

South African Engagement with Muslim Personal Law: The Women's Legal Centre, Cape Town and Women in Muslim Marriages

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Introduction

While the South African Constitution serves as the legitimate legal instrument on the enshrinement of the rights of individuals to be freely who they are, without fear or prejudice from others, it does little to ensure that these rights are enacted and protected across the landscape of social engagement. This is especially prevalent where a particular grouping is in a minority, and where the isolation of an apartheid way of life ensured that little was known or debated about within the community. As just one minority group within South Africa, the Muslim community has the right to freely practise its religious and traditional practices. As a social grouping, therefore, it would be fair to say that Muslims are able to comfortably enjoy a certain freedom of expression, which is not always found by other minority groups elsewhere in the world. But beneath the social surface of this community, more and more questions are emerging regarding the legal rights of the Muslim woman – not within her role as a South African citizen, but within her legal role as a wife – how this is constituted, exercised, and in the event of divorce or death of her spouse, what this means to her in terms of access to resources.

This case study article examines the South African context, introduces the Women's Legal Centre (WLC) in Cape Town, South Africa as a feminist organisation, and explores the strategies of the WLC in relation to litigation attempts at legislation recognising Muslim marriages, case studies that have developed Muslim Personal Law (MPL) in South Africa and the international approach to MPL.

The South African context

A situational analysis of South Africa shows that South Africa has one of the widest disparities in income between rich and poor in the world, which has steadily increased since 2000.¹ Poverty and inequality in South Africa are organized by class, race and gender, with a per capita income of black households 13% of that of whites, and female headed households 46.2% of that of male headed households.² According to the South African government 2007 report on Millennium Development Goal 3, the majority of the poor are disproportionately women.³ The poorest households in South Africa are female headed (Bonthuys and Albertyn, 2007: 205).

The WLC takes note of the subordination and discrimination suffered by South African women by specifically acknowledging that black South African women are further disempowered by a lack of access to resources as a direct consequence of the apartheid regime that differentiated among women. Considering that the focus of this paper is on Muslim women, when one looks at the position of Muslims as blacks in South Africa, one is obliged to look at their role in the anti-apartheid struggle as a minority group. South Africa's transition to democracy had an enormous impact on all social, religious and ethnic groups in the country, defining or rather redefining their political role within a changing order (Bonthuys and Albertyn, 2007). In the early 1980's the resistance to the apartheid regime grew rapidly and embraced almost all social groups which were oppressed. This development led to an increasing political mobilization and involvement of Muslims who until then had shown little interest in political participation as long as they could exercise their religious duties freely (Niehaus, 2006).

In line with the many resistance movements at the time, there was a part of the Muslim community that protested under the guise of forums such as the Call of Islam (1960), Muslim Youth Movement (1957) and Qibla (1980). Even though it was a small group of Muslims that became active in the struggle, the apartheid regime saw Muslims as militant and suppressed their religious rights with the aim to curb their political activism in the struggle. It must be noted that the Islamic clergy took a political and principled stand not to register as marriage officers as prescribed by South African legislation. Their position was bending to the legislation implied an acceptance of the apartheid regime and after the new dispensation it was felt that Muslims contributed and should be entitled to practice their religion freely; and the country's laws on marriage did not make provision for polygamous marriages which is permissible in MPL,

and in customary law. The battle for the recognition of customary law in its relationship to polygamy was won in South Africa in 1998, but the meaning of marriage in MPL was still under contestation in 2010. In order to explore the Women's Legal Centre's approach to the issues raised by MPL for South African Muslim women, the next section briefly introduces the Centre itself and its broadly feminist platform towards strategic litigation.

WLC strategy: strategic litigation

"To be a feminist today, I think it is fair to say, is to believe that we belong to a society, or even civilization and have been subordinated by men and women, and that life would be better certainly for women possibly for everybody, if that were not the case, feminism is then the range of committed enquiry and activity dedicated first, to describing women's subordination – exploring its nature, extent, dedicated second, to asking both how and through what mechanisms and why for what complex and interwoven reasons – women continue to occupy that position and dedicated third, to change." (Dalton, 1987:1)

Whilst the WLC identifies as a feminist organisation, it must be noted that there is no single definitive or correct feminism or feminist theory. Instead, feminist insights, methods and theories are applied to challenge mainstream analyses across a multitude of disciplines including history, sociology, philosophy, psychology and anthropology. In some contexts, feminism sought to unite women in the face of oppression under patriarchy, but in the past three decades - and in diverse contexts - feminists understand the intersection of race and class, alongside other forms of social categorization, with gendered experience (Lewis, 1993). By acknowledging that feminism must be examined in terms of race and class, it becomes always necessary to put feminism into context and the WLC argues that a contextual and intersectional approach forms part of any definition of feminism in South Africa which aims to use of litigation to achieve women's equality.

It is important to examine how the WLC uses the law to bring about change through strategic litigation. Strategic litigation is defined as a method used by attorneys, usually non profit organisations (NPO), to advance human rights. It is also known as impact litigation. The court is used to create broad social change to create long term positive effects.

The most common method of achieving the objectives of strategic litigation is through the establishment of effective and enforceable law (i.e.

creating precedents). In successful litigation, this may arise through: the interpretation of existing laws, constitutions and international law instruments to substantiate or redefine rights, or to enforce or apply favourable rules that are underused or ignored i.e. implementation problems, challenging existing laws detrimental to social justice or individual rights (e.g. based on conflict with internal law or constitutional law) and where existing law prohibits the human rights violations complained of but the local judicial and executive systems fail to provide a remedy for the wrong.

Organisations use strategic litigation because it can contribute to the stabilisation and clarification of the legal system or its laws (procedural and substantive) providing the basis for government reform and the legal parameters within which this must occur, it raises the level of legal and human rights literacy by educating the judiciary and legal profession, it exposes institutionalised injustice, promotes government accountability and changes social attitudes and empowers vulnerable groups

Strategic litigation has several advantages over other strategies (Kitchling, 2003):

- A single case can have extensive legal and social effects and impact.
- It uses judicial power to defend and promote the rights of minority, deprived or marginalized groups. In a system where there is an independent judiciary and credible legal system, but where the executive and legislature reflect only the view of the majority or the political and economic elite (e.g. South Africa under Apartheid), this may be the only way to get redress for wrongs suffered.
- It establishes precedent that benefits future claimants. This is particularly relevant in common law jurisdictions where stare decisis (i.e. legal precedent) is the rule.
- It raises issues publicly.
- In the case of international tribunals or courts, it may create political pressure from abroad – will have an international impact.
- In many cases (particularly for group claims through class/group action) it raises an issue or has a genuine political effect than other means.
- It broadens access to justice.
- It 'tests' and clarifies the content of existing laws, thus furthering government accountability by establishing the parameters within which government must operate.

There are also disadvantages to strategic litigation:

- By its very nature, the outcome of any litigation can rarely be assured. Hence, a 'trial and error' approach has been used. This means that several cases can be taken to court before obtaining the desired judgment.
- A related consideration is that because of the need for a decision of precedential value, there may be no judgment below that of the highest available court that is fully satisfactory. Given that in most legal systems it is only very few disputes that reach trial (because of settlement, lack of knowledge about rights, etc.), and fewer still appeal, Settlement out of court is not an option – settlement does not bring about change. Attorneys need to act on instructions.
- Litigation does not necessarily reflect public opinion and may achieve a result that does not have public support. The objective of strategic litigation may be more properly achieved through debate in the political system rather than judicial decision.
- Impact litigation is dependent on finding the 'right' client. Ideal clients are not easily found in the real world. Many client problems, such as fear, lack of resources, inability to understand the process and inconsistencies in testimony, may need to be addressed through client management rather than case selection.
- Where legal protections and enforcements are weak, strategic litigation may not achieve the desired impact. Implementation is fundamental.
- Where there is no independent judiciary, attempting to use the judicial power for policy ends may be redundant.
- Often the process of strategic litigation is difficult to control, particularly in class action procedures where the claimant class is not fixed.
- Strategic litigation may not actually benefit the affected community. As a strategy, it has been criticised for being lawyer-centred and lawyer-defined and having the effect of disempowering affected communities, relegating them to victim status and producing wins that do not improve the well-being of the community. This is because policy-oriented strategies do not focus on the client as an individual but rather as the means to further a social reform strategy.
- Litigating may be a costly method of raising issues. Publicity or political lobbying may be cheaper.

In the South African context public interest litigation has played and is playing an increasingly important role in addressing inequality and realising the achievement of constitutional rights. While it has its challenges and risks, one cannot underestimate the role of public interest litigation in making the constitution a living document that can be used to make a real difference in the lives of our most vulnerable citizens. With constitutional supremacy in South Africa there has been a deliberate intention to ensure that the law is not used as means to oppress as was done by the apartheid. On that premise, the chosen strategy of the WLC to use impact litigation has had far reaching implications for women by obtaining a number of successful judgments to advance women's rights.

In the next sections, the focus will be on relationship rights in respect of the vulnerability of Muslim women who cannot turn to the courts for protection on the dissolution of their marriages because they are married by religious rites only as such marriages are not recognised as legal marriages and therefore do not have legal consequences. Many women are currently deprived of access to resources (including their homes) by the failure of the State to recognize religious marriages.

Muslims make up two percent of the South African population. The failure to recognise these marriages means that all women married by Muslim law do not enjoy the protections offered by civil marriages.

Islamic feminist discourse and activism has grown, historically, in response to the Muslim conservatism present in the process for the development of MPL legislation for South Africa. There is an assumption (often ungrounded) that women in Islam are oppressed and while there may be much to debate here, it remains true that the South African Muslim society often deploys a conservative and often patriarchal approach to the Quran where Islamic religious leaders consist of only men and are seen as authorities for the South African community. This has served as an obstacle to ensuring that Muslim women's rights are protected in the adjudication of MPL by the Islamic authority, highlighting the necessity for legislation to govern MPL so that Muslim women's rights are adequately protected.

The main strategy used by the WLC to further the cause of Muslim women has been through strategic litigation. The WLC argues that women who are married by religious rites are discriminated against and marginalised by the fact that their marriages are not legally recognised. Hence they do not have a right to fair access to resources on the dissolution of marriages through death or

divorce, whereas women who are married civilly or in terms of African Customary Law are protected by a legislative framework. The status quo currently is that religious marriages are not legally recognised. What that in effect means is that a woman's marriage in accordance with her religion (Islam, for example) is not actually considered as a marriage in the eyes of civil and constitutional law.

Attempts at enacting legislation

The South African Constitution advocates the Bill of Rights as the “cornerstone” of democracy in South Africa, enshrining the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights.⁴ This includes the right to freedom of religious belief and opinion in terms of Section 15 of the constitution. Section 15 expressly allows for legislation to be passed recognizing such rights subject to the Constitution.

The political transformation in the country was the catalyst for renewed attempts at the legal recognition and enforcement of aspects of MPL. Considering the active role that Muslims played in the apartheid struggle, some assumed that this would be acknowledged by not only having the right to freedom of religion, but by an approach which would offer religious law a new status. Under the new dispensation, there were various endeavours on the part of the Muslim community to seek legal recognition of aspects of MPL. With the electoral promise made in 1994 that legislation will be passed relating to MPL, the Muslim Personal Law Board was established in 1994 with the general brief to legally recognise the MPL law system. Due to ideological differences relating to the compatibility of Shariah (MPL) with the Constitution, the Board disbanded in the same year.

A Project Committee of the South African Commission Law Reform Commission was established to investigate Islamic Marriages and related matters. The project committee was tasked to investigate Islamic marriages and related matters with effect from 1 March 1999 for the duration of the investigation having a more specific brief than to examine the MPL system overall by only looking at the recognition of Muslim marriages.

In the context of a secular state in which Muslims constitute a minority community, the non-recognition by the State of the system of MPL or aspects thereof has caused serious hardships and produced grossly unjust consequences. The issues have been identified as *inter alia* being:

- the status of a spouse or spouses in an Islamic marriage or marriages,
- the status of children born of an Islamic marriage,
- the regulation on the termination of an Islamic marriage,
- the difficulties in enforcing maintenance obligations arising from an Islamic marriage,
- the difficulties in enforcing custody of and access to minor children,
- the proprietary consequences arising automatically from an Islamic marriage are not recognised in law and therefore not enforceable.⁵

The draft of the Discussion Paper culminated in the draft Muslim Marriage Bill in 2003 after extensive public comment. As a consequence of receiving numerous concerns relating to the SALRC Bill, which revolved around both constitutionality issues generally and the women's right to equality in particular, the parliamentary office of the South African Commission for Gender Equality drafted an alternative bill in October 2005 called the Recognition of Religious Marriages Bill. This Bill was of general application and provided for the recognition of all religious marriages.⁶

The importance of passing legislation was highlighted by Manjoo when she argued that "Bringing personal status laws into conformity with international and constitutional equal rights provisions is an imperative for the protection of women's human rights. Multicultural secular democracies face a challenge in effectively and meaningfully guaranteeing the right to equality and the right to religion and culture" (Manjoo, 2007; 4).

It is our understanding that the Gender Commission Bill was not taken any further in the executive structures. The draft Bill by the SALRC seems to be the only Bill that is being given due consideration. The Bill is obviously subject to amendments and modification by the Minister of Justice and Constitutional Development. The Department of Justice and Constitutional Development has informed the public that the Bill is on the legislative timetable for the year 2010, and to be introduced to Cabinet. There is presently an embargo on the amended Bill, pending Cabinet approval. From enquiries made to the Parliamentary Monitoring Group in September 2010 as to the progress of the passing of the Bill, it seems that the Bill is still with the Department of Justice and Constitutional Development and has not been taken to Cabinet for approval yet. While it is commendable that the State acknowledged that MPL should be given legal recognition to be consistent with the Constitution, a decade and a half later, the status quo remains the same in that Muslim

marriages are still not recognised and the serious hardships suffered by Muslims are more apparent, the question about the lack of legislative framework has become ground for intensive feminist work within the WLC.

A contextual reality is that idea of legislation has received mixed reactions from the Muslim community. There are those that vehemently oppose the Bill saying that enacting legislation will make it subject to constitutional supremacy which is unacceptable as the Quran is the supreme law according to the tenets of Islam. Then there are those that favour legislation only if there are independent Shariah courts to ensure that adjudication is strictly according to Islam, thereby favouring religious pluralism. Then there is a significant sector of the Muslim community that feel strongly that the advantages of legislation far outweigh the disadvantages in that the community will benefit from having a legislative framework and that MPL, which is based on the premise of fairness and justice, can be compatible with the Constitution. During colonial and apartheid South Africa, marriages contracted under Islamic Law were considered null and void. Against this background, clergy regulated Muslim family life through the practice of MPL as an unofficial community code parallel to secular law (Abdullah S., 2006; 3)

However, the effectiveness of the Islamic clergy regulation has been problematic in that: as a community organisation, its funding is limited resulting in them not having the resources to provide Muslim women with the urgent assistance required and there is no consistency amongst the “judgments” of the Islamic clergy where some of the conservative Ulama do not interpret MPL in line with the changing situation in modern society.

The majority of the clients who utilise the MJC’s services are women between the ages of 18 and 50 who seek assistance for marital problems in abusive marriages who are mainly homemakers or otherwise unemployed and automatically rely on their spouses.⁷ The Islamic clergy have been criticised for serious shortcomings when addressing the plight of women in that their decisions are skewed in favour of men. Many women coming to the WLC reported struggling to get divorced.

Women are often torn between their religious affiliations (advocated to them by their religious leaders) and the hardship they endure. They find it difficult to reconcile that their religious beliefs condone pain and suffering where the clergy do not grant them redress based on religious doctrine according to them. The secular courts have seen more and more women turn to them for help, having little faith that the Islamic clergy which consists only

of males, will take due consideration of their plight. Muslim women have no legal redress, and so the WLC has felt obligated to intervene to challenge the discrimination suffered by Muslim women.

Muslim Personal Law Through the Courts

Prior to the Constitution, the courts viewed Muslim marriages as potentially polygynous and therefore contrary to public policy. Not too long ago, in 1983, in *Ismail vs Ismail 1983* (1)SA1006(A) where the appellant sought the proprietary consequences flowing from the termination of a marriage solemnised according to Islamic rites, the court refused to grant rights to polygynous unions on the grounds of public policy saying that “the union was contrary to the accepted norms that are morally binding on our society”.

After the democracy in South Africa was achieved, when the court had to consider the consequences of a Muslim marriage in *Rylands vs Edros 1997*(2) SA 690(C), where a woman married by Muslim rites in a *de facto* monogamous union which had subsequently been terminated by her husband in accordance with Islamic law, asked the Court to enforce ‘*the contractual agreement*’ constituted by the marriage according to Muslim rites between the parties. The Court was not asked to recognize the marriage by Muslim rights as a valid marriage, but rather to enforce certain terms of a contract made between the two parties. The Court considered whether the spirit, purport and objects of Chapter 3 of the interim Constitution were in conflict with the views of public policy expressed and applied in the *Ismail case*. Recognizing the values of equality and tolerance of diversity underlie the interim Constitution, the court found there was nothing offensive to public policy or good morals in the contract which the defendant was seeking to enforce. As such, the Cape High Court recognized a *de facto* marriage by Islamic rites as a valid contract under the Constitution and demonstrated that the Court could be called upon to ensure that parties to a monogamous Muslim marriage comply with the terms of the contractual engagement. Here, the court decided to enforce a contract to protect the vulnerable spouse. This case is known as the case that gave legal recognition to the consequences of an Islamic marriage. Even though it did not recognize the union as a marriage, it was hailed as a breakthrough because it removed the uncertainty of spouses married according to Islamic rites from having to prove their contributions to the marital estate. By looking at it the consequences of a Muslim marriage contractually, the court avoided having to interpret what the religion dictated.

In *Amod v Multilateral Motor Vehicle Accidents Fund* 1999(4) SA1319 (SCA1) a woman brought an action against the insurer of a driver who had negligently killed her husband. She and her husband had been married according to Muslim rites in a *de facto* monogamous marriage, which had not been registered in terms of the Marriage Act 25 of 1961. The Supreme Court of Appeal found that since the marriage had been a *de facto* monogamous marriage and undertaken according to the customs of a major religion through a very public ceremony, the appellant's marriage, in the spirit of plurality, equality, and freedom of the new Constitution, could not continue to be found to be offensive to the *bonos mores* of society. The court focused on the legal duty of support, rather than committing to examine the status of the relationship that gave rise to the legal duty.

The WLC has been approached for legal help by many Muslim women and the first case that the WLC took on to challenge the discrimination faced by Muslim women by not having their marriages recognized was the groundbreaking case of Daniels which allowed for Muslim women to inherit from their deceased husband to whom they were married to Muslim rites only.

Daniels v Campbell N.O. and Others 2004(5) SA 33C

Zuleigha Daniels married Mogamat Amien Daniels in 1977 according to Muslim rites. In 1994 Mr Daniels died without leaving a will. The only real asset in Mr Daniels' estate was a house in Hanover Park. The house was first occupied by Mrs Daniels as a rental from the City of Cape Town in 1969. When Mr and Mrs Daniels married, the housing policy dictated that the tenancy be transferred to Mr Daniels as he was deemed to be the principal breadwinner. Consequently when he died, the property formed part of his estate. The legislation relating to persons dying without a will, namely the Intestate Succession Act 81 Of 1987, stipulated that the surviving spouse would inherit the estate. The surviving spouse was considered to be where the parties were married legally. Further, the Maintenance of Surviving Spouses Act 20 of 1990 stipulated that a spouse may claim maintenance from the deceased estate, spouse being considered where the parties were married civilly.

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

In terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 20 of 1990, the surviving spouse of the deceased has a right to inherit and be maintained. However, the Master of the High Court (who administers deceased estates) failed to acknowledge Mrs Daniels as a spouse because her marriage was not solemnised by a marriage officer appointed in terms of the Marriage Act 25 of 1961.

Mrs Daniels approached the WLC for help to prevent her from losing her home which she lived in for more than two decades and to which she had financially contributed to and maintained. The WLC made an application to the Cape High Court in 1999 to have her rights asserted as her late husband's surviving spouse in terms of her constitutional right to freedom of religion, equality and dignity. When considering the matter, Judge Van Heerden said:

"Marriages by Muslim rites have not been recognized by South African Courts as valid marriages, firstly because such marriages are potentially polygamous and hence contrary to public policy and secondly because such marriages are not solemnized by authorized marriage officers in accordance with the Marriage Act 25 of 1961...An appropriate remedy must mean an effective remedy for breach, for without an effective remedy for breach,, the values underlying the rights entrenched in the constitution cannot be properly upheld or advanced. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal". The High Court declared Mrs Daniels to be a spouse so that she could be deemed to be an heir to her deceased's husband's estate and claim maintenance from the estate.

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

"the word "spouse" as used in the Intestate Succession Act 81 of 1987 includes the surviving partner to a monogamous Muslim Marriage and the word survivor as used in the Maintenance of Surviving Spouse Act 27 of 1990 includes the surviving partner to a monogamous Muslim marriage."

Despite this landmark victory, Mrs Daniels was not in a financial position to register the property in her name which she inherited because of the legal costs involved and the arrears owing on the property in respect of rates and taxes. The Women's Legal Centre managed for the transfer of the property at no cost. The Women's Legal Centre raised funds to pay for the arrear rates

and taxes to effect the transfer of the property in her name. Mrs Daniels is now the proud registered owner of the property!

The WLC's concluding analysis of this case starts with the premise that the Constitution dictates that the courts have an obligation to give due consideration to the Bill of Rights entrenched in our constitution and this court decision illustrated constitutional supremacy by recognizing the importance of the Bill of Rights, albeit that the marriage was not given legal recognition by the Legislature. The Constitutional Court agreed with the High Court that relevant legislation be declared inconsistent with the Constitution whereby in terms of Section 1(4) of the Intestate Succession Act 81 of 1987 ("ISA"), the definition of spouse shall include a husband or wife married in accordance with Muslim rites in a de facto monogamous marriage and Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 ("MSSA") survivor shall be deemed to include the surviving husband or wife of a de facto monogamous union in accordance with Muslim rites.

Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19; 2009 (11) BCLR 1148 (CC) (15 July 2009)

The WLC then intervened as an amicus curiae (friend of the court) in the watershed case which gave recognition to polygamy in Muslim marriages for the purpose of inheritance, where the husband died intestate, having more than one wife to whom he was married according to Muslim rites:

Mrs Fatima Gabie Hassam made an application to court concerning the estate of the late Ebrahim Hassam as one of two current wives of the deceased, to whom they were both married to according to Muslim Rites, asking the court had to provide clarity on the validity of the marriage/s.

Fatima Gabie Hassam married Ebrahim Hassam in accordance with Muslim rites on 3 December 1972. On 10 February 1990 Ebrahim Hassam acquired property in Cape Town that served as their matrimonial home for them and their children. In June 1998 Fatima obtained a "fasakh" to terminate their marriage. Their marriage was not considered terminated because they reconciled within three months and they continued to live together as husband and wife until his death on 22 August 2001. Mr Hassam was also married to Miriam Hassam in or about 2000 and there were three children born of the marriage. Mr Hassam died without leaving a will. When his estate was reported to the Master's office, the Master refused to acknowledge Fatima Gabie Hassam as a spouse because Miriam Hassam was also a spouse. Fatima

Gabie Hassam sought to challenge her rights as a spouse. She applied to the Cape High Court asking that she be declared the spouse of the deceased because she was first married to the deceased.

The WLC as *amicus curiae* sought to make submissions to the court arguing that a polygynous Islamic marriage should be dealt by advocating that the relief that should be accorded to all parties in polygynous Islamic marriages should be in accordance with a constitutional reading of the ISA and MSSA.

The legal issue was whether or not upon the death of their husband, the surviving spouses of a polygynous marriage contracted in accordance with Muslim private law are entitled to the benefits created by the Intestate Succession Act 81 of 1987.

In terms of the legislation relating to intestate succession and maintenance of surviving spouses, there is no provision for the polygynous Muslim marriages allowing more than one wife to inherit intestate and be maintained. The purpose of the Acts in question was to provide relief to a vulnerable section of our society, namely widows who face dependence and potential homelessness and women who are parties to Muslim polygynous marriages fall into this category. Excluding surviving spouses from polygynous Muslim marriages would be inconsistent with the purpose of the constitution to provide human dignity, equality and freedom. In *Daniels v Campbell NO and Others* 2004(5) SA 331 (CC), the provisions of the legislation in question were interpreted so that the concepts of “spouse” and “survivor” are sufficiently wide to encompass surviving spouses of marriages contracted according to Muslim private law. To do otherwise would result in a violation of such widows’ rights to equality as regards marital status, religion and culture and would compromise their right to dignity. This should apply with equal force to polygynous Muslim marriages. Muslim men are permitted under the Qur’an to marry more than one woman. Not extending the concept of “spouse” and “survivor” to polygynous Muslim marriages discriminates against these widows solely because of an aspect of their faith, violating their rights to equality based on marital status, religious, and culture as well as violating their right to dignity. That discrimination is unfair in terms of section 9(5) of the Constitution. Legislative and judicial policy is shifting to reflect the recognition of polygynous marriages.

The provisions of the Intestate Succession Act 81 of 1987, save section 1(4)(f), are easily capable of being applied to spouses in polygynous marriages

in that each spouse would be entitled to a child's portion of the estate, if there are descendants and an equal share if there are none. The concept of "survivor" in the Maintenance of Surviving Spouses Act 27 of 1990 uses the article "the", insinuating a singular application. However, section 6 of the Interpretation Act 33 of 1957 provides in every law, unless contrary to intention appears, that words in the singular can include the plural; and in sections 2(3)(b) and 3 of the Maintenance of Surviving Spouses Act 81 of 1987 "survivor" could be applied in terms of multiple surviving spouses without straining the language of the act.

The order was made declaring the word "survivor" as used in the Maintenance of Surviving Spouses Act 27 of 1990, to include a surviving partner to a polygynous Muslim marriage. Fatima Gabie Hassam was, for the purpose of the Maintenance of Surviving Spouses Act 27 of 1990, a "survivor" of the late Ebrahim Hassam, as was Miriam Hassam. The word "spouse" as used in the Intestate Succession Act 81 of 1987, included a surviving partner to a polygynous Muslim marriage. Fatima Gabie Hassam was, for the purpose of the Intestate Succession Act 81 of 1987, a "spouse" of the late Ebrahim Hassam, as was Miriam Hassam. Section 1(4)(f) of the Intestate Succession Act 81 of 1987 was declared inconsistent with the Constitution, to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband. The section was substituted with a statement that if more than one spouse survived a deceased person, the estate would be divided by dividing the value of the estate by the number of children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased. Each surviving spouse would inherit a child's share of the intestate estate or the amount fixed from time to time by the Minister for Justice and Constitutional Development; whichever was greater. The orders of the new section were referred to the Constitutional Court for confirmation.

The Constitutional Court confirmed the order by the High Court and went further to order that it had retrospective effect.

This case has been described as a "watershed" case in the media because of the recognition of a Muslim polygamous marriage. For the WLC, The judgment was obviously welcome, giving recognition to polygamous Islamic marriages was a major step towards entrenching constitutional rights.

In the legal community, the Hassam judgment has been welcomed and

rightly so, in developing MPL in South Africa, but for Ms Hassam who now will only receive a portion of her home the legal gains achieved is of little consequence to her personally.

By unlocking the door in recognizing polygamy also opened the door to further implications arising out of polygamy with regard to the position of wives in dual system marriages i.e. where the one wife is married legally having purported a civil ceremony before a registered marriage officer and the other wife married according to religious rites only. This begs the question of whether both wives will be treated the same. The current legislation relating to customary law, the Reform of Customary Law of Succession Act of 2009, failed to use the opportunity to make provision for women in dual system marriages with the result that women whose customary marriages are not valid or who are involved in unregistered polygamous marriages or dual system marriages cannot inherit from their spouses.

The Hassam judgment reflects the success of impact litigation to be able to change the interpretation of the law in the interests of women in the broader community where there is no legislative framework to afford the necessary protection.

Muslim women spouses' right to maintenance

The area of maintenance has also seen favourable adjudication being made for Muslim women who have claimed maintenance from their ex-husbands to whom they were married according to Muslim rites. In *Khan v Khan 2005 (2) SA 272 (T)* the Court considered whether there was a legal duty on the appellant, in terms of the Maintenance Act of 1998, to maintain the respondent, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygynous one. The Court held that the preamble to the Maintenance Act emphasized the establishment of a fair system of maintenance premised on the fundamental rights in the Constitution; that the common law duty of support was flexible and had expanded over time to include many types of relationships; that the purpose of family law was to protect vulnerable family members and ensure fairness in disputes arising from the termination of relationships; that polygamous marriages were a family structure and thus be protected by family law; and held that partners to Muslim marriages – whether monogamous or not – were entitled to maintenance. This case laid the foundation for the maintenance courts to have jurisdiction to hear maintenance matters.

Maintenance claims were further developed when Muslim women made interim maintenance claims where they turned to the secular courts to grant them a divorce. Rule 43 of the Uniform Rules of Court allows for whenever a spouse seeks relief from the court in matrimonial matters the court made provision for *pendent lite* maintenance, a contribution towards costs of a pending matrimonial action, interim custody of a child or interim access to any child.

In *Mahomed v Mahomed 2008 ECP* an interim application for maintenance in terms of Rule 43, Judge Revelas recognized that an increased tendency had developed in our courts to enforce maintenance and other rights to spouses married in terms of Islamic law, even though the legislature did not legally recognize an Islamic marriage as a marriage in terms of the Marriage Act. Accordingly, on that premise the Rule 43 Application was granted in terms of which the Respondent was ordered to pay maintenance for the applicant and his minor child and had to pay a contribution towards costs.

In *Hoosain v Dangor 2009 CPD* in an application in terms of Rule 43 of the uniform rules of court Ms Hoosain sought interim maintenance for herself and her minor daughter and a contribution towards costs in the main divorce action. The court found that interim maintenance arose from the general duty of a husband to support his wife and children and is not precluded from doing so because she is married by Muslim rites.

The WLC has also taken matters to court on behalf of women seeking legal redress in terms of the proprietary consequences of the marriages which was terminated Islamically. For the past seven years, the WLC has continued to use strategic litigation very successfully to create increasingly widening recognition of the legal discrimination faced by Muslim women married under MPL, and to address this through concrete issues, each of which interrupts an individual woman's life and stability in specific and contextualized ways. This chapter could outline the facts and outcomes of many more cases taken on by the WLC, and reports and discussion papers on these are readily available from the WLC.

The one with which I would like to end this section of the chapter brings us back to the meaning of MPL itself in South Africa:

The Women's Legal Centre Trust vs The President Of The Republic Of South Africa & Four Others (Constitutional Court Case CCT13/09 [2009] ZACC20

As much as the piecemeal development of the law by the courts is making inroads towards recognising Muslim marriages, legislation is necessary to help the broader Muslim community by having provisions to ensure that women's rights are protected. This led to the WLC launching a class action.

Because of the continued vulnerability being faced by Muslim women having no legal recourse, the WLC felt that as a strong advocate of women's rights it had a duty to advocate for the passage of legislation where there has been a draft bill since 2003 which had not been actioned.

The WLC felt that it was imperative for the protection of Muslim women in South Africa that legislation be passed to put them on par with other South African women who can seek legal redress and can have access to the courts.

The Women's Legal Centre brought an application at the beginning of 2009 directly to the Constitutional Court in terms of Section 167 of the Constitution asking the court to compel the President and Parliament to pass legislation recognizing Muslim Marriages and regulating the consequences of such marriages thereof within eighteen (18) months.

The response to our application was overwhelming.

Formally many Muslim organizations vied to enter the court arena by either wanting to be a party to the proceedings to oppose the application or applying to be a friend of the court and make submissions in support of our application. Notably, the United Ulama Council of South Africa, which is the umbrella body of Muslim religious bodies of South Africa, voted in favour of supporting the implementation of Muslim Personal Law in South Africa, with one constituent body dissenting. The majority of the Muslim religious bodies realize that a legislative framework would be necessary to protect the Muslims' interest, rather than relying on the courts advocating constitutionality on an ad hoc basis, which could be more threatening to the sanctity of the religion by the courts getting involved in religious doctrinal issues.

Informally we received a flurry of "objection mail" nationally from a vociferous Muslim minority, basically all in the same vein vigorously objecting to the WLC interfering in religious affairs of Muslims, asking for "an unwarranted and unwanted intrusion on Islamic law" when the "WLC does not represent the Muslims" and the application is a "misguided effort which aims to be a threat to the Holy Quran".

The court asked the WLC to address the preliminary issue relating to the jurisdictional issue of whether the Constitutional Court can hear the matter. The constitutional Court has concurrent jurisdiction with the High Courts and SCA to enquire into the constitutionality of legislation and has exclusive jurisdiction in certain instances inter alia in terms of Section 167(4)(c) where it may decide that Parliament and the President has failed to fulfill a constitutional obligation or in terms of Section 176(6) one may approach the Constitutional Court directly in extraordinary circumstances where the matter is of sufficient public importance or urgency that direct access will be in the interests of justice.

The Women's Legal Centre brought its application in terms of Section 167 applying for an order declaring that the President in his capacity as the head of the National Executive has failed to fulfill the obligation imposed on him by Section 7(2) of the Constitution to protect, promote and fulfill the rights of the Constitution and by preparing and initiating diligently without delay a Bill to provide for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition.

We submitted that the adjudication of the dispute involved important questions that relate to the sensitive areas of separation of powers and would require a decision on critical political question and precisely fall within the ambit of Section 167(4)(e) of the Constitution.

In the alternative, we made application in terms of Section 167(6)(a) that the failure of the President (in his capacity as head of National Executive and head of State) and Parliament to pass legislation was not in the interests of justice.

When considering the application in terms of this provision, the court highlighted that it contained a significant "agent-specific" focus in that the provision refers to "Parliament" only. The court held that the obligations we sought were obligations imposed by the Constitution on the "State". The court advocated that the provision envisages only constitutional obligations imposed specifically and exclusively on the President or Parliament alone. The Courts must allow a person, when it is in the interests of justice and without leave of the Constitutional Court to bring a matter directly to the Constitutional Court.

The decisions of the Constitutional Court on application for direct access make it clear that there must be compelling reasons to use this exceptional procedure to persuade the Constitutional Court that it should exercise its

discretion to grant access. It was our considered opinion that the consequences of having no legislative framework for Muslims married according to the tenets of their faith constituted compelling reasons for direct access.

However, the Constitutional Court found that this was a matter that would have benefit from other courts and that a multistage litigation process would have the advantage of isolating and clarifying issues and may require the resolution of conflicting expert and other evidence which the Constitutional Court as court of first and last instance.

Legislation not recognizing Muslim marriages and the consequences therefore was inconsistent with fundamental rights, equality, human dignity, freedom of religion, belief and opinion, rights of children, language, cultural, cultural religious and linguistic communities, access to courts, diligent performance of constitutional obligations.

Section 167(6)(a) of the Constitutional provides “National legislation or the rules of Constitutional Court must allow a person to bring a matter directly to the Constitutional Court when it is in the interests of justice.

It was the considered opinion of the Women’s Legal Centre that the delay in passing the bill relating to Muslim marriages was deemed to be extraordinary circumstances in the interests of justice. There has been a limited application of this provision and we were obviously disappointed that that the delay in passing the bill relating to Muslim Marriages was not deemed to be extraordinary circumstances. There has been limited application of this provision and we were obviously disappointed that the Constitutional Court did not use this opportunity to develop the law. Had we applied to the High Court we would have risked the same jurisdictional challenge and could maybe have been referred to the Constitutional Court.

We obviously have been set back by having to re-launch our application but do not consider that we had “lost” our application in the Constitutional Court because it caused the office of the Minister of Justice to prioritize the Muslim Marriage Bill whereby the Department of Justice publicly announced that the Bill is on the legislative timetable for 2010. However, 2010 is at an end and there is no indication that the Bill will be introduced

Global Context

Globally the challenge of having legislation which engages religious norms is a very difficult one. The recognition of Muslim Personal law throughout the world is dependent on the religious status of Islam within the given

country. The situation varies from non-recognition in secular countries at one end of the scale, to the application of Islamic law in all areas of the legal system in Islamic states. Of those countries in the middle ground, efforts have been made to accommodate diverse religious beliefs, through measures such as codification of family law and the existence of customary courts within certain countries. Global trends include the increased recognition in Western countries of the need for some form of acknowledgment of the range of religious beliefs within their country, and in countries with a large Muslim population, there are moves towards codification of family laws and other measures to ensure less arbitrariness in judicial decisions and greater protection of women's rights.

Countries with minority Muslim populations, for the most part, do not recognise MPL within their legal systems. Western countries are the main countries in this category, with stringently secular France demonstrating this point. There are nonetheless moves within some of these countries to recognise the existence of different belief systems within the state. An example of this is current dialogue in Britain about whether the Human Rights Act of 1998 necessitates the protection and recognition of the rights of Muslims to live under their own religious laws. However, the predominant belief in many of these countries is that Islamic laws propound the idea of inequality of the sexes. This can at times be a simplified notion of Islam.

There are however exceptions to this general rule that countries with a minority Muslim population do not recognise MPL. A number of African countries come under this category. Ethiopia and Ghana both have minority Muslim populations, and both have provided for some form of recognition of MPL. Article 34 of Ethiopia's constitution allows for 'adjudication of disputes relating to personal and family laws in accordance with religious or customary laws', and Ghana has legislation providing for registration of Muslim marriages. India has the Muslim Personal Law (Sharia) Application Act, which applies MPL to any legal matters involving personal law for Muslims.

Those with majority Muslim populations, even if secular states, generally have legislation in place which recognises the religious diversity within their borders. At the far end of the scale there are of course the Islamic States such as Iran, where the law goes beyond recognition of MPL, and Sharia law is implemented in all spheres of life. Then there are legal systems which seek to accommodate a number of different religions, such as Tanzania. Tanzania has a Muslim population of 65%, but the Constitution of the State does not lay

down an official state religion. Tanzania has a uniform Marriage Act, which integrates existing marriage laws while preserving certain rights such as the right to religious solemnisation.

The group 'Women living under Muslim Laws' (WLMUL) have noted the major trend recently towards codification of family law. They note the views of the Women's Petition Committee in Bahrain, which hopes that codification will introduce the rule of law in family matters and end the arbitrariness of current judicial decisions. WLMUL observes that getting divorced women an equal or more equitable share of assets acquired during the marriage is one of the most hotly contested areas in recent family law reform in the systems covered here. When considering the reactions of different countries towards this issue, they note that a common first step in this area to improve the situation of women's rights, is the entry into force of new provisions which enable a couple to choose their matrimonial property regime.

Taking further heed that the Muslim population of South Africa has nearly doubled from 1991 to 2004, with the presence of a growing number of Muslims from the rest of the continent with an estimated 75,000 African Muslims being in South Africa, indicating a 600% increase, we argue the onus is even more on the Legislature to ensure that their rights are protected. Where foreigners turn to the South African Courts for assistance when they have been married in their country of birth which recognizes Muslim Personal Law, will the courts apply the law or will the courts deem it contrary to our law and apply what they would seem to be fair and just in their discretion?

Most discussions about the recognition of MPL globally, and the clash this creates with principles of equality and the rhetoric of women's rights, can be linked to the issue of interpretation of Islamic law. Many would argue that Islamic law does not in fact dictate certain current applications of MPL, in integral areas such as property rights and guardianship issues, and that the Quran can be interpreted in a non-patriarchal way so as to ensure equality for women and men.

Conclusion

Although the courts have made significant inroads towards the development of the recognition of MPL in South Africa, one cannot rely on the courts to provide relief to the majority of Muslim women who do not have the financial resources, education and/or time to turn to the courts for relief. Piecemeal legislation is costly and time consuming, which the Muslim woman on the

street who has no access to resources does not have.

The question has been asked “Why is there this need for MPL to be legislated?” The problem can be easily addressed by registering the marriage whereby women can then access the courts. Quite frankly that is what Muslims are doing at the moment because legislation is taking so long to be implemented. However, it does not solve the problem in that civil marriages do not make allowance for polygynous marriages; and furthermore, as South Africans many Muslims feel that their contribution to the liberation struggle gives them some entitlement to practice their religion freely in terms of the Constitution which represents what the struggle was all about.

Legislation is imperative to protect the Muslim woman in her being able to turn to the courts for protection. Furthermore the process of implementation of legislation is through a consulting process with those that the legislation affects, which can ensure that the religious principles will be respected.

Obviously, the Bill is not without flaws and remains contested. Its codification of MPL opens a Pandora’s Box of constitutional quagmires that threatens to swallow whole the social justice mission which embodies the right to gender equality (Naylor, 2008). According to Waheeda Amien of the Law, Race and Gender Project at the University of Cape Town, even though the problems remain challenging, with the new legislative process South Africa stands at the forefront of countries with minority Muslim populations in moving to entrench religious rights within the framework of civil law (www.capeargus.co.za/index.php?fArticleID=5341355).

Advocating for the rights of women, the WLC acknowledges that the Bill will be examined in terms of its gender sensitivity and we will be making submissions accordingly. In the absence of legislation, the WLC will continue with its litigation strategy in order to ensure that women have some relief.

Endnotes

1. RRIN Humanitarian News and Analysis, UN Office for HR Co-ordination of Humanitarian Affairs 7 November 2007 (IRIN) Statistics SA Places the GINI Co-Efficient at 0.72 on a scale of 0 to 1, with 1 being total inequality
2. 2007 Transformation Audit, Institute for Justice and Reconciliation, Cape Town www.ijc.org.za
3. South African Government Millennium Development Goals Mid Term Report 2007, p 22, available at www.gov.za
4. The Constitution of the Republic of South Africa, Act 108 of 1996 Section 7.
5. SALRC Discussion Paper 101. 2000

6. SALRC Discussion Paper 101, 2000 para 1.3
7. SALRC Discussion Paper 101, 2000 para 1.6.

References

- Abdullah, S. 2002. Multicultural Social Intervention and Nation-Building in South Africa, the role of Islamic Counselling and Psychotherapy (unpublished PhD Dissertation, University of Cape Town)
- Abdullah, S. 2006. "The Shariah and the Secular Shifting Paradigms in Muslim Personal Law" in *Post Apartheid South Africa and Prospects for Democratic Change*
- Bonthuys, E. and Albertyn, C. 2007. *Gender, Law and Justice* Cape Town: Juta and Co. Publishing Company
- Currie, I. and de Waal, J. 2005. *The Bill of Rights handbook 5th Edition* Cape Town: Juta and Co. Publishing Company
- Dalton, C. 1987. *Where we stand observations on the situation of feminist legal thought Berkeley Women's Law Journal*, Vol 1
- Hough, M. and Du Plessis, A. 1994. *Selected documents and commentaries on negotiations and constitutional development in the RSA 1989-1984*, Pretoria: Institute for Strategic Studies, University of Pretoria
- Jeena, N. 2006. "The National Liberation Struggle and Islamic feminisms in South Africa", *Women's Studies International Forum*, Vol. 29
- Kitching, K. 2003. "Strategic Litigation and Case selection", Research Paper, Interights (the International Centre for the Protection of Human Rights)
- Lewis, D. 1993. "Feminism in South Africa", *Women's Studies International Forum* Vol.16.No.5
- Manjoo, R. 2007. "The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights" Human Rights Program at Harvard Law School Working Paper, July 2007
- Murray, C. and O'Sullivan, M. 2005. *Advancing Women's Rights, The First Decade of Democracy* Cape Town: Juta and Co Publishing Company,
- Naylor, N. 2005. Discussion Paper: Rules of Standing in Litigating Public Interest Cases on Behalf of Women on the Continent, Workshop on Strategic Litigation For Women's Property Rights, African Human Rights Access to Justice Women's Rights Programme (AHRAJ)
- Niehaus, I. 2006. "South Africa's Muslims between participation and exclusion- the political role of a religious minority during the transition of democracy". Paper presented at the conference "Islamic Civilisation in Southern Africa" University of Johannesburg 2006
- Thornton, M. 2004. "Neoliberal Melancholia: The Case of Feminist Legal Scholarship" *Australian Feminist Law Journal* 7, 14.