

The Shari'ah and the Secular: Shifting Paradigms in Muslim Personal Law in Post-Apartheid South Africa and Prospects for Democratic Change

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Abstract

This article explores the debate of the application of *sharī'ah* law in secular societies in the context of South African society. In South Africa, the government is seeking to implement Muslim Personal Law (MPL), for which draft legislation exists, through its secular courts to support post-apartheid redress in the Muslim community. Historically, because of a lack of legal status of Muslim marriages in the country, Muslim clergy ('*ulamā*') regulated family life through the practice of MPL parallel to secular law, a situation that remains current. The clergy's decision-making is Islamically sanctioned but not legally binding and together with ineffective services, the result has been significant problems which affect mainly women in the community. The government's initiative is an attempt to deal with these circumstances, and this article assesses this goal by contrasting MPL services provided by the clergy with the proposed legislation for change. It concludes that the proposed legislation in its current form is not sufficient to ensure post-apartheid redress in the Muslim community, especially for women, and that efficiency in this area would require decisive changes that address the standard of MPL services by the clergy to achieve the legislation's desired outcomes.

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Equality and rights for Muslim women whose lives are restricted in patriarchal family and community contexts are central to debates on Islam. An emerging enquiry on the application of *shari‘ah* law in secular societies in the form of Muslim Personal Law (MPL), which regulates Muslim family life, is influencing this debate anew. Canada, the United States and the United Kingdom offer varied examples in this regard. In Canada, the Premier of Ontario recently banned faith-based arbitration, as Muslim leaders sought to secure legal endorsement for *shari‘ah* arbitration tribunals and their outcomes.² In the United States, American courts have been confronted with a number of situations which have necessitated deliberation on MPL³ while the practice of MPL through the mainstream legal system is a developing debate in the United Kingdom.⁴

In South Africa, similar circumstances prevail. Here MPL is entangled in the goals of the new government to facilitate redress for communities who in the past were the target of apartheid policies. The government in consultation with relevant stakeholders is seeking to implement MPL through the country’s secular courts to provide a legal framework to regulate Muslim family matters including marriage,

¹ I would like to thank Rashida Manjoo from the Harvard University Human Rights Program and Honorary Resident Associate at the University of Cape Town Law School for her comments and assistance during the course of this work.

² The Pluralism Project, *International News: Cross Reference-Islamic Law in Canada* (2006) <http://www.pluralism.org/news/intl/index.php?xref=Islamic+Law+in+Canada&sort=ASC> (last visited June 2, 2006).

³ R. Freedland, *Islamic Personal Law in American Courts*, in *BEYOND THE EXOTIC: WOMEN’S HISTORIES IN ISLAMIC SOCIETIES* 227 (Amira El-Azhary Sonbol ed., 2005).

⁴ Ihsan Yilmaz, *Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law*, 21 *J. MUSLIM MINORITY AFF.* 297, 299 (2001).

polygyny, divorce, maintenance, child custody, and to a limited extent, succession.

Proposed legislation (hereafter legislation) for this initiative is currently in draft form as *South Africa Law Reform Commission, Project 59: Islamic Marriages and Related Matters*.⁵

South Africa's legislation on MPL is targeted toward the country's particular context of apartheid discrimination against the Muslim community through the non-recognition of Muslim marriages. During colonial and apartheid South Africa, marriages contracted under Islamic law were considered null and void, circumstances which were challenged for the first time only in 1999.⁶ Against this background,⁷ clergy regulated Muslim family life through the practice of MPL as an unofficial community code parallel to secular law. In the absence of a legally binding framework, however, it was always extremely difficult to enforce the decisions made regarding Muslim marriage. Together with an unregulated service provided by the clergy, the result has been alarming effects on the community, manifesting in wide-scale family disintegration and especially affecting women within the poorer sectors of the Muslim community, circumstances

⁵ The commission's proposal on succession in the legislation is for the provision of interim relief for Muslim spouses by extending the definition of "spouse" in the Intestate Succession Act No. 81 of 1987 to include "spouse shall include a spouse of a Muslim Marriage recognized in terms of the Muslim Marriages Act, 20.., and shall otherwise include the spouse of a deceased person in a union recognized as a marriage in accordance with the tenets of any religion...". A related amendment is in the Maintenance of Surviving Spouses Act No. 27 of 1990, which states "Marriage shall include an Islamic marriage recognized in terms of the Muslim Marriages Act, 20.., and shall otherwise include a union recognized as a marriage in accordance with the tenets of any religion". South Africa Law Reform Commission, *Project 59: Islamic Marriages and Related Matters*, July 2003, at 132 Ann. A, http://www.doj.gov.za/salrc/reports/r_prj59_2003jul.pdf

⁶ K. Govender & J. Kollapen, *Constitutional Law Case Summaries* (1999) http://www.sahrc.org.za/constitutional_court_judgements.pdf.

⁷ In a decisive case, *Amod v Multilateral Motor Vehicle Accidents Fund*, 1999 (4) SA 1319 (SCA), a South African court for the first time recognized a Muslim marriage insofar as the court recognized that there was a *de facto* duty of support in a *de facto* monogamous union rather than the marriage *per se*, in a widow's claim to damages after the death of her husband in a motor vehicle accident.

which continue to the present. South Africa's legislation on MPL is an attempt to address these conditions by providing a legal framework for Muslim marriages and its related matters, and accordingly support post-apartheid democratic change by advancing redress for Muslims and the rights of Muslim women in the community.

This article examines the government's proposed plan on MPL as a means to achieve this end. As such, it contrasts current MPL service provision in South Africa with corresponding aspects in the proposed legislation to assess its value as an alternative to the clergy's services and as a means to improve the position of Muslim women in the country. The basis of this analysis, in respect of the former, is the findings of research conducted as part of a study on Islamic Counseling and Nation-building in South Africa, on MPL practices at one of South Africa's largest Islamic clerical organisations, the Muslim Judicial Council (MJC).⁸ The government's proposed legislation on Muslim marriages provides the text for analysis in respect of the latter. To offset this debate a brief historical overview of the Muslim community and the initial practice of MPL in South Africa to its current practice as a formal service of the MJC follows.

⁸ S. Abdullah, *Multicultural Social Intervention and Nation-Building in South Africa: The Role of Islamic Counselling and Psychotherapy* (2002) (unpublished Ph.D. Dissertation, University of Cape Town) (on file with author). The MJC is located in the Western Cape, one of South Africa's nine provinces, and has one central office whose service spans the province. This study therefore has a particular demographic focus. However, MPL service provision is essentially a practice of the Muslim clergy and an important channel through which they negotiate their role and power in Muslim society. In addition, they employ a common interventionist approach based on Islamic law and therefore, although this study concentrates on the Western Cape, wider applicability in this practice in South Africa and elsewhere can be discerned; instances of such convergence are noted in the text.

A Historical Overview of the Muslim Community in South Africa

The Muslim community is one of many minority groups in South Africa and has been present in the country for close to three hundred and fifty years. They are a diverse, multicultural group of people bound as a community by Islam and according to the 2001 census total 654,064 in a population estimate of 44.8 million people.⁹ Within the community, popular group distinctions of “Cape Malay”, “Indians”, “Zanzibaris”, and “African Muslims” exist; categories which developed alongside and as an outcome of apartheid racial categorisation of the population into “Black”, “White”, “Indian” and “Coloured” groups. As the history of the community shows, however, the diversity of the community transcends this narrow categorization.

The arrival of Muslims in South Africa is located in colonialism and slavery, and its course between Southeast Asia and the tip of Africa. During the 17th century, the Dutch, who were present in South East Asia, an area with a significant Islamic presence, colonised the Cape. Through a concomitant slave trade, they acquired slaves from what was then known as the Malay Archipelago, which included Malaysia and Indonesia and its estimated 1300 islands, as well as from parts of India, and settled them in the Cape. At the same time, the Cape was also a penal colony for prisoners and political exiles who resisted the Dutch in Southeast Asia and who were then banished for incarceration or to serve sentences of hard labour at various outposts in the region.¹⁰

⁹ Statistics South Africa, *Census 2001 Primary Tables South Africa: Census 1996 and 2001 compared*, <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf> (last visited June 2, 2006).

¹⁰ F. BRADLOW & M. CAIRNS, *THE EARLY CAPE MUSLIMS: A STUDY OF THEIR MOSQUES, GENEALOGY AND ORIGINS* 83 (1978); S. Dangor, *The Expression of Islam in South Africa*, 17 *J. MUSLIM MINORITY AFF.* 141,

The South African Muslim community emerged from these people, and the earliest group was referred to as the *Mardykens*. The *Mardykens* arrived in the Cape in 1658 from the Southern Moluccan Islands as a labour and military force to protect the Dutch settlement from resistance by the country's indigenous communities. From this time, the Muslim community developed through various slave arrivals into the country, as well as through integration by marriage and conversion to Islam with the indigenous and European populations. In the Cape, the first Imam was originally from Yemen. Transaction lists of slaves and of persons released from internment between 1658 and 1824 include such listed home nations as Indo-china, Japan, Madagascar, Ceylon, Malaya, Mauritius, Philippines, Siam, Persia and Arabia. Other records similarly indicate instances of slaves brought to South Africa from such countries as Vietnam, the West Indies and Brazil, as well as those captured off European ships. These were mainly individual cases, however, and other significant arrivals of slaves, many of whom were Muslim, were from East Africa, Guinea, and Angola.¹¹

In subsequent times, scholars from the Middle East and Africa commissioned to arbitrate local religious disputes as well as the voluntary settlement of scholars from Saudi Arabia and Turkey added to the community's diversity. Later in the north and east of the country, Muslims arrived from Java (1858), India (1860), and East Africa (1873-1880) as part of 19th century British indentured labour policies as well as through trade.

146 (1997); A. DAVIDS, *THE MOSQUES OF BO-KAAP: A SOCIAL HISTORY OF ISLAM AT THE CAPE* 18 (1980); F. ESACK, *QUR'AN, LIBERATION AND PLURALISM: AN ISLAMIC PERSPECTIVE OF INTERRELIGIOUS SOLIDARITY AGAINST OPPRESSION* 20 (1997); A. TAYOB, *ISLAMIC RESURGENCE IN SOUTH AFRICA: THE MUSLIM YOUTH MOVEMENT* 39 (1995); T. Sonn, *Islamic Studies in South Africa*, 11 AM. J. ISLAMIC SOC. SCI. 274, 274 (1995).

¹¹ Y. DA COSTA & A. DAVIDS, *PAGES FROM CAPE MUSLIM HISTORY* 2 (1994); BRADLOW & CAIRNS, *supra* note 10, at 101.

The latter group was classified as a distinct Muslim community and referred to as Zanzibaris but included people from Malawi, Mozambique, Zambia, Somalia and Zanzibar.¹² These trends illustrate the diverse composition of the South African Muslim community and in post-apartheid South Africa continue through ongoing migration of Muslims from various regions in Africa, the Middle East and India.

Imams and the Early Practice of Muslim Personal Law

The varied origins of Muslims in South Africa give the community a characteristic diversity. Their practice of Islam, in turn, gives the community a dynamic history where an impetus for MPL can be located in the early colonial society and the role of the Imam. Since their arrival in the country, Muslims were continually subjected to significant discrimination. In colonial times this included restrictions placed on the practice of Islam and on their movement and a tradition of negative stereotyping as people who were passive but potentially disruptive and inclined to run amok.¹³ In the apartheid years, Islam was a focus of derision by the Afrikaans *Nederduitse Gereformeerde Kerk* (Dutch Reformed Church) and the state subjected the community to the racist measures of the apartheid regime including forced removals through the Group Areas Act.¹⁴

¹² R.C. Shell, *The March of the Mardijckers: The Toleration of Islam at the Cape, 1633-1861*, 22 KRONOS: J. CAPE HIST. 3, 3 (1995); MEER, PORTRAIT OF INDIAN SOUTH AFRICANS 187 (1969); A.K. Aziz, *Islamic Resurgence in South Africa: A Historical Survey*, 13 AM. J. ISLAMIC SOC. SCI. 429, 433 (1996).

¹³ DAVIDS, *supra* note 10, at 35; DA COSTA & DAVIDS, *supra* note 11, at 58.

¹⁴ M. Haron, *Three Centuries of NGK Mission [sic] amongst Cape Muslims 1652-1952*, 19 J. MUSLIM MINORITY AFF. 115, 115 (1999); A. TAYOB, ISLAM IN SOUTH AFRICA: MOSQUES, IMAMS, AND SERMONS 44 (1999); MEER, *supra* note 12, at 88. *See also* Group Areas Act No. 41 of 1950.

In the initial period, amidst a hostile colonial climate, a large part of Muslim life revolved around negotiating the practice of Islam. Early Islam in South Africa developed as a guarded private activity removed from mainstream society with religious activities conducted from various private homes and developing in a ceremonial form where communal life was structured around worship and religio-cultural community activities.¹⁵ These activities defined the social life of the community and provided a platform for cohesion as well as a source of prestige for those who officiated. Imams who conducted the affairs of the community emerged then as important local leaders to whom great esteem was attached.¹⁶

According to Davids, the Imam was regarded as the spiritual guide of the community and communal solidarity was secured through him. Through this elevated status, he assumed multiple roles including that of medical officer, social and financial advisor, and as Allie indicates, mediator in marital disputes.¹⁷ Jeppie confirms that 19th century Imams were respected leaders who were financially and materially

¹⁵ DA COSTA & DAVIDS, *supra* note 11, at 47. The religio-cultural activities of the early Muslim community were colorful, festive occasions, which included communal prayer meetings called a *merang*, *rhatieb*, a practice in which the body is pierced with metal spikes and swords during a prayer ceremony, *tamat*, the graduation ceremony of children from a *madrassa* which later took the form of a parade of graduates dressed in Arab attire to a mosque to recite and be tested on the Qur'ān, and *moulood*, a ceremony to celebrate the Prophet's birthday. An accompanying activity to *moulood* for women was *rampie-sny* or the Festival of Orange Leaves. The Cape Muslim community still practice most of these activities today in modified forms.

¹⁶ A. Davids, *Imams and Conflict Resolution Practices among Cape Muslims in the Nineteenth Century*, *KRONOS: J. CAPE HIST.* 54, 55 (1995).

¹⁷ S. Allie, *A Historical Review of Muslim Personal Law at the Cape during the Dutch Period* (2000), http://www.islamicuniversity.co.za/research/articles/mpl_during_dutch_period/article.php (last visited June 2, 2006). In contrast to accepted notions that MPL was not legally recognized in South Africa, Allie asserts that a limited legal structure for MPL did exist in colonial times. He notes, however, that the legislation favored free Muslims, who were those released from internment and who subsequently became community leaders and Imams. As he states: "In the case of Muslim slaves, they turned to their religious clerics who conducted such ceremonies on a regular basis and also later acted as arbitrators in the event of marital disputes".

independent.¹⁸ Many were employed and their affluence together with their participation in communal religious life consolidated their status as leaders. They also did not challenge the status quo and in fact reinforced societal power relations through participating in slavery.¹⁹

Within the Muslim community, however, the Imam remained a revered, charismatic personality. The position was sought after and consequently fervently contested. This led to a tradition of social dissent in the community on the rights and appointments of Imams, which commonly resulted in breakaway congregations led by competing Imams and ensuing legal proceeding to settle disputes. Thus, in the period 1866 to 1900, the Supreme Court heard more than twenty cases challenging the position of the Imam²⁰, which included claims of malpractice, assault (in one instance with a teapot), and nepotism; this became a pattern of most mosques in the Cape.²¹

Muslim Personal Law: From the Imam to the Muslim Judicial Council

The Muslim Judicial Council emerged in response to the environment of discord amongst local imams in the Cape. The organization was established in 1945 to manage the elevated conflict that occurred amongst Imams as an MJC mission statement states:

¹⁸ S. Jeppie, *Leadership and Loyalties: The Imams of Nineteenth Century Colonial Cape Town, South Africa*, 26 J. RELIGION IN AFRICA 139, 147 (1996).

¹⁹ Davids, *supra* note 16, at 58. Davids notes that Imams kept slaves for commercial gain and therefore he states: “The popular notion, that the Imams purchased slaves merely to set them free is a fallacious one. There might have been exceptional cases where slaves were purchased for manumission, but on the whole they were purchased for security and as a means of investment.” *Id.* at 58.

²⁰ DAVIDS, *supra* note 10, at 5.

²¹ See F. Esack, *Mosques: The battle for control-Some Reflections* (1989) <http://uk.geocities.com/faridesack/femosques.html> (last visited Mar. 24, 2006), for similar mosque disputes in the recent decades.

“The establishment of such an organisation was necessary to unite the leaders (The ‘*ulamā*’ Fraternity) of the Muslims and the Muslim community. During this time, there was a lot of infighting, fracas and religious differences and debates (‘*picharas*’) amongst the Muslims.²² The level of debates and differences reached the point of personality clashes and differing on issues, depending on which school of thought one adhered to. . . . Hence, the formation of the MJC to foster a spirit of goodwill and unity amongst Muslims.”²³

The organisation has since evolved to represent approximately 120 of 132 mosques in the Western Cape. It is now widely accepted as a representative body of the Cape Muslim community and as an authority on Islamic matters and is frequently consulted from within the community and the larger society on matters pertaining to Islam. The MJC services include religious guidance and consultation, marriage and divorce counselling, Islamic courts, social welfare, and the administration of *halāl* dietary laws and compiling *sharīʿah* wills. Its stated objectives include providing for the overall socio-religious needs of the community and arbitrating in Muslim community matters based on the *sharīʿah*. The organisations Department of Social Welfare provides its MPL service. This office is the organisations primary link to the Muslim community, whose

²² *Pichara* refers to *bechara* and derives from an Indonesian term meaning “conference” or “debate”. These were public forums held at mosques where Imams presented their opposing views and the congregation could comment and decide on matters under discussion. The *bechara* helped to defuse certain situations. In others it ended inconclusively when brawls erupted between opposing congregates and which Tayob has described as “a premature death for Islamic democracy of the most literal, even though anarchic, variety.” TAYOB, *supra* note 10, at 52.

²³ Abdullah, *supra* note, 8 at 78. This information comes from documents (undated) obtained from the MJC (on file with author).

members use this service mainly for marriage counselling and mediation.²⁴ Their MPL service merge in processes of counselling, mediation, and advising on the *shari'ah*, and this department will be the focus of the assessment of MPL service provision as presented further. The terms MPL mediation and mediators (to refer to Imams and their assistants) will also be used interchangeably in relation to this context to refer to this process overall.

The Research Design and Process

The research that informs this paper is a component of a larger study on the role of Islamic counselling and nation-building in post-apartheid South Africa. The study included a range of interviews, a participant-observation process, and a client survey conducted at the MJC.²⁵ The participant observation research involved weekly sessions over a period of six months to observe the practice of MPL mediation at the MJC. This process provided data on the organisational setting, the client composition, the experiences of clients in the mediation process, the mediation techniques and styles of the clergy and their assistants, and identified concerns and problems in the Muslim community. Discussions held with clients while they waited to see a mediator and related interviews with Muslim and non-Muslim professionals from both Islamic and mainstream welfare agencies provided additional information on this service. To obtain further insight into the clients' experiences, a survey was conducted with clients who were in the process of utilising the organisation's mediation services. The survey was designed in

²⁴ Abdullah, *supra* note 8, at 169 (on file with author). *See also* Muslim Judicial Council Home Page, <http://www.mjc.org.za> (last visited June 2, 2006).

²⁵ Abdullah, *supra* note 8, at 159 (on file with author).

conjunction with the University of Cape Town Statistics Department to ensure its statistical validity and in total was completed by one hundred and one clients (seventy-five women and twenty-six men). The majority of these respondents came from Mitchell's Plain, a huge low cost residential area in the Cape where the apartheid government relocated communities under its forced removal policies and who as a result were most exposed and vulnerable to social problems and deprivation.²⁶

Gender and the Social Context of Clients

Based on the research outcomes, the majority of clients who utilise the MJC services are women between the ages of 18 and 50 who seek assistance for marital problems in abusive marriages.²⁷ They are mainly homemakers or otherwise unemployed and are economically dependent on a spouse. These women come from various suburbs in the Western Cape, although most are from the Cape Flats or township areas, the racially divided, low-cost housing areas created by the apartheid state through its Group Areas Act.²⁸ These areas remain sites of communal disintegration because of apartheid dispossession and are furthermore characterised by poverty, crime, violence, inadequate resources, and a range of social problems.²⁹ These circumstances also influence how Muslim women engage MPL services. Pressing social conditions, together with financial problems related to marital discord or a lack of financial support by a husband, lead many women to endure marital problems and delay seeking intervention until their

²⁶ Abdullah, *supra* note 8, at 176 (on file with author).

²⁷ Abdullah, *supra* note 8, at 177 (on file with author).

²⁸ Abdullah, *supra* note 8, at 176 (on file with author). *See also* Group Areas Act, *supra* note 14

²⁹ SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT. 5 VOLS. 60, 371, 390 (1998).

circumstances reach crisis levels.³⁰ For women in abusive relationships (a predominant feature of MJC cases) who have no income and are economically dependent on their spouses, it is difficult to leave these relationships. Turning to family is a limited option with its own additional financial and emotional stressors. Thus, when women first seek services at the MJC, it is usually during heightened states of distress and significant disempowerment within a marriage and in their lives overall.³¹

Against this background, the MJC Social Welfare department identifies extramarital affairs as its main presenting problem. In these cases, clients experience acrimonious relations and approach the organisation to enquire about divorce. In Islamic law, both men and women can seek a divorce in a *shari'ah* court. For men the process, called *talāq* rests on the verbal expression of divorce to a wife which effects divorce immediately. A man is allowed three such repudiations with fixed periods in between to reconsider a decision, in which he clearly expresses his intent of divorce, after which time divorce is irrevocable. *Faskh*, the judicial dissolution of marriage based on the principle that an Imam or a judge (*qāḍī*) can act on behalf of the wife to annul a marriage is the

³⁰ Abdullah, *supra* note 8, at 184. Religious leaders also emphasize the Islamic principle of *sabr* (patience) to encourage Muslims to endure problems. Their approach leads many women to tolerate problems believing it to be a religious obligation until it is beyond their ability to cope, as in the case of one research respondent, who told of having endured problems with her husband for fourteen years before seeking assistance. See also A. Tayob, *Muslim Personal Law – Women's Experiences and Perspectives*, ANN. REV. ISLAM IN SA. 32, 32 (2003), who in similar research on MPL in another South African province, Kwazulu-Natal, likewise observed that women found it difficult to comprehend having to show patience in the face of abuse and regarded this expectation as one-sided with no such demands made on an offending husband.

³¹ Abdullah, *supra* note 8, at 180 (on file with author). During the survey, in two instances, for example, clients indicated that they were receiving psychiatric treatment for mental health conditions related to marital problems. In the one case, the client suffered partial paralysis due to continual physical abuse by her husband.

corresponding process for women.³² Other types of divorce exist in Islamic law, but *talāq* and *faskh* in this form are the principal ways in which they present at the department; as such, both men and women can seek a divorce at the organisation.

Based on participation in mediation sessions, polygyny is another major presenting problem and the basis of intense marital discord.³³ In these cases, women seek assistance to deal with a range of difficulties they experience in these unions or to verify the status of a polygynous marriage when a husband plans to take another wife or has already remarried with or without his wife's knowledge.³⁴ The department recognises polygyny as a community problem, although in their intervention it does not constitute a serious concern. An Imam, for example, attributed wide-scale polygynous marriages to the lack of legal status of Muslim marriages but was also willing to acknowledge a lack of coordination of the activities of Imams at local levels in perpetuating these circumstances. At the same time, the clergy's position is that polygyny is Qur'ānically sanctioned and therefore permissible as this view on the matter reflects, 'The Qur'ān gives permission for a man to take another wife, so that is why even married life should

³² JOHN ESPOSITO & J. DELONG BAS, *WOMEN IN MUSLIM FAMILY LAW* 33 (2d ed. 2001).

³³ MUHAMMAD M. PICKTHALL, *THE MEANING OF THE GLORIOUS QURAN* 86 (1st ed. 1996).

The Qur'ān allows polygyny, but circumscribes its practice. Chapter 4:3 states: "And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only)." Qur'ān 4:3, *available at* [http://www.ishwar.com/islam/holy_quran_\(pickthall\)/](http://www.ishwar.com/islam/holy_quran_(pickthall)/) Clergy accept polygyny on this basis, while Islamic discourses that emphasise gender equality stress its latter emphasis and a later verse: "Ye will not be able to deal equally between (your) wives, however much ye wish (to do so)." *Id.* at 4:129. Picktall's translation is used throughout this paper.

³⁴ Abdullah, *supra* note 8 at 186 (on file with author). In one MPL session, a client explained how she learnt from a friend that her husband had remarried after the friend unwittingly enquired about her situation.

not be based on emotion . . . you can't stop people from getting married. I know of a lot [sic] of people who has [sic] two and three wives, and they all live very happily...'³⁵

In the Muslim community, men can marry and re-marry with ease, but the reality of the situation is very different from the view the Imam conveyed. The above presenting problems commonly ally to a range of related problems like violence against women and children, desertion, neglect, and a lack of maintenance as required in marriage under *shar'ah* law.³⁶ Typically, cases are of a multi-problem nature and cohere in particular with studies of polygynous families in Muslim communities that confirm high levels of dysfunction in these unions.³⁷ The perspective of a welfare worker at a state aligned Islamic organisation provides a better insight into this reality, including the complicity of Imams:

You sometimes find people get married with one imam and they go to another imam for a second marriage, then the first imam didn't know that he is married—and he can't even maintain the one marriage. He goes to another imam, in another area and actually creating more problems in the community, the wives, the maintenance, the children, goes to another wife having the same problems and the problems just increases, all the

³⁵ Abdullah, *supra* note 8, at 164 (on file with author).

³⁶ Abdullah, *supra* note 8, at 165 (on file with author).

³⁷ A. Al-Krenawi & J.R. Graham, The Story of Bedouin-Arab Women in a Polygamous Marriage, 22 WOMEN'S STUDIES INTERNATIONAL FORUM 497, 505 (1999); A. Al-Krenawi & R. Wiesel-Lev, Perception of Family among Bedouin-Arab Children of Polygamous Families as Reflected in Their Family Drawings, 38 AM. J. OF ART THERAPY 98, 101(2000); A. Al-Krenawi & Ernie S. Lightman, Learning Achievement, Social Adjustment, and Family Conflict among Bedouin-Arab Children from Polygamous and Monogamous Families, 140 J. SOCIAL PSYCHOLOGY 345, 351 (2000); A. Al-Krenawi, Family Therapy with a Multiparental / Multispousal Family, 37 FAMILY PROCESS 65, 70 (1998); A. Al-Krenawi, J.R.Graham & S. Al-Krenawi, Social Work Practice with Polygamous Families, 14 CHILD AND ADOLESCENT SOC. WORK J. 445, 451 (1997). Based on studies in the Negev, these authors report that commonly, hostile relations exist between wives in polygamous marriages as well as economic hardship and poor marital relations. In addition, they observe a higher risk of social, academic, and emotional problems among children in these marriages.

time. One wife that I can remember . . . her husband got married to a second wife and she ran into the mosque and she went to stop the nikah [the Islamic marriage contract] . . . and she asked the Imam, “do you know my husband is married, do you know he is not maintaining me and my children properly” . . . and he said no he didn’t know her husband was married . . . but still he went through with the second marriage.³⁸

In general then, this example is representative of the nature and circumstances of MPL cases at the MJC. In addition, other problems like substance abuse, child abuse, and wife battery present at the department as well as a basis for women seeking divorce. Staff usually refer such cases to specialised mainstream agencies for intervention, although the department continues to attend to the marriage counselling and mediation aspects of each case.³⁹

MPL Mediation – The Islamic Framework

Islamic law, as Schacht and Bosworth describe,⁴⁰ is the totality of God’s commands that regulate the life of every Muslim and the most typical manifestation of the Islamic way of life. As practice, it rests on judicial reasoning with a judge (*qāḍī*) who makes decisions on a spectrum of concerns within the structure of a *sharī‘ah* court and implements them based on his knowledge and interpretation of Islamic Law. In addition, decision-making connects intimately to the social and cultural environment within which

³⁸ Abdullah, *supra* note 8, at 165 (on file with author). This organization employs professional staff and is generally more effective in their service delivery.

³⁹ Abdullah, *supra* note 8, at 167 (on file with author).

⁴⁰ THE LEGACY OF ISLAM 392 (J. Schacht & C.E. Bosworth eds., 2d ed. 1974).

a particular *sharīʿah* court operates.⁴¹ This framework guides MPL service provision conceptually and in practice. Intervention concentrates on principles from the *Qurʾān*, Prophetic example (*sunnah*) and the *sharīʿah* that regulate family life—in particular, marriage, divorce, maintenance and child custody—and depending on the nature of the problem, mediators advise clients accordingly. The classical paradigm of MPL as outlined below further guides procedures.

In Islam, marriage is considered sacred, although it is governed by a civil contract that legalises sexual relations and reproduction. To be valid it requires an offer (*ijab*) and acceptance (*qabul*) in the presence of witnesses and once undertaken imposes certain rights and obligations on a couple. Primarily, a woman is expected to maintain a home and obey her husband, while a man has to financially maintain his wife and children and has the power to impose his authority in the home. A woman has the right to a dower and any property she owns. Before a marriage she may, within due limits, stipulate provisions in the marriage contract—to be approved by her husband—to define the relationship. This has particular relevance for polygyny and divorce given that men may marry up to four wives and have the right of unilateral divorce over women.⁴² This form of divorce contrasts with the other forms of divorce described earlier, in that it includes delegated divorce (*talāq al-tafwīd*), where the husband delegates the right of divorce to his wife, and divorce at the request of a woman based on agreement between the spouses

⁴¹ ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 7 (1989).

⁴² D. EL ALAMI & D. HINCHCLIFFE, *ISLAMIC MARRIAGE AND LAWS OF THE ARAB WORLD* 9 (1996). This is a view from the Hanbali School of Islamic Law and its inclusion in a marriage contract extends the range for women to seek the dissolution of a marriage if a husband violates the terms of a contract.

but with compensation due by the woman to her husband (*khul'*). On dissolution of a marriage, a woman has to enter a mandatory waiting period (*iddah*) and she remains entitled to maintenance from her husband during this time as well as under certain circumstances related to custody. The husband, in turn, has to continue to support his children financially and custody arrangements favour initial custody with the mother to ages seven for girls and nine for boys and later with the father and his family.⁴³

Within this framework, further, marriage is encouraged as a fundamental requirement of Islam, while the family is the basic unit of the Muslim community that must be preserved. Divorce therefore, although allowed, is discouraged based on Prophetic sayings like, “Of all the lawful acts the most detestable to Allah is divorce.”⁴⁴ Reconciliation in marital disputes is encouraged based on the *Qurʾānic* verse “And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind.”⁴⁵ Where reconciliation fails and divorce is imminent, however, the *Qurʾānic* verse, “Then, when they have reached their term, take them back in kindness or part from them in kindness,” would apply.⁴⁶

⁴³ ESPOSITO & DE LONG BAS, *supra* note 28, at 14; Z. MIR-HOSSEINI, MARRIAGE ON TRIAL: ISLAMIC FAMILY LAW IN IRAN AND MOROCCO 31 (rev. ed. 2000); A. BARLAS, ‘BELIEVING WOMEN’ IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QURʾĀN 172 (2002)

⁴⁴ Sunan Abu-Dawud Book 12, *available at* <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/012.sat.html> (last visited March 1, 2007).

⁴⁵ Picktall, *supra* note at 33. Qurʾān 4:35, *available at* [http://www.ishwar.com/islam/holy_quran_\(pickthall\)/](http://www.ishwar.com/islam/holy_quran_(pickthall)/)

⁴⁶ *Id* at 65:2, *available at* [http://www.ishwar.com/islam/holy_quran_\(pickthall\)/sura065.html](http://www.ishwar.com/islam/holy_quran_(pickthall)/sura065.html); S.Z. SYED HASSEN & S. CEDERROTH, MANAGING MARITAL DISPUTES IN MALAYSIA: ISLAMIC MEDIATORS AND CONFLICT RESOLUTION IN THE SYARIAH COURTS 103 (1997); A. Othman, And Sulh is Best: Amicable Settlement and Dispute Resolution in Islamic Law 46 (2005) (unpublished Ph.D. dissertation, Harvard University) (on file with author); *See also* D. Hassouneh-Phillips, ‘Marriage is half of faith and the rest is

MPL Mediation – The MJC Approach

The aforementioned injunctions from an array of Islamic texts and Prophetic practices resonate primarily in MPL mediation. The MJC has its own unique slant on the process, which, as shall be seen further, is completely incompatible with the needs of Muslim clients, both in appropriately applying Islamic law and in considering the clients' personal and social circumstances. Given high caseloads,⁴⁷ there is usually a waiting period before a mediator holds an initial “fact finding” session and schedules a subsequent joint session with a view to reconciling a disputing couple.⁴⁸ A spouse who is not present at the onset, usually the husband, is sent a letter of request to attend the joint session. If he does not respond, additional correspondence over a period of about two months, which may be extended, ensues.⁴⁹ This procedure also applies to cases where clients have been separated for considerable periods, unless a man has abandoned his wife and cannot be located, in which case the woman has to sign an affidavit confirming her circumstances to ensure a *faskh* divorce.⁵⁰

An unwillingness or failure by men to participate in mediation is a feature of this process and women in the meantime must continue to attend sessions as required by the administrative procedure to ensure a *faskh*, reporting on their progress and their efforts to

fear Allah': Marriage and Spousal Abuse among American Muslims, 7 VIOLENCE AGAINST WOMEN 927, 932 (2001) (for a related study of gender violence amongst American Muslims, based on the social emphasis on a particular Prophetic saying on marriage being a part of Islamic faith).

⁴⁷ Abdullah, *supra* note 8, at 169 (on file with author). At the time of the research five mediators were attending to up to forty clients per day, Mondays to Thursdays, from 8.30am to 13.30pm.

⁴⁸ Abdullah, *supra* note 8, at 173 (on file with author).

⁴⁹ Abdullah, *supra* note 8, at 174 (on file with author).

⁵⁰ Abdullah, *supra* note 8, at 175 (on file with author).

persuade their spouse to be present. Where the husband does not respond to requests for mediation at all, if assessed to qualify for divorce, the case is eventually referred to the *sharīʿah* court and the matter is finalised by *faskh* in the husband's absence. The *sharīʿah* court is not a separate court structure. Instead, court hearings are held once a week, and on these days, the Imam's office is the *sharīʿah* court and he decides on matters in a role that model that of a *qādī*.⁵¹ Except for minor differences, like clients taking an oath for *talāq* or *fasakh* these sessions operate in the same way as the mediation sessions.

This is the initial procedure of MPL at the MJC. In some cases, mediators apply these procedures randomly and in others, they may limit or circumvent it if an Imam assesses a case to be of a nature that warrants prompt resolution. During the process of the research, the Imam effected such a decision once in a case of incest and in another when he doubted the beliefs of a woman who had converted to Islam. Conversely, a case may extend indefinitely especially when a man challenges a divorce and expresses a desire for reconciliation, as the Imam explained:

A lady here at the moment in time has made an application for a marriage annulment about a year ago and we are still busy with the case. The husband is defending wanting to reconcile the marriage and we cannot redefine *sharīʿah* down to have the marriage annulled. So there are cases whereby there are no reasons and we do tell the applicant, the woman, that we do not have any grounds for an annulment of the marriage.⁵²

⁵¹ Abdullah, *supra note* 8, at 175 (on file with author).

⁵² Abdullah, *supra note* 8 at 174. Information from additional recorded research data (on file with author).

In cases where joint sessions occur from the onset, the primary goal of the intervention is likewise to attain reconciliation between the disputing couple.⁵³ Mediators counsel reconciliation regardless of the intensity of a client's problem or the expressed request—by women especially—for a *talāq* or *faskh*. Clients are advised on MPL as it relates to marriage and divorce. This information is merged with advice from the *Qur'ān*, the *sunnah* and personal experience, with the earlier Islamic injunctions on reconciliation and divorce providing a context for the process as a whole.

For most women, however, reconciliation is often at complete variance with their level of functioning and their needs.⁵⁴ When they first engage MJC services, it is usually after sustained marital discord. They are distressed and rarely deem reconciliation desirable. In fact, given the nature of their family problems and their social circumstances, this insistence on reconciliation adds to the client's distress by compelling her to remain in a situation of ongoing marital and family violence.⁵⁵ An inconsistency in the mediation context exists therefore which extends rather than alleviates the problems of women, which in turn conflicts with the Islamic imperative for reconciliation. In effect, the pressing conditions of clients, together with the implications of unregulated MPL services, merge at this point in a problematic cycle. A critical dilemma between sacred and profane evolves, which in most instances undermines the MPL services that the clergy provide from the onset.⁵⁶

⁵³ Abdullah, *supra note 8*, at 181 (on file with author).

⁵⁴ Abdullah, *supra note 8*, at 182 (on file with author).

⁵⁵ Abdullah, *supra note 8*, at 184 (on file with author).

⁵⁶ See F. Boonzaier & C. De La Rey, 'He's a Man and I'm a Woman': *Cultural Constructions of Masculinity and Femininity in South African Women's Narratives of Violence*, 9 VIOLENCE AGAINST WOMEN 1003, 1015 (2003) (giving an example of this situation at the judicial council (*sic*), where a woman,

Nonetheless, the clergy emphasise reconciliation as an Islamic imperative, which they also view as an indicator of the success of mediation with higher reconciliation rates (itself not subjected to systematic assessment), interpreted as successful intervention.

Children are often a focus to attain the desired reconciliation, as the Imam explained of his approach:

Now I have reconciled a lot of irreconcilable marriages . . . I am very fond of saying . . . you people want to give up your marriage and nobody can convince you but answer me this question. I would say to them look, lady you can walk out of here and find another husband, that is not impossible, husband you can walk out of here and find another wife, that is not impossible, but for your children to find other parents like you is impossible. I then sway that whole form of counselling focusing onto the children and if they love their children, they would put their differences aside and many a times you will find that what caused the breakdown of the marriage, many times it is petty, it's about wanting to win in the end.⁵⁷

This approach shows the intent to maintain the family unit but given the clients' circumstances, a focus on children to reconcile disputing couples is problematic since domestic violence associates with long-term negative implications for the family and well-being of children.⁵⁸

despite expressly stating that she does not want to reconcile with an abusive husband who has threatened her with a knife, is still told to reconcile with him).

⁵⁷ Abdullah, *supra* note 8, at 185 (on file with author). Compare MPL mediation in Malaysia which also illustrates the uniformity in MPL beyond local and national contexts. SYED HASSEN & CEDERROTH, *supra* note 39, at 114. A woman advises a couple, "Please consider your children. They need their father and mother. They need you both in the same house. . . . Thank Allah you are blessed with children. This problem can be resolved." *Id.* at 115. As at the MJC, women are employed as MPL mediators but with limited decision-making power and supervised by Imams.

⁵⁸ A.A. Guth & L.H. Prachter, *Domestic Violence and the Trauma Surgeon*, 179 AM. J. SURGERY 134, 136 (2000); L.A. McClosky, J.F. Aurelio & M.P. Koss, *The Effects of Systemic Family Violence on Children's*

In dealing with polygyny, mediators concentrate on the first part of the earlier mentioned *Qur'anic* verse on polygyny to advise women that polygyny is permissible in Islam. While many women believe a husband needs her permission to take another wife, Imams note that this is not compulsory. The advice they offer is presented to women as information, which they can use to reflect on their situation and to make further decisions on their continued role and place in the marriage.⁵⁹ Mediators also encourage clients to accept and manage a polygynous marriage, and general advice to women on how to deal with marital discord may include ways of attending to her husband's needs, like arranging a romantic evening, or making herself more attractive to him.⁶⁰

In disputes of maintenance and custody, clients negotiate and agree upon maintenance amounts and appropriate rights of access to children. Mediators record a written agreement, which the parties sign.⁶¹ In most cases, clients do not adhere to these arrangements. Women in fact indicate their preference to negotiate custody and maintenance agreements through the state welfare services, as this ensures legally binding decisions, which incur criminal changes if not observed.⁶²

Mental Health, 66 CHILD DEVELOPMENT 1239, 1246 (1995); M.S. Stith, K.H. Rosen, K.A. Middleton, A.L. Busch, K. Lundeberg & R.P. Carlton, *The Intergenerational Transmission of Spouse Abuse: A Meta-Analysis*, 62 J. MARRIAGE & FAMILY 640, 647 (2000).

⁵⁹ Abdullah, *supra note* 8, at 186 (on file with author).

⁶⁰ SYED HASSEN & CEDERROTH, *supra note* 39, at 117. In the Malaysian case likewise, the mediator instructs the client to look after herself, her children, and her self-respect and to perform her duties as a wife even in the husband's absence, which she considers virtuous behaviour that may motivate the husband to reconcile with her. As with the MJC, here one sees most clearly the subjective application of Islamic law given the restriction the Qur'an places on polygamous marriages and which in other countries has been used to curtail or ban polygamy as in Tunisia, for example. See, ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 183 (An-Na'im eds., 2002)

⁶¹ Abdullah, *supra note* 8, at 188 (on file with author).

⁶² Abdullah, *supra note* 8, at 193 (on file with author).

In advising men, the clergy are more inclined to view the clients' behaviour as a deviation from the path of Islam and therefore advice would concentrate on Islamic conduct and trying to instil a sense of Islamic moral consciousness as a basis to attain change in their lives.⁶³ In relation to the family, the emphasis is on the duty to financially support and maintain their family, which the clergy also highlight as a validation of the rights of women in Islam. Given the levels of gender violence of their cases, however, this approach is neither persuasive nor appropriate as a focus for women's rights. While Imams may reprimand an abusive husband, violence against women is not sufficiently condemned nor systematically addressed to attain concrete change in the lives of Muslim women. As a result, women risk ongoing violence even as they leave the department's offices, as is evident in cases that descend into arguments and intimidation as couples exit the premises.⁶⁴

MPL Mediation – An Assessment

The above overview of MPL mediation is an indication of the nature of this service in South Africa, based on the example of the Western Cape. Essentially, service provision is limited to mediation sessions by clergy in which clients receive advice on marriage and related matters but which is significantly removed from the everyday

⁶³ See Othman, *supra* note 39, at 268 (for an example of this approach in an American context).

⁶⁴ Abdullah, *supra* note 8, at 180, 187 (on file with author). On a number of occasions, clients would approach the author outside the MJC offices for additional advice. One woman, for example, explained that her husband wanted to assault her after a mediation session. She called for help and a mediator intervened, but rather than helping her, the mediator instead advised that she and her husband make every effort to settle their differences at home. In a similar way, many women who attended sessions alone would leave the premises visibly distressed, conditions sustained by the need for clients to follow administrative procedures before problems could be addressed in any significant way.

realities of their lives. In addition, at the MJC, there is for women an intrinsic link between the way in which the clergy categorize presenting problems and their resultant services, which disadvantages women from the onset. Although women form the main client base and gender violence is inherent in most cases, gender violence in itself is not a focus of the MJC intervention. Instead, the clergy class violence against women within the ambit of extramarital affairs and hereby minimise its occurrence and impact. In addition, in light of their understanding that the role of women in the home is central to good marital relations and important in determining a husbands response to his wife, the clergy as a consequence, place responsibility for marital discord disproportionately on women. Simultaneously, systematic intervention to address the concerns of women is limited and the problems they experience are prolonged. This service has a number of obvious limitations relating to Islamic knowledge, mediation skills and methods, and the general application of MPL, which make a comprehensive and binding alternative in post-apartheid South Africa an imperative. MPL intervention in its current form does not address the pressing problems that affect the Muslim community both within the family and within South African society. The intensity of client problems, a preferred interpretation of Islamic law fixed in its classical context together with limited resources and skills reinforce and in fact sustain the problems that the community and especially women endure. In spite of severe circumstances, women are urged to reconcile in abusive marriages with limited consideration for the family and social conditions that continue to disempower them and impact their overall well-being.

Nor do the clergy seek a more relevant interpretation and application of Islamic doctrine and practice, which may afford greater equality and redress for women in Muslim marriages and simultaneously demand from Muslim men responsibility in their actions. Instead, the clergy employ a long-term process, full of unfavourable circumstances towards women, to reconcile couples in situations for which men show little regard. The intense client problems are also often beyond reconciliation, and the gender imbalance in a mediation situation where mainly men advise women in family matters using a preferred male centered interpretation of religious texts compounds the situation.

These circumstances are precarious given South Africa's history and its now democratic society. Apartheid created communities where violence became endemic and women bore the brunt of this violence. In post-apartheid South Africa, women continue to suffer the impact of the past and endure ongoing abuse and violence through poverty, socio-economic disadvantage, sexual assault, and attacks on their person.⁶⁵ In the Muslim community, these conditions manifest in the context of the family, where women face abuse and violence in domestic and social circumstances and, in addition, have to contend with the abuse of religious leaders who deny their rights through an inappropriate application of MPL, which the example of the welfare worker quoted earlier in this text clearly illustrates.

⁶⁵ L. Bollen, S. Artz, L. Vetten & A. Louw, *Violence against Women in Metropolitan South Africa: A Study on Impact and Service Delivery, Monograph 41* (2000), <http://www.iss.co.za/Pubs/Monographs/No41/Contents.html> (last visited June 2, 2006); B. Goldblatt & S. Meintjes, *Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission* (1996), <http://www.doi.gov.za/trc/submit/gender.htm> (last visited June 2, 2006); L. Graybill, *The Contribution of the Truth and Reconciliation Commission Toward the Promotion of Women's Rights in South Africa*, 24 WOMEN'S STUD. INT'L FORUM 1, 3 (2001)

Given these conditions, the South African government's initiative on MPL presents an opportunity to address the problems that the Muslim community is experiencing. The following section examines this prospect in the government's plan for MPL as a function of the country's secular courts. It outlines, first, the sections of the legislation that relates directly to the clergy's MPL practices and then assesses it accordingly.

The South African Legislation on MPL

South Africa's legislation on MPL was negotiated in consultation with a range of stakeholders including civil society, Islamic organisations, and members of the public who participated in its formulation through submissions to the South African Law Reform Commission.⁶⁶ The legislation emerged because of the problems discussed so far in the Muslim community as relates the non-recognition of Muslim marriages and as a way to address these circumstances. A number of submissions opposed the legislation outright, or otherwise endorsed it only in part, but as the commission's report notes, overall, respondents were in favour of the draft bill.⁶⁷ In an ensuing development, the legislation and the ongoing process of assessing its constitutionality and practical implementation is now a project of the South African Gender Commission.⁶⁸

⁶⁶ South Africa Law Reform Commission, *supra* note 5, at 14 Ann. A.

⁶⁷ South Africa Law Reform Commission, *supra* note 5 at 103 Ann. A.

⁶⁸ E-mail from R. Manjoo, Honorary Resident Associate, University of Cape Town Law School (March. 4, 2007) (on file with author). The South Africa Gender Commission has formulated an alternative draft bill, emphasizing that the main problem that needs to be addressed is the non-recognition of religious marriages. This alternative draft bill was submitted to the Minister of Justice in 2006 for further joint discussion which to date is still pending.

The South African legislation on MPL is framed within Section 15 of the Bill of Rights of the South African Constitution, in particular, the right of Freedom of Religion, Belief and Opinion, which allows for the recognition of religious practices including marriage, but that are in accordance with the constitution in general. In full, it states:

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that –
 - (a.) those observances follow rules made by the appropriate public authorities;
 - (b.) they are conducted on an equitable basis; and
 - (c.) attendance at them is free and voluntary.
3. (a.) This section does not prevent legislation recognizing
 - i. marriages concluded under any tradition, or a system of religious, personal or family law; or marriages concluded under any tradition, or a system of religious, personal or family law; or
 - ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b.) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.⁶⁹

While based on this constitutional rationale, in form, the legislation is a document on Muslim marriages, which as stated in its preamble, provides *inter alia* for the recognition of Muslim marriage contracts and the status of spouses in the marriage, the registration of the marriage, and regulation of the implementation and dissolution of such

⁶⁹ S. AFR. CONST. 1996 Ch. II.

contracts.⁷⁰ As such, the legislation links directly with current MPL practices by the clergy, but in contrast seeks a balance between the *sharī‘ah* and the secular legal code while reflecting the democratic culture of the new South African society. Thus, the legislation does not exclusively consider the classical tenets of MPL; it employs also contemporary interpretations of Islamic law to achieve this end. The following are of its pertinent constructs, which relate directly to the intervention of the clergy as outlined earlier.

For a Muslim marriage to be legally valid, spouses would have to be eighteen, a condition which is subject to concession with parental consent, ministerial approval, or the approval of an appropriate Muslim person or body. Mutual consent by the prospective spouses with witnesses as required by Islamic law would also be necessary.⁷¹ The officer who solemnizes a marriage would be required to register the marriage and to inform the spouses, using practical examples to illustrate, that they are entitled to conclude either a standard marriage contract or else a contract of their choice to regulate their marital status. In all, the officer would be required to record all the particulars of the marriage, register it, issue a marriage certificate, and submit all records to the Department of Home Affairs, while the registration of a marriage in contravention of the law would constitute a civil offense and be subject to a substantial fine.⁷²

⁷⁰ South Africa Law Reform Commission, *supra* note 5, at 110 Ann. A.

⁷¹ South Africa Law Reform Commission, *supra* note 5, at 114 Ann. A.

⁷² South Africa Law Reform Commission, *supra* note 5, at 116 Ann. A. These rulings on mutual consent and registration of Muslim marriages, in the context of current MPL mediation services, would immediately demand greater legal accountability on the part of clergy as officers in authorizing marriages and, as a consequence, would also impede unrestrained practices of polygamous marriages. Likewise, situations where women may face forced or arranged marriages would be hampered while awareness of the marriage contract would place women in a better position to negotiate their role in a marriage.

A Muslim marriage will also be deemed to be out of community of property.⁷³ This means, unless the couple agree to an ante-nuptial contract to regulate the proprietary consequences of their marriage, each spouse retains the use and benefit of their separate estates with which they enter into the marriage and neither can claim from the other's estate on divorce or death. If a couple, decide on an ante-nuptial contract, they would have to register the contract in the Deeds Registry and spouses would be able to apply to the court to change the matrimonial property system of their marriage, if the change they seek is with good reason and does not cause disadvantage to either party.⁷⁴ In polygamous marriages, all spouses would have to be part of the proceedings. Linked to these rulings are principles on the allocation of the matrimonial property system and custody and maintenance arrangements in the event of dissolution of a marriage. Here the court would implement decisions, as it deemed fit, within the framework of relevant state legislation and the principles of Islamic law.⁷⁵

Under this legislation, a spouse would also not be able to enter into another marriage by any other law of the country during the course of a Muslim marriage.⁷⁶ The legislation recognizes polygyny, however, and accommodates for it in the following way: should a man wish to take another wife he is required to make a court application to do so and must agree to a written contract to regulate the future matrimonial property system of his marriages. The court, in turn, has to assess and grant approval of an application for a

⁷³ South Africa Law Reform Commission, *supra* note 5, at 118 Ann. A.

⁷⁴ South Africa Law Reform Commission, *supra* note 5, at 119 Ann. A.

⁷⁵ South Africa Law Reform Commission, *supra* note 5, at 120 Ann. A. Here again women would be better protected through the law by having any property or possessions safeguarded as their own. These rulings would also advance the wellbeing of children in a Muslim marriage, ensuring greater responsibility by men to their families, especially in light of abandonment and neglect which occur frequently in MPL cases.

⁷⁶ South Africa Law Reform Commission, *supra* note 5, at 114 Ann. A.

polygynous marriage if it is content that the applicant can maintain equality between his spouses as required in the *Qur'ān*.⁷⁷ Here again the participation of all parties in the matter would be required. Should a man, while already married, enter into another marriage without the permission of a court, he would be guilty of an offence and if convicted be liable to a substantial fine.⁷⁸

In cases of *talāq*, a husband would be required to register an irrevocable *talāq* certificate with a marriage officer.⁷⁹ The legislation also provides for *khul'* divorce, which spouses would have to register jointly. In cases where a husband delegates the right of *talāq* to his wife, she would be required to register the *talāq*.⁸⁰ *Talāq* would be finalised pending any legitimate dispute to its validity, while non-registration by a husband would constitute a punishable offence. Similarly, the legislation provides for the wife to apply for a *faskh* to dissolve the marriage.⁸¹ *Faskh* would be assessed and granted in accordance with criteria based in Islamic law, and would terminate the marriage when effected. The legislation lists the following criteria, which includes the absence of a husband for a substantial period of time: the failure of a husband to maintain his wife, or (in a polygynous marriage) failing to treat a wife justly as required by the *Qur'ān* and

⁷⁷ South Africa Law Reform Commission, *supra* note 5, at 119 Ann. A.

⁷⁸ South Africa Law Reform Commission, *supra* note 5, at 120 Ann. A. Polygyny would significantly be controlled by these rulings, but it does not outlaw its practice and as a male institution this makes the legislation problematic when it come to equality for women.

⁷⁹ South Africa Law Reform Commission, *supra* note 5, at 121 Ann. A.

⁸⁰ South Africa Law Reform Commission, *supra* note 5, at 122 Ann. A.

⁸¹ South Africa Law Reform Commission, *supra* note 5, at 122 Ann. A.

sunnah; subjecting a wife to cruelty or harm; and marital discord to the extent that it undermines the values of marriage.⁸²

In matters of custody and access to minor children, as well as changes to these arrangements, the court would use Islamic law and the supporting recommendations of the Family Advocate to decide on appropriate action in accordance with the welfare and best interests of the child.⁸³ For maintenance arrangements, the provisions of the country's Maintenance Act⁸⁴ would apply together with consideration for the requirements of maintenance as defined in Islamic law.⁸⁵ This includes the husband's duty to maintain a wife during marriage and *iddah*, while the wife has custody of children, and caring for children until they are self-supporting.⁸⁶

Within the framework the MJC services, these aspects of the legislation on marriage, divorce, polygamy, matrimonial property systems, and maintenance and custody, link to the experiences of MJC clients and would provide for significant redress for women under the current conditions of MPL practices. The requirements of the legislation in terms of mediation in marital disputes and arbitration, in turn, suggest a link to the work of the clergy. In dealing with marital disputes, the legislation makes compulsory mediation at an accredited Mediation Council a preliminary requirement to

⁸² South Africa Law Reform Commission, *supra* note 5, at 111 Ann. A. Substantial redress for women particularly in circumstances of abusive marriages, that will counter current conditions where many women are compelled to remain in these situations, could result from these rulings in the legislation.

⁸³ South Africa Law Reform Commission, *supra* note 5, at 123 Ann. A.

⁸⁴ Maintenance Act 99 of 1998 (S. Afr.).

⁸⁵ South Africa Law Reform Commission, *supra* note 5, at 123 Ann. A.

⁸⁶ South Africa Law Reform Commission, *supra* note 5, at 124 Ann. A. In addition to the rulings on matrimonial property arrangements this aspect of the legislation will promote further the well-being of children in Muslim marriages.

adjudication by the court.⁸⁷ In this mediation process, a representative of the parties' choice may represent each spouse to assist them in dealing with their situation. A one-month time limit is allocated for the process and after this time, the Mediation Council has to submit a report to the court on its findings.⁸⁸ The court may validate a mediation agreement if it is satisfied that the interests of the children are protected, while unresolved cases, as verified by the Mediation Council, would qualify for court adjudication.⁸⁹ In a similar manner, the parties to a Muslim marriage may seek independent arbitration to resolve a marital dispute and arbitrators would likewise have to apply to the court for legal endorsement of their outcomes, especially if it affects the welfare of minor children or the status of other persons.⁹⁰

In unresolved cases referred for court adjudication, a judge, preferably a Muslim, would deal with the case and two Muslim assessors with specialised knowledge of Islamic law would assist the judge in decision-making. In unopposed proceedings for divorce or a related matter or if the parties have concluded a settlement agreement, a Muslim judge will be allowed to preside without assessors.⁹¹ The Minister for Justice and Constitutional Development is to appoint assessors whose main role is to act in an advisory capacity to the judge. The decision of the court will be subject to appeal and in such cases, the court will seek the views of two independent Muslim institutions for

⁸⁷ South Africa Law Reform Commission, *supra* note 5, at 125 Ann. A.

⁸⁸ *Supra* note 33 at 4:35. The legislation does not specifically define the nature of Mediation Councils or arbitration. However, the process here points toward the Qur'ānic injunction on mediation and reconciliation in Muslim marriages and is indicative of a continued role for the clergy through the legislation.

⁸⁹ South Africa Law Reform Commission, *supra* note 5, at 126 Ann. A.

⁹⁰ *Id* at 126 Ann. A. With Mediation Councils and arbitration undefined, this aspect of the legislation would, like polygynous marriages, be problematic especially if mediation and arbitration are to be facilitated through current MPL mediation structures.

⁹¹ South Africa Law Reform Commission, *supra* note 5, at 127 Ann. A.

written comment to finalise the matter.⁹² This overall then is the broad range of the proposed legislation as it relates to the current MPL practices by the clergy.

Assessing Muslim Personal Law in Post-Apartheid South Africa

In South Africa, MPL service provision is primarily the domain of the clergy. At the MJC, the clergy are, to various degrees, educated in Islam and in different roles practice Islamic law in mediating in Muslim family life. This service is consistent with the needs of Muslim clients in that it provides an Islamic service to the community. However, their approach raises a number of concerns that make the alternative of MPL through the country's secular courts an important consideration.

The legislation outlines measures compatible with MPL, which in its implementation in the secular courts could begin to address the family and social disintegration in the community and improve the status of women. By legally defining Muslim marriages, the legislation would regulate MPL services and promote adherence to the requirements and responsibilities thereof. The registration of Muslim marriages and divorces and the role of the marriage officer as a facilitator in the process, for example, would also further contain unregulated MPL practices at organisational and local levels that underpin social and family dysfunction in the community.

The provisions for *faskh* in Islamic law offer an important alternative for women to free themselves from abusive marriages. The limitations on polygynous marriage

⁹² *Id* at 127.

based on court approval would control current unrestricted practices of polygyny. It would be unlikely, for example, given the socio-economic status of MJC clients, that many men would be in a position to support taking another wife in a court of law based on the equal treatment provision. Similarly, the provisions for maintenance, child custody, and the regulation of matrimonial property systems would be decisive in ensuring financial and parental support of spouses to their families, guaranteeing arrangements where property has to be allocated to women, and this allocation is focused on supporting the well-being of children in a marriage.

These are important elements of the legislation for MPL clients, which could be a beginning to address the problems of the Muslim community in fundamental ways. However, the legislation has conflicting inherent weaknesses, which would make MPL untenable as a function of secular courts. For example, polygyny sustains gender inequality and given its practice in the Muslim community, as a precursor to violence against women as well, its inclusion in the legislation would clearly negate its goals of gender justice for Muslim women. The legal recognition of polygyny would require, therefore, serious consideration at the institutional level before this legislation passes, as the circumstances in fact warrant its exclusion.

The ruling on compulsory mediation at Accredited Mediation Councils prior to court adjudication is likewise contentious. While providing a legitimate avenue for the clergy to seek accreditation, in the absence of mechanisms to ensure adequate standards in their service, the legislation will validate MPL service provision in its current flawed

form. Without measures to ensure improved standards in MPL practices by the clergy, the legislation will then sanction practices that play a significant role in the disempowerment of Muslim women. In addition, the requirement for compulsory mediation under these circumstances, in particular, would be a violation of the rights of Muslim clients to effective services and in general, is an undue imposition that will impede the right of Muslims to choose the services they wish to utilize. Further, since Islamic law allows for *faskh* for reasons of harm, compulsory mediation is unnecessary and indeed hazardous for women given the high number of gender violence cases of MPL intervention as illustrated by the MJC.

A related concern is the provision for Muslim assessors with specialised knowledge of Islamic law to act in an advisory capacity to judges in decision-making. Male scholars dominate Islamic law and the legislation must ensure a gender balance here in order to avert the risk of a mere shift of the control of the lives of Muslim women by clergy from a community setting to a legal one. In a similar vein, the legislation would have to consider any additional factors that may reinforce the disempowerment of women, its terms of *khul'* divorce, for instance, which it defines in relation to an agreement with the transfer of property, as this could financially incapacitate women who already find themselves in disadvantageous circumstances. Likewise, the inclusion in the legislation of a definition of a Muslim (which is self-evident) is precarious given the propensity amongst those who hold conservative views on Islam, to which the majority of

the clergy align, to categorise and vilify persons who do not fit their understanding of being “Muslim”.⁹³

A final concern is that the legislation gives Muslims the option of participation where the parties can elect to be bound by it. This option is problematic, as it will only sustain the current situation where MPL services functions parallel to secular law. Given the persuasive power that clergy continue to hold over the communities where they implement their services who would likely continue to access this service, this legislative option will operate to create a division where the affluent and educated would be able to utilise this legal option and it would not likely benefit those most in need. In its current form, then, while the legislation offers options for redress and women’s rights in the Muslim community, in a wider constitutional context, especially in ensuring the rights of equality, dignity, and security for all, it will fail in its goals.

These are all problematic factors that essentially weaken the goals of the legislation and the intent of the state to ensure post-apartheid redress in the Muslim community. If the government can deal with these limitations through redrafting the legislation to include prohibiting polygynous marriages, defining the role and scope of

⁹³ E. Moosa, *Muslim Conservatism in South Africa*, 69 J. THEOLOGY S. AFRICA 73, 79 (1989); F. Esack, *TRC Submission*, 17 J. ISLAMIC STUD. 109, 111 (1997). See also A. Tayob, *Fitnah: The Ideology of Conservative Islam*, 69 J. THEOLOGY S. AFRICA 65, 70 (1989) (for a related debate). Moosa and Esack show how clergy have disparaged those who challenge their authority. As Esack, a prominent anti-apartheid activist and scholar in Islamic and Biblical studies stated in his submission to the Truth and Reconciliation Committee “The Muslim clergy described me in their paper as an ignoramus masquerading as a theologian”. Esack, *supra* at 111. In fact, this attitude is evident as well in submissions on the legislation as recorded from Islamic groups that called the legislation “*kuffaar* intervention” stating, “There is the overwhelming possibility of alien ideologies gaining momentum in propagating their views amongst the Muslim masses via the agency of the secular *kuffaar* courts.” South Africa Law Reform Commission, *supra* note 5, at 104. The term *kuffaar* is Arabic for “unbeliever”.

mediation councils, and ensuring that the legislation primarily supports the rights and well-being of women the legislation could be a viable alternative to current MPL services offered by the clergy. In addition, as the above tract indicates, this process may require only a few decisive elements that relate to MPL, to function through the secular system to effect the needed change rather than a comprehensive integration of MPL into the secular legal system. These are the registration of Muslim marriages and related accountability of marriage officers, the provisions of *talāq* and *faskh*, and legislation of maintenance, custody and property arrangements. In this form, the legislation will support post-apartheid redress for Muslims by eradicating the long-standing problems of not having Muslim marriages legally recognised and will facilitate the rights of Muslim women through the legal system. As a starting point then, a limited construction of MPL could attain the goals of the government as related to the Muslim community. Conversely, each day these circumstances continue constitutes injustice and a violation of the rights of women in the South African Muslim community.

The current clergy-provided service as relayed in this paper also raises an added concern of the nature and standard thereof. In many aspects of Muslim community life, the clergy provide needed services especially in religious and ceremonial services and in certain sectors still enjoy the charismatic appeal of the past. However, in post-apartheid South Africa, with the pressing conditions of the Muslim community in communal and family life, a role based on charismatic authority is simply inadequate to ensure change in the community, and any attempt by the clergy to secure socio-political authority through state MPL legislation under these conditions is likewise inappropriate. A legal

endorsement of the clergy's role will only serve to continue the trends of disadvantage that Muslims have long endured as a community, and in addition, entrench the power of the clergy over the people in decisively negative ways. In any socially relevant role, therefore, the clergy would need to maintain serious cognizance of the history of disadvantage of their community. Concomitantly the clergy would have to implement effective services that are consistent with the democratic culture of South African society and, in addition, engage in change processes in the Muslim community that moves the community away from its oppressive past. As such, the clergy would have as a priority to transform its structures, including its male-dominated networks. In their intervention, they would have to, importantly, improve their level of service and address the gender inequality and gender-based violence in the community. Here the government could add to the legislation as well by defining parameters to ensure such outcomes and hereby facilitate goals of democratic service provision in the country.⁹⁴

Conclusion

In secular democratic societies where Muslims live as minorities and religious leaders regulate MPL separately from the mainstream environment, the role and

⁹⁴ Abdullah, *supra* note 8, at 190, 192, 193 (on file with author). It remains a complex task to dismiss the clergy outright. In the survey, in spite of their poor level of service, the majority of respondents expressed a preference for the clergy's services. This support was not unreserved though nor did clients consider the service ideal. Most respondents indicated that there was a need for professional standards in MPL mediation especially in ensuring confidentiality, as one internet respondent commented: "Too often matters discussed with 'ulamā' become public knowledge a few days after". In a similar way, a Muslim professional in Islamic community services commented: "The quality of counselling that takes place... whether we link up with the government or not we discussed that... but at the end of it what came out was there is a need for some sort of structure. Who will watch the counsellors do unethical things? People are a law unto themselves". Overall, the research findings also revealed a desire amongst respondents for a compromise position between the state and the clergy's services.

provision of MPL services as part of mainstream resources is emerging as an important area of debate. However, the way in which religious leaders apply MPL, in the main, conflicts with the equality and rights of Muslim women and hence with the broader environment. In turn, the state faces the challenge of having to respond to these circumstances if it is to ensure democracy for all. The practice of MPL in South Africa, as illustrated by the example of the MJC, exemplifies this dilemma and shows that there is a need to find common ground between the *sharī'ah* and the secular, notwithstanding its opposing designs, if inclusive democratic progress is to be attained in Muslim minority contexts. A proposed limited application of MPL through the secular legal system offers one such channel to this end, which could promote the rights of women in Muslim communities and address inappropriate MPL practices, while the state ensures broader democratic progress in relation to all its citizens.