'. *South African Journal on Human* Rights, 33(1), (pp. 1-24)
- Okin, S. M. (1999). *Is multiculturalism bad for women?*. Princeton University Press.
- Oppermann, B. (2006). The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States. *Hastings Women's LJ, (p.*65)

- Patel, A, D. (2018). Feminism is Muslim Women Talking Back. In Thorpe, J (Ed), *Feminism Is: South Africans Speak Their Truth*, (pp.92-97). Cape Town. Kwela Books.
- Patel, K. 'All the women in me are tired'. *The Mail and Guardian*. 8 June 2018. Retrieved from: https://mg.co.za/article/2018-06-08-00-all-the-women-in-me-are-tired
- Pathak, Z. Rajan, R. S. (1989). Shahbano. Signs: *Journal of Women in Culture and Society*, 14(3), (pp. 558-582)
- Rajan, R. S. (2000). Women between community and state: Some implications of the uniform civil code debates in India. *Social Text*, 18(4), (pp. 55-82)
- Rautenbach, C. (1999). Muslim personal law and the meaning of" law" in the South African and Indian constitutions. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, *2*(2).
- Rautenbach, C. (2004). Islamic marriages in South Africa: Quo vadimus?. *Koers: Bulletin for Christian Scholarship*, *69*(1), (p.p. 121-152).
- Rautenbach, C. (2010). Deep legal pluralism in South Africa: Judicial accommodation of non-state law. *The Journal of Legal Pluralism and Unofficial Law*, *42*(60), (p.p. 143-177).
- Rawoot, I. "Muslim Marriages Bill causes rift amongst Muslims". *Mail and Guardian*, 18 March 2011. Retrieved from: https://mg.co.za/article/2011-03-18-marriage-bill-causes-rift-among-muslims/
- Recognition of Muslim Marriages Forum. (2011). Comments to the Minister of Justice and Constitutional Development. Retrieved from : https://www.academia.edu/630724/Comments_to_the_Minister_of_Justice_and_Constitutional_Development_on_the_Muslim_Marriages_Bill
- Sebola, M, P. (2016). Public Participation in South Africa's Policy Decision- Making Process: The Mass and the Elite Choices. *International Public Administration Review, 14*(1), (pp. 55–73).
- Seedat, F. (2019). Determining the application of a system of Muslim personal law in South Africa. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp.178-189).

- Sezgin, Y. (2010). How to Integrate Universal Human Rights into Customary and Religious Legal Systems?. *The Journal of Legal Pluralism and Unofficial Law*, *42*(60), 5-40.
- Sezgin, Y. (2012) The Problems and Pitfalls of Women Challenging Muslim Family Laws in India and Israel. In Hélie, A and Hoodfar, H. (Eds.). *Sexuality in Muslim contexts: Restrictions and resistance*. (pp. 98-123) Zed Books Ltd.
- Shabodien, R. (1995). Muslim Personal Law—Progressive or Conservative? *Agenda*, *11*(25), (pp. 16-20)
- Shabodien, R. (2010). Making Haste Slowly: Legislating Muslim Marriages in South Africa. In Abdulkader,T. (ed.) *Muslim Marriages in South Africa: From Constitution to Legislation: Papers Presented At Muslim Marriages Workshop, Saturday 22 My 2010, Capetonian Hotel*. Cape Town: Centre for Contemporary Islam, UCT, 2011
- Shachar, A. (2009). What We Owe Women: The View from Multicultural Feminism.
- Shachar, A. (2000). On Citizenship and Multicultural Vulnerability. *Political Theory*, 28(1), (pp. 64-89)
- Singerman, D. (2005). Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism and Coalition Politics. In Hefner, R. W (Eds). *Remaking Muslim Politics: Pluralism, Contestatio*n. (pp.161-188). Princeton Studies in Muslim Politics.
- Solanki, G. (2013). Beyond the limitations of the impasse: Feminism, multiculturalism, and legal reforms in religious family laws in India. *Politikon*, *40*(1), 83-111.
- South African Law Commission. (2000). Project 59: Islamic Marriages and Related Matters. Retrieved from: https://www.justice.gov.za/salrc/ipapers/ip15_prj59_2000.pdf
- South African Law Commission. (2019). Project 144: Single Marriage Statute. Retrieved from: justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf
- Tayob, A. (2003). Muslim Personal Law–Women's Experiences And Perspectives'. *Annual Review of Islam in South Africa*, 6, (pp. 30-34).
- Toffar, A.K. Muslim Marriages Bill impasse- an interim way forward. In Dangor, S and Moosa, N (Eds), *Muslim Personal Law in South Africa: Evolution and Future Status*. Cape Town. Juta and Company (Pty) Ltd. (pp. 401-404).
- Vahed, G. (2000). Indian Muslims in South Africa, 1860-2000. *Alternation*. 7(2), (pp.67-98).

- Vahed, G. (2003). Muslim Marriages in South Africa: The limitations and legacy of the Indian Relief Act of 1914. *Journal of Natal and Zulu history*, *21*(1), (pp.1-40).
- Vahed, G. Waetjen, T. (2010). *Gender, modernity & Indian delights: the women's cultural group of Durban, 1954-2010*. HSRC Press.
- Van Niekerk, G, J. (2010). Legal Pluralism. In Bekker, J. C., Rautenbach, C., and Goolam, N. M. (Eds) *Introduction to legal pluralism in South Africa*. Durban, LexisNexis.
- Women's Legal Centre. 'MEDIA STATEMENT: Update in respect of the Recognition of Muslim Marriages Case (Women's Legal Centre v The President and Others)'. 24 May 2019. Retrieved from: https://www.wlce.co.za/category/media-statement/
- Women's Legal Centre. (2010). Annual Report. Retrieved from: https://wlce.co.za/resources/
- Women's Legal Centre. (2019). 20th Anniversary Publication. Retrieved from: http://www.wlce.co.za/wp-content/uploads/2019/08/Final-WLC-publication-20-year-v6-email-version.pdf
- Women's Legal Centre. (n.d). About the Women's Legal Centre. Retrieved from: https://wlce.co.za/about-us/
- Zaki, H. A. (2017). Law, Culture, and Mobilization: Legal Pluralism and Women's Access to Divorce in Egypt. *Muslim World Journal of Human Rights*, *14*(1), (pp.1-25)

Legislation

- Civil Union Act 17 of 2006
- Marriage Act 25 of 1961
- Recognition of Customary Marriages Act 120 of 1998
- South African Law Reform Commission Act (previously South African Law Commission Act) 19 of 1973

Case Law

- Ryland v Edros 1997 (2) SA 690 (C)
- Amod v Multilateral Motor Vehicle Accidents Fund (CCT4/98) [1998] ZACC 11; 1998 (4) SA 753; 1998 (10) BCLR 1207 (27 August 1998)

- Daniels v Campbell and Others (CCT 40/ 03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004)
- Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC) ; 2009 (5) SA 572 (CC) (15 July 2009)
- Butters v Mncora (419/13) [2014] ZASCA 86; [2014] 3 All SA 259 (SCA) (30 May 2014)
- Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bignham N.O. and Others, Esau v Esau and Others (22481/2014, 4466/2013, 13877/2015) [2018] ZAWCHC 109; [2018] 4 All SA 551 (WCC); 2018 (6) SA 598 (WCC) (31 August 2018)
- President of the RSA and Another v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others (612/19) [2020] ZASCA 177; [2021] 1 All SA 802 (SCA) (18 December 2020)